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DISTRICT III

November 8, 2022

To:

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Circuit Court Judge
Electronic Notice

John VanderLeest
Clerk of Circuit Court
Brown County Courthouse
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Frederick A. Bechtold
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You are hereby notified that the Court has entered the following opinion and order:

2021AP374-CR State of Wisconsin v. Donnell Devonte Sanders
(L. C. No. 2015CF1695)

Before Stark, P.J., Hruz and Gill, 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).

Donnell Sanders appeals a judgment convicting him of first-degree sexual assault by threat of use of a dangerous weapon and of strangulation and suffocation, both counts as a repeater. Sanders also appeals the order denying his postconviction motion for a new trial. Sanders argues that the circuit court erred by denying his postconviction motion without conducting an evidentiary hearing. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. We reject Sanders'

arguments and summarily affirm the judgment and order. *See* WIS. STAT. RULE 809.21 (2019-20).[1]

The State charged Sanders with first-degree sexual assault by threat of use of a dangerous weapon, strangulation and suffocation, and battery—all three counts as a repeater. At a bench trial, Melissa[2] testified that Sanders contacted her via Facebook messenger regarding a mutual friend. After communicating with each other on the app for a few weeks, Melissa agreed to meet with Sanders in Green Bay.

On the night of November 29, 2015, Sanders and two of his friends met Melissa in a casino parking lot, and she left with the three men in Sanders' black SUV. Melissa further testified that after dropping off Sanders' two friends, Sanders told her that they were going to hang out at "somebody else's house." Instead, Sanders parked in a secluded area behind a building and told Melissa that he thought they were going to have sex. When Melissa refused, Sanders told her "you can either fuck me, suck me, or you can walk back to your car."

Melissa exited the car, but Sanders pursued her and coaxed her back into his vehicle. There, he sexually assaulted Melissa, threatening to shoot her when she failed to comply with his commands to "take down her pants" and to "put it in." According to Melissa, Sanders forced his penis into her vagina. When Melissa started screaming, Sanders "grabbed my throat and I couldn't breathe and he said … do you want me to punch you in the face." After the assault, Melissa ran from the vehicle, and Sanders threatened to shoot her if she told anybody.

[1] All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

[2] Pursuant to the policy underlying WIS. STAT. RULE 809.86(4), we use a pseudonym instead of the victim's name.

Melissa spent the rest of that night at a friend's house and sent a series of text messages to Sanders, accusing him of raping her. During this text exchange, Sanders denied raping Melissa, stating that "it wasn't like that" and that he needed to talk to Melissa. Melissa returned to her home in Appleton, and, at the urging of her mother and a doctor, she reported the assault to police and underwent an examination by a sexual assault nurse examiner on December 2, 2015. Melissa testified that she had cleaned up after the assault and that Sanders wore a condom. Although Melissa identified Sanders in a photo array and surveillance video of the casino parking lot showed Melissa entering a black SUV, there was no physical evidence linking Sanders to the assault. Therefore, Melissa's credibility was critical to the State's case.

Melissa, who was twenty-six years old at the time of the 2017 trial, testified that she graduated from Appleton West High School, she worked as a certified nursing assistant, and she lived with her mother. Melissa further testified that she did not consume alcohol or drugs on the evening of the assault. In outlining its findings, the circuit court noted that it was "not insignificant that there's no testimony, no evidence that [Melissa] was drinking, smoking dope or doing any drugs." The court further stated that it could not "find where there's a motive [for Melissa] to falsify testimony." Ultimately, the court found Sanders guilty of both the sexual assault and the strangulation and suffocation offenses, but it found Sanders not guilty of the battery offense. The court imposed concurrent sentences resulting in an aggregate thirty-year term, consisting of fourteen years of initial confinement followed by sixteen years of extended supervision.

