COURT OF APPEALS
DECISION
DATED AND RELEASED

July 18, 1995

No. 94-2883-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

KELLY SCOTT ROBERTS,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: RUDOLPH T. RANDA and MAXINE A. WHITE, Judges. *Affirmed.*

Before Wedemeyer, P.J., Sullivan and Schudson, JJ.

PER CURIAM. Kelly Scott Roberts appeals from a judgment of conviction after a jury found him guilty of first-degree recklessly endangering safety, contrary to § 941.30(1), STATS., and from an order denying his postconviction motions. Roberts raises essentially three claims of error: (1) the evidence was insufficient to support the verdict of guilty; (2) the trial court erroneously exercised its discretion in denying him the opportunity to present

testimony from an expert and factual witnesses at the postconviction hearing; and (3) he was denied effective assistance of counsel.

Because the evidence was sufficient to support the verdict, because the trial court did not erroneously exercise its discretion in denying Roberts the opportunity to present certain witnesses at the postconviction hearing, and lastly, because Roberts was not denied effective assistance of counsel, we affirm.

I. BACKGROUND

The jury convicted Roberts of first-degree recklessly endangering safety for stabbing Gregory Reineck in the chest with a knife around 11:50 p.m. on May 8, 1991, in the vicinity of Holy Cross church, 5624 West Bluemound Road, Milwaukee. How the actual stabbing occurred was hotly contested at trial. Needless to say, however, the jury accepted Reineck's version of the incident. Events preceding and following the incident are substantially not in dispute.

Prior to the incident, Roberts spent most of the evening of May 8 drinking a liter of vodka with a friend, Jayson Huth, under the Hoan Bridge on Milwaukee's lakefront. Later, a friend, Tiffany Doney, agreed to drive them home. Doney took Wisconsin Avenue west. In route, Doney, Huth, and Roberts observed the victim, Reineck, in his truck, stopped at a traffic sign.

Reineck, for his part, was accompanied by James McCreary, his roommate. The two lived in an upper flat at 5412 West Bluemound Road, two doors east of where the stabbing took place. At the time, Reineck was driving his Dodge Ram pickup truck. When Roberts and Huth observed Reineck and McCreary stopped at the traffic sign, for some unknown reason, they (Roberts and Huth) began shouting at them. Because the windows on Reineck's truck were closed, he and McCreary paid no attention to the verbal remarks of Roberts and Huth. Nevertheless, Roberts and Huth told Doney to follow Reineck's truck. According to Doney, they wanted to fight Reineck and his roommate.

Reineck pulled into his driveway and parked. Under directions from Roberts, Doney likewise stopped her vehicle. Roberts and Huth then jumped out and commenced a verbal confrontation with Reineck and McCreary. Doney drove west to a Total gas station located at the northeast corner of North Hawley Road and West Bluemound Road where she waited for Roberts and Huth to join her.

In the meantime, Reineck and McCreary told Roberts and Huth they were going to Derry's Pub located two doors east of the duplex where they lived, and that if they wanted to continue their arguing, they would have to do it in Derry's. Reineck and McCreary went into Derry's but Roberts and Huth remained outside near Reineck's apartment. Apparently frustrated by this turn of events, Roberts then threw a rock through a window of Reineck's truck, smashing it. Upon observing this activity through a window of the tavern, Reineck left Derry's and chased Roberts and Huth westbound on the north sidewalk of West Bluemound Road. What happened from that point on is highly disputed.

According to Reineck, he pursued Roberts and Huth to see where they were going and obtain the license plate of their vehicle. He chased Roberts to the open gate of a fence enclosing a parking lot located adjacent to and west of the Holy Cross church. Suddenly, Roberts stopped and Reineck observed him holding a knife in his hand. Roberts lunged at Reineck and "poked him" with the knife. Roberts then fled into the parking lot and Reineck followed for about twenty-five to thirty feet until he realized he had been stabbed and then stopped. Returning to the sidewalk on West Bluemound Road, Reineck again ran west until he observed Doney's truck leaving the Total gas station. Reineck was able to observe the truck's license plate number. With blood dripping from his chest, he returned to his residence and obtained emergency aid.

Roberts, for his part, claimed that he began running when he saw Reineck coming after him and that he did not stop until he had traversed almost the entire church parking lot to the fence line adjacent to the Total gas station. When he reached the fence, he turned around and observed Reineck still coming at him. Because of Reineck's conduct, Roberts was convinced Reineck intended to "do something" to him, so he pulled out a knife and held it up in an attempt to scare Reineck. He stabbed Reineck when he realized Reineck was

not just coming to talk. He insisted he had not pulled out the knife while he was on Bluemound Road.

