COURT OF APPEALS
DECISION
DATED AND FILED

October 23, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP2297 **Cir. Ct. No. 1999CF3969**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DWIGHT D. CAMPBELL,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: DENNIS R. CIMPL, Judge. *Affirmed.*

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

¶1 PER CURIAM. Dwight D. Campbell appeals an order denying his motion seeking a new trial under WIS. STAT. § 974.06. He contends that he has newly-discovered evidence. He also contends that he should be granted a new

trial in the interest of justice. We reject his contentions and affirm the order denying postconviction relief.

I.

¶2 The State charged Campbell with first-degree reckless homicide by use of a dangerous weapon and as a party to a crime after Johnnie Humphrey was shot and killed in July 1999. At Campbell's trial in 2000, many of the witnesses presented by the State had either a familial connection or a friendship with Elmer Jones. Campbell's theory of defense was that Jones, who did not testify, manipulated the State's evidence in ways that Campbell could not precisely identify. The jury rejected Campbell's theory and found him guilty. The circuit court imposed a forty-five-year sentence. He pursued a direct appeal, and this court summarily affirmed. *See* ***State v. Campbell***, No. 2001AP2321-CR, unpublished slip op. (WI App Sept. 24, 2002).

¶3 In 2010, Campbell launched the proceedings underlying this appeal by filing a postconviction motion and supporting affidavits pursuant to WIS. STAT. § 974.06. He alleged that he had newly-discovered evidence that he was framed by Jones, and the circuit court conducted a hearing to consider the claim.

¶4 Armond Pride, Antwiane Sago, and Travis Ranson each testified that he was incarcerated at Waupun Correctional Institution at the same time as Jones. Pride and Sago each testified that Jones made statements about how he manipulated the witnesses who testified against Campbell at his homicide trial. Ranson testified that Jones said "he was the reason why Dwight Campbell is here [in prison]."

¶5 Campbell testified on his own behalf. He told the circuit court that he was formerly a member of the Gangster Disciples, a street gang, and that Jones belonged to a rival gang. According to Campbell, Jones was selling drugs in Campbell's neighborhood in 1999, viewed Campbell as a competitor, and wanted him out of the area. He suggested that these considerations motivated Jones to manufacture the evidence offered against Campbell at his homicide trial. Campbell testified that when he and Jones were both later imprisoned in Waupun Correctional Institution, they had a conversation during which Jones said "he didn't know that they were going to lock [Campbell] up and basically throw away the key." Jones then offered to help secure Campbell's release. Campbell went on to describe learning from Pride, Sago, and Ranson that Jones had admitted manipulating the testimony presented at Campbell's homicide trial, and Campbell further described the mechanics of seeking affidavits from the witnesses and getting a lawyer.

¶6 Jones also testified. He told the circuit court that he was present when his uncle, Humphrey, was shot, but Jones did not testify about what he saw at that time. He denied trying to influence the testimony of the witnesses at Campbell's trial, and he denied the conversations described by Pride, Sago, and Ranson. Jones acknowledged discussing Humphrey's homicide with Campbell while the two men were both incarcerated. According to Jones, however, the conversation involved Campbell apologizing for the homicide and offering to pay Jones to say either that Campbell did not commit the crime or that Jones did not see Campbell commit it.

¶7 At the conclusion of the evidentiary hearing, the circuit court determined that "the alleged new evidence" did not earn Campbell a new trial

because "there is absolutely no way" that the new evidence would probably result in a different jury verdict. Campbell appeals.

II.

¶8 The decision to grant or deny a motion for a new trial based on newly-discovered evidence rests in the circuit court's sound discretion. ***State v. Plude***, 2008 WI 58, ¶31, 310 Wis. 2d 28, 47, 750 N.W.2d 42, 52. Such motions, however, "'are entertained with great caution.'" ***State v. Morse***, 2005 WI App 223, ¶14, 287 Wis. 2d 369, 377, 706 N.W.2d 152, 156 (citation omitted). To get a new trial based on newly-discovered evidence, a defendant must prevail in a multi-pronged inquiry. *See* ***State v. Love***, 2005 WI 116, ¶¶43–44, 284 Wis. 2d 111, 133–134, 700 N.W.2d 62, 73–74.

> [A] defendant must first prove 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."
>
> If the defendant makes this showing, then "the circuit court must determine whether a reasonable probability exists that a different result would be reached in a trial." The reasonable probability determination does not have to be established by clear and convincing evidence, as it contains its own burden of proof. 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."

