**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**April 27, 2016**

**Diane M. Fremgen**
**Clerk of Court of Appeals**



**Appeal No. 2014AP2915** **Cir. Ct. No. 2006CF450**

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

**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**TRAMELL E. STARKS,**

**DEFENDANT-APPELLANT.**

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

Before Neubauer, C.J., Reilly, P.J., and Hagedorn, J.

¶1 PER CURIAM. Tramell E. Starks appeals an order summarily denying his WIS. STAT. § 974.06 (2013-14)[1] postconviction motion seeking a new

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

trial due to newly discovered evidence. He also requests a new trial in the interest of justice. Because Starks's motion fails to establish the existence of newly discovered evidence entitling him to a new trial, we affirm.

¶2 In 2005, police were dispatched to Lee Weddle's apartment after a neighbor called 911 to report that he heard a fight followed by several gunshots. Police arrived to find Weddle in a pool of blood, and he died shortly thereafter. Law enforcement received an anonymous tip that Starks was the shooter and that Antwon Nellum, Dwayne Rogers, and other unidentified people were present during the shooting. Nellum told police he witnessed a fight between Starks and Weddle but left because he thought Starks "was going to do something real crazy." As he was running out of the apartment, he heard four or five gunshots.[2] Rogers eventually told police that on the date in question, he witnessed a physical altercation between Starks and Weddle, after which Starks shot Weddle two times. Rogers told police he heard Weddle say "man, you killed me," and heard three or four more shots as he was leaving the apartment.

¶3 At Starks's trial, the State relied on the eyewitness accounts of three men, including Rogers, who testified they were present when the shooting occurred. The other eyewitnesses provided testimony very similar to that of Rogers, though one stated he left the apartment during the fight and was walking to his car when he heard shots fired. The State also presented the testimony of Trenton Gray, Starks's cousin. Gray testified that on the day of Weddle's murder

[2] Nellum provided this information during a second police interview. When police first questioned Nellum, he declined to provide any information, stating he was afraid for his and his family's safety. Following his second interview and three weeks after he was released from custody, Nellum was found murdered in his car.

Starks called him "in a state of distress." As Gray recounted, "he was asking me if he can go to a place that I had been previously in my life up in North Dakota, would he be able to take refuge for some things that he believe[d] he had done." When Gray asked Starks what was going on, he said, "I don't know, cuz, I think I just murdered somebody." Gray stated that in a later conversation, Starks told him about the fight and named the person who provided the gun. Gray further testified that Starks wanted to kill another individual he believed "was telling on him about the murder" at a funeral.

¶4 The jury convicted Starks of reckless homicide and possessing a firearm as a felon, and we affirmed on direct appeal. ***State v. Starks***, No. 2008AP790-CR, unpublished slip op. (WI App Dec. 23, 2008) (***Starks I***). Starks then filed a WIS. STAT. § 974.06 postconviction motion which the circuit court summarily denied. We affirmed the circuit court's order denying relief. ***State v. Starks***, No. 2010AP425, unpublished slip op. (WI App June 14, 2011) (***Starks II***). The Supreme Court granted review and affirmed the circuit court's order on different grounds. ***State v. Starks***, 2013 WI 69, 349 Wis. 2d 274, 833 N.W.2d 146 (***Starks III***).

¶5 Starks filed a second WIS. STAT. § 974.06 motion requesting a new trial on grounds of newly discovered evidence, alleging that the new evidence established that Gray perjured himself at trial and that the State engaged in prosecutorial misconduct by suborning perjury. The proffered new evidence consisted of two letters purportedly written and sent by Trenton Gray to Gray's son, Reginald Boston which, according to Starks, contained admissions from Gray that he lied at Starks's trial. Starks's motion included an affidavit from Boston averring that he received the letters in 2013 and forwarded them to Starks. The

letters purportedly written by Gray were included in Starks's motion. A letter dated January 1, 2013, stated:

