02-1869

STATE OF WISCONSIN
IN SUPREME COURT

Appeal No. 02-1869-CR
(Milwaukee County Case No. F-962007)

STATE OF WISCONSIN,

Plaintiff-Respondent-Cross-Petitioner,

v.

IRAN EVANS,

Defendant-Appellant-Petitioner.

Appeal From The Judgment and Order Entered In The Circuit Court For Milwaukee County, The Honorable Victor Manian, Circuit Judge, Presiding

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BRIEF AND APPENDIX OF DEFENDANT-APPELLANT-PETITIONER

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1. Whether exclusion of Evans' evidence that he was elsewhere at or around the time of the shooting was reversible error and deprived him of his rights to present a defense, due process and a fair trial.

The circuit court excluded the evidence and summarily denied Evans' post-conviction motion on this ground. The Court of Appeals affirmed, holding that exclusion of such evidence was harmless.

2. Whether admission of a statement purportedly made by Evans but which he claimed to have been fabricated by the police denied him due process.

At the circuit court suppression motion, that court did not address whether the officer had fabricated the statement and subsequently denied Evans' post-conviction motion on this ground. The Court of Appeals affirmed, holding that there is no procedure for exclusion of evidence fabricated by the police.

3. Whether quashing Evans' subpoena *duces tecum* denied him due process and a fair hearing on the issue of whether the statement was fabricated by the police.

The circuit court quashed Evans' subpoena for evidence necessary to rebut the officer's claim that his procedure for recording Evans' supposed statement, while contrary to standard police practice in Milwaukee, was consistent with his own practice. That court likewise denied post-conviction relief on this ground and denied post-conviction discovery of that information, even after being presented with evidence that the officer had previously been suspended for 25 days without pay for "untruthfulness." The Court of Appeals affirmed.

4. Whether Evans was entitled to post-conviction discovery regarding (1) the results of any drug screens or other evidence that the complainant was under the influence of drugs at the time of the shooting, and (2) evidence necessary to rebut the claim of the officer that his procedures for taking Evans' supposed statement, though contrary to Milwaukee police practice, were consistent with his own, and (3) *in camera* review of that officer's personnel records.

The circuit court denied Evans' request for post-conviction discovery. The Court of Appeals affirmed.

5. Whether denying the jury relevant and admissible evidence that Evans was elsewhere at the time of the shooting and that the officer who purportedly took the contested statement from Evans previously had been suspended for 25 days without pay for "untruthfulness" resulted in the real controversy not being fully tried, thereby justifying reversal in the interests of justice under Wis. Stat. §751.06.

The lower courts could not and did not address the appropriateness of this Court exercising its discretionary power of reversal in the interests of justice under §751.06. They did, however, summarily deny Evans' requests for similar relief under Wis. Stat. §§805.15(1) & 752.35.

6. Whether Evans was denied the effective assistance of counsel should the Court find that trial counsel failed to preserve any of the substantive issues raised on this appeal.

Having rejecting Evans' substantive claims on their merits, the circuit court denied his contingent ineffectiveness claim and the Court of Appeals, finding no waiver, chose not to address it.

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BRIEF OF DEFENDANT-APPELLANT-PETITIONER

STATEMENT OF THE CASE

Following waiver from juvenile court, the state charged Iran Evans with one count of attempted first degree intentional homicide while armed as party to a crime, Wis. Stat. §§940.01, 939.32, 939.05, by criminal complaint filed on April 13, 1996. The charge arose from an incident in which an individual alleged to have been Evans shot Deric Devine in the arm, the leg, and the buttocks (R2, R3).[1]

Evans waived preliminary examination and the state filed an information alleging the same offense (R5; R6; R32). An amended information subsequently added a count of first degree reckless injury while armed, Wis. Stat. §§939.63 & 940.23(1) (R15).

[1] Throughout this brief, references to the record will take the following form: (R__:__), with the R__ reference denoting record document number and the following :__ reference denoting the page number of the document. Where the referenced material is contained in the Appendix, it will be further identified by Appendix page number as App. __.

The case proceeded to trial before the Hon. Victor Manian on June 24, 1996, and, on June 26, 1996, the jury returned verdicts of guilty on both counts. (R34-R36; R17; R18).

On July 29, 1996, the court, Hon. Victor Manian presiding, sentenced Mr. Evans to 35 years incarceration on the attempted homicide count and a concurrent term of 10 years on the reckless injury count (R37:23), and entered judgment (R22).

Evans timely sought to appeal his conviction and the State Public Defender appointed counsel to represent him. Following a disagreement regarding what issues to raise, however, that counsel failed to take further action on the appeal and never sought leave of this Court to withdraw. (R48:Exh.A:1-6).

Left to his own devices, Evans was unable to pursue his direct appeal at that time (R48:ExhA:2). However, on April 15, 1999, he filed a *pro se* motion pursuant to Wis. Stat. §974.06. That motion asserted various grounds, including that (1) the trial court committed prejudicial error by excluding his alibi witnesses, (2) the court improperly admitted fabricated evidence, and (3) that court erred by denying a lesser included offense instruction (R25).

The circuit court, Hon. Dennis P. Moroney, summarily denied the motion four days later, concluding that neither impeachment nor the withheld evidence would have made any difference, and adopting the trial court's reasoning on the remaining claims although not directly addressing the fabricated evidence claim (R26).

The Court of Appeals affirmed on Mr. Evans' *pro se* appeal, *State v. Iran Evans*, Appeal No. 99-1147-CR (October 3, 2000) (R40). The Court held that, because Evans' trial counsel "conceded" that he had no witnesses who could attest to Evans being elsewhere at the time of the crime, the trial court properly excluded Evans' alibi witnesses (R40:9-10). Construing the false evidence claim as a *Miranda-Goodchild* claim, the Court affirmed on that ground (R40:11-12). Finally, the Court determined that the absence of a lesser included offense instruction was nonconstitutional and thus not properly raised under §974.06 (R40:12-13).

This Court dismissed Evans' *pro se* petition for review as

untimely on November 6, 2000 (R41).[2]

By Motion filed in the Court of Appeals by counsel on March 11, 2002, Evans sought an extension of time for filing his post-conviction motion or notice of appeal under Wis. Stat. (Rule) 809.30 on the grounds that he was denied his right to counsel on direct appeal (R48:Exh.A). On March 13, 2002, the Court of Appeals granted that motion and reinstated Evans' direct appeal rights (R48:Exh.B).

Evans timely filed his post-conviction motion pursuant to Wis. Stat. §974.02 and (Rule) 809.30(2)(h) on May 10, 2002. That motion challenged the trial court's exclusion of relevant and exculpatory defense evidence, admission of false evidence, denial of a lesser included offense instruction, and ineffective assistance of trial counsel. The motion also sought reversal in the interests of justice and post-conviction discovery. (R48). The circuit court, Hon. Victor Manian, denied the motion without a hearing on May 29, 2002 (R49; App. 14-18).

Evans timely filed his notice of appeal on July 12, 2002 (R54), the Court of Appeals having extended the time for filing that document to allow evaluation for appointment of counsel by the State Public Defender by Order dated June 24, 2002.

When counsel subsequently obtained new evidence that the officer who took the statement challenged by Evans had previously been suspended for 25 days for "untruthfulness," he sought reconsideration by motion dated August 12, 2002 (R51), and sought remand from the Court of Appeals for such reconsideration (R52). By Order dated August 16, 2002, however, the circuit court denied reconsideration, holding that evidence that the officer's prior untruthfulness could not have made any difference to the jury (R53; App. 19-22).

On September 3, 2002, the Court of Appeals denied remand as

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[2] Evans' Motion for Reconsideration in this Court explained that he had placed the petition to the Court into the prison mail system on October 31, 2000, but that, due to a glitch in that system, it was not actually mailed until November 2, 2000. The Court nonetheless denied reconsideration. Under current law, the petition would be deemed timely. *See State ex rel. Nichols v. Litscher*, 2001 WI 119, 247 Wis.2d 1013, 635 N.W.2d 292.

moot, holding it sufficient if Evans filed an amended Notice of Appeal including the denial of reconsideration. The Court also denied the state's request for "clarification" of the Court's March 13, 2002 Order reinstating Evans' direct appeal rights based on the ineffectiveness of post-conviction counsel (R57).[3]

Evans filed his amended notice of appeal on September 5, 2002 (R58).

By decision dated July 24, 2003, the Court of Appeals reversed Evans' conviction for attempted first degree intentional homicide based on the trial court's improper refusal to instruct on a lesser-included offense (App. 4-8), but affirmed his conviction for first-degree reckless injury (App. 9-13).

STATEMENT OF FACTS

Deric Devine testified at trial that Evans and another individual confronted him on the 500 block of East Wright Street in Milwaukee at about 3 p.m. on March 10, 1996, and that Evans shot him several times with a black revolver (R35:82-88). Devine had known Evans from the neighborhood, but the two were not friends (*Id.*:90, 103). Devine knew Evans as "Macho" (*Id.*:88). Devine described the shooter as wearing a yellow, 3/4 length leather jacket, no hat and with straight hair (*Id.*:101-02). Devine claimed to have fallen to the ground with the first shot and that he did not see the shooter run away as he had passed out (*Id.*:88-89, 110-12). Devine was shot from a distance of about 3 or 4 feet (*Id.*:110).

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[3] The state's motion asserted that Evans should have sought relief by habeas petition to the Court of Appeals rather than by motion to extend. While that assertion plainly was wrong, see Wis. Stat. (Rule) 809.82(2); *State v. Harris*, 149 Wis.2d 943, 440 N.W.2d 364 (1989), Evans filed a Contingent Petition for Writ of Habeas Corpus concurrently with his brief in the Court of Appeals to resolve any lingering doubts on the question. *State ex rel. Iran D. Evans v. John R. Bertrand*, Appeal No. 02-2904-W. That petition asked that the Court grant the Writ and order reinstatement of his direct appeal rights under Wis. Stat. §974.02 and (Rule) 809.30, retroactive to May 10, 2002, should the Court determine that it had not already done so by its Order of March 13, 2002. By Order dated November 6, 2002, the Court of Appeals denied the petition as premature.

Daniel B. Kelley, on the other hand, testified that he saw the shooting from directly across the street. He saw the shooter fire 4 or 5 shots and then run north through an alley. He described the shooter as about 6 feet tall, dark and thin, with curly, shoulder-length hair and wearing a blue and yellow Michigan jacket, black pants and a black knit cap. He explained that there were only the shooter and Devine present at the time. He could not recall ever seeing Devine on the ground. Despite his having witnessed the shooting, and having told the police at the time that he could identify the shooter, they did not ask him to review any photographs. At the trial, Kelley could not identify Evans as the shooter. (R35:68-81).

Derrick Johnson did not see the shooting. However, he testified that he heard 5 or 6 shots and then saw Devine hobbling down the street. Devine then said that "Macho" had shot him. Johnson did not see Devine get up off the ground. (R35:115-123).

Detective Andrea Jaeger testified that Devine was shot four times, once in the right arm, twice in the left leg, and once in the buttocks. When she spoke with him after the shooting, he claimed that "Macho" had shot him. (R35:11-12, 164-66). She further testified that, contrary to his trial testimony, Devine had told her that he had seen the shooter running down an alley (*Id.*:167).

Following an unsuccessful motion to suppress (R35:19-66), Detective Tony Jones was allowed to testify that Evans had made a statement to him in which Evans admitted shooting Devine but claimed to have done so because he thought Devine was about to pull a gun on him and the person with Evans. (R35:126-51; R48:Exh.:D (State's Exh.1)).

Evans testified that his nickname is "Muncho" because he ate a lot when he was little. He explained that on March 9 and 10, 1996, he was spending time with his friends, including Marshall Noel, and that he was at Noel's home during the afternoon of March 10 when the shooting allegedly took place, leaving only to drive with Noel to pick up Noel's girlfriend, Kena Foster. He did not shoot Devine and did not tell Det. Jones that he had. (R35:177-93).

Marshall Noel testified that Evans wore a gray and black White

Sox jacket on March 10, 1996, and that he either wore his hair in a pony-tail or straight and real long in back. Noel had never seen Evans wear either a Michigan jacket or a hat. (R36:19-21).

The Court sustained the state's objection to Noel's further testimony that Evans was with him all day on March 10, 1996, (R36:22), and likewise ordered stricken the testimony of Noel's mother, Gail Jarrett, to the effect that they were at her house at the time of the shooting (R35:170-76).

ARGUMENT

I.

EXCLUSION OF RELEVANT AND EXCULPATORY DEFENSE EVIDENCE DENIED EVANS DUE PROCESS AND A FAIR TRIAL

The trial court erred and violated Evans' due process rights to present relevant exculpatory evidence when it excluded evidence of witnesses who would account for his whereabouts on the day of the shooting and corroborate his testimony.

While admission of evidence generally is reviewed for misuse of discretion, the court misuses that discretion where, as here, the decision rests upon an error of law or lacks a reasonable basis. *E.g.*, *State v. Eugenio*, 219 Wis.2d 391, 579 N.W.2d 642, 646 (1998). Also, whether the exclusion of evidence denied the defendant rights to due process and to present a defense is a legal issue reviewed *de novo*. *State v. Dodson*, 219 Wis.2d 65, 580 N.W.2d 181, 185 (1998).

A. Background

Prior to trial, Evans' trial counsel, Attorney Richard E. Poulson, Jr., served and filed a Notice of Alibi pursuant to Wis. Stat. §971.23(8), notifying the state of his intent to present evidence that Evans was elsewhere at the time of the shooting. Specifically, that notice explained that "[t]his evidence will place the defendant at various

locations on Milwaukee's near northside and more specifically with the following potential witnesses . . .." The notice then listed Marshal Noel, Gail Jarrett, Kena Foster, and Donald Miller as witnesses, and provided their addresses. (R10).

Rather than investigate this claimed defense, or seek a continuance in order to do so, the state chose to wait until the first day of trial and then sought to exclude the defense witnesses for various perceived technical defects in the notice. (R34:4-5). The circuit court concluded that those complaints were insignificant. (*Id.*:8; R36:10; App. 28, 47). It nonetheless excluded the evidence on the grounds that (1) the notice was insufficiently specific regarding where Evans was located at the time of the shooting and (2) the witnesses were unable to account for Evans' exact location at exactly the time of the shooting. (R34:11; *see* R36:2-4, 8-11; App. 31, 39-41, 45-48).

Poulson attempted to explain that the Notice was literally accurate and that it was impossible to be more specific as to the exact time of the offense as none of the witnesses had reason to pay particular attention to a clock that afternoon. They could tell where they were that day, but could not say exactly where they were at the exact time of the offense. (R34:8-10; App. 28-30). The court nonetheless concluded that proffered evidence would not constitute an "alibi" and accordingly granted the state's motion to exclude the evidence (*Id.*:11; App. 31).

The court misconstrued Mr. Poulson's argument regarding the witnesses as conceding that they could not testify regarding Evans' whereabouts at the time of the offense, but only concerning his whereabouts at points before and after the shooting. (R36:3-4; App. 40-41). Poulson made no such concession.

Gail Jarrett testified for the defense that Evans had spent the night of March 9, 1996, with her son, Marshall Noel, at their home at 3313 North 28th Street in Milwaukee. She explained that he was still at her home on March 10, the day of the shooting, because she had taken the only telephone into her bedroom and Evans "was running in and out of [her] room" to make phone calls "all afternoon," although she could not put any more specific time on it. (R35:170-175).

