COURT OF APPEALS
DECISION
DATED AND FILED

July 31, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP2270-CR **Cir. Ct. No. 2009CF4051**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

WARREN HUDSON, JR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: REBECCA F. DALLET, Judge. *Affirmed.*

Before Curley, P.J., Fine and Kessler, JJ.

¶1 PER CURIAM. Warren Hudson, Jr., appeals from a judgment of conviction entered after a jury found him guilty of first-degree intentional homicide by use of a dangerous weapon. He also appeals from the order denying his postconviction motion for a new trial. He claims that he has newly-discovered evidence, that he received constitutionally ineffective assistance from his trial

lawyer, and that the circuit court erred by denying him postconviction relief without a hearing. We affirm.

I.

¶2 On May 25, 2007, Jerome Lea was shot and killed on the grounds of a McDonald's restaurant at 5729 W. Silver Spring Drive, Milwaukee, Wisconsin. The State charged Hudson some years later with first-degree intentional homicide while armed with a dangerous weapon. A jury trial began in March 2010.

¶3 Several McDonald's customers testified about their observations on the day of the shooting. Patrice Adam testified that she was lunching at McDonald's when she saw a tall man with a short companion shoot someone in the restaurant's parking lot. Marcus Carter testified that he had just parked in the McDonald's lot when he saw a shooting there. He picked Hudson out of a photo array as a person who looked like the shooter.

¶4 Two witnesses recalled being near the McDonald's on 57th and W. Silver Spring Drive on May 25, 2007. Both of these witnesses described hearing shots fired and then seeing a tall man running with a shorter man. Both witnesses later picked Hudson's picture out of photo arrays and told police that the person pictured looked like the taller runner.

¶5 Robert Jones testified that on the day of the shooting, two men tried to rob him. He ran to the McDonald's on 57th and W. Silver Spring Drive, and the assailants followed him into the parking lot. Jones told the jury that Hudson was one of the assailants and that he was with a "short friend." A police officer described showing Jones an array of seventy-five photographs. Jones picked out

Hudson's photograph and told the officer that he had "no doubt" the picture he chose depicted one of the assailants.

¶6 Willie Gill, also referred to during the trial as "Little Will," testified that on May 25, 2007, Hudson wanted to rob someone who they followed to McDonald's.[1] Gill told the jury that while he was at McDonald's, he saw Hudson shoot a man. Hudson and Gill then ran to James Jamison's house.

¶7 Jamison testified that he is Hudson's cousin. Jamison told the jury that he did not remember the events of May 25, 2007, and he did not remember what he told the police ten days later. A detective then testified that he took a statement from Jamison on June 5, 2007. According to the detective, Jamison said that Hudson and Gill came to Jamison's house on May 25, 2007, and Hudson admitted that he had just "popped" someone. Jamison clarified for the detective that "popped" meant "shot."

¶8 Julian Meadows testified that he met Hudson in Arkansas during the summer of 2007. Meadows told the jury that Hudson said he fled to Arkansas from Milwaukee, Wisconsin, because he had killed a man outside of a McDonald's.

¶9 Hudson did not testify or call any witnesses. The jury found him guilty as charged.

[1] During the State's opening statement and closing argument, the State told the jury without objection that Hudson was tall and that Gill was short. In postconviction submissions, the State repeatedly, and again without objection, described Hudson as tall and Gill as short. In the respondent's brief, the State describes Gill as "significantly shorter" then Hudson. Hudson offered nothing in reply to this contention. "[U]nrefuted facts are deemed admitted." ***State v. Bean***, 2011 WI App 129, ¶24 n.5, 337 Wis. 2d 406, 419 n.5, 804 N.W.2d 696, 703 n.5. We are satisfied that Hudson concedes that he is significantly taller than Gill.

¶10 Hudson filed a postconviction motion in May 2011 alleging that he had newly-discovered evidence and that his trial lawyer was constitutionally ineffective by failing to discover that his cousins, Chiquita Nolen and Jamison, had exculpatory evidence to offer. Nolen, who was not a witness at the trial, and Jamison both executed affidavits in support of the postconviction motion.

¶11 Nolen alleged that on May 25, 2007, Gill told her that he "killed that dude at McDonald[']s." Nolen also alleged that she told Hudson about Gill's confession but neither Hudson's lawyer nor an investigator interviewed her before trial.