> You asked me how did I deal with it? Well let me be 100% honest with you. I always thought deeply before I did certain things. Don't get me wrong. I've acted and reacted off of emotion countless of times. When I took a plea for 40 [years], it was only because I had a plan. I never dealt with it because my plan was to never deal with it. My plan was freedom. Now pay very close attention to what I'm saying because it's all true. You're going to hear people say that I told on this person (Flash [Starks]) and I've told on that person (Coop) but none of it is true. Their own actions told on them, and people hate me because I was man enough to find a way out. Did I go to jail and tell on them, No! Did I ever call the police on anyone for any reason, No! Did I wear a wire ever, No! Did I ever buy drugs for the police, No! Was I there when [Starks] killed that boy, No! Was I there when Coop kill those men, No! Let me tell you exactly what I did. First off I waited and never said a word. When the feds came at me they didn't have nothing other than what the people, "my people" told them. "My people" bought drugs from me for them, "my people" wore a wire on me, and it was because of my people that I was facing double life, and pled out to 40. The feds are liars, and when they came to me to deal they knew I couldn't help them so they found a way to put me in the mix. They put me on the case with Coop which was a lie, and they threaten to give me life in the state along with Coop if I didn't say what they wanted me to say. Now don't get me wrong [] Coop was my friend, and I still do love that brother, but if I was in his or Flash shoes I would have wanted them to do the exact same thing to me. I say this because regardless if they want my help or not I will do my very best for the both of them. I've never snitch[ed] on any man in my life, and I never will! But I'm no fool either, and one of us has [or had] to get free to help the other....

The second letter dated August 20, 2013, stated:

> Secondly, you asked me about my legal expertise? You fought your case differently than the way I use to fight mine. When I was on the run for murder I used that time to make sure nobody was coming to court! When I went to court the state didn't have no witnesses and the few people who got away was scared after they saw what was

> happening to their people. I let them know that if you came to court on me I'm going to slaughter your whole family. So my legal advice is [meaningless] right now, but I got a plan! It ain't over! It's far from over! While you was hiding you was hiding so good that you was hiding from me! I tried to help you but I was told to step back and stay away. Let me tell you how it went down. Your mother told me that you was thinking about giving up, and I told her to tell you to never give up until you set all of your affairs in order. … Your mother went off because she said she was tired of this. I told her to be patient because she wasn't the one on the run. … Then one day out of the clear blue sky she asked me was I trying to turn you in!!! … I told her if she ever said anything like that to me again I would never talk to her ever again in life!!!
>
> Now I know what I had done with Coop and Flash [Starks], but son please trust me when I tell you that I know exactly what I was doing, and Both of them will get back in court real soon and get some action. I wasn't going to let these people beat us like that, and if I had to be the one to take the bad name then so be it, but it's all about the plan. The only thing that hurt me with Coop and Flash is that they doubted me. I wasn't scared to take a life bit, just like I ain't scared to take a life or (two). I had to do what I did so we could come up out of here. I didn't foresee you going to jail, but all that did was make it so I got to get three people out instead of two. …
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> So don't trip on what people say about your father because I'm coming to get my people (You, Coop, and Flash) and in the end, that's all that matter[s].

¶6 The circuit court denied Starks's motion without an evidentiary hearing. Determining that Starks's motion did not include any affidavit or statement from Gray, himself, and that his proffered new evidence was "insufficient, unreliable," and "completely uncorroborated by any other evidence,"[3] the circuit court concluded that Starks's submissions did not satisfy

[3] In reaching its decision, the circuit court correctly set forth the test for newly discovered evidence and cited to ***Nicholas v. State***, 49 Wis. 2d 683, 694, 183 N.W.2d 11 (1971), which holds that "a new trial may be based on an admission of perjury only if the facts in the affidavit are corroborated by other newly discovered evidence."

the newly discovered evidence standard and consequently, failed to state a viable claim for relief. Starks appeals.

*The circuit court properly denied Starks's motion for a new trial based on newly discovered evidence without an evidentiary hearing.*

