COURT OF APPEALS
DECISION
DATED AND FILED

January 21, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal Nos. 2014AP484
2014AP485

Cir. Ct. Nos. 2009CF001966
2009CF002064

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

WILL HAYWOOD,

DEFENDANT-APPELLANT.

APPEALS from orders of the circuit court for Milwaukee County: DAVID L. BOROWSKI, Judge. *Affirmed*.

Before Kessler, Brennan, JJ., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Will Haywood appeals the orders denying his motion for postconviction relief based on newly discovered evidence and the motion for reconsideration that followed.[1] We affirm.[2]

BACKGROUND

¶2 Haywood was convicted, following a jury trial, of three counts each of kidnapping, second-degree sexual assault, and first-degree sexual assault, and two counts of child enticement. Haywood's crimes had three victims: Eugene L., Quentin K., and Joshua C.

¶3 The underlying facts were set forth in our decision affirming Haywood's convictions on direct appeal, *see* ***State v. Haywood***, 2011AP809-CR, 2011AP810-CR, unpublished slip op. (WI App May 30, 2012) (***Haywood I***), and need not be repeated in detail. For purposes of this appeal, it suffices to restate only the following:

> **Haywood's testimony**
>
> Haywood testified on his own behalf and denied all of the allegations.
>
> ….
>
> Haywood testified that he first met Eugene on April 21, 2009. According to Haywood, on that date, Eugene tried to break into Haywood's prior residence. Haywood was driving past the house and happened to see Eugene there. Haywood approached Eugene and asked him what he was doing at the house. When he did not get a response,

[1] These appeals were consolidated for briefing and dispositional purposes.

[2] The Honorable Jeffrey A. Conen entered the underlying judgments of conviction. The Honorable David L. Borowski entered the orders denying Haywood's request for postconviction relief and the motion for reconsideration that followed.

> Haywood threatened to call the police. Haywood testified that he was then grabbed from behind by another young man. As Eugene and the other man were dragging Haywood, he kicked Eugene in the face.
>
> Haywood then saw Quentin with a fourth man. The fourth man had a gun. Haywood was pushed into the garage and was forced to give oral sex to each of the four men, including Eugene and Quentin. He was then anally raped by one of the men. Haywood did not report the assault to anyone because he was embarrassed. He did not tell the police about the assault after he was arrested.

Id., ¶¶19, 22-23.

¶4 Eighteen months after we decided his direct appeal, Haywood wrote two letters to the circuit court. The first letter stated:

> I know you don't want to hear from me, but I needed your help. I have new evidence. Please read Haywood's testimony please…. The new evidence is Jonathan Clark That's the fourth men [sic] that had the gun from April of 2009[.] I didn't say his name because I don't am sorry didn't know his name, but I know how he look. Please look it up. Judge I know you think bad about me. But this is not who I am Sir, am gay, but I didn't do this. He's in for sexually assaulting wonmen [sic] He's to gay the news said and 2011 if he did this to you please come up, well sir am comeing [sic] up. Please ask the DA to look at it please.
>
> Thank you for your time.

(Some capitalization omitted.)

¶5 The second letter stated: "This is not a copy cat this is the men that did this to me. He's why [sic] am here sir. Please look at this case Thank you for your time." (Some capitalization omitted.)

¶6 The postconviction court denied Haywood's motion, explaining, "[Haywood's] letter is completely incomprehensible and sets forth no cognizable basis for relief in the above cases."

¶7 In a follow-up letter, Haywood again asked the court:

> Sir please look at my case. New evidence is Jonathan Clark. That's the f[o]urth men [sic] that had the gun on me on April 21, 2009 Please look at my case "Please" Thank you for your time.
>
> Dated 1-10-2014
>
> (P.S[.] He's lock up now for the same thing)

¶8 The postconviction court treated Haywood's letter as a request for reconsideration and issued a decision and order denying the request. The postconviction court explained:

> [T]he defendant filed a *pro se* request to reconsider his motion for postconviction relief based on new evidence. The proffered new evidence is the identification of Jonathan Clark as the fourth man that the defendant claims held a gun on him during the April 21, 2009 incident. The defendant testified at trial that a fourth man armed with a gun was with Eugene, Quentin and another man when he was forced to give oral sex to each of the four men and was anally raped by one of them. The jury did not believe his testimony. The fact that the defendant has identified the fourth man by name does not meet the standard for newly-discovered evidence under ***State v. Coogan***, 154 Wis. 2d 387, 394-95[, 453 N.W.2d 186] (1990)[,] and ***State v. Boyce***, 75 Wis. 2d 452, 457[, 249 N.W.2d 758] (1977).

This appeal follows.

DISCUSSION

¶9 Haywood argues that he is entitled to a new trial based on newly discovered evidence of the name of the armed man who, he testified at trial, forced

him to perform oral sex on the victims. According to Haywood, this evidence "is admissible to show intent, plan and motive as it related to the untruth kidnap[p]ing, raped and with a gun allegations of Quentin K. and Eugene L." (Some capitalization omitted.)

¶10 A defendant seeking a new trial based on newly discovered evidence must prove by clear and convincing evidence all of the following: (1) the evidence was discovered after trial, (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 to the evidence that was introduced at trial. ***State v. Avery***, 2013 WI 13, ¶25, 345 Wis. 2d 407, 826 N.W.2d 60 (quotation marks and citation omitted). If all four factors are proven, "then it must be determined whether a reasonable probability exists that had the jury heard the newly-discovered evidence, it would have had a reasonable doubt as to the defendant's guilt." ***State v. Plude***, 2008 WI 58, ¶32, 310 Wis. 2d 28, 750 N.W.2d 42.

¶11 Here, Haywood fails to explain in his postconviction filings exactly how the name Jonathan Clark would have impacted his case in any regard, let alone convince us that there is a reasonable probability that the jury would have doubted his guilt if it had heard the name Jonathan Clark.[3] *See* ***id.***, ¶33 (Whether newly discovered evidence would change the result of the trial is a question of law considered independently by an appellate court.). We point out that there is a

[3] To the extent he tries to address this shortcoming in his reply brief, he is too late. We generally do not consider issues raised for the first time on appeal, and we decline to do so here. *See* ***Wirth v. Ehly***, 93 Wis. 2d 433, 443-44, 287 N.W.2d 140 (1980), *superseded by statute on other grounds*.

complete lack of evidentiary support for Haywood's undeveloped and conclusory assertions. *See* ***Associates Fin. Servs. Co. of Wis., Inc. v. Brown***, 2002 WI App 300, ¶4 n.3, 258 Wis. 2d 915, 656 N.W.2d 56 (appellate courts generally do not consider conclusory assertions and undeveloped issues).

By the Court.—Orders affirmed.

This opinion shall not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2011-12).