

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 6, 2007

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

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Appeal No. 2005AP2311-CR

Cir. Ct. No. 2001CF117

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DOUGLAS J. PLUDE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Vilas County: JAMES B. MOHR, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 HOOVER, P.J. Douglas Plude appeals a judgment of conviction for first-degree homicide, contrary to WIS. STAT. § 940.01,¹ and an order denying his

¹ All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

motion for postconviction relief. Plude asked to have the jury's verdict set aside and the case dismissed or a new trial ordered on three bases: (1) the State's expert lied about his credentials, therefore making his "expert" testimony incredible as a matter of law; (2) the State failed to produce a copy of the death certificate when requested; and (3) the State failed to timely disclose potentially exculpatory evidence contained on the hard drives of two computers taken from the Plude home. We conclude the expert's testimony is not patently incredible, any error in failing to turn over the death certificate was harmless because the certificate contained no exculpatory evidence, and the State timely disclosed information about the computer. Thus, we affirm the judgment and order.

Background

¶2 According to Plude's trial testimony, on October 22, 1999, he found his wife Genell slumped over a toilet bowl, not breathing. Plude claimed the "top of her forehead hung down and was touching the water." Plude testified he attempted CPR, but Genell was pronounced dead at 6:50 a.m. It was eventually stipulated that Genell had a fatal dose of Fioricet-Codeine in her system. The State theorized that Plude killed Genell by poisoning her with the Fioricet and, while she was vomiting, pushing her face into the toilet to drown her. Plude's defense was that Genell committed suicide by consuming multiple pills.

¶3 No cause of death was initially listed on the death certificate. Plude requested a copy of the death certificate prior to trial but never received it. The State claimed it never possessed the certificate and the coroner claimed to have filed it with the Register of Deeds, but the registrar was unable to produce the certificate for either Plude or his attorney.

¶4 There was conflicting evidence about the cause of death at trial. The State’s expert thought the fluid—water mixed with vomit—in Genell’s lungs was more likely than not from the toilet and he concluded death was caused by “drug intoxication abetted by drowning.” He could not, however, say whether it was homicide or suicide. Plude’s expert testified that fluid in Genell’s lungs was pulmonary edema, caused when the Fioricet slowed her heart and reduced her blood circulation. Thus, Genell would have drowned not by inhaling water but because reduced circulation allowed fluid to accumulate in her lungs.

¶5 Based on its expert’s conclusion that the fluid in Genell’s lungs was from the toilet, the State retained Saami Shaibani to conduct experiments to show that Genell could not have inhaled water from the toilet bowl herself simply by “falling” into it. Shaibani testified as to multiple professional credentials, claiming among them that he was a clinical professor of physics at Temple University. Shaibani also testified that, given how Plude described finding Genell’s body, the laws of physics dictated she could not have accidentally drown in the toilet.

¶6 The Pludes had two computers, one made by Compaq and one by Packard Bell. Plude normally used the Compaq while Genell used the Packard Bell.² On the night of October 21, shortly before Genell died, both computers were active around 10 p.m. Genell’s computer shows the user conducted online searches for information on Fioricet. Plude’s computer shows activity on the internet and in a photo editing program between 10 p.m. and 10:30 p.m.

² The Pludes acquired the Compaq three weeks before Genell’s death.

¶7 According to Plude, the computers show parallel activity, indicating that both he and Genell were on their respective computers at the same time. This in turn allegedly demonstrates Genell was looking up information on the drug that killed her, supporting a conclusion of suicide. But Plude did not present evidence of this parallel timeline at trial. He asserts that he did not have this information until a day before trial, when the hard drives were finally made available to him and a computer technician examined the drives.

¶8 Plude also asserts the State's technician told his attorney, off the record during a break at trial, that he had not found evidence of a parallel timeline on the computers. Thus, Plude's trial counsel did not cross-examine the State's expert about the existence of a parallel timeline, in part because counsel did not think she would be able to qualify her computer technician to testify in rebuttal.

¶9 The jury convicted Plude of homicide and he was sentenced to life imprisonment with parole eligibility after twenty years. He filed a postconviction motion, asking the court to set aside the verdict and grant a new trial, alleging multiple errors. The court denied the motion and Plude appeals. Additional facts will be included in the discussion as needed.

Discussion

¶10 We reserve our discussion of the expert testimony for the end of this opinion. The issues of the death certificate and computer evidence are more readily disposed of.

