COURT OF APPEALS
DECISION
DATED AND FILED

October 24, 2001

Cornelia G. Clark
Clerk of Court of Appeals

No. 00-1637-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

OTIS B. BLEDSOE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and orders of the circuit court for Kenosha County: MARY KAY WAGNER-MALLOY, Judge. *Affirmed.*

Before Brown, Anderson and Snyder, JJ.

¶1 PER CURIAM. Otis B. Bledsoe has appealed from a judgment convicting him after a jury trial of attempted first-degree intentional homicide by use of a dangerous weapon in violation of WIS. STAT. §§ 939.32(1)(a), 939.63,

and 940.01(1) (1999-2000).[1] He was also convicted of burglary in violation of WIS. STAT. § 943.10(2)(d), and injury by intoxicated use of a motor vehicle in violation of WIS. STAT. § 940.25(1)(a).

¶2 In addition to appealing from his judgment of conviction, Bledsoe has appealed from orders denying postconviction relief. We affirm the judgment and orders.

¶3 Bledsoe's convictions arise from events which occurred on April 27, 1997. Bledsoe's ex-girlfriend, Melanie Powell, testified that in the early morning hours, Bledsoe broke into her home while she was sleeping on the living room couch. She testified that he confronted her and accused her of having sex with another man. She testified that he beat her with his fists and a beer bottle, tore off her clothes, and raped her.[2] She testified that he then dressed her, dragged her to his car, and drove off with her, still hitting her and yelling. Powell testified that as they drove, Bledsoe said, "I should just kill you now." She testified that after saying this he brought the car to a stop in the road, and then accelerated toward a tree.

¶4 It is undisputed that Bledsoe's car rammed into a tree, that the primary damage to the car was on the front passenger side, and that Powell suffered serious injuries. Bledsoe claimed that the collision was accidental. He testified that Powell had allowed him into her home when he knocked on her door, and that, although they argued and were both intoxicated, there was no physical

[1] All references to the Wisconsin Statutes are to the 1999-2000 version.

[2] Bledsoe was also charged with sexual assault, but was acquitted of that charge.

confrontation. He testified that they left her home to drive to get cigarettes, and continued arguing in the car. He testified that something caused Powell to "snap," and that she grabbed the steering wheel, causing the car to swerve and run into the tree. He testified that, "I hit the brakes and then we just hit the tree." He denied first stopping the car in the middle of the road, or stopping it anywhere prior to hitting the tree. He testified that he was driving at the speed limit of about thirty miles per hour when Powell grabbed the wheel, and that he tried to straighten the steering wheel back out, but it was too late and they hit the tree.

¶5 Bledsoe's first argument is that the trial court erred when it permitted Christine Flahive, a police officer for the city of Kenosha, to provide expert testimony. Bledsoe contends that Flahive's testimony should have been excluded because the prosecutor did not notify him prior to trial that she would be testifying as an expert. He also contends that Flahive lacked the necessary expertise to give opinion testimony.

¶6 Flahive was dispatched to the scene of Bledsoe's accident shortly after it occurred. The record reveals that prior to trial and in accordance with WIS. STAT. § 971.23(1)(d), the prosecutor identified Flahive as a witness that he intended to call at trial. He also provided defense counsel with the police report prepared by Flahive. However, despite defense counsel's request for pretrial notice of the names of any experts that the State intended to call at trial, the prosecutor did not identify Flahive as an expert, nor did her police report set forth expert opinions regarding the cause of the accident or whether Bledsoe's car was accelerating or decelerating at the time of the accident.

¶7 At trial, Flahive testified that she had been a police officer for thirteen and one-half years, that she had attended two weeks of accident

investigation schooling at Northwestern, and that she was a "level two accident investigator," which she described as a step above basic accident investigation and just below accident reconstruction. She also testified that she had investigated accidents in the past. Flahive testified that in her role as an accident investigator, she makes a diagram to scale according to her training, but that she does not do an accident reconstruction.

¶8 Flahive testified that on April 27, 1997, she made various observations of the scene of the accident. She testified that she observed the presence and locations of the tire marks, the position of Bledsoe's car, the direction and distance of travel from the tire marks in the road to the tree where the car rested, and the position of Powell on the ground by the passenger side of the vehicle.

