

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 29, 2026

Samuel A. Christensen
Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2025AP410-CR
STATE OF WISCONSIN**

Cir. Ct. No. 2019CF1494

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SHAQUILLE CHARLES ONEAL HAMILTON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Brown County: JOHN P. ZAKOWSKI, Judge. *Affirmed.*

Before Stark, P.J., Hruz, and Gill, JJ.

Per curiam opinions 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).

¶1 PER CURIAM. Shaquille Charles Oneal Hamilton appeals from a judgment, entered following a jury trial, convicting him of attempted first-degree

intentional homicide with use of a dangerous weapon. He also appeals from the circuit court’s order denying his motion for postconviction relief. Hamilton asserts that the court erred by refusing to grant his motion for a new trial based on newly discovered evidence and by refusing to admit evidence of the victim’s reputation for violence at trial. He also seeks a new trial in the interest of justice. For the reasons that follow, we reject all of Hamilton’s arguments and affirm.

BACKGROUND

¶2 On the evening of September 29, 2019, in the City of Green Bay, Hamilton shot his friend, Darius,¹ in the face and the chest after the two teens had an escalating disagreement. Hamilton claimed that he shot Darius in self-defense.

¶3 Before trial, Hamilton moved to introduce **McMorris**² evidence of six specific acts of violence or aggression by Darius that gave Hamilton reason to fear him. The circuit court’s pretrial ruling allowed for the jury to hear evidence regarding four of those incidents that Hamilton had personally witnessed, including evidence that Darius pistol whipped someone; that Darius ran after a person, knocked them to the ground, and punched and kicked them; that Darius beat up a person who knocked on the back window of his vehicle and then mentioned to Hamilton that he had a “pipe,” i.e., a gun; and that Darius accused Hamilton of stealing money from him, pointed a gun at Hamilton, and pushed the

¹ Pursuant to the policy underlying WIS. STAT. RULE 809.86(4) (2023-24), we use a pseudonym instead of the victim’s name. We also use a pseudonym for the foster mother in this case.

All references to the Wisconsin Statutes are to the 2023-24 version.

² **McMorris v. State**, 58 Wis. 2d 144, 205 N.W.2d 559 (1973).

muzzle of the gun into Hamilton's chest. The court refused to admit two other incidents that Hamilton had heard about, but had not witnessed, including an act of domestic violence during which Darius choked his 16-year-old girlfriend for 15 to 20 seconds and a failed attempt to hide a firearm during a traffic stop, both of which resulted in criminal convictions.

¶4 The circuit court held a four-day jury trial in 2021. At trial, Hamilton did not dispute that he shot Darius, arguing, as noted, that he had done so in self-defense. The shooting occurred on a residential street after Darius and Hamilton met outside Darius's children's foster home. Testimony revealed that Paige Osborne, who was Hamilton's former girlfriend, drove Jadvin Sanders and Darius from Wausau to Green Bay, where Darius previously lived, so that Darius could visit with his children, who were in Hazel's foster care. When the group arrived at Hazel's home, Hamilton was also there, returning keys to Hazel's daughter.

¶5 At trial, Sanders identified Hamilton as the shooter, although he did not name Hamilton to law enforcement on the night of the incident. Sanders testified that Darius planned to "fistfight" Hamilton, and Sanders further stated that neither he nor Darius had guns that evening. According to Sanders, Darius never said he was going to kill Hamilton. Sanders explained that after he "saw [Darius] fall to the ground," he "rushed [to] him," "picked [Darius] up and brought him back to the car[,] and then brought [Darius] to the hospital." When asked why he did not tell police that Hamilton was the shooter, Sanders stated, "That was my little brother. I didn't want to tell on my little brother."

¶6 Osborne testified that Darius had asked her "to pull around the corner [from Hazel's house] and park," and Darius eventually told her that "he

was waiting for [Hamilton].” According to Osborne, a car “pull[ed] up” behind their parked car on the street, but she alleged that she “couldn’t see” what kind of car it was and that she did not “know who it was.” She stated that Sanders and Darius got out of the car at the same time, and a “couple minutes” later, when she was “looking down at [her] lap,” she “heard gunshots” followed by “tires screeching and a distant yelling in the background.” She would not name Hamilton as the shooter because she alleged that she did not see anything when she “crouched down” after she heard the gunshots. Osborne was then confronted with the transcript of her interview with police identifying Hamilton as the shooter, but she insisted that she did not know if Hamilton was in the vehicle that pulled up behind them. According to Osborne, she “made up a lot of [the] information” in her statement to police after the shooting because she “was scared” and “had just undergone trauma that [she] had never experienced before.”

¶7 After the shooting, Osborne explained, she got out of the car, Darius was on the ground, and Sanders “was screaming and yelling and crying” and “was ... really frantic.” Osborne and Sanders then carried Darius to her car, and they drove him to the hospital. Osborne did not “remember if [Darius or Sanders] had any weapons on them” that evening.

¶8 Osborne stated that she was not friendly with Hamilton in September 2019 because they had been in a romantic relationship and had broken up before the shooting, so they were “not on great terms.” By the time of the trial, however, Osborne described Hamilton as “[c]urrently a friend.”

