COURT OF APPEALS
DECISION
DATED AND FILED

January 26, 2012

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP377 **Cir. Ct. No. 1995CF240**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

REYNOLD C. MOORE,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Brown County: JAMES T. BAYORGEON, Judge. *Affirmed*.

Before Lundsten, P.J., Higginbotham and Blanchard, JJ.

¶1 BLANCHARD, J. At a jury trial in 1995, Reynold C. Moore was convicted of first-degree intentional homicide, contrary to WIS. STAT. § 940.01

(2009-10),[1] as party to the crime, pursuant to WIS. STAT. § 939.05, along with five co-defendants.[2] This court affirmed Moore's conviction on direct appeal in an unpublished opinion. ***State v. Basten, Moore, Johnson***, Nos. 97-0918-CR, 97-1193-CR, 97-0919-CR, unpublished slip op. (WI App Feb. 17, 1998) (hereafter ***Basten***). In April 1999, Moore petitioned for a federal writ of habeas corpus, which was denied by the district court, and affirmed on appeal. ***Moore v. Casperson***, 345 F.3d 474 (7th Cir. 2003).

¶2 In July 2009, Moore returned to state circuit court with the motion at issue in this appeal. He seeks a new trial based on newly discovered evidence, relying primarily on a purported recantation of James Gilliam, a witness called by the State at Moore's trial. Moore also argues that the newly discovered evidence, when considered together with additional alleged failings in the State's proof discussed below, demonstrates that he should receive a new trial in the interest of justice under WIS. STAT. § 752.35.[3]

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[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted. The language of the 1993-94 statutes that were operative at the time of trial has not changed in a way that affects any issue raised in this appeal.

[2] One co-defendant, Michael Piaskowski, was granted a federal writ of habeas corpus in 2001. The federal appeals court affirmed an order issuing the writ, holding that the evidence presented at the trial against Piaskowski was insufficient to support his conviction beyond a reasonable doubt and that the double jeopardy clause of the Fifth Amendment barred the State from retrying Piaskowski, "the defendant against whom, it appears, the State presented the least evidence." ***Piaskowski v. Bett***, 256 F.3d 687, 690 (7th Cir. 2001).

[3] More specifically, as authority for his request for a new trial in the interest of justice before the trial court, Moore cited WIS. STAT. § 805.15(1), as well as the "inherent authority" of "Wisconsin courts" to enter such orders, citing ***State v. Armstrong***, 2005 WI 119, ¶113, 283 Wis. 2d 639, 700 N.W.2d 98. Subsequent to the filing of the motion, the supreme court in ***State v. Henley***, 2010 WI 97, ¶39, 328 Wis. 2d 544, 787 N.W.2d 350, held that § 805.15(1) does not provide grounds for a criminal defendant to seek a new trial in the interest of justice. In any case, though, the State does not argue in this appeal that Moore did not preserve an argument, or may (continued)

¶3 In November 2009, the same circuit court judge who presided over Moore's trial conducted an evidentiary hearing to consider the newly discovered evidence. The court denied the motion, finding that there was not a reasonable probability that a jury in a new trial would reach a different result based on the newly discovered evidence. The court also concluded that it could "find no reason" to grant a new trial in the interest of justice. Moore appealed the resulting order.

¶4 For the following reasons, we conclude that the court did not err in denying the motion for a new trial based on newly discovered evidence or in the interest of justice. We therefore affirm.

BACKGROUND

¶5 This case involves the murder of Thomas Monfils, on Saturday, November 21, 1992, at a paper mill then run by the James River Corporation, where Moore and Monfils both worked. The following brief overview is taken from this court's opinion in ***Basten***:

> On November 10, [1992,] the police received an anonymous call reporting that Keith Kutska, a James River employee, planned to steal an expensive electrical cord from his employer. When Kutska finished his shift and was leaving the premises, a security guard asked to inspect his bag. Kutska refused to open the bag and, as a result, received a five-day unpaid suspension. Kutska later obtained from the police department a tape of the call, and identified the caller as Monfils.
>
> On November 21, Kutska arrived at work at 5 a.m. and began to play the tape for employees, attempting to

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not now appeal, based on the discretionary power of this court to order a new trial in the interest of justice under WIS. STAT. § 752.35.

> garner support for his position that he had been wrongly turned in for actions that should have been handled within the union. Kutska played the tape for Monfils, who admitted it was his voice. Monfils performed a turnover (a change in the paper roll) on his paper machine at 7:30 a.m. At approximately 8 a.m., Monfils was reported missing. The State presented evidence that between 7:30 and 8 a.m., Monfils was confronted by a group of employees, including [Dale] Basten, Moore and [Michael] Johnson, and the three other defendants, Michael Piaskowski, Keith Kutska, and Michael Hirn. The verbal confrontation became physical, and Monfils was beaten and rendered unconscious by a blow to the back of the head. The following day, Monfils's partially decomposed body was found in a pulp vat. A heavy weight was tied around his neck.

Basten, unpublished slip op. at 3-4.

¶6 Additional background regarding evidence presented during the twenty-eight-day trial and during the hearing on newly discovered evidence is discussed as necessary below.

DISCUSSION

I. Newly Discovered Evidence

¶7 We review a circuit court's decision to deny a motion for a new trial based on newly discovered evidence for an erroneous exercise of discretion. ***State v. Plude***, 2008 WI 58, ¶31, 310 Wis. 2d 28, 750 N.W.2d 42. "We will affirm the trial court's exercise of discretion as long as it has a reasonable basis and was made in accordance with accepted legal standards and the facts of record." ***State v. Terrance J.W.***, 202 Wis. 2d 496, 500, 550 N.W.2d 445 (Ct. App. 1996). To the extent that this exercise of discretion involves "findings of fact as to the credibility of witnesses, we will not upset those findings unless they are clearly erroneous." ***Id.*** at 501.

¶8 A motion to set aside a judgment of conviction based on newly discovered evidence seeks to establish that a "manifest injustice" would stand if a new trial is not granted. ***Plude***, 310 Wis. 2d 28, ¶32. Courts use a five-factor test to determine whether the defendant has shown such a "manifest injustice." ***Id.*** A defendant must first prove four factors:

> (1) the evidence was discovered after conviction; (2) the defendant was not negligent in seeking the evidence; (3) the evidence is material to an issue in the case; and (4) the evidence is not merely cumulative.

Id. (citation omitted). If these four factors are shown, the court turns to the fifth factor, namely, "whether a *reasonable probability* exists that had the jury heard the newly discovered evidence, it would have had a reasonable doubt as to the defendant's guilt." ***Id.*** (emphasis added).[4]

¶9 Here, we need not reach the first four factors of the ***Plude*** "manifest injustice" test, because we conclude for reasons set forth below that the fifth factor is not met. A reasonable probability does not exist that, had the jury heard the newly discovered evidence, it would have had reasonable doubt as to Moore's guilt. *See* ***Plude***, 310 Wis. 2d 28, ¶32.

