STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I
Appeal No. 2006AP002300

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

LISIMBA LITEEF LOVE,

Defendant-Appellant.

APPEAL FROM AN ORDER OF THE MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE TIMOTHY DUGAN, PRESIDING, DENYING THE APPELLANT'S MOTION FOR A NEW TRIAL ON THE GROUNDS OF INEFFECTIVE ASSISTANCE OF COUNSEL

APPELLANT'S BRIEF AND APPENDIX

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The issues presented by this appeal are primarily factual in nature and, therefore, the opinion of the court of appeals is not likely to be of statewide importance. As such, neither oral argument nor publication is recommended.

STATEMENT OF THE ISSUES

I. Whether the trial court erred in denying Love's motion for a new trial based on newly discovered evidence?

ANSWERED BY THE TRIAL COURT: No

II. Whether the trial court erred in denying Love's motion for a new trial based upon ineffective assistance of trial counsel?

ANSWERED BY THE TRIAL COURT: No

SUMMARY OF THE ARGUMENT

The appellant, Lisimba Love ("Love") was convicted after a jury trial of armed robbery. The victim of the robbery was Milwaukee Bucks player, Glenn Robinson ("Big Dog"). At trial Love presented the defense of alibi.

I. NEWLY DISCOVERED EVIDENCE

The trial court abused its discretion in denying Love's motion for a new trial based upon the claim of newly-discovered evidence. The newly-discovered evidence was Christopher Hawley's testimony that, while in prison, he had a conversation with Floyd Lindell Smith in which Smith admitted that he did the "Big Dog" robbery and that Love had nothing to do with it. When called as a

witness at the postconviction motion hearing Smith invoked his fifth amendment privilege when questioned about the robbery. The trial court denied the motion on the grounds that Hawley's testimony was not credible and it was not admissible under the hearsay rules.

The trial court abused its discretion because Hawley's testimony concerning Smith statement against penal interest is admissible because Smith's invocation his fifth amendment rights made him unavailable and, at the same time, it offered independent corroboration of the statements to Hawley. Additionally, in ruling on a newly-discovered evidence motion the trial court does not make credibility determinations. That is for the jury to determine at trial.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

Prior to the start of trial, Love's counsel was made aware that a man named Jerees Veasley had information that would exculpate Love. Trial counsel admitted that she was made aware of Veasley prior to trial. Veasley testified that Love's counsel never interviewed him prior to trial. Jail records do not show that Love's attorney ever visited the jail during the relevant period. Trial counsel, though, claimed that she interviewed Veasley and determined that he had "no useful information." Veasley, on the other hand, testified that he was at the scene of the Robinson robbery earlier in the night and saw Michael Cooks there but not Love. Later, Cooks told Veasley that he (Cooks) did the "Big Dog" robbery.

Although a strategic decision of counsel based upon a

reasoned interpretation of the facts may not be the basis for a claim of ineffective assistance of counsel, here, it does not appear that trial counsel actually did interview Veasley; and, moreover, Veasley's testimony was plainly exclupatory to Love- it was consistent with Love's alibi defense. There could be no legitimate reason for not calling Veasley as a witness.

STATEMENT OF THE CASE

I. PROCEDURAL BACKGROUND

The defendant-appellant, Lisimba Love ("Love") was charged with armed robbery, party to a crime, arising out of an incident which Milwaukee Bucks basketball player, Glenn Robinson, was mugged while leaving "Juniors", a local nightclub. (R:2)

Love entered a not guilty plea and the case proceeded to jury trial. The jury returned a verdict finding Love guilty. Thereafter, the court sentenced Love to 44 years in prison.

Love's postconviction counsel filed two motions, one requesting sentencing modification, the other alleging ineffective assistance of counsel. The ineffective assistance of counsel claims stemmed from Love's trial counsel's failure to object to the prosecutor's (1) reference to the preliminary examination during the trial and closing arguments; and (2) invitation to the jurors to turn down the lights and time themselves for two minutes during their deliberations. See ***State v. Love***, No. 2001AP817, unpublished slip. op., ¶6 (Wis. Ct. App. Dec. 11, 2001). The trial court denied these motions, and the court of appeals affirmed. *Id.*

Years later, on May 6, 2003, Love, *pro se*, filed a motion for postconviction relief under Wis. Stat. § 974.06 (2001-02) requesting a new trial on two grounds. First, Love requested a new trial based on newly discovered evidence. Love included an affidavit from Christopher Hawley, who claimed to have met another inmate, Floyd Lindell Smith, Jr., while at Green Bay Correctional Institution. Hawley averred that Smith admitted to robbing Robinson and shared in-depth details regarding the incident. Love also submitted a booking photograph of Smith taken one week after the Robinson robbery. Smith had been arrested for carrying a concealed weapon, and his picture is that of a male with a dark complexion, 22 years old, weighing 170 pounds with a mini-afro.

