STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 03-2083-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

KENNETH A. HUDSON,

Defendant-Appellant.

ON APPEAL FROM ORDERS DENYING MOTIONS FOR POSTCONVICTION DNA TESTING UNDER WIS. STAT. § 974.07 ENTERED IN THE OUTAGAMIE COUNTY CIRCUIT COURT, THE HONORABLE HAROLD V. FROEHLICH, PRESIDING

BRIEF AND SUPPLEMENTAL APPENDIX OF PLAINTIFF-RESPONDENT

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not necessary because the briefs fully set forth the facts and the legal authorities governing this court's review. Publication of the court's decision may be warranted because there are no reported cases interpreting the recently enacted postconviction DNA testing statute, Wis. Stat. § 974.07.

STATEMENT OF THE CASE

Given the nature of the arguments raised in the brief of defendant-appellant Kenneth A. Hudson, the state exercises its option not to present a statement of the case. *See* Wis. Stat. § (Rule) 809.19(3)(a). The relevant facts and procedural history will be discussed in the argument section of this brief.

APPLICABLE STATUTE

Wis. Stat. § 974.07 provides in relevant part:

> **(2)** At any time after being convicted of a crime . . . a person may make a motion in the court in which he or she was convicted . . . for an order requiring forensic deoxyribonucleic acid testing of evidence to which all of the following apply:
>
> (a) The evidence is relevant to the investigation or prosecution that resulted in the conviction. . . .
>
> (b) The evidence is in the actual or constructive possession of a government agency.
>
> (c) The evidence has not previously been subjected to forensic deoxyribonucleic acid testing or, if the evidence has previously been tested, it may now be subjected to another test using a scientific technique that was not available or was not utilized at the time of the previous testing and that provides a reasonable likelihood of more accurate and probative results.
>
> ***
>
> **(6)** (a) Upon demand the district attorney shall disclose to the movant or his or her attorney whether biological material has been tested and shall make available to the movant or his or her attorney the following material:

1. Findings based on testing of biological materials.

2. Physical evidence that is in the actual or constructive possession of a government agency and that contains biological material or on which there is biological material.

(b) Upon demand the movant or his or her attorney shall disclose to the district attorney whether biological material has been tested and shall make available to the district attorney the following material:

1. Findings based on testing of biological materials.

2. The movant's biological specimen.

(c) Upon motion of the district attorney or the movant, the court may impose reasonable conditions on availability of material requested under pars. (a) 2. and (b) 2. in order to protect the integrity of the evidence.

(d) This subsection does not apply unless the information being disclosed or the material being made available is relevant to the movant's claim at issue in the motion made under sub. (2).

(7) (a) A court in which a motion under sub. (2) is filed shall order forensic deoxyribonucleic acid testing if all of the following apply:

1. The movant claims that he or she is innocent of the offense at issue in the motion under sub. (2).

2. It is reasonably probable that the movant would not have been prosecuted [or] convicted . . . for the offense at issue in the motion under sub. (2), if exculpatory deoxyribonucleic acid testing results had been available before the prosecution [or] conviction. . . .

3. The evidence to be tested meets the conditions under sub. (2)(a) to (c).

> 4. The chain of custody of the evidence to be tested establishes that the evidence has not been tampered with, replaced, or altered in any material respect or, if the chain of custody does not establish the integrity of the evidence, the testing itself can establish the integrity of the evidence.

Wis. Stat. § 974.07(2), (6) & (7) (2001-02).

ARGUMENT

Hudson was convicted following a jury trial of first-degree intentional homicide in the stabbing death of Shanna Van Dyn Hoven (24:1; 87:1). He also was convicted of attempting to kidnap Ms. Van Dyn Hoven; attempting to kill David Carnot, who came to Ms. Van Dyn Hoven's aid; and recklessly endangering safety for leading the police on a high-speed chase as he attempted to avoid capture (*id.*).

This appeal is from circuit court orders that denied Hudson's motion for court-ordered postconviction DNA testing under Wis. Stat. §§ 974.07(2) and (7)(a) and his motion to compel the state pursuant to Wis. Stat. § 974.07(6)(a) to make biological materials available for testing (159:1-5; 163:1; A-Ap. A1-A5). For the reasons stated below, the state does not oppose Hudson's request under sub. (6)(a) for access to the biological materials for testing at his own expense. However, the circuit court's order denying Hudson's motion under subs. (2) and (7) for court-ordered DNA testing should be affirmed because Hudson has not shown that there is a reasonable probability that he would have been acquitted had the exculpatory DNA testing results he hypothesizes been available at trial.

