COURT OF APPEALS
DECISION
DATED AND FILED

May 27, 2004

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal Nos. 01-2789
02-2979

Cir. Ct. No. 80-CF-495

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RALPH D. ARMSTRONG,

DEFENDANT-APPELLANT.

APPEALS from orders of the circuit court for Dane County: PATRICK J. FIEDLER, Judge. *Affirmed*.

Before Dykman, Vergeront and Higginbotham, JJ.

¶1 DYKMAN, J. Ralph D. Armstrong appeals: (1) from an order denying his motion to vacate his judgment of conviction and; (2) from an order denying his motion for reconsideration. He seeks a new trial because DNA tests establish that some of the physical evidence the prosecution presented to the jury

was false. He argues that this evidence is exculpatory, not inculpatory. We affirm because the DNA evidence does not create a reasonable probability that the outcome would be different on retrial.

FACTS

¶2 Charise Kamps was murdered in her apartment on June 24, 1980. Her body was found nude, with a bathrobe belt draped on her back. Blood from her wounds had been smeared on her skin from her buttocks to her lower legs and on her face. Pathologist Robert Huntington concluded that Kamps most likely died from strangulation. He found bruises consistent with a strike to the head with a hard object. He also found other wounds, which he believed were caused by a blunt non-yielding object and required a considerable amount of force.

¶3 The Madison Police Department investigated the crime scene and found no evidence of forced entry into the apartment. Brian Dillman, Kamps' fiancée, testified that she would always lock, bolt, and chain her door. The only sign of a struggle in the apartment was a backgammon game that fell to the floor. There were no blood stains in the bathroom or anywhere else in the apartment, except on the bed where Kamps was killed; the police concluded the killer had not cleaned him or herself in the apartment.

¶4 A jury convicted Armstrong of first-degree murder and first-degree sexual assault. The critical question for the jury was: When did Armstrong go to Kamps' apartment on the evening of her murder? The evidence showed that Kamps was probably killed between midnight and 3:00 a.m. While Armstrong admitted that he was alone with her in her apartment that night, he claims he was there around 9:30 p.m. Based on eye witness testimony and circumstantial evidence, the State argued that Armstrong was in Kamps' apartment around

midnight. Moreover, it presented evidence which, in its view, suggested that Armstrong's version of events that evening was physically impossible. We will explain the evidence supporting these contrary theories in turn.

Background

¶5 The evidence establishes without contradiction that Kamps and Armstrong socialized together and were friendly. Kamps knew Armstrong's fiancée, Jane May, because both women worked at Pipefitter, Ltd. on State Street. Kamps was engaged to Brian Dillman, who lived in McGregor, Iowa. She spent the evening of June 23, 1980, with her friends, including Armstrong and May. She attended a small party at May's apartment around 5:00 p.m. Two other women who also worked at Pipefitter attended the party. Both women testified that they saw Armstrong and Kamps flirting, and that Armstrong sat on Kamps' lap and tried to kiss her. Kamps resisted and Armstrong said he would see her later that night. However, Armstrong testified that Kamps sat on his lap, not vice versa, and that he was not interested in her sexually, although he found her attractive. Kamps, Armstrong, and May all consumed alcohol and used cocaine at the party.

¶6 This group spent most of the evening together. After May's party disbanded, they ate at a restaurant and then watched television. The parties dispute what occurred from 9:00 to 10:00 p.m. However, the evidence clearly shows that Kamps, Armstrong and May watched some of the 10:00 p.m. news together in May's apartment while using cocaine. Kamps left May's apartment between 10:30 and 11:00 p.m. Armstrong left about fifteen minutes later. May called Kamps at Kamps' apartment and spoke to her on the telephone from 11:00

to 11:15 p.m. to discuss waterskiing plans for the following day. That phone call was the last time any witness admitted seeing or hearing from Kamps.

¶7 Around noon on June 24th, Dillman asked May to go over to Kamps' apartment to check on her. He had been trying to get in touch with Kamps since 2:00 a.m. and was unable to reach her. May then found Kamps' body; she testified that the phone appeared as though it intentionally had been left off the hook.

