COURT OF APPEALS
DECISION
DATED AND FILED

December 28, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP185 **Cir. Ct. No. 1995CF238**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KEITH M. KUTSKA,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Brown County: JAMES T. BAYORGEON, Judge. *Affirmed*.

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

¶1 PER CURIAM. Keith Kutska appeals an order denying his WIS. STAT. § 974.06[1] postconviction motion in which he alleged ineffective assistance of counsel, and newly discovered evidence, and requested a new trial in the interest of justice. The circuit court denied the motion, reasoning it was procedurally barred and also failed on the merits. Because some of Kutska's arguments embellish on issues that were presented and rejected in his previous postconviction motion and appeal, and he has not established ineffective assistance of counsel or newly discovered evidence, we affirm the order.

BACKGROUND

The 1995 Trial Testimony

¶2 Kutska and five other defendants were charged as parties to the 1992 murder of Thomas Monfils at the paper mill where they worked. Eleven days before his death, Monfils called the police to report that Kutska planned to steal an electrical cord from the mill. When Kutska attempted to leave the premises, a security guard asked to inspect his bag. Kutska refused, and bolted out the door. He was suspended from work without pay for five days.

¶3 Kutska obtained a recording of the anonymous call to the police and recognized Monfils' voice. Kutska played the recording for Monfils who admitted it was his voice. Kutska also played the tape for other employees and encouraged them to "go give [Monfils] some shit."

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

¶4 According to the State's witnesses, verbal harassment turned physical when the six defendants cornered Monfils near a water bubbler. Kutska punched Monfils in the face. A co-defendant hit Monfils on the back of the head, possibly with a wrench or board. All of the defendants joined in kicking and beating Monfils.

¶5 A short time later, David Wiener observed two of the defendants, Dale Basten and Michael Johnson, walking toward a vat where Monfils' body was eventually found. They were hunched over, approximately six feet apart, and appeared to be carrying something Wiener could not see.

¶6 Shortly thereafter, Kutska told another co-defendant to notify a supervisor that Monfils was missing, even though it was no more than ten minutes since he was last seen. A search for Monfils began immediately, but his body was not found until the pulp vat was drained the next morning. His partially decomposed body was found in the vat with a heavy weight tied around his neck. He died from asphyxiation and strangulation.

¶7 Wiener was initially considered a suspect, and he denied any knowledge of the incident. Two months later, he told police he had a "repressed memory" of seeing Basten and Johnson carrying the heavy object toward the vat. Wiener testified that after Monfils' body was found, Basten went to Wiener's work area to determine what could be seen from that area. By the time the trial took place, Wiener had been convicted of killing his brother and was serving a prison sentence. He and the State denied the existence of any deal or sentencing consideration for his testimony. However, after the trial, the State did not oppose Wiener's motion for a sentence reduction.

¶8 When the police questioned Basten, he started to cry and said he did not mean to kill Monfils. He said he should have left town when the police started questioning him because now they knew that "We did the shit."

¶9 A forensic pathologist, Dr. Helen Young, performed the autopsy on Monfils' body. Young rejected any possibility of suicide and determined Monfils had been beaten with one or more blunt objects while still alive and was placed in the vat where he died. Young testified Monfils would have bled profusely from the injuries caused by the beating. She concluded the injuries she observed on Monfils were not caused by the propeller blades in the pulp vat.

¶10 The police never identified the object that struck the back of Monfils' head and found no traces of blood on the floor. Kutska had earlier spray-washed the floor around the paper machines.

¶11 Brian and Verna Kellner testified that at the Fox Den Bar, Kutska had "reenacted" the bubbler confrontation and beating. Kutska cast himself, his wife, the Kellners and, according to Verna, two bartenders, to demonstrate the relative positions of the participants at the bubbler incident. When describing Monfils being struck with a wrench or board, Kutska used the terms "what if" somebody had hit him in the head. The bartenders denied participation in any reenactment and told police they did not witness a reenactment.

¶12 Jail inmates testified that other co-defendants made self-incriminating statements regarding their participation in the beating.

