COURT OF APPEALS DECISION DATED AND FILED

December 23, 2008

David R. Schanker
Clerk of Court of Appeals

NOTICE

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Appeal No. 2008AP34

Cir. Ct. No. 1995CF954841

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHAUNTE DEAN OTT,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Reversed and cause remanded.*

Before Higginbotham, P.J., Dykman and Bridge, JJ.

¶1 HIGGINBOTHAM, P.J. Chaunte Dean Ott appeals a circuit court order denying his motion for a new trial following his conviction for first-degree intentional homicide. Ott argues that he is entitled to a new trial based on newly discovered evidence or in the interest of justice because the real controversy was

not fully tried. *See* WIS. STAT. §§ 974.06, 805.15 and 752.35 (2005-06).[1] Ott contends that newly discovered DNA evidence linking someone other than Ott to the murder scene establishes a reasonable probability that a different verdict would be reached at a new trial, and that the real controversy was not fully tried because the jury did not have the opportunity to consider that evidence. We conclude that the newly discovered DNA evidence creates a reasonable probability that a different verdict would be reached at a new trial. Accordingly, we reverse and remand for a new trial.[2]

Background

¶2 On August 30, 1995, Jessica Payne's body was found in back of a vacant house in Milwaukee. Her throat was slashed, her pants were pushed down to her ankles, and her shirt was partially raised. She had slight bruising right above her rib cage and in the inner area of both thighs. The medical examiner's autopsy report indicated "possible sexual assault," and vaginal swabs revealed semen.

¶3 A month later, an inmate at the Milwaukee County Jail told police that Richard Gwin had implicated himself in the murder of a young white woman. Police arrested Gwin, who told police that on the night of Payne's murder, he picked up Payne, Ott, and Sam Hadaway in his car. He stated that he drove to an abandoned building, where Ott, Payne, and Hadaway got out of the car. Gwin

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

[2] Because we reverse and remand based on newly discovered evidence, we need not reach Ott's argument that he is entitled to a new trial in the interest of justice.

stated that the three went behind the building; that Hadaway returned after ten minutes and Ott returned another five minutes after that; and that both Hadaway and Ott indicated that Ott had killed Payne.

¶4 The police subsequently arrested Hadaway and Ott. Hadaway told police that on the night of Payne's murder, Gwin picked up Ott, Payne, and Hadaway in his car, and drove them to an abandoned building. Hadaway stated that Payne, Ott and Hadaway left the car and walked to the back of the building. Hadaway stated that Ott grabbed Payne and they began struggling, and that Ott asked Hadaway to hold Payne's hands while he robbed her, which he did. He said that when Ott found nothing in Payne's pockets, Ott told her she was going to give him something and pushed her down on a mattress. Hadaway said that Ott pulled down Payne's pants, pulled up her shirt, and tried to force his way between her legs; that Hadaway turned away and heard choking or gagging sounds, and when he looked back he saw that Payne's throat was cut and blood was gushing out; and that he returned to Gwin's car, and Ott followed about five or ten minutes later.

¶5 The State charged Ott with first-degree intentional homicide. Gwin and Hadaway testified for the State at Ott's trial. Ott's defense consisted of cross-examining the State's witnesses and closing argument. The jury found Ott guilty, and the court sentenced him to life in prison with parole eligibility in fifty years.

¶6 In 2002, the Wisconsin Innocence Project requested new DNA testing of the vaginal swabs conducted on Payne. The State Crime Lab conducted the testing, which excluded Ott as the source of the semen. Gwin, Hadaway, and all of the other men known to be in Payne's presence on the night of her murder were also excluded. In July 2007, the State informed the Innocence Project that the DNA recovered in Payne's vaginal swabs matched DNA found on two other

murder victims in the same geographical area in which Payne's body was found, both of whom were murdered after Ott was arrested. The first homicide was committed in 1997, and the body was found a few houses away from where Payne's body had been found. Vaginal swabs of the victim's body revealed semen. The second homicide was committed in 2007, and the body was found a few blocks from where Payne's body was found. Blood samples were obtained from various locations of the crime scene, including from the victim's bra. The DNA from the semen obtained from the 1997 victim and the blood obtained from the 2007 victim matched the DNA profile of the semen obtained from Payne's body.

