

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 23, 2008

David R. Schanker
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 No. 2008AP8-CR

Cir. Ct. No. 2005CF785

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DEMETREY LAMBOUTHS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Winnebago County: BARBARA H. KEY, Judge. *Affirmed.*

Before Anderson, P.J., Snyder and Neubauer, JJ.

¶1 PER CURIAM. Demetrey Lambouths appeals from a judgment of conviction of two counts of party to the crime of false imprisonment, two counts of intimidation of a victim by threat of force, and party to the crime second-degree sexual assault by use of force. He also appeals from an order denying his

postconviction motion for a new trial on the grounds of prosecutorial misconduct, newly discovered evidence, and ineffective assistance of trial counsel. He argues those same claims on appeal and requests a new trial in the interests of justice under WIS. STAT. § 752.35 (2005-06).¹ We reject his claims and affirm the judgment and order.

¶2 In November 2005, Crystel B., a seventeen-year-old runaway stayed at the apartment of Anthony Wallace and smoked crack cocaine with him for several days. Wallace thought Crystel or Shamenika R., an adult female, stole some cocaine from him. Wallace got Shamenika to come to his apartment and over next seven to eight hours he beat, sexually assaulted, and detained both Crystel and Shamenika. Wallace also tortured Crystel and required the women to smoke drugs and fight each other. The women indicated that another man known to them as “Marco” or “Marcus” was present during their ordeal and participated in some ways. Lambouths was identified as “Marco” or “Marcus.”

¶3 At trial Crystel testified that she awoke on November 8, 2005 and saw Wallace and Lambouths beating Shamenika. Wallace ordered the women to undress and take showers. Wallace sexually assaulted Crystel while Shamenika showered. At some point Lambouths attempted to tie a cloth around Crystel’s mouth and when she resisted, Lambouths struck her in the back of the head. Wallace hit Crystel multiple times with a phone cord and then poured salt and alcohol in the wounds. Lambouths watched. While Wallace was in another room with Shamenika, he instructed Lambouths to watch Crystel and not let her leave.

¹ All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

Lambouths refused Crystel's request to be allowed to leave. Crystel indicated that Wallace and Lambouths discussed killing both women in their presence.

¶4 Shamenika testified that Lambouths was at the apartment when she arrived. Lambouths was told to watch Shamenika while Wallace was out of the room and while she showered. Wallace sexually assaulted Shamenika twice. During the second rape, Lambouths held Shamenika's arms above her head to prevent her resistance. While Shamenika was in another room with Wallace, Lambouths was hitting Crystel on the back and slapping her in the face with an extension cord. Shamenika saw Wallace and Lambouths further beat Crystel. She confirmed that both men discussed killing both women. She heard Wallace on the phone asking for some plastic to prevent blood from getting on the carpet.

¶5 All three of Lambouths's appellate claims focus on evidence that impacts Shamenika's credibility before the jury. He first claims that the prosecution committed a *Brady*² violation by not disclosing that to secure Shamenika's presence at trial it had obtained the dismissal of a criminal charge against Shamenika in another county in order to lift a bench warrant. He argues that he was denied the opportunity to show that Shamenika received an inducement and benefit for her testimony against him.

¶6 Lambouths's claim of newly discovered evidence is based on Shamenika's contradictory testimony given at Wallace's trial, seven months after her testimony at Lambouths's trial. He points to Shamenika's testimony at Wallace's trial denying that Lambouths participated in whipping Crystel with a

² *Brady v. Maryland*, 373 U.S. 83 (1963).

cord, failing to mention that Lambouths held her down during one of Wallace's sexual assaults, and describing only one sexual assault in contrast to the two described at Lambouths's trial. He argues that if the jury "had been confronted with such contradictory testimony on facts central to the case, it would have had reason to question the entirety of Shamenika's testimony."

¶7 Lambouths claims his trial counsel was constitutionally deficient in not confronting Shamenika with inconsistent statements she made to the police and in her preliminary hearing testimony. He points to Shamenika's statement to police that Lambouths held her down while Wallace removed her pants, that Lambouths held both women down while Wallace beat them, that Lambouths held Crystel while Wallace assaulted Crystel with a vase, and her preliminary hearing testimony that she could not remember if Lambouths held her down during Wallace's first or second sexual assault of her. Lambouths asserts that the statements are inconsistent with Shamenika's trial testimony that she removed her own clothing and that Lambouths held her down during an assault that occurred long after she was undressed, that Lambouths only held her down during one sexual assault and did not otherwise beat her, and that with certainty Lambouths held her down during Wallace's second sexual assault. As with his other claims, Lambouths argues he was prejudiced by trial counsel's performance because any evidence that tended to cast doubt on Shamenika's credibility could have tipped the scales in his favor and done so at least with respect to the counts for which Shamenika was the victim.