Second, Love also argued that his postconviction counsel was ineffective for failing to allege that his trial counsel was ineffective for failing to investigate an exculpatory witness. As support, Love provided a police report that was prepared on January 7, 2000, which was three days before Love's trial was to begin, that noted that Love's mother received a telephone call from the Milwaukee County Jail on November 22, 1999. The caller identified himself as Jerees Veasley and claimed to have knowledge of who actually robbed Robinson. Love alleged in his motion that trial counsel did not attempt to contact Veasley nor investigate the claim. Love also alleged that since Robinson's identification was the sole piece of evidence linking Love to the scene, the failure to investigate this exculpatory witness, or at least a witness that inculpated another, was deficient and prejudicial.

The trial court denied the motion without hearing ruling that

the pleadings, even when taken as true, failed to allege sufficient facts to establish that Love was entitled to the relief he sought.

Still proceeding *pro se*, Love appealed to the Wisconsin Court of Appeals. The court of appeals summarily affirmed the circuit court's order. ***State v. Love***, No. 2003AP2255, unpublished order (Wis. Ct. App. May 12, 2004).

Thereafter the Supreme Court granted review. Love was then appointed counsel for the appeal. On July 12, 2005 the Supreme Court reversed the Court of Appeals and remanded the case to the trial court with orders to conduct a hearing into Love's §974.06, STATS., motion.

A series of hearings were held with the first on March 10, 2005. The evidentiary phase of the motion was completed on May 12, 2006.

At the March 10, 2006 hearing Floyd Lindell Smith was asked whether he ever discussed his (Smith's) involvement in the Glenn Robinson robbery with a man named Christopher Hawley. (R:64-14) Smith invoked his fifth amendment privilege and refused to answer. *Id.* Love then made a formal request of the district attorney that Smith be granted immunity. The State declined. *Id.*

Love's counsel then continued to question Smith about his involvement in the robbery thereby forcing Smith to repeatedly invoke the fifth amendment privilege. (R:64-16 *et seq.*) Love asked the court to draw inferences in favor of Love from Smith's refusal to answer.

Following the May 12, 2006 hearing the court adjourned the matter for the filing of an affidavit by a Milwaukee County sheriff's

deputy concerning whether jail records reflected that Love's trial counsel visited him at the jail during the relevant period. That affidavit was finally filed on August 31, 2006. Thereafter the trial court made findings of fact, conclusions of law, and ordered that Love's motion be denied (*see* Appendix D). The court ruled:

> The Court finds Miss Bowe's testimony to be credible.
>
> Further, there was no Mike Cooks in the RCI and there was no Mike Cooks found to the date of the hearing. And the Court's conclusion is that Mr. Veasley's testimony was merely a fabrication by Mr. Veasley for the purpose of helping the defendant.
>
> The second portion of the motion was that new evidence Floyd Smith admitted committing the crime and Floyd Smith testified that he knows Hawley but knows-- know of Hawley but doesn't know him. That he never talked with Hawley. And then he took his fifth amendment.
>
> As to Mr. Hawley's testimony and the defendant's testimony the Court finds neither one of them to be credible. That both were perjuring themselves during the course of their testimony.
>
> Hawley was serving 55 years in prison. The defendant is his friend and he talks about Baylo and that he saw Floyd in court and he says that Smith is not Baylo. He denies the words in the affidavit were in effect his works and that he was in prison.
>
> Moreover, based upon-- considering all the credibility factors, again the Court does not find that testimony credible.
>
> Additionally, the testimony would not be admissible under State v. Guerard . . . because the hearsay statements that Hawley was attempting to introduce, which he never really came back to support, that Smith or Baylo admitted to committing the crime are not independently corroborated by any other source.
>
> Also, the statements of Veasley that Mike Cooks allegedly stated that he committed the crimes also would not have been admissible on the grounds that they were not corroborated . . .