The Death Certificate

¶11 Plude asserts the State violated WIS. STAT. § 971.23(1)(e) by failing to produce Genell's death certificate, which initially listed no cause of death.

Plude asserts the certificate was both material and exculpatory because “it would have demonstrated to the jury that no cause of death could be determined to the extent that it was drug intoxication or drowning.”

¶12 Whether the State has fulfilled its statutory disclosure obligations is a question of law we review de novo. *State v. Schroeder*, 2000 WI App 128, ¶8, 237 Wis. 2d 575, 613 N.W.2d 911. WISCONSIN STAT. § 971.23(1)(e) in part requires the district attorney to disclose to the defendant, upon demand,

any reports or statements of experts made in connection with the case or, if an expert does not prepare a report or statement, a written summary of the expert’s findings or the subject matter of his or her testimony, and the results of any physical or mental examination, scientific test, experiment or comparison that the district attorney intends to offer in evidence at trial.

Plude contends the death certificate is covered by this provision.

¶13 The coroner claimed to have filed the death certificate with the register of deeds and stated he had never given a copy to the district attorney. This was consistent with the district attorney’s statement that he did not have a copy. But when both Plude and his attorney tried to get a copy of the certificate from the register, they were advised the office did not have the certificate on file. Plude asserts that regardless of whether the district attorney had a copy, the coroner is an agent of the State such that his actions can be imputed to the State for purposes of this analysis.

¶14 We will assume without deciding that Plude’s inability to obtain the certificate and the State’s failure to provide a copy amount to a discovery violation that is not excused by good cause. Nevertheless, the violation amounts to

harmless error. *See State v. Ruiz*, 118 Wis. 2d 177, 198-99, 347 N.W.2d 352 (1984).

¶15 Plude's complaint is that the jury did not get to see the blank spot for cause of death which, he argues, would have demonstrated the State's uncertainty about whether the cause of death was suicide by drug intoxication or homicide by drowning. But the jury did hear evidence to this effect. The State's expert, the forensic pathologist who conducted Genell's autopsy, testified the cause of death was likely, not certainly, a combination of drug intoxication and drowning, and he could not conclude whether this was the result of suicide or homicide. Because the pathologist gave equivocal testimony, any information Plude hopes the jury would infer from the death certificate would merely be cumulative. Additionally, the coroner testified. His report had listed Genell's cause of death as pending. Thus, even without the physical death certificate, Plude could have cross-examined him about the cause of death.³

¶16 Moreover, the remedy for a violation of WIS. STAT. § 971.23 is suppression of the evidence at trial, a continuance or recess where appropriate, or advising the jury of the failure to comply with the discovery statute. WIS. STAT. § 971.23(7m). The death certificate was not offered at trial, and Plude did not seek a continuance or admonition to the jury.

³ Plude also notes that the cause of death was changed after his trial. The coroner made a motion, pursuant to WIS. STAT. § 69.12, to supplying drowning as the cause of death. The court heard the motion but supplied drug intoxication as the cause. Plude also argues the coroner initially had the cause listed as drowning but then changed the certificate to be blank. To the extent Plude is suggesting this information should have been available at trial, we reject his argument. The argument was raised first in the reply brief and thus we do not consider it. *Northwest Wholesale Lumber v. Anderson*, 191 Wis. 2d 278, 294 n.11, 528 N.W.2d 502 (Ct. App. 1995). Additionally, Plude does not demonstrate that the information is relevant.

The Computer Evidence

¶17 Plude claims the two computers' hard drives contained potentially exculpatory evidence. Specifically, Plude contends there is evidence that someone—ostensibly, Genell—used Genell's computer to search for information on Fioricet while at the same time, Plude's computer was being used for a different, benign task. Plude's theory is that from this evidence, the jury would conclude Genell was using her computer to research a manner of suicide. Plude alleges that because he did not have knowledge of this information until the last day before trial, the State committed a discovery violation by not providing this evidence in a timely manner.

¶18 Our understanding of the relevant portions of the timeline is as follows. In 1999, the State, which had seized both computers, copied the hard drives with an EnCase program or technology.⁴ EnCase makes a mirror image copy of a hard drive, without altering the original drive. EnCase is used because otherwise, every time a computer is even turned on, some change, however small, is made to the hard drive. The State eventually analyzes these copies, not the original drives. However, EnCase-copied discs are not easily read or interpreted by users who lack the necessary software for accessing the information on such discs, and the EnCase program is expensive and not widely distributed.