After an unreported sidebar, the Court struck all of Ms. Jarrett's

testimony (*Id.*:175-76). It explained the following day that it did so because "if [the testimony] was given for the purpose of an alibi, [it] was not an alibi because she didn't know, she couldn't say where Mr. Evans was at the time these acts allegedly occurred, and the other evidence that she was offering about where he was the day or two before and what activities the defendant was involved in with her son was not relevant." (R36:2-3; App. 39-40). Mr. Poulson objected and sought a mistrial on the grounds that Jarrett's testimony was relevant as it corroborated Evans' testimony, that exclusion of his alibi witnesses deprived Evans his right to present a defense, and that the Alibi Notice was sufficiently precise as to permit the state to investigate had it chosen to do so. (R36:4-8; App. 41-45). The court nonetheless refused to allow any defense witnesses (other than Evans himself) to testify about Evans' whereabouts on the day and approximate time of the shooting. (R36:8-17; *see id.*:22 (sustaining state's objection to Marshall Noel's testimony that Evans "was with me all that day"); App. 45-54).

B. Exclusion of the Proffered Evidence Violated State Evidentiary Rules

The exclusion of the defense witness testimony regarding Evans' whereabouts on the afternoon of the shooting was error on a number of grounds. As shown by the actual testimony which the court ordered stricken, both Jarrett and Noel were ready to testify to facts from which the jury reasonably could infer that Evans was with them or at their home all afternoon on the day of the shooting. The trial prosecutor admitted as much in seeking to exclude the evidence:

> MS. DEPETERS: That's what Jarrett was saying. Jarrett was saying that he was with her between three and four.
>
> * * *
>
> She said they were on the north side of the city. This thing happened at river west, and then he was running in

> and out of the house [sic - the bedroom]. That could be concluded by a jury as a reason to find him not guilty . . . .

(R36:12; App. 49).

Even if the evidence proffered by the defense could not account for Evans' whereabouts at the exact time of the shooting, however, it remained highly relevant and crucial to Evans' defense. The court's confusion appears to have arisen from its focus on the term "alibi" rather than the broader issue of relevance.

This Court has gone back and forth regarding whether, to be considered an "alibi," defense evidence must establish that the defendant's commission of the crime is *impossible* or merely *unlikely* given his presence elsewhere. *Compare State v. Shaw*, 58 Wis.2d 25, 205 N.W.2d 132, 135 (1973) ("'a purported alibi which leaves it possible for the accused to be the guilty person is no alibi at all.'" (citation omitted)),[4] *with Flowers v. State*, 43 Wis.2d 352, 168 N.W.2d 843, 848 (1969) (likening alibi defense to that in which defendant's intoxication rendered it "improbable" that he could have committed acts constituting the crime); *Logan v. State*, 43 Wis.2d 128, 168 N.W.2d 171, 175 (1969) (alibi established by "'[a]nything which tends to show the absence of the defendant from the scene of the crime at the time when it was committed . . . .'" (citation omitted)).

The exact definition of an "alibi" should be irrelevant, however, as admission of evidence is based, not on fitting the evidence into a particular definitional cubbyhole, but on whether the evidence is relevant. *See, e.g, State v. Horenberger*, 119 Wis.2d 237, 349 N.W.2d 692 (1984) (evidence of defendant's whereabouts during planning stage of crime relevant to defense but not "alibi" evidence and thus improperly excluded at trial); *Shaw*, 205 N.W.2d at 135 (evidence corroborated defendant's denial of guilt, even though not technically providing an "alibi").

Pursuant to Wis. Stat. §904.01, evidence is relevant if it has "any

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[4] *Shaw* was overruled on other grounds by *State v. Poellinger*, 153 Wis.2d 493, 451 N.W.2d 752 (1990).

tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." To be relevant, therefore, an item of proof need not prove a matter by itself; it need only be a "single link in the chain of proof." *State v. Brewer*, 195 Wis.2d 295, 536 N.W.2d 406, 412 (Ct. App. 1995); *cf. Lasecki v. State*, 190 Wis. 274, 280, 208 N.W. 868 (1926) (reasonable doubt re premeditation arises from intoxication evidence showing either "an inability to form *or an improbability that there was formed* a premeditated design" to kill (emphasis added)). *See also McKoy v. North Carolina*, 494 U.S. 433, 440 (1990):

> "[I]t is universally recognized that evidence, to be relevant to an inquiry, need not conclusively prove the ultimate fact in issue, but only have 'any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.'"

(Citation omitted).

As noted above, the prosecutor conceded at trial that the proffered defense evidence meets this standard of relevance (R36:12; *id.*:37 ("The guy said he was with him all day. That sounds like an alibi to me ....)).[5] The fact that Evans was with Mr. Noel all day and was running in and out of Ms. Jarrett's bedroom all afternoon, makes it less likely that he would have left the house undetected, traveled to a different part of the city, shot someone, and then returned, again undetected.

The proffered evidence also was highly relevant as it tended to corroborate Evans' account of his actions and whereabouts the day of the shooting, again making his account more likely than it would be otherwise. Significant prejudice results where, as here, a defendant's

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[5] Indeed, it appears that the prosecutor never claimed that the evidence was irrelevant. Her primary argument was that she somehow was denied the right to cross-examine the witnesses, despite her failure to investigate the witnesses identified in the alibi notice. (*See* R34:4-5; R36:9-17, 37-41; App. 24-25, 46-59).

testimony concerning his whereabouts is uncorroborated by those he claims to have been with:

> If the defendant claimed he was with other persons at another location at the time of the offense, the jury logically might want to hear those identified persons testify as to the truthfulness of the defendant's claim. If those persons did not then testify, the jury would be in a quandry and no instructions could alleviate its questions without prejudice to the defendant or the state.

State v. Burroughs, 117 Wis.2d 293, 344 N.W.2d 149, 156 (1984).

C. The Notice of Alibi Was Not Fatally Defective and Did Not Justify Exclusion of Evans' Proffered Evidence

Although the circuit court focused primarily on the "non-alibi" theory in excluding the proffered evidence, it also referred briefly to a perceived lack of sufficient particularity in the Notice of Alibi itself. The court claimed that "the whole purpose of the alibi is so that the witnesses say with particularity where the defendant was at the time he was there so that the state can check it out." (R36:9; App. 46).

To the contrary, however, the Notice of Alibi met the requirements of Wis. Stat. §971.23(8)(a). While the notice likely could have been a bit more specific in stating that Evans and Noel were at Noel's home, then traveled by car to pick up Ms. Foster, and then returned to Noel's home, where they remained the rest of the afternoon, omission of that additional information did nothing to undermine the purposes of the notice requirement.

"The purpose of the alibi statute . . . is to avoid the sudden and unexpected appearance of witnesses for the first time at trial under such circumstances that it is impossible for the state to make any investigation in respect to the alibi defense or in respect to the witnesses who intend to establish that defense." *McClelland v. State*, 84 Wis.2d 145, 267 N.W.2d 843, 846 (1978) (citation omitted).

Here, the notice informed the state that Evans would present

evidence that he was elsewhere at the time of the offense, that he in fact was at various locations on the city's near north side, and that he was with four individuals for whom he provided both names and addresses. The state thus was provided more than enough information sufficiently before trial such that it easily could have investigated had it chosen to do so. All it had to do was ask the identified witnesses, something it would have to do even if the notice had specified exactly where Evans was at every minute of the afternoon of March 10, 1996.

Yet, despite having more than enough information to investigate Evans' witnesses, the state chose not to do so. Instead, it waited until the first day of trial and asked for exclusion of witnesses whom the prosecutor herself admitted could have swayed the jury to acquit.

The exclusion of the witnesses for lack of particularity of the notice thus was error on two grounds. First, as already noted, the notice fully complied with the purpose of the statute to provide the state notice and a reasonable opportunity to investigate the alibi. Any damage to the state's case resulted from its own failure to investigate the information it had, not from any perceived defect in the Notice of Alibi. Second, even if the notice could be deemed defective in some way, the proper remedy would have been a continuance for the state to conduct an investigation, not exclusion. *Tucker v. State*, 84 Wis.2d 630, 267 N.W.2d 630, 636 (1978). This is especially true where, as here, any defect was at most technical and the state suffered no resulting prejudice because it easily could have investigated the alibi had it chosen to do so. *See also State v. Hoffman*, 106 Wis.2d 185, 316 N.W.2d 143, 162 (Ct. App. 1982) (striking witness for failure to provide alibi rebuttal notice permissible "if a recess or continuance would be inadequate").

D. Exclusion of the Proffered Evidence Violated Evans' Rights to Present a Defense

Because the proffered evidence was highly relevant to Evans' defense, the exclusion of that evidence violated not only state rules of evidence, but his constitutional rights to due process, to compulsory

process, and to present a defense as well. *See, e.g., Pennsylvania v. Ritchie*, 480 U.S. 39, 40 (1987) (recognizing criminal defendant's "right to put before the jury evidence that might influence the determination of the guilt"); *Crane v. Kentucky*, 476 U.S. 683, 690 (1986). Even if evidence is properly excluded under state evidence rules, such exclusion may violate the defendant's constitutional rights. *E.g., State v. St. George*, 2002 WI 50, 252 Wis.2d 499, 643 N.W.2d 777. While Evans sought a mistrial on just such grounds, the court denied the request (R36:4-8, 40-41, App. 41-45, 58-59).

To establish that exclusion of defense evidence violates his right to present a defense, the defendant must show (1) that admission of the evidence would not have been a misuse of discretion, (2) that the evidence "was clearly relevant to a material issue in [the] case," (3) that the evidence "was necessary to the defendant's case," and that "[t]he probative value of the [evidence] outweighed its prejudicial effect." *St. George*, ¶54 (footnotes omitted). "After the defendant successfully satisfies these four factors to establish a constitutional right to present the [evidence,] a court undertakes the second part of the inquiry by determining whether the defendant's right to present the proffered evidence is nonetheless outweighed by the State's compelling interest to exclude the evidence." *Id.* ¶55.

Applying these standards, it is clear that the excluded evidence was admissible. The court would not have misused its discretion in granting the state a continuance to investigate the alibi. Indeed, given the state's failure to investigate when it had every opportunity prior to trial, there would have been no misuse of discretion had the court simply overruled the state's objection without a continuance.

The evidence likewise was relevant to the central issue in the case, that being whether Evans was the person who shot Devine. Also, while the lack of motive, inconsistencies in the complainant's story, and questionable nature of the alleged admission, *see* Section II, *infra*, substantially weakened the state's case, the excluded evidence provided necessary corroboration for Evans' testimony. As the prosecutor conceded, the jury was much more likely to find a reasonable doubt based on corroborated evidence than the defendant's uncorroborated

denial. *See also Burroughs*, 344 N.W.2d at 156.

Finally, there is neither any prejudicial effect against which to balance the probative value of the proffered evidence nor any compelling state interest in excluding the evidence. While the evidence clearly undermines the state's case, as would any other evidence of the defendant's innocence, there is nothing unfairly prejudicial about such evidence. Given that the notice provided the state every reasonable opportunity to investigate Evans' alibi, moreover, the state clearly has no legitimate interest, let alone a compelling one, in hiding such relevant, exculpatory evidence from the jury.

The exclusion of the defense evidence thus denied Evans due process and the ability to present the "fundamental elements" of his defense.

E. Exclusion Was Not Harmless

The Court of Appeals' conclusion that exclusion of evidence corroborating Evans' claim of innocence was harmless is incomprehensible (App. 9). As the beneficiary of the error, the state was obligated to prove the improper exclusion to be harmless beyond a reasonable doubt. *E.g., State v. Dyess*, 124 Wis.2d 525, 370 N.W.2d 222, 231-32 (1985). Yet, the trial prosecutor herself noted that the excluded evidence could have swayed the jury to acquit (R36:12).

It is not enough, as the court below suggests, that the jury *might* have convicted anyway. The state must establish that a rational jury necessarily *would* have done so. *Dyess, supra.* The lower court's conclusion necessarily is based on the erroneous assumption that Evans' testimony, and that of his corroborating witnesses, was incredible as a matter of law, because it is only in such circumstances that the Court is permitted to substitute its credibility assessment for that of the jury. *E.g, State v. Holt*, 128 Wis.2d 110, 382 N.W.2d 679, 685 (Ct. App. 1985) (weight and credibility to be given to testimony is a matter for the jury).

While the evidence may be viewed as strong *if* Devine and Det. Jones are believed, there is nothing inherently incredible about either

Evans' testimony or that of his corroborating witnesses. Devine's description of his assailant and the incident, moreover, conflicts with that of the independent eye-witness, Mr. Kelley. Devine said two men were present, Kelley said only one. Devine said he immediately fell to the ground, while Kelley said he did not. Devine said the shooter had a 3/4 length yellow leather jacket, no hat, and straight hair; Kelley said a blue and yellow Michigan jacket, curly, shoulder-length hair and a knit cap. Devine said Evans did it; Kelley could not identify Evans as the shooter.

For the reasons discussed *infra*, moreover, Jones' story of Evans' supposed statement is likewise questionable. Yet, the Court of Appeals fails even to mention those defects. Despite its obligation to assess harmlessness cumulatively, moreover, *see State v. Thiel*, 2003 WI 111, ¶¶ 59-60, 665 N.W.2d 305, the Court's conclusory analysis likewise fails to account for the likely effect on a jury of the fact that Jones previously had been suspended for "untruthfulness."

Under these circumstances, independent evidence corroborating the fact that Evans was elsewhere at the time of the shooting easily could have raised a reasonable doubt regarding the state's proof. Excluding such evidence was far from harmless.

II.

ADMISSION OF FALSE/PERJURED EVIDENCE OF ALLEGED STATEMENT BY DEFENDANT VIOLATED DUE PROCESS

Prior to trial, Mr. Poulson sought suppression of a statement (App. 64-65) attributed to Evans by Det. Tony Jones. A hearing was held on that motion (R35:19-64), at which Evans testified that the statement was not his beyond the first two paragraphs and that the remainder was false and must have been made up by Det. Jones. Evans testified that he signed immediately under the first paragraph immediately after it was written and did the same after the second paragraph. Jones then had him sign at the bottom of that first page, as well as the bottom of a second page which had no other writing on it. Jones said

he would write out later Evans' statement that he was not involved in the shooting. (R35:44-48).

Jones, on the other hand, denied that he had Evans sign a blank sheet and claimed that the entire statement was Evans'. (R35:39-41). He also claimed that he did not have Evans sign directly under the body of the statement, as he did under the first two paragraphs, because it was his procedure only to have the suspect sign at the bottom of the page. However, he chose to ignore defense counsel's subpoena*duces tecum* for other recent statements he had taken to verify that claim. (*Id.*:38-39). He admitted that he had read the other police reports describing the shooting before interviewing Evans. (*Id.*:26).

While Evans' testimony squarely presented the falsity of the state's evidence, the circuit court's ruling admitting that statement was limited to the questions of whether the statement was voluntary and taken in compliance with *Miranda v. Arizona*, 384 U.S. 436 (1966). The circuit court did not address Evans' claim that the statement was not his, other than to agree that the form of the statement and placement of the signatures did not comply with the usual practice of Milwaukee law enforcement and to suggest that the jury would have to decide how much weight to give it. The court then quashed the subpoena *duces tecum* for the detective's other statements reflecting his supposed "procedure" as irrelevant. (R35:62-66; App. 33-37).

