COURT OF APPEALS
DECISION
DATED AND FILED

July 5, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP1074-CR **Cir. Ct. No. 2015CF681**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JESSE STEVEN POEHLMAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed*.

Before Brennan, P.J., Kessler and Dugan, JJ.

¶1 BRENNAN, P.J. Jesse Steven Poehlman appeals from a judgment of conviction, entered on a jury verdict, and an order denying his postconviction motion. The jury convicted Poehlman on five counts related to an incident in February 2015 in which he sexually assaulted, battered, strangled, and falsely

imprisoned N., his pregnant wife, over a period of several hours. The jury acquitted him of charges of battery and sexual assault of N. in December 2014.

¶2 Poehlman raises two arguments on appeal. First he argues that trial counsel was ineffective when he failed to object to the trial testimony of N.'s coworker on the grounds that the State failed to disclose the witness and the police reports concerning her interview prior to trial. On this claim he argues that he has alleged sufficient facts to warrant an evidentiary hearing. Secondly, he argues that an affidavit of Daniel Neeley, obtained after conviction, constitutes newly discovered evidence that corroborates his testimony and warrants a new trial. We disagree and affirm.

BACKGROUND

¶3 The State's witnesses at trial included N., a police officer, a detective, a nurse, and N.'s work supervisor. Poehlman testified in his defense. The following facts are taken from trial testimony.

¶4 N., who was pregnant at the time, walked into the Cudahy police station at about 10:00 a.m. on Saturday, February 7, 2015. The officer who took her complaint observed that she appeared distraught and had visible injuries to her neck and right eye.

¶5 N. testified about what had happened as follows: at 9:30 p.m. on the previous evening, after she told Poehlman she wanted a divorce, an argument escalated. She testified that Poehlman had caused her injuries, that he had yelled, pulled her hair, and gouged her eye by digging his finger into it. N. testified that she had asked him to stop and reminded him that she was pregnant, but he had said she could not "use [her] pregnancy as an excuse, that he was going to keep it

all to [her] face." When a friend of Poehlman called and then came to their apartment Friday evening, Poehlman told N. to go into the bedroom and stay there, and he threatened to "smash" her face if she came out of the room "for any reason at all." When the friend left, N. testified, Poehlman returned to the room:

> [H]e told me that I was going to have to do everything that he said for the weekend, the whole weekend, and if I complained, cried about it, asked him to stop, or did anything that he would kill me[.]

¶6 She testified that he told her that "how well … the weekend went" would affect the "well being of [her] kids when they came home." Her testimony was that he instructed her to take her clothes off, began choking her, threatened to kill her, and engaged in multiple acts of oral, vaginal and anal sex to which she did not consent. She testified that she planned to leave the apartment when she awoke at about 8:00 a.m. on February 7, 2015, but discovered that he was awake, and so instead she returned to bed. When she awoke again at about 9:30 a.m., and he was asleep, she ran outside, ran down the alley, and asked a woman for a ride to the police station.

¶7 She also testified that Poehlman had hit and assaulted her on December 11, 2014, and that she reported that incident to police when she was asked on February 7, 2015, by the police whether anything similar had happened before. During that incident, an argument started after he knocked some cupcakes on the floor. She testified that Poehlman hit her, pushed her, and kicked her after she fell to the floor. She testified that she "reminded him that [she] was pregnant," which stopped the physical assault, but he then told her "that he would do things that [she] didn't like as basically a punishment for [her][.]" She testified that he told her they "were going to have anal and that it was probably going to hurt."

When asked if she agreed to this, she testified, "At that point only because I was afraid of him flipping out again and hitting me or hurting the baby in any way."

¶8 Poehlman's testimony concerning the events of February 6 and 7, 2015, was that he and N. had argued about their failing marriage, that she had then insisted on engaging in sexual activity, and that the choking had been at her request as part of the sexual activity. His testimony was that the sexual activity ended at approximately 2:00 a.m., and he then left the apartment and walked in the alleys nearby for approximately eight hours. He said he returned to the duplex in the morning and N. was not home. His testimony about December 11, 2014, was that there had been an argument but that there had been no sexual activity. He denied ever "lay[ing] a violent hand on her." He testified that N. "has a rather extreme temper, and her temper would cause her to throw objects or to assault herself from time to time."