¶8 All three of Lambouths's appellate claims require the showing of prejudice in some form. A *Brady* violation warrants a new trial where the concealed evidence is "material." *State v. Harris*, 2004 WI 64, ¶13, 272 Wis. 2d 80, 680 N.W.2d 737. "The evidence is material 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.” *Id.*, ¶14 (quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985)). If a defendant establishes newly discovered evidence material to an issue in the case and not cumulative to other evidence at trial, a new trial is warranted only if there is a reasonable probability that a different result would be reached in a new trial. *State v. Armstrong*, 2005 WI 119, ¶¶161-62, 283 Wis. 2d 639, 700 N.W.2d 98. The prejudice prong of the ineffective assistance of counsel analysis requires the defendant to show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.³ *State v. Thiel*, 2003 WI 111, ¶20, 264 Wis. 2d 571, 665 N.W.2d 305. That test is the same as the test applied in assessing a *Brady* violation—a probability sufficient to undermine our confidence in the outcome. *Harris*, 272 Wis. 2d 80, ¶14; *Thiel*, 264 Wis. 2d 571, ¶20. Distilled to its core, Lambouths’s appeal rests on whether the six or seven additional points of impeachment of Shamenika undermine our confidence in the outcome.

¶9 Before addressing the Lambouths’s specific claims, we observe, as the circuit court found, that Shamenika’s credibility was challenged throughout the trial. On direct examination, Shamenika acknowledged that she had been in prison and had been convicted of a crime five times. She admitted that she smoked crack

³ To prevail on a claim of ineffective assistance of trial counsel a defendant must show that counsel’s representation was deficient and prejudicial. *State v. Thiel*, 2003 WI 111, ¶18, 264 Wis. 2d 571, 665 N.W.2d 305. When reviewing a claim of ineffective assistance of counsel, the reviewing court may reverse the order of the two tests or avoid the deficient performance analysis altogether if the defendant has failed to show prejudice. See *State v. Johnson*, 153 Wis. 2d 121, 128, 449 N.W.2d 845 (1990).

cocaine and marijuana during the incident at Wallace's apartment. She also admitted to previously getting crack cocaine from Wallace. Cross-examination pointed out that in her initial statement to the police she did not mention Lambouths by name or anything about Lambouths holding her down while Wallace assaulted her. Cross examination also highlighted that at Wallace's preliminary hearing Shamenika did not testify that Lambouths held her down. Shamenika acknowledged that because of the blow to the head she may have been confused about certain things. During Crystel's testimony her statement to police that Shamenika had been to Wallace's apartment often to buy crack was revealed. Shamenika's credibility was not pristine.

¶10 Despite that the prosecution should have disclosed that it intervened in Shamenika's behalf to get a bench warrant against her in another county dismissed,⁴ the absence of that information at trial did not prejudice Lambouths. Dismissal of the obstructing charge in the other county was not part of a bargain which required Shamenika to testify against Lambouths or even to testify truthfully. There was no agreement between the prosecution and Shamenika. The prosecution only indicated to Shamenika's victim's advocate that it would attempt to ensure that Shamenika would not be jailed on the bench warrant in the other case. It was only the Sunday night before Monday's trial that prosecution requested the prosecutor in the other county to dismiss the charge. The prosecution's intervention was only a means of securing Shamenika's presence at trial. Shamenika's testimony at Wallace's trial indicates that she was not sure how the charge in the other county was resolved. She only knew that it went away.

⁴ The State concedes on appeal that the prosecution violated the requirement that it disclose exculpatory evidence to the defense.

She also indicated that the charge in the other county was not discussed when she gave her statements to police. The dismissal of the charge in the other county was not a direct inducement for Shamenika to testify in a certain way. We are confident in the result despite that evidence of the dismissal of the other charge was not revealed to the jury. It would not have turned the tide on Shamenika's credibility.

¶11 Looking to Shamenika's testimony at Wallace's trial as newly discovered evidence,⁵ we acknowledge that she directly contradicted herself on whether Lambouths participated in whipping Crystel with a cord. The conflict does not render her testimony at Lambouths's trial perjury. When confronted at Wallace's trial with her previous testimony that Lambouths had whipped Crystel with a cord, Shamenika indicated that she did not recall giving that testimony and could not remember if Lambouths had done so. Crystel did not indicate that Lambouths whipped her. Although Lambouths was charged with child abuse for hitting Crystel on the back of the head, the prosecution did not argue that he was guilty of child abuse because he whipped Crystel. In any event, Lambouths was acquitted of the child abuse charge. Shamenika's subsequent testimony that Lambouths did not whip Crystel would not have made a difference.

