COURT OF APPEALS
DECISION
DATED AND FILED

August 24, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2009AP1242 **Cir. Ct. No. 1995CF767**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CODY J. VANDENBERG,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Brown County: DONALD R. ZUIDMULDER, Judge. *Reversed and cause remanded with directions.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Cody Vandenberg appeals an order denying his motion for postconviction relief. In 1996, Vandenberg was convicted of armed robbery and attempted first-degree intentional homicide following a trial at which

the principal issue was the perpetrator's identification. He now seeks a new trial, arguing that: (1) his co-defendant, Larry Pearson, had since confessed to the crimes; and (2) the jury was not presented with evidence undermining the victim's eyewitness testimony, including medical records indicating the victim was severely intoxicated at the time of the attack. Using our discretionary authority under WIS. STAT. § 752.35,[1] we reverse in the interest of justice and remand for a new trial.

BACKGROUND

Vandenberg's Trial

¶2 The victim, Blake Renard, was the State's primary witness and testified that on July 15, 1995, someone entered his trailer home in Bellevue, stabbed him multiple times, and robbed him. Renard explained he had lost his wallet a few weeks before the attack, and someone had been using his credit cards, which he cancelled. On the night of the attack, a man, whom Renard identified as Vandenberg, showed up at the trailer with Renard's wallet. Renard, who had already consumed six or seven beers, invited the man inside for a drink. The man asked about a reward, and Renard offered to write a check for $20. As Renard turned to retrieve his checkbook, the visitor stabbed him in the neck, just missing his spine. Renard spun around and a brief struggled ensued, during which Renard was stabbed seven more times. The assailant stole Renard's new credit cards, cut the phone cord, and left.

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

¶3 Police lieutenant Jeff Sanborn testified that he found Renard lying outside his trailer, covered in blood. Renard repeatedly told Sanborn "some guy" he had never seen before stabbed him. Renard did not provide a description at the time.

¶4 Deputy George Gulczynski also responded to the trailer park. He tried to calm Renard until a rescue crew arrived, and then accompanied Renard in the ambulance. While being treated, Renard described his assailant as a 220-pound white male, approximately six-feet-four-inches tall, clean-shaven, with long, sandy brown hair parted down the middle. Two days later, Renard provided a similar description to a sketch artist while hospitalized.

¶5 At trial, the State theorized that Vandenberg committed the crimes with the help of Larry Pearson, who had come to Green Bay a few weeks before the attack to avoid arrest in Illinois, and had found work in the same mechanic's shop as Vandenberg. Pearson roughly matched Renard's description, save one notable characteristic: Pearson had a beard. Pearson owned a white Ford Pinto similar to one witnesses saw being driven up and down Renard's dead-end road in the hours before the attack. Pearson and the Pinto were also captured on surveillance video at a gas station near the trailer park. Police eventually found Pearson in Indiana, carrying Renard's wallet.

¶6 Police gathered further evidence against Pearson after he was apprehended. A bloody shoe print in the trailer was consistent with Pearson's shoe. Police found Pearson's car in a salvage yard with presumptive blood on the driver's side of the vehicle. During initial questioning, Pearson admitted he was at

Renard's trailer and had used Renard's credit cards, but denied committing the crimes. Instead, he claimed he was the getaway driver for a man named Tom,[2] who entered the trailer alone and returned to the car ten to fifteen minutes later. Based on the physical evidence and Pearson's admission, he was charged with armed robbery and attempted homicide as party to a crime. Pearson later pled guilty to the armed robbery charge pursuant to a plea deal in which the State agreed to drop the attempted homicide charge in exchange for Pearson's testimony at Vandenberg's trial.

¶7 Prosecutors, lacking any physical evidence tying Vandenberg to the scene, sought to link Vandenberg with Pearson. Colin Gelford, an inmate on the same cell block as Pearson at the Brown County Jail, testified that before police arrested Vandenberg, Pearson often spoke about his case. Sometimes Pearson claimed he stabbed Renard, and at other times he claimed he was only an accomplice. Gelford told police Pearson became emotional after a visit from a detective, repeatedly exclaiming to Gelford that police had found his partner. According to Gelford, Pearson wanted to get a message to Vandenberg that he was not "snitching" on him.