I. THE STATE DOES NOT OPPOSE HUDSON'S REQUEST FOR ACCESS TO BIOLOGICAL MATERIALS FOR TESTING AT HIS OWN EXPENSE.

The first issue Hudson raises on appeal is whether the state is required under Wis. Stat. § 974.07(6)(a) to make certain items containing biological material available on demand for independent DNA testing at the defendant's expense. Hudson demanded that ten items be made available to him under sub. (6)(a) and asserts that the Office of the State Public Defender has approved funding for independent testing of that material (156:1-3; 158:2). The issue presented on appeal is whether sub. (6)(a) requires the state to make biological material available to a defendant for independent testing or whether, as the state argued below (170:13), the statute merely requires that the material be made available for inspection to determine which items will be the subject of a motion seeking court-ordered DNA testing under Wis. Stat. §§ 947.07(2) and (7).[1]

Wis. Stat. § 974.07(6)(a)2 provides that "[u]pon demand the district attorney shall disclose to the movant . . . whether biological material has been tested and shall make available to the movant . . . the following material: . . . Physical evidence that is in the . . . possession of a government agency and that contains biological material or on which there is biological material." The circuit court implicitly found the statute ambiguous, as it concluded that Hudson offered a plausible argument in support of his interpretation of the statute even though it rejected that argument (159:3; A-Ap. A3). The state also believes that the statute is ambiguous. Subsection (6)(a) does not state the purposes for which the state must make the biological material

[1]The state agrees with Hudson the interpretation of the statute presents a question of law that is reviewed *de novo*. *See State v. Hughes*, 218 Wis. 2d 538, 543, 582 N.W.2d 49 (Ct. App. 1998).

available to the defendant, nor does it impose any limitations on what the defendant may do with the material. The absence of such a limitation in sub. (6)(a) suggests that the defendant may test the material made available under sub. (6)(a) if he has the funds to do so, subject to any order under sub. (6)(c) that may be necessary to protect the integrity of the material.

The trial court concluded, however, that other provisions in § 947.07 mandated the conclusion that the defendant does not have a right to test the material made available under sub. (6)(a) unless the court grants the defendant's motion for court-ordered DNA testing (159:1-5; A-Ap. A1-A5). The court noted that sub. (6)(d) states that sub. (6) applies only if the material being made available "is relevant to the movant's claim 'in the motion [for DNA testing] made under sub. (2)'" (159:4; A-Ap. A4). Because that motion can be granted only upon meeting the criteria enumerated in sub. (7), the court concluded, it "would be futile and wasteful to conduct DNA testing unless there is a reasonable probability that exculpatory test results would produce a different outcome" (*id.*).

While there is some force to that logic, the state believes that there are two problems with the court's reasoning. First, sub. (6)(d) merely requires that the material be relevant to a motion for testing; it does not require that the motion be successful before the material is made available. Second, sub. (6)(b) imposes a reciprocal obligation on the defendant to make his biological specimen available to the district attorney upon demand. Subsection (6)(d)'s requirement that the material be relevant to the defendant's motion applies to the defendant's obligation to make material available to the state under sub. (6)(b) as well as to the state's obligation under sub. (6)(a) to make material available to the defendant. *See* Wis. Stat. § 974.07(6)(d). Yet there is no mechanism in Wis. Stat. § 974.07 for the state to seek court-ordered DNA testing of the material provided by the defendant, and the state presumably is free to test that

material without court approval. If the state need not obtain court approval to test biological material that the defendant must "make available" to the state under sub. (6)(b), it is not apparent why the defendant must seek court approval for testing of the material that the state must "make available" to the defendant under sub. (6)(a), assuming that the defendant has the ability to pay for the testing and the integrity of the material is adequately protected.

The state has examined the legislative history of Wis. Stat. § 974.07, but that history does not provide any clear guidance on the meaning of sub. (6)(a). The statute was adopted as part of the 2001 budget bill. *See* 2001 Wis. Act 16, § 4028j. The budget bill language had its origin, however, in separately introduced legislation, 2001 Assembly Bill 291 (A.B. 291). A.B. 291, in turn, was modeled on 1999 Senate Substitute Amendment 1 to 1999 Assembly Bill 497 (R-Ap. 105, 107).[2]

The drafting file for A.B. 291 reveals that the original draft of § 974.07 did not include any language similar to that eventually enacted as sub. (6) and that that language was inserted later in the drafting process (R-Ap. 120-25, 134). That new language was discussed in an LRB Drafter's Note to Representative Scott Walker that discussed several modifications to the original draft (R-Ap. 137-40). In that note, the drafter stated it was "unclear as to how much you intend that I modify the 1999 senate substitute in accordance with the Uniform Statute for Obtaining Postconviction DNA Testing (uniform statute) that was produced by the National Commission on the Future of DNA Evidence (Commission)" (R-Ap. 137). With regard to the addition of the new sub. (6), the Drafter's Note stated:

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[2]The state has included in the appendix to this brief excerpts from the drafting file for A.B. 291. The court may take judicial notice of those documents. *See Czapinski v. St. Francis Hospital, Inc.*, 2000 WI 80, 236 Wis. 2d 316, ¶24, 613 N.W.2d 120.