¶9 Darius, for his part, testified that Hamilton was like his “little brother” and that at the time of the shooting, the two teens were arguing on “[s]ocial media” after Hamilton “had made [a] comment to ... [Darius’s]

girlfriend.” According to Darius, he had threatened Hamilton that he was going to “[w]hoop his ass,” meaning that Darius was going to “[j]ust beat him up like a big brother beating up a little brother.” Darius stated that he did not know who shot him: “Everybody says Mr. Hamilton. I’m not really sure. I don’t really remember that night.” Darius explained that “everybody said” that he “left” Hazel’s house “to go try to fight” Hamilton, but he was adamant that he did not have a weapon with him that night because he “would never bring a weapon to a fight with someone that [he was] cool with.”

¶10 On cross-examination, Hamilton’s defense counsel played audio recordings from Facebook messages, during which Darius told Hamilton “[p]ull up, Pussy”; that he was a “little bitch”; that Darius was “gonna slap him so fucking hard”; that Darius had “to show [Hamilton’s] bitch ass not to fuck with [his] big brother”; that Darius “put a mark on [Hamilton’s] back and ... got a band on [Hamilton’s] head, Pussy”; and that Hamilton should not “make [his] granny lose her only son to this bullshit.” In response, Darius explained, “That don’t mean I’d shoot him in the fucking face” because “[y]ou don’t use guns on people you call brothers. You don’t bring a gun to a fight with somebody you call a brother.”

¶11 Hazel testified that Darius had just put the kids to bed when “he said he’d be right back, and that’s when he left, and then that’s when we heard shots.” According to Hazel and her daughter’s testimony, “[w]ithin seconds” of hearing gunshots, they ran outside and drove to the location of the shooting—Darius was known to hang out there—but did not see either Darius or Hamilton. A video from a neighbor’s home security system showed Hamilton’s vehicle heading toward the location of the shooting, and then “just over a minute after Mr. Hamilton’s vehicle had just made the same turn,” Hazel and her daughter’s vehicle was seen on the video.

¶12 Hamilton testified in his own defense. He stated that he had seen Darius carry firearms and engage in physical violence in the past, and he testified to those incidents pursuant to his **McMorris** motion. Hamilton explained that Darius had told him to “meet me around the corner”; he complied and parked behind Osborne’s vehicle on the street; and then he, Darius, and Sanders got out of their vehicles.

¶13 When the shooting occurred, Hamilton testified, Darius was “five, six feet” away, and Sanders had approached the back of his vehicle, which made him “feel [that] something’s off.” Hamilton turned to Darius, who had an “angry” “look on [his] face,” which Hamilton had “seen ... many times.” He then saw Darius “reach[] inside his pocket,” and Hamilton stated that he “[a]bsolutely” thought Darius “was getting a gun.” As a result, Hamilton “grabbed for [his] gun as fast as [he] could,” “raised [his] arm, squinted [his] eyes, and just pulled the trigger.” He admitted that he shot Darius because he “felt like that was [his] only option at the time.” Hamilton stated that he drove to Chicago after the shooting and that, once he was arrested, he called witnesses from jail and told them not to come to court.

¶14 The jury found Hamilton guilty of attempted first-degree intentional homicide with use of a dangerous weapon. Thereafter, the circuit court sentenced Hamilton to ten years’ initial confinement followed by ten years’ extended supervision.

¶15 In 2024, Hamilton filed a postconviction motion for a new trial based on newly discovered evidence or, in the alternative, in the interest of

justice.³ In it, he stated that Osborne and Sanders had recanted portions of their trial testimony, and they now alleged that they saw Darius with a gun on the evening he was shot, that Sanders hid the gun after the shooting, and that Sanders and Darius had talked about killing Hamilton prior to the shooting. Hamilton also alleged that Robert Robertson, a friend of Hamilton who also knew Darius, learned from speaking with Darius that Darius had a gun that night, but “police never found the gun because Sanders hid the gun for him.” Hamilton submitted affidavits from all three witnesses with his motion.

¶16 The circuit court held an evidentiary hearing on Hamilton’s motion, during which Osborne, Sanders, and Robertson testified. Osborne testified that she “used to be a friend” or “associate” of Darius because he was in her “circle” for “a couple months” at the time of the shooting. Osborne described Darius as “very outgoing, very ignorant, very self-loathed, and had a lot of pride. He was also a very angry person.” This time, Osborne testified that before the shooting, she “saw a silver handgun in the waistband of [Darius’s] pants.” She also said she saw Darius “pull[] the handgun out of his waistband and set it on his lap” when he got in her car. Osborne further testified that when they were in the car, Darius and Sanders “were discussing pulling around the corner and beating and popping [Hamilton],” which Osborne “understood” to mean “shooting him.”

³ In 2022, Hamilton filed a notice of appeal in this case, but he later moved to stay appellate proceedings and remand this matter to the circuit court to allow him to file a postconviction motion. In response, we dismissed the appeal without prejudice and extended the time for Hamilton to file a WIS. STAT. RULE 809.30 motion.

¶17 According to Osborne, when Darius exited the car to confront Hamilton, he “grabbed [the gun] off of his lap and carried it with him.” However, she testified that when she got out of the car and “saw [Darius] laying on the ground,” Sanders was “walking [back] from a bushy area by a house that [they] were next to,” but she did not see the gun “anywhere near” Darius. When she was reminded that she had testified at trial that Sanders was frantic, Osborne stated that she “just made up” those details. Instead, Osborne stated that Sanders was “cool, calm, and collected” and “almost calculating” in removing Darius’s gun from the scene.

