STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

Appeal No. 2010AP1856
(Milwaukee County Case No. 00-CF-6204)

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

KENNETH M. DAVIS,

Defendant-Appellant.

Appeal From The Final Order Entered In The Circuit Court For Milwaukee County, The Honorable M. Joseph Donald Circuit Judge, Presiding

---

REPLY BRIEF OF DEFENDANT-APPELLANT

Robert R. Henak
State Bar No. 1016803

HENAK LAW OFFICE, S.C.
316 North Milwaukee Street, Suite 535
Milwaukee, Wisconsin 53202
(414) 283-9300

Counsel for Defendant-Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutions, Rules and Statutes

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

Appeal No. 2010AP1856
(Milwaukee County Case No. 00-CF-6204)

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

KENNETH M. DAVIS,

Defendant-Appellant.

REPLY BRIEF OF DEFENDANT-APPELLANT

ARGUMENT

I.

THE POST-CONVICTION COURT ERRONEOUSLY EXERCISED ITS DISCRETION BY WHOLESALE ADOPTING THE DISPUTED REASONING OF THE STATE'S BRIEFS BELOW

The circuit court erroneously exercised its discretion by adopting wholesale the state's briefs as supplemental reasons for denying Davis' motion, and by failing to "indicate the factors which it relied on in making its decision and state those on the record." ***Trieschmann v. Trieschmann***, 178 Wis.2d 538, 543, 504 N.W.2d 433 (Ct. App. 1993); Davis' Brief at 4-8.

Davis' counsel did not waive objection to the court's error by

noting the appellate standard of review (R88:36; App. 14), State's Brief at 2-3. Acknowledging that damage caused by circuit court error may be mitigated by *de novo* review is not the same as waiving the error. Davis' counsel objected to the error and began explaining his objection, only to be cut off by the circuit court with the directive to raise the objection here (R88:36-42; App. 14-20).

Kersten v. H.C. Prange Co., 186 Wis.2d 49, 60, 520 N.W.2d 99 (Ct. App. 1994), did not and could not hold that ***Trieschmann*** is inapplicable to factfinding. ***Trieschmann*** reversed, in part, because, like here, the circuit court adopted one party's proposed findings of fact and conclusions of law without explanation. 178 Wis.2d at 543 ("We can only speculate as to why the court accepted Patricia's view of the parties' respective earning powers . . .."); ***id.*** at 544 (refusing to independently judge merits because factual findings were inadequate and "'the evidence respecting material facts is in dispute'" (citation omitted)). Having so held, this Court in ***Kersten*** did not have the authority to limit or overrule that holding as the state suggests here. ***Cook v. Cook***, 208 Wis.2d 166, 560 N.W.2d 246 (1997).

Nor did ***Kersten*** have to modify or overrule ***Trieschmann***. State's Brief at 3-4. Unlike here, the circuit court in ***Kersten*** made independent findings of fact, merely using one party's factual summary to guide its damage calculations. 186 Wis.2d at 60. Given the circuit court's failure here to explain what it found or why, this case falls squarely within ***Trieschmann***, not ***Kersten.***

II.

THE FAILURE TO SEEK SUPPRESSION UNDER *EDWARDS v. ARIZONA* DENIED DAVIS THE EFFECTIVE ASSISTANCE OF TRIAL COUNSEL

The state's suggestion that the continued interrogation of Davis after he invoked his right to counsel was somehow consistent with ***Edwards v. Arizona***, 451 U.S. 477 (1981), State's Brief at 5-7,

overstates the law while ignoring both the facts and the circuit court's contrary factual findings.

Although a suspect can expressly limit his invocation of the right to counsel, ***Connecticut v. Barrett***, 479 U.S. 523 (1987) (limited invocation where defendant declined to give written statement without counsel but had "no problem" talking with police), the "'settled approach to questions of waiver . . . requires [this Court] to give a broad, rather than a narrow, interpretation to a defendant's request for counsel.'" ***Id.*** at 529 (citation omitted). Accordingly, a clear request for counsel, that nonetheless may be viewed as ambiguous in scope, must be construed broadly, ***id.***, not, as the state asserts, in the most artificially narrow sense possible. State's Brief at 6-7.

