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DISTRICT I

July 2, 2019

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You are hereby notified that the Court has entered the following opinion and order:

2018AP491 State of Wisconsin v. James Arnold Lewis (L.C. # 2012CF93)

Before Brash, P.J., Kessler and Brennan, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

James Arnold Lewis, *pro se*, appeals a February 9, 2018 order denying his motion for postconviction relief filed pursuant to WIS. STAT. § 974.06 (2017-18).[1] He claims he has newly discovered evidence warranting a new trial. Alternatively, he claims he is entitled to a new trial in the interest of justice. Based upon our review of the briefs and record, we conclude at

[1] All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

conference that this matter is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We affirm.

A jury found Lewis guilty in 2013 of one count of sexually assaulting a child younger than twelve years old and three counts of sexually assaulting a child younger than thirteen years old. Each conviction involved Lewis's sexual contact with L.M.A.—the daughter of Lewis's girlfriend, L.C.—during the period from August 1, 2011, through the end of December 2011.[2]

Represented by appointed counsel, Lewis pursued an appeal of his convictions, seeking a new trial on the ground that alleged errors in the jury instructions and verdict forms prevented a full trial of the controversy. We affirmed. *See* ***State v. Lewis*** (***Lewis I***), No. 2014AP1824-CR, unpublished slip op. (WI App July 7, 2015). Proceeding *pro se*, Lewis next filed a motion in August 2016, seeking postconviction relief under WIS. STAT. § 974.06 (2015-16). He alleged that: the circuit court erred by denying his request for new trial counsel; his trial counsel was ineffective in a host of ways; and his postconviction counsel was ineffective for failing to challenge the effectiveness of trial counsel. He supported his allegations with a 222-page appendix. The circuit court rejected his claims, and we affirmed. *See* ***State v. Lewis*** (***Lewis II***), No. 2016AP1790, unpublished op. and order (WI App Aug. 7, 2017).

In February 2018, Lewis filed the motion underlying this appeal, claiming that he had newly discovered evidence relating to one of his crimes. Specifically, he alleged that he had discovered documents showing that he could not have sexually assaulted L.M.A. at a motel, as

[2] L.M.A., born August 17, 2005, was just shy of her sixth birthday at the start of the charging period, and she was seven years old when she testified at Lewis's trial.

alleged in count four of the amended information, because he was in custody during the time that L.M.A. lived in a motel. In support of his claim, Lewis submitted: (1) a letter dated August 20, 2015, written by a Salvation Army social worker, reflecting that L.C. and her children lived at the Salvation Army Emergency Lodge from August 2, 2011, through September 1, 2011; (2) a copy of a receipt issued to Lewis by the Midpoint Motel showing an arrival date of September 2, 2011, and a check-out date of September 9, 2011; and (3) Milwaukee County Jail booking records showing that Lewis was in custody from September 3, 2011, through September 19, 2011.

Lewis also relied on a portion of the trial transcript, namely, an excerpt from his cross-examination of L.C. In the excerpted testimony, L.C. said that she and her children lived in a Salvation Army shelter for approximately one month, and thereafter they lived in the Midpoint Motel "for a couple of weeks." She said that she was unable to recall the precise dates of her stays in these locations. L.C. went on to testify that she and her children left the motel to live with friends and remained in the friends' home until February 2012.

Lewis argued that the documents he presented in his February 2018 motion, viewed together with L.C.'s testimony, warranted a new trial because they proved that he was incarcerated when L.M.A. lived at the Midway Motel, and therefore he could not have assaulted her there. The circuit court rejected the claim, concluding that the documents did not satisfy the criteria for newly discovered evidence. Lewis twice moved to reconsider, and the circuit court denied both motions. He appeals.

A claim of newly discovered evidence proceeds under WIS. STAT. § 974.06. *See* ***State v. Bembenek***, 140 Wis. 2d 248, 251-52, 409 N.W.2d 432 (Ct. App. 1987). To succeed:

> "the defendant must prove, 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. If the defendant proves these four criteria by clear and convincing evidence, the circuit court must determine whether a reasonable probability exists that a different result would be reached in a trial."

State v. Armstrong, 2005 WI 119, ¶161, 283 Wis. 2d 639, 700 N.W.2d 98 (citing ***State v. McCallum***, 208 Wis. 2d 463, 473, 561 N.W.2d 707 (1997)).

Lewis asserts that his documentary evidence satisfied each of the factors necessary to prevail on a claim of newly discovered evidence. We must begin, however, by considering a preliminary question, namely, whether Lewis satisfied the prerequisites for proceeding under WIS. STAT. § 974.06. That statute requires a convicted person to raise all grounds for postconviction relief in his or her original, supplemental, or amended postconviction motion. *See* ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 181, 517 N.W.2d 157 (1994). Second or subsequent motions under § 974.06 are procedurally barred unless the person offers a sufficient reason for failing to allege or adequately raise his or her claims in the prior proceeding. *See* ***Escalona-Naranjo***, 185 Wis. 2d at 181-82. Whether a person presents a sufficient reason to permit serial litigation is a question of law that we review *de novo*. *See* ***State v. Kletzien***, 2011 WI App 22, ¶16, 331 Wis. 2d 640, 794 N.W.2d 920. Accordingly, we turn to whether Lewis presented a sufficient reason for failing to raise his claim of newly discovered evidence in prior proceedings.

The postconviction motion that Lewis pursued *pro se* in 2016 included a claim that his trial counsel was ineffective for failing to introduce evidence refuting the allegation that Lewis sexually assaulted L.M.A. in a motel. In support of the motion, Lewis filed as attachment Nos.