Roberts essentially presented a case of self-defense. He conceded that he provoked the entire incident, but argued that after the initial provocation, he withdrew while Reineck acted as a "vigilante" by taking the law into his own hands.

The jury convicted Roberts as charged. He then filed postconviction motions essentially requesting a new trial based upon ineffective assistance of counsel. The trial court denied his motions and he now appeals.

II. DISCUSSION

A. Sufficiency of the Evidence.

Roberts first claims that the evidence presented at trial was insufficient to support the jury's guilty verdict for first-degree recklessly endangering safety.

We shall affirm a conviction if we can conclude that the jury, acting reasonably, could be convinced, beyond a reasonable doubt by evidence it is entitled to accept as true. ***State v. Teynor***, 141 Wis.2d 187, 204, 414 N.W.2d 76, 82 (Ct. App. 1987). When there are inconsistencies between witnesses's testimony, it is the task of the jury to determine both the credibility of each witness and the weight to be given to the testimony. ***State v. Toy***, 125 Wis.2d 216, 222, 371 N.W.2d 386, 389 (Ct. App. 1985). We shall not assess the credibility nor weigh the evidence. Nor shall we substitute our judgment for that of the jury, unless "the evidence supporting the jury's verdict conflicts with nature or the fully established facts, or unless the testimony supporting and essential to the verdict is inherently and patently incredible." ***State v. Sharp***, 180 Wis.2d 640, 659, 511 N.W.2d 316, 324 (Ct. App. 1993). In our review, if more than one inference can be drawn from the evidence, the inference which supports the jury's finding must be followed unless the testimony was incredible as a matter of law. ***State v. Poellinger***, 153 Wis.2d 493, 507, 451 N.W.2d 752, 757 (1990).

We conclude that the jury could reasonably find Reineck's testimony, as supported by the evidence, and in part corroborated by McCreary and Doney, more credible and entitled to more weight than Roberts's claim of self-defense.

In order to prove the charge of first-degree recklessly endangering safety, the State was required to prove three elements: (1) that Roberts endangered the safety of another human being; (2) that he did so by criminally reckless conduct, that is, conduct creating an unreasonable and substantial risk of death or great bodily harm; and (3) that the circumstances of Roberts's conduct showed utter disregard for human life. Section 941.30(1), STATS.

If a defendant introduces evidence to establish the statutory affirmative defense of self-defense, *see* § 939.48, STATS., the state must then also disprove that defense beyond a reasonable doubt. ***State v. Staples***, 99 Wis.2d 364, 299 N.W.2d 270 (Ct. App. 1980). To be successful in its prosecution, it is necessary for the state to disprove one or more of the three elements of self-defense, plus prove the three elements of first-degree recklessly endangering safety.[1] Perforce, the nature of these two statutory concepts creates a condition of mutual exclusivity.

A review of the record reveals the following evidence presented to the jury. Reineck testified that he chased Roberts west on the north sidewalk of West Bluemound Road when suddenly Roberts stopped, turned, and held up a knife in his hand. Before he could move backwards, Roberts jumped at him and "poked" him in the chest with the knife. Reineck further testified that Roberts

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[1] The absolute privilege of perfect self-defense applies where a defendant shows all three of the following elements: (1) the defendant reasonably believed that he was preventing or terminating an unlawful interference with his person; (2) the defendant reasonably believed that force or threat thereof was necessary to prevent or terminate the interference; and (3) the defendant reasonably believed that the actual amount of force used was necessary to prevent or terminate the interference.

State v. Camacho, 176 Wis.2d 860, 869, 501 N.W.2d 380, 383 (1993); *see also* § 939.48, STATS.

then turned and ran across the church parking lot. He pursued Roberts into the lot for about twenty-five to thirty feet when he realized he was stabbed. At that point, he turned and ran back to the sidewalk and continued west on Bluemound for a short distance until he was able to obtain the license number of the Doney vehicle. It was then that Reineck observed that blood was dripping from his chest wound onto the sidewalk. He then walked back to his residence, some 450 feet, under his own power and obtained emergency aid. In corroboration of this version, a police officer testified he followed the blood drippings from the yard of Reineck's residence back west to the point where Reineck said he stopped to observe the license plate. The officer also testified he checked the church parking lot for blood stains, but found none.

