COURT OF APPEALS
DECISION
DATED AND FILED

February 9, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP975 **Cir. Ct. No. 1978CF002153**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JEFFREY HARRIS,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: DANIEL L. KONKOL, Judge. *Affirmed.*

Before Curley, P.J., Brennan and Brash, JJ.

¶1 PER CURIAM. Jeffrey Harris, *pro se*, appeals from a trial court order denying his postconviction motion for a new trial. Harris argues that he is entitled to a new trial based on: (1) newly discovered evidence from several individuals, including recantation evidence from a key trial witness; (2) ineffective

assistance of Harris's trial and appellate counsel; and (3) in the interest of justice. We reject Harris's arguments and affirm the order.

BACKGROUND

¶2 In 1978, a jury found Harris guilty of first-degree murder and attempted armed robbery, both as a party to a crime. The charges stemmed from the death of a liquor store owner who was shot during an attempted armed robbery in the store. At trial, the undisputed evidence indicated that the two men involved in the crimes were Harris and Charles Hart, neither of whom testified. The key trial witnesses were Herbert Shropshire, Ellnora Howze, and Donald Carter. The State's brief provides a succinct summary of their testimony:

> According to Shropshire's testimony, he met Harris at Howze's home on the day of the murder, where Harris and Hart were discussing how they could make some "fast money." Harris and Hart then left Howze's home and Shropshire followed. Harris and Hart told Shropshire that they planned to rob a liquor store, and they asked Shropshire to act as their lookout. Shropshire complied.
>
> Shropshire further testified that after casing the liquor store, Harris and Hart went inside and a gun shot rang out…. Harris and Hart then ran from the liquor store and Shropshire saw Harris with a gun in his hand. Shropshire rejoined Hart and Harris at Howze's home…. At that time, Harris and Hart told Shropshire that "it had went down wrong," "there was a struggle," and "they had to kill a man."
>
> Shropshire also testified that Harris and Hart told him that they dropped the gun, but they sent Donald Carter to look for it. Carter testified that Harris asked him to retrieve the gun and Carter complied. The testimony of Howze, Harris'[s] girlfriend, corroborated that Hart and Harris, not Shropshire, were the main actors in the robbery and murder. Howze testified that Harris told her that when he tried to stick up the liquor store the clerk tried to kill him, but Hart saved his life.

(Record citations omitted.)

¶3 After Harris was convicted, postconviction counsel was appointed. Harris filed a postconviction motion, which the trial court denied.[1] On appeal, we affirmed. *See* ***Harris v. State***, No. 1978AP623-CR, unpublished slip op. (WI App Mar. 29, 1979) (***Harris I***). In the three decades that followed, Harris filed in the trial court numerous *pro se* motions and a petition for *habeas corpus*, all of which were denied. Each time he appealed to this court, we affirmed. *See* ***State v. Harris***, No. 1987AP1918, unpublished slip op. (WI App June 28, 1988) (***Harris II***); ***State v. Harris***, Nos. 1994AP2001&2002, unpublished slip op. (WI App. Oct. 11, 1994) (***Harris III***); ***State v. Harris***, No. 2000AP1164, unpublished op. and order (WI App. June 7, 2001) (***Harris IV***), and ***State v. Harris***, Nos. 2000AP2380&2381, unpublished op. and order (WI App. Dec. 26, 2001) (***Harris V***). In January 2015, Harris filed a petition for *habeas corpus* in this court. We denied the petition. *See* ***State ex rel. Harris v. Kemper***, No. 2015AP42-W, unpublished op. and order (WI App April 13, 2015) (***Harris VI***).

¶4 On April 22, 2015, Harris filed the *pro se* postconviction motion that is at issue in this appeal. He argued that newly discovered evidence—statements from several individuals—justified a new trial. He also argued that he was denied the effective assistance of trial and appellate counsel. Finally, he sought a new trial, or a release with time served, in the interest of justice. The trial court denied the motion in a written order, without a hearing.[2] This appeal follows.

