

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**January 31, 2006**

Cornelia G. Clark  
Clerk of Court of Appeals

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2004AP1423-CR**

**Cir. Ct. No. 2002CF5997**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT I**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**DEXTER SALLIS,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Milwaukee County: DAVID A. HANSHER, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

¶1 PER CURIAM. A jury found Dexter Sallis<sup>1</sup> guilty of one count of burglary, party to a crime, and one count of operating a motor vehicle without the

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<sup>1</sup> The criminal complaint alleges that Dexter Sallis is also known as Derrick Sallis. Throughout the record, Sallis is referred to by both names.

owner's consent (OMVWOC). The court sentenced Sallis to fifteen years of imprisonment, comprised of eight years of initial confinement and seven years of extended supervision, for the burglary, and to a concurrent term of five years of imprisonment, comprised of two years of initial confinement and three years of extended supervision, for the OMVWOC. On appeal, Sallis asks this court to exercise its power of discretionary reversal under WIS. STAT. § 752.35 (2003-04).<sup>2</sup> We reject Sallis's request and affirm.

### BACKGROUND

¶2 Between 6:30 a.m. and 7:00 a.m. on October 20, 2002, Anne Schimmel awoke to “banging noises” outside her Wauwatosa house located near 102nd Street and North Avenue. Schimmel looked out her window and saw that the light was on inside her garage. She then went outside and saw a man in the alley behind the garage, loading her snow blower into a white van. The man loading the snow blower was wearing a blue jacket with a white emblem. Another man was seated in the van. Schimmel yelled and the man outside the van pushed the snow blower into the van, closed the van door and got into the van on the passenger side. The van then drove off, with the other man driving.

¶3 When the men drove off, they encountered several dead-ends, and the van drove past Schimmel's garage several times. In the meantime, Schimmel had called the police and a squad car arrived before the van was able to leave the area. The squad car stopped the van. Sallis was in the driver's seat and another man, Readell Washington, was in the passenger seat. Washington was wearing a

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<sup>2</sup> All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

blue jacket similar to that described by Schimmel. The window on the driver's side of the van was "smashed out" and the steering column had been "punched" so that the van could be started without a key. The back seats to the van had been removed and the rear of the van contained an assortment of items such as bicycles, lawn mowers and snow blowers. Police later determined that some of the items had been taken from another garage on Bluemound Road earlier that morning.

¶4 Sallis and Washington were each charged with two counts of burglary, party to a crime. Sallis was also charged with OMVWOC. Washington entered into a plea bargain under which one of the burglary counts would be amended to misdemeanor receipt of stolen property. In exchange, Washington agreed to testify against Sallis.

¶5 At Washington's plea hearing, the assistant district attorney indicated that Washington "would inform the court today what ... happened ... so that the State can assess whether ... his testimony would be viewed as truthful" at Sallis's trial. After being sworn to tell the truth, Washington first testified that he was sleeping in the van and he woke up when Sallis gave him a "jacket to put on" and told him to "get under the wheel" and "go." Washington testified that he "had been priorly intoxicated" and refused to drive so Sallis "stepped over me" and drove off. When asked about "what happened in the burglary," Washington testified "[t]he only thing ... I know [is] there was a snow blower put in the truck and I think it was a lawnmower." Washington testified that Sallis had taken them out of a garage and "drug" them into the back of the van. Washington denied helping Sallis put the items in the van, stating that he was "still asleep." Washington also denied knowing how Sallis got into the garage and that he "really wasn't aware" that Sallis was going to enter the garage and take the items.

¶6 At this point, the assistant district attorney informed the court that Washington's testimony sounded "less than candid" and "like he's rejecting the offer." After an off-the-record discussion, Washington asked the court if he could "change the statement." The court told him to "[j]ust tell the truth." Washington then testified that Sallis "went into the garage and I was sitting in the van waiting on him to come back." Washington admitted that he "was aware of what [Sallis] was going in to do." Washington testified that Sallis had told him "he was going to go ... pick up something." When asked by the court whether he thought Sallis was taking the things from the garage "legitimately," Washington replied, "Well, not really."

¶7 The assistant district attorney then described the numerous items that were found in the van and the court admonished Washington "if you want to plead guilty you have to tell the truth." The court told Washington that he had "told two stories that I don't think anybody in the courtroom believes so far." Washington then admitted that he "was aware that the bike, two bikes ... were stolen also" and that other items in the back of the van "came from another garage." Washington testified that he acted as the lookout during the burglaries and that he knew Sallis was breaking into the garages to take items to sell. The assistant district attorney then informed the court that Washington's testimony was "satisfactory" and the plea colloquy continued.

¶8 Washington testified at Sallis's trial. Washington testified that Sallis was driving a white van when he picked up Washington about 5:30 a.m. on October 20, 2002. Together, they drove to a garage on Bluemound Road from which they took a lawn mower, a snow blower and some bikes. They then drove to a garage near 102nd Street and North Avenue. Washington testified that Sallis opened the garage door and he helped Sallis load a snow blower into the van.

After a woman started yelling at them, they drove off and met several dead-ends. A squad car stopped the van about five minutes later near an entrance to the freeway. Washington testified that he was wearing a “Lions jacket” at the time. Washington admitted that the State had reduced the charges against him in exchange for testifying against Sallis.

¶9 On cross-examination, Washington admitted that he told police that he had not been in any garages or stolen anything when first interviewed after his arrest. He also admitted that his statements, made under oath at his plea hearing, were not true. At trial, Washington admitted entering the garage and helping to load the snow blower into the van, contrary to his earlier testimony that he had remained in the van as a lookout.

