STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2016AP1074-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JESSE STEVEN POEHLMAN,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION AND ORDER DENYING POSTCONVICTION RELIEF, ENTERED IN THE MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE JEFFREY A. WAGNER, PRESIDING

PLAINTIFF-RESPONDENT'S BRIEF

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ISSUES PRESENTED

1. Did Poehlman's postconviction motion alleging that his trial counsel acted ineffectively state sufficient material facts that entitled him to an evidentiary hearing?

The circuit court answered: No. (40:2.)

2. Did Poehlman's postconviction motion seeking a new trial based on newly discovered evidence state sufficient material facts that entitled him to an evidentiary hearing?

The circuit court answered: No. (40:3.)

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State believes that neither oral argument nor publication is necessary. The parties have fully developed the arguments in their briefs and the issues presented involve the application of well-settled legal principles to the facts.

SUPPLEMENTAL STATEMENT OF THE CASE AND FACTS

The State will supplement the procedural history and facts of Poehlman's case as appropriate in its argument.

SUMMARY OF THE ARGUMENT

The State charged Poehlman in a seven-count complaint based on incidents that occurred on December 11, 2014, and between February 6 and 7, 2014. (2:1-3.) With respect to the December 11 incident, the State alleged that Poehlman committed the crime of battery to N., in violation

of Wis. Stat. § 940.19(1). It also alleged that Poehlman committed second-degree sexual assault of N.,[1] in violation of Wis. Stat. § 940.225(2)(a). (2:1.)

With respect to the February 6-7 incident, the State alleged that Poehlman committed battery to N., in violation of Wis. Stat. § 940.40(1); false imprisonment of N., in violation of Wis. Stat. § 940.30; strangulation and suffocation of N., in violation of Wis. Stat. § 940.235(1); and two counts of second-degree sexual assault of N., in violation of Wis. Stat. § 940.225(2)(a). (2:1-3.)

The jury acquitted Poehlman of the battery and second-degree sexual assault charges related to the December 11 incident. (11; 12.) But the jury found Poehlman guilty of the charges stemming from February 6-7 incident. (13; 14; 15; 16; 17.)

After the circuit court sentenced him (32), Poehlman moved for postconviction relief. (34.) The circuit court denied Poehlman's postconviction motion without a hearing. (40.)

Poehlman raises two claims on appeal that he previously raised in his postconviction motion. First, he alleges that his trial counsel was ineffective because he did not object to the testimony of Lynn Kruszka. He contends that Kruszka's name did not appear on the witness list and that he had not received the report of her interview through discovery. (Pohelman's Br. 10-18.) The circuit court properly

[1] In his brief, Poehlman refers to the victim with the initial "N." For consistency, the State will use the initial "N." to refer the victim. *See* Wis. Stat. § (Rule) 809.86(4).

denied this claim without a *Machner*[2] hearing. Poehlman's pleading failed to demonstrate that Kruszka's testimony prejudiced his defense. (40:2.) Further, although the circuit court did not decide whether trial counsel's performance was deficient, the record demonstrates that it was not.

Second, Poehlman contends that he was entitled to a new trial based on newly discovered evidence. He asserted that a witness, Daniel Neeley, would corroborate Poehlman's testimony and undermine the victim N.'s testimony. (Poehlman's Br. 18-23.) The circuit court properly denied this claim without a hearing. Poehlman's pleading did not satisfy all of the criteria for newly discovered evidence and it was not reasonably probable that the jury would have reached a different result had Neeley testified. (40:3.)

ARGUMENT

I. The circuit court did not err when it denied Poehlman's ineffective assistance of counsel claim without a *Machner* hearing.

Poehlman contends that his trial counsel was ineffective for failing to object to Lynn Kruszka's testimony because her name did not appear on the State's witness list. (Poehlman's Br. 10-18.) The circuit court reviewed the record and determined that trial counsel's failure to object did not prejudice Poehlman's defense. (40:2.) As the State will demonstrate, the record supports the circuit court's decision.

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

A. General legal principles.

1. Legal standards related to ineffective assistance of counsel claims.

The United States Constitution's Sixth Amendment right of counsel and its counterpart under article I, § 7 of the Wisconsin Constitution encompass a criminal defendant's right to the effective assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668, 686 (1984); *State v. Sanchez*, 201 Wis. 2d 219, 226-36, 548 N.W.2d 69 (1996). A defendant alleging ineffective assistance of trial counsel must prove that trial counsel's performance was deficient and that he suffered prejudice as a result of that deficient performance. *Strickland*, 466 U.S. at 687.

To prove deficient performance, the defendant must show that his counsel's representation "fell below an objective standard of reasonableness" considering all of the circumstances. *Id.* at 688. The defendant must demonstrate that specific acts or omissions of counsel fell "outside the wide range of professionally competent assistance." *Id.* at 690. In assessing the reasonableness of counsel's performance, a reviewing court should be "highly deferential," making "every effort . . . to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* at 689.