¶9 A detective who interviewed Poehlman Saturday morning February 7 after he was in custody testified that he had taken the shoes Poehlman was wearing when he was taken into custody and went to the gangways between the apartment buildings surrounding Poehlman's duplex home to check for footprints in the snow. He testified that Poehlman had described walking in those areas "for numerous hours," but when detectives viewed the scene, they saw there had been "little to no foot traffic in the snow between these buildings" and nothing that matched Poehlman's shoe prints.

¶10 N.'s coworker testified about her observations of facial injuries on N. "as early as December." A nurse from Aurora Sinai Hospital testified as to N.'s injuries on February 7, 2015.

¶11 The jury acquitted Poehlman of two counts (those related to the December incident) and convicted him on the five counts related to the February incident.

¶12 Prior to sentencing, Poehlman moved for a new trial. The trial court denied the motion at the beginning of the sentencing hearing. He filed a postconviction motion. The trial court denied the motion. This appeal follows. Further details about the trial will be included as necessary in the discussion.

DISCUSSION

I. Poehlman is not entitled to an evidentiary hearing on his ineffective assistance of counsel claim because the record conclusively shows that the alleged deficient performance did not prejudice him.

A. Standard of review and legal principles.

¶13 A ruling on an ineffective assistance claim presents a mixed question of law and fact; we "uphold the [trial] court's findings of fact unless they are clearly erroneous," but the determination of whether counsel's assistance was ineffective is a question of law we review *de novo*. ***State v. Carter***, 2010 WI 40, ¶19, 324 Wis. 2d 640, 782 N.W.2d 695.

¶14 In order to prevail on a claim of ineffective assistance of counsel and obtain a new trial, a defendant must prove that counsel's performance was deficient and that as a result, the defendant suffered prejudice. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Prejudice is established where defendant demonstrates "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. "[N]ot every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding." ***Id.*** at 693. If we

conclude that the defendant has not proven one prong, we need not address the other. *See* ***id.*** at 697.

¶15 Where a claim is based on an allegation of ineffective assistance of counsel, a reviewing court will not grant a motion for a new trial absent a hearing at which trial counsel's testimony is preserved. ***State v. Machner***, 92 Wis. 2d 797, 908-09, 285 N.W.2d 905 (Ct. App. 1979). "An evidentiary hearing is nothing more than an intermediate step" toward Poehlman's goal of a new trial. *See* ***State v. Balliette***, 2011 WI 79, ¶61, 336 Wis. 2d 358, 805 N.W.2d 334. In order to obtain such a hearing, he must, in his postconviction motion, "allege facts which, if true, would entitle him to a new trial." ***Id.***

¶16 We employ a mixed standard of review for a trial court's ruling that a postconviction motion alleges insufficient facts to entitle the defendant to an evidentiary hearing for the relief requested. First, whether the motion on its face alleges sufficient material facts that, if true, would entitle the defendant to relief is a question of law we review *de novo*. ***State v. Bentley***, 201 Wis. 2d 303, 309-10, 548 N.W.2d 50 (1996). If the motion raises such facts, the trial court must hold an evidentiary hearing. *See* ***id.*** at 310; *see also* ***Nelson v. State***, 54 Wis. 2d 489, 497, 195 N.W.2d 629 (1972). However, the trial court has the *discretion* to grant or deny a hearing if the motion does not raise facts sufficient to entitle the movant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief. ***Bentley***, 201 Wis. 2d at 310-11; ***Nelson***, 54 Wis. 2d at 497-98. We review a trial court's discretionary decisions under the deferential erroneous exercise of discretion standard. ***State v. Franklin***, 2004 WI 38, ¶6, 270 Wis. 2d 271, 677 N.W.2d 276; ***Bentley***, 201 Wis. 2d at 311.

