COURT OF APPEALS
DECISION
DATED AND FILED

June 6, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP2588-CR **Cir. Ct. No. 2013CF213**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RODNEY JAMES HOPKINS,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: DENNIS R. CIMPL, Judge. *Affirmed*.

Before Brennan, P.J., Kessler and Brash, JJ.

¶1 PER CURIAM. Rodney J. Hopkins, *pro se*, appeals from an order of the circuit court that denied his motion seeking sentence modification based on newly discovered evidence. Hopkins claims that newly discovered evidence supports his self-defense theory. We affirm the circuit court.

¶2 Hopkins was charged with one count of second-degree recklessly endangering safety with a dangerous weapon based on an altercation on a Milwaukee County Transit System bus in January 2013. Based on testimony at Hopkins' court trial, Hopkins was harassing two women, S.B. and K.W., who were passengers on the bus. *See* ***State v. Hopkins***, No. 2014AP1353-CR, unpublished slip op. ¶¶4-5 (WI App May 5, 2015). Another passenger, D.A., asked the women if Hopkins was bothering them. *See* ***id.***, ¶6. When they said yes, D.A. told Hopkins to leave them alone. *See* ***id.***

¶3 This angered Hopkins, who tried to grab at D.A.'s coat. *See* ***id.*** D.A. held Hopkins down on a seat, promising to let him go if he got off the bus. *See* ***id.*** Hopkins appeared to get off the bus, but D.A. then saw Hopkins coming toward him, swinging a knife and taking several jabs at D.A. before fleeing. *See* ***id.*** Hopkins testified he was only flirting with the women and, although he admitted having a knife, he testified that he only used the knife in self-defense. *See* ***id.***, ¶7. The trial court convicted Hopkins and sentenced him to a total of eight years' imprisonment. Hopkins appealed his conviction, but we affirmed.

¶4 Hopkins subsequently commenced a civil suit against Milwaukee County Transit. He submitted an interrogatory to the bus driver that asked, "Can you explain what you witnessed … on the No. 19 bus that day?" Based on the driver's answer, detailed below, Hopkins filed a "sentence modification amended motion" claiming newly discovered evidence. Hopkins asserted that the driver's answer to the interrogatory "mirrors" Hopkins' own testimony that he acted in self-defense and "should exonerate me totally[.]" The circuit court denied the motion, noting that the "proffered newly-discovered evidence has no exculpatory value and does not undermine the court's confidence in the guilty verdict." Hopkins appeals.

¶5 The decision whether to grant a motion for a new trial[1] based on newly discovered evidence rests in the circuit court's discretion. *See* ***State v. Plude***, 2008 WI 58, ¶31, 310 Wis. 2d 28, 750 N.W.2d 42. A defendant alleging newly discovered evidence must show "by clear and convincing evidence that: (1) the evidence was discovered after the 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." ***State v. Avery***, 2013 WI 13, ¶25, 345 Wis. 2d 407, 826 N.W.2d 60 (citation and two sets of quotation marks omitted).

¶6 If the defendant makes those four initial showings, "'the circuit court must determine whether a reasonable probability exists that a different result would be reached in a [new] trial.'" ***State v. Love***, 2005 WI 116, ¶44, 284 Wis. 2d 111, 700 N.W.2d 62 (citation omitted). "A reasonable probability of a different outcome exists if there is a reasonable probability that a jury, looking at both the old evidence and the new evidence, would have a reasonable doubt as to the defendant's guilt." ***State v. Vollbrecht***, 2012 WI App 90, ¶18, 344 Wis. 2d 69, 820 N.W.2d 443.

¶7 The circuit court did not expressly discuss any of the four threshold factors set out in ***Avery***.[2] However, its determination that its confidence in the

[1] We apply this standard even though Hopkins called his motion a "sentence modification amended motion." We are not bound by the labels a party places on his pleadings. *See* ***Lewis v. Sullivan***, 188 Wis. 2d 157, 166, 524 N.W.2d 630 (1994).

[2] Hopkins claims that, by not citing to any specific case or statutory law in its decision, the circuit court violated SCR 60.01(10), part of the Judicial Code of Conduct. However, Rule 60.01 is entitled "Definitions," and Rule 60.01(10) merely defines the word "law" to mean "court rules, statutes, constitutional provisions and legal conclusions in published court decisions." The rule thus imposes no affirmative obligation on a circuit court.

verdict is not undermined is akin to concluding that, assuming the first four factors were shown, there is no reasonable probability of a different outcome. While we agree with the circuit court—there is no reasonable probability of a different outcome—we also conclude that Hopkins has failed to establish that the bus driver's answer is material to the self-defense claim, meaning Hopkins has failed to make the required satisfactory initial showing that leads a court to consider the probability of a different result. *See* ***State v. Earl***, 2009 WI App 99, ¶18 n.8, 320 Wis. 2d 639, 770 N.W.2d 755 ("[W]e may affirm on different grounds than those relied on by the [circuit] court.").

¶8 Contrary to Hopkins' interpretation of the driver's answer, it does not mirror Hopkins' trial testimony. Hopkins testified that D.A. slammed him against a seat and started choking him. Hopkins disembarked and got on what he thought was a different bus, but was actually the same bus, so when he saw D.A. again, he pulled his knife to defend himself in case D.A. came at him again.

¶9 The driver's interrogatory answer states, in relevant part:

> I observed [Hopkins] enter the bus through the front door …. [He] initially did not want to pay the full fare for the bus ride and appeared to be under the influence of alcohol or drugs. … [J]ust as the bus passed Clyborn Avenue I heard a shout from the rear of the bus. I looked in the rear-view mirror and from what I could see on what was a crowded bus, there was a young man partially on top of another young man. I raised my voice and told the two men to take the altercation off of the bus. I stopped the bus … and Mr. Hopkins exited the bus through the rear door. Three or four people entered the bus through the front door and before I could pull away I saw another passenger at the front door. … [I]t was Mr. Hopkins. Mr. Hopkins entered the bus again … facing me as the bus remained stopped. Mr. Hopkins displayed a folding knife at approximately waist level, unfolded the knife, and proceeded toward the back of the bus. I then said very loudly "Not on this bus." Mr. Hopkins exited the bus through the front door. I closed

> the door and contacted dispatch to alert them of the situation.

¶10 The only detail of the original altercation described in this answer is that the driver saw "a young man partially on top of another young man." Nothing about this statement "mirrors," or even really resembles, Hopkins' trial testimony. Thus, the driver's interrogatory answer is not material to the self-defense claim.[3] A new trial based on newly discovered evidence was properly denied by the circuit court.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2015-16). This opinion may not be cited except as provided under RULE 809.23(3) (2015-16).

[3] Hopkins also asserts that the real controversy was not fully tried. This claim is conclusory and undeveloped but, in any event, we reject the assertion. The real controversy was indeed fully tried.

To the extent that Hopkins raises new arguments, including claims of ineffective assistance of counsel, discovery violations, and due process violations, in his reply brief, we note that we typically do not consider arguments raised for the first time in the reply brief, *see* ***Northwest Wholesale Lumber, Inc. v. Anderson***, 191 Wis. 2d 278, 294 n.11, 528 N.W.2d 502 (Ct. App. 1995), and we see no reason to deviate from that rule here.