To demonstrate prejudice, the defendant must affirmatively prove that the alleged deficient performance prejudiced his defense. *Id.* at 693. The defendant must demonstrate "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. A defendant must show that trial counsel's errors were so

serious that the defendant was deprived of a fair trial and reliable outcome. *Id.* at 687.

When an evidentiary hearing is unnecessary. A circuit court may deny a postconviction motion alleging ineffective assistance of counsel without a *Machner* hearing unless the motion alleges sufficient facts to entitle a defendant to relief. The circuit court may still deny an evidentiary hearing if the record conclusively demonstrates that a defendant is not entitled to relief. A circuit court must exercise its independent judgment and support its decision denying a hearing through a written decision based upon a review of the record and pleadings. *State v. Allen,* 2004 WI 106, ¶ 9, 274 Wis. 2d 568, 682 N.W.2d 433.

If the circuit court improperly denies a defendant an evidentiary hearing, a reviewing court will remand the matter for a *Machner* hearing. *State v. Curtis*, 218 Wis. 2d 550, 554-55, 582 N.W.2d 409 (Ct. App. 1998).

Standard of review. A claim of ineffective assistance of counsel presents a mixed question of law and fact. *State v. Carter*, 2010 WI 40, ¶ 19, 324 Wis. 2d 640, 782 N.W.2d. 695. While this Court must uphold the circuit court's findings of fact unless clearly erroneous, the ultimate determination of whether counsel's assistance was ineffective presents a legal question that this Court reviews de novo. *Id.*

2. General legal principles related to the failure to list a witness.

Wisconsin Stat. § 971.23(1)(d) provides that the State must disclose to the defendant "[a] list of all witnesses and their addresses whom the district attorney intends to call at trial." When the State fails to list a witness, the circuit court "shall exclude any witness not listed . . . required by this section, unless good cause is shown for failure to

comply." Wis. Stat. § 971.23(7m)(a). The State bears the burden of establishing good cause. *State v. DeLao*, 2002 WI 49, ¶ 51, 252 Wis. 2d 289, 643 N.W.2d 480.

If a party establishes good cause, the circuit court may "grant the opposing party a recess or a continuance." Wis. Stat. § 971.23(7m)(a); *DeLao*, 252 Wis. 2d 289, ¶ 51. "The granting of a continuance or recess is to be favored over striking the witness." *Irby v. State*, 60 Wis. 2d 311, 322, 210 N.W.2d 755 (1973). In addition, the circuit court may also advise the jury that a party failed to disclose or untimely disclosed a witness' identity. Wis. Stat. § 971.23(7m)(b).

A circuit court's failure to exclude evidence under Wis. Stat. § 971.23 does not automatically entitle a defendant to a new trial. To receive a new trial, the improper admission of the evidence must be prejudicial. *DeLao*, 252 Wis. 2d 289, ¶ 60. In the context of a discovery violation under Wis. Stat. § 971.23(1), prejudice is assessed under the harmless error standard. *See State v. Harris*, 2008 WI 15, ¶¶ 41-42, 307 Wis. 2d 555, 745 N.W.2d 397.

B. Relevant procedural and factual background.

The State filed a witness list before Poehlman's trial. Lynn Kruszka's name did not appear on the list. (7.) Poehlman did not object when the State called Kruszka as a witness and the prosecutor began to question her. (52:42.)

Kruszka testified that she worked with N. at a Milwaukee-area retail business. Kruszka observed that N. came to work with bruises to her face. She recalled that it occurred "as early as December." (52:43.) The following exchange occurred:

> [PROSECUTOR]: And was there more than one occasion where she reported to work with bruises to her face?
>
> [KRUSZKA]: On one occasion she did have a black eye, actually two. She a black eye, and then she's had like cuts on her neck and bruises on her arm and stuff like that.
>
> [PROSECUTOR]: Did she ever talk to you about these injuries?
>
> [KRUSZKA]: No. But the consensus at work we knew she was being --
>
> [TRIAL COUNSEL]: Objection.
>
> [COURT]: Sustained.
>
> [PROSECUTOR]: She never said anything to you about what these were from?
>
> [KRUSZKA]: Not on those indications.
>
> [PROSECUTOR]: Let's put it up until February. Prior to February, had she ever said anything to you about how she had gotten these injuries, yes or no?
>
> [KRUSZKA]: No.
>
> [TRIAL COUNSEL] Judge, I'm sorry to interrupt. Could I approach sidebar?

(52:43-44.) Following the sidebar, the State ended its direct examination of Kruszka without further questions. (52:44.)

