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

**February 1, 2018**

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



**Appeal No. 2017AP35-CR** **Cir. Ct. No. 1999CF3970**

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

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**FLOYD L. MARLOW,**

**DEFENDANT-APPELLANT.**

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APPEAL from an order of the circuit court for Milwaukee County: THOMAS J. MCADAMS, Judge. *Affirmed*.

Before Lundsten, P.J., Blanchard, and Fitzpatrick, JJ.

¶1 PER CURIAM. Floyd L. Marlow, pro se, appeals a circuit court order that denied Marlow's motions for a new trial or sentence modification following his conviction and sentence for first-degree reckless homicide as party to a crime. Marlow contends that he is entitled to a new trial or sentence modification based on newly discovered evidence in the form of an admission by Marlow's co-defendant, Dwight Campbell, taking full responsibility for the shooting and disavowing any involvement by Marlow. Alternatively, Marlow seeks a new trial in the interest of justice. For the reasons set forth below, we reject Marlow's arguments. We affirm.

¶2 In July 1999, Marlow and Campbell were charged with homicide for the shooting death of Johnnie Humphrey. They were tried together at a jury trial, and both were convicted of first-degree reckless homicide as party to a crime. Marlow appealed, and we affirmed the conviction.

¶3 In September 2015, Marlow moved for a new trial based on newly discovered evidence. Marlow asserted that Campbell now claimed responsibility for Humphrey's death and also that Campbell now claimed that Marlow was not involved in the homicide. Marlow provided a supporting affidavit from Campbell. The circuit court held a motion hearing, and Campbell testified in support of Marlow's motion. Marlow then filed a supplemental motion adding requests for a new trial in the interest of justice or sentence modification.

¶4 The circuit court denied Marlow's requests for relief. The court explained that it found that Campbell's testimony was not believable. The court noted that Campbell testified at the motion hearing that he gave the gun to a man named Higgs after he shot Humphrey, while his affidavit stated that he gave the gun to Marlow after the shooting. The court also found unbelievable Campbell's

account that Campbell went to avenge a shooting at the home shared by Campbell's and Marlow's girlfriends while Marlow stayed behind at the girlfriends' home. The court found that Campbell had nothing to lose by offering the testimony to support Marlow's motion and that Campbell had a criminal history prior to this case. The court found that Campbell did not present as a believable witness, citing Campbell's demeanor and his bad memory.

¶5 The court then found that a reasonable jury looking at the evidence at trial—including witness testimony that Marlow was with the group that went to the scene of the shooting, and that Marlow made a statement that he was involved in the homicide—together with Campbell's testimony, would not have a reasonable doubt as to Marlow's guilt. Because the court found that Campbell's testimony lacked credibility, it also found that Marlow was not entitled to sentence modification or a new trial in the interest of justice. Marlow appeals.

¶6 Marlow contends that Campbell's testimony is newly discovered evidence that entitles him to a new trial. Marlow argues that the circuit court erred by denying Marlow's newly discovered evidence claim based on the court's mistaken view of Campbell's testimony as incredible as a matter of law. Marlow points out that the shooting occurred more than seventeen years ago, and asserts that Campbell's lack of memory as to certain details is attributable to the passage of time and the stress of the incident itself. He also asserts that the court's belief that Marlow necessarily would have joined Campbell to avenge the shooting at their girlfriends' house was unfounded. He contends that the court was wrong that Campbell had nothing to lose, since untruthful testimony could lead to a perjury charge and negatively affect Campbell's chances for parole. He also argues that the court was wrong to cite Campbell's criminal record, pointing out that Campbell explained that he has been through the restorative justice program.

¶7 Marlow asserts that, ultimately, the discrepancies in Campbell's testimony did not render it incredible as a matter of law, citing ***Chapman v. State***, 69 Wis. 2d 581, 583, 230 N.W.2d 824 (1975) ("To be incredible as a matter of law, evidence must be '… in conflict with the uniform course of nature or with fully established or conceded facts.'"). He argues that the circuit court erred by basing its decision on its finding that Campbell was not believable rather than weighing that testimony against the trial evidence, citing ***State v. Plude***, 2008 WI 58, ¶33, 310 Wis. 2d 28, 750 N.W.2d 42 ("A court reviewing newly-discovered evidence should consider whether a jury would find that the newly-discovered evidence had a sufficient impact on other evidence presented at trial that a jury would have a reasonable doubt as to the defendant's guilt."). We disagree.

¶8 Whether to grant a new trial on the basis of newly discovered evidence is committed to the circuit court's discretion. ***Id.***, ¶31. We uphold a circuit court's exercise of discretion if "it has a reasonable basis and is made in accordance with accepted legal standards and facts of record." ***State v. Morse***, 2005 WI App 223, ¶14, 287 Wis. 2d 369, 706 N.W.2d 152.