Armstrong's Theory of the Case

¶8 At about 9:16 p.m., Kamps and Armstrong dropped May off at May's apartment. Then they drove to Kamps' apartment to drink some leftover beer. This was not the first time he had been in Kamps' apartment. They arrived around 9:20 p.m. and stayed for only about ten to fifteen minutes. During that time, he may have played some music, drank half a glass of orange juice and one beer. He also moved a bong off of the table so that he could set his beverage down, which explained why the police found his fingerprint on the bong. Then they went to Brent Goodman's home to purchase cocaine. They brought the cocaine to May's apartment, where they watched the 10:00 p.m. news program. Afterwards, May wanted to sleep and Kamps left. Armstrong was not tired, so he drove to his apartment to see his brother who was visiting town. He claimed he made several phone calls in order to buy more cocaine, but did not reach any of his dealers. He testified that he returned to May's apartment around 1:00 a.m., where he stayed until approximately 10:00 a.m. the next morning.

¶9 The State presented evidence that the distance between Kamps' apartment and Goodman's apartment was too far for Armstrong's theory to be plausible. Investigator Theodore Mell testified that Armstrong and Kamps would

have spent ten to sixteen minutes driving to and from Goodman's residence each way, even if they drove five to ten miles per hours above the speed limit. Goodman testified that Armstrong and Kamps arrived at his house to buy cocaine around 9:30 p.m. He recalled that they left his home between 9:35 and 9:45 p.m., and were definitely gone when the 10:00 p.m. news started. The State argued that this showed they could not have spent ten to fifteen minutes at Kamps' apartment as Armstrong claims.

¶10 The State presented evidence showing that residents Jeff Zuba and Terry Fink would have seen or heard Armstrong enter the building if he had returned to May's apartment around 1:00 a.m. Zuba and Fink were awake because musician James Brown was involved in a film near the apartment building. Armstrong claims he entered May's apartment via the building's back staircase. He testified that the front door was a locked entrance; so he usually only exited the building through it and relied on the back door to enter the building because it was never locked. Both Zuba and Fink testified that they could not hear and would not see anybody enter the apartment building from the back stair case. However, Fink testified that she heard somebody in the front stairwell sometime between 3:30 and 5:00 a.m. She also testified that the back entrance "is not a path anybody would normally travel because it is so hard to get through and you have to push shrubs and bushes aside and twigs. It is not easy to get there ...." Zuba testified that a brick propped the front door open that evening because of the James Brown film. He also testified that Kamps and Armstrong entered the building via the front door when they returned to watch the evening news with May.

¶11 May verified that Armstrong returned to her apartment, but she could not recall precisely when. She testified that it could have been as late as 3:30 a.m. At one point, she told friends that he had not returned at all that night

and later recanted that statement. On the morning of June 24th, Armstrong received a ticket for parking in a parking lot near May's apartment. He argued that this proves he returned to May's apartment that night. His car was parked in a lot that was closer to the front door than the back door of May's apartment building.

State's Theory of the Case

¶12 The State argued that two witnesses corroborated its theory that Armstrong went to Kamps' apartment around midnight. First, Laura Chafee, who lived below Kamps, testified that at approximately 12:05 a.m. she went to the bathroom and heard music coming from Kamps' apartment. This music was hard to hear, but she was fairly certain it came from Kamps' apartment. The bass sounds were consistent with the Grand Funk album the police found on Kamps' stereo. Armstrong admitted that he liked to listen to Grand Funk and other witnesses corroborated that fact. Armstrong argued, however, that Grand Funk was a popular album that many people owned.

¶13 The second witness was Riccie Orebia.[1] Orebia, who lived across the street from Kamps' building, sat on his front porch from 10:45 p.m. until 3:55 a.m. to get fresh air. At 11:45 p.m., he asked a passerby what time it was. Around 12:30 p.m., he saw a white car with a black top drive down the street and then turn around. The driver was a man with dark, shoulder-length hair. The car parked in a nearby lot; five to ten minutes later Orebia saw somebody come across the street and go into Kamps' building; five or ten minutes later the same man came out and

[1] Riccie Orebia, a transvestite, was identified as female in prior court proceedings and decisions. Now, the record from the postconviction motion hearing identifies Orebia as male.

returned to the car. This happened several times. When he went back into the building a third time, he was wearing blue jeans without a shirt and was running fast. He stayed inside about twenty minutes. The last time he left the building he was running and his skin was shining, as if he were oily. The man had caught Orebia's attention because he was not wearing a shirt and had a very muscular, lean body.

