COURT OF APPEALS
DECISION
DATED AND FILED

November 10, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal Nos. 2015AP364-CR
2015AP1662

Cir. Ct. No. 2009CF222

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RORY A. KUENZI,

DEFENDANT-APPELLANT.

APPEALS from orders of the circuit court for Waupaca County: PHILIP M. KIRK, Judge. *Affirmed.*

Before Lundsten, Sherman and Blanchard, JJ.

¶1 PER CURIAM. Rory Kuenzi challenges the circuit court's orders addressing his contention that he was denied counsel of his choosing and denying

him a new trial based on newly discovered evidence. For the reasons below, we affirm both orders.

Background

¶2 In November 2009, the State charged Kuenzi with hit-and-run involving death and homicide by intoxicated use of a motor vehicle. The criminal complaint alleged that, in October 2004, Kuenzi struck and killed a pedestrian while driving under the influence and then moved the body from the road into a ditch before driving away. Following a five-day jury trial, Kuenzi was convicted of both charges.

¶3 Post-trial, as pertinent here, Kuenzi argued that he was denied his right to counsel of his choosing when, prior to trial, the circuit court denied Kuenzi's request to substitute counsel and grant a continuance so that the new attorney could prepare. In Kuenzi's initial appeal, we addressed that issue and another issue alleging ineffective assistance relating to the failure of counsel to stipulate that Kuenzi had a prior conviction for operating a motor vehicle while under the influence of an intoxicant. We rejected the latter claim, but reversed on the choice of counsel claim. We remanded the case to the circuit court with directions to hold a retrospective hearing on the topic. *See* ***State v. Kuenzi***, No. 2012AP1909-CR, unpublished slip op. ¶27 (WI App Aug. 14, 2014).

¶4 The case now returns to us. In the proceeding below, the circuit court, now applying a different legal test, determined that Kuenzi's request for substitution of counsel was properly denied. The court also addressed a new claim of newly discovered evidence, and rejected that claim.

¶5 We provide additional background facts as needed below.

Discussion

¶6 Kuenzi makes two general arguments supporting reversal of his conviction. First, he contends that he was denied counsel of his choosing. Second, he contends that he has presented newly discovered evidence warranting a new trial. We reject both arguments.

A. Right To Counsel Of Kuenzi's Choosing

¶7 The question presented is whether, nine days before Kuenzi's scheduled trial, the circuit court reasonably denied Kuenzi's request for a continuance of the trial and substitution of a privately retained attorney for Kuenzi's public defenders. We are not, however, reviewing the decision the circuit court made before trial, but rather the retrospective decision the circuit court made following our decision remanding the matter for a retrospective hearing under the correct standard.

¶8 The procedural and legal history of this case is complicated, and much of it is set forth in our prior opinion. For purposes of this decision, it is enough to know that in our prior decision we accepted the State's position on appeal that the circuit court had erred by failing to treat an attorney, Nathan Schnick, who was hired by Kuenzi's parents, as a "retained" attorney for purposes of deciding whether to continue the trial and permit the privately retained attorney to substitute for Kuenzi's public defenders. In that opinion, essentially, we directed the circuit court to exercise its discretion retrospectively, applying the test found in ***State v. Prineas***, 2009 WI App 28, 316 Wis. 2d 414, 766 N.W.2d 206, rather than the test found in ***State v. Jones***, 2010 WI 72, 326 Wis. 2d 380, 797 N.W.2d 378, that the circuit court had applied. We now review whether the circuit

court's exercise of discretion under ***Prineas*** was reasonable, and we conclude that it was.[1]

1. Applicable Legal Principles And Standards

¶9 The right to counsel under the Sixth Amendment includes "the right of a defendant who does not require appointed counsel to choose who will represent him." ***United States v. Gonzalez-Lopez***, 548 U.S. 140, 144 (2006). In this situation, there is a "presumption in favor of a defendant's counsel of choice." ***Carlson v. Jess***, 526 F.3d 1018, 1024 (7th Cir. 2008).

¶10 However, ***Gonzalez-Lopez*** goes on to explain that circuit courts have "wide latitude in balancing the right to counsel of choice against the needs of fairness." ***Gonzalez-Lopez***, 548 U.S. at 152. As we explained in ***Prineas***, 316 Wis. 2d 414, the question is "whether the circuit court's denial of [a defendant's] motion for substitution and a continuance was arbitrary or unreasonable and therefore violated [the defendant's] constitutional rights." ***Id.***, ¶15.

[1] In fairness to the circuit court, no one at the time of the November 3, 2010 pretrial hearing suggested that the court was applying an incorrect standard, and we have not faulted the circuit court for failing to do so at that time. Rather, the issue came to the circuit court's attention post-trial in the context of ineffective assistance of counsel. ***State v. Kuenzi***, No. 2012AP1909-CR, unpublished slip op. ¶¶20-21 (WI App Aug. 14, 2014). It was at that point in time that the circuit court first had a fair opportunity to address whether it properly applied the standard in ***State v. Jones***, 2010 WI 72, 326 Wis. 2d 380, 797 N.W.2d 378, or whether, instead, it should have applied ***State v. Prineas***, 2009 WI App 28, 316 Wis. 2d 414, 766 N.W.2d 206. Moreover, we acknowledge that there are reasons to question whether ***Jones*** or ***Prineas*** is the better fit under the particular facts of this case. However, because in the prior appeal the State chose not to defend the circuit court's rejection of the ***Prineas*** standard, it was not our place to advance, and then accept or reject, an argument the State might have made. For that matter, we observe that the approach taken by the State in the prior appeal appears reasonable, given the complications, including the ineffective assistance context. In any event, then and now we assume that ***Prineas*** is the correct standard under the facts here.

¶11 As we further explained in ***Prineas***, several factors may be relevant. In that case, we set forth a non-exclusive list:

> When making a determination whether to allow the defendant's counsel of choice to participate, the circuit court must balance that right against the public's interest in the prompt and efficient administration of justice. Several factors assist the court in balancing the relevant interests, for example: the length of delay requested; whether competent counsel is presently available and prepared to try the case; whether prior continuances have been requested and received by the defendant; the inconvenience to the parties, witnesses and the court; and whether the delay seems to be for legitimate reasons or whether its purpose is dilatory.

Id., ¶13 (citations omitted). Because they are relevant here, to this list we add the alleged communication breakdown between Kuenzi and his public defenders and the ability of Kuenzi to fund his defense.