¶17 In this case, the ineffective assistance claim is premised on counsel's failure to object to a discovery violation. The relevant statutory provisions are found in WIS. STAT. § 971.23(1)(d) and (e) (2015-16).[1] Sanctions for violations are found in § 971.23(7m).[2] The statute requires the State to disclose "[a] list of all witnesses … whom the district attorney intends to call at the trial," § 971.23(1)(d), but only where the defendant has made a demand for the list.

¶18 A separate subsection addresses "[s]anctions for failure to comply" with the required disclosures. WIS. STAT. § 971.23(7m). It contains two subsections. The first states, "The court shall exclude any witness not listed or evidence not presented for inspection or copying required by this section, unless good cause is shown for failure to comply. The court may in appropriate cases grant the opposing party a recess or a continuance." § 971.23(7m)(a). The second states, "In addition to or in lieu of any sanction specified in par. (a), a court may … advise the jury of any failure or refusal to disclose material or information

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

[2] WISCONSIN STAT. § 971.23 is titled "Discovery and inspection," and it states:

> (1) WHAT A DISTRICT ATTORNEY MUST DISCLOSE TO A DEFENDANT. Upon demand, the district attorney shall, within a reasonable time before trial, disclose to the defendant or his or her attorney and permit the defendant or his or her attorney to inspect and copy or photograph all of the following materials and information, if it is within the possession, custody or control of the state:
>
> ….
>
> (d) A list of all witnesses and their addresses whom the district attorney intends to call at the trial….
>
> (e) Any relevant written or recorded statements of a witness named on a list under par. (d)[.]

required to be disclosed under sub. (1) or (2m), or of any untimely disclosure …[.]" § 971.23(7m)(b).

¶19 The discovery statute has been modified repeatedly since it first took effect. In ***Irby v. State***, 60 Wis. 2d 311, 210 N.W.2d 755 (1973), our supreme court interpreted the first version. The court concluded that the State violated the statute by listing witnesses beyond those it intended to call, and the court held that the trial court had erred when it did not "conduct[] a hearing to discover which of the ninety-seven witnesses the district attorney in fact and in good faith intended to call." ***Id.*** at 321. But the ***Irby*** court further concluded that the error did not "necessarily require a reversal unless there is a showing of surprise and prejudice by the defendant." ***Id.*** It further noted that other remedies existed: "We point out when an error is claimed amounting to noncompliance with or abuse of the witness-list requirement, the error or abuse may in some cases be cured by the court granting the other party a continuance so he can adequately prepare for trial, or by recessing for a period sufficient to allow counsel to interview the witness (which was done here)." ***Id.*** at 321-22 (citations omitted). "The granting of a continuance or recess is to be favored over striking the witness." ***Id.*** at 322.

¶20 The statute was again interpreted in ***State v. Wild***, 146 Wis. 2d 18, 429 N.W.2d 105 (Ct. App. 1988). ***Wild*** held that under the version of the statute then in effect, if the party that failed to comply could not show good cause for the noncompliance, exclusion of the undisclosed evidence was mandatory. ***Id.*** at 27.

¶21 In 1995, the legislature amended (7m), the sanctions subsection, to add the current language found in sub (b): "In addition to or in lieu of any sanction specified in par. (a), a court may … advise the jury of any failure or

refusal to disclose material or information required to be disclosed under sub. (1) or (2m)." WIS. STAT. § 971.23(7m)(b).

¶22 In 2002, our supreme court decided ***State v. DeLao***, 2002 WI 49, 252 Wis. 2d 289, 643 N.W.2d 480. In that case, trial counsel had informed the jury of DeLao's intention to testify and had explained that the defense theory was coercion by a codefendant. ***Id.***, ¶8. After opening arguments, the State revealed its intention to introduce statements DeLao had made to a detective in which she did not indicate that she feared the codefendant. ***Id.***, ¶9. Over trial counsel's timely objection, the State was permitted to cross-examine DeLao using the statements and to reference them in closing arguments. ***Id.***, ¶10. In that case, the analysis was as follows: First, did the State violate the requirements of the discovery statute? If so, did the State show good cause for the violation? If no good cause was shown, was the defendant prejudiced by the State's use of the untimely disclosed evidence? ***Id.***, ¶15.

