APPENDIX

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COURT OF APPEALS
DECISION
DATED AND FILED

May 4, 2021

Sheila T. Reiff
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2020AP360-CR Cir. Ct. No. 2016CF3473

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

ROBERT CARR, JR.

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JANET C. PROTASIEWICZ, Judge. *Affirmed.*

Before Brash, P.J., Graham and White, JJ.

Per curiam opinions 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).

¶1 PER CURIAM. Robert Carr, Jr. appeals a judgment of conviction and an order of the trial court denying his motion for postconviction relief. He

Appendix A

argues that he presents newly discovered evidence and claims of ineffective assistance of counsel that require an evidentiary hearing or a new trial. We reject Carr's arguments, and accordingly, we affirm.

BACKGROUND

¶2 Carr was arrested based on allegations that on July 14, 2016, and July 29, 2016, Carr and his son, Nacarrente L. Carr[1] sold heroin to a confidential informant (CI). On August 2, 2016, the police executed a lawfully obtained "knock and announce" search warrant for the property where Carr and Nacarrente both resided. In the search, the police recovered cocaine, heroin residue, drug paraphernalia, and a Remington .45 caliber semi-automatic handgun. Carr was charged with two counts of manufacture or delivery of heroin between three and ten grams as a party to a crime, and one count of possession of a firearm by a felon.

¶3 The case proceeded to trial in April 2018. At trial, the State called an investigator in the Oak Creek Police Department assigned as the task force officer for the Drug Enforcement Administration (DEA) operations targeting state and federal drug offenses. The task force involved officers from multiple jurisdictions. The investigator testified about his investigation into Carr in 2016. The task force identified and surveilled Carr's current address on South 6th Street and his prior address on South 19th Street. The investigator explained he could identify Nacarrente and Carr's voices on the calls recorded by the task force because of his contact with the men before and after their arrests.

[1] We refer to Nacarrente Carr by his first name throughout this opinion.

from a distance and identified by sight Nacarrente as the person driving a Chrysler 200, who then entered and exited the CI's vehicle.

¶7 The investigator testified that a similar controlled buy was arranged on July 29, 2016. The CI and Carr arranged that the sale would take place on South 20th Street and Layton Avenue. The investigator explained that after the CI was prepared for the controlled buy, he parked at the arranged location. Over the radio, the investigator was informed by an officer watching Carr's house on South 6th Street that two men left the house in a maroon Blazer.[2] Then the investigator and another officer parked near the arranged buy location and saw "Robert Carr and Nacarrente Carr pull their vehicle into the parking lot." The investigator watched the CI's car to make sure he did not exit the vehicle and that no other person interacted with his vehicle until the Carrs arrived. The investigator reviewed surveillance photographs of the Blazer taken that day and identified Nacarrente in the passenger seat.

¶8 The State played audio clips from the recording device worn by the CI, which included a phone call arranging the July 29 buy and the recordings from the controlled buy itself. The investigator identified Carr's voice on the phone. Although trial counsel raised concerns about which voices were identified, the trial court ruled that it was the jury's role to decide whose voices were heard.

¶9 A sergeant in the Wauwatosa Police Department testified about assisting the investigation and surveillance of Carr on July 14, 2016, and July 29,

[2] The officer whose testimony is recounted in Paragraph 10 is the officer from whom the investigator received this information. The second officer does not identify Carr or Nacarrente by name.

¶4 The investigator testified that on July 14, 2016, the task force "had scheduled a meeting with a [CI] in order to plan a controlled purchase from Robert Carr." The CI made contact with Carr in a recorded call. The investigator stated that the "initial phone call" was answered by Nacarrente. In the call, the CI made "arrangements to purchase [three] grams of heroin. The phone call kind of gets, I guess, bounced and both Robert Carr and Nacarrente Carr are part of the conversation as far as making the arrangements for the [three] grams and working on the price." The CI asked to speak with Nacarrente's "daddy" on the phone call, the CI then spoke to Carr, they negotiated the price for the heroin, and Carr "directs [the CI] to his old place [on South 19th Street] as far as the buy location." The State played voice recordings from the phone call setting up the controlled buy on July 14, 2016; on the witness stand, the investigator identified the voices of Nacarrente and Carr.

¶5 The investigator testified about the logistics of the controlled buy after the CI set up the location and time. Before the CI went to the controlled buy, the investigator and another task force officer searched the CI's vehicle and searched the CI's person to make sure there were no other drugs, weapons, or money involved. The investigator gave the CI $250 in prerecorded bills. The DEA team maintained constant surveillance of the CI from the time he was searched and given the money until he went to the buy and then met up with the DEA task force again.

¶6 The investigator continued in his testimony, stating that he had surveillance on Carr's residence on South 6th Street and surveillance on the buy location; he and another officer "followed the informant down to the area down on 19th Street" on July 14, 2016. During the controlled buy, the investigator watched

2016. On July 14, 2016, the sergeant surveilled Carr's former residence on South 19th Street, and then met with the CI and took custody of the heroin purchased in the controlled buy.

¶10 An officer with the Oak Creek Police Department testified about the surveillance he did during the July 29th controlled buy. The officer watched two males leave the house on South 6th Street, get into a maroon Blazer, and drive off; the officer stopped following them at about South 20th Street and Layton Avenue. The officer took photographs of the two men in the Blazer; three photographs were received into evidence.

¶11 Nacarrente testified for the State in Carr's trial. He testified that on July 14, 2016, his father set up by phone the location for a drug deal. He testified that he and his father both dealt heroin during the summer of 2016. Although he was residing in a house on South 6th Street, in Milwaukee, his father arranged a heroin deal on July 14, 2016, near a house in which they used to live on South 19th Street. By the terms of the deal, Nacarrente "was sent to [the CI] to serve him 2 grams for [$]250, but it ended up for another bag -- it was [$]255." And after the sale, Nacarrente "got back into the Chrysler 200 and sped off through the alley."

¶12 Nacarrente further testified that the second controlled buy was on July 29, 2016. He and his father spoke to the CI, but his father set the price and the location of the deal. The second deal occurred in a store parking lot near South 20th Street and West Layton Avenue. He and Carr drove together to the arranged location and met the CI, who was waiting there for them. "I got out to get into the back seat and the [CI] got in.... He handed me the money but got the drugs from my father." He explained that Carr drove the vehicle during that sale.

Nacarrente also testified that the Remington firearm found in the house on South 6th Street during the search after he and his father were arrested belonged to Carr and had been purchased by Carr and his girlfriend.

¶13 On the witness stand, Nacarrente reviewed photographic evidence from the State and identified Carr "outside the house on 6th Street" and "pulling into the buy location" on July 29. The State again played recordings of phone calls from these drug sales. Nacarrente identified the voices of the CI and Carr, as well as his own voice on a recording of a July 29, 2016 phone call. He also identified his own voice and the CI's voice on a recording of a July 14, 2016 phone call.

¶14 Nacarrente testified that he also had been charged for the same conduct and agreed to testify pursuant to an agreement with the State.

> [THE STATE:] And pursuant to this agreement, what are you asked to do?
>
> [NACARRENTE:] Just to testify.
>
> [THE STATE:] And in return, is the State making any promises to you as to what's gonna happen with your case?
>
> [NACARRENTE:] No.
>
> ....
>
> [THE STATE:] And when we met, how were you instructed to testify?
>
> [NACARRENTE:] Just to tell the truth.
>
> [THE STATE:] And are you doing that today?
>
> [NACARRENTE:] Yes.

¶15 On cross-examination, trial counsel asked of Nacarrente: "[a]nd while there's no promises that have been made, you are expecting that you would receive some consideration when your cases resolve; correct?" Nacarrente replied, "Yes." On redirect, the State questioned Nacarrente again, this time about his reluctance to testify:

> [NACARRENTE:] You know, I'm fearing for my life a couple times, why I haven't come to court, you know.
>
> [THE STATE:] So I wanted to talk to you about that. So defense counsel referenced a period of time where you weren't showing up to court. Why didn't you show up?
>
> [NACARRENTE:] There's been numerous times I've been shot at. There's threats over Facebook.
>
> [THE STATE:] And so are you saying that—but why not come to court? So people are threatening you outside—.
>
> [NACARRENTE:] Yes.
>
> [THE STATE:] Why not come to court?
>
> [NACARRENTE:] Because I was scared. Even on my way here, on my way in, walking in, you never know what could have happened, you know. It's not everybody can't watch your back for good. It's stuff like that I was scared of. People telling me when they see me—you know, I ain't had no type of car so I would have to get on the city bus. Me standing outside on the street, people see me, shoot at me, and it's not—it's not good.
>
> [THE STATE:] And so even though—has the charges in this case stopped everyone who was participating in this heroin operation from reaching you?
>
> [NACARRENTE:] Yes.
>
> ....
>
> [THE STATE:] And regarding what promises have been made to you, I would assume—do you want me to dismiss your case?

> [NACARRENTE:] I'm not asking for you to dismiss it.
>
> [THE STATE:] Okay. But you know that that's something that I could do if I decided that that was appropriate?
>
> [NACARRENTE:] Yes.
>
> [THE STATE:] And so you cooperating with the State, you're trying to get that type of consideration?
>
> [NACARRENTE:] Yes.
>
> [THE STATE:] Okay. But again, pursuant to the proffer letter, if you testify truthfully—even if you testify truthfully, there's no promise of consideration?
>
> [NACARRENTE:] Yes.

¶16 An officer with the Wauwatosa Police department also testified that he was part of the task force that surveilled and investigated Carr and participated in the execution of the search warrant at Carr's residence on August 2, 2016. He searched the premises and recovered "several narcotics. We recovered suspected narcotics, some suspected cocaine. We recovered packaging materials. We recovered manufacturing items. We recovered ammo and we recovered one handgun along with numerous identifiers, paper documents in Robert Carr's name." Some of the items recovered were drug processing items including "coffee filters, two open boxes of pure baking soda, an open bottle of vinegar, a Pyrex glass measuring cup, and a fork … all found next to one another." He also explained that a firearm was found in the "northeast bedroom … under the mattress but above the box spring." Additionally, Carr's wallet, auto registration, USPS change of address letter, and one of his bills were found in this bedroom.

¶17 The officer also testified that a Blazer was parked at Carr's residence on South 6th Street during the search and a Blazer was observed during the

controlled buy on July 29. The officer explained that the Blazer had different license plates on July 29 during the controlled buy than it did on August 2 during the execution of the search warrant. However, the police search of the registration records showed that both license plates on the Blazer were registered to a Blazer with the same VIN number.

¶18 The State called a controlled substances analyst from the State Crime Laboratory who analyzed the drugs purchased in the controlled buy and entered into evidence. The first item received was a "sealed brown paper bag containing the following: Item A1 is one paper packet containing tan, chunky material. Item A2 ... one paper packet containing tan chunks and powder." The analyst's investigation into the substances—using a gas chromatograph-mass spectrometer—showed the presence of heroin and fentanyl. The second piece of evidence analyzed was a "sealed brown paper bag containing a paper packet containing gray, chunky material," which testing showed contained heroin.

¶19 The State called a forensic scientist from the State Crime Laboratory who analyzed materials seized in the search of Carr's residence for latent fingerprints. He analyzed a Pyrex glass measuring cup and was able to identify a print from Carr's left middle finger.

¶20 The State called a DNA analyst from the Wisconsin Department of Justice Crime Laboratory. The analyst testified that "swabs of a firearm that were from the slide, the grip, and the trigger" were analyzed to develop a DNA profile. The results of that testing was compared to a buccal swab from Carr. There was a mixture of DNA from three people on the firearm swabs, but "there was one major contributor" who matched the buccal swab from Carr. In other words, Carr was "the source of the DNA from the swabs of the trigger, slide, and grip." After the

firearm DNA evidence was received the trial court explained that it received a stipulation that before Carr's arrest on August 2, 2016, Carr "was convicted of a felony offense which prohibited him from lawfully possessing a firearm, and that this conviction remained of record and unreversed as of August 2, 2016. These facts are accepted as proven as a fact at trial by the stipulation."

¶21 Carr did not testify and the defense presented no witnesses. The jury returned guilty verdicts on all charges: two counts of manufacturing or delivering heroin between three and ten grams as party to a crime and one count of possession of a firearm as a convicted felon.

¶22 At the sentencing hearing, the State reviewed Carr's history and the evidence in the case. The State argued it was important for the trial court to consider the need to protect the community from Carr's heroin dealing because of the growing number of heroin overdoses. It informed the court that the search of Carr's house showed fentanyl residue on some materials, even if the heroin sold to the CI was only heroin and it was not laced with fentanyl. Further, the State asserted that "some of the most dangerous type[s] of [people] in Milwaukee County" were people like Carr, profiting from heroin and fentanyl dealing. The trial court addressed Carr:

> I am not here with an opinion that you're a bad person. Human beings are complicated. Sometimes they do things they shouldn't do and make decisions that they shouldn't make. Doesn't necessarily mean you're a bad person. But it means you made some very irresponsible choices that have harmed the community for sure and have had the potential to cause devastation across the community, right?
>
> So Mr. Carr, I don't necessarily think you're a bad person, but I think you've engaged in very dangerous conduct that's tearing apart the fabric of the community[.]

¶23 The trial court sentenced Carr as follows: "[o]n count 1, five years of initial confinement to be followed by three years of extended supervision, 638 days credit; consecutive to count two, five years of initial confinement, three years of extended supervision; consecutive to count three, five years of initial confinement, four years of extended supervision."