Kutska's Initial Postconviction Motion and Appeal

¶13 Following his conviction, Kutska filed a postconviction motion and an appeal from the judgment of conviction and the order denying his

postconviction motion. On appeal, he raised thirteen issues, including sufficiency of the evidence based on his challenge to the State's witnesses' credibility and alleged perjury, the State's failure to produce exculpatory evidence, ineffective assistance of counsel and newly discovered evidence consisting of Brian Kellner's recantation, testimony from three prisoners that Wiener said he killed Monfils, and evidence that Wiener expected a sentence reduction as a result of his testimony. ***State v. Kutska***, No. 1997AP2962, unpublished slip op. at 22-26 (WI App Sept. 22, 1998). To bolster his claims, Kutska presented affidavits from two other individuals who claimed Wiener killed his brother to prevent him from revealing Wiener's role in the Monfils murder. Another inmate averred Wiener told him "he and the black guy [Moore] killed Monfils," and "[t]he five white guys were innocent" and "[w]hat would they do if they found out that I killed him?" ***Id.*** at 26.

¶14 The circuit court found the testimony and affidavits "imaginative, resourceful, and innovative, but in no event could the word 'credible' be attached to them." ***Id.*** at 27. It ruled the alleged connection between this case and Wiener's killing of his brother was pure speculation. This court affirmed the circuit court's ruling, concluding the evidence did not meet the criteria for newly discovered evidence because evidence found to be incredible would not lead to a different result at a new trial. ***Id.*** at 29.

¶15 Kellner's recantation consisted of correcting his trial testimony identifying the six individuals who were present at the confrontation near the bubbler, and claiming Kutska's reenactment only identified the individuals present when he played the tape of Monfils' call to the police. ***Id.*** at 23. Kellner also said the entire conversation at the Fox Den Bar, not just the description of the blow to the back of Monfils' head, was phrased in terms of "what if." ***Id.*** Kellner testified

at the postconviction hearing that he gave untruthful answers at the trial because the police threatened him with the loss of his children and his job. ***Id.*** The circuit court found Kellner's reasons for his recantation cumulative to evidence the jury heard at the trial, and further found the recantation not credible. ***Id.*** at 24. This court affirmed the circuit court's decision, because the circuit court's finding the recantation was incredible showed the recantation would not have led the jury to have a reasonable doubt about the defendant's guilt. ***Id.*** at 25.

¶16 For the same reason, this court affirmed the circuit court's rejection of Kutska's newly discovered evidence that Wiener allegedly told other prisoners he killed Monfils. ***Id.*** at 27. The circuit court found their testimony incredible.

¶17 Regarding the allegation that Wiener gave false testimony in expectation of receiving a sentence reduction, Kutska presented no evidence of "a deal" with the State. Wiener's statements to police implicating the six defendants occurred long before he killed his brother. Therefore, this court concluded it made no sense that Wiener concocted his story in return for sentencing concessions. ***Id.*** at 29.

¶18 In his initial appeal, Kutska also argued the State failed to disclose exculpatory evidence that (1) Kellner told the district attorney his preliminary hearing testimony was incorrect, (2) Sergeant Randy Winkler's investigative techniques were questionable, and (3) Wiener attempted to negotiate a deal in return for his testimony. This court rejected those arguments. ***Id.*** at 30, 32. We noted Kellner did not recant his testimony about Kutska's participation in the confrontation and playing the tape. His clarification that Kutska's statements began with "what if" or "this is what the police think," matched his trial testimony. Kellner's preliminary hearing testimony suggesting more inculpatory statements

would not so impeach his trial testimony as to render a different result. ***Id.*** at 32. Regarding Winkler's investigative techniques, this court noted Kutska simply listed tactics he believed were improper, but provided no explanation as to why this court should find the tactics exculpatory. ***Id.*** at 35.

