COURT OF APPEALS
DECISION
DATED AND FILED

January 29, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal Nos. 2003AP2030-CR
2004AP3314-CR

Cir. Ct. No. 2002CF3707

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DONNELLY SMITH,

DEFENDANT-APPELLANT.

APPEAL from a judgment and orders of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed*.

Before Curley, P.J., Fine and Kessler, JJ.

¶1 PER CURIAM. Donnelly Smith appeals *pro se* from a judgment of conviction for substantial battery, and from several postconviction orders

including the summary denial of his motion for a new trial based on newly discovered evidence.[1] We conclude that Smith has not shown that: (1) the trial court erred in failing to recuse itself; (2) the criminal charges against him were re-issued invalidly; (3) the trial court admitted hearsay evidence that deprived him of his Sixth Amendment right of confrontation; (4) his criticisms of standby counsel are valid; and (5) the victim's purported recantation constituted newly discovered evidence. We further conclude that Smith has not established the probability of a miscarriage of justice. Therefore, we affirm.

I. BACKGROUND OF THE OFFENSE

¶2 A jury found Smith guilty of substantial battery (with intent to cause substantial bodily harm) against his girlfriend, in violation of WIS. STAT. § 940.19(3) (2001-02).[2] The jury heard from the victim only through hearsay; she did not testify. The State's version of the incident consisted principally of Milwaukee Police Officer Steve Delie's extensive observations of Smith, and the victim and her hearsay exclamations. Officer Delie described the victim as "highly upset," "crying," "kind of shaking like -- like she had been through a traumatic experience," and "in a state of almost shock," and recounted her exclamations at the scene. *See* WIS. STAT. § 908.03(2). He described Smith as

[1] Appeal no. 2003AP2030-CR was from the judgment of conviction and other postconviction orders. At Smith's request, we remanded this matter to allow him to file a newly discovered evidence claim, which was summarily denied. We review that postconviction order in appeal no. 2004AP3314-CR, which we consolidated with appeal no. 2003AP2030-CR.

On June 29, 2007, the Wisconsin Supreme Court remanded this matter for our reconsideration prior to deciding whether to grant Smith's petition for review. We vacate our September 19, 2006 decision and substitute this decision, in which we also respond to the supreme court's concerns expressed in its June 29, 2007 order.

[2] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

angry at the victim and the police. He also testified that Smith smelled of alcohol, and had slurred speech. The State also presented evidence from an emergency room physician who supervised the victim's treatment, and from the lead telecommunicator who supervised the handling of 9-1-1 calls for the Milwaukee Police Department's Communications Division.

¶3 Police received two 9-1-1 calls: the first caller hung-up; the second caller complained of a man beating a woman. At the scene, Officer Delie heard someone yelling,

> "[h]e's beating me. He's beating me. He's hurting me." We heard a pushing and shoving commotion. Then we heard a male voice saying, "I'm not opening the door for you punk ass cops." Then we heard more commotion…. The female voice we heard at that time was yelling, "[h]elp me. Help me. He's hurting me. He's beating me." The male voice continued to speak obscenities at her and us.

Finally, a man opened the door, and Officer Delie testified that:

> the woman that we had heard screaming was standing in front of us wearing a white T-shirt covered with blood about to down here, and she had several bumps on her head, and she had what appeared to be a bent-out-of-shape pinky, and she was very upset. She was yelling and screaming that the man that had let us into the apartment, later identified as Donnelly Smith, had beat her over the head with his boot and had smacked her around a little bit.

II. SMITH APPEARING *PRO SE*

¶4 After expressing extreme dissatisfaction with two appointed counsel, admitting that he could not afford to hire counsel, and after a series of hearings and warnings, and time to consider his repeated requests to proceed *pro se*, the trial court finally obliged Smith's request. However, the trial court appointed standby counsel, with whom Smith was also dissatisfied. Smith sought to remove standby counsel, which the trial court declined to do. Following his conviction for

substantial battery, the trial court appointed postconviction counsel. Again dissatisfied with counsel, Smith finally persuaded the trial court to allow him to proceed *pro se*. The trial court warned him, in writing, that his choice to represent himself may "preclude[him] from filing a postconviction motion later on which raises additional issues that he has researched."