¶24 Carr filed a motion for postconviction relief in November 2019 in accordance with WIS. STAT. RULE 809.30 (2019-20).[3] He requested an evidentiary hearing to present newly discovered evidence: a recantation of trial testimony by Nacarrente and a letter from the CI who claimed that the police falsely reported his statement regarding the two controlled buys upon which Carr was convicted. Further, he argued there were eight grounds upon which he received ineffective assistance of counsel from his first, second, and third attorneys. Carr supplemented his original motion to allege two more counts of ineffective assistance of counsel.

¶25 The first piece of alleged newly discovered evidence was an affidavit from Nacarrente made on May 17, 2019, just sixteen days after Carr was sentenced and less than two months after he was convicted. Nacarrente averred that Carr was not involved in the delivery of heroin on July 14, 2016. He stated that he went alone to the buy and Carr did not direct him to sell or deliver heroin to the CI. "I lied in the courtroom to a get a lesser time and because I was scared and high off of extasy [sic], marijuana, and psych meds at the time." He stated his father was home sleeping.

[3] All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

¶26 With regard to the July 29 buy, Nacarrente stated:

> I got a couple of calls early in the morning from the CI asking me to deliver him some heroine [sic] for $255. He asked about my father, and my father told him that he's got to talk to me. I hung up the phone and went back to sleep when he called back, I told him to let me get myself together and meet me on 20th and Layton[.]

Nacarrente stated his father was "at home just getting out of bed" when Nacarrente went to the buy. He listed the same reasons why he lied on the stand. Further, he claimed that the gun found in the house was his own and Carr was unaware that the gun was under the mattress, in other words, Carr never possessed it. Nacarrente claimed that his stepmother purchased the firearm for Nacarrente. He lied about the gun because he was scared he would get charged with felon in possession, but he did not know that he could not be charged with that because he was not a convicted felon.

¶27 The second proffered newly discovered evidence was an affidavit from the CI, who stated:

> I ... had never done any drug transactions with Robert Carr by phone or in person. On the dates of July 14, 2016 and July 29, 2016 I did not meet up with Robert Carr and I never spoke with Robert Carr on the phone. On both dates I set up the transactions with Nacarrente and I purchased the drugs from Nacarrente. On July 14, 2016 Nacarrente Carr was by himself when I made a purchase and on July 29, 2016 Nacarrente was with another male unknown to me but who was not Robert Carr. I've only ever done all deals and transactions with Nacarrente Carr none of which involved Robert Carr.

¶28 The trial court denied Carr's motion for postconviction relief without a hearing. The trial court incorporated the State's response brief by reference in its decision. This appeal follows. Additional facts are included in the discussion as relevant.

DISCUSSION

¶29 Carr requests postconviction relief on two bases: newly discovered evidence and ineffective assistance of trial counsel. For his newly discovered evidence, he argues that Nacarrente's recantation and the CI's statement provide proof that Carr was not involved in the drug transactions for which he was convicted. We conclude Carr has failed to provide sufficient corroboration of his claim and reject his argument. For his claim of ineffective assistance of counsel, he argues there are ten ways that his pretrial and trial counsel performed deficiently and prejudiced his defense.[4] Carr fails to show that his defense performed deficiently or that his defense was prejudiced by any of these claims of deficient performance. Accordingly, we conclude that the trial court's denial of Carr's motion was an appropriate exercise of discretion.

I. Newly discovered evidence

¶30 "In order to set aside a judgment of conviction based on newly[]discovered evidence, the newly[]discovered evidence must be sufficient to establish that a defendant's conviction was a 'manifest injustice.'" ***State v. Plude***, 2008 WI 58, ¶32, 310 Wis. 2d 28, 750 N.W.2d 42 (citation omitted). Mirroring the statutory requirements warranting a new trial on the basis of newly discovered evidence in WIS. STAT. § 805.15(3), a postconviction motion must establish by clear and convincing evidence that: "(1) the evidence was discovered after

[4] We note that Carr retained three attorneys through his conviction and sentencing. Initially, he was represented by Eric D. Lowenberg. In February 2017, he moved the court to substitute Ann T. Bowe as his attorney. In August 2017, Attorney Bowe moved to withdraw as counsel citing "irretrievable breakdown in communications" that meant counsel could not "effectively represent" Carr. Joseph R. Kennedy then represented Carr through his trial, although new counsel represents him in his pursuit of postconviction relief.

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. Love***, 2005 WI 116, ¶43, 284 Wis. 2d 111, 700 N.W.2d 62 (citation omitted). We review the trial court's decision to grant or deny a motion for a new trial based on newly discovered evidence under the erroneous exercise of discretion standard. *See* ***Plude***, 310 Wis. 2d 28, ¶31.

¶31 If the defendant establishes the four factors of newly discovered evidence, then a trial court must determine whether there is a reasonable probability that a different result would have been reached at trial. *See* ***Love***, 284 Wis. 2d 111, ¶44. "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. Vollbrecht***, 2012 WI App 90, ¶18, 344 Wis. 2d 69, 820 N.W.2d 443. The determination of a reasonable probability is a question of law. ***Id.*** If the newly discovered evidence and the reasonable probability of a different outcome are both established, a manifest injustice is shown and a new trial must be ordered. ***Plude***, 310 Wis. 2d 28, ¶¶ 31-33.

¶32 Carr's new evidence purports to show that Carr was not involved in the two controlled buys surveilled by the police. Further, Nacarrente's affidavit also alleges that his father did not possess the firearm found in the search of the Carr residence, but that the firearm was purchased by his stepmother for him.

¶33 Nacarrente's affidavit is a recantation of the testimony he gave at trial. Because recantations are inherently unreliable, "[a] claim of newly discovered evidence that is based on recantation also requires corroboration of the recantation with additional newly discovered evidence..., [which shows] that '(1)

there is a feasible motive for the initial false statement; and, (2) there are circumstantial guarantees of the trustworthiness of the recantation.'" ***State v. McAlister***, 2018 WI 34, ¶33, 380 Wis. 2d 684, 911 N.W.2d 77 (footnote omitted) (quoting ***State v. McCallum***, 208 Wis. 2d 463, 478, 561 N.W.2d 707 (1997)).

¶34 Carr argues that Nacarrente's affidavit satisfies the standards for newly discovered evidence. Carr argues that Nacarrente's recantation occurred after his sentencing and therefore could not have been discovered prior to trial, which satisfies the first prong, and he was not negligent in obtaining the information earlier, which satisfies the second prong. Carr also argues that Nacarrente was the State's star witness, which makes his recantation material to the proceedings, satisfying the third prong, and that this new information is not cumulative to the trial testimony, satisfying the fourth prong. He asserts that if the jury heard Nacarrente's testimony in his affidavit instead of his testimony at trial, there was a reasonable probability that the outcome would be different. Finally, he argues that this recantation fulfills the additional requirements for such evidence: (1) Nacarrente had a feasible reason to lie because he hoped to get a lighter sentence, he was under the influence of intoxicants, and he did not understand he could not be charged with felon in possession; and (2) the CI's affidavit corroborates his story, which would provide sufficient guarantees of trustworthiness.

¶35 The State argues that Carr's evidence does not satisfy the newly discovered evidence standard because the new evidence is cumulative to the evidence at trial. "Where the credibility of a prosecution witness was tested at trial, evidence that again attacks the credibility of that witness is cumulative." ***McAlister***, 380 Wis. 2d 684, ¶39. In the context of Nacarrente's recantation, it is unclear if Nacarrente's new statements attacking the credibility of his trial

testimony would be considered cumulative, and our review does not require us to determine this issue to conclude that Carr has not satisfied the newly discovered evidence standard to require a new trial or evidentiary hearing.

¶36 The State further argues that the new evidence does not satisfy either required factor of corroboration. Even if we assumed without deciding that Nacarrente was motivated by a desire for a lesser sentence, which seems at least possible for serving as a witness for the State, Carr's attempt to provide a "circumstantial guarantee[] of trustworthiness" of the recantation falls short. ***State v. Ferguson***, 2014 WI App 48, ¶31, 354 Wis. 2d 253, 847 N.W.2d 900. Such a guarantee of trustworthiness "may be established by ... internal consistency." ***Id.*** The CI's affidavit does not provide a cohesive narrative with Nacarrente's statement, such that we may conclude internal consistency or indicia of trustworthiness were established. The statements from both Nacarrente and the CI are refuted by the record, including the testimony from law enforcement officers about their surveillance of Carr, Nacarrente, and the CI and the audio recordings played at trial in which the trial court made clear it was the jury's role to determine who was speaking on the recordings. Therefore, we conclude there are not sufficient indications of trustworthiness and the statements do not fully corroborate each other.

¶37 On the issue of the CI's affidavit, Carr asserts this evidence provides corroboration of Nacarrente's recantation, but also can be considered independent newly discovered evidence. The CI's affidavit is not a recantation because the CI did not testify at trial. *See* ***McCallum***, 208 Wis. 2d at 476. Considered independently, we could assume that Carr could not have known about this evidence until after the police testified to an alternate version of events and Carr was not negligent in seeking this information. That the CI affidavit seeks to

undermine the testimony given by police about what the CI did and said during the controlled buys could be considered material and not cumulative to trial testimony. However, we conclude that Carr's argument fails on the final stage of evaluating newly discovered evidence: a reasonable probability of a different trial outcome. Carr simply cannot show that the outcome would be different if Nacarrente and the CI testified consistent with the contents of these affidavits at trial. The weight of the trial evidence is simply too strong for this evidence to raise reasonable doubt.[5]

¶38 The State argues that sufficient evidence supports the verdict without Nacarrente's testimony; additionally, it disputes that Nacarrente was the State's star witness. The State presented evidence from law enforcement officers and analysts that connected Carr to each controlled buy and his DNA to the firearm found in his bedroom. The drug task force investigator testified that the July 14th buy was set up by phone call from the CI and the investigator identified Carr's voice in the phone call. In that call, Carr set the price and location of the buy. The investigator also testified that the July 29th buy was set up by a phone call with Carr and that he saw Carr driving the Blazer to the location of the controlled buy. A second officer surveilled the July 29th buy; he testified that he monitored Carr's residence and watched two men enter the maroon Blazer and then followed them to the buy location. The State played recordings from phone calls arranging the drug sales, which allowed the jury to determine whose voices they identified.

[5] The trial court stated that the "motives for both witnesses' original statements were known at the time of trial, and their original statements were corroborated by the observations of the investigating officers, the photograph, the audio recording of the phone call, and the presence of the defendant's DNA on the gun." We agree that the evidence in the record supports the convictions and the new evidence does not give reason to doubt it.

Forensic scientists testified to the analysis of the crime scene that showed Carr's fingerprint on the Pyrex measuring cup and his DNA on the firearm.

¶39 We conclude that Carr has failed to undermine the testimony presented at trial. There is no reasonable probability of a different result if this new evidence were presented. *See* ***McAlister***, 380 Wis. 2d 684, ¶32. Therefore, Carr has failed to satisfy the newly discovered evidence standard to receive a new trial. The trial court did not erroneously exercise its discretion to deny Carr's motion without a hearing.

II. Ineffective assistance of counsel

¶40 Carr makes ten separate claims for ineffective assistance of counsel and requests a ***Machner***[6] hearing on his claims. Carr claims that each of the attorneys who represented him throughout this case: (1) failed to talk to the CI; (2) failed to file a ***Franks/Mann***[7] motion related to the search warrant; (3) failed to follow up on a potential mistaken identification of a vehicle; (4) failed to arrange independent DNA testing or hire an expert to testify; (5) failed to file an alibi defense; (6) failed to file a ***Denny***[8] motion. Against Attorney Kennedy specifically, Carr claims that he: (7) failed to question Nacarrente about statements made by the CI; (8) failed to file a motion to compel the disclosure of the person with the CI during the July 29th buy; (9) failed to object to the

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

[7] ***Franks v. Delaware***, 438 U.S. 154 (1978); ***State v. Mann***, 123 Wis. 2d 375, 367 N.W.2d 209 (1985).

[8] ***State v. Denny***, 120 Wis. 2d 614, 357 N.W.2d 12 (Ct. App. 1984).

introduction of fentanyl or to arrange independent testing of the substance; and (10) failed to object to inaccurate information used at sentencing.

¶41 To prove ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that the defendant was prejudiced by counsel's performance. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Our first inquiry is whether the defendant has shown that counsel's performance was deficient. ***Id.*** "Counsel's conduct is constitutionally deficient if it falls below an objective standard of reasonableness." ***State v. Thiel***, 2003 WI 111, ¶19, 264 Wis. 2d 571, 665 N.W.2d 305. Our second inquiry is whether the defendant was prejudiced by counsel's performance. ***Strickland***, 466 U.S. at 687. "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** at 694. A court need not address both aspects of the ***Strickland*** test if the defendant does not make a sufficient showing on either one. *See* ***State v. Johnson***, 153 Wis. 2d 121, 128, 449 N.W.2d 845 (1990).