¶14 Armstrong admitted that he owned a white car with a black top. His friend, Greg Kohlhardt, testified that Armstrong was strong. In fact, he had seen Armstrong rip a full deck of cards in half. Armstrong had dark, shoulder-length hair. He was taller than the man Orebia described, but Orebia testified that he was not a good estimator of height. Another resident of Orebia's apartment building, Thomas Anderson, testified that Orebia told him on the afternoon of June 24th that he had seen a man entering and leaving Kamps' apartment building early that morning, and described the man to him. His description that day and his testimony were consistent.

¶15 Prior to any identification processes, Orebia underwent hypnosis to help him recall events of that evening. The police presented a line-up to Orebia, whereby Armstrong followed the advice of his lawyer and went limp, requiring two police officers to drag him across the street. To make the line-up as fair as possible, the other participants were also dragged across the street. Orebia gasped when he saw Armstrong's head over the bushes and identified him as the man he saw the morning of June 24th. Orebia also testified that he could tell that some of the other men in the line-up were wearing wigs.

¶16 Under oath, Orebia recanted his identification of Armstrong and then recanted his recantation. Ultimately, at trial he identified Armstrong as the man he

saw on the morning of June 24th enter Kamps' apartment. He explained that his perjured testimony and inconsistency was a result of emotional problems stemming from the stress of the case.

¶17 Armstrong called experts to refute Orebia's identification. Dr. John Fournier, an ophthalmologist, testified that many of the conditions on the night in question worked against the eye being able to see well. He concluded that it would be impossible to identify facial features at that distance in the poor lighting that existed. Dr. John Kihlstrom, a psychology professor, testified that under hypnosis, subjects become very responsive to suggestions or alterations to perceptions. He testified that the hypnosis session substantially departed from the guidelines developed to safeguard the memory of the witness. Dr. Roger McKinley, who hypnotized Orebia, defended his procedures and concluded that he did nothing to cause Orebia to identify Armstrong over any other participant in the line-up.

¶18 The State also presented evidence that Armstrong stole $400 from Kamps' apartment when he murdered her. Dillman had lent Armstrong $500 to purchase a car. Armstrong admitted that he partially repaid Dillman on the day of the murder by giving $420 or $440 in cash to Kamps. When the police searched Kamps' apartment, they could not find the money. They found only $136 in a pair of jeans in her apartment.

¶19 Armstrong deposited $315 in his bank account the morning of the murder. He explained that his brother had paid him $300 in cash for food and lodging; he had sold his car to his roommate for $250; and he had picked up his paycheck from work, which was in the amount of $150. He also explained that he had cashed a $600 insurance check recently, so he had more cash than usual. The

teller at the bank testified that Armstrong was not as friendly as he was on other occasions. Armstrong claims he paid less attention to the teller because he was talking to his brother, Steve, in the car.

¶20 The State presented evidence casting doubt on whether Steve had $300 cash to give to Armstrong. On June 23, Armstrong spent about $140 to purchase clothes for Steve whose bag was lost during his bus trip to Madison, Wisconsin. The brothers found the bag on June 24th. Steve did not testify at trial. Moreover, Goodman testified that Armstrong was short on cash and had to borrow money from Kamps when they purchased cocaine from him around 9:30 p.m. At trial, Armstrong disputed this testimony, claiming he had chosen not to buy cocaine and that was why Kamps paid for the drugs.