¶23 In ***DeLao***, the court concluded that there was a violation and that there was not good cause shown. It further concluded that the violation prejudiced the defendant's case. ***Id.***, ¶61. The court focused on the position DeLao was in after leading the jury to believe in opening argument that she would testify and then being surprised by the belated disclosure of a prior statement. ***Id.***, ¶63. It concluded, "Here, the State's discovery violation undermined the essence of discovery. It placed DeLao on the horns of a dilemma and prejudiced her case." ***Id.***, ¶65. Under those circumstances, the court held, the defendant was entitled to a new trial.

B. The facts related to the undisclosed witness.

¶24 The State did not list Lynn Kruszka among the thirteen names on its witness list. The State did not name Kruszka during voir dire among the thirteen potential witnesses identified by name to the jury pool. At trial the State called Kruszka, who was N.'s work supervisor. At the time the witness was called, Poehlman told his trial counsel that the witness had not been disclosed. Trial counsel did not object to the testimony. On direct, the State elicited the following testimony, which is provided in full.

> [State]: Miss Kruszka, what do you do for work?
>
> [Kruska]: I'm a receiving supervisor at Burlington Coat Factory.
>
> [State]: Here in Milwaukee, Burlington Coat Factory here in Milwaukee?
>
> [Kruska]: Yes.
>
> [State]: Did you work with someone by the name of [N.]?
>
> [Kruska]: Yes.
>
> [State]: Now, was there a time when you were working with [N.] where she came into Burlington Coat Factory with bruises to her face?
>
> [Kruska]: Yes.
>
> [State]: Do you recall when that was?
>
> [Kruska]: I know it was as early as December.
>
> [State]: And was there more than one occasion where she reported to work with bruises to her face?
>
> [Kruska]: On one occasion she did have a black eye, actually two. She had a black eye, and then she's had like cuts on her neck and bruises on her arm and stuff like that.
>
> [State]: Did she ever talk to you about these injuries?
>
> [Kruska]: No. But the consensus at work we knew she was being ---
>
> [Trial counsel]: Objection.

> The Court: Sustained.
>
> [State]: She never said anything to you about what these were from?
>
> [Kruska]: Not on those indications.
>
> [State]: Let's put it up until February. Prior to February, had she ever said anything to you about how she had gotten these injuries, yes or no?
>
> [Kruska]: No.
>
> [Trial counsel]: Judge, I'm sorry to interrupt. Could I approach sidebar?
>
> (Discussion held off the record in private.)
>
> [State]: I have no further questions.

¶25 The sidebar conference was not put on the record. Trial counsel's brief cross-examination of the witness spans less than two pages of the transcript. Trial counsel made no objection at trial. However, the day after trial, trial counsel sent an email to the State. The April 29, 2015 email mentioned Kruszka's testimony at trial the previous day and stated that counsel's file contained no report containing a reference to Kruszka and that "her name doesn't appear on the state's witness list filed 3/24/15." Trial counsel's email stated that at the moment in the trial, he had thought the witness's name might have slipped his mind. He said that contrary to what he had been told by the State during the unrecorded sidebar conference, the report was not in his materials. The State then provided a police report detailing a February 17, 2015 interview with Kruszka. Trial counsel mentioned the alleged discovery violation in a motion for a new trial filed prior to sentencing, but his brief in support of the motion focused on a different issue and did not address the discovery violation. That motion was denied. In his postconviction motion, Poehlman briefed the issue and noted that the State had stated on the record at the February 20, 2015 preliminary examination that "all the

discovery in this case" had been provided to Poehlman. As noted, the trial court denied the motion.