¶42 "[T]he [trial] court must hold a hearing when the defendant has made a legally sufficient postconviction motion, and has the discretion to grant or deny an evidentiary hearing even when the postconviction motion is legally insufficient." ***State v. Allen***, 2004 WI 106, ¶12, 274 Wis. 2d 568, 682 N.W.2d 433. "[I]f the motion does not raise facts sufficient to entitle the movant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief," the trial court has discretion to deny a postconviction motion without a hearing. ***Id.***, ¶9. We review the trial court's decision to deny an evidentiary hearing under the erroneous exercise of discretion standard. *See* ***id.***

¶43 The trial court denied Carr's postconviction motion on ineffective assistance of counsel without a hearing after determining that the record conclusively demonstrated that Carr was not entitled to relief. In our review of the record, Carr fails to show that any of his trial attorneys performed deficiently or that their performance prejudiced his defense. Therefore, he has not satisfied the constitutional standard for an ineffective assistance of counsel claim. We review each claim.

¶44 First, Carr alleges that his trial attorneys were ineffective for failing to talk to the CI prior to trial. Carr argues that if any counsel had spoken to the CI, the CI would have explained that he did not implicate Carr in the controlled buys, which would have undermined the evidence at trial. The State argues that Carr's assertion that counsel could have impeached witnesses with this information is conclusory and speculative. His trial attorneys' strategies and decision-making to investigate or not investigate witnesses must be reasonable. *See* ***Thiel***, 264 Wis. 2d 571, ¶40. Here, the State presented overwhelming evidence in support of Carr's conviction and the case against Carr was established by more than the CI's statements to police. Even if we assumed that any of Carr's attorneys were deficient for failing to investigate the CI's statement independently, Carr has not alleged sufficient material facts to support a reasonable probability of a different outcome at trial; therefore, he makes no showing of prejudice.

¶45 Second, Carr alleges that his trial attorneys were ineffective for failing to file a ***Franks/Mann*** motion related to the search warrant. *See* ***Franks v. Delaware***, 438 U.S. 154 (1978); ***State v. Mann***, 123 Wis. 2d 375, 367 N.W.2d 209 (1985). Here, Carr alleges that because the CI claims that he did not tell the police

that Carr was involved, the police must have relied on false information to obtain a search warrant.[9] The trial court concluded that Carr "made absolutely no showing that the officers knowingly made any false statements in the affidavit that were necessary to a finding of probable cause." *See* ***Franks***, 438 U.S. at 154-55; ***State v. Mitchell***, 144 Wis. 2d 596, 604, 424 N.W.2d 698 (1988) (explaining that a defendant is only entitled to a suppression hearing on a search warrant if "'the defendant makes a substantial preliminary showing that a false statement made knowingly and intentionally, or with reckless disregard for the truth, was included in the warrant affidavit and that this allegedly false statement was necessary to the finding of probable cause'" (citation omitted)). Carr argues there were discrepancies in the search warrant affidavit; however, he does not allege the specific material facts of what trial counsel failed to pursue. Carr's allegations are conclusory and insufficient to support his claims that any of his trial attorneys' performances prejudiced his defense.

¶46 Third, Carr alleges that his trial attorneys were ineffective for failing to follow up on a potential mistaken identification of a vehicle. Carr argues that a similar car, owned by a houseguest, was parked outside his residence during the month of July, which would support his theory that another person or his roommate was the second man in the July 29 controlled buy. In cross-examination at trial, Attorney Kennedy raised the issue of the Blazer outside Carr's residence having different license plates and probed how the police determined it was the same vehicle, which was answered by both license plates being associated with the

[9] In May 2017, Carr attempted to file a motion *pro se* requesting a hearing challenging the truthfulness of Nacarrente's statements, pursuant to ***Mann***. As Carr was represented at the time, this motion was not considered. Our review shows that the motion itself was conclusory.

same VIN number. Because this issue was explored at trial, we conclude that Carr has failed to show that trial counsel performed deficiently. *See* ***State v. DeLain***, 2004 WI App 79, ¶18, 272 Wis. 2d 356, 679 N.W.2d 562, *aff'd*, 2005 WI 52, 280 Wis. 2d 51, 695 N.W.2d 484. Further, Carr fails to show how pressing this issue differently would have raised a reasonable probability of a different outcome.

¶47 Fourth, Carr alleges that his trial attorneys were ineffective for failing to arrange independent DNA testing or hire an expert to testify. Carr argues that in a new trial, Nacarrente would testify he put the firearm under the mattress, Carr would state the gun was not his, and a retained postconviction expert would testify that his review of the exhibits, testimony, and evidence showed that the State's analysis of the DNA evidence was not convincing under today's standards of knowledge. The trial court reviewed the expert's letter that discussed the possibility of secondary transference of DNA as the source of Carr's DNA on the firearm. The State argues that Carr has failed to sufficiently allege how trial counsel performed deficiently or how the new DNA expert would create reasonable doubt about Carr's guilt in the jury's mind, and Carr has not produced any evidence that the DNA analysis was flawed. He has not disputed that the possession charge was supported not only by his DNA, but by the firearm being found in the bedroom identified as Carr's based on his personal identification documents being stored in that room. Carr's allegations are an attempt to reargue the case under a different theory of defense. *See* ***State v. Maloney***, 2006 WI 15, ¶36, 288 Wis. 2d 551, 709 N.W.2d 436. Carr has failed to allege sufficient material facts that would allow this court to conclude that the failure to engage a DNA expert was prejudicial to his defense.

¶48 Fifth, Carr alleges that his trial attorneys were ineffective for failing to file an alibi defense. Carr argues that he informed his attorneys that he was in

Illinois on July 14, 2016, and three family members could attest to that. However, the State did not allege that Carr was present for the controlled buy on July 14th; instead, he was alleged to have arranged the buy location and price by telephone. Evidence of Carr's voice on the recordings was admitted at trial. The trial court concluded that given the "overwhelming evidence" that Carr participated in arranging the controlled buy by telephone, there was no reasonable probability that mounting an alibi defense would have altered the outcome. *Cf* ***State v. Cooks***, 2006 WI App 262, ¶63, 297 Wis. 2d 633, 726 N.W.2d 322 (counsel was ineffective for failing to investigate witnesses who would have added substance, credibility, and corroboration to defendant's alibi defense). Therefore, Carr has not shown prejudice to his defense based on the failure to pursue an alibi defense because the alleged alibi would not have cleared him from guilt or undermined the evidence in support of his conviction.

¶49 Sixth, Carr alleges that his trial attorneys were ineffective for failing to file a ***Denny*** motion showing there was a legitimate tendency that a third-party committed the crimes. *See* ***id.***, 120 Wis. 2d 614, 357 N.W.2d 12 (Ct. App. 1984). Carr alleges that his roommate was also coming and going from the same residence during this time period, which he argues means that trial counsel could have pursued a ***Denny*** defense. However, the State argues that Carr has not set forth sufficient material facts to support a claim of mistaken identity, much less explained how this theory refutes the recordings of Carr's voice arranging the buys or the photographs of Carr in the Blazer. Carr's conclusory allegations do not satisfy the requirement that "the defendant must show 'a legitimate tendency' that the third party committed the crime; in other words, that the third party had motive, opportunity, and a direct connection to the crime." ***State v. Wilson***, 2015 WI 48, ¶3, 362 Wis. 2d 193, 864 N.W.2d 52 (citation omitted). We conclude that

Carr has failed to allege that there was a reasonable probability of a different trial outcome if counsel had pursued a ***Denny*** defense; therefore, we conclude Carr has not shown prejudice to his defense.

¶50 Seventh, Carr alleges that Attorney Kennedy was ineffective for failing to question Nacarrente about statements made by the CI. Carr argues that Nacarrente's testimony would have been impeached if Attorney Kennedy had questioned Nacarrente about his statements about who gave the drugs to whom and who took the money in the controlled buys. The State argues that Carr's claims are conclusory and meritless. Carr has not alleged sufficient material facts that show how trial counsel would have impeached Nacarrente's credibility and instead only offers conclusory statements. Carr cannot satisfy the prejudice prong of our inquiry with speculation. *See* ***State v. Erickson***, 227 Wis. 2d 758, 774, 596 N.W.2d 749 (1999). We conclude that Carr has not shown there was a reasonable probability of a different outcome at trial if the questioning had happened; therefore, Carr has failed to show prejudice.

¶51 Eighth, Carr alleges that Attorney Kennedy was ineffective for failing to file a motion to compel the disclosure of the identity of a person who accompanied the CI during the July 29th buy. The DEA task force investigator and an officer involved in the surveillance of Carr both confirmed during their testimonies that a person accompanied the CI to the July 29, 2016 buy. Carr argues that if trial counsel had sought the name of the person with the CI during the controlled buy, counsel could have contacted and questioned the second person about the events. The State argues that Carr's claim is conclusory and meritless. Carr speculates about what this person might have said, but his speculation does not demonstrate that trial counsel performed deficiently. *See* ***State v. Gutierrez***, 2020 WI 52, ¶45, 391 Wis. 2d 799, 943 N.W.2d 870. Carr has shown no prejudice

to his defense by his attorney failing to compel the disclosure of the person with the CI at the July 29th buy.

¶52 Ninth, Carr alleges that Attorney Kennedy was ineffective for failing to object to the introduction of fentanyl or failing to arrange independent testing of the substance. Carr contends that Attorney Kennedy stated that prior to trial, he had not seen a State's report showing the presence of fentanyl. Carr argues that trial counsel should have objected to the potential admission of this evidence and he should have requested the substance be tested by an independent lab. Further, Carr argues that trial counsel erred when he brought up the issue of fentanyl in the heroin when he questioned a State Crime Laboratory controlled substance analyst. The State argues that the introduction of evidence at trial that some of the heroin tested positive for fentanyl did not prejudice Carr because he was only charged with manufacture or delivery of heroin, he was not charged with crimes based on fentanyl. Further, the State argues that Carr failed to sufficiently allege how additional testing of the heroin would have created reasonable doubt in the jury's mind or changed the result of the trial. To show prejudice on this issue, Carr would have to show that the failure to object to the fentanyl evidence undermined confidence in the reliability of the proceedings. *See* ***State v. Diehl***, 2020 WI App 16, ¶41, 391 Wis. 2d 353, 941 N.W.2d 272. He has not alleged how the jury hearing about fentanyl influenced the verdict convicting him on heroin charges. We conclude that Carr fails to allege sufficient facts to support his claim of prejudice and relies only on conclusory allegations; therefore, his argument fails.

¶53 Finally, Carr alleges that Attorney Kennedy was ineffective for failing to object to inaccurate information used at sentencing. Carr argues that the prosecutor "walk[ed] dangerously close" to appearing to assert that Carr caused individuals' deaths through drug sales. The State rebuts this allegation to state that

Carr's counsel was not deficient for failing to object to the sentencing remarks because the prosecutor did not claim that Carr caused anyone's death. The prosecutor argued that Carr's selling heroin while armed posed danger to the community. The trial court at sentencing agreed with the State that heroin was "tearing apart the community." In its decision denying Carr's postconviction motion, the trial court stated that the State's

> information was not inaccurate, and in any event, it did not impact the sentence the court imposed in this case. This court presided over the defendant's trial and based its sentence only on the evidence presented. The court in no way based its sentence on a belief that the defendant was involved in a heroin overdose death.

Carr's allegations are conclusory and fail to allege sufficient material facts to show that his defense was prejudiced by trial counsel failing to object. As there does not appear to be a valid objection, trial counsel cannot be considered deficient for failing to make a meritless objection. *See* ***State v. Pico***, 2018 WI 66, ¶28, 382 Wis. 2d 273, 914 N.W.2d 95.. Therefore, Carr has not satisfied either the deficiency or prejudice inquiry to show ineffective assistance of counsel.

¶54 Carr's claims of ineffective assistance of counsel fail. Trial counsel is not considered ineffective merely for having an unsuccessful trial outcome or for having unsuccessful trial strategy. *See* ***State v. Maloney***, 2004 WI App 141, ¶23, 275 Wis. 2d 557, 685 N.W.2d 620, *aff'd*, 2006 WI 15, 288 Wis. 2d 551, 709 N.W.2d 436. In his written decision, the trial court stated that the "balance of the [Carr's] claims [were] speculative, conclusory, undeveloped and lack[ed] merit." Carr simply did not establish prejudice to his defense or deficient performance in any of his claims against any of his counsel.

¶55 The trial court exercised its discretion to deny Carr's motion for postconviction relief without an evidentiary hearing, having determined he did not plead sufficient material facts and presented conclusory allegations. *See* ***Allen***, 274 Wis. 2d 568, ¶9. We sustain the trial court's exercise of discretion when it "examined the relevant facts, applied the proper legal standards, and engaged in a rational decision-making process." ***State v. Bentley***, 201 Wis. 2d 303, 318, 548 N.W.2d 50 (1996). We conclude that the trial court engaged in a rational process in light of the relevant facts and applicable law when it denied Carr's claims of ineffective assistance of counsel.

CONCLUSION

¶56 For the reasons stated above, we conclude that Carr is not entitled to a new trial or an evidentiary hearing on the basis of newly discovered evidence or ineffective assistance of counsel. We affirm the judgment and trial court order denying his motion for postconviction relief.

By the Court.—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

STATE OF WISCONSIN | CIRCUIT COURT Branch 24 | MILWAUKEE COUNTY

STATE OF WISCONSIN,

Plaintiff,

vs.

ROBERT CARR, JR.,

Defendant.

