STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2014AP2561

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DAVID MCALISTER, SR.,

Defendant-Appellant.

APPEAL FROM AN ORDER DENYING POSTCONVICTION RELIEF, ENTERED IN RACINE COUNTY CIRCUIT COURT, THE HONORABLE EMILY S. MUELLER, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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BRIEF OF PLAINTIFF-RESPONDENT

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication. This court may resolve this case by applying well-established legal principles to the facts presented.

SUPPLEMENTAL STATEMENT OF FACTS AND STATEMENT OF THE CASE

As respondent, the State exercises its option not to present a full statement of facts and statement of the case. Wis. Stat. § 809.19(3)(a)2.[1] Instead, the State presents the following summary and will present additional facts, if necessary, in the argument portion of its brief.

After a three-day trial in 2007, a jury found David McAlister, Sr. guilty for his participation in two armed robberies (28-30; 42:2). The jury acquitted him of a third robbery (25-27; 42:2 n.1). Two of McAlister's co-actors, Alphonso Waters and Nathan Jefferson, testified for the State and provided much of the evidence linking McAlister to the crimes (*see* 42:2).

In exchange for Waters' and Jefferson's testimony, the State agreed to "reduce the exposure for both of the witnesses, and once the exposure was reduced, make a recommendation as to what the ultimate sentence should be" (72:44-46).

Waters was the State's first witness. On cross-examination, defense counsel asked Waters about several incidents in which he had either lied to the police about his involvement in a particular crime or used a false name to escape detection, and Waters admitted that, in those instances, he had been willing to lie to keep himself out of jail (71:121-22, 127-31). Waters refused, however, to acknowledge the consideration he had received for his testimony (71:151-53; 72:46). The next day, the court read to the jurors a joint stipulation prepared by the parties, informing them that the State had agreed to reduce Waters' exposure and recommend less prison time, and that Waters

[1] Unless indicated otherwise, all citations to Wisconsin Statutes refer to the 2013-14 edition.

knew about the agreement before he testified (42:3; 72:17-18).

When Jefferson testified, he acknowledged his plea agreement with the State (72:42, 45-49). Defense counsel cross-examined Jefferson extensively about his negotiations with the State (72:45-49). Jefferson also admitted that he had originally lied to investigating officers about his involvement in one of the robberies because he didn't want to go to jail (72:50-51). Only when he was convinced that the police had sufficient evidence to convict him of that robbery did Jefferson, hoping for leniency, tell them about his role in the robbery and implicate McAlister (72:52-54).

At the close of evidence, the circuit court gave the jury a specific instruction about Waters' and Jefferson's testimony:

> You have heard testimony from Alphonso Waters and Nathan Jefferson who stated that they were involved in the crimes charged against the defendant. You should consider this testimony with caution and great care, giving to it the weight that you believe it is entitled to receive. You should not base a verdict of guilty upon it alone unless after consideration of all the evidence, you are satisfied beyond a reasonable doubt that the defendant is guilty.
>
> You have heard testimony from the two witnesses Alphonso Waters and Nathan Jefferson who have received consideration for their testimony. These witnesses, like any other witnesses, may be prosecuted for testifying falsely. You should consider whether receiving consideration affected the testimony and give the testimony the weight that you believe it is … entitled to receive.

(73:52). The jury found McAlister guilty of participating in two of the three robberies at issue in the case.

McAlister filed both a motion for postconviction relief and a related direct appeal of his convictions, claiming: that the State failed to make full disclosure of its agreements with Waters and Jefferson; that the State relied on perjured testimony from Waters; that the real controversy was not

fully tried because the jury did not hear alibi and other exculpatory evidence; and, that he received ineffective assistance of counsel (42:2). On September 23, 2009, this court rejected all of McAlister's claims and affirmed his convictions (42).

On May 19, 2014, McAlister filed another postconviction motion, this time seeking a new trial based on newly-discovered evidence "that the primary witnesses against [him] conspired to frame him to obtain favor from the State" (46:1). In support of his motion, McAlister submitted affidavits from three men who claimed that Waters and Jefferson had confessed to lying about McAlister's participation in the robberies (47; 48).

According to his affidavit, Wendell McPherson was in prison with Alphonso Waters before he testified at McAlister's trial (47:1-4). Waters allegedly told McPherson about the plea agreement he had with the State and that he was afraid the State would find out that he and Jefferson were lying about McAlister's involvement in the robberies (47:2). Confronted with a video recording showing him committing one of the robberies, Waters said he asked the police for a deal (47:2). Waters told McPherson that "he needed to come up with a lie so that he can throw somebody under the bus and that's when David McAlister entered his mind" (47:2). When McPherson asked why he was going to lie about McAlister's part in the robberies, Waters told him that "[h]e didn't like Mr. McAlister and he wanted to get Mr. McAlister out of the picture" (47:3). Waters also said he'd written to Jefferson and told him "exactly what to say because he had made a plea deal and he want they statements to collaborate so Mr. Jefferson can get a plea deal as well" (47:3). Finally, McPherson stated that he helped Waters prepare for McAlister's trial by helping Waters "rehearse[] the lies that he testified to so he would be believable" (47:3).