(R:69-18, 19)

Love now appeals to the Court of Appeals.

II. FACTUAL BACKGROUND[1]

A. Testimony concerning newly discovered evidence

Floyd Lindell Smith testified at the postconviction motion hearing. Smith is Love's first counsin. (R:64-28) At the time Smith was housed at the Green Bay Correctional Institution (GBCI). (R:64-8) Smith was serving a prison sentence of twenty years initial confinement and six years extended supervision for a 2000 conviction for armed robbery. (R:64-9) Smith was sent to GBCI in February, 2001, and had resided there continuously until the time of the hearing. (R:64-10)

Smith told the court that while he was at GBCI he came to know a person named Christopher Hawley. (R:64-10) Smith claimed that he was not close friends with Hawley but, rather, he merely knew who the man was. Prison records established that Smith and Hawley were, in fact, both assigned to GBCI at the same time. (R:64-31)

At the hearing Smith was asked whether he had ever discussed with Hawley his (Smith's) involvement in the Glenn Robinson robbery. (R:64-12) Smith invoked his fifth amendment rights and refused to answer. *Id.* (*see* Appendix C which is the transcript of this series of questions)

1 The facts of the underlying offense are set forth at length in the attached opinion from the Wisconsin Supreme Court. (Appendix B) Those facts will be referred to as needed for a clear understanding of the issues; however, the facts will not be restated at length here.

Christopher Hawley also testified at the postconviction hearing. He was at the time assigned to the Waupun Correctional Institution (WCI). (R:64-39) He explained, though, that he had been at GBCI for eight-and-a-half years. (R:64-40) Hawley said that while at GBCI he knew a man named "Baylow" who, he later learned, was Floyd Lindell Smith. (R:64-40)[2]

Hawley testified that he had a conversation with Baylow at GBCI in which Baylow said that he was wrong for allowing his cousin to do time for the robbery of Glenn Robinson when he (the cousin) had nothing to do with it. (R:64-51, 52) Specifically, Hawley admitted that Smith told him that he (Smith), "stripped Big Dog[3] for his jewelry. He's a whore." (R:64-59, 60)

B. Testimony concerning ineffective assistance of counsel

Jerees Veasley[4] testified that,

> It was told to me by another individual named Mike Cooks when we was in RCI (Racine Correctional Institution) together that him and several other people, you know what I'm saying, they was at the club kicking, having a good time. And Big Dog supposed to came in, I guess, you know, strutting the celebrity thing around or whatever. And dude mentioned to me a couple times that him and his guys was plotting, you what I'm saying, to get what he had.

(R:64-71). Further, Veasley testified that he had been at Junior's

2 In a course of events that is emblematic of the difficulties of inmate testimony, Smith was brought into the courtroom for Hawley to identify as "Baylow", the man he later came to know was Floyd Lindell Smith. When Hawley looked at Smith he said, "That 'aint dude." (R:64-50) It was established, though, that Hawley had earlier signed a sworn affidavit that the person he had the conversation with was Floyd Lindell Smith (R:64-48) The judge later viewed Smith's forearms and found that on the right arm was tattooed "Bay" and on the left arm was tattoed "Low"- together reading "Baylow." (R:64-69)

3 "Big Dog" is the commonly-known nickname for Glenn Robinson

4 The State introduced prison records which suggested that Veasley was not in the Racine Correctional Institution during the period he claimed to have had this conversation with Michael Cooks (R:68-33)

Sport Bar[5] earlier on the night Robinson was robbed and the he recalled seeing Michael Cooks and Sharrod Higram at the club. (R:64-74)

Prior to Love's jury trial Veasley and Love were together in the Milwaukee County Jail. (R:64-73) During that time Veasley learned that Love was the one charged with robbing Robinson. Therefore, Veasley called Love's mother, Dorothy Love, and informed her that, "her son was innocent . . . that, basically, he's being framed for something that he didn't do . . . The people that done it . . . are sitting here laughing behind his back." (R:64-75) Veasley was certain that he made this call to Mrs. Love prior to Lisimba Love's trial. *Id.*