¶18 Osborne testified that she did not inform law enforcement or testify at trial that Darius had a gun “[b]ecause [she] was terrified for [her] life, [her] safety, [her] freedom, and [her] well-being,” and her fear was of “[t]he detectives that were present, the [district attorney], [Sanders], and [Darius].” In particular, Osborne explained that she “was coerced, [she] was threatened [by Sanders], and [she] was falsely accused of other charges” by law enforcement.⁴ Osborne stated that she had not spoken to Sanders or Darius since the trial, but she said that she speaks to Hamilton “[o]ften,” that she “consider[s] him like family,” and that “[h]e’s part of [her] support system.” She denied that Hamilton had told her what to say in her affidavit or hearing testimony. And when she was asked why she “fe[lt] that [she] could tell the truth now,” Osborne explained, “Because I wanted to rewrite history. I wanted to finally use my voice to come forward and voice how corrupt I feel like the system is.”

⁴ Osborne had a pending criminal case in Brown County, and she “found out from [her] lawyer” “years later” that the substance she was charged with possessing, which was said to be THC, “was retested, and it came back as CBD.”

¶19 For his part, Sanders also testified that Darius had a gun that evening. Sanders said that he did not see the gun on Darius during the ride to Green Bay—although he alleged in his affidavit that Darius “had a visible handgun tucked in the waist band of his pants when he was making the threats about [Hamilton]” on the drive to Green Bay—but he “knew he had one” because he “knew [Darius] to typically carry a gun.” His hearing testimony suggested that he first saw the gun when they were at Hazel’s house and Darius was holding the gun in his waistband. On cross-examination, Sanders agreed that Darius had “pulled the gun out of his waistband and was shifting it from one side to another while threatening [Hamilton]” and may have cocked the gun in his pants. When the circuit court sought clarification regarding Sanders’ testimony, he stated that the gun “was in [Darius’s] pants. Then he pulled it out of the pants, cocked it, then put it in his hand.”

¶20 After Darius was shot, Sanders stated that he approached Darius and “grabbed the gun” because he thought Darius “was on a bail or something like that,” “[s]o [Sanders] took the gun ... and put it in an abandoned car.” According to Sanders, it took “[p]robably, like, 50 seconds, not even” to hide the gun “because [he] was running ‘cause [he] knew [he] was in trouble.” Although Sanders stated in his affidavit that he “looked for [Darius’s] gun and found it in one of [his] pant[] legs as if it fell from his waist[band],” Sanders testified at the hearing that he took the gun out of Darius’s hand. When defense counsel brought Sanders’ attention to the inconsistency, Sanders said, “It was in his hand but in his pant[] leg, but I had to take it out of his hand ‘cause he was in shock still. Your body lock up. You know what I mean?” Sanders stated that he did not tell law enforcement that Darius had a gun “[b]ecause [he] didn’t want nobody to get in trouble.” Sanders also testified that he had not spoken to Hamilton since the trial.

¶21 Robertson testified that he was incarcerated at Lincoln Hills when the shooting occurred, but he talked to Darius about the shooting after he was released. According to Robertson, Darius told him “that he had a firearm with him that night, that he was lucky that he didn’t lose his life,” and that “because the officers didn’t find the firearm,” “he ... got away with a crime.” When asked for more specific details, Robertson stated that he could not provide more details “because it was really just, like, a casual conversation.”

¶22 After additional briefing by the parties, the circuit court issued a 20-page written decision and order denying Hamilton’s postconviction motion for a new trial. In its decision, the court summarized the trial testimony of Osborne and Sanders, the postconviction affidavits, and the hearing testimony. Having assessed the witnesses’ demeanor at trial and at the hearing, the court found Osborne’s and Sanders’ recantations to be “unreasonable and incredible and therefore not newly discovered evidence constituting a manifest injustice.” According to the court,

[i]f all the proposed new evidence testimony was admitted at trial, the jury would still find the witnesses were attempting to go to bat for Hamilton in trying to distance themselves from their previous statements to police. The jury would continue to see their attempts to assist Hamilton if such recantations were presented to the jury. It would not result in a different verdict at trial. The court further does not find that Robertson’s uncorroborated testimony would result in a different verdict at trial.

Further, the court concluded that Osborne’s and Sanders’ testimony did not satisfy the corroboration requirement, that their testimony was “not consistent with each other,” and that there was no “new feasible motive” presented for Osborne and Sanders to have testified falsely at trial. Hamilton appeals.

DISCUSSION

I. Newly discovered evidence

¶23 According to Hamilton, “[w]hen the jury evaluated Hamilton’s self-defense claim, it did so on evidence suggesting that [Darius] was unarmed and intended only to physically fight Hamilton,” but the newly discovered evidence “contradicts the testimony of all three eyewitnesses as to whether Hamilton was the only one who had a gun.” Hamilton further contends that “[w]hether [Darius] had a gun when he approached Hamilton is highly relevant to his claim of self-defense, and it is reasonably probable the jury would have had reasonable doubt that he was guilty of attempted first degree homicide had it been aware of this evidence.”