[4] Although, as we have noted in the text, the court in ***State v. Plude***, 2008 WI 58, ¶31, 310 Wis. 2d 28, 750 N.W.2d 42, stated that the decision whether to grant or deny a new trial based on newly discovered evidence is committed to the circuit court's discretion, the court also stated that whether there is a reasonable probability of a different result presents a question of law. ***Id.***, ¶33. Questions of law are generally subject to de novo review. *See* ***Ball v. District No. 4, Area Bd. of Vocational, Tech. & Adult Educ.***, 117 Wis. 2d 529, 537, 345 N.W.2d 389 (1984). We are uncertain whether the ***Plude*** court is suggesting a de novo standard of review for the question of whether there is a reasonable probability that a new trial would have a different outcome. However, the result in this case would be the same whether we review the circuit court's ruling on the fifth factor on a de novo basis or under the more deferential standard of review for discretionary decisions.

¶10 The court in ***Plude*** summarized the "reasonable probability" test in the following terms:

> A reasonable probability of a different outcome exists if there is a reasonable probability that a jury, looking at both the old evidence and the new evidence, would have a reasonable doubt as to the defendant's guilt. A court reviewing newly-discovered evidence should consider whether a jury would find that the newly-discovered evidence had a sufficient impact on other evidence presented at trial that a jury would have a reasonable doubt as to the defendant's guilt.

Id. (citations, brackets, and quotation marks omitted).

¶11 Of particular relevance to this appeal are the standards that apply when the newly discovered evidence at issue is a purported recantation. Recantation evidence is subject to a preliminary threshold determination for believability, requiring corroboration by other newly discovered evidence. ***State v. McCallum***, 208 Wis. 2d 463, 476-77, 561 N.W.2d 707 (1997). This is because every recantation is "inherently unreliable" in that it involves an admission that the recanting witness lied under oath in his or her original testimony. ***Id.*** at 476.

A. Additional Facts Relevant to the Newly Discovered Evidence Motion

¶12 Immediately following is an overview of evidence presented at trial and in the newly discovered evidence hearing that bears most directly on the motion for a new trial based on newly discovered evidence.

1. Testimony by or Related to James Gilliam

¶13 The State called James Gilliam as a witness at trial, and Gilliam testified again at the hearing on the motion for a new trial. In addition, testimony was adduced at the hearing regarding out-of-court statements allegedly made by

Gilliam to third parties, that is, his alleged statements to two sets of advocates for Moore and to a fellow inmate.

a. Gilliam Testimony at Trial

¶14 At trial, Gilliam testified in substance as follows. Gilliam had six criminal convictions. He had been called "a jailhouse snitch" in the newspaper. He had participated in police drug investigations, including buying drugs as a confidential informant, resulting in convictions. Gilliam gave police information about big drug dealers, and he did this because he had "lived it"[5] and "it ain't no fun." Police paid Gilliam for at least some of his cooperation with police investigations in the form of percentages of the value of drugs seized in those investigations. Separately, Gilliam received a benefit from the State when an "agent" apparently convinced a "city attorney" to reduce or drop a "fine" against Gilliam arising from Gilliam's involvement in a rowdy party.

¶15 Gilliam testified that he had not been offered "a thing" from the State in exchange for his testimony in this case. He suggested that he was testifying out of sympathy for murder victim Monfils. Separately, he also testified that he was motivated to help Moore, to make clear that Moore was not as deeply involved in the murder as others.

¶16 Gilliam testified that he met Moore in April 1995, while both men were confined in the Brown County Jail. Gilliam saw that Moore was "very … sad and down." Gilliam told Moore, who is African American, that each of his co-

[5] By this testimony, it is unclear whether Gilliam meant to convey that he had been a drug abuser, a drug trafficker, or both. However, as referenced below, the jury heard separate testimony that Gilliam had been a cocaine addict.

defendants was white and had more resources to defend himself in court. "You [are] here all by yourself, you're the only black guy." Gilliam told Moore that he should "save himself."

¶17 Turning to the more substantive portion of his testimony, Gilliam testified that Moore told him that, two days before the murder, Kutska gathered together six people at a cigarette smoking area outside the mill. These people had been involved in stealing from the mill. Kutska told these people that Monfils was going to get them all fired from the mill. Moore quoted Kutska as saying they needed to "talk" to Monfils, which involved a plan to "scare" Monfils, because Monfils "was going around blabbing his mouth."

¶18 Gilliam also testified that Moore told him that, on the day of the murder, Kutska gathered members of this same group together, along with others, who "just wanted to talk to Mr. Monfils." Moore told Gilliam that, in a hallway at the mill containing "two big huge machines,"[6] Kutska "popped" Monfils in the face with his fist. According to this account, Monfils "went in like a cuddle," and Moore struck Monfils in the head with his fist "just … like everybody else[,] … and [Moore] was just kicking and beating him." While this group "was all around kicking him, hitting him[,] Mr. Moore [said that] he just went over everybody[']s fists and tapped [Monfils] a couple times in the head." After the beating ended, Monfils was "just laying down in a ball, curled up in a ball," still alive. By this account, the men then "[w]ent their own ways," leaving Monfils on the floor. Moore told Gilliam that another person who had not been arrested by police was

[6] There was a reasonable inference from other evidence presented at trial that the "two big huge machines" would have been the Number 7 and Number 9 paper machines located next to each other in the mill, as referenced in discussion below.

also involved in the murder and, when his memory was refreshed by a police report, Gilliam named that person. When Gilliam asked Moore who had thrown Monfils into the vat, Moore told him, "Pick your choice."

¶19 Gilliam further testified that Moore told him that he did not learn until the day after the attack on Monfils, through a television news report, that Monfils had died. Moore told Gilliam this news shocked him. Gilliam further testified that, because it sounded to him as though Moore "couldn't have [done] too much" and therefore appeared to be less responsible for the homicide than others, Gilliam told Moore to cooperate with police to help himself.

b. Gullickson Testimony at Hearing

¶20 At the hearing on the motion for a new trial, Denis Gullickson testified in substance as follows. Gullickson was a dean of students at a high school. Over the previous several years, Gullickson had been writing a book about the Monfils case with John Gaie, a brother-in-law of Moore's co-defendant Michael Piaskowski. Gullickson and Gaie had come to the conclusion that Moore and each of his five co-defendants "were innocent." Gaie contacted Gilliam for an interview, telling Gilliam that the co-authors were convinced that Moore was innocent, and Gilliam agreed to meet with them, saying it would be "an honor" to be interviewed.[7]

[7] The letterhead of Gaie's letter to Gilliam read, "The Monfils Conspiracy: Six Innocent Men." This letter also said the group was "in contact with the Wisconsin Innocence Project." Gilliam's response letter stated, in part, "I think it would be [an] honor for me to assist you in the completion of your book concerning 'The Monfils Conspiracy: Six Innocent Men,' and would be very interested in helping Mr. Moore."

¶21 Gullickson testified that, during the course of the interview, Gilliam said that Moore had told him in jail that Moore tried to help Monfils on November 21, 1992, and specifically "tried to stop" "the alleged confrontation" of Monfils. In other words, Gullickson understood Gilliam to say during the interview that Moore told Gilliam that he was present when Monfils was confronted by co-workers, but that Moore tried at that time only to help Monfils, not to harm him.