¶9 Bledsoe objected when the prosecutor asked Flahive what the tire marks told her about how the accident occurred, contending that he had no notice that Flahive would testify as an expert witness. The trial court overruled his objection. Flahive then testified that she observed, examined, and measured the tire markings on the road. She testified that the markings started in the lane closest to the center line of the road, and that they veered right, extending across the next lane, over the curb, and up into the grass to the spot where the car rested against the tree. She testified that she is able to tell by looking at tire markings whether they are braking or acceleration marks. Flahive testified that by looking at the tire markings in this case, she could tell that the car was accelerating rather than decelerating as it headed toward the tree. She testified that she observed no skid marks or deceleration marks either before or after the car started to turn, and that the tires were free rolling.

¶10 Flahive concluded that "[f]or whatever unknown reason" the vehicle "all of a sudden just veered off toward the right towards the tree." She testified that she measured the distance between the tree and the point at which the tire marks first started to veer as seventy-six feet. She further testified that she observed no evidence of any obstruction in the roadway, and that the vehicle was predominantly damaged on the front passenger side. In response to questioning by the prosecutor, she testified that based upon her observations, the accident was "consistent" with a motorist driving down the road "and suddenly deciding to ram the passenger front side of his motor vehicle in that tree."

¶11 We first address Bledsoe's claim that Flahive lacked sufficient expertise to render an opinion as to whether the vehicle was accelerating or decelerating when it hit the tree, or whether the tire marks were skid marks or brake marks. A police officer may testify to his or her personal observations at the scene of an accident, including providing a description of the scene of the accident, and the type and nature of damage observed. ***Vonch v. Am. Standard Ins. Co.***, 151 Wis. 2d 138, 150, 442 N.W.2d 598 (Ct. App. 1989). Bledsoe also concedes that Flahive was qualified to make measurements and draw diagrams of the scene of the accident. However, he disputes her qualifications to draw conclusions regarding the cause of the accident from those observations.

¶12 A decision as to whether a witness is qualified as an expert and may properly provide opinion testimony is a discretionary decision for the trial court. ***Wester v. Bruggink***, 190 Wis. 2d 308, 317, 527 N.W.2d 373 (Ct. App. 1994). The decision will be upheld unless discretion was not exercised or there was no reasonable basis for the decision. ***Id.*** While police experience alone does not qualify an officer as an expert in accident reconstruction, whether an officer is qualified to testify as an expert depends upon his or her background, education,

and experience, rather than on a particular label. ***Id.*** at 319. Here, the trial court reasonably permitted Flahive to testify that she observed no skid marks. *See* ***Vonch***, 151 Wis. 2d at 150. Based upon Flahive's testimony concerning her training at Northwestern, her prior experience in investigating accidents, and her status as a level two accident investigator, the trial court could also reasonably conclude that she was qualified to testify concerning the meaning of the tire marks observed by her. *Cf.* ***id.*** at 150-51 (police officer's background, training, experience and observations were sufficient to permit him to testify as to the presence or absence of skid marks and to conclude that vehicle did not attempt to brake before accident).

¶13 We next address Bledsoe's claim that Flahive's testimony should have been excluded pursuant to WIS. STAT. § 971.23(7m) based upon the prosecutor's failure to identify her as an expert witness prior to trial. Initially, we note that because Flahive was timely identified as a witness in the prosecutor's response to Bledsoe's discovery request, no basis existed to exclude her testimony in its entirety, including the portions of her testimony which simply related her personal observations. However, we agree with Bledsoe that because the prosecutor intended to have Flahive provide expert opinion testimony in addition to the personal observations set forth in her police report, the prosecutor was required to inform Bledsoe that Flahive was being called as an expert when he requested the names of all expert witnesses. This in turn would have entitled him to request a written summary of her findings or the subject matter of her testimony pursuant to § 971.23(1)(e).