Case No. 16CF003473

DECISION AND ORDER
DENYING MOTION FOR POSTCONVICTION RELIEF

On November 11, 2019, the defendant by his attorney filed a Rule 809.30 motion for postconviction relief seeking a new trial on grounds of newly discovered evidence and ineffective assistance of counsel. The defendant supplemented that motion with additional claims of ineffective assistance of counsel on November 26, 2019. On April 11, 2018, a jury found the defendant guilty of one count of delivery of heroin (>3-10 grams) (PTAC), one count of delivery of heroin (<3 grams) (PTAC) and one count of possession of a firearm by a felon. On May 2, 2018, the court sentenced him to a total of 15 years of initial confinement followed by 10 years of extended supervision. The court ordered a briefing schedule in this matter to which the parties have responded.[1]

The two delivery of heroin charges in this case stem from two controlled buys police conducted through the use of a confidential informant (hereinafter, "CI"). The CI made arrangements to and successfully completed transactions for the purchase of heroin from the

[1] Although Judge J.D. Watts issued the briefing schedule order in this case, the matter has been transferred back to this court for a decision because this court presided over the defendant's jury trial, and moreover, the defendant alleges that this court considered inaccurate information at his sentencing hearing.

Appendix B.

defendant and his son/codefendant, Nacarrente Carr, on July 14, 2016 and July 29, 2016. In both buys, the CI was given pre-recorded buy money, was searched before and after the purchases and was surveilled during the drug purchases. Testimony regarding the controlled buys was further corroborated at trial with a photograph of the defendant driving the vehicle with Nacarrente during the July 29, 2016 purchase as well as a recorded phone calls where the defendant can be heard arranging the purchases. On July 29, 2016, a search warrant was also executed at the residence of the defendant and Nacarrente, and a loaded .45 caliber handgun was found between the mattress and box spring of the bed in the defendant's room. The defendant's DNA was found on the handgun.

The defendant's motion raises a litany of postconviction claims, which are enumerated in the State's response brief[2] as follows: 1) newly discovered evidence in the form of a sworn affidavit from co-defendant Nacarrente Carr, 2) newly discovered evidence from the testifying confidential informant and ineffective assistance for failing to "check out the information pertaining to the confidential informants," 3) ineffective assistance of counsel for failing to file a ***Franks/Mann*** motion, 4) ineffective assistance of counsel for failing to "follow up" on a potential mistaken identification of a vehicle, 5) ineffective assistance of counsel for failing to question Nacarrente Carr about statements made by a confidential informant, 6) ineffective assistance for failing to file a motion to compel the disclosure of an alleged second confidential informant, 7) ineffective assistance for failing to undertake independent DNA analysis, 8) ineffective assistance for failing to object to the introduction of fentanyl or failing to undertake independent testing of the substance, 9) ineffective assistance of counsel related to inaccurate information used at sentencing, 10) ineffective assistance of counsel for failure to file an alibi

[2] The numbering of the defendant's claims in his brief and supplement is inconsistent.

defense, 11) ineffective assistance for failing to sufficiently meet with the defendant, and 12) ineffective assistance for failing to file a ***Denny***[3] motion.

The court has reviewed the record and pleadings and agrees with the analysis set forth in the State's response, which the court incorporates herein by reference. The two recantation affidavits plainly fail to meet the requirements necessary to warrant relief based on newly discovered evidence. The Wisconsin Supreme Court held in ***State v. McAlister***, 380 Wis. 2d 684, ¶ 33 (2018) that:

> A claim of newly discovered evidence that is based on recantation also requires corroboration of the recantation *with additional newly discovered evidence*. As we have explained, "recantations are inherently unreliable." Therefore, corroboration requires *newly discovered evidence that* (1) there is a feasible motive for the initial false statement; and (2) there are circumstantial guarantees of the trustworthiness of the recantation.

(Emphasis added). (Citations omitted). Here, the defendant has provided no newly discovered evidence of a feasible motive for either the CI or Nacarrente to give their initial (purportedly) false statements, nor has the defendant identified any other newly discovered circumstantial guarantees of trustworthiness. The motives for both witnesses' original statements were known at the time of trial, and their original statements were corroborated by the observations of the investigating officers, the photograph, the audio recording of the phone call, and the presence of the defendant's DNA on the gun. In sum, the court agrees with the State that the recantation do not meet the requirements of ***McAlister***, and therefore, are insufficient to warrant a new trial or other relief.

The defendant also raises several claims of ineffective assistance of counsel. ***Strickland v. Washington***, 466 U.S. 668, 694 (1984), sets forth a two-part test for determining whether an attorney's actions constitute ineffective assistance: deficient performance and prejudice to the

[3] ***State v. Denny***, 120 Wis. 2d 614 (Ct. App. 1984)

defendant. Under the second prong, the defendant is required to show "that there is a reasonable probability, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id.*** at 694; also ***State v. Johnson***, 153 Wis.2d 121, 128 (1990). A court need not consider whether counsel's performance was deficient if the matter can be resolved on the ground of lack of prejudice. ***State v. Moats***, 156 Wis.2d 74, 101 (1990). In order to obtain an evidentiary hearing, the defendant must allege within the four corners of the document itself sufficient material facts for reviewing courts to meaningfully assess a defendant's claim; that is, who, what, where, when, why, and how (the five "w's" and one "h"). ***State v. Balliette***, 336 Wis.2d 358, ¶ 59 (2011) (*citing* ***State v. Allen***, 274 Wis.2d 568 (2004)).

The defendant's claim that counsel was ineffective for failing to bring a ***Franks/Mann*** motion, which is likewise predicated on the CI's recantation, also fails. The defendant has made absolutely no showing that the officers knowingly made any false statements in the affidavit that were necessary to a finding of probable cause. *See* ***Franks v. Delaware***, 438 U.S. 154, 155-56 (1978), and ***State v. Mitchell***, 144 Wis. 2d 596 (1988) ("A defendant is not entitled to a hearing on a motion to suppress evidence obtained through a search warrant unless the defendant makes a substantial preliminary showing that a false statement made knowingly and intentionally, or with reckless disregard for the truth, was included in the warrant affidavit and that this allegedly false statement was necessary to the finding of probable cause"). Even assuming, *arguendo*, counsel could have produced the recantation affidavit from the CI in support of a ***Franks/Mann*** motion, that would have been insufficient to make a substantial preliminary showing that police had knowingly and intentionally made false statements that were necessary to a finding of probable cause. The motion and affidavit are insufficient to demonstrate that counsel's performance was deficient or that the defendant was prejudiced by that deficiency.

The defendant also claims that counsel was ineffective for failing to bring an alibi defense. He asserts that he "told my attorneys on the date of the first confidential buy I was with my brother, Antonio Phipps, his wife Joan Phipps and NaShannon celebrating his birthday in Illinois. And my attorneys never followed up on this and never filed an Alibi defense." (Defendant's motion, Exhibit 1). On February 12, 2020, three weeks after the State filed its response in this case, the defendant filed affidavits from Antonio Phipps and Joan Phipps.[4] Both claim they were with the defendant at Six Flags in Illinois on the date of the controlled buy (July 14, 2016).[5] The defendant was convicted of delivering heroin as a party to a crime after the CI spoke with both the defendant and Nacarrente Carr by phone to arrange to purchase heroin. That phone conversation was recorded and played for the jury. On that call, Nacarrente is heard initially answering the phone, before the CI asks to talk to his "daddy." Narcarrente then turned the phone over to the defendant, his father, who can then be heard on the phone arranging the drug transaction with the CI. (Tr. 4/10/2018 a.m., pp. 40-42). Additionally, Nacarrente testified that he and his father were in the business of selling heroin and that his father made the arrangements by phone for him (Nacarrente) to deliver heroin to the CI on July 14, 2016 at a specific location selected by the defendant. (Tr. 4/10/2018 p.m., 65-58). Given the

[4] The court issued a briefing schedule in this matter after the postconviction motion was filed with the understanding that counsel had filed a complete and final motion. While briefing was ongoing counsel filed a supplement to her motion. After briefing had concluded, counsel filed a letter with unsigned affidavits, then affidavits, and finally a letter from an expert. The court does not look favorably upon this kind of piecemeal postconviction practice. Attorneys who file postconviction motions in Milwaukee County are expected to file a complete and final motion, not a work in progress. If an attorney does not have affidavits or other evidence needed to support a postconviction claim, the attorney has the option of petitioning the Court of Appeals for additional time to file a postconviction motion. Counsel is advised any future postconviction motions filed in Milwaukee County must include any affidavits or other evidence counsel deems necessary to support her claims.

[5] Postconviction counsel advised the court by letter dated January 30, 2020 that an affidavit from Rachel Johnson, who was purportedly the fourth member of the group that went to Six Flags, was also forthcoming. As of the date of the drafting of this motion, no such affidavit has been filed with the court. Additionally, no explanation has been offered as to the apparent inconsistency between the defendant's allegation that a person named "NaShannon" was with him on July 14, 2016 and the January 30, 2020 allegation that Rachel Johnson was the fourth individual in the group. Notably, the affidavits filed on February 12, 2020 simply refer to the fourth person as the defendant's girlfriend. In any event, an affidavit from this forth individual, whether it was NaShannon or Rachel Johnson would not alter the court's decision in this case.

overwhelming evidence that the defendant participated in arranging the drug buy on July 14, 2016, which included audio recordings of the defendant, there is no reasonable probability that testimony that the defendant was at Six Flags on July 14, 2016 would have altered the outcome.[6]

On February 14, 2020, the defendant filed yet another supplement to his motion, denoted "Exhibit 8," which is a two page letter from Alan Friedman, PhD. In the letter, Dr. Friedman sets forth his opinion that "touch DNA" can in some cases be the result of a secondary transfer if that person's DNA was transferred to the hands of a second individual and that person touched the object. The inference that the defendant's DNA was directly transferred to the firearm by him is supported by the other evidence that the defendant possessed the firearm – namely, that it was found between the mattress and box spring in a room containing multiple identifiers for the defendant, including his wallet. Additionally, Nacarrente testified that the pistol belonged to the defendant and that he carried with him often. (Tr. 4/10/2018, pp. 72-74). Under the circumstances, the court is not persuaded that generic testimony regarding the *possibility* of secondary transference of DNA would have created a reasonable possibility of a different result as to the felon in possession of a firearm charge.

The defendant also raises a claim that he was sentenced based on inaccurate information because the prosecutor supposedly claimed that he had engaged in a drug sale that had resulted in an overdose death. The court has reviewed the sentencing transcript and can find no support for the defendant's assertion. Rather, the prosecutor discussed the extent to which the distribution of heroin in the community has generally contributed to an increasing number of overdose deaths.

[6] Moreover, the affidavits allege that the defendant and his girlfriend allegedly drove separately to Illinois on July 13, 2016, and they "let [Antoinio] know when they reached the motel..." Joanne states that she and her husband were up by 6 a.m. on July 14, 2016 but that the defendant and his girlfriend joined them later after they slept in. There is no specific allegation that Joanne or Antonio had any physical contact with the defendant before he was recorded on the phone at around 11:30 a.m. on July 14, 2016 arranging the drug transaction. Consequently, even if a jury found Joanne and Antonio credible, they still could have found that the defendant had participated in the phone call.

(Tr. 5/1/2018, pp. 15-20). This information was not inaccurate, and in any event, it did not impact the sentence the court imposed in this case. This court presided over the defendant's trial and based its sentence only on the evidence presented. The court in no way based its sentence on a belief that the defendant was involved in a heroin overdose death. Frankly, if evidence had been presented that the defendant had been directly responsible for an overdose death, it may have resulted in a *longer* sentence. The defendant's motion for postconviction relief on these grounds is denied.

The balance of the defendant's claims are speculative, conclusory, undeveloped and lack merit for the reasons set forth in the State's response, and the court adopts the response as its decision on these claims. If the defendant fails to allege sufficient facts in his motion to raise a question of fact, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the trial court may in the exercise of its legal discretion deny the motion without a hearing. ***Nelson v. State***, 54 Wis. 2d 489, 497-498 (1972). Assertions that his attorney 'failed to keep him fully apprised of the events,' 'failed to completely review all of the necessary discovery material' and 'failed to completely and fully investigate any and all matters' are simply not the type of allegations that raise a question of fact. ***State v. Washington***, 176 Wis. 2d 205, 215-216 (Ct. App. 1993).

THEREFORE, IT IS HEREBY ORDERED that the defendant's motion for postconviction relief is **DENIED.**

Janet C. Protasiewicz
Circuit Court Judge

Dated: 2/18/2020

CIRCUIT COURT MILWAUKEE CO. WISCONSIN SEAL

OFFICE OF THE CLERK

Supreme Court of Wisconsin

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October 18, 2021

To:

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

No. 2021AP1372-W Carr v. Winkleski L.C.#2016CF3473
No. 2020AP360-CR State v. Carr L.C.#2016CF3473

A petition for writ of habeas corpus having been filed on behalf of petitioner, Robert Carr, Jr., and considered by this court, together with the petition for review filed June 8, 2021;

IT IS ORDERED that the petition for writ of habeas corpus is granted, ex parte; and

Appendix C

IT IS FURTHER ORDERED that the relief requested in the habeas petition, that the petition for review filed in State v. Carr, No. 2020AP360-CR, be reinstated and deemed timely-filed is granted. See State ex rel. Nichols v. Litscher, 2001 WI 119, 247 Wis. 2d 1013, 635 N.W.2d 292; State ex rel. Schmelzer v. Murphy, 201 Wis. 2d 246, 548 N.W.2d 45 (1996); and

IT IS FURTHER ORDERED that the petition for review is denied, without costs. The petition does not meet any of the criteria for review set forth in Wis. Stat. § 809.62(1r).