A. The Trial Court Failed Properly to Address Evans' Claim That The Statement Was False

The circuit court erred in limiting its consideration to whether the alleged statement was voluntary and in compliance with *Miranda*. The Supreme Court has long held that the state's knowing use of false evidence deprives the defendant of due process and a fair trial when the evidence is material to guilt or punishment. *See, e.g., Miller v. Pate*, 386 U.S. 1 (1967); *Mooney v. Holohan* , 294 U.S. 103, 112 (1935) ("[D]eliberate deception of court and jury by the presentation of testimony known to be perjured ... is ... inconsistent with the rudimentary demands of justice," violates due process rights, and denies fair

trial); *Pyle v. Kansas*, 317 U.S. 213 (1942). The same analysis applies when the prosecutor fails to correct false testimony. *Giglio v. United States*, 405 U.S. 150 (1972); *Napue v. Illinois*, 360 U.S. 264 (1959); *Alcorta v. Texas*, 355 U.S. 28 (1957). The Supreme Court also has held that the requirements of due process apply to the prosecutorial arm of the state as a whole, including investigating police agencies, and not simply to the individual prosecutor. *Kyles v. Whitley*, 514 U.S. 419, 438 (1995).

The court thus was obligated to make a preliminary determination of whether Evans in fact made the statements or whether they were concocted by Det. Jones as a member of the state's prosecutorial team. *See State v. Samuel*, 2002 WI 34, ¶30, 252 Wis.2d 26, 643 N.W.2d 423, *cert. denied*, 123 S.Ct. 550 (2002). The Court of Appeals, however, chose not to follow *Samuel*'s procedure for pretrial exclusion of unreliable evidence created by police misconduct (App. 9-10).

Under *Samuel*, evidence which is unreliable as a matter of law is subject to suppression prior to trial. This is because "due process demands that the State not marshal its resources against an accused in a manner that results in a conviction based on unreliable evidence obtained through egregious police practices." *Id.* ¶30. Evaluation of the evidence must be made prior to trial because, "although the jury is normally the sole judge of the credibility and weight given to witness statements, '[e]xceptions are made where a threshold finding is made by the court, since presentation to the jury would expose them to evidence which might be otherwise barred by constitutional principles.'" *Id.* ¶34.

The *Samuel* Court also defined the parameters of such a hearing. Once the defendant, as here, has made a *prima facie* showing of a due process violation, the state must disprove the violation by a preponderance of the evidence. *Id.* ¶¶38-39.[6]

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[6] *Samuel* dealt with police practices which would encourage a witness to lie; in this case the police witness himself lied. Either way, the end result is the same: police actions resulting in the presentation of false, and thus inherently unreliable evidence.

While the trial court did not address the falsity of the alleged statement, Evans' account is far from incredible. There is no rational reason why the officer would have Evans sign immediately under the first two paragraphs of the statement but not under the remainder of the statement, unless Evans is correct that the body of the statement had not been written when he signed the document. Moreover, there is nothing in the challenged portion of the statement itself which is inconsistent with having been concocted by a police officer with full access to the prior police accounts of the incident and either a decent imagination or years of experience taking statements from suspects. The statement also omitted any information which could be proved or disproved by independent investigation, such as the name of the "friend" allegedly with Evans at the time of the shooting or the location of the weapon. An experienced officer, moreover, would know that shooting at someone 5 or 6 times for fear he might pull a gun would not support a self-defense claim, so that a statement admitting such conduct would be inculpatory rather than exculpatory.

The statement also reflects at least one allegation which Evans would have known was physically impossible, although Jones, who was unfamiliar with the area and merely relying on the police reports to fill in the statement, would not. Specifically, Jones' statement has Evans meeting Devine "near N.5th & E. Wright Street," even though the two streets do not meet. (R35:140, 207; *see* R48:Exh.:E (map of area)). Given the inherent weakness of the state's case without the statement, moreover, resting as it did solely on the complainant's say-so which conflicted with that of the only other eye-witness, there was much more of a motive for Jones to fabricate an "admission" than for Evans to have committed the offense itself.

Because there existed ample reason to question the legitimacy of the statement attributed to Mr. Evans, the trial court thus erred in limiting its pre-trial consideration to matters of voluntariness and compliance with *Miranda*.

B. Admission of the False Evidence Was Not Harmless

Admission of the false evidence concocted by the state was not harmless. The test for determining whether the resulting conviction or sentence is fundamentally unfair in such cases, and thus violative of due process, is whether "there is any reasonable likelihood that the false testimony could have affected the judgment of the jury," *United States v. Agurs*, 427 U.S. 97, 103 (1976). Given the importance of the alleged admission in corroborating the only eye-witness to claim Evans was the shooter, as well as the overwhelming effect of a supposed confession on the usual jury, there can be no question but that the false testimony here could have affected the jury's verdict. (*Cf.* App. 9 (Court of Appeals deeming harmless exclusion of evidence defendant elsewhere at time of shooting, in substantial part, based on his alleged statement to Det. Jones)). The false evidence, and resulting bolstering of the state's case, was especially devastating to the defense when combined with exclusion of witnesses corroborating Evans innocence.

The state's case was based on two rickety foundations: Devine's claims and Evans' alleged statement to Jones. Significant reasons existed to question either of them, whether it was the substantial conflict between Devine's account and that of the only other eye-witness or the questionable circumstances surrounding production of Evans' alleged statement. Yet, the superficial mutual corroboration of the two, each leaning heavily on the other, was minimally sufficient to convince the jury to convict. Removing Jones' false testimony, however, leaves Devine's account without meaningful corroboration beyond his own statements. Under such circumstances, a jury easily could believe Evans' account and that, whether due to lying or to shock, Devine misidentified him as the shooter.

III.

THE TRIAL COURT ERRED IN QUASHING EVANS' SUBPOENA

The order quashing Evans' subpoena *duces tecum* denied the

defense relevant evidence, both at the suppression hearing and before the jury, rebutting Det. Jones' claim that the statement was Evans' rather than one Jones concocted himself. A central issue at both proceedings was whether Evans had in fact given the statement or whether Jones had made it up. Among the evidence of the latter was the fact that there otherwise existed no rational basis for requiring Evans to sign immediately following the first two paragraphs of the statement but not after the body of the alleged "admission." Jones and the state sought to nullify this evidence by suggesting that this at least somewhat unique manner of handling statements was Jones' usual practice. Evans was entitled to confront this claim and to require production of evidence necessary to do so.

The evidence requested in the subpoena thus was highly relevant to Evans' defense and its denial deprived him of the rights to due process, to compulsory process, to confront the witnesses against him, and to present a defense. Evidence that Jones in fact generally complied with standard law enforcement practice in Milwaukee by having the suspect sign immediately below the statement would have made more likely Evans' testimony that Jones had concocted the statement. Other statements in which Jones followed standard police practice would help negate his rationalization that the odd-ball format he followed here was his normal practice rather than just a means to produce a more believable, though fabricated confession.

Contrary to the Court of Appeals' suggestion (App. 10-11), the trial court could not rationally assess the probative value of the evidence without first reviewing it. *Cf. Wiggins v. Smith*, 123 S.Ct. 2527, 2543 (2003) (attorney who failed to conduct reasonable investigation cannot reasonably assess value of its results).

Because Evans was denied relevant, admissible evidence supporting his claim that the statement was concocted by Jones, he is entitled to both a new hearing on the motion to suppress on *Miller*/due process grounds and, regardless of the results of that hearing, to a new trial with full access to the requested reports of Det. Jones.

IV.

EVANS WAS ENTITLED TO POST-CONVICTION DISCOVERY

By post-conviction motion, Evans sought an order requiring disclosure of Devine's medical records regarding this incident, including the record of any drug or alcohol screens performed shortly after this shooting, as well as any documents or information that Devine possessed or had used illegal drugs or alcohol in the time leading up to the shooting (R48:27-28). As grounds therefor, Evans explained that independent post-trial investigation had disclosed that Devine had admitted to possession of rock cocaine at the time of the shooting. His consumption of drugs easily could have interfered with his ability accurately to perceive and identify who shot him (thus explaining the significant conflicts between his description of the shooter and that by Mr. Kelley) and create a reasonable doubt that did not otherwise exist in the minds of the jurors (R48:28). The circuit court nonetheless denied the request as a "fishing expedition." (R49:4; App. 17), and the Court of Appeals affirmed (App. 11).

Evans also sought disclosure of the reports of statements taken by Det. Jones in the three months leading up to his taking of Evans' statement and *in camera* review of Det. Jones' personnel files for evidence of perjury or like dishonesty, citing *United States v. Henthorn*, 931 F.2d 29 (9th Cir. 1991) (when defendant requests personnel files of testifying officers, government must examine them and disclose material information favorable to the defense; if the government is uncertain about the materiality of the information, it may submit the information to the trial court for in camera review; defendant need not make an initial showing of materiality) (R48:28). The circuit court denied the request on the grounds that Jones' prior dishonesty would not have changed the jury's verdict (R49:4; App. 17).

Even after counsel subsequently obtained evidence through an open records request demonstrating that Jones previously had been disciplined with a 25-day suspension without pay specifically for

"untruthfulness," and sought reconsideration on that basis (R51), the circuit court persisted in its denial. The apparent basis for the holding is that Evans did not prove "that such evidence, had it been discovered, would have altered the outcome of the proceedings. (R53:2-4; App. 20-22). Citing its belief that evidence of the Jones' prior untruthfulness would have had no effect on the jury, the Court of Appeals affirmed (App. 12).

The lower courts erred.

Pursuant to *State v. O'Brien*, 223 Wis. 2d 303, 588 N.W.2d 8, 16 (1999), "a defendant has a right to post-conviction discovery when the sought-after evidence is consequential to the case." The *O'Brien* Court construed "consequential to the case" in terms of the traditional standard for materiality set forth in *United States v. Bagley*, 473 U.S. 667, 682 (1985) (plurality opinion). Under that standard,

> "[E]vidence is [consequential] only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." . . .

588 N.W.2d at 15-16 (fn and citations omitted).

Under that federal due process standard, the defendant need not show that the information more likely than not would have changed the result of the trial. *Kyles v. Whitley*, 514 U.S. 419, 434 (1995). The circuit court thus was wrong in holding that Evans must prove that the requested information "would have altered" the outcome at trial; he need only show a reasonable probability of such a change.

The lower courts likewise erred in assuming that, merely because they disbelieved Evans, a jury necessarily would as well. There was nothing inherently incredible about Evans' testimony, and evidence of Jones' prior untruthfulness reasonably would have corroborated Evans' account in the mind of a rational juror. The effect of such evidence accordingly was for the jury, not the lower courts, to decide. *E.g.*, *State v. Zimmerman*, 2003 WI App 196, ¶30, 669 N.W.2d 762.

It is incomprehensible that Det. Jones' prior established prior untruthfulness could be deemed irrelevant to his credibility when the state regularly asserts that a defendant's older unrelated conduct regularly should be admitted. Remoteness does not render evidence irrelevant unless "the elapsed time is so great as to negate all rational or logical connections between the fact to be proven and the other acts evidence." *State v. Opalewski*, 2002 WI App 145, ¶20, 256 Wis.2d 110, 647 N.W.2d 331 (upholding admission of defendant's other acts from 15 and 25 years prior to alleged offense). *See also State v. Mink*, 146 Wis.2d 1, 429 N.W.2d 99, 105 (Ct. App.1988) (concluding that a span of twenty-two years did not render the other acts evidence irrelevant).

The fact is that a police witness whose credibility was critical to the state's case, previously received a substantial punishment from the Department for his "untruthfulness." The report available to Evans is "unelaborated" only because, while we know Jones was untruthful; we simply do not have access to the underlying records reflecting the specifics of his dishonesty. The state's case here turned in large part on the jury's evaluation of Jones' claims. At least without reviewing the records, one cannot credibly assert that Jones' prior dishonesty could have no possible effect on that assessment. *E.g.*, *Opalewski*, *supra* (relevance often turns on similarity between prior and alleged acts).

The circuit court's "fishing expedition" reference likewise was unjustified. Evans' motion set forth specific facts that Devine had admitted possessing rock cocaine at the time of his arrest. The state conceded below that it is reasonable to infer Devine's consumption of cocaine from the evidence that he possessed it at the time he was shot. State's Ct. App. Brief at 37.

The question thus is not whether Devine's consumption of cocaine rendered his testimony inherently unreliable or inadmissible, but whether there is a reasonable probability that his drug use could have affected the jury's assessment of his testimony enough for acquittal. *O'Brien*, 588 N.W.2d at 15-16 (defining consequential evidence). Given the effect of drug use on one's ability accurately to observe and recall, the inherent conflicts and other problems in the

state's case, and Evans' explanation that he was elsewhere at the time, such an explanation for the misidentification of Evans easily could have swayed a rational jury to find reasonable doubt in this case.

V.

REVERSAL IS APPROPRIATE IN THE INTERESTS OF JUSTICE

Regardless whether this Court deems any issue raised here to have been waived or forfeited by failure to preserve the issue by proper motion or objection, the interests of justice also require grant of relief pursuant to Wis. Stat. §751.06, because the combined errors resulted in the real controversy not being tried. *See Vollmer v. Luety*, 156 Wis.2d 1, 456 N.W.2d 797 (1990).

This Court has recognized that reversal in the interests of justice is justified on grounds that the real controversy was not tried when, as here, "the jury was erroneously not given the opportunity to hear important testimony that bore on an important issue of the case." *State v. Hicks*, 202 Wis.2d 150, 549 N.W.2d 435, 440 (1996).

The primary question before the jury was whether Evans was in fact the person who shot Mr. Devine. Evidence that Evans was elsewhere at the time of the shooting, or at a time and under circumstances making it unlikely he could have committed the crime, would have been critical to a valid jury determination of that issue. Evidence that Det. Jones previously had been suspended for "untruthfulness" likewise would have corroborated Evans' account that Jones had concocted his supposed admission. The presentation of such evidence easily could have created a reasonable doubt in the minds of the jurors, as the trial prosecutor conceded (R36:12), and exclusion of that evidence in this case necessarily skewed the jury's evaluation toward conviction. *E.g.*, *Burroughs*, 344 N.W.2d at 156.

As this Court held in *State v. Cuyler*, 110 Wis.2d 133, 327 N.W.2d 662, 667 (1983):

"[t]he administration of justice is and should be a search

> for the truth," and . . . the jury cannot search for truth if it cannot consider relevant and admissible evidence on a critical issue in the case.

(citation omitted).

It ultimately is irrelevant who, if anyone, is at fault for exclusion of the evidence. All that matters is that the jury was denied relevant, exculpatory evidence of the defendant's innocence. Whether due to error by the trial court or by counsel or to general miscommunication, these omissions resulted in the real controversy , whether Evans was involved in this shooting, not being fully and fairly tried. *E.g.*, *Logan v. State*, 43 Wis.2d 128, 168 N.W.2d 171 (1969) (reversing conviction where confusion regarding whether corroborating evidence constituted "alibi" resulted in real controversy not being tried).

The Court, therefore, should exercise its discretion to order a new trial under §751.06. *See Vollmer*, 456 N.W.2d at 805-06 and cases cited therein.[7]

VI.

EVANS WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL

To the extent that trial counsel's actions or inaction are somehow deemed to have waived, forfeited, or conceded away the substantive claims raised on this appeal, Evans was denied the effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 7 of the Wisconsin Constitution.