Ibid. (first set of brackets added, citations and footnote omitted). New evidence that fails to satisfy any of the five criteria is not sufficient to warrant a new trial. ***State v. Kaster***, 148 Wis. 2d 789, 801, 436 N.W.2d 891, 896 (Ct. App. 1989).

¶9 The circuit court concluded, and the parties do not dispute, that the testimony from Pride, Sago, and Ranson satisfied the first four criteria for Campbell to obtain a new trial on the ground of newly-discovered evidence. The determinative question is whether the proposed new evidence would have created a reasonable doubt in the jurors' minds. This component of the analysis presents a question of law. ***Plude***, 2008 WI 58, ¶33, 310 Wis. 2d at 49, 750 N.W.2d at 53. We consider questions of law *de novo*. ***State v. Ploeckelman***, 2007 WI App 31, ¶8, 299 Wis. 2d 251, 258, 729 N.W.2d 784, 788. We defer, however, to the underlying credibility assessments of the circuit court "because of its superior opportunity to observe the demeanor of witnesses and to gauge the persuasiveness of their testimony." *See* ***State v. Carnemolla***, 229 Wis. 2d 648, 661, 600 N.W.2d 236, 242 (Ct. App. 1999).

¶10 Here, the circuit court found that Pride, Sago, and Ranson had "credibility problems," and that Campbell himself "was incredible when he talks about ... no longer being a Gangster Disciple, being a neutral now, but yet he still has the tattoo and everything else." The circuit court then concluded that the jury would not have reached a different result had the jury heard the evidence Campbell presented at the postconviction hearing.

¶11 Evidence that is incredible would not raise a reasonable doubt in the minds of jurors. *See* ***State v. McCallum***, 208 Wis. 2d 463, 475, 561 N.W.2d 707, 711 (1997). Therefore, a new trial is not warranted unless the defendant satisfies the circuit court that a jury could believe the newly-discovered evidence on which he or she relies. *See* ***State v. Kivioja***, 225 Wis. 2d 271, 298, 592 N.W.2d 220, 233 (1999). A circuit court finding that new evidence is not credible "is sufficient to conclude that it is not reasonably probable that a different result would be reached

at a new trial." ***State v. Terrance J.W.***, 202 Wis. 2d 496, 501, 550 N.W.2d 445, 447 (Ct. App. 1996).

¶12 Campbell challenges the circuit court's order denying relief because, he says, the circuit court did not expressly deem Pride, Sago, and Ranson "incredible" or state that their testimony was "unworthy of belief." Campbell emphasizes that to secure a new trial based on newly-discovered evidence he is not required to offer evidence that is more credible than the State's original evidence. *See* ***McCallum***, 208 Wis. 2d at 474–475, 561 N.W.2d at 711. A jury that hears evidence less credible than the original evidence may nonetheless have a reasonable doubt about the defendant's guilt. *See* ***ibid.*** Relying on this principle, he contends that the circuit court erred by denying him the opportunity to present his evidence to a jury. We are not persuaded.

¶13 We do not require the circuit court to use magic words when it assesses credibility. Rather, we review the circuit court's credibility assessments by examining the totality of the circuit court's remarks. *See* ***Kivioja***, 225 Wis. 2d at 297–298, 592 N.W.2d at 233. Thus, in ***Kivioja***, the supreme court explained: "we find that the circuit court's discussion that [the witness]'s statements show so many marked inconsistencies that his 'reliability and credibility is seriously challenged' to be a finding that the recantation is incredible as a matter of law." *See* ***ibid.*** Similarly, a circuit court's "written finding that 'a reasonable jury would not believe the recanting statement of [the witness]' is also a finding that the recantation is incredible as a matter of law." ***Id.*** at 298, 592 N.W.2d at 233.

¶14 Here, the circuit court made extensive findings bearing on the credibility of the witnesses that Campbell offered. The circuit court noted that Pride had known Campbell for many years, that Pride was "like an adopted son"

to Campbell's mother, and that Pride dated Campbell's sister and received money from her. The circuit court noted that Sago was Campbell's cellmate, that Sago testified that he lied to Jones to gain his confidence, and that Sago did not cooperate with the detective who asked to speak with him about his proposed testimony despite a sworn statement in his affidavit that he was "willing to cooperate with the authorities in this matter." The circuit court determined that Ranson was Campbell's "fellow gang member" who knew Campbell "from the streets," and that Ranson had no independent recollection of some of the allegations he swore to in his affidavit, including that Jones admitted coaching witnesses and telling them what to say. The circuit court also noted that neither Pride nor Ranson was able to identify Jones when shown his photograph.[1]

