COURT OF APPEALS
DECISION
DATED AND FILED

July 18, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP791-CR **Cir. Ct. No. 2012-CF-1134**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ALPHONSO LAMONT WILLIS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and orders of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed in part; reversed in part and cause remanded for further proceedings.*

Before Brennan, P.J., Kessler and Dugan, JJ.

¶1 DUGAN, J. Alphonso Lamont Willis appeals the judgment convicting him of first-degree intentional homicide as party to a crime while armed with a dangerous weapon and being a felon in possession of a firearm. He also appeals the trial court's orders denying his postconviction motions.

¶2 The issues before this court involve boot print evidence and the time of death of the victim. Willis raises four arguments in claiming that trial counsel was ineffective based on trial counsel's failure to: (1) object during the prosecutor's opening and closing arguments; (2) object during a detective's trial testimony regarding Willis's boots; (3) obtain an expert to rebut the State's boot print evidence; and (4) introduce evidence of the victim's time of death which, coupled with the testimony of a disinterested witness, would have challenged the State's assertion that Willis killed the victim. Willis also contends that a new trial is required in the interest of justice for two reasons: (1) his boots were improperly admitted into evidence; and (2) the prosecutor's opening and closing argument improperly suggested a match between the boot prints and his boots. Alternatively, Willis argues that forensic evidence from a "boot expert" that he offered with his postconviction motion is newly-discovered evidence warranting a new trial. Additionally, Willis argues that the trial court failed to adequately explain its sentence and the trial court violated his right to due process by informing the jury that he was a felon.

¶3 We affirm the trial court's orders with respect to Willis's arguments regarding (1) ineffective assistance of counsel in failing to object to the admission of the boot evidence and the State's argument about them in opening and closing, (2) a new trial in the interest of justice, (3) a new trial based on newly-discovered evidence, (4) sentencing, and (5) the reference to Willis as having been convicted of a felony. However, we reverse and remand for a ***Machner*** hearing[1] on whether trial counsel was ineffective with respect to the failure to (1) obtain a witness to

[1] ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

rebut the State's boot print evidence, and (2) introduce evidence regarding the time of the victim's death. For these reasons we remand to the trial court for further proceedings consistent with this decision.

BACKGROUND

¶4 At about 7:58 p.m. on March 2, 2012, police received a 911 call stating, "[t]here's a lady been shot and killed." Susan Hassel, the woman who was killed, lived in a second floor apartment at 2315 West Scott Street in Milwaukee. Officers later determined Hassel's phone records showed outgoing phone calls on her cell phone at 7:51 and 7:55 p.m. that night.

¶5 On March 9, 2012, Willis was charged with first-degree intentional homicide as a party to the crime by the use of a dangerous weapon and of being a felon in possession of a firearm. Earnest Jackson, his nephew, was charged with felony murder-armed burglary. The criminal complaint alleged that "[w]hen [Willis] was arrested he was wearing shoes which matched the prints on one set of the footprints" observed outside Hassel's apartment.

¶6 Prior to trial, Willis stipulated to his status as a felon and requested that the trial court read the charge as possession of a firearm by a "prohibited person" rather than possession of a firearm by a felon. The State objected, citing "confusion," and the trial court denied Willis's motion.

¶7 During the jury trial, evidence regarding the boot prints was significant to the State's case. In his opening statement, the prosecutor told the jurors:

> You will hear from officers who went to the scene and what they observed at the scene including the fact that the people who had left, [Willis] and Earnest Jackson left foot

> prints in the snow as they walked away. And that when … Willis was arrested that he had in his possession boots. *And you will be able to look at the boots and look at the footprints left in the snow and the footprints left in the snow that were photographed and measured by the police which you will see photographs of those, matched the boots from … Will*[]*is*.

(Emphasis added.)

¶8 Detective Matthew Goldberg testified that when he arrived at the scene there was no sign of a forced entry, Hassel's body was on the couch, and she was dead when medical personnel arrived. She had been shot in the face and right wrist. Her cell phone was still in her hands.

¶9 Steven Williams, the State's next witness, testified that he had been staying with Hassel. He said that on March 2, he and two other men went to Hassel's apartment between 3:30 and 4:00 p.m. to smoke crack cocaine and marijuana with her. At approximately 6:00 p.m., he went back across the hall to his cousin Ralph's apartment where he continued drinking. Other family members including Williams's uncle, Norman Wilkens, were in Ralph's apartment at that time.

¶10 Williams testified that at some point, he heard a gunshot, got up, went to the door, opened it, and saw "another guy and [Willis] come out the door [of Hassel's apartment]." Williams testified that when he looked at them he saw that Willis was trying to hide a grey or black "long nose" revolver with "smoke coming out of it." He said the other man and Willis exited the apartment and went down the stairs. Williams also testified that previously he had seen Willis in the building and in Hassel's apartment and that he knew of him.

¶11 Williams said he went into Hassel's apartment and he saw Hassel dead on the couch. He collected his possessions and left the apartment building without calling 911 because he was scared. Wilkens called 911. Williams admitted to lying to the police regarding the homicide on several occasions. He also testified that, although he was high on crack cocaine that night, it made him more alert.

¶12 Trina Jagiello testified that at 7:30 p.m. on March 2, she went outside her house at 1230 South 23rd Street to shovel snow. She was emphatic that 7:30 p.m. was not an estimate. Jagiello's house is approximately one-half block east and one-half block south of Hassel's apartment. Jagiello said she was shoveling in her backyard for ten to fifteen minutes when someone approached and said, "it's Phonso, is Larry in the house?" Jagiello said Willis was with another black male, but she could not further describe that person.

¶13 Jagiello said that, after asking if Larry Durrah was home, Willis and the other male walked up to the back porch of her house, waited "[m]aybe five or six minutes," then walked off the porch and headed south through the alley. After she finished shoveling between either "a little after [eight] or a little before [eight]," Jagiello walked to a store at 22nd and Scott.

