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

2018AP2194-CR State of Wisconsin v. Edjuan W. Haywood (L.C. # 2016CF1613)

Before Brash, 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).

Edjuan W. Haywood appeals a judgment of conviction entered after a jury found him guilty of substantial battery and first-degree recklessly endangering safety, both by use of a dangerous weapon. He also appeals an order denying his postconviction motion seeking a new trial on the ground that he has newly discovered evidence or, alternatively, that his trial counsel was ineffective for failing to uncover and present the newly discovered evidence at his original

trial. Upon our review of the briefs and record, we conclude at conference that this matter is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2017-18).[1] We affirm.

The State filed a criminal complaint alleging that on April 7, 2016, Haywood stabbed L.L. The case proceeded to a jury trial in early 2017, on charges of substantial battery and first-degree recklessly endangering safety, both by use of a dangerous weapon.[2] The nature of Haywood's claims on appeal requires an overview of the evidence presented to the jury.

Laniqua L. testified that she and her brothers Laqjuan L. and L.L. drove to a Milwaukee liquor store, the S & S Liquor Mart, arriving at approximately 8:30 p.m. on April 7, 2016.[3] Her brothers were in the store when Haywood, a member of her extended family, drove up and parked. She said that when L.L. exited the liquor store, he exchanged words with Haywood, who began chasing L.L. Laniqua L. observed that Haywood had "something shiny" in his hand, and then she saw L.L. run into the store. She acknowledged that she did not see Haywood pursue L.L. into the liquor store, but she saw Haywood come out. He was followed by L.L., who was bleeding from his chest and leg. L.L. then got into Laniqua L.'s car, and she drove him to the hospital.

[1] All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

[2] The trial also included a charge that Haywood obstructed an officer by giving a false name to the police officers investigating the April 7, 2016 incident. Haywood was not convicted of obstructing an officer, and we do not discuss that charge any further.

[3] Laniqua L. and Laqjuan L., who are witnesses, in this matter, have the same last name as the victim L.L. We therefore use only the initial L. as the surname for all three people. *Cf.* WIS. STAT. RULE 809.86(4)-(5) (directing the use of initials to identify victims in appellate briefs and permitting any necessary order to protect the identity of a victim).

L.L. testified that he encountered Haywood outside the liquor store on April 7, 2016, and that the two men previously had a "family argument." According to L.L., Haywood made a rude remark and pulled out a knife upon seeing L.L. outside the liquor store. L.L. said he ran into the liquor store because he knew that the surveillance cameras inside would record any altercation that might occur. He also said that he took two wine bottles from a cooler to use for protection.

The State played portions of a video recorded by the liquor store's security system on April 7, 2016. L.L. identified Haywood as the person seen on the video chasing L.L. into the store at 8:53:36 p.m. Several seconds of the video show the person identified as Haywood striking L.L. in the left side, but Haywood's hand cannot be seen. L.L. acknowledged that a knife is not visible in any frame of the video, but he told the jury that the portion of the video showing Haywood striking L.L. at 8:53:47 p.m. in fact captures a moment when Haywood was stabbing L.L. L.L. went on to describe the six stab wounds he received—one in the chest, one in the hand, and four in the leg—and to identify them in photographs.

L.L. identified Haywood as the man in the video seen leaving the liquor store at 8:54:02 p.m., and L.L. identified himself as the man seen in the video inside the store at 8:54:27 p.m, holding his side and lifting his shirt to show another person his chest. L.L. then identified himself as the man seen in the video leaving the liquor store at 8:54:33 p.m.

L.L. testified that during the attack in the liquor store, he dropped the two wine bottles he had seized to protect himself. He identified one of them in the video as the bottle seen rolling away from the two men grappling. He agreed that the video did not show what happened to the second bottle, but he testified that he dropped it when he tried to grab the knife away from Haywood, and L.L. explained that he received the wound to his hand at that time. An additional

video excerpt recorded shortly after both L.L. and Haywood exited the store showed that at 8:55:21 p.m., a person who appeared to be a store clerk placed two wine bottles in a cooler.

L.L. testified that after leaving the liquor store, he immediately got into his sister's car and asked to go to the hospital because he had been stabbed. He said that when he reached the hospital, he received seven stitches to repair his chest wound and that the other wounds required only bandaging. He identified a photograph of the inside of the car in which he rode to the hospital. The photograph shows a moderate-sized stain on the left side of the passenger seat-cushion, and L.L. said that his blood caused the stain.

