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**DISTRICT I**

September 22, 2016

*To*:

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You are hereby notified that the Court has entered the following opinion and order:

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2015AP2023 State v. Chris Lamar Crittendon (L.C. # 1991CF12153)

Before Kessler, Brennan, JJ., and Daniel L. LaRocque, Reserve Judge.

Chris Lamar Crittendon, *pro se*, appeals from the circuit court's order denying his motion for a new trial. Crittendon argues that he should be retried based on newly discovered evidence. After review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2013-14).[1] We affirm.

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

Crittendon was convicted of first-degree intentional homicide, as a party to a crime, in 1992. Since that time, Crittendon has challenged his conviction multiple times in the circuit court and in this court. As pertains to this appeal, he moved the circuit court for a new trial on the grounds that Albert Spence, Crittendon's co-defendant, now claims that he, rather than Crittendon, fired the fatal shot that killed the victim. The circuit court denied the motion without a hearing.

Crittendon contends that the circuit court should have held a hearing on his motion for a new trial based on Spence's affidavit in which Spence takes responsibility for the crime. To obtain a trial based on newly discovered evidence, a defendant must establish that: "(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." ***State v. Plude***, 2008 WI 58, ¶32, 310 Wis. 2d 28, 750 N.W.2d 42 (quotation marks and citation omitted). If the defendant establishes all four of these criteria, then the court must determine "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.*** This determination is a question of law. ***Id.***, ¶33.

Assuming for the sake of argument that Crittendon was able to establish the four criteria necessary to obtain a retrial based on newly discovered evidence, there is not a reasonable probability that had the jury heard the newly discovered evidence, it would have had a reasonable doubt as to Crittendon's guilt. Spence's assertion that he fired the fatal shot does not undermine the facts central to Crittendon's conviction. Multiple witnesses testified that Crittendon shot the unarmed victim in the face or the chest during a verbal argument on the street, and then Crittendon and Spence chased the fleeing victim to the porch of a house a few

blocks away. Witnesses testified that Crittendon and Spence then beat the victim and Crittendon or Spence, or both, fired additional shots at the victim. Regardless of whether Crittendon or Spence fired the fatal shot, Crittendon acted as a party to a crime with Spence in committing intentional homicide. *See* WIS. STAT. § 939.05(1) ("Whoever is concerned in the commission of a crime is a principal and may be charged with and convicted of the commission of the crime although the person did not directly commit it and although the person who directly committed it has not been convicted or has been convicted of some other degree of the crime or some other crime based on the same act."). Crittendon is guilty whether he fired the fatal shot or whether Spence fired the fatal shot.

Beyond this central flaw in Crittendon's claim, Spence's affidavit was insufficient to warrant a hearing for two reasons. First, the affidavit is conclusory. Spence stated that he fired the "fatal shot," but he did not explain how he knew which of the many bullet wounds the victim sustained was the fatal shot, nor did he explain when or where it was inflicted. At trial, the medical examiner testified that the victim was shot in the face, leg, buttock, and chest, but the medical examiner could not determine the order in which the wounds were inflicted. He also testified that the chest wound was fatal, but he did not know whether that wound was inflicted before the victim attempted to flee or after the victim was caught.

Second, the affidavit is inherently unreliable. As many courts have explained, a convicted co-actor who "seeks to exculpate his co-defendant lacks credibility, since he has nothing to lose by testifying untruthfully regarding the alleged innocence of the defendant seeking a retrial." *See* ***State v. Jackson***, 188 Wis. 2d 187, 200, 525 N.W.2d 739 (Ct. App. 1994) (quotation marks and citation omitted). "Once sentence is imposed … there is very little to deter

[a co-actor] from untruthfully swearing out an affidavit in which he purports to shoulder the entire blame." ***Id.*** at 200 n.5 (citation and quotation marks omitted).

Crittendon next argues that he is entitled to a new trial in the interest of justice. *See* WIS. STAT. § 752.35. Crittendon has presented nothing that persuades us that a new trial in the interest of justice is warranted. Therefore,

IT IS ORDERED that the order of the circuit court is summarily affirmed. *See* WIS. STAT. RULE 809.21.

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*Diane M. Fremgen*
*Clerk of Court of Appeals*