[1] The Honorable Robert W. Landry presided over the trial and denied the postconviction motion Harris filed prior to his direct appeal.

[2] The Honorable Daniel L. Konkol denied the postconviction motion at issue in this appeal.

DISCUSSION

¶5 Harris argues he is entitled to a new trial based on: (1) newly discovered evidence from several individuals, including recantation evidence from Shropshire; (2) ineffective assistance of Harris's trial and appellate counsel; and (3) in the interest of justice, which we interpret to be a request that this court exercise its power of discretionary reversal. We consider each issue in turn.

I. Harris's motion for a new trial based on newly discovered evidence.

¶6 To be entitled to a hearing on a WIS. STAT. § 974.06 (2013-14) motion, a movant must allege sufficient material facts which, if true, would entitle him or her to relief.[3] *See* ***State v. Balliette***, 2011 WI 79, ¶18, 336 Wis. 2d 358, 805 N.W.2d 334. However, if the record conclusively demonstrates that the movant is not entitled to relief, the trial court may deny the motion without a hearing. *See* ***State v. Bentley***, 201 Wis. 2d 303, 309-10, 548 N.W.2d 50 (1996). To meet the ***Bentley*** standard, litigants should "allege … who, what, where, when, why, and how." ***State v. Allen***, 2004 WI 106, ¶23, 274 Wis. 2d 568, 682 N.W.2d 433. The sufficiency of a postconviction motion is question of law. *See* ***Balliette***, 336 Wis. 2d 358, ¶18.

¶7 A defendant seeking a new trial on the basis of newly discovered evidence must show by clear and convincing evidence that "(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

[3] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

is not merely cumulative." ***State v. Avery***, 2013 WI 13, ¶25, 345 Wis. 2d 407, 826 N.W.2d 60 (two sets of quotation marks and citations omitted). "If the defendant is able to make this showing, then 'the [trial] court must determine whether a reasonable probability exists that a different result would be reached in a trial.'" ***Id.*** (citation omitted).

¶8 To be entitled to a new trial, the newly discovered evidence "must be sufficient to establish that a defendant's conviction was a 'manifest injustice.'" ***State v. Plude***, 2008 WI 58, ¶32, 310 Wis. 2d 28, 750 N.W.2d 42 (citation omitted). A motion for a new trial is addressed to the sound discretion of the trial court, and the trial court will be reversed on appeal only for an erroneous exercise of this discretion. ***Id.***, ¶31. Whether the new evidence would have a sufficient impact on the other evidence such that a jury would have a reasonable doubt about the defendant's guilt is a question of law. ***Id.***, ¶33.

¶9 Harris's postconviction motion asserted that affidavits from three men, as well as a memo concerning an alleged recantation by Shropshire, demonstrated that "Harris is truly innocent of the crimes that he was convicted of." We are not persuaded that the trial court erroneously exercised its discretion when it denied Harris's motion without a hearing.

¶10 We begin with the October 3, 2014 affidavit from Hart, Harris's co-defendant, who did not testify at Harris's trial. It states that Hart, Harris, and Shropshire went to the liquor store to buy alcohol and, once inside the store, Hart and Shropshire "decided to steal a money bag from behind the store counter without Harris knowing about it." Hart states that Harris "had no knowledge that [Shropshire] and I had formed the intent to steal money from the … [s]tore."

¶11 The State argues that this affidavit is not new evidence because Harris has always known—and has argued in his prior motions—that he did not intend to commit the robbery. The State also asserts: "A codefendant's testimony is not newly discovered evidence where the defendant was aware of the facts at the time of the trial but was unable to present the testimony of the codefendant regarding those facts because the codefendant refused to give that testimony." *See* ***State v. Jackson***, 188 Wis. 2d 187, 199, 525 N.W.2d 739 (Ct. App. 1994) ("[T]here is a distinction between newly *discovered* evidence that was unknown at the time of trial and newly *available* evidence that was known to the defense, but unavailable because of the co-defendant's refusal to testify."). In addition, the State points out that this is not the first affidavit from Hart that Harris has submitted in support of a postconviction motion.