¶14 Officer Michael Hansen testified he was dispatched to the shooting at about 8:02 p.m. and arrived relatively quickly because he was in the area. After he arrived, Hansen saw two separate sets of impressions (one made by shoes, the other by boots) in the freshly-fallen snow on the east side of Hassel's apartment building. Hansen followed the impressions south until the boot impressions stopped in front of Jagiello's house. When Hansen arrived at Jagiello's house, he was met out front by a woman who was shoveling snow. After Hansen tracked the

impressions, he went back to the scene and placed a bucket over the boot and shoe impressions.

¶15 Jackson stated that, when they got to the building, they walked in the unlocked common door and Willis walked up the stairs with Jackson following. Jackson said that at the top of the stairs Willis knocked on a door, a woman opened the door a crack and Willis pushed the door open and told Jackson to come inside. As he entered the woman was sitting on a couch and Willis told Jackson to go sit on the coffee table.

¶16 Jackson testified Willis asked the woman why she was "playing" him and asked her about twenty dollars she owed him. Jackson testified that Willis started yelling and the woman twice said that she would get his money. Then Willis pulled a gun out of his jacket and said, "watch this." Jackson then said the woman raised her hand above her face and was leaning backwards, Jackson looked down, then he heard "a ringing noise," "a little buzzing, ringing noise." Jackson testified he then saw the woman "laying backwards," slumped to the side with a red mark on her cheek.

¶17 Jackson testified that he and Willis left the apartment and as they were leaving he saw a tall bald black man come out of the adjacent second floor apartment and look at Willis. Jackson just continued to walk down the stairs and Willis followed him out the front door. After exiting the building, Willis said, "[c]ome on, we [are] going around the back." With Willis in the lead they walked side-by-side to the back of the building into the parking lot and crossed the street. Jackson said he and Willis walked to the backyard of a house on 23rd Street where Willis stopped to talk to a woman shoveling snow, and then they continued walking south down the alley. They went into a gas station behind the school

where Willis bought bus tickets. Jackson saw Willis get onto a bus and the two of them parted ways without discussing what happened in the apartment.

¶18 Detective Robert Rehbein testified that Willis was wearing black leather boots when Willis was arrested on March 6, 2012. Through Rehbein and Hansen, the State introduced over twenty exhibits pertaining to Willis's boots and the route of the boot and shoe impressions including: photos of shoe and boot impressions next to Hassel's apartment building; close up photos of the boot impression in the snow; a Google map on which Hansen drew the route of the impressions; the inventory sheet of Willis's boots and the actual boots Willis was wearing when he was arrested; photographs of the soles of the boots Willis was wearing when he was arrested; and a photo of Willis's boots size and style.

¶19 Prior to closing arguments, the parties stipulated that (1) Willis was a felon, (2) many items in Hassel's apartment were subjected to fingerprint analysis including a match box cover, a cigarette box, beer cans, glasses, cups, and a bottle, and (3) none of those items found in Hassel's apartment matched to Willis or Jackson.

¶20 In closing, the prosecutor argued that Willis's boot prints matched the boot prints in the snow:

> When [Willis] is arrested he's wearing boots. And you can look at the pictures of those boots, you can look at the boots. Like I said, because the footprints in the snow aren't the best and they are melting, I don't expect anyone to become an expert and look at them, but I think a layperson can say, "[l]ook, these are the same type of boots, same size of boots." What a coincidence that the boot prints that are running from the scene are those same boots that are being worn by … Willis—

Defense counsel interjected, "I object." The prosecutor completed his statement saying, "days later." The trial court overruled the objection stating that "[t]he jury can use their collective memory as to what they heard." In rebuttal, without objection, the prosecutor again stated: "[w]hen [Willis] is arrested he is wearing shoes with the same types of soles as are in the boot footprints. These are not coincidences, these are facts that you have."

¶21 During deliberations, the jury asked to see "[b]oots, pictures of bootprints, right and left, Google maps, direction of the footprints. Back porch [of Jagiello's house] picture." Those items were provided to the jury without objection, after which the jury returned verdicts finding Willis guilty of both counts.

¶22 Willis was sentenced on April 5, 2013. The State recommended a life sentence with eligibility for release on extended supervision after serving forty-five years in prison. The defense recommended consideration for release to extended supervision after serving twenty-five years in prison. The court sentenced Willis to life imprisonment consecutive to the sentence that he was currently serving, with eligibility for release on extended supervision after forty-five years in prison. The court also sentenced Willis to ten years for being a felon in possession of a firearm, comprised of five years of initial confinement, and five years of extended supervision, concurrent with the sentence on count one.

¶23 On March 26, 2015, Willis filed a postconviction motion. The trial court denied the motion without a hearing. On December 9, 2015, Willis filed a supplemental postconviction motion. The trial court denied that motion without a hearing. This appeal followed.

DISCUSSION

I. Willis Presented Sufficient Facts, Including a Forensic Opinion About the Boot Prints and Time of Death, to Entitle him to a *Machner* Hearing—But not to Entitle Willis to a *Machner* Hearing on the Admissibility of the Boot Print Evidence or the State's Arguments About that Evidence.

¶24 Willis sought hearings on his original and supplemental postconviction motions alleging ineffective assistance of counsel. However, a defendant's claim that counsel provided ineffective assistance does not automatically trigger a right to an evidentiary hearing. ***State v. Allen***, 2004 WI 106, ¶10, 274 Wis. 2d 568, 682 N.W.2d 433. A trial court may deny a postconviction motion without a hearing "if the motion does not raise facts sufficient to entitle the movant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief." ***Id.***, ¶9. Whether a motion alleges sufficient facts that, if true, would entitle the defendant to an evidentiary hearing presents a question of law that we review *de novo*. *See* ***State v. Bentley***, 201 Wis. 2d 303, 310, 548 N.W.2d 50 (1996). In determining whether Willis is entitled to an evidentiary hearing, we accept as true the facts alleged in the postconviction motion. *See* ***id.*** at 309.

¶25 The question is whether Willis has alleged facts which, if true, would entitle him to an evidentiary hearing. *See* ***id.*** at 310. Willis claims that trial counsel was ineffective in failing to do the following: (1) object to the prosecutor's statements about the boots during opening and closing argument; (2) object to testimony about the boot prints; (3) obtain an expert to show that the boot prints do not match; and (4) introduce evidence of the time of death in relation to calls on the victim's phone. We conclude that Willis's motions were sufficient to

warrant an evidentiary hearing on issues (3) and (4), but not on issues (1) and (2) because we find that the boot print evidence is relevant and admissible.