¶14 Although we conclude that the prosecutor should have identified Flahive as an expert prior to trial, we also conclude that Bledsoe suffered no prejudice as a result, and that reversal of his judgment of conviction is therefore

unwarranted. *See* ***Kutchera v. State***, 69 Wis. 2d 534, 545, 230 N.W.2d 750 (1975). A defendant is entitled to reversal of a criminal conviction only if an error affected his or her substantial rights. *See* ***State v. Stark***, 162 Wis. 2d 537, 547, 470 N.W.2d 317 (Ct. App. 1991). If an error was harmless, no basis for reversal exists. *See* ***id.*** at 547-48 (citing WIS. STAT. § 805.18). The test for determining harmless error is whether there is a reasonable possibility that the error contributed to the conviction. ***State v. Sullivan***, 216 Wis. 2d 768, 792, 576 N.W.2d 30 (1998). The burden of proving no prejudice is on the State. ***Id.***

¶15 As already noted, in response to questioning by the prosecutor, Flahive testified that she observed no skid marks or deceleration marks either before or after the vehicle veered to the right, and that she concluded from the tire marks that the car was accelerating rather than decelerating. Based upon the lack of braking or deceleration marks, she also opined that the accident was consistent with a motorist driving down the road and suddenly deciding to ram the passenger side of the car into a tree.[3] However, Flahive's testimony that there was no evidence of braking or deceleration was contradicted by the testimony of Erick Jordan, the only independent eyewitness to the accident. Jordan clearly testified that he observed Bledsoe's brake lights go on "for a split second," at which point Bledsoe's car swerved and jumped the curb. Jordan testified that the car did not

[3] On cross-examination by defense counsel, Flahive also testified that the tire markings were inconsistent with the passenger grabbing the steering wheel and turning the car toward the tree because she did not think someone could crank the wheel in this manner while in the passenger seat, and she believed the driver would react by slamming on the brakes if someone grabbed the wheel. When asked by defense counsel whether she was stating that the evidence was consistent with a car starting from a dead stop, she stated: "My opinion? I think the vehicle slammed on its brakes and the wheel was cranked toward the right and it was accelerated into the tree." Because these particular opinions were elicited by the defense, Bledsoe cannot complain of them on appeal. *Cf.* ***Shawn B.N. v. State***, 173 Wis. 2d 343, 372, 497 N.W.2d 141 (Ct. App. 1992) (an appellant cannot complain on appeal of an action he or she invited).

slow down much, if at all, and that it looked like Bledsoe was swerving to avoid an animal that had run out. Jordan's testimony was thus consistent with Bledsoe's testimony that he was driving about thirty miles per hour when Powell grabbed the wheel, that he hit the brakes, and that he had never stopped the car prior to hitting the tree. Jordan's undisputed eyewitness testimony thus contradicted Flahive's assumption that Powell could not have grabbed the wheel because there were no signs of braking. In closing argument, Bledsoe's counsel emphasized the consistency between the testimony of Jordan and Bledsoe, and the contradiction between the testimony of Jordan and Flahive. Under these circumstances, and in light of the remaining strong evidence of Bledsoe's guilt, we conclude that there is no reasonable possibility that any error in admitting Flahive's expert opinion contributed to Bledsoe's conviction.

¶16 Bledsoe's next argument is that the trial court erroneously exercised its discretion by admitting other acts evidence. A trial court's decision to admit other acts evidence involves the exercise of discretion and will not be disturbed absent an erroneous exercise of discretion. ***State v. Hammer***, 2000 WI 92, ¶21, 236 Wis. 2d 686, 613 N.W.2d 629. If discretion was exercised in accordance with accepted legal standards and the facts of record, and if there was a reasonable basis for the trial court's determination, we will uphold the trial court's decision. ***Id.***

¶17 Although other acts evidence may not be admitted into evidence to prove the character of a defendant or his or her propensity to commit a crime, it is admissible if it is offered for an acceptable purpose under WIS. STAT. § 904.04(2), it is relevant to an issue at trial, and its probative value is not substantially outweighed by the danger of unfair prejudice. *See* ***Hammer***, 2000 WI 92 at ¶22. Evidence is offered for an acceptable purpose under § 904.04(2) when it is offered

to establish motive, intent, or the absence of a mistake or accident. ***Sullivan***, 216 Wis. 2d at 772.