¶22 The interview was recorded. Gilliam said, in part, as reflected on the recording,

> See, if you want to know the truth, [Moore said that he] tried, you know, he tried to help the boy [Monfils]. That's all he tried to do. He just got caught up with some shit that was going down that day
>
> … I [testified at the original trial that] someone else reached over and hit it, and [Moore] was trying to stop someone from hitting [Monfils]. Ain't that[] what I [testified]? I never did say [Moore] reach over—I say [Moore] was trying to stop what was going on ….

¶23 When asked whether he and his co-author during the interview pursued with Gilliam the question of who Moore had said was involved in the confrontation with Monfils, in addition to Moore himself, Gullickson said that it would not have made sense for the interviewers to ask Gilliam questions along these lines, "because we knew that confrontation didn't occur."

c. Schwalbach and Rios Testimony at Hearing

¶24 Also at the hearing, Nicholas Schwalbach testified in substance as follows. Schwalbach was a law student working on behalf of Moore through the Innocence Project, with the ultimate goal of attempting to exonerate Moore, when he learned from Gaie that Gilliam "was now saying something different than what

he testified to." With two other law students, Schwalbach visited Gilliam in prison, informing Gilliam that they were with the Innocence Project. During the course of the interview, Gilliam said that Moore "had tried to break up the fight and that he did not punch anybody." Gilliam told the students that this account was the same one he had given in his trial testimony.

¶25 Another of the law students who joined in the Innocence Project meeting with Gilliam, Anthony Rios, also testified at the hearing, in part as follows:

> [Gilliam said that] when he testified at the trial that he was really trying to help [Moore], that he knew [Moore] was innocent, … [H]e said that [Moore] saw a commotion, went over there and tried to break it up. He said that, you know, the whole incident was about drugs, that everybody knew it was about drugs, and he went on for quite some time about how drugs were running through Green Bay and running through the plant from Sheboygan up to Green Bay.

¶26 Rios testified that he could not recall whether the students asked Gilliam if Moore told him who the people were who were beating Monfils when Moore was allegedly trying to help Monfils. Rios also could not recall if the students asked Gilliam if he recalled what, if anything, Moore told Gilliam had occurred after Moore tried to break up the commotion involving Monfils.

d. Watson Testimony at Hearing

¶27 Also at the hearing, Jeffrey Watson testified in substance as follows. Watson had eight criminal convictions at the time of the hearing. Watson has known Gilliam since 1988. Watson was a cocaine dealer and Gilliam was a cocaine addict who was one of Watson's "best customers." The two men got along until Gilliam stabbed a "lieutenant" of Watson's who was, according to

Watson, "eight" "levels" below Watson within Watson's drug dealing organization. While both men were confined in a Green Bay area prison in 1990-91, Watson and Gilliam spoke approximately six to ten times.

¶28 Watson testified that when the two men spoke in prison Gilliam told him that Gilliam "goes to the police when he gets in trouble," and asks the police who "they want him to target in the county jail." Watson testified that Gilliam said he would "go after" these targets, "and he said sometimes that if he didn't get the information they were looking for he would lie." "[H]e said he would mix, he would get information that he could, and the other information he would try to make it seem like it would fudge with the truth."

e. Gilliam Testimony at Hearing

¶29 Gilliam testified at the hearing in substance as follows. He spoke with Moore in the Brown County Jail two or three times. Moore told Gilliam that Moore "and a couple other guys had approached a man and [the] man got pretty upset, [and] next thing you know licks were flying, hits were flying all over the place." Gilliam's testimony proceeded as follows:

> Q Mr. Moore said that licks [were] flying all over the place?
>
> A Yeah, something like that.
>
> Q Did he say who was throwing those licks?
>
> A He just say him and the guys, you know, how many guys, there was so many guys, they were talking to [a] guy.
>
> Q So you're saying that Mr. Moore admitted that he thr[e]w licks at this person?
>
> A Yeah, he say hits were flying all over the place[.] I don't know whether him or other guys[. H]e say

hits were flying all over the place, something like that.

Q So you don't know whether he said he himself had thrown one of the hits?

A Well, I just assumed since he was there, you know, hits were flying, he was with those guys, you know, I guess, some of them, too, who knows.

Q I don't want you to assume, I want you to tell me what he actually said, did he say that he threw—

A He said he hit a punch, he walked out[. H]e hit and he walked out[. H]e left the other guys, that's what he said, all right.

Q So he said that he himself had hit the man?

A Yeah, he walked out, he left the guy alone[. H]e walked out and the other guy was still talking to the guy.

Q Do you know what person he was talking about?

A I don't know, Keith Kutska and other guys, I guess, something like that.

Q Who was the person who had gotten hit?

A Monfils [was the] one that got hit.

¶30 Regarding his recorded statement to Gullickson and Gaie, referenced above, Gilliam testified that he lied to them during this interview because he wanted to help out Moore. Gilliam denied that he made the statements to Watson that Watson testified to.

2. Testimony of Georgia Ruggles

¶31 Georgia Ruggles, who was not a witness at the 1995 trial, testified at the hearing in substance as follows. At the time of the murder, Ruggles was working as a secretary at the mill. She had a "casual friendship, [as a] coworker," with Moore. At the end of the Monday following the Sunday on which Monfils's

body was found in the vat at the mill, Ruggles encountered Moore at work and the following occurred:

> I walked up to him because I felt comfortable talking with Rey [Moore], and I said, hi; and he spoke to me; and I said, Rey, my god, do you believe what's going on here, now we're killing each other, is what I said; and I remember, he looked at me with a very sad look, like he couldn't believe it either; and then I said something to the effect, as best I can recall, that perhaps Tom [Monfils] should not have reported the stolen extension cord and not said anything, because look what happened; and Rey, I clearly remember what he said to me, he just looked sad, he shook his head and he said, I don't care what he did, he didn't deserve to die, and he sure didn't deserve to die like that ….

During their conversation, Ruggles further testified, Moore

> seemed very relaxed and not nervous or scared as somebody would be who was talking to the mill manager's secretary at a time like that. He seemed to be thinking about his wife and the upcoming holidays and not somebody who had a murder on his [conscience] at all, not at all.

B. Moore's Argument

¶32 With that factual background, Moore argues that the following constitutes newly discovered evidence entitling him to a new trial: (1) the substance of Gilliam's purported recantation, (2) the impeachment value arising from the new testimony by and about Gilliam, and (3) the substance of the Ruggles testimony. Separately, Moore cites this new evidence, as well as other factors discussed below, in arguing that a new trial is required in the interest of justice. We address the newly discovered evidence issue first, and then the interest of justice issue.

C. Newly Discovered Evidence Analysis

1. Ruggles Testimony

¶33 Because it does not require extensive discussion, we first address the Ruggles testimony. The circuit court did not explicitly address this testimony in denying the motion.[8] However, based on our review of the record we conclude that the court's implicit determination that Ruggles' testimony does not merit a new trial was correct, because the testimony has little exculpatory value.