C. Poehlman's argument.

¶26 As Poehlman notes, the test for prejudice on review is whether there is a reasonable probability that "a jury viewing the evidence untainted by counsel's errors would have had a reasonable doubt respecting guilt." *See* ***State v. Moffett***, 147 Wis. 2d 343, 357, 433 N.W.2d 572 (1989). He argues that there is a reasonable probability that a jury would have a reasonable doubt respecting guilt if it were viewing the evidence "untainted by counsel's errors"—errors that resulted in the jury's hearing Kruszka's testimony.

¶27 For purposes of our analysis, we assume, without deciding, that counsel performed deficiently in failing to object to the witness, and we will focus our attention on whether that deficiency prejudiced Poehlman, that is, whether there is a reasonable probability of a different outcome absent the error. Poehlman argues that there is. He portrays Kruszka's testimony as the critical corroboration of N's testimony: "only Kruszka could suggest that N.'s version of the events of February 2015 was more likely to be true because the events were part of a larger pattern."

¶28 He argues that two statements the State made later in the trial prove this. He points to the State's cross-examination of Poehlman where he was asked about "the testimony that N[.] had showed up at her job at the Burlington Coat Factor[y] repeatedly with injuries?" He also points to the State's closing argument comment, with regard to the first two counts that allegedly occurred in December: "[W]e know that N[.] was showing up at work with injuries back then." He then argues that those two comments show that Kruszka's testimony provided critical

corroboration "that [N.] was an abused woman and suggested that all of [N.'s] co-workers knew it."

¶29 He characterizes Kruszka's testimony as critical to the jury's verdict on the February incident in light of what he describes as weak evidence of that incident, which he says consisted merely of "N.'s various repetitions of her story to the police, and to a nurse, pictures of eye and neck injuries, and testimony about a lack of tracks in the snow[.]"

D. Kruszka's testimony did not prejudice Poehlman.

¶30 As Poehlman recognizes, the sole evidence that is relevant to the prejudice analysis here is that relating to the February 7, 2015 incident because that is the date of the offenses for which he was convicted. *See* ***State v. Prineas***, 2009 WI App 28, ¶35, 316 Wis. 2d 414, 766 N.W.2d 206 ("To satisfy the prejudice aspect of ***Strickland***, the defendant must demonstrate that the lawyer's errors were sufficiently serious to deprive him or her of a fair proceeding and a reliable outcome. [Defendant] cannot credibly argue that representation leading to an acquittal deprived him of a fair proceeding or favorable outcome[.]"). Therefore, the question is whether there is a reasonable probability that, but for counsel's error, there would be a different outcome as to the charges based on the February incident.[3] *See* ***Strickland***, 466 U.S. at 694.

[3] Poehlman's argument as to the prejudice he suffered from counsel's failure to object to the witness assumes two things that are not necessarily true: that the State would have been unable to show good cause for its violation, and that a timely objection by counsel would have resulted in the exclusion of the witness. We note that the discovery statute expressly provides for lesser sanctions "in lieu of any sanction specified in par. (a)." WIS. STAT. § 971.23(7m)(b). For purposes of this analysis, we assume, without deciding, that no good cause could have been shown and that the testimony would have been excluded had a timely objection been made. Our prejudice analysis therefore addresses whether there is a reasonable likelihood of a different outcome if the testimony had been excluded.

¶31 Poehlman's argument fails for two reasons. First, Kruszka's testimony and the State's argument from it were addressed to the December charge of which Poehlman was acquitted, thereby showing no prejudice to Poehlman. And second, there is no reasonable probability of Kruszka's testimony prejudicing Poehlman in light of the strength of the State's evidence about the February charge—N.'s testimony, the police officer's testimony about the lack of footprints in the snow, and the officer's and nurse's corroboration of N.'s injuries.

¶32 Regarding the first argument, in neither its questioning of Poehlman, nor its closing argument did the State tie Kruska's testimony to the February 2015 incident. Kruszka testified she observed the facial injuries to N. as early as December 2014. She was not asked, nor did she specifically state, that she observed any injuries in February 2015. Additionally the State's only reference to Kruszka's testimony in its closing argument was in the context of the December incident, saying that: "[W]e know that N[.] was showing up at work with injuries back then[.]"