¶5 Despite numerous warnings, which explained the ramifications of his request, Smith nevertheless insisted on proceeding *pro se* at trial, and during postconviction and appellate proceedings. He raised a number of issues insufficiently, and did not obtain the relief he sought.

III. SMITH'S POSTCONVICTION MOTIONS

¶6 Smith seeks appellate review of six postconviction orders in appeal no. 2003AP2030-CR, and a seventh postconviction order (newly discovered evidence) in appeal no. 2004AP3314-CR. We first review the issues Smith pursued in appeal no. 2003AP2030-CR: (1) his motion for a new trial; (2) his "petition to remove/replace Judge Wagner"; (3) his "motion to set aside the verdict or [for] a new trial"; (4) his mistrial motion; (5) his motion for the production of transcripts; and (6) his "supplementary motion to set aside verdict."

¶7 In the postconviction motions we are reviewing, Smith challenged: (1) the trial court judge's impartiality; (2) the prosecutor's conduct in re-issuing the criminal charges; (3) the admissibility of the victim's hearsay evidence, in light of her failure to appear at trial; (4) standby counsel's effectiveness; and (5) the trial court's denial of his new trial motion based on the victim's statements at sentencing disputing the trial evidence. He also sought a new trial in the interest of justice. The trial court summarily denied the motions,

ruling that Smith's "arguments are wholly conclusory and without the requisite legal or factual support."

¶8 To demonstrate entitlement to a postconviction evidentiary hearing, the defendant must meet the following criteria:

> Whether a defendant's postconviction motion alleges sufficient facts to entitle the defendant to a hearing for the relief requested is a mixed standard of review. First, we determine whether the motion on its face alleges sufficient material facts that, if true, would entitle the defendant to relief. This is a question of law that we review de novo. [***State v.***] ***Bentley***, 201 Wis. 2d [303,] 309-10[, 548 N.W.2d 50 (1996)]. If the motion raises such facts, the [trial] court must hold an evidentiary hearing. ***Id.*** at 310; ***Nelson v. State***, 54 Wis. 2d 489, 497, 195 N.W.2d 629 (1972). However, if the motion does not raise facts sufficient to entitle the [defendant] to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the [trial] court has the discretion to grant or deny a hearing. ***Bentley***, 201 Wis. 2d at 310-11; ***Nelson***, 54 Wis. 2d at 497-98. We require the [trial] court "to form its independent judgment after a review of the record and pleadings and to support its decision by written opinion." ***Nelson***, 54 Wis. 2d at 498. *See* ***Bentley***, 201 Wis. 2d at 318-19 (quoting the same).

State v. Allen, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. We consider Smith's allegations.

A. *Trial Court's Alleged Partiality*

¶9 Smith contends that the trial court was conducting proceedings in a manner that demonstrated its bias against him to retaliate for his challenges to several of its rulings. He moved for the trial judge's recusal two months after he had been sentenced, claiming that this trial judge would unfairly decide his postconviction motion. The trial court summarily denied Smith's recusal motion.

¶10 "A person's right to be tried by an impartial judge stems from his/her fundamental right to a fair trial guaranteed by the due process clause of the fifth amendment of the United States Constitution." ***State v. Hollingsworth***, 160 Wis. 2d 883, 893, 467 N.W.2d 555 (Ct. App. 1991). "To overcome this presumption [of impartiality], the party asserting judicial bias must show that the judge is biased or prejudiced by a preponderance of the evidence." ***State v. McBride***, 187 Wis. 2d 409, 415, 523 N.W.2d 106 (Ct. App. 1994). The party asserting judicial bias must demonstrate subjective and objective bias. *See* ***id.*** "The subjective component is based on the judge's own determination of whether he will be able to act impartially." ***Id.*** The objective component is "whether there are objective facts demonstrating that [the trial court judge] was actually biased" and "'treated him unfairly.'" *See* ***id.*** at 416 (citation omitted). "Merely showing that there was an appearance of partiality or that the circumstances might lead one to speculate that the judge was partial is not sufficient." ***Id.*** We review a decision on this issue independently of the trial court. *See* ***id.*** at 414.