¶26 Additionally, Willis independently argues that because the boot prints were improperly admitted into evidence, he is entitled to a new trial. However, because trial counsel did not object to the admission of the boot prints, Willis waived his right to appeal this issue. *See* ***State v. Nielsen***, 2001 WI App 192, ¶11, 247 Wis. 2d 466, 634 N.W.2d 325. Moreover, Willis did not respond to the State's contention that, by failing to object to the admission of the boots, he waived any objection to their admissibility. Therefore, Willis has conceded the issue. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp***., 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments are deemed conceded).

¶27 Because Willis did not object to the admission of the boot print evidence, did not obtain an expert to analyze the footwear impressions, and did not present any evidence regarding the time of Hassel's death, this court considers these issues under the United States Supreme Court's two-pronged ***Strickland*** [***v. Washington***, 466 U.S. 668 (1984)] test for analysis of ineffective assistance of counsel claims adopted by Wisconsin. *See* ***State v. Williams***, 2015 WI 75, ¶74, 364 Wis. 2d 126, 867 N.W.2d 736, *cert. denied*, 136 S. Ct. 1451 (2016).

A. Willis's Evidence Regarding the Forensic Evidence Regarding the Boot Prints is Sufficient to Warrant a *Machner* Hearing.

¶28 As noted earlier, in determining whether Willis is entitled to an evidentiary hearing, we accept as true the facts alleged in his postconviction motion. *See* ***Bentley***, 201 Wis. 2d at 309. In his supplemental postconviction motion, Willis proffered the opinion of Williams L. Streeter, an experienced

forensic analyst, who compared photos of the snow impressions with photographs of Willis's boots and concluded that "the suspect shoe did not produce the snow impressions." Streeter also explained that this "particular outsole pattern" of "lugs and stars" on the boots seized from Willis is "very common" and "is [reportedly] used by more than a thousand manufacturers in their footwear products." Streeter also stated that once Willis's footwear was obtained, the footwear and the photographs of the snow impressions should have been submitted to a forensic laboratory for comparison purposes.

¶29 This court considers, *de novo*, whether Willis's motion alleges sufficient facts that, if true, would entitle Willis to an evidentiary hearing. *See* ***Allen***, 274 Wis. 2d 568, ¶9. While the trial court concluded that very little evidence was offered at trial about the boots, Willis argues otherwise and we agree.

¶30 Willis points out that the State highlighted the importance of the boot print evidence in its opening statement: "[a]nd you will be able to look at the boots and look at the footprints left in the snow and the footprints left in the snow that were photographed and measured by the police which you will see photographs of those, matched the boots from … Will[]is." Willis then notes that during the evidentiary portion of trial, the State presented no testimony, witness or otherwise, that the boots Willis was wearing when arrested matched the boot impressions outside Hassel's apartment.

¶31 Additionally, he points out that Hansen testified about tracking the impressions leading away from Hassel's apartment—one set made by shoes, the other made by boots. Willis further notes that Rehbein testified that Willis was wearing black leather boots when he was arrested, which were taken from him and

inventoried. Through Rehbein, the State was able to have photographs of the soles of Willis's left and right boots admitted into evidence. Willis also notes that during the trial over twenty exhibits relating to the snow impressions, their route, and Willis's boots were admitted.

¶32 Willis further argues that despite having not introduced any direct evidence, testimony, or an expert opinion that his boots actually made the boot impressions, the State argued in its closing argument that Willis's boots made the impression in the snow. The prosecutor argued, "I think a layperson can say, [l]ook, these are the same type of boots, same size of boots. What a coincidence that the boot prints that are running from the scene are those same boots that are being worn by … Willis— … days later." In its rebuttal argument, the State reiterated the idea stating, "[w]hen [Willis] is arrested he is wearing shoes with the same types of soles as are in the boot footprints."

¶33 Willis argues that the jury's determination of guilt likely hinged on the boot evidence. He points to the fact that during its deliberations the jury requested that the "[b]oots, pictures of bootprints, right and left, Google maps, direction of the footprints. Back porch [of Jagiello's house] picture," be provided to them. The jury reached its guilty verdicts shortly after receiving those exhibits.

¶34 Additionally, Willis argues that the importance of the boot evidence was great because the other evidence against him was hardly overwhelming. There was no physical evidence tying him to the crime scene, no gun was recovered, Willis did not confess, and the State's primary witnesses, Williams and Jackson, were inconsistent and had lied to the police.

¶35 Streeter's opinion, taken as true for purposes of evaluating whether Willis has presented sufficient material facts to require a ***Machner*** hearing,

supports Willis's argument that the boot print evidence was not conclusive and given the emphasis that the State placed upon it at trial, Streeter's opinion may have changed the result. *See* ***Bentley***, 201 Wis. 2d at 310.

¶36 In response, the State argues that the photos show that the prints from Willis's boots and print impressions are about the same size and shape, but acknowledges there are differences in the "lugs or ridges." From this, the State argues that you have "to take into account that the impression was made by a moving boot in freshly fallen snow with snow continuing to fall over the impression." The State goes on to argue a host of possible explanations for the differences in Willis's boot print and the impression including that it is possible that there was another star on the impression but it could have been cloaked by the snow.

¶37 The State also argues that Streeter or any other expert would not have been allowed to testify about whether the boot print and the impression matched because the jurors could have looked at the print and the impression and made their own decision whether they matched. The State asserts that whether impressions left at the scene of a crime match a suspect's footwear is within the common knowledge and experience of the average juror. Moreover, the State argues that all Streeter did in formulating his opinion was look at the boot tread and impression in the snow and "[t]hat is something anyone could do."

