COURT OF APPEALS
DECISION
DATED AND FILED

January 18, 2012

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2011AP174 **Cir. Ct. No. 2001CF8**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

FLOYD W. HIPSHER,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Bayfield County: KELLY J. THIMM, Judge. *Affirmed*.

Before Hoover, P.J., Peterson, J., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Floyd Hipsher, pro se, appeals an order denying his motion for postconviction relief. This is Hipsher's third appeal. *See* ***State v. Hipsher***, No. 2002AP2461, unpublished slip op. (WI App May 20, 2003) (***Hipsher I***); ***State v. Hipsher***, No. 2005AP632, unpublished slip op. (WI App

Dec. 20, 2005) (***Hipsher II***). On appeal, he asserts he is entitled to a new trial because of new evidence of juror bias and innocence. He also contends the judge presiding over his postconviction motion was biased and the cumulative effect of his perceived errors require reversal. We affirm.

BACKGROUND

¶2 In 2001, Hipsher was convicted of repeatedly sexually assaulting his stepdaughter. In his first appeal, Hipsher argued that one of the jurors, Jacqueline LaBelle, was biased because she failed to disclose her relationship with the prosecutor's father. *See* ***Hipsher I***, No. 2002AP2461, unpublished slip op. (WI App May 20, 2003). We rejected Hipsher's argument, reasoning:

> During voir dire, the juror stated that she worked with Hipsher's wife and knew the prosecutor both personally and professionally. She stated that she had dated the prosecutor's father and the last contact she had with him or a member of his family was the previous summer.
>
> At the postconviction hearing, [Hipsher's defense counsel] testified that he knew the juror and the prosecutor's father had been seeing each other and that she had spent time with him in North or South Carolina when he stayed there for the winter. [Defense counsel] suspected that the two had an intimate relationship and discussed the relationship with Hipsher. Hipsher told him that the relationship between the juror and the prosecutor's father had "ended badly" and Hipsher wanted the juror to remain on the jury. Hipsher also knew her in her role as town clerk and thought she would be a positive juror toward him.
>
> All of Hipsher's arguments relating to the juror's relationship with the prosecutor's father fail because of his and [his defense counsel's] knowledge of the relationship. … Hipsher has not demonstrated that the juror was biased against him. At the time Hipsher requested that she be left on the panel, he believed she could be biased in his favor.

Id., ¶¶3-5.

¶3 In 2004, Hipsher filed a second motion for postconviction relief, contending the prosecutor "impermissibly presented evidence that Hipsher invoked his right to remain silent, and his trial attorney was ineffective for failing to object to the impermissible questions." ***Hipsher II***, No. 2005AP632, unpublished slip op. ¶1 (WI App Dec. 20, 2005). We rejected Hipsher's arguments. ***Id.***

¶4 In 2009, Hipsher filed the present motion for postconviction relief, arguing he has newly discovered evidence that, at the time of trial, LaBelle was the prosecutor's employee in his private business. He also asserted he has other newly discovered evidence demonstrating his innocence. Hipsher later added an allegation that the cumulative effect of the errors required reversal.

¶5 The circuit court judge assigned to Hipsher's case wrote a letter to the current district attorney, who coincidently was Hipsher's former defense attorney in the underlying case. The court stated that because the district attorney had formerly represented Hipsher, the district attorney could not represent the State in this matter. The court requested the district attorney obtain a special prosecutor. Hipsher filed a motion to disqualify the judge, alleging the judge "showed manifest bias" after requesting Hipsher's former defense attorney to obtain a special prosecutor for the case. Hipsher subsequently objected to the special prosecutor, arguing, in part, the special prosecutor represented Hipsher's friend's ex-wife in the couple's divorce.

¶6 In a written decision and order entered on December 9, 2010, the court denied Hipsher's motions for postconviction relief and judicial disqualification without a hearing. The court rejected Hipsher's allegation that, at the time of trial, LaBelle was the prosecutor's employee and determined his

remaining newly discovered evidence was based on hearsay or other inadmissible evidence. The court reasoned that because there were no errors, reversal based on any cumulative effect was unwarranted. The court also determined it "has complied with the rules of appointment of a special prosecutor and finds no merit in Mr. Hipsher's assertions regarding bias." Finally, the court concluded "Mr. Hipsher does not present sufficient evidence or legal authority to support the court removing the [special prosecutor] and appointing another special prosecutor."

DISCUSSION

¶7 Hipsher raises four arguments on appeal. First, he asserts the circuit court erred by denying his claim regarding LaBelle's bias. Second, he contends other newly discovered evidence proves his innocence. Third, he argues the judge was biased and should have disqualified himself. Fourth, he contends the cumulative effect of the errors requires a new trial.

