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DISTRICT I

April 13, 2018

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

2017AP482 State of Wisconsin v. Jacquis Lamont Leichman
(L.C. # 2011CF2926)

Before Brennan, P.J., Kessler and Dugan, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Jacquis Lamont Leichman, *pro se*, appeals from an order of the circuit court that denied his motion for a new trial based on newly discovered evidence. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2015-16). The order is summarily affirmed.

Leichman was convicted of first-degree intentional homicide as a party to a crime while armed with a dangerous weapon and sentenced to life without extended supervision for the June 2011 shooting death of Kenda Baker. At least two people, including Leichman's aunt, identified Leichman as the shooter; his aunt testified against him at trial.

Leichman filed a *pro se* postconviction motion. One of his arguments was that his third trial attorney was ineffective for failing to adequately investigate, interview, and call his mother, Willa Leichman (Willa), as an alibi witness. The trial court denied the motion; we affirmed. *See* ***State v. Leichman***, No. 2015AP356-CR, ¶1, unpublished slip op. (WI App Aug. 30, 2016). With respect to that particular ineffective-assistance claim, the trial court had rejected it as insufficiently pled, and we agreed. The motion alleged only that Willa could provide him with an alibi; it did not provide any details of what the alibi might be, even though Leichman himself should have had personal knowledge of some details. *See* ***id.***, ¶¶11-13. We also observed that Leichman's second attorney had disclosed that she had spoken to Willa but did not obtain any beneficial information. *See* ***id.***, ¶12 n.4.

In February 2017, Leichman filed the underlying motion for a new trial based on newly discovered evidence. Specifically, Leichman attached a written statement, signed by Willa, with details about the alibi she ostensibly would have provided. The circuit court denied the motion, concluding Willa's statement was insufficient and not new: while the statement was obtained after trial, the information in it would have been known before trial. Leichman appeals.

The decision to grant a motion for a new trial based on newly discovered evidence rests in the circuit court's discretion. ***State v. Plude***, 2008 WI 58, ¶31, 310 Wis. 2d 28, 750 N.W.2d 42. A defendant seeking a new trial based on newly discovered evidence must establish "'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.'" ***State v. Armstrong***, 2005 WI 119, ¶161, 283 Wis. 2d 639, 700 N.W.2d 98 (citation omitted). If the defendant satisfies these requirements, '"the circuit court must determine whether a reasonable probability exists that a different result would be reached in a [new] trial.'" ***Id.*** (citation omitted).

Leichman asserts that Willa's statement is newly discovered evidence because this is the first statement obtained from her and it was impossible for him to know what she would have said prior to obtaining the statement. Like the circuit court, we disagree. Willa's statement accompanying Leichman's motion claims that on the night of the shooting, Leichman was at 7912 West Congress, Apartment 2, from 8 p.m. until 7 a.m. the next morning. While there, Leichman argued on the phone with his children's mother. Leichman certainly should have been able to inform his counsel of his location, the time he was there, and any notable activities. He also should have been able to reasonably anticipate that his alibi witness would have the same or similar information.[1] As best we can tell, Leichman only ever claimed that Willa would provide him with an alibi; he never provided any details of what that alibi entailed. We therefore agree with the circuit court: while Willa's statement may have been discovered after trial, the information therein is not new, so the evidence is not newly discovered.[2]

[1] The circuit court had commented that Willa's statement was unsworn and unnotarized, so Leichman obtained a sworn and notarized statement from Willa, which the circuit court allowed him to file for the record. We observe that Willa's second statement indicates that Leichman was at 7903 West Congress until 8 a.m. the next morning and that she cooked chicken for him while he was there.

[2] We are also not persuaded that Leichman "was not negligent" in seeking the evidence.

Leichman also claims his trial attorney was ineffective for failing to obtain Willa's statement. Leichman has already litigated trial counsel's ineffectiveness relative to Willa as a possible alibi witness. "A matter once litigated may not be relitigated in a subsequent postconviction proceeding no matter how artfully the defendant may rephrase the issue."[3] *See* ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991).

Additionally, in his reply brief, Leichman asks us to apply our power of discretionary reversal under WIS. STAT. § 752.35 (2015-16) to grant him a new trial in the interest of justice based on the ineffectiveness of his trial counsel. Discretionary reversal under § 752.35 is to be used only in exceptional cases. *See* ***State v. McKellips***, 2016 WI 51, ¶52, 369 Wis. 2d 437, 881 N.W.2d 258. We are not persuaded this is an exceptional case. Further, we typically do not consider arguments made for the first time in the reply brief. *See* ***Northwest Wholesale Lumber, Inc. v. Anderson***, 191 Wis. 2d 278, 294 n.11, 528 N.W.2d 502 (Ct. App. 1995).

Upon the foregoing, therefore,

IT IS ORDERED that the order appealed from is summarily affirmed.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals

[3] Additionally, the claim is raised in only a conclusory fashion in his motion. Conclusory allegations typically do not merit relief. *See* ***State v. Allen***, 2004 WI 106, ¶¶13-14, 274 Wis. 2d 568, 682 N.W.2d 433.