¶38 We reject the State's proposition that footwear identification not only does not require expert testimony, but more so, that expert testimony is never permitted. As Willis points out, this argument calls into question why the

Wisconsin State Crime Lab's Footwear Identification Unit exists. Moreover, a lay witness is permitted to express opinions pursuant to WIS. STAT. § 907.01.[2]

¶39 Willis's postconviction motion meets "the five 'w's' and one 'h'" test; "that is, who, what, where, when, why, and how" as explained in ***Allen***, 274 Wis. 2d 568, ¶23. A motion provides "sufficient material facts," if it provides the name of the witness (the who), the reason the witness is important (the why and the how), and facts that can be proven (the what, where and when). *See* ***id.***, ¶24. The ***Allen*** test is satisfied as follows: (1) the who is Streeter; (2) the what, where, and when are that Willis's boot print and the impression obtained at the time and place of the incident do not match; and (3) the why and the how is that Streeter's opinion could have been used to establish that Willis's boots do not match the boot impression. *See* ***id.***

¶40 With respect to the boot evidence, Willis has alleged sufficient facts to warrant a ***Machner*** hearing.

B. Willis's Evidence Regarding the Time of Death is Sufficient to Warrant a *Machner* Hearing.

¶41 Willis's original postconviction motion asserted that trial counsel was ineffective in not introducing evidence of Hassel's time of death. That motion identified evidence described in two police reports that could be used to establish Hassel's time of death, including cell phone records showing outgoing calls from Hassel's phone at 7:51 p.m. and 7:55 p.m. and the 911 call at 7:58 p.m.

[2] We are not deciding whether Streeter should be allowed to testify as either an expert or lay witness—that is an evidentiary ruling left to the discretion of the trial court to be addressed on remand at the ***Machner*** hearing.

¶42 Willis argues that no evidence regarding the time of Hassel's death was introduced at trial. He asserts that the following demonstrates that he was not present when Hassel was killed: (1) Jagiello testified that she encountered Willis between 7:40 and 7:45 p.m.; (2) after talking with her for a period of time, Willis and Jackson went to her back door; (3) after five or six minutes, Willis walked away with Jackson; (4) after Willis left, Jagiello finished shoveling, went to the store, and upon leaving, heard the sirens at 8:02 p.m.; (5) there were outgoing calls on Hassel's cell phone that was found in her hand at 7:51 p.m. and 7:55 p.m.; and (6) the 911 call was made at 7:58 p.m.

¶43 In response, the State argues that the phone calls are not relevant to the time of death. It points out that Willis assumes that the 911 call was made immediately at the time of the shooting, but testimony shows that Williams took time to gather his things from Hassel's apartment and it was Williams's uncle, Wilkens, who made the 911 call. The State asserts that, "[s]o it is likely that the caller [Wilkens], waited at least until after [Williams] had collected his things and left the building before finally deciding to call the police."

¶44 Regarding the outgoing cell phone calls made at 7:51 p.m. and 7:55 p.m., the State argues that because Hassel was found clutching the cell phone in her hand, that those outgoing calls could have been the result of cadaveric spasm. The State explains that such spasms may occur "where a person who is dead or dying, although otherwise limp, clutches an object, like a cellphone, in their hand." The State maintains that in his testimony, Dr. Brian Peterson, the Milwaukee County Medical Examiner, said that cadaveric spasm "is seen most often in drowning cases, and that, although [Hassel] was shot, the bullet ripped open vessels in her neck causing her to drown in her own blood." The State then goes on to assert that "[t]hus, it is possible that [Hassel] made the calls at 7:51 and

7:55, but did so spasmodically an appreciable amount of time after she had been shot."

¶45 However, Dr. Peterson never expressed any opinion about whether Hassel could have made those phone calls. He was merely asked to explain how it was possible that Hassel was found clutching her cell phone. He testified:

> There's a phenomenon, there's some debate about it in forensic circles but it's called cadaveric spasm. You tend to see it or I've seen it … in drowning cases where perhaps somebody's whole body is limp but in one hand there's seaweed. It could easily be what we're seeing there … Theoretically anyway, it has to do with emotional state at the time of death, what kind of hormones are circulating, whatever. But it's the kind of thing you'll see in textbooks. Again a picture is not really helpful because you can't tell what the rigor mortis is like in the rest of her body but you sure can tell that she's got that phone grasped in her hand, so that's how I'd interpret it.

¶46 The State then goes on to argue that there is some evidence that Hassel was shot before 7:40 p.m. The State points out that Hassel's phone records show that "she placed a brief call to 'Steve,' perhaps Steven Williams, at 7:33 p.m., and another brief call to 'Jerry' at 7:36 p.m." The State surmises that "[i]t is plausible that [Hassel] placed these calls trying to summon help as she was being confronted by Willis." When asked how long it took Hassel to die, Dr. Peterson said, "I can't say specifically … but whether that would take 30 seconds, 45 seconds, 60 seconds, there's no way to say scientifically." This testimony does not support the State's argument that Hassel could have been shot before 7:40 p.m., but was still alive to make the phone calls at 7:51 p.m. and 7:55 p.m.

¶47 Willis contends that the cell phone, 911 evidence, and other evidence shows that Hassel died sometime after Willis left Jagiello and, therefore, he could not have killed her. We find that Willis's postconviction motion meets

"the five 'w's' and one 'h'" test. *See* ***Allen***, 274 Wis. 2d 568, ¶23. The ***Allen*** test is satisfied as follows: (1) the who, as indicated in the police reports, are Officer Michael Sarenac, the cell phone data analyst, and Detective Thomas J. Caspar, Jr., author of the 911 call report; (2) the what, when, and where are the times of Hassel's cell phone calls, the time of the 911 call, and Willis's whereabouts when Hassel died; and (3) the why and the how are that the information potentially could be used to establish that Willis was not present when Hassel died. *See* ***id.***, ¶24.

¶48 The question before us is whether Willis has alleged sufficient material facts which, if true, would entitle him to an evidentiary hearing on whether trial counsel's performance was deficient and whether Willis was prejudiced thereby. *See* ***id.***, ¶9. We conclude that Willis's original and supplemental motions as they pertain to the boot evidence and time of Hassel's death were sufficient to warrant an evidentiary hearing.

¶49 Based on the facts Willis presents, which we must take as true, he is entitled to an evidentiary hearing to address his ineffective assistance of counsel claim. *See* ***id.***, ¶24. To be clear, this court is neither finding that trial counsel's performance was deficient nor that Willis suffered any prejudice. We are merely finding that Willis alleged sufficient facts to entitle him to a ***Machner*** hearing.