Sheila T. Reiff
Clerk of Supreme Court

Wisconsin Supreme Court and Court of Appeals Case Access

Robert Carr, Jr. v. Dan Winkleski

Appeal Number 2021AP001372 - W

Supreme Court

CASE HISTORY

Status	Court	Filing Date	Anticipated Due Date	Activity
OCCD	SC	11-24-2021		Remittitur

OCCD	SC	11-04-2021		Letter/Correspondence

Comment: Letter from Atty. Cornwall indicating their representation has ended

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OCCD SC 10-18-2021 Opinion/Decision

Opinion: Miscellaneous Order
Decision: Other Pages: 2
Order Text: IT IS ORDERED that the petition for writ of habeas corpus is granted, ex parte; and
IT IS FURTHER ORDERED that the relief requested in the habeas petition, that the petition for review filed in State v. Carr, No. 2020AP360-CR, be reinstated and deemed timely-filed is granted. See State ex rel. Nichols v. Litscher, 2001 WI 119, 247 Wis. 2d 1013, 635 N.W.2d 292; State ex rel. Schmelzer v. Murphy, 201 Wis. 2d 246, 548 N.W.2d 45 (1996); and
IT IS FURTHER ORDERED that the petition for review is denied, without costs. The petition does not meet any of the criteria for review set forth in Wis. Stat. 809.62(1r).

OCCD SC 08-10-2021 Petition for Writ of Habeas Corpus

Filed By: Andrea Cornwall
Submit Date: 8-11-2021
Decision: (G) Grant
Decision Date: 10-18-2021
IT IS ORDERED that the petition for writ of habeas corpus is granted, ex parte; and
IT IS FURTHER ORDERED that the relief requested in the habeas petition, that the petition for review filed in State v. Carr, No. 2020AP360-CR, be reinstated and deemed timely-filed is granted. See State ex rel. Nichols v. Litscher, 2001 WI 119, 247 Wis. 2d 1013, 635 N.W.2d 292; State ex rel. Schmelzer v. Murphy, 201 Wis. 2d 246, 548 N.W.2d 45 (1996); and
IT IS FURTHER ORDERED that the petition for review is denied, without costs. The petition does not meet any of the criteria for review set forth in Wis. Stat. 809.62(1r).

OCCD SC 08-10-2021 Fee Waived

Comment: SPD

STATE OF WISCONSIN : CIRCUIT COURT : MILWAUKEE COUNTY

STATE OF WISCONSIN,

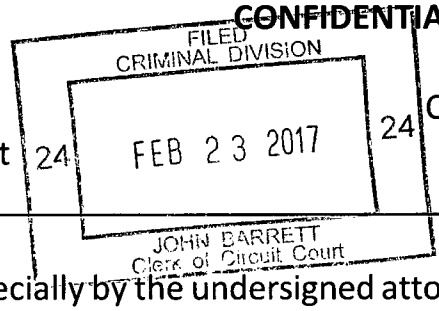
Plaintiff

-vs-

ROBERT CARR,

Defendant

DEFENDANT'S MOTION TO COMPEL DISCLOSURE OF CONFIDENTIAL INFORMANT



Case No. 16-CF-3473

The defendant, appearing specially by the undersigned attorney and reserving the right to challenge the court's jurisdiction, moves the court for an order compelling the prosecution to disclose the identity and location of all unnamed or confidential informants relied on or otherwise employed by the state or any of its agents in this case. The defendant brings this motion pursuant to the 5th, 6th, and 14th Amendments to the United States Constitution; article I, sections 1, 7, and 8 of the Wisconsin Constitution; sections 905.10 and 971.31(2) and (5) of the Wisconsin Statutes; and *McCray v. Illinois*, 386 U.S. 300 (1967), *Roviaro v. United States*, 353 U.S. 53 (1957), and *State v. Outlaw*, 108 Wis. 2d 112, 321 N.W.2d 145 (1982).

AS GROUNDS, the defendant asserts that he is charged in two counts with selling drugs to a confidential informant. It is essential for trial preparation purposes that the identity of the informant or informants be disclosed.

Dated: February 20, 2017

Ann T. Bowe
Attorney for the Defendant

Ann T. Bowe
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414-344-4434

Appendix D

ORDER APPOINTING COUNSEL

Client's Full Name:	Robert Carr	Client ID:	map1204134
Address:	New Lisbon Correctional Institution PO Box 4000 New Lisbon, WI 53950 4000	SPD ID:	184008285Z
		File No:	18P-40-A-P08285
		Case Group #:	2310064
		Date of Birth:	5/31/1980
		DOC #:	313510

Statutes:

Nature of Case: 941.29 Possession of firearm A 1 Cnts:

961.41(1)(d)1 Manufacture/Deliver Heroin (< 3g) 1 Cnts:
Charge Modifier 939.05 Party to crime

961.41(1)(d)2 Manufacture/Deliver Heroin (> 3g <10g) 1 Cnts:
Charge Modifier 939.05 Party to crime

County and Court:	Milwaukee Circuit Court BR. 24, Rm 608		**Case No:**
Other Information:	Judge:	Protasiewicz Janet	16-CF-3473
	Record Created:	September 27, 2018	
	Judgment Entered:	May 01, 2018	
	Type:	Felony: Jury Trial - 2-3 days	

IN ACCORDANCE WITH CHAPTER 977 OF THE WISCONSIN STATUTES, I HEREBY APPOINT THE FOLLOWING ATTORNEY TO REPRESENT THE ABOVE NAMED INDIVIDUAL IN RELATION TO THE ABOVE ENTITLED PROCEEDINGS.

Attorney's Name:	Diane C Lowe	Local Counsel	
Address:	1809 N. Cambridge Avenue, Ste 306 Milwaukee, WI 53202	SPD Office Handling:	Madison
		Appointed By:	Joseph N. Ehmann
State Bar No:	1017781	Case Opened, Court Record & Transcripts Ordered: September 27, 2018	
Phone Number:	(414) 345-0949		

Office of the State Public Defender - Notice to Clients - File Retention Policy

When an attorney represents an individual, s/he makes and keeps a file of the documents and work done on the case. Attorneys on staff with the Office of the State Public Defender (SPD) create and maintain such files for each case. This notice applies only to cases handled by staff attorneys of the Office of the State Public Defender. If your case has been assigned to a private attorney, please consult that attorney about his or her file retention policy.

Upon the conclusion of the representation in this case, the SPD will, upon your request, deliver the original file or any portion requested, to you, along with any of your original documents or other property that the SPD has in its possession.

If you do not request your file, the SPD will retain it for a period of at least five years after the matter is closed. At any point during this period, you may request delivery of the file. If you do not request the file before the end of the five-year period, the SPD may, in its discretion, destroy the file and its contents without further notice to you.

Appendix E

CASE 1

Appendix F

484 F.2d 1

United States Court of Appeals,

Fourth Circuit.

Herman Russell McLAWHORN, III, Appellant,

v.

STATE OF NORTH CAROLINA, Appellee.

No. 73-1231.

Argued April 2, 1973.

Decided Sept. 10, 1973.

Synopsis

Habeas corpus proceeding brought by state prisoner based on State's refusal to reveal identity of informant who participated in illegal activities with respect to narcotic drugs. The United States District Court for the Middle District of North Carolina, at Greensboro, Gordon, Chief Judge, denied petition and prisoner appealed. The Court of Appeals, Boreman, Senior Circuit Judge, held that, inasmuch as informant was participant in incident which resulted in arrest and conviction of petitioner, identity of informant should have been disclosed to defense.

Reversed and remanded.

On Appeal

Opinion

BOREMAN, Senior Circuit Judge:

Herman Russell McLawhorn, III (hereafter petitioner or McLawhorn) appeals the district court's denial of his petition for a writ of habeas corpus. He complains that the State's refusal to reveal the identity of an informant who participated in illegal activities with respect to narcotic drugs of which petitioner was convicted in state court is a denial of due process. Since we conclude that this refusal to reveal the identity of a participant in the offenses charged constitutes a denial of fundamental fairness required by the Fourteenth *3 Amendment, we reverse and remand.

I

During the summer and fall of 1971, Detective Sylvester Daughtry, an officer in the Greensboro, North Carolina, Police Department, was conducting an extensive undercover investigation of illegal drug sales in the area with the assistance of an unidentified informant. The informant told Daughtry that McLawhorn was involved in the drug traffic and offered to arrange a sale of cocaine. On August 7, 1971, after making several telephone calls to McLawhorn in an effort to arrange a "buy," the informant met Daughtry and began looking for McLawhorn on the streets. The informant saw McLawhorn driving a car and signaled him to stop. After a brief conversation the informant called to Daughtry and introduced him as a potential customer. They entered McLawhorn's car who then drove them a short distance while

the informant negotiated a sale of one gram of cocaine. According to Daughtry's testimony, McLawhorn then removed one gram of cocaine from under the dashboard of his car and sold it to Daughtry and the informant for forty-five dollars.1

123On December 11, 1971, approximately four months after the sale,2 McLawhorn was arrested and later indicted. He was charged in separate counts with illegal transportation,3 possession4 and sale5 of a narcotic drug.6 He first moved to dismiss the indictments for failure to provide a speedy trial.7 McLawhorn alleged at the hearing on the motion and again at trial that the delay in charging him resulted in his inability to secure the attendance of the informant as a witness to the defense of entrapment. The trial court denied the motion to dismiss and held that the State was entitled to invoke the privilege of nondisclosure to support its refusal to reveal the informant's identity.8

*4 Form his conviction and sentence on the three counts McLawhorn unsuccessfully appealed to the North Carolina Court of Appeals. An attempted appeal to the Supreme Court of North Carolina was denied for failure to raise a substantial constitutional question. An application for a writ of habeas corpus was denied by the district court in a memorandum opinion. We grant a certificate of probable cause for appeal and consider the petition on its merits.

II

Petitioner contends that the State may not conceal facts concerning the true identity, present whereabouts, and status of an "informant" to whom delivery of the drug was made and who alone made all arrangements for the sale.9

Although this circuit has not had previous occasion to examine fully the limits of the nondisclosure privilege,10 decisions of other circuits and the Supreme Court are persuasive. After reviewing those cases and taking into account underlying policy considerations, we conclude that the State could not properly claim the nondisclosure privilege under the facts of this case.

4The leading case involving the right of an accused to require disclosure of the identity of an informant is Roviaro v. United States, 353 U.S. 53, 77 S. Ct. 623, 1 L.Ed.2d 639 (1957). There the Court characterized the problem as one calling for the balancing of the public interest in protecting the flow of information respecting criminal activities against the individual's right to prepare his defense. No fixed rule with respect to disclosure was established by the Court. Whether nondisclosure is warranted must depend upon the particular circumstances of each case, taking into consideration the crime charged and the possible defenses, the possible relevance and significance of the informant's testimony, and other related factors. Roviaro v. United States, supra, 353 U.S. at 62, 77 S.Ct. 623; Miller v. United States, 273 F.2d 279, 281 (5 Cir. 1959); Gilmore v. United States, 256 F.2d 565, 566 (5 Cir. 1958).

5The public interest referred to by the Supreme Court in Roviaro, supra, concerns the prevention, detection, and prosecution of criminal acts. We are keenly aware that law enforcement officers dealing with a large number of crimes, especially in the area of the narcotics traffic, must depend upon informants to furnish information concerning criminal activities; privileged communications of this nature must be encouraged if law enforcement officers are to be held to the task of solving and prosecuting crime; if the identity of the informant must be routinely disclosed undoubtedly such sources of information would disappear almost immediately. Still, this valid public interest must be balanced against the individual's right to prepare a defense. The privilege of nondisclosure must give way where

disclosure is essential or relevant and helpful *5 to the defense of the accused, lessens the risk of false testimony, is necessary to secure useful testimony, or is essential to a fair determination of the case. Roviaro v. United States, supra; Miller v. United States, supra; Gilmore v. United States, supra; Portomene v. United States, 221 F.2d 582 (5 Cir. 1955); Sorrentino v. United States, 163 F.2d 627 (9 Cir. 1947). Limitations on the privilege of nondisclosure arise from the Fourteenth Amendment's requirement of fundamental fairness to the accused. Roviaro v. United States, supra; Benton v. Maryland, 395 U.S. 784, 89 S. Ct. 2056, 23 L.Ed.2d 707 (1969).

678In undertaking to balance the interests here involved we look to the decisions of the Supreme Court and of other circuits as they appear properly applicable to the particular circumstances and relevant factors of this case. It is important to determine those who have been treated by the courts as tipsters as distinguished from those labeled as "participants." In determining whether invocation of the privilege of nondisclosure is to be sustained a distinction has frequently been made based on the nature of the informant's activities, that is, whether the informant is an active participant in the offense or is a mere tipster who supplies a lead to law enforcement officers to be pursued in their investigation of crime.11 Applying this distinction, disclosure of the informant's identity is required where the informant is an actual participant, particularly where he helps set up the criminal occurrence. Roviaro v. United States, supra; Gilmore v. United States, supra; Portomene v. United States, supra; United States v. Conforti, 200 F.2d 365 (7 Cir. 1952); Sorrentino v. United States, supra. Therefore, one of the factors tending to show that the prosecution is not entitled to withhold from the accused information as to the identity of an informant is the qualification of the informant to testify directly concerning the very transaction constituting the crime.12

9On the other hand, the privilege of nondisclosure ordinarily applies where the informant is neither a participant in the offense, nor helps set up its commission, but is a mere tipster who only supplies a lead to law investigating and enforcement officers. Miller v. United States, supra; Williams v. United States, 273 F.2d 781 (9 Cir. 1959); Anderson v. United States, 106 U.S. App.D.C. 340, 273 F.2d 75 (1959); Pegram v. United States, 267 F.2d 781 (6 Cir. 1959); United States v. Conforti, supra; Sorrentino v. United States, supra. This appears to be the generally accepted rule where the informant merely provides a lead or tip that furnishes probable cause for a search and seizure. Ordinarily, knowledge of the identity of a tipster would not be essential in preparing the defense of the accused and the public interest in protecting such informants should weigh heavily in favor of nondisclosure.13 However, where the informant is an actual participant, and thus a witness to material and relevant events, fundamental fairness dictates that the accused have access to him as a potential witness. In such instances disclosure of identity should be required.