¶19 The State sent its EnCase discs to the MidState Organized Crime Information Center, which made copies of the EnCase discs. The Center's discs were purportedly sent to the defense in March 2002. These discs would have

⁴ This program is also spelled N/Case or N-Case in the record. We use EnCase throughout for consistency's sake.

shown parallel usage—that is, the time at which each computer was being used—but would not have detailed what each user was doing. The information on the discs was also evidently difficult to access, although the State’s expert testified the discs could have at least been used to construct a rudimentary timeline.

¶20 In October 2002, a change was made to the EnCase technology, making the contents of the discs more easily accessible or readable. Discs made with the new technology reached the defense on November 8, 2002. For the first time, Plude claims, the defense could see what each computer was being used for.

¶21 Around November 10 or 14, defense counsel reviewed the discs and discovered Genell’s computer was used to search for information on Fioricet. On November 21, counsel hired a computer expert and began trying to make an appointment to view the actual hard drives held at the sheriff’s department. The State, reluctant to allow examination of the original drives because of how readily changes can be made, eventually agreed. The appointment was for November 29, but Plude’s expert was unable to make the trip because of other commitments. Plude hired a technician, Jill Claimore, from a computer store to help counsel examine the drives. Plude claims that he first became aware that the computers displayed parallel activity as a result of Claimore’s inspection. At the time Genell’s computer was being used to search for Fioricet, his computer was using a photo editing program.

¶22 Because it was not until November 29 that Claimore discovered the allegedly exculpatory information, Plude asserts the State’s discovery obligation was not timely completed. Rather, he asserts that he did not obtain necessary information until the last business day before trial. This complicated his defense

because, he asserts, he was not able to secure an expert witness to explain the computer evidence.

¶23 At oral argument, however, Plude conceded that on November 8, 2002, the State had provided information that showed the parallel activity on the computers.⁵ This is more than three weeks before trial. It is not the last working day, the crucial day on which Plude rests his argument. That Plude did not *notice* evidence until the last day, in files he had for three weeks, is not a discovery violation by the State.

¶24 Also, although the State concedes it first made EnCase discs in 1999 and it was not until 2002 that Plude had copies, this is not fatal. WISCONSIN STAT. § 971.23 requires the State to turn over evidence within a reasonable time before trial, not as soon as it is in the State's possession.

¶25 While we agree that turning over potentially exculpatory evidence on the last business day before trial would be unreasonable in this case,⁶ we cannot say that a span of three weeks suffers the same presumption. Indeed, it appears that Plude had access to the information in question even earlier than November—perhaps as early as March 2002. To the extent Plude complains that he could not effectively access that information, the State responds that Plude could have requested the State crime lab to analyze the data for him. *See* WIS. STAT.

⁵ In his brief, Plude also concedes that on November 14, he had discs showing Genell's computer was used to search Fioricet.

⁶ We do not accept the State's argument that even though November 29 was the last business day before trial, there were several more days before Plude began to present his case and we should therefore count those days as well. This is directly contrary to the language of the statute, which requires disclosure before trial, not the start of the defendant's case.

§ 165.79. Plude does not refute this argument. Additionally, part of Plude's difficulty appears to arise from his failure to timely hire a computer expert. This is not a delay attributable to the State.

Expert Testimony

¶26 Plude complains of multiple misrepresentations in Shaibani's curriculum vitae. He asserts Shaibani: (1) did not have a professorship at Temple University; (2) was never a research fellow at Conemaugh Memorial Medical Center; (3) did not work with a violent crimes response team in Virginia; (4) was not designated an "international expert" in anything by the United States Departments of Labor or Justice; (5) had articles that were published but not in peer-reviewed journals; (6) holds degrees unrelated to his claimed field of expertise; (7) invented a name for this field; and (8) had suspect motives for testifying because he did not accept a fee, did not leave Wisconsin immediately after testifying, and may have spent time at the district attorney's home.⁷

¶27 As a threshold matter, we are deeply disturbed by the allegations of misrepresentation. Nevertheless, we are constrained by the fact that in the postconviction motion, the only basis for a challenge—and thus, the only topic on which there is a developed record—was Shaibani's purported misrepresentation of his relationship with Temple University. As a result, the trial court held

the state has stipulated that Dr. Shaibani was not, in fact a Clinical Associate professor at Temple University. That given his education, training, teaching background, and knowledge and the fact that there was no evidence that Dr. Shaibani's testimony concerning his curriculum vitae

⁷ Several of these complaints are not misrepresentations per se, but go to Shaibani's credibility.

made his opinions unreliable, therefore, no prejudice to the defendant has been shown. The court denies the defendant's request for a new trial based only on the inaccuracy in Dr. Shaibani's curriculum vitae.

