**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**July 15, 2014**

**Diane M. Fremgen**
**Clerk of Court of Appeals**



**Appeal No. 2013AP1450** **Cir. Ct. No. 1999CF5150**

**STATE OF WISCONSIN** **IN COURT OF APPEALS**
**DISTRICT I**

**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**LISIMBA LITEEF LOVE,**

**DEFENDANT-APPELLANT.**

APPEAL from an order of the circuit court for Milwaukee County: JEAN A. DiMOTTO, Judge. *Affirmed.*

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 PER CURIAM. Lisimba Liteef Love appeals an order of the circuit court denying his motion for a new trial in his criminal case. He claims that he has newly discovered evidence warranting relief. The circuit court concluded that his evidence was not credible. We affirm.

## BACKGROUND

¶2 In January 2000, a jury found Love guilty of armed robbery as a party to a crime and as a habitual offender. The charges arose when Glenn Robinson, a professional basketball player, reported to police that, on September 28, 1999, two men robbed him at gunpoint in the parking lot of a Milwaukee tavern. Robinson identified Love as one of the robbers. The State charged Love and Effrim Moss with the crime. The jury that convicted Love was unable to reach a verdict as to Moss, and Moss was later acquitted in a second trial.

¶3 Love pursued a direct appeal. We affirmed. ***State v. Love***, No. 2001AP0817-CR, unpublished slip op. (WI App Dec. 11, 2001) (***Love I***). Next, he pursued a collateral attack on his conviction that eventually reached the supreme court. *See* ***State v. Love***, 2005 WI 116, 284 Wis. 2d 111, 700 N.W.2d 62 (***Love II***). Underlying ***Love II*** was Love's claim to have newly discovered evidence that his cousin, Floyd Lindell Smith, Jr., committed the armed robbery of Robinson. ***Id.***, ¶¶47-49. The supreme court concluded that Love was entitled to an evidentiary hearing on the claim. ***Id.***, ¶51. In 2006, following remand, the circuit court heard testimony from Love's childhood friend, Christopher Hawley, who had filed an affidavit stating that he spoke to Smith while the two men were incarcerated at the same institution. According to the affidavit, Smith admitted to Hawley that Smith committed the armed robbery of Robinson and that Love was innocent. At the hearing, however, Hawley viewed Smith in the courtroom and testified that Smith was not the person who confessed to the armed robbery. Smith himself invoked his right against self-incrimination. The circuit court

concluded that Hawley was not credible and denied Love any relief.[1] We affirmed. *See* ***State v. Love***, No. 2006AP2300-CR, unpublished slip op. (WI App July 5, 2007) (***Love III***).

¶4 Love filed another postconviction motion. He alleged that he now had newly discovered evidence from Moss and Willie L. Parchman inculpating Smith in the crime against Robinson. The circuit court conducted a hearing in 2010, and both Moss and Parchman testified. They described circumstances under which Smith told each of them that he, not Love, committed the armed robbery. The circuit court, however, identified significant inconsistencies and anomalies in the testimonies of Moss and Parchman. The circuit court concluded that Moss and Parchman were "not credible at all" and rejected Love's claim.[2] We affirmed. ***State v. Love***, No. 2010AP853, unpublished slip op. (WI App May 17, 2011) (***Love IV***).

¶5 Underlying the instant appeal is a 2013 postconviction motion in which Love again asserted that he has newly discovered evidence that exonerates him and inculpates Smith in the armed robbery. The circuit court conducted another hearing, and this time, Smith himself testified. He told the circuit court that he committed the armed robbery and that Love was not involved. The circuit court found that Smith was not a credible witness. The circuit court also took judicial notice that a predecessor circuit court found Moss and Parchman

[1] The Honorable Timothy G. Dugan presided over and resolved the 2006 circuit court proceedings.

[2] The Honorable Daniel A. Konkol presided over and resolved the 2010 circuit court proceedings.

incredible. The circuit court concluded that Love's claim for a new trial lacked any credible supporting evidence and denied relief.[3] Love appeals.