¶12 The State's arguments are persuasive. Hart's affidavit does not constitute newly discovered evidence, especially because Harris previously filed two statements from Hart in support of Harris's prior postconviction motions: a signed statement dated 1986 and a notarized affidavit dated December 4, 1991. In both of those documents, Hart asserted that Harris was not involved in the plan to rob the storeowner. Indeed, in Hart's 1991 affidavit, he not only asserted that Harris was not involved, but also that Harris was not even in the store at the time of the crimes, having been left by Hart and Shropshire "at a filling station on 17th Street." The trial court and this court have previously rejected Harris's claims that Hart's statements provided a basis for postconviction relief. Harris cannot relitigate this issue by submitting another affidavit from Hart again asserting that Harris was not involved in the crimes. *See* ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991) ("A matter once litigated may not be

relitigated in a subsequent postconviction proceeding no matter how artfully the defendant may rephrase the issue.").

¶13 Next, we turn to an affidavit from Mark Springfield dated 2008. That affidavit states that Springfield was at Howze's apartment before the crimes were committed and did not hear Harris discussing a proposed robbery or see Harris with a gun. Springfield further states: "I later learned in life that Jeffrey Harris did not have anything to do with [the storeowner's] death. I learned that Hart and Shropshire were the only two individuals involved in the crime." Harris argued in his postconviction motion that this evidence should have been presented to contradict other evidence offered at trial.

¶14 Springfield's affidavit does not constitute newly discovered evidence. In a previous postconviction motion, Harris submitted an affidavit from Springfield, dated September 19, 1986, stating that Springfield had not heard Harris discussing a robbery. In that affidavit, Springfield admitted lying to the police about Harris's involvement. We considered Springfield's affidavit in ***Harris II*** and concluded that it did not provide a basis for relief. Harris cannot relitigate this issue by submitting a new affidavit from Springfield. *See* ***Witkowski***, 163 Wis. 2d at 990.

¶15 The third affidavit, dated April 30, 2009, is from a man named Raymond Pullum, who claims that he served time in prison with Hart. It states: "Hart told me … Harris did not have anything to do with the homicide of [the storeowner]. He said he is totally innocent of the homicide." It is not clear when Pullum claims to have had this conversation with Hart. We agree with the trial court that Pullum's affidavit does not provide a basis to grant Harris a new trial. At best, it could be used to bolster Hart's numerous statements that Harris was not

involved, but evidence that is "merely cumulative" does not provide a basis for a new trial. *See* ***Avery***, 345 Wis. 2d 407, ¶25 (two sets of quotation marks and citations omitted).

¶16 Finally, we consider a two-page, unsigned document entitled "INVESTIGATION MEMO" that purports to be a memo to "File" from Byron Lichstein of the University of Wisconsin Law School's Remington Center.[4] The memo provides information on a meeting Lichstein had with Shropshire on May 9, 2013. The memo states that Shropshire told Lichstein he lied at trial to "save his own butt" and that Shropshire gave an account of the crimes that exonerates Harris. Specifically, the memo states Shropshire told Lichstein that Shropshire, Hart, and Harris all entered the store to buy liquor and had not previously discussed committing a robbery. Shropshire said that after entering the store, he and Hart decided to commit a robbery and Harris did not know anything about it. The memo states that Shropshire said that "Hart pulled out a gun and said something like 'this is a stick-up,'" which led the storeowner to grab Harris around the neck. Hart then shot the storeowner in the head.