¶28 On appeal, Plude appears to challenge both Shaibani's credibility and his qualifications as an expert. However, Plude did not challenge Shaibani's qualifications at trial. He asserts that he could not have, because he was unaware of misrepresentations at the time. But although the postconviction motion alleged newly discovered evidence relating to Shaibani's credentials, Plude intimated he was only challenging Shaibani's credibility, not his qualifications to testify as an expert. Shaibani's credibility and the decision to let him testify present two different questions. Accordingly, we confine Plude to the same argument on appeal that he raised with the trial court. See *Wirth v. Ehly*, 93 Wis. 2d 433, 443, 287 N.W.2d 140 (1980) (we do not consider issues first raised on appeal).

¶29 Credibility is generally a question of fact. WIS. STAT. § 805.17(2). Plude contends that Shaibani's testimony was incredible as a matter of law. We conclude that this argument is controlled by *State v. Sprosty*, 2001 WI App 231, 248 Wis. 2d 480, 636 N.W.2d 213, and *Ricco v. Riva*, 2003 WI App 182, 266 Wis. 2d 696, 669 N.W.2d 193.

¶30 Sprosty was convicted of first-degree sexual assault of a child and other charges in 1991 and was sentenced to five years in prison. *Sprosty*, 248 Wis. 2d 480, ¶3. As his release date approached, the State filed a WIS. STAT. ch. 980 petition to commit Sprosty as a sexually violent person. The court granted this initial petition. *Id.* In 1996, Sprosty petitioned for supervised release and the court granted that motion.

¶31 Because of difficulties finding a placement, Sprosty was never released and was still in the State’s custody in 2000. *Id.*, ¶¶4-6. In March 2000, the State filed a motion for relief from the order granting supervised release because Sprosty allegedly made written sexual advances towards his seventeen-year old cellmate in February 2000. These advances were in a letter, but Sprosty never directly gave the letter to the cellmate, nor had he verbalized the advances or physically attempted to make sexual contact. *Id.*, ¶8.

¶32 Sprosty and the State each had two expert witnesses testify about the likelihood he would reoffend. Sprosty’s experts testified the jail incident did not raise the risk of reoffense because Sprosty had not created his living conditions nor had he physically acted on his desires. *Id.*, ¶¶11-12.

¶33 The State’s first expert, Raymond Wood, believed Sprosty was still sexually violent and there was a substantial probability he would reoffend on supervised release, and the jail incident was an “enormous” part of that conclusion. *Id.*, ¶9. The second expert, Anthony Thomalla, concurred with Wood. *Id.*, ¶10. The court ultimately granted the State’s motion, finding its experts’ opinions more reasonable and, by implication, more credible. *Id.*, ¶14.

¶34 In August 2000, Sprosty filed a motion to vacate the court’s order on the basis that Thomalla had presented false and misleading testimony about his professional background. *Id.*, ¶15. The court denied the motion and Sprosty appealed. He alleged Thomalla had lied about his credentials, which had gotten him fired from his most recent position; lied about the circumstances of his termination from a prior job; altered two ch. 980 reexamination reports; and made an unauthorized deposit of state money. *Id.*, ¶31.

¶35 We held that Thomalla’s “past misconduct and misleading testimony may have impaired his credibility, [but] it does not make his testimony incredible as a matter of law.” *Id.*, ¶33. We noted that Thomalla was, in fact, a licensed psychologist with experience evaluating sexually violent people. We also noted his opinion was corroborated by Wood’s testimony. *Id.*, ¶32.

¶36 As to Sprosty’s additional claim that Thomalla committed a fraud on the court, mandating a new trial, we noted there was no evidence the State was aware Thomalla’s testimony was inaccurate, the circuit court had not relied on Thomalla’s titles, and the court had noted its decision was based on Wood’s opinions as well as Thomalla’s. *Id.*, ¶34.