Reineck's companion, McCreary, testified as to his observations about Reineck's bleeding from the chest area and his blood- stained shirt and his efforts to keep his roommate conscious until emergency aid arrived. Reineck testified that he was treated for a puncture wound in the chest and had to remain in the hospital for two days to ensure that no arteries running from the heart had been damaged.

Roberts's defense, as earlier stated, was self-defense in that he had drawn a knife only after he had been cornered. Roberts testified that he drew the knife out of fear that Reineck was going to attack and injure him.

The jury was free to accept either version of how the incident occurred. Obviously, it accepted Reineck's version as partially corroborated by the physical facts. We conclude that the evidence was reasonably sufficient to reject Roberts's self-defense claim and to convince the jury, beyond a reasonable doubt, that Roberts was guilty of first-degree recklessly endangering safety.

B. Machner *Hearing Witnesses.*

Roberts's second claim of error relates to the trial court's refusal to hear testimony of two fact witnesses and one expert in support of Roberts's ineffective assistance claim.

Evidentiary rulings made during a ***Machner***[2] hearing are within the discretion of the trial court and, as such, are subject to the same standards of review as other evidentiary rulings. *See* ***State ex rel. Flores v. State***, 183 Wis.2d 587, 612, 516 N.W.2d 362, 370 (1994) (same standard rules of evidence apply). An appellate court reviews a trial court's evidentiary rulings according to the erroneous exercise of discretion standard. *See* ***State v. Pharr***, 115 Wis.2d 334, 342, 340 N.W.2d 498, 501 (1983). If a trial court applies the proper law to the established facts, we will not find a misuse of discretion if there is any reasonable basis for the trial court's ruling. ***Id.***

Roberts sought to have Huth testify at the ***Machner*** hearing, but the trial court denied the request because Huth's testimony would not impact or rebut trial counsel's testimony in some direct way. In essence, the trial court excluded the testimony on relevancy grounds. Huth's affidavit does not contain any information that would be relevant to the trial court's determination on the postconviction motion.[3] Based on the foregoing, the trial court did not erroneously exercise its discretion in declining to hear additional testimony from Huth.

Roberts also attempted to present the testimony of his grandmother, Dorothy Schumacher. The purpose of this effort was to show his trial counsel's deficient performance in failing to pursue a motion to suppress the knife seized from his jacket at the time of his arrest in his grandmother's home.

Roberts lived with his grandmother. Police learned of his residence and went to the home to question him. Roberts was asleep at the time the police arrived and gained entrance to the premises by the consent of Schumacher. After his arrest, police seized the knife from his jacket. Trial

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[2] *See* ***State v. Machner***, 92 Wis.2d 797, 285 N.W.2d 905 (Ct. App. 1979).

[3] In his affidavit, Huth confirms that he was contacted by an investigator working with the defense, who questioned him. Huth's affidavit also confirms that Roberts's trial counsel spoke with him on a few occasions in the courthouse. He also attests that "it is my opinion that Kelly could not have confronted Mr. Reineck at the entrance of the fenced-in parking lot as Mr. Reineck claims." This information does not rebut Roberts's trial counsel's testimony. Hence, the affidavit was irrelevant to the trial court's determination under the facts and circumstances of this case.

counsel testified that she considered a motion to suppress the physical evidence, but after she conferred with Roberts and learned from him that the entry to the home was consented to, she concluded such an effort would be fruitless.

At the ***Machner*** hearing, Roberts presented no evidence to controvert that he himself told his counsel his grandmother consented to the entry. It is true that Roberts's trial counsel never interviewed his grandmother, but relying on Roberts's statement that his grandmother had consented to the entry, counsel's decision not to bring a motion to suppress is reasonably based, ***Strickland v. Washington***, 466 U.S. 668, 669 (1984), and did not constitute deficient performance. Hence, the trial court's decision to refuse to hear the grandmother's testimony was not an erroneous exercise of discretion.

Roberts also attempted to call another attorney as an expert witness to offer his opinion whether trial counsel's performance in certain respects was deficient. The trial court determined that expert testimony on this issue was not necessary in order for it to reach a decision.

Whether expert testimony should be admitted or excluded in any particular case is left to the discretion of the trial court. *See* ***State v. Hamm***, 146 Wis.2d 130, 142, 430 N.W.2d 584, 590 (Ct. App. 1988); *see also* § 907.02, STATS. Expert testimony is generally admitted when it will be helpful to the trier of fact in considering the issues. ***Id.*** The trial court, acting as the trier of fact at the ***Machner*** hearing, determined that expert testimony would not be helpful to it in rendering a decision. We cannot say that this decision was an erroneous exercise of discretion.

