COURT OF APPEALS
DECISION
DATED AND FILED

December 7, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP2320-CR **Cir. Ct. No. 2003CF5733**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JARVIS N. BRADLEY,

DEFENDANT-APPELLANT.

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

Before Lundsten, P.J., Deininger and Higginbotham, JJ.

¶1 LUNDSTEN, P.J. Jarvis Bradley entered a guilty plea to armed robbery. After sentencing, he moved to withdraw his plea based on alternative grounds: ineffective assistance of trial counsel and newly discovered evidence. Bradley asserted his trial counsel rendered ineffective assistance by failing to

conduct a sufficient investigation and by misleading him regarding what would happen if he did enter a guilty plea. Bradley asserted that recantations by three witnesses, his brother Johnny Bradley and his two alleged accomplices, constituted newly discovered evidence. The circuit court held an evidentiary hearing on the motion and then rejected both grounds. We affirm the circuit court.

¶2 In this decision, we must repeatedly refer to both Jarvis Bradley and his brother Johnny. To differentiate the two, we will refer to them by their first names.

Background

¶3 We begin with a summary of facts that are undisputed for purposes of our analysis. We then contrast Jarvis's postconviction testimony regarding his guilty plea with the contrary testimony of his trial attorney. Finally, we briefly summarize the circuit court's rulings.

¶4 During the evening hours of September 27, 2003, two young black males robbed a Papa John's pizza restaurant in West Allis and a Shell gas station in Whitefish Bay. During both robberies, one of the men displayed a handgun and threatened to shoot employees. A third man drove a "get-away" car.

¶5 The first robbery took place at Papa John's at approximately 8:40 p.m. Two black males entered the business together and ordered pizza. One of them then produced a dark-colored revolver. One of the employees told police that the male with the gun ordered the employees to the floor and told them if they got up they would die. This same employee said she looked up at one point and the male with the gun slammed her head to the ground. A second employee told police that, after he was ordered to the ground, one of the males came up to him,

told him he would shoot him if he moved, and took money from his pockets. Yet a third Papa John's employee present during the robbery was Johnny Bradley, Jarvis's brother. When police interviewed Johnny just after the robbery, he described the robbery but did not identify either robber.

¶6 The second robbery took place at about 10:00 p.m. in Whitefish Bay. There, two black males entered a Shell gas station. They made a purchase so the clerk would open the cash register. Once the cash register was open, one of the men produced a gun and told the clerk to give him all the money. The gunman told the clerk to open the safe, but the clerk said he did not know the code. The gunman "put the gun" in the clerk's face and told him he had "six caps and wasn't afraid to put any of them into" the clerk. The clerk pleaded with the gunman, and the other robber told the gunman, "Come on, man. He's cool. Let him go." The gunman responded, "No, man. I want to fuck this kid up." The clerk again pleaded and said he did not know the safe's combination. The other robber said to the gunman, "It's time to go," and both men left and ran back to the car. Police spotted the get-away car and gave chase. The car was abandoned on Humboldt Avenue and the occupants fled. Police later recovered a .38 caliber revolver from a window box at a residence on Humboldt Avenue, a location where one of the suspects had been seen running. No one was apprehended at the time, but the vehicle led police to the home of the owner of the get-away car, Devin P.'s mother.[1]

[1] Devin P. was prosecuted as a juvenile. In the remainder of this opinion, we will refer to him simply as Devin.

¶7 The next day, September 28, police contacted Devin at his mother's home. Devin was asked if he knew the whereabouts of his mother's car and Devin said he noticed at 9:00 p.m. on September 27 that it had been stolen. Devin denied to police that he was involved in the two robberies. Later that same day, Devin was again questioned by police and admitted committing an armed robbery five days earlier at a Subway store with a man named Jasmaine Farmer. On September 29, police interviewed Devin again. This time, Devin admitted his participation in the two robberies, indicating he was the get-away driver.[2]

¶8 Devin told the investigating officer that, on September 27, he received a phone call from his cousin, Quentin Seals, who said he wanted to "go hit a lick," meaning that Quentin wanted to rob some place. Devin told the officer he drove his mother's car to a residence where he picked up Seals and Jarvis. Devin stated that he had his .38 caliber revolver with him. Devin said that Seals told him how to get to Papa John's and that, when they arrived, Seals and Jarvis left the car and walked to the restaurant. Devin said that, when Seals and Jarvis returned from Papa John's, Seals had money and that Seals said they needed more money and would rob another place. Devin told the officer that Seals then told Devin how to get to a Shell gas station located in Whitefish Bay.