Evans raised this issue as a contingent claim in his post-conviction motion (R48:20-25), and on appeal. Having found no

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[7] Under the "real controversy not tried" category of "interests of justice" cases, "it is unnecessary . . . to first conclude that the outcome would be different on retrial" prior to ordering a new trial. *Vollmer*, 456 N.W.2d at 805; *see Hicks*, 549 N.W.2d at 439. As amply demonstrated throughout this brief, however, the facts of this case establish just such a probability of acquittal upon retrial.

substantive error, however, the circuit court held that Evans was not denied the effective assistance of counsel (R49:3; App. 16). The Court of Appeals found no waiver and thus no need to address the issue (App. 12).

A. Standard for Ineffectiveness

The test for ineffective assistance of counsel is two-pronged. A defendant alleging ineffective assistance of counsel first "must show that 'counsel's representation fell below an objective standard of reasonableness.'" *State v. Johnson*, 133 Wis.2d 207, 395 N.W.2d 176, 181 (1986), *quoting Strickland v. Washington* , 466 U.S. 668, 688 (1984). In analyzing this issue, the Court "should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case." *Strickland*, 466 U.S. at 690; *see Kimmelman v. Morrison*, 477 U.S. 365, 384 (1986).

It is not necessary, of course, to demonstrate total incompetence of counsel, and the defendant makes no such claim here. Rather, a single serious error may justify reversal. *Kimmelman*, 477 U.S. at 383; *see United States v. Cronic*, 466 U.S. 648, 657 n.20 (1984). "[T]he right to effective assistance of counsel ... may in a particular case be violated by even an isolated error ... if that error is sufficiently egregious and prejudicial." *Murray v. Carrier*, 477 U.S. 478, 496 (1986).

The deficiency prong of the *Strickland* test is met when counsel's performance was the result of oversight or inattention rather than a reasoned defense strategy. *See Wiggins v. Smith*, 123 S.Ct. 2527, 2542 (2003); *Kimmelman*, 477 U.S. at 385; *State v. Moffett*, 147 Wis.2d 343, 433 N.W.2d 572, 576 (1989); *but see State v. Koller*, 2001 WI App. 253, ¶¶8, 53, 248 Wis.2d 259, 635 N.W.2d 838.

Second, a defendant generally must show that counsel's deficient performance prejudiced his defense. "[A] counsel's performance prejudices the defense when the 'counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is

reliable.'" *Johnson*, 395 N.W.2d at 183, *quoting Strickland*, 466 U.S. at 687. "The defendant is not required [under *Strickland*] to show 'that counsel's deficient conduct more likely than not altered the outcome of the case.'" *Moffett*, 433 N.W.2d at 576, *quoting Strickland*, 466 U.S. at 693.

Rather, "[t]he question on review is whether there is a reasonable probability that a jury viewing the evidence untainted by counsel's errors would have had a reasonable doubt respecting guilt." *Moffett*, 433 N.W.2d at 577 (citation omitted). "Reasonable probability," under this standard, is defined as "'probability sufficient to undermine confidence in the outcome.'" *Id.*, *quoting Strickland*, 466 U.S. at 694. In addressing this issue, the Court normally must consider the totality of the circumstances. *Strickland*, 466 U.S. at 695. If this test is satisfied, relief is required; no supplemental, abstract inquiry into the "fairness" of the proceedings is permissible. *Williams v. Taylor*, 529 U.S. 362 (2000).

In assessing resulting prejudice, the Court must assess the cumulative effect of *all* errors, and may not merely review each in isolation. *E.g.*, *Washington v. Smith*, 219 F.3d 620, 634-35 (7th Cir. 2000); *State v. Thiel*, 2003 WI 111, ¶¶ 59-60, 665 N.W.2d 305.

Once the facts are established, whether counsel's representation was deficient and, if so, whether it was prejudicial are reviewed *de novo*. *Thiel*, ¶ 21-24; *State v. Cummings*, 199 Wis.2d 721, 546 N.W.2d 406, 416-17 (1996).

B. Deficient Performance

1. Failures Regarding Alibi Witnesses

a. Technical insufficiency of the Notice of Alibi.

The trial court properly concluded that the state's objections regarding the timing and technical sufficiency of the Notice of Alibi filed by Mr. Poulson were insignificant, (R34:8; R36:10; App. 28, 47). Should this Court conclude otherwise, however, and use such perceived

defects as grounds to uphold exclusion of Evans' alibi evidence, then Evans was denied the effective assistance of counsel.

Mr. Poulson filed the Notice of Alibi, attempting to comply with the statutory notice requirements and fully intending to present the evidence at trial. Any error on his part regarding the timing or technical sufficiency of the Notice accordingly was not intentional or strategic. Rather, it resulted at most from an oversight or negligence on his part. (R48:Aff't). Deficient performance is shown where counsel's failures are the results of oversight rather than a reasoned defense strategy. *Wiggins*, *supra*; *Moffett*, 433 N.W.2d at 576.

b. Alleged lack of sufficient precision regarding location of defendant

The state also complained that the notice of alibi was insufficiently precise regarding where Mr. Evans was located at the time of the offense. (R34:4-11). It was a combination of this ground and the belief that the evidence would not constitute an alibi in any event which led the trial court to grant the state's motion to exclude Evans' alibi witnesses at trial. (*Id.*:9-11; R36:8-9; App. 29-31, 45-46).

To the extent this finding is upheld, Evans was denied the effective assistance of counsel on this ground as well. At the time he filed the Notice of Alibi, Attorney Poulson knew that Evans and his witnesses placed him at 3313 N. 28th Street, Milwaukee, for much of the day on March 10, 1996, and he could have included that information in the Notice of Alibi (R48:Aff't). Poulson filed a Notice of Alibi, attempting to comply with the notice requirements, and fully intended to present evidence at trial regarding the fact that Evans was elsewhere on the date of the offense and thus unlikely to have committed it. He had nothing reasonably to gain by excluding that information from the Notice, as he also knew at the time that the state easily could determine Evans' exact whereabouts during the day merely by speaking with the identified witnesses had it bothered to do so. Any failure to include sufficient information in the Notice was neither intentional nor strategic. Again, the failure was due to oversight rather than any

reasoned defense strategy. To the extent the Notice is deemed insufficient on this ground, therefore, counsel's performance was deficient. *Wiggins, supra*; *Moffett, supra.*

c. Conceded lack of alibi or relevance.

Both the circuit court and the Court of Appeals on Evans' *pro se* appeal construed Poulson's statements at trial as conceding that his witnesses would not support Evans' defense that he was elsewhere at the time of the alleged offenses. (R36:3-4; R40:9-10). Poulson never intended to concede the lack of an alibi or that his witnesses were not relevant (R48:Aff't), and the testimony of Gail Jarrett and Marshall Noel demonstrate that any such a concession would have been wholly inaccurate.

To the extent that Poulson is deemed to have conceded the absence of an alibi or that his witnesses would not support Evans' alibi, therefore, such a concession was due to oversight or misstatement rather than an intentional or strategic admission. Such a concession thus would constitute deficient performance. *Wiggins, supra*; *Moffett, supra.*

d. Failure otherwise to preserve challenge to exclusion of defense evidence.

To the extent that trial counsel otherwise failed to preserve challenge to the exclusion of his defense evidence corroborating Evans' testimony, Evans was denied the effective assistance of counsel on this ground as well. Poulson understood the relevance and importance of the evidence and fully intended to present that evidence to the jury in support of his defense that Evans was elsewhere at the time of the charged offenses. He made every effort to prevent exclusion of that exculpatory evidence. Any alleged failure properly to preserve challenge to that exclusion thus was neither intentional nor part of a reasoned defense strategy, but rather was due to oversight. Any such failure accordingly constituted deficient performance. *Wiggins, supra*; *Moffett, supra.*

2. Failures Regarding False Evidence/Perjury

To the extent that Mr. Poulson failed adequately to preserve Evans' due process challenge to admission of the statement attributed to him by the state but which Evans claimed was concocted by Det. Jones, Evans once again was denied the effective assistance of counsel. Poulson clearly understood the significance of the alleged statement and the damage it would do to his case, and accordingly sought to exclude it from evidence. Evans can imagine no possible legitimate reason for failing to preserve this due process claim. At best, should this Court hold otherwise, such failure was due to oversight. Once again, deficient performance is shown where counsel's failures are the results of oversight rather than a reasoned defense strategy. *Wiggins, supra*; *Moffett*, 433 N.W.2d at 576.

3. Failure to Preserve Other Objections

To the extent he is deemed to have waived either Evans' requests for a lesser included offense instruction (on which the Court of Appeals granted relief) or for discovery as raised in this brief, Evans also was denied the effective assistance of counsel on that ground. Again, Poulson attempted to preserve those issues, and Evans can imagine no legitimate reason for failing to do so appropriately. Once again, it appears that trial counsel merely overlooked any defect, so any failure would constitute deficient performance.*Wiggins, supra*; *Moffett*, 433 N.W.2d at 576.

C. Counsel's Deficient Performance Prejudiced Evans' Defense at Trial

Counsel's errors prejudiced Evans' defense for the reasons stated *supra*. Had counsel not committed the identified errors, the substantive errors identified in this motion would have been avoided, or would have resulted in reversal on appeal.

While any one of the identified errors of counsel would justify

reversal, the Court must keep in mind that it is the cumulative effect of the errors by which prejudice or the existence of a reasonable probability of a different result must be judged. *Williams v. Washington*, 59 F.3d 673, 682 (7th Cir. 1995); *see State v. Crowell*, 149 Wis.2d 859, 440 N.W.2d 352, 358 (1989) (assessing harmlessness in light of cumulative effect of errors). Exclusion of critical evidence regarding Evans' whereabouts on March 10, 1996, left Evans' testimony uncorroborated, both weakening that testimony and leaving the jury to assume wrongly that those he claimed to be with that day would not support that claim. *See Burroughs, supra*. Admission of the statement falsely attributed to Evans likewise had its intended effect of undermining Evans' claim he was elsewhere at the time of the offense.

The jury cannot search for the truth if it is prevented from considering relevant and admissible evidence on a critical issue in the case. *Cuyler*, 327 N.W.2d at 667. Nor can it do so when it's assessment of such an issue is tainted by false evidence. Evans' defense was not inherently incredible and the state's case rested entirely on the Devine's say-so (which conflicted with that of the other eye-witness) and a questionable "confession." Given these circumstances, there is more than a reasonable probability of a different result absent the errors of counsel. Whether alone or in combination, therefore, such errors deprived Mr. Evans a fair opportunity to present his defense to be assessed by a fair jury.

D. Because Evans' Motion Established His Entitlement to Relief, the Circuit Court Erred in Denying His Ineffectiveness Claim Without a Hearing.

While Evans' motion demonstrated his entitlement to relief, an evidentiary hearing is necessary on an ineffectiveness claim to permit trial counsel to state his or her reasons for the challenged acts or omissions. *See, e.g., State v. Mosley*, 102 Wis.2d 636, 307 N.W.2d 200, 212 (1981). The question is whether counsel's acts or omissions were the result of reasonable strategy. Having found a lack of prejudice from trial counsel's errors, the circuit court denied Evans' motion

without a hearing (R49:3; App. 16).

A defendant is entitled to an evidentiary hearing if the motion "alleges facts which, if true, would entitle the defendant to relief . . .." *Nelson v. State*, 54 Wis.2d 489, 195 N.W.2d 629, 633 (1972) (motion to withdraw guilty plea); *see State v. Bentley*, 201 Wis.2d 303, 548 N.W.2d 50, 53 (1996). Sufficiency of the motion is reviewed*de novo*. *Id.*

The court below concluded that Evans is not entitled to relief; Evans has demonstrated to the contrary. Accordingly, he is entitled to remand for a hearing on this claim. *See State v. Washington*, 176 Wis.2d 205, 500 N.W.2d 331, 336 (Ct. App. 1993) ("Were Washington to have alleged sufficient facts to support his claim that he was denied the effective assistance of counsel, we would have to remand for an evidentiary hearing on the issue").

CONCLUSION

For these reasons, Mr. Evans asks that the Court reverse his conviction and the circuit court's orders and remand for a new suppression hearing and trial. Should that not be granted, Evans asks that the Court remand for a *Machner* hearing and direct provision of post-conviction discovery.

Dated at Milwaukee, Wisconsin, January 13, 2004.

Respectfully submitted,

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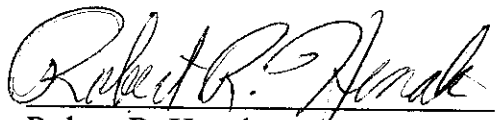
RULE 809.19(8)(d) CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Rule 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 10,466 words.



Robert R. Henak

Brf.Cert.wpd

STATE OF WISCONSIN
IN SUPREME COURT

Appeal No. 02-1869-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Cross Petitioner,

v.

IRAN EVANS,

Defendant-Appellant-Petitioner.

APPENDIX OF DEFENDANT-APPELLANT-PETITIONER

COURT OF APPEALS
DECISION
DATED AND FILED

July 24, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-1869-CR **Cir. Ct. No. 96CF962007**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

IRAN D. EVANS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: VICTOR MANIAN, Judge. *Affirmed in part; reversed in part and cause remanded.*

Before Dykman, Roggensack and Deininger, JJ.

¶1 PER CURIAM. Iran Evans appeals a judgment of conviction and an order denying his postconviction motion. The principal issues we address are

whether we properly extended Evans's time to pursue direct postconviction relief under WIS. STAT. RULE 809.30 (2001-02),[1] and whether the circuit court properly denied Evans's request for instruction on a lesser-included offense. We conclude the extension was properly granted, and that the trial court erred in denying the instruction. We therefore reverse Evans's conviction for attempted first-degree homicide. We do not, however, disturb the conviction for first-degree reckless injury (except to require resentencing on it) because we find no merit in Evans's remaining claims of error or in his request for discretionary reversal.

EXTENSION OF DIRECT APPEAL TIME

¶2 The State argues that we incorrectly extended Evans's time to file a postconviction motion and appeal under WIS. STAT. RULE 809.30. Evans was convicted in July 1996. In October 2000, we affirmed the denial of his pro se postconviction motion brought under WIS. STAT. § 974.06. In March 2002, represented by retained counsel, Evans moved this court for an extension under WIS. STAT. RULE 809.82(2) of his time to file a postconviction motion or notice of appeal under WIS. STAT. RULE 809.30. According to the motion, postconviction counsel had been appointed for Evans in 1996, but withdrew in March 1997, without advising Evans of the dangers of proceeding pro se. The motion alleged that Evans did not make a valid waiver of his right to counsel, and therefore he must be returned to that point in the postconviction process. The motion was accompanied by an affidavit from former appointed counsel agreeing with this factual description. We granted the motion in March 2002 in a brief order.

[1] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

¶3 Following that order, Evans moved the circuit court for postconviction relief in May 2002. The court denied the motion later that month, and denied reconsideration in August 2002. This appeal is taken from the judgment of conviction and those orders. In August 2002, after this appeal was filed, the State filed a "motion for clarification" in this court that contested, for the first time, our granting the extension five months earlier. The State did not dispute any factual assertion in the extension motion, but raised only legal arguments. By order of September 3, 2002, we advised the State that it could raise this issue in its brief and it has done so.