*6 10The facts in the case at bar clearly indicate that the informant was a participant in the incident which resulted in the arrest and conviction of petitioner. The unidentified informant initially suggested that petitioner dealt in drugs. There is evidence that he made confidential telephone calls to petitioner in an attempt to arrange a sale. He made the initial face-to-face contact with the petitioner, conversed with him several moments in private and then introduced him to Daughtry. The informant, riding in the front seat with petitioner while Daughtry rode in the back seat, observed and engaged in the negotiations for the sale. He actually took delivery of the drug, passed the package back to Daughtry, and paid at least a part of the purchase price with money he had on his person. It is apparent that the informant engineered the events leading up to the criminal occurrence and was a material witness who could testify directly from personal knowledge concerning the transportation,14 possession,15 and

sale16 of cocaine. Indeed his testimony was mandated in order to accomplish the purpose of a criminal trial–finding the truth. It is our view that participation by the informant is the essential distinction and we conclude that the prosecution's claim of the nondisclosure privilege should have been denied by the trial court. Quoting from Roviaro, supra, which seemingly cannot be materially distinguished from the case at bar, we note that:

"His [the informant's] testimony might have disclosed an entrapment. He might have thrown doubt upon petitioner's *7 identity or on the identity of the package. He was the only witness who might have testified to petitioner's possible lack of knowledge of the contents of the package that he 'transported' . . . . The desirability of calling . . . [informant] as a witness, or at least interviewing him in preparation for trial, was a matter for the accused rather than the Government to decide." Roviaro v. United States, 353 U.S. at 64, 77 S.Ct. at 629.

This rule with respect to an informant's participation protects the interests to be balanced. It does not tend to curtail the necessary flow of information of criminal activities since the privilege of nondisclosure may be invoked where the informant is a mere tipster. The rule also operates to protect the accused in the proper preparation of his defense. Where participation, per se, qualifies the informant as a material witness, to require the accused to present proof of a need for the informant's testimony, as would the district court in this case, places an unjustifiable burden on the defense.17 Evidence of entrapment, misidentification, intent, or knowledge often is available only to those who actively participate in the transaction; unless the accused waives his Fifth Amendment right to remain silent, and testifies, he is forced to rely upon prosecution witnesses to provide proof of need. A more compelling instance is where the participating informant alone contrived and perpetrated an entrapment,18 as contended by petitioner in the case at bar. In such circumstances the accused could show a need for disclosure of the identity of the informant, a material witness, only by testifying to the facts of entrapment.

III

11We find no merit in the contention here that any error inherent in the prosecution's failure to reveal the identity of the informant was waived. Petitioner first sought to learn the identity of the informant by questioning Detective Daughtry at the hearing on the motion to dismiss the indictment; an objection to the question was made by the prosecution and was sustained by the court. At trial petitioner again asked the name of the confidential informant and whether he was still acting as an informant; again the court promptly sustained objections to these questions.

12The State argues that even if the refusal to reveal the informant's identity was error it was not prejudicial. While it is true that petitioner made no effort to subpoena the informant as a witness his every effort to obtain sufficient information to secure a subpoena was thwarted. Admittedly he did not tell the court in so many words that he needed the informant's name so that he could be called as a witness but, at the hearing on the pretrial motion to dismiss, *8 McLawhorn's attorney stated that "witnesses are not available to this defendant to show entrapment." This statement clearly alerted the court to the purpose of the questions.19 McLawhorn cited the refusal of the State to identify the informant as prejudicial error in all subsequent appeals and in this petition for habeas relief. This question was clearly and fully presented to the state courts, to the district court, and is properly before this court.

The judgment of the district court is reversed and the case is remanded with directions that petitioner be released and discharged from custody unless the State of North Carolina shall elect to retry him within a reasonable period of time to be fixed by the court.

Reversed and remanded.

All Citations

484 F.2d 1

Footnotes

1

Daughtry testified at the pretrial hearing on a motion to dismiss and again at trial that he paid twenty dollars and the informant paid an additional twenty-five dollars to McLawhorn for a single bag of cocaine. McLawhorn was charged with a single sale of cocaine to Daughtry. It was contended that this constituted a fatal variance between the indictment and the evidence since the sale was made to the two jointly. This contention appears to have been abandoned on appeal to the Supreme Court of North Carolina.

2

During that four-month period Daughtry continued his undercover investigation. His desire to conceal his own identity while operating as an undercover officer was assigned as his reason for delaying the filing of charges.

3

N.C.Gen.Stat. § 90-111.2 (1965 Repl.Vol.).

4

N.C.Gen.Stat. § 90-88 (1965 Repl.Vol.).

5

Id.

6

Actually, two indictments were returned against the petitioner. One charged him with illegal transportation of a narcotic drug and in the other he was charged in one count with illegal possession and in the second count with sale of that drug. All of these charges arose from the incidents described. Convictions on all the three counts contained in the two indictments were consolidated in the final judgment and the petitioner was sentenced to imprisonment for one term of five years.

7

McLawhorn claims the four-month delay between the alleged illegal activities and the arrest denied him due process of law and his rights under the Sixth Amendment. The Sixth Amendment is applicable only after a person has been accused of a crime; the relevant statute of limitations protects against

preaccusation delay. United States v. Marion, 404 U.S. 307, 92 S.Ct. 455, 30 L. Ed.2d 468 (1972). Where an unreasonable preaccusation delay is shown to have impaired the defendant's ability to defend himself, there may be a denial of due process which precludes prosecution. Ross v. United States, 121 U.S.App.D.C. 233, 349 F.2d 210 (1965). In light of our ultimate decision we find it unnecessary to consider this issue.

8

It is clear that McLawhorn was acquainted with the informant; however, the extent of that acquaintanceship is not disclosed and the informant may have been known only by an alias. There is some evidence in the record that the person McLawhorn suspected was the informant had left the jurisdiction and could not be located by the defense. The State refused to reveal the informant's true name or current address or divulge whether the informant was still actively assisting the police despite defense requests for that information.

9

The petitioner did not specifically argue that the informant was a participant in the transportation and possession or that the State could not properly withhold his identity on those counts. Counsel for the petitioner and the State have treated this error on appeal in the state courts and in this petition for habeas relief as a single question: whether the convictions and sentence should be set aside on the ground that the refusal to reveal the informant's identity denied fundamental fairness. We have examined this issue as to each distinct charge and conclude that since the informant played a part with the petitioner in the very transaction upon which the State relies to prove illegal transportation, possession and sale of cocaine, he was entitled to require the State to reveal the identity of the informant with respect to all of the charges arising from that transaction. See notes 14, 15, and 16 infra.

10

We have previously recognized the privilege to withhold the identity of an informant. United States v. Fisher, 440 F.2d 654 (4 Cir. 1971); United States v. Pitt, 382 F.2d 322 (4 Cir. 1967); United States v. Whiting, 311 F.2d 191 (4 Cir. 1962). In each of these cases the informant was a mere tipster who supplied information sufficient to show probable cause for the issuance of a search warrant.

11

In Roviaro it was held error for the trial court to deny, prior to trial, an accused's demand for a bill of particulars as to a participating informant's identity and address where the accused was charged with illegal transportation and sale of heroin. The Court noted that the informant "helped to set up the criminal occurrence and had played a prominent part in it." 353 U.S. at 64, 77 S.Ct. at 629. The Court concluded that when the informant's name and address were thus requested, the prosecution should have been required to supply the information or suffer dismissal of that count.

12

Roviaro v. United States, 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed.2d 639 (1957); Miller v. United States, 273 F.2d 279 (5 Cir. 1959); Gilmore v. United States, 256 F.2d 565 (5 Cir. 1958). This is not to say that the informant's mere physical presence at the scene of the alleged crime would be sufficient to hold him a participant and thus affect the nondisclosure privilege. Miller v. United States, supra.

13

The seemingly impossible task of balancing these interests without being aware of the relevancy of the information possessed by the informant, be he merely a tipster or a participant, can be obviated by utilizing an in camera hearing. The Third Circuit has approved such hearings in informant cases and has described the procedure in the following language:

"[T]he trial judge conducted an in camera confrontation with the informer, who was made to take the oath and testify as to any relevant knowledge he had pertaining to the crime. A record of that in camera session was transcribed and sealed so that only an appellate court would have access to its contents. The advantage of the procedure is that it enables the court to view with a keener perspective the factual circumstances upon which it must rule and attaches to the court's ruling a more abiding sense of fairness than could otherwise have been realized."

United States v. Jackson, 384 F.2d 825, 827 (3 Cir. 1967). Under this procedure the defendant is not compelled to show need and the trial court is not left to mere speculation as to the materiality of the informant's testimony.

14

In Roviaro the defendant was convicted of illegal sale and transportation of heroin. On appeal to the Supreme Court of the United States the Government did not defend its failure to disclose the informant's identity with respect to the conviction on the sale count but argued that the informant did not sufficiently participate in the transportation to compel disclosure for a conviction on that count. The Court reversed the conviction, specifically responding to the Government's argument by noting that the informant was so closely involved in the criminal occurrence and the evidence introduced at trial was so closely related to the informant that disclosure was essential to a fair trial on all counts.

We reach the conclusion that the informant's participation in the transportation aspect of Roviaro cannot be materially distinguished from the informant's participation in the case at bar.

15

United States v. Conforti, 200 F.2d 365 (7 Cir. 1952).

Roviaro indicates that if the participation of the informant in the transaction was such as to make him a relevant and material witness to the sale then his testimony should be available to the accused on all charges arising from that criminal occurrence. 353 U.S. at 63, 77 S.Ct. 623.

16

Roviaro v. United States, supra; Portomene v. United States, 221 F.2d 582 (5 Cir. 1955). In both of these cases the informant was the unidentified party who was charged in the indictment as the buyer of drugs. Hence, "it was evident from the face of the indictment that . . . [the informant] was a participant in and a material witness to that sale." Roviaro v. United States, 353 U.S. at 65 n. 15, 77 S.Ct. at 630. The Court in Roviaro, however, noted that the disclosure of the informant's identity is appropriate even when he "is not expressly mentioned . . . [in the indictment, if the] charge, when viewed in connection with the evidence introduced at the trial is so closely related to . . . [the informant] as to make his identity and testimony highly material." 353 U.S. at 63, 77 S.Ct. at 629.

17

The majority in Roviaro clearly did not require the petitioner to present evidence of entrapment or other need to overcome the claim of privilege of nondisclosure where the informant was an actual participant in the offense charged.

Justice Clark, dissenting in Roviaro, argued that the accused must demonstrate need before disclosure is proper. He noted:

"The petitioner has not mentioned a single substantial ground essential to his defense which would make it necessary for the Government to name the informer. The Court mentions that there might have been entrapment. Petitioner not only failed to claim entrapment but his counsel appears to have rejected any suggestion of it in open court. . . . It should be noted that petitioner's counsel stated in open court that petitioner knew the informant and believed he was dead." 353 U.S. at 69, 77 S.Ct. at 632. (footnote omitted).

Justice Clark's view was clearly rejected by the Court.

18

The occasional instance of entrapment is most likely to occur when the purchase of drugs is made outside of police supervision. The payment of contingent fees to informants, the use of informants who are drug addicts, promises of immunity and pay-offs in drugs create a self-interest on the part of the informant. This self-interest in "making a buy" may lead to excessive appeals to the seller's sympathies or other unconscionable tactics. See Note, 31 U.Chi.L. Rev. 137 (1963).

19

The record indicates the defense was unable to locate the informant. The use of an alias or a change of occupation and residence by a participating informant may well render useless information obtained through a very casual acquaintanceship. See Portomene v. United States, 221 F.2d 582 (5 Cir. 1955). Only by disclosing all material information, especially informant's true name and address (see Roviaro, supra) does the prosecution discharge its duty under the due process clause. Giglio v. United States, 405 U.S. 150, 92 S.Ct. 765, 31 L.Ed.2d 104 (1971); Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

CASE 2

Appendix F

208 Wis.2d 463

Supreme Court of Wisconsin.

STATE of Wisconsin, Plaintiff–Respondent–Petitioner,

v.

Ronald V. McCALLUM, Defendant–Appellant.

No. 95–1518.

Argued Dec. 4, 1996.

Decided April 18, 1997.

