COURT OF APPEALS
DECISION
DATED AND FILED

April 23, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 96-3616-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

DIANE BORCHARDT,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Jefferson County: JOHN M. ULLSVIK, Judge. *Affirmed.*

Before Vergeront, Roggensack, and Nichol, JJ.[1]

NICHOL, J. Diane Borchardt appeals from a trial verdict in which she was convicted of party to a crime first-degree homicide with the use of a

[1] Circuit Judge Gerald Nichol is sitting by special assignment pursuant to the Judicial Exchange Program.

dangerous weapon, in violation of §§ 939.05 and 939.63, STATS., respectively, in the death of her husband Ruben Borchardt, and using a child to commit a Class A felony, in violation of § 948.36, STATS., for which she was sentenced to life in prison, with a parole eligibility of forty years. Borchardt also appeals an order by the trial court denying postconviction relief. On appeal, Borchardt contends that the trial court committed error in finding that the John Doe session on October 13, 1994, was for the purpose of learning about other potential co-conspirators. Borchardt further contends that the trial court erred in admitting a statement by the decedent, Ruben Borchardt, implicating Borchardt under the excited utterance hearsay exception; that her trial counsel was ineffective; that she was denied due process because the John Doe transcripts were not produced in a timely manner; that the trial court erred in denying a new trial based on newly discovered evidence; and that a new trial is warranted in the interest of justice. For the reasons stated in this opinion, the decision of the trial court is affirmed.

BACKGROUND

At approximately 3:35 a.m. on April 3, 1994, Ruben Borchardt was shot two times with a shotgun at his rural residence in Jefferson County. Ruben's son, Charles, age sixteen, who was upstairs, was awakened. Charles found his father still conscious and able to state that two males had shot him. Ruben also stated twice, "I can't believe she would do this to me." After being conveyed to the hospital a short time later, Ruben died.

At the time of the murder, Diane and Ruben Borchardt were in the middle of a highly contentious and very bitter divorce. Borchardt knew that Ruben was having an affair with another woman throughout part of their marriage and throughout the divorce proceedings. Borchardt worked at Jefferson High

School as a teacher's aide and was in charge of study hall periods. It was here that she became acquainted with students Doug Vest, a co-defendant, and Tim Quintero. Vest and Quintero were friends with co-defendants Josh Yanke and Michael Maldonado. In addition to being friends, Vest, Quintero, and Maldonado also had familial ties and were cousins. Besides working at Jefferson High School at the time of the homicide, Borchardt also had her own silk-screening t-shirt business in Jefferson, which was in financial difficulty.

An investigation into Ruben's murder began and eventually led to a John Doe proceeding pursuant to § 968.26, STATS., which was convened on May 5, 1994. After numerous witnesses were called in May and June of 1994, the John Doe investigation had little activity until September 28, 1994, when Vest was interrogated and eventually confessed to Ruben's murder, and implicated Borchardt, Yanke and Maldonado as well. Vest stated that Borchardt had solicited his assistance in murdering her husband, and offered him or whoever would carry out the murder $20,000 from an insurance policy, two rings, and a car. Vest was charged on September 28, 1994, and Borchardt, Yanke, and Maldonado were charged on September 29, 1994.

On October 13, 1994, the John Doe reconvened. A number of witnesses were called, including Tim Quintero. Prior to October 13, police had interviewed Quintero twice and at each interview he had provided them written statements implicating Borchardt, Vest, Maldonado and Yanke in Ruben's homicide. Quintero also furnished law enforcement with a map Borchardt had drawn with directions to her home. Quintero's testimony at the John Doe was virtually the same as his answers in the police interview the previous day, which involved some discussion regarding another potential conspirator, Shannon Johnson. In a pretrial motion, Borchardt claimed Quintero should not be allowed

to testify because the John Doe hearing was improperly continued for the purpose of building a case against her and the three co-defendants after they had been charged. In denying the motion, the trial court found that the primary purpose for calling Quintero to testify in the John Doe was to determine whether or not there were other parties involved in Ruben's murder. The court held this was a proper purpose, and that a substantial portion of Quintero's testimony was simply to confirm his two previous statements for which he was given immunity. As Quintero was given immunity, the court held that the State received no benefit from having him make statements under oath rather than not under oath.