¶12 Our review of this discretionary decision is deferential. "Discretionary acts are sustained if the trial court 'examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach.'" ***Richards v. Land Star Group, Inc.***, 224 Wis. 2d 829, 848, 593 N.W.2d 103 (Ct. App. 1999) (quoting ***Loy v. Bunderson***, 107 Wis. 2d 400, 415, 320 N.W.2d 175 (1982)). "When reviewing a trial court's exercise of discretion, we will look for reasons to sustain the decision." ***State v. Verhagen***, 198 Wis. 2d 177, 191, 542 N.W.2d 189 (Ct. App. 1995). "Where the trial court fails to adequately explain the reasons for its decision, we will independently review the record to determine whether it

provides a reasonable basis for the trial court's discretionary ruling." ***State v. Clark***, 179 Wis. 2d 484, 490, 507 N.W.2d 172 (Ct. App. 1993).[2]

2. The Decision At Issue

¶13 Before proceeding to consider the factors, we comment on Kuenzi's apparent confusion about the decision at issue.

¶14 The question here is whether the circuit court reasonably decided on remand that *on November 3, 2010*, nine days before the start of the trial, the court properly denied Kuenzi's request for a continuance and a substitute attorney of his choosing. More precisely, a letter from Attorney Schnick, faxed to the circuit court on Thursday, October 28, 2010, first advised the court that the court was being asked to replace Kuenzi's public defenders with Attorney Schnick, assuming the court would also continue the trial for at least 60 days. On Monday, November 3, 2010, the court promptly held a hearing on the requests in that letter, and it is the decision the court made that day that we directed the court to revisit on remand. The circuit court's earlier decisions denying continuances and denying withdrawal of counsel have not been challenged.

¶15 We address this topic because Kuenzi's briefing suggests confusion as to the decision at issue. For example, Kuenzi refers to the decisions at issue as having been made "almost a month before trial." But this could only be a reference to the circuit court's earlier decisions to deny continuances and the

[2] It might be argued that, under these principles, we could have affirmed the circuit court in Kuenzi's first appeal by applying the ***Prineas*** standard regardless whether the circuit court had. However, we generally remand cases when the circuit court has exercised its discretion based on a misunderstanding of the law. *See* ***State v. Anderson***, 230 Wis. 2d 121, 144, 600 N.W.2d 913 (Ct. App. 1999).

withdrawal of the public defenders, decisions that were made well before the circuit court had any inkling that the Kuenzi family had possibly retained Attorney Schnick.

¶16 For that matter, Kuenzi makes several arguments and points that are off-topic. Examples include the following.

¶17 Kuenzi complains that the circuit court misled Attorney Schnick when the court, according to Kuenzi, "intimated to attorney Schnick that he would be permitted to substitute on the case if he drove [from La Crosse to Waupaca] for a hearing on the matter, which [Attorney Schnick] did." We disagree that the circuit court misled Attorney Schnick. But our point here is that it does not matter. Kuenzi completely fails to explain how this alleged misleading "intimation" by the circuit court has any implications for the proper application of the ***Prineas*** standard to the facts here.

¶18 Another example is Kuenzi's assertion that "Schnick ... was not allowed to argue the Sixth Amendment implications of the refusal to allow Kuenzi the counsel of his choice." This assertion is factually untrue—the circuit court put no limitation on Schnick's arguments—but, more to the point, the assertion has no effect on the circuit court's retrospective application of the correct ***Prineas*** standard.

¶19 Kuenzi also makes unsupported legal assertions. An example of this is found in Kuenzi's reply brief. There, Kuenzi complains about the State's reliance, in its appellate briefing, on factual assertions made by the prosecutor. Without citation to authority, Kuenzi contends that such reliance is legally improper because "[s]tatements made by a prosecutor during argument are not evidence." We agree that such statements are not evidence, but Kuenzi's assertion

that we may not consider factual information provided by the prosecutor in the context of the ***Prineas*** standard makes no sense. Kuenzi himself repeatedly and necessarily relies on non-sworn factual assertions made by the public defenders and Attorney Schnick. Kuenzi does not explain why reliance on the factual assertions of his attorneys is proper, but not the factual assertions of the prosecutor. Accordingly, we rely on non-sworn factual assertions made by the attorneys.

¶20 We could go on. Instead, we observe generally that Kuenzi makes several assertions and arguments that are either off-topic or unsupported by authority or record cites. We decline to identify and explain why each is without merit. Rather, with a few exceptions, our discussion below is limited to the appropriate arguments that we have been able to identify in Kuenzi's appellate briefs.

3. Discussion Of Factors

a. The Length Of Delay Requested

¶21 Kuenzi asserts that "only 60 days was requested" and contends that a "60-day continuance in a case of this magnitude is quite short." Elsewhere, Kuenzi characterizes the request as one for a "short adjournment." We agree with the State and the circuit court that Kuenzi mischaracterizes the length of the requested delay. Rather, the most reasonable view is that Attorney Schnick requested an initial 60-day delay with the likelihood that Schnick would need and seek additional time.

¶22 The letter from Attorney Schnick that was faxed to the circuit court, effectively advising the court of Kuenzi's desire to have Attorney Schnick replace Kuenzi's public defenders, informed the court that:

- Schnick had "agreed to be retained to review Mr. Kuenzi's files, and to offer an advisory opinion in [Kuenzi's] case."
- Kuenzi's "family has secured the necessary funds to pay the additional retainer to hire me to represent Rory Kuenzi, should the trial date be continued."
- Schnick had an agreement with "Mr. Kuenzi and his family that if the current trial date is continued for at least 60 days," Schnick would handle the case through trial.
- If the circuit court granted the continuance, Schnick would appear as Kuenzi's attorney "to schedule a new trial date."