¶37 In *Ricco*, the Riccos alleged that the Rivas misrepresented the condition of real estate. *Ricco*, 266 Wis. 2d 696, ¶1. The trial court determined the Riccos’ expert, John Wantz, misrepresented his qualifications in their case and a prior action before the court and therefore struck Wantz’s affidavit as an admittedly unusual, but prophylactic, measure. *Id.*, ¶¶1, 6. This led to dismissal of the misrepresentation claim. The court also precluded Wantz from testifying on the Riccos’ other claims. When the trial court denied the Riccos’ motion for reconsideration, they took an interlocutory appeal. *Id.*, ¶2.

¶38 Wantz had referred to himself as a “Master Home Inspector,” a designation he attained by making it his “corporate or trade name,” which “deceive[d]” people into thinking that he was licensed or certified as such. *Id.*, ¶5. Wantz represented himself as a graduate of Milwaukee School of Engineering when he had no degree from that school. He defended his claim by citing to a dictionary definition for “graduate” that means to move from one class to another. *Id.* Wantz had also represented on his website that he had never been challenged

in a lawsuit when there were several suits challenging his “holding himself out as being a licensed building or home inspector.” *Id.*

¶39 Uncertain of the trial court’s exact rationale, we considered the possibilities that the court’s ruling rested on either Wantz being incredible as a matter of law or being unqualified as an expert as a matter of law. When we addressed credibility, we wrote:

While Wantz’s claims regarding some of his credentials are suspect and likely untrue, the summary judgment record nonetheless establishes that he is a “licensed home and building inspector,” who has “inspected thousands of homes in the Milwaukee area,” and that he is “familiar with construction standards building defects and problems relating to home construction.” For the moment at least, these assertions are not in dispute. If the more aggravated conduct in [*Sprosty*] did not warrant striking the expert witness’s testimony, it surely follows that the conduct in this case does not warrant that sanction.

We share the trial court’s concerns about Wantz playing fast and loose with his qualifications. But we part ways with the trial court on its holding that Wantz’s specious claims about his credentials render his testimony incredible as a matter of law. In order to make that statement, *we would have to hold that Wantz’s testimony would be in conflict with the uniform course of nature or with fully established or conceded facts.* ... Wantz’s inflated estimation of himself and his credentials, while obnoxious to us, does not satisfy this test. The weight and credibility to be given to the opinions of expert witnesses are uniquely within the province of the fact finder. (Emphasis added.)

Id., ¶¶16-17.

¶40 In the present case, Shaibani’s actual credentials—at least to the extent they are unchallenged by Plude—include a Master’s degree in Crystal Physics and Metallurgy, a Master’s degree in Science of Materials, and a Ph.D. in Material Physics, all from Oxford University. Plude asserts that none of these

degrees provides adequate background for a specialty called “injury mechanism analysis” because none really involves the behavior of human bodies.

¶41 However, that one’s degrees are not specifically supportive of a present-day field of expertise is not dispositive. Indeed, Shaibani testified he had several years’ experience evaluating, for United Kingdom and United States officials, how car accidents result in injuries to the passengers. Additionally, Shaibani appears to have a patent relating to a “method and system for diagnosis of trauma injuries.”⁸ Thus, despite not having degrees exactly matching his current practice, Shaibani appears to have practical experience from which to draw conclusions. Qualification as an expert witness is not based exclusively on one’s education, but also one’s experience. In fact, formal education sometimes need not be considered at all when qualifying an expert. *See* WIS. STAT. § 907.02; *State v. Hollingsworth*, 160 Wis. 2d 883, 895-96, 467 N.W.2d 555 (Ct. App. 1991).

¶42 Certainly, Shaibani’s degrees suggest familiarity with the scientific process, which Shaibani would have utilized when he conducted and documented experiments performed specifically for this case. *Cf. Sprosty*, 248 Wis. 2d 480, ¶32. Shaibani took great care to explain to the jury how he conducted his experiments and why he performed each step in the manner documented. Thus, as in *Ricco*, for us to declare Shaibani’s testimony incredible as a matter of law, we would have to hold his testimony was “in conflict with the uniform course of nature or with fully established or conceded facts.” *Ricco*, 266 Wis. 2d 696, ¶17.