At the ***Machner*** hearing, the trial court heard lengthy testimony from trial counsel. It also reviewed briefs as to whether it should hear testimony from the expert, reviewed the trial record, and entertained argument. Referring to a concurring opinion in ***State v. Fencl***, 109 Wis.2d 224, 325 N.W.2d 703 (1982), the trial court, in the instant case, acknowledged that "it may be necessary just as in medical situations where standards of professional conduct await for a court to gain professional or expert testimony to assist it in evaluating the record or the facts." *See* ***id.*** at 246, 325 N.W.2d at 715 (certain cases may benefit from expert testimony on ineffective assistance claims). The trial court in the instant case concluded, however, that the Roberts case was not

one of those situations where expert testimony would assist the fact finder in reaching a determination.

The reasoning employed by the trial court demonstrates a proper exercise of discretion. The issues Roberts presented in his postconviction motions do not involve areas where "scientific, technical or other specialized knowledge" of an expert would assist the trial court in reaching a decision. Accordingly, we reject Roberts's claim on this ground.

C. Ineffective Assistance.

Roberts also claims that he did not receive effective assistance from his trial counsel. He alleges that his trial counsel's performance was ineffective because: (1) she failed to properly interview a potential witness, Jayson Huth, and failed to call Huth as a witness; (2) she failed to move to suppress the knife, which was discovered without a warrant; (3) she failed to properly modify the standard self-defense instruction to reflect the facts of this case; (4) she failed to request a bridging instruction; (5) she failed to object to the testimony of a police officer who characterized the knife as an illegal knife; (6) she failed to introduce into evidence the victim's medical records; and (7) her performance was ineffective because of her excessive case load. We review each contention *seriatim*.

The United States Supreme Court set out the two-part test for ineffective assistance of counsel under the Sixth Amendment in ***Strickland***. The first prong of ***Strickland*** requires that the defendant show that counsel's performance was deficient. ***Id.***, 466 U.S. at 687. This demonstration must be accomplished against the "strong presumption that counsel acted reasonably within professional norms." ***State v. Johnson***, 153 Wis.2d 121, 127, 449 N.W.2d 845, 848 (1990). The second ***Strickland*** prong requires that the defendant show that counsel's errors were serious enough to render the resulting conviction unreliable. ***Strickland***, 466 U.S. at 687. In reviewing the trial court's decision, we accept its findings of fact, its "'underlying findings of what happened,'" unless they are clearly erroneous, while reviewing "the ultimate determination of whether counsel's performance was deficient and prejudicial" *de novo*. ***Johnson***, 153 Wis.2d at 127-28, 449 N.W.2d at 848 (citation omitted).

1. Jayson Huth.

Roberts first claims that he received ineffective assistance because his trial counsel failed to properly investigate the potential testimony of Jayson Huth, and failed to call him (Huth) as a witness at trial. Roberts claims it was deficient performance to not call Huth as a witness because Huth could have corroborated Roberts's version of events.

Trial counsel did not call Huth as a defense witness, although she subpoenaed him. By the time of trial, however, counsel had acquired the contents of a statement Huth had given to the police implicating Roberts; her own investigator had interviewed him twice; and additionally, she talked to him twice during the trial. She knew that Huth had been drinking heavily the night of the incident; that he had not seen what actually happened because he was in such a hurry to get to Doney's vehicle and that he admitted his alcoholic consumption may have impaired his memory and powers of observation. Thus, Huth was ripe for cross-examination.

Trial counsel did not state precisely why she chose not to use Huth as a witness, but it is not unreasonable to conclude that, given the vulnerability to cross-examination of any testimony he might offer, trial counsel strategically decided not to use Huth. Such a tactical decision would certainly comport with the reasonable reaction of any trial counsel and would not be fatal. ***State v. Vennemann***, 180 Wis.2d 81, 97, 508 N.W.2d 404, 411 (1993) (a wide range of professionally competent assistance is acceptable). Huth's indication that he had not seen the confrontation, together with the admitted fact that Huth and Roberts were intoxicated, may lead a reasonable attorney to forego calling Huth as a witness. Why put a witness on for the defense who can confirm that the defendant was drunk, that the defendant provoked the victim, and that the defendant damaged the victim's car? It was reasonable strategy to forego calling Huth as a witness.