Officer Curtis Pelczynski testified that at approximately 8:50 p.m. on April 7, 2016, he was dispatched to the S & S liquor store in response to a reported battery. He said that he arrived within five minutes of receiving the report and that the incident was over by the time he arrived. He said he did not find any blood at the scene and "learned ... that the workers at the store had already cleaned up any fluids, blood, et cetera that w[ere] on the floor."

Haywood testified on his own behalf. He described a verbal confrontation with L.L. outside the S & S liquor store, and Haywood acknowledged following L.L. into the store. Haywood said that he saw L.L. "in a fighting stance" holding two bottles, and Haywood admitted that he approached L.L. "to kick his ass." Haywood said that he delivered three punches, "knocked [L.L.] ... out cold," and then left the scene. Haywood repeatedly denied that he had a knife during the fight and said that he "d[id]n't know what happened" to L.L.

In closing argument, Haywood emphasized that the State did not offer any expert medical testimony, and he argued that the jury therefore did not "know what kind of wounds" L.L. sustained. Haywood described the photographs of L.L.'s injuries as depicting "awkward and

odd" wounds, and Haywood suggested that L.L. might have received those wounds from shards of broken wine bottles. Haywood acknowledged that the video evidence did not reveal any broken bottles, but he reminded the jury that, according to Pelczynski, store employees had cleaned up before the police arrived. The jury rejected the theory of defense and found Haywood guilty of substantial battery and first-degree recklessly endangering safety, both by use of a dangerous weapon.

In postconviction proceedings, Haywood alleged that he had newly discovered evidence, namely, a statement from a witness who was not mentioned in the police reports. In support, he submitted a private investigator's 2018 report of an interview with one Devin Nash, who said that he was working as a clerk at the S & S liquor store on the night of April 7, 2016. According to Nash, Haywood was a regular customer, and when he arrived at the store late that night, Nash agreed to "let Mr. Haywood get what he needed." While Haywood was inside, a customer that Nash did not recognize came into the store, and a fight broke out between the unknown person and Haywood. Nash said he was twenty feet away from the fight and saw that the unknown person was holding liquor bottles, but Nash did not see anyone with a knife. Nash also did not observe injuries on either person. Nash said that he mopped the floor after the fight and did not see any blood.

Haywood argued that Nash's statement constituted newly discovered evidence warranting a new trial. Alternatively, Haywood argued that his trial counsel was ineffective for failing to find Nash and present his testimony to the jury. The circuit court denied the newly discovered evidence claim and implicitly rejected the claim that Haywood's trial counsel was ineffective. Haywood appeals.

A defendant seeking a new trial on the basis of 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 the evidence; (3) the evidence is material to an issue in the case; and (4) the evidence is not merely cumulative.'" ***State v. Avery***, 2013 WI 13, ¶25, 345 Wis. 2d 407, 826 N.W.2d 60 (citations and some quotation marks omitted). If the defendant satisfies these four requirements, "then 'the circuit court must determine whether a reasonable probability exists that a different result would be reached in a trial.'" *See* ***id.*** (citation omitted). ***Avery*** teaches that "[a] reasonable probability of a different result exists if there is a reasonable probability that a jury, looking at both the old and the new evidence, would have a reasonable doubt as to the defendant's guilt." *See* ***id.*** A convicted person must satisfy all five parts of the newly discovered evidence test to earn relief. *See* ***State v. Kaster***, 148 Wis. 2d 789, 801, 436 N.W.2d 891 (Ct. App. 1989).

The circuit court found that Haywood met his burden to prove the first four parts of the newly discovered evidence test, and the State does not dispute that finding on appeal. Whether a litigant has satisfied an applicable burden of proof is, however, a question of law, *see* ***State v. Nielsen***, 2001 WI App 192, ¶10, 247 Wis. 2d 466, 634 N.W.2d 325, and we are not required to accept a party's concession of law, *see* ***State v. Carter***, 2010 WI 77, ¶50, 327 Wis. 2d 1, 785 N.W.2d 516. Nonetheless, our review persuades us to accept the State's concession in this case. First, the postconviction motion included allegations that Nash's name did not appear in the police reports and that trial counsel's independent investigative efforts did not lead to Nash because no one at the S & S liquor store would cooperate with the defense. Second, Nash's postconviction statement reflects that Nash was an eyewitness to the April 7, 2016 incident underlying the criminal charges in this case. Third, the statement reflects that no attorney or

investigator spoke to Nash about the incident until August 2018. Fourth, Nash is the only person other than Haywood and L.L. to describe the fight and its immediate aftermath. We therefore accept the circuit court's determinations that Haywood was diligent in seeking evidence before trial, Nash's statement was discovered after trial, the statement was material to a relevant issue, and the statement was not merely cumulative. *See* ***Avery***, 345 Wis. 2d 407, ¶25.