The parties below disputed whether Davis' clear invocation of the right to counsel was selective, respecting only additional information, or total (R88:13-15; R77:6 n.2; R78:5). Although deeming the error harmless, the circuit court implicitly, if not explicitly, resolved the question in favor of Davis by holding that the officers violated ***Edwards*** (R88:28-30; App. 6-8). A trial court's findings of fact are binding on this Court unless they are "clearly erroneous," ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990), and those findings may be implicit in the trial court's ultimate conclusion, ***Schneller v. St. Mary's Hosp. Med. Ctr.***, 162 Wis. 2d 296, 311, 470 N.W.2d 873 (1991) (citation omitted).

The state makes no suggestion that the trial court's rejection of its factual argument on this point is clearly erroneous, nor could it. While Domagalski dutifully followed the prosecutor's lead at the post-conviction hearing in suggesting that Davis' invocation of counsel referred to some future point (R86:80), his prior testimony and actions belie that assertion. Consistently throughout the suppression hearing, at trial, and at the post-conviction hearing, Domagalski acknowledged that Davis had asserted his right to counsel, such that the detectives were required to stop interrogating him (R60:44 (Davis asked to speak

with an attorney at the end of the interview and "[t]he interview was terminated"); R62:213-14 (after Davis asked for an attorney, "[w]e stopped talking to him"); R86:84 (after Davis asserted his right to counsel, Domagalski understood "[t]hat we could not interrogate him anymore"). Domagalski's defense was not that Davis had failed to invoke his right to counsel, but that the detectives had complied with that right by not thereafter "interrogating" him.

Even if Davis' assertion reasonably could be construed as only requesting the assistance of counsel before providing any additional information, the detectives' questioning elicited exactly such additional information in the form of Davis' supposed confirmation of the accuracy of Morales' summary, information the officers did not have to that point.

The state's fallback argument that, in isolation, the ***Edwards*** violation was harmless, State's Brief at 7-9, both is wrong, *see* Davis' Brief at 31-35; Section V, *infra*, and ignores the fact that resulting prejudice must be assessed cumulatively. *E.g.*, ***Strickland v. Washington***, 466 U.S. 668, 695 (1984).

III.

DAVIS WAS DENIED THE EFFECTIVE ASSISTANCE OF POST-CONVICTION COUNSEL

The state does not dispute, and therefore concedes, that Attorney Sommers possessed information sufficient to require a hearing on his post-conviction motion and acted unreasonably by failing to include that information in his motion. *See* ***State v. Clark***, 179 Wis.2d 484, 492, 507 N.W.2d 172, 175 (Ct. App. 1993) (that not disputed is deemed conceded). The state likewise fails to rebut, and thus concedes, that Sommers acted unreasonably by not explaining the fatal defects in the state's theory, later adopted by the circuit court and this Court, that Davis' disputed admission somehow rendered conviction inevitable.

Davis' Brief at 17-19.[1]

Rather, the state focuses entirely on the assertion that evidence establishing that (1) Henderson admitted, when he had no reason to lie, that Davis in fact was not involved in the crime for which he was convicted and (2) Ringstad defrauded the Court and jury by falsely claiming Davis had admitted his involvement, does not meet its view of the requirements for newly discovered evidence. State's Brief at 10-23. The state is wrong. Davis' Brief at 20-35.

IV.

NEWLY-DISCOVERED EVIDENCE MANDATES REVERSAL

A. Henderson's Pre-Testimonial Admissions to Griffin Constitute Newly Discovered Evidence

The state does not dispute, and thus concedes, ***Clark***, *supra*, that evidence of Henderson's pre-arrest admissions to Derrick Griffin, describing Henderson's involvement in this offense with Roger "Manny" Powell and Shomar Lord (and not mentioning Davis), was material to the question of Davis' alleged involvement. Nor does the state dispute here that Henderson's admission concerned the same offense for which Davis was convicted.