¶18 Over Bledsoe's objection, the trial court admitted testimony concerning other acts committed by him against two former girlfriends, Barbara Minor and Michelle Lanton. Minor testified that she dated Bledsoe from approximately May 1995 to March 1996 when she broke up with him. She described how Bledsoe would become jealous and suspicious, especially when he drank. She testified that Bledsoe once told her that she would end up "stinking somewhere" if she broke up with him, and that he often threatened to kill her during their relationship. She described how he punched and choked her on different occasions, and when choking her once stated that he wanted to see what it was like when someone took their last breath. Minor testified that when they broke up, Bledsoe told her several times that if he could not have her, no one would. She also testified that he became a totally different person when he drank, and that she saw him at a bar on the night of these offenses. She testified that he had been drinking, and told her that he was seeing a woman, but had just gotten out of jail. According to Minor, he stated "the [expletive deleted] sent me to jail."

¶19 Similarly to Minor, Lanton testified to being choked, grabbed, and head-butted by Bledsoe during the course of their relationship in 1990 and 1991. She described an occasion when he lit lighter fluid around her door during an argument, and kicked in her bathroom door when she retreated to that room during an argument. Like Minor, Lanton testified that Bledsoe became jealous and violent when he drank, and that he told her that if he could not have her, no one would. She also described an incident in which Bledsoe attempted to abduct her from a public place, but was stopped when a police officer intervened.

¶20 The conduct described by Minor and Lanton was very similar to conduct described by Powell. Powell testified that she dated Bledsoe from November 1996 to March 1997, when she broke up with him. She testified that Bledsoe strangled and punched her during the course of their relationship, and told her once while choking her that he could easily kill her and no one would know. Powell also described Bledsoe's arrest for beating her in March 1997, and testified that after he was released from jail in mid-April he told her that he wanted to get back together. She testified that when she refused, Bledsoe told her that he had better not see her with anyone else.

¶21 Other acts evidence is relevant when it tends to prove an element of the crime charged. ***State v. Friedrich***, 135 Wis. 2d 1, 22, 398 N.W.2d 763 (1987). Bledsoe's intent to kill, and the related issue of the motive behind his actions, was obviously critically relevant to the attempted homicide charge in this case. It was also directly relevant to the issue of whether the collision was an accident, as contended by Bledsoe, or intentional, as alleged by the State. Other acts evidence establishing intent, motive, and the absence of mistake thus was offered for a permissible purpose under WIS. STAT. § 904.04(2).

¶22 The other acts evidence involving Lanton and Minor was also clearly relevant to the issues of intent, motive, and the absence of a mistake in causing the accident involving Powell. The evidence regarding Bledsoe's relationships with the three women was strikingly similar, involving verbal intimidation, threats to kill, physical assaults, and, in the case of Lanton and Powell, an attempted abduction. All of the women testified concerning the effect of alcohol on Bledsoe, his extreme jealousy, and his attitude that if he could not have them, no one would. The other acts evidence was thus relevant to prove that Bledsoe was motivated to injure Powell because he was angry at her for breaking

up with him, that he intended to injure her when he assaulted her in her home, and that he intended to kill her by driving his car into the tree. *See* ***State v. Clark***, 179 Wis. 2d 484, 494, 507 N.W.2d 172 (Ct. App. 1993).[4]

¶23 The trial court also reasonably rejected Bledsoe's claim that the probative value of the evidence was outweighed by the danger of unfair prejudice. "Unfair prejudice results when the proffered evidence has a tendency to influence the outcome by improper means or if it appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish or otherwise causes a jury to base its decision on something other than the established propositions in the case." ***Sullivan***, 216 Wis. 2d at 789-90. "The inquiry is not whether the other acts evidence is prejudicial but whether it is *unfairly* prejudicial." ***State v. Gray***, 225 Wis. 2d 39, 64, 590 N.W.2d 918 (1999).