The second affidavit was from Corey Prince (47:5). Prince stated that he was in the Racine County Jail with

Nathan Jefferson in 2006 and 2007, before Jefferson testified at McAlister's trial (47:5). During that time, Prince claimed that Jefferson told him that Alphonso Waters, who was also known as "Bird," had instructed him on "exactly what to say in regards to their pending case" and to lie about "the older man" being involved "so that they could receive a shorter sentence" (47:5). Prince alleged that several years later, in 2012, he was in Waupun Correctional Institution with McAlister when he overheard McAlister complaining that "Nate" and "Bird" had set him up by lying and implicating him in robberies they had committed (47:5). At that point, Prince introduced himself to McAlister and told him about the conversation(s) he'd had with Jefferson back in 2006-07 (47:5).

The third affidavit came from Antonio Shannon, who stated that he and his friend, Amanda, had actually seen Jefferson commit one of the robberies at issue, which had taken place at an auto loan business (48:1). Two years later, Shannon happened to be in the Racine County Jail with an inmate who turned out to be Jefferson (48:1). They talked and learned that they both knew Amanda (48:1). When Jefferson later confessed to the auto loan robbery,[2] Shannon told Jefferson that he'd seen him running from the scene (48:1). Jefferson allegedly said that he had "an out[,]" but it would only work if "Bird" said the same thing (48:1). The next day, Jefferson told Shannon that he had a plea deal "if he took the stand against someone he said was not involved in the robbery" (48:2).

On September 29, 2014, the circuit court heard argument on whether McAlister's motion warranted an evidentiary hearing (76:5-6). Ultimately, the circuit court denied McAlister's motion without an evidentiary hearing,

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[2] McAlister attached a single page of what appears to be a police report regarding the robbery at the auto loan store (46:13). That page identifies "Amanda Angove" as the manager who was working there at the time of the robbery (46:13). The report does not mention any other witnesses, including Shannon.

finding: that the affidavits in support of the motion were "inherently not believable[;]" that the allegations in the affidavits were essentially recantations without a new feasible motive for the original false statements or any circumstantial guarantees of trustworthiness; and, that the information in the affidavits did not demonstrate a reasonable probability that a different result would be reached at trial (*see* 52; 76:29-30).

McAlister appeals.

ARGUMENT

THE INCREDIBLE AFFIDAVITS IN SUPPORT OF MCALISTER'S MOTION DID NOT WARRANT AN EVIDENTIARY HEARING OR A NEW TRIAL.

The decision to grant or deny a motion for a new trial based on newly-discovered evidence rests in the circuit court's sound discretion. *State v. Plude*, 2008 WI 58, ¶ 31, 310 Wis. 2d 28, 47, 750 N.W.2d 42, 52. Such motions, however, "'are entertained with great caution.'" *State v. Morse*, 2005 WI App 223, ¶ 14, 287 Wis. 2d 369, 377, 706 N.W.2d 152, 156 (citation omitted).

A defendant seeking a new trial based on newly-discovered evidence must demonstrate "'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 130 (citation omitted). If a defendant satisfies these 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). "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]

Evidence that is incredible would not raise a reasonable doubt in the minds of jurors. *State v. Edmunds*, 2008 WI App 33, ¶ 17, 308 Wis. 2d 374, 746 N.W.2d 590; *State v. Kivioja*, 225 Wis. 2d 271, 298, 592 N.W.2d 220 (1999); *State v. McCallum*, 208 Wis. 2d 463, 475, 561 N.W.2d 707 (1997). So, a new trial is not warranted unless a defendant satisfies the circuit court that a jury could believe the newly-discovered evidence on which he relies. *See Kivioja*, 225 Wis. 2d at 298. A circuit court finding that new evidence is not credible "is sufficient to conclude that it is not reasonably probable that a different result would be reached at a new trial." *State v. Terrance J.W.*, 202 Wis. 2d 496, 501, 550 N.W.2d 445, 447 (Ct. App. 1996).[4]

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[3] New evidence that fails to satisfy any of these criteria is not sufficient to warrant a new trial. *State v. Kaster*, 148 Wis. 2d 789, 801, 436 N.W.2d 891, 896 (Ct. App. 1989).

[4] Generally, a circuit court must hold an evidentiary hearing only when a postconviction motion "on its face alleges sufficient material facts that, if true, would entitle the defendant to relief. This is a question of law that appellate courts review de novo." *See State v. Allen*, 2004 WI 106, ¶ 9, 274 Wis. 2d 568, 682 N.W.2d 433. The circuit court has the discretion to deny a request for an evidentiary hearing if: the motion does not raise sufficient material facts, the allegations are merely conclusory, or the record conclusively shows that the defendant is not entitled to relief. *Id.* "'[A]n evidentiary hearing is not mandatory if the record as a whole conclusively demonstrates that [the] defendant is not entitled to relief, even if the motion alleges sufficient nonconclusory facts.'" *State v. Balliette*, 2011 WI 79, ¶ 50, 336 Wis. 2d 358, 805 N.W.2d 334 (citation omitted).