¶19 We concluded the allegation that the State withheld information regarding Wiener's attempt to negotiate a deal was not material because there is no reasonable probability that disclosure would have resulted in a different outcome. ***Id.*** at 36. Because Wiener told police what he knew about this case long before he was convicted of killing his brother, he had no motive for presenting false evidence at the trial. In addition, the circuit court found no evidence of any negotiations for a deal. Therefore, the State had no duty to disclose Wiener's alleged attempt to negotiate a deal. ***Id.***

Kutska's Present Postconviction Motion

¶20 Kutska's present postconviction motion espouses the theory that Monfils committed suicide. He contends his trial attorney should have pursued a suicide theory, and his postconviction counsel was ineffective for failing to argue ineffective assistance of trial counsel on that basis. He also presented testimony from witnesses regarding Monfils' suicidal tendencies, Winkler's investigative techniques, Brian Kellner's further recantation, and testimony that both Brian and Verna Kellner told other people they were forced to lie about the Fox Den Bar reenactment.

¶21 Doctor Mary Ann Sens, a forensic pathologist, coroner and medical examiner, reviewed the autopsy photos and reports. She testified she would have listed the cause of death as "unknown" or "undetermined," rather than a homicide. She would not have been able to conclude that certain injuries occurred

pre-mortem. She conceded medical examiners previously thought they could better distinguish pre-mortem and post-mortem injuries. She testified she did not know if the science has changed or whether medical examiners were more "humble and realistic" in their opinions. She was unable to determine whether Monfils' death was a homicide or suicide and whether the injuries might have occurred in a manner other than a beating.

¶22 Kutska's trial counsel testified he did not consult with or hire an independent forensic pathologist because he saw no reason to question Young's findings. He had worked with Young in the past and had no reason to question her competency. He did not believe a claim of suicide would "sit well with the jury" and believed the better defense was to challenge the credibility of the State's witnesses and to argue someone else was responsible for Monfils' death.

¶23 Kutska's postconviction counsel testified he did not consult with any forensic pathologist because he had "settled on a theory of defense that was presented at trial and it seemed to make the most sense to [him]." He was aware that witnesses had provided statements that they believed Monfils may have committed suicide, but he concluded trial counsel reasonably believed Wiener was responsible.

¶24 Kutska's ex-wife testified Kutska did not demonstrate or reenact the incidents at the Fox Den Bar. She stated she was willing to testify at the trial but was not called as a witness because she was told the jury would not believe her given she was Kutska's wife.

¶25 Kellner's daughter testified Winkler interviewed her without her parents' knowledge or permission. She also testified to statements made by both

Winkler and her father, but the circuit court found the statements were hearsay and minimally relevant and attached no weight to them.

¶26 Attorney John Lundquist testified Brian Kellner told him the Fox Den Bar reenactment "simply did not happen." Kellner told Lundquist the statement he signed was completely written by Winkler. Lundquist prepared an affidavit for Kellner to sign, but Kellner died unexpectedly before signing it. The circuit court found Kellner's statements to Lundquist were hearsay, rejecting a claim that they were statements against Kellner's interest. The court further concluded the statements were minimally relevant even if they were admissible.

¶27 Cal Monfils, Thomas Monfils' brother, testified Thomas had been in the Coast Guard for approximately four years and regularly tied knots similar to the knots tied to the weight attached to Thomas' neck. Cal further testified that after Thomas' death, he picked up Thomas' wife from a psychiatric ward and, within five or ten seconds of hearing of Thomas' death on the radio, she asked Cal to drive her to the bank. The court ruled inadmissible double hearsay statements that Cal's mother told him Monfils' wife made statements that she thought Monfils may have committed suicide or left suicide notes. The court also concluded the statements, if admissible, were of such limited relevance that they would be given little or no weight by the court.

¶28 George Jansen, a former Coast Guard engineman, testified that Coast Guard members receive training in knot tying, and he identified the rope knots pictured in Monfils' autopsy photos as two-half hitch knots. Jansen conceded these knots are also taught to Boy Scouts as part of the knot-tying badge.

¶29 Steven Stein, a fellow employee at the paper mill, testified Monfils had spoken to him about his time in the Coast Guard and about recovery of

drowning suicide victims. Stein also testified, in the days before his disappearance, Monfils "got very quiet … he didn't want to talk to his partners [in the mill] at all." Stein further testified he felt pressured by Winkler and others in law enforcement to say he had seen Monfils being beaten. Stein also testified that, after the trial, Kellner made statements to him on five or six occasions that Kellner had lied to police because he was afraid of losing his job and family.

¶30 Jody Liegois testified she had previously worked with Verna Kellner who told her both she and Brian Kellner were forced to make statements about the reenactment at the bar.