⁸ We realize that this appeal involves a question of Shaibani’s credibility, so we take this testimony not only with a grain of salt, but with the entire salt shaker. However, while Plude details a litany of complaints against Shaibani’s testimony, he does not assail this part of Shaibani’s background.

Shaibani's testimony, however, does not fulfill that standard, odious as his embellished credentials may be. Shaibani based his experiments on one of Plude's descriptions of the position in which he discovered Genell's body. Plude's own expert agreed with at least one of Shaibani's conclusions based on those experiments. See *Sprosty*, 248 Wis. 2d 480, ¶32.⁹

¶43 Plude additionally contends that *Giglio v. United States*, 405 U.S. 150 (1972), mandates a new trial because the State should have withdrawn Shaibani's testimony once it learned of any misrepresentation. Giglio was convicted of passing forged money orders, based substantially on the testimony of his co-conspirator, Robert Taliento. *Id.* at 150-51. While Giglio's appeal was pending, counsel discovered new evidence that the government failed to disclose a promise of immunity made to Taliento, even though Taliento had testified he believed he could still be prosecuted. *Id.* at 152. The Supreme Court wrote: "deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with 'rudimentary demands of justice.' ... '[T]he same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears.'" *Id.* at 153 (citations omitted).

¶44 However, the Court also stated:

We do not, however, automatically require a new trial whenever "a combing of the prosecutors' files after the trial has disclosed evidence possibly useful to the defense but not likely to have changed the verdict...." A finding of materiality of the evidence is required.... A new trial is

⁹ In addition, although Plude makes a fraud argument, he does not contend the State was aware of Shaibani's misrepresentations at the time of trial and, as explained later in this opinion, there is also other evidence to support the verdict. See *State v. Sprosty*, 2001 WI App 231, ¶34, 248 Wis. 2d 480, 636 N.W.2d 213.

required if “the false testimony could ... in any reasonable likelihood have affected the judgment of the jury.”

Id. at 154. Thus, because the government’s case depended almost exclusively on the testimony of co-conspirator Taliento, Giglio was granted a new trial.

¶45 The dissent in this case would grant a new trial under *Giglio* because it concludes there is a reasonable likelihood that Shaibani’s claim, that he taught other professionals while at Temple, affected the jury.¹⁰ Despite our revulsion at Shaibani’s misrepresentation, we do not agree that this claim likely affected the jury.

¶46 As the State points out, there were multiple other pieces of evidence that would support Plude’s conviction, diminishing any likelihood Shaibani’s misrepresentation could have affected the jury’s judgment. For example, Plude gave varying descriptions of the position in which he found Genell’s body. Genell had an internal bruise on her neck, sustained while she was still alive, that could not be explained by CPR but was consistent with her neck being forced against the toilet rim.

¶47 Moreover, a “consulting engineer” who specialized in plumbing testified that the particular toilet in question is designed to prevent accidental drowning and that he knew of no case where an adult drowned in a toilet bowl absent force. He also estimated the volume of water displaced from the bowl. Because it contained vomit, it was evident the toilet had not been flushed, but the

¹⁰ From our reading of the transcript, it is not entirely clear to us that Shaibani meant to claim he was hired by Temple to teach continuing medical education classes. We think it is more likely that he taught CMEs while simultaneously holding his purported position with the university. In any event, the State only conceded that Shaibani never taught at Temple; its concession goes no further.

approximate one pint of displaced water was not explained by vomiting—something more forceful had to have caused the displacement. Plude’s expert testified that, based on Plude’s first version of how he found Genell, she could not have had her mouth and nose in the water.

¶48 Genell had planned to have her mother pick her up on the day of her death and was going to return with her mother to Minnesota. From there, Genell had planned to move to Texas. Her coworkers testified she was looking forward to a new life and had been secretly saving money for the move.

¶49 Plude exhibited unusual behavior the day of Genell’s death. He evidently said to her, “I told you not to leave me.” He then checked with her supervisor about her last paycheck and insurance policy and later insisted that Genell be cremated immediately.

¶50 The crime scene was also quite clean despite approximately forty capsules of Fioricet having been opened. Genell’s thumbprint was on only one capsule and the pill bottle. Plude’s fingerprints were nowhere, despite his having used the Fioricet before.

¶51 Further, the computer searches that Plude claims are exculpatory are only minimally so. Whoever performed the search on Genell’s computer only examined the first page of various results—no page with dosing information was ever displayed on the computer.