¶23 At the subsequent hearing, Attorney Schnick spoke briefly. Pertinent here, Schnick asked the court to continue the trial and offered to then "work with scheduling a trial if the Court would be so inclined." Schnick told the court:

- "I was retained this morning by the Kuenzi family to represent Mr. Kuenzi through the remainder of the trial, if this does go to trial."
- "I haven't had a chance to review any discovery ...."
- The public defenders could deliver the discovery to Schnick "at the end of this week or possibly at the beginning of next week."
- It was Schnick's understanding that "there may be some science evidence involved as far as DNA and accident reconstruction, and I

> may need an expert opinion in preparing [for trial], and that may take some time."[3]

¶24 Nothing presented to the circuit court suggested that Attorney Schnick requested a continuance of the trial date lasting *only* 60 days. Rather, Schnick's request was for "at least 60 days," and that was just a starting point. Schnick was plainly communicating that he knew little about the case and that he did not know how much time he would need to be prepared to go to trial. Reasonably interpreted, both the letter and assertions made by Schnick at the hearing informed the court that, if the court initially granted a 60-day continuance and permitted substitution, Schnick would start his review of the case and make further argument as to the amount of time he needed to review discovery, contact possible and probable witnesses, including expert witnesses, and prepare for a trial.[4]

¶25 Moreover, there were good reasons to think that Schnick would end up asking for more than 60 days. Schnick had done nothing to prepare except attempt to gain Kuenzi's trust. Schnick had not talked with Kuenzi about the facts of the case "whatsoever" or what the defense would be. Schnick had not reviewed any discovery and had not talked with any witnesses. The State had identified 42

[3] Schnick's letter indicated that the agreement with the Kuenzi family included another attorney who would be Schnick's co-counsel. For ease of discussion, we ignore references to co-counsel because those references have no substantive effect on the parties' arguments or on our analysis.

[4] Kuenzi incorrectly contrasts Attorney Schnick's conditional agreement with the situation in ***Prineas*** where "Prineas ... paid a retainer to [an] attorney conditioned on the substitution of counsel and postponement of the trial." ***Prineas***, 316 Wis. 2d 414, ¶4. Far from being different, Schnick's proposal was exactly the same—that he would remain retained counsel only if the court granted substitution and delayed the trial.

possible witnesses, and 28 witnesses ended up testifying at the five-day trial. Attorney Schnick had much to do.

¶26 There were more than 1,600 pages of discovery and at least "a dozen CDs worth of photographs and other information." More significantly, Schnick needed to explore whether he could come up with helpful expert witnesses to rebut the State's accident reconstruction and DNA witnesses. As the circuit court aptly observed, as of the time of the request on November 3, 2010, Schnick had no basis for knowing "what needs to be done to provide adequate representation."

¶27 Thus, contrary to Kuenzi's argument on appeal, the circuit court reasonably viewed the request as one for an initial 60-day delay with the likelihood that Attorney Schnick would need and seek additional time.

b. Whether Competent Counsel Is Presently Available And Prepared To Try The Case

¶28 The circuit court found that the public defenders were competent. Kuenzi does not and, based on our review of the record, could not reasonably challenge that finding.

¶29 Rather, Kuenzi argues that his public defenders were unprepared to try the case. The problem with this argument is that, as of November 3, 2010, there was no meaningful *current* information regarding the state of preparedness of Kuenzi's public defenders.

¶30 Kuenzi's imprecise approach to this topic, both before the circuit court and this court, focuses solely on general assertions made between one week and one month earlier in the proceedings. During that time frame, Kuenzi's public defenders contended that failures on the part of an investigator were making it

unlikely that they would be prepared by the scheduled trial date. On November 3, 2010, when the circuit court promptly held a hearing to address the new substitution request, trial preparations had progressed to some unknown extent and, of course, would continue until trial. This is no small point. When it comes to trial preparation, days matter.

¶31 Moreover, even if we were to focus on the prior requests and accompanying assertions, it is evident that there was no basis on which to conclude that lack of preparation weighs in favor of Kuenzi for purposes of the ***Prineas*** test.

¶32 Much could be said as to why the circuit court properly denied the public defenders' two continuance requests and, for that matter, the request that the circuit court allow the assigned public defenders to be replaced by other appointed counsel. But it all boils down to this: the motions and arguments lacked specifics. For example, the public defenders explained that an investigator had been derelict in interviewing witnesses, but there were no details as to why the pertinent witnesses could not be interviewed before trial. And, as the circuit court effectively observed, it is normal for attorneys and investigators to move into high gear close in time to a trial.

¶33 For that matter, the circuit court made clear that it was not foreclosing a continuance, should it develop that counsel were in fact unable to sufficiently prepare. At a hearing on October 14, 2010, the court said, "I don't intend to prohibit a motion to revisit the [continuance] issue," and on October 26, 2010, the court similarly stated that, although it was again denying a continuance, the court was willing to revisit the issue. Notably, the public defenders did not renew their continuance motion, much less renew it with specifics as to why they

were not prepared to competently represent Kuenzi at trial. And, also notably, Kuenzi has never argued that the circuit court erred in denying the public defenders' earlier motions.[5]

¶34 Thus, as of November 3, 2010, so far as the circuit court knew, Kuenzi had competent counsel who would be prepared to defend Kuenzi on the scheduled trial date.[6]

c. Whether There Was A Communication Breakdown

¶35 Kuenzi asserts that there was a communication breakdown between himself and his public defenders. The problem with this argument is the same as his assertion that his public defenders were unprepared to go to trial—it lacks specifics.

¶36 The pertinent part of the record is a motion filed October 25, 2010, and a subsequent hearing on that motion. Our review shows nothing more than the vague assertion by the public defenders of a communication breakdown. All that we can glean from the motion and the transcripts is (1) that Kuenzi and his attorneys disagreed over Kuenzi's decision to reject the plea agreement and

[5] Prior to October 28, 2010, there was no indication that Kuenzi or his parents had contacted any particular private attorney or that they had the financial wherewithal to pay for private counsel. Thus, during these earlier proceedings, the only substitution of counsel issue that was ripe was whether the circuit court should permit Kuenzi to have different counsel at public expense.

[6] In a poorly developed argument, Kuenzi contends that his public defenders' failure to timely attempt to stipulate to Kuenzi's prior OWI conviction shows that they were "demonstrably unprepared." Kuenzi, however, fails to demonstrate that this "failure" resulted from lack of preparation time. At the postconviction hearing, Kuenzi's lead counsel at trial did not blame lack of preparation time for this failure, but rather stated: "I just simply screwed that one up."

(2) that Kuenzi asserted that he had lost confidence in his public defenders because all public defenders are overworked.

¶37 At the postconviction hearing after the trial, but before remand, Assistant Public Defender Nielsen characterized his relationship with Kuenzi as "good" and further explained: "There were periods where it was up and down or down a little bit. It was more toward the end. But I think overall we had a pretty good relationship." Nielsen explained that there had been a "contentious" discussion about Kuenzi's decision to reject the plea agreement, after initially indicating acceptance, but that the conversation ended "with apologies both from Mr. Kuenzi and myself and [Assistant Public Defender] Dickmann." Nielsen further testified that he had no problem communicating with Kuenzi "in terms of the plea negotiations" and that, other than the dispute over Kuenzi changing his mind about accepting the plea agreement, which Nielsen thought "was relatively short lived," Nielsen had "[n]o [plea agreement communication] problems at all."

