COURT OF APPEALS
DECISION
DATED AND FILED

December 1, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP1462 **Cir. Ct. No. 1995CF954803**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAVID MARTELL WILSON,

DEFENDANT-APPELLANT.

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

Before Curley, P.J., Brennan, J., and Daniel L. LaRocque, Reserve Judge.

¶1 PER CURIAM. David Martell Wilson, *pro se*, appeals a trial court order denying his postconviction motion filed under WIS. STAT. § 974.06

(2013-14).[1] Wilson claims he has newly discovered evidence warranting a new trial, his postconviction counsel was ineffective, the prosecutor engaged in misconduct, the trial evidence was insufficient for conviction, and he was sentenced on the basis of inaccurate information. We reject his arguments and affirm.

BACKGROUND

¶2 Patrick Quinn was shot in the chest while he sat in his car at approximately 1:30 a.m. on August 6, 1995. The gunshot killed him, and the State charged Wilson with felony murder and possessing a firearm while a felon. The matter proceeded to a jury trial in February 1996. The jury returned guilty verdicts, and the trial court determined that he was a habitual offender. He received an aggregate sentence of seventy-eight years in prison. He appealed, and we affirmed. *See* ***State v. Wilson***, No. 1997AP1338-CR, unpublished slip op. (WI App Aug. 11, 1998) (***Wilson I***).

¶3 We discussed the trial evidence at length in ***Wilson I***. To assist in our discussion of the issues currently before the court, we review a portion of that evidence again here:

> Lataro P. Jones (a/k/a "Pee-Wee") testified that, on August 5, 1995, he attended a wedding reception with David Wilson (a/k/a "Snake")..... Jones testified that, at approximately 6:00 p.m., he and David Wilson left the wedding reception and drove to the house of Shema Huff,

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

one of their "associates." Jones testified that, at approximately 9:00 p.m., he and Wilson left Huff's house in Wilson's girlfriend Bonita Field's car, a four-door blue station wagon, which Wilson was driving. Jones testified that they drove around for a while, and at approximately 12:00 a.m., arrived at a party at Patricia Burks's house, located near 31st Street and West Brown Street. Jones testified that, after approximately thirty minutes, he left the party, accompanied by: Wilson; Nathaniel Bell, who is Burks's son; Jimmy Bell, who is Nathaniel Bell's cousin; and a person named Kenneth, who was Jimmy Bell's friend. Jones testified that they all left in the blue station wagon, which Wilson was driving, that Jones was in the front passenger seat, and that the three others were in the back seat.

Jones testified that Wilson drove the car to a Citgo filling station located at the intersection of 31st Street and Lisbon Avenue. Jones testified that he, Wilson, and some of the others in the back seat then exited the car. Jones testified that he then saw Patrick Quinn, and that Quinn asked Jones if he "knew where to score for him." Jones testified that he understood Quinn to be interested in buying cocaine, and that Jones told Quinn that he knew where to get cocaine for him. Jones testified that he told the others to follow him, and entered Quinn's car on the passenger side. Jones testified that he then directed Quinn to drive to a location near the corner of 31st Street and West Brown Street. Jones testified that Wilson followed Jones and Quinn to 31st Street and West Brown Street in Wilson's car, and pulled up behind Quinn's parked car. Jones testified that he exited Quinn's car, walked to Wilson's car, and told Wilson that he was going to get some crack for Quinn. Jones testified that Wilson said that he had some crack, exited the car, and walked to Quinn's car. Jones testified that when Wilson reached Quinn's car, Wilson entered and sat in the passenger seat, and that Jones then sat in the passenger seat of the station wagon. Jones also testified that Nathaniel Bell had exited the station wagon, but that Jimmy Bell and Kenneth remained in the back seat.