I. Juror Bias

¶8 Hipsher asserts he has new evidence showing LaBelle was biased against him. Specifically, Hipsher contends that his new evidence proves LaBelle was the prosecutor's "own personal employee in his private businesses by proxy of his relationship to his father as his business partner."

¶9 In support of this allegation, Hipsher relies on the prosecutor's 2006 statement of economic interest and evidence Hipsher introduced at his first postconviction hearing. The prosecutor's 2006 statement of economic interest provides that both the prosecutor and his father have an interest in Deep Lake, Inc. The evidence Hipsher introduced at the first postconviction hearing alleged, in

part, that LaBelle worked part-time for the prosecutor's father at Van Hollen Realty.[1]

¶10 The circuit court determined this evidence did not establish LaBelle was working for the prosecutor. We agree. This evidence does not show that Van Hollen Realty and Deep Lake, Inc., are related or that the prosecutor has any interest in Van Hollen Realty. Hipsher's contention that LaBelle worked for the prosecutor is nothing more than a conclusory allegation and is unsupported by his alleged evidence. The court did not err by denying Hipsher's motion without a hearing. *See* ***State v. Allen***, 2004 WI 106, ¶¶14-15, 274 Wis. 2d 568, 682 N.W.2d 433 (postconviction motion requires more than conclusory allegations).

¶11 Also within this argument, Hipsher asserts the prosecutor and LaBelle engaged in misconduct by failing to reveal during voir dire that she worked for him, and as a result, we should overrule ***Hipsher I*** and redetermine whether LaBelle was biased against him. He contends that our determination regarding LaBelle's alleged bias should not be barred by issue or claim preclusion because we never determined the effect LaBelle's employment with the prosecutor had on the case. Hipsher's arguments, however, improperly assume the record shows LaBelle was the prosecutor's employee. As noted above, Hipsher's evidence does not support this contention. We will not consider it. *See* ***Dieck v. Antigo Sch. Dist.***, 157 Wis. 2d 134, 148 n.9, 458 N.W.2d 565 (Ct. App. 1990) (We will not consider unsupported assertions of fact.).

[1] On appeal, Hipsher argues nothing in the record supports the court's determination that LaBelle worked at Van Hollen Realty. Hipsher, however, ignores his own testimony from the first postconviction hearing. There, he testified LaBelle worked at Van Hollen Realty.

II. Newly Discovered Evidence

¶12 Hipsher next argues he is entitled to a new trial because other newly discovered evidence proves his innocence. When moving for a new trial based on the allegation of newly discovered evidence, a defendant must prove: "(1) the evidence was discovered after conviction; (2) the defendant was not negligent in seeking evidence; (3) the evidence is material to an issue in the case; and (4) the evidence is not merely cumulative." ***State v. McCallum***, 208 Wis. 2d 463, 473, 561 N.W.2d 707 (1997). "If the defendant is able to prove all four of these criteria, then it must be determined 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." ***State v. Plude***, 2008 WI 58, ¶32, 310 Wis. 2d 28, 750 N.W.2d 42 (citation omitted). Further, when the allegedly new evidence is a witness's recantation, it must be corroborated by other newly discovered evidence. ***McCallum***, 208 Wis. 2d at 476.

¶13 Hipsher contends he is entitled to a new trial based on the following newly discovered evidence, as outlined in his brief:

> 1) a sworn affidavit from Joseph F. Soulier alleging that the victim in the case had admitted to his friend that she had been pressured by her mother to make up the false allegations against Mr. Hipsher in order to gain the upper hand in the custody battle that was sure to ensue in their pending divorce ….
>
> 2) a sworn affidavit from Shaun L. Williams, who contacted Mr. Hipsher to inform him that Mr. Hipsher's ex-wife had also made false sexual assault allegations up against him related to Mr. Hipsher's own blood daughter,

> which were later proven to be false by a formal investigation ….[2]
>
> 3) a sworn affidavit from Michael Gellerman, who claims that several months prior to Mr. Hipsher's having been charged in the original matter, that he had witnessed Mr. Hipsher's ex-wife show up at Mr. Hipsher's business office one day to retrieve a tape from his telephone answering machine in an attempt to cover up a threat she had left on it for Mr. Hipsher ….
>
> 4) a sworn affidavit along with supporting evidence from Mr. Hipsher's former business colleague, Steven P. Krueger, claiming among other things that he had read his ex-wife's journal in which she had deliberated about "a plan" she had with Mr. Hipsher's ex-wife to get rid of Mr. Hipsher several months prior to Mr. Hipsher having been charged in the matter ….[3]

¶14 Hipsher, however, fails to develop a legal argument explaining how these pieces of evidence satisfy the new evidence criteria or why they entitle him to a new trial. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (We need not address undeveloped arguments.).