On December 5, 1996, a postconviction motion hearing was held in front of the trial court. The same issues were argued to the trial court that are now pending on this appeal and the trial court denied defendant's motion for a new trial.

DISCUSSION

The John Doe Investigation.

The first issue to address is whether or not the district attorney's use of the October 13, 1994, John Doe was for the improper purpose of obtaining evidence against Borchardt and/or obtaining evidence against Borchardt and her co-conspirators.

"The purpose of a John Doe proceeding is to determine if a crime has probably been committed and who probably committed it, not whether a specific person committed a specific crime." ***State v. Brady***, 118 Wis.2d 154, 157, 345 N.W.2d 533, 535 (Ct. App. 1984) (citations omitted). The goal throughout the proceeding is "toward issuing a complaint or determining that no crime has

occurred. To the extent that the judge exceeds this limitation, there is an abuse of discretion." ***State v. Hoffman***, 106 Wis.2d 185, 204, 316 N.W.2d 143, 155 (Ct. App. 1982) (citations omitted).

The Supreme Court decided the limited circumstances when a John Doe proceeding may be continued after a criminal complaint has been filed against a defendant in ***State v. Cummings***, 199 Wis.2d 721, 546 N.W.2d 406, (1996). The proceeding may be continued only in order to: (1) investigate other possible defendants related to the crimes that will be charged in the information filed against the original defendant; and (2) investigate other crimes that cannot be charged in the information, but may have been committed by the defendant. ***Cummings***, 199 Wis.2d at 745-46, 546 N.W.2d at 415.

Borchardt argues that neither circumstance listed above in ***Cummings*** is applicable to her case. She cites the testimony of two witnesses at the October 13, 1994, John Doe in making the argument that the primary purpose behind the proceeding was to continue investigation of Borchardt and the three juvenile co-conspirators on the pending criminal charges.

The first witness at the John Doe was Detective Brunk, who testified seeking the renewal of a subpoena for phone records of co-defendant Maldonado's sister, among others.[2] Borchardt argues that the prosecutor could not suggest any reason why the subpoena was directed at anyone other than Maldonado, who was already charged. The record reflects that Brunk was asked by the court whether he believed that the phone records would provide information into the conspiracy to murder Ruben, to which he answered yes.

[2] As these telephone records were not introduced at trial, Borchardt seeks no remedy.

Second, Borchardt argues that final witness Tim Quintero's testimony was primarily regarding Borchardt and the other co-conspirators. Borchardt presented a charted breakdown of Quintero's substantive John Doe testimony, pointing out the low number of questions asked about anyone else other than Borchardt and the other charged co-conspirators.

The State responds to Borchardt's arguments by stating that the John Doe was permissibly continued despite charging Borchardt and the three co-conspirators because the investigation was focused on the possible involvement of at least one other co-conspirator, Shannon Johnson, thus meeting ***Cummings****'s* exception (1). Although at the time ***Cummings*** had yet to be published, the trial court also made the finding that the purpose of Quintero's testimony was to learn the identity of others who may have been involved in Ruben's murder, which is a proper purpose under ***Cummings***. The court further held that a majority of Quintero's testimony was to confirm what he had said in his two previous statements to police, but since he was given immunity, the state received no benefit by having Quintero make his statements under oath.

The trial court did find that the purpose underlying Detective Brunk's testimony requesting a subpoena for phone records was not clear in the transcript. The purpose could have been for an already-charged individual or someone not yet charged. The court concluded that since the phone records involved persons already charged, that the John Doe was used improperly in this regard. However, the court also found that the State received no benefit, as they could have obtained the same information through a search warrant.

Borchardt did not argue that the testimony of the second witness, Detective Lee, was improper. This is with good reason, as Detective Lee testified

that based on his interviews with Vest, there was a possibility of Shannon Johnson having previously perjured herself and that more investigation was required to see if she was involved in the murder as yet another co-conspirator. Upon review of the John Doe transcript, the trial court held that Lee's testimony was proper and of no advantage to the State because all Lee did was relate his beliefs regarding Vest's statements in relation to Johnson, which was discoverable by the defense.

