COURT OF APPEALS
DECISION
DATED AND FILED

April 13, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP871-CR **Cir. Ct. No. 2007CF943**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LERON SCOTT BROWN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: CLARE L. FIORENZA, Judge. *Affirmed.*

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

¶1 PER CURIAM. Leron Scott Brown appeals from an amended judgment of conviction, entered after a jury trial, for one count of substantial battery as a habitual criminal and as a party to a crime. *See* WIS. STAT.

§§ 940.19(2), 939.62, 939.05 (2007-08).[1] He also appeals from an order denying his postconviction motion seeking a new trial or, in the alternative, resentencing. We affirm.

BACKGROUND

¶2 The State charged Brown with one count of substantial battery as a party to a crime and one count of solicitation to commit substantial battery, all as a habitual criminal. According to the criminal complaint, Brown ordered Monique Love to strike Rebecca Jones. The complaint reflects that Love punched Jones in the face numerous times while Brown restrained Jones, and Jones suffered injuries as a result. Brown demanded a jury trial.

¶3 At the final pretrial conference, held two weeks before trial began, Brown's trial counsel told the circuit court: "I have not been able to track [Love] down yet." Brown did not, however, ask the court to issue a material witness warrant for Love's arrest pursuant to WIS. STAT. § 969.01(3), nor did Brown move to adjourn the trial to allow him additional time to locate Love.

¶4 The matter proceeded to trial. Jones testified that on January 23, 2007, she telephoned Brown, whom she described as her boyfriend, and asked him to meet her at a friend's residence because she was having an argument with Brown's cousin, Michael Taylor Brown.[2] Jones testified that Brown arrived at the residence with Love. According to Jones, Brown suggested that she, Love, and

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

[2] We refer to Michael Taylor Brown as "Taylor Brown" to distinguish him from Leron Brown.

Brown all get into Brown's car. Jones testified that she and Brown were "just talking" in the car until Brown became convinced that Jones had spent part of the evening with a former boyfriend. Jones testified that Brown then ordered both Love and Jones out of the car, that he restrained Jones by holding her arms, and that he directed Love to hit Jones in the face. After Love struck Jones numerous times, Brown told Love to stop the assault, and Brown and Love drove away from the scene.

¶5 Brown testified on his own behalf. Brown told the jury that he received a telephone call from Jones asking him to "come talk." Brown testified that he and his girlfriend of ten years, Love, drove to meet Jones at a friend's residence in response to the call. Brown testified that after he arrived at the residence, Jones and Taylor Brown had "a little tussle" and Brown "broke up the argument." When Taylor Brown "started to get at [Jones] again," Brown suggested to Jones that she get into his car. Brown testified that after Jones got into the car she insulted Love, and Love responded by hitting Jones. According to Brown, he did not instigate Love's attack on Jones nor did he physically intercede, but he did tell Love to stop the attack and eventually she complied.

¶6 Other witnesses at trial included the law enforcement officers who investigated after Jones called the police, and a person who testified that she saw a fight on January 23, 2007, between Love and Jones. Love did not testify.

¶7 The jury convicted Brown of both substantial battery as a party to a crime and solicitation to commit substantial battery. Brown stipulated to his status as a habitual criminal. The circuit court imposed two concurrent six-year terms of imprisonment, each bifurcated as four years of initial confinement and two years of extended supervision.

¶8 Brown moved for postconviction relief on several grounds. As to Brown's claim that WIS. STAT. § 939.72(1), prohibited his convictions for both party to the crime of substantial battery and solicitation to commit the same substantial battery, the State conceded error. The circuit court agreed with the parties' position, vacated the conviction for solicitation to commit substantial battery, and dismissed that charge.

¶9 Brown also moved for a new trial on the charge of substantial battery as a party to a crime, asserting that he had newly discovered evidence. In support, he submitted an affidavit from Love. In the affidavit, Love averred that on January 23, 2007, she was with Brown and that they both interceded when Taylor Brown hit Jones. Love further averred that she also struck Jones but that Brown "did not hit, push, kick or hold [Jones] down at any time." The affidavit reflects that Brown ended Love's attack on Jones by separating the two women. Brown filed no additional affidavits or other offers of proof with his postconviction motion.

¶10 The circuit court held a hearing on Brown's motion for a new trial, but Love did not appear. According to Brown's postconviction counsel, Love was "ducking" a subpoena for the hearing. The circuit court denied Brown a new trial, stating that his motion was insufficiently supported. The circuit court also denied Brown's alternative request for resentencing. This appeal followed.[3]

[3] Although Brown moved the circuit court for an order permitting postconviction discovery, he does not pursue the issue on appeal. Accordingly, we do not address it.