¶38 In sum, nothing in the record supports the view that there was any significant communication problem between Kuenzi and his public defenders.

d. Whether Kuenzi Had The Ability To Fund His Defense

¶39 Kuenzi complains that the circuit court erroneously persisted in considering Kuenzi's indigency. Kuenzi seems to believe that consideration of Kuenzi's ability to fund his defense conflicts with the proposition that the test applicable to Kuenzi's substitution request is the ***Prineas*** retained counsel test. We are not persuaded. More specifically, we discern no reason why the circuit court could not consider Kuenzi's indigency and, thus, the potential lack of funding relating to the search for and possible use of expert witnesses.

¶40 We begin by noting that it is uncontested that Kuenzi was indigent. There were confusing assertions as to whether Kuenzi himself owned or partly owned a piece of rural property that was used as collateral for a bank loan which, in turn, was allegedly the source of the money Kuenzi's parents used to pay a $25,000 retainer to Attorney Schnick. However, in the end, the circuit court reasonably assumed that the property did not belong to Kuenzi and that Kuenzi was otherwise indigent. Kuenzi does not challenge this factual assumption.

¶41 As to Kuenzi's assertion that consideration of his indigency conflicts with our opinion remanding the matter for a retrospective hearing, Kuenzi provides no supporting argument. Moreover, Kuenzi does not even support the general proposition that a court may not consider a defendant's resources in the context of a ***Prineas*** analysis. On this topic, we acknowledge that it might seem odd to assume that Kuenzi's parents' ability and willingness to fund a private attorney is factually sufficient to require the application of the ***Prineas*** test, and at the same time, in applying the ***Prineas*** test, it is proper to consider Kuenzi's inability to fully fund his defense. However, as we explained in footnote 1, the applicability of ***Prineas*** is something that the State chose to concede and that we determined we should not raise and decide sua sponte.

¶42 Regardless, under the ***Prineas*** test, we perceive no reason why it would have been unreasonable, at the time of the November 3, 2010 hearing, to consider Kuenzi's ability to fund anticipated possible additional expenses. More specifically, we are given no reason why it would have been unreasonable for the circuit court to believe that the defense might need expert witnesses, that there was public defender funding available for such witnesses, and that there was no similar assurance of funding if the court permitted Attorney Schnick to replace the public defenders.

¶43 Notably, at the time the circuit court denied substitution, it had almost no information about funding for a private-pay defense. The court had been informed that the "family has secured the necessary funds to pay" a "retainer" fee to Attorney Schnick and that the "Kuenzi family" did retain Schnick the morning of November 3, 2010.[7] But the circuit court was not told that Schnick had been paid, how much he was paid, or whether he was willing to represent Kuenzi through the trial for the amount he had received.

¶44 At later proceedings, the existence of the retainer and Attorney Schnick's promise to represent Kuenzi for that amount through trial were revealed. But the circuit court also learned that the retainer would not cover the expense of expert witnesses. According to what Schnick told the circuit court, if any expert witnesses had been necessary, "we would have [needed] to renegotiate." Moreover, there was no information showing that Kuenzi's parents had provided assurances to anyone that they would pay for expert witnesses, whatever that

[7] Kuenzi asserts more than once that the payment to Attorney Schnick was "paid by Rory Kuenzi's mother, Cindy Kuenzi, not Kuenzi's father." Kuenzi apparently believes this is significant because, even if the circuit court could reasonably attribute bad faith to Kuenzi's father with respect to funding Kuenzi's defense, there is nothing in the record to suggest that Kuenzi's mother was acting in bad faith. Kuenzi's assertion is both wrong and inconsequential. There are indications in the record that the check given to Attorney Schnick was signed by Kuenzi's mother and that the refund was paid to Kuenzi's mother. But the source of the funds was a bank loan on property that appears to have been jointly owned by the parents. Kuenzi points to nothing in the record suggesting that the funds came solely from his mother. More importantly, our analysis is unaffected by whether both parents or just Kuenzi's mother paid Schnick the retainer fee of $25,000. We do not rely on any allegation of bad faith on the part of Kuenzi's father and, to the extent the circuit court did so, it is apparent to us that the circuit court would have made the same decision without consideration of Kuenzi's father's motives.

expense might be. And, there was no clear information about Kuenzi's parents' ability to fund such experts.[8]

¶45 Also, the circuit court reasonably drew a distinction between Kuenzi and his parents. The circuit court plainly believed that Kuenzi's parents might be less willing to part with money than Kuenzi himself. This assumption is all the more reasonable because Kuenzi's parents never appeared to provide any such assurances.

¶46 Thus, if this topic had been explored during the November 3, 2010 hearing, the circuit court would have been left wondering whether Kuenzi's parents were willing and able to fully fund Kuenzi's defense. This, in turn, meant that, if the court had permitted substitution, there might have been further delays owing to the inability or unwillingness of Kuenzi's parents to provide funds for experts to review evidence or, possibly, testify at trial.

e. Whether Prior Continuances Have Been Requested And Received By The Defendant

¶47 Kuenzi states that "[t]he [circuit] court conceded that Kuenzi had been granted no previous continuances, [and] so that factor was in his favor." We agree.

[8] At one point, Attorney Schnick seemed to suggest to the circuit court that a banker directly told him that additional money, collateralized by the property, was available to Kuenzi's parents. However, we conclude that the circuit court appropriately gave this no weight. As with so many of the arguments relating to substitution of counsel of Kuenzi's choosing, the circuit court had almost no concrete assertions of fact to rely on. For example, Attorney Schnick's assertions to the court on this topic did not include how much additional money was available.

f. The Inconvenience To The Parties, Witnesses, And The Court

¶48 Kuenzi's primary argument relating to inconvenience is that the statements of the prosecutor are not evidence and may not be considered. We have already rejected this argument in ¶19, and discuss it no further here.

¶49 Looking to the record, the inconvenience to the parties, the witnesses, and the court are what one would expect with a trial of this magnitude just nine days away, and where several lawyers and witnesses were not locals. An additional complicating factor here was that the circuit court had granted a defense request for jurors from a different county. Prospective jurors were from Dodge County and jury selection was held in that county. The evidentiary phase of the trial was held in Waupaca County.