Additionally, Veasley testified that he had been at Junior's (the club in question) on the night that Robinson was robbed. (R:64-72) He claimed he left before Robinson arrived, though. *Id.* Significantly, though, Veasley testified that he saw Michael Cooks at the club that night. (R:64-74)

Dorothy Love testified that in November, 1999, she received telephone call from Jerees Veasley. (R:68-6) According to Dorothy Love, Veasley told her that her son was innocent. (R:68-7) Dorothy then called Lisimba's attorney, Ann Bowe, and told her about the existence of Veasley. *Id.* Dorothy told Bowe that there was a witness who wanted to talk to her. (R:68-8) Dorothy made two additional calls to Bowe about Veasley but she (Dorothy) never heard back from Bowe about Veasley. *Id.* Prior to the start of the trial Dorothy was, however, interviewed by a Milwaukee police detective about

5 The club outside of which Robinson was robbed

Veasley. (R:68-10)

Lisimba Love, too, testified that he spoke to Bowe about Veasley and instructed her to go interview him. According to Love's testimony at the hearing, Bowe said, "Don't worry about it. I'm gonna take care of it." (R:68-17) Love denied that Bowe ever told him that Veasley would not be called because he did not fit within the trial strategy. (R:68-18)

As late as the morning of trial Love questioned Bowe about Veasley. According to Love, Bowe just said, "Don't worry about nothin' it's all tooken [sic] care of." (R:68-20)

Veasley testified that no attorney or investigator interviewed him prior to Love's jury trial. (R:64-77)

Bowe admitted that she had a conversation with Dorothy Love prior to trial in which Love told her (Bowe) that there was a man in the jail claiming that her son was innocent. (R:68-38) However, Bowe claimed that she went and talked to Veasley. *Id.* Bowe testified at the postconviction hearing that when she went to talk to Veasley she was unimpressed with him as a witness because, "he was not able to give specifics and my impression was that he was attempting to get information from me about what the accusations were . . ." (R:68-39) Significantly, Bowe did not bring an investigator with her when she interviewed Veasley. (R:68-46) She could not remember where she interviewed him except that she believed it was in a jail in Milwaukee. In another piece of bad luck, Bowe testified that she is sure she took notes of her interview with Veasley but that the notes were destroyed in an office fire. (R:68-48)

According to jail records, the only time Bowe visited the

Milwaukee County Jail during the relevant period was on October 11, 1999- well before Veasley's existence was made known to her. (R:69-2). The records custodian told the court that these jail records are not conclusive- there was the possibility that Bowe went into the jail but did not sign the log. *Id.*

Bowe suggested that she did not follow up on her conversation with Veasley because she did not believe he was a credible witness. On this point, Bowe testified:

> Q And you didn't make any real effort to try to find out who this guy was that Veasley knew about.
>
> A Other than the conversation I had, which I found to be incredible. I did no further work after that.
>
> Q Well, that's what I'm trying to understand is, according to your testimony, Veasley made no claim to be an eyewitness of the armed robbery, right?
>
> A Correct.
>
> Q So his credibility really isn't an issue as far as you're concerned, is it?
>
> A It was an issue. I was concerned about what information he was offering me. I did not find the information useful.
>
> Q Well, he was just offering you a lead as to where you might go for further information, right?
>
> A Except that he didn't. He didn't give me a name. He didn't tell me specifics about the alleged other person.

(R:68-50)

Additionally, Bowe recalled Lisimba Love asking her about Veasley as a witness. According to Bowe, she told Love that Veasley, "[D]idn't have anything to help you." (R:68-41)

ARGUMENT

I. THE TRIAL COURT ERRED IN DENYING LOVE'S MOTION FOR A NEW TRIAL BASED UPON NEWLY-DISCOVERED EVIDENCE.

Love alleged in his motion that he was entitled to a new trial based upon newly-discovered evidence. The new evidence was the testimony of Christopher Hawley that he had a conversation with Floyd Lindell Smith in which Smith admitted that he committed the robbery of Robinson and that his cousin (Love) had nothing to do with it. Smith was called as a witness at the motion hearing but invoked his fifth amendment privilege in response to any questions about his involvement in the robbery. Hawley, after some difficulty in establishing the identity of the person to whom he spoke, admitted that "Baylow" (Smith) told him that he (Baylow) had done the Big Dog robbery. The trial court found that Love had not established his right to a new trial primarily because Hawley's testimony about Smith's admissions was hearsay that was "not independently corroborated by other sources (presumably the court was relying on the provisions of Sec. 908.045(4), STATS)."