Rather, the state speculates that, even though Davis' trial counsel never knew about Henderson's admissions to Griffin (R85:11-12), Griffin might have figured out that the offense Henderson spoke of was the same as that Davis was charged with and might have told Davis about it before Griffin had any reason to connect the two, and that Davis might have just forgotten or dismissed as unimportant critical,

---

[1] The state's suggestion that Davis' alleged admission was undisputed, State's Brief at 5, 19, is false. Davis testified at the suppression hearing that he did not make the statement and that he was not involved in the crime (R60:74-75), and there was substantial reason for a jury to question the accuracy and credibility of the officers' claims. Davis' Brief at 17-19.

unbiased evidence of his innocence. State's Brief at 13-14. No rational person charged with a serious offense would do that.

It is true that the prosecutor at the post-conviction hearing succeeded in confusing Griffin concerning some matters of timing. However, the state's speculation makes no sense and the circuit court's supposed adoption of that reasoning accordingly is clearly erroneous. Davis' Brief at 24-27.

The state's suggestion that Henderson's pre-arrest admission is somehow cumulative because it corroborates other, disputed evidence of Davis' innocence made under substantially different circumstances, State's Brief at 15-16, lacks arguable merit. The fact that Henderson was lying about Davis' involvement was neither conceded by the state at trial nor "established by existing evidence." ***Washington v. Smith***, 219 F.3d 620, 634 (7th Cir. 2000) (citation omitted); *see* ***Wilson v. Plank***, 41 Wis. 94 (1876). Although Henderson made a similar admission to Davis' investigator, Henderson claimed he only did so because Davis was either harassing him or had offered him money (R63:96-98). However, Henderson had no apparent reason to lie when he made his admission to Griffin.

B. Henderson's Admissions to Reed Constitute Newly Discovered Evidence

The state does not dispute, and thus concedes, that Henderson's post-trial admissions to Cornelius Reed that Davis was falsely accused and convicted in this matter were newly discovered and material to the issue of Davis' involvement. ***Clark***, *supra*.

The state again makes a feeble claim that Henderson's admission to Reed that he had falsely accused Davis to preserve a beneficial plea deal was somehow cumulative to evidence that he had made a similar statement, allegedly in response to harassment and promises, prior to trial. State's Brief at 15-16. Unlike what Henderson claimed while recanting his admission to the defense investigator, he had no apparent

reason to lie when he told Reed that Davis was convicted and serving time for a crime he did not commit. That makes Reed's testimony affirmative and *corroborating* evidence on the critical disputed issue of whether Davis in fact was involved in Henderson's robbery attempt, not merely cumulative evidence of a conceded or previously established fact. ***Washington v. Smith***, *supra*; ***Wilson***, *supra*.

C. Ringstad's Pre-Testimonial Admission to Winkler Constitutes Newly Discovered Evidence

The state concedes that Daniel Winkler's testimony regarding Richard Ringstad's pre-testimonial disclosures about his plan to fabricate allegations against Davis based on information taken from Davis' footlocker is material to the issue of whether Davis in fact was involved in this crime and not cumulative. ***Clark***, *supra*. It again speculates, however, that Davis might have known of critical evidence supporting his defense at the time of trial but inexplicably concealed that information from his attorney. State's Brief at 21. That, of course, makes no sense, and the circuit court did not address the issue.

This Court cannot resolve a non-frivolous factual dispute. ***Trieschmann***, 178 Wis.2d at 544 (citation omitted). However, since any finding by the circuit court accepting the state's speculation here would have been irrational, and thus clearly erroneous, there is no actual factual dispute on the point and remand is not necessary. ***Johnson***, 153 Wis. 2d at 127 (Court not bound by clearly erroneous factfinding). The only rational view of the facts is that Erickson did not know of Ringstad's admissions to Winkler at the time of trial (RR85:11-12), and that Davis accordingly must not have known. The state presented no evidence to the contrary.