¶8 Renard testified that police administered a photo lineup shortly after receiving Gelford's tip. The six-person array included Vandenberg's picture. Renard initially expressed some reservations about his ability to identify his assailant, and did not make an immediate identification. Police left Renard alone with the photo array for about five minutes, after which Renard indicated he was "pretty sure" Vandenberg was his attacker. Renard asked to look at the sketch

[2] Pearson gave police many names for his accomplice, including Tony, Tom, Glen Rogers, and James Drown. Pearson testified at trial he had a lot of fun leading police astray.

from the hospital, and then told police he was "more certain" it was Vandenberg. At trial, Renard stated there was "no question" Vandenberg was the person who stabbed him.

¶9 The State bolstered its identification case with other witnesses who linked Vandenberg with Pearson. Angela Horn, a shoe salesperson at Sears, testified that a man with a beard used a stolen credit card to buy basketball shoes for another man with long, blonde hair, but she could not identify Vandenberg at trial. Patricia Fischer, Pearson's co-worker, testified that Pearson often bragged about using Renard's stolen credit cards, and that she overheard Pearson tell Vandenberg he knew where the trailer was.[3] Jerome Malinski, another jail inmate, testified Pearson "spent about three days coming up with various stories of who did what, when, how, why, just … constantly lying," and that one of these versions implicated Vandenberg. Dennis Hart, Vandenberg's friend, testified that while drinking at a bar, Vandenberg said police were looking for him in connection with the stabbing.[4] And Cathy Green, Vandenberg's girlfriend, testified that she saw Pearson ask Vandenberg for his survival knife a week before the stabbing. Vandenberg gave Pearson the knife.

¶10 Pearson testified for the State after receiving immunity. Pearson stated he was drinking into the early morning on July 15, and left a Green Bay bar with a male he did not know. Pearson began telling the stranger about Renard's

[3] Fischer did not hear Renard's name mentioned in the conversation between Vandenberg and Pearson.

[4] In a prior statement to police, Hart stated Vandenberg admitted that he "rolled" a guy and could not believe the victim did not die. At trial, Hart disputed the accuracy of the police report, asserting Vandenberg never said anything about robbing or stabbing Renard. Hart admitted he "was not coherent whatsoever" during the conversation with Vandenberg.

wallet, and suggested they go to Renard's trailer and rob him. Pearson drove to Renard's trailer, and the stranger entered alone, fought with Renard, and stabbed him. The stranger, covered in blood, returned to the car and jumped in the passenger seat, and Pearson testified he left him at a nearby gas station. Pearson stated he then left for Indiana, burying the knife and burning the stranger's clothes on the way. Pearson claimed Vandenberg had nothing to do with the stabbing, and denied implicating Vandenberg while incarcerated.

¶11 On May 3, 1996, the jury found Vandenberg guilty of armed robbery and attempted first-degree intentional homicide. He was sentenced to eighty years in prison, forty for each charge.

Vandenberg's Prior Postconviction Motion

¶12 Vandenberg filed a postconviction motion for a new trial in 1997. In it, he alleged his trial attorney was ineffective for failing to interview or present the testimony of alibi witnesses who swore they were with Vandenberg at a nearby lake the night of, and morning after, the attack. He also claimed the alibi witnesses constituted newly-discovered evidence. At an evidentiary hearing, Kristin Reynolds testified that Vandenberg was asleep in his truck at the lake when she went to bed and that, when she awoke, he was still sleeping and his truck had not moved. The court rejected the motion, noting no testimony established Vandenberg's location at the time of the crime. We affirmed. *See* ***State v. Vandenberg***, No. 1997AP2864, unpublished slip op. (Wis. Ct. App. July 21, 1998).

Vandenberg's Current Postconviction Motion

¶13 Vandenberg filed the present postconviction motion on June 9, 2008. In it, he alleged he was entitled to a new trial on the grounds of newly discovered evidence, ineffective assistance of counsel, and in the interest of justice.

¶14 Vandenberg presented Pearson's testimony in support of his newly discovered evidence claim. Contrary to his trial testimony, Pearson admitted that he was the sole perpetrator, and had stabbed and robbed Renard while his girlfriend's two teenage sons waited in the car. Pearson testified he was just looking to rob Renard so he could leave the state, but "flipped out" when Renard fought back. He cleaned up in an outdoor restroom after the stabbing and fled. Pearson told police he committed the crimes, but they did not believe him because they already suspected Vandenberg. Pearson explained his refusal to incriminate himself at Vandenberg's trial by noting that, at the time, he had not yet been sentenced on the armed robbery charge.