¶50 About 50 prospective jurors had been told to report in Dodge County. Transportation and hotel rooms had been arranged for the jurors selected. Similarly, transportation and hotel rooms had been arranged for prosecutors and investigators. The State had subpoenaed "80% of its witnesses." One of the State's expert witnesses was from Indiana. The State had made substantial arrangements for video equipment in the courtroom.

¶51 For these reasons, the circuit court could reasonably conclude that the inconvenience involved in continuing the trial so that Attorney Schnick could substitute for the public defenders was significant.

¶52 Kuenzi complains that "there was no victim objecting" to a continuance and that the State does not explain why consideration of the victim's family is appropriate. Kuenzi apparently makes this argument because the circuit court gave weight to the effect of the delay on the family of the man killed. The

circuit court seemingly agreed with the prosecutor's statement that the victim's family was "mentally ready to go forward" and that delaying the trial would "pull the rug out from under" them. We need not rely on this factor to affirm the circuit court and, therefore, address it no further.

g. Whether The Circuit Court Gave Sufficient Weight To Kuenzi's Right To Counsel Of His Choosing

¶53 Kuenzi seems to argue that the circuit court erred as a matter of law by giving insufficient weight to Kuenzi's right to choose his own attorney. Kuenzi points to the circuit court's statement that:

> even if you consider Attorney Schnick's retained counsel status, as an item that deserves weight in the ***Prineas*** factors; it is so minimal that it would barely rise above the level described in this language.

Kuenzi asks us to interpret this language as the circuit court improperly giving Kuenzi's choice "minimal weight." According to Kuenzi, this interpretation would mean that the circuit court ran afoul of case law explaining that there is a "presumption" in favor of allowing a defendant counsel of his or her choice. We disagree with Kuenzi's reading of the circuit court's comment.

¶54 The passage quoted is ambiguous. Contrary to Kuenzi's reading, it might also simply mean that the circuit court gave Kuenzi's choice the weight indicated in ***Prineas***. This reading is supported by the circuit court's later statement: "I will accept [Attorney Schnick as retained counsel] and find that would be a factor weighing in [Kuenzi's] benefit, in that it would meet [Kuenzi's] wish." Accordingly, we conclude that the circuit court properly weighed Kuenzi's preference for Attorney Schnick in favor of Kuenzi.

¶55 But even if the circuit court had given this factor too little weight, we would still affirm. As will be seen when we summarize, the factors easily show that denying substitution was a reasonable exercise of discretion.

h. Whether The Delay Seems To Be For Legitimate Reasons Or Whether Its Purpose Is Dilatory

¶56 The circuit court appears to have found that the substitution request may have been part of an improper effort to delay the proceedings. In this regard, the circuit court appears to rely on the fact that funding from Kuenzi's parents made the substitution request possible and the assertion that Kuenzi's father had previously obstructed police when they attempted to make contact with Kuenzi. The circuit court expressed its understanding that Kuenzi's father lied to the police about Kuenzi being home when the police went there looking for Kuenzi. The circuit court also pointed to information indicating that Kuenzi's aunt attempted to insert herself into the investigation under false pretenses. We understand the circuit court to have taken the position that the Kuenzi family was inclined to obstruct the proceedings and might use its purse-string power to cause problems moving forward.

¶57 It may be that the circuit court was in a superior position to assess this situation and that the court had good cause to be suspicious. However, we need not resolve the dispute between Kuenzi and the State on this topic. For purposes of this decision, we will assume that Kuenzi's parents' $25,000 payment to Attorney Schnick was not part of an effort to cause delay.

¶58 Similarly, we will assume, for purposes of this decision, that there is a lack of information indicating that Kuenzi himself wanted to switch attorneys in order to delay the trial. We acknowledge that Kuenzi and his family waited until

about a month before trial to start exploring alternative representation, but this timing also coincides with the undisputed conflict between Kuenzi and his public defenders over whether he should accept a plea agreement that the public defenders had negotiated on Kuenzi's behalf.

¶59 We turn to whether Kuenzi had a "legitimate reason" for wanting Attorney Schnick to replace his public defenders.

¶60 The ***Prineas*** test makes clear that weight must be given to a defendant's choice when it comes to privately retained counsel. ***Prineas***, 316 Wis. 2d 414, ¶¶14-15. And, we have already given weight to Kuenzi's preference for Attorney Schnick. But that does not address whether Kuenzi had a legitimate reason for wanting to switch to Attorney Schnick. The record reveals no legitimate reason. That is, the record provides no indication that there was a practical benefit to Kuenzi.

¶61 It was undisputed that Kuenzi became interested in Attorney Schnick because of a recommendation by a jail cell mate. Attorney Schnick acknowledged as much. Beyond that, we have nothing.

¶62 We have already explained that there is nothing to back up general assertions of lost confidence or lack of communication. And, there is nothing in the record to indicate why Attorney Schnick might have provided a better defense. For example, there is nothing indicating that the public defenders refused to pursue leads or a line of defense that Kuenzi desired and nothing indicating that Attorney Schnick had special expertise or brought something else to the table that the public defenders lacked.

¶63 Accordingly, while we will assume that the substitution request was not part of an effort at delay for delay sake, we also find nothing to support the conclusion that Kuenzi had a "legitimate reason" for wanting Attorney Schnick to substitute in, as that term is used in this factor.

i. Summary Of Factors

¶64 The factors that favor permitting substitution:

Kuenzi's preference for Attorney Schnick: Kuenzi's preference for Attorney Schnick creates a presumption that the court should allow substitution unless the presumption is offset by other factors.

Prior continuances: There had been no prior continuances.

¶65 The factors that favor denying substitution:

Length of delay: There was nothing approaching certainty as to the requested delay, and there was good reason to think that Attorney Schnick would need substantially more time than 60 days.

Existing counsel competent and prepared: The public defenders were competent counsel and, so far as the record discloses, the circuit court had no concrete reason to doubt that they would be prepared to try the case.

Communication breakdown: Contrary to Kuenzi's assertion, there was no evidence supporting the notion that he had a communication breakdown with his public defenders.

Kuenzi's ability to fund his defense: Even assuming that Kuenzi's parents fully covered other expenses, there was no reliable information showing the ability or willingness of Kuenzi's parents to pay expert witness fees. Thus, the circuit court was reasonably concerned about further delays relating to what appeared at the time to be a likely expense.

