

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 17, 2017

Diane M. Fremgen
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. 2016AP1613-CR

Cir. Ct. No. 2004CF4624

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANDRE M. HICKS,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County:
JONATHAN D. WATTS, Judge. *Affirmed.*

Before Brennan, P.J., Kessler and Brash, 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. Andre M. Hicks appeals from an order denying his postconviction motion for a new trial based on newly discovered evidence and from an order denying his motion for reconsideration. The circuit court rejected Hicks’s argument that another man’s confession to Hicks’s crimes constitutes newly discovered evidence that entitles Hicks to a new trial. We affirm the orders.

BACKGROUND

¶2 A jury found Hicks guilty of three crimes that were committed in 2004: armed robbery with the use of force, first-degree reckless injury, and being a felon in possession of a firearm.¹ At trial, three men, all of whom knew Hicks, testified that they were gambling in a garage when Hicks arrived, displayed a gun, and took money from one man. Another man drew a gun and a gun battle ensued, injuring multiple people. In addition to the three men who identified Hicks as the robber, a fourth man said Hicks got into an argument with someone, but the man did not see Hicks display a weapon or demand money.² A fifth man testified that a man entered the garage, displayed a gun, and robbed someone, but he said that the robber was not Hicks. Throughout the trial and on appeal, Hicks maintained that he was not the man who committed the crimes. We affirmed Hicks’s conviction. *See State v. Hicks*, No. 2007AP2432-CR, unpublished slip op. (WI App Dec. 30, 2008).

¹ The record uses the terms “crime” and “crimes.” We have not altered quoted language from transcripts and affidavits. In this decision, both “crime” and “crimes” refer to the incidents that occurred in a Milwaukee garage in 2004, which led to Hicks’s conviction for three felonies.

² The State attempted to impeach that man’s testimony by calling the detective who interviewed him hours after the incident. The detective testified that the man told him that Hicks displayed a gun, took money from another man, and later shot the gun into the garage.

¶3 In 2015, Hicks retained counsel and filed the postconviction motion seeking a new trial that is at issue in this appeal. The motion alleged that another prison inmate, Raeshawn Wiseman, committed the crimes of which Hicks was convicted. The motion contained an affidavit from Wiseman that stated he was driving in a car with another person, saw some men playing craps (a dice game) in a garage, and got out of the car to rob the men. Wiseman's affidavit said he displayed a gun, "told the people in the garage to empty their pockets," took money off the ground, and returned fire when a man in the garage started shooting. Wiseman then fled the scene. Wiseman's affidavit continued:

I didn't know anyone was in custody for this crime I committed until 2013 when a friend told me that someone was in prison for the crime I committed. That friend told me his name was Andre Hicks.

I didn't act on this information for about a year. I then told two prison guards at the New Lisbon Correctional Institution that I was guilty of the crimes for which Andre Hicks was in prison. I also told a social worker and a psychologist.

The reason I finally told of the crime I had committed is because I would want someone else to help me if I were in the position of Andre Hicks. After I told [the prison staff members] that I committed the crimes ... I was moved to Fox Lake Correctional Institution.

(Paragraph numbering omitted.)

¶4 After learning that Wiseman was on work release at the time of the shooting, the State did not oppose Hicks's request for an evidentiary hearing. At that hearing, Wiseman invoked his Fifth Amendment right against self-incrimination. Although Wiseman could no longer be prosecuted for the 2004 crimes due to the expiration of the applicable statutes of limitations, counsel

appointed for Wiseman opined that he could be subject to perjury, false swearing, or obstruction charges if he chose to testify at the hearing.

¶5 While Wiseman did not testify, the defense did call three correctional officers who testified about conversations they had with Wiseman. Lukas Robertson testified that Wiseman “came up to the officer’s station and said that he would like to go to restrictive housing.” Robertson continued:

[Wiseman] said that he was talking to [Kwesi] Amonoo or another offender at the institution about his religion and confessed to him that he had committed a crime but was never convicted of it.

And Mr. Amonoo explained to him that there was a guy in [the same prison] that was incarcerated for the crime that he said he committed.

Robertson testified that Wiseman said he “held up a dice game in a garage and robbed them and shots were fired, and he had shot ... at people.” Robertson said Wiseman also told him that “Amonoo asked him a specific location” and when Wiseman provided it, Amonoo told Wiseman “that he knew Mr. Hicks [was] ... incarcerated for that exact crime.”

¶6 Timothy Crapser testified that he and another correctional officer, Michael Subjek, were asked to interview Wiseman about his statements. Crapser said that Wiseman told him he held up men in a garage and “when he was leaving, one of the guys drew a gun [and] started firing.”