¶34 Moore argues that this testimony would convey to a new jury his "normal sadness" following the murder, "and is inconsistent with the reaction of a person who had just participated in a murder." However, by Ruggles' account this conversation occurred at the end of the work day on the day following the discovery of Monfils' body, not immediately after the murder or discovery of his body. In this temporal context, Moore's alleged statement would shed only the dimmest light on his culpability, in that the statement could be viewed as evincing sadness reflecting innocence, or instead evincing sadness reflecting a remorseful or regretful guilty mind. Ruggles' testimony is not so probative in the direction of

[8] Moore argues that the court's failure to address the Ruggles testimony in denying his motion constitutes an erroneous exercise of discretion, citing ***Schmid v. Olsen***, 111 Wis. 2d 228, 237, 330 N.W.2d 547 (1983). However, Moore fails to acknowledge the following proposition, reflected on the same page of ***Schmid*** that he cites: "A reviewing court is obliged to uphold a discretionary decision of a trial court, if [the reviewing court] can conclude *ab initio* that there are facts of record which would support the trial judge's decision had discretion been exercised on the basis of those facts." ***Id.*** (citation omitted). As we have said, a circuit court's decision to grant or deny a motion for a new trial based on newly discovered evidence is ultimately a discretionary one. ***Plude***, 310 Wis. 2d 28, ¶31. Here, we have reviewed the record and agree with the circuit court's implicit conclusion that Ruggles' testimony does not merit a new trial based on newly discovered evidence.

innocence that there is a reasonable probability that, when considered with all other evidence, a jury would have a reasonable doubt as to Moore's guilt.

¶35 Similarly, Ruggles' opinion that Moore appeared so "relaxed and not nervous or scared" that he did not seem to have murder on his conscience carries very low probative value in the direction of innocence, primarily given the timing of Ruggles' observations relative to the murder and discovery of the body. It is at least as likely as not that a reasonable jury would conclude that Moore, even if guilty, would have had time to compose himself adequately to appear in this manner. And, as with Moore's alleged statement, this observation of Moore's demeanor cuts both ways in that a guilty party might attempt to appear relaxed, whereas an innocent mill worker might well exhibit agitation or nervousness over a recent homicide at his workplace by an unknown assailant.

¶36 For these reasons, we agree with the circuit court's implicit conclusion that Ruggles' testimony would not, in itself or in combination with other evidence, reasonably raise new doubts with a jury about Moore's guilt.

2. Testimony by or Related to Gilliam

¶37 The circuit court divided Gilliam-related newly discovered evidence into two categories. The first involves the value to the defense in offering the purported recantation for its truth. As referenced above, when offered for its truth, a recantation is subject to a preliminary threshold determination as to whether it "is worthy of belief by the jury." *See* ***McCallum***, 208 Wis. 2d at 487

(Abrahamson, C.J., concurring).[9] The court concluded that the recantation is not worthy of belief.

¶38 The second way the circuit court categorized Gilliam-related evidence was to focus on the value to the defense of impeaching Gilliam at a new trial by highlighting inconsistent statements Gilliam gave to the advocates for Moore, even if the substance of the purported recantation is incredible. As to this category, the court concluded that the potential impeachment of Gilliam would have little or no impact in a new trial because Gilliam's testimony is not an important aspect of the State's proof.

¶39 The State submits that the circuit court correctly found that the recantation is outside the realm of believability, and also correctly exercised its discretion in determining that the impeachment value of the inconsistent statements is negligible. In addition, the State argues that, based on the first ruling alone, without proceeding to the question of whether the impeachment value of the inconsistent statements merits a new trial, the court could have denied the motion, based on the general rule that mere impeachment evidence is not sufficient to constitute newly discovered evidence requiring a new trial.

¶40 For reasons discussed below, we agree with the State and the circuit court that the testimony by and about Gilliam does not merit a new trial.[10]

[9] Moore relies, in part, on standards set forth in the concurrence in ***State v. McCallum***, 208 Wis. 2d 463, 561 N.W.2d 707 (1997). Following Moore's lead and ***State v. Kivioja***, 225 Wis. 2d 271, 592 N.W.2d 220 (1999), we do the same. *See* ***Kivioja***, 225 Wis. 2d at 296 (applying standards from ***McCallum*** concurrence).

[10] The State takes no position on the merits of the rationale relied on by the circuit court, which was that, because Gilliam's testimony is unimportant to the overall proof at a new trial, impeachment of that testimony would be inconsequential. Instead, the State argues that the court reached the correct result because the new impeachment material would not undermine the (continued)

However, we disagree with the State regarding the formulation of the rule disfavoring newly discovered impeachment evidence.

¶41 To review, Gilliam purported to recant aspects of his trial testimony long after trial in interviews with advocates for Gilliam. The essence of Gilliam's new statements was that, while Moore had told Gilliam that Moore was present when a group confronted Monfils in the mill on the morning he disappeared, Moore did not strike Monfils and instead tried to help him. Confusing the picture, Gilliam inaccurately told the advocates that his new version matched the testimony he gave at trial. Then, in advance of the hearing and again at the hearing, Gilliam purported to take back this recantation, essentially re-adopting his original trial testimony.

¶42 We now address in turn the circuit court's threshold determination regarding the believability of the recantation and the impeachment-value issue.

a. Threshold Determination Regarding Believability of Recantation

¶43 As stated above, in evaluating the nature of the purported recantation, the circuit court concluded that it lacked the circumstantial guarantees of trustworthiness necessary to constitute newly discovered evidence under the rule of ***McCallum***, which requires a defendant to point to sufficient evidence to overcome the "inherent unreliability" of recantation evidence. The court's

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incriminating value of Gilliam's testimony. The circuit court focused on one variable—the incriminating strength of Gilliam's testimony at a new trial—while the State focuses on another variable—the extent to which Gilliam could be impeached at a new trial. These variable concepts are two sides of the same coin in answering the ultimate question: "whether a jury would find that the newly discovered evidence had a sufficient impact on other evidence presented at trial that a jury would have a reasonable doubt as to the defendant's guilt." *See* ***Plude***, 310 Wis. 2d 28, ¶33.

conclusion was based in part on its finding that Gilliam's "testimony and recollections are strongly influenced by the wind direction," by which the court clearly intended, in context, to mean that Gilliam tends to say what he believes the listener wants to hear on this topic, including interviewers whose obvious goal is to help Moore. The court stated, "It appears that for a period of time, [Gilliam] wanted to satisfy anyone interviewing him with the answers they wanted, and then later decided that he was being 'bothered' and declined any further contact about this case," before recanting the purported recantation.

¶44 The court's finding that Gilliam's purported recantation is not credible is a finding of fact regarding Gilliam's credibility. *See* ***id.*** at 487-88 (Abrahamson, C.J., concurring). Based on our review of the record, we conclude for the reasons that follow that this finding was made under the correct legal standard and is not clearly erroneous.