Physical Evidence at Crime Scene

¶21 The police collected hair and semen samples from Kamps' apartment, as well as a fingerprint from a bong. The fingerprint belonged to Armstrong. Coila J. Wegner, a microanalyst at the State Crime Laboratory Bureau, tested the semen samples taken from Kamps' bathrobe. No semen was found on Kamps' body. Wegner concluded that the semen was from a type A secretor; both Armstrong and Dillman, as well as eighty-percent of the population were type A secretors. She could not determine how long the semen had been on the robe.

¶22 Wegner also tested hairs found in Kamps' apartment. At trial, Wegner explained the spectrum of similarity between hairs. Specifically, hairs can be "similar" or "consistent." "Consistent" signifies a stronger likelihood that two samples came from the same person. With respect to the bathrobe belt draped across Kamps, Wegner testified as follows:

> I found that the two head hairs present on the belt, one was consistent with the standard head hairs from [Armstrong], one was similar to the standard head hair of [Armstrong] and the pubic hair was consistent with the pubic hair standards from [Kamps].

She also testified about other hairs in the apartment, concluding some were consistent with Armstrong, but most were not. There were no pubic hairs in Kamps' apartment consistent with Armstrong.

¶23 Wegner testified that hemostick tests taken after Armstrong's arrest showed that blood of human origin was underneath Armstrong's thumb nails and both large toes. She could not determine how long the blood had been there or if it was from Kamps. Armstrong explained that he had injured himself during a footrace on June 23 and his leg had bled. He also testified that he had sexual relations with May on the morning of June 24th while she had her menstrual period.

¶24 Finally, Wegner testified that she thoroughly searched Armstrong's car, but found no traces of blood inside of it.

Procedural History of the Case & Newly Discovered Evidence

¶25 Armstrong's conviction has received an unusual amount of judicial attention. First, he appealed from an order denying his motion for postconviction relief. His appeal bypassed this court. The Wisconsin Supreme Court affirmed the judgment, holding that: (1) Orebia's testimony was admissible despite hypnosis; (2) the line-up procedure was sufficiently reliable so that the out-of-court identification was admissible; (3) the trial court did not abuse its discretion by sending a color photograph of the victim taken at the scene of the crime to the jury room; and (4) the State did not violate its duty to disclose exculpatory

evidence. ***State v. Armstrong***, 110 Wis. 2d 555, 560-61, 329 N.W.2d 386 (1983). The Seventh circuit denied Armstrong's petition for a writ of habeas corpus in ***Armstrong v. Young***, 34 F.3d 421 (7th Cir. 1994).

¶26 Armstrong also moved for a new trial based on newly discovered evidence. He presented DNA evidence establishing that he could not have been the source of the semen on Kamps' robe. The trial court denied the motion and we affirmed in an unpublished *per curiam* decision dated June 17, 1993.

¶27 Armstrong moved again for a new trial based upon newly discovered evidence. He presented three reasons for why a new trial was warranted: (1) DNA analysis excluded Armstrong from being the source of the head hairs found on Kamps' bathrobe belt; (2) DNA analysis excluded Armstrong from being the source of the semen on the bathrobe; and (3) the hemostick tests that incriminated Armstrong now do not reveal any trace of blood whatsoever. At the July 20, 2001 postconviction motion hearing, the State did not dispute the DNA test results. However, it argued that the new information regarding the hair and semen did not create a reasonable probability that a jury would reach a different verdict. It also claimed that Wegner, the analyst who tested the toenails and fingernails in 1980, used all of the sample, which explains why recent tests would produce exculpatory results. The trial court denied the motion.

¶28 Armstrong then filed a motion to reconsider, bringing to the trial court's attention two new facts. First, he argues that police reports establish that Laura Chaffee, who lived below Kamps, was hypnotized by the police to refresh her recollection. He contends the trial judge who presided over his original trial was unaware of this fact and did not review the hypnosis session prior to trial as required by ***State v. Armstrong***, 110 Wis. 2d 555, 329 N.W.2d 386 (1983).