¶24 “In order to set aside a judgment of conviction based on newly[]discovered evidence, the newly[]discovered evidence must be sufficient to establish that a defendant’s conviction was a ‘manifest injustice.’” *State v. Plude*, 2008 WI 58, ¶32, 310 Wis. 2d 28, 750 N.W.2d 42 (citation omitted). The defendant must first prove the following: “(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.” *Id.* (citation omitted). “If the defendant is able to prove all four of these criteria,” then the circuit court must “determine[] whether a reasonable probability exists that had the jury heard the newly[]discovered evidence”—“looking at both the [old evidence] and the [new evidence]”—the jury “would have had a reasonable doubt as to the defendant’s guilt.” *Id.*, ¶¶32-33 (third and fourth alterations in original; citation omitted). “This latter determination is a question of law.” *Id.*, ¶33.

¶25 Finally, because “[r]ecantations are inherently unreliable,” “when the newly discovered evidence is a witness’s recantation, we have stated that the recantation must be corroborated by other newly discovered evidence.” *State v. McCallum*, 208 Wis. 2d 463, 473-74, 476, 561 N.W.2d 707 (1997). Because there may be situations in which no physical evidence or witness corroborates a recantation, the corroboration element may also be met by showing that there is a feasible motive for the initial false statement and there are circumstantial guarantees of the trustworthiness of the recantation. *Id.* at 477-78.

¶26 Circumstantial guarantees of trustworthiness may exist where (1) the recantation is internally consistent and given under oath, (2) it was consistent with circumstances existing at the time of the initial accusation, and (3) the recanting witness was advised at the time of recantation that he or she faced criminal consequences if the initial testimony was false. *Id.* at 478. “[C]redibility is crucial to the application of the proper legal standard” on a motion for a new trial based on recantation evidence, “and the circuit court judge is in a much better position to resolve the question of whether the recantation would raise a reasonable doubt in the minds of a jury that is looking at both the recantation and the original statement.” *Id.* at 479.

¶27 “The decision to grant or deny a motion for a new trial based on newly[]discovered evidence is committed to the circuit court’s discretion.” *Plude*, 310 Wis. 2d 28, ¶31. “A circuit court erroneously exercises its discretion when it applies an incorrect legal standard to newly[]discovered evidence.” *Id.* “However, 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 is a question of law that we review de novo.” *State v. Watkins*, 2021 WI App 37, ¶44, 398 Wis. 2d 558, 961 N.W.2d 884.

¶28 On appeal, Hamilton argues that the State did not contest, and the circuit court implicitly found, that the witnesses’ testimony satisfied the first four prongs of the newly discovered evidence test. Accordingly, we will assume, without deciding, that Hamilton has met the four initial criteria for newly discovered evidence. *See Plude*, 310 Wis. 2d 28, ¶32.

¶29 Nevertheless, based on the circuit court’s review of Osborne’s and Sanders’ recantation testimony, the court determined both that there was not a reasonable probability that a jury, hearing this new evidence, would have had a reasonable doubt as to Hamilton’s guilt and also that the recantations were not corroborated by other newly discovered evidence, a feasible motive for the initial false statement, or circumstantial guarantees of trustworthiness. Specifically, the court determined that Osborne’s and Sanders’ testimony was incredible, that they were “not consistent with each other,” and that there was no “new ‘feasible motive’ accounting for false testimony from the witnesses subsequent to the trial.” *See McCallum*, 208 Wis. 2d at 475 (“A finding that the recantation is incredible necessarily leads to the conclusion that the recantation would not lead to a reasonable doubt in the minds of the jury.”); *State v. Carnemolla*, 229 Wis. 2d 648, 660-61, 600 N.W.2d 236 (Ct. App. 1999) (reasoning that because “[t]he circuit court had the opportunity to view [the witness’s] demeanor on the stand, weigh evidence of bias or motive to testify falsely, consider past convictions and other impeaching evidence and look for any other indicia of reliability or the lack thereof,” the circuit court was “in the best position to evaluate the credibility of [the witness’s] testimony”).

¶30 The State argues that we “should defer to a circuit court’s determination that the recantations were ‘incredible’ because the circuit court was in the best position to make such a determination.” *See McCallum*, 208 Wis. 2d at

479. In contrast, Hamilton suggests that the “court’s role in judging the credibility of recantation testimony is limited” and cites former Chief Justice Shirley Abrahamson’s concurrence in *McCallum* for the proposition that the “circuit court does not determine whether the recantation is true or false.... The circuit court merely determines whether the recanting witness is worthy of belief [and] ... has any indicia of credibility persuasive to a reasonable juror if presented at a new trial.” See *id.* at 487 (Abrahamson, C.J., concurring).

¶31 The circuit court preemptively addressed Hamilton’s argument in its decision. The court noted that it was “not to weigh the conflicting testimony,” but it recognized that “it [could] find [Osborne’s and Sanders’] recantations to be incredible.” In doing so, it cited the dictionary definition of “incredible,” explaining that it “means ‘not believable’” and “too extraordinary and improbable to be believed.” Said differently, the court specifically determined that the new recantation testimony was not “worthy of belief” and that it lacked any “indicia of credibility.” See *id.* (Abrahamson, C.J., concurring). We have no basis to conclude that the circuit court’s findings regarding Osborne’s and Sanders’ credibility were clearly erroneous. See *id.* at 488 (Abrahamson, C.J., concurring) (“An appellate court should not upset a finding of credibility unless it is clearly erroneous.”); see also *Dickman v. Vollmer*, 2007 WI App 141, ¶14, 303 Wis. 2d 241, 736 N.W.2d 202 (stating that an appellate court does not “reweigh the evidence or reassess the witnesses’ credibility”).