Jones testified that, sometime between five seconds and four minutes after Wilson entered Quinn's car, Jones heard a shot. Jones testified that he then saw Wilson exit Quinn's car and return to Wilson's car, and that Wilson told Jones to "scoot over" into the driver's seat. Jones testified that he moved into the driver's seat and that Wilson entered the car and sat in the passenger seat. Jones testified that he saw that Wilson had a gun, that he had

> blood on his hands and shorts, and that he said something to the effect that "he reached and he caught one in the shoulder."
>
> ....
>
> Nathaniel Bell also testified as a witness for the State. Bell testified similarly to Jones, and corroborated much of Jones's testimony. Bell testified that, before the shooting, he exited Wilson's car and walked around the corner. Bell testified that, when he heard the gunshot, he turned around and saw Wilson exit Quinn's car and return to the station wagon. Bell testified that, after the shooting, Quinn exited his car and ran toward him, swearing, with a hole in his chest.

Wilson, No. 1997AP1338-CR at 2-5. In defense, Wilson offered the alibi that he was at his brother's wedding reception until 12:45 a.m. on August 6, 1995, when another of his brothers drove Wilson to Huff's home. ***Id.*** at 6. Wilson's girlfriend testified that Wilson called her at approximately 1:00 a.m., she picked him up from Huff's home about an hour later, and Wilson spent the remainder of the night with her. ***Id.*** at 6-7.

¶4 The jury found Wilson guilty, and he pursued postconviction relief. The trial court denied his postconviction motions and he appealed, claiming: (1) the trial court erroneously exercised its discretion when it denied his motion for an adjournment or continuance of his trial; (2) the trial court erred when it found that the prosecutor did not comment in closing argument on Wilson's choice not to testify; and (3) the trial court erroneously denied his claim of ineffective assistance of counsel. ***Id.*** at 1-2. We rejected his claims. *See* ***id.***

¶5 In May 2014, Wilson filed a postconviction motion under WIS. STAT. § 974.06. He claimed he had newly discovered evidence, the State engaged in misconduct before and during his trial, the evidence was insufficient to convict him, the sentencing court relied on inaccurate information, and his postconviction

counsel was ineffective in various ways. The trial court denied the motion without a hearing, and he appeals.

ANALYSIS

¶6 Wilson first claims he has newly discovered evidence entitling him to a new trial. 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.'" ***State v. Love***, 2005 WI 116, ¶43, 284 Wis. 2d 111, 700 N.W.2d 62 (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). Additionally, when a defendant seeks a new trial on the basis of a witness's admission of perjury, the facts in the recanting witness's affidavit must be corroborated by other newly discovered evidence. *See* ***Rohl v. State***, 64 Wis. 2d 443, 453, 219 N.W.2d 385 (1974)

¶7 Wilson's newly discovered evidence is contained in a 2003 affidavit from Nathaniel Bell.[2] In the affidavit, Bell claims he testified under pressure from State actors, and he recants the testimony he gave inculpating Wilson. The affidavit provides, in part:

[2] Nathaniel Bell's affidavit is sworn to as signed on September 9, 2003. Wilson submitted the affidavit with his postconviction motion filed in May 2014. As the trial court pointed out when resolving the motion, "it is unknown why Wilson did not file the affidavit sooner, or whether Bell is still alive or whether he would affirm the statements made in his 2003 affidavit at this time." Throughout the remainder of this opinion, we refer to Nathaniel Bell as "Bell." To avoid confusion, we refer to Jimmy Bell by his full name.

> (1) I testified at a jury trial and gave a false testimony for the District Attorney in the case against David Wilson.
>
> (2) I testified that I was in the car when David Wilson got out of the vehicle he was driving and entered the victim's car in a[n] attempt to rob him. Where upon I heard a gun shot, and then Mr. Wilson exited the victim's car. This testimony and all other statements I previously made before this testimony were falsely made under pressure by law enforcement agents who questioned me.
>
> ....
>
> (11) I do re-call seeing Mr. David M. Wilson on the day in question, at a party that my mother Patricia Burks had given earlier in the day (evening). But he was not the person I seen later that night who got out of the victim's car after I heard the shot.
>
> (12) The person I really saw get out of the victim's car when I heard the gun go off was Jimmy Bell, who then ran away from the crime scene. It was not David Wilson.