¶7 Starks argues he was entitled to a hearing because the allegations in his motion, if true, established the existence of newly discovered evidence warranting a new trial. His primary contention is that the statements in Gray's purported letters constitute a recantation of his trial testimony, amounting to an admission of perjury. A defendant seeking a new trial based on newly discovered evidence must prove by clear and convincing evidence all of the following: (1) the evidence was discovered after trial, (2) the defendant was not negligent in seeking the evidence, (3) the evidence is material to an issue in the case, and (4) the evidence is not merely cumulative to the evidence that was introduced at trial. ***State v. Avery***, 2013 WI 13, ¶25, 345 Wis. 2d 407, 826 N.W.2d 60. Additionally, where the new evidence is a witness's recantation of his or her trial testimony, it must be corroborated by other newly discovered evidence. ***Nicholas v. State***, 49 Wis. 2d 683, 694, 183 N.W.2d 11 (1971); s*ee also* ***State v. Ferguson***, 2014 WI App 48, ¶¶24-25, 354 Wis. 2d 253, 847 N.W.2d 900 (addressing a witness's recantation of his or her initial accusation). Once these factors are established, "then it must be determined whether a reasonable probability exists that had the jury heard the newly-discovered evidence, it would have had a reasonable doubt as to the defendant's guilt." ***State v. Plude***, 2008 WI 58, ¶32, 310 Wis. 2d 28, 750 N.W.2d 42. A circuit court's decision whether to grant or deny a newly discovered evidence motion is reviewed for an erroneous exercise of discretion. ***State v. Edmunds***, 2008 WI App 33, ¶¶8, 14, 308 Wis. 2d 374, 746 N.W.2d 590.

¶8 We conclude that the circuit court properly denied Starks's motion without a hearing because the allegations, if true, failed to establish that Gray was recanting his trial testimony. We first note, aside from the letters' substance, Starks's motion did not include any statement or acknowledgment from Gray that he actually wrote the letters and would so testify at an evidentiary hearing, and Starks's allegation that Gray was available to testify "concerning the content of [the] motion" was insufficient to establish either.

¶9 Even assuming Gray wrote the letters, the statements therein do not constitute a recantation. First, to recant is "[t]o withdraw or renounce (prior statements or testimony) formally or publicly." *Recant*, BLACK'S LAW DICTIONARY (10th ed. 2014). Gray's purported letters written to a private party, his son, are the antithesis of a formal or public renunciation. At a minimum, for Starks to obtain an evidentiary hearing based on Gray's alleged recantation, he needed to provide something from Gray himself acknowledging that he made and stood by the purportedly relevant statements. Second, we are hard pressed to construe Gray's statements as a recantation or admission of perjury. Gray never says he lied at Starks's trial. The letters are filled with coded references to incidents outside the record, including a case involving someone named "Coop." Ambiguous statements such as "one of us had [or has] to get free to help the other" and "I wasn't going to let these people beat us like that," along with vague references to Gray's "plan" do not approximate a recantation or admission of perjury.

¶10 The circuit court also properly exercised its discretion in summarily denying the motion due to its lack of corroboration by other newly discovered evidence. *See* ***Rohl v. State***, 64 Wis. 2d 443, 453, 219 N.W.2d 385 (1974); ***Nicholas***, 49 Wis. 2d at 694. Starks contends he has provided corroboration

within the meaning of ***State v. McCallum***, 208 Wis. 2d 463, 561 N.W.2d 707 (1997) (addressing the requisite corroboration in a case involving the recantation of an accusation). Under ***McCallum***, "the corroboration requirement in a recantation case is met if: (1) there is a feasible motive for the initial false statement; and, (2) there are circumstantial guarantees of the trustworthiness of the recantation." ***McCallum***, 208 Wis. 2d at 477-78. Starks asserts the evidence shows a feasible false motive for Gray's trial testimony, namely, "to get out of prison." He relies on Gray's purported statements that "the Feds are liars and when they came to me to deal they knew I couldn't help them so they found a way to put me in the mix. They put me on the case with Coop which was a lie, and they threaten to give me life in the state along with Coop if I didn't say what they wanted me to say." We are not persuaded. Gray admitted at Starks's trial that he was facing a life sentence in federal prison and hoped to receive a lesser sentence in exchange for his testimony. These ambiguous statements do not constitute newly discovered evidence of a feasible motive to lie at Starks's trial.

¶11 Additionally, Gray's purported statements do not contain the circumstantial guarantees of trustworthiness required by ***McCallum***. Relevant factors in determining a recantation's trustworthiness include whether (1) it is internally consistent and made under oath; (2) it is consistent with circumstances existing when the recanting witness initially testified or made his accusation; and (3) the recanting witness knows he could suffer criminal consequences stemming from the earlier false accusation, or, in this case, perjured testimony. *See* ***id.*** at 478; ***Ferguson***, 354 Wis. 2d 253, ¶25. Starks contends the statements are trustworthy because Gray purportedly exposed himself to criminal liability by admitting to not only perjury but also murder and how he got away with it. We disagree. The statements are not made under oath and are too ambiguous to be

read as an admission to either perjury or murder. Further, nothing in the letters purportedly authored by Gray indicates they were made with an awareness that his statements could expose him to criminal prosecution. *See* ***McCallum***, 208 Wis. 2d at 478 (fact that victim was "advised at the time of her recantation that she faced criminal consequences if her initial allegations were false" considered to be a circumstantial guarantee of the recantation's trustworthiness).