¶12 Jamison alleged that Gill came to Jamison's house carrying a gun on May 25, 2007, and Gill said he "killed a dude at McDonald[']s." Jamison further claimed that Hudson arrived at Jamison's house about ten minutes after Gill, and Hudson did not have a gun. Jamison went on to say that when police took his statement, he did not incriminate Hudson. Further, Jamison alleged that during his trial testimony he tried to make corrections to his pretrial statement to police, but he "was called a liar."

¶13 The circuit court denied Hudson's motion for postconviction relief without a hearing. The circuit court said it was "satisfied beyond a reasonable doubt that the new evidence would not have made a singular differen[ce] in the trial." Hudson appeals, arguing that he is entitled to a hearing on his claims.

II.

¶14 Hudson seeks postconviction relief on the grounds that he has newly-discovered evidence and that he received constitutionally ineffective

assistance from his trial lawyer. Well-established standards govern the analyses of these claims.

¶15 The decision to grant a motion for a new trial based on newly-discovered evidence rests in the circuit court's discretion. ***State v. Plude***, 2008 WI 58, ¶31, 310 Wis. 2d 28, 47, 750 N.W.2d 42, 52. A defendant seeking a new trial based on newly-discovered evidence must establish "'by clear and convincing evidence, that: (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. Armstrong***, 2005 WI 119, ¶161, 283 Wis. 2d 639, 704, 700 N.W.2d 98, 130 (citation omitted). If the defendant satisfies these requirements, '"the circuit court must determine whether a reasonable probability exists that a different result would be reached in a [new] trial.'" ***Ibid.*** (citation omitted). "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.'" ***State v. Love***, 2005 WI 116, ¶44, 284 Wis. 2d 111, 134, 700 N.W.2d 62, 74 (citation and two sets of brackets omitted).

¶16 To establish constitutionally ineffective representation, a defendant must prove both that the lawyer's performance was deficient and that the deficiency prejudiced the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To demonstrate deficient performance, the defendant must show specific acts or omissions of the lawyer that are "outside the wide range of professionally competent assistance." ***Id.*** at 690. To demonstrate prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id.***

at 694. If a defendant fails to satisfy one component of the analysis, the circuit court need not address the other. ***Id.*** at 697.

¶17 Whether a lawyer's performance was deficient and whether the deficiency was prejudicial are questions of law that we review *de novo*. ***State v. Johnson***, 153 Wis. 2d 121, 128, 449 N.W.2d 845, 848 (1990). If the answers to those questions rest on the circuit court's factual findings, we will not disturb those findings unless they are clearly erroneous. ***Id.***, 153 Wis. 2d at 127, 449 N.W.2d at 848.

¶18 Hudson's contention that the circuit court erred by denying him a hearing on his postconviction motion is governed by a third analysis. The circuit court must hold a hearing only when the postconviction motion "on its face alleges sufficient material facts that, if true, would entitle the defendant to relief. This is a question of law that we review *de novo*." *See* ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 576, 682 N.W.2d 433, 437 (italics added). If, however, the motion does not raise sufficient material facts, if the allegations are merely conclusory, or if the Record conclusively shows that the defendant is not entitled to relief, the circuit court has the discretion to deny a request for an evidentiary hearing. ***Ibid.*** Moreover, '"an evidentiary hearing is not mandatory if the [R]ecord as a whole conclusively demonstrates that [the] defendant is not entitled to relief, even if the motion alleges sufficient nonconclusory facts.'" ***State v. Balliette***, 2011 WI 79, ¶50, 336 Wis. 2d 358, 380, 805 N.W.2d 334, 344 (citation omitted).

¶19 We review with deference the circuit court's discretionary decision to grant or deny a postconviction hearing. ***Allen***, 2004 WI 106, ¶9, 274 Wis. 2d at 577, 682 N.W.2d at 437. We will affirm the circuit court's exercise of discretion if the decision had a reasonable basis and the circuit court reached its conclusion

in accordance with accepted legal standards and the facts of record. ***State v. LaCount***, 2008 WI 59, ¶15, 310 Wis. 2d 85, 96, 750 N.W.2d 780, 786.

III.

¶20 With the foregoing principles in mind, we examine the material that Hudson submitted to support his substantive claims. We begin with Nolen's affidavit.