On cross-examination, Kruszka testified that she observed bruises to N.'s arm and scrapes to her neck. (52:44.) Kruszka said she observed these marks on more than one occasion, clarifying that the first time she saw them was sometime in December. (52:45.) Trial counsel asked: "How many occasions since the first time in December did you see

anything new or noteworthy?" Kuszka replied: "Maybe like two." (52:45-46.) Kruszka observed N. with a black eye on two occasions, once in December and once in February. (52:46.)

Trial counsel did not make a record of the sidebar conference following Kruszka's testimony (52:46), after the State called its next and last witness before it rested. (52:64), or during the defense case. (52:71-111.)

In his closing argument, the prosecutor summarized N.'s testimony regarding the December 11th incident. (53:135.) He asked the jurors to consider Kruszka's testimony about N.'s injuries in the context of the December incident. "She said going back as far as December [N.] would come into work and she would have injuries. She described a black eye, grab marks on her arm." (53:136.) The remainder of the prosecutor's closing argument focused on the February 6-7 incident without reference to Kruszka's testimony. (53:136-144.)

On April 29, 2015, the day after the trial ended, trial counsel sent an email to the prosecutor. He noted that Kruszka did not appear on the witness list and that he did not have a report that referenced her. Trial counsel explained that he believed that Kruszka was an officer or a technician. (34:Attachment C.) He recalled that he interrupted the examination after Kruszka testified about her employment and the prior bruising to N. (*id.*) Trial counsel requested a copy of the Kruszka report. (*id.*) The prosecutor promptly sent trial counsel the report. (34:Attachment D.)

Before sentencing, Poehlman filed a motion seeking a new trial. (19.) His motion focused on N.'s alleged post-trial recantation. In addition, he also asserted the State failed "to

disclose on its witness list that trial witness Lynn Kruszka might be called to testify, and failure to provide relevant discovery prior to trial." (19:2) Poehlman resubmitted the motion and a supporting brief. (22; 23.) The brief focused on the recantation issue and did not address the Kruszka issue. (23.) The circuit court denied Poehlman's motion at the sentencing hearing. (56:11-12.)

Poehlman filed a postconviction motion alleging that trial counsel was ineffective for failing to object Kruszka's testimony because her name was not on the witness list and the report summarizing her statement was not provided in discovery. (34:10-16.) The State responded to this claim, asserting that trial counsel's performance was not deficient or prejudicial. (38:12-15.) The circuit court denied the motion without a hearing, finding that Kruszka's testimony did not prejudice Poehlman. (40:2.)

C. Poehlman was not entitled to a *Machner* hearing because he failed to demonstrate that his trial counsel's failure to timely object to Kruszka's testimony prejudiced his defense.

This Court must decide whether Poehlman's motion adequately stated a claim of ineffective assistance of counsel that entitled him to an evidentiary hearing.[3] Here, the

[3] The State concedes that it did not list Kruszka on the witness list. (7.) For purposes of this Court's review of Poehlman's motion, it also assumes that Poehlman did not receive a copy of Kruszka's report through discovery. *See State v. Allen*, 2004 WI 106, ¶ 9, 274 Wis. 2d 568, 682 N.W.2d 433 (a court reviews a postconviction motion assuming that the facts as alleged are true). But the State does not concede that it failed to timely disclose the report or that the failure to disclose the report before trial necessarily constituted a discovery violation.

circuit court concluded that trial counsel's failure to object to Kruszka's testimony because the State did not list her on the witness list did not prejudice Poehlman's defense. (40:2.) The record supports the circuit court's determination.

Kruszka was one of nine witnesses whom the State called at trial. (51:2; 52:2.) Her entire testimony was limited to approximately four pages in the transcript and focused solely on her observations of injuries to N. (52:42-46.) Kruszka and N. never talked about N.'s injuries. (52:43.) Kruszka did not testify about the cause of N.'s injuries nor did she even suggest that Poehlman caused them. (52:42-46.) Kruszka's testimony simply did not prejudice him.

Poehlman appropriately acknowledges that the State primarily intended to use Kruszka to corroborate the December charges. (Poehlman's Br. 16.) In its closing argument, the State relied on Kruszka's testimony to corroborate N.'s claim that she was injured with respect to the December 11 incident. (53:135-36.) The jury's acquittal of Poehlman with respect to the counts associated with the December 11 incident effectively undermines Poehlman's claim that trial counsel's failure to object to Kruszka's testimony prejudiced his defense. *See State v. Elm*, 201 Wis. 2d 452, 463, 549 N.W.2d 471 (Ct. App. 1996) (suggesting that when the alleged deficiency in counsel's performance relates to a charge for which the defendant is acquitted, the defendant suffers no prejudice).[4]

[4] In *Elm*, the State was tried for two counts of sexual assault. One count involved the victim touching Elm's penis and the other involved Elm touching the victim's vagina. The jury acquitted as to the penis touching incident. *State v. Elm*, 201 Wis. 2d 452, 457, 549 N.W.2d 471 (Ct. App. 1996). The defendant asserted that trial counsel was ineffective for failing to elicit testimony from him to discredit factual discrepancies in a sexual assault victim's

(continued on next page)

Nonetheless, Poehlman suggests that Kruszka's testimony "colored the February charges as well." (Poehlman's Br. 16.) For two reasons, trial counsel's failure to object to Kruszka's testimony did not prejudice Poehlman's defense as to the February incident.