¶9 On October 2, 2003, police conducted a second interview of Jarvis's brother, Johnny, the Papa John's employee. The investigating officer knew, prior

[2] The first interview of Devin on September 28 was conducted by the West Allis Police Department. The second interview on September 28, in which he admitted participating in the Subway robbery in Glendale, was conducted by Glendale police at the Glendale Police Department. After that interview, Devin was booked and placed in a holding cell. The interview of Devin on September 29 was conducted by the West Allis Police Department at the Glendale Police Department.

to the interview, that Johnny and Jarvis shared the same home address. The officer presented Johnny with a photo lineup, including a picture of Jarvis. Johnny said he did not recognize any of the persons in the photographs. Because the officer had good reason to believe that Johnny in fact knew Jarvis, he placed Johnny under arrest, handcuffed him, and advised him of his rights. The officer then pointed to the picture of Jarvis and asked Johnny if he knew the person. Johnny responded, "oh yea, that's my little brother Jarvis." The officer asked Johnny why he did not identify Jarvis before, and Johnny said, "I told him not to rob my store, my momma told him not to rob my store, but he would not listen."

¶10 The officer asked Johnny if he knew ahead of time that Jarvis was going to rob Papa John's. Johnny said that approximately two days before the robbery, Jarvis and Seals talked to him about possibly robbing Papa John's. Johnny said that both Jarvis and Seals asked him how many people were in the store and how much money was in the safe. Johnny said he believed Jarvis and Seals planned to rob the store and he told them not to. Johnny said that, at the time of the robbery, he did not see the robbers' faces, but recognized the voices as belonging to Jarvis and Seals. Johnny said that after the robbery Jarvis did not come home for a couple of days, but that Jarvis telephoned him two days after the robbery and told him they got chased by police but they all got about $400. Johnny told the officer he asked Jarvis why he robbed the store, and Jarvis told him he needed money for clothes for Homecoming. Because Johnny had not identified Jarvis or Seals during the initial interview, and because Johnny knew about the robbery ahead of time, he was arrested for obstructing.

¶11 The next day, October 3, 2003, police interviewed Quentin Seals. Seals also confessed and named Jarvis. Seals stated that on the evening of September 27, he was at his residence with his sister, his sister's boyfriend Jarvis,

and Seals' cousin, Devin P. Seals told the officer that the robberies were Jarvis's idea and that he left with Jarvis and Devin in a car driven by Devin. Seals stated that Jarvis said they were going to rob Papa John's where Jarvis's brother Johnny worked. Seals told the officer he knew Jarvis's brother Johnny, but not well. The officer asked Seals if Jarvis's brother knew about the robbery before it happened, and Seals said he did not know the brother "that way" and did not discuss the robbery with him. Seals acknowledged that he recognized Jarvis's brother when they entered the Papa John's.

¶12 Describing the Papa John's robbery, Seals said he entered with Jarvis, that Jarvis ordered a pizza, and that Jarvis then pulled out the gun and ordered the employees to the ground. Seals said that Jarvis looked at a "small white girl" and ordered her to "go to the side room and get the key." He said that Jarvis then ordered the girl to open the safe, which she did. The girl removed money bags from the safe and handed them over. Seals and Jarvis then returned to the car where Devin was waiting, and they drove away. Seals stated that Devin then said he had a place he wanted to "hit" and drove them to a gas station in Whitefish Bay. Seals said that he and Jarvis entered the gas station and that Jarvis pulled the gun. Seals stated that after the gas station robbery, they were chased by police and they "ditched" the car and ran through yards on Humboldt Avenue. Seals said that at this time he had the gun and he got rid of it as he ran between houses on Humboldt Avenue.