¶15 Pearson's attorney, Mark Converse, also testified at the postconviction hearing. Converse stated that Pearson had privately confessed to both him and his investigator, Larry Robe. Converse testified that Robe had since died, but had submitted a report before his death indicating Pearson admitted to the stabbing and robbery.

¶16 Chris Heil, Pearson's social worker at the Green Bay Correctional Institution, testified that Pearson admitted stabbing Renard. According to Heil, Pearson

> went into how Cody had nothing to do with the offense that they were convicted of and … wanted to have it on the record and let it be known that he was willing to cooperate with anyone and everyone that was necessary in order to

> correct the record and let it be known that he was the only one who committed the offense ….

Pearson further told Heil that Vandenberg had no knowledge of the attack and was not involved in the planning. He did tell Heil there were two juvenile boys that he had with him at the time, but they waited in the car. Heil informed Pearson of the possible consequences of coming forth, then documented the conversation and discussed it with her supervisor.

¶17 In support of his ineffective assistance of counsel claim, Vandenberg presented the testimony of his trial counsel, Eric Stearn. Stearn admitted that, through his own error, he failed to present hospital records at trial showing Renard had a blood alcohol content of .22 shortly after the attack.

¶18 The State's only witness at the postconviction hearing was Blake Renard. Renard testified he was not surprised to learn the degree of his intoxication on the night of the attack. He stated that when he described his attacker to the sketch artist in the hospital, he was "groggy" and on morphine. Renard acknowledged he needed the sketch to pick his assailant out of the photo lineup months later, but stated he "just absolutely [knew]" it was not Pearson who attacked him.

¶19 The circuit court orally denied Vandenberg's motion on April 24, 2009. It noted this has "always been an identification case," and determined Pearson's recantation "would [not] necessarily have been material to the issue at trial." The court also concluded Vandenberg failed to prove counsel was ineffective or that he was entitled to a new trial in the interest of justice.

DISCUSSION

¶20 We do not address Vandenberg's arguments of newly discovered evidence and ineffective assistance of counsel because we conclude he is entitled to a new trial in the interest of justice. This court possesses a broad power of discretionary reversal pursuant to WIS. STAT. § 752.35, which provides authority to achieve justice in individual cases. ***Vollmer v. Luety***, 156 Wis. 2d 1, 19, 456 N.W.2d 797 (1990). Broadly, we may exercise our power of discretionary reversal where it appears from the record that the real controversy has not been fully tried, or if it is probable that justice has for any reason miscarried. WIS. STAT. § 752.35. No mechanistic formula governs when we should exercise this authority. ***State v. Cuyler***, 110 Wis. 2d 133, 142, 327 N.W.2d 662 (1983).

¶21 Here, Vandenberg claims he is entitled to a new trial because the real controversy—the attacker's identity—was not fully tried. This argument requires us to determine whether, considering the totality of circumstances, a new trial is required to accomplish the ends of justice. ***State v. Wyss***, 124 Wis. 2d 681, 735-36, 370 N.W.2d 745 (1985), *overruled on other grounds by* ***State v. Poellinger***, 153 Wis. 2d 493, 505-06 and n.6, 451 N.W.2d 752 (1990). Whether the outcome would be different on retrial is irrelevant. ***Vollmer***, 156 Wis. 2d at 19. "[T]he real controversy has not been tried if the jury was not given the opportunity to hear and examine evidence that bears on a significant issue in the case, even if this occurred because the evidence or testimony did not exist at the time of trial." ***State v. Maloney***, 2006 WI 15, ¶14 n.4, 288 Wis. 2d 551, 709 N.W.2d 436.

¶22 Here, the jury did not hear Pearson's testimony that he was the sole perpetrator. Instead, Pearson presented an elaborate story in which he was nothing more than an unwitting accomplice to a "stranger" who was not Cody

Vandenberg. This testimony obfuscated the critical identification issue. Pearson's testimony invited the jury to speculate about the stranger's identity, an effect that would have been avoided if Pearson had simply declared himself the assailant as he did at the postconviction hearing. While we cannot determine whether the jury would have found Pearson's confession credible, the jury should at least have the opportunity to consider that evidence.