First, Poehlman acknowledged engaging in physical contact with N. during the February incident, claiming that N. consented to sex and being choked. He told an officer that he and N. were into rough sex and that N. would ask Poehlman to choke her. (52:51.) During a videotaped interrogation, he demonstrated how N. wanted Poehlman to place his hands on her neck. (52:62.) At trial, Poehlman testified that that he placed his hands on her neck during sex at N.'s request because she wanted him to choke her. (52:88-89.) Poehlman examined a photograph depicting marks on N.'s neck and said that those marks were where he had placed his left fingers. (52:89.) He denied injuring N.'s eye, but noted that she did not have an injury to her eye that evening. (52:90.)[5] That Poehlman acknowledged causing some N.'s injuries, albeit with her consent, undermines his claim that his trial counsel's failure to object to Kruszka's testimony prejudiced his defense.

Second, the State did not rely on Kruszka's testimony to support its assertion that N. sustained injuries that supported the battery or strangulation charges associated

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testimony about the penis touching incident. This Court held that "[b]ecause Elm was acquitted of the charge that involved contact with his penis, Elm has not demonstrated that he was prejudiced by a lack of further questioning about the incident." *Id*. at 463.

[5] Poehlman denied ever "la[ying] any violent hand" on N. and suggested that N. injured herself. He said about N., "She has a rather extreme temper, and her temper would cause her to throw objects or to assault herself from time to time." (52:77.)

with the February incident. In its closing argument, the State did not reference Kruszka's testimony when it addressed Poehlman's responsibility for the February incident. (53:136-44.) Instead, it relied on the testimony of several other witnesses to establish N.'s February injuries.

These witnesses included N.'s own testimony about her injuries (51:26, 30, 60-61); Officer Brian Scott, who observed N. with marks around her neck and a bruised and bloodshot right eye (51:74); and Nurse Nina Deering, who noted bruising on the sides of N.'s neck and her right eye consistent with being choked or strangled, and bruises on her breasts (51:109-12). Unlike the detailed testimony from N., Scott, or Deering regarding N.'s February injuries, Kruszka's testimony was relatively limited and nonspecific. At most, her testimony was merely cumulative as to the February 6-7 incident. Under the circumstances, Poehlman cannot demonstrate that trial counsel's failure to object to Kruszka's testimony about N.'s injuries that other witnesses observed after February 7 prejudiced Poehlman's defense.

Poehlman also contends that Kruszka's testimony also prejudiced his defense because it "suggested that there were times, in addition to December 11, 2014 and February 7, 2015 when N. had been abused." (Poehlman's Br. 17.) For example, Poehlman points to Kruszka's response to the prosecutor's question as to whether she reported to work on "more than one occasion . . . with bruises to her face?" (52:43.) Kruszka responded "On one occasion she did have a black eye, actually two. She had a black eye, and then she[] had like cuts on her neck and bruises on her arm and stuff like that." (52:43.) Kruszka later clarified that she observed N. with a black eye on only two occasions, both of which relate to the dates of the charged offenses. "That I think the first time was in December, and then the second time was the February incident." (52:46.)

Likewise, Poehlman observes that Kruszka's use of the phrase "as early as December" suggests that there might be occasions other than the charged incidents when she observed injuries to N. (Poehlman's Br. 17.) But trial counsel subsequently clarified this point.

> [TRIAL COUNSEL]: You said as early as December?
>
> [KRUSZKA]: Yes.
>
> [TRIAL COUNSEL]: You didn't mean early in December?
>
> [KRUSZKA]: I just know it was sometime in December[.]

(52:45.) At best, Kruszka's testimony is ambiguous as to whether she observed injuries to N. on more than two occasions. When read in its entirety, Kruszka's testimony was limited to her observations of N. on two occasions related to the charged offense dates.

While Poehlman complains that Kruszka's testimony suggested the possibility of other violent incidents between him and N., Poehlman ignores his own testimony acknowledging other violent incidents occurred during the time period from December 11 and February 7 (52:75-77.) While he denied laying "any violent hand on her[,]" he noted that N.'s temper would cause her to "throw objects or to assault herself from time to time." (52:77.)