(Emphasis and some parentheses omitted.)

¶8 Bell's affidavit is a recantation of Bell's trial testimony. Wilson therefore must offer other newly discovered evidence to corroborate the evidence in the affidavit. *See* ***Rohl***, 64 Wis. 2d at 453. Wilson does not offer any such evidence. The omission dooms Wilson's claim.

¶9 In the postconviction motion, Wilson argued that his failure to offer newly discovered evidence to corroborate Bell's 2003 averments is not fatal to his claim because the Bell affidavit is corroborated by evidence that was presented at trial. The trial court properly rejected this contention, explaining that trial evidence does not qualify as "newly discovered." *See* ***Love***, 284 Wis. 2d 111, ¶43 (requiring that newly discovered evidence be discovered after conviction).

¶10 In this court, Wilson argues he has provided newly discovered corroborating evidence within the meaning of ***State v. McCallum***, 208 Wis. 2d 463, 561 N.W.2d 707 (1997). In ***McCallum***, a complaining witness recanted allegations of sexual contact after the defendant was convicted of sexual assault, and the defendant claimed the recantation was newly discovered evidence entitling him to a new trial. *See* ***id.*** at 468-69. In assessing the claim, the supreme court addressed the vexing question of how to "corroborate the recantation of an accusation that involves solely the credibility of the complainant, inasmuch as there is no physical evidence and no witnesses." *See* ***id.*** at 477. Citing this court's earlier decision in the matter, the supreme court agreed that '"under the circumstances presented [in ***McCallum***], the existence of a feasible motive for the false testimony together with circumstantial guarantees of the trustworthiness of the recantation are sufficient to meet the corroboration requirement.'" ***Id.*** (citation omitted).

¶11 The circumstances of Wilson's case are nothing like those in ***McCallum***. Wilson's convictions for felony murder and possession of a firearm while a felon did not turn solely on the credibility of a single complainant who made an accusation in the absence of physical evidence and without witnesses. The State supported the allegations against Wilson with physical evidence, including the body of a victim murdered by a gun shot, and with the testimony of multiple witnesses, including several eye witnesses who placed Wilson at the scene of the crime. Accordingly, to satisfy the corroboration requirement, Wilson must corroborate Bell's recantation with evidence from another source. *See* ***Rohl***, 64 Wis. 2d at 453. Wilson fails to offer such evidence.

¶12 For the sake of completeness, we add that, were we to agree with Wilson that ***McCallum*** guides the analysis here, we would conclude that Wilson

fails to satisfy the ***McCallum*** requirements. Wilson has not demonstrated "a feasible motive for the initial false statement[] and ... circumstantial guarantees of the trustworthiness of the recantation." *See* ***McCallum***, 208 Wis. 2d at 478.

¶13 Wilson disagrees. He contends that Bell's affidavit reflects a feasible motive for giving false testimony "in the form of pressure and threats to Bell by the police's outrageous conduct of threatening him to frame Wilson." In support of the contention, Wilson points to allegations in Bell's affidavit that police threatened to charge Bell with felony murder, threatened to charge both Bell and his mother with felonious possession of a firearm, and threatened Bell with physical abuse "if Bell didn't frame Wilson for the felony murder."

¶14 These allegations of threats and coercion do not constitute a "feasible motive" for Bell to falsely accuse Wilson. Nothing in the affidavit explains why it is feasible that police pressured Bell to "frame" an innocent person rather than to accuse the real murderer, who Bell suggests in the affidavit was Jimmy Bell.