¶32 In arguing that the circuit court erroneously weighed the evidence to determine whether the recantations were true or false, Hamilton cites the court’s statements that, at the trial, “[i]t was obvious that nobody wanted to be in court,” “that nobody was telling the complete truth,” and that “[n]obody wanted to give incriminating testimony against Hamilton.” Hamilton states that, “[c]ontrary to

[these] finding[s], if Osborne and Sanders were attempting to help Hamilton at trial, they would not have left out the obviously helpful fact that [Darius] was armed during the incident.” Hamilton also points to the statement the court made about Osborne’s and Sanders’ postconviction hearing testimony: “It was more of the same and obvious that nobody was telling the complete truth. Osborne has since rekindled a relationship with Hamilton and is trying to assist him. Sanders seemed to make up his testimony to protect his friend as it went along.” He argues that the court’s “finding ignores the evidence of Osborne[’s] and Sanders’ motivations for their false statements at trial—Osborne’s fear of [Darius] and Sanders and Sanders’ desire to keep both [Darius] and himself out of further legal trouble.”

¶33 Rather than support Hamilton’s claim that the circuit court weighed the evidence to determine the veracity of the recantation evidence, all of Hamilton’s above arguments amount to a claim that the court should have viewed the evidence differently. However, Hamilton’s disagreement with the court’s credibility and factual determinations—that the recantations were not worthy of belief—is an insufficient basis from which to order a new trial on newly discovered evidence. See *Dickman*, 303 Wis. 2d 241, ¶14 (“Because it is for the [circuit] court to resolve conflicts in the testimony, we will uphold its calls as to witness credibility unless they are inherently or patently incredible, and we will not second-guess the [circuit] court’s reasonable factual inferences.”).

¶34 For the reasons that follow, and as the State argues, the circuit court’s “determination [was] reasonable and grounded in the record.” First, as to Osborne, the court did not find that there was a feasible motive for her claimed initial false statement. See *McCallum*, 208 Wis. 2d at 477-78. It found incredible Osborne’s assertion that she would have withheld information that Darius had a

gun during the trial because she was “scared.” According to the court, “[i]t is unreasonable to think that ... stating [that Darius] had a gun would have put her in any danger, especially given her proclivities to protect Hamilton.” We agree with the State’s explanation that “[e]ven if he had possessed a gun, [Darius] would have, at worst, been guilty of a gun possession charge,” and, therefore, “[t]he suggestion that Osborne had reason to ‘fear[] for her life’ from [Darius] for revealing that he merely possessed a weapon in a confrontation in which [Darius] was the one who was shot in the face and chest is incredible.”⁵

¶35 Further, the circuit court was appropriately skeptical of the relationship between Osborne and Hamilton, given that the two had previously dated; that they had “rekindled” their relationship by the time of the postconviction hearing; and that Osborne testified that she speaks with Hamilton “often” and “consider[s] him like family” and “part of [her] support system.” At trial, Osborne refused to identify the shooter’s vehicle as Hamilton’s or otherwise identify Hamilton as the shooter, even when confronted with her inconsistent statement to police. Thus, given Osborne’s demonstrated willingness to assist Hamilton at trial, it was not credible to believe that if Osborne had in fact seen Darius with a gun that she would not have testified to that fact in order to bolster Hamilton’s claim of self-defense. As a result, there was a reasonable basis for the court to question Osborne’s credibility and find that her recantation was merely an attempt to “try[] to assist [Hamilton].”

⁵ Osborne also testified that Sanders told her to “keep [her] mouth shut and act like [she] didn’t see anything” or “he would make [her] pay,” which Osborne said also contributed to her not telling law enforcement about the gun. When asked if he had threatened Osborne, however, Sanders responded, “I don’t remember.”

¶36 The circuit court additionally found that it was “totally illogical” for Osborne to say that “she lied when [she testified] that Sanders was very upset after his friend was shot.” As noted, Osborne stated during the trial that Sanders was frantic after the shooting; however, postconviction, she testified that she had “just made up” Sanders’ response and that Sanders was actually “cool, calm, and collected” when he disposed of Darius’s gun. According to the court, “[i]t is totally reasonable that Sanders would have been distraught and ‘panicking’ after seeing his friend shot and a bloody mess,” and Osborne’s “description now of Sanders as being cool, calm and collected is patently unbelievable.”

¶37 In terms of Sanders, the circuit court reasonably found that Sanders’ testimony “seemed to [be made] up ... to protect his friend [Hamilton] as it went along.” Sanders claimed that he did not inform law enforcement that Darius had a gun “[b]ecause I didn’t want nobody to get in trouble.” However, again, and like Osborne, Sanders had demonstrated a willingness to assist Hamilton by not informing the police that Hamilton was the shooter, which renders less credible his reason for not stating at trial that Darius had a gun.

¶38 Further, Sanders’ recantation was not internally consistent. He was vague during his postconviction testimony about when he first knew or saw that Darius had a gun—first saying he saw a weapon when they picked Darius up in Wausau, then saying he first saw the weapon when they were outside Hazel’s house, and finally admitting that he actually just knew Darius to carry a gun. Sanders further testified at the postconviction hearing that Darius was holding the gun in the waistband of his pants when he confronted Hamilton, but then, after the shooting, the gun was in Darius’s hand when Sanders took it and hid it. However, in his affidavit, Sanders stated that the gun had fallen down Darius’s pant leg. When he was questioned about this fact, Sanders stated, “It was in his hand but in

his pant[] leg.” The circuit court also noted with skepticism Sanders’ “convoluted description of [Darius] shifting the gun side-to-side” in the waistband of his pants after being confronted with his statement in the affidavit and his conflicting testimony that Darius “cocked [the gun] while still in his pants.”