Poehlman has failed to sufficiently plead that his trial counsel's errors were so serious that they deprived him of a fair trial and a reliable outcome. *See Strickland*, 466 U.S. at 693 ("not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceedings."). Here, Poehlman has not demonstrated that a reasonable probability exists that the jury would have

acquitted him had the circuit court granted a motion to exclude Kruszka's testimony.

D. Poehlman also failed to demonstrate that his trial counsel's performance was deficient.

The circuit court did not address whether trial counsel's performance was deficient. Here, Poehlman's ineffective assistance claim proceeds on the assumption that the circuit court would have granted his motion to exclude Kruszka's testimony under Wis. Stat. § 971.23(7m)(a). (Poehlman's Br. 13-15.)

In the context of motions to suppress evidence, this Court has held that an attorney is not ineffective for failing to bring a motion that the circuit court would have denied. *State v. Berggren*, 2009 WI App 82, ¶ 21, 320 Wis. 2d 209, 769 N.W.2d 110. "Failure to raise an issue of law is not deficient performance if the legal issue is later determined to be without merit." *State v. Wheat*, 2002 WI App 153, ¶ 14, 256 Wis. 2d 270, 647 N.W.2d 441. In alleging deficient performance related to a failure to raise a legal issue, the defendant must show a reasonable probability that the motion would have been successful. *Id.* ¶ 23.

With respect to a motion to strike a witness for the State's failure to list the witness, the circuit court is not required to exclude the witness and instead may, on a showing of good cause, "grant the opposing party a recess or continuance." Wis. Stat. § 971.23(7m)(a). Wisconsin courts have long favored granting a continuance or recess over striking a witness. *Irby*, 60 Wis. 2d at 22.

Here, Poehlman cannot show a reasonable probability that his motion would have been successful in preventing

Kruszka's testimony. As the State argued in the preceding section, Kruszka's testimony did not prejudice him. She provided limited testimony about her observations of N.'s injuries in December and February without linking them to Poehlman.

Kruszka's testimony did not undermine Poehlman's theory of defense. He disputed that he battered or sexually assaulted N. in the December 11 incident. While Poehlman admitted arguing with N. on December 11, he denied having sex on that date. (52:74.) N. testified that Poehlman struck her with an open hand on the left side of her face near her eye. (51:17-18.) When asked about N.'s December injuries, Poehlman replied that the injuries were a "complete mystery" to him and that Kruszka was the only witness "that made any allegations of those injuries being actually present." (52:104.)

Poehlman also disputed N.'s claim that blood spatter on their apartment's wall was N.'s blood from a prior incident. Officer Jurkiewicz photographed blood inside the residence that N. reported came from a prior incident in which Poehlman struck her, causing her to bled from her nose. (52:14.) Poehlman denied punching N. in the nose. (52:78.) He provided an alternative explanation, claiming that N. had struck him with a hammer earlier in the evening and then later pushed him causing him to bleed. (52:79-81.)

Unlike the untimely disclosure in *DeLao*, Kruzka's testimony did not undermine Poehlman's defense in a manner that would have justified a finding of prejudice that warranted exclusion of her testimony rather than a

continuance or recess.[6] Poehlman's postconviction motion does not adequately allege deficient performance because he failed to demonstrate that the circuit court would have granted a motion to exclude Kruszka's testimony. And here, where trial counsel successfully convinced a jury to partially acquit Poehlman, deficient performance is even more difficult to establish. *See United States v. Banks*, 405 F.3d 559, 568 (7th Cir. 2005) ("[W]here counsel has succeeded in having his client acquitted of at least one of the charges brought, the presumption [that trial counsel was effective] is likely to be even more difficult to rebut.")

Based on the record, Poehlman has not demonstrated that trial counsel's failure to object to Kruszka's testimony fell outside the wide range of professionally competent assistance.

* * * * * *

The circuit court appropriately denied Poehlman's ineffective assistance of counsel claim without a hearing. Should this Court disagree, it should remand the case for a *Machner* hearing.

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[6] In *DeLao*, the prosecutor did not disclose DeLao's statement until after the trial began and DeLao committed to a specific defense. The court found that the untimely disclosure of DeLao's statement prejudiced her because it directly undermined her theory of defense and her credibility. *State v. DeLao*, 2002 WI 49, ¶¶ 61-65, 252 Wis. 2d 289, 643 N.W.2d 480.

II. The circuit court properly denied Poehlman's newly discovered evidence claim without a hearing.

Poehlman also claims that the circuit court erred when it denied him an evidentiary hearing to address his claim of newly discovered evidence. Specifically, he contends that after his conviction, an investigator discovered a witness, Daniel Neeley, whose proffered testimony would undermine N.'s claim that Poehlman falsely imprisoned her. (Poehlman's Br. 18-23.) The circuit court properly exercised its discretion when it denied Poehlman's newly discovered evidence claim without a hearing because his pleading did not satisfy all of the criteria for newly discovered evidence and it was not reasonably probable that the jury would have reached a different result had Neeley testified. (40:3.)