> 2. The uniform statute has a provision regarding discovery that is not in the 1999 senate substitute. The Wisconsin Supreme Court found in *State v. O'Brien*, 223 Wis. 2d 303 (1999), that there is a generalized right to postconviction discovery, but the Court did not adopt guidelines for postconviction discovery, so I added a discovery provision for postconviction DNA testing to this draft.

R-Ap. 138.

That explanation does not provide much help in interpreting sub. (6). It refers to the discovery provision of the Uniform Statute, but that provision is wholly unlike sub. (6). The Uniform Statute's discovery provision does not include the "make available" language in our statute:

> 3. Discovery. If evidence had previously been subjected to DNA testing, the court may order the prosecution or defense to provide all parties and the court with access to the laboratory reports prepared in connection with the DNA testing, as well as the underlying data, and laboratory notes. If the court orders DNA testing in connection with a proceeding brought under this Act, the court shall order the production of any laboratory reports prepared in connection with the DNA testing, and may in its discretion order production of the underlying data, and laboratory notes.

R-Ap. 149.

The Drafter's Note also mentions the supreme court's decision in *State v. O'Brien*, 223 Wis. 2d 303, 588 N.W.2d 8 (1999). In *O'Brien*, the court held that a defendant "has a right to post-conviction discovery when the sought-after evidence is consequential to the case." It declined, however, to adopt the guidelines that had been adopted by this court with regard to postconviction discovery. *See id.* at 323. Instead, the court simply held "that a party who seeks post-conviction discovery must first show that the evidence is consequential to an issue in the case and had the evidence been discovered, the result of the proceeding would have been different." *Id.*

The trial court in this case believed that its construction of sub. (6)(a) comported with *O'Brien*, noting the similarity between the standard that the defendant must meet to be entitled to court-ordered DNA testing under sub. (7) and the standard under *O'Brien* (159:4; A-Ap. A4). The state agrees that the requirement for court-ordered testing under sub. (7)(a)1 that the defendant demonstrate a reasonable probability that he would not have been acquitted is similar to the *O'Brien* standard. But that does not mean that the *O'Brien* standard governs the defendant's rights under sub. (6)(a), and the drafter's comment does not clearly indicate an intent that sub. (6)(a) was incorporating the *O'Brien* test.[3]

While the question is far from clear, the state believes that the better interpretation of sub. (6)(a) is that if the defendant has the ability to have the requested material tested at his own expense, the statute requires the state to make those materials available for testing subject to any protective order entered under sub. (6)(c) to protect the integrity of that material. The state reaches that conclusion based primarily on two factors: 1) the absence of any limitation in sub. (6)(a) on the use of the materials made available to the state; and 2) the defendant's reciprocal obligation under sub. (6)(b) to make his biological material available to the state upon demand and the absence of any procedure in Wis. Stat. § 974.07 for the state to seek a court-order for the testing of that material, which strongly suggests that the state is free to test the material it obtains from the defendant without

[3]The state notes that a letter to Representative Walker written on behalf of the State Bar's Criminal Law Section stated with regard to the drafter's comment on the discovery provision that it "commend[ed] the drafters for incorporating case law into the statute to allow for consistency and clarity" (R-Ap. 142). Representative Walker also received comments on the bill draft from Milwaukee County Assistant District Attorney Norman Gahn, who had "no response" to the drafter's comment on that point (R-Ap. 148). Representative Walker's staff, however, noting that it had received comments on the draft from both sources, instructed the drafter to "incorporate these changes into the bill, with Norm Gahn's comments overriding those of the State Bar" (R-Ap. 141).

obtaining a court order. Accordingly, the state does not object to Hudson's request that the state make the items he has requested available for testing, subject to any protective order that the circuit court may impose to protect the integrity of that material.

II. THE CIRCUIT COURT PROPERLY DENIED HUDSON'S MOTION FOR POSTCONVICTION DNA TESTING.

Hudson also argues that he is entitled to court-ordered DNA testing under Wis. Stat. § 974.07(7)(a). *See* Hudson's brief-in-chief at 30-31. That statute establishes four prerequisites that a defendant must meet before the court orders DNA testing. *See* Wis. Stat. § 974.07(7)(a)1-4. The circuit court denied the motion based on its finding that Hudson had not met one of those requirements, that the movant demonstrate a reasonable probability that he would not have been convicted if exculpatory DNA testing results had been available prior to the conviction (163:1; A-Ap. A6). *See* Wis. Stat. § 974.07(7)(a)2. To understand why the court's finding in that regard was correct, it is necessary to compare the absurd story Hudson hopes to support with DNA evidence to the compelling evidence of guilt adduced at trial. *See State v. McDowell*, 2003 WI App 168, 266 Wis. 2d 599, ¶68, 669 N.W.2d 204 (holding that the defendant was not prejudiced by counsel's deficient performance because "his defense was preposterous, and the state's evidence was overwhelming") (petition for review granted).

