**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**May 16, 2006**

**Cornelia G. Clark**
**Clerk of Court of Appeals**



**Appeal No. 2004AP996** **Cir. Ct. Nos. 1998CF894**
**1998CF1659**

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

---

**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**LOREN L. LEISER,**

**DEFENDANT-APPELLANT.**

---

APPEAL from orders of the circuit court for Milwaukee County: ELSA C. LAMELAS, Judge. *Affirmed.*

Before Fine, Curley and Kessler, JJ.

¶1 PER CURIAM. Loren L. Leiser appeals from a postconviction order summarily denying his motion for a new trial, and from an order summarily denying his consequent motion for reconsideration. We conclude that an evidentiary hearing is unnecessary to confirm that Leiser's proffered evidence is

not newly-discovered, and that his remaining claims not involving alleged newly-discovered evidence are procedurally barred by ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185-86, 517 N.W.2d 157 (1994). Therefore, we affirm.

¶2 A jury found Leiser guilty of eight felonies involving misconduct with children.[1] Leiser moved for postconviction relief from the judgments of conviction, seeking a new trial for the ineffective assistance of trial counsel, juror misconduct, and in the interest of justice. The trial court summarily denied the postconviction motion, and this court affirmed the judgments of conviction and the postconviction order. Leiser filed a second postconviction motion, contending principally that his trial and postconviction counsel were ineffective. The trial court summarily denied that motion. This court dismissed Leiser's appeal from that order for his failure to file a brief or a motion seeking to extend his briefing deadline.

¶3 In his current postconviction motion, Leiser sought a new trial, principally on the basis of newly-discovered evidence, but also for the ineffective assistance of trial and postconviction counsel, and in the interest of justice. The trial court summarily denied this—his third postconviction motion—because he had not established that his proffered submissions constituted newly-discovered evidence. Leiser also moved for reconsideration from that order, and to file yet another postconviction motion to vacate his convictions on the basis of ineffective assistance of trial and postconviction counsel. The trial court summarily denied

[1] The misconduct was four counts of second-degree sexual assault of a child, three counts of physical abuse of a child, and one count of exposing a child to harmful material.

this motion because it exceeded the maximum permissible briefing length, and was procedurally barred. Leiser appeals from both orders.

¶4 Leiser's newly-discovered evidence is transcriptions of tape-recorded conversations between various witnesses who testified against him at trial, which he claims would have been admissible pursuant to WIS. STAT. § 968.29(3)(b) (1997-98). Leiser claims that these tape recordings show that these witnesses were lying, or, at minimum, biased against him. He also proffered documents from co-workers purportedly to show that he was actually working on specific dates and at particular times when he was allegedly engaging in the charged misconduct.

¶5 To establish a newly-discovered evidence claim, the defendant must clearly and convincingly show that:

> (1) the evidence was discovered after trial;
>
> (2) the defendant was not negligent in seeking evidence;
>
> (3) the evidence is material to an issue;
>
> (4) the evidence is not merely cumulative to the evidence presented at trial; and
>
> (5) a reasonable probability exists of a different result in a new trial.[2]

***State v. Coogan***, 154 Wis. 2d 387, 394-95, 453 N.W.2d 186 (Ct. App. 1990) (footnote added). This court reviews the trial court's decision for an erroneous

[2] "The reasonable probability determination does not have to be established by clear and convincing evidence, as it contains its own burden of proof." ***State v. Love***, 2005 WI 116, ¶44, 284 Wis. 2d 111, 700 N.W.2d 62.

Although Leiser urges us to apply other newly-discovered evidence standards, this is the applicable standard in Wisconsin.

exercise of discretion. *See* ***State v. Boyce***, 75 Wis. 2d 452, 457, 249 N.W.2d 758 (Ct. App. 1977).

¶6 Leiser alleges that he obtained this potential evidence "after his trial." He further alleges his diligence, and "his long and exhaustive [discovery] attempts." Leiser admitted in his motion, however, that he had all of the tapes in his possession by April 17, 2003, more than ten months before his current postconviction motion.[3]

¶7 The more troublesome concern, however, is the materiality of this potential evidence. Leiser proffered this newly-discovered evidence, hoping to compromise the credibility of certain witnesses. Notwithstanding the questionable authenticity of these tape recordings and transcriptions, credibility determinations are within the jury's province. *See, e.g.*, ***State v. Hahn***, 221 Wis. 2d 670, 683, 586 N.W.2d 5 (Ct. App. 1998). "[E]vidence which merely tends to impeach the credibility of a witness does not warrant a new trial upon the ground of newly-discovered evidence." *See* ***State v. Debs***, 217 Wis. 164, 166, 258 N.W. 173 (1935).