2. Motion to Suppress.

Roberts next claims that he received ineffective assistance because his trial counsel failed to move to suppress the knife that the police discovered after coming to Roberts's grandmother's home. Trial counsel testified that she considered a motion to suppress, but Roberts told her that his grandmother consented to the officers entering the home. Accordingly, she concluded that a motion to suppress would not be successful.

At the ***Machner*** hearing, appellate counsel submitted an affidavit from Roberts's grandmother swearing that she did not give consent to the officers. We resolve this contention by considering the prejudice prong. ***Strickland***, 466 U.S. at 697 (performance prong need not be considered if claim

can be resolved solely on the prejudice prong). A review of the record demonstrates that even if a motion to suppress was brought *and* was successful, the outcome of the case would remain the same. Roberts admitted that he had the knife in his possession, alleging that he used it in self-defense. Based on these admissions, even if the knife was suppressed, the jury would have still heard testimony regarding the knife. Therefore, the failure to pursue a suppression motion was not prejudicial and we reject Roberts's claim on this ground.

3. Defective Self-Defense Instruction.

Next, Roberts claims his trial counsel's failure to modify the self-defense instruction to fit the facts of his case constituted ineffective assistance. Trial counsel requested the standard self-defense instruction, which was given. The instruction given, provided in pertinent part:

> If you find that a defendant did *intentionally* cause bodily harm to Gregory Reineck, as charged in complaint, but that he did so under such circumstances that under the law of self-defense as it has been explained to you, such use of force was privileged, than you must find the defendant not guilty, giving him the benefit of any reasonable doubt as to whether his conduct was privileged under the law of self-defense. (Emphasis added).

Roberts objects to the term *intentionally*, because he was charged only with *recklessness*. Hence, Roberts asserts that the self-defense instruction required the jury to find Roberts actually acted with intent in order to find that he acted in self-defense.

The State concedes that this instruction should have been modified, but argues that the error was harmless. We agree with the State. This case is analogous to ***State v. Paulson***, 106 Wis.2d 96, 106-08, 315 N.W.2d 350, 355-56 (1982), where our supreme court held that the failure to modify the

standard self-defense instruction in this circumstance did not prejudice the defendant. The ***Paulson*** court noted that:

> It is a well established rule that if the jury instructions, when considered as a whole and in their entirety, render the error harmless because the overall meaning communicated by the instruction was a correct statement of the law, there are no grounds for reversal based upon that error.

Id. at 108, 315 N.W.2d at 356. In the instant case, as in ***Paulson***, the instruction immediately following the erroneous language correctly stated the law of self-defense. It instructed as follows:

> In other words, before you can find the defendant guilty of the offense charged, you must be satisfied beyond a reasonable doubt f[ro]m the evidence in this case that any use of force by him against Gregory Reineck, if such force was so used, was not privileged under the law of self-defense as it has been defined for you.

We conclude that despite the erroneous language, the overall correct statements of the law contained in the remainder of the jury instructions did not affect the reliability of the verdict.

4. Bridging Instruction.

Next, Roberts argues his trial counsel should have requested a bridging instruction so that the jury could have considered his self-defense assertion as a mitigating factor to find him guilty of the lesser included offense rather than first-degree recklessly endangering safety. Trial counsel testified that she did not consider requesting a bridging instruction.

A bridging instruction was not required in this case and, therefore, not a proper basis to find ineffective assistance. *See* ***State v. Felton***, 110 Wis.2d 485, 489, 329 N.W.2d 161, 163 (1983) (bridging instruction appropriate when "the evidence arguably permits a finding of first or second degree murder or manslaughter").

5. Failure to Object to Officer's "Illegal Knife" Testimony.

Roberts next claims that trial counsel was ineffective because she failed to object to the following testimony:

> Q:[Assistant District Attorney]: When you said its locking bladed knife, what do you mean by that?
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> A:[Police Officer]: What I mean is when the blade is open, it will lock in place and it won't close just by trying to force it. A separate button you have to push in order to close the blade. *And by the standard of the city, this is considered an illegal knife because of the length of the blade.*

(Emphasis added.) Roberts objects to the emphasized language, arguing that this is a reference to other bad acts, which was prohibited by motion in limine rulings. Trial counsel testified at the ***Machner*** hearing that she did not recall this testimony and probably just "missed it."