Second, he contends that two John Doe witnesses, his roommate and his brother Steve, corroborated his testimony about the source of the $315 he deposited the morning after the murder. Although neither witness testified at the first trial, Armstrong argued in his motion to reconsider that "this evidence would be available to the defense to rebut any argument by the State that the $400 taken from the victim was the only source of the money Ralph Armstrong had the next day."[2]

¶29 The trial court denied Armstrong's motion for two reasons. First, the motion was not based on new facts, "but rather upon factors that were known, or with the exercise of reasonable diligence should have been known, at both the time of trial and prior to the" postconviction hearing. Second, Armstrong still had not shown by clear and convincing evidence that the aggregate of his "newly discovered" evidence created a reasonable probability that the outcome would be different on retrial. Armstrong appeals.

DISCUSSION

Judicial Estoppel

¶30 Armstrong seeks to invoke judicial estoppel to bar the State from arguing a position contrary to its position at trial. Specifically, the State argued at

[2] Armstrong does not explain how "this evidence would be available to the defense." Neither witness testified at the first trial. We do not know whether Armstrong would call both or either at retrial, or whether he would attempt to admit the transcripts from John Doe proceedings as evidence under the hearsay exception in WIS. STAT. § 908.04 (2001-02). We cannot determine from the record whether either witness qualifies as an unavailable declarant. Regardless, we will consider the testimony of these witnesses as part of the evidence that would be presented to a jury on retrial, without deciding the admissibility of such evidence. Ultimately, we agree with the trial court that Armstrong still has not satisfied his burden of proof, even in light of the allegedly new information from the John Doe proceeding.

trial that the semen and hairs found on the victim's bathrobe implicated Armstrong. Now the State argues that neither the semen nor hair was connected to the murder and that innocuous reasons explain why that physical evidence was present. The State argues that it "has not asserted irreconcilably inconsistent positions" because it has "consistently taken the position that Armstrong ... sexually assaulted and murdered Kamps." Moreover, it contends that judicial estoppel does not lie because Armstrong seeks to present newly discovered evidence.

¶31 Whether to judicially estop a party is within the trial court's discretion. ***Salveson v. Douglas County***, 2001 WI 100, ¶38, 245 Wis. 2d 497, 630 N.W.2d 182. We review de novo whether the facts of a case meet the requirements of the judicial estoppel doctrine. ***Id.*** Judicial estoppel is available when: "(1) the later position is clearly inconsistent with the earlier position; (2) the facts at issue are the same in both cases; and (3) the party to be estopped convinced the first court to adopt its position." ***Riccitelli v. Broekhuizen***, 227 Wis. 2d 100, 112, 595 N.W.2d 392 (1999). The scientific testing Armstrong seeks to include at retrial constitutes new evidence because it was neither available nor presented at trial. *Compare* ***State v. Fosnow***, 2001 WI App 2, 240 Wis. 2d 699, 624 N.W.2d 883. We conclude that judicial estoppel does not lie because the facts are not the same in both cases: by Armstrong's own argument, newly discovered evidence would be presented at a second trial.

Burden of Proof

¶32 The parties dispute which one bears the burden of proof. The State contends that the newly discovered evidence test controls this appeal. Under that

test, Armstrong would have to prove, by clear and convincing evidence, all of the following:

> (1) The evidence must have come to the moving party's knowledge after a trial; (2) the moving party must not have been negligent in seeking to discover it; (3) the evidence must be material to the issue; (4) the testimony must not be merely cumulative to the testimony which was introduced at trial; and (5) it must be reasonably probable that a different result would be reached on a new trial.

State v. Avery, 213 Wis. 2d 228, 234, 570 N.W.2d 573 (Ct. App. 1997) (citation omitted). However, the only prong disputed is whether "the newly-discovered evidence create[s] a reasonable probability that the outcome would be different on retrial." ***Id.*** at 240-41. A reasonable probability of a different outcome exists "if there is a reasonable probability that a jury would harbor a reasonable doubt as to guilt." ***Id.*** at 241 n.1.