¶9 A motion for a new trial based on newly discovered evidence must establish that: "'(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.'" ***State v. Avery***, 2013 WI 13, ¶25, 345 Wis. 2d 407, 826 N.W.2d 60 (quoted source omitted). If those criteria are satisfied, "'the circuit court must determine whether a reasonable probability exists that a different result would be reached in a trial.'" ***Id.*** (quoted source omitted). "A reasonable probability of a different result exists if there is a reasonable probability that a jury, looking at both the old and the new

evidence, would have a reasonable doubt as to the defendant's guilt." ***Id.*** (citation omitted).

¶10 Here, the circuit court reviewed the facts presented in the postconviction motion, Campbell's affidavit, and Campbell's testimony at the motion hearing. It denied Marlow's newly discovered evidence claim based on its finding that Campbell's testimony was not credible. It explained that it made its credibility determination based on the inconsistencies in Campbell's story, the implausibility of his account of the shooting, the timing of Campbell's disavowing Marlow's involvement after Campbell's own postconviction claims failed, and Campbell's demeanor while testifying at the postconviction motion hearing. We defer to the circuit court's credibility determinations because the circuit court "is in the best position to evaluate ... credibility." ***State v. Carnemolla***, 229 Wis. 2d 648, 661, 600 N.W.2d 236 (Ct. App. 1999).

¶11 Marlow disputes the circuit court's credibility determination by arguing the reasons that Marlow believes the court should have found Campbell credible. However, while Marlow sets forth the credibility determination that he believes the court should have made, he has not set forth a basis to disturb the credibility determination the court did make. *See* ***State v. Terrance J.W.***, 202 Wis. 2d 496, 501, 550 N.W.2d 445 (Ct. App. 1996) ("When the trial court makes findings of fact as to the credibility of witnesses, we will not upset those findings unless they are clearly erroneous."). As explained above, the circuit court made a finding as to Campbell's credibility based on the facts in the record and the court's observations of Campbell at the hearing, and we have no basis to disturb that finding.

¶12 Marlow also asserts that the circuit court could not find Campbell's testimony incredible as a matter of law under ***Chapman***, and that the court was therefore required to weigh Campbell's testimony against the trial evidence to determine whether a jury would have reasonable doubt as to Marlow's guilt under ***Plude***. However, in ***Carnemolla***, 229 Wis. 2d at 659, we rejected the argument "that, to warrant denial of a new-trial motion, the newly discovered evidence must be 'incredible as a matter of law,' as opposed to not credible or not believable." We explained that "[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." ***Id.*** at 661. We then concluded that the court's finding that the witness was not credible was "the equivalent of finding that there is no reasonable probability of a different outcome on retrial." ***Id.***

¶13 Here, the circuit court's finding that Campbell's testimony was not credible "'necessarily leads to the conclusion that [the evidence] would not lead to a reasonable doubt in the minds of the jury.'" *See* ***id.*** at 660 (quoted source omitted). Accordingly, we conclude that the court properly exercised its discretion by denying Marlow's motion for a new trial based on newly discovered evidence.

¶14 Marlow also argues that the circuit court erred by denying Marlow's motion for sentence modification based on the new factor of Campbell's taking full responsibility for the homicide. Again, we disagree.

¶15 A defendant seeking sentence modification must establish that: (1) a new factor exists; and (2) the new factor justifies sentence modification. ***State v. Franklin***, 148 Wis. 2d 1, 8, 434 N.W.2d 609 (1989). A "'new factor'" for

sentence modification purposes is "'a fact or set of facts highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in existence or because … it was unknowingly overlooked by all of the parties.'" *See* ***State v. Harbor***, 2011 WI 28, ¶40, 333 Wis. 2d 53, 797 N.W.2d 828 (quoted sources omitted)). The defendant has the burden to demonstrate the existence of a new factor by clear and convincing evidence. ***Franklin***, 148 Wis. 2d at 8-9. Because the circuit court found that Campbell's testimony was not credible, and we defer to that credibility determination, we conclude that Marlow has not established the existence of a new factor for sentence modification purposes.

¶16 Finally, Marlow requests that we exercise our discretion to order a new trial in the interests of justice. We may order a new trial in the interests of justice "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." WIS. STAT. § 752.35 (2015-16). However, we do so only in exceptional cases. ***State v. McKellips***, 2016 WI 51, ¶30, 369 Wis. 2d 437, 881 N.W.2d 258. Marlow does not explain why such extraordinary relief is warranted in this case. Thus, we decline to exercise our discretionary powers to order a new trial in the interests of justice.

*By the Court.*—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2015-16).