38, 44, and 47, precisely the same Salvation Army letter, Midpoint Motel receipt, and Milwaukee County Jail booking information that he attached to support his February 2018 postconviction motion alleging newly discovered evidence. Therefore, Lewis could have, but did not, state a claim for relief in 2016 based on alleged newly discovered evidence.

Lewis asserts that he did not know in 2016 that the documents he relies on now could form the basis for a claim of newly discovered evidence and that a fellow inmate suggested the idea only after Lewis received an adverse decision in ***Lewis II***. According to Lewis, his ignorance of the law in 2016 constitutes a sufficient reason for failing to raise the claim at that time. We disagree.

Our supreme court has suggested that ignorance of the law is potentially a sufficient reason for failing to raise a claim in earlier proceedings, depending upon the surrounding facts. *See* ***State v. Allen***, 2010 WI 89, ¶91, 328 Wis. 2d 1, 786 N.W.2d 124. The ***Allen*** court made clear, however, that ignorance of the law is not a sufficient reason when the law in question was well established at the time of the original litigation. *See* ***id.***, ¶44.

The Wisconsin law governing claims of newly discovered evidence was firmly established in 2016. Indeed, Lewis explicitly acknowledges that ***McCallum***, decided in 1997, and ***Armstrong***, decided in 2005, reflect the "applicable law concerning newly discovered evidence." Accordingly, his allegation that in 2016 he was ignorant of the law governing newly discovered evidence cannot serve as a sufficient reason for failing to raise a newly-discovered-evidence claim at that time. *See* ***Allen***, 328 Wis. 2d 1, ¶44.

Because Lewis does not present a sufficient reason for failing to raise his current claim in his earlier litigation, WIS. STAT. § 974.06 does not provide an avenue for Lewis to pursue the

claim now. *See* ***Escalona-Naranjo***, 185 Wis. 2d at 181. The circuit court therefore properly denied his postconviction motion.

Lewis next argues that, even if he is unable to proceed under WIS. STAT. § 974.06, this court should nonetheless grant him a new trial in the interest of justice. *See* WIS. STAT. § 752.35.[3] To grant a discretionary reversal under § 752.35, we must conclude either that the real controversy has not been fully tried or that justice has probably miscarried, and we exercise our power to reverse only in "exceptional cases." *See* ***State v. Jones***, 2010 WI App 133, ¶43, 329 Wis. 2d 498, 791 N.W.2d 390 (citation omitted). Lewis does not present such an exceptional case.

A party may show that the real controversy was not fully tried by establishing, *inter alia*, that "'the jury was erroneously not given the opportunity to hear important testimony that bore on an important issue of the case.'" *See* ***State v. D'Acquisto***, 124 Wis. 2d 758, 764, 370 N.W.2d 781 (1985) (citation omitted). Lewis argues that this basis for reversal exists here because the jury did not see evidence that he was jailed during September 2011, when L.M.A. lived in a motel. In his view, the evidence of his incarceration proves that he could not have assaulted her at a motel, as alleged in count four of the amended information. In fact, however, Lewis's documents indicate at best that L.M.A. and her family moved into the Midway Motel on September 2, 2011, the day before Lewis was booked into the Milwaukee County Jail on

[3] Lewis points to WIS. STAT. § 805.15(1), as the mechanism allowing this court to grant him a new trial in the interest of justice. That statute does not apply to criminal cases. *See* ***State v. Henley***, 2010 WI 97, ¶¶39, 66, 328 Wis. 2d 544, 787 N.W.2d 350. WISCONSIN STAT. §752.35, however, does confer discretionary power on this court to reverse a criminal conviction in the interest of justice. *See* ***State v. Avery***, 2013 WI 13, ¶23, 345 Wis. 2d 407, 826 N.W.2d 60. We construe Lewis's appellate submissions as presenting a claim under the latter statute. *See* ***bin-Rilla v. Israel***, 113 Wis. 2d 514, 521, 335 N.W.2d 384 (1983).

September 3, 2011. Accordingly, Lewis's documents fail to show that he was unable to assault L.M.A at the start of her stay in the motel.[4] Indeed, as the circuit court explained in 2016, Lewis's documentary evidence "really doesn't place any of the material facts in dispute."

Lewis also suggests that justice miscarried because his documentary evidence would permit him to undermine L.M.A.'s credibility. He emphasizes that when L.M.A. testified, she said that Lewis assaulted her "the whole time" that she lived in the motel, but his documents prove that to be impossible because his time in custody overlapped with her time at the motel. Lewis's contention does not support a claim for a new trial under WIS. STAT. § 752.35. "[E]vidence which merely impeaches the credibility of a witness does not warrant a new trial on this ground alone."[5] ***State v. Machner***, 92 Wis. 2d 797, 806, 285 N.W.2d 905 (Ct. App. 1979) (citation omitted). For all the foregoing reasons, we affirm.

IT IS ORDERED that the order is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals

[4] Significantly, in portions of the trial testimony that Lewis did not excerpt in his appellate briefs, both he and L.C. testified that he was with L.C. and her family on the day that the family moved into the motel. Moreover, L.C. testified that she left L.M.A. alone with Lewis at the motel.

[5] We observe that the trial included Lewis's extensive attack on L.M.A.'s credibility. Moreover, during closing argument, Lewis discussed L.M.A.'s testimony that he assaulted L.M.A. "every day" in multiple locations, and he pointed out that these claims were not supported by the physical evidence.