¶45 As an initial matter, we note that, in arguing that the circuit court could not reasonably conclude that the recantation was not worthy of belief by a jury, Moore takes a position directly contrary to his own trial testimony. First, Moore testified at trial that he never spoke with Gilliam in jail. Therefore, Moore cannot credibly now argue that Gilliam truthfully attributed to Moore the exculpatory statements. In his trial testimony, Gilliam did not claim to be relying on any source of information apart from Moore. Second, Moore also testified at trial that he had no interaction with Monfils on the morning he disappeared. Thus, not only did Moore deny speaking with Gilliam, any assertion by Gilliam that Moore told Gilliam that he tried to help Monfils conflicts with Moore's own trial testimony. Thus, it would be self-defeating for the defense to argue at a new trial that Gilliam's recantation version is the truth. Moore fails to explain how

evidence that would run directly contrary to his own trial testimony in two key respects could serve as a basis for a new trial.

¶46 Turning to the specific challenges Moore now makes to the circuit court's finding, Moore argues that the court misapplied the legal standard derived from ***McCallum***. We disagree. Moore correctly points out that a court should not attempt to determine whether a recantation is true or false, that is, whether the original testimony appears more likely to be the truth than the recantation. This is a question for the jury to answer. Instead, the court is to determine whether the recantation is "worthy of belief," that is, "within the realm of believability," because it bears some "indicia of credibility persuasive to a reasonable juror if presented at a new trial." *See* ***id.*** at 487 (Abrahamson, C.J., concurring).[11] This is the standard that the court applied. The court found the recantation to be "incredible" and "not credible," which in this context plainly meant entirely outside the realm of believability.

¶47 Moore makes the additional argument that the circuit court's finding is "irrational" because, Moore asserts, the court found all of Gilliam's testimony at the hearing to be not believable, and therefore his testimony at the hearing purporting to withdraw the recantation must not be believable. We acknowledge

[11] The court in ***McCallum*** expanded on this idea in the following terms:

> A finding that the recantation is incredible necessarily leads to the conclusion that the recantation would not lead to a reasonable doubt in the minds of the jury. 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.

McCallum, 208 Wis. 2d at 475.

that one sentence in the court's written opinion could be read in isolation to support this position,[12] but we conclude that this would be a misreading of the court's opinion when read as a whole. When read in the context of the paragraph in which this sentence is found, as well as the overall context of the entire decision and order, it is evident that the court intended to convey in this sentence, and more generally, that the out-of-court recantation statements were not believable and that Gilliam's attempt to explain them was not believable. The court did not intend to convey that everything Gilliam testified to at the hearing, including what amounted to re-adoption of his original trial testimony, was not believable. The court found that Gilliam's attempts at the hearing to explain what he had recently told Moore's advocates, and why he had made those statements, were "somewhat incredulous."

b. Impeachment Value of Recantation

¶48 We turn now to the question of whether the facts surrounding Gilliam's purported recantation, even though the recantation in itself is incredible, might nonetheless merit a new trial when considered as impeachment material at a new trial. On this question, the circuit court acknowledged that Gilliam's credibility could be generally impeached at a new trial because he made inconsistent statements to the advocates, and in particular made statements to them that conflict with his trial testimony. However, the court concluded that Gilliam's testimony was likely not significant to the jury in the trial, and therefore this new

[12] The court stated, "Mr. Gilliam's testimony at the motion hearing may have been colorful, but that does not equate to believable."

impeachment would not create reasonable doubt at a new trial. The court stated, "Mr. Moore was not convicted by the testimony of jailhouse snitches."

¶49 The State argues that our analysis should stop with our conclusion, explained above, that the court correctly found that the purported recantation is not credible. The State bases this argument on what it submits is a strict rule that the discovery of newly discovered evidence that "merely impeaches the credibility of a witness is not a basis for a new trial on that ground alone," as stated in ***Simos v. State***, 53 Wis. 2d 493, 499, 192 N.W.2d 877 (1972). Thus, in the State's view, the impeachment value of new evidence can never be a basis for a new trial. We disagree, but also conclude that the impeachment value of the particular evidence here does not merit a new trial.

¶50 As Moore points out, the supreme court emphasized in ***Plude*** that

> Wisconsin law has long held that impeaching evidence may be enough to warrant a new trial. ***Birdsall v. Fraenzel***, 154 Wis. 48, 142 N.W. 274 (1913). In commenting on the discovery that a trial witness could read and write English after he testified to the contrary, we stated: "It may well be that newly discovered evidence impeaching in character might be produced so strong as to constitute ground for a new trial; *as for example where it is shown that the verdict is based on perjured evidence*." ***Id.*** at 52. (Emphasis added).

Plude, 310 Wis. 2d 28, ¶47. The following somewhat longer quotation from ***Birdsall*** is consistent with the one-sentence quotation from ***Birdsall*** given by the court in ***Plude*** above, and sheds additional light:

> The newly discovered evidence here was *at most only impeaching in character*, and this court has ruled that *ordinarily* such evidence is not ground for new trial. It may well be that newly discovered evidence, impeaching in character, might be produced *so strong* as to constitute ground for a new trial, as for example where it is shown that the verdict is based upon perjured evidence. But no

> such case is made here. Counsel relies upon [an opinion in which] the newly discovered evidence was vital, *not cumulative nor purely impeaching*. It related to new and material facts and was strictly original evidence.
>
> It appears quite clearly from the record that had the [newly discovered evidence] been introduced in evidence *it would not have changed the result.*

Birdsall, 154 Wis. at 51-52 (emphasis added; citations omitted).

¶51 In ***Plude***, the court concluded that the newly discovered impeachment material in that case qualified as so strong and noncumulative, and so critical to the State's case, as to require a new trial to avoid a manifest injustice. The testimony of a critical expert witness called by the State included undisputedly false testimony regarding his credentials. *See* ***Plude***, 310 Wis. 2d 28, ¶¶4, 23-29, 48-49. The holding of ***Plude*** turned on the court's conclusion that the purported expert was presented as "a quasi-medical expert notwithstanding his lack of medical education" and provided a "link" to other "critical testimony that related to the manner of [the victim's] death." ***Id.*** at ¶36.

¶52 Here, based on these standards, we conclude that the impeachment material is not "so strong" as to merit a new trial. Moore's primary basis for undermining Gilliam's trial testimony is the purported recantation. However, the circuit court characterized the purported recantation as a confused, temporary attempt by Gilliam to ingratiate himself with persons who presented themselves as strong advocates for Moore. As stated above, Moore does not persuade us that that finding is clearly erroneous, and we are left with the two statements that Gilliam has given under oath describing what Moore allegedly admitted to him.

¶53 Moore argues that Watson's testimony would serve as a concrete basis for a jury to conclude that Gilliam lied at the first trial. The circuit court did

not make a specific credibility finding regarding Watson, nor did the court explicitly evaluate his testimony for its potential value in impeaching Moore. However, Moore's argument is flawed because Watson did not quote Gilliam as saying that he lied in *this case*, but instead that he had lied on unidentified occasions to help police when he could not get the evidence they wanted from him. Therefore, even putting aside the motive that Watson had to lie about what Gilliam said, based on Gilliam's allegedly stabbing a drug dealing "lieutenant" of Watson's, Watson's testimony is at best weak impeachment evidence.