Given its finding that the evidence in support of McAlister's motion was incredible, the circuit court was within its discretion to deny the motion without an evidentiary hearing. Should this court disagree, however, the appropriate remedy would be to remand the case for the necessary hearing and related decision in the circuit court. Any testimony from the men who provided the affidavits in support of McAlister's motion for a new trial would not likely improve and become more credible on cross-examination from the State.

McAlister's newly-discovered evidence claim fails for two reasons. First, the information offered in the supporting affidavits at most would provide some additional evidence that Waters and Jefferson had lied at McAlister's trial to curry favor with the State and benefit themselves in the context of their own prosecutions for the robberies at issue. That theory, however, already was the bedrock of McAlister's defense. Both men were cross-examined about their willingness to lie to avoid incarceration, as well as the plea agreements they received for their testimony (71:121-22, 127-31; 72:42, 45-54). When Waters denied receiving any concessions from the State for his testimony, the parties had the court read a stipulation that proved otherwise, showing that Waters had been untruthful (42:3; 72:17-18). The circuit court even gave the jurors a specific instruction regarding Waters' and Jefferson's testimony, warning them to view the evidence "with caution and great care[,]" and reminding them that they "should consider whether receiving consideration affected the testimony" (73:52). The information from the three men who claimed that Waters and Jefferson told them that they were going to lie at McAlister's trial to secure a plea deal with the State would have been merely cumulative. *Armstrong*, 283 Wis. 2d 639, ¶ 161.

More important, the proffered testimony of those three men was incredible and failed to establish "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.'" *Love*, 284 Wis. 2d 111, ¶ 44 (citation and two sets of brackets omitted).

The first of the affiants, Wendell McPherson, claims he not only knew that Waters was going to lie at McAlister's trial, but that he helped him rehearse the lies to make them sound credible (47:2-3). McPherson does not explain why he failed to come forward at that time. Still in prison, he also doesn't say how and why he ended up providing his affidavit to McAlister almost seven years later.

Corey Prince claims that he just happened to be in the Racine County Jail with Nathan Jefferson for several months before McAlister's trial (47:5). During that time, Jefferson allegedly told Prince that "Bird" had instructed him to lie about "the older man" being involved in the robberies "so that they could receive a shorter sentence" (47:5). Like Wendell McPherson, Prince does not explain why he failed to come forward at that time. Then, by coincidence, Prince states that he ended up in Waupun Correctional Institution with McAlister in 2012, where he not only met McAlister, but overheard him complaining that "Nate" and "Bird" had set him up by lying and implicating him in robberies they had committed (47:5). Prince states that he chose to introduce himself to McAlister and tell him about the conversation(s) he'd had with Jefferson several years earlier (47:5). The story is unbelievable.

The third affidavit, from Antonio Shannon, is the most incredible of all. Shannon claims that he and a mutual friend of Jefferson's actually witnessed Jefferson commit one of the robberies at issue in the case (48:1). Then, two years later, Shannon claims he was in the Racine County Jail with Jefferson, where they talked about their friend, Amanda,[5] and the robbery (48:1). Jefferson allegedly told Shannon that he had "an out[,]" but that it would only work if "Bird" said the same thing (48:1). The next day, Jefferson said that he had a plea deal "if he took the stand against someone he said was not involved in the robbery" (48:2). Like McPherson, Shannon fails to explain how, so many years later, he came to provide an affidavit in support of McAlister's motion for a new trial.

More witnesses is not always better, and the far-fetched statements from the three individuals who swore out affidavits for McAlister's postconviction motion come together to form a tale that the circuit court aptly described as "inherently not believable" (76:29). At best, it indicates a

[5] *See* footnote 2, above.

rather poor attempt to manufacture a claim for a new trial based on newly-discovered evidence. As the circuit court found, no reasonable jury, looking at both the original evidence and the new evidence from these three affiants, would have a reasonable doubt as to McAlister's guilt (*see* 52; 76:30). *Love*, 284 Wis. 2d 111, ¶ 44; *See Kivioja*, 225 Wis. 2d at 298. This court should affirm the circuit court's decision denying McAlister's motion for a new trial.

CONCLUSION

For the foregoing reasons, this court should affirm the circuit court's decision denying David McAlister, Sr.'s motion for a new trial based on newly-discovered evidence.

Dated this 20th day of August, 2015.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,756 words.

_____
Nancy A. Noet
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 20th day of August, 2015.

_____
Nancy A. Noet
Assistant Attorney General