## DISCUSSION

¶6 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 evidence; (3) the evidence is material to an issue in the case, and (4) the evidence is not merely cumulative.'" ***Love II***, 284 Wis. 2d 111, ¶43 (citation omitted). If the defendant satisfies these four criteria, "'the circuit court must determine whether a reasonable probability exists that a different result would be reached in a trial.'" ***Id.***, ¶44 (citation omitted). This fifth criterion requires the defendant to demonstrate "'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.'" ***Id.*** (citation omitted, brackets in ***Love II***). The defendant must satisfy all five of the criteria to earn a new trial on the ground that he or she has newly discovered evidence. *See* ***State v. Kaster***, 148 Wis. 2d 789, 801, 436 N.W.2d 891 (Ct. App. 1989).

¶7 We review a circuit court's decision granting or denying a new trial based on newly discovered evidence by considering whether the circuit court erroneously exercised its discretion. *See* ***State v. Plude***, 2008 WI 58, ¶31, 310 Wis. 2d 28, 750 N.W.2d 42. A court erroneously exercises its discretion by applying the wrong legal standard or making a decision not reasonably supported

[3] The Honorable Jean A. DiMotto presided over and resolved the 2013 circuit court proceedings.

by the facts of record. *See* ***Johnson v. Cintas Corp. No. 2***, 2012 WI 31, ¶22, 339 Wis. 2d 493, 811 N.W.2d 756. "'Because the exercise of discretion is so essential to the [circuit] court's functioning, we generally look for reasons to sustain discretionary decisions.'" ***Burkes v. Hales***, 165 Wis. 2d 585, 591, 478 N.W.2d 37 (Ct. App. 1991) (citation and one set of brackets omitted).

¶8 Love first asserts that the circuit court erred by finding he relied on the testimony of a witness who was incredible. In pursuing such a challenge, Love assumes a heavy burden. We defer to the credibility assessments of a circuit court "because of its superior opportunity to observe the demeanor of witnesses and to gauge the persuasiveness of their testimony." ***State v. Carnemolla***, 229 Wis. 2d 648, 661, 600 N.W.2d 236 (Ct. App. 1999). Therefore, we will not disturb a circuit court's credibility assessments unless they are clearly erroneous. *See* ***State v. Thiel***, 2003 WI 111, ¶23, 264 Wis. 2d 571, 665 N.W.2d 305. Love nonetheless contends that deference to the circuit court's credibility assessment is improper here because, he says, the circuit court committed legal error by assessing credibility at all. In his view, a circuit court considering a claim of newly discovered evidence "is not supposed to determine credibility." He is wrong.

¶9 A circuit court certainly may conduct a credibility assessment when considering a claim for a new trial based on newly discovered evidence. *See* ***Carnemolla***, 229 Wis. 2d at 656, 660-61. If, upon conducting that assessment, the circuit court deems the newly discovered evidence credible, the court next determines whether a jury, after hearing all of the evidence, would have a reasonable doubt as to the defendant's guilt. ***State v. Edmunds***, 2008 WI App 33, ¶18, 308 Wis. 2d 374, 746 N.W.2d 590. When called upon to make such a determination, the circuit court does not weigh the credible evidence. *See* ***id.*** If, however, the circuit court concludes that the newly discovered evidence lacks any

credibility, that conclusion "is the equivalent of finding that there is no reasonable probability of a different outcome on retrial." *See* ***Carnemolla***, 229 Wis. 2d at 661. Thus, the circuit court does not err by determining whether newly discovered evidence is credible. Rather, the circuit court performs its duty.

¶10 In this case, the circuit court assessed Smith's testimony and concluded that it was not credible. The circuit court first observed that Smith described himself as "a man of many hustles" and that he had a long history of "crimes of dishonesty." Further, the circuit court considered Smith's demeanor and found that he was "slick" and "belligerent to the State, as well as to the court." The circuit court also determined that Smith's testimony seemed "coached" and that the coaching appeared to account for "some of the discrepancies on the stand." Indeed, as the State pointed out in opposing the motion for a new trial, Smith appeared unfamiliar with the fundamental facts and circumstances of the robbery: he did not know the location of the tavern where the robbery occurred, the time of the robbery, or details about the items stolen from Robinson. Finally, the circuit court took into account both that Smith had a motive to lie because he is Love's cousin and that Smith faced minimal risk from incriminating himself because the statute of limitations for the armed robbery offense has expired. The circuit court found that "the total effect was that he was an incredible witness."