¶15 Additionally, the affidavit does not contain the circumstantial guarantees of trustworthiness required by ***McCallum***. In that case, the supreme court concluded that the recanting witness's affidavit had such guarantees because: (1) it was internally consistent and given under oath; (2) the recantation was consistent with the circumstances existing at the time of the initial accusation; and (3) the recanting witness "was advised at the time of her recantation that she faced criminal consequences if her initial allegations were false." ***Id.*** These guarantees are not present here.

¶16 First, Bell's affidavit is not internally consistent. At paragraph two, Bell avers that his trial testimony was false in its entirety. At paragraph twelve,

however, he reveals that some of the trial testimony was true, including, specifically, the testimony that he was present at the scene of the crime and heard a gun shot.

¶17 Second, the affidavit is in conflict with the undisputed evidence and with Wilson's alibi. As we noted in ***Wilson I***, no one denied that Wilson attended his brother's wedding, which began at approximately 2:00 p.m. on August 5, 1995. ***Id.***, No. 1997AP1338-CR at 11. According to Wilson's alibi witnesses, Wilson spent the remainder of the afternoon and evening at the wedding reception, save for a brief interval that he spent with his girlfriend at Huff's home.[3] Notwithstanding this alibi testimony, Bell states in the affidavit that he saw Wilson at a party given by Bell's mother, Burks, "earlier in the day (evening)." Bell's claim that Wilson went to a party with Bell at his mother's house during the evening of August 5, 1995, is simply not consistent with the evidence Wilson produced at trial placing him at a wedding, a wedding reception, and with his girlfriend at the home of an acquaintance named Huff throughout the afternoon and evening of that day.[4]

[3] The testimony of Wilson's alibi witnesses included descriptions of Wilson's activities immediately following the wedding on August 5, 1995. We did not summarize the totality of that testimony in ***State v. Wilson***, No. 1997AP1338-CR, unpublished slip op. (WI App Aug. 11 1998) (***Wilson I***). We note here that the bride testified she saw Wilson at the reception while she was setting up the area at 4:30 p.m. The groom testified that Wilson was still at the reception a little after 5:00 p.m. The bride's brother testified he saw Wilson at the reception at 6:00 p.m. or 7:00 p.m. Somewhat inconsistently, Wilson's girlfriend testified that at approximately 7:00 p.m., she talked to Wilson while they were both at the home of Shema Huff. The bride's sister-in-law testified that she saw Wilson back at the reception at 7:30 p.m. A description of Wilson's alibi for the later hours of August 5, 1995, and the early morning hours of August 6, 1995, appears in ***Wilson I***, No. 1997AP1338-CR, at 6, 10 & n.4. We have already summarized that testimony earlier in this opinion.

[4] As discussed at the outset of this opinion, witnesses for the State testified that Wilson was at Burks's birthday party early in the morning of August 6, 1995.

¶18 Third, Bell's affidavit does not reflect that Bell received any warnings when he executed it. Nothing suggests that Bell learned at the time he recanted that his recantation might put him at risk of criminal prosecution.[5]

¶19 In sum, the newly discovered evidence Wilson offers here fails to satisfy the requirements of both ***Rohl*** and ***McCallum***. We therefore reject Wilson's claim that he has newly discovered evidence that earns him a new trial.

¶20 Wilson next claims he is entitled to relief based on alleged "outrageous government conduct," namely, threats against Bell by State actors "in order to frame Wilson for felony murder." Relatedly, he claims his judgment of conviction is invalid because the jury was unaware of the alleged threats against Bell. We agree with the State that these contentions are merely a component of Wilson's claim to have newly discovered evidence. Bell's affidavit includes allegations that police and prosecutors threatened Bell and his family members to coerce him into fabricating evidence against Wilson. These avowals constitute a recantation of Bell's testimony at trial that he had not been pressured to testify against Wilson. Bell's recantation, however, is not supported by other newly discovered evidence, as required by ***Rohl***. *See* ***id.***, 64 Wis. 2d at 453. Moreover, as we have already explained, Wilson does not show a feasible motive for Bell's initial false statements and the affidavit lacks circumstantial guarantees of trustworthiness. *See* ***McCallum***, 208 Wis. 2d at 478. Accordingly, Wilson's claim fails.