¶24 The evidence regarding Bledsoe's conduct toward Lanton and Minor was very probative of his motive to control Powell, and his intent to injure or kill her if he could not control her. Its probative value was not outweighed by the danger that the jury would use the evidence to conclude that Bledsoe had a bad character. In making this determination, we note that the trial court instructed the jury that the other acts evidence was relevant only as to the issues of motive, intent, and the absence of mistake or accident. The trial court specifically cautioned the jurors that they could not consider the evidence to conclude that Bledsoe had a certain character or character trait, and acted in conformity

[4] Contrary to Bledsoe's argument, ***State v. Sullivan***, 216 Wis. 2d 768, 576 N.W.2d 30 (1998), is inapposite. In ***Sullivan***, the court held that unfulfilled threats against one person did not make it more probable that the defendant intentionally hit another person during an argument two years later. ***Id.*** at 788-89. In contrast, the other acts evidence and the acts involving Powell were very similar, involving jealousy, threats to kill, and acts of violence.

therewith. The trial court's use of this cautionary instruction minimized or eliminated the danger of unfair prejudice. *See* ***State v. Parr***, 182 Wis. 2d 349, 361, 513 N.W.2d 647 (Ct. App. 1994).

¶25 Bledsoe's next argument is that the burglary instruction misstated the law and confused the jury. The jury found Bledsoe guilty of burglary and of committing a battery while in the burglarized building. Bledsoe contends that the jury instruction misstated the law because it permitted the jury to convict him of burglary based upon a finding that he entered Powell's home with the intent to cause bodily harm, which is the intent element that applies to misdemeanor battery under WIS. STAT. § 940.19(1) as well as felony battery under § 940.19(6).

¶26 We reject Bledsoe's argument on the ground that the instruction given to the jury clearly required it to find that Bledsoe entered Powell's home with the intent to commit a felony, not a misdemeanor. The instruction informed the jury that before it could convict Bledsoe of burglary, it had to find that he intended to commit a felony at the time he entered the building. It also instructed the jury that "[b]attery, when committed by one who intentionally causes bodily harm to another by conduct which creates a substantial risk of great bodily harm, is … a felony." The jury was thus clearly informed that to convict Bledsoe of burglary, it had to find that the battery Bledsoe intended to commit when he entered Powell's home met all of the elements of felony battery. No basis exists to conclude that the jury was misled into believing that it could convict Bledsoe of burglary based only on a finding that he intended to cause Powell bodily harm. It was informed that it also had to find that Bledsoe knew that the conduct he intended to engage in created a substantial risk of great bodily harm to Powell.

¶27 Bledsoe's next argument is that his trial counsel rendered ineffective assistance. To establish ineffective assistance of counsel, a defendant must show that his or her counsel's performance was deficient, and that he or she was prejudiced by the deficient performance. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). A reviewing court may dispose of a claim of ineffective assistance of counsel on either ground. ***Id.*** at 697. Consequently, if counsel's performance was not deficient, the claim fails and this court's inquiry is finished.

¶28 To prove deficient performance, a defendant must show that his or her counsel made errors so serious that he or she was not functioning as the "counsel" guaranteed by the Sixth Amendment. ***Id.*** at 687. A defendant must also overcome a strong presumption that his or her counsel acted reasonably within professional norms. ***State v. Wanta***, 224 Wis. 2d 679, 700, 592 N.W.2d 645 (1999).

¶29 Determining whether there has been ineffective assistance of counsel presents a mixed question of law and fact. ***State ex rel. Flores v. State***, 183 Wis. 2d 587, 609, 516 N.W.2d 362 (1994). A trial court's findings of fact concerning the circumstances of the case and counsel's conduct and strategy will not be overturned unless they are clearly erroneous. ***State v. Knight***, 168 Wis. 2d 509, 514 n.2, 484 N.W.2d 540 (1992). However, the final determinations of whether counsel's performance was deficient and prejudicial are questions of law which this court decides without deference to the trial court. ***Id.***

¶30 Bledsoe contends that his trial counsel failed to provide adequate assistance when he: (1) failed to properly object to the expert or other acts evidence; (2) failed to object to the burglary instruction; and (3) failed to use Erick Jordan's prior statement to police either as substantive evidence or to refresh

Jordan's memory. All of these arguments fail. Bledsoe's trial counsel strenuously objected to the admission of both the other acts evidence and the testimony of Flahive. Based upon our prior rulings concerning those issues, he cannot be deemed ineffective for failing to have prevailed on them. Similarly, in light of our determination that the jury was not misled by the burglary instruction, trial counsel cannot be deemed deficient for failing to object to the instruction.

