

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 17, 2011

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2010AP853

Cir. Ct. No. 1999CF5150

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LISIMBA LITEEF LOVE,

DEFENDANT-APPELLANT.

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

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Lisimba Liteef Love appeals from an order denying his motion for a new trial based on newly-discovered evidence. Because we conclude that the circuit court properly denied his motion, we affirm.

BACKGROUND

¶2 The facts underlying Love's conviction are set out in prior decisions. *See, e.g., State v. Love*, No. 2001AP0817-CR, unpublished slip op. (WI App Dec. 11, 2001) (per curiam) (*Love I*); *State v. Love*, 2005 WI 116, ¶¶3-18, 284 Wis. 2d 111, 700 N.W.2d 62 (*Love II*). Only a brief summary is necessary here. Two men robbed Glen Robinson on September 28, 1999, outside of Junior's Sports Bar in Milwaukee, Wisconsin. Robinson identified Love as one of the assailants. The State charged Love and Effrin Moss with the crime. The jury found Love guilty but was unable to reach a verdict as to Moss. The circuit court sentenced Love to a forty-four year term of imprisonment.

¶3 Love pursued a direct appeal, and this court affirmed. *Love I*, No. 2001AP0817-CR, ¶1. Moss, meanwhile, was acquitted after a retrial.

¶4 Love filed a collateral attack on his conviction. As relevant here, he claimed to have newly-discovered evidence that his cousin, Floyd Lindell Smith, committed the robbery. The matter reached the supreme court, which determined that Love was entitled to a hearing on his claim. *See Love II*, 284 Wis. 2d 111, ¶56. At the hearing following remittitur, Love presented evidence from an inmate, Christopher Hawley. The circuit court deemed Hawley incredible and denied relief.¹ This court affirmed. *See State v. Love*, No. 2006AP2300-CR, unpublished slip op. (WI App July 5, 2007) (*Love III*).

¹ Love also called Smith as a witness at the hearing held after remittitur. Smith, however, provided no substantive testimony, instead invoking his right against self-incrimination. *See* U.S. CONST. amend. V.

¶5 Love next filed the postconviction motion underlying this appeal. He claimed to have additional newly-discovered evidence supporting his theory that Smith committed the robbery.

¶6 The circuit court held a hearing at which Moss and Willie L. Parchman testified on Love's behalf. According to Moss, Smith brought items to Moss's residence and claimed that he stole them from Robinson. Moss testified that when he expressed doubt that the items were Robinson's, Smith displayed Robinson's driver's license. On cross-examination, Moss admitted that he never told his attorney, the State, or the police about Smith's visit to his residence with stolen items even though Moss faced two trials for the robbery that he now claimed Smith committed. Moss testified that he had abided by a "code on the street," and that "at the time" he was willing to "take the fall for Smith." Moss testified that the "code" had since changed.

¶7 Upon further cross-examination, Moss acknowledged that he could not identify which state issued Robinson's driver's license despite Moss's opportunity to examine the license. Moss also exhibited some confusion about the residence where he saw the items that Smith displayed. Moss first testified that he lived at the residence, but he was unable to state the exact address. When questioned about why he could not recall the house number, Moss responded: "[b]ecause I did not live there."

¶8 Parchman testified that he spoke to Smith while the two men were in prison together. According to Parchman, Smith both confessed to the robbery and stated that Love was not involved. Parchman, however, was unable to offer any details about the robbery. Additionally, Parchman was inconsistent when describing his relationship with Love. Parchman signed an affidavit stating that he

was in prison when he “ran into somebody that he knew as Lisimba Love.” Parchman testified during direct examination, however, that he did not know Love and had never met him. During cross-examination, Parchman testified that he met Love in prison and that the two men were housed on the same unit.

¶9 The circuit court found that Moss and Parchman were “not credible at all” and rejected the motion for a new trial. Love appeals.