¶8 The affidavits from co-workers, which purportedly show that Leiser was working on the specific dates and at the specific times he was convicted of sexually assaulting or physically abusing his victims, does not show what Leiser claims.[4] The misconduct for which Leiser was convicted occurred over a period

[3] Leiser alleges that he gave one of these tapes to his trial counsel to no avail.

[4] Leiser and the trial court refer to correspondence from a senior fraud analyst with Medicare regarding an audit purporting to provide Leiser with an arguable alibi. This correspondence is in Leiser's appendix to his brief-in-chief, however we are unable to locate it in the appellate record. Assuming it is proper for us to consider, it has no probative value because it merely advises Leiser of Medicare's lack of jurisdiction to conduct the type of audit he requested.

of time.[5] Neither the date nor the time of any of these incidents were critical to his convictions.

¶9 Consequently, this potential evidence, while failing to meet the newly-discovered evidence criteria in many respects, has not been shown as "material to an issue." ***Coogan***, 154 Wis. 2d at 394. Our concerns, which are substantially the same as those of the trial court, coupled with the trial court's explanation for denying the motion, persuade us that Leiser's proffered evidence is not newly-discovered.[6] The trial court properly exercised its discretion in determining that Leiser's proffered potential evidence was not newly-discovered. *See* ***Boyce***, 75 Wis. 2d at 457.

¶10 A criminal defendant must raise all grounds for postconviction relief in his or her original, supplemental or amended postconviction motion, or on direct appeal, unless in a successive postconviction motion, he or she alleges a "*sufficient reason*" for failing to previously raise the belated issue. ***Escalona***, 185 Wis. 2d at 185-86; *see* WIS. STAT. § 974.06(4) (2003-04).[7] Whether a successive

[5] Some of these offenses were charged as occurring in January of 1995, while others were charged as occurring over the summer of 1995. No date, much less a time, was listed.

[6] The trial court's refusal to conduct an evidentiary hearing on this newly-discovered evidence claim was predicated on multiple bases, including the fact that these tape recordings were not transcribed by a certified transcriptionist, the apparent absence of consent by those recorded, the absence of a showing of these witnesses' availability to testify at trial, and the uncertain reliability of these tape recordings and their ultimate admissibility at trial. Moreover, the trial court recognized that Leiser was essentially "inviting th[e trial] court to examine the credibility of trial witnesses." The trial court characterized Leiser's proffered evidence as "unclear, uncertain, and unreliable," and explained that Leiser had not shown the reasonable probability of a different result in the event of a new trial. It ultimately rejected Leiser's request for an evidentiary hearing because his showing of newly-discovered evidence was insufficient.

[7] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

postconviction claim is procedurally barred is a question of law entitled to independent review. *See* ***State v. Tolefree***, 209 Wis. 2d 421, 424, 563 N.W.2d 175 (Ct. App. 1997).

¶11 Leiser alleges the ineffectiveness of his various counsel as his reason for failing to proffer this potential evidence in a prior postconviction motion. Leiser has not been represented, however, since at least May 21, 2002, when he, proceeding *pro se*, filed his second postconviction motion. Leiser's general, repetitive criticisms of his various counsel do not overcome ***Escalona***'s procedural bar. *See* ***Tolefree***, 209 Wis. 2d at 424.

¶12 Leiser moved for reconsideration of the trial court's denial of his postconviction motion seeking a new trial on the basis of newly-discovered evidence.[8] The trial court refused to consider this motion or reconsider that refusal because: (1) it never received the second motion for filing;[9] (2) the two motions and their supporting memoranda, allegedly filed together, were each twenty pages long, and Milwaukee County Circuit Court Local Rule 427 establishes twenty pages as the maximum page limit for a postconviction motion pursuant to WIS. STAT. § 974.06(4), and the alleged second motion circumvents the twenty-page limit maximum; and (3) the allegedly filed postconviction motion challenged the effective assistance of trial and postconviction counsel, which has been repeatedly litigated.

[8] Leiser claims to have filed two postconviction motions, the one that is the major subject of this decision, and another, alleging yet again, the ineffective assistance of trial counsel.

[9] Leiser attached a copy of that second postconviction motion, which had not been previously received by the trial court, to his reconsideration motion.

¶13 Nothing in Leiser's reconsideration motion compels us to require an evidentiary hearing to further prolong a futile exercise to litigate proffered evidence, which is not newly-discovered. We likewise reiterate our determination that a nonspecific allegation of ineffective assistance does not constitute a "*sufficient reason*" for failing to previously raise these claims.

¶14 The State urges us to establish conditions precedent to Leiser's filing any additional trial court motions pursuant to ***State v. Casteel***, 2001 WI App 188, ¶¶19-27, 247 Wis. 2d 451, 634 N.W.2d 338. Although we are sympathetic to the State's request, we do not impose such conditions at this time. We warn Leiser, however, that he risks the imposition of such conditions if his unmeritorious filings continue.

*By the Court.*—Orders affirmed.

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