¶31 Bledsoe also argues that his trial counsel was ineffective for failing to either confront Jordan with his prior statement to police, or to use the statement to refresh Jordan's memory. In his statement, Jordan stated that he observed Bledsoe's vehicle swerve from the left lane to the right lane, "then suddenly hit the brakes- … and then it struct [sic] a tree." In his trial testimony, Jordan testified that Bledsoe's brake lights flashed on before he swerved, not after. Bledsoe contends that the difference is important because the statement corroborated Bledsoe's testimony, while Jordan's testimony corroborated the testimony of Powell. He contends that trial counsel was ineffective for failing to seek admission of the statement as a prior inconsistent statement under WIS. STAT. § 908.01(4)(a)1, or to refresh Jordan's recollection.

¶32 At the postconviction hearing, Bledsoe's trial counsel testified that he considered the differences between the statement and testimony to be minor, and that he did not want to impeach Jordan because he viewed Jordan's testimony as helpful to the defense. Counsel's decisions were reasonable. Jordan's testimony contradicted Powell's testimony that Bledsoe brought the car to a stop in the road and then accelerated into the tree. It was consistent with Bledsoe's testimony that he was driving about thirty miles per hour when Powell grabbed the wheel, that he hit the brakes, and that he neither stopped the car prior to hitting the tree nor accelerated into the tree. Trial counsel drove these points home during

closing argument, reminding the jury that Jordan said the car never came to a stop, but suddenly swerved as if trying to avoid an animal. Jordan's testimony thus bolstered the defense theory, and Bledsoe's testimony, that the car suddenly swerved as it headed down the roadway because Powell grabbed the steering wheel and jerked the car in the direction of the tree.

¶33 Jordan also testified that he ran to the car after the accident to assist the people inside. He described Bledsoe as panicky and distraught, and concerned for the welfare of his passenger, thus belying the State's argument that Bledsoe intended to kill Powell.

¶34 Under these circumstances, trial counsel reasonably concluded that there would be little or nothing to gain by discrediting Jordan by introducing the statement into evidence, or by questioning Jordan about his statement. Counsel could reasonably conclude that it was wiser to focus on the favorable testimony given by Jordan in front of the jury than to confront him with the minor differences in his statement and testimony. This was a strategic decision, not ineffective assistance as Bledsoe contends. *See* ***Wanta***, 224 Wis. 2d at 701. Trial counsel provided representation which was reasonable and within professional norms. He adequately developed a prudent defense. Therefore, his performance was not defective. *See* ***id.*** at 702.

¶35 Bledsoe's next argument is that the trial court erred in denying his postconviction motion for an order compelling Powell to provide palm prints for comparison to those found on a note which Bledsoe admittedly stuck on Powell's door on the night of the accident. Bledsoe put the note on Powell's door when he came to her apartment and found that she was not home. The note stated:

"Melanie, that was some foul [expletive deleted] you done, and I'll be waiting or watching. Otis."

¶36 Powell testified that she never saw the note until the time of trial. Bledsoe requested a postconviction order compelling her to provide palm prints to compare to those found on the note in the hopes of impeaching her trial testimony.

¶37 A defendant has a right to postconviction discovery when the sought-after evidence is relevant to an issue of consequence. ***State v. O'Brien***, 223 Wis. 2d 303, 308, 588 N.W.2d 8 (1999). Evidence is consequential only if there is a reasonable probability that the result of the proceeding would have been different if the evidence had been disclosed to the defense. ***Id.*** at 320-21. The mere possibility that an item of undisclosed information might have helped the defense is insufficient. ***Id.*** at 321.

¶38 The trial court correctly concluded that the requested palm print did not meet this standard. The palm print on the note could have come from Bledsoe, Powell's sister, Jackie Crump, or from Powell's landlord, Jeff Burger, all of whom admittedly handled the note. Most importantly, even if Powell's testimony that she did not see the note prior to trial was impeached, there is no reasonable probability that the result of the proceeding would have been different. The important point at trial was not whether Powell saw or handled the note when she returned home after a night of drinking. The important point was that Bledsoe admittedly wrote the threatening note and left it for Powell shortly before the offenses alleged here. This critical fact was confirmed by the testimony of Crump and Burger, both of whom testified that they saw the note where Bledsoe said he put it. No basis exists to conclude that even if Powell touched it, the result of the proceeding would have been different.