¶11 We are satisfied that the circuit court considered highly relevant factors in determining whether to credit Smith's testimony. Our standard of review dictates that we sustain the circuit court's decision. *See* ***Thiel***, 264 Wis. 2d 571, ¶23.

¶12 Because the circuit court concluded that Love failed to present any credible evidence, the circuit court necessarily determined "that there is no

reasonable probability of a different outcome on retrial." *See* ***Carnemolla***, 229 Wis. 2d at 661. The circuit court therefore concluded that Love failed to satisfy the necessary criteria to support his claim. *See* ***id.***

¶13 Love asserts, however, that the circuit court erred by considering only the evidence presented at the 2013 motion hearing. Specifically, Love claims that the circuit court should have determined whether he has newly discovered evidence by examining not only the testimony Smith gave in 2013 but also the testimony that Moss and Parchman gave in 2010.

¶14 The doctrine of issue preclusion bars the relitigation of previously litigated issues unless the party seeking relitigation prevails in a multifaceted test. *See* ***State v. Sorenson***, 2001 WI App 251, ¶¶11, 13-14, 248 Wis. 2d 237, 635 N.W.2d 787, *aff'd as modified*, 2002 WI 78, 254 Wis. 2d 54, 646 N.W.2d 354. Love argues that the circuit court erroneously relied on the doctrine of issue preclusion here to discount Moss's and Parchman's testimonies because, Love says, the doctrine "does not apply to a motion for newly discovered evidence." In support, he relies on this court's opinion in ***Sorenson***.

¶15 As the State accurately explains, Love has misread our ***Sorenson*** opinion. In that case, we concluded that the circuit court failed to complete the analysis required for application of the doctrine of issue preclusion, not that the

doctrine is inapplicable to claims of newly discovered evidence.[4] *See* ***Sorenson***, 248 Wis. 2d 237, ¶¶4, 32-33.

¶16 Love next argues that the circuit court erred by taking judicial notice of the predecessor circuit court's conclusion that Moss and Parchman were not credible witnesses. In support, Love again advances the theory that a circuit court cannot assess credibility in the context of resolving a newly discovered evidence claim. As we have already explained, this position is incorrect, so Love's contention must fail.

¶17 Last, Love asserts that we should exercise our discretionary power of reversal and grant him a new trial pursuant to WIS. STAT. § 752.35 (2011-12).[5] He claims that the real controversy has not been fully tried because a jury has not heard Smith's confession or testimony from Moss and Parchman corroborating that confession. To establish that the real controversy has not been fully tried, Love "must convince us that the jury was precluded from considering 'important testimony that bore on an important issue.'" *See* ***State v. Darcy N.K.***, 218 Wis. 2d 640, 667, 581 N.W.2d 567 (Ct. App. 1998) (citation omitted). Here, however, Love seeks a new trial so that he may call witnesses that circuit courts have

[4] In the reply brief, Love abandons his argument that issue preclusion is inapplicable to a motion for newly discovered evidence, offering nothing to refute the State's reading of our opinion in ***State v. Sorenson***, 2001 WI App 251, 248 Wis. 2d 237, 635 N.W.2d 787, *aff'd as modified*, 2002 WI 78, 254 Wis. 2d 54, 646 N.W.2d 354. Instead, he argues for the first time that proper application of the doctrine of issue preclusion supports relitigating his claim that testimony from Moss and Parchman is newly discovered evidence warranting a new trial. We normally do not address arguments offered by an appellant for the first time in a reply brief because the respondent has no opportunity to address the points made. *See* ***State v. Lock***, 2013 WI App 80, ¶38 n.6, 348 Wis. 2d 334, 833 N.W.2d 189. We follow our normal practice here.

[5] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

uniformly found incredible. Love fails to persuade us that testimony from such witnesses is "important," or that the real controversy has not been fully tried until a jury hears from witnesses who cannot be believed. For all the foregoing reasons, we affirm.

*By the Court.*—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.