¶21 Nolen avers that Gill, her former boyfriend, confessed to committing a homicide at McDonald's. She further avers that she "told Warren [Hudson] about this information," but she was "not … interviewed by [Hudson's] former attorney." Hudson does not dispute any of these allegations. We conclude that, as a matter of law, Nolen's affidavit does not constitute newly-discovered evidence because the affidavit on its face reflects that Hudson knew about its contents before his conviction. Evidence is not newly discovered when the defendant had it before trial. *See* ***State v. Morse***, 2005 WI App 223, ¶21, 287 Wis. 2d 369, 380, 706 N.W.2d 152, 157. The affidavit thus does not satisfy the first element of the test for newly-discovered evidence. *See* ***Armstrong***, 2005 WI 119, ¶161, 283 Wis. 2d at 704, 700 N.W.2d at 130.

¶22 For related reasons, Hudson's trial lawyer did not perform deficiently for failing to present Nolen's testimony at trial. Nothing in the postconviction submissions demonstrates that Hudson told his trial lawyer about Nolen and the information that she allegedly could provide. Information that a defendant knows but fails to disclose to his or her lawyer cannot form the basis for a claim that the lawyer was ineffective. ***State v. Nielsen***, 2001 WI App 192, ¶23, 247 Wis. 2d 466, 482, 634 N.W.2d 325, 332.

¶23 We acknowledge Hudson's complaint to the circuit court during the final pretrial conference that "he felt his attorney was not preparing to present witnesses." Similarly, he told the circuit court during the trial that his lawyer "was not calling rebuttal witnesses." These complaints do not demonstrate that Hudson told his lawyer about Nolen or the evidence she allegedly could provide. *Cf.* ***Allen***, 2004 WI 106, ¶24, 274 Wis. 2d at 586, 682 N.W.2d at 442 (defendant sufficiently alleges material facts supporting claim of ineffective representation by describing information not presented at trial and stating that defendant disclosed that information to the trial lawyer). Moreover, Hudson fails to offer any material facts showing that his lawyer had, or should have had, independent knowledge that Nolen was a potential defense witness or might have exculpatory information.[2] Hudson thus fails to identify any action or inaction on the part of his trial lawyer sufficient to support a claim of constitutionally ineffective assistance.

¶24 We next examine Jamison's affidavit. Jamison avers that "[o]n May 25, 2007, Willie Gill came to [Jamison's] house at 5724 W. Custer Avenue, Milwaukee, Wisconsin. Willie said that he killed a dude at McDonald[']s, and had a gun with him when he came to [Jamison's] house." Jamison also avers that Hudson came to Jamison's house on May 25, 2007, "about ten minutes after [Gill], but [Hudson] did not have a gun."

¶25 These avowals contradict the testimony that Jamison offered at trial. He testified:

[2] We note that Nolen's affidavit describes her unsuccessful efforts to contact "Willie's attorney," but nothing in the affidavit reflects that she sought out Hudson's lawyer.

> Q: We are going to start now with the date of May 25 in the year 2007. Do you remember Mr. Hudson coming to your house on that day?
>
> A [Jamison]: No.

Jamison also testified that he met with police ten days after the shooting, and at that time he did not know about a murder at McDonald's:

> Q: And do you remember there was a murder at the McDonald's by your house?
>
> A [Jamison]: That is what the police said.
>
> Q: You didn't even know that?
>
> A [Jamison]: Uh Uh. That is what police told me. I didn't know.

¶26 The rule is long established in this state that an affidavit admitting perjury, standing alone, is not sufficient to support a request for a new trial. ***Rohl v. State***, 65 Wis. 2d 683, 697, 223 N.W.2d 567, 573 (1974). "[A] new trial may be based on an admission of perjury only if the facts in the affidavit are corroborated by other newly[-]discovered evidence." ***Ibid.***; *see also* ***State v. McCallum***, 208 Wis. 2d 463, 476, 561 N.W.2d 707, 711 (1997) (newly-discovered recantation evidence must be corroborated by other newly-discovered evidence). Here, Hudson submitted an affidavit from Nolen along with Jamison's affidavit, but, as we have seen, Nolen's affidavit does not meet the criteria for newly-discovered evidence.

¶27 A convicted defendant who cannot corroborate a recantation with other newly-discovered evidence may, alternatively, show both that: "(1) there is a feasible motive for the initial false statement; and (2) there are circumstantial guarantees of the trustworthiness of the recantation." ***McCallum***, 208 Wis. 2d at 477–478, 561 N.W.2d at 712. Hudson, however, fails to identify any

circumstantial guarantee that Jamison's belated affidavit is trustworthy. Indeed, we agree with the State that Jamison's affidavit is incredible as a matter of law.