DISCUSSION

¶10 The decision to grant or deny a motion for a new trial based on newly-discovered evidence rests in the circuit court’s sound discretion. *See State v. Morse*, 2005 WI App 223, ¶14, 287 Wis.2d 369, 706 N.W.2d 152. Such motions, however, “are entertained with great caution.” *Id.* (citation omitted). To obtain a new trial based on newly-discovered evidence, a defendant must prevail in a multi-pronged inquiry. *See Love II*, 284 Wis.2d 111, ¶¶43-44. “[A] defendant must first 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.’” *Id.*, ¶43 (citation omitted). If the defendant satisfies the burden of proof as to these four criteria, “the circuit court must determine whether a reasonable probability exists that a different result would be reached in a trial.” *Id.*, ¶44 (citation omitted). This latter determination “contains its own burden of proof. 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.* (citation omitted, brackets in original). Newly-discovered evidence that fails to

satisfy any of the five criteria is not sufficient to warrant a new trial. *State v. Kaster*, 148 Wis. 2d 789, 801, 436 N.W.2d 891 (Ct. App. 1989).

¶11 When the circuit court acts as the finder of fact, the circuit court is the “ultimate arbiter of the credibility of the witnesses.” *Cogswell v. Robertshaw Controls Co.*, 87 Wis. 2d 243, 250, 274 N.W.2d 647 (1979). We afford great deference to the circuit court’s credibility determinations in recognition of “the superior opportunity of the [circuit] court to observe the demeanor of witnesses and to gauge the persuasiveness of their testimony.” *Johnson v. Merta*, 95 Wis. 2d 141, 152, 289 N.W.2d 813 (1980) (citation omitted). We will not overturn the circuit court’s credibility findings “unless they are inherently or patently incredible or in conflict with the uniform course of nature or with fully established or conceded facts.” *Global Steel Prods. Corp. v. Ecklund Carriers, Inc.*, 2002 WI App 91, ¶10, 253 Wis. 2d 588, 644 N.W.2d 269.

¶12 The circuit court discussed Love’s evidence in detail before denying the motion for a new trial. The circuit court emphasized that Moss failed to accuse Smith of the armed robbery during the time that Moss faced prosecution for the crime. The circuit court found Moss’s explanation for his silence “not credible at all.” The circuit court found that neither Moss nor Parchman had information about the robbery that was not public knowledge, and the circuit court determined that Parchman was evasive in an effort to hide his lack of information. The circuit court concluded that the evidence Love presented had no credibility. We have no basis to disturb the circuit court’s credibility assessments.

¶13 The circuit court’s conclusion that Love’s newly-discovered evidence lacked any credibility “is the equivalent of finding that there is no reasonable probability of a different outcome on retrial.” See *State v. Carnemolla*,

229 Wis. 2d 648, 661, 600 N.W.2d 236 (Ct. App. 1999). Thus, Love failed to satisfy the burden of proof necessary to secure a new trial based on newly-discovered evidence. *See Love II*, 284 Wis. 2d 111, ¶44.

¶14 Love nonetheless asserts that the circuit court erred because it did not consider the trial evidence in light of the evidence he presented during the postconviction proceedings. We disagree. A jury heard the State’s evidence at trial and found Love guilty beyond a reasonable doubt. Love did not challenge the sufficiency of the evidence against him. *See Love I*, No. 2001AP817-CR, *passim*. The circuit court assessed the testimony that Love presented to support his motion for a new trial and found that evidence devoid of credibility. Indeed, the circuit court deemed Love’s evidence so infirm as to constitute no evidence at all, stating: “I’m not going to find that there is any new evidence based on the testimony that’s presented.” Because the circuit court found that Love offered no new evidence, the circuit court in effect determined that the postconviction submissions could not overcome the evidence presented at trial. *See Love II*, 284 Wis. 2d 111, ¶44. The circuit court’s conclusions fully support its order denying Love a new trial.

By the Court.—Order affirmed.

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