¶54 In addition, for the following reasons the record supports a conclusion that the testimony by and about Gilliam would not, as in ***Plude***, undermine a critical link in the State's case, because the other evidence at Moore's trial shows that a jury would already have had reasons to put little weight on any testimony by Gilliam, and that the State had ample proof of Moore's guilt, even without Gilliam's testimony.[13]

[13] Moore argues extensively that the doctrines of issue preclusion, judicial estoppel, and law of the case preclude the State from prevailing on an argument in this appeal "that Gilliam was unimportant" as a witness in the trial, because Gilliam's great "significance to the conviction" was litigated and resolved in Moore's federal habeas case. That is, Moore essentially argues the following: (1) his federal petition for a habeas writ was denied only because the federal courts credited the State's argument that Gilliam was a strong witness after concluding that all other evidence (i.e., all non-Gilliam evidence) offered against Moore was insufficient to sustain his conviction, (2) Gilliam's testimony has now been revealed to be worthless, therefore (3) the State may not now switch horses and argue that Gilliam's now-discredited testimony was not significant. Both premise (1) and premise (2) are false, and therefore this argument is without merit.

As to the first premise, the federal court of appeals concluded that Moore's sufficiency argument was procedurally defaulted for purposes of federal habeas review, because he failed to include this issue in his petition for review to the Wisconsin Supreme Court. *See* ***Moore v. Casperson***, 345 F.3d 474, 486 (7th Cir. 2003). The court turned to Moore's argument that this procedural default ought to be excused because he showed "cause" and "prejudice" for his failure. ***Id.*** at 486. Having determined that Moore could not show "cause," the court turned to (continued)

"prejudice," and made the following statement, which is the focus of Moore's current argument that this court is bound to deem Gilliam a "significant" witness:

> We determined [in ***Piaskowski v. Bett***, 256 F.3d 687 (7th Cir. 2001)] that the evidence was insufficient to convict Piaskowski. However, the evidence concerning Mr. Moore and Piaskowski is different. Gilliam testified to a statement made by Mr. Moore that Mr. Moore had said he helped in the beating of Monfils. There was no evidence that Piaskowski had participated in the beating or even in the confrontation….
>
> ….
>
> Such evidence exists against Mr. Moore.

Moore, 345 F.3d at 488-89.

Plainly, the court in this passage used Gilliam's testimony as an example of the different proof offered against the two men, and did not purport to rank or rate "Gilliam's importance" relative to any other proof against Moore. Rather, the court made an observation that, even if the court were to address Moore's sufficiency claim, which it was constrained from doing, Gilliam's testimony was among the pieces of evidence that provided sufficient proof and contrasted with the absence of any such proof against Piaskowski.

Moreover, in a separate part of the opinion the court highlighted additional evidence against Moore, unrelated to Gilliam's testimony and which also did not exist against Piaskowski, further demonstrating that the federal court of appeals did not conclude, as Moore now submits, that only Gilliam's testimony saved Moore's conviction from reversal. Specifically, the court pointed to the ultimate testimony of Brian Kellner (after a purported recantation), that a drunken Kutska suggested to Kellner, in 1995, that it was Kutska, Hirn, *and Moore* who confronted Monfils. ***Id.*** at 491 n.5. This directly contradicts Moore's argument in this appeal that Kellner's testimony is not "any more incriminating as to Moore than as to Piaskowski."

On a related note, Moore misrepresents this court's ***Basten*** opinion as having stated that Gilliam's trial testimony was "the most important" evidence of Moore's guilt, after the testimony of witnesses Brian Kellner and David Wiener; this is not true. *See* ***State v. Basten, Moore, Johnson***, Nos. 1997AP918-CR, 1997AP1193-CR, 1997AP919-CR, unpublished slip op. at 8 (WI App Feb. 17, 1998).

Turning to the second premise, namely, that Gilliam would have no value as a witness in a new trial, Moore fails to explain how the State is precluded from calling Gilliam as a witness at a new trial or why his testimony could be of no value to a jury evaluating the State's theory of guilt, and there was no finding by the circuit court that Gilliam's testimony regarding what he says Moore told him would not support the State's theory. For the reasons stated in the text, Gilliam is certainly highly vulnerable to cross-examination, as he was in the original trial, but a jury could nevertheless decide at a new trial to credit the substance of his testimony that incriminated Moore as a direct participant in Monfils' beating.

¶55 Gilliam was presented as a six-time convict, a "jailhouse snitch," likely at least a former drug addict, who had a history of accepting percentages of the value of drugs held by the dealers whom he could help police arrest. He gave two accounts of his primary motivation for testifying that appeared to conflict, without reconciling the two explanations. The jury heard Moore deny that he had ever even talked with Gilliam. For these reasons, Gilliam's testimony was in some respects already suspect. The additional impeachment value at issue may have added to Gilliam's credibility problems, but the fact remains that Gilliam has given the same incriminating testimony twice under oath to the same basic version of events, and there is no persuasive reason to conclude that Gilliam would give different testimony under oath at a new trial. Similarly, there is no reason to conclude that a jury would believe Gilliam's purported recantation, which was never made under oath, over his sworn testimony.

¶56 In addition, our review of the record reveals that the State could present strong circumstantial proof of Moore's guilt at a new trial that does not depend on Gilliam's testimony, particularly in light of the prior statements and testimony of Moore available to the State as proof. We describe some relevant facts at some length in part because they are relevant to the second issue, discussed below, as to whether a new trial in the interest of justice is merited.

¶57 Our discussion of the non-Gilliam evidence begins with the following general summary of the trial evidence, followed by a more detailed recitation of evidence placing Moore at the scene when Monfils was beaten and his body thereafter dumped in the vat.

¶58 It is true that the State's case was entirely circumstantial as to each of the defendants, including Moore, in that the State produced no witness who

testified to having personally participated in, or to having personally witnessed, any of the following events: the beating of Monfils; the tying of the weight to his neck; or the dumping of his body into the vat. However, the State produced at trial strong evidence of the following propositions:

- That the leader of hostility toward Monfils, Kutska, arrived at work early that Saturday and played the recording of Monfils' call to police for various subgroups of co-workers.

- That at least some of these co-workers, enraged by the tape, confronted Monfils in the mill and severely beat him there, then made a spontaneous decision to dispose of the evidence of his beating on site by tying a weight around his neck and throwing his weighted-down body into a pulp vat, where, they hoped, his body would completely disintegrate.

- That, in interviews with police and deposition testimony in parallel civil litigation, Moore committed himself to factual positions that include the following: (1) Moore joined other angry coworkers in listening to the tape of the call shortly before the fatal confrontation; (2) while listening to the tape, and also later that day during the general search of the mill for Monfils, Moore expressed bitter hostility toward Monfils; (3) Moore was in the company of Kutska at the time of the confrontation and immediately thereafter; but (4) Moore had no interactions whatsoever with Monfils on the

morning of his disappearance, despite strong evidence that places him in Kutska's company at the critical moments.[14]

¶59 The last two propositions are particularly significant, given the other evidence presented at trial, because of the strong inference from all evidence that Kutska orchestrated an emotional confrontation with Monfils at precisely the time when this evidence places Moore in Kutska's company.