¶4 The State's first argument is that this extension can be obtained only by a habeas petition under ***State v. Knight***, 168 Wis. 2d 509, 484 N.W.2d 540 (1992), and therefore we erred by granting the extension under WIS. STAT. RULE 809.82(2). However, even if we assume the State is correct that habeas is the better procedure, or even the exclusive one, the State identifies only one substantive difference in how the two procedures would apply to this case: a habeas petition would have been subject to dismissal for laches under ***State ex rel. Smalley v. Morgan***, 211 Wis. 2d 795, 565 N.W.2d 805 (Ct. App. 1997). We do not regard this difference as significant. The concept of unreasonable delay is inherent in our consideration of whether good cause has been shown for an extension. Although our order in this case did not expressly discuss those factors, we typically consider the amount of time that has passed, the reasons for the delay and any other facts that may be relevant. Therefore, because the State was free to argue the length of the delay in the context of the extension motion, we see little substantive difference between the two procedures.

¶5 The State next argues that Evans's delay was unreasonable because he failed to explain why he did not earlier raise the issue about the invalid waiver

of his right to counsel. The State argues that the delay of six years between the conviction and the extension motion was unreasonable. However, we apparently did not regard it as so. The present panel did not decide the extension motion, and we are therefore unable to relate from personal knowledge the factors that influenced the decision. We note, however, that Evans while proceeding pro se was apparently not aware he had a claim for relief based on the fact that he dismissed his attorney without first receiving certain information. Nor does there appear to be any reason to believe that a pro se defendant *should* have been aware of that claim. Finally, one might also reasonably infer that, because the extension motion was filed by retained counsel, Evans had only recently acquired funds to retain counsel. In summary, we conclude that our granting of an extension of that length was reasonable.

¶6 Finally, we note that the State was also guilty of some delay by failing to timely object to Evans's extension motion. The motion appears to have been served on the State, and our extension order was served on the State in March 2002. The State did not object until five months later, after Evans's postconviction motion had already been litigated in the circuit court.

MERITS OF APPEAL

¶7 Evans was convicted of attempted first-degree intentional homicide and first-degree reckless injury while armed. The victim, Deric Devine, testified that Evans shot him at close range on a Milwaukee street. Evans argues that the court erred by denying his request for an instruction on first-degree recklessly endangering safety, WIS. STAT. § 941.30(1) (1993-94), as a lesser-included offense to the homicide charge. We agree.

¶8 The parties agree on the legal standard for when a lesser-included instruction must be given:

> A challenge to a trial court's refusal to submit a lesser-included offense instruction presents a question of law which we review de novo. "The submission of a lesser-included offense instruction is proper *only* when there exists reasonable grounds in the evidence both for acquittal on the greater charge and conviction on the lesser offense." In determining the propriety of a defendant's request for a lesser included offense instruction, the evidence must be viewed in the light most favorable to the defendant and the requested instruction. Further, "the lesser-included offense should be submitted only if there is a reasonable doubt as to some particular element included in the higher degree of crime." "If the court improperly fails to submit the requested lesser included offense to the jury, it is prejudicial error and a new trial must be ordered."

State v. Foster, 191 Wis. 2d 14, 23, 528 N.W.2d 22 (Ct. App. 1995) (citations omitted).

¶9 The circuit court ruled, and the State now argues, that there was no basis in the evidence for acquittal on the greater charge and also conviction on the lesser. The State argues that if the jury concluded Evans was the shooter, the manner in which Devine was shot negates any reasonable inference that the shooter did not intend to kill. In other words, the State argues that the only reasonable conclusion a jury could draw is that the shooter intended to kill Devine. Evans counters that there is ample precedent for the proposition that a shooter's failure to hit a vital body part from close range is grounds for reasonable doubt as to the shooter's intent to kill. The State does not distinguish, or even address, the precedents on which Evans relies.

¶10 Evans relies primarily on ***Hawthorne v. State***, 99 Wis. 2d 673, 299 N.W.2d 866 (1981). In ***Hawthorne***, the defendant was charged with attempted

first-degree homicide, and the trial court denied his request for a lesser-included instruction of recklessly endangering safety. *Id.* at 678. The defendant testified that he shot the victim in the arm in attempted self-defense because he thought the victim had a gun, but did not intend to kill him. *Id.* at 677-78, 684. In analyzing the facts, the court said the lesser-included instruction should have been given because there was evidence that negated a finding of intent to kill. In that discussion, the court noted that the victim was shot "in a non-vital area." *Id.* at 686.

¶11 In *Hawthorne*, the court relied in part on *Terrell v. State*, 92 Wis. 2d 470, 285 N.W.2d 601 (1979). In *Terrell*, the defendant objected to the State's request for a lesser-included instruction of second-degree murder, on a greater charge of first-degree murder. *Id.* at 471-72. The difference between the two crimes was that second-degree murder did not require the intent to kill, but only conduct "evincing a depraved mind." *Id.* at 473. The court affirmed the giving of the lesser crime instruction. *Id.* at 476. In its analysis the court stated:

> The evidence also shows that Cobb was shot in widely separate parts of his body, a fact which could reasonably demonstrate to the jury that Terrell did not aim at vital portions of Cobbs' body with the specific intent to kill. The evidence of the police officer who investigated at the scene also indicates that some shots struck the wall and did not hit Cobbs.
>
> Under one reasonable view, this evidence demonstrates that Terrell's conduct was imminently dangerous and evinced a depraved mind regardless of human life. Under that view, it could also be reasonably said that the evidence negated the specific intent to kill.

Id. at 474-75.

¶12 In addition, our own review of the case law has found other decisions that focus on whether a victim was shot in "vital parts." In *State v.*

Leach, 122 Wis. 2d 339, 350-51, 363 N.W.2d 234 (Ct. App. 1984), *rev'd on other grounds,* 124 Wis. 2d 648, 675-76, 370 N.W.2d 240 (1985) (reversing on other grounds, but affirming on instruction issue), the defendant made a similar argument based on ***Terrell***, but we rejected it, in part because the defendant had shot the victim in the back, and a bullet had lodged near a key blood vessel that led to the victim's heart. Rejecting a similar argument in ***State v. Moffett***, 147 Wis. 2d 343, 352, 433 N.W.2d 572 (1989), the court noted that the defendant "fired at a vital part of Tysen's body from a short distance." And, in ***State v. Cartagena***, 99 Wis. 2d 657, 665-66, 299 N.W.2d 872 (1981), the supreme court agreed with our analysis that even though the defendant shot the victim in the stomach, the jury could conclude that the defendant lacked intent to kill based on evidence of the defendant's comment at the time suggesting lack of intent and because the defendant failed to finish the victim off despite the opportunity, and in fact, attempted to take him to the hospital. In addition, there was evidence in ***Cartagena*** that could lead the jury to conclude the shooting was intended as punishment or retaliation for an earlier action by the victim. ***Id.***

¶13 With these precedents in mind, we review the evidence in the present case, in the light most favorable to the defendant and the requested instruction. Devine testified that he passed Evans and another male on the sidewalk. Devine previously had contact with the other male a week earlier, when they had "a few words with each other" because one did not like the way the other was looking at him. Devine testified that as they passed on the sidewalk the day of the shooting, Devine and Evans had a brief exchange of greetings. Then Evans made a comment to Devine that his companion was staring at Devine, and Devine responded "So?" and continued walking.

¶14 A moment later, Evans came up behind Devine, called his name, and began shooting when Devine turned. According to Devine, Evans shot him from three or four feet away. Devine fell on his back and heard five or six shots. According to police, he was struck by four shots: one through the upper right arm, one in the left buttock, one in the front left thigh, and one through the lower left leg. A police detective testified that Evans gave a statement in which he admitted shooting Devine, and stated that he met up with Devine at the location of the shooting, that they do not get along with each other, that Devine was giving him and his friends dirty looks that day, and that they got in an argument.

¶15 In summary, there is no evidence that Evans aimed at or hit a vital part of Devine's body. The evidence suggests that one or two shots may have missed. Evans may have had an opportunity to finish Devine off, with the firearm or otherwise, but did not. There appears to be no evidence that Evans made an oral statement showing intent to kill at the time of the crime. On this evidence, and in light of existing case law, we conclude that a jury could have reasonable doubt whether Evans intended to kill Devine, or whether he instead acted recklessly, possibly to intimidate or punish Evans based on previous negative feelings between them, and with Evans's companion. Accordingly, we reverse the judgment, on the attempted homicide count.[2]

[2] Evans does not argue that the State produced insufficient evidence at trial to convict him of attempted first-degree homicide. Our review of the record satisfies us that even if the court had instructed jurors on the lesser-included offense of first-degree reckless endangerment, a reasonable jury could have found beyond a reasonable doubt that Evans attempted to kill Devine. Accordingly, we see no legal bar to the State's retrying Evans for attempted first-degree homicide on remand. *See* ***State v. Perkins***, 2001 WI 46, ¶¶47-48, 243 Wis. 2d 141, 626 N.W.2d 762.

¶16 It does not appear that the instructional error we described above would require reversal of Evans's other conviction, for first-degree reckless injury while armed. Therefore, we must address his remaining claims of error that might affect that conviction.

¶17 Evans argues that the court erred by excluding testimony from two witnesses who would have testified that Evans was with them at or near the time of the shooting. We conclude that any error here was harmless. A constitutional or other error is harmless if it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error. ***State v. Harvey***, 2002 WI 93, ¶49, 254 Wis. 2d 442, 647 N.W.2d 189. The evidence against Evans in this case included Devine's own identification of Evans as the shooter, which was based on his previous familiarity with Evans from other encounters. It also included Evans's statement to police admitting the shooting, and the fact that he was found hiding from police in his mother's basement. We are satisfied that this excluded testimony would not have changed the outcome.

¶18 Evans next argues that the circuit court erred in ruling on his request before trial to exclude his statement to police. He argues that the court was obligated to make a preliminary determination of whether Evans in fact made the statement, or whether it was fabricated by the detective. His brief-in-chief cites no authority for the proposition that a court is required or permitted to exclude evidence simply because the court does not find it credible. In his reply brief, Evans cites ***State v. Samuel***, 2002 WI 34, 252 Wis. 2d 26, 643 N.W.2d 423, *cert. denied*, 123 S. Ct. 550 (2002). Because this case was first cited in the reply brief, we decline to address it in detail. *See* ***Swartwout v. Bilsie***, 100 Wis. 2d 342, 346 n.2, 302 N.W.2d 508 (1981). However, we see no reason to believe ***Samuel*** extends beyond the situation at issue there, which was an allegedly involuntary

statement by a witness other than the defendant. In the present case, the court determined that Evans's statement, if it was genuine, was made voluntarily, and Evans does not dispute that determination on appeal.

¶19 Evans argues that the court erred by denying his subpoena duces tecum for the detective who took Evans's alleged statement. Evans's position was that his statement was partially fabricated by the detective after Evans signed it, and that this occurred by having him sign at the bottom of the first page, and on a second page that was blank, and that the detective later filled in additional material above his signature. The detective's testimony suggested that it was his usual procedure to have the signature at the bottom of the page, rather than at the conclusion of the statement text. Evans's subpoena sought copies of statements the detective had taken from defendants in other cases, so Evans could see whether the detective indeed followed the same signature practice in other statements. The circuit court acknowledged that it was "unusual" to have a suspect sign at the bottom of a page, but concluded that the other statements would not be relevant, "and that it's going to be spending a lot of time on something that's not necessary for the -- the jury to consider in arriving at a verdict."

¶20 We understand the second part of the court's ruling to have been saying that regardless of what evidence might have been produced by the subpoena, the court was not going to admit it at trial because its probative value would be substantially outweighed by a consideration of waste of time under WIS. STAT. § 904.03. We conclude this was a reasonable exercise of discretion. Even if other statements taken by the detective were signed in a different manner, the issue for the jury was not whether the officer followed or deviated from his regular procedure in this case, but whether he fabricated parts of Evans's written statement. We agree with the State that having the jury examine statements the

detective had taken from defendants in other cases would be of limited probative value in the absence of evidence that the officer had added fabricated material to those statements, and that pursuing the "customary procedure" issue would have been both a waste of time and potentially confusing to the jury. Accordingly, we conclude the trial court did not erroneously exercise its discretion in quashing the subpoena duces tecum.

¶21 Evans also argues for reversal in the interest of justice under WIS. STAT. § 752.35, based on the claimed errors we have discussed above. We conclude that reversal of the reckless injury conviction on this ground is not warranted.

¶22 Evans argues that the court erred in denying his request for postconviction discovery. A defendant is entitled to postconviction discovery when the sought-after evidence probably would have changed the outcome of the trial. ***State v. O'Brien***, 223 Wis. 2d 303, 321, 588 N.W.2d 8 (1999).

¶23 Evans sought Devine's medical records or any other information that Devine possessed or used illegal drugs or alcohol in the time leading up to the shooting. The motion asserted that "[i]ndependent investigation has disclosed that Mr. Devine admitted to possession of rock cocaine at the time of the shooting. His consumption of drugs easily could have interfered with his ability accurately to perceive and identify who shot him and create a reasonable doubt that did not otherwise exist in the minds of the jurors." However, the motion did not describe any specific facts from the "investigation," and therefore it provided no basis to believe there was evidence that potentially would have changed the outcome of the trial.

¶24 Evans also sought, as postconviction discovery, the same material that he sought with his subpoena duces tecum that we discussed above. We concluded above that the court properly quashed the subpoena, and our reasoning there demonstrates that this evidence would not have potentially changed the outcome of the trial. Finally, Evans sought an *in camera* review of the personnel file of the detective who took his statement, for evidence of perjury or other like dishonesty. Later, in a reconsideration motion, Evans presented information, obtained through an open-records request, that the detective had previously been given a twenty-five-day suspension without pay for "untruthfulness." Evans asserted that he was unable to obtain the facts of that incident except by inspection of the detective's file. We conclude that this request was properly denied. Whatever the facts of that incident may have been, it was eleven years before trial, and we are satisfied that this evidence of this one incident would not have changed the outcome at trial.

¶25 In summary, we reverse Evans's conviction for attempted first-degree homicide but not his conviction for first-degree reckless injury while armed with a dangerous weapon.[3] We do, however, vacate the sentence on the latter conviction to allow for resentencing. *See* ***State v. Church,*** 2003 WI 74, ¶¶21-26, No. 01-3100-CR.[4] The circuit court may wish to delay resentencing on the

[3] Evans also presented alternative arguments couched in terms of ineffective assistance of counsel in the event we would conclude that any of his substantive claims of error were deemed waived by failure to make timely or proper objections in the trial court. We find no waiver and have addressed all claims of error directly. Accordingly, we do not consider the alternative ineffective assistance arguments.

[4] The court sentenced Evans on July 29, 1996, to a thirty-five-year term of imprisonment for attempted homicide and to ten years concurrent on the reckless injury count. Reversal of the conviction underlying the controlling thirty-five-year sentence thus significantly impacts the original sentence structure.

reckless injury count until the post-appeal disposition of the attempted homicide charge is determined (see footnote 2).

By the Court.—Judgment and order affirmed in part; reversed in part and cause remanded.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

ATTY R HENAK

STATE OF WISCONSIN CIRCUIT COURT Branch 13 MILWAUKEE COUNTY

STATE OF WISCONSIN,

Plaintiff,

vs.

IRAN D. EVANS,

Case No. 96CF962007

Defendant.