¶7 On October 2, 2007, Ott filed a motion in Milwaukee County Circuit Court seeking a new trial based on newly discovered DNA evidence or in the interest of justice, before a substitute judge. Following briefing, the court denied the motion. Ott appeals.

Standard of Review

¶8 Because the trial court judge who decided this motion did not preside over the original trial and hear the evidence, we review the court's decision de novo. *See* ***State v. Herfel***, 49 Wis. 2d 513, 521, 182 N.W.2d 232 (1971).

Discussion

¶9 Ott argues that he is entitled to a new trial because the new DNA evidence creates a reasonable probability of a favorable verdict at a new trial. The State argues that it presented unusually conclusive and direct evidence at trial that Ott killed Payne and that the new evidence does not raise any doubt about Ott's

guilt. We conclude that the new DNA evidence creates "a reasonable probability that a different result would be reached in a trial," and therefore Ott is entitled to a new trial. *See* ***State v. Armstrong***, 2005 WI 119, ¶162, 283 Wis. 2d 639, 700 N.W.2d 98.

¶10 Under ***Armstrong***, Ott must satisfy a five-prong test in order to prevail on his motion for a new trial based on newly discovered evidence:

> First, the defendant must prove, by clear and convincing evidence, that: (1) the evidence was discovered after conviction; (2) the defendant was not negligent in seeking evidence; (3) the evidence is material to an issue in the case; and (4) the evidence is not merely cumulative. If the defendant proves these four criteria by clear and convincing evidence, the circuit court must determine whether a reasonable probability exists that a different result would be reached in a trial.

Id., ¶161 (citation omitted). Because there are no gradations of reasonable probability, the clear and convincing evidence standard does not apply to whether a reasonable probability exists that a different result would be reached in a trial. ***Id***., ¶162.

¶11 The parties agree that Ott has met his burden as to the first four factors. They dispute only whether there is a reasonable probability that a different result would be reached in a trial. Ott argues that there is a reasonable probability of a different result at a trial because the evidence indicates that Payne was sexually assaulted at the time of her murder, suggesting that the same person who sexually assaulted her killed her; the fact that the same person's DNA was found at three murder scenes indicates that the same person killed all three women; and the State's evidence at trial was not so strong that there is not a reasonable probability of a different result in light of the new evidence. Finally, Ott argues that he is not required to prove that someone else killed Payne to

establish a reasonable probability that a jury would have a reasonable doubt as to his guilt. The State argues that Ott's theories are speculative, and do not cast any doubt on his guilt.[3] We agree with Ott.

¶12 A reasonable probability of a different result exists when "there is a reasonable probability that a jury, looking at both the old and the new evidence, would have a reasonable doubt as to the defendant's guilt." ***State v. Edmunds***, 2008 WI App 33, ¶22, 308 Wis. 2d 374, 746 N.W.2d 590 (citation omitted). Thus, in assessing whether there is a reasonable probability of a different result at a trial,

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[3] The State also argues that it is not enough for Ott to merely undermine our confidence in the verdict, because the reasonable probability of a different outcome test requires an outcome-determinative showing. *See* ***State v. Avery***, 213 Wis. 2d 228, 237-41, 570 N.W.2d 573 (Ct. App. 1997), *abrogated on other grounds by* ***State v. Armstrong***, 2005 WI 119, ¶162, 283 Wis. 2d 639, 700 N.W.2d 98. Ott does not dispute this argument; he merely reiterates in his reply brief that the new evidence establishes a reasonable probability of a different result at trial. However, the supreme court has expressly declined to decide whether a defendant must make an outcome-determinative showing rather than merely undermine our confidence in the outcome of the trial, and has categorized the outcome-determinative test as the higher standard. *See* ***State v. Love***, 2005 WI 16, ¶¶52-54, 284 Wis. 2d 111, 700 N.W.2d 62. As the court concluded in ***Love***, we conclude that we need not determine whether Ott is required to make an outcome-determinative showing because, under either standard, Ott is entitled to a new trial. *See* ***id.*** As we recently explained in ***State v. Edmunds***, 2008 WI App 33, ¶22, 308 Wis. 2d 374, 746 N.W.2d 590:

