COURT OF APPEALS
DECISION
DATED AND FILED

July 28, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-2000-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

MELINDA WEBBER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: VICTOR MANIAN and DAVID A. HANSHER, Judges. *Affirmed.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

PER CURIAM. Melinda Webber appeals from a judgment of conviction entered after a jury found her guilty of making false representations to secure public assistance, contrary to §§ 49.12(1) and 943.20(3)(c), STATS, 1993–

94.[1] Webber also appeals from an order denying her postconviction motion for a new trial. Webber argues that the trial court erred in denying her postconviction motion for a new trial on the basis of newly discovered evidence. Alternatively, Webber argues that if the evidence is not newly discovered evidence, then the trial court erred in concluding that her trial counsel was not ineffective in failing to present the evidence at trial, and she is entitled to a ***Machner*** hearing on her ineffective assistance claim.[2] Lastly, Webber argues that she is entitled to a new trial in the interest of justice. We affirm.

I. BACKGROUND

Webber was charged with falsely representing, with the intent to secure public assistance, that her brother, Ronald Beyah, did not live at her home with his four children. Beyah's four children began living with Webber in September of 1990. On June 10, 1991, Webber applied for public assistance for Beyah's four children. On the application, Webber indicated that her brother was neither living with nor supporting his four children. Webber indicated that Beyah had moved out of her home one week before she filed the application. According to an employee of the Milwaukee Department of Human Services, Webber was not eligible for benefits if Beyah either lived with or supported his children.

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[1] Section 49.12(1), STATS., 1993–94, provides, in relevant part:

> **Penalties; evidence. (1)** Any person who, with intent to secure public assistance under this chapter, whether for himself or herself or for some other person, wilfully makes any false representations may, if the value of the assistance so secured … exceeds $2,500, be punished as prescribed under s. 943.20 (3) (c).

[2] *See* ***State v. Machner***, 92 Wis.2d 797, 285 N.W.2d 905 (Ct. App. 1979).

Webber received public assistance between June 10, 1991 to November 30, 1992, in the amount of $10,921.

At Webber's trial, Beyah testified that throughout 1990 to 1992, he listed Webber's address as his own on his employment records, and stated in family court appearances that he lived at Webber's address. Beyah also claimed, both at Webber's trial and at a family court proceeding on November 2, 1992, that he was supporting his four children. Beyah initially testified that he had lived in a hotel and not with Webber, but after he was asked if he had lied in family court, he eventually testified that he had lived with Webber periodically from September of 1991 to November of 1992.

An employee of the Milwaukee Department of Human Services testified that, in October of 1990, Beyah had himself applied for public assistance, using Webber's address as his own. In support of the application, Beyah provided rent receipts bearing Webber's purported signature, which had been issued to Beyah for the August 1990 and September 1990 rent at Webber's address. In March of 1991, at 5:00 p.m., a food stamp investigator went to Webber's home to verify the information on Beyah's application.[3] Both Beyah and Webber were present at that time, and both verified that Beyah lived there. The State offered, and the trial court admitted, the rent receipts at Webber's trial. Webber denied issuing those receipts to Beyah.

The State also presented testimony of two employers for whom Beyah worked during 1991 and 1992. Both employers testified that Beyah

[3] The evidence disclosed that Beyah's public assistance was eventually terminated because he fraudulently failed to fully disclose his income.

consistently provided Webber's address as his own. The employer for whom Beyah worked from May 1992 to June 1993 testified that calls were made to Webber's residence in order to contact Beyah to work overtime.

A detective who had investigated the case against Webber testified that he spoke to Beyah in August of 1993. He testified that Beyah said that he lived with Webber and his children and that he was unaware that Webber was receiving public assistance for the children. The detective further testified that he also spoke to Webber that day, and that he confronted Webber with the fact that her mother, who also lived with Webber, had testified in family court that Beyah lived with them. The detective testified that Webber was unable to explain her mother's statement.

Webber testified that Beyah merely used her address as a mailing address, that he never lived with her, and that he was not supporting his children. Webber's mother and four of Webber's siblings also testified that Beyah did not live with Webber.

The jury returned a guilty verdict, and the trial court entered the judgment of conviction and sentenced Webber accordingly. Thereafter, Webber submitted the rent receipts from the trial to a handwriting expert, and the expert determined that Webber did not sign those receipts. Relying on the expert's analysis, Webber filed a postconviction motion for a new trial. She asserted that the expert's analysis was newly discovered evidence, or, in the alternative, that her trial counsel was ineffective in failing to have the rent receipts analyzed by a handwriting expert. She also asserted that she was entitled to a new trial in the interest of justice. The trial court denied the motion.

II. DISCUSSION

Webber argues that the trial court erred in denying her postconviction motion for a new trial on the basis of newly discovered evidence. She argues that the handwriting expert's testimony is material to the issue of whether Beyah lived with her at the time she received public assistance. The postconviction court, however, concluded that the testimony was not material to this issue because the receipts were dated almost a year prior to the time that Webber applied for and received public assistance. The postconviction court further concluded that the evidence did not warrant a new trial because it related only to Beyah's credibility, and that there was no reasonable probability that the evidence would lead to a different result in a new trial. We agree.