C. Trial Counsel was not Ineffective in Not Objecting to the Boot Print Evidence or the State's Arguments about it Because the Evidence was Relevant and Admissible.

¶50 Willis asserts that based on Streeter's opinion that Willis's boots do not match the boot prints in the snow, all the boot print evidence was not relevant and, therefore, was not properly admitted. He argues that trial counsel was, therefore, ineffective in failing to object to the testimony and admissibility of all

the evidence about the boot prints and to the State's arguments that the boot prints matched.

¶51 Willis merely cites WIS. STAT. § 904.02 (2015-16)[3] and ***Bittner by Bittner v. American Honda Motor Co., Inc.***, 194 Wis. 2d 122, 147, 533 N.W.2d 476 (Ct. App. 1995), for the proposition that evidence that is not relevant is not admissible. He states, without authority, that because the boot print evidence was not admissible, he is entitled to a new trial. Willis then asserts that this error gives rise to distinct interwoven claims— a new trial in the interest of justice and ineffective assistance of counsel. We discuss the interest of justice claims in Section II.

¶52 With respect to Willis's ineffective assistance of counsel claims, this court considers these issues under the United States Supreme Court's two-pronged ***Strickland*** test for analysis of ineffective assistance of counsel adopted by Wisconsin. *See* ***Williams***, 364 Wis. 2d 126, ¶74. Arguments regarding ineffective assistance of counsel are not considered in isolation, but instead are determination based on whether "the cumulative effect undermines our confidence in the outcome of the trial." *See* ***State v. Thiel***, 2003 WI 111, ¶63, 264 Wis. 2d 571, 665 N.W.2d 305.

¶53 "To prevail under ***Strickland***, a defendant must prove that counsel's representation was both deficient and prejudicial." ***Williams***, 364 Wis. 2d 126, ¶74. "Deficient performance means that defendant's counsel's conduct 'so undermined the proper functioning of the adversarial process that the trial cannot

[3] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

be relied on as having produced a just result.'" ***Id.*** (citing ***Strickland***, 466 U.S. at 686). "Prejudice means that, but for counsel's unprofessional errors, there is a reasonable probability that the trial's outcome would have been different." ***Id.*** "A reasonable probability is 'a probability sufficient to undermine confidence in the outcome.'" ***Id.*** (citation omitted.) "'Courts may apply the deficient performance and prejudice tests in either order, and may forgo the deficient performance analysis altogether if the defendant has not shown prejudice.'" ***Id.***

¶54 Willis asserts that, based on Streeter's opinion that Willis's boots do not match the boot prints in the snow, all the boot print evidence was not relevant and, therefore, the evidence was not properly admitted. He argues that, because the boot print evidence was not relevant, trial counsel was deficient in not objecting to its admissibility and the State's arguments about the evidence. Willis's argument is solely based on his belief that Streeter's opinion is conclusive regarding the relevance and admissibility of the boot print evidence.

¶55 We disagree and find that the State's boot evidence was relevant and admissible. Therefore, trial counsel was not deficient in not objecting to admission of the boot print evidence or the State's arguments about it.

¶56 Irrespective of Streeter's opinion, the boot print evidence was relevant to show that Willis was present at the scene of the shooting. Relevance is defined in WIS. STAT. § 904.01 as: "'[r]elevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." In ***State v. Richardson,*** 210 Wis. 2d 694, 563 N.W.2d 899 (1997), our Supreme Court stated:

> The 'any tendency' standard reflects the broad definition of relevancy and the resulting low threshold for the introduction of evidence that the relevancy definition creates.
>
> The intention to broadly define relevance is illustrated by the Judicial Council note to [WIS. STAT.] § 904.02: "[t]he criterion of relevancy is whether or not the evidence adduced tends to cast any light upon the subject of the inquiry." Judicial Council Committee's Note, [WIS. STAT. §] 904.01 (quoting ***Oseman v. State***, 32 Wis. 2d 523, 526, 145 N.W.2d 766 (1966)). This court has also recognized that relevance is defined broadly. ***State v. Hungerford***, 84 Wis. 2d 236, 257, 267 N.W.2d 258 (1978), ("[t]he Judicial Council Committee's Note to [SEC.] 904.01 indicates that the rule was intended to broadly define relevancy."); ***State v. Alles***, 106 Wis. 2d 368, 381 n.4, 316 N.W.2d 378 (1982) ("[W]hile the evidence introduced at trial may not have been the most probative evidence available, it was nevertheless relevant."). Thus, there is a strong presumption that proffered evidence is relevant.

Richardson, 210 Wis. 2d at 707.

¶57 Further, in ***State v. Payano***, 2009 WI 86, 320 Wis. 2d 348, 768 N.W.2d 832, our Supreme Court explained that:

> The first consideration in assessing relevance is whether the … evidence relates to a fact or proposition that is of consequence to the determination of the action. The second consideration in assessing relevance is whether the evidence has probative value, that is, whether the … evidence has a tendency to make the consequential fact or proposition more probable or less probable than it would be without the evidence.

Id., ¶60.

¶58 The fact of consequence in this case is whether Willis was at the scene of the crime and could have killed Hassel. Secondly, the relevance of the boot print evidence is arguably that the prints are similar in size, shape and print pattern. The statute only requires "any tendency" to make the existence of any

fact of consequence more probable than it would be without the evidence. Here, under the totality of the evidence, the boot print evidence has some tendency to show that Willis was at the scene of the crime and therefore could have killed Hassel.

¶59 Because we find that the State's boot evidence was relevant and admissible we conclude that trial counsel was not deficient in not objecting to admission of the boot print evidence or the State's arguments about it.

II. Willis is not Entitled to a New Trial in the Interest of Justice.

A. Streeter's Opinion is not Analogous to DNA Evidence and Does not Render the Boot Print Evidence Inadmissible.

¶60 Citing ***State v. Hicks,*** 202 Wis. 2d 150, 171, 549 N.W.2d 435 (1996), Willis asserts that he is entitled to a new trial in the interest of justice because the jury heard evidence that was later determined to be inconsistent with the facts. He asserts that such evidence was that the boot print evidence did not match. Willis argues that based on Streeter's opinion that the prints from Willis's boots "did not produce the snow impressions," the boot print evidence was irrelevant. He then argues that the real controversy was not fully tried because the jury heard improperly admitted evidence—the boot print evidence.