As a result of the pretrial motion, the court ordered the entire October 13, 1994, John Doe proceeding transcript to be made available to the defense.[3] Despite the subpoena of the phone records, the trial court found that the overall purpose of identifying other possible co-conspirators at the proceeding was proper.

Our standard of review is "not to upset the trial court's findings of historical or evidentiary fact unless they are contrary to the great weight and clear preponderance of the evidence. This is basically a 'clearly erroneous' standard of review." ***State v. Turner***, 136 Wis.2d 333, 343-44, 401 N.W.2d 827, 832 (1987) (citing ***State v. Woods***, 117 Wis.2d 701, 715, 345 N.W.2d 457 (1984)).

Upon review of the record, we conclude that the trial court was not clearly erroneous in finding that the John Doe had a proper purpose. First, as previously discussed above, Detective Lee testified to the court about his concern regarding Johnson's possible perjury and potential involvement with the murder. Second, while being interviewed on October 12, 1994, Quintero was asked

[3] This was done rather than disclosing only the relevant portions of the John Doe transcript of October 13, 1994. The court's rationale was that "if the defense believes that the court has erred in its denials of suppression or finding of propriety, the defense can come again and show how the court is wrong."

questions about Johnson. At that time, he asked to speak to a lawyer and terminated the interview. The next day at the John Doe, Quintero was questioned about others who may have been involved in the murder, including Johnson. Third, the simple fact that Johnson was later charged as a co-conspirator[4] also supports the fact that the John Doe was properly continued for her possible involvement.

Borchardt also argues that Quintero's John Doe testimony was improper and an abuse of discretion because it allowed the prosecutor to "freeze" Quintero's testimony under oath, thus prejudicing her, citing ***United States v. Fisher***, 455 F.2d 1101, 1104-05, (2d Cir. 1972). "Locking in" Quintero's testimony within a John Doe, it is argued, was beneficial to the State because Quintero could be charged with a felony, perjury (§ 946.31, STATS.), whereas he could only be charged with a misdemeanor, obstruction of an officer (§ 946.41, STATS.), if he lied in a statement given to police in the course of an investigation. It was also argued to be especially helpful in this case to "freeze" Quintero's testimony, as he was cousins with Vest and Maldonado, giving him a higher incentive to change his testimony in order to protect them later on. However, prejudice to the defendant's case must be found in order for the testimony to be improperly "frozen." ***Id.*** The state's receipt of any "incidental benefit" from the John Doe testimony regarding the pending prosecution will not render the proceeding improper. ***Hoffman***, 106 Wis.2d at 207 n.7, 316 N.W.2d at 156 n.7 (citing ***United States v. Gibbons***, 607 F.2d 1320, 1328, (13th Cir. 1979)). Although Quintero's testimony was "frozen" once he testified in the John Doe,

[4] Although that charge was eventually dropped, it is still relevant regarding the propriety of the John Doe that Johnson was charged as a co-conspirator.

Borchardt suffered no prejudice as a result of that testimony. The entire John Doe transcript was given to her ahead of trial, and furthermore, was found to be consistent with Quintero's previous statements. In addition, Quintero's first two statements occurred before he was given immunity.

As a remedy, Borchardt requests a new trial based upon the error committed by the trial court in not suppressing Quintero's testimony as well as the fruits from that testimony because of the improper use of the John Doe on October 13, 1994. Borchardt also argues that suppression solely of the John Doe transcript is an insufficient remedy. However, the flaw in Borchardt's argument is that this is not a case in which the John Doe was continued for building a case against already-charged individuals. Here, the trial judge found—and we confirm—there was a proper purpose for the continuing John Doe. Even if we assume, *arguendo,* that there was an improper purpose for the October 13, 1994 John Doe hearing (freezing the testimony of Quintero), this court would still deny the motion to suppress Quintero's trial testimony, as no prejudice has been shown, any benefit to the State is minimal and there exists no case authority for the imposition of such a radical remedy. The only remedy would be to suppress Quintero's John Doe testimony, which would amount to naught, since he had already given police two written statements prior to the John Doe.

Admission of the Decedent's Statement as an Excited Utterance.