As will be set forth in more detail below, the trial court abused its discretion in denying Love's motion. Even if Smith were to invoke his fifth amendment right at trial, Hawley's testimony concerning Smith's admissions is admissible as a statement against punitive interest.[6] (*See,* Sec. 908.045(4), STATS which requires that

6 **908.045(4)** : "(4) Statement against interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability or to render invalid a claim by the declarant against another or to make the declarant an object of hatred, ridicule, or disgrace, that a reasonable

where a hearsay statement exculpates a criminal defendant it is not admissible unless it is corroborated) Although Smith's hearsay statement exculpates Love, admission of the statement is not precluded because it is independently corroborated by the fact that Smith invoked his fifth amendment privilege. Given the nature of the admission, had the evidence been presented to the jury it is likely that the result of the trial would have been different.

There are strict requirements which must be proven by clear and convincing evidence in order for a convicted defendant to receive a new trial based on newly discovered evidence. The defendant must show that: "(1) the evidence was discovered after conviction; (2) the defendant was not negligent in seeking to discover it; (3) the evidence is material to an issue in the case; (4) the evidence is not merely cumulative to the testimony introduced at trial; and (5) it is reasonably probable that, with the evidence, a different result would be reached at a new trial." ***State v. Carnemolla***, 229 Wis. 2d 648, 656, 600 N.W.2d 236 (Ct. App. 1999). "Finally, when the newly discovered evidence is a witness's recantation, ...the recantation must be corroborated by other newly discovered evidence. ***State v. McCallum***, 208 Wis. 2d 463, 473-74, 561 N.W.2d 707 (1997).

On appeal, the standard of review is whether the trial court erroneously exercised its discretion. *See* ***State v. Brunton***, 203 Wis. 2d 195, 201-02, 552 N.W.2d 452 (Ct. App. 1996).

There was no issue raised about whether the Smith/Hawley

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person in the declarant's position would not have made the statement unless the person believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborated."

.testimony was "newly discovered". Rather, the issue at the hearing was whether this evidence would have caused a different result at trial- specifically, the issue was whether the evidence was even admissible in the first place.

Here, when questioned about the Big Dog robbery, Smith invoked his fifth amendment privilege. Presumably, he would do the same if called to testify at a new trial. Although a criminal defendant has no right to force a witness to invoke his fifth amendment privilege in front of the jury[7] and to then request an instruction that the jury may draw a negative inference, Smith's invocation of his fifth amendment privilege is important in two other respects: (1) It makes him unavailable as a witness; and, (2) It corroborates Hawley's testimony that Smith admitted to being involved in the robbery and that Love had nothing to do with it.

The invocation of fifth amendment rights makes a witness "unavailable" as that term is used in Sec. 908.045(3), STATS. *See,* Sec. 908.04(1)(a), STATS. Thus, Smith was unavailable as a witness for

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7 *See, generally,* Sec. 905.13, STATS. Also, "Another reason for the distinction between criminal and civil cases is the need for mutuality. Clearly, the statute reasonably prohibits a prosecutor from attempting to prove up a criminal case by calling a group of the defendant's friends who assert their fifth amendment privilege before the jury. If there is a rational basis for the state not to be permitted to rely on adverse inferences from the invocation of a fifth amendment right, then the defendant should not be able to benefit from an identical inference. If this court were to accept Heft's argument that she could force Cisler to plead the fifth in the presence of the jury, what, then, should preclude the state, when attempting to rebut her affirmative defense, from adversely calling her to the stand and forcing her to assert her right to remain silent before the jury? The consequences of this scenario demonstrate the rationality of treating criminal and civil cases differently.

Collusion between criminal defendants and witnesses is also a valid concern. That is, a defendant, for the sole purpose of creating a reasonable doubt in the mind of the jurors, could choose not to testify and then could call various witnesses who he or she knew would plead the fifth amendment." ***State v. Heft***, 185 Wis. 2d 288, 301-302 (Wis. 1994)

Love.