A. The standard of review.

Analogizing to the standard of review applied to the prejudice prong of the ineffective assistance of counsel analysis, Hudson contends that an appellate court should review *de novo* the circuit court's determination

whether there is a reasonable probability that the defendant would not have been convicted had the exculpatory DNA testing results been available. *See* Hudson's brief-in-chief at 30 (citing *State v. Sanchez*, 201 Wis. 2d 219, 548 N.W.2d 69 (1996); *State v. Pitsch*, 124 Wis. 2d 628, 369 N.W.2d 711 (1985)). That comparison is flawed, however, because ineffective assistance claims are constitutionally based. *See Sanchez*, 201 Wis. 2d at 226. Appellate review is not deferential when the claim is that the defendant was deprived of a constitutional right. *See State v. Robertson*, 2003 WI App 84, 263 Wis. 2d 349, ¶24, 661 N.W.2d 105. That is not the case here.

Perhaps the closest analogy to the trial court's determination under the DNA testing statute whether there is a reasonable probability that the defendant would not have been convicted had exculpatory DNA evidence been available is found in cases involving newly discovered evidence. One of the elements that a defendant who seeks a new trial based on newly discovered evidence must establish is that there is a reasonable probability that a different result would be reached in a new trial. *See State v. McCallum*, 208 Wis. 2d 463, 473, 561 N.W.2d 707 (1997). The majority in *McCallum* did not discuss the standard of review to be applied to the trial court's reasonable probability determination because it concluded that the trial court had applied the wrong legal standard when making that determination. *See id.* at 474-76. Significantly, the supreme court declined to make the reasonable probability determination itself, which it could have done if its review were *de novo*, and instead "defer[red] this determination to the circuit court" because "the circuit court is in a better position to determine whether a reasonable probability exists that a reasonable jury looking at both the recantation and the original accusation would have a reasonable doubt as to McCallum's guilt. . . ." *Id.* at 480. That language strongly implies that a deferential standard of review is appropriate.

In her concurring opinion in *McCallum*, Chief Justice Abrahamson asserted that the circuit court's reasonable probability determination should be reviewed under the erroneous exercise of discretion standard, noting that "[h]aving heard both the evidence at the original trial or hearing, or even just the evidence on the motion hearing, a circuit court is in a better position than an appellate court" to make that determination. *See id.* at 491 (Abrahamson, C.J., concurring). The state believes that the erroneous exercise of discretion standard also is the appropriate one to apply on review of the circuit court's reasonable probability determination under Wis. Stat. § 974.07(7).[4]

B. The overwhelming evidence against Hudson.

When the circuit court denied Hudson's motion for postconviction DNA testing, it described the evidence against him as "overwhelming" (163:1; A-Ap. A6). Hudson does not dispute that characterization – to the contrary, he concedes that "the case against Hudson at his trial appeared to be overwhelming. . . ." Hudson's brief-in-chief at 9.

Hudson's appellate brief describes some of the main points of the compelling body of evidence that was presented to the jury during the five-day trial. *See id.* at 13-18. That evidence included:

-- the testimony of a friend who said that Hudson was "very angry" with his mother the day before the killing and that he was "upset and angry" at his girlfriend the day of the killing (138:47-49);

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[4]This court noted in *Robertson* that newly discovered evidence claims often are framed as constitutional due process claims that are reviewed *de novo*. *See Robertson*, 263 Wis. 2d 349, ¶24. The right at issue under Wis. Stat. § 974.07(6)(a), in contrast, is strictly statutory.

-- the testimony of a K-Mart employee that Hudson appeared mad when he purchased a hunting knife hours before the killing (138:115);

-- the testimony of David Carnot, who heard the victim screaming and observed Hudson standing over her body, and who Hudson tried to run down in his truck when he came to the victim's aid (136:223-25);

-- the testimony of a witness who saw Hudson throw an object from his truck as he made his escape, an object that turned out to be a bloody rag (137:42, 211, 226);

-- the testimony of police officers that when they finally stopped Hudson after a sixteen-mile chase that reached speeds of eighty to ninety miles an hour (137:64, 86), Hudson had a substantial amount of blood on him, the passenger side of Hudson's truck was soaked in blood, and there was a bloody knife on the floorboard (137:94-97, 100, 163-64); and

-- the testimony of a state crime lab technician that the blood found in the truck, on the knife and on Hudson's hand was that of the victim (138:195).

In addition to the inculpatory evidence recounted in Hudson's brief and highlighted above, there also was evidence at trial about the incriminating statements that Hudson made to law enforcement officers. Kaukauna assistant police chief John Manion testified about an interview that he and Lt. Kevin Shepardson conducted with Hudson several hours after Hudson's arrest (140:95). Hudson told them that he had been in the area of the murder to check on a roofing job (140:105). When they asked Hudson "what happened when he met that girl on Plank Road," Hudson responded that he got into an argument with her (140:107-08). He said that he did not remember what they were arguing about but was otherwise nonresponsive about what had happened in his encounter with the victim (140:108).