The second issue to address is whether or not the trial court erred by admitting Ruben's statement, "I can't believe she would do this to me" as an excited utterance exception to the hearsay rule despite defense objections that the

exception did not apply because Ruben was not excited when he made it[5]. *See* § 908.03(2), STATS.

The admission or exclusion of evidence is a discretionary determination of the trial court and will be upheld absent any misuse of that discretion. ***State v. Patino***, 177 Wis.2d 348, 362, 502 N.W.2d 601, 606, (Ct. App. 1993) (citations omitted). "If the trial court's decision is supportable by the record, we will not reverse even though the court may have given the wrong reason or no reason at all." ***Id.***

An excited utterance under § 908.03(2), STATS., is "[a] statement relating to a startling event ..., made while the declarant was under the stress of excitement caused by the event or condition" and is admissible into evidence as an exception to the hearsay rule. ***State v. Boshcka***, 178 Wis.2d 628, 639, 496 N.W.2d 627, 630 (Ct. App. 1993). There are two requirements that must be met in order for a statement to qualify as an excited utterance: "(1) there must be a 'startling event or condition' and (2) the declarant must have made the statement relating to the startling event or condition while 'under the stress of excitement caused by the event or condition.'" ***Id.*** (citing ***Muller v. State***, 94 Wis.2d 450, 466, 289 N.W.2d 570, 578, (1980)).

We conclude that the trial court's ruling was supported by the record. The first element—the existence of a "startling event/condition"—is met by the fact that at the time the statements were made, Ruben had been shot two

[5] In her brief, Borchardt makes the argument that the statement was improperly admitted as an excited utterance because it was an opinion and there was no foundation for the opinion. We do not address this issue and deem it to be waived, as it was not brought to the trial court's attention at the time it made its ruling. *See* § 901.03(1)(a), STATS.

times and was wounded. This obviously qualifies as a "startling event/condition." The second element was also met, as Ruben's statement was made while being under the stress of excitement caused by such a startling event/condition. Since the record supports the trial court's finding, the court did not erroneously exercise its discretion in admitting the testimony as an excited utterance. The decision of the trial court is therefore affirmed as to this issue.

Ineffective Assistance of Counsel.

The third issue to address is Borchardt's claim that her trial counsel rendered ineffective assistance in their defense of her case by not eliciting testimony and making a record to implicate Rubin's son, and Borchardt's stepson, Charles, as the person involved in the conspiracy to murder Ruben. The question of whether counsel's actions constitute ineffective assistance is a mixed question of law and fact. ***State ex rel. Flores v. State***, 183 Wis.2d 587, 609, 516 N.W.2d 362, 368-69 (1994) (citing ***Strickland v. Washington***, 466 U.S. 668, 698 (1984)). The circuit court's findings of fact will not be reversed, unless they are clearly erroneous. ***State v. Pitsch***, 124 Wis.2d 628, 634, 369 N.W.2d 711, 714-15 (1985); § 805.17(2), STATS. However, the ultimate conclusion of whether counsel's conduct violated the defendant's right to effective assistance of counsel is a question of law, which this court decides without deference to the circuit court. ***State v. (Oliver) Johnson***, 133 Wis.2d 207, 216, 395 N.W.2d 176, 181 (1986).

The right to effective assistance of counsel stems from the Sixth Amendment to the United States Constitution, which guarantees a criminal defendant a fair trial. *See* ***Strickland***, 466 U.S. at 684-86. The test for ineffective assistance of counsel has two prongs: (1) a demonstration that counsel's performance was deficient, and (2) a demonstration that the deficient performance

prejudiced the defendant. ***Id.*** at 687. The defendant has the burden of proof on both components of the test. ***Id.*** To prove deficient performance, a defendant must establish that his or her counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***State v. (Edward) Johnson***, 153 Wis.2d 121, 127, 449 N.W.2d 845 (1990) (citing ***Strickland***, 466 U.S. at 687).