A. General legal principles guiding a request for a new trial based on newly discovered evidence.

The standard for granting a new trial on the basis of newly discovered evidence is well-established. A defendant must prove, by clear and convincing evidence, that: "(1) the evidence was discovered after conviction; (2) the defendant was not negligent in seeking the evidence; (3) the evidence is material to an issue in the case; and (4) the evidence is not merely cumulative." *State v. Plude*, 2008 WI 58, ¶ 32, 310 Wis. 2d 28, 750 N.W.2d 42 (citations omitted). If the defendant fails to demonstrate any one of these elements, he fails to carry his burden of proof to show that newly discovered evidence exists. *State v. Sarinske*, 91 Wis. 2d 14, 38, 280 N.W.2d 725 (1979).

But even if the defendant shows that all four elements are satisfied, "'the court must determine whether a reasonable probability exists that a different result would be reached in a [new] trial.'" *See State v. Avery*, 2013 WI 13, ¶ 25, 345 Wis. 2d 407, 826 N.W.2d 60, *reconsid. denied*,

2013 WI 40, 347 Wis. 2d 115, 829 N.W.2d 752 (quoted source omitted). Evidence that merely impeaches a witness' credibility is generally insufficient to warrant a new trial because it does not create a reasonable probability of a different result. *Simos v. State*, 53 Wis. 2d 493, 499, 192 N.W.2d 877 (1972); *but see Plude*, 310 Wis. 2d 28, ¶ 47 (recognizing that impeachment evidence might strongly support a new trial where the record demonstrates that the verdict is based on perjured evidence, such as an expert's misrepresentations about his credentials).

When an evidentiary hearing is unnecessary. In seeking postconviction relief based on a newly discovered evidence claim, a defendant's motion must set forth sufficient material facts that entitle him to a hearing. *State v. Love*, 2005 WI 116, ¶ 51, 284 Wis. 2d 111, 700 N.W.2d 62. If the motion does not raise facts sufficient to entitle the defendant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the circuit court has the discretion to grant or deny a hearing. *Id.* ¶ 26.

When a circuit court erroneously denies an otherwise properly pled motion alleging newly discovered evidence without a hearing, the reviewing court should remand the matter to the circuit court for an evidentiary hearing. *Id.* ¶¶ 55-56.

Standard of review. The decision to grant or deny a new trial based on newly discovered evidence is committed to the circuit court's discretion. *See Avery*, 345 Wis. 2d 407, ¶ 22. On appeal, the circuit court's decision is reviewed for an erroneous exercise of discretion. *Id.* Therefore, the circuit court's discretionary decision should be sustained "unless it can be said that no reasonable judge, acting on the same facts and underlying law, could reach the same conclusion." *State v. Jeske*, 197 Wis. 2d 905, 913, 541 N.W.2d 225 (Ct. App. 1995).

B. Procedural and factual background related to newly discovered evidence claim.

Following Poehlman's June 11, 2015 sentencing (56), postconviction counsel conducted additional investigation. (34:Attachment E:1-2, F.) On January 28, 2016, Daniel Neeley spoke to a private investigator. (34:Attachment F.) Neely executed an affidavit dated March 1, 2016 regarding his recollection of the events of February 7, 2015. (34:Attachment G.)

According to his affidavit, Neeley lived in a house directly behind a building on Packard Avenue where Poehlman lived. On February 7, 2015, Neely reportedly left his house between 6:45 a.m. and 6:50 a.m. to take his niece to school. Neeley claims that he saw Poehlman leaving his house at that time. They nodded to each other. Neeley says that Poehlman then walked south on Packard Avenue. (34:Attachment G:1.) After dropping his niece off at school, Neeley returned to his residence at 7:10 a.m. (34:Attachment G:2.) Neeley did not see Poehlman return to his residence. (34:Attachment G:1.)

At approximately 9:30 a.m., Neeley heard N. yelling and screaming. He looked out his window and saw her run down the alley and speak to a woman. She was yelling, "Help me." Neeley did not see anyone chasing her or see anything wrong with her. (34:Attachment G:2.)

N.'s trial testimony. On February 6, N. told Poehlman that it was time to get a divorce. (51:24.) Poehlman got upset and yelled at her. (51:25.) She left the living room to get a cigarette. Poehlman "charged up behind me and pulled my hair and reached around and gouged my eye, dug his finger into my eye." (51:25-26.) When N. reminded Poehlman that

she was pregnant, Poehlman replied that he would "keep it all to [her] face" and continued to yell at her (51:27.)