Hawley's testimony, then, as to Smith's statements regarding the Big Dog robbery would be an exception to the hearsay under Sec. 904.045(4), STATS as a statement against penal interest. That section creates an exception to the hearsay prohibition where the declarant is unavailable and the statement is, "A statement which was at the time of its making . . . tended to subject the declarant to civil or criminal liability . . . A statement tending to expose the declarant to criminal liability and offered to exculpate the accused *is not admissible unless corroborated.* " (emphasis provided)

Here, the trial court specifically held that Hawley's testimony concerning Smith's admission was not corroborated by an independent source and, therefore, that it was not admissible. However, Hawley's testimony *was* corroborated by the fact that Smith invoked his fifth amendment privilege when questioned about the robbery.

The prohibition against requiring a witness to invoke his fifth amendment privilege before the jury has no bearing on the present question. Smith's invocation of his privilege is important only as a preliminary question of the admissibility of the hearsay statement against interest (that is, because invoking the privilege is independent corroboration of the admission against interest made to Hawley). Hearings for a preliminary ruling on the admissibility of evidence are, by statute, to be conducted by the judge outside the presence of the jury. *See,* 901.04(3), STATS.

Thus, Hawley's testimony about the statements against interest made by Smith are plainly admissible.

The judge's remarks in denying Love's motion make it clear, also, that the judge denied the motion in large part because the judge made a preliminary determination as to the credibility of Hawley/Smith. The judgment of the trial court ought not become "reverse-proof" merely because the trial judge purports to base the decision on credibility determinations. One reading of the relevant case law suggests that where a witness recantation is involved the court may make a preliminary determination as to whether the recantation is credible. However, none of the cases suggest that in non-recantation cases the court may deny a new trial merely because the judge does not believe the newly-discovered evidence.[8] In a criminal case the credibility of witnesses must be determined by the jury.

The only remaining question, then, is whether this evidence would have caused the jury to reach a different result.

Firstly, it is important to note that Robinson's description of of the robbers did not match Love in any respect except race. (*See* Appendix B in which it is noted that Robinson told police that neither robber weighed more than 180 pounds- Love weighed substantially more than that). Moreover, Love presented evidence of alibi at trial. Therefore, this was not merely a "burden of proof" defense.

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8 In ***State v. McCallum***, 198 Wis. 2d 149, 542 N.W.2d 184 (Ct. App. 1995) the Supreme Court recognized that the trial court must determine on a threshold basis whether the recantation is credible to some degree or incredible in its entirety. *See* ***McCallum***, 208 Wis. 2d at 475, 561 N.W.2d at 711. ***McCallum*** recognizes that an incredible recantation "would not lead to a reasonable doubt in the minds of the jury." *Id*. "However, a finding that a recantation is less credible than the accusation does not necessarily mean that a reasonable jury could not have a reasonable doubt." *Id*. If the recantation is credible in some degree, the trial court errs in determining there is not a reasonable probability of a different outcome.

Secondly, perhaps the most compelling evidence at any criminal trial is an admission of guilt that comes directly from the mouth of the culprit. Juries simply tend to believe that no one would admit to a serious crime unless they really did commit it.

Thus, had Smith/Hawley testified at trial it is very likely that the jury's verdict would have been different.

II. THE TRIAL COURT ERRED IN DENYING LOVE'S MOTION FOR A NEW TRIAL BASED UPON INEFFECTIVE ASSISTANCE OF COUNSEL.

Love also claimed that his trial counsel was ineffective because she was made aware that Jerees Veasley had information that tended to suggest that Love was not involved in the robbery of Robinson and she failed to call him as a witness at trial. Love's trial counsel admitted that she was made aware of Veasley. She claimed, however, that she interviewed him in jail and determined that he did not have any useful information. The jail records do not support counsel's assertion that she met with Veasley during the relevant period. Moreover, Veasley claimed to be an eyewitness to events leading up to the robbery that were circumstantially exculpatory and, further, Veasley's observations indepedently corroborated Cooks' statements against penal interest that exculpated Love. Therefore, Veasely's testimony concerning Cooks' statement is admissible.