¶13 Jarvis, Seals, and Devin were all arrested. Devin was prosecuted as a juvenile. Jarvis and Seals were prosecuted as adults and had their initial appearances on October 5, 2003. Jarvis remained in jail because of an inability to post a cash bond.

¶14 When Jarvis met with his trial attorney, he maintained his innocence. Jarvis, a high school senior, was very concerned about his basketball career. He told his attorney he believed he could get a basketball scholarship at a college. Jarvis told his attorney he was confident that Seals would recant, but did not know if Devin would. From Jarvis and his family members, the attorney learned that Jarvis's brother Johnny would not testify against Jarvis. Jarvis's family had made it clear that if the attorney attempted to contact Johnny, Johnny would disappear. The attorney discussed with Jarvis the possibility of getting an investigator and decided in the course of that conversation to stay away from Johnny.

¶15 Jarvis's attorney testified that he spoke with Seals' attorney. Seals' attorney indicated that Seals would not recant; to the contrary, Seals would maintain that Jarvis played the lead role in the robberies. Jarvis's attorney said he did not attempt to speak with Devin because Devin was represented and neither he nor Jarvis knew of a reason why Devin would recant.

¶16 In late November 2003, Jarvis's attorney received a phone call from Jarvis's family and was informed that Jarvis wanted to plead guilty. The attorney met with Jarvis, and Jarvis said he wanted to "work it out" and not go to trial.

¶17 Plea negotiations eventually led to Jarvis entering a guilty plea to one count of armed robbery, with the second count being dismissed and read in. As part of the plea agreement, the State would recommend initial incarceration, but make no specific recommendation as to time. Jarvis entered a guilty plea on January 8, 2004. Seals had entered a plea to one count of armed robbery about a month earlier. Seals was sentenced on February 12, 2004. Jarvis was sentenced the next day, on February 13, 2004. Jarvis received eleven years of initial confinement followed by fifteen years of extended supervision.

¶18 After sentencing, Jarvis obtained a different attorney as his postconviction counsel. This attorney obtained affidavits from Johnny, Seals, and Devin in which they recanted their statements to the police naming Jarvis as the third robber. Johnny asserted he lied because the officer told him if he did not name his brother as one of the robbers, they would charge him with armed robbery as a party to a crime. Seals and Devin both asserted, in essence, that they lied to protect the real third robber. In a fourth affidavit, Jarvis asserted that his trial attorney told him that, if he pled guilty to robbery, there was a good chance he would get supervision and Huber time that would permit him to go back to high school, play basketball, and still have a chance for a college scholarship.

¶19 Jarvis's postconviction counsel filed a motion seeking plea withdrawal based on ineffective assistance of trial counsel and on newly discovered evidence. Jarvis's affidavit and the recantation affidavits were attached.

¶20 Based on Jarvis's motion, the circuit court held an evidentiary hearing. At that hearing, Jarvis and his trial attorney gave substantially different accounts of their conversations leading up to Jarvis's guilty plea.

¶21 Jarvis testified that he had been with Seals and Devin before the robberies. He said he heard them talking, apparently by telephone, to his brother Johnny, who worked at Papa John's. Jarvis testified that he heard Seals and Devin ask Johnny when a good time would be "to go in and stuff like that." Jarvis asserted, however, that he refused to participate. He said he did ride in the car Devin was driving, but was dropped off at a friend's house. According to Jarvis, this car ride explained why he asserted to his attorney that he knew the gun used in the robberies was unloaded. He said the gun was under his passenger seat and

Devin asked him to hand it to him. Jarvis claimed he observed that the gun was not loaded either while passing the gun to Devin or while Devin was handling it. Jarvis testified that Seals and Devin told him they were going to get someone else to help with the robberies because Jarvis would not help.[3]

¶22 Regarding plea negotiations, Jarvis testified that his trial attorney told him that if he pled guilty he would have a better chance at getting back to school and playing basketball. Jarvis said he was told he would "probably get some probation and some CCC time." He said "CCC time" is like "Huber or something where I could still go to school and school would release me." Jarvis said he believed that if he could get out of jail and get back in school, he would be a basketball starter again even if convicted. He asserted that at the time of his plea he did not believe it would be a problem for a convicted armed robber to be a starter on the high school basketball team.