¶7 Subjek testified that he did not remember details about what Wiseman said about the crimes, except that Wiseman said he had fired shots into the garage and someone else returned fire. Subjek also said he later spoke with Hicks and advised Hicks not to take action against Wiseman in the prison. Subjek said Hicks told him he would likely pursue the issue with a lawyer.

¶8 Hicks testified at the hearing. He said that he did not commit the crimes in the garage and did not threaten Wiseman.

¶9 The State called one witness at the hearing: Aaron Weiss, an investigator for the Milwaukee County District Attorney's Office who interviewed Wiseman shortly after Hicks's postconviction motion was filed. Weiss said that he asked Wiseman "if he was having any problems at the facility, and he told me that, yes, he was and that the person who was convicted of the crime had family at the same facility as him." Weiss said that Wiseman "declined to talk to me about the underlying offense" but "was insistent that he had committed a robbery in Milwaukee." Weiss said Wiseman also acknowledged that he told prison authorities that Hicks "had threatened him" and "that Mr. Hicks expected [Wiseman] to come forward and do the right thing."

¶10 The circuit court denied Hicks's motion for a new trial. The circuit court determined there was little evidence that was material. It concluded that Wiseman's affidavit would not be admissible because he refused to testify and even if it were admissible, its value was "incredibly vitiated and damaged" when Wiseman refused to testify at the hearing. The circuit court also concluded that the correctional officers' testimony would be inadmissible hearsay. Finally, the circuit court said that even if Wiseman's affidavit and the officers' testimony were admitted at a new trial, there was not a reasonable probability that a different result would be reached at that trial.

¶11 Hicks filed a motion for reconsideration. He provided a new affidavit executed by Wiseman's fellow inmate, Kwesi Amonoo. In that affidavit, Amonoo stated that in 2014, Wiseman approached him and asked about becoming a Muslim. Amonoo told him he needed to "confess all of his past sins" and "try to

correct the wrongs he had committed.” Amonoo said that in response, Wiseman told Amonoo that another man named “Andre Hicks” was serving time in prison for crimes Wiseman committed. Amonoo said Wiseman described the crimes he committed, including that he “took out a gun and robbed the people playing craps” and shot back when someone in the garage started shooting.

¶12 Amonoo’s affidavit also stated that he “told Andre Hicks and other people that Raeshawn Wiseman had committed the crime for which Andre Hicks was incarcerated.” In addition, the affidavit said that Wiseman told Amonoo that a corrections officer told Wiseman “he must be moved because his life was in danger.” Finally, the affidavit said that Wiseman told Amonoo “that certain people in the prison had been victims of the crime ... he was now admitting and that his life was in danger.”

¶13 The circuit court denied Hicks’s motion for reconsideration in a written order without a hearing. It stated: “Amonoo’s affidavit is predicated on hearsay. Without the testimony of Wiseman admitting to the crime, the same result is obtained. That Wiseman chose to refrain from admitting that he committed Hicks’[s] crime after being advised of perjury charges renders his original affidavit unworthy of belief.” This appeal follows.

LEGAL STANDARDS

¶14 “The decision to grant or deny a motion for a new trial based on newly discovered evidence is committed to the circuit court’s discretion.” *State v. Plude*, 2008 WI 58, ¶31, 310 Wis. 2d 28, 750 N.W.2d 42 (hyphen omitted). A defendant alleging newly discovered evidence must “prove, by clear and convincing evidence, that: (1) the evidence was discovered after conviction; (2) the defendant was not negligent in seeking the evidence; (3) the evidence is

material to an issue in the case; and (4) the evidence is not merely cumulative.” *State v. Avery*, 2013 WI 13, ¶25, 345 Wis. 2d 407, 826 N.W.2d 60 (citations and two sets of quotation marks omitted). If the defendant establishes the four criteria, “the circuit court must determine whether a reasonable probability exists that a different result would be reached in a trial.” *Id.* (citation omitted). “A reasonable probability of a different outcome exists if ‘there is a reasonable probability that a jury, looking at both the [old evidence] and the [new evidence], would have a reasonable doubt as to the defendant’s guilt.’” *State v. Love*, 2005 WI 116, ¶44, 284 Wis. 2d 111, 700 N.W.2d 62 (citation omitted; bracketing in *Love*). This determination presents a question of law. *Plude*, 310 Wis. 2d 28, ¶33.

DISCUSSION

¶15 On appeal, Hicks continues to argue that he is entitled to a new trial based on Wiseman’s affidavit, which Hicks asserts would be admissible in a new trial because it falls under hearsay exceptions outlined in WIS. STAT. § 908.03(24) (2015-16) and WIS. STAT. § 908.045(4) (2015-16).³ Hicks also argues that Wiseman’s confession was corroborated by the three correctional officers and the district attorney’s investigator, and that Amonoo’s affidavit “makes it more reasonably probable that a different result would be reached at a new trial.” (Capitalization omitted.)

