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DISTRICT I

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

2019AP1666 State of Wisconsin v. Jacquis Lamont Leichman
(L.C. # 2011CF2926)

Before Dugan, Donald and White, 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 an order denying his motion for a new trial on the basis of newly discovered evidence. 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 summarily affirm.

Leichman was convicted of first-degree intentional homicide as a party to a crime while armed with a dangerous weapon for the June 2011 shooting death of Kenda Baker. At least two people, including Leichman's aunt, Felicia Leichman,[2] identified Leichman as the shooter.

Felicia testified that on the night of June 17, 2011, she was standing outside and chatting with a group of women from her neighborhood. Felicia called one of the women a "bitch," prompting the woman's brother, Baker, to jump to her defense. Felicia testified that Baker was "coming down towards her." Felicia stated that two women tried to push Baker back, at which point she saw Leichman coming down the street with a gun in his hand. Felicia testified that Leichman struck Baker with a gun, the two got into a physical altercation, and Leichman shot Baker in the chest. Leichman proceeded to shoot Baker another "three or four" times before leaving the scene.

Leichman was subsequently convicted and sentenced to life in prison, with no opportunity for extended supervision. Leichman filed a *pro se* postconviction motion seeking a new trial on multiple grounds. The postconviction court denied the motion. This court affirmed and the Wisconsin Supreme Court denied review.

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

[2] Because Leichman shares the same last name as his aunt, we refer to Felicia Leichman by her first name.

Leichman, *pro se*, again moved for postconviction relief on the grounds that an affidavit from his mother, claiming that Leichman was at her house on the night of the shooting, was newly discovered evidence. Again, the postconviction court denied the motion, this court affirmed, and the Wisconsin Supreme Court denied review.

Leichman then filed the *pro se* postconviction motion underlying this appeal, arguing again that newly discovered evidence warranted a new trial. Leichman's motion alleged that a fellow inmate, Robert Berndt, told Leichman that he was near the scene of the shooting when Baker was killed. Leichman's motion included an affidavit from Berndt stating that on the evening Baker was killed, Berndt and his girlfriend were walking in the vicinity of the shooting when they "heard gunshots and saw flashes of light in a small crowd of people across the street." The affidavit further states that a tall man with a light complexion, low haircut, and black t-shirt ran past them "with a gun in his hand." The affidavit further states that Berndt and his girlfriend then left the scene. Leichman's motion argued that Berndt's affidavit was newly discovered evidence calling into question the identity of the shooter because Berndt's description of the shooter did not match Leichman's physical characteristics.

The postconviction court denied the motion without a hearing. In a written decision, the postconviction court determined that in light of all of the trial evidence, Berndt's affidavit "would not have been reasonably probable to alter the outcome of the trial." The postconviction court noted "that a jury would have to completely discount **ALL** of the evidence from the trial to accept Berndt's affidavit signed eight years after the shooting." This appeal follows.

The decision to grant a motion for a new trial based on newly discovered evidence rests in the postconviction court's discretion. *See* ***State v. Plude***, 2008 WI 58, ¶31, 310 Wis. 2d 28,

750 N.W.2d 42. When moving for a new trial based on the allegation of newly discovered evidence, a defendant must prove: "(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. McCallum***, 208 Wis. 2d 463, 473, 561 N.W.2d 707 (1997). "If the defendant proves these four criteria by clear and convincing evidence, the [postconviction] court must determine whether a reasonable probability exists that a different result would be reached in a trial." ***Id.*** "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.'" ***State v. Love***, 2005 WI 116, ¶44, 284 Wis. 2d 111, 700 N.W.2d 62 (citation omitted).

Here, the postconviction court assumed that Berndt's affidavit met the first four criteria, but determined that there would not be a reasonable probability of a different outcome if the jury heard the newly discovered evidence. We agree with the postconviction court that Berndt's affidavit does not undermine the abundance of trial evidence. The postconviction court chronicled the litany of evidence presented at trial, including, but not limited to, the fact that multiple witnesses identified Leichman as the shooter. Officer Daniel Roufus testified that he stopped a vehicle driven by a man who had lived with Leichman and Felicia and found a letter written by Leichman in the man's pocket. The letter stated that Felicia would not be testifying and it provided the addresses of two other women who witnessed the shooting, asking the recipient "to get on dat asap." The letter further stated, "[f]emale or not do wat you got to do." The postconviction court also noted that police recovered a pistol magazine for a .40 caliber Glock semi-automatic pistol at Leichman's residence. Trial testimony suggested that Baker was shot with a .40 Glock manufactured pistol. Based on this evidence, the postconviction court

found that the trial evidence was "simply overwhelming" and noted that "there are no facts set forth in the affidavit which would effectively obliterate all of the evidence that was presented at trial."

Contrary to Leichman's assertion, the postconviction court applied the appropriate standard when rendering its decision. In chronicling the trial evidence and evaluating Berndt's affidavit, the postconviction court appropriately determined that Berndt's affidavit did nothing to undermine the evidence presented at trial. Indeed, Berndt's affidavit does not even claim that he witnessed the shooting. He simply states that he was near the scene, heard gun shots, and saw someone other than Leichman run past him.

We also disagree with Leichman's assertion that the postconviction court was required to hold an evidentiary hearing to determine the credibility of Berndt's affidavit. The postconviction court assumed the affidavit *was* credible and trustworthy, but nonetheless determined that it was insufficient to create a reasonable probability of a different outcome.

Accordingly, we affirm the order denying Leichman's motion for a new trial.[3]

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

[3] Leichman raises additional, undeveloped, arguments in his brief to this court. Leichman asserts that the postconviction court should have considered the evidence that he presented with his prior motions for a new trial. Specifically, he points to an email from an investigator who told him that in 2014 he contacted Felicia, who told him that she had been pressured to lie on the stand and implicate Leichman. This argument is undeveloped and we do not address it further. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (we do not consider undeveloped arguments on appeal).

In Leichman's appendix to his brief-in-chief, he also mentions a 2014 affidavit from Felicia in which she said that "lil Ron," not Leichman, was the shooter. The postconviction court did not consider Felicia's affidavit because Leichman did not present the affidavit to the court in his motion for postconviction relief. Accordingly, we also do not consider the affidavit.

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

Sheila T. Reiff
Clerk of Court of Appeals