¶52 Finally, parts of Shaibani’s testimony were based on the multiple experiments he had performed. Plude does not suggest that false credentials somehow tainted the actual results of those experiments. Similarly, that Shaibani may not have taught other professionals does not invalidate the scientific process

he employed. Even if the jury had known of Shaibani's misrepresentations, it could accept the portions of testimony it did believe while rejecting incredible portions. It is entirely possible, given Shaibani's actual credentials and experience—impressive on their own—the jury would still accept his scientifically based testimony as credible.

¶53 We stress yet again our great dismay at the allegations of misrepresentations against Shaibani in this case, whether part of the record or not. Indeed, we are perplexed as to why, given his actual credentials, Shaibani felt any need to embellish his curriculum vitae. Ultimately, however, the record only demonstrates Plude complained of Shaibani's misrepresentation of his affiliation with Temple University. The jury could nevertheless have accepted his testimony even after being apprised of the misrepresentation. There was significant other evidence from which a jury could find Plude guilty, even if Shaibani's testimony were stricken entirely. "Indeed, '[a] criminal conviction can stand based in whole or in part upon circumstantial evidence.'" *Bautista v. State*, 53 Wis. 2d 218, 223, 191 N.W.2d 725 (1971) (citation omitted). The computer evidence Plude wanted was turned over an acceptable time before trial, and the death certificate would merely have been the source of cumulative information. We therefore conclude that no reversible error occurred.

By the Court.—Judgment and order affirmed.

Recommended for publication in the official reports.

No. 2005AP2311-CR(d)

¶54 CANE, C.J. (*dissenting*). I agree with the majority on all the issues except for one. Because the State's evidence was based in large part on an expert who falsified his credentials and there is a reasonable likelihood his false testimony affected the jury's judgment resulting in a conviction, I respectfully dissent. I would reverse the conviction and remand the matter for a new trial.

¶55 Douglas Plude reported to the authorities that he found his wife, Genell, slumped over a toilet bowl and not breathing. He described the top of her forehead as hung down over the toilet bowl and touching the water. He indicated that he pulled her off the toilet, began performing CPR, and screamed to awake his mother. Genell was then taken to the local hospital in Eagle River where she was pronounced dead.

¶56 The State's theory in this case was that Plude had murdered his wife by administering an overdose of medication and, while she was vomiting, forced her face into the toilet water to drown her. Plude's defense was that Genell had committed suicide.

¶57 To set the scene and appreciate the importance of the State's expert Dr. Saami Shaibani's false testimony, a brief prelude is necessary. At trial, conflicting expert medical testimony was presented concerning Genell's death. Both the prosecution and defense stipulated that a fatal dose of medication was present in Genell's body. But the State's expert, Dr. Robert Huntington, testified the fluid in the lungs was more likely than not water from the toilet, mixed with vomit. He concluded that Genell's death was brought about by drug intoxication

abetted by drowning. However, he could not determine if her death was caused by suicide or homicide. On the other hand, one of the defense experts testified the fluid in Genell's lungs was not toilet water, but rather pulmonary edema caused when the medication overdose slowed her heart to a very low rate. He concluded Genell drowned due to the reduced blood circulation caused by the drugs and the presence of the pulmonary edema.

¶58 In order to prove its homicide case, the prosecution had to show that Genell could not have inhaled the toilet water herself. This is where Shaibani was called to testify about his variety of experiments and his expertise to conclude Genell had been forcibly drowned. In fact, it appears that this was a primary focus of the trial covering extensive pages of testimony. Unfortunately, Shaibani misrepresented his professional credentials in large part when testifying to the jury.

¶59 In *Giglio v. United States*, 405 U.S. 150, 154 (1972), the Court held that a new trial is required when prosecutors relied on testimony that they later learn to be false if, “the false testimony could ... in any reasonable likelihood have affected the judgment of the jury.” Wisconsin followed this principle in *State v. Nerison*, 136 Wis. 2d 37, 401 N.W.2d 1 (1987).

¶60 The Court made it very clear in *Giglio* that deliberate deception of a court and jurors by the presentation of false evidence is incompatible with rudimentary demands of justice. *Id.* at 153. The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears. *Id.* This is irrespective of the good faith or bad faith of the prosecutor. *Id.* However, the Court acknowledged that a new trial is not automatically required, but rather the false evidence must be material such that a new trial is

required if the false testimony could in any reasonable likelihood have affected the judgment of the jury. *Id.* at 154.