Lt. Shepardson then asked Hudson about his mother because Hudson seemed willing to talk about that subject (140:109). Hudson said that his mother made him very angry, which prompted Lt. Shepardson to ask if that was the reason he stabbed the girl (*id.*). Hudson first responded that he didn't stab anyone, but then said, "I got into an argument with a girl and I think I stabbed . . .", but did not complete the sentence (*id.*).

As they continued talking, Hudson said that he tried to pull the girl into the truck but "she fought with me like my mother did" (140:110). Lt. Shepardson asked Hudson if he stabbed her while she was in the truck, and Hudson said that he believed so (140:110-11). Hudson did not recall how many times he stabbed her; he only recalled getting in the truck and leaving (140:111).

Assistant Chief Manion and Lt. Shepardson then drove Hudson to the Outagamie County Justice Center (140:115). During the drive, Hudson asked what charges he was going to be booked on (140:117). Manion said that they would be homicide charges because the victim had died from her wounds (*id.*). Hudson began to moan and cry, and said, "Why did I stab her" (*id.*). He then said, "I didn't want for her to die. This is all because of my mother" (*id.*). He asked Manion if Wisconsin had the death penalty (140:118). When Manion told him that it does not, Hudson said that he wanted to die (*id.*).

The next day, when Hudson was jailed at the Justice Center, he asked Outagamie County Sheriff's Lieutenant David Kiesner if he could take a shower because he had blood on his feet (140:188). Lt. Kiesner asked Hudson if he was injured (140:189). Hudson responded, "No, it's from her" (*id.*).

C. Hudson's bizarre version of events.

In the face of this overwhelming evidence, Hudson proclaims his innocence based on a story that can only be described as ludicrous. Hudson testified at the hearing on his motion for postconviction DNA testing that he had returned to the Appleton area after a weekend camping trip (171:111-12). He stopped at a K-Mart to purchase a knife so that he could clean two fish he had caught (171:112). He happened across Ms. Van Dyn Hoven, who was standing by the side of the road screaming, while he was driving in his truck (171:114-15). He pulled up beside her, asked her what had happened and if she needed help, and told her to sit in his truck on the passenger side (171:116). At that point, a man screamed and came running from the woods with a rake in his hands (171:117). Hudson was afraid because the woman was bleeding and he thought the man with the rake would hurt him, so he decided to drive away (*id.*). As Hudson got into his truck, the woman got out of truck and fell down (*id.*).

Hudson swerved his truck to avoid the man, driving it into a fence (171:120). As he freed the truck from the fence, he says, it is "possible" that the boat and trailer he was towing ran over the woman as she was lying in the road (171:121). As he drove away, he heard the boat dragging on the pavement (*id.*). Unable to crank the boat back onto the trailer, Hudson unhooked the boat and drove away (171:122).

Hudson "didn't know what to do" about the woman whom he had run over and left bleeding in the road, so he decided to drive home (*id.*). When he became aware that the police were pursuing him, he decided not to stop because he had some marijuana in his pocket and his driver's license had been revoked (171:124).

After the police finally stopped him, Hudson was thrown to the ground, handcuffed and searched (171:124). He was then placed in a squad car where, Hudson says, he fell asleep (171:125). He awoke "to a warm feeling running down my leg," as one of the officers, Officer Patschke, was pouring blood from a cup on him (*id.*). Shortly after that, Officer Patschke began wiping Hudson's chest with a paper towel (171:126-27). Because the police had just poured blood on his leg, Hudson was concerned that they were now putting something on him (171:127). Hudson struggled, but Officer Patschke held him down while another officer took pictures of him (*id.*).

Hudson denies making any incriminating statements to the officers during interrogation or while being transported to the county jail (171:129, 134). He also denies that he told the jail officer that he wanted to wash his leg or that he wanted to wash his leg because he had "her blood" on it (171:134-35).

For the jury to buy Hudson's defense, it would have to conclude that there was a massive conspiracy among law enforcement officials to frame Hudson – officers planting evidence and lying about his inculpatory statements. Why would they do that? According to Hudson, their aim was to protect David Carnot, who is the son of a recently retired Kaukauna police officer. *See* Hudson's brief-in-chief at 34-35. Hudson argues that the fact that Carnot is the son of a Kaukauna police officer "raise[s] the possibility that if the arresting officers were aware that Carnot was present at the scene of a homicide and if they had any reason to ensure that Carnot not be viewed as a suspect, they would have a motive to frame the only other obvious suspect, Hudson." Hudson's brief-in-chief at 35.