> **Inconvenience to the parties, witnesses, and the court:** For the reasons in ¶¶49-50, moving the trial date would entail significant inconvenience.
>
> **Legitimate reason or dilatory purpose:** Although we assume no dilatory purpose, we also conclude that Kuenzi presented no "legitimate reason" for wanting to substitute in Attorney Schnick. We conclude that the circuit court could have reasonably surmised that there was no reason to think that Kuenzi would benefit from substitution of counsel and, therefore, the court could reasonably think that this factor supported denying the motion.

¶66 As noted at the beginning of this section, the question is "whether the circuit court's denial of [a defendant's] motion for substitution and a continuance was arbitrary or unreasonable and therefore violated [the defendant's] constitutional rights." ***Prineas***, 316 Wis. 2d 414, ¶15. Under this standard, and in light of the facts here, we cannot say that the circuit court misused its discretion.

B. Newly Discovered Evidence

¶67 Kuenzi argues that he is entitled to a new trial based on newly discovered evidence. To receive a new trial based on newly discovered evidence, the defendant must prove that: "'(1) the evidence was discovered after conviction; (2) the defendant was not negligent in seeking the evidence; (3) the evidence is material to an issue in the case; and (4) the evidence is not merely cumulative.'" ***State v. Plude***, 2008 WI 58, ¶32, 310 Wis. 2d 28, 750 N.W.2d 42 (quoted source omitted). If the defendant satisfies these four criteria, the question becomes "whether a reasonable probability exists that had the jury heard the newly-discovered evidence, it would have had a reasonable doubt as to the defendant's guilt." ***Id.*** This reasonable-probability issue presents a question of law for de novo review. *See* ***id.***, ¶33.

¶68 Here, we assume without deciding that Kuenzi met the first four criteria. We proceed to address the final "reasonable probability" of a different result part of the test. We are confident that the result would have been the same, regardless of the newly discovered evidence. We say a bit more about this new evidence below. For the moment, it is enough to know that it relates to DNA evidence that the prosecution used against Kuenzi at trial.

¶69 As we have seen, a jury found Kuenzi guilty of two crimes, hit-and-run involving death and homicide by intoxicated use of a motor vehicle. In his newly discovered evidence argument, Kuenzi fails to differentiate between the two convictions, let alone discuss elements of the crimes and how those elements relate to the DNA evidence.

¶70 Regardless, as far as we can tell, the only arguable question here is whether the newly discovered evidence undermines the prosecution's case on the hit-and-run count. More specifically, because it is undisputed that Kuenzi's truck struck the victim and that Kuenzi left the scene without rendering assistance, the only discernible issue raised by Kuenzi is whether the newly discovered evidence undermines proof that Kuenzi knew that he struck a person.[9] As to *that* specific

[9] The jury was instructed as follows on the hit-and-run count elements:

> One, the defendant operated a vehicle involved in an accident on a highway….
>
> Two, the defendant knew that the vehicle he was operating was involved in an accident involving a person.
>
> Three, the accident resulted in death of any person.
>
> Four, the defendant did not immediately stop his vehicle at the scene of the accident and remain at the scene until he had fulfilled [certain requirements]….

(continued)

question, we lack a developed argument from Kuenzi. We affirm on that basis. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (we need not consider inadequately developed arguments).

¶71 We could stop here. Instead, however, we choose to explain why we are persuaded that the alleged newly discovered evidence would not have affected the hit-and-run verdict.[10]

¶72 Our explanation begins with a bit more background. At trial, there was substantial and mostly unchallenged evidence that Kuenzi struck the victim with Kuenzi's truck, instantly killing the victim. There was unchallenged expert testimony that several types of debris at the scene came from Kuenzi's damaged truck; that there was paint transfer from Kuenzi's truck to the victim's jacket; that damage to a brush guard on Kuenzi's truck was consistent with injuries to the victim's legs; and that the victim died almost instantly from being struck by a vehicle.

¶73 Rather, as the State points out on appeal, the only real dispute on the hit-and-run count was whether Kuenzi knew, at the time he struck the victim, that he had struck a *person*. The defense maintained that Kuenzi thought he struck a deer, and kept driving. The DNA evidence was significant because it supported

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> Five, the defendant was physically capable of complying with the requirements ….

(Paragraph breaks added.)

[10] Kuenzi sometimes appears to complain about the role that the DNA evidence played in the prosecutor's decision to bring charges. But the pertinent inquiry, as Kuenzi at other times acknowledges, focuses on the likelihood that the *jury* would reach a different result had the jury heard the newly discovered evidence. *See* ***State v. Plude***, 2008 WI 58, ¶32, 310 Wis. 2d 28, 750 N.W.2d 42. We discuss the prosecutor's charging decision no further.

other evidence that Kuenzi stopped his truck and, with a man named Klotzbuecher, who had been following Kuenzi, moved the victim's body from the roadway to a ditch. Obviously, if Kuenzi stopped and moved the body, then Kuenzi knew that he struck a person.

¶74 More specifically, the prosecution used the DNA evidence to bolster Klotzbuecher's testimony that Klotzbuecher and Kuenzi both stopped their vehicles and, together, moved the victim's body from the road to a less visible location in a ditch next to the road. Specifically, Klotzbuecher testified that he grabbed the body behind the shoulders while Kuenzi grabbed the legs, and that the two moved the body off the road to the ditch. The DNA evidence that the prosecution used to corroborate this testimony consisted of evidence that Kuenzi's DNA was a likely match for DNA on the victim's pant leg, lending considerable support to Klotzbuecher's version of events. For a number of reasons we need not go into, Klotzbuecher's testimony was suspect. Thus, the DNA evidence, bolstering Klotzbuecher's testimony, was important to support the theory that Kuenzi and Klotzbuecher, together, moved the victim's body.

¶75 Our point here is to acknowledge that the DNA evidence the jury heard strongly supported one of the ways that the prosecution hoped to prove that Kuenzi knew he struck a *person* with his truck, namely, that Kuenzi stopped his truck and helped move the person's body.

¶76 As to the newly discovered evidence, we need not go into detail. It is enough to note that the newly discovered evidence appears to cast serious doubt on the reliability of the DNA evidence that the jury heard connecting Kuenzi to the victim's body. We assume, without deciding, that a jury hearing the newly discovered evidence could not have reasonably relied on the prosecution's DNA

evidence as a reason to find Klotzbuecher's account of moving the body credible.[11] However, as we now describe, there was other strong evidence showing that Kuenzi knew he struck a person, regardless whether Kuenzi moved the body.