¶39 Bledsoe also contends that the trial court erred by denying his motion for a new trial based on newly discovered evidence. A defendant who seeks a new trial based on newly discovered evidence has the burden of establishing a right to relief by clear and convincing evidence. ***State v. Brunton***, 203 Wis. 2d 195, 198, 552 N.W.2d 452 (Ct. App. 1996). He or she must establish: (1) that the evidence came to his or her knowledge after trial; (2) that he or she was not negligent in seeking to discover it; (3) that the evidence is material to an issue; (4) that the evidence is not merely cumulative to evidence that was presented at trial; and (5) that it is reasonably probable that a different result would be reached on a new trial. ***Id.*** at 200. A motion for a new trial based on newly discovered evidence is addressed to the trial court's discretion. ***Id.*** at 201-02.

¶40 At trial, Burger testified that he entered Powell's apartment on the morning after Powell's accident to make repairs in the bathroom which were required by a previous Kenosha County housing inspection. Powell was hospitalized at the time. Burger testified that he wanted to make the repairs because a housing inspector was coming for a repeat inspection later that day. Burger testified that Powell normally kept a very clean, "excellent" apartment, but that when he entered on the morning of April 28, 1997, he discovered that the apartment was ransacked. He testified that the furniture was shuffled around, clothing was all over the floor, a broken necklace and watch were on the coffee table, and there was some blood on the wall. He testified that he then telephoned Powell's parents and asked if someone could come and clean up the apartment before the inspection scheduled for that afternoon.

¶41 Testimony indicated that Jackie Crump and another sister of Powell's went to the apartment to clean it later that same day. Crump testified to finding clothing on the floor, broken beer bottles, blood on the wall, a ripped bra

and shirt, a broken necklace and watch, and a broken light switch on the wall. Crump testified that Powell normally kept a clean apartment, and that it had been neat when she was there on April 26, 1997. Crump further testified that she and her sister cleaned the apartment up for the housing inspection, throwing things into the garbage which was then discarded. She testified that she did not, however, clean the blood spatters on the wall or fix the light switch.

¶42 The newly discovered evidence alleged by Bledsoe consisted of information that the housing inspection was scheduled for April 29, 1997, rather than April 28, 1997, and that the housing inspector did not observe a broken light switch when he conducted his inspection. Bledsoe contends that this evidence undermines Crump's testimony as to her reasons for disposing of the evidence of an altercation on April 28, 1997, and undermines her testimony that the light switch was broken when she was in the apartment on April 28, 1997.

¶43 Bledsoe provided no explanation in the trial court as to why he did not investigate the housing inspection issues prior to trial. He thus failed to meet his burden of showing that he was not negligent in seeking to discover the evidence. In addition, as with the palm prints, the proffered evidence does not render it reasonably probable that a different result would be reached on retrial. The inspector came to inspect the bathroom, not the living room where the broken switch was located. Evidence that he did not notice the broken light switch does not prove that it was not broken on April 29, 1997, nor is the matter sufficiently significant as to be reasonably likely to lead to Bledsoe's acquittal. Similarly, evidence that Burger and Crump were mistaken or deceptive as to the date they entered the apartment or the scheduled date for the inspection would not render it reasonably probable that Bledsoe would be acquitted on retrial. Evidence which merely impeaches the credibility of a witness does not warrant a new trial because

it does not create a reasonable probability of a different result. ***Simos v. State***, 53 Wis. 2d 493, 499, 192 N.W.2d 877 (1972).

¶44 Bledsoe's final argument is that he should be granted a new trial in the interests of justice pursuant to WIS. STAT. § 752.35 based on the cumulative effect of the errors alleged in his brief. Because we have rejected Bledsoe's claims of error except as to the State's failure to identify Flahive as an expert prior to trial, and because the latter error was harmless, a new trial pursuant to § 752.35 is unwarranted. *See* ***State v. Marhal***, 172 Wis. 2d 491, 507, 493 N.W.2d 758 (Ct. App. 1992).

By the Court.—Judgment and orders affirmed.

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