¶60 Moving from those general observations to more specific examples of proof, the following are among the pieces of evidence that the State could offer to prove that Moore was in the group that confronted Monfils and participated in the brutal beating and disposal of his body between about 7:35 and 7:55 a.m. in the area of the mill's Number 9 control room (or "coop," as some witnesses referred to it). The following are among the pieces of evidence that demonstrate that it is not true, as Moore argues, that "Gilliam's trial testimony [that Moore participated in the beating] was uncorroborated by any physical evidence or witness testimony." Even without Gilliam's testimony, a jury would likely find beyond a reasonable doubt that Moore was in the presence of Kutska, actively seeking Monfils while in a highly hostile state, at the time of the fatal confrontation, and at that time participated in a beating and contemporaneous disposal of the body that was discovered the next day in the vat.

¶61 The testimony of mill employee Constance Jones established that on the morning of Monfils' disappearance, at about 7:25 or 7:30 a.m., she entered the Number 9 coop, where six or seven co-workers had gathered, including Keith

[14] Moore testified that, to his knowledge, he did not see or interact with Monfils on the morning he disappeared. "[N]ever saw him, never touched him, never witnessed it, no way."

Kutska and Mike Johnson. The men were playing "the tape that Kutska had from the police." Kutska pointed out Monfils to the group, in "an atmosphere of anger" and raised voices that was "escalating"; "people seemed to be getting angrier, feeding on one comment from the other." Jones ran into Moore after leaving this coop, and told him that "they have the tape of the individual that called in in No. 9" and that Moore "should go down there," which Moore did. Significantly, Jones testified that about twenty minutes later, Moore stopped by Jones' work station and said "they had everything on the tape," and when Jones asked Moore if he had seen Monfils, Moore responded, "No, he's gone." Thus, a jury could find that at approximately 7:50 a.m., Moore, who had just been in the company of the Kutska-led antagonizers of Monfils, was reporting to Jones that Monfils was "gone."

¶62 Police Sergeant Randy Winkler testified that when he interviewed Moore on November 30, 1992, Moore told him that, after Jones told Moore on the morning of Monfils' disappearance that the tape was being played in the Number 9 coop at what Moore estimated to have been "about 7:20 a.m.," Moore went to the Number 9 coop, where Keith Kutska and three others were. This was strong evidence that Moore joined the angry group at approximately 7:20 a.m.

¶63 Winkler further testified that he interviewed Moore a second time, on December 16, 1992, at which time Moore did not suggest that he had been at the Number 9 coop at a time *other* than about 7:15 or 7:20 a.m.; that Moore said at that time that he was present in the Number 9 coop when Kutska spoke on the phone with a union official; that during that phone conversation Kutska described to the union official how he had played the recorded call to Monfils that morning and gotten an admission from Monfils that it was his voice on the tape; and that

phone records place that telephone call as having occurred at about 7:20 or 7:21 a.m.

¶64 Moore testified at trial, contrary to Winkler's account of his prior statement, that he had *not* been present when Kutska made any phone calls that morning, and that he had *not* told Winkler that he had been present for the conversation between Kutska and the union official from Number 9 coop.

¶65 Moore acknowledged that in December 1993, when deposed in parallel civil litigation, Moore testified that it was not until approximately 7:40 a.m. that he spoke with Jones. This was a new chronology that would have put him in the area of Monfils only *after* the critical time of 7:34 a.m., when Monfils performed a "turnover" on his paper machine and shortly thereafter disappeared. The jury would reasonably have concluded that this was a false attempt to exculpate himself.

¶66 Mill employee Charles Bowers testified that on the morning of Monfils' disappearance, at approximately 7:30 a.m., Bowers saw Moore walk through his work area, which was the "repulper" area. However, Winkler testified that, when interviewed in December 1992, Moore "insisted" that he had not been in the repulper area on the day Monfils disappeared, but that when Moore was confronted repeatedly with the assertion that he had been seen in that area, "he stopped and about 5 seconds later he put his head into his hands and said[, 'T]he repulpers[,'] and then exhausted air." At trial, Moore denied that he had been in this area that morning.

¶67 Mill employee David Wiener testified that on the morning of Monfils' disappearance, at approximately 7:40 a.m. (a time corroborated by an entry he contemporaneously made on a work log sheet), he saw Basten and

Johnson walking in an aisleway, toward the Number 7 and Number 9 paper machines; and that they were walking "kind of bent over," approximately five or six feet apart, and appeared to be carrying something. (The "dump vat" in which Monfils' body was discovered was in an area near the Number 7 machine). This reasonably establishes the time at which some of the co-conspirators carried Monfils from the scene of the beating to the vat.

¶68 Patrick Ferraro, a James River fill-in supervisor on the day of Monfils' disappearance, testified to the effect that, starting sometime shortly before 8:00 a.m., he had a series of communications with Michael Piaskowski in which Piaskowski told Ferraro that "there was some shit going down," that Monfils was missing, and that Ferraro should talk to Kutska about it. This testimony reasonably establishes a latest time by which Monfils had been beaten and carried to the vat.

¶69 Moore testified that, on the morning Monfils disappeared, Moore joined Kutska, Piaskowski, and approximately six others in the Number 9 coop, where the other men played the tape for him.

¶70 One critical aspect of Moore's testimony was that he went to the Number 9 coop, within "maybe two minutes" of when Connie Jones had sent him there to hear the tape, which, when considered in light of other evidence that includes Jones' testimony, placed him there earlier than he testified at trial and also places him there just before Monfils' disappearance.

¶71 Separately, Moore admitted in his testimony that there were expressions of "disgust" with Monfils among those in Number 9 coop; that Moore himself told the group that the group had Monfils "right by the balls," meaning that they could "bring him up on charges"; that Kutska explained what Monfils

looked like and what he was wearing, trying to point him out to the group; that Kutska then took Moore to the Number 7 coop, looking around for Monfils, described by Kutska to be a guy in khaki shorts and a blue hat; that in the Number 7 coop, they asked a coworker where Monfils was, and he said he did not know, but he should return soon for a "turnover"; that Moore told the others they should not try to report Monfils for being away from his work station, but instead they should let the foreman discover that he was off the job; that while he remained at the Number 7 coop, Kutska remained with him; that at 7:58 a.m., Moore left the Number 7 coop, having been in that coop for about ten minutes, at which time he visited Connie Jones, sticking his head in the door to say hello, and she said they can't find the guy now; that Moore then went back to his work area, where he remained for the next hour. This chronology, when compared with other evidence, places Moore with Kutska at the critical moment of Monfils' beating.

¶72 Mill employee Randy LePak testified that he joined in the search for Monfils at the mill on the morning of his disappearance; that he ran into Moore and told Moore that he was looking for Monfils and asked if Moore had seen Monfils, and Moore, in an agitated state, responded with words to the effect of, "[W]hat are you looking for him for? He's no better than a fuckin' scab."