¶31 Gary Thyes, a barber, testified detectives came to his barber shop during the investigation and gave him written statements to sign, but he refused because the statements were untruthful. He testified Brian Kellner told him he had signed a statement because "they threatened to take his kids away," but Kellner immediately told "the lawyer" that he had signed the false statement.

¶32 Randy Winkler testified he believed workers at the mill were covering up what happened and he used interrogation tactics to get them to talk. He denied threatening Kellner with the loss of his children or his job. He testified people at the mill told him during the course of the investigation that Monfils often discussed drowning and recovery of drowning victims while Monfils was in the Coast Guard. Finally, Winkler testified he received a letter from Wiener's attorney, but he denied making statements to Wiener intimating that his cooperation could affect the sentence he was serving for killing his brother.

DISCUSSION

¶33 Because Kutska had a previous postconviction motion and appeal, he is procedurally barred from raising new issues in a subsequent postconviction motion under WIS. STAT. § 974.06(4) unless he can show sufficient reason for not asserting the issues in his initial postconviction proceedings. Ineffective assistance of postconviction counsel or newly discovered evidence would constitute sufficient reason. ***State v. Romero-Georgana***, 2014 WI 83, ¶36, 360 Wis. 2d 522, 849 N.W.2d 668; ***State v. Love***, 2005 WI 116, ¶51, 284 Wis. 2d 111, 700 N.W.2d 62. Issues previously litigated cannot be reconsidered in a subsequent postconviction motion. ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991).

Ineffective Assistance of Counsel

¶34 Kutska claims his postconviction counsel was ineffective for failing to challenge the effectiveness of his trial counsel. To establish ineffective assistance of counsel, Kutska must show both deficient performance and prejudice. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). As to the former, he must show that counsel's representation fell below an objective standard of reasonableness. ***Id.*** at 687-88. Judicial scrutiny of counsel's performance must be highly deferential, and we must eliminate the distorting effects of hindsight to reconstruct the circumstances of counsel's challenged conduct and evaluate the conduct from counsel's perspective at the time. ***Id.*** at 689. To establish prejudice, Kutska must show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. ***Id.*** at 694. A reasonable probability is one that undermines our confidence in the outcome. ***Id.***

¶35 Kutska contends his trial counsel was ineffective for failing to consult with an independent forensic pathologist and failing to pursue a theory that Monfils committed suicide. He contends Sens' testimony undermines Young's conclusion that Monfils was murdered. We conclude Kutska failed to establish deficient performance or prejudice from his counsel's conduct. Of the twenty attorneys who represented the six defendants at trial and in postconviction proceedings, none pursued the suicide theory. Kutska's trial counsel testified he had previously worked with Young, had no reason to question her competence and thought she was "state of the art." Based on the information available at the time of the trial, counsel reasonably deferred to Young's conclusions.

¶36 Kutska has not established prejudice from his attorney's failure to consult with another pathologist because he has not identified any pathologist who would have disagreed with Young's conclusions at the time of the trial. Sens testified pathologists in the 1990s were more confident of their ability to determine whether injuries were inflicted pre-mortem or post-mortem and she made calls during that period she would not make today. Even with modern forensic techniques and twenty additional years of experience, Sens would have listed the cause of death as "unknown" or "undetermined." Kutska has provided no evidence that another pathologist in 1995 would have contradicted Young's conclusions.

¶37 Kutska contends his trial counsel should have utilized deposition testimony in Monfils' wife's wrongful death action to undermine Young's conclusions. Young testified the slurry in the tank was the consistency of oatmeal. Anthony Cicero, the mill's chief engineer, testified the specific weight of the pulp is nearly identical to the specific weight of water. Kutska contends Cicero's testimony contradicts Young's testimony and shows her medical conclusions were

based on assumptions regarding engineering and fluid dynamics that were beyond her areas of expertise. Contrary to Kutska's argument, Cicero did not confirm that Monfils would almost certainly have come into contact with the propeller blades. Rather, he said a person who was floating would have been drawn into the propeller blades. However, Cicero testified a person dropped in to the tank with a forty-pound weight (the weight attached to Monfils' body was actually more than forty-nine pounds) would sink to the bottom, and the agitator would not be sufficient to move the weight. Moreover, Cicero testified a person coming into contact with the four-foot diameter propeller blades operating at 281 r.p.m. would suffer severance of "big parts of the body."