The test for ineffective assistance of counsel has two prongs: (1) a demonstration that counsel's performance was deficient; and (2) a demonstration that the deficient performance prejudiced the

defendant. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Whether counsel's actions were deficient or prejudicial is a mixed question of law and fact. *Id*. at 698. The circuit court's findings of fact will not be reversed, unless they are clearly erroneous. Sec. 805.17(2), STATS; ***State v. Pitsch***, 124 Wis. 2d 628, 634, 369 N.W.2d 711, 714 (1985). However, whether counsel's conduct violated the defendant's right to effective assistance of counsel is a legal determination, which the appellate court decides *de novo*. *Id*. at 634, 369 N.W.2d at 715.

To prove deficient performance, a defendant must establish that his or her counsel "made errors so serious that counsel was not functioning as the counsel' guaranteed the defendant by the Sixth Amendment." ***Strickland***, 466 U.S. at 687. The defendant must overcome a strong presumption that his or her counsel acted reasonably within professional norms. ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845, 847 (1990). To satisfy the prejudice prong, the defendant usually must show that "counsel's errors were as to deprive the defendant of a fair trial, a trial whose result is reliable." ***Strickland***, 466 U.S. at 687.

"An attorney's strategic decision based upon a reasonable view of the facts not to call a witness is within the realm of an independent professional judgment." ***Whitmore v. State***, 56 Wis.2d 706, 715, 203 N.W.2d 56, 61 (1973).

Here, trial counsel's explanation for not pursuing Veasley as a witness was her (counsel's) belief that Veasley had not useful information. It is well-settled that a strategic decision based upon a reasoned interpretation of the facts cannot be the basis for a claim of

ineffective assistance of counsel. In order to be a "reasoned interpretation", though, counsel must be able to give some reason for the strategy she chose.

Here, it is difficult to understand why Veasley's testimony would not have been useful at trial. Firstly, Veasley was an eyewitness to events leading up to the robbery (but not including the robbery). That is, he was in Junior's on the evening that Robinson as robbed. Veasley did see Michael Cooks in Junior's that night also and heard Cooks plotting to do the robbery. Just as importantly, Veasley *did not* see Love in the club- much less did he see Love plotting with Cooks to do the robbery. Thus, in this regard, Veasley's testimony circumstantially supports the theory of defense that trial counsel chose (i.e. alibi).

More importantly, though, Veasley's proposed testimony also included a later conversation with Michael Cooks in which Cooks admitted that he was involved with robbing Robinson. This testimony is admissible for the same reasons outlined at length in the preceding section. Cooks is apparently unavailable (the judge noted that Cooks could not be located even as of the date of the hearing) and the statement is plainly against his penal interest. Because the statement also exculpates Love it must be corroborated. Veasley's observations on the night of the robbery provide the necessary corroboration.[9]

9 Trial counsel testified that Veasley never gave her the name of Michael Cooks- she claimed that Veasley just mentioned that "some guy" was saying that Love had nothing to do with the robbery. Because Veasley claims that trial counsel never interviewed him, and because jail records do not corroborate counsel's claim that she did interview Veasley, the trial court's implicit finding of fact that Veasley never told Bowe the name of the witness is clearly erroneous.

Thus, no legitimate reason can be given for trial counsel's failure to call Veasley as a witness.

Veasley's testimony, especially now, in combination with the testimony of Smith/Hawley, is, for the same reasons set forth above, very likely to cause a different result at trial.

CONCLUSION

For these reasons it is respectfully requested that the Court of Appeals reverse the order of the trial court denying Love's motion for a new trial.

Dated at Milwaukee, Wisconsin this ____ day of _____, 2006.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of the brief is 4744 words.

This brief was prepared using *Open Office* word processing software. The length of the brief was obtained by use of the Word Count function of the software

Dated this _____ day of _____, 2006:

_____

Jeffrey W. Jensen

STATE OF WISCONSIN
COURT OF APPEALS
Appeal No. 2006AP002300

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

LISIMBA LOVE,

Defendant-Appellant.

APPENDIX CERTIFICATION

A. Record on Appeal

B. Opinion of the Wisconsin Supreme Court

C. Excerpt of transcript where Floyd Lindell Smith invokes his fifth amendment privilege (R:64-21 *et seq.*)

D. Excerpt of trial court's findings of fact and conclusions of law (R:68)

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19 (2) (a) and that contains: (1) a table of contents; (2) relevant trial court record entries; (3) the findings or opinion of the trial court; and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

I further certify that if the record is required by law

to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated at Milwaukee, Wisconsin, this _____ day of February, 2006.

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