OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT III

October 22, 2019

To:

Hon. James A. Morrison
Circuit Court Judge
1926 Hall Ave.
Marinette, WI 54143

Timothy C. Samuelson
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Sheila Dudka
Clerk of Circuit Court
Marinette County Courthouse
1926 Hall Ave.
Marinette, WI 54143

Joseph Wayne Evans, Jr. 552370
Wisconsin Secure Program Facility
P.O. Box 1000
Boscobel, WI 53805-1000

DeShea D. Morrow
District Attorney
1926 Hall Ave.
Marinette, WI 54143

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

2018AP2062 State of Wisconsin v. Joseph Wayne Evans, Jr.
(L. C. No. 2008CF123)

Before Stark, P.J., Hruz and Seidl, 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).

Joseph Evans, pro se, appeals an order denying his third WIS. STAT. § 974.06 (2017-18)[1] postconviction motion. Evans argues the change in Wisconsin law incorporating the so-called "castle doctrine" is newly discovered evidence entitling him to a new trial. Evans also requests a

new trial in the interests of justice. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21.

Evans was convicted by a jury of first-degree intentional homicide for the 2008 shooting of his estranged wife. The circuit court sentenced him to life imprisonment without the possibility of extended supervision. In 2011, we affirmed his conviction on direct appeal. ***State v. Evans***, No. 2010AP1294-CR, unpublished slip op. (WI App Apr. 26, 2011). Our supreme court denied Evans' petition for review. We denied a subsequent petition for a writ of habeas corpus, and our supreme court again denied Evans' petition for review.

On August 23, 2012, Evans filed a pro se WIS. STAT. § 974.06 motion for postconviction relief. Evans added numerous supplemental and amended motions, all of which the circuit court summarily denied without a hearing. We again affirmed, finding that Evans' "current arguments have been waived, forfeited, or are procedurally barred," pursuant to ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). Our supreme court again denied Evans' petition for review.

On July 2, 2014, Evans filed a second WIS. STAT. § 974.06 postconviction motion. The circuit court denied the motion without a hearing. We affirmed, and the supreme court denied Evans' petition for review.

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

Evans has now filed a third pro se WIS. STAT. § 974.06 motion for postconviction relief. Evans contends Wisconsin's so-called "castle doctrine" statute, codified at WIS. STAT. § 939.48(1m), would have provided him with a legal basis for a self-defense claim. According to Evans, he had mowed his lawn and was sitting in his living room examining a 9mm handgun his brother had purchased for him "because Evans was unable to purchase it by himself due to a 1990 welfare issue." Evans asserts his estranged wife "unlawfully and forcible [sic] entered into Evans' home" and "would have used the gun on [Evans] to cause death or harm to him." Evans claims his wife "reached out to try to take the gun away from Evans and … Evans shot and killed [his wife], thinking that [she] was trying to get the gun and maybe used [sic] it on him." The circuit court denied Evans' motion without a hearing. The court found Evans' motion to be "utterly without merit." Evans now again appeals.

Courts have long emphasized the need for finality in our litigation. A defendant must raise all grounds for postconviction relief on direct appeal or in the original postconviction motion. *See* ***Escalona-Naranjo***, 185 Wis. 2d at 185-86. Unless a sufficient reason exists for failing to raise the issues during the earlier postconviction proceedings or direct appeal, the defendant is barred from raising claims in a subsequent WIS. STAT. § 974.06 motion. ***Id.*** at 181-82. Convicted defendants are not entitled to pursue an endless succession of postconviction remedies. ***Id.***

As mentioned, this is Evans' third WIS. STAT. § 974.06 postconviction motion. Because the castle doctrine legislation was not passed until three years after Evans shot and killed his wife, Evans could not have raised his current argument on direct appeal. However, Evans could have raised the castle doctrine issue during his first two postconviction motions, but he failed to

do so. His claims are procedurally barred under ***Escalona-Naranjo***, and the circuit court properly denied Evans' current motion.

Evans argues that because the circuit court did not mention ***Escalona-Naranjo*** in its order denying his third WIS. STAT. § 974.06 motion, the State "cannot make a claim" that his motion is procedurally barred. Evans provides no citation to legal authority supporting this contention, and we will not further address the issue. *See* ***M.C.I., Inc. v. Elbin***, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988).

Evans also argues the castle doctrine legislation, as well as the autopsy report dated August 20, 2008, are newly discovered evidence and therefore provide a "sufficient reason" to avoid the ***Escalona-Naranjo*** bar. However, the legislature's enactment of the castle doctrine is not evidence. Evidence is witness testimony, received exhibits, or stipulated facts. WIS JI—CRIMINAL 103 (2000).

Moreover, the castle doctrine does not meet the test for newly discovered evidence because it is not material to an issue in Evans' case, nor is there a reasonable probability that the castle doctrine would have changed the result of Evans' trial. *See* ***State v. McCallum***, 208 Wis. 2d 463, 473, 561 N.W.2d 707 (1997). The legislature enacted 2011 Wis. Act 94, creating WIS. STAT. § 939.48(1m), on December 7, 2011—more than three years after Evans killed his wife. Furthermore, the enabling section applied the legislation only prospectively. *See* 2011 Wis. Act 94, § 3. The circuit court thus correctly recognized that § 939.48(1m) was not effective when Evans killed his wife and would not retroactively apply to Evans' crimes.

In addition, the castle doctrine provides a basis for modifying the self-defense instruction—i.e., allowing the jury to not consider whether the defendant had an opportunity to

retreat. WIS JI—CRIMINAL 805A (2013). However, Evans never argued at trial that he shot his wife as an act of self-defense, or that he should have been required to retreat. Evans' theory of defense was that he killed his wife accidentally. Evans testified: "It was nothing more than an accident. … It was a tragic accident. Nothing more." Quite simply, there was no evidence at trial supporting a self-defense instruction. Thus, even if WIS. STAT. § 939.48(1m) had been in effect at the time of trial, it would not have been helpful to Evans.

The autopsy report is also not newly discovered evidence—it was introduced into evidence at the preliminary hearing, at which time the State produced a copy for the defense. The report was also discussed at trial. Newly discovered evidence does not include a "new appreciation" of the importance of evidence previously known but not used. ***State v. Williams***, 2001 WI App 155, ¶16, 246 Wis. 2d 722, 631 N.W.2d 623.

Because there is no newly discovered evidence that would entitle Evans to a new trial, the circuit court properly denied his motion without a hearing. *See* ***State v. Romero-Georgana***, 2014 WI 83, ¶30, 360 Wis. 2d 522, 849 N.W.2d 668. In turn, Evans cannot show any grounds for why he should receive the extraordinary remedy of a new trial in the interests of justice. The record contains no suggestion that justice miscarried or that the real controversy was not fully tried. *See* WIS. STAT. § 752.35.

Upon the foregoing,

IT IS ORDERED that the order is summarily affirmed pursuant to 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