¶38 Young did not specifically relate her homicide conclusion to the thickness of the slurry. She testified Monfils died as a result of aspiration of the paper slurry and the ligature around his neck. While she disagreed with the description of the slurry as having the consistency of water, her conclusions did not depend on that differentiation. Rather, she determined by close examination of each of Monfils' wounds whether they were inflicted before or after his death and testified that post-mortem movement of the body could not have caused certain of the injuries she observed. Her differentiation between pre-mortem and post-mortem injuries was based entirely on the presence of blood cells in other tissues. Young acknowledged post-mortem trauma resulting from Monfils' body intermittently swinging into the propeller,[2] but averred she could distinguish between those injuries and pre-mortem injuries that resulted from a beating before

[2] When asked whether the propeller could have caused Monfils' body to twist and turn and "move around quickly," she responded "I don't know. I doubt very much that it was moved quickly in that heavy slurry, but it most certainly would have turned and twisted, which accounts for some of the post-mortem trauma that was present."

Monfils was placed in the tank. Therefore, Cicero's testimony regarding the consistency of the slurry would not have impeached Young's conclusions, and Kutska has not established deficient performance or prejudice from his trial counsel's failure to present Cicero's testimony.

Newly Discovered Evidence

¶39 To prevail on a claim of newly discovered evidence, Kutska must prove by clear and convincing evidence that: (1) the evidence was discovered after conviction; (2) he was not negligent in seeking evidence; (3) the evidence is material to an issue in the case; (4) the evidence is not merely cumulative; and (5) a reasonable probability exists that a different result would be reached in a new trial. *See* ***Love***, 294 Wis. 2d 111, ¶¶43-44. The motion is addressed to the circuit court's sound discretion, and we will affirm the court's decision if it has a reasonable basis and was made in accordance with accepted legal standards and facts of record. ***State v. Carnemolla***, 229 Wis. 2d 648, 661, 600 N.W.2d 236 (Ct. App. 1999). The circuit court decides the credibility of the witnesses, and a finding of a reasonable probability of a different outcome on retrial cannot be supported by testimony the circuit court finds incredible. ***Id.***

¶40 Kutska argues he is entitled to a new trial based on "newly-presented evidence."[3] Monfils' co-workers' speculation that Monfils committed suicide was well documented in police reports, and was advocated by Kutska before the trial. Therefore, it did not constitute newly discovered evidence.

[3] Evidence that does not qualify as newly discovered evidence is relevant to the extent it establishes ineffective assistance of trial counsel for his failure to have introduced that evidence.

¶41 The proffered evidence supporting the suicide theory consists largely of non-expert speculation and hearsay. Stein's non-expert opinion that Monfils needed psychiatric help, and his speculation that Monfils took leave from work to receive that help, does not constitute strong evidence in support of the suicide theory. Likewise, Stein's recollection of Monfils' stories regarding his Coast Guard experiences of recovering the bodies of drowning victims who committed suicide by tying heavy objects to themselves, suggests only that Monfils would have known enough to attach a weight to his body, hardly a remarkable proposition, and one that he shared with his co-workers. Stein's testimony of rumors that Monfils and his wife were about to divorce constitutes hearsay and speculation.

¶42 Likewise, Monfils' family's opinions regarding his possible suicide consisted of hearsay and speculation. Cal Monfils testified regarding conversations he had with his mother in which she related Monfils' wife's statements that Monfils committed suicide. Kutska contends these statements are admissible as statements against Monfils' wife's interest because of her pending civil action. Kutska does not explain how defense counsel in the civil action could have learned of that alleged statement, or establish a hearsay exception for Monfils' mother's statement. Nonetheless, even if the statement was admissible, there is no foundation for her conclusion. Kutska speculates that they were based on notes Monfils' wife found "above the ceiling tiles in their bedroom," but he admits the subject of the notes is not known.