DECISION AND ORDER DENYING MOTION FOR POSTCONVICTION RELIEF AND MOTION FOR POSTCONVICTION DISCOVERY

On May 10, 2002, the defendant by his attorney filed a motion for postconviction relief pursuant to section 809.30, Stats., seeking a new trial.[1] A jury convicted the defendant of attempted first degree intentional homicide (count one) and first degree reckless injury while armed (count two) on June 26, 1996. On July 29, 1996, this court sentenced him to 35 years in prison on count one and ten years (concurrent) on count two. The defendant contends that the court erred by refusing to (1) permit his alibi witnesses to testify, (2) suppress his confession, and (3) give a lesser-included offense instruction. He further alleges that trial counsel's performance was deficient with respect to these matters. Finally, the defendant requests an order for postconviction discovery.

On April 15, 1999, the defendant filed a *pro se* motion for postconviction relief pursuant to section 974.06, Stats., alleging the same trial court errors raised in the instant motion. On April 19, 1999, the motion was summarily denied by the Hon. Dennis P. Moroney, to whom

[1]The court grants the defendant's motion to file an oversized motion under Local Rule 427.

the motion was assigned because this court was no longer in the felony division. Judge Moroney's decision was affirmed by the Court of Appeals on October 3, 2000. The defendant's appellate rights were reinstated under Rule 809.30 by the Court of Appeals on March 13, 2002.[2] Even though counsel was originally appointed to represent the defendant's appellate interests in 1996 and the defendant discharged counsel in favor of proceeding *pro se* in 1997, the appellate court subsequently found that he was not sufficiently apprised of the risks and hazards of proceedings on his own. Therefore, it reinstated his appellate rights and Attorney Robert Henak was retained as postconviction counsel.

As indicated, the present motion reraises some of the same issues raised by the defendant in his 1997 *pro se* motion. The court has reviewed the entire transcript in conjunction with Judge Moroney's April 19, 1999 decision and adopts that decision as it relates to the issues reraised by the defendant in his current motion with respect to trial court error.

Based on the trial transcript, the court finds that even if the defendant's alibi witnesses had been permitted to testify, the outcome of the trial would have been no different since the jury heard the testimony of police officers who elicited a confession from the defendant and was able to observe them on the witness stand. As this court indicated during the trial, "they [the proffered alibi witnesses" could all testify as to some background information about where [the defendant] was earlier in the day or later in the day but the time of the offense, which was the critical time, was unexplained and unable to be explained by any of those witnesses." (Tr. 6/26/96, p. 3).

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[2]Although the Court of Appeals did not explicitly state in its March 13, 2002 order that it was reinstating the defendant's appellate rights, it was implied in the order extending the defendant's time to file his current motion.

While the defendant claims that the police detective fabricated his confession[3], the court considered this claim at the suppression hearing, and it found the detective's version of the events to be far more credible than the defendant's version. (Tr. 6/25/96, pp. 19-64). As Judge Moroney set forth in his April 19, 1999 decision, "the defendant's testimony with respect to his interview with police was incredible. The court finds that no reasonable juror would have accepted Evans' version of the police interview."

The defendant also was not entitled to the requested lesser-included offense instruction for the reasons this court set forth in the record. (Tr. 6/26/96, pp. 49-50).

The defendant also contends that trial counsel was ineffective for failing to file a sufficient Notice of Alibi and for failing to preserve a challenge to the exclusion of the alibi witnesses and the admission of the defendant's confession. Because the court finds that the outcome of the trial would not have been different had the testimony of the proffered alibi witnesses been received, the defendant was not prejudiced by trial counsel's performance pertaining to the Notice of Alibi. Nor was counsel deficient with regard to the defendant's confession, which the court concludes was properly admitted into evidence. In sum, the court finds that the defendant has failed to allege a viable Sixth Amendment claim in this case.

Finally, the defendant seeks a new trial in the interests of justice or based upon plain error. The court is satisfied that the real controversy was fully and fairly tried before the jury and that justice was carried out in this case. Moreover, the court finds nothing in the record which would warrant a new trial on grounds of plain error.

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[3]The defendant's claim that the police detective lied was raised at the suppression hearing, during trial, in his original postconviction motion, and his current motion. This issue has therefore been visited on three separate occasions previously.

The defendant also requests an order for postconviction discovery allowing him access to the victim's medical records regarding this incident to determine whether the victim may have had any drugs in his system at the time of the shooting which may have interfered with his ability to identify the shooter. He also seeks all written statements taken by Detective Tony Jones in the three-month period leading up to the shooting, as well as an *in camera* inspection of Detective Jones' personnel file for evidence of perjury. State v. O'Brien, 223 Wis. 2d 303 (1999) requires a defendant to show that the evidence is both consequential to an issue in the case and, had the evidence been discovered, the result of the proceeding would have been different. During the trial, defense counsel thoroughly cross-examined Detective Jones about the circumstances surrounding the defendant's confession, suggesting that the defendant was tricked into signing a false statement. (Tr. 6/25/96 at pp. 127-145). The jury rejected this inference, and it believed Detective Jones when he testified he did not fabricate the statement. (Tr. 6/25/96 at p. 146). Based upon the trial testimony in this case, the court finds that there is not a reasonable probability that a different outcome would occur had the requested evidence been discovered.

The court also finds that the defendant's request for the victim's medical records is nothing more than a fishing expedition in the absence of some factual showing justifying a probe into the victim's medical records. The defendant's request is completely conclusory in nature and is in no way supported by any specific facts tending to show that his suspicions will be confirmed. O'Brien requires a strong showing of success based on the particular postconviction evidence sought. The defendant has not met his burden in this regard.

THEREFORE, IT IS HEREBY ORDERED that the defendant's motion for postconviction relief is **DENIED.**

IT IS FURTHER ORDERED that the defendant's motion for postconviction discovery is **DENIED.**

Dated this 29th day of May, 2002 at Milwaukee, Wisconsin.

BY THE COURT:

/S/VICTOR MANIAN

Victor Manian
Circuit Court Judge

ATTY. R. HENAK

STATE OF WISCONSIN CIRCUIT COURT Branch 13 MILWAUKEE COUNTY

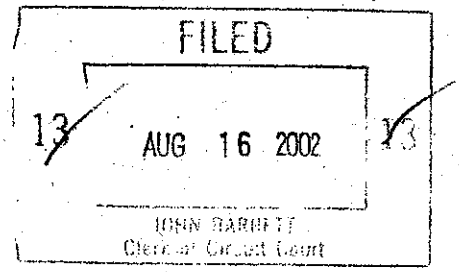
STATE OF WISCONSIN,

Plaintiff,

vs.

IRAN D. EVANS,

Defendant.



Case No. F-962007

DECISION AND ORDER DENYING MOTION FOR RECONSIDERATION

On August 12, 2002, the defendant by his attorney filed a motion for reconsideration of that part of the court's May 29, 2002 decision and order which denied his motion for postconviction discovery. The defendant was charged with attempted first degree intentional homicide and first degree reckless injury while armed for shooting Deric Devine. At trial, Detective Tony Jones testified that the defendant made a statement in which he admitted to shooting Deric Devine in self-defense. Evans testified, both in a pretrial hearing and at trial, that he did not shoot Devine and had not made the alleged admission. The defense suggested that Detective Jones duped Evans into signing the bottom of each page of the two-page statement and fabricated that portion of the written statement relating to the shooting incident. The jury rejected Evans' denials and found him guilty of both counts.

The defendant's *pro se* postconviction challenges in the circuit court and Court of Appeals were unsuccessful. On March 13, 2002, the Court of Appeals reinstated the defendant's appellate rights, and Attorney Robert Henak was retained as postconviction counsel. On May 10, 2002, the defendant by his attorney filed a motion for postconviction relief and a motion for

postconviction discovery seeking, in part, written statements Detective Jones had taken from other suspects in the three-month period leading up to the shooting and an *in camera* inspection of his personnel file for evidence of perjury or untruthfulness. The court denied the motion for discovery on grounds that trial counsel had thoroughly cross-examined Detective Jones about the circumstances surrounding the confession and that the jury believed Detective Jones when he testified that he did not fabricate the statement. Moreover, the court concluded that there was not a reasonable probability that the outcome would have been any different had the requested evidence been discovered.

The motion for reconsideration is based upon a City of Milwaukee Police Department document dated September 18, 1985, which indicates that Detective Jones was suspended for 25 days without pay for "untruthfulness." The basis for the finding of untruthfulness, however, is not contained in the defendant's submissions. The defendant seeks an order for postconviction discovery in order to obtain information regarding Detective Jones' actions underlying the Department's findings as well as any other prior instances of "untruthfulness" that may have had an effect on the outcome of the trial.

The standard for postconviction discovery is set forth in State v. O'Brien, 223 Wis. 2d 303 (1999). "[A] party who seeks postconviction discovery must first show that the evidence is consequential to an issue in the case and had the evidence been discovered, the result of the proceeding would have been different." Id. at 323. "Evidence that is of consequence . . . is evidence that probably would have changed the outcome of the trial." Id. at 321. (Citations omitted]. "'The mere possibility that an item of undisclosed information might have helped the defense . . . does not establish '[a consequential fact]' in the constitutional sense.'" United

States v. Agurs, 427 U.S. 97, 109-10 (1976). O'Brien requires a strong showing of success based on the particular postconviction evidence sought.

The court finds that there is not a reasonable probability that any of the items that the defendant seeks would alter the outcome of the trial proceedings. As Judge Moroney wrote in his April 19, 1999 decision and order denying the defendant's *pro se* motion for postconviction relief, the defendant's testimony with respect to his interview with police was incredible. This court listened to Detective Jones and the defendant testify regarding the circumstance of the defendant's confession during the pretrial hearing and the trial, and it concurs with Judge Moroney's conclusions. No reasonable juror would have accepted the defendant's version of the police interview.

Notwithstanding the confession, there was sufficient evidence presented at trial for the jury to find that the defendant was guilty beyond a reasonable doubt. The victim, Deric Devine, testified that "Macho" (whom he knew to be the defendant) shot him five or six times at close range for no apparent reason. He also testified that he had known the defendant from the neighborhood for about two years. Derrick Johnson also testified for the State. He testified that he did not witness the shooting but that he turned at the sound of gunfire and saw Deric Devine hobbling down the street. He then recalled how when he reached Devine, Devine told him that "Macho" had shot him. Further, the jury heard testimony from an independent witness, Daniel Kelley, who observed the shooting from across the street. Although he could not identify the shooter, Kelley's physical description of the shooter (six feet tall, dark complexion, thin build, above-the-shoulder black, curly hair, yellow and blue jacket, black pants and black knit cap) basically corroborated that given by Devine and Johnson, who both identified the defendant as

the shooter. Thus, there existed sufficient evidence pointing to the defendant's guilt irrespective of the defendant's confession.

Evidence that Detective Jones had been untruthful in the past might have assisted the defense if it could have been shown that Detective Jones had engaged in the exact same kind of conduct alleged by the defendant in taking other suspects' confessions. Nevertheless, the mere possibility that such evidence might have helped the defense does not establish that the evidence is consequential to the identification of the defendant as the shooter. Rather, the defendant must show that such evidence, had it been discovered, would have altered the outcome of the proceedings. O'Brien. Based upon the trial testimony, the court concludes that even if the defendant were to discover evidence that Detective Jones had been untruthful in the taking of confessions or in other respects prior to the shooting, there is not a reasonable probability that the outcome of the trial would have been any different. In short, the defendant has failed to meet his burden of a strong showing of success based on the particular postconviction evidence sought.

THEREFORE, IT IS HEREBY ORDERED that the defendant's motion for reconsideration is **DENIED.**

Dated this 16th day of August, 2002 at Milwaukee, Wisconsin.

BY THE COURT:

/S/VICTOR MANIAN

Victor Manian
Circuit Court Judge

MILWAUKEE COUNTY COURT WISCONSIN
SEAL

STATE OF WISCONSIN : CIRCUIT COURT : MILWAUKEE COUNTY
BRANCH 13

STATE OF WISCONSIN,

Plaintiff,

v.

IRAN D. EVANS,

Defendant.

TRANSCRIPT OF:
JURY TRIAL

Case No. F-962007

CHARGES: 1) Attempt First Degree Intentional Homicide/PTAC
2) First Degree Reckless Injury, While Armed With a Dangerous Weapon

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JUNE 24, 1996

MILWAUKEE, WISCONSIN
SAFETY BUILDING--ROOM 568

BEFORE:

THE HONORABLE VICTOR MANIAN,

CIRCUIT JUDGE.

ATTORNEYS:

DISTRICT ATTORNEY'S OFFICE, by MARCELLA DePETERS, Assistant District Attorney, appeared on behalf of the State of Wisconsin.

RICK POULSON, appeared on behalf of the Defendant, who appeared in person.

KATHERINE M. TROMP
OFFICIAL COURT REPORTER

first degree reckless injury, while armed with a dangerous weapon.

(Pause)

MS DePETERS: Umm, we have an issue to take up with the notice of alibi that Mr. --

Oh.

MR. POULSON: I'm sorry.

MS DePETERS: Your client is not here.

CLERK: He's supposed to be on his way out.

THE COURT: Okay, Mr. Evans is now present. Said there was an issue about a notice of alibi?

MS DePETERS: Yeah, Mr. Poulson filed a notice of alibi, it's not within the 15 days, it's 14 days.

In addition, he doesn't have any name on it anywhere.

It also doesn't have the correct case number, and he cites, umm, the alibi witnesses and what he states, which in my view doesn't satisfy the statute, which is supposed to be in particularity, umm, this evidence will place the defendant at various locations on Milwaukee's near north side.

What's that supposed to mean?

My understanding of alibi witnesses, Joe will testify that Jim was at such-and-such a place at such-and-such a time not, he was at various locations on Milwaukee's near north side.

I don't think it -- it's not timely, it's not the job of the clerks and the D.A.'s Office to figure out where these things are supposed to go, and what case it is, and what court it's in.

THE COURT: I don't --

I don't have a notice of alibi, I got a motion to suppress statement.

That was filed April 25th.

MR. POULSON: It's already been stamped.

CLERK: Not by me.

BAILIFF: Are you ready? All rise, please.

THE COURT: No, no.

BAILIFF: No?

(Pause)

THE COURT: I think the notice of alibi has to be stated with more particularity as to exactly where he was and who's going to say he is there at what time.

MR. POULSON: Let me just address this.

THE COURT: And you can't conclude by saying, other, and further information regarding the same will be furnished as it becomes known when it's filed today.

MR. POULSON: Well, I --

THE COURT: It was filed June 10th in the Clerk's Office, I assume.

MR. POULSON: And it was served on the District Attorney's Office on the same day.

THE COURT: Okay.

MR. POULSON: And I went to the -- That was a Monday, 15th day was a Sunday, all right?

Umm, I suppose theoretically, I could of served on them Saturday if the office was open or the Friday before, but understanding, you know, the common practice here is if it falls on a Sunday, do it on a Monday. If it falls on a Saturday, do it on a Friday.

MS DePETERS: No, the statute says at least 15 days.

It doesn't say 15 days, it says at least 15 days.

THE COURT: Well, let him finish.

MS DePETERS: All right.

MR. POULSON: So, it was filed on the 10th.

With respect to the case number, apparently, which I didn't catch, my secretary left the F off of the case number, but the digits for the case number are exactly the same.

Umm, third, with respect to the -- respect to the notice of alibi, it's my understanding that the District Attorney was on vacation that whole week anyway.