¶12 Evidence that Shamenika failed to mention at Wallace's trial that Lambouths held her down during the second of Wallace's sexual assaults was not

⁵ The State concedes on appeal that Lambouths has satisfied the first four criteria of a claim of newly discovered evidence. See *State v. Love*, 2005 WI 116, ¶43, 284 Wis. 2d 111, 700 N.W.2d 62 (a claim of newly discovered evidence requires proof by clear and convincing evidence that (1) the evidence was discovered after conviction; (2) the defendant was not negligent in seeking the evidence; (3) the evidence is material; and (4) the evidence is not merely cumulative).

inconsistent with her testimony at Lambouths's trial. It was merely incomplete testimony. It is undisputed that at Wallace's trial Shamenika was not asked about Lambouths's involvement in the sexual assault or whether a second assault occurred. Lambouths's involvement was not explored at Wallace's trial but for the attempt to impeach Shamenika with inconsistent statements about Lambouths's conduct. Even if Shamenika's incomplete testimony at Wallace's trial would suggest that the jury disbelieve Shamenika's testimony that Lambouths held her down while Wallace sexually assaulted her, there was another basis for Lambouths's conviction of party to the crime of second-degree sexual assault committed against Shamenika. The evidence firmly establishes that Lambouths participated by watching Crystel and preventing her escape while Wallace was assaulting Shamenika. Crystel testified that it happened that way. Wallace could not commit the sexual assault against Shamenika without the assistance provided by Lambouths in preventing Crystel from escaping. Despite the newly discovered evidence presented by Shamenika's testimony at Wallace's trial, there is no reasonable probability that a different result would be reached in a new trial.

¶13 Lambouths's claim that trial counsel should have impeached Shamenika with her inconsistent statements to police cannot satisfy the prejudice component of the ineffective assistance of counsel analysis. When confronted at Wallace's trial with her statement to police that Lambouths held her down while Wallace removed her pants, Shamenika denied that she had said that to police and she confirmed that she removed her own clothes under threat of force. The impeachment value on that inconsistency was negated by the suggestion that the police misunderstood Shamenika's statement. We reject Lambouths's contention that Shamenika's statement to police that Lambouths was the "motherfucker" who was "kicking my ass with [Wallace]," is directly inconsistent with her testimony

that Lambouths did not physically harm her. The vernacular of her statement is consistent with her testimony that Lambouths was present throughout the ordeal. Bringing that statement before the jury would also have allowed an explanation of the circumstances in which it was made—Shamenika’s unequivocal identification of Lambouths from a photo array. Although Shamenika told police that Lambouths held both women down during Wallace’s beating and held Crystal while Wallace assaulted her with the vase and did not repeat those statements at trial, it would have been more harmful for the jury to hear that just days after the incident she told the police that Lambouths further assisted Wallace’s assaults. That was information tending to show that Lambouths was more deeply involved in Wallace’s torture scheme than Shamenika revealed on direct examination.⁶

¶14 Shamenika’s preliminary hearing testimony suggesting uncertainty as to when Lambouths held her down was not directly contradictory on the fact that Lambouths held her down.⁷ The uncertainty she exhibited at the preliminary

⁶ For this same reason, we reject Lambouths’s claim that Shamenika’s testimony at Wallace’s trial that the police wrote down wrong information in her statements would have permitted the defense to demonstrate falsity in the police investigation. It would have been prejudicial to try and demonstrate police errors since all the statements and investigative reports would have been admitted into evidence. Again, the statements included information the jury was not otherwise provided at trial.

⁷ During Shamenika’s cross-examination at the preliminary hearing the following exchange occurred:

Q. How many times did [Lambouths] hold you down?

A. Once.

Q. Was that the first time or—

A. I tried to forget so I don’t remember.

hearing was minor in comparison to her direct testimony at trial. Impeachment on that point would have had little to no impact.

¶15 We are confident in the outcome despite trial counsel's failure to use Shamenika's prior statements to impeach her credibility. It would not be a surprise to the jury or significant that Shamenika's statements and testimony would be inconsistent in small ways because the ordeal lasted a long period of time, involved many different acts, and included drug use. Further, at some points Crystel's and Shamenika's testimony was inconsistent and their recall of the entire course of events was not crystal clear. Yet on the critical points Shamenika's testimony was corroborated by Crystel's testimony. Moreover, the physical injuries the women sustained were documented in photographs. As the trial court observed, overall the additional points of impeachment would not have made a difference.

¶16 We are not persuaded that the cumulative effect of Lambouths's claims warrant a new trial under WIS. STAT. § 752.35 on the ground that Shamenika's credibility was not fully tried. If this court believes either that the real controversy has not been fully tried, we may, in the exercise of our sound discretion, enter an order necessary to accomplish justice. *State v. Clutter*, 230 Wis. 2d 472, 476, 602 N.W.2d 324 (Ct. App. 1999). We have rejected Lambouths's sweeping claims that Shamenika gave inconsistent or perjured testimony. A final catchall plea for discretionary reversal based on the cumulative effect of non-errors cannot succeed. *State v. Marhal*, 172 Wis. 2d 491, 507, 493 N.W.2d 758 (Ct. App. 1992). There was no contrary evidence presented at trial to suggest that issues were not fully and fairly tried by the corroborating testimony of Crystel and Shamenika.

By the Court.—Judgment and order affirmed.

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