REQUEST FOR NEW TRIAL

¶11 The decision to grant or deny a new trial based on newly discovered evidence rests in the sound discretion of the circuit court. ***State v. Plude***, 2008 WI 58, ¶31, 310 Wis. 2d 28, 750 N.W.2d 42. We will sustain the circuit court's discretionary decision if it "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.

¶12 A defendant seeking a new trial on the basis of newly discovered evidence must establish "'by clear and convincing evidence, that: (1) the evidence was discovered after conviction; (2) the defendant was not negligent in seeking evidence; (3) the evidence is material to an issue in the case; and (4) the evidence is not merely cumulative.'" ***State v. Armstrong***, 2005 WI 119, ¶161, 283 Wis. 2d 639, 700 N.W.2d 98 (citation omitted). If the defendant establishes these four requirements, "'the circuit court must determine whether a reasonable probability exists that a different result would be reached in a [new] trial.'" ***Id.*** (citation omitted).

¶13 The circuit court found that Brown's postconviction submission was insufficient to entitle Brown to a new trial. We need not review all of the requirements for granting a new trial based on newly discovered evidence because we conclude that Brown did not prove the first two requirements by clear and convincing evidence. *See* ***Jones v. State***, 226 Wis. 2d 565, 596, 594 N.W.2d 738 (1999) ("Whether a party has met its burden of proof is a question of law which we examine without deference to the circuit court's conclusion.").

¶14 First, Love's affidavit does not satisfy the requirement that newly discovered evidence be discovered after conviction. Evidence that is known to the

defendant at the time of trial is not newly discovered evidence merely because it becomes available after the defendant is convicted. *See* ***State v. Jackson***, 188 Wis. 2d 187, 198-99, 525 N.W.2d 739 (Ct. App. 1994).

¶15 The trial testimony establishes that Love's affidavit contains only newly-available evidence. Brown testified that he and Love were together when Love attacked Jones. He also testified that he did not batter Jones and that he observed Love commit the battery. Brown told the jury that his only role in the battery was to end it. Love's affidavit largely echoes Brown's testimony.

¶16 Brown argues in his appellate brief that the evidence in Love's affidavit is newly discovered because Love did not testify at trial, and she provided an affidavit only after Brown's conviction. While this contention suggests that Brown's trial counsel did not know what Love might say if called to testify, the test for newly discovered evidence involves "not what counsel knows or is aware of, but what [his or her] client ... is or should be aware of." *See* ***State v. Williams***, 2001 WI App 155, ¶21, 246 Wis. 2d 722, 631 N.W.2d 623. At the time of trial, Brown knew about Love's potentially exculpatory evidence because, according to Brown's testimony, he and Love were together throughout the incident. Love's affidavit confirms Brown's version of events. Thus, Brown did not demonstrate that he discovered Love's potential testimony only after his conviction.

¶17 Further, Brown failed to satisfy the second requirement for demonstrating that his evidence is newly discovered, namely, that he was not negligent in seeking to present Love's testimony at trial. *See* ***Armstrong***, 283 Wis. 2d 639, ¶161. Brown argues on appeal that Love "avoided trial counsel." The record contains no evidentiary support for this statement. Although Brown's

trial counsel represented to the circuit court that he "ha[d] not been able to track [Love] down yet," this representation provides no information about efforts made on Brown's behalf to contact Love or whether such efforts were diligent.[4]

¶18 As the State accurately points out, Brown failed to supplement the record during postconviction proceedings with either evidence or offers of proof demonstrating his efforts to secure Love's appearance at trial. Brown expresses indignation at the State's position, complaining that "the State is questioning the trial attorney's honesty, efforts and testimony in procuring Ms. Love for trial." Brown's burden, however, is to prove each of the requirements necessary to sustain his claim that he has newly discovered evidence warranting a new trial. A defendant may not rely on conclusory assertions in support of a postconviction motion. ***State v. Allen***, 2004 WI 106, ¶15, 274 Wis. 2d 568, 682 N.W.2d 433.