¶11 Smith contends that his motion for a new trial "would be asking Judge Wagner[] to rule against himself and therefore this situation invokes sec. 757.19(F)(G) Wis. Stat." The trial court's denial of Smith's motion indicates its subjective belief that it will be able to act impartially.

¶12 Smith also alleged that the trial court judge "refuse[d] to acknowledge [Smith's] right to represent himself and seems to be attempting to divert transcripts away from [Smith] to an unauthorized attorney." Smith referred to the diversion of transcripts to appointed counsel as a manipulation of evidence. "[A]ttempting to divert transcripts away from defendant to an unauthorized attorney" is not a manipulation of evidence; in fact, Smith ultimately received copies of the transcripts. Any delay in receiving those transcripts was to allow

Smith time to contemplate his request to continue to represent himself; Smith has not shown any prejudice resulting from this delay. The trial court reluctantly allowed Smith to represent himself; its reluctance, repeated warnings, and appointment of standby counsel demonstrate prudence, not objective bias. Smith also alleged that the trial court judge "may have bias towards th[e victim]." Smith failed to identify any evidence of this potential bias.

B. *Purported Prosecutorial Misconduct for Re-Issuing Charges*

¶13 Smith accuses the prosecutor of misconduct and violating WIS. STAT. § 970.04 for re-issuing the criminal charge against him without presenting new or additional evidence.[3] Smith's post-trial complaint about the re-issuance of the substantial battery charge is untimely because "a conviction resulting from a fair and errorless trial in effect cures any error at the preliminary hearing." *See* ***State v. Webb***, 160 Wis. 2d 622, 628, 467 N.W.2d 108 (1991).

[3] At the preliminary hearing, Smith's counsel objected that "this second preliminary examination is improper." The ensuing discussion at that hearing between defense counsel and the prosecutor was about the "second preliminary examination," where counsel and the trial court focused on WIS. STAT. § 970.04 and ***State v. Twaite***, 110 Wis. 2d 214, 218, 327 N.W.2d 700 (1983). On appeal, the State continued its defense of the trial court's ruling, relying on § 970.04 and ***Twaite***. Further scrutiny of the record discloses that this was not the second preliminary examination in this case, but the first preliminary examination in this case on this re-issued charge. The discussion about the "second preliminary hearing" by both counsel at that hearing and on appeal inadvertently led this court to incorrectly conclude that the preliminary hearing in issue was Smith's second on the charge in this case. The variety of (mis)spellings of Smith's first name (Donald, Dontrell, Donoan, Donavan, Donell, Dontrel, Donny, Donnie, Donia, Donnely, Dontray, Don, Donald Lee, Donyel, Donita, Donald E., Don Oneal, Dona, Donally, Donnell, and Donna Lynn) in the hundreds of Milwaukee County Circuit Court Cases involving a Smith with one of the foregoing first names, include multiple charges of battery, domestic violence and violating a temporary restraining order against this Donnelly Smith. Further confusing the chronology is that Smith's first name is spelled differently in the dismissed case than it is in this case involving the re-issued charge.

C. *Admitting the Victim's Excited Utterances Did Not Violate the Confrontation Clause*

¶14 Smith claims that the victim's failure to appear at trial deprived him of his Sixth Amendment right of confrontation. *See* U.S. CONST. amend. VI; WIS. CONST. art. I, § 7. We consider the related issues of the victim's failure to appear with the admissibility of her hearsay statements.

¶15 The trial court admitted the hearsay statements of the victim pursuant to the excited utterance exception to the hearsay rule. *See* WIS. STAT. § 908.03(2). The declarant's availability is immaterial to the admissibility of this type of hearsay. *See* § 908.03. At the final pre-trial conference, the trial court explained that "it's not abnormal in these courts, especially in the domestic violence courts, that the victims don't appear. But excited utterances are permitted to be used during the course of the testimony." Smith responded that he would "go to trial" because he "can't see a jury convicting a man without the victim there [in court], facing 20 years."