V.

THE COMBINED EFFECT OF THE IDENTIFIED ERRORS PREJUDICED DAVIS' DEFENSE

Given the substantial prejudice resulting from prior counsels'

errors and the newly discovered evidence, Davis' Brief at 17-19, 31-35, the state understandably seeks to minimize that damage by addressing the effect of each in artificial isolation. State's Brief at 7-9, 16-20, 22-23. That is not only inappropriate legally, *see, e.g.*, ***State v. Thiel***, 2003 WI 111, ¶59, 264 Wis.2d 571, 665 N.W.2d 305 (prejudice must be assessed based on cumulative effect of errors); it also creates some rather glaring instances where the state relies on the absence of one error in an attempt to minimize the prejudicial effect of another.

Thus, the state claims that the ***Edwards*** violation was harmless because the jury still would have heard, *without contradiction*, the officers' allegations regarding Davis' supposed admission even if his alleged confirmation of their summary was suppressed. State's Brief at 7-9. Yet, this argument ignores the fact that evidence from Griffin, Reed, or both that Henderson had admitted Davis was not involved would be affirmative evidence of Davis' actual innocence, in fact contradicting the alleged admission and giving the jury all the more reason to credit Erickson's attack on it and the officers' credibility. *See* Davis' Brief at 18.

Similarly, the state relies on Davis' alleged confirmation of the officers' summary to mitigate the effect of evidence of his innocence provided by Griffin and/or Reed. State's Brief at 19-20. The state effectively concedes resulting prejudice from the ***Edwards*** violation, admitting that, absent suppression of the supposed confirmation, "[t]here would be no reason for the jury to surmise that the police concocted a confession which Davis admitted he made." State's Brief at 19. Indeed, even without the new evidence of Davis' innocence, the trial prosecutor recognized that Davis' supposed confirmation of the officers' summary was critical to rehabilitating the officers' allegations (*see* R62:213-14), and the jury therefore easily could as well. *Cf.* ***Kyles v. Whitley***, 514 U.S. 419, 448 (1995) ("If a police officer thought so, a juror would have, too") (footnote omitted).

The state's argument also effectively concedes the exculpatory

impact of the type of evidence of actual innocence provided by Griffin and/or Reed, asserting that, absent such evidence, "[i]t is highly improbable that any reasonable jury would believe . . . that the police would perjure themselves" here. State's Brief at 19.

The remainder of the state's attempt to mitigate the prejudicial effect of the errors and new evidence consists exclusively of spin, State's Brief at 17-20, 22-23, the type of argument appropriate for a jury but wholly misplaced when applying the legal standard for resulting prejudice. The issue here, after all, is not whether this Court has a reasonable doubt regarding Davis' guilt, but whether a reasonable probability exists, given the identified errors and new evidence, that a *jury* would find reasonable doubt. ***State v. McCallum***, 208 Wis.2d 463, 474, 561 N.W.2d 707 (1997).[2]

> When faced with competing credible evidence, "[t]he question ... is not whether the jury could accept the recantation as true, or even whether the jury could believe it. A jury does not necessarily have to accept a recantation as true, nor believe it, in order to have a reasonable doubt." [***McCallum***, 208 Wis.2d] at 475 & n. 2, 561 N.W.2d 707. If "there is a reasonable probability that a jury, looking at both the accusation and the recantation, would have a reasonable doubt as to the defendant's guilt [,] ... [then] the circuit court must grant a new trial." ***Id.*** at 475, 561 N.W.2d 707.

State v. Edmunds, 2008 WI App 33, ¶17, 308 Wis.2d 374, 746 N.W.2d 590.