¶39 Osborne’s and Sanders’ testimony was also inconsistent with Hamilton’s and Darius’s trial testimony. While Osborne said she saw the gun in Darius’s hand when he got out of her car and Sanders said the gun was in the waistband of Darius’s pants, Hamilton testified that he never saw Darius with a gun and that he only saw Darius “reach[] inside his pocket.” Had the gun been in either Darius’s hand or waistband, Hamilton likely would have seen it, and neither Osborne nor Sanders said that Darius ever put the gun in his pocket. Additionally, Osborne’s and Sanders’ recantations stand in contrast to Darius’s statements about why he did not have a weapon that evening because he “would never bring a weapon to a fight with someone that I’m cool with” and because “[y]ou don’t bring a gun to a fight with somebody you call a brother.”

¶40 Osborne’s and Sanders’ postconviction testimony also appears to be inconsistent with the timeline of the circumstances existing at the time of and immediately after the shooting. As noted above, Hazel and her daughter got in their car and drove around the corner “[w]ithin seconds” of hearing the gunshots, but there was no one remaining at the location. Sanders stated that it took him approximately 50 seconds to dispose of the gun, and given that Osborne and Sanders also had to drag Darius into the vehicle, it is likely that Hazel and her daughter would have encountered them had Sanders taken the extra time to dispose of the gun.

¶41 The circuit court also found that Robertson’s testimony would not result in a different verdict at trial.⁶ Although the court did not expand upon its reasoning with regard to Robertson’s testimony, we conclude that the facts in this case support the court’s exercise of discretion. See **Randall v. Randall**, 2000 WI App 98, ¶7, 235 Wis. 2d 1, 612 N.W.2d 737 (“Although the proper exercise of discretion contemplates that the circuit court explain its reasoning, when the court does not do so, we may search the record to determine if it supports the court’s discretionary decision.”). Importantly, Robertson did not witness the shooting, and, therefore, his testimony regarding what Darius told him after the event is hearsay. Hamilton has not presented an explanation for how he would admit Robertson’s hearsay testimony at trial. Regardless, Robertson’s testimony at the postconviction hearing was very brief, and, when asked, he was unable to provide more details to support his testimony because he said he had “a causal conversation” with Darius.

¶42 To the extent that Hamilton argues that the purpose of Robertson’s testimony was merely to provide corroboration for Osborne’s and Sanders’ testimony, we have already determined, for the reasons discussed above, that the circuit court’s conclusion that Osborne’s and Sanders’ testimony was incredible

⁶ Hamilton argues that the circuit court appeared to “wrongly require that Robertson’s new evidence be corroborated, despite that this new evidence is not a recanted statement.” In response, the State asserts that “Robertson’s statement is hearsay about an alleged recantation, and the State is unsure whether, if admissible, the corroboration requirement would apply to such evidence” and that “[t]he court’s statement that Robertson’s hearsay statement is ‘uncorroborated’ may simply mean that it is ‘uncorroborated’ by the speaker himself, [Darius].” Regardless, we agree with the State that “even if the court improperly treated Robertson’s hearsay ... as a recantation, it reached the correct result in concluding that his statement probably would not change the outcome of the trial.”

was not erroneous. Hearsay testimony, which lacks sufficient detail, cannot save their recantations.

¶43 Accordingly, the circuit court did not erroneously exercise its discretion by denying Hamilton a new trial based upon newly discovered evidence. The court’s findings and conclusions that the witnesses were incredible, that there was no reasonable likelihood of a different result if the matter were retried, and that their testimony was not corroborated were all supported by the record.

II. *McMorris* evidence

¶44 Hamilton next argues that the circuit court erroneously excluded the *McMorris* evidence of Darius’s prior convictions. “It is well established that a defendant seeking to support a self-defense claim may attempt to ‘prov[e] prior specific instances of violence within [the defendant’s] knowledge at the time of the incident.’” *State v. McClaren*, 2009 WI 69, ¶21, 318 Wis. 2d 739, 767 N.W.2d 550 (alterations in original; citations omitted). Admissibility of *McMorris* evidence “is within the circuit court’s discretion.” *McClaren*, 318 Wis. 2d 739, ¶21. We may not substitute our discretion for that of the circuit court, and we will “look for reasons to sustain a [circuit] court’s discretionary decision.” *State v. Gutierrez*, 2020 WI 52, ¶27, 391 Wis. 2d 799, 943 N.W.2d 870 (citation omitted).

¶45 As noted above, in furtherance of his self-defense claim, Hamilton moved to admit several instances of Darius’s violent behavior and reputation for violence before trial, and the circuit court granted Hamilton’s motion in significant part. The court, however, excluded evidence that Darius had physically attacked and strangled his 16-year-old ex-girlfriend and was convicted of physical abuse of

a child, suffocation and strangulation, disorderly conduct, and battery as a result. The court also excluded evidence that Darius was convicted of carrying a concealed weapon after a gun was found during a traffic stop. We will refer to these incidents as “the **McMorris** convictions.”