Synopsis

Defendant, convicted of second-degree sexual assault of a minor, moved to withdraw Alford plea after victim recanted accusation. The Circuit Court, Brown County, Peter J. Naze, J., denied motion, and defendant appealed. The Court of Appeals, Myse, J., 198 Wis.2d 149, 542 N.W.2d 184, reversed and remanded, and state petitioned for review. The Supreme Court, Bablitch, J., held that: (1) legal standard to apply in determining whether there was reasonable probability of different outcome was whether there was reasonable probability that jury, looking at both accusation and recantation, would have reasonable doubt as to defendant's guilt; (2) rule that newly discovered recantation evidence must be corroborated by other newly discovered evidence was met by defendant; and (3) under the circumstances, appropriate remedy was remand to circuit court for redetermination, applying correct legal standard, of defendant's request to withdraw plea.

Affirmed in part, reversed in part, and remanded with directions.

Abrahamson, C.J., filed concurring opinion.

Opinion

¶ 1 WILLIAM A. BABLITCH, Justice.

Ronald V. McCallum (McCallum) was convicted of second degree sexual assault of H.L., a minor, under Wis. Stat. § 948.02(2). The prosecution was based solely on H.L.'s uncorroborated testimony. One year after McCallum was convicted, H.L. recanted her accusation. Relying on H.L.'s recantation, McCallum filed a post-conviction motion to withdraw his Alford plea. Concluding that H.L.'s recantation was "less credible" than her original accusation, the Circuit Court for Brown County, Judge Peter J. Naze, presiding, denied McCallum's motion. The court of appeals held that the circuit court had applied the wrong legal standard in determining whether there was a reasonable probability of a different outcome, and reversed and remanded for a new trial.1 We agree. The standard is whether there is a reasonable probability that a jury, looking at both the accusation and the recantation, would have a reasonable doubt as to the defendant's guilt. **709 However, we reverse that part of the court of appeals' decision granting a new trial. We remand to the circuit court to apply *469 the proper legal standard to determine whether McCallum should be allowed to withdraw his plea.

¶ 2 The facts pertinent to this appeal are as follows: In February 1993, McCallum, his girlfriend, Sandra L., and Sandra's daughter, H.L., lived together. Although Sandra was still married to H.L.'s father, they were in the process of divorcing. During this time, H.L. accused McCallum of sexual contact. She reported her accusation to the Green Bay police department. McCallum was charged with one count of second degree sexual assault. A preliminary hearing was held at which H.L. was the sole witness against McCallum. She repeated her accusations against him. On May 19, 1993, maintaining his innocence, McCallum entered an Alford plea and was convicted of second degree sexual assault.

¶ 3 In May 1994, H.L. recanted. After speaking with her mother, H.L. wrote a letter, which was given to McCallum's attorney, stating that she had made up the story of McCallum grabbing her breast so she could get him out of her mother's life. She hoped her parents would reconcile. In the letter, H.L. explained that she set up a situation "so [McCallum] didn't have a witness to back up his story." Her letter concluded:

He was arrested on Feb 26, 1993 & was sent to jail that weekend. He was released and had to move out because of the case. He was sentenced to 6 months in the County Jail for a crime he didn't commite [sic]. I realize that what I said was not the truth and I'm sorry that I said what I said. I want him to be free of all this because I feel that I commited [sic] an error so long ago that wasn't right. I just hope Ron McCallum, the corts [sic] and everybody else will forgive me.

*470 *208 Based on H.L.'s recantation of her original statement, McCallum filed a post-sentencing motion to withdraw his Alford plea. Sandra and H.L. testified at the post-conviction hearing. During the hearing, Judge Naze explained to H.L. that she had "a right to not answer any question that might tend to incriminate her" and a right to talk to an attorney. He also explained that if she were to testify that she had lied under oath, she would be committing a criminal or delinquent juvenile offense. Consequently, the hearing was interrupted and resumed after the court appointed an attorney for H.L.

¶ 5 The facts elicited from H.L. and Sandra's testimony at the post-conviction hearing follow: McCallum was Sandra's boyfriend with whom she had a six-year relationship. When she heard of H.L.'s allegation, Sandra was skeptical but did not accuse H.L. of lying. Sandra maintained her relationship with McCallum throughout the case despite H.L.'s original allegation and despite the no contact order. She would have liked to have continued living with McCallum. Nonetheless, Sandra never explained to H.L. that if H.L. would admit that she lied, McCallum could live with them again. When asked whether H.L. knew of the no contact order, Sandra answered that she had never mentioned it to H.L.

¶ 6 In early 1993, Sandra was in the process of obtaining a divorce. During that period, H.L. was skipping school, coming home late, and not obeying house rules. Because Sandra worked nights, and McCallum worked the day shift, he was responsible for enforcing the rules and disciplining H.L.

¶ 7 H.L. testified that during this time, she was upset, hurt, and angry because her mother and father were going through a divorce. She blamed McCallum *471 for the divorce and felt that he was trying to take the place of her father. She resented the fact that he was disciplining her. At the time H.L. accused him of sexual contact, McCallum had "grounded" her for almost three months. She first related her accusation to her sister, Joy, because she believed Joy would report the assault to Social Services.

¶ 8 In May 1994, H.L. told her mother that she had lied to the police and to the circuit court about what happened with McCallum, and she wanted to resolve it. H.L. asked her mother what she could do. Her

mother replied that she could talk to McCallum's attorney **710 or write a letter. On May 3, 1994, H.L. handed her mother a letter stating that she had lied. Sandra testified that she neither participated in the letter writing, nor knew H.L. was writing it. At H.L.'s suggestion, the letter was witnessed by Sandra and H.L.'s grandmother.

¶ 9 H.L. testified that everything in the letter was true and that no one told her what to say or assisted her in any way. She insisted that she had falsely accused McCallum of sexual contact; no one influenced her to recant; and she understood that she was admitting to perjury. She confessed her lie to her mother and wrote the letter because she felt that McCallum "shouldn't have a criminal record because I lied about the stuff—about him supposedly sexually assaulting me."

¶ 10 H.L. further testified that, at the time of her accusation, she hoped to get McCallum out of the home so that her mother and father would have a chance to get back together. She believed the accusation would accomplish this because her friend's brother had to move out of the house when he sexually *472 assaulted his sister. She made the specific allegation "because there were no witnesses and ... no evidence."

¶ 11 Under cross-examination, H.L. agreed that things were "better" when McCallum was living in the home, and she was aware that in order for him to return to the home, she would have to return to court and recant her accusation.

¶ 12 After the hearing, the circuit court denied McCallum's motion to withdraw his Alford plea. It found H.L.'s recantation to be uncorroborated and less credible than her accusations. After finding "the victim's uncorroborated recantation to be less credible" than the accusations she made to her sister, to the police, and to the circuit court at the preliminary hearing, the circuit court concluded that there was no reasonable probability that a different result would occur at trial.

¶ 13 The court of appeals reversed, ordering a new trial and stating that if a reasonable jury could believe the recantation, that determination would be sufficient to meet the requirement of a reasonable probability of a different result at trial. We agree that the circuit court applied the wrong standard of law. We remand to the circuit court to apply the correct standard. In addition, the court of appeals held that corroboration is required, and McCallum has met the corroboration requirement. We agree.

¶ 14 This case presents three issues: (1) Whether the circuit court applied an erroneous legal standard when determining that there was not a reasonable probability of a different outcome. (2) Whether the recantation of an uncorroborated allegation must be supported by newly discovered evidence corroborating evidence of the recantation, and, if so, whether that requirement was met. (3) Whether the appropriate *473 remedy, in this case, is remand directing a grant of the motion to withdraw the plea, or for redetermination by the circuit court, applying the correct legal standard, of McCallum's request to withdraw his plea.

1234¶ 15 After sentencing, a defendant who seeks to withdraw a guilty or no contest plea carries the heavy burden of establishing, by clear and convincing evidence, that withdrawal of the plea is necessary to correct a manifest injustice. State v. Krieger, 163 Wis.2d 241, 249, 471 N.W.2d 599 (1991). The withdrawal of a plea under the manifest injustice standard rests in the circuit court's discretion. Id. at 250, 471 N.W.2d 599. We will only reverse if the circuit court has failed to properly exercise its

discretion. Id. An exercise of discretion based on an erroneous application of the law is an erroneous exercise of discretion. State v. Martinez, 150 Wis.2d 62, 71, 440 N.W.2d 783, 787 (1989).

56¶ 16 Newly discovered evidence may be sufficient to establish that a manifest injustice has occurred. Krieger, 163 Wis.2d at 255, 471 N.W.2d 599. For newly discovered evidence to constitute a manifest injustice and warrant the withdrawal of a plea the following criteria must be met. First, 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 **711 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. Finally, when the newly discovered evidence is a witness's recantation, we have stated that *474 the recantation must be corroborated by other newly discovered evidence. Zillmer v. State, 39 Wis.2d 607, 616, 159 N.W.2d 669 (1968).

I.

¶ 17 The first issue we address is whether the circuit court applied an erroneous legal standard when concluding that there was not a reasonable probability of a different outcome. In determining whether there was a reasonable probability of a different result, the circuit court stated that H.L.'s recantation was less credible than her accusation. Therefore, the court concluded, McCallum could not withdraw his Alford plea because "there is no reasonable probability that a different result would occur at trial."

7¶ 18 The problem here rests with the circuit court's determination that H.L.'s recantation was less credible than her accusation. That is not the appropriate standard. The correct legal standard when applying the "reasonable probability of a different outcome" criteria is whether there is a reasonable probability that a jury, looking at both the accusation and the recantation, would have a reasonable doubt as to the defendant's guilt. This standard is equally applicable to motions to withdraw an Alford plea, motions to withdraw a guilty plea, and motions for a new trial. State v. Krieger, 163 Wis.2d 241, 255, 471 N.W.2d 599 (Ct.App.1991).

89¶ 19 The circuit court concluded that there was no reasonable probability that a different result would be reached at a new trial because H.L.'s recantation was less credible than her accusation. One does not necessarily follow from the other. A reasonable jury *475 finding the recantation less credible than the original accusation could, nonetheless, have a reasonable doubt as to a defendant's guilt or innocence. It does not necessarily follow that a finding of "less credible" must lead to a conclusion of "no reasonable probability of a different outcome." Less credible is far from incredible. A finding that the recantation is incredible necessarily leads to the conclusion that the recantation would not lead to a reasonable doubt in the minds of the jury. However, a finding that a recantation is less credible than the accusation does not necessarily mean that a reasonable jury could not have a reasonable doubt. Therefore, in sum, in determining whether there is a reasonable probability of a different outcome, the circuit court must determine whether there is a reasonable probability that a jury, looking at both the accusation and the recantation, would have a reasonable doubt as to the defendant's guilt.2 If so, the circuit court must grant a new trial. Accordingly, we hold that the circuit court employed the wrong legal standard *476 when determining that there was not a reasonable probability of a different outcome. Therefore, we affirm that part of the court of appeals' decision reversing the circuit court.

II.

10¶ 20 Next, we consider the issue of corroboration. The rule is that newly discovered recantation evidence must be corroborated by other newly discovered evidence. Zillmer, 39 Wis.2d at 616, 159 N.W.2d 669; Rohl v. State, 64 Wis.2d 443, 219 N.W.2d 385 (1974). McCallum argues that the corroboration requirement should be abandoned because **712 of the high hurdle it creates for the defendant who must corroborate—with newly discovered evidence—the recantation of an uncorroborated accusation. The State of Wisconsin (State) argues that the corroboration requirement must be maintained, even in the case of uncorroborated accusations, because recantation testimony is inherently unreliable. Although we agree with the State that the corroboration requirement must be maintained, we further conclude that it was met in this case.

¶ 21 There is sound reason to adhere to the requirement. Recantations are inherently unreliable. Dunlavy v. Dairyland Mut. Ins. Co., 21 Wis.2d 105, 114, 124 N.W.2d 73 (1963). The recanting witness is admitting that he or she has lied under oath. Either the original sworn testimony or the sworn recantation testimony is false. Because of the unreliability of recantations, we reaffirm the rule that recantation testimony must be corroborated by other newly discovered evidence.

¶ 22 Alternatively, McCallum argues that the corroboration requirement was satisfied in this case by *477 the newly discovered evidence contained in H.L.'s post-sentencing statement regarding her motive for the accusation against McCallum.

11¶ 23 We agree with the court of appeals that the difficulty in this kind of case is manifest: How can a defendant corroborate the recantation of an accusation that involves solely the credibility of the complainant, inasmuch as there is no physical evidence and no witness. McCallum must corroborate H.L.'s recantation of her uncorroborated accusation. The court of appeals, recognizing the unique difficulty presented by this case, properly concluded that McCallum met the corroboration requirement:

[T]he degree and extent of the corroboration required varies from case to case based on its individual circumstances. Here, the sexual assault allegation was made under circumstances where no others witnessed the event. Further, there is no physical evidence that could corroborate the original allegation or the recantation. Under these circumstances, requiring a defendant to redress a false allegation with significant independent corroboration of the falsity would place an impossible burden upon any wrongly accused defendant. We conclude, under the circumstances presented here, the existence of a feasible motive for the false testimony together with circumstantial guarantees of the trustworthiness of the recantation are sufficient to meet the corroboration requirement.

¶ 24 State v. McCallum, 198 Wis.2d 149, 159–60, 542 N.W.2d 184 (1995). We agree. The rule has been, and remains, that recantation testimony must be corroborated by other newly discovered evidence. We hold that the corroboration requirement in a recantation *478 case is met if: (1) there is a feasible motive for the initial false statement; and, (2) there are circumstantial guarantees of the trustworthiness of the recantation.