¶73 Mill employee Brian Kellner[15] testified that he was a co-worker and friend of Kutska during the relevant time period; that the two men spent much of

[15] Moore calls attention to observations of the federal court of appeals in ***Piaskowski***, 256 F.3d at 687, that Kellner's testimony "is a bit suspect," and that "inconsistencies in Kellner's trial account of Kutska's story render his credibility marginal at best." However, the federal court accepted aspects of Kellner's testimony, and did not purport to conclude, based on its review of the trial record, that Kellner's testimony was so deeply flawed that a jury could not reasonably rely on it. *See* ***id.*** Moore provides us with insufficient reasons to conclude that a jury would not remain free to credit Kellner's testimony at a new trial.

one day over the July 4th weekend in 1994 drinking beer together; that, on that evening, Kutska talked about the events of November 21, 1992, to the effect that "if" something had happened, this is the way it happened; that this included statements that:

- After Kutska first confronted Monfils with the tape, Kutska played the tape for other co-workers in the Number 9 coop, and the last person to join the group was Moore, so the group decided to rewind and play the tape again for Moore, because he had missed some of it;

- The "guys in the coop were getting cranked up about it and decided to go out and let [Monfils] know that they knew that he was the one who called the police and that was the reason that Keith got suspended";

- Moore said he wanted to "holler" at the "fuckin' snitch";

- Kutska sent Moore out the back door of the coop to a spot where he could block Monfils from leaving the area;

- Moore was to "pick on" Monfils, and this made sense because Moore, who is African-American, could allege racial bias if Monfils complained about it;

- Everyone except Moore went out the front door of the coop and confronted Monfils to his face and Moore went out the back door and Moore stood directly behind Monfils, at a distance of two-and-one-half feet, while others yelled in Monfils' face and Moore yelled expletives at Monfils;

- Someone slapped Monfils on the back of the head.

¶74 Based on the summaries given above, in the context of all other evidence presented, even if we were to assume that a jury would not rely to any degree on Gilliam's testimony at a new trial, we agree with the circuit court that a new trial is not merited based on the impeachment value of the new testimony by and about Gilliam.

¶75 Moore argues that the circuit court erred in emphasizing the incriminating nature of the trial testimony of the defendants, including that of Moore himself. However, this argument is undeveloped, and fails even to begin to address the details of Moore's admissible statements, which as set forth above place him alongside Monfils' leading antagonist at the moment when, from all of the evidence, a jury would conclude that the fatal confrontation occurred. It would not be appropriate for us to attempt to develop Moore's argument for him. *See* ***State v. Pettit***, 171 Wis. 2d 627, 647, 492 N.W.2d 633 (Ct. App. 1992).

¶76 For all of these reasons, we conclude that the newly discovered evidence does not merit a new trial.

II. Interest of Justice

¶77 Turning to the second issue in this appeal, Moore argues that, based on the newly discovered evidence regarding the Gilliam testimony, together with questions regarding the testimony of Brian Kellner and David Wiener discussed below, we should order a new trial in the interest of justice because the real controversy was not fully tried or because it is probable that justice has miscarried. For the following reasons, based in part on the above discussion, we affirm the circuit court on this issue.

A. Standard of Review

¶78 We review a circuit court's ruling on a postconviction motion for a new trial in the interest of justice for an erroneous exercise of discretion. ***State v. Williams***, 2006 WI App 212, ¶13, 296 Wis. 2d 834, 723 N.W.2d 719. However, in addition, this court has discretion, under the terms of WIS. STAT. § 752.35, to grant a new trial if we conclude that the real controversy was not fully tried, or it is

probable that justice has miscarried. Thus, we independently review the record to determine whether a new trial is warranted in the interest of justice. ***Id.***, ¶12.

B. Substantive Standard

¶79 A new trial may be ordered in the discretion of the court "when it appears from the record that the real controversy has not been fully tried." ***Id.***, ¶36. It is not necessary to "determine that a new trial would likely result in a different outcome." ***Id.*** However, because this "discretionary reversal power is formidable," it "should be exercised sparingly and with great caution." ***Id***. Moore must convince us that the jury was precluded from considering "important testimony that bore on an important issue" or that certain evidence which was improperly received "clouded a crucial issue" in the case. *See* ***State v. Hicks***, 202 Wis. 2d 150, 160, 549 N.W.2d 435 (1996).

C. Analysis

1. James Gilliam

¶80 Our discussion above regarding the nature and impact of the testimony of Gilliam resolves this issue against Moore.

2. Brian Kellner

¶81 Moore now seeks to resurrect a purported recantation that Kellner made during post-trial testimony that was addressed by the circuit court and this court in 1997-98. *See* ***Basten***, unpublished slip op. at 10-13. The circuit court rejected Kellner's recantation as unworthy of belief, and we affirmed this conclusion as not clearly erroneous. ***Id.*** at 13. In the current appeal, Moore essentially reargues his position that Kellner's recantation is credible, without

acknowledging the history of prior court decisions. Moore has not presented sufficient reason for this court to disturb its prior ruling on this issue.

3. David Wiener

¶82 Moore's argument regarding the testimony of David Wiener rests on two factors: (1) alleged weaknesses in Wiener's trial testimony and (2) the fact that Wiener was convicted of a homicide in 1994. At the time of his trial testimony, Wiener was serving a prison sentence for that homicide. In addressing the instant motion as it relates to Wiener, the circuit court merely observed that evidence apart from Wiener's testimony was sufficient to support a guilty verdict.

¶83 As to the first factor, Moore fails now to explain why it would have been error for the circuit court to have concluded that the jury was able to consider the weaknesses in Wiener's testimony that Moore now highlights, and why a new trial is merited for a second jury to consider the same strengths and weaknesses. As to the second factor, Moore fails to develop an argument that any fact related to Wiener's 1994 homicide conviction that may be presented to a jury in Moore's prosecution was not presented to the jury in the trial in his case. The jury learned that, at the time of trial, Wiener was a prison inmate as a result of his single conviction, consistent with the general "counting rule," and WIS. STAT. § 906.09. *See* ***State v. Smith***, 203 Wis. 2d 288, 297, 553 N.W.2d 824 (Ct. App. 1996). Ordinarily, the jury will not learn the nature of any prior convictions, absent circumstances not relevant to this appeal. *See* ***Nicholas v. State***, 49 Wis. 2d 683, 689, 183 N.W.2d 11 (1971) (witness denies fact of prior conviction).

¶84 In sum, Moore's arguments do not persuade us that the jury was precluded from considering "important testimony that bore on an important issue," or that improperly admitted evidence "clouded a crucial issue" in the case. *See*

Hicks, 202 Wis. 2d at 160. For all of the reasons already stated, Moore's arguments also do not persuade us that it is probable that justice has miscarried.

CONCLUSION

¶85 For these reasons, we conclude that the circuit court properly denied Moore's motion for a new trial, and we therefore affirm the court's order denying that motion.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.