

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 23, 2012

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2010AP2797

Cir. Ct. No. 2006CF516

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DANIEL D. BOLSTAD,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for LaCrosse County:
RAMONA A. GONZALEZ, Judge. *Affirmed.*

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

¶1 PER CURIAM. Daniel Bolstad, pro se, appeals from an order denying his WIS. STAT. § 974.06 (2009-10)¹ motion for postconviction relief.

¹ All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

Bolstad argues that he is entitled to a new trial based on newly discovered evidence and that the absence at trial of a recently located witness violated his right to a fair trial. Bolstad further contends a new trial is warranted based on the cumulative effect of the newly discovered evidence and the affidavit of the recently located witness. Finally, Bolstad claims the circuit court erred by denying his postconviction motion without a hearing. We reject these arguments and affirm the order.

BACKGROUND

¶2 The State charged Bolstad with attempted second-degree sexual assault of Michelle S. At Bolstad's jury trial, Michelle testified that on the night of June 20, 2006, Bolstad and Jason Conry were guests at her house. She went to her bedroom and fell asleep, and later woke up with Bolstad in her bed, attempting to sexually assault her. Conry testified that after Michelle went to bed he and Bolstad went out into the yard to smoke. Bolstad then returned to the house and locked Conry out. Michelle and Conry testified that they and Bolstad were the only adults present at the residence until after the attempted assault. Michelle's sister, Christina Lorenz, lived across the street and corroborated much of Michelle's and Conry's testimony, including their assertion about who was present during the described events.

¶3 Bolstad testified that he did not attempt to assault Michelle. He testified that a man named Todd Mitchell, the father of Lorenz's children, was present on the night of the assault, along with Lorenz, Conry, and one other man. He also testified that earlier in the day Mitchell and a social worker had been at the house at the same time. Michelle testified that Mitchell had not been present at her house that day. Mitchell was not available to testify and did not appear at the

trial. Bolstad presented no other witnesses to corroborate his testimony concerning Mitchell's presence. In closing arguments, the prosecutor argued that Bolstad lied about Mitchell's presence and that this lie was an indication that Bolstad also lied when he denied the attempted assault.

¶4 After a jury found Bolstad guilty of the crime charged, he moved to set aside the verdict on the ground that Michelle and her sister committed perjury when they testified that Mitchell had not been present on the day of the attempted sexual assault. After a hearing, the court denied the motion, concluding Bolstad had failed to establish that any witnesses perjured themselves. Bolstad ultimately received a twenty-year sentence consisting of twelve and one-half years of initial confinement and seven and one-half years of extended supervision.

¶5 Bolstad then filed a postconviction motion for a new trial on the ground that he was denied the effective assistance of trial counsel and, alternatively, in the interest of justice. Specifically, Bolstad claimed his counsel was ineffective by failing to call witnesses to corroborate his testimony that Mitchell had been present at Michelle's home. He also claimed counsel should have called witnesses to testify to Michelle's and her sister's reputations for untruthfulness. After a *Machner*² hearing, the circuit court denied Bolstad's postconviction motion. Both the judgment of conviction and the order denying postconviction relief were affirmed on direct appeal. *State v. Bolstad*, No. 2008AP177-CR, unpublished slip op. (WI App Dec. 30, 2008). In October 2010, Bolstad filed the underlying WIS. STAT. § 974.06 motion for postconviction relief. The motion was denied without a hearing and this appeal follows.

² *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

DISCUSSION

¶6 Bolstad argues that newly discovered allegations against Conry in an unrelated case made it “plausible to believe that it was Conry that committed the assault on Michelle.” A circuit court may grant a new trial based on newly discovered evidence if the following requirements are met: “(1) the evidence was discovered after trial; (2) the moving party was not negligent in seeking the evidence; (3) the evidence is material to an issue in the case; (4) the evidence is not merely cumulative to the evidence that was introduced at trial; and (5) it is reasonably probable that a different result would be reached at a new trial.” *Terrance J.W.*, 202 Wis. 2d 496, 500, 550 N.W.2d 445 (Ct. App. 1996). “If the newly discovered evidence fails to meet any of these tests, the moving party is not entitled to a new trial.” *State v. Avery*, 213 Wis. 2d 228, 234, 570 N.W.2d 573 (Ct. App. 1997), *abrogated on other grounds by State v. Armstrong*, 2005 WI 119, ¶162, 283 Wis. 2d 639, 700 N.W.2d 98.

¶7 In his postconviction motion, Bolstad claimed that Conry was subsequently convicted of a crime similar in nature to that described by Michelle in this case and this may point to Conry being the perpetrator of the attempted sexual assault of Michelle. We assume without deciding that the first four criteria for newly discovered evidence are met; however, we conclude that it is not reasonably probable that admission of this evidence at a new trial would lead to a different result. Michelle testified at trial that it was Bolstad on top of her—she knew both men, so this is not a case of misidentification. Further, Bolstad provided no plausible reason why Michelle would have implicated Bolstad if, in fact, it was Conry. If Michelle was trying to protect Conry, as Bolstad suggests, she would not have reported the attempted assault to anyone.

¶8 Next, Bolstad claims his right to a fair trial was violated by Mitchell's absence at trial. In affidavits submitted with the WIS. STAT. § 974.06 motion, Mitchell relayed a story that was inconsistent with the testimony presented by Michelle, her sister, and Conry. Specifically, Mitchell averred that he was with Lorenz at Michelle's house. Bolstad, however, presents no legal theory entitling him to a new trial now that Mitchell has resurfaced. To the extent Mitchell's affidavits could be construed as attempting to raise the issue of newly discovered evidence, Bolstad did not frame his argument as one of newly discovered evidence, and the circuit court did not address it as such.³ Ultimately, Bolstad fails to explain why the affidavits constitute newly discovered evidence warranting a new trial—in particular, he does not show diligence in attempting to obtain the information included in the affidavits.

¶9 Bolstad also argues that the cumulative effect of Mitchell's affidavits and the newly discovered evidence regarding Conry establish grounds for granting a new trial. Because we have rejected both of Bolstad's arguments, we likewise reject his claim that these arguments together warrant a new trial.

¶10 Finally, Bolstad claims the circuit court erred by denying his WIS. STAT. § 974.06 motion without an evidentiary hearing. If a postconviction motion does not raise facts sufficient to entitle the defendant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the circuit court has discretion to deny the

³ This court considered whether a remand to consider Bolstad's argument under the rubric of newly discovered evidence was warranted. We will not, however, blindside circuit courts with reversals based on theories that did not originate in their forum. *State v. Rogers*, 196 Wis. 2d 817, 827, 539 N.W.2d 897 (Ct. App. 1995).

motion without a hearing. *See State v. Bentley*, 201 Wis. 2d 303, 310-11, 548 N.W.2d 50 (1996). As discussed above, the record demonstrates that Bolstad is not entitled to relief. Therefore, we conclude the circuit court properly exercised its discretion when it denied the motion without an evidentiary hearing.

By the Court.—Order affirmed.

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