¶16 Smith contends that admitting the absent victim's hearsay statements violated his right to confront the witnesses against him. *See* U.S. CONST. amend. VI; WIS. CONST. art. I, § 7. To evaluate Smith's contention, we determine whether the absent victim's hearsay was testimonial or nontestimonial. *See* ***Crawford v. Washington***, 541 U.S. 36, 68 (2004); *see also* ***Davis v. Washington***, 126 S. Ct. 2266, 2273-74 (2006).

¶17 To satisfy the Confrontation Clause pursuant to ***Crawford***, testimonial hearsay is admissible only when the declarant is unavailable and the defendant had a prior opportunity for cross-examination. *See* ***Crawford***, 541 U.S. at 68. The Supreme Court in ***Crawford***, however, did not "spell out a

comprehensive definition of 'testimonial.'" ***Id.*** It defined testimonial in ***Davis*** as statements made "when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." ***Id.***, 126 S. Ct. at 2273-74.

¶18 To admit nontestimonial hearsay against a defendant in a criminal case, the declarant's statements must "bear[] adequate indicia of reliability[, which] may be inferred without more where the evidence falls within a firmly rooted hearsay exception or upon a showing of 'particularized guarantees of trustworthiness.'" ***State v. Savanh***, 2005 WI App 245, ¶29, 287 Wis. 2d 876, 707 N.W.2d 549 (citing and quoting ***State v. Manuel***, 2005 WI 75, ¶61, 281 Wis. 2d 554, 697 N.W.2d 811 and ***Ohio v. Roberts***, 448 U.S. 56, 65-66 (1980)).[4]

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Davis, 126 S. Ct. at 2273-74.

¶19 Officer Delie, who was responding to a 9-1-1 call regarding a complaint of a man beating a woman, described the victim at the scene as being "in a state of almost shock." At the scene, Officer Delie heard someone yelling, "[h]e's beating me. He's hurting me." When the door was opened, Officer Delie

[4] ***Ohio v. Roberts***, 448 U.S. 56 (1980), *was abrogated as applicable to testimonial, not nontestimonial hearsay by* ***Crawford v. Washington***, 541 U.S. 36, 68 (2004).

saw the victim wearing a blood-covered T-shirt with bumps on her head and "a bent-out-of-shape pinky," who was "very upset." She was "yelling and screaming" that Smith "had beat her over the head with his boot and had smacked her around a little bit."

¶20 At trial, Officer Delie recounted the victim's exclamations; they were not in response to police questioning but were spontaneously exclaimed while police were performing their public safety caretaker role of responding to a 9-1-1 call for help. The trial court admitted the victim's nontestimonial hearsay as an excited utterance, which is a firmly rooted exception to the hearsay rule. *See* WIS. STAT. § 908.03(2). An excited utterance is "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." ***Id.*** We agree that the victim's spontaneous exclamations were excited utterances. Consequently, admitting the declarant-victim's hearsay statements, pursuant to the excited utterance exception to the hearsay rule, passes constitutional muster pursuant to ***Davis***.[5] *See* ***id.*** at 2276-78; *accord* ***Savanh***, 287 Wis. 2d 876, ¶29.

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[5] Smith complained that the trial court did not require the State to demonstrate a good faith effort to compel the declarant-victim's appearance at trial before admitting her hearsay statements. Insofar as the declarant's unavailability was a prerequisite to the admissibility of her statements, the State satisfied the trial court of its good faith efforts. *See* ***Crawford***, 541 U.S. at 68. The State is required to make reasonable, good faith efforts to compel a witness's appearance at trial. *See* WIS. STAT. § 908.04(1)(e); ***LaBarge v. State***, 74 Wis. 2d 327, 336, 246 N.W.2d 794 (1976). The prosecutor told the trial court that "[w]e exhausted all our resources with regards to the victim witness. We utilized outreach units. I've shown [standby] counsel the efforts we've made." Smith has not persuaded us to reverse the trial court's implicit finding that the State made reasonable, good faith efforts to compel the victim to testify at trial. *See* ***LaBarge***, 74 Wis. 2d at 336.