WISCONSIN STAT. § 752.35 provides:

> In an appeal to the court of appeals, if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried, the court may reverse the judgment or order appealed from, regardless of whether the proper motion or objection appears in the record and may direct the entry of the proper judgment or remit the case to the trial court for entry of the proper judgment or for a new trial, and direct the making of such amendments in the pleadings and the adoption of such procedure in that court, not inconsistent

> with statutes or rules, as are necessary to accomplish the ends of justice.

The real controversy may not have been fully tried "when the jury had before it evidence not properly admitted which so clouded a crucial issue that it may be fairly said that the real controversy was not fully tried." ***Hicks***, 202 Wis. 2d at 160.

¶61 We disagree and find that irrespective of Streeter's opinion, the boot print evidence was admissible. First, the evidence regarding the boots prints is not the equivalent of the DNA evidence in the ***Hicks*** case. As Chief Justice Roberts noted in ***District Attorney's Office for Third Judicial Dist. v. Osborne***, 557 U.S. 52 (2009):

> Modern DNA testing can provide powerful new evidence unlike anything known before. Since its first use in criminal investigations in the mid–1980s, there have been several major advances in DNA technology, culminating in STR technology. It is now often possible to determine whether a biological tissue matches a suspect with near certainty. While of course many criminal trials proceed without any forensic and scientific testing at all, there is no technology comparable to DNA testing for matching tissues when such evidence is at issue.

Id. at 62.

¶62 In contrast to the technology involved in DNA analysis, it appears from his report that Streeter examined photos of Willis's boot prints and photos of the boot prints in the snow. Based on his observations, experience, and training, Streeter formed his opinions. Boot print methodology does not compare to the technical scientific methodology of DNA analysis. Therefore, unlike ***Hicks*** where the DNA evidence conclusively proved that Hicks was excluded as a source of the crucial hair sample, Streeter's opinion that Willis's boot prints did not produce the

snow impressions is not conclusive as to whether the State's boot print evidence is relevant and admissible.

¶63 Second, the facts in ***Hicks*** are distinguishable from this case. In ***Hicks***, the State's theory was that hairs found at the crime scene came from Hicks. However, the State's theory was later proven to be wrong by DNA evidence that excluded Hicks as the source of one of the hairs. Our Supreme Court held under those circumstances the real controversy had not been fully tried.

¶64 By contrast in this case, Willis argues that Streeter's opinion that the boot prints do not match is conclusive on the issue. We disagree. First, as noted above, Streeter's boot print opinion is not the equivalent of scientific DNA evidence. Second, the trier of fact is not bound by the opinions expressed by any witness, either lay or expert. *See* WIS JI-CRIMINAL 200 ("[o]pinion evidence was received to help you reach a conclusion. However, you are not bound by any expert's opinion."); *See also* WIS JI-CRIMINAL 201 (similar statement regarding lay opinion).

¶65 The jury instructions properly summarize our case law:

> The jury, as the trier of fact, 'determines the credibility of the witnesses, resolves conflicts in the testimony, weighs the evidence and draws reasonable inferences from the evidence.' ***State v. Johannes***, 229 Wis. 2d 215, 222, 598 N.W.2d 299 (Ct. App. 1999). The jury is not bound by expert opinions; rather, it can accept or reject an expert's opinion. ***State v. Kienitz***, 227 Wis. 2d 423, 438, 597 N.W.2d 712 (1999).

Geise v. American Transmission Co. LLC ex rel. ATC Mgmt. Inc., 2014 WI App 72, ¶13, 355 Wis. 2d 454, 853 N.W.2d 564. Therefore, the jury could choose to disregard Streeter's opinion.

¶66 In ***Geise***, this court explained, "[t]he jury was free to weigh all of the evidence admitted at trial. … It was 'the function of the jury to evaluate the foundation for the expert's opinion and to accord to that opinion such weight as the jury deem[ed] appropriate.' The jury was 'free to accept or reject the judgment of the expert.'" *See* ***id.***, ¶15 (citation omitted).

¶67 For the reasons stated above, we find the boot print evidence relevant and admissible. Because the boot print evidence was relevant and properly admitted, it was properly before the jury. Therefore, it did not "so cloud[ ] a crucial issue that it may be fairly said that the real controversy was not fully tried." *See* ***Hicks***, 202 Wis. 2d at 160 (brackets added). Therefore, Willis is not entitled to a new trial in the interest of justice.

B. Willis is Not Entitled to a New Trial in the Interest of Justice Based on the Prosecutor's Closing Arguments About the Boot Prints.

¶68 Citing ***State v. Weiss***, 2008 WI App 72, ¶15, 312 Wis. 2d 382, 752 N.W.2d 372, Willis argues that he is entitled to a new trial in the interest of justice on the grounds that when making opening statements and closing arguments, the State knew or should have known that its argument that the boot prints in the snow matched Willis's boot prints was not true. Again, Willis makes this argument based on Streeter's opinion that the boot prints did not match.

¶69 However, as noted above, the State's boot print evidence was relevant and properly admitted. Even if Streeter had testified, the jury could reject Streeter's opinion, review all the evidence, and reach its own conclusions about the boot prints. Therefore, the State could make appropriate arguments about the boot evidence.

¶70 As explained in ***State v. Burns***, 2011 WI 22, 332 Wis. 2d 730, 798 N.W.2d 166:

> Counsel is allowed considerable latitude in closing arguments, with discretion given to the trial court in determining the propriety of the argument. A prosecutor may comment on the evidence, detail the evidence, argue from it to a conclusion and state that the evidence convinces him and should convince the jurors. The prosecutor should aim to analyze the evidence and present facts with a reasonable interpretation to aid the jury in calmly and reasonably drawing just inferences and arriving at a just conclusion upon the main or controlling questions. It is impermissible, therefore, for a prosecutor to suggest the jury reach its verdict by considering facts not in the evidence.
>
> When deciding whether a prosecutor's statements necessitate a new trial in the interest of justice, the test applied is whether the statements so infected the trial with unfairness as to make the resulting conviction a denial of due process. Even if there are improper statements by a prosecutor, the statements alone will not be cause to overturn a conviction. Rather, the statements must be looked at in context of the entire trial.