¶15 Nevertheless, even on the merits, Hipsher's newly discovered evidence would not warrant a new trial. First, the victim's alleged recantation consists of inadmissible double hearsay with no other corroborating evidence. Newly discovered recantations must bear, in part, circumstantial guarantees of trustworthiness. *See* ***State v. Kivioja***, 225 Wis. 2d 271, 301, 592 N.W.2d 220 (1999). Soulier's averment that a friend told him that the victim told the friend

[2] We observe that Williams' affidavit does not state that he was cleared after a "formal" investigation; it states only that "an investigation" by some unknown party confirmed that the allegations were false.

[3] Krueger's affidavit contains no reference to "a plan." The affidavit is from Krueger's divorce proceeding and deals with incidents surrounding Krueger's children. The record does, however, contain a letter from Krueger to Hipsher in which Krueger speculates allegations made against himself are related to allegations made against Hipsher.

that she falsified her testimony bears no circumstantial guarantee of trustworthiness.

¶16 Moreover, the remaining pieces of evidence, which involve allegations concerning Hipsher's former wife, do not demonstrate a reasonable probability that a different result would be reached at a new trial. As the State argues in its brief, the evidence supporting Hipsher's conviction *came from the victim* and the new evidence proffered by Hipsher does nothing to undermine the victim's credibility. The State contrasts the victim's trial testimony to that of Hipsher's former wife, who at trial testified she had never observed Hipsher do anything inappropriate with the victim. The State contends that "the most damaging testimony that [Hipsher's former wife] gave concerned Hipsher's looking in the [victim's] bedroom window, and Hipsher admits that he did that." Hipsher has failed to file a reply brief in response to these arguments; therefore, they are deemed conceded. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments are deemed conceded).

III. Judicial Bias

¶17 Hipsher next contends the circuit court judge presiding over his most recent postconviction motion was biased. When analyzing an allegation of judicial bias, we presume the judge was fair, impartial, and capable of ignoring any biasing influences. ***State v. Gudgeon***, 2006 WI App 143, ¶20, 295 Wis. 2d 189, 720 N.W.2d 114. This presumption is rebuttable. ***Id.*** The party asserting judicial bias must prove judicial bias by a preponderance of the evidence. ***State v. McBride***, 187 Wis. 2d 409, 415, 523 N.W.2d 106 (Ct. App. 1994).

¶18 The test for judicial bias consists of a subjective and objective inquiry. ***Id.*** The subjective component is based on the judge's own determination about whether he or she can act impartially. ***Id.*** Here, the judge declined to recuse himself from the case after concluding there was "no merit in Mr. Hipsher's assertions regarding bias." This determination satisfies the subjective component and shows the judge did not believe he was subjectively biased. *See* ***id.***

¶19 Under the objective test, we determine whether there are objective facts demonstrating actual bias. ***Id.*** at 416. We conclude the evidence submitted by Hipsher does not show actual bias—specifically, it does not show the judge acted unfairly when requesting the district attorney obtain a special prosecutor or when refusing to remove the special prosecutor.

¶20 Here, after Hipsher objected to the district attorney obtaining a special prosecutor, the court wrote to Hipsher, explaining "while I understand your position … it is the normal procedure for the District Attorney with the conflict to locate a special prosecutor to represent the State and the County." The court stated it found "no ethical or other concerns with [the district attorney] performing his required function of finding a special prosecutor." When denying Hipsher's motion for disqualification, the court reasoned it "complied with the rules of appointment of a special prosecutor." As to Hipsher's objection to the special prosecutor, the court determined, "Mr. Hipsher does not present sufficient evidence or legal authority to support the court removing [the special prosecutor] and appointing another special prosecutor." Hipsher has failed to prove by a preponderance of the evidence that these actions demonstrated actual bias.

¶21 Moreover, as the State argues, even if the judge was wrong to request the district attorney to obtain a special prosecutor or was incorrect in its

refusal to replace the special prosecutor, these are only judicial errors and do not establish judicial bias. *See* ***Liteky v. United States***, 510 U.S. 540, 555 (1994) ("Judicial rulings alone almost never constitute a valid basis for a bias or partiality motion."). Hipsher has failed to respond to this argument. Therefore, it is deemed conceded. *See* ***Charolais***, 90 Wis. 2d at 109.

IV. Cumulative Effect

¶22 Finally, Hipsher contends that the cumulative effect of the errors alleged in all of his appeals demands a new trial. None of his alleged errors, however, have had any merit. Consequently, we do not need to determine any alleged cumulative effect.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2009-10).