[5] Wilson's unexplained eleven-year delay in submitting the Bell affidavit to the trial court adds to the questions about the trustworthiness of the document.

¶21 Next, Wilson offers interrelated claims that the prosecutor engaged in misconduct and his postconviction counsel was ineffective. To prevail on a claim of ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that the deficiency prejudiced the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To obtain postconviction relief based on a claim of prosecutorial conduct, the alleged misconduct must "rise to such a level that the defendant is denied his or her due process right to a fair trial." *See* ***State v. Wolff***, 171 Wis. 2d 161, 167, 491 N.W.2d 498 (Ct. App. 1992). Absent prejudice, prosecutorial misconduct is not a basis for reversal or a new trial. *See* ***Nelson v. State***, 59 Wis. 2d 474, 487, 208 N.W.2d 410 (1973).

¶22 Here, Wilson claims the State engaged in misconduct by telling the jury—falsely, he maintains—that his witnesses delayed giving him an alibi until his trial began. Relatedly, he alleges he was denied a fair trial when the State produced some discovery documents relating to his alibi witnesses for the first time at trial and the trial court denied him a continuance to review those documents. He argues that he was prejudiced because, but for the belated disclosure of documents, he could have refuted the prosecutor's alleged misstatements about his witnesses' delay in coming forward with exculpatory evidence. He contends his postconviction counsel was ineffective for failing to make these arguments.

¶23 As the trial court correctly determined, Wilson's claims must fail because Wilson litigated them in ***Wilson I***. *See* ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991) (matter litigated in postconviction proceeding may not be relitigated in subsequent postconviction proceeding no matter how artfully the defendant may restate the issue). In ***Wilson I***, he argued that the trial court erroneously exercised discretion by denying him a continuance

"because the State's delivery of certain discovery materials on the first day of trial violated [his] constitutional right to due process, and statutory right to pretrial discovery." ***Wilson I***, No. 1997AP1338-CR at 7. He further argued that if the State had disclosed the disputed material earlier, "he would have been able to effectively counter the State's suggestion that his alibi witnesses had recently fabricated their testimony." ***Id.*** at 10.

¶24 In assessing the claims presented in ***Wilson I***, we considered Wilson's contention that the prosecutor had a duty to disclose the pretrial statements at issue. *See* ***id.*** at 8-9. We concluded both that the prosecutor did not have such a duty, *see* ***id.***, and that "Wilson was not prejudiced by the State's failure to deliver the evidence earlier," ***id.*** at 9. Moreover, in assessing the discovery provided at trial in light of the testimony, we concluded: "had the discovery arrived earlier, David Wilson still could not have successfully countered the prosecutor's valid comment on the 'eleventh hour' nature of the alibi witnesses[']s testimony." *See* ***id.*** at 11.

¶25 In the current litigation, Wilson uses the rubrics of prosecutorial misconduct and ineffective assistance of counsel instead of erroneous exercise of discretion and the duty to disclose, but, as in ***Wilson I***, his claims are that he was prejudiced by delayed receipt of discovery material and by the prosecutor's alleged misstatements about his witnesses. Thus, his current claims are not new. They are merely reformulations of the arguments we considered and rejected in ***Wilson I***. We will not consider them again. *See* ***Witkowski***, 163 Wis. 2d at 990.

¶26 Wilson next argues that his postconviction counsel was ineffective for failing to claim that the evidence at trial was insufficient to support his conviction. Although we will briefly address this claim, we caution Wilson that it

comes within a hair's breadth of the line that separates a feeble argument from a frivolous one.