¶46 Hamilton argues that the **McMorris** convictions were “highly relevant to Hamilton’s state of mind during the incident, and to the question of the reasonableness of his fear for his life and/or safety from substantial bodily harm” and “the reasonableness of his belief that [Darius] ... was likely armed with a gun.” Further, he asserts that the **McMorris** convictions were “no more prejudicial than the other evidence the [circuit] court admitted, and [the evidence] was not cumulative because it involved a criminal conviction, rather than just Hamilton’s testimony.” Therefore, argues Hamilton, the court erred by “incorrectly treat[ing] [the **McMorris** convictions] as other acts evidence and ... appl[ying] the wrong legal standard” because it concluded that the evidence did not satisfy the **State v. Sullivan**, 216 Wis. 2d 768, 576 N.W.2d 30 (1998), standard.⁷

¶47 As a preliminary matter, we must address Hamilton’s assertion that the circuit court proceeded under an incorrect legal standard by referencing **Sullivan**. “Admissibility [of **McMorris** evidence] is not automatic,” **State v. Head**, 2002 WI 99, ¶128, 255 Wis. 2d 194, 648 N.W.2d 413, and the court has the “responsibility to vet the evidence prior to admission to be sure it is valid

⁷ Under **State v. Sullivan**, 216 Wis. 2d 768, 772-73, 576 N.W.2d 30 (1998), other-acts evidence must satisfy a three-part test: (1) the evidence must be offered for a permissible purpose under WIS. STAT. § 904.04(2); (2) the evidence must be relevant under WIS. STAT. § 904.01; and (3) the probative value of the evidence must not be substantially outweighed by the danger of unfair prejudice under WIS. STAT. § 904.03.

McMorris evidence,” **McClaren**, 318 Wis. 2d 739, ¶21. As our supreme court has explained,

If the court determines that the evidence is relevant, the court should admit it as it would any other relevant evidence, excluding it only if its “probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”

Head, 255 Wis. 2d 194, ¶129 (quoting WIS. STAT. § 904.03); **McClaren**, 318 Wis. 2d 739, ¶21. In other words, as the State correctly argues, **McMorris** evidence must still be relevant and must withstand the § 904.03 balancing test, which are two aspects of the **Sullivan** analysis.

¶48 We conclude that the circuit court did not erroneously exercise its discretion when it excluded the **McMorris** convictions because the court considered the applicable law, applied the pertinent facts, and reached a reasonable determination. See **State v. Payano**, 2009 WI 86, ¶51, 320 Wis. 2d 348, 768 N.W.2d 832. The court stated on the record, “I don’t think that evidence comes in under **Sullivan**. I don’t think [the **McMorris** evidence is] similar in time and nearness and place and facts, and also any probative [value] is outweighed by undue prejudice. It really is kind of an attack on the character of [Darius].” Therefore, while the court’s specific reference to **Sullivan** was imprecise, the legal standard that it applied was not incorrect.

¶49 The circuit court first properly considered whether the evidence was relevant. “Relevant evidence” refers to evidence “having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” WIS. STAT. § 904.01. We measure probative value of evidence by considering the

similarity between that evidence and the current incident, which is demonstrated by “nearness of time, place, and circumstance.” See *State v. Hurley*, 2015 WI 35, ¶¶78-79, 361 Wis. 2d 529, 861 N.W.2d 174 (citation omitted); *State v. Ochoa*, 2022 WI App 35, ¶¶27, 29, 404 Wis. 2d 261, 978 N.W.2d 501 (holding that the circuit court’s decision that the proffered *McMorris* evidence was “too remote [and] too dissimilar” was a proper exercise of discretion); *State v. Pharr*, 115 Wis. 2d 334, 344, 340 N.W.2d 498 (1983) (“The issue of relevancy ‘must be determined by the trial judge in view of his or her experience, judgment and knowledge of human motivation and conduct.’” (citation omitted)); see also *Sullivan*, 216 Wis. 2d at 786 (“[T]he probative value lies in the similarity between the other act and the charged offense.”).

¶50 As noted, the circuit court determined that the *McMorris* convictions were not relevant because they were not “similar in time and nearness and place and facts” to the current incident. According to the court, “any kind of activity between somebody and their girlfriend” is “a totally different situation [than] we had here between [Darius] and Mr. Hamilton,” and “[t]he fact that somebody had an altercation with his girlfriend doesn’t automatically mean that somebody is somehow dangerous” because “[t]hat’s between him and his girlfriend.” We agree that knowing that an individual has been violent toward an intimate partner does not provide an objective or logical basis for a friend to reasonably fear for their life during a separate confrontation.⁸ The court further reasoned that “[y]ou could

⁸ Hamilton contends that *McMorris* “does not support this distinction between domestic and other violence.” According to Hamilton, the court in *McMorris* “did not parse between the different types of violence committed by the victim,” and neither did the court “suggest that the domestic-related offense of the victim shooting her husband would not be relevant to the defendant’s state of mind during the altercation with the victim just because they were not in a domestic relationship.” See *McMorris*, 58 Wis. 2d at 149-52.

(continued)

be an outstanding citizen and never have a spot on your record and you could have had a bad night with your wife and then you have a domestic violence incident,” which the court did not believe should automatically be admissible in a self-defense case. The court similarly found the conviction for attempting to hide a weapon from police irrelevant, stating, “I don’t see how that really ties in.”