We need not address whether it was deficient to fail to object to this statement because we conclude that this testimony was not prejudicial. The reference was isolated and brief. In addition, it is arguable that an objection at that point may have drawn unnecessary attention to the remark. We conclude that this one word objectionable characterization did not affect the reliability of the verdict, and we therefore reject Roberts's claim on this ground.

Roberts also claims that the prosecutor's reference to the blade length in closing argument was improper. There is no merit to this argument. It is undisputed that the prosecutor did not resurrect the police officer's "illegal" comment, but merely reflected on the blade length. Under the facts of this case, there was nothing objectionable about the prosecutor commenting on the descriptive nature of the weapon.

6. Failure to Introduce Medical Records.

Next, Roberts claims that trial counsel was ineffective because she failed to introduce into evidence the victim's medical records. Trial counsel testified at the ***Machner*** hearing that she erred in failing to submit the records, but was caught off-guard because the prosecutor represented that he would be introducing the records.

Roberts asserts that the medical records contained information contrary to the testimony of the victim and should have been introduced into evidence to challenge the victim's credibility. Our review of Roberts's claim demonstrates that the failure to introduce the medical documents was not prejudicial. We base this conclusion on the fact that trial counsel effectively cross-examined the victim using information from the medical records and on the fact that trial counsel attacked the State's case in her closing for failing to introduce any documentation of the alleged injury. Based on these facts, it was not absolutely necessary for the medical records themselves to be introduced. In fact, their absence allowed trial counsel to attack the State's case. Therefore, we reject Roberts claim on this ground.

7. Excessive Case Load.

Roberts's final claim regarding ineffective assistance is that trial counsel's excessive case load adversely affected her performance in this case. Trial counsel testified at the ***Machner*** hearing that she felt her preparation time was lacking because of her other cases. The trial court, however, determined that the record did not support this allegation, explaining that:

> The record discloses that the trial counsel spent a day and an evening preparing immediately before the first day of trial and talked with the defendant about his case at other times, reviewed all the case file records and made notes. Additionally, trial counsel indicated that she was prepared to go to trial on two earlier dates. Those earlier dates preceded the actual trial date by almost ten months. And finally, trial counsel also made use of an investigator to assist her with the preparation of this case.

These findings are supported by the record and, therefore, are not clearly erroneous. Although trial counsel could have undoubtedly spent additional time in preparation, we conclude, her preparation in defense of this case did not constitute ineffective assistance. Accordingly, we reject Robert's claim that trial counsel's excessive case load resulted in him receiving ineffective assistance.

III. CONCLUSION

Based on the foregoing, we reject each of Roberts's contentions and affirm the judgment of conviction and order denying his postconviction motions.[4]

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[4] Roberts also alleges that he is entitled to a new trial on the basis of newly discovered evidence or pursuant to § 752.35, STATS., in the interests of justice. We summarily reject both contentions.

Roberts claims that the testimony of Huth and Roberts's grandmother constitutes newly discovered evidence and therefore he is entitled to a new trial. We disagree.

Evidence is considered "newly discovered" if: (1) it comes to the moving party's notice after trial; (2) the moving party's failure to discover the evidence earlier did not arise from lack of diligence in seeking to discover it; (3) the evidence is material and not cumulative; and (4) the new evidence would probably change the result. Section 805.15(3), STATS. Neither witness's proffered testimony would probably have changed the result; therefore, we reject Roberts's contention.

As discussed above, Roberts's grandmother's testimony would not have influenced the outcome even if it was the basis of a successful motion to suppress. Likewise, Huth's proffered testimony would not have probably changed the result. The critical testimony proffered by Huth's affidavit is: "Although I could not see [Roberts] at all times because I was running in front of him, it is my opinion that [Roberts] could not have confronted Mr. Reineck at the entrance of the fenced-in parking lot as Mr. Reineck claims." Even if the trial court would have allowed this testimony—which was not a personal factual observation, but an opinion—the admission probably would not have changed the result.

As noted above, Huth was admittedly intoxicated; he had given statements closer to the time of the incident stating that he did not see anything; and the physical evidence supported Reineck's version of events. Accordingly, we reject Roberts's claim on this ground.

Finally, Roberts asserts that we should reverse the conviction and grant a new trial "in the interests of justice." Based on our analysis throughout this opinion, we see nothing in the record before us to invoke § 752.35, STATS. (new trial may be granted if real controversy was not fully

By the Court. – Judgment and order affirmed.

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

(..continued)
tried or if it is probable that justice has miscarried).