Although much of Officer Delie's testimony about the victim was descriptive and not objectionable, some of his testimony, recounting the victim's hearsay, was arguably testimonial. While "in a state of almost shock" the victim "basically walked back and forth in [the] hallway. She was very upset, trying to gather up her children." Officer Delie testified that while the victim (continued)

was talking, she was "very upset …. crying …. in a state of almost shock…. She had blood on her shirt. She was kind of shaking like – like she had been through a traumatic experience." Officer Delie testified that while in that state, the victim told him that Smith

> had walked in very intoxicated and demanded that she cook him some dinner for the night, and when she declined to do – or wasn't able to do so, he became enraged and began beating her with his hands. At that point, she was trying to defend herself. So he picked up his boot attempting to beat her over the head with the boot, in the process striking her hand.

Insofar as the hearsay (as opposed to descriptive) evidence was testimonial (not conveyed for the "primary purpose" of "meet[ing] an ongoing emergency"), it was cumulative to or corroborative of the nontestimonial evidence. *See* ***Davis v. Washington***, 126 S. Ct. 2266, 2273 (2006). The noncumulative, corroborative ("new") evidence was merely background about how the incident began (the victim's failing to cook Smith dinner), and her attempt to defend herself. These two excerpts of arguably new evidence are inconsequential to the substantial battery (with intent to cause bodily harm) conviction, and insofar as the admission of this arguably testimonial hearsay was error, it was harmless beyond a reasonable doubt. *See* ***Delaware v. Van Arsdall***, 475 U.S. 673, 684 (1986) (Confrontation Clause errors subject to harmless-error analysis).

To demonstrate the inconsequential nature of admitting this arguably testimonial hearsay, we recount the indisputably admissible evidence. Officer Delie testified that he stood outside the apartment door for about ten minutes and heard the victim "yelling" from inside the apartment; Smith finally opened the door for police and then put his boot on. Officer Delie observed Smith, describing him as having "a very strong scent of alcohol," and "slurring his words slightly." Officer Delie listened as Smith "shout[ed] profanities at [the victim] as well as [the police]." Officer Delie saw the victim's "bent-out-of-shape pinky," and saw "the woman that we had heard screaming … standing in front of us wearing a white T-shirt covered with blood … and she had several bumps on her head."

Officer Delie's testimony that he heard the commotion and the yelling of the victim and Smith, and saw the victim covered in blood with an obviously injured finger, as well as his observations of Smith (appearing intoxicated, with slurred speech, screaming profanities at the victim and the police) was not hearsay or violative of the Confrontation Clause. Officer Delie testified that the victim "was yelling and screaming" and that Smith had been beating her with his boot; this information was "to enable police assistance to meet an ongoing emergency." *See* ***Davis***, 126 S. Ct. at 2273. These statements had been properly admitted as excited utterances and as nontestimonial hearsay. Apart from the two "new" shreds of evidence gleaned from the arguably testimonial hearsay (victim's refusal to fix Smith dinner, and her attempt to defend herself), there was overwhelming evidence from which the jury found Smith guilty. To convict Smith of substantial battery, the State was required to prove that he "cause[d] substantial bodily harm to another by an act done with intent to cause substantial bodily harm to that person." WIS. STAT. § 940.19(3). If the trial court improperly admitted any arguably testimonial hearsay (and we are not persuaded that it did), that admission was harmless beyond a reasonable doubt, as it was either cumulative to or corroborative of other properly admissible testimony, or inconsequential to the overwhelming evidence of Smith's guilt for substantial battery. *See* ***Van Arsdall***, 475 U.S. at 684.

