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DISTRICT II

July 26, 2023

To:

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Electronic Notice

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Clerk of Circuit Court
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Deshawn D. Johnson, #456307
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P.O. Box 2000
New Lisbon, WI 53950-2000

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

2021AP1066-CR State of Wisconsin v. Deshawn D. Johnson (L.C. #2006CF1064)

Before Gundrum, P.J., Neubauer and Lazar, 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).

Deshawn D. Johnson appeals pro se from an order denying his postconviction motion for relief. He argues that he was entitled to relief due to 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 (2021-22).[1] We affirm.

[1] All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

In 2007, Johnson was convicted following a jury trial of attempted first-degree intentional homicide. He was accused of shooting a man multiple times at close range at a bus stop. The circuit court imposed a sentence of twenty-five years of initial confinement and fifteen years of extended supervision.

This court affirmed Johnson's conviction in 2008. ***State v. Johnson***, No. 2008AP671-CRNM, unpublished op. and order (WI App July 2, 2008). We later affirmed the denial of his WIS. STAT. § 974.06 postconviction motion, which Johnson filed in January 2020. ***State v. Johnson***, No. 2020AP215, unpublished op. and order (WI App Mar. 16, 2022).

Johnson subsequently filed another WIS. STAT. § 974.06 postconviction in September 2020 that is the subject of this appeal. In it, he sought a new trial due to newly discovered evidence from two witnesses: a co-defendant named Jermaine Gooch[2] and the shooting victim, Z.V.

Gooch did not testify at Johnson's trial; however, he told authorities that he did not see the shooting. In an affidavit executed on July 22, 2020, Gooch recanted this statement, indicating that he had witnessed the shooting and that someone named "Drew" or "Andrew" was the perpetrator.

[2] Two months before Johnson's trial, Gooch pled guilty to conspiracy to commit first-degree recklessly endangering safety for his role in the shooting.

Z.V., meanwhile, did testify at Johnson's trial and identified Johnson as the shooter. However, in an affidavit executed on July 16, 2020, Z.V. recanted this testimony, indicating that he had lied at trial and did not know who the shooter was.

Ultimately, the circuit court denied Johnson's postconviction motion without a hearing. The court concluded that, based upon the District Attorney's representations,[3] Z.V. had recanted his recantation. The court further concluded that both witness affidavits lacked circumstantial guarantees of the trustworthiness and would not have led to a different result at trial. This appeal follows.

To prevail on a claim of newly discovered evidence, a defendant must show by clear and convincing evidence that (1) the evidence was discovered after the conviction; (2) he or she was not negligent in seeking it; (3) the evidence is material; and (4) the evidence is not merely cumulative. ***State v. Armstrong***, 2005 WI 119, ¶161, 283 Wis. 2d 639, 700 N.W.2d 98. If the defendant meets this burden, then the circuit court considers "whether a reasonable probability exists that a different result would be reached in a trial." ***State v. Love***, 2005 WI 116, ¶44, 284 Wis. 2d 111, 700 N.W.2d 62 (citation omitted).

When the newly discovered evidence involves a witness's recantation, the defendant must also demonstrate that the recantation is corroborated by other newly discovered evidence. ***State v. McCallum***, 208 Wis. 2d 463, 476, 561 N.W.2d 707 (1997). Corroboration is necessary because "[r]ecantations are inherently unreliable." ***Id.*** "Corroboration requires newly

[3] In a May 2021 letter to the circuit court, the District Attorney noted that Z.V. had "given a signed statement [to police] indicating that he only provided this false document to Mr. Johnson because of the pressure of Deshawn Johnson's family member, Sergio Brown." The record does not contain this statement, so the State does not rely upon it on appeal.

discovered evidence of both: (1) a feasible motive for the initial false statement; and (2) circumstantial guarantees of the trustworthiness of the recantation." ***State v. McAlister***, 2018 WI 34, ¶58, 380 Wis. 2d 684, 911 N.W.2d 77.

Finally, to earn a hearing on a postconviction motion, the defendant must allege "sufficient material facts that, if true, would entitle the defendant to relief." ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. If the motion alleges sufficient facts, a hearing is required. ***Id.*** If the motion is insufficient, if it presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the circuit court may exercise its discretion in deciding whether to grant a hearing. ***Id.*** We review the court's discretionary decision under the deferential erroneous exercise of discretion standard. ***Id.***

Here, we are satisfied that the circuit court properly denied Johnson's postconviction motion without a hearing. As noted by the State, Johnson's motion does not contain sufficient material facts to establish that he was "not negligent" in seeking the evidence in question. The witness affidavits were obtained thirteen years after Johnson's conviction and include statements suggesting that Johnson could have obtained them much earlier.[4] As further noted by the State, the affidavits do not meet the corroboration requirement because they lack circumstantial

[4] In Gooch's affidavit, he asserts, "The reason why I'm coming forward with this information at this time is because I was never contacted by Mr. Johnson['s] attorney before or during his trial. Had Mr. Johnson's attorney contacted me I would have informed him of the things that I have stated here." As for the timing of Z.V.'s affidavit, he explains, "[t]he [six-year] statute of limitations for falsifying information [has] ran it[]s course." These statements suggest that Johnson could have obtained the affidavits from Gooch and Z.V. as early as 2007 and 2013, respectively.

guarantees of trustworthiness. Not only was their near-identical timing suspicious, but the recantations themselves cannot be squared with the circumstances of the case.[5]

Johnson did not file a reply brief to contest any of the State's points. Accordingly, we deem them conceded. *See* ***State v. Chu***, 2002 WI App 98, ¶41, 253 Wis. 2d 666, 643 N.W.2d 878 ("Unrefuted arguments are deemed admitted.").

Upon the foregoing reasons,

IT IS ORDERED that the order of the circuit court is summarily affirmed, pursuant to WIS. STAT. RULE 809.21.

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

Samuel A. Christensen
Clerk of Court of Appeals

[5] Again, Gooch was Johnson's co-defendant. If he had seen someone else do the shooting, he presumably would have said so to avoid criminal liability. Instead, he pled guilty to conspiring with Johnson to carry out the shooting. Meanwhile, Z.V. was shot at close range and identified Johnson—someone he had known since the fourth grade and had had problems with over the years—as the shooter. It would have been difficult for Z.V. not to have identified the shooter if it was a person he knew. The testimony and statements of other eyewitnesses, including Johnson's own brother, confirm Z.V.'s identification of Johnson as the shooter.