¶61 I emphasize Shaibani's testimony not for whether his conclusions were true or false, but to show the importance of his false testimony. At the beginning of his testimony, Shaibani outlined to the jury his credentials, which appeared impressive. He testified that as a clinical professor of physics at Temple University he had two main areas of responsibilities. He taught and researched.

¶62 He elaborated that,

My teaching is to physicians and surgeons, fully qualified medical doctors, and I teach them about injury. It's one of those curious things that they don't learn about injury in medical school. So I explain how injuries are caused, how they can be prevented, how they can be treated under certain circumstances.

When asked if these people received credit for his teachings, he responded,

Yes, sir. There is something called continuing medical education credits, and that's called CME, and the type of people who come to my classes would be orthopedic surgeons, neurosurgeons, emergency room physicians, pathologists, those kind of specialties, and, if they don't come to my class in certain circumstances, they can lose their license because they have to maintain a certain level of education.

In response to a following question as to whether he had ever been employed at any hospitals before, he stated,

Yes, sir, I have. As part of my responsibility with Temple University Medical School, I worked at one of their teaching hospitals for four years in the name of the main place where I—called Conemaugh Memorial Medical Center.

¶63 As was learned after trial and the State concedes, any representation that Shaibani was employed by or affiliated with Temple University was simply untrue. One must keep in mind that when testifying as to his conclusions, the jury believed he was a clinical professor who taught at a university the mechanics of injury to highly professional medical personnel. His impressive credentials were undisputed at that time. However, it appears undisputed that, at best, he held a courtesy appointment, though it carried little more than parking privileges. But, the jury did not know it. The court did not know it. The defense did not know it. The prosecutor did not know it. In my opinion there is a reasonable likelihood these material false representations as to his professional qualifications affected the jury's judgment, requiring a new trial.

¶64 After explaining his professional background, Shaibani proceeded to testify that the mechanics of how any particular injury might occur was his specialty. He demonstrated to the jury how he reconstructed on an exhibit the basic dimensions and floor of the bathroom and the position of Genell's body at the toilet area where she was found. In great detail he referred the jury to his exhibit, prepared photographs depicting the scene in the bathroom as Plude claimed, as well as his explanation of experimenting with volunteers with the same body dimensions as Genell and placing their head in a toilet bowl and their knees and hands in the same position as Plude said he found Genell. Shaibani concluded that under the physical laws of nature only an external force of at least sixty pounds would keep Genell's face in the toilet water. Without this extremely critical testimony for the prosecution, it is unlikely the State could have proven a homicide.

¶65 Here, a State's expert tells the jury he is a specialist in the mechanics of injury and has been teaching this subject as a clinical professor at Temple

University to medical doctors and surgeons for four years. He concludes that, in his expert opinion, Genell's head had to be forced with at least sixty pounds of external pressure into the toilet water. What jury would not be impressed with these credentials and his conclusion? From the guilty verdict, it seems obvious the jury was impressed. Admittedly, Shaibani has other worthy credentials to qualify him as an expert, but here his testimony was critical for the prosecution in context of his background and teachings at Temple University, teaching as a clinical professor in physics at Temple University, which I would again emphasize was false.

¶66 Is there a reasonable likelihood that his false testimony as to his affiliation with Temple University would have affected the judgment of the jury? Absolutely. Any judge who has presided over a jury trial with expert testimony knows that an expert's credentials are a substantial factor that can favorably impress a jury. Whether the jury would have accepted Shaibani's conclusions on how Genell died if he had not lied about his claimed affiliation with Temple University is not the question. Rather, the question is if there is a reasonable likelihood his false testimony as to his teachings as a clinical professor in physics at Temple University affected the jury's judgment. I conclude the answer must be yes.

¶67 What our United States Supreme Court said thirty-five years ago in *Giglio* remains true today. Deliberate deception of a court and jurors by the presentation of false evidence is incompatible with rudimentary demands of justice. *Id.* at 153. We should not permit a conviction to stand even when it rests in part on false testimony if there is a reasonable likelihood the false testimony influenced the jury in reaching its verdict. This principle must apply even if the prosecution did not solicit the false evidence or was unaware of its falsity when

presented. Therefore, I would reverse the conviction and remand the matter for a new trial.