D. *Standby Counsel*

¶21 Smith next complained that his standby counsel provided ineffective assistance at trial. He specifically alleged that the "unauthorized continuance," for standby counsel to obtain "x-rays of the alleged victim's injury," and the witnesses subpoenaed for trial "[a]ffected [his] speedy trial time-line." Smith was repeatedly and extensively warned about the risks of proceeding *pro se*. He knowingly and voluntarily chose that course. There was no question that Smith was proceeding *pro se*, and did not endorse standby counsel's efforts. "When the [trial] court appoints standby counsel over the objection of the defendant, it naturally follows that standby counsel functions primarily for the benefit of the [trial] court." ***State v. Campbell***, 2006 WI 99, ¶64, 294 Wis. 2d 100, 718 N.W.2d 649 (citing ***State v. Lehman***, 137 Wis. 2d 65, 78, 403 N.W.2d 438 (1987)). Standby counsel was attempting to advance Smith's defense, however, he did so at the trial court's request and for its benefit.

¶22 On appeal, the State opposed Smith's oblique claims of ineffective assistance of counsel principally on procedural grounds, namely that Smith had not sought a ***Machner*** hearing. *See* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). Standby counsel was "primarily for the benefit of the [trial] court." ***Campbell***, 294 Wis. 2d 100, ¶64 (citing ***Lehman***, 137 Wis. 2d at 78). The State supplemented its analysis of Smith's claims to include a refutation of any potential claim that standby counsel violated Smith's right to self-representation pursuant to ***McKaskle v. Wiggins***, 465 U.S. 168, 177-78 (1984) (addressing ***Faretta v. California***, 422 U.S. 806, 821 (1975)). We rejected Smith's factual criticisms of standby counsel because they are not supported by the record.

¶23 Insofar as Smith claims that standby counsel interfered with his defense, the record does not support his claim.

> A defendant's right to self-representation plainly encompasses certain specific rights to have his voice heard. The pro se defendant must be allowed to control the organization and content of his own defense, to make motions, to argue points of law, to participate in voir dire, to question witnesses, and to address the court and the jury at appropriate points in the trial.

McKaskle, 465 U.S. at 174. Review of the trial transcript establishes that Smith "preserve[d] actual control over the case he cho[]se[] to present to the jury," and that standby counsel's participation in no way "destroy[ed] the jury's perception that the defendant [wa]s representing himself." ***Id.*** at 178. "[T]he right to appear pro se exists to affirm the accused's individual dignity and autonomy." ***Id.*** Standby counsel did not compromise Smith's autonomy; insofar as Smith's dignity was compromised, it was compromised by Smith, not by standby counsel.

> A defendant's Sixth Amendment rights are not violated when a trial judge appoints standby counsel – even over the defendant's objection – to relieve the judge of the need to explain and enforce basic rules of courtroom protocol or to assist the defendant in overcoming routine obstacles that stand in the way of the defendant's achievement of his own clearly indicated goals. Participation by counsel to steer a defendant through the basic procedures of trial is permissible even in the unlikely event that it somewhat undermines the pro se defendant's appearance of control over his own defense.

Id. at 184. Smith's criticisms were not that standby counsel deprived him of the "appearance [to the jury] of control over his own defense."[6] ***Id.*** Consequently,

[6] Smith cites ***McKaskle v. Wiggins***, 465 U.S. 168 (1984), for that general proposition; however, an analysis of his criticisms demonstrates that they are different from ***McKaskle***'s concerns.

Smith has no legitimate factual basis to claim ineffective assistance of standby counsel.

E. *Victim's Statements at Sentencing*

¶24 Smith's next complaint is that the trial court erred in denying his motion for a new trial predicated on the victim's statements at sentencing. Despite her failure to attend other proceedings, the victim attended Smith's sentencing. The prosecutor suggested that he and Officer Delie address the trial court first because he correctly suspected that the victim would seek to comment on their remarks. After the prosecutor spoke, Officer Delie told the trial court that Smith was "a manipulator, trickster. He's been trying to manipulate victims this whole court process. He's trying to right now. He's a violent offender. He needs to be put away a long time." Officer Delie's comments were not restatements of his trial testimony; principally, he addressed Smith's character. The victim called Officer Delie a liar and explained how her door opens the opposite direction to which he testified in court. She also told the trial court that her finger was broken five times, although she never addressed whether any of those times was by Smith.[7] Some of her other remarks prompted the trial court to ask if she was medicated; she admitted that she was suffering from a bipolar disorder.