¶27 When this court reviews the sufficiency of the evidence on appeal, we apply a highly deferential standard. We may not substitute our judgment for that of the jury unless the evidence, viewed most favorably to the State and the conviction, is so lacking in probative value and force that no reasonable jury could have found guilt beyond a reasonable doubt. ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990). This court will uphold the verdict if any possibility exists that the jury could have drawn the inference of guilt from the evidence. ***Id.***

¶28 We examined the evidence at length when we resolved ***Wilson I***. *See* ***id.***, 1997AP1338-CR at 2-6, 9-12. We have again summarized some of the trial testimony at the outset of this opinion. As our reviews show, the evidence included testimony from eye witnesses who knew Wilson and said they saw him get into Quinn's car on August 6, 1995, just before they heard a gunshot. An eye witness also described seeing Wilson get out of the car and then seeing Quinn with a gunshot wound in his chest. Wilson's friend Jones testified that when Wilson returned to his own car, he was armed with a gun, he had blood on his hands and shorts, and, when asked what happened in Quinn's car, Wilson said that Quinn "caught one" in the shoulder. The evidence amply supports the jury's finding that Wilson killed Quinn. Wilson's appointed counsel did not perform deficiently by foregoing a meritless contrary claim. *See* ***State v. Wheat***, 2002 WI App 153, ¶14, 256 Wis. 2d 270, 647 N.W.2d 441 (counsel not required to make meritless arguments).

¶29 Wilson last contends that the trial court sentenced him based on inaccurate information, namely, allegations by citizens who spoke at sentencing

and claimed that Wilson had previously killed other people before he killed Quinn. To prevail on such a claim, Wilson must '"show both that the information was inaccurate, and that the court actually relied on the inaccurate information in the sentencing.'" *See* ***State v. Tiepelman***, 2006 WI 66, ¶17, 291 Wis. 2d 179, 717 N.W.2d 1 (citation omitted).

¶30 The record defeats Wilson's claim. The sentencing court recognized that Wilson had at one time faced a charge of murdering Theodis Bankhead, and the sentencing court noted that the charge was dismissed. The sentencing court also discussed a charge of second-degree murder against Wilson arising from the death of Lenzy Brunson, and the sentencing court recognized that Wilson resolved the second-degree murder allegation with a plea to a lesser charge.[6] The sentencing court explicitly assured Wilson that it would not give any weight to the charge concerning Bankhead, but, as to the second matter, the sentencing court said it would consider that Wilson "pled guilty to some crime, whether it was an ***Alford*** guilty plea or not, [he] pled guilty to a serious felony offense in connection with an incident that resulted in someone's death." The record thus clearly shows that the sentencing court did not base its sentencing decisions on misinformation about Wilson's record.

[6] The record includes certified documents filed at the time of sentencing reflecting that the State had previously charged Wilson with first-degree intentional homicide in the death of Theodis Bankhead and that the charge was dismissed on Wilson's motion. A second set of certified documents reflects that the State had charged Wilson with second-degree murder in the death of Lenzy Brunson, the charge was amended to endangering safety by conduct regardless of life, and Wilson entered a guilty plea to the amended charge pursuant to ***North Carolina v. Alford***, 400 U.S. 25, 37 (1970) (providing that a defendant may plead guilty while protesting innocence).

¶31 Nonetheless, Wilson claims the sentencing court considered inaccurate information, and in support, he points to the following remarks by the court: "I do believe that the *grief that's suffered by surviving friends and family members is entitled to great weight*, that their loss, the loss of people who knew and cared about and loved the victim and their grief is *entitled to consideration and weight here*. Although that in these cases is a pretty remarkable constant also." (Emphasis supplied by Wilson.) Nothing in this acknowledgement of the grief suffered by Quinn's surviving friends and family demonstrates reliance on inaccurate information about Wilson's criminal history. Wilson's suggestion to the contrary is baseless.

By the Court.—Order affirmed.

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