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April 19, 2016

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

2015AP1396

State of Wisconsin v. Ronnie L. Thums (L.C. # 2010CF35)

Before Lundsten, Sherman and Blanchard, JJ.

Ronnie Thums, pro se, appeals a circuit court order that denied Thums's WIS. STAT. § 974.06 (2013-14)¹ postconviction motion without a hearing. 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. We summarily affirm.

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

Thums was charged with multiple criminal counts alleging that while in prison, Thums hired his former cellmate, Robert Trepanier, to kill Thums's ex-wife. At trial, Trepanier testified that Thums offered Trepanier money to kill Thums's ex-wife, and the State played a recording of Trepanier and Thums making plans for the murder and payment. Thums testified that Trepanier had repeatedly offered to kill Thums's ex-wife for money; that Thums pretended to go along with the plan but then told Trepanier that he would not give him any money; and that, after Trepanier physically attacked him, Thums again pretended to go along with the plan in order to avoid further physical harm from Trepanier. Thums was found guilty by the jury.

After a direct appeal, Thums moved the circuit court for a new trial based on newly discovered evidence under WIS. STAT. § 974.06. Thums offered an affidavit by Thums's fellow inmate, Joseph Hrbacek, asserting that Hrbacek witnessed another inmate attacking Thums and demanding money a couple months before the recorded conversation between Thums and Trepanier. The circuit court denied the motion without a hearing.

A postconviction motion seeking a new trial based on newly discovered evidence must show that: “(1) the evidence was discovered after conviction; (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.” See *State v. Avery*, 2013 WI 13, ¶25, 345 Wis. 2d 407, 826 N.W.2d 60 (citation omitted). “If the defendant is able to make this showing, then ‘the circuit court must determine whether a reasonable probability exists that a different result would be reached in a trial.’” *Id.* (quoted source omitted).

Thums asserts that Hrbacek's affidavit is newly discovered evidence because: (1) Thums met Hrbacek and discovered that Hrbacek witnessed the attack after Thums's conviction;

(2) Thums was not negligent in discovering the evidence, since he had not previously met Hrbacek; (3) Hrbacek's claim that he witnessed another inmate attacking Thums is material to the issue of whether Thums's statements to Trepanier were made out of fear of further physical harm from Trepanier; and (4) the evidence is not cumulative because Thums offered no other evidence at trial to corroborate his own testimony. Thums asserts that, had the jury heard that Hrbacek witnessed a physical attack in the prison consistent with the attack that Thums testified to, the jury would have had a reasonable doubt that Thums offered Trepanier money with the intent that Trepanier would act on Thums's offer. We are not persuaded.

Hrbacek's affidavit is not newly discovered evidence because it is merely cumulative to the evidence presented at trial. Trepanier and Thums both testified at trial that Trepanier physically assaulted Thums following a dispute over items in their cell while Trepanier was moving out. In addition, Thums testified that, during the attack, Trepanier yelled at Thums about going back on his word to give Trepanier money. Thums does not point to any evidence presented at trial that Thums's testimony that Trepanier yelled at him about money during the attack was placed in dispute. Thus, taken together, the undisputed testimony by Trepanier and Thums was that Trepanier physically attacked Thums after a dispute over items in their cell and that, during the attack, Trepanier yelled at Thums about not giving Trepanier money that Thums had promised him. Additionally, during the recorded conversation played for the jury, Trepanier repeatedly demanded money from Thums to kill Thums's ex-wife. Hrbacek's affidavit asserts that Hrbacek witnessed Thums being attacked in his cell by a man demanding money from Thums. Because Hrbacek's affidavit is consistent with the trial evidence, it is merely cumulative and could not constitute newly discovered evidence.

Moreover, there is not a reasonable probability that a different result would have been reached at trial had the jury heard Hrbacek's testimony. See *State v. Love*, 2005 WI 116, ¶44, 284 Wis. 2d 111, 700 N.W.2d 62 (“A reasonable probability of a different outcome exists if ‘there is 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.’” (quoted source omitted)). The jury had the opportunity to evaluate evidence that Thums hired Trepanier to kill Thums’s ex-wife; that Trepanier attacked Thums and demanded money; and that Thums was pretending to go along with the plan out of fear of further physical harm. In light of the evidence presented to the jury, there is no reasonable probability that Hrbacek’s testimony that he witnessed an inmate attacking Thums while demanding money would have led to a different result. Because the record shows that Thums was not entitled to relief on his WIS. STAT. § 974.06 motion, the circuit court did not err by denying the motion without a hearing.² See *State v. Allen*, 2004 WI 106, ¶12, 274 Wis. 2d 568, 682 N.W.2d 433.

Therefore,

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

Diane M. Fremgen
Clerk of Court of Appeals

² To the extent Thums raises arguments not specifically addressed in this opinion, we deem those arguments insufficiently developed to warrant a response. See *State v. Pettit*, 171 Wis. 2d 627, 646–47, 492 N.W.2d 633 (Ct. App. 1992) (we need not consider inadequately developed arguments).