[7] Smith emphasizes that the victim's purportedly broken finger was a preexisting injury. Officer Delie observed that the victim had "what appeared to be a bent-out-of-shape pinky." During her cross-examination, the supervising emergency room physician testified extensively about how the x-ray showed that the victim's injury to her finger indicated a new, as opposed to an old fracture. The jury was well aware of Smith's position regarding the recency of the victim's injury. Moreover, there was considerable evidence, apart from the victim's injured finger, to support the guilty verdict of substantial battery.

IV. SUCCESSIVE POSTCONVICTION MOTIONS INCIDENT TO DIRECT APPEAL

¶25 Before filing his notice of appeal, Smith filed a succession of postconviction motions. He moved for a new trial, citing the victim's sentencing remarks and claiming that she telephoned police while she was medicated, implying that the incident never happened and that Officer Delie lied. The victim, however, never testified. Smith's postconviction allegations and the victim's sentencing remarks do not require an evidentiary hearing on Smith's motion for a new trial.

¶26 Over four months after the jury had returned its verdict and over three months after the trial court imposed sentence Smith moved for a mistrial, challenging the allegedly unauthorized release of the victim's medical records. The trial court summarily denied the motion as successive, emphasizing Smith's obligation to raise all of his claims for relief in his original postconviction motion, which had already been denied. Smith then filed a "supplementary motion to set aside verdict," challenging the *voir dire*, the release of the victim's medical records, the "hostil[ity]" of the police as witnesses and the "inconsisten[cies]" in their testimony, the admissibility of the hearsay testimony of the child who telephoned 9-1-1, and the alleged denial of Smith's right to compulsory process. The trial court warned Smith, in denying his sixth postconviction motion, that "[t]he defendant is not entitled to file multiple motions for postconviction relief in succession. As he was informed in the court's order dated July 2, 2003, he was obligated to raise all issues in his original motion for postconviction relief."

¶27 The court is not obliged to entertain successive motions for postconviction relief. *See* ***Jones (Hollis) v. State***, 70 Wis. 2d 62, 73, 233 N.W.2d 441 (1975) ("[s]uccessive motions for postconviction relief, raising the same

issues and seeking the same relief, need not be entertained."). Smith filed a series of postconviction motions, raising the same or similar issues, or challenging the same result in a slightly different manner.[8] The trial court has the inherent power to exercise its discretion in controlling the judicial business before it "with economy of time and effort," consistent with the Constitution and statutes. *See* ***Latham v. Casey & King Corp.***, 23 Wis. 2d 311, 314, 127 N.W.2d 225 (1964). The trial court properly exercised its discretion in forewarning Smith that it declined to decide a seemingly endless succession of postconviction motions.

V. VICTIM'S AVERMENTS DO NOT CONSTITUTE NEWLY DISCOVERED EVIDENCE

¶28 At Smith's request, this court remanded this matter for Smith to proffer newly discovered evidence. Although Smith raised other issues (including the improper re-issuance of the charges, the trial court's partiality, and criticisms of standby counsel), his principal basis for the remand motion was newly discovered evidence, proffered in an affidavit from the victim.[9] In this seven-sentence affidavit, the victim avers:

> That Don[n]elly Smith did not fracture my finger in the Fall of 2001. I did not tell police officers that nor did I testify to it in court. In fact, I wasn't even in court.
>
> I was however at the sentencing at which time I related, under oath, that the incident never happened. The police officers stated that Mr. Smith refused to open the door and they had to kick in the door however, since the

[8] Smith filed successive motions to set aside the verdict, for a mistrial, and for a new trial, among other related motions. Many of his challenges were not raised or properly preserved during trial, while others were largely repetitive of his previous postconviction challenges.

[9] None of the other issues Smith raised purported to constitute newly discovered evidence.

