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DISTRICT I

June 6, 2023

To:

Hon. Carolina Stark
Circuit Court Judge
Electronic Notice

Hon. Jonathan D. Watts
Circuit Court Judge
Electronic Notice

Kieran M. O'Day
Electronic Notice

Anna Hodges
Clerk of Circuit Court
Milwaukee County Safety Building
Electronic Notice

Mark S. Rosen
Electronic Notice

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

2021AP1735-CR State of Wisconsin v. Michael L. Cunningham (L.C. # 2016CF916)

Before Brash, C.J., Dugan and White, 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).

Michael L. Cunningham appeals from a judgment of conviction and from an order denying his postconviction motion. 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 (2021-22).[1] The judgment and order are summarily affirmed.

[1] All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

In January 2016, E.B. was at Cunningham's home so that he could help her fix her computer and so their respective pre-teen sons could play together. Cunningham convinced E.B. to go with him to the basement, where Cunningham pushed her against a washing machine and forced both mouth-to-vagina intercourse and penis-to-vagina intercourse with her. E.B. also reported that Cunningham had a small gun in his waistband while he was assaulting her.

Cunningham was charged with one count of second-degree sexual assault with a dangerous weapon. Cunningham conceded the two had engaged in sexual intercourse, but claimed that it was consensual. In November 2017, a jury convicted Cunningham on the sexual assault charge, without the dangerous weapon enhancer.

In February 2018, the trial court[2] sentenced Cunningham to six years of initial confinement and four years of extended supervision. It also awarded E.B. a total of $17,162.25 in restitution, the full amount of her request. Included in this total was $9,600 for lost wages from E.B.'s recurring appearance in a play presented by the Greater Milwaukee chapter of the National Alliance on Mental Illness (NAMI). E.B. stated that this amount was calculated at a rate of $200 per performance, twice a month, for the two-year pendency of the criminal case.

In May 2021, Cunningham filed a postconviction motion seeking a new trial based on "newly discovered evidence." This evidence consisted of an affidavit from Brenda Wesley, the former Director of Education and Outreach for NAMI Greater Milwaukee, who stated that the play was performed, at most, eight times per year. She further stated that neither cast nor any

[2] The Honorable Carolina Stark presided at trial and imposed sentence and will be referred to as the trial court.

production assistants were paid on a regular basis; stipends would be distributed if a performance fee were received, but not all of the shows were paid appearances. Armed with Wesley's affidavit, Cunningham asserted that E.B.'s $9,600 claim had been a lie and part of a scheme "to have [Cunningham] pay her this exorbitant sum of money as alleged 'restitution.'" He also asserted that this scheme gave E.B. a motive to testify falsely at trial and that Wesley's affidavit constitutes evidence of E.B.'s "corrupt testimonial intent,"[3] warranting a new trial.

The decision to grant a motion for a new trial based on newly discovered evidence rests in the circuit court's discretion. ***State v. Plude***, 2008 WI 58, ¶31, 310 Wis. 2d 28, 750 N.W.2d 42. A defendant seeking a new trial based on 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." *See* ***id.***, ¶32 (citation omitted); *see also* ***State v. Armstrong***, 2005 WI 119, ¶161, 283 Wis. 2d 639, 700 N.W.2d 98. If the defendant satisfies these requirements, the circuit court must then determine whether there is a reasonable probability that a different result would be reached in a new trial. *See* ***Armstrong***, 283 Wis. 2d 639, ¶161**.** "A reasonable probability of a different outcome exists if 'there is a reasonable probability that a jury, looking at both the old evidence and the new evidence, would have a reasonable doubt as to the defendant's guilt.'" ***State v. Love***, 2005 WI 116, ¶44, 284 Wis. 2d 111, 700 N.W.2d 62 (citation and two sets of brackets omitted).