¶77 *Wollangk's statements to police and testimony.* The prosecution introduced prior statements and testimony from a man named Wollangk, who was driving a vehicle some unspecified distance ahead of Kuenzi's truck. Wollangk met with police two days after the incident, and wrote out and signed a statement. In this statement, Wollangk asserted that Wollangk, Kuenzi, "Wally" Engel, and Klotzbuecher were at a party and decided to leave the party around the same time. Wollangk stated that he left first, driving in his vehicle alone, and that he called Engel, who was a passenger in Kuenzi's truck, for directions. Significantly, Wollangk made the following assertions about the call:

> When I called Wally he said something about hitting a dude. My reaction was holy shit. I then continued home. I didn't think that they had killed the guy. Maybe just injured him. I didn't think it was that big of a deal. I asked who he had hit. I don't recall if [Engel] said a name or not.

[11] As we understand Kuenzi's argument, he asserts one or both of two things: (1) there is a reasonable likelihood of a different result *if the jury had heard the newly discovered evidence* because the jury then could not have reasonably relied on the State's DNA evidence to bolster Klotzbuecher's credibility, and (2) there is a reasonable likelihood of a different result if the prosecution's DNA evidence *had been excluded*, as it should have been, because of the newly discovered evidence. The circuit court assumed that Kuenzi was making the latter argument, and Kuenzi does not complain about that approach. We need not decide which is the better approach because the result is the same under either. For purposes of this decision, we speak in terms of the first approach and address whether the result would have been different if the jury had heard the newly discovered evidence because that is consistent with the newly discovered evidence test as stated in ***Plude***, 310 Wis. 2d 28. *See* ***id.***, ¶32 (framing the test as "whether a reasonable probability exists that had the jury heard the newly-discovered evidence, it would have had a reasonable doubt as to the defendant's guilt").

Thus, Wollangk's initial statement was highly incriminating of Kuenzi, both because it showed a clear, contemporaneous admission by Engel that Kuenzi struck a person, prompting a "holy shit" reaction from Wollangk, and because the ensuing exchange during the call showed that Wollangk had not misheard or misunderstood that Engel said something about "hitting a dude," as opposed to a deer. That is, if Wollangk had misheard or misunderstood, then when Wollangk followed up by asking Engel "*who* [Kuenzi] had hit" (emphasis added), Engel would have immediately clarified that it was not a "who" but a deer. Instead, Wollangk's statement asserted only that he could not recall if Engel responded with a name or not.

¶78 A subsequent statement to police and trial testimony by Wollangk might, at first, appear to cast doubt on the highly incriminating assertions in Wollangk's initial statement. Specifically, Wollangk made a subsequent statement several days later claiming that "Wally told [me] on that night that [they] had hit a deer and not a person." At trial, Wollangk flip-flopped back and forth in his testimony as to whether he stood by his initial statement or his subsequent statement. But what was uncontested at trial was that Wollangk made his second statement to police only after talking again with Engel. Indeed, in front of the jury, Wollangk agreed that the reason he changed his account to police was to conform that account with what Engel told him in that subsequent conversation; that is, Wollangk agreed that the reason he changed his account was because Engel claimed to Wollangk in that subsequent conversation that, during the phone call on the night of the incident, Engel had said "deer" instead of "dude."

¶79 It seems clear from Wollangk's testimony as a whole that one obvious explanation for Wollangk's changed statement was not any change in

Wollangk's memory, but rather his interim conversation with Engel. And Engel's self-interest would have been obvious to the jury.

¶80 Also important here is the fact that the defense never provided a plausible explanation for why Wollangk would have been mistaken or lied in his initial statement. In the end, the obvious inference was that Wollangk's initial incriminating assertions were true and that his changed statement was an effort to help his friend, Engel.[12]

¶81 Wollangk's initial statement incriminated Kuenzi for a second reason. Wollangk asserted in that statement that he had "seen somebody walking on the side of the road wearing a blue jacket." The plain inference was that, if Wollangk could see a person walking on the side of the road, including the color of the person's jacket, Kuenzi and Engel would have seen that Kuenzi hit a person, not a deer or some other animal. During trial, Wollangk more specifically asserted that the person in the blue jacket he saw was on a different road further away from where Kuenzi struck the victim. This obvious attempt at undoing an incriminating statement would have had the net effect of further undercutting Wollangk's

[12] The defense attempted to suggest that, when giving his initial statement to police, Wollangk was worn down by a long interview and only told police what they wanted to hear. Wollangk testified that the interview lasted 3 or 4 hours and that he told the police what he "felt … they wanted to hear." Although Kuenzi's briefing does not rely on this testimony, we have independently considered whether this is a plausible explanation for Wollangk's initial statement. We conclude that there is nothing in Wollangk's testimony to support the notion that police indicated that they wanted to hear Wollangk say that Engel admitted in the phone call that a person was hit. Wollangk said no more in his testimony than what we summarize above. Wollangk did not suggest why, even if the interview was relatively long, he would have agreed to make a statement that was not true, nor did Wollangk provide details as to how he would have known what the police "wanted to hear." Further, it was unlikely that police would have told Wollangk to include colloquial, specific assertions, such as Engel saying that Kuenzi hit a "dude" and Wollangk reacting by thinking or saying "holy shit." Finally, nothing in Wollangk's testimony suggested that he had anything to gain by giving a false initial statement.

attempt to back away from his "dude" statement and, thus, further incriminated Kuenzi. The reason is simple. To believe this "clarification," one would have to suppose that there was, at 3:45 a.m. in this rural area, a *second* person walking along a nearby road who just happened to also be wearing a blue jacket. Having carefully reviewed the trial testimony, it is readily apparent that the jury would have seen this second-person-in-blue-jacket clarification as further support for the view that Wollangk's first account was true and his subsequent changes and additions were not credible.

¶82 *Photographic evidence of damage to Kuenzi's truck.* The prosecution introduced photographic images showing damage to Kuenzi's truck. Among other damage, these images depicted a large, deep dent centered on the passenger-side half of the truck's hood. Kuenzi did not dispute that this damage occurred as a result of the victim striking the hood. Based on the depth of the indentation, the obvious inference, even without expert testimony, was that Kuenzi's truck hit the victim head-on and that the victim landed with substantial downward force on the truck hood and was carried for a distance on that hood. That is, the strong inference presented by the photographs is that the victim's body did not hit the hood with a glancing blow that would be consistent with immediately passing up and over the top of the truck or otherwise immediately being propelled away from the hood. Rather the photos, along with evidence we summarize next, supported the inference that the victim was carried on the hood of the truck which, in turn, strongly supported the further inference that Kuenzi and Engel saw the victim while he was on the hood.