¶33 Armstrong contends that he should not bear the burden of proof because his case is distinguishable from other instances of newly discovered evidence. He argues that the newly discovered evidence test should apply only when the parties did not present the newly discovered, exculpatory evidence to the jury. *See, e.g.*, ***State v. Brunton***, 203 Wis. 2d 195, 552 N.W.2d 452 (Ct. App. 1996); ***Avery***, 213 Wis. 2d at 234. Here, the State argued that physical evidence incriminated him and now DNA testing has disproved that theory. Armstrong contends that the harmless-error doctrine should apply because the trial court admitted erroneous evidence. An error is harmless if the beneficiary of the error proves beyond a reasonable doubt that the error did not contribute to the verdict. ***State v. Norman***, 2003 WI 72, ¶47, 262 Wis. 2d 506, 664 N.W.2d 97. Under this standard, the State would bear the burden of proof.

¶34 Which test we use is of potential significance. This is an extremely close case. It is not possible to tell from this record whether Armstrong is innocent or guilty. While we affirm the trial court's decision to use the newly discovered evidence test, the use of a harmless-error test would probably result in our reversing the trial court's order. We agree with Armstrong's argument that innovations in science cast doubt on evidence admitted at trial. These advancements in technology, however, do not render the trial court's evidentiary rulings erroneous at the time they were made. "A motion for a new trial based on newly-discovered evidence does not claim that there were errors in the conduct of the trial or deficiency in trial counsel's performance." ***Brunton***, 203 Wis. 2d at 206-7. The distinction Armstrong makes between newly discovered evidence not presented to the jury and evidence later shown to be false is a rational distinction. Additional evidence is conceptually different from evidence from which the State argued false conclusions. But this distinction has not been recognized and we cannot escape the undisputed fact that Armstrong's DNA evidence is newly discovered. It may be anomalous that we use a more strict test where the State benefits from false factual conclusions than where the State benefits from an erroneous evidentiary ruling. But the test for newly discovered evidence is the test the supreme court and this court continue to use. We are not free to develop a different test. ***Cook v. Cook***, 208 Wis. 2d 166, 190, 560 N.W.2d 246 (1997).

Newly Discovered Evidence Test

¶35 We review motions for postconviction relief by ascertaining whether the trial court erroneously exercised its discretion. ***State v. Brunton***, 203 Wis. 2d at 201-2. A trial court erroneously exercises its discretion when it bases a decision on an error of law. ***Id.*** at 202. To review whether the trial court's denial of postconviction relief was based on an error of law, we consider issues of

constitutional fact. We review findings of constitutional fact de novo. ***Avery***, 213 Wis. 2d at 234. Thus, "[w]hether due process warrants a new trial on grounds of newly-discovered evidence is a constitutional question which we review de novo." ***Id.***

¶36 Above, we explained the test for determining whether newly discovered evidence warrants a new trial and summarized the evidence that would likely be presented on retrial. The State disputes only whether Armstrong has clearly and convincingly proven that the "evidence create[s] a reasonable probability that the outcome would be different on retrial." ***Id.*** at 241. "If there is a reasonable probability that a jury would harbor a reasonable doubt as to guilt, it follows that there exists a reasonable probability of a different result." ***Id.*** at 241 n.1.

¶37 Armstrong's briefs focus on how the incriminating semen and hair evidence affected the jury at trial. He claims that the physical evidence was critical to the prosecution's case because it linked him to the crime scene. His argument asserts the probable weight and credibility of the evidence as it was presented to the jury. However, the proper inquiry is whether a hypothetical, future jury at retrial would find Armstrong not guilty based on the totality of the evidence, including the new evidence obtained from advances in DNA testing. ***State v. Boyce***, 75 Wis. 2d 452, 457, 249 N.W.2d 758 (1977). Our job is not to determine how, if at all, the false evidence influenced the jury in the first trial.

¶38 Accordingly, we begin by examining the evidence that would incriminate Armstrong at a new trial: Orebia identified him in a line-up procedure and described his vehicle in detail without any apparent motive to fabricate these identifications. Kamps' apartment showed no sign of forcible entry, suggesting

she voluntarily let her killer inside; Armstrong and Kamps were friends. Armstrong deposited a large sum of cash in the bank the morning of the murder; a large sum of cash was missing from Kamps' apartment.