Poehlman's friend called and said that he was coming over for drinks. Poehlman told N. to go into the bedroom and that if she "came out for any reason at all that he would smash my face in." (51:27.) Fearing for her safety, N. complied with Poehlman's directive, believing that if she left the room Poehlman would kill or badly hurt her. (51:27-28.) N. remained in the room for at least an hour while Poehlman and his friend drank in the living room. (51:28.)

After Poehlman's friend left, Poehlman came into the room. He told N. that she would do as he told her for the whole weekend. If she complied, cried, or asked him to stop, Poehlman said he would kill her. Poehlman told her that how she acted would affect the well being of N.'s children, a seven-year-old son and 13-month-old daughter, when they came home. (51:29.)

After Poehlman directed her to get undressed, Poehlman grabbed N. around the neck, telling her that she did not deserve to live. (51:30.) He choked her for approximately two to three minutes. She could barely breathe. N. did not fight back. (51:30.) N. did not agree to Poehlman placing his hands on her neck. She only placed her hands on his hands to try and get them off her neck because she felt like she was about to pass out. (51:60.) Poehlman squeezed harder when N. tried to pull his hands off her neck. (51:61.) She explained that she believed that Poehlman would kill or hurt her or her children. (51:31.) Poehlman sexually assaulted N., penetrating her anus with his penis. N. did not agree to the anal sex, but she did not tell him to stop. (51:31.)

Later, Poehlman directed N. to perform oral sex on him. N. did not agree to it. N. tried to stop because she was about to throw up, but Poehlman shoved her head on harder. (51:32.) She did not attempt to push him away or fight him off because she believed that Poehlman would retaliate by hurting her or killing her. (51:33.) Poehlman then engaged in additional anal and vaginal sex with N., to which she did not agree. (51:33.) At times, Poehlman would tell N. how he should kill her, that she did not deserve to live and that she was a despicable person. (51:34.) Poehlman engaged in additional sex acts with N. that evening without her consent. (51:35-36.)

During the night, Poehlman positioned himself in front of the door. (51:64.) When Poehlman went to a room, N. had to follow. (51:65.)

N. said that they went to bed and fell asleep. N. awoke at 8:00 a.m., intending to leave the house. (51:37. 66-67) But because Poehlman also woke up, N. decided to wait for him to fall back to sleep before she left. N. fell back to sleep, woke up between 9:30 a.m. and 10:00 a.m. Poehlman was still asleep. N. grabbed her coat and shoes and ran out the door. (51:38, 67) She ran down the alley. On the next block she encountered a woman that she recognized from her son's school. The woman gave N. a ride to the police station. (51:39.)

Officer Brian Scott's testimony. Cudahy Police Officer Brian Scott took N.'s complaint at the station. (51:73-74.) She was upset, crying, and appeared distraught. N. had physical injuries to her person including marks around her neck and a bruised and blood shot right eye. (51:74.)

N. recounted how Poehlman had engaged in a series of sexual assaults beginning at approximately 9:30 p.m. on

February 6. (51:76-77.) N. also reported that when Poehlman's friend came over, Poehlman ordered her into the bedroom and told her not to come out or he would "smash her in the face." (51:84.) N. also told Scott how she was waiting for Poehlman to fall asleep so that she could flee the house and get help. (51:77-78.) When N. initially attempted to leave, she realized that Poehlman was not asleep. N. did not leave because she feared that he would cause her more harm if she attempted to escape. (51:78.)

Detective Andrew Ayala's testimony. Poehlman told Detective Ayala that Poehlman and N had a conversation about their failing marriage and then had consensual sex throughout the night. (52:50-51.) Poehlman insisted that the choking was consensual. (52:51.) When they finished, Poehlman left the apartment and milled around outside, leaving the apartment in the very early morning hours of Saturday morning, sometime around 3:00 a.m. (52:51.)

Poehlman told Ayala that he walked in the neighborhood, including between several apartment buildings. (52:54.) Poehlman stated that he milled about in the area while smoking for "numerous hours overnight." (52:55.) Based on Poehlman's statement, officers looked in the alleyway between the buildings. They saw little to no foot traffic. And none of the footprints that the officers observed matched the shoe print of the shoe that Poehlman was wearing. (52:55.)

Poehlman's testimony. While arguing about their marriage, Poehlman's friend Adam called about coming over for a drink. (52:94.) Adam later arrived and stayed for approximately three hours. N. stayed in the bedroom during this time. (52:95.) Later that evening, Poehlman and N. had sex with the first sex occurring on February 6, between 10:30 and 11:00 p.m. and the last encounter ending between

1:30 a.m. and 2:00 a.m. (52:87, 91.) Poehlman said that the sex was consensual. (52:99.) Poehlman choked N. because she asked him to. (52:88-89, 100-102.)