We turn to the fifth component of the newly discovered evidence test, namely, whether in light of the new evidence, "a reasonable probability exists that a different result would be reached in a trial." *See* ***id.*** (citation omitted). In examining that component of the test, we keep in mind that "[a] court reviewing the newly discovered evidence should consider whether a jury would find that the evidence had a sufficient impact on other evidence presented at trial that a jury would have a reasonable doubt as to the defendant's guilt." *See* ***id.*** (citation omitted).

We begin by noting that the proposed newly discovered evidence is relevant only to whether Haywood used his fist or used a knife to fight L.L.; no dispute exists that the two men fought. In this regard, the trial evidence included testimony from Laniqua L. that she saw Haywood with "something shiny" in his hand outside the liquor store, and L.L. testified that he saw Haywood holding a knife both outside the store and just before he attacked L.L. inside. Further, the trial testimony, photographs, and video evidence show that L.L. entered the liquor store uninjured, scuffled with Haywood and no one else, and exited the store thirty seconds later with seven stab wounds. This is compelling evidence that Haywood stabbed L.L. *See* ***State v. Ritchie***, 2000 WI App 136, ¶16, 237 Wis. 2d 664, 614 N.W.2d 837 ("Circumstantial evidence can sometimes be, and often is, stronger and more satisfactory than direct evidence.").

In light of the compelling evidence presented at trial, we are satisfied that no reasonable possibility exists that Nash's testimony would lead the jury to reassess that evidence and reach a verdict other than guilty of the two crimes at issue here. Significantly, Nash's description of the events immediately preceding the fight is flatly contradicted by the video that recorded the incident: while Nash describes Haywood entering the liquor store before L.L., the video shows that L.L. entered the liquor store followed by Haywood. Similarly, the video refutes Nash's claim that Haywood arrived at the store late but Nash nonetheless "let Mr. Haywood get what he needed." The video shows a number of people in the store when Haywood arrived, and no one granted him permission to enter. To the contrary, he pushed past another person who was leaving the store, bumping shoulders with that person and then striding towards the back of the store. Nash's description of the initial moments in the liquor store is therefore not reasonably likely to persuade a fact finder to reevaluate the original evidence.

Nash's description of the fight and its aftermath is no more likely to be persuasive. While Nash did not see a knife from his vantage point twenty feet away from the fight, the surveillance video from several angles similarly failed to show a knife. Haywood fails to explain why Nash's testimony would have a greater impact on the jury than the video evidence. As to the proposed testimony that Nash did not see any blood on the floor when the fight ended, Haywood argues that this is persuasive exculpatory evidence because "blood on the floor ... would have likely resulted from multiple stabbings." This argument is wholly unsupported. The trial did not include any medical evidence, and Haywood fails to offer any now. Accordingly, nothing in the record demonstrates that the "awkward and odd" wounds L.L. sustained would necessarily have bled so profusely in the few seconds that L.L. remained in the store following the stabbing that his blood would have soaked through his clothing and flowed onto the floor.

To the contrary, the moderate-sized stain on the car seat suggests limited bleeding, and indeed, L.L. testified that only one of his wounds required stitches. Therefore, as the circuit court explained, absence of blood on the floor would not likely lead the jury to acquit Haywood or to conclude that he did not stab L.L. during the fight.

In sum, the proposed new evidence would not likely have such an impact on the evidence originally produced at trial as to give rise to a reasonable doubt about Haywood's guilt. Haywood's claim for relief based on newly discovered evidence therefore fails.

We last briefly address Haywood's contention that "if the court finds that Nash's potential testimony was not discovered before trial because of [trial counsel's] lack of diligent investigation, the court should consider the issue of ineffective assistance of counsel." A successful claim of ineffective assistance of counsel requires the defendant to prove both that counsel performed deficiently and that the deficiency prejudiced the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). If the defendant cannot satisfy one component of the analysis, a court need not consider the other. *See* ***id.*** at 697. Here, Haywood offers no basis for us to reject the circuit court's determination that trial counsel was not negligent in investigating the case, and we have accepted that determination. Accordingly, we are satisfied that trial counsel's performance was not deficient. Further consideration of the ineffective assistance counsel claim is therefore unnecessary. *See* ***id.***

IT IS ORDERED that the judgment and order are summarily affirmed. *See* WIS. STAT. RULE 809.21.

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

Sheila T. Reiff
Clerk of Court of Appeals