At the postconviction motion hearing, the trial court held that there was no ineffective assistance of counsel by Borchardt's trial counsel, as the first prong of the ***Strickland*** test was not satisfied. This court agrees with the trial court's assessment that defense counsel's performance was not deficient. There is a presumption that must be overcome in establishing ineffective assistance at trial. "[T]he case is reviewed from counsel's perspective at the time of trial, and the burden is placed on the defendant to overcome a strong presumption that counsel acted reasonably within professional norms." ***Johnson***, 153 Wis.2d at 127, 449 N.W.2d at 847-48 (1990). The evidence brought forth at the postconviction hearing did not overcome this presumption. The court further noted correctly that the defense attorneys' decision not to pursue a third party theory of defense regarding Charles was a strategic one and was not ineffective. Thus, counsel's assistance was not deficient as required under prong one of the test.

A review of the record strongly supports defense counsel's strategy not to attempt to implicate Charles in the conspiracy to murder his father Ruben. At the time of trial, the record substantiated few facts that in any way could possibly tie Charles to his father's murder. One is that Charles was in the home at the time of Ruben's murder. A second fact is that Charles was a schoolmate with co-defendants Vest and Yanke. A third fact is that Charles, as Ruben's son, could

possibly inherit from his father's estate if Borchardt stood convicted of Ruben's murder.

Nothing in the record indicates Charles had an estranged relationship with his father. There was no evidence to connect him with the murder weapon. Co-defendant Vest in his confession, and both Vest and Yanke in their trial testimony, strongly and in detail implicate Borchardt in Ruben's murder and not Charles. The fact Charles was awakened by hearing one loud noise at the time his father was shot is irrelevant as is how he outwardly expressed his grief, sorrow and emotions at his father's funeral.

Borchardt further contends deficient performance was also demonstrated because defense counsel informed her that presenting Charles as a co-conspirator was not an option in presenting her defense. Trial counsel testified that this trial strategy was discussed with Borchardt and Borchardt expressed her belief to her attorneys that Charles was not involved. Our measure is the trial court record and nothing indicates trial counsel's strategy was deficient. If indeed counsel informed Borchardt that accusing Charles was not an option under their trial strategy, it made no difference in the outcome. In fact, as was noted in the record, pursuing such a strategy may have actually backfired, due to juror sympathy for Charles.

In short, we agree with the trial court that not presenting Charles as a suspect was a tactical decision and was not exemplary of deficient representation, which is required under ***Strickland*** in order to establish counsel was ineffective. We conclude that there was no ineffective assistance of counsel on this matter. We therefore affirm the ruling of the trial court on this issue.

Delay in Furnishing the John Doe Transcripts.

The fourth issue to address is whether the State's not furnishing the John Doe transcripts until after the witness had testified at trial denied Borchardt's right to due process of law and her right to a fair trial. Borchardt argues that she should have received these transcripts earlier. This court already decided in an interlocutory ruling that the State was under no obligation to produce transcripts of the John Doe witnesses who were going to testify at trial until the completion of their direct testimony. Our decision was controlled by the decision of ***Myers v. State***, 60 Wis.2d 248, 208 N.W.2d 311 (1973).[6] As only the Supreme Court can modify its own decisions, this issue is raised solely to preserve it for such possible review.

Motion for a New Trial Based on Newly Discovered Evidence.

The fifth issue to address is whether the trial court erroneously exercised its discretion when it refused to grant Borchardt's postconviction motion for a new trial based upon an offer of proof of newly discovered evidence.[7]

The requirements for granting a new trial for newly discovered evidence are:

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[6] The court accommodated defense counsel by allowing them to review the John Doe transcripts overnight. In addition, after such review, the "John Doe witnesses" who had already testified at trial were subject to recall if any further examination by defense counsel was needed.

[7] The newly discovered evidence—presented as an offer of proof at the post-conviction motion hearing—consisted of the testimony of Gabe Alwin, a former cellmate of co-defendant Yanke, and Robert Bergess, a former cellmate of co-defendant Vest. Alwin and Bergess were cellmates of Yanke and Vest respectively after conviction and sentencing. It was offered that Alwin and Bergess would each testify that Yanke and Vest made a statement to them, respectively, that Borchardt was not involved in Ruben's death and that Chuck (Charles) was involved in the homicide.

> (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. Boyce, 75 Wis.2d 452, 457, 249 N.W.2d 758, 760 (1977) (citations omitted). A motion for a new trial based on newly discovered evidence is addressed to the sound discretion of the trial court. ***Id.*** The proper legal standard in assessing the "reasonable probability of a different outcome" criteria is "whether there is a reasonable probability that a jury, looking at [newly discovered evidence], would have a reasonable doubt as to the defendant's guilt." ***State v. McCallum***, 208 Wis.2d 463, 474, 561 N.W.2d 707, 711 (1997).