¶19 Thus, Brown failed to prove the first two elements necessary to sustain his claim that newly discovered evidence warrants granting him a new trial. *See* ***Armstrong***, 283 Wis. 2d 639, ¶161. Brown failed to demonstrate by clear and convincing evidence that he discovered the information in Love's affidavit only after his conviction. *See* ***id.*** He failed to proffer any evidence, let alone clear and convincing evidence, that he was not negligent seeking Love's testimony at trial. *See* ***id.*** Accordingly, the circuit court properly exercised its discretion in denying Brown a new trial. *See* ***Plude***, 310 Wis. 2d 28, ¶32 (new

[4] The State told the circuit court that it had made its own unsuccessful efforts to locate Love before Brown's trial. The State's lack of success in locating Love, however, does not demonstrate that Brown made diligent efforts to locate her, particularly in light of his trial testimony that Love was his "girlfriend for ten years."

trial based on newly discovered evidence may be warranted only if defendant proves all enumerated criteria).

REQUEST FOR RESENTENCING

¶20 The circuit court agreed with Brown's postconviction claim that he was improperly convicted of both solicitation to commit substantial battery and of being a party to the same substantial battery that was the objective of the solicitation. *See* WIS. STAT. § 939.72(1) (barring a conviction under both "[wis. stat. §] 939.30 for solicitation and [WIS. STAT. §] 939.05 as a party to a crime which is the objective of the solicitation"). Accordingly, the circuit court vacated the conviction for solicitation to commit substantial battery and the accompanying six-year sentence originally ordered to run concurrently with Brown's identical sentence for substantial battery. Brown contended that he was also entitled to be resentenced for the remaining valid conviction.[5] The circuit court properly denied that relief.

¶21 When a defendant is convicted and sentenced for multiple counts and one count is later vacated as multiplicitous, resentencing is permissible. ***State v. Martin***, 121 Wis. 2d 670, 681, 360 N.W.2d 43 (1985). Resentencing is not required, however, and the decision to resentence rests in the circuit court's

[5] During the postconviction hearing, Brown asked the circuit court to determine whether he was "entitled to a new sentencing" for substantial battery. The circuit court concluded that he was not so entitled. Brown asserts for the first time on appeal that he should be resentenced because the circuit court originally sentenced him on the basis of "inaccurate information," namely, his invalid conviction for solicitation to commit substantial battery. *See* ***State v. Tiepelman***, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1 (defendant has a due process right to be sentenced on the basis of accurate information). We decline to address the argument. *See* ***Kolupar v. Wilde Pontiac Cadillac, Inc.***, 2007 WI 98, ¶23, 303 Wis. 2d 258, 735 N.W.2d 93 ("Generally, arguments raised for the first time on appeal are deemed waived.").

discretion. ***State v. Sinks***, 168 Wis. 2d 245, 255, 483 N.W.2d 286 (Ct. App. 1992). Therefore, we will uphold the decision to grant or deny resentencing if the circuit court "examined the relevant facts, applied a proper standard of law, and using a rational process, reached a conclusion that a reasonable judge could reach." ***Id.***

¶22 Although the circuit court vacated one of Brown's convictions pursuant to WIS. STAT. § 939.72(1), the circuit court found that the sentence imposed for the valid conviction remained the proper disposition. The circuit court noted that it originally imposed concurrent sentences, explaining that its decision reflected the appropriate penalty "for the defendant's part [in the incident] with respect to what he did."

¶23 As the State points out, the circuit court's postconviction remarks are entirely consistent with the circuit court's pronouncements at the time of sentencing. The record reflects that at sentencing the circuit court considered the seriousness of Brown's conduct, and the circuit court described that conduct: "[Brown] held the victim's arms while [he] directed an individual, Monique Love, to punch [Jones], to batter her." The circuit court also observed, however, that Brown's two convictions "went hand in hand." Therefore the circuit court found that the sentences "should be concurrent."

¶24 The supreme court determined that when a double jeopardy bar requires vacating one of two parallel counts, resentencing for a remaining count is:

> permissible if the invalidation of one sentence ... disturbs the overall sentence structure or frustrates the intent of the original dispositional scheme. Resentencing is unnecessary, and certainly not required, where ... the invalidation of one count on double jeopardy grounds has no [e]ffect at all on the overall sentence structure.

State v. Church, 2003 WI 74, ¶26, 262 Wis. 2d 678, 665 N.W.2d 141 (citation omitted). Moreover, the supreme court has "never held ... that remand for resentencing is always required, even where the vacated count in a multi-count case has no [e]ffect whatsoever on the overall sentence structure." ***Id.***, ¶25 (emphasis omitted).

¶25 In this case, the circuit court imposed a six-year term of imprisonment as a penalty for Brown's criminal conduct. The circuit court's later order vacating one of Brown's two convictions as invalid under WIS. STAT. § 939.72(1), did not affect the overall sentencing structure or the rationale for the penalty chosen. Accordingly, the circuit court properly exercised its discretion in denying Brown's request for resentencing.

By the Court.—Judgment and order affirmed.

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