There are several insurmountable problems with that theory. First, there is not the remotest hint in the record that the arresting officers, who were at least sixteen miles from the site of the murder (137:86), were even aware that Carnot was present at the scene of the murder,

much less that he might be "viewed as a suspect." If the arresting officers were unaware that Carnot was present at the scene, they had no possible reason to frame Hudson.

Second, even if the arresting officers had known that Carnot was at the scene, a desire to protect him from being "viewed as a suspect" is an awfully feeble reason to frame an innocent man for murder. Hudson does not assert that anyone actually thought that Carnot was the killer. It makes no sense that the police would frame Hudson to avoid Carnot's being considered, however briefly, a potential suspect.[5]

Third, there were officers from at least three other jurisdictions -- the Grand Chute and Hortonville police departments and the Outagamie County Sheriff's Department -- present at the scene of the arrest (137:93, 151, 163, 166, 175-82). Were these officers part of the conspiracy, too? If so, what motive would they have to frame an innocent man? Hudson offers none. If those other officers were not part of the conspiracy, the Kaukauna officers were taking a pretty big risk when they poured a cup of blood on Hudson while he was sitting in a squad car in their presence. In addition, an Outagamie County Sheriff's lieutenant testified that Hudson said the blood was "from her" when he asked to take a shower (140:189). Hudson denies saying that (171:135), but offers no reason why yet another officer from outside the Kaukauna police department would be involved in the frame-up.

Fourth, civilian witnesses provided crucial evidence against Hudson. First and foremost was David Carnot. Hudson does not claim that Carnot was the killer. His theory of the frame-up is only that the police did not

[5]The state does not concede, of course, that even if the Kaukauna police believed that Carnot was the killer, that that would provide a plausible motive for framing Hudson.

want Carnot to be viewed as a suspect.[6] So, according to Hudson's theory, Carnot would have no reason to lie.

Hudson asserts that Carnot's trial testimony was consistent with Hudson's own version of events. *See* Hudson's brief-in-chief at 43 n.8. It was not -- not by a long stretch. Hudson says that "Carnot only testified that he saw Hudson standing by the front driver's door of his truck, near the body laying on the road, as he emerged from the woods. . . ." *Id.* But Carnot also testified that when he came to the victim's aid, Hudson jumped into his truck and drove straight at him; when Carnot tried to get out the way, Hudson pursued him and struck him with the truck as he tried to climb over a fence to escape (136:231-34). Hudson, on the other hand, claims that he swerved to avoid hitting Carnot and that Carnot jumped over the fence before Hudson hit the fence gate (171:120). Hudson does not attempt to explain why Carnot would lie about Hudson's attempt to kill him, an attempt that provided strong evidence that Carnot had just come upon a murderer standing over his victim.

In addition, another civilian witness, Melvin Vanden Bloomer, testified that he saw something thrown from the window of Hudson's truck as Hudson drove by at a high rate of speed (137:42). The police later found a bloody rag in the middle of the road (137:211, 226). Hudson denies that he ever threw a bloody rag from his vehicle (71:123). Why then, did Mr. Vanden Bloomer testify as he did? Was he part of the frame-up, too?

Hudson's story is riddled with other holes and implausibilities. Hudson claims that after he was arrested,

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[6]The state notes that five civilian witnesses (Lisa Carnot, Mike Borchert, James Vander Loop, Diane Vandenberg, and Bruce Benotch) saw David Carnot immediately after the attack on Ms. Van Dyn Hoven (136:256, 270, 288; 137:8-13, 19-21). None testified that he had any blood on him or that there was the slightest indication that he might be the killer.

he fell asleep in the squad car and awoke to find Sgt. Patschke pouring blood on his leg (171:125). He fell asleep? Hudson, by his own account, had just escaped from a man who Hudson thought had just brutally attacked a woman and had then led police on a lengthy high-speed chase (171:118-23). When he was stopped by the police, officers threw him down, handcuffed him, and placed him in the back of a squad car (171:124). He then fell asleep?

Hudson claims that the blood that the police poured on him was animal blood. *See* Hudson's brief-in-chief at 33. Where did that blood come from? Do the Kaukauna police carry a supply of animal blood with them in case they need to frame someone for murder? Did they dispatch a squad car to a butcher shop to place an order for a cup of blood? And why would they use animal blood to frame Hudson, when it could readily be determined that it was not human blood?

There is a far more plausible explanation why there not only might be, but why, in fact, there was animal blood on Hudson (138:201). Hudson had been fishing and had caught some fish (171:112). As Hudson had just been in contact with animals, those animals provide a far more likely source of non-human blood than a cup of animal blood that the police just happened to have with them.