Despite the state's spin, none of the new evidence is patently incredible or contrary to established fact. Indeed, unlike the state's witnesses, none of the defense witnesses had any apparent reason to lie. Thus, questions of whether Ringstad's allegations or Winkler's testimony has "the edge," State's Brief at 22, are for the jury, as are

---

[2] More than somewhat inconsistent with the jury argument the state presents here, it concedes as much. State's Brief at 11.

issues of whether Henderson was lying when he testified at trial or when he admitted, to three different people and under three entirely different circumstances, that Davis in fact was innocent. ***Edmunds***, *supra*.

It also is up to the jury to determine whether affirmative evidence of Davis' innocence would give it reason to doubt the allegations of two officers who knew they lacked hard evidence against Davis absent an easily fabricated "admission" that was nonetheless vague enough not to conflict with the honest testimony of eyewitnesses. Indeed, the only evidence they had at the time that Davis was involved apparently came from Shomar Lord, the same Shomar Lord one eyewitness identified as sounding like one of the robbers (R62:207), and whom Henderson twice identified as the third participant in the robbery/homicide rather than Davis (R2:4; R63:86-89).

Davis' prior statement to the officers that they "did not have the story right" because he was involved in the crime (R62:187-88, 208) is not, as the state attempts to suggest, State's Brief at 19, an "admission," virtual or otherwise. This is all the more reason why the officers would be desperate to come up with something solid on which to rest their case.

Why would the prosecutor offer Henderson a deal for implicating Davis? State's Brief at 17-18. Perhaps because the police already had limited their focus to Davis, based on Lord's allegations, and had the supposed "admission" from Davis before Henderson was arrested (R62:204-08; R63:114). Although the prosecutor likely was unaware that Davis' "admission" was fabricated, she certainly knew that it was attackable and that there was little, if anything, else tying Davis to the crime. She no doubt was seeking whatever corroboration she could find. Confirmation from Henderson that Lord, not Davis, was the third participant would have undermined, rather than corroborated, the state's case against Davis.

The state is correct that there is no reason why Henderson would admit to Reed that he falsely accused Davis, State's Brief at 18, unless, of course, the admission was true. The fact that he made such an admission against his own interest makes it *more* credible, not less. *Cf.*, Wis. Stat. §908.045(4).

Again, however, it is not for this Court to arrogate to itself the jury's role as factfinder. Where, as here, there exists, at a minimum, a reasonable probability of a different result (and, more accurately, the likelihood that an innocent man was convicted), the Court must vacate the conviction and allow the jury to determine whether the state's spin is sufficient to meet its burden beyond a reasonable doubt. ***Edmunds***, *supra*.

CONCLUSION

For these reasons, and for those in his opening brief, Davis asks that the Court reverse the order denying his postconviction motion, vacate the judgment of conviction, and remand with directions to grant him a new trial.

Dated at Milwaukee, Wisconsin, January 28, 2011.

Respectfully submitted,

KENNETH M. DAVIS,
Defendant-Appellant

HENAK LAW OFFICE, S.C.

Attorney Robert R. Henak
State Bar No. 1016803

P.O. ADDRESS:

316 North Milwaukee Street, Suite 535
Milwaukee, Wisconsin 53202
(414) 283-9300

RULE 809.19(8)(d) CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Rule 809.19(8)(b) and (c) for a reply brief produced with a proportional serif font. The length of this brief is 2,995 words.

_____
Robert R. Henak

RULE 809.19(12)(f) CERTIFICATION

I hereby certify that the text of the electronic copy of this brief is identical to the text of the paper copy of the brief.

_____
Robert R. Henak

Davis 974.06 COA Reply.wpd

CERTIFICATE OF MAILING

I hereby certify pursuant to Wis. Stat. (Rule) 809.80(4) that, on the 28th day of January, 2011, I caused 10 copies of the Reply Brief of Defendant-Appellant Kenneth M. Davis to be mailed, properly addressed and postage prepaid, to the Wisconsin Court of Appeals, P.O. Box 1688, Madison, Wisconsin 53701-1688.

_____

Robert R. Henak

Davis 974.06 COA Reply.wpd