¶17 The memo does not indicate whether Lichstein ever spoke with Shropshire again and there is no signed statement or affidavit from Lichstein or Shropshire to attest to the memo's authenticity. Even if we assume the memo is authentic and accurately describes a meeting Lichstein had with Shropshire, the document does not provide a basis for a new trial. The hearsay statements in the memo attributed to Shropshire are a recantation of his trial testimony.

[4] Although the memo does not identify Lichstein as an attorney, this court is aware from other correspondence that Lichstein is licensed to practice law in Wisconsin.

"Recantations are inherently unreliable." ***State v. McCallum***, 208 Wis. 2d 463, 476, 561 N.W.2d 707 (1997), *holding modified on other grounds by* ***State v. Kivioja***, 225 Wis. 2d 271, 592 N.W.2d 220 (1999). "[R]ecantation testimony must be corroborated by other newly discovered evidence" and that requirement "is met if: (1) there is a feasible motive for the initial false statement; and, (2) there are circumstantial guarantees of the trustworthiness of the recantation." ***McCallum***, 209 Wis. 2d at 477-78.

¶18 At a minimum, the alleged recantation in this case fails because there are not "circumstantial guarantees of the trustworthiness of the recantation." *See* ***id.*** Harris's motion did not include a signed or notarized statement from Shropshire. The memo indicates that Shropshire was reluctant to speak with Lichstein and did so only after talking with Harris's relatives and receiving numerous calls from Lichstein's office. Further, the story Shropshire told Lichstein is contradicted by both the testimony offered at trial by other witnesses and by the affidavits Harris has offered in support of his postconviction motions. For instance, Shropshire told Lichstein that Hart "pulled out a gun," but the 2014 affidavits from both Hart and Harris assert that none of the three men entered the store with a gun and that the victim was killed with his own gun. Because the alleged recantation lacks "circumstantial guarantees of … trustworthiness"—in addition to being presented as hearsay in an unsigned report—we reject Harris's argument that the trial court erroneously exercised its discretion when it declined to grant Harris a hearing or relief based on the memo. *See* ***id.***

II. Harris's allegations concerning his trial and appellate counsel.

¶19 Harris argues that he was denied the effective assistance of both his trial counsel and appellate counsel for several reasons. He asserts that both failed to properly investigate the case and interview relevant witnesses.

¶20 "[A]ny claim that could have been raised on direct appeal" or in a prior postconviction motion is barred from being raised in a WIS. STAT. § 974.06 motion absent a sufficient reason for not raising it earlier. *See* ***State v. Lo***, 2003 WI 107, ¶2, 264 Wis. 2d 1, 665 N.W.2d 756; *see also* ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994). Whether a procedural bar applies is a question of law. *See* ***State v. Tolefree***, 209 Wis. 2d 421, 424, 563 N.W.2d 175 (Ct. App. 1997).

¶21 We conclude that Harris's claims with respect to his trial and appellate counsel are barred because he unsuccessfully raised these same issues in previous litigation. *See* ***Witkowski***, 163 Wis. 2d at 990. To the extent he is attempting to raise new ineffective-assistance-of-counsel issues, he has not shown a sufficient reason for not raising those issues in his numerous previous filings and appeals. *See* ***Lo***, 264 Wis. 2d 1, ¶2; ***Escalona-Naranjo***, 185 Wis. 2d at 185.

III. Harris's request for discretionary reversal.

¶22 Harris asserts that "a new trial is due in the interest of justice or, in the alternative, time served to cure the manifest injustice rendered in this particular case." (Some capitalization omitted.) We interpret Harris's argument to be a request for discretionary reversal under WIS. STAT. § 752.35. An appellate court will exercise its discretion to grant a new trial in the interest of justice "only in exceptional cases." ***State v. Cuyler***, 110 Wis. 2d 133, 141, 327 N.W.2d 662

(1983). Our review of the trial and postconviction proceedings in this case, as well as Harris's arguments on appeal, leads us to conclude that a new trial in the interest of justice is not warranted.

By the Court.—Order affirmed.

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