¶39 Moreover, Armstrong's explanation of his whereabouts from 9:00 to 10:00 p.m. and between 11:30 and 5:00 a.m. is open to rebuttal. The prosecution would argue that he was not able to drink at Kamps' apartment and buy cocaine from Goodman in the time frame he contends. The evidence supports a conclusion that he went to Kamps' apartment near midnight and returned to May's apartment between 3:00 and 5:00 a.m. Perhaps coincidentally, Fink heard somebody in the hallway at that time. Neither Fink nor Zuba, who were milling around the building, saw or heard Armstrong enter the building around 1:00 a.m. His explanation that he entered via the back stairs is undermined by the fact that he parked in the lot closer to the front door than back door and the back door was hard to access. Armstrong probably knew the front door was propped open with a brick because he entered the building that way earlier in the evening. The only evidence supporting Armstrong's alibi is his own testimony. He did not provide the phone numbers of the people he called when he allegedly returned to his apartment around midnight; his brother, who allegedly was with him, did not testify at trial.

¶40 The record also suggests that tension existed between May, Kamps, and Armstrong because Armstrong expressed a sexual interest in Kamps. The record shows that Kamps did not return those feelings.

¶41 In Armstrong's favor, there is evidence permitting reasonable inferences of his innocence. Except for the fingerprint on the bong, the prosecution had no physical evidence definitively linking Armstrong to the crime

scene. Armstrong admitted being in Kamps' apartment that evening, thus explaining the fingerprint. Kamps was brutally murdered and her body was covered in blood. Yet Wegner did not find any traces of blood in Armstrong's car; and the police did not find traces of blood in Kamps' bathroom, suggesting the killer did not rinse off before leaving the apartment. Moreover, Orebia testified that the offender's skin was "shining" as if oily. The only physical evidence that linked Armstrong to having contact with blood was the hemostick. He provided plausible explanations for why his fingers and toes had had contact with human blood recently. However, this evidence was available to the first jury, which convicted Armstrong.

¶42 The difference between the evidence produced at trial, and the evidence which the defense could produce at a new trial is this: DNA testing showed that two head hairs found on Kamps' bathrobe belt came from neither Armstrong or Dillman. At trial, the State's expert witness testified that of these two hairs, one was consistent with Armstrong's hair, while the other was similar to his hair. And at trial, the witness testified that of nine pubic hairs found on Kamps' bedspread, five were not consistent with Armstrong's hair while four were not consistent with either Armstrong's or Kamps' hair. A head hair was found on Kamps' bedspread, but at trial the expert did not testify as to its significance. The expert testified that neither Armstrong nor Kamps were the donors of the pubic hairs found on the bedspread. The DNA evidence added that in addition, Dillman was not the donor of the bedspread pubic hairs. A previous DNA test had shown that Armstrong was not the source of semen found on Kamps' bathrobe.

¶43 The new findings challenge the physical evidence that places Armstrong at the murder scene. Yet, Orebia's testimony made it more likely that Armstrong went to Kamps' apartment at midnight instead of between 9:00 and

10:00 p.m. To infer that Armstrong's timeline between 9:00 and 10:00 p.m. is more credible because of the newly discovered evidence is not reasonable. With regard to Orebia's identification, both the supreme court and Seventh Circuit have concluded that a jury could find his testimony credible. Of course, a jury at retrial would not be bound by these judicial conclusions. A new jury might choose to disbelieve Orebia because of his recantation. But the recantation was only that Orebia no longer identified Armstrong as the person who went in and out of Kamps' apartment building. Orebia did not recant her testimony about seeing a man going in and out of Kamps' apartment in the early hours of June 24th. Armstrong has not provided clear and convincing evidence that shows Orebia's testimony is any less credible than it was when the jury convicted him.

¶44 Despite the closeness of this case, Armstrong has not persuaded us that the newly discovered evidence would reasonably cause a new jury to discredit the incriminating circumstantial evidence. It is easily possible that a new jury could reach a different verdict, but Armstrong must prove more than a possibility. We conclude that Armstrong has not shown that the newly discovered evidence clearly and convincingly creates a reasonable probability that the outcome would be different on retrial. ***Avery***, 213 Wis. 2d at 241.