> [T]he dispute as to whether a defendant needs to show that confidence in the outcome of the trial is undermined or make an outcome determinative showing [is] a very fine distinction. That is, we find it difficult to conceive of a scenario in which our confidence in the outcome of a trial would be undermined by newly discovered evidence (which ***Love*** categorizes as the lower standard), and where we could not say that the defendant had made an outcome determinative showing as to a reasonable probability of a different result at a new trial (which ***Love*** categorizes as the higher standard). Stated otherwise, it seems that our confidence in the outcome of a trial will only be undermined if the new evidence, together with the old evidence, would probably create a reasonable doubt for a jury. Conceding that there may be the rare case where our confidence in the outcome of a trial is undermined, and yet there is only a fifty-fifty or lower chance that the evidence would probably create reasonable doubt in a jury, we conclude that this is not that case.

we must analyze the new DNA evidence linking another man to sexual contact with Payne around the time of her death, with the evidence presented at trial. The State's evidence at trial was primarily the eyewitness testimony of Hadaway and Gwin. Ott challenged both men's credibility and motivation for testifying at trial.[4] Additionally, the only physical evidence introduced by the State was two box cutters and a knife recovered from Ott's home. The medical examiner conclusively ruled out one of the box cutters as the murder weapon and said it was unlikely that the other was used. While the medical examiner said the knife could have been used, blood was not found on any of the weapons.

¶13 We conclude that it is reasonably probable that a jury considering the newly discovered DNA evidence along with the evidence presented at trial would have a reasonable doubt as to Ott's guilt. Although the State presented two witnesses who claimed to have been present when Ott killed Payne, each witnesses' credibility was called into doubt, and the new DNA evidence excludes Ott as a source of the semen retrieved from Payne's body. Moreover, the same DNA profile was found on two other murder victims in the same geographical area, and any other men known to have been in Payne's presence on the night she was killed have been excluded as possible sources of that DNA. Thus, the newly discovered DNA evidence potentially links someone other than Ott or anyone else identified in this case to Payne's murder. We agree with Ott that there is a

[4] The State argues that Ott had his chance to impeach Hadaway and Gwin and the jury believed them, and contends that newly discovered impeachment evidence is typically not grounds for a new trial. *See* ***State v. Canon***, 2001 WI 11, ¶23, 241 Wis. 2d 164, 622 N.W.2d 270. However, Ott does not base his motion on impeachment evidence. Instead, Ott argues that the questionable credibility of the State's witnesses means that the State's evidence at the first trial was not so strong that the newly discovered evidence does not raise doubt as to Ott's guilt. Further, while the jury must have believed Hadaway and Gwin at the first trial, the question remains whether a jury would believe that testimony in light of the new evidence.

reasonable probability that a jury, hearing this evidence and the State's witnesses' testimony from the first trial, would have a reasonable doubt as to Ott's guilt.

¶14 The State argues, however, that Ott's newly discovered DNA evidence could not have any impact on a new trial because it is inadmissible "other acts" evidence. The State argues that there is no basis for Ott's assertion that the source of the DNA retrieved from Payne's body was the person who killed her. Instead, the State asserts, it is sheer speculation to conclude that the source of the DNA must have been her killer. Ott replies that, although it is possible that the DNA source and Payne's killer are two different people, it is unlikely, and that the evidence is relevant and admissible because it is probative of the very issue in this case: whether Ott killed Payne. We agree that the evidence is relevant and therefore admissible.