"[A] motion for a new trial upon the ground of newly discovered evidence is addressed to the sound discretion of the trial court, and this court will reverse the trial court only for an [erroneous exercise] of discretion." ***State v. Sarinske***, 91 Wis.2d 14, 37, 280 N.W.2d 725, 735–736 (1979). In order to obtain a new trial based on newly discovered evidence, a party must establish by clear and convincing evidence that the following factors are met:

> (1) The evidence must have come to the moving party's knowledge after a trial; (2) the moving party must not have been negligent in seeking to discover it; (3) the evidence must be material to the issue; (4) the testimony must not be merely cumulative to the testimony which was introduced at trial; and (5) it must be reasonably probable that a different result would be reached on a new trial.

Id., 91 Wis.2d at 37, 280 N.W.2d at 736 (citations and internal quotation marks omitted); *see also* ***State v. Avery***, 213 Wis.2d 228, 234–237, 570 N.W.2d 573, 576–577 (Ct. App. 1997). "Evidence which merely impeaches the credibility of a

witness does not warrant a new trial on this ground alone." ***Greer v. State***, 40 Wis.2d 72, 78, 161 N.W.2d 255, 258 (1968).

Because the rent receipts related to August and September of 1990, almost a year prior to the time in which Webber applied for and received public assistance, they are only marginally material to whether Beyah lived with Webber at the time she applied for and received assistance. The fact that Webber did not sign those receipts could only serve to impeach Beyah's credibility by suggesting that he forged the receipts. This is not enough to warrant a new trial. Additionally, there is no reasonable probability that a different result would be reached in a new trial, both because the evidence was not material to whether or not Beyah lived with Webber during the relevant time period, and because the jury had before it ample evidence challenging Beyah's credibility, but nonetheless found that Webber was guilty. In fact, Beyah denied that he had lived with Webber until his credibility was impeached by reference to his family court testimony that he lived with Webber. Further, in addition to the family court records and Beyah's employment records, the jury was presented with testimony from other witnesses that indicated that Beyah lived with Webber. Two of Beyah's employers said that Beyah consistently provided Webber's address, and one of those employers contacted Beyah at that address when he needed Beyah to work overtime. We therefore conclude that there is no reasonable probability that the handwriting expert's opinion would have led to a different result.

Alternatively, Webber claims that her trial counsel was ineffective in failing to have the rent receipts analyzed by a handwriting expert. To prevail on a claim of ineffective assistance of counsel, a defendant bears the burden to establish both that counsel's performance was deficient and that the deficient performance produced prejudice. *See* ***State v. Sanchez***, 201 Wis.2d 219, 232–236,

548 N.W.2d 69, 74–76 (1996). To show prejudice, the defendant must demonstrate "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Strickland v. Washington***, 466 U.S. 668, 694 (1984).

As noted, the record reveals that there was no reasonable probability that the handwriting expert's testimony would have changed the outcome of the trial, and Webber's trial counsel's failure to present this evidence does not undermine our confidence in Webber's conviction.[4] We therefore reject Webber's ineffective-assistance-of-counsel claim.[5]

Webber also argues that she is entitled to a new trial in the interest of justice, pursuant to § 752.35, STATS. She argues that the failure to present the handwriting expert's opinion deprived the jury of crucial evidence relating to Beyah's credibility, that credibility was a central issue at trial, and that the real issue has thus not been tried. She also argues that justice has miscarried.

Section 752.35, STATS., provides:

> In an appeal to the court of appeals, if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried,

[4] We recognize that the defendant's burden to establish a reasonable probability of a different outcome under the ineffective assistance of counsel analysis is a lower burden than under the newly discovered evidence analysis, *see* ***State v. Avery***, 213 Wis.2d 228, 237–241, 570 N.W.2d 573, 577–579 (Ct. App. 1997), but conclude that this lower burden has also not been satisfied.

[5] We also reject Webber's claim that she is entitled to a ***Machner*** hearing; the record conclusively shows that Webber is not entitled to relief. *See* ***State v. Bentley***, 201 Wis.2d 303, 310, 548 N.W.2d 50, 53 (1996) (when the record conclusively demonstrates that the defendant is not entitled to postconviction relief, the trial court may deny the motion without a hearing).

> the court may reverse the judgment or order appealed from, regardless of whether the proper motion or objection appears in the record and may direct the entry of the proper judgment or remit the case to the trial court for entry of the proper judgment or for a new trial, and direct the making of such amendments in the pleadings and the adoption of such procedure in that court, not inconsistent with statutes or rules, as are necessary to accomplish the ends of justice.

If we conclude that the real controversy has not been fully tried, we may grant a request for a new trial based upon that conclusion alone, *see* ***State v. Betterley***, 191 Wis.2d 406, 424–425, 529 N.W.2d 216, 223 (1995); if we conclude that it is probable that justice has miscarried, however, we must also determine that there is a substantial probability that that a new trial would produce a different result, *see* ***State v. Martinez***, 210 Wis.2d 396, 403, 563 N.W.2d 922, 925 (Ct. App. 1997).

As noted, the jury was presented with ample evidence challenging Beyah's credibility, and the handwriting expert's opinion regarding the rent receipts was not material to whether Beyah lived with Webber when she applied for and received public assistance. Thus, we reject Webber's contention that the real controversy has not been tried. Further, we have already determined that there is no reasonable probability, and it follows that there is no substantial probability, that a new trial would produce a different result. Accordingly, we reject Webber's request for a new trial pursuant to § 752.35, STATS.

By the Court.—Judgment and order affirmed.

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