> door opened out, that was impossible. I don't know where these officers got their information.
>
> I sincerely hope that this affidavit in some way helps Mr. Smith in righting this horrible injustice and miscarriage of justice.

¶29 To establish newly discovered evidence, the defendant must clearly and convincingly show that:

> (1) the evidence was discovered after trial;
>
> (2) the defendant was not negligent in seeking evidence;
>
> (3) the evidence is material to an issue;
>
> (4) the evidence is not merely cumulative to the evidence presented at trial; and
>
> (5) a reasonable probability exists of a different result in a new trial.[10]

State v. Coogan, 154 Wis. 2d 387, 394-95, 453 N.W.2d 186 (Ct. App. 1990) (footnote added). "Finally, when the newly discovered evidence is a witness's recantation, we have stated that the recantation must be corroborated by other newly discovered evidence." ***State v. McCallum***, 208 Wis. 2d 463, 473-74, 561 N.W.2d 707 (1997) (citation omitted), *modified on other grounds by* ***State v. Kivioja***, 225 Wis. 2d 271, 295, 592 N.W.2d 220 (1999). This court reviews the trial court's decision for an erroneous exercise of discretion. *See* ***State v. Boyce***, 75 Wis. 2d 452, 457, 249 N.W.2d 758 (1977).

¶30 The trial court summarily denied the motion, reiterating some of the testimony with citations to the trial transcript.[11]

[10] "The reasonable probability determination does not have to be established by clear and convincing evidence, as it contains its own burden of proof." ***State v. Love***, 2005 WI 116, ¶44, 284 Wis. 2d 111, 700 N.W.2d 62.

> The defendant was convicted of substantial battery (substantial harm intended) following a jury trial in which he basically represented himself. Stand-by counsel was appointed to assist, but for the most part, the defendant ran the show contending continuously that the State's case was based on nothing but hearsay.…[12]
>
> At trial, Officer Steve Delie testified that he went to [5662B North 80th Street] based on a 911 call and heard yelling and screaming inside. He testified he heard someone yelling, "He's beating me. He's beating me. He's hurting me," followed by "Help me. Help me." After Office Delie entered the residence, he saw the victim with a white T-shirt covered with blood and a bent finger; she identified the defendant as the person who had beat her up and filled out a document with the officer attesting to this fact as well as where she sustained injury. Delie testified that [the victim] was lucid and not intoxicated at the time. [The victim] did not testify.
>
> On April 9, 2003, the court sentenced the defendant to ten years in prison (five years initial confinement followed by five years extended supervision). At the time of sentencing, the victim appeared in court and accused Officer Delie of lying, stated that her finger had been broken five times in the past, and that everything was "bogus." Defendant now submits an affidavit from [the victim] in which she states that Smith did not fracture her finger in 2001; that she did not tell police officers that he did; that the incident never happened; and that the officer was lying.

(footnote added; footnote emphasizing inconsistencies in the victim's statements omitted). The trial court then explained that the victim's proffered evidence

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[11] We omit the transcript citations.

[12] The remainder of this paragraph addresses the complaint's allegations regarding different charges against Smith involving this same victim, which were dismissed. The remaining (deleted) part of the paragraph is not relevant to our decision.

satisfied none of the requisites of newly discovered evidence, and was not sufficiently corroborated.[13]

¶31 We review the trial court's denial of Smith's motion to determine whether the trial court erroneously exercised its discretion. *See* ***Boyce***, 75 Wis. 2d at 457. Our independent review discloses no evidence to corroborate the victim's postconviction affidavit. The trial court's explanation provides a reasoned and reasonable decision demonstrating a proper exercise of discretion for summarily denying the motion for a new trial on the basis of newly discovered evidence.

VI. REMAINING CLAIMS

¶32 The trial court also concluded that Smith's other claims lacked merit. For the reasons previously addressed in this opinion, we agree. Similarly, Smith has failed to establish that the interest of justice, which he also raised, warrants a new trial.

By the Court.—Judgment and orders affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2005-06).

[13] Smith contends that corroboration is unnecessary because the victim never testified, and is therefore not recanting. This contention is without merit.