¶28 Evidence is incredible as a matter of law when it is "inherently incredible, such as in conflict with the uniform course of nature or with fully established or conceded facts." ***State v. King***, 187 Wis. 2d 548, 562, 523 N.W.2d 159, 163 (Ct. App.1994). Here, Jamison first averred in his affidavit that the detective who took his statement in 2007 erroneously "wrote that Warren popped someone.... I did not say it." Jamison next offered an avowal that cannot be reconciled with fully-established facts: "I tried to make the correction to the statement that the police wrote while testifying, but I was called a liar."

¶29 The transcript of Jamison's testimony irrefutably shows that at no point in the trial did Jamison "tr[y] to make [a] correction" to the statement that he gave to the police.[3] To the contrary, when asked about the statement, Jamison responded: "I don't remember none of that. I told you I got a short memory." Because Jamison's affidavit is neither corroborated by other newly-discovered evidence nor clothed with any circumstantial guarantee of trustworthiness, the affidavit cannot, as a matter of law, constitute newly-discovered evidence sufficient to support a request for a new trial.

¶30 Hudson also failed to advance material facts demonstrating that his trial lawyer was ineffective in regard to Jamison. Hudson contends that his trial lawyer performed deficiently because the lawyer allegedly neglected to find and

[3] Significantly, Hudson did not respond to the contention in the State's brief that Jamison "never tried to correct anything" at the trial. We again note that unrefuted facts are deemed conceded. *See* ***Bean***, 2011 WI App 129, ¶24 n.5, 337 Wis. 2d at 419 n.5, 804 N.W.2d 696 at n.5.

interview Jamison, but this contention is conclusory and unsupported by any evidence. Significantly, Jamison's affidavit omits an allegation that Hudson's trial lawyer failed to contact Jamison. Regardless of that telling omission, a defendant moving for postconviction relief may not rely on conclusory allegations of deficient trial preparation, hoping to supplement them at a hearing. ***State v. Bentley***, 201 Wis. 2d 303, 313, 548 N.W.2d 50, 54.

¶31 Because Hudson fails to show that his trial lawyer performed deficiently, he cannot demonstrate that the lawyer gave him constitutionally ineffective representation. *See* ***Strickland***, 466 U.S. at 697 (requiring defendant to show both deficiency and resulting prejudice). For the sake of completeness, however, we consider whether Hudson showed that he suffered prejudice from any alleged failure of his trial lawyer to conduct a pretrial investigation of Jamison.

¶32 "'[A] defendant who alleges a failure to investigate on the part of his counsel must allege with specificity what the investigation would have revealed and how it would have altered the outcome of the trial.'" ***State v. Flynn***, 190 Wis. 2d 31, 48, 527 N.W.2d 343, 349–350 (Ct. App. 1994) (citation omitted). Hudson offers no such specific allegations. He implies that Jamison would have testified at trial in conformity with his affidavit, but the Record does not support that suggestion. At trial, Jamison repeatedly testified that he had "a short memory," and he agreed that he "really d[id]n't remember much of what happened in 2007." Indeed, his memory loss was so extensive that he told the jury, "I don't know where I live." As Hudson acknowledged in his postconviction motion, "Jamison insisted that he did not remember anything."

¶33 Given Jamison's amnesia in March 2010, Hudson fails to show that any investigative effort at that time would have revealed the exculpatory

statements that Jamison provides in his affidavit. Thus, the postconviction submissions do not demonstrate that Hudson suffered any prejudice assuming, as he alleges, that his trial lawyer neglected to find and interview Jamison before trial.

IV.

¶34 Hudson's postconviction submissions were conclusory in some respects, lacked essential material facts, and were insufficient to sustain Hudson's substantive claims. We therefore review the circuit court's decision to deny Hudson's claims without a hearing solely to determine whether the circuit court erroneously exercised its discretion. *See* ***State v. Ziebart***, 2003 WI App 258, ¶33, 268 Wis. 2d 468, 489, 673 N.W.2d 369, 379–380.

¶35 The circuit court found "beyond a reasonable doubt" that the information in support of Hudson's postconviction motion would not have made any difference at trial. The circuit court explained that "there were independent witnesses who saw the shooter and who identified Hudson as the shooter." The circuit court presided at the trial and saw the witnesses who testified. Their testimony conflicts with the belated information from Hudson's cousins. In light of our deferential standard of review, we are satisfied that the circuit court properly exercised its discretion when it denied Hudson's claims without a hearing.

By the Court.—Judgment and order affirmed.

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