¶23 Jarvis said he told his trial attorney that he did not commit the crime, but his attorney told him he needed to plead guilty anyway because "something about [the] evidence being overwhelming." Jarvis testified that his attorney told him to lie about his participation. He claimed his attorney told him to "lie to the Court if [he was] going to plead guilty [even if he was] not."

[3] Jarvis's testimony about his involvement with Seals and Devin before the robberies appears to be the first time Jarvis disclosed this version of the facts to his counsel or authorities. The circuit court found that initially Jarvis did nothing more than make vague denials and maintain his innocence. This finding supports the circuit court's view that Jarvis's account at the postconviction hearing was a fabrication.

¶24 The circuit court did not believe Jarvis's account of his exchanges with his attorney relating to why he entered a guilty plea. Instead, the court credited the following testimony from Jarvis's attorney.

¶25 Jarvis's trial attorney testified that by the time he entered his guilty plea, Jarvis was no longer asserting his innocence. In fact, Jarvis told his attorney about his role in the robberies. The attorney testified that Jarvis told him he was the one who held the gun during the robberies. Jarvis asserted the gun was unloaded during the robberies. Jarvis said he insisted the gun be unloaded and that Seals reloaded the gun after the robberies were done. Jarvis asserted that the robberies were "Seals' plan." Jarvis told his attorney that Seals told Jarvis to be the gunman because Jarvis was the "biggest guy."

¶26 Jarvis's trial attorney testified that he may have told Jarvis that probation was a possibility. Regardless, he did tell Jarvis that he would probably receive incarceration time of three or four years. The attorney testified that he plainly conveyed to Jarvis that the State was going to recommend prison. The attorney denied advising Jarvis to enter a plea if he was not guilty.

¶27 The circuit court declined to hear testimony from Johnny, Seals, and Devin. The court concluded that hearing their testimony was not necessary but would assume that, if called, the three men would testify consistently with their affidavits.

¶28 As noted, the court made clear by express and implied comments that it found Jarvis's testimony not credible. Specifically, the court rejected Jarvis's testimony that his attorney "coached all of this" knowing that Jarvis maintained his innocence. The court found that Jarvis told his attorney he wanted to plead guilty and "did so in terms that made it clear to [the attorney] that he was

guilty." The court found Jarvis's testimony that he believed he would get probation to be "preposterous." The court stated: "I'm satisfied [Jarvis] pled guilty because he was guilty." The court rejected Jarvis's ineffective assistance of trial counsel claim and his newly discovered evidence claim.

Discussion

¶29 Jarvis seeks plea withdrawal on two grounds: ineffective assistance of trial counsel and newly discovered evidence. We address each separately below.

Ineffective Assistance Of Trial Counsel

¶30 Jarvis asserts that he is entitled to plea withdrawal based on ineffective assistance of trial counsel. He argues that his trial counsel performed deficiently by failing to attempt to interview and seek recantations from Johnny, Seals, and Devin.[4] Jarvis's theory seems to be that he would not have pled guilty had his counsel not deficiently failed to pursue recantations.

¶31 Jarvis's claim requires that he show both deficient performance and resulting prejudice. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). When assessing deficient performance, we look to see whether counsel's performance was objectively reasonable. *See* ***State v. Kimbrough***, 2001 WI App 138, ¶¶31-35, 246 Wis. 2d 648, 630 N.W.2d 752. In this regard, we may rely on reasoning that

[4] Jarvis's appellate brief is unclear as to whether he complains that his trial counsel performed deficiently with respect to seeking an interview with Seals. As recounted in the background section, Jarvis's attorney contacted and was rebuffed by Seals' attorney. Thus, it is not apparent what Jarvis contends his attorney should have done with respect to Seals. Nonetheless, we will assume for purposes of our discussion that Jarvis claims his trial attorney performed deficiently with respect to all three men.