Id., ¶¶ 48-49 (citations and internal quotation marks omitted).

¶71 In closing, the prosecutor argued that Willis's boot prints matched the boot prints in the snow:

> When [Willis] is arrested he's wearing boots. And you can look at the pictures of those boots, you can look at the boots. Like I said, because the footprints in the snow aren't the best and they are melting, I don't expect anyone to become an expert and look at them, but I think a layperson can say, "[l]ook, these are the same type of boots, same size of boots." What a coincidence that the boot prints that are running from the scene are those same boots that are being worn by … Willis—

Defense counsel interjected, "I object." The prosecutor completed his statement saying, "days later." In rebuttal, the prosecutor again stated: "[w]hen [Willis] is

arrested he is wearing shoes with the same types of soles as are in the boot footprints. These are not coincidences, these are facts that you have."

¶72 Because the State's boot print evidence was properly admitted, the State could comment on the evidence, argue from it to a conclusion, and assert that the evidence convinces the State and should convince the jury. The State may analyze the evidence and present facts with a reasonable interpretation to aid the jury in calmly and reasonably drawing just inferences and arriving at a just conclusion upon the main or controlling questions. Based on the boot print evidence that the prints are similar in size, shape and print pattern, Streeter's opinion to the contrary, the State had a reasonable basis to make its arguments about the boot prints.

¶73 Because we find that the boot print evidence was properly admitted and that it was reasonable for the State to argue that the boot prints matched, we conclude that Willis is not entitled to a new trial in the interest of justice.

C. Streeter's Opinion that the Boot Prints do not Match is not Newly-Discovered Evidence.

¶74 Willis asserts that he is entitled to a new trial on the grounds that Streeter's opinion that the boot prints do not match is newly-discovered evidence. As explained in ***State v. Plude***, 2008 WI 58, ¶32, 310 Wis. 2d 28, 750 N.W.2d 42:

> When moving for a new trial based on the allegation of newly-discovered evidence, a defendant must prove: '(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.' If the defendant is able to prove all four of these criteria, then it must be determined 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.

(Citation omitted).

¶75 Willis argues that Streeter's opinion was discovered after conviction, he was not negligent in seeking the evidence, the evidence is material to the issue of whether Willis was at the scene of the crime, and it was not cumulative.

¶76 The trial court denied Willis's postconviction motion on the grounds that there is not a reasonable probability that Streeter's opinion would lead to a different outcome at a second trial. We affirm the trial court's denial of a new trial on the grounds of newly-discovered evidence, but on a different ground. We find that Streeter's opinion does not constitute newly-discovered evidence because no new evidence was discovered after conviction. We may, nonetheless, affirm the trial court's result, even if we do so for a different reason. *See* ***State v. Fosnow***, 2001 WI App 2, ¶11, 240 Wis. 2d 699, 624 N.W.2d 883.

¶77 Willis knew that the State was going to argue that his boot prints matched the boot prints in the snow. Willis points out that the criminal complaint "proclaimed that Willis's boots matched the prints on one set of the footprints." He does not argue that he was not aware of the evidence the State was relying on to support its theory, including photos and the boots. Therefore, the knowledge of the evidence did not come after the trial. Rather, it was known prior to trial and

therefore, it does not constitute newly-discovered evidence. *See* ***Vara v. State***, 56 Wis. 2d 390, 394, 202 N.W.2d 10 (1972).

¶78 Willis argues that Streeter's analysis and opinion constitutes newly-discovered evidence. However, what he is actually asserting is that the "importance" of the previously known boot evidence is "newly discovered." ***Id.*** In ***Vara***, at trial, the theory of defense was self defense. After he was convicted Vara brought a motion for a new trial on the grounds of newly-discovered evidence, based upon evidence that Vara suffered a brain injury. He argued this supported an insanity defense. ***Id.*** at 392-93. Our Supreme Court rejected the argument stating that Vara and his trial counsel knew he had the head injury, which formed the basis of the claim of insanity. It stated, "[t]his knowledge did not come after the trial but was known before the trial and therefore is no ground for the motion." ***Id.*** at 394. It went on to note that, "[t]he claim is made [that] the importance of the brain injury was not realized until after trial. But newly-discovered does not include newly-discovered importance of evidence previously known and not used." ***Id.*** *See also* ***Fosnow***, 240 Wis. 2d 699, ¶11.

¶79 We conclude, therefore, that Streeter's opinion is nothing more than the newly-discovered importance of existing evidence, not newly-discovered evidence, that does not support Willis's motion for a new trial.

III. The Trial Court Adequately Explained Willis's Sentence Under *Gallion.*

¶80 Willis also contends that the trial court did not adequately explain his sentence under ***State v. Gallion***, 2004 WI 42, ¶¶40-44, 270 Wis. 2d 535, 678 N.W.2d 197, because it recited only the general sentencing objectives. However, this court's review of the sentencing hearing establishes that in sentencing Willis,

the trial court satisfied the ***Gallion*** requirements. Sentencing lies within the trial court's discretion, and our review is limited to determining if the trial court erroneously exercised its discretion. ***Id.***, ¶17. "When the exercise of discretion has been demonstrated, we follow a consistent and strong policy against interference with the discretion of the trial court in passing sentence." ***State v. Stenzel***, 2004 WI App 181, ¶7, 276 Wis. 2d 224, 688 N.W.2d 20.

¶81 It is a well-settled principle of law that a trial court must exercise discretion at sentencing. ***Gallion***, 270 Wis. 2d 535, ¶17. Under ***Gallion***, trial courts must specify the objectives of the sentence on the record which "include, but are not limited to, the protection of the community, punishment of the defendant, rehabilitation of the defendant, and deterrence to others" and "by reference to the relevant facts and factors, explain how the sentence's component parts promote the sentencing objectives." ***Id.***, ¶¶ 40, 46.

¶82 In seeking to fulfill the sentencing objectives, the trial court must consider the primary sentencing factors of "the gravity of the offense, the character of the defendant, and the need to protect the public." ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. The trial court may also consider a wide range of other factors concerning the defendant, the offense, and the community. *See* ***id***. The trial court has discretion to determine the factors that are relevant in fashioning the sentence and the weight to be given to each factor. ***Stenzel***, 276 Wis. 2d 224, ¶16.