¶83 *Andraschko Expert Testimony.* The prosecution introduced the expert testimony of Mark Andraschko, a state trooper who worked for the State Patrol's technical reconstruction unit. Andraschko had experience conducting

hundreds of accident reconstructions, and he conducted a reconstruction in Kuenzi's case. Andraschko determined that the distance between the point where the victim's body was found and the point of initial impact with Kuenzi's truck was approximately 136 feet.[13] Significantly, Andraschko explained that the victim lacked the "road rash," abrasions, or grass stains to be expected if the victim was propelled forward by the collision. Andraschko opined that an explanation for the lack of abrasions was that the victim's body traveled some distance on the hood of Kuenzi's truck and only hit the ground when the truck came to a stop. Andraschko made clear his opinion that, if the body had been propelled forward as a result of the impact instead of remaining on the hood, there would be "road rash" and abrasions. These parts of Andraschko's testimony stood unchallenged by the defense.

¶84 Thus, the jury was left with unchallenged evidence strongly supporting the finding that the victim not only landed on Kuenzi's hood, but also remained there in obvious view for at least a brief time as the truck either continued to travel or came to a stop.

¶85 *Sobek Expert Testimony.* The prosecutor introduced lengthy testimony from another expert, James Sobek, an "accident reconstructionist" who

[13] We note that there was no suggestion that the victim's body, if carried into the ditch by Kuenzi and Klotzbuecher, was carried more than a very short distance perpendicular to the road. That is, there was no suggestion that any significant portion of the 136-foot distance was due to someone carrying the victim's body.

We also note that Andraschko gave testimony we do not describe that supported the prosecution theory that Kuenzi and Klotzbuecher immediately stopped their vehicles and carried the victim's body into the ditch. As already explained in the text, there was other strong evidence showing that Kuenzi knew he struck a person that did not depend on the jury believing that Kuenzi moved the body with Klotzbuecher.

ran a simulation of the visibility conditions at the time Kuenzi struck the victim. Sobek described in detail the simulation and principles of visibility and light reflection. The simulation included Andraschko's estimate of Kuenzi's vehicle's speed, between 44 and 49 m.p.h.; wetting down the road; using the actual headlights from Kuenzi's truck; and dressing a mannequin with some of the victim's clothing. Sobek formed an opinion that the victim would have been "noticeable" to Kuenzi and Engel for over ten seconds before impact, and "conspicuous" for over seven seconds before impact.[14] Sobek noted that yellow material on the shoulder area of the victim's jacket was "45 to 55% reflective" and that this yellow area created a high contrast with blue and black areas on the jacket; that the reflectivity of light onto a pedestrian on the road in question would have been *higher* when wet than dry; and that there were two street lights near the location where Kuenzi struck the victim.

¶86 The defense did not seriously challenge Sobek's testimony, other than to suggest that Sobek had not taken into account foggy conditions. However, Kuenzi points to no evidence of heavy fog of a type that would have affected the bottom line of Sobek's opinion that the victim would have been highly noticeable to drivers for some period of time before impact, an opinion, we note, that was consistent with Wollangk's statement that he saw someone in a blue jacket walking along the side of the road. Even Engel, who testified that conditions were foggy, ultimately admitted that "you could see" and that visibility was adequate to drive at or near the posted speed limit.[15]

[14] Sobek used a scale with four levels of visibility, ranging from lowest to highest as follows: "invisible," "visible," "noticeable," and "conspicuous."

[15] Sobek testified that the posted speed limit was 45 m.p.h.

¶87 Moreover, the defense theory did not simply depend on the assertion that visibility conditions were poor but also on a highly implausible confluence of other events, including all of the following:

- that, even though Wollangk had seen a person walking along the side of the road, and seen him clearly enough to notice that he was wearing a blue jacket, Kuenzi, Engel, and Klotzbuecher never saw the person;
- that Kuenzi and Engel did not see the person as they approached because they were continuously distracted from the roadway ahead by Klotzbuecher's attempt to race or pass Kuenzi's truck;
- that Kuenzi and Engel both happened to remain distracted at the moment that Kuenzi struck the victim with the brush guard on the front of Kuenzi's truck;
- that, when the victim landed on Kuenzi's hood, and likely remained there for at least a few moments, Kuenzi and Engel were both still somehow unable to discern that Kuenzi had struck a person;
- that, despite having struck a large object they supposedly never saw or never saw clearly enough to identify, Kuenzi and Engel assumed that the object was a deer and did not stop to find out what Kuenzi struck or to assess the damage to Kuenzi's truck; and
- that Klotzbuecher's vehicle was positioned at the time of impact in just the right place so that he too did not see that Kuenzi had struck a person. That is, Klotzbuecher was not directly behind Kuenzi because then he would have been looking forward and likely would have seen what Kuenzi had hit, and also was not alongside Kuenzi to the left because from there he again would have been looking forward or toward Kuenzi and would have seen the victim.

¶88 In sum, we are confident that, even without the DNA evidence, that is, even without the evidence that Kuenzi moved the victim's body off the road to a ditch, the jury would have found that Kuenzi knew he struck a person. To repeat, the prosecution did not need to prove that Kuenzi moved the victim's body; it was enough to prove that Kuenzi knew that he struck a person and left the scene

without rendering assistance. And, the prosecution elicited ample evidence, apart from Klotzbuecher's testimony and the DNA evidence, to prove Kuenzi's knowledge. Accordingly, Kuenzi's newly discovered evidence claim fails.[16]

Conclusion

¶89 For the reasons above, we affirm the circuit court's order addressing Kuenzi's contention that he was denied counsel of his choosing, and also affirm the court's order denying Kuenzi a new trial based on newly discovered evidence.

By the Court.—Orders affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2013-14).

[16] Kuenzi requests that we exercise our discretionary reversal power, but Kuenzi's argument on this topic does not add to his other arguments that we have already rejected. We thus deny his request. *See* ***State v. McKellips***, 2016 WI 51, ¶52, 369 Wis. 2d 437, 881 N.W.2d 258 (explaining that our supreme court has "consistently held that the discretionary reversal statute should be used only in *exceptional* cases").