At the postconviction hearing, defense counsel presented its motion as an offer of proof that had two parts: (1) a preliminary offer made first in order to determine the plausibility of the evidence; and (2) if found plausible, the offer was then evaluated to see if it was credible. Defense counsel argued that if the court found the offer of proof to be plausible, it should set another hearing in order to have the witnesses testify and have the trial court make a determination regarding the witnesses' credibility. If the testimony was found to be implausible, then the motion would be disposed of and reviewed by this court on that basis.

At the hearing, the trial court accepted defense counsel's offer of proof and made the following ruling:

> The court accepts the offer of proof made by Mr. Auerbach that Gabe Alwin or Alwin and Robert Bergess, Prison mates of Josh Yanke and Doug Vest, would come to court and testify that Yanke told Alwin that Mrs. Borchardt didn't have anything to do with Ruben Borchardt's death, and that Mr. Bergess would testify that Douglas Vest said

> that Mrs. Borchardt didn't have anything to do with Ruben Borchardt's death.
>
> The court also accepts the offer of proof that Josh Yanke would say he was involved with Maldonado and Vest in Ruben Borchardt's death going to the house, if not into the house, when Ruben Borchardt was shot; and that Doug Vest would say he was right there with Maldonado, in fact, passed the gun over to Maldonado just before Ruben Borchardt was shot; and that Diane Borchardt hired him to kill Ruben Borchardt; and Doug Vest would deny saying he said to Bergess that Mrs. Borchardt didn't have anything to do with this killing; and Josh Yanke would deny saying to Alwin that Mrs. Borchardt didn't have anything to do with this homicide.
>
> The court understands that Alwin would have his credibility impeached by at least one criminal conviction and Bergess would, too.
>
> The court concludes that upon such evidence the defendant has not met her burden to prove by clear and convincing evidence that there is a reasonable probability that there would be a different result, if she was granted a new Trial. In other words, *the court concludes that such testimony by Alwin and Bergess and Yanke and Vest would certainly in a new Trial again result in a conviction of Mrs. Borchardt as a party to the first-degree intentional killing of Ruben Borchardt beyond a reasonable doubt;* and, therefore, defendant's Motion for a New Trial based on such newly discovered evidence is denied. (emphasis added)

In her brief to this court, Borchardt argues that the trial court "ultimately ruled that it was unnecessary for him to hear Gabe Alwin's and Robert Bergess's testimony 'live,' accepting the offer of proof that these two inmates would so testify." Borchardt also argues that the "inmates' testimony was plausible; they had access to Doug Vest and Josh Yanke and their reports of the conversation were consistent with the facts that already pointed to Charles. [The trial court] erred in ruling as a matter of law that these witnesses were not plausible or credible."

We do not agree with Borchardt's characterization of the record—that the trial court ruled that it was unnecessary to hear Alwin's and Bergess's live testimony. Borchardt's counsel chose to present an offer of proof, rather than just simply putting Alwin and Bergess on the stand and having them testify. There was nothing preventing defense counsel from doing so. In fact, the record reflects that defense counsel preferred not to bring Alwin and Bergess based upon their assumption of how the court would rule:

> Again the reason we're doing this via an offer of proof is because we have heard your litany of rather exhaustively detailing the evidence of defense, my client, and your belief it was compelling, and essentially giving you the opportunity to look at this evidence on paper or orally and say: It's true, it wouldn't change my ruling, I would not find it enough to warrant a new Trial as a matter of law. I don't need to see them in person, that's given their status as inmates and the timing of the statements, given what you have indicated, the lack of credibility of attributing to Chuck, it wouldn't change your ruling.

To this the court replied:

> Well, again I think you misunderstood me. ... if people came here to testify, now Gabe Alwin and Robert Bergess in effect saying, Vest lied about Mrs. Borchardt being involved and Yanke lied about whatever he said, how can I, without hearing them testify and seeing them cross-examined, conclude that they would not affect the outcome of the Trial? Maybe they are very credible and would make Vest and Yanke incredible.