¶83 The record here reflects an appropriate exercise of sentencing discretion. The trial court identified protection of the community and punishment as the primary sentencing goals. The trial court began by considering the gravity of the offense. With respect to the offense, the trial court stated that the offense

was a "horrific offense" perpetrated on a very vulnerable victim. It noted, "[a] human life was, in fact, taken." The trial court noted that Willis showed up at Hassel's house to collect money due from purchasing drugs, armed with a firearm which, as a felon, he was not supposed to possess, and shot the victim at short range, with the bullet having a shotgun-like effect as reflected by Hassel's injuries.

¶84 Addressing the factor of Willis's character, the trial court also noted that previously Willis and his friend had committed armed robberies and in doing so, he had terrorized at least three other victims in the community. The trial court also remarked that neither prior incarceration nor educational accomplishments had deterred Willis from engaging in criminal activity. Willis had experienced both; neither caused him to cease his criminal conduct.

¶85 The trial court identified multiple other factors relevant to the sentence and the weight accorded to those factors and its discussion reflected its consideration of the presentence report. The trial court found the first aggravating factor was that Willis had gotten his seventeen-year-old nephew, Jackson, involved in the homicide. It considered Willis's juvenile record consisting of some contacts, probation, extensions, and revocations and specifically noted that Willis had been at Ethan Allen School for Boys and had been revoked as a juvenile. The trial court also noted Willis's criminal record establishing that, as an adult, Willis had a fleeing case and armed robbery cases.

¶86 The trial court noted that while incarcerated in the state institution, Willis completed several certifications: parenting, treatment, and obtained his High School Equivalency Diploma. However, the trial court observed, "it didn't help as much as it should have because subsequently thereafter, while he was on extended supervision, he committed this crime of first-degree intentional homicide

and felon in possession of a firearm." The trial court also stated, "[y]ou can't minimize those—those other contacts as an adult." Thus, the court gave no weight to Willis's academic and educational skills.

¶87 The trial court also noted that Willis had a checkered "work histor[y], … was an absconder at one time. He was released on extended supervision in 2011, did some work. And then while on extended supervision he incurred the offenses that he's here on today's date."

¶88 The trial court also took into consideration Willis's significant relationships, although it questioned the significant relationship paragraph of the presentence investigation report. The trial court took into consideration Willis's alcohol and drug history and emotional and mental health history. It concluded that there was "no doubt that [Willis] had a chaotic upbringing." Notwithstanding problems with Willis's rearing, the court stated:

> But that doesn't depreciate the seriousness of the offense that's before the court. He's [twenty-nine] years old. He's here because of the first-degree intentional homicide, use of a dangerous weapon, possession of a firearm by a felon. A young lady, who was very vulnerable, lost her life as a result of … Willis'[s] direct involvement. And his background is one of—his character is reflected—his character is reflected in his background. And it's one of a legacy of sadness that he's left behind to a number of different victims that he's preyed upon. And the last victim being the one who he's taken the life from. This is a horrific offense. A human life was, in fact, taken. There's going to be a significant amount of time so he's no longer any danger to the community and to others who have a right to walk the streets of this community without being terrorized by … Willis. And it has a significant effect on the community as a whole, the offense, because of the amount of guns that are on the street and the amount of drugs that are on the street. So there are a lot of aggravating factors.

¶89 The trial court identified the factors it considered when fashioning the sentences it imposed. *See* ***Gallion***, 270 Wis. 2d 535, ¶¶40-43. Based upon our review of the sentencing determination, this court concludes that the trial court appropriately considered the ***Gallion*** factors and provided a "rational and explainable basis" for the sentences it imposed. *See* ***id.***, ¶39. Thus, the sentence was an appropriate exercise of discretion and is affirmed.

IV. By Informing the Jury that Willis Was Convicted of a Felony, the Trial Court Did Not Violate Willis's Due Process Rights.

¶90 Willis argues that the trial court violated his right to due process by informing the jury that he was a felon. Despite raising this issue, Willis acknowledges that this proposition has not been accepted by Wisconsin's appellate courts.

¶91 Indeed, Willis cites ***State v. McAllister***, 153 Wis. 2d 523, 525, 529, 451 N.W.2d 764 (Ct. App. 1989), which holds that when a defendant is willing to stipulate that he or she has a prior felony conviction, the nature of the felony is not relevant with some exceptions. Thus, the nature of the felony must be excluded when the defendant stipulates to the felony-conviction element. Here, in accord with ***McAllister***, the nature of Willis's prior felony was not disclosed to the jury. *See* ***id.*** at 529.

¶92 More apropos is ***State v. Nicholson***, 160 Wis. 2d 803, 805, 467 N.W.2d 139 (Ct. App. 1991), also cited by Willis. Nicholson argued that revealing his felon status to the jury constituted reversible error because he had offered to stipulate to the fact. This court held that Nicholson "apparently is confusing revealing his felon status to the jury with revealing the nature of the

felony to the jury." *See* ***id.*** at 806-07. As in ***Nicholson***, the nature of Willis's felony was not revealed to the jury, just the fact that he was a felon.

¶93 The crime of felon in possession of a firearm has two elements: "(1) the person must have been convicted of a felony, and (2) subsequent to that conviction the person must be in possession of the firearm." *See* ***id.*** at 807. The State must prove "all elements of a crime to the jury beyond a reasonable doubt." ***Id***. "Reversible error would only arise when the nature of that felony were revealed to the jury despite the offer to stipulate." ***Id.*** at 807-08. Because the jury was not told the nature of Willis's prior felony conviction, Willis does not establish a basis for relief.

CONCLUSION

¶94 Given these determinations, the next step is a postconviction evidentiary hearing on the issues we have identified. We emphasize that we are not deciding that trial counsel was ineffective or that Willis was prejudiced, only that Willis's original and supplemental postconviction motions were sufficient to require that the trial court conduct an evidentiary hearing on those matters. We remand to the trial court for further proceedings consistent with this decision

By the Court—Judgment and orders affirmed in part, reversed in part and cause remanded for further proceedings.

Not recommended for publication in the official reports.