defense counsel overlooked or even disavowed. *See* ***id.***, ¶¶24, 31. "'A defendant who alleges a failure to investigate on the part of his counsel must allege with specificity what the investigation would have revealed ….'" ***State v. Flynn***, 190 Wis. 2d 31, 48, 527 N.W.2d 343 (Ct. App. 1994) (quoting ***United States v. Green***, 882 F.2d 999, 1003 (5th Cir. 1989)). As applicable here, the prejudice prong of ***Strickland*** is satisfied when a defendant shows "'that there is a reasonable probability that, but for the counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.'" ***State v. Bentley***, 201 Wis. 2d 303, 312, 548 N.W.2d 50 (1996) (quoting ***Hill v. Lockhart***, 474 U.S. 52, 59 (1985)).

¶32 Before addressing the ineffective assistance argument Jarvis does make, we comment briefly on an argument he has abandoned. Jarvis argued before the circuit court that his trial attorney performed deficiently by giving him erroneous information prior to his plea and by advising him to enter a guilty plea even though he maintained his innocence. On appeal, however, Jarvis does not seriously pursue this theory, and we deem it abandoned. Furthermore, such an argument has no merit because it hinges on the assumption that Jarvis testified truthfully at his postconviction hearing about his conversations with his attorney leading up to his plea. The assumption that Jarvis was truthful is at odds with the circuit court's finding that Jarvis's trial attorney, not Jarvis, was truthful. We normally defer to such credibility findings, *see* ***State v. Baudhuin***, 141 Wis. 2d 642, 647, 416 N.W.2d 60 (1987), and there is no reason to deviate from that norm here.

¶33 We turn our attention to Jarvis's argument that his trial attorney performed deficiently by failing to attempt to obtain recantations from Johnny,

Seals, and Devin. Jarvis's argument is off the mark because it ignores the fact that he confessed his participation to his attorney.

¶34 When Jarvis initially met with his attorney in October 2003, Jarvis maintained he was innocent. Regardless what investigatory actions Jarvis's attorney took or did not take during October and November 2003, in late November Jarvis told his attorney that he was the robber with the gun. Jarvis told his attorney that Devin provided the gun and that Seals was the planner. Jarvis told his attorney that Seals decided that Jarvis should be the gunman because Jarvis was the "biggest guy." Jarvis told his attorney that he, Jarvis, insisted that the gun be unloaded during the robberies and that Seals reloaded the gun after the robberies.

¶35 In light of the fact that the other two participants in the crime, Seals and Devin, and Jarvis's brother Johnny had all given statements naming Jarvis as the gunman in the two armed robberies, and that now Jarvis himself was admitting his participation, there can be no tenable assertion that Jarvis's trial attorney performed deficiently by failing to attempt to obtain recantations. Simply stated, Jarvis's attorney had no reason to think that Jarvis was lying to him about his participation in the robberies and, therefore, no reason to think that further investigative steps would produce recantations.

¶36 Jarvis also fails to demonstrate prejudice. He presents no reason to think that, if his counsel had pursued recantations in late 2003, such an effort would have been successful. Nothing in the affidavits, or asserted by Jarvis at the

postconviction hearing or in his motion, suggests that any of the men would have recanted if contacted by Jarvis's trial attorney.[5]

¶37 In sum, Jarvis has not demonstrated deficient performance or prejudice and, therefore, his ineffective assistance claim was properly denied.

Newly Discovered Evidence

¶38 Jarvis asserts that the circuit court erred in denying his newly discovered evidence claim without a full evidentiary hearing. We conclude that the circuit court properly denied the claim without a full hearing because the partial hearing and the remainder of the record conclusively show that Jarvis is not entitled to relief.

¶39 Jarvis takes the position that his entitlement to a postconviction evidentiary hearing is governed by the ***Nelson*/*Bentley*** test.[6] The State does not dispute this proposition, and we will assume it is true for purposes of this decision.