What about the bloody knife that was found on the floor of Hudson's truck when he was stopped by the police – the knife that bore the victim's blood? In his appellate brief, Hudson says that he "does not contest that he had with him a knife purchased that afternoon from a local K-mart." Hudson's brief-in-chief at 36. What an unfortunate coincidence for Hudson, and a lucky one for the police who were trying to frame him, that Hudson's

knife was just the right size to have made the fatal stab wounds.[7]

How did the victim's blood get on the knife? According to Hudson, the Kaukauna police must have placed it on there. Where did they get the blood? To answer that question, Hudson spins a web of speculation. There was inconsistent testimony at the postconviction motion hearing about the number of vials of blood that were collected at the autopsy for the sexual assault kit. The coroner, Ruth Wulgaert, testified that at the time the evidence was collected there was only one tube for blood collection in the kit (171:21-22), but the pathologist who performed the autopsy, Dr. Michael Chambliss, and a crime lab technician, John Ertl, testified that the kit included more than one tube for blood collection (171:9-10, 88). Because there was one vial of blood in the kit when it arrived at the crime lab (171:88), Hudson speculates that the Kaukauna police may have taken a vial of blood from the kit before sending it on to the crime lab and used that blood to frame him. *See* Hudson's brief-in-chief at 38.

How did the Kaukauna police remove the vial of blood without breaking the seal on the kit? They didn't have to break the seal, Hudson contends, because Ms. Wulgaert's testimony "indicated" that the "kit was not sealed at the time of the autopsy." *See id.* Her testimony "indicated" no such thing. She did testify that the kits are not always sealed, but she did not testify that the kit in this case was not sealed (171:23-24). However, Kaukauna Police Officer Don Krueger testified that Ms. Wulgaert sealed the kit and handed it to him (171:66). Hudson notes that there was no documentation of the location of

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[7]The stab wounds were one-and-an-eighth to one-an-a-quarter inch wide (138:82-85). The murder weapon is not in the appellate record, and the state has not located any reference in the trial testimony to the width of the blade of Hudson's knife. However, the sheath for the knife is in the appellate record (174:Exhibit 120), and that sheath accommodates a knife blade that is slightly wider than one inch.

the kit prior to its transfer to the crime lab. *See* Hudson's brief-in-chief at 39. He fails to mention, however, that Officer Krueger testified that the kit was placed in a freezer in the evidence room until it was transferred to the crime lab the next day (171:69-71). The kit was still sealed when it reached the crime lab (171:85).

Undoubtedly, Hudson believes that Officer Krueger also was part of the conspiracy to frame him and was lying, therefore, when he testified that the kit was sealed when he received it. (The number of police officers who must have committed perjury in this case is impressive.) Anyway, he argues, there is another way the police might have placed blood on the knife: the officers at the scene who recovered the knife from Hudson's truck could have smeared it with the victim's blood, which also was in the truck. *See* Hudson's brief-in-chief at 39. But how could the officers at the scene of the arrest have known that the knife they found in the truck was the type of weapon used to stab the victim? After he saw the knife in the truck, one of the arresting officers radioed an officer at the murder scene to ask whether there were any possible knife wounds on the victim (137:122). But the autopsy that determined that the stab wounds were one-and-an-eighth to one-an-a-quarter inch wide was not conducted until the next day (138:62, 82-85). The officers would have had a lot of explaining to do if the victim's wounds had been caused by a knife with a half-inch-wide blade and they had planted blood on a hunting knife with a blade at least an inch wide that could not have been the murder weapon. *See supra* n.7.

Hudson's story was so unbelievable that his trial counsel refused to argue it to the jury (141:64). (Although Hudson elaborated on his story at the hearing on his postconviction motion (171:111-29), some of the major points of the story – including Hudson's claims that the police planted the bloody knife and poured blood on him – emerged at trial (141:40-41, 44)). Indeed, if this were not such a tragic case, Hudson's story would be laughable.

D. There is no reasonable probability that Hudson would be acquitted even if the DNA testing yields the evidence that Hudson hopes to discover.

Hudson sought court-ordered DNA testing on seven items containing blood, one item containing his fingernail clippings, and two items containing the victim's fingernail swabbings and scrapings. *See* Hudson's brief-in-chief at 32. The trial court correctly denied that request because it correctly concluded that Hudson has not shown a reasonable probability that exculpatory test results on any of those items would create a reasonable probability that he would be acquitted. *See* Wis. Stat. § 974.07(7)(a)2

With regard to the blood samples, which were taken from Hudson's clothing and body, Hudson claims that if the testing revealed that the blood was not of human origin, that would support his claim that the Kaukauna police poured animal blood on him. *See id.* at 32-33. But, as Hudson's brief notes, there was evidence at trial that some of the blood on Hudson was not human blood. *See id.* A state crime lab DNA analyst, John Ertl, testified that he tested a blood sample from Hudson's left foot because "it looked very bright, and it looked like there was a lot of blood there," but the sample "turned out to not be human blood" (138:201). If the additional testing Hudson seeks showed the presence of non-human blood, that evidence would be merely cumulative of the trial evidence.

