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DISTRICT IV

February 2, 2023

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

2021AP2055-CR State of Wisconsin v. Douglas N. Swenson (L.C. # 2018CF2355)

Before Kloppenburg, Fitzpatrick, and Nashold, 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).

Douglas Swenson appeals a judgment of conviction and an order denying his postconviction motion. 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 (2019-20).[1] We affirm.

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

During a jury trial in 2019, Swenson was convicted of third-degree sexual assault, strangulation and suffocation, and disorderly conduct. He filed a postconviction motion seeking a new trial on the basis of purportedly newly discovered evidence. This claim was based on a police investigation, approximately a year after Swenson's trial, into allegations that were made by the victim in Swenson's case against a different man. The motion described that material as follows:

> On July 29, 2020, the prosecutor filed a letter and multiple police reports detailing an investigation beginning on June 28, 2020 and continuing until July 22, 2020, documenting [the victim's] accusations of battery and sexual assault against another man … with whom she had a relationship and from whom she was trying to obtain a large sum of cash…. As shown in the police reports, [her] claims were contradicted by her ever-changing stories, as well as a recording of her attempts to extort money from [the man] and a video of the two having sex on the night of the alleged assault…. The state filed no charges against [the man].

The circuit court denied the motion based on a then-recently issued opinion of this court. The opinion supported the court's ruling because, quoting the circuit court, "facts and events arising after a defendant's trial do not satisfy the requirements for 'newly-discovered' evidence because the evidence did not, and could not, exist at the time of trial." *See* ***State v. Watkins***, 2021 WI App 37, ¶50, 398 Wis. 2d 558, 961 N.W.2d 884.

On appeal, Swenson first argues that ***Watkins*** was wrongly decided. However, he acknowledges that this court lacks the authority to overrule or modify its own opinions, and we do not further address this issue.

Swenson next argues that ***Watkins***, as applied to his case, violates his rights to present a defense and to due process. We conclude that we need not address this issue because Swenson's claim of newly discovered evidence fails under the law as it existed before ***Watkins***.

The State appears to concede that, if ***Watkins*** is not applied, Swenson has shown three of the four factors necessary to support a claim of newly discovered evidence. *See* ***id.***, ¶43 (identifying the factors). The State argues only that the evidence regarding the incident between the victim in this case and another man is cumulative. The State argues that it is cumulative because Swenson already argued at his trial that the victim had a motive to lie.

Swenson disagrees. He contends that, although he argued at trial that the victim had a motive to lie, he had little evidence to support the argument because he was lacking evidence that the victim would actually do what Swenson was claiming, namely, that she would make an accusation of sexual assault against a man she is in a relationship with for the purpose of obtaining something she wants. Swenson asserts that the State's argument "conflates arguments and evidence."

We conclude that this issue is controlled by case law relied on by the State. *See* ***State v. McAlister***, 2018 WI 34, 380 Wis. 2d 684, 911 N.W.2d 77. In ***McAlister***, the defendant was convicted of an armed robbery and an attempted armed robbery. ***Id.***, ¶18. His convictions were based in part on testimony by two alleged co-actors whose plea agreements included sentencing consideration from the State. ***Id.***, ¶¶5-16. On cross-examination of these witnesses, the defense used this consideration as a basis to attack their credibility. ***Id.***, ¶¶10, 16.

As newly discovered evidence, McAlister presented affidavits by three new witnesses who averred that, before McAlister's trial, the co-actors admitted to these new witnesses that they intended to falsely accuse McAlister of involvement in the crimes in order to reduce their own punishments. ***Id.***, ¶20. The supreme court held that this evidence was cumulative to the cross-examination conducted at trial. ***Id.***, ¶¶46-51.

As to one co-actor, the ***McAlister*** court characterized the affidavit allegations as "of the same general character, and to the same point for which testimony was elicited at trial, i.e., whether [the co-actor's] testimony that McAlister was involved in the armed robberies was truthful or whether he testified falsely to get a favorable plea bargain." ***Id.***, ¶46. Regarding the averments about the other co-actor, the court wrote: "The jury heard it all before. The McPherson affidavit is cumulative because it was drawn to the same point, i.e., that [the co-actor's] testimony was given in exchange for a lesser sentence for his own crimes. This is the same evidence that was presented to the jury." ***Id.***, ¶49.

McAlister appears to hold that evidence from new witnesses that a trial witness intended to lie at trial is cumulative to trial cross-examination of that witness that presented a motive for the witness to lie. Swenson argues here that information about the victim's new incident with the other man is substantive evidence of her willingness to lie in the manner that his cross-examination at trial could only imply. In that light, the situation before us is not readily distinguishable from ***McAlister***. Although this new information about the victim might arguably add weight to the cross-examination alone, the same was true in ***McAlister*** but did not affect the outcome. Accordingly, we conclude that Swenson's claim of newly discovered evidence was properly rejected under the law as it existed before ***Watkins***.

IT IS ORDERED that the judgment and order appealed from are summarily affirmed under 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