I don't know whether it's in her file or not, or not in her file. I don't know whether she got it or didn't get it, but I filed it with the District Attorney's Office on the day that I thought it was to be filed when the 15th day fell on a Sunday and I was unable to get in there.

I recognize the statute says at least 15, but we're not going to get into this thing until tomorrow or the next day anyway.

It appears that the Court, under the statute, has the ability to extend, umm, the time if -- if what happens is that the day falls -- the 15th day falls on a Sunday, I guess for cause, I'm asking

the Court to extend it for one -- for one additional day, because the last day for filing and the last day on which we were trying to gather information in regard to drafting it and filing this document, umm, was -- it was that day.

I had put it together, basically.

THE COURT: I'm not so much concerned about that.

MR. POULSON: Okay.

THE COURT: What I'm concerned about is what each of these people are going to say.

MR. POULSON: Now, let me just address that, if I may.

THE COURT: Okay.

MR. POULSON: The problem with being any more specific was, that this young man and another young man that he was with, it's hard and it's difficult when no one knows exactly what the timing is because no one was paying close attention to the time as to be able to definitively say that at 3 o'clock, this is where he was.

Well, what had happened was, on this particular day and I believe the testimony will show this, is that they got up and they were driving around for a period of time.

Now, if they're driving around, where do I put them at any particular time when they were driving around?

THE COURT: No, but he should say that. Who says they were driving around and were they driving and when?

MR. POULSON: Well, I'm not necessarily sure that that's exactly the time frame that they were driving around in either.

It may very well have been that they were.

THE COURT: Then it's not an alibi.

MR. POULSON: That it may not be.

I mean, it may not be -- it may not be that it covers the exact time frame in which the offense occurred, that may be.

From what I can gather, from the witnesses that I have talked to and their potential testimony, that may very well be the problem with respect to this.

They may not be able to pinpoint the exact time at which the offense occurred and place my client somewhere else at that exact time. It may not be.

So, it may very well be with respect to this -- to this document, it may not even come into

play, or I thought perhaps what I ought to do is at least give them a notice that I think that, to avoid the problem, that if I call these people up here and the evidence starts to come out and it appears that it's in the nature, too, of an alibi and I think I probably should give them notice and that's what I tried to do by virtue of letting them know. I gave them addresses, I didn't have --

I didn't have phone numbers at the time. All I had were addresses.

THE COURT: It's either an alibi or it isn't. I don't think --

MS DePETERS: Well.

THE COURT: -- the State should have to go chasing after witnesses to find out what they're going to say and if it's an alibi.

MS DePETERS: And I think, what's happening here and I think what's apparent here, is that, and I don't blame this on Mr. Poulson and whatsoever, is that his client came up with this, this man confessed, all right?

He made a statement to the police saying that he shot the guy.

Now, how we'll get around that, I don't know. Is whether that confession is a confession to a

first degree attempted homicide, or whether that's a confession to first degree reckless injury, or whether it's some sort of self defense claim, that's what the jury will have to decide, but what I hear going on here is, let's wait till the State's witness will testify and then we'll put up these witnesses so, you know, they can say whatever, that's not what an alibi is.

An alibi is, I was with Jim at the time of the crime.

THE COURT: Yeah, I agree, I don't think this is an alibi, so.

MR. POULSON: So, then that takes --

THE COURT: Unless these witnesses can make a specific statement that the police can investigate, I don't think it's an alibi.

And ah, to say it might be an alibi, and therefore, you're giving the State notice, I don't think comports with the purpose of the statute.

So, the motion is granted.

MS DePETERS: I also, Judge, filed an amended information charging a count of first degree recklessly endang -- I'm sorry, first degree

STATE OF WISCONSIN : CIRCUIT COURT : MILWAUKEE COUNTY
BRANCH 13

STATE OF WISCONSIN,

Plaintiff,

v.

IRAN D. EVANS,

Defendant.

TRANSCRIPT OF:
JURY TRIAL

Case No. F-962007

CHARGES: 1) Attempt First Degree Intentional Homicide/PTAC
2) First Degree Reckless Injury, While Armed With a Dangerous Weapon

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JUNE 25, 1996

MILWAUKEE, WISCONSIN
SAFETY BUILDING--ROOM 568

BEFORE:

THE HONORABLE VICTOR MANIAN,

CIRCUIT JUDGE.

ATTORNEYS:

DISTRICT ATTORNEY'S OFFICE, by MARCELLA DePETERS, Assistant District Attorney, appeared on behalf of the State of Wisconsin.

RICK POULSON, appeared on behalf of the Defendant, who appeared in person.

KATHERINE M. TROMP
OFFICIAL COURT REPORTER

that these words are not my client's words, and if that's the case, they certainly aren't freely and voluntarily given and they shouldn't be relayed to the jury.

THE COURT: Well, the officer testified that he advised Mr. Evans fully and completely of his Miranda warnings and read them from his calendar book, which is a complete recitation of the Miranda Rights.

Mr. Evans said that he remembered that he advised him of most of 'em, but he didn't think he advised him of all of them.

Although he wasn't sure and, in any event, he knew what his rights were from having been previously advised.

I'm satisfied that the officer did fully and completely inform Mr. Evans of his Miranda protections and his constitutional rights pursuant to the Miranda formula, and also, that he advised him that he could stop the questioning at any time or answer some questions and not answer others, and if he did make a statement, that he could stop and ask to be represented by an attorney at any time. I'm also satisfied that there were no promises

made or any coercion or force, of any kind, employed either physically or psychologically to induce Mr. Evans to make the statement.

I agree that it is somewhat unusual to have a suspect sign at the bottom of a page, but that's, as I understand the officer's explanation, he does that so that there can be no claim later on that someone substituted another page before the one that he wrote out at the time and that Mr. Evans signed the page for that purpose so that his signature would be on there and it could be not another page substituted.

Ordinarily it's true, one would suspect that if the signature was to verify the accuracy of the statement, that the signature would be at the end of the statement.

That is true on the page where it says that the defendant was advised of his rights and on the page where the biographical information is contained, signed it and dated it, there's a date there. The other signatures are on the bottom of the page.

I don't know what the -- whether the purpose for doing that is appropriate or not, that'll be for the jury to decide.

The date and time of the interview is stated on the bottom of the page, although it doesn't say when it commenced and when it ended, and although that's usually contained in the police reports, I don't think that's necessary to make it admissible pursuant to the Miranda-Goodchild requirements.

That may be something that can be argued to the jury, but as far as I'm concerned, for the purposes of this hearing, I'm satisfied and I find that Mr. Evans was fully and completely informed of his rights, that the statement he made was made freely, voluntarily and intelligently, and that it was the product of his own free and unconstrained will, and therefore, the motion to suppress is denied.

It's after 12 o'clock, I have to get to an executive committee meeting so I'm going to bring the jury in and excuse them.

We'll have to take up your other motions at an appropriate time at a break, or something, this afternoon.

The other motion is to have the officer bring in other statements where he had people sign on the bottom of the page?

I don't know if that's necessary, he said he always does that, he's done that in other cases.

MS DePETERS: And also it's -- a lot of cops do it that way, it's not unusual at all that they sign at the bottom of the page.

I've seen it more than just this detective have done it that way.

I think they signed because it's where their signature is so that both the defendants or the detective sign the thing in the same place, so I don't think that's relevant.

He's arguing that the cop made the whole thing up. What's the signature thing relative to anyways? (Indicates.)

MR. POULSON: I'm sorry, what's the what?

MS DePETERS: Your argument is that Detective Jones just made this whole thing up and wrote it down there himself, so what's the point where the signature is?

How is what his signature --

THE COURT: I don't want to spend a lot of time on something that is not going to go anywhere. The officer says he always has people sign like that, so then, what's the point of having

him bring in other statements? So.

MR. POULSON: Well, to verify that.

MS DePETERS: Why?

THE COURT: Well you're --

MS DePETERS: He's no more required to verify his testimony than any other witness is.

THE COURT: I'm going to deny the request.

It seems to me that it's not relevant to this issue and that it's going to be spending a lot of time on something that's not necessary for the -- the jury to consider in arriving at a verdict.

(12:03 p.m. jury is summoned.)

THE COURT: I'm sorry that the legal question that had to be resolved took longer than I expected it would.

I'm already late for an executive committee meeting, so I'm going to have to recess now for the -- for the noon hour. Ah, it's unfortunate that we didn't get started the way we had hoped we would, due to some unforeseen difficulties, but I think we're hopefully straightened out now so that we can start and move expeditiously through

STATE OF WISCONSIN : CIRCUIT COURT : MILWAUKEE COUNTY

STATE OF WISCONSIN,

Plaintiff,

-VS- Case No. F962007

IRAN D. EVANS,

Defendant.

June 26, 1996

JUDGE VICTOR MANIAN
Presiding Judge

CHARGE: ATTEMPT FIRST DEGREE INTENTIONAL HOMICIDE, PARTY TO A CRIME

APPEARANCES:

MARCELLA DEPETERS, Assistant District Attorney, appeared on behalf of the Plaintiff.

RICHARD POULSON, Attorney-at-Law, appeared on behalf of the defendant.

The Defendant appeared in person.

Hattie Mitchell - Court Reporter

TRANSCRIPT OF PROCEEDINGS

THE CLERK: State of Wisconsin versus Iran Evans. Case number F-962007. Charge, attempt first degree intentional homicide.

MR. POULSON: And first degree reckless injury while armed.

MS. DEPETERS: Marcella DePeters for the State.

MR. POULSON: Rick Poulson on behalf of Iran Evans.

MS. DEPETERS: Judge, Mr. Poulson has informed me that he plans on calling more of these alibi witnesses, and I guess I'm going to object to it.

THE COURT: Why don't you make your record. We had a side bar yesterday after Ms. Jarrett testified, and during the course of her testimony, and the state objected, and I ruled that her testimony, if it was given for the purpose of an alibi, was not an alibi because she didn't know, she couldn't say where Mr. Evans was at the time these acts allegedly occurred, and the other evidence that she was offering about where he was the

day or two before and what activities the defendant was involved in with her son was not relevant.

So, on the motion of the State, rather than call a mistrial, I struck her testimony and instructed the jury to disregard it.

There were a number of other witnesses listed on what was called an alibi. We had discussed that before the trial began. I think it was conceded by the defense that none of the witnesses could say where the defendant was during the time that the incidents leading up to and including the time of the offense were allegedly committed. They could all testify as to some background information about where he was earlier in the day or later in the day, but the time of the offense, which was the critical time, was unexplained and unable to be explained by any of those witnesses.

I therefore ruled that this was, that these were not alibi witnesses, and they could not testify for purposes of an alibi, and their testimony concerning events hours

before and hours after the event did not appear to be relevant, and therefore was immaterial what he was doing hours before and hours after the incident unless it was directly connected to the offense to which he is accused.

So that was the posture that we left it in.

You wanted to make a record, Mr. Poulson?

MR. POULSON: I do, Judge. I now want to move for a mistrial.

First of all, with respect to the testimony that was given by Gail Jarrett, and that testimony in light of the testimony that was given by the defendant who denies the fact of being in the area or being the shooter of the victim in this case, I think was relevant testimony in that it corroborates his position slightly before and slightly after, while it was acknowledged by the witness on the witness stand that for a period of time, probably an hour on each side of 3:00 o'clock, she was unaware of where the defendant in this case was, but at least can place him there in the

morning and the early afternoon and in the later afternoon.

Secondly, I think the striking of the testimony as it occurred before the jury I think created an adverse inference for my client in terms of that testimony not being irrelevant, but being rather not believed and/or not believable or not credible, and therefore it sheds adverse light on the testimony that he gave in terms of being in that position on that day.

Thirdly, I guess it's our, it's our position that by not being allowed to present these witnesses, whether they are in fact in the nature of an alibi witness or not, seems to me to be denying my client his right to present a defense.

Seems to me that while there were some problems with the notice of alibi, that being, of course, those items that were pointed out by the State, first that the letter F in the designation of the case number was missing. Secondly, that the filing date was only 14 days prior to the day of the trial, rather than the 15 days, even though

the 15 days would have been on a Sunday, and the fact that the Court believes the specificity laid out in the notice in terms of the place or places where the defendant was alleged to have been during the course of that afternoon was not present, and thereby denied my client the right to put into evidence testimony that would have been in the nature of an alibi that conjoin with his testimony may have given the inference that he was somewhere else. In fact, him saying that he was and other witnesses corroborating at least a piece of what he was saying.

It seems to me that in actuality, what would have happened had the state taken a look at that notice, whether or not the particularities in terms of he was at the Jarrett residence or he was driving around in Marshall Noel's car would have been checked out regardless of whether or not there was a particularity set forth in regard to the place.

It would seem to me that it would be not in the interest of the state to ignore the notice, but rather to have it checked out and

be ready and prepared to proceed and then make the argument that it wasn't specific enough. It seems to me that they would have, whether it was particular or not, would have had to check that out, and the names and the addresses of the individuals who were to be called were on the notice. I might suggest that as that is set forth they could have checked that out anyway.

I guess, with respect to calling of Marshall Noel, who is a person who is listed on the notice of alibi, the purpose would not be to lay out additional, at least at this point based on the Court's ruling, would not be to lay out additional information or testimony of the nature of an alibi, but for other purposes other than that. And I think it would probably be sufficient to call them for purposes other than the alibi. I don't see that there would be any problem with that. And if the Court needs an offer of proof, I will give an oral offer of proof here telling the Court what I would expect what he would testify to.

So, I think given all of those

circumstances in regard to that notice of alibi I'm going to request and move the Court to declare a mistrial.

THE COURT: Section 971.23(8) provides that if the defendant intends to rely upon an alibi as a defense, the defendant shall give notice to the District Attorney at the arraignment or at least 15 days before trial, stating particularly the place where the defendant claims to have been when the crime is alleged to have been committed together with names and addresses and witnesses to the alibi, if known. If at the close of the State's case the defendant withdraws the alibi, or if after the close of the defendant's case defendant does not call some or any of the alibi witnesses, the State shall not comment on the defendant's withdrawal, or on the failure to call some or any of the alibi witnesses.

Then it goes on to say the State shall not call the alibi witnesses if the defense doesn't call them. It says in Subsection E, in default of such notice, no evidence of the alibi shall be received unless

the court orders otherwise. C, the Court may enlarge the time for filing a notice of alibi as provided in paragraph A for cause.

The problem with this notice which has been filed and made a part of the record, it simply says this evidence will place the defendant at various locations on Milwaukee's near north side, and more specifically with the following potential witnesses. That doesn't notify the district attorney of anything, and the whole purpose of the alibi is so that the witnesses say with particularity where the defendant was at the time he was there so that the state can check it out.

The State, this doesn't notify the State of anything except he claims he wasn't there. So the State would then have to go find these witnesses and ask them what they're going to say. You're supposed to tell them what they're going to say.

MS. DEPETERS: Right. And the other problem, too, with it being filed late, and the fact that the clerks in the office have to figure out whose case this is. Your name

isn't on it. My name isn't on it. They wouldn't know whether it was a felony or a misdemeanor. If the computer's down, which they've been down every afternoon for the last two weeks, they have no way of knowing where this thing's supposed to go. So he files it late and probably because they're trying to find out who it's supposed to go to, it doesn't get sent to MPD until 6/18.

THE COURT: I don't think the time or the fact that the F is left off the case file is serious.