³ Hicks also suggests, without explanation, that Wiseman would actually testify at a new trial. There is no indication in the record that Wiseman would testify at trial after pleading the Fifth Amendment at the evidentiary hearing.

All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

¶16 In response, the State argues that Wiseman’s affidavit and his statements to third parties would be inadmissible at a new trial because they are hearsay and do not qualify under various hearsay exceptions.⁴ The State contends that because the statements are not admissible, Hicks failed to meet the material evidence prong of the newly discovered evidence test.⁵ See *Avery*, 345 Wis. 2d 407, ¶25. The State also notes that the circuit court said that aside from being inadmissible, Wiseman’s affidavit was unreliable and the officers’ testimony about Wiseman’s statements was “incredibly weak” evidence. Finally, the State argues that “[e]ven if Wiseman’s statements were admissible and material, the circuit court properly determined that there was not a reasonable probability of a different result at a new trial.” (Bolding omitted.)

¶17 The State presents a compelling case that Wiseman’s affidavit, Amonoo’s affidavit, and the officers’ testimony about what Wiseman told them would be inadmissible at trial and, therefore, there is insufficient material evidence to justify a new trial. For instance, in order to qualify under the catchall hearsay exception outlined in WIS. STAT. § 908.03(24), a statement must have “comparable circumstantial guarantees of trustworthiness.” See *id.* Wiseman’s affidavit contains the wrong date of the crime, does not provide details such as the identity of the person who was driving Wiseman, and is inconsistent with statements

⁴ The State asserts that the evidence used to support a claim based on newly discovered evidence must be admissible, citing *State v. Vollbrecht*, 2012 WI App 90, 344 Wis. 2d 69, 820 N.W.2d 443, and *State v. Bembenek*, 140 Wis. 2d 248, 409 N.W.2d 432 (Ct. App. 1987). Hicks does not appear to dispute this proposition. Instead, he argues that Wiseman’s statements satisfy various hearsay exceptions.

⁵ The State does not argue that Hicks failed to establish the other three prongs of the newly discovered evidence test. See *State v. Avery*, 2013 WI 13, ¶25, 345 Wis. 2d 407, 826 N.W.2d 60.

Wiseman made to the correctional officers, the investigator, and Amonoo. For example, Wiseman's affidavit claims that he was riding in a car when he saw the men gambling in a garage, but Amonoo's affidavit states that Wiseman told Amonoo that "he was walking down the street in 2004 when he saw a group of men playing craps in an open garage." In addition, Wiseman's affidavit claimed he was coming forward in order to help Hicks, but the officers, the investigator, and Amonoo said that Wiseman said he was afraid of Hicks for the following reasons: Hicks had threatened him, some of the victims of the crime were in the same prison, and some of Hicks's family members were in the same prison.⁶

¶18 To the extent Wiseman seeks to admit his affidavit under WIS. STAT. § 908.045(4), governing statements against interest, he must offer corroboration for statements tending to expose him to criminal liability. *See id.* ("A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborated."). It appears that Wiseman told at least five people that he committed the crimes for which Hicks is incarcerated, but his claim is not corroborated by any other evidence. No other witness placed Wiseman at the scene and there is no physical evidence to support his claim.

¶19 For these reasons, it does not appear that Wiseman's statements in his affidavit and to others would be admissible at trial. But even if we assume that each of those statements were admitted under a hearsay exception, we are not persuaded that there is "a reasonable probability ... that a different result would be reached in a trial." *See Avery*, 345 Wis. 2d 407, ¶25 (citation omitted).

⁶ The record does not identify which, if any, crime victims or members of Hicks's family were living in the same prison as Wiseman.

Wiseman—who cannot be charged with the crimes because the statutes of limitations have passed—told multiple people he committed the crimes, but he refused to testify at the evidentiary hearing. His affidavit identifies the wrong date of the crimes and provides only limited details about what happened in the garage and after he fled the scene. Wiseman’s affidavit also contradicts statements he made to others, as noted above.

¶20 In contrast, the trial testimony included three witnesses—all of whom personally knew Hicks—who identified Hicks as the robber in the hours and days after the incident, including one seriously injured witness who was interviewed in the ambulance on his way to the hospital. A fourth witness placed Wiseman at the scene. While a fifth witness described a different robber, Hicks has not suggested that Wiseman fits that witness’s description of the robber as “a brown-skinned guy” who had “short braids.” Like the circuit court, we are not convinced that Wiseman’s affidavit and statements to others about his alleged involvement in the crimes would lead a jury to disregard the testimony of four eyewitnesses and find Hicks not guilty. Accordingly, we affirm the circuit court’s orders denying Hicks’s motions seeking a new trial.

By the Court.—Orders affirmed.

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