¶40 The ***Nelson*/*Bentley*** test asks whether a motion alleges "facts sufficient to entitle the movant to relief, or presents only conclusory allegations, or if the record [otherwise] conclusively demonstrates that the defendant is not entitled to relief." ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d

[5] Jarvis's appellate counsel asserts that the circuit court's refusal to hear testimony from Johnny, Seals, and Devin prevented proper resolution of Jarvis's ineffective assistance claim. However, there is no reason to think Jarvis was deprived of evidence supporting that claim. Nothing in the affidavits of the men, even if true, changes *what Jarvis and his counsel would have known at the time Jarvis entered his plea*.

[6] We use "the ***Nelson*/*Bentley*** test" as shorthand for the test applied to determine whether a defendant is entitled to a postconviction evidentiary hearing. *See* ***State v. Bentley***, 201 Wis. 2d 303, 309-10, 548 N.W.2d 50 (1996); ***Nelson v. State***, 54 Wis. 2d 489, 497-98, 195 N.W.2d 629 (1972).

433 (paraphrasing ***Bentley***, 201 Wis. 2d at 309-10, and ***Nelson v. State***, 54 Wis. 2d 489, 497, 195 N.W.2d 629 (1972)).

¶41 The pertinent newly discovered evidence standards are as follows:

> After sentencing, a defendant who seeks to withdraw a guilty or no contest plea carries the heavy burden of establishing, by clear and convincing evidence, that withdrawal of the plea is necessary to correct a manifest injustice.…
>
> Newly discovered evidence may be sufficient to establish that a manifest injustice has occurred. For newly discovered evidence to constitute a manifest injustice and warrant the withdrawal of a plea the following criteria must be met. First, the defendant must 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 proves these four criteria by clear and convincing evidence, the circuit court must determine whether a reasonable probability exists that a different result would be reached in a trial.

State v. McCallum, 208 Wis. 2d 463, 473, 561 N.W.2d 707 (1997) (citations omitted). When the new evidence is a witness's recantation, it must be corroborated by other newly discovered evidence because recantations are inherently suspect. *See* ***id.*** at 476. The degree of corroboration required varies from case to case, depending on the circumstances. ***Id.*** at 477.

¶42 The State asserts, and Jarvis does not dispute, that the ***McCallum*** corroboration rule applies here. ***McCallum*** states that "the corroboration requirement in a recantation case 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." ***Id.*** at 477-78.

¶43 Jarvis maintains that his newly discovered evidence claim could not properly be assessed without the circuit court hearing in-court testimony from the recanting witnesses, Seals, Devin, and Johnny. Jarvis asserts that, for purposes of assessing his motion, the circuit court and, presumably, this court are required to assume that the recantation statements are true. We are uncertain what Jarvis means when he asserts we must make this assumption. In any event, as exemplified by ***McCallum***, courts need not always hear a recantation in person to assess whether the recantation meets the newly discovered evidence standards and, more particularly, whether it meets the corroboration standard. *See* ***id.*** at 476-78. Accordingly, we proceed to assess the three recantations offered by Jarvis under the ***McCallum*** corroboration test.

¶44 As applied here, the ***McCallum*** corroboration test asks whether Seals, Devin, and Johnny had a "feasible motive" for their initial allegedly false statements and whether "circumstantial guarantees of the trustworthiness" support their new recantations. ***Id.*** at 477-78.

¶45 We conclude that Devin's recantation lacks circumstantial guarantees of trustworthiness because it is patent nonsense. Devin now asserts he named Jarvis in order to protect Devin's friend Jasmaine Farmer. But, at the time he named Jarvis, Devin had already identified Farmer as his accomplice in a separate armed robbery. Indeed, after interviewing Devin, the police went to Farmer's house and attempted to arrest him, and eventually did arrest him. Having named Farmer in one robbery, does it make sense that Devin would put himself at risk—either of retaliation by Jarvis or being charged with obstruction—by falsely naming Jarvis as the third robber in the other two robberies? Of course not.