Approximately six months after Sanders' trial, Melissa was slain in an apparent murder-suicide by her boyfriend, Jeremy Wallenfang. Shane Hart, a person living in the house where the deaths occurred, told law enforcement that Wallenfang and Melissa were regular

methamphetamine users, having smoked "thousands of dollars worth of methamphetamine." Hart relayed that on the day before the shooting, the couple broke up and that Wallenfang had threatened to shoot Melissa. Although Melissa had gone to her mother's house, Hart surmised that she probably returned because "she needed meth."

One month later, Melissa's mother contacted law enforcement to report that when cleaning out Melissa's bedroom, she found a large amount of methamphetamine and six glass pipes in a duffel bag. Another witness told law enforcement that Melissa was "a big meth head and … [Wallenfang] was supplementing" her habit. The same witness claimed that she heard Melissa threaten to leave Wallenfang or call his "PO" if he did not provide her with methamphetamine.

Sanders filed a postconviction motion seeking a new trial based on newly discovered evidence consisting of Melissa's methamphetamine use. Sanders alleged that had he testified at trial, he would have told the circuit court that he had consensual sexual intercourse with Melissa after promising to give her methamphetamine, which he did not in fact have. Sanders further claimed that when he did not produce the methamphetamine, Melissa "got very mad" and accused him of raping her. Sanders averred that his decision not to testify at trial "was driven in part on my belief that it would be my word against hers that she even used methamphetamine." The court denied the postconviction motion without a hearing. This appeal follows.

Sanders argues that the circuit court erred by denying his postconviction motion without an evidentiary hearing. The court may, in its discretion, deny a postconviction motion without a hearing "if all the facts alleged in the motion, assuming them to be true, do not entitle the movant to relief; if one or more key factual allegations in the motion are conclusory; or if the record

conclusively demonstrates that the movant is not entitled to relief." ***State v. Allen***, 2004 WI 106, ¶12, 274 Wis. 2d 568, 682 N.W.2d 433 (footnote omitted). We review a circuit court's discretionary decisions under the deferential erroneous exercise of discretion standard. ***Id.***, ¶9.

To obtain a new trial based on newly discovered evidence, a defendant 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. Edmunds***, 2008 WI App 33, ¶13, 308 Wis. 2d 374, 746 N.W.2d 590 (citation omitted). If the defendant establishes all four criteria, then the circuit court must determine "whether a reasonable probability exists that a different result would be reached in a trial." ***Id.*** (citation omitted).

The circuit court determined that even accepting all of the alleged new evidence as true, the evidence was not material to an issue in Sanders' case. The court deemed the evidence irrelevant, noting there was "no connection between the meth evidence involving [Melissa] and the sexual assault incident involving [Sanders]." The court added:

> The fact [Melissa] used drugs and threatened her boyfriend in 2018 does not mean she was involved in similar conduct in 2015. The court surmises she may not have even met Wallenfang until after the sexual assault. One could postulate she never did meth until introduced to Wallenfang. It is just as speculative to say she was using meth during the time frame when she met Sanders.

The circuit court further noted that Melissa's purported drug use was not "newly" discovered evidence based on the testimony Sanders claims he would have given at trial—specifically, that the rape allegation was in retaliation for failing to provide methamphetamine after the two had consensual sex. *See* ***Vara v. State***, 56 Wis. 2d 390, 394, 202 N.W.2d 10 (1972) (holding that newly discovered evidence does not include newly discovered "importance" of

evidence previously known and not used). Despite Sanders' failure to establish all four criteria for newly discovered evidence, the court also determined that there was no reasonable probability of a different result at trial given the consistency of Melissa's description of the incident when compared to statements made to others, Melissa's demeanor on the witness stand, and the corroborating evidence supporting her testimony.

The circuit court acknowledged and applied the correct standard of law when it concluded that the evidence was neither "newly" discovered nor material to an issue in the case. The court also properly exercised its discretion when determining that there was no reasonable probability that the "new" evidence would result in a different outcome at trial. Because the record conclusively demonstrates that the movant is not entitled to relief, we conclude the court properly denied the motion without a hearing.

Upon the foregoing,

IT IS ORDERED that the judgment and order are summarily affirmed pursuant to 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