¶10 Sallis also testified at trial. He stated that Washington offered to pay him \$5 to help load a snow blower into the van. According to Sallis, Washington was driving the van at the time and there was a “bunch of stuff in the van already.” Sallis drove with Washington to the North Avenue garage where they found a snow blower sitting outside of the open garage. Sallis testified that he was helping Washington load the snow blower into the van when a woman started yelling at them. After Washington got the snow blower into the van, Sallis “jumped behind” the wheel and drove off because he was “afraid.” Sallis testified that they did not stop at a garage on Bluemound Road on the way to the North Avenue garage. As noted above, the jury found Sallis guilty.

¶11 At sentencing, Sallis’s counsel asked the court to impose a sentence comparable to the nine-month sentence imposed on Washington. The State countered that the two men were not “remotely similar,” noting that Washington’s prior criminal record consisted of two misdemeanor convictions arising from a

single incident whereas Sallis had a much longer criminal record. The court agreed with the State, stating that Sallis's criminal record was "damning" and consisted "of fifteen prior convictions ... from possession of drug paraphernalia to theft to burglary, enough is enough." The court stated that the community needed to be protected from Sallis's "criminal activity [that] has continued for years." The court then imposed the sentence set forth above.

¶12 Sallis filed a postconviction motion in which he sought a new trial, or in the alternative, resentencing. In the motion, Sallis contended that Washington perjured himself at trial, and he relied on a newspaper article detailing Washington's arrest in October 2003 for nearly thirty garage burglaries.<sup>3</sup> According to Sallis, Washington's subsequent arrest shows that Washington was "the ringleader and organizer" of this burglary, rather than "a more or less passive passenger" who "quickly chose the route of 'ratting out' on [Sallis], casting blame on [Sallis] and totally minimizing his own involvement in order to make the best deal possible." Sallis also contended that the sentencing court "unduly emphasized and believed Washington's testimony" which "cast all blame and responsibility" on Sallis leading to "a longer sentence than would have been appropriate had the court known the truth."

¶13 The circuit court denied Sallis's postconviction motion. The court noted that "[n]either party possessed a great degree of credibility during the trial" and that the jury knew that "Washington's credibility was questionable" because of his several conflicting statements about the incident. The court stated that Washington's subsequent criminal conduct "does not have a significant impact on

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<sup>3</sup> Sallis's trial took place in May 2003.

Sallis’s testimony at trial or the jury’s rejection of his story” and denied Sallis’s request for a new trial. As for Sallis’s request for resentencing, the court stated Sallis’s criminal record “alone was substantial enough to warrant a heftier sentence than the court imposed” and that the subsequent burglaries committed by Washington “do[] not diminish ... Sallis’s prior record.” The court also stated that “information about Washington and his role in subsequent burglaries does not demonstrate that Sallis was an innocent bystander or minor participant in the [October 20, 2002] burglary and it “does not render Sallis’s version [of the incident] more credible.” Because Sallis had not shown that the information about Washington’s subsequent burglaries was a new factor which would justify sentence modification, the court denied Sallis’s request for resentencing.<sup>4</sup>

## DISCUSSION

¶14 On appeal, Sallis recounts Washington’s conflicting sworn testimony at Washington’s plea hearing and at Sallis’s trial and concludes that Washington’s trial testimony was perjury. Sallis asserts that “the State elected to put on a known perjurer [Washington] to testify against Sallis, and therefore, this court should order a new trial in the interest of justice.”

¶15 This court’s power of discretionary reversal is governed by WIS. STAT. § 752.35. We will exercise our reversal power under this statute in two situations: “(1) whenever the real controversy has not been fully tried; or (2) whenever it is probable that justice has for any reason miscarried.” *State v. Hicks*, 202 Wis. 2d 150, 159-60, 549 N.W.2d 435 (1996). The supreme court has

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<sup>4</sup> On appeal, Sallis does not renew his request for resentencing premised on Washington’s later criminal conduct. Therefore, we need not discuss that question further.

found that the real controversy has not been fully tried when the jury was erroneously deprived of hearing pertinent testimony bearing on an important issue in the case or when the jury had before it improperly admitted evidence. *State v. Wyss*, 124 Wis. 2d 681, 735, 370 N.W.2d 745 (1985), *overruled on other grounds* by *State v. Poellinger*, 153 Wis. 2d 493, 506, 451 N.W.2d 752 (1990). The miscarriage of justice standard requires a showing that a different result would be substantially probable upon retrial. *Id.* at 741. In either case, however, we will exercise our discretionary reversal power only sparingly. *Vollmer v. Luety*, 156 Wis. 2d 1, 11, 456 N.W.2d 797 (1990).

¶16 Sallis does not attempt to fit his argument into either situation, and we agree with the State's observation that Sallis's argument assumes, without proof, that Washington's trial testimony was perjured. Regardless of those shortcomings, we conclude that a new trial in the interest of justice is not warranted.

¶17 Through cross-examination, the jury learned that Washington previously had given statements, both sworn and unsworn, that contradicted his trial testimony. The jury also knew that the charges against Washington had been reduced in exchange for his testimony against Sallis. Washington's credibility, or lack thereof, was fully explored at trial. The jury also had before it Sallis's exculpatory trial testimony, and as with Washington, Sallis's credibility was challenged. The fact that Washington later committed additional similar burglaries does not detract from his trial testimony, in which he readily admitted his participation in the crime. The jury was not erroneously deprived of hearing pertinent testimony bearing on an important issue nor did the jury have before it improperly admitted evidence that clouded a crucial issue in the case. Therefore, the real controversy in this case was fully tried.



¶18 We also conclude that it is not probable that justice has miscarried. As noted previously, Washington's credibility was thoroughly challenged by Sallis. Sallis has not shown that a different result would be substantially probable upon a retrial.

*By the Court.*—Judgment and order affirmed.

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