¶33 With regard to the second argument, Kruszka's testimony did not prejudice Poehlman with regard to the charges related to the incident on February 7, 2015, because the State's evidence on that charge was so strong that even without Kruszka's testimony, we cannot say that there is a reasonable probability of a different result. We note that Poehlman flatly denied causing any injury to N.'s eye in the February incident. (His testimony was that he "caused no injury to her eye whatsoever.") In that context, the police officer and nurse's testimony of their observations of that injury, along with the photographs of it, directly contradicted Poehlman's denial and corroborated N.'s account.

¶34 Poehlman's attempt to minimize the testimony of the officer and of the nurse who examined N., by implying that they merely repeated N.'s version of the story is also unpersuasive. Those witnesses testified to what they observed about N. on that date, and those observations of her demeanor and her injuries corroborated her account. Given the objective photographic evidence and the absence of footprints matching Poehlman's, the credibility of the State's witnesses was enhanced in direct proportion to the diminishment of Poehlman's. So, the jury heard witnesses who were not merely repeating N.'s version.

¶35 Finally, Poehlman contends that "[e]ven if the state primarily intended that Kruszka corroborate the allegations in the December charges, her allegations *colored* the February charges as well." The standard of undermined reliability is not intended to be that broadly interpreted: "[N]ot every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding." ***Strickland***, 466 U.S. at 693. We conclude that on these facts, the reliability of the result of the proceeding was not undermined by the error because even if the witness's testimony was wrongly admitted, the testimony did not relate to the February incident, and it was outweighed by the other State's evidence, and therefore its impact, if any, did not rise to the level of undermining the reliability of the conviction. We therefore conclude that Poehlman did not have ineffective assistance of counsel and the postconviction court did not err in denying a ***Machner*** hearing.

II. Poehlman is not entitled to a new trial on his newly discovered evidence claim because the trial court's determination that there was not a probability of a different result was based on the law and the facts and was a result a reasonable judge could reach.

A. Standard of review and principles of law.

¶36 The decision to grant or deny a motion for a new trial based on newly discovered evidence is committed to the trial court's discretion. ***State v. Avery***, 2013 WI 13, ¶22, 345 Wis. 2d 407, 826 N.W.2d 60. We review the trial court's determination for an erroneous exercise of discretion. ***Id.***

¶37 "In order to set aside a judgment of conviction based on newly-discovered evidence, 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). To get a new trial based on newly-discovered evidence, a defendant has to show the following: "'(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 is not merely cumulative.'" ***Id.*** "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." ***Id.*** "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.'" ***Id.***, ¶33 (citation omitted).

B. The evidence.

¶38 An SPD investigator hired by Poehlman's postconviction counsel attempted to interview Poehlman's downstairs neighbor on January 28, 2016. In the course of that attempt, the investigator engaged in conversation with a man outside the apartment. He identified himself as Daniel Neeley, a relative of the neighbor, and said he "had some knowledge of the events" that occurred the

morning of February 7, 2015. In an affidavit submitted as an attachment to the postconviction motion for a new trial, Neeley averred the following:

- He had worked until midnight on February 6, 2015.
- He knew the Poehlmans as neighbors and lived in a house "directly behind" the address in which the Poehlmans lived in the upper unit.
- He had a view of their parking slab from his house.
- He left his house on February 7, 2015, "between 6:45 a.m. and 6:50 a.m. to take [his] niece to school" returning home "at approximately 7:10 a.m."
- He "saw Mr. Poehlman leaving his house" that morning.
- He "saw Mr. Poehlman walk south on Packard Avenue[,]" he and Poehlman "nodded to each other" that morning, and he "never saw Mr. Poehlman return to his residence."
- He returned at 7:10 a.m. and "laid on the couch to watch television."
- He heard N. outside screaming "[a]t approximately 9:30 a.m. that same day," and he looked out his window.
- He then saw N. "run down the alley and speak with a woman."