¶15 Evidence of "other acts" offered to indicate that someone other than the defendant committed the charged crime is admissible if it is offered to establish the identity of the perpetrator, it is relevant, and the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.[5] *See* ***State v. Scheidell***, 227 Wis. 2d 285, 297-98, 595 N.W.2d 661 (1999). In order for evidence to be relevant

[5] In his brief-in-chief, Ott argues that the "other acts" evidence test set forth in ***State v. Scheidell***, 227 Wis. 2d 285, 297-98, 595 N.W.2d 661 (1999), does not apply here because the DNA source is not "unknown" because DNA identifiers make a party a "known" party. *See* ***State v. Davis***, 2005 WI App 98, ¶¶29-34, 281 Wis. 2d 118, 698 N.W.2d 823. In response, the State merely argues that the DNA evidence is inadmissible under the ***Scheidell*** test without responding to Ott's argument that the test is inapplicable. The State only argues that the evidence is not relevant, and does not argue that the other two ***Scheidell*** factors weigh in favor of inadmissibility. In reply, Ott does not take up his argument that ***Scheidell*** does not apply, and instead argues only that the DNA evidence meets the ***Scheidell*** test for admissibility. Thus, we address only the point disputed between the parties: whether the DNA evidence is relevant as "other acts" evidence under ***Scheidell***.

to whether someone other than the defendant committed the charged crime, the evidence must do "more than raise conjecture or speculation." ***Id.*** at 305. The evidence must give more than a "possible ground of suspicion against another person," and it must connect that person to the crime directly or indirectly. ***Id.*** at 301. The defendant need not "establish that the [other] crimes are the 'imprint' or 'signature' of the third party" as required when the State seeks to introduce other acts evidence against the defendant, because "the standards of relevancy are stricter when the [S]tate seeks to introduce other crimes evidence to prove identity." ***Id.*** at 304. The similarity between acts that the defendant must establish to show relevancy is measured by "nearness of time, place, and circumstance of the other act to the crime alleged." ***Id.*** at 305. "The greater the similarity, complexity and distinctiveness of the events … the stronger is the case for admission of the other acts evidence." ***Id.*** at 307-08. However, there is no set formula to determine how much similarity is enough. ***State v. Sullivan***, 216 Wis. 2d 768, 787, 576 N.W.2d 30 (1998).

¶16 Ott argues that the evidence of DNA found at two other murder scenes matching the DNA retrieved from Payne's body presents the complex and distinct similarity of a single DNA profile. Additionally, he points to the close physical proximity and shared sexual component of all three murders. The State argues that the crimes were widely separated in time, the circumstances surrounding the three deaths were different, the victims' ages and races differed and police found no semen anywhere on the body of one of the victims. We agree with Ott that the DNA evidence is relevant under the ***Scheidell*** test.

¶17 First, the matching DNA was found on two other murder victims. *See* ***Sullivan***, 216 Wis. 2d at 788 (when comparison involves only one other incident, it is less likely to provide probative value). Second, the three cases share

several significant factual similarities. All three victims died in a very small geographical area. In fact, Payne and one of the other victims died just a few houses away from each other. All of the killings indicated a possible sexual component. Additionally, Ott was in jail when the other two victims were killed, providing him with an irrefutable alibi. *See* ***State v. Wright***, 2003 WI App 252, ¶45, 268 Wis. 694, 673 N.W.2d 386 (evidence of an unknown third party committing a crime while the defendant is in jail and incapable of committing the similar crime provides stronger probative value than if the defendant was free to commit the similar crime).

¶18 Most conclusively, it is difficult to imagine more complex or distinct evidence than a single DNA profile found on all three victims. *See* ***State v. Zimmerman***, 2003 WI App 196, ¶40, 266 Wis. 2d 1003, 669 N.W.2d 762 (discussing the importance and power of DNA evidence). While we acknowledge that Payne was killed in 1995 and the other victims were killed in 1997 and 2007, the significant separation in time does not override the strong probative value of newly discovered DNA evidence linking someone other than Ott or the two State witnesses to all three murders. This new evidence suggests that someone other than Ott may have killed Payne. Accordingly, we conclude that the other acts evidence is probative of the identity of Payne's killer and that the evidence is admissible. We reverse and remand for a new trial.[6]

[6] After Ott filed this appeal, he moved this court for relief on the basis of additional newly discovered evidence. That evidence consists of a recantation by Hadaway, who now claims that his testimony at trial was completely false; corroboration of Hadaway's recantation by Hadaway's sister; and statements by Gwin's sister that Gwin, who is now deceased, had always maintained that his testimony at Ott's trial was false. Because we reverse and remand for a new trial based on the newly discovered DNA evidence, we need not address Ott's motion.

By the Court.—Order reversed and cause remanded.

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