¶12 To the extent Starks argues that Gray's statements were inconsistent with and could be used to impeach Gray's trial testimony, we disagree. As explained above, we do not construe Gray's purported statements as an admission of perjury. Further, to say that Starks told on himself "by his own actions" in no way contradicts Gray's testimony. To the contrary, the reference to Starks's "own actions" is consistent with the fact that Starks committed the crimes for which he was convicted. Similarly, Gray never testified that he witnessed the shooting and his purported statement that he was not there "when [Starks] killed that boy," is consistent with his testimony. Starks thus failed to establish that Gray's purported statements were material to an issue in the case.[4] The circuit court properly exercised its discretion in determining that the motion failed to satisfy the newly discovered evidence test.

¶13 Finally, we reject Starks's claim that Gray's purported statements warrant a new trial insofar as they demonstrate that his conviction "is based on

[4] Though the State's brief concedes for purposes of argument that Starks established the first four prongs of the newly discovered evidence test, we are not bound by a party's concessions of law. *See* ***State v. Gomaz***, 141 Wis. 2d 302, 307, 414 N.W.2d 626 (1987). In denying Starks's motion, the circuit court determined he failed to satisfy the newly discovered evidence test. We may independently review the record to determine whether it provides a basis for the circuit court's exercise of discretion. ***State v. Pharr***, 115 Wis. 2d 334, 343, 340 N.W.2d 498 (1983).

prosecutor misconduct and false testimony that the prosecutor knew or should have known was false." Harkening back to his direct appeal argument that the State failed to timely disclose the name of "Junebug,"[5] Starks suggests that Gray's purported recantation demonstrates the prosecutor knew Gray testified falsely and intentionally withheld information about Junebug's name in order to suborn perjury. Starks merely reformulates arguments we considered and rejected in ***Starks I***. We will not consider them again. *See* ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991) (matters previously litigated may not be relitigated in subsequent postconviction proceedings no matter how artfully rephrased).

*Starks is not entitled to a new trial in the interest of justice.*

¶14 Finally, Starks asserts he is entitled to discretionary reversal and a new trial in the interest of justice under WIS. STAT. § 752.35. Section 752.35 allows this court to reverse a judgment by the circuit court "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." We will exercise our discretionary reversal power sparingly, and only in the most exceptional cases. ***State v. Schutte***, 2006

[5] According to Gray, one of his calls to Starks was made from the phone of a person known as Junebug. At trial, Starks moved for a mistrial on the ground that the State failed to provide Junebug's name, thus preventing trial counsel from investigating Junebug's cell phone records in order to verify or discredit Gray's testimony. In affirming Starks's conviction, we observed: "The record is uncontroverted that prior to trial, the prosecutor gave Starks Gray's cell phone directory" which listed only one Junebug and contained Junebug's phone number. ***State v. Starks***, No. 2008AP790-CR, unpublished slip op. ¶26 (WI App Dec. 23, 2008) (***Starks I***). We stated: "Additionally, the prosecutor turned over documents showing that the name of the person who subscribed to [that phone number] was Willie R. Gill." ***Id.*** We determined there was no violation under ***Brady v. Maryland***, 373 U.S. 83 (1963), or its progeny because once the prosecutor provided the information Starks requested, it was not in the State's exclusive possession, and the defense had enough information to conduct its own investigation. ***Starks I***, unpublished slip op. ¶27.

WI App 135, ¶62, 295 Wis. 2d 256, 720 N.W.2d 469. Starks rehashes arguments rejected in this appeal and in ***Starks I*** and ***Starks III***. *See* ***State v. Arredondo***, 2004 WI App 7, ¶56, 269 Wis. 2d 369, 674 N.W.2d 647. Accordingly, we decline to grant the extraordinary relief requested.

*By the Court.*—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2013-14).