¶46 Additionally, the particulars of Devin's recantation story are not plausible. In his new account, Devin asserts that, before the robberies, Farmer asked for a name he could use "if stopped" because Farmer had "a record." According to Devin, Seals suggested using Jarvis's name because Jarvis had no record. Devin asserts that, after the robberies, he and Seals agreed to protect Farmer by saying that Jarvis was the third robber. Devin asserts he had "no idea [Jarvis] would get in so much trouble" and he, Devin, is now telling the truth with "no motive except to clear [Jarvis's] name." The problems with this new story are obvious. It is not believable that Farmer asked Seals and Devin for a name he could use if caught. We agree with the State that there would have been no reason for Farmer to think that, if caught by police for robbery, he could escape punishment by simply asserting he was some other person. Also, it is not plausible that Devin believed Jarvis would not, relatively speaking, get into serious trouble if convicted as the gunman in two armed robberies, even without a prior record. In a new trial, a prosecutor would justly label this after-the-fact explanation as absurd.

¶47 Apart from a frivolous argument we will not repeat here, Jarvis's only counter-argument is that people like Devin and Farmer, that is, people who consider "armed robbery to be a reasonable means of livelihood," are not "deep thinker[s]" and, therefore, the men may have engaged in such illogical thinking. This argument rings hollow. There is no evidence that either Devin or Farmer thought armed robbery was a "reasonable" way to make a living. Furthermore, we have no reason to assume that persons who engage in armed robbery are mentally deficient.

¶48 Seals' recantation closely tracks Devin's recantation and, therefore, suffers the same deficiencies. As to Seals in particular, it is especially implausible

that he would falsely name Jarvis as the gunman when he knew that Jarvis's brother Johnny was an employee of the Papa John's and that Johnny was present during the robbery. Thus, Seals would have known at the time he supposedly agreed with Devin to lie, and when he talked with police, that an eyewitness to one of the robberies, albeit Jarvis's brother, would be able to contradict him.

¶49 The above discussion demonstrates that the recantations of Devin and Seals do not possess circumstantial guarantees of trustworthiness.

¶50 We pause here to note that, although this case is distinguishable from ***State v. Jackson***, 188 Wis. 2d 187, 525 N.W.2d 739 (Ct. App. 1994), we agree with the State that the Devin and Seals recantations share much in common with the evidence viewed with skepticism in ***Jackson***. In ***Jackson***, the newly discovered evidence was, as here, a new statement of an alleged accomplice who had already been convicted of the armed robbery in question and sentenced.[7] ***Id.*** at 193-94. In explaining why the accomplice's new statement was unreliable, we quoted with approval a discussion from ***United States v. La Duca***, 447 F. Supp. 779 (D. N.J. 1978):

> "The co-defendant who has admitted his guilt and who is awaiting sentencing is concerned with what the sentencing court will do. That very concern is a potent guarantee of trustworthiness. Once sentence is imposed, however, there is very little to deter the pleading co-defendant from untruthfully swearing out an affidavit in

[7] In ***State v. Jackson***, 188 Wis. 2d 187, 525 N.W.2d 739 (Ct. App. 1994), as here, Jackson was allegedly one of multiple men who committed robbery and Jackson was the alleged gunman. ***Id.*** at 190-91. One of Jackson's codefendants had pled guilty and was awaiting sentencing at the time of Jackson's trial. ***Id.*** at 193. Called as a witness for Jackson, the codefendant invoked his Fifth Amendment right against self-incrimination and, thus, did not testify. ***Id.*** at 193-94. After Jackson was convicted and after the codefendant was sentenced, the codefendant was willing to testify that Jackson was not involved in the robbery. ***Id.*** at 194.

> which he purports to shoulder the entire blame. In these circumstances, the possibility of a successful prosecution for perjury is not a sufficient guarantee of trustworthiness. If the new trial motion is granted, two new trials would be required. If the motion for a new trial is denied, a perjury prosecution would probably require a re-play of the original trial to establish the untruthfulness of the affiant's statements. Most prosecutors do not have the resources to constantly retry the same issues against the identical defendants."

Jackson, 188 Wis. 2d at 200 n.5 (quoting ***La Duca***, 447 F. Supp. at 783).