Reversal in the Interest of Justice

¶45 Armstrong urges us to exercise our power of discretionary reversal in the interest of justice because the real controversy in the case was not fully tried. A controversy may not have been fully tried if (1) "the jury was erroneously not given the opportunity to hear important testimony that bore on an important issue of the case;" or (2) "the jury had before it evidence not properly admitted which so clouded a crucial issue that it may be fairly said that the real controversy

was not fully tried." ***State v. D'Acquisto***, 124 Wis. 2d 758, 370 N.W.2d 781 (1985).

¶46 Armstrong argues that "the case was not fully tried because the jury heard false biological evidence and the jury was not given the opportunity to hear important new DNA evidence that suggests someone other than [him] murdered [Kamps]." He concedes that we have no statutory authority under WIS. STAT. § 752.35 (2001-02)[3] to grant a new trial in the interest of justice on appeal from a WIS. STAT. § 974.06 order denying postconviction relief. ***State v. Allen***, 159 Wis. 2d 53, 464 N.W.2d 426 (Ct. App. 1990). However, he contends that we have inherent or equitable powers to grant a new trial in the interest of justice under ***Vollmer v. Luety***, 156 Wis. 2d 1, 456 N.W.2d 797 (1990), and ***State v. Penigar***, 139 Wis. 2d 569, 408 N.W.2d 28 (1987).

¶47 The State argues that ***Vollmer*** does not authorize us to grant a new trial in the interest of justice that is in addition to or greater than our statutory power to do so. We need not decide whether any such authority exists because we would decline to exercise it in this case.[4]

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

[4] Armstrong urges us not to deny him relief under WIS. STAT. § 752.35 simply because his appeal is under WIS. STAT. § 974.06 and not a direct appeal. He argues that:

> [i]t would be fundamentally unfair for this Court to deny discretionary review to [him] when it was given to Hicks. It is only technological happenstance that DNA testing was available to Hicks while his direct appeal was pending, rather than many years later when, like [him], a Sec. 974.06 motion was the only avenue of review still available.

We do not reach this issue because we conclude that the real controversy was tried fully here.

¶48 Armstrong primarily relies upon ***State v. Hicks***, 202 Wis. 2d 150, 549 N.W.2d 435 (1996), for his argument that the real controversy was not tried in his case. In ***Hicks***, the supreme court concluded that the real controversy of identification was not tried when "the State used the hair evidence assertively and repetitively as affirmative proof of Hicks' guilt" and, after trial, DNA tests excluded Hicks as a donor of the hair. ***Id.*** at 153. At trial, the victim testified that her attacker was an African American and that the assault occurred in her apartment. ***Id.*** She also testified that no African American male had ever been in her apartment before the assault. ***Id.*** at 155. A crime lab analyst testified that the pubic and head hair found at the scene came from an African American. ***Id.*** at 154. Therefore, the evidence established that the hairs came from her attacker. ***Id.*** Hicks, who was African American, claimed that he had never been in the victim's apartment and could not have been the source of the hair found there. ***Id.*** at 163. The jury found Hicks guilty of robbery and two counts of sexual assault. ***Id.*** at 152. The supreme court reasoned that it could not "say with any degree of certainty that the hair evidence used by the State during trial played little or no part in the jury's verdict." ***Id.*** at 158-59. Pursuant to WIS. STAT. § 751.06, it ordered a new trial in the interest of justice. ***Id.*** at 159.

¶49 The facts of Armstrong's case do not compel a new trial in the interest of justice. Unlike Hicks, Armstrong admitted that he was in Kamps' apartment; he disputes only whether he was there when the murder occurred.

¶50 Here, the sole issue of the case was whether Armstrong murdered Kamps. The jury considered eye witness testimony, along with other circumstantial evidence, and found that Armstrong murdered Kamps. The misleading hair and semen evidence did not "so cloud" or distract the jury from deliberating this issue. Likewise, the DNA evidence excluding Dillman as the

source of the hair and semen is not important enough testimony bearing on the controversy to warrant a new trial. We conclude that the real controversy was tried fully.

By the Court.—Orders affirmed.

Not recommended for publication in the official reports.