A short time later, defense counsel clarified why they sought a ruling dissecting the offer of proof into a plausibility and credibility determination:

> Let me clarify something, if I could, which maybe helps, maybe doesn't. The court has properly had some trouble, I believe, understanding how you are being asked to rule on credibility without hearing, seeing the witness. I agree that's a concern. ... I felt it was, although I wouldn't disagree for the record there was a reasonable prospect of your finding their version of it being Chuck not plausible

> because it would be contradictory of all the other evidence you went through, and that you might choose to deny for relief on the grounds it was not plausible, therefore, avoiding or not getting to the issue of credibility. If you do that and if the Court of Appeals says it was perfectly plausible, what was [the trial court] thinking of the remedy at that point, obviously would be a remand to determine whether or not they were credible. So all we will be doing is having a Hearing later instead of now. … *So what I was somewhat inviting was a ruling on your part that, if you thought it was implausible, then make that ruling. That disposes of this Motion and is reviewable on plausibility. If you think it is plausible, then let's find out if it is likely to be true by having the witnesses testify and having you make a determination of the credibility.* (emphasis added)

Appellate counsel for Borchardt chose not to have Alwin or Bergess testify. It is not the trial court's role or prerogative to direct how parties should present and support their motions and arguments.

We also do not agree that we should review whether the offer of proof is plausible, as Borchardt asks us to do. Borchardt has provided no authority for the plausibility/credibility distinction in the context of a motion for a new trial based on newly discovered evidence. If Borchardt is now at a disadvantage because the trial court did not have the ability to make a determination of Alwin's and Bergess's credibility first hand, that is, as we have said, a decision made by Borchardt and not an error of the trial court.

We conclude that the trial court applied the correct legal standard and properly exercised its discretion in deciding that, even with Alwin's and Bergess's proposed testimony, there is no reasonable probability that a jury would have a reasonable doubt as to Borchardt's guilt.

The record is replete with evidence demonstrating Borchardt's guilt. Motive evidence existed. Borchardt was embroiled in a bitter divorce with Ruben,

knew Ruben was having an affair with another woman, and wanted undercover pictures and surveillance of Ruben and the woman taken by an investigator and third parties. Ruben was to receive their home on the Proposed Balance Sheet & Division of Marital Estate for the divorce, which Borchardt contested. Borchardt's silk screen t-shirt business was in financial trouble. Borchardt told Vest and Quintero, as well as many other friends and acquaintances that she wanted to "get rid of him" on more than one occasion. Evidence was also brought forth showing how Ruben was afraid of Borchardt, and how he stacked empty mayonnaise jars in the doorway of the basement where he slept as an "alarm" in case she tried to harm him while he slept. Also, Borchardt was a beneficiary under Ruben's life insurance policy and named in his will.

Regarding the murder itself, Yanke's testimony corroborated that of Vest, stating that Borchardt had solicited the murder of her husband, offering cash, rings, and a car. Quintero testified that Borchardt had drawn him a map of directions to her residence, which a handwriting expert verified at trial as being Borchardt's handwriting. Shannon Johnson testified that on the day before the murder, she observed Borchardt pass something to Vest. Borchardt was absent the night of the murder with her daughter visiting the Manthies, the family of Ruben's first wife. The Manthies testified that they heard Borchardt say "I'm sorry; I'm sorry, Regen" and "[t]hey're going to put me in jail" upon finding out that Ruben had been murdered. In short, the multitude of evidence supporting the jury's finding that Borchardt was guilty is overwhelming and supports the trial court's ruling. Thus, based upon the record, the trial court applied the proper standard in its ruling regarding the newly discovered evidence. Such a ruling was not erroneous, and we affirm its ruling.

Motion for New Trial in the Interests of Justice.

Finally, Borchardt asks this court for a new trial "in the interest of justice" based upon the "compounded effect of the trial court errors." There is enough evidence in the record, *see* **Newly Discovered Evidence** section, above, to support the fact that a new trial is not warranted in this matter and that justice was served. As we affirm the rulings of the trial court, Borchardt's request for a new trial is therefore denied.

By the Court.—Judgment and order affirmed.

Recommended for publication in the official reports.