¶15 After reviewing the testimony of Pride, Sago, and Ranson, the circuit court determined: "[w]ith the credibility problems of these three witnesses, there is absolutely no way that the jury would have changed its mind." This determination, in context, is a finding that the witnesses were incredible as a matter of law. *See* ***ibid.***

¶16 As to Campbell, the circuit court explicitly found him "incredible." Campbell argues, however, that the circuit court limited this finding to his testimony about terminating his gang membership, and he states that the circuit court did not make an express finding that the remainder of his testimony was "wholly outside the realm of believability." This contention is unavailing. When the circuit court does not make express findings, we assume that the circuit court made implicit findings in a manner supporting its decision. ***State v. Martwick***,

[1] Sago was not asked to identify Jones from a photograph.

2000 WI 5, ¶31, 231 Wis. 2d 801, 817, 604 N.W.2d 552, 559. Here, the circuit court did not describe each self-serving component of Campbell's testimony as incredible, but that finding is implicit in the circuit court's ruling. Additionally, and perhaps more importantly, Campbell does not identify anything in his testimony that supports a claim for a new trial in the absence of credible new evidence from Pride, Sago, and Ranson.

¶17 The circuit court determined that Campbell did not meet his burden of proof in this case. The circuit court thoroughly reviewed the evidence he offered and concluded: "[w]hen you look at the reasonable probability[,] would it result in a different trial [outcome] if we had known all of this? No way. Absolutely no way." The circuit court's findings and conclusion reflect its assessment that Campbell's evidence was incredible and thus would not raise a reasonable doubt in the minds of jurors. *See* ***Kivioja***, 225 Wis. 2d at 297–298, 592 N.W.2d at 233. Accordingly, Campbell did not show that he had newly-discovered evidence warranting a new trial. *See* ***Love***, 2005 WI 116, ¶¶43–44, 284 Wis. 2d at 133–134, 700 N.W.2d at 73–74.

¶18 Campbell alternatively seeks a new trial in the interest of justice. This court has the discretionary power to reverse a judgment when the real controversy was not fully tried or justice has for any reason miscarried. ***Vollmer v. Luety***, 156 Wis. 2d 1, 17, 456 N.W.2d 797, 805 (1990). We exercise the power, however, in only the most exceptional of cases. *See* ***id.***, 156 Wis. 2d at 11, 456 N.W.2d at 802. To get a new trial on the ground that the real controversy was not fully tried, Campbell "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. Darcy N.K.***, 218 Wis. 2d 640, 667, 581 N.W.2d 567, 579 (Ct. App.

1998) (citation omitted). To get a new trial on the ground that justice has miscarried, Campbell "must convince us 'there is a substantial degree of probability that a new trial would produce a different result.'" *See* ***ibid.*** (citations and one set of quotation marks omitted).

¶19 The parties dispute whether this court may exercise the discretionary power to reverse a judgment of conviction in the context of a collateral attack on that conviction filed, as here, under WIS. STAT. § 974.06. We need not decide the question. Assuming that we have the power in cases such as this one, Campbell has not demonstrated that his case merits the extraordinary remedy he seeks.

¶20 Campbell primarily contends that we should grant him a new trial in the interest of justice because Jones acknowledged for the first time during his testimony at the postconviction hearing that he was present when Humphrey was shot. In statements to police and investigators, Jones did not previously make such an admission, but we do not agree that this testimony constitutes a basis for granting Campbell a new trial. The jury heard evidence that Jones was present at the scene of the homicide.[2] Campbell fails to demonstrate that the lack of additional testimony from Jones on that point precluded the jury from hearing important testimony about an important issue or that Jones's own testimony about his presence would create a substantial probability of a different result at a new trial. *See* ***Darcy N.K.***, 218 Wis. 2d at 667, 581 N.W.2d at 579. Indeed, we note Campbell's position that Jones fabricated "virtually everything ... that came out of [his] mouth in the run-up to the original trial and since."

[2] During closing argument, Campbell pointed out to the jury that Jones "[i]s in and out, he's at the scene, he's gone from the scene. Some witnesses say he's there, some witnesses say he's not there."

¶21 We also reject the suggestion that we should reverse Campbell's conviction because the jury "did not hear important evidence" from Pride, Sago, and Ranson. We have already determined that the circuit court properly denied a new trial upon a finding that the allegedly important evidence from those witnesses is incredible. Nothing persuades us that justice requires giving Campbell an opportunity to present such evidence to a jury.

By the Court.—Order affirmed.

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