12¶ 25 We conclude that McCallum has established a feasible motive for H.L.'s accusation. First, she wanted her divorcing parents to reconcile. Second, she resented McCallum for attempting to take the place of her father. Finally, she was angry at McCallum for disciplining her. The newly discovered requirement is met inasmuch as the motives for H.L.'s initial accusation were unknown until she revealed them when she recanted.

¶ 26 We further conclude that there are sufficient circumstantial guarantees of the trustworthiness of H.L.'s recantation. The recantation is internally consistent, and was given under oath. Furthermore, the recantation is consistent with circumstances existing at the time of H.L.'s initial allegation, as testified to by H.L.'s mother: that she and H.L.'s father were in the process of divorcing, and that McCallum had disciplined H.L. for her misconduct involving school truancy, coming home late, and not observing rules of the house. Finally, H.L. was advised at the time of her recantation that she faced criminal consequences if her initial allegations were false. In sum, McCallum has established newly discovered evidence corroborating H.L.'s recantation, and has also provided sufficient circumstantial guarantees of trustworthiness of the recantation. Here, the **713 newly discovered evidence requirement is met inasmuch as the motives for the initial accusation were unknown to the trier of fact at the time of trial.

*479 III.

¶ 27 McCallum asks us to apply the proper standard and conclude that H.L.'s recantation raises a reasonable probability of a different outcome, and hence, remand to the circuit court for a new trial—a trial in which both H.L.'s recantation and her accusation are admissible. He argues that where, as here, the circuit court erroneously exercised its discretion by applying the wrong legal standard, a new trial is required. We disagree.

13¶ 28 Although we could apply the proper legal standard to the facts of this case and determine whether McCallum should be permitted to withdraw his Alford plea, Libke v. State, 60 Wis.2d 121, 129, 208 N.W.2d 331 (1973), our independent review of the record indicates that the wiser course, under these facts, is to remand this case to the circuit court for a hearing to apply the proper legal standard.

¶ 29 Recantation, by its very nature, calls into question the credibility of the witness or witnesses. During the preliminary hearing, under oath, H.L. accused McCallum of pinching her breasts. During the post-conviction hearing, again under oath, she swore that her original sworn testimony was false. During at least one of these hearings, H.L. lied under oath.

¶ 30 H.L.'s credibility is crucial to the application of the proper legal standard, and the circuit court judge is in a much better position to resolve the question of whether the recantation would raise a reasonable doubt in the minds of a jury that is looking at both the recantation and the original statement.

¶ 31 This court is bound by the cold, appellate record. We have read and reread the testimony of H.L. and her mother. Nonetheless, our consideration is limited to the written word and rarely can credibility be *480 judged by words alone. More often, credibility, or lack thereof, is revealed by a close examination of the witness's demeanor. The cold record does not reflect the witness's demeanor and all its facets; the circuit court has the advantage of observing them.

¶ 32 Because the circuit court is in a better position to determine whether a reasonable probability exists that a reasonable jury looking at both the recantation and the original accusation would have a reasonable doubt as to McCallum's guilt, we defer this determination to the circuit court. Accordingly, the court of appeals' decision granting a new trial is reversed and the cause remanded to the circuit court to apply the proper legal standard to determine whether McCallum should be allowed to withdraw his plea.3

The decision of the court of appeals is affirmed in part, reversed in part, and cause remanded to the circuit court with directions.

¶ 33 SHIRLEY S. ABRAHAMSON, Chief Justice (concurring).

I agree with the mandate but write separately to elaborate on the two major issues I believe are raised in the present case. The first is the standard of review applied by an appellate court to a circuit court's denial of a motion for a new trial based on recantation testimony. The second is the legal standard a circuit court applies to determine whether there is a reasonable probability of a different outcome were the fact finder to hear the evidence presented at the *481 initial proceeding and to hear the recantation and other new evidence. I shall address each of these issues in turn, but I begin with a general discussion of recantation testimony in the context of a motion for a new trial based on newly discovered evidence.

I.

¶ 34 Recantation is not a rare phenomenon in the law. Recantation by a prosecution witness, even the sole prosecution witness, **714 does not automatically entitle a defendant to a new trial. Courts view recantation with great caution because of the possibility of undue influence or coercion.

¶ 35 The policy justifying retrial on the basis of recantation is that only guilty persons should be convicted and only by proof beyond a reasonable doubt. Important countervailing policies militate against retrial: the integrity of the initial fact finding process, the finality of judgments, judicial economy, and prejudice to the state caused by delay. Accordingly, exacting standards are applied when a defendant moves for a new trial.

¶ 36 Recantation testimony has proved troublesome for federal and state courts. A rich literature about recantation evidence exists in court decisions and in legal commentary but it is not discussed in Wisconsin cases. This literature explores the tension between the policy concerns which militate for and against the grant of a new trial on the basis of recanted testimony.1

*482 In Wisconsin, recantation evidence is treated as one of several types of newly discovered evidence to be analyzed under the "manifest injustice" test. The manifest injustice test for a new trial has five parts and is derived from a Georgia case, Berry v. State, 10 Ga. 511 (Ga.1851).2 The five elements are: (1) The *483 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; (4) the evidence is not merely cumulative; and (5) "a reasonable probability exists of a different result in a new trial." State v. Krieger, 163 Wis.2d 241, 255, 471 N.W.2d 599 (Ct.App.1991). See also Wis. Stat. § 805.15(3) (test for new civil trial on basis of newly discovered evidence) and § 972.11 (rules of practice in civil actions generally applicable in criminal proceedings). Unique to Wisconsin, a sixth element is added when the newly discovered evidence is recantation testimony: corroboration, which is discussed in the majority opinion.

¶ 38 Other jurisdictions apply a special rule, the so-called Larrison test derived from Larrison v. United States, 24 F.2d 82, 87–88 (7th Cir.1928), to recantation evidence. The Larrison test for recantation evidence is based on the theory that perjured testimony affects the integrity of the judicial process in a way that other newly discovered evidence does not.3

**715 *484 In this case there is no serious dispute that the defendant met the first four elements for a circuit court to order a new trial based on newly discovered evidence.4 The determinative element in this case is the fifth Berry element, namely that a defendant's motion for a new trial will be granted only if a reasonable probability exists of a different result in a new trial.

II.

¶ 40 The first issue is the standard of review of a circuit court's determination on a new trial motion. The majority opinion concludes that a motion for a new trial on the ground of newly discovered evidence is addressed to the sound discretion of the circuit court and that an appellate court reviews the circuit court's determination for erroneous exercise of discretion.

¶ 41 Numerous prior Wisconsin cases state this standard of review; precedent is abundant. I find no case, however, that sets forth an analysis of the standard of review. Indeed careful assessment of the cases reveals that although this standard of review is oft *485 repeated, it is not necessarily applied.5 Courts have sometimes applied a different standard of review to each of the five elements of the newly discovered evidence rule.6 The standard may also depend on whether the same trial judge heard both the trial evidence and the recantation and other new evidence.7

*486 Because a defendant must satisfy each of the five elements, State v. Sarinske, 91 Wis.2d 14, 38, 280 N.W.2d 725 (1979); State v. Kaster, 148 Wis.2d 789, 801, 436 N.W.2d 891 (Ct.App.1989), I conclude that a circuit **716 court should make a separate finding for each element it considers. Thus I would have the standard of review depend on the element being considered.

¶ 43 The first two elements of the five-part test, whether the evidence was discovered after trial and whether the defendant was not negligent in seeking evidence, are factual determinations. A circuit court's determination of these issues should therefore be reviewed by an appellate court using the clearly erroneous standard, the standard applied to factual findings. Wis. Stat. § 805.17(2) (1995–96).8

¶ 44 The third and fourth elements of the five-part test, whether the evidence is material to an issue and whether the evidence is not merely cumulative to the evidence presented at trial, are evidentiary determinations that ordinarily are addressed to the discretion of the circuit court. A circuit court's determination of these issues should be reviewed by an appellate court using the erroneous exercise of discretion standard. State v. Fishnick, 127 Wis.2d 247, 257, 378 N.W.2d 272 (1985); State v. Wollman, 86 Wis.2d 459, 464, 273 N.W.2d 225 (1979).

*487 I discuss below the standard of review of the fifth element of the test, whether a reasonable probability exists of a different result in a new trial.

III.

¶ 46 In determining whether a reasonable probability exists of a different result when a jury considers both the evidence in the initial proceeding and the recantation and other new evidence, the circuit court must make two determinations.

¶ 47 First, the circuit court makes a preliminary threshold determination about the credibility of the recanting witness, that is, whether the witness is worthy of belief by the jury. Second, if the recantation is not incredible, the circuit court determines whether a reasonable probability exists of a different result at a new trial.

¶ 48 The first step is for the circuit court to determine whether the recantation is credible, that is, worthy of belief. The circuit court does not determine whether the recantation is true or false. Such a holding would render meaningless the right to have a jury determine the ultimate issue of guilt based on all the evidence. The circuit court merely determines whether the recanting witness is worthy of belief,

whether he or she is within the realm of believability, whether the recantation has any indicia of credibility persuasive to a reasonable juror if presented at a new trial.9

¶ 49 A circuit court's finding that a recanting witness is incredible as a matter of law is sufficient to support its conclusion that no reasonable probability *488 exists of a different result at a new trial. State v. Terrance J.W., 202 Wis.2d 497, 502, 550 N.W.2d 445 (Ct.App.1996).10

¶ 50 The circuit court did not find coercion or duress in the present case, nor did it find the recantation testimony inherently incredible. The State does not assert that the recanting witness is inherently incredible.

¶ 51 An appellate court should not upset a finding of credibility unless it is clearly erroneous. Terrance J.W., 202 Wis.2d at 502, 550 N.W.2d 445. This standard of review of the circuit court's finding of credibility recognizes that the circuit court is in a much better position than an appellate court to resolve whether the witness is inherently incredible.

¶ 52 Once a circuit court finds that a recanting witness is credible, then it must decide whether the defendant has satisfied the **717 crux of the fifth element: whether a reasonable probability exists of a different result in a new trial.

¶ 53 The court has used different language in describing the fifth element. In some cases the fifth element is set forth as in the majority opinion: "whether a reasonable probability exists of a different result in a new trial." Krieger, 163 Wis.2d at 255, 471 N.W.2d 599.

¶ 54 The element has also been stated as: "it must be reasonably probable that a different result would be reached on a new trial." State v. Herfel, 49 Wis.2d 513, 522, 182 N.W.2d 232 (1971) (emphasis *489 added) (citing Estate of Eannelli, 269 Wis. 192, 68 N.W.2d 791 (1955)); Estate of Teasdale, 264 Wis. 1, 4, 58 N.W.2d 404 (1953) (emphasis added). This formulation is also used in the majority opinion. Majority op. at 711.

¶ 55 A third phrasing is that "it must be reasonably probable that a different result will be reached on a new trial." Eannelli, 269 Wis. at 214, 68 N.W.2d 791 (emphasis added) (citing Teasdale).

¶ 56 The court of appeals in the present case stated the standard as whether "a reasonable jury could accept the recantation as true" and whether "there is a reasonable probability of a different result." State v. McCallum, 198 Wis.2d 149, 158, 542 N.W.2d 184 (Ct.App.1995).

¶ 57 Do these various formulations of the fifth element differ? Do they give sufficient guidance to the circuit court and court of appeals? The majority opinion gathers these formulations into one formulation, namely that the probability of a different result in a criminal case exists when there is a reasonable probability that a jury would have a reasonable doubt as to the defendant's guilt. Maj. Op. at 711.

¶ 58 I would gather these various formulations of the fifth element into the test for reversal for prejudicial error with which this court has struggled and with which we are all familiar. Indeed recantation testimony discovered after trial can be recast, for purpose of analysis, as testimony that was erroneously omitted from the initial trial.

¶ 59 The prejudicial error test states, in language similar to that used in manifest injustice cases, that an error is prejudicial and reversal of a conviction is required if "there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable *490 doubt respecting guilt." Strickland v. Washington, 466 U.S. 668, 694–95, 104 S.Ct. 2052, 2068–69, 80 L.Ed.2d 674 (1984), discussed in State v. Dyess, 124 Wis.2d 525, 543, 370 N.W.2d 222 (1985). Reasonable probability for purposes of prejudicial error is not strictly outcome determinative. Reasonable probability does not mean that it is more likely than not that a new trial would produce a different result.11 The circuit court does not determine which of the two statements is more credible; the circuit court is not to act as a thirteenth juror.12 "[A] reasonable probability of a different outcome is one that raises a reasonable doubt about guilt, a 'probability sufficient to undermine confidence in the outcome' of the proceeding." Dyess, 124 Wis.2d at 544–545, 370 N.W.2d 222, quoting Strickland, 466 U.S. at 694, 104 S.Ct. at 2068.

¶ 60 I conclude that a circuit court may usefully apply the prejudicial error inquiry to the fifth element of our recantation test. Thus when a witness' recantation and other new evidence undermine the circuit court's confidence in the correctness of the outcome at the original trial or hearing, a new trial should be ordered.

**718 *491 On appellate review, I conclude that an appellate court should review the reasonable probability determination under the erroneous exercise of discretion standard. Having heard both the evidence at the original trial or hearing, or even just the evidence on the motion hearing, a circuit court is in a better position than an appellate court to determine whether confidence in the correctness of the outcome at the original trial or hearing has been undermined.13