¶43 Cal Monfils also testified at the postconviction hearing that the knots tying Monfils' body "looked familiar" and were of a type Monfils could have tied. That testimony was supported by Jansen, the former Coast Guard seaman who testified the knots were of a type taught to Coast Guard seamen. These knots were

also common knots to Boy Scouts and would provide weak evidence in support of the suicide theory. In light of Young's expert medical conclusions, trial counsel's decision to forego presenting a suicide defense constituted a reasonable trial strategy, particularly given the questionable admissibility of the non-expert evidence supporting the suicide theory.

¶44 Much of Kutska's alleged newly discovered evidence focuses on Winkler's "coercion" and Brian and Verna Kellner's alleged perjury. Before the trial, Brian Kellner disavowed portions of his written statement and was directed by the district attorney to testify truthfully. In his initial appeal, Kutska argued Brian Kellner's testimony was "false, coerced and unreliable." That argument cannot be the basis of the present postconviction motion and appeal. ***Witkowski***, 163 Wis. 2d at 990. In 1997, Kellner recanted his testimony, and the circuit court found the recantation not credible.

¶45 To the extent newly discovered evidence would create an exception to the ***Witkowski*** holding, the circuit court properly rejected the evidence. Kutska contends Kellner's recantation given to Attorney John Lundquist, a member of Kutska's current legal team, would establish "that the Fox Den incident simply did not happen. There was no conversation by Mr. Kutska at all about Thomas Monfils." Kellner died without signing or even seeing the affidavit prepared by Lundquist. As the circuit court noted, a motion for a new trial based on a witness's recantation is entertained with great caution. ***State v. Terrance J.W.***, 202 Wis. 2d 496, 500, 550 N.W.2d 445 (Ct. App. 1996). The circuit court noted Kellner testified in two previous proceedings that the Fox Den Bar incident occurred. An additional recantation now claiming the reenactment never took place would lack credibility and would not likely result in a different verdict upon retrial, particularly since the recanting witness is no longer alive.

¶46 Amanda Williams, Brian Kellner's daughter, testified regarding Winkler's pressure on her parents to testify. Pressure to testify is not synonymous with pressure to testify falsely. As the circuit court noted, testimony by Williams, Stein, and Thyes regarding Winkler's pressure and Kellner's recantation was hearsay and cumulative of evidence already considered and rejected. Liegois' testimony that Verna Kellner said she was forced into making statements about the reenactment at the bar was also hearsay and also equates pressure to testify with pressure to testify falsely. The circuit court properly exercised its discretion when it concluded this evidence, even if it is admissible, does not meet the criteria for newly discovered evidence because it was merely cumulative and it is not reasonably possible that a different result would be reached at a new trial.

Alleged Due Process Violations

¶47 Kutska contends the State "had strong reason to know that Winkler coerced witness statements and testimony." He notes the State told the jury Winkler had "maybe threatened" witnesses in order to overcome their obstruction. Kutska has not established that Winkler induced false testimony.

¶48 Kutska also contends the State and Wiener failed to disclose that Wiener expected some sort of sentencing concession in return for his testimony against Kutska. In his earlier appeal, Kutska argued that "Wiener's testimony was false and given in expectation of a reduction in his current sentence for an unrelated crime." This court observed, "[i]t makes no sense that an expectation of a reduction in sentence motivated Wiener's testimony given that Wiener gave police his version of the events long before Wiener was convicted of an unrelated homicide." No. 1997AP2962, unpublished slip op. at 29. We again conclude there is no basis for arguing that the State knowingly presented false testimony

from Wiener, and the State had no obligation to disclose a deal with Wiener that did not exist.

Reversal in the Interest of Justice

¶49 Finally, Kutska requests a new trial in the interest of justice. Because he failed to establish ineffective assistance of counsel or newly discovered evidence, that motion is procedurally barred. In addition, he has not established that the real controversy was not fully tried or that, because of trial error, it is probable that justice miscarried and a new trial would produce a different result. *See* ***State v. Wyss***, 124 Wis. 2d 681, 735, 350 N.W.2d 745 (1985), *overruled on other grounds by* ***State v. Poellinger***, 153 Wis. 2d 493, 451 N.W.2d 752 (1990).

By the Court.—Order affirmed.

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