¶39 The State responded that the newly discovered evidence did not satisfy all of the ***Plude*** prongs and was incredible as a matter of law: Neeley averred that he took his niece to school on the date in question, but the date in question fell on a Saturday.

¶40 Poehlman attached a new affidavit to his reply. In the new affidavit, Poehlman's investigator described the testimony Neeley would give at the hearing. Neeley reiterated to the investigator that he had seen Poehlman early on the day of the incident but revised his proffered testimony slightly in two ways. First, he recalled that he was taking his sixteen-year-old niece somewhere that morning, but not to school. Second, that when he saw Poehlman, Poehlman was *outside* his house, not necessarily "leaving" his house.

C. Poehlman fails to satisfy the *Plude* requirements to entitle him to a new trial on his newly discovered evidence argument.

¶41 Poehlman contends that the new evidence meets the four ***Plude*** requirements. As to the first and fourth requirements, the State does not dispute that the evidence was discovered after conviction and that the evidence is not merely cumulative. The parties disagree on the second requirement—whether Poehlman was negligent in seeking the evidence. He argues that he was not because it is not unreasonable that he did not remember the passing encounter with the neighbor on the morning of February 7, 2015. The State argues that he is negligent because he could have informed his counsel that he had greeted his neighbor.

¶42 We conclude that we need not resolve the issue of negligent discovery because Poehlman fails utterly on the third requirement: materiality. Poehlman argues that if Neeley's evidence is believed, Poehlman was outside at around 6:45 a.m., rather than, as N. had testified, inside. The State argues that Neeley's observation was so limited that it does not undermine N.'s testimony on any significant point. We agree with the State. Contrary to Poehlman's contention, Neeley's statement does not contradict N.'s statement that when she awoke at 8:00 a.m., Poehlman was with her. The times do not match up to support

Poehlman's materiality argument. Neeley's statement is that, after seeing Poehlman at around 6:45 a.m., he drove his niece somewhere, came home at 7:10 a.m. and then went inside to watch television. He did not monitor what was happening outside. Poehlman could have easily returned home and rejoined N. exactly as she testified.

¶43 The next part of Neeley's statement deals with his observation of N. that day. He said that at 9:30 a.m., he saw N. run outside screaming for help, and he saw her approach a woman. This statement not only does not rebut N.'s testimony, but in fact, it corroborates N.'s testimony that she awoke at 9:30 a.m. to find Poehlman asleep and ran out the door to the police station. Finally, Neeley's testimony fails to corroborate Poehlman's testimony that he was outside for eight hours.

¶44 As to the final ***Plude*** requirement for newly discovered evidence, we agree with the State that it was not error for the trial court to reach the conclusion that "there was no reasonable probability that the jury would have reached a different result[.]" Poehlman's argument to the contrary is that Neeley's statement shows that N. was lying on key points and that the jury's decision to acquit on the counts related to December 11, 2014, shows that "the jury already had some doubt about N.'s overall credibility[.]" Accordingly he argues that Neeley's evidence creates a reasonable probability of acquittal. Specifically he contends that Neeley's testimony "undercuts N.'s claim that she was essentially held hostage for hours[.]" Relatedly he argues that Neeley's statement "discredits" the value of the detective's testimony that footprints were not found in the snow when detectives searched several hours later.

¶45 But as we have just observed, Neeley's affidavit fails to do that. He saw Poehlman at one point only around 6:45 a.m., and did not observe him before that and did not continue to observe him after. The question is whether the result reached was one a reasonable judge could reach. *See* ***Avery***, 345 Wis. 2d 407, ¶22. Even assuming Neeley's statements to be credible (we agree with Poehlman that the statements are not incredible as a matter of law, *see* ***Ruiz v. State***, 75 Wis. 2d 230, 235, 249 N.W.2d 277 (1977), when we apply the discretionary standard of review to the trial court's determination, we must conclude that the trial court applied a proper standard of law to the facts and reached a conclusion that a reasonable judge could reach.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.