Poehlman claims that he then got dressed and left the apartment. He said that he walked between two buildings behind his apartment in the alleys, last walking in the alley at 10:00 a.m. (52:91.) Poehlman claimed he was gone for seven to eight hours and that N. was not there when he returned. (52:92.)

C. Poehlman was not entitled to a hearing on his claim of newly discovered evidence.

Poehlman did not demonstrate that he was entitled to an evidentiary hearing. His pleading did not satisfy all four prongs of the newly discovered evidence test.

First, the State acknowledges that the defense did not discover Neeley's potential testimony until after his conviction. *See Plude*, 310 Wis. 2d 28, ¶ 32.

Second, the State contends that Neeley was negligent in seeking the evidence. *Id*. When Neeley left his residence, he saw Poehlman leaving his house and they "nodded to each other." (34:Attachment G:1.) Neeley's statement certainly suggests that Poehlman was aware that Neeley saw him. And if Poehlman saw him, he could have informed his counsel that he saw his neighbor on February 7.

Third, Neeley's information was not material to Poehlman's defense. *See Plude*, 310 Wis. 2d 28, ¶ 32. Poehlman argues that Neeley's testimony demonstrates that Poehlman could not have not falsely imprisoned N. against her will since he was not present when N. claimed he was. (Poehlman's Br. 18.) Neeley's observations were limited.

Neeley did not live in the same building as Poehlman. He did not return home from work until midnight on February 6. And he did not describe seeing or hearing anything at the Poehlman residence until he briefly saw Poehlman the following morning between 6:45 a.m. and 6:50 a.m. (34:Attachment G:1-2.) Neeley's testimony does not undermine N.'s testimony that Poehlman ordered her into the bedroom on February 6 when Poehlman's friend spent at least an hour there or that Poehlman otherwise falsely imprisoned N. throughout the night as he sexually assaulted her.

Poehlman also claims that Neeley's testimony was material because it discredits Detective Ayala's testimony concerning the absence of footprints. (Poehlman's Br. 22-23.) Here, Neeley allegedly saw Poehlman exit his building and walk south on Packard Avenue. (34:Attachment G:1.) Neeley did not claim that he saw Poehlman between the buildings where Ayala looked for prints. (52:55.) Neeley's testimony is simply not material to discrediting Ayala because Ayala did not look for prints in the place where Neeley saw Poehlman, but where Poehlman said he went.

Fourth, the State acknowledges that Neeley's testimony was not cumulative. *See Plude*, 310 Wis. 2d 28, ¶ 32. But Neeley's statement was inconsistent with Poehlman's testimony and undermines his claim that there is a reasonable probability that the jury would have reached a different result if it had the new evidence.

Here, Neeley made only brief observations of Poehlman, between 6:45 a.m. and 6:50 a.m., as Poehlman left his residence, and N., at approximately 9:30 a.m, as she ran down the alley yelling "help me." Neeley's testimony does not undermine N.'s claim that Poehlman ordered her not to leave a bedroom when Poehlman's friend came over on

February 6 or that N. feared leaving both during and after Poehlman had sex with her on February 6 or 7 Both Poehlman and N. agreed that they had sex and that Poehlman choked N. They disagreed about whether N. consented. Neeley's testimony sheds no light on whether N. consented to Poehlman's conduct.

More importantly, Neeley's proffered testimony contradicted Poehlman's testimony. Neeley stated that he saw "Poehlman *leaving his house*." (34:Attachment G:1.) But this is inconsistent with Poehlman's own testimony that he had left the house much earlier, as early as 2:00 a.m., and remained outside the apartment for seven to eight hours, not returning until after N. had left at around 10 a.m. (52:91-92.).[7]

Poehlman's pleading failed to satisfy the four elements of the newly discovered evidence test. But even if he had made this showing, the circuit court could correctly determine that there was no reasonable probability that the jury would have reached a different result had Neeley testified. But should this Court conclude that that the circuit court erroneously denied Poehlman's motion without a hearing, this Court should remand the case to the circuit court for an evidentiary hearing. *Love*, 284 Wis. 2d 111, ¶¶ 55-56.

[7] Neeley claims that he was dropping his niece off for school on February 7. (34:Attachment G:1.) In its reply to Poehlman's postconviction motion, the State noted that February 7 was not school day. (38:18.) Poehlman then submitted a reply brief with an affidavit that suggested that Neeley may have been mistaken about driving his niece to school but that he was driving her somewhere (39:11-12.)

CONCLUSION

For the above reasons, the State respectfully requests that this Court affirm Poehlman's judgment of conviction and order denying Poehlman's motion for postconviction relief.

Dated this 25th day of October, 2016.

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 6621 words.

_____
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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 25th day of October, 2016.

_____
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