[3] Cunningham does not define "corrupt testimonial intent" nor develop further argument on the concept. The only published Wisconsin case that uses the phrase "corrupt testimonial intent" is ***State v. Amos***, 153 Wis. 2d 257, 273, 450 N.W.2d 503 (Ct. App. 1989), and we question whether that case is applicable. In ***Amos***, we considered whether extrinsic evidence could be used to show a corrupt testimonial intent such as subornation of perjury, which tends to show a *defendant's* consciousness of guilt, not a victim's. *See* ***id.***

The circuit court[4] denied Cunningham's motion on multiple grounds. It concluded that Cunningham's evidence was, at best, impeachment testimony, but impeachment testimony alone will not warrant a new trial. It also concluded that Wesley's affidavit did not go to the material issue of whether E.B. consented to the intercourse; that E.B.'s credibility was "undoubtedly tested at trial," so a new attack on her credibility was simply cumulative; and that there was no reasonable probability that the "newly discovered" evidence would have led to a different result at trial. Cunningham appeals.

Although the circuit court gave multiple reasons for denying Cunningham's postconviction motion, we need focus only on one. *See* ***Maryland Arms Ltd. P'ship v. Connell***, 2010 WI 64, ¶48, 326 Wis. 2d 300, 786 N.W.2d 15 ("Typically, an appellate court should decide cases on the narrowest possible grounds."). Even if we determined that Cunningham satisfied the test for newly discovered evidence, we agree with the circuit court that there is no reasonable probability of a different result.

The trial court addressed E.B.'s restitution request at the November 2017 sentencing hearing. Cunningham actively disputed the wage claim,[5] arguing that his actions did not cause the play to end and that there was no supporting documentation to indicate how long the play would have continued. Because of the dispute, the trial court had E.B. give sworn testimony regarding her claim. E.B. acknowledged that she had not performed in the play since January

[4] The Honorable Jonathan D. Watts reviewed and denied the postconviction motion and will be referred to as the circuit court.

[5] Cunningham disputed all but around $334 of E.B.'s restitution claim. However, the issue on appeal relates solely to the $9,600 claim derived from play performances; we therefore do not discuss the other components of the restitution award.

2016 and that she did not know how many performances had been given between January 2016 and October 2017. She testified, however, that the play had recently been performed in October 2017, although she was uncertain if it was performed twice a month because the play had been recast. The trial court found that it was "clear by a preponderance of the evidence that the conduct for which [Cunningham is] being sentenced … resulted in her no longer participating in the … production that was providing her income." Based on E.B.'s testimony that the show "picked up again recently, about two years after the offense," the trial court determined that it could conclude that E.B. "would have otherwise … received $200 per show twice a month as it was scheduled."

Further, as the circuit court noted in denying Cunningham's postconviction motion, E.B. had supported her restitution claim with a letter from the executive director of NAMI, which stated that NAMI stopped production of the play after E.B.'s allegations, but they had "intended to put on two production[s] a month," for which E.B. would have been paid $200 per show. Thus, Wesley's contradictory information about E.B.'s "play compensation would not so dramatically undercut [E.B.'s] credibility as to whether the defendant sexually assaulted her that there is a reasonable probability of a different result[.]"[6]

Based upon E.B.'s testimony at sentencing and upon the trial and circuit court findings, we discern no "corrupt testimonial intent" from E.B. Wesley's testimony would not have

[6] Wesley's affidavit states that the executive director provided information about the play without first checking with Wesley. When she informed him "that the information he provided was not accurate," he ostensibly "apologized and said he should have checked with me first before providing the information that he did." We note, however, that Cunningham does not provide an affidavit or other statement from the executive director himself.

undermined E.B.'s credibility to such an extent that there is any reasonable probability of a different result.[7]

Upon the foregoing, therefore,

IT IS ORDERED that the judgment and order are 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

[7] We also note that, were Wesley's testimony admitted to support Cunningham's claim that E.B. had fabricated her allegation, he would be opening the door to rebuttal evidence regarding the multiple ways in which the assault had adversely impacted E.B.