¶51 Similarly here, Seals, Devin, and Johnny realistically have little to lose. We acknowledge that they faced the possibility of obstructing charges, but such a possibility appears remote. We need not rely on ***Jackson*** here, but its reasoning supports rejection of Jarvis's request for a new trial.

¶52 We now address Johnny's recantation. In his recantation affidavit, Johnny asserts he was working at Papa John's when it was robbed and he recognized Quentin Seals, but did not recognize the second robber. Johnny now asserts he pretended not to recognize Jarvis's photograph when shown a photo lineup with Jarvis's picture, but does not explain why. Johnny asserts he falsely identified Jarvis as the second robber because the officer threatened to charge him with armed robbery party to a crime if he did not. Viewed in context, Johnny's recantation provides no basis for plea withdrawal. Indeed, if a trial were held, Jarvis would be better off without Johnny as a witness.

¶53 Jarvis's argument does not take into account the fact that if Johnny testifies at a trial consistent with his affidavit, the statements Johnny made to police shortly after the robberies would be admissible to impeach him. According to the police report, Johnny declined to acknowledge even recognizing his brother in the photo lineup until police made it clear to him that they believed he was lying

by arresting him. Only then did Johnny admit his brother Jarvis was one of the persons in the photo lineup he had been shown. More importantly, Johnny went on to offer incriminating details in a manner inconsistent with merely naming Jarvis to avoid being charged himself. When asked why he did not identify Jarvis before, Johnny did not answer that question, but instead said: "I told him not to rob my store, my momma told him not to rob my store, but he would not listen." Johnny went on to admit that Jarvis and Seals had talked to him about possibly robbing Papa John's. Johnny told police that after the robbery Jarvis did not come home for a couple of days, but that Jarvis telephoned him and told him they were chased by police, but they all got about $400. And, Johnny told police that Jarvis told him he robbed the store because he needed money for clothes to wear to Homecoming.

¶54 Johnny's recantation is so lacking in circumstantial guarantees of trustworthiness that it is not reasonable to think that, if a trial was held and Johnny testified, a jury would believe Johnny is now telling the truth. Apart from Johnny providing details that are inconsistent with him simply naming his brother as a result of a police threat, there is the more fundamental question as to why Johnny waited to come forward with his recantation. Johnny's affidavit contains no explanation for why Johnny waited to recant until after his brother entered a guilty plea and was sentenced.[8]

[8] Jarvis's appellate counsel does not and could not suggest that the circuit court was required to hear testimony from Johnny, Seals, or Devin because they might provide more information than contained in their affidavits. Such an argument would be tantamount to asserting that Jarvis is entitled to a hearing in order to engage in a fishing expedition for additional evidence.

¶55 Jarvis argues that, if nothing else, the three recantations are sufficiently corroborated because they corroborate each other. But we reject the proposition that three implausible stories add up to three plausible ones.

¶56 The above discussion supports rejection of Jarvis's newly discovered evidence claim based on insufficient circumstantial guarantees of trustworthiness. Nonetheless, we also conclude that Jarvis's claim fails to satisfy another newly discovered evidence requirement. Our discussion demonstrates that, if Jarvis was permitted to withdraw his plea and have a trial, it is not reasonably probable that a trial, with all three men, or some combination of the three, testifying, would produce an acquittal. *See* ***McCallum***, 208 Wis. 2d at 473 (newly discovered evidence does not warrant a new trial unless "a reasonable probability exists that a different result would be reached in a trial").

Conclusion

¶57 In closing, we note that we do not rely on reasons used by the circuit court to deny Jarvis's ineffective assistance and newly discovered evidence claims. We do not, for example, rely on the circuit court's conclusion that Jarvis was negligent in failing to obtain the newly discovered evidence. We also do not rely on the court's conclusion that there is no manifest injustice warranting plea withdrawal because Jarvis is in fact guilty and entered his plea because of his guilt. Still, because we may sustain a circuit court's holding based on reasoning not presented to or relied on by that court, *see* ***State v. Amrine***, 157 Wis. 2d 778, 783, 460 N.W.2d 826 (Ct. App. 1990), we affirm the circuit court's order denying relief.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.