With regard to the fingernail evidence, Hudson argue that if his fingernails proved negative for a second source of DNA, that would be exculpatory because the state posited a struggle between the killer and the victim. *See* Hudson's brief-in-chief at 33. But there was no evidence that the victim was scratched by her assailant (138:62-99), so there is no reason to believe that the assailant must have gotten the victim's tissue under his

fingernails. Moreover, the victim's blood was found on Hudson's hand (138:195). If her blood were not found under his fingernails, the exculpatory value of that absence would be negligible.

With regard to the victim's fingernails, Hudson says that the absence of someone else's DNA would be exculpatory because a struggle between the assailant and the victim should have left DNA under her fingernails. But if there were no such DNA, what would that prove? There is no dispute that the victim was murdered. If there were no third-party DNA under her fingernails, that would not tend to exonerate Hudson or implicate someone else. The absence of Hudson's DNA would indicate, at most, that the victim did not scratch him. That would be consistent with the trial evidence, which indicated that the only injuries observed on Hudson after his arrest were a small scratch on his face apparently caused by pea gravel in the road when he was pushed to the ground by the arresting officers and an abrasion on his elbow that appeared to have been caused by a fall (137:94; 138:25, 28).

What if the victim's fingernails yielded DNA from someone other than Hudson? If the source of that DNA could not be identified, its presence would be only minimally exculpatory given the overwhelming evidence against Hudson – it would indicate only that at some unknown time and in some unknown manner the victim got that tissue under her fingernails. Hudson says it could be compared to state and national DNA banks for a possible match. But that is too speculative a basis on which to order testing, particularly in light of the absurdity of Hudson's story. If the mere possibility that DNA testing would yield a match to someone in a state or national database were a sufficient basis for ordering testing, testing would have to be ordered in virtually every case.

The sheer incredibility of Hudson's story is not the only reason that there is no reasonable probability that

Hudson would have been acquitted had the DNA evidence that Hudson posits been available. No reasonable jury would believe Hudson's story because it conflicts with his prior statements. Even if one were to disregard the various statements he made to law enforcement officers that Hudson denies making, Hudson made several highly inculpatory statements during the trial that he cannot deny having said.

On the first day of trial, Hudson, proceeding pro se, told the court that his defense was a lack of intent (136:18). He explained, "I'm stating that the victim had attacked me and scratched me and dug me, and that's what caused me to react in that way" (*id.*). He reacted because he "was in a withdrawal state from cocaine" (136:23). He also stated that he suffered from post-traumatic stress disorder that was triggered "after I was attacked – that I was scratched and dug by the victim . . . I got images of my mother because at times when me and my mother would argue, she would call my brother up and he would come over and beat me unconsciously [sic]" (136:40-41).

Hudson ultimately abandoned any attempt to convince the jury that he reacted violently because the victim attacked him. But he cannot deny that that is what he told the court, and that story cannot be reconciled with his claim that he was framed.

Hudson asserts that exculpatory DNA testing results would support other "significant evidence" of his innocence. *See* Hudson's brief-in-chief at 40. That "significant evidence" consists primarily of the absence of blood on items that Hudson would have touched during his attempted escape, such as the steering wheel, gear shift lever and boat and trailer, and the absence of a significant amount of blood on the driver's side of the passenger compartment. *See id.* at 40-41. But the fact that Hudson got some of the victim's blood on him does not mean that he necessarily got blood on the palm of hands, so the absence of blood on the surfaces he touched proves

nothing. Likewise, the fact that Hudson's leg had blood on it does not mean that the bloody area of his leg necessarily came into contact with the driver's side seat or door panel.[8]

Hudson also argues that it is "remarkable" that no fingerprints were found on the handle of his knife because "one would expect that fresh blood on the knife handle would provide a fruitful medium for fingerprints." *See id.* at 41. However, Hudson does not provide any record citation for his assertion that there was enough blood on the knife handle to provide a "medium for fingerprints." But even if there were, he provides no support for his assertion that it would be "remarkable" that no fingerprints would be found, and it is not at all apparent that the absence of prints has any significance. The most apparent explanation is that the knife handle has a rough, cross-hatch textured surface (174:Exhibit 47) that is very unlikely to hold a print.

The circuit court correctly concluded that Hudson did not establish a reasonable probability that he would not have been convicted had the exculpatory DNA testing results he posits been available at trial. Accordingly, this court should affirm the order denying Hudson's motion for postconviction DNA testing.

CONCLUSION

For the reasons stated above, the court should affirm the order denying Hudson's motion for court-ordered DNA testing and should remand this case with instructions that the items he has requested be made available for testing at Hudson's expense, subject to any protective order that the circuit court may impose under

[8]Photographs of Hudson after the arrest are in the appellate record at 174:Exhibits 48, 49 and 50.

Wis. Stat. § 974.07(6)(c) to protect the integrity of that material.

Dated this 5th day of February, 2004.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 7,554 words.

Dated this 5th day of February, 2004.

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