COURT OF APPEALS
DECISION
DATED AND FILED

December 2, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2009AP1759 **Cir. Ct. No. 1996CF75**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JONATHAN C. SEGNER,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Green County: JAMES R. BEER, Judge. *Affirmed*.

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

¶1 PER CURIAM. Jonathan Segner appeals from an order denying his WIS. STAT. § 974.06 (2007-08)[1] motion for a new trial. Segner argues that newly discovered evidence warrants a new trial and the circuit court erred by denying his motion without an evidentiary hearing. We reject Segner's arguments and affirm the order.

BACKGROUND

¶2 In July 1997, Segner was convicted upon a jury's verdict of three counts of armed burglary, two counts of armed robbery, two counts of felony theft, two counts of possession of a firearm by a felon, and one count each of misdemeanor theft, intimidating a witness, and burglary of a building or dwelling. The underlying charges arose after Jason Kotte—the State's primary witness at Segner's trial—called police to his residence, where he showed them guns and other stolen property which, according to Kotte, Segner had stolen from several area homes. Kotte told police that Segner, who had stayed with him on the nights the various burglaries took place, told him what he had done and showed him the items he had taken. Kotte also claimed that Segner had sent him a threatening note while both men were confined in the Green County jail. Segner's defense to the burglary charges was that Kotte had committed the crimes and falsely accused Segner in an attempt to hide his own culpability. Segner also claimed he had sent Kotte an innocuous note that Kotte replaced with one containing a threatening message: "Count your days."

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

¶3 On direct appeal, Segner argued he was denied the right to a fair trial when the prosecutor failed to disclose exculpatory evidence which Segner claimed would have affected Kotte's credibility. Segner also claimed he was denied effective assistance of trial counsel for failing to impeach the credibility of another prosecution witness. This court rejected Segner's arguments and affirmed the judgment. *See* ***State v. Segner***, No. 1999AP935-CR, unpublished slip op. (Wis. Ct. App. Jan. 13, 2000). In January 2009, Segner filed the underlying WIS. STAT. § 974.06 motion seeking a new trial based on newly discovered evidence. The motion was denied without an evidentiary hearing and this appeal follows.

DISCUSSION

¶4 In ***State v. Coogan***, 154 Wis. 2d 387, 453 N.W.2d 186 (Ct. App. 1990), this court outlined the criteria for seeking a new trial based on newly discovered evidence, stating that due process requires a new trial where the following factors are met:

> (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.

Id. at 394-95 (citation omitted). A reasonable probability exists if "a jury, looking at both the [old evidence] and the [new evidence], would have a reasonable doubt as to the defendant's guilt." ***State v. Love***, 2005 WI 116, ¶44, 284 Wis. 2d 111, 700 N.W.2d 62 (quoting ***State v. McCallum***, 208 Wis. 2d 463, 474, 561 N.W.2d 707 (1997)). If the newly discovered evidence fails to meet any of these factors, the moving party is not entitled to a new trial. ***State v. Avery***, 213 Wis. 2d 228, 234, 570 N.W.2d 573 (Ct. App. 1997).

¶5 Here, Segner offered two documents to support his motion for a new trial. First, an affidavit from Darrin Gruenberg in which he claimed that at a party he attended during the summer of 1998, Kotte admitted that he committed the burglaries and set Segner up to be convicted for them. Gruenberg also averred that at a subsequent party, Kotte's brother, Ken Kotte, told him that after the burglaries, Kotte "sat down" with Ken, Kip Groom and Gary Brown, and "came up with a story about [Segner] committing the burglaries."

¶6 Second, Segner offered a written summary of an interview that representatives of the University of Wisconsin Innocence Project conducted with Groom in July 2007. At that time, Groom indicated that Kotte "told him everything that he then told police." Groom indicated, however, that he remembered Segner joking about going into people's houses, but he could not remember exactly what Segner said. Groom ultimately stated he would "stick to the transcript the police have of his interview."

¶7 We conclude that, even if the other criteria for newly discovered evidence are met, no reasonable probability exists of a different result in a new trial. First, we are not convinced that Groom's statements serve to exculpate Segner. Although Groom apparently told Innocence Project representatives that information he gave to police came from what Kotte told him, he personally recalled Segner joking about going into people's houses, and ultimately indicated that the statements he made to police would not change. In any event, the testimony of Kotte and Groom were only part of the State's evidence against Segner.

¶8 Two eyewitnesses testified that the perpetrator was a white male, approximately six feet tall; one witness indicated the perpetrator was of average

build, and the other told an investigating officer that the perpetrator weighed approximately 170 pounds. A third eyewitness testified that the perpetrator was a white male of average build, "maybe a little bit heavier," and better than average height. At the time of the burglaries, Segner, a white male, was between six feet two inches and six feet three inches tall and weighed approximately 180 pounds. In contrast, Kotte was six feet tall and weighed approximately 141 pounds. Further, the jury heard testimony that, at the time of his arrest, Segner was in possession of a video card that had been stolen in one of the robberies. Because this other evidence provided sufficient corroboration to support Segner's convictions, we conclude there is no 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. *See* ***Love***, 284 Wis. 2d 111, ¶44.

¶9 Finally, Segner claims the circuit court erred by denying his WIS. STAT. § 974.06 motion without an evidentiary hearing. If a postconviction motion does not raise facts sufficient to entitle the defendant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the circuit court has discretion to deny the motion without a hearing. *See* ***State v. Bentley***, 201 Wis. 2d 303, 310-11, 548 N.W.2d 50 (1996). As discussed above, the record demonstrates that Segner is not entitled to relief. Therefore, we conclude the circuit court properly exercised its discretion when it denied the motion without an evidentiary hearing.

By the Court.—Order affirmed.

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