¶51 The circuit court further found that the evidence did not meet the WIS. STAT. § 904.03 balancing test because the minimal probative value of the evidence was outweighed by the danger of unfair prejudice and because the evidence was cumulative.⁹ The court initially recognized that “**McMorris** evidence sometimes is an attempt to just dirty up the alleged victim,” and later, after a more thorough review of the evidence, determined that the convictions were “really ... kind of an attack on the character of [Darius].” We agree with the court that the **McMorris** convictions, particularly the violence against Darius’s ex-girlfriend, may have prejudiced the jury unfairly against Darius. See **McAllister v. State**, 74 Wis. 2d 246, 251, 246 N.W.2d 511 (1976) (stating that it is the circuit court’s duty to exclude evidence where “[t]he accumulation of evidence as to a particular violent act of the victim ... may go beyond the

The **McMorris** court was explicit that “[t]he admission of such evidence rests in the exercise of sound and reasonable discretion by the [circuit] court,” *id.* at 152, and, as we explained above, **McMorris** evidence must still be relevant and must withstand the WIS. STAT. § 904.03 balancing test. Thus, while the **McMorris** court did not distinguish domestic violence from other violence, it also did not prohibit that distinction under the facts of a different case.

⁹ Nearly all evidence is prejudicial to the party against whom it is offered, **State v. Murphy**, 188 Wis. 2d 508, 521, 524 N.W.2d 924 (Ct. App. 1994); therefore, unfair prejudice “is not based on simple harm to the opposing party’s case, but rather ‘whether the evidence tends to influence the outcome of the case by improper means,’” **State v. Hurley**, 2015 WI 35, ¶87, 361 Wis. 2d 529, 861 N.W.2d 174 (citation omitted). For instance, unfair prejudice occurs “when the proffered evidence ... appeals to the jury’s sympathies, arouses its sense of horror, provokes its instinct to punish or otherwise causes a jury to base its decision on something other than the established propositions in the case.” **Hurley**, 361 Wis. 2d 529, ¶88 (citation omitted).

legitimate purpose of establishing what the defendant believed to be the violent character of the victim and reach the point where it is only offered to prove the victim acted in conformity with the prior violent behavior”).

¶52 In terms of the cumulative nature of the evidence, the circuit court reasoned that Darius’s history of violence was sufficiently supported by Hamilton’s other proposed **McMorris** evidence. “Evidence is cumulative when it ‘supports a fact established by existing evidence.’” *State v. Thiel*, 2003 WI 111, ¶78, 264 Wis. 2d 571, 665 N.W.2d 305 (citations omitted). Hamilton submitted four instances of Darius’s violent conduct that Hamilton had personally witnessed, and neither the State nor the court disputed Hamilton’s ability to testify to those events. Three of those four events involved Darius having a gun. Specifically, in one event, Darius pointed a gun at Hamilton and “pushed the gun into ... Hamilton’s chest.” Based on all the proposed **McMorris** evidence, the court explained, “There’s already enough [evidence], I think, in [those personally witnessed events], to kind of establish [Darius’s] reputation without getting into additional acts.” We agree that the **McMorris** convictions would have been cumulative evidentiary support for the facts that Darius was known to have carried a firearm and that Darius had a history of, as Hamilton described it, attacking “someone with whom he had once shared a close relationship.”¹⁰

III. New trial in the interest of justice

¶53 Lastly, Hamilton asks us to grant him a new trial in the interest of justice pursuant to WIS. STAT. § 752.35. Under § 752.35, we have the discretion

¹⁰ Hamilton also argues that the admission of the **McMorris** convictions was not harmless error, but because we conclude that there was no error, we do not address this argument.

to reverse and remand for a new trial “if it appears from the record that the real controversy has not been fully tried.” *Id.* “[T]he real controversy has not been tried if the jury was not given the opportunity to hear and examine evidence that bears on a significant issue in the case, even if this occurred because the evidence or testimony did not exist at the time of trial.” *State v. Davis*, 2011 WI App 147, ¶16, 337 Wis. 2d 688, 808 N.W.2d 130 (alteration in original; citation omitted). To grant relief because a matter was not fully tried, “[w]e need not determine that a new trial would likely result in a different outcome.” *State v. Williams*, 2006 WI App 212, ¶36, 296 Wis. 2d 834, 723 N.W.2d 719. However, discretionary reversal “should be exercised sparingly and with great caution.” *Id.*

¶54 Hamilton asserts that the real controversy has not been fully tried because “[t]he fact that [Darius] possessed a gun that night is key to Hamilton’s self-defense claim” and “because three of the State’s witnesses”—Osborne, Sanders, and Darius—“testified untruthfully that [Darius] was unarmed when he approached Hamilton” and “[t]wo of those witnesses ... have now recanted their testimony.” According to Hamilton, this case is “exceptional because the newly discovered evidence” reveals the untruthful testimony. “Further compounding the jury’s inability to address the real case or controversy,” argues Hamilton, “was the [circuit] court’s exclusion of *McMorris* evidence that prevented Hamilton from presenting a full and complete defense, in violation of his constitutional rights.”

¶55 Hamilton’s above arguments on this point all assume that we agree that the circuit court erroneously exercised its discretion by refusing to grant him a new trial based on newly discovered evidence and by refusing to admit the *McMorris* convictions. Because we do not agree that the circuit court erred in those respects, Hamilton is not entitled to a new trial in the interest of justice.

By the Court.—Judgment and order affirmed.

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