¶23 The jury also did not consider that Pearson confessed to other individuals, both before and after Vandenberg's trial. Unbeknownst to the jury, Pearson had privately confessed to his attorney, Mark Converse. Converse's investigator, Larry Robe, noted that Pearson declared his guilt during a November 23, 1995 interview:

> Client says he assaulted the victim from the back, the knife had a ball on the butt end of the knife, he repeatedly struck the victim in the head, blood spattered the wall, victim managed to turn around and hit the client, client said: "Fuck it" and stuck him in the rib cage, approximately 6-7 times.

After Vandenberg was convicted, Pearson confessed to Chris Heil. Despite having worked as a prison social worker for over twelve years, Heil found Pearson's admission particularly unusual, stating, "I can't recall having another similar conversation with anybody else, I never had anybody say, you know, they want to confess to a crime and they don't want anything in return for it."

¶24 The State argues we should not rely on Pearson's confession, claiming he *does* want something other than a clear conscience in return. Although the State theorizes Pearson recanted in the hope of gaining an early parole, Pearson testified to the contrary at the postconviction hearing, stating he was "probably shooting [himself] in the foot [for] saying this stuff," and noting his

testimony would likely invite unfavorable letters from the prosecutor and victim to the parole board. Pearson also acknowledged he could be charged with perjury. Further, Pearson told Heil he understood his confession could adversely affect him, but wanted to cooperate in any event.

¶25 The State minimizes the significance of Pearson's recantation by pointing out that the jury was presented with evidence that Pearson admitted guilt to other inmates. Both Gelford and Malinski testified that Pearson implicated himself in some versions of his story. Yet this testimony did not present the full identification issue to the jury. The weight of the inmates' testimony was diminished to the extent that Pearson's trial testimony contradicted what he purportedly said while incarcerated. Moreover, both inmates testified that Pearson frequently changed his story. This, too, undermined the weight of the inmates' testimony, as it invited speculation about which of his numerous stories might be true. Pearson's in-person confession would have cast the inmates' testimony in a far different light.

¶26 The jury also did not hear testimony bearing on Renard's ability to correctly describe and identify his assailant. During closing arguments, Pearson's trial counsel asserted Renard was "getting to the point of intoxication" before the attack, but conceded that "the level of intoxication we don't know, there was no blood alcohol test or figure like that." The prosecutor seized upon this lack of evidence:

> You know, why does Mr. Stearn say Blake Renard is intoxicated[?] He had—he said he was telling the truth. He said he's had 6 or 7 beers over 3, 3 and a half hours. Do you think he was intoxicated[?] … No police officer who responded said he was intoxicated. Why does he have to say he's intoxicated[?] *He wasn't*. (Emphasis added.)

As the hospital records indicate, Renard was, in fact, severely intoxicated—nearly three times the current legal driving limit. This evidence directly bears on Renard's ability to perceive and recall his attacker's characteristics. Stearn's failure to introduce the records allowed the prosecutor to argue Renard was not impaired—a fact that is simply not true.

¶27 Having thoroughly reviewed the record, we conclude the real controversy regarding the identity of Renard's attacker was not fully tried. The jury did not hear critical evidence bearing on the identification issue, including Pearson's confession, the testimony of Pearson's attorney and social worker, and hospital records indicating Renard was severely intoxicated at the time of the attack. Accordingly, we conclude Vandenberg is entitled to a new trial in the interest of justice.

¶28 We reach this conclusion mindful that "eyewitness testimony is often hopelessly unreliable." ***State v. Dubose***, 2005 WI 126, ¶30, 285 Wis. 2d 143, 699 N.W.2d 582 (quotation omitted). Our supreme court has taken notice of research indicating "that eyewitness misidentification is now the single greatest source of wrongful convictions in the United States, and is responsible for more wrongful convictions than all other causes combined." ***Id.*** Although eyewitness testimony remains a permissible form of proof in criminal cases, we must ensure the jury is presented with all relevant information affecting the weight given to that evidence.

By the Court.—Order reversed and cause remanded with directions.

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