MS. DEPETERS: I think it is in the sense that Mr. Poulson is arguing they should have gone to check this out. It's not my job to track down, I don't go to Foley and Lardner and file a paper that says Foley and Lardner on it. I address it to the specific attorney. I have a mailbox. I have voice mail. I have all sorts of means of communicating with me, and --

THE COURT: Well, I just think the notice is insufficient to serve as a notice of alibi, and I think it's conceded that none of these witnesses can say that the defendant,

where the defendant was at the time of the alleged shooting.

So, it's not an alibi, and whatever they're gonna say about where he was hours before or hours after I don't think is relevant. If they want to testify about something else --

MS. DEPETERS: But, see the problem with them testifying about something else --

THE COURT: Well I'm not sure --

MS. DEPETERS: He wants them to testify to like clothing description. But the problem with that is that this individual has approached, these individuals, okay, have approached someone at Mr. Poulson's office, whether it be him or whether it be his investigator, and stated I was with the defendant at the time of the shooting.

MR. POULSON: Now, that's not necessarily true.

MS. DEPETERS: Their names are on an alibi notice, counsel.

MR. POULSON: And the notice that was given says that these people were with the defendant at the time and place that the

offense was to have occurred, so yes that's what -- we were not able to pinpoint a time frame in terms of no one exactly keeping an eye on their watch and knowing exactly what the time frames were. And after we had found out and had gotten a hold of these people and started talking to them we understood there was a problem in terms of the exactness. That is, that if the offense occurred somewhere between 3:00 and 3:15, in fact, none of these witnesses would be able to come forward and sit on the witness stand and say I was with Iran Evans at 3:00 o'clock and 3:15, and therefore he couldn't possibly commit the offense.

MS. DEPETERS: That's what Jarrett was saying. Jarrett was saying that he was with her between three and four.

MR. POULSON: That's not --

MS. DEPETERS: That's what the presumption -- She said they were on the north side of the city. This thing happened at river west, and then he was running in and out of the house. That could be concluded by a jury as a reason to find him not guilty, which

I have no statement of this woman, you know.

And it's the same thing with Noel testifying. What's he going to get up there and say? What about my ability to impeach this guy when I have no information about what he told you or what he told your investigator?

I think it's unfair. He's either an alibi witness, or he's not an alibi witness. He doesn't get to be any kind of witness he --

THE COURT: Mr. Poulson is going to give us an offer of proof as to what Mr. Noel is going to say or testify to.

MR. POULSON: Mr. Noel would testify to the fact that he had observed on that day my client and on that day he was not wearing, at least at this point in observation, which would have been sometime after the offense, that he was not wearing a jacket, a Michigan jacket, nor was he wearing a hat.

He would probably also testify that he has known my client for some time, that they are friends and that he has never known my client to ever wear a hat, and he hasn't season a Michigan jacket, and on that day he wasn't wearing a Michigan jacket. He was

wearing a different type of jacket.

He would describe for the jury the length of the hair, type of the hair, and I don't see how that could come into play in any way whatsoever as a part of being an alibi, and if, and even if --

THE COURT: I think he can testify to that.

MS. DEPETERS: What times did he see this guy?

THE COURT: Well, you can cross examine him about that.

MS. DEPETERS: I don't know what time. If he gets up there and says he saw him at 3:15, we're back to the same problem, and now Mr. Poulson has put two alibi witnesses in, despite the Court's order to strike these witnesses.

MR. POULSON: Well, sufficed to say if I ask him --

MS. DEPETERS: Why can't I impeach him? Now I'm unable to impeach this guy on some unknown statement that he said he was with the guy.

THE COURT: No. He's not going to

say he was with him at the time of the shooting.

MR. POULSON: That's exactly the case.

MS. DEPETERS: But the point is he made a prior statement saying he was with the guy.

MR. POULSON: No. The point is he did not make --

THE COURT: It was my understanding of the alibi notice, and that's what the problem is with him, he didn't say he was with him at the time of the shooting. And also I think the record speaks for itself, but just in response to what somebody else had said about the Court's admonition to the jury, I told them that her testimony was being stricken because of some legal reasons that they should not concern themselves with and didn't tell them that her testimony was not relevant or immaterial.

Okay. He's not going to testify about the time of the offense or claim that he was with Mr. Evans someplace as I understand it. He's just going to testify that he knows

Mr. Evans not to wear a hat and that he doesn't have a jacket like that.

MS. DEPETERS: But he's not going to say what time he saw Mr. Evans that day.

MR. POULSON: I don't think I should be precluded from saying, if for example, there had never been a notice that had been filed, and we had never had that problem with the notice, would I then be precluded from calling someone up on the witness stand that says that he saw him at 4:00 o'clock on that day at that location and he was not wearing a Michigan jacket? I submit to you that I would not be. It is not in the nature of an alibi. It is after the offense.

THE COURT: Yes. Okay.

MR. POULSON: And I would be able to say, hey, did you see him on that day at 4:00 o'clock, and if he says yes, I can ask him where did you see him at 4:00 o'clock, then ask him about the type of clothing he was wearing, and ask him about the hat and ask him about the hairstyle. And it would seem to me that I would be able to call that type of witness regardless of whether or not a notice

of alibi had been filed or not.

MS. DEPETERS: But the problem in my view is that you did file a notice of alibi.

THE COURT: But it's not for the purpose of an alibi. It's for the purpose of showing what clothes he saw him with and his hairstyle.

MS. DEPETERS: I guess I'm wasting my time, but it just seems to me that you're calling a witness who is going to lie for the defendant.

MR. POULSON: I object to that.

THE COURT: You can argue that to the jury. Okay. If we can have the jury, we'll proceed.

(Jurors present)

THE COURT: Good morning, ladies and gentlemen.

THE JUROR: Good morning.

THE COURT: One of the hardest things that we have to do is to get everybody together so we can get the trial started in the morning, and Mr. Poulson went out in the hall to get his next witness, and apparently he went to the men's room on another floor, so

him guilty of both offenses if they believe the State's witnesses. I don't think the fact that the shots were fired one after the other without any significant delay between shots makes one intentional and the other a reckless.

There are all kinds of factors that come into play. After he was shot he was lying on the ground. He got up. He was shot in different places. So, I think the evidence can support both charges.

And therefore -- and I think the evidence if believed by the jury does support both charges, and therefore the motions are denied.

MS. DEPETERS: Is Mr. Poulson going to get to argue this alibi offense in his closing argument?

THE COURT: There was no alibi.

MS. DEPETERS: The guy said he was with him all day. That sounds like an alibi to me, which I'm precluded from cross-examining the guy on because you know, then he'll just say well yes, I was with him at the time of the shooting.

THE COURT: No, I don't think he should be allowed to argue that. As we discussed at side bar that was something that came out without the knowledge of the defense attorney. It was a volunteered statement. It wasn't in response to any direct question, and had it been, the Court would have prevented him from answering that based on the Court's previous ruling.

So, the State moved for a mistrial at side bar, and I said I would take that motion under advisement.

MS. DEPETERS: I think the State has somewhat of a fair trial in that I think he has put up two witnesses up there that have testified in direct opposition to the Court's order that I had no notice of.

When the Judge -- you know, it amazes me. When the Judge orders something for the State to do, for the police officer not to mention something, I go out to the police officer and I say, Detective Yaeger this has been stricken, don't mention it. The defense attorney is under the same obligation to do that. There was a ruling of the Court,

and the alibi defenses wasn't going to come in. He should have gone out there and told his witness, well, you can't testify as to this.

If I did that and a cop puts something in on my direct examination that was stricken, you know, there would either be a mistrial, I would be yelled at, or I would be in front of the bar. So, even if Mr. -- and I don't think Mr. Poulson intentionally asked him that, but he should have instructed him not to say that.

The jury is gonna be sitting there wondering why we didn't hear more about that, that this kid said he was with him all day. The State is hiding things from us.

This is a serious charge. The kid was shot five times. He is permanently disabled.

MR. POULSON: Is that an argument for a mistrial?

MS. DEPETERS: Yes. Because I don't think I've been given a fair trial. I think you put in two alibi witnesses, that you gave me absolutely no notice of, in opposition to

the Court's order. You totally hamstringed me. I couldn't cross examine the kid on his statement that he was with him all day because I would screw myself.

If this were a different kind of case it would be different, but this is a first degree intentional attempted homicide case. It's a serious injury committed by a defendant who has an extraordinary long history in juvenile court.

I mean, there is some duty to the community and the victim to make sure he gets an appropriate trial. So if he did it he gets convicted and to not be bushwhacked by an alibi defense that wasn't even suppose to go in.

THE COURT: You really want a mistrial?

MS. DEPETERS: Well --

MR. POULSON: I'll tell you what, I'll go along with that. I'll join in that motion. I'll join in that motion for a mistrial.

MS. DEPETERS: If the Court didn't strike the testimony of this kid -- I mean,

minimally the Court should have struck that testimony where he said he was with him all day.

MR. POULSON: I'll reraise my same arguments that I made to the mistrial argument before, that is that I believe I'm being denied the right to put a defense on for my client. The State wants a mistrial, I'll join.

MS. DEPETERS: I don't think you have any grounds for a mistrial. You're the one that didn't file a notice of alibi properly.

THE COURT: Okay. We've heard that. If you want a mistrial he's joining in the motion.

MR. POULSON: That's the argument that she was making. She is making an argument for a mistrial. You're right. I do join in.

MS. DEPETERS: Let me talk to the victim.

I'll withdraw it.

MR. POULSON: I won't.

MS. DEPETERS: The victim wants to

go forward, but I do want an order to Mr. Poulson that he can't talk about it in his closing argument.

THE COURT: I think I've already ruled that.

MR. POULSON: Just to make sure just so I'm clear on what I can talk about, I'm not going to talk about the defense of alibi in terms of the witnesses who would have testified, but it's clear that my client has a right to get up on the witness stand and testify and say that he was someplace at some other time, I mean at the time that the offense occurred, and I certainly ought to be able to comment on that.

MS. DEPETERS: But I don't think he gets to comment who he was with.

THE COURT: I don't think he can comment on what this last witness said, that he was with him all day.

MR. POULSON: Judge, I'm not going to.

MS. DEPETERS: Don't forget the testimony, in his testimony he said I was with those other people.

MR. POULSON: I'm sure he can comment on that.

MS. DEPETERS: No.

THE COURT: I think he can comment on what the defendant said.

MS. DEPETERS: But then if he says -- the defendant said he was with his friend, Marshall Noel. Marshall Noel said he was with his friend all day.

THE COURT: I don't think he testified to that.

MS. DEPETERS: Yes. He testified he was with Marshall Noel.

THE COURT: Then you get to argue that.

MR. POULSON: Just so the record is clear, I have filed with your clerk defendant's requested jury instructions which were drafted prior to the submission to me indicating what the second charge was. Therefore, there is nothing relating to the second count of first degree reckless injury while armed.

THE COURT: Does anybody know what the jury instruction number is for that?

STATE OF WISCONSIN : CIRCUIT COURT : MILWAUKEE COUNTY
CRIMINAL DIVISION

STATE OF WISCONSIN,

Plaintiff,

v. Case No. 962007

IRAN D. EVANS,

Defendant.

NOTICE OF ALIBI

TO: DISTRICT ATTORNEY
MILWAUKEE COUNTY

PLEASE TAKE NOTICE that the above-named defenant, Iran D. Evans, by and through his attorney, Richard E. Poulson, Jr., and pursuant to Sec. 971.23(8), Wis. Stats., does intend to offer evidence at the trial hereon in the nature of an alibi defense. This evidence will place the defendant at various locations on Milwaukee's near northside and more specifically with the following potential witnesses, to wit:

Marshal Noel
3313 N. 28th Street
Milwaukee, WI

Gail Jarrett
3313 N. 28th Street
Milwaukee, WI

Kena Foster
6544 N. 65th Street
Milwaukee, WI

Donald Miller
2436 N. 16th Street
Milwaukee, WI

Other and further information regarding same will be

furnished as it becomes known.

Dated at Milwaukee, Wisconsin this 6th day of June, 1996.

Respectfully submitted,

Richard E. Poulson, Jr.

RICHARD E. POULSON, JR.
Attorney for Defendant
State Bar No. 01018498

P.O. Address:

P.O. Box 421
Hales Corners, WI 53130
(414)529-0710

PA-45 A | NAME: LAST Evans, FIRST Iran MIDDLE Darnell D.O.B. 06-30-79 | CIB FILE # 96-070 3087

ARREST DATE AND TIME: 03-31-96 | CHARGE: STATUTE NO./ORD.NO. RES 941.30

STATEMENT OF PRISONER CONTINUED:

On Sunday, March 31, 1996 at 5:45 p.m., I Det Tom while on the 5th Floor Jail area advised the Subject of his constitutional rights at which time he stated he understood. X Iran Evans

Subject states he was born in Chicago, ILL, and moved to Milwaukee when he was 4 yrs old. Subject states he attends Riverside outpost School in the 10th GR. Subject states he can read and write. Subject states he does not used drugs or drink alcoholic beverages. Subject states he has never been treated for any mental illness and that he is currently sober at this time.

X Iran Evans
3/31/96

Regarding the above offense, Subject states that he did meet up with the victim known to him as Derrick near (N. 5th & W. Wright Street). Subject states that he was with his friend whom he does not want to name at this time. Subject stated that he and Derrick got into an argument. Subject states that he and Derrick do not get along with each other and on Sunday when the incident occurred, Subject stated that Derrick was also giving him and his friends dirty looks and that what started the argument. Subject stated that Derrick had threatened him and his friend. Subject he stated that as he and his friend were walking away, Derrick said something else to him and his friend and as he turned around, he thought Derrick had a weapon at which time he pull out his gun and fired several times at the victim Derrick. Subject states after the victim Derrick fell on the ground, he and his friend ran (NB) from the scene on foot. Subject stated that he shot

Det. Tom Jones 5357 03-31-96 5:45 p.m.
INTERVIEWING OFFICER TO FURNISH: Name, Rank, Payroll Number, Date and Time of Interview.

X Iran Evans
3/31/96

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A-45 A | Evans | Iran | Darnell | 06-30-79 | 96070 3087
NAME: LAST | FIRST | MIDDLE | D.O.B. | CIB FILE #

03-31-96 | RES 941.30
ARREST DATE AND TIME: | CHARGE: STATUTE NO./ORD.NO.

STATEMENT OF PRISONER CONTINUED:

the victim Derrick because he thought Derrick was about to pull out a gun and shoot him and he said. Subject stated that he had heard that the victim Derrick usually carries a gun with him. Subject states that the gun he used was a revolver and that he got the gun from a friend on the streets. Subject stated that he got rid of the gun but refused to say what he did with it. Subject then stated that he gave the gun to a friend who got rid of the gun but he does not know where and that he is not saying who his friend is. Subject states he has been incarcerated at Wales and Lincoln Hills for Auto Theft and Burglary.

Det. Tony Jones 5357 | 03-31-96 5:45 p.m.
INTERVIEWING OFFICER TO FURNISH: Name, Rank, Payroll Number, | Date and Time of Interview.

[redacted] X Iran Evans 3/31/96

CERTIFICATE OF MAILING

I hereby certify pursuant to Wis. Stat. (Rule) 809.80(4) that, on the 15th day of January, 2004, I caused 22 copies of the Brief of Defendant-Appellant-Petitioner Iran Evans to be mailed, properly addressed and postage prepaid, to the Wisconsin Supreme Court, P.O. Box 1688, Madison, Wisconsin 53701-1688.

Robert R. Henak

Cert. Mailing2.wpd