COURT OF APPEALS
DECISION
DATED AND FILED

March 14, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP1447 **Cir. Ct. No. 1994CF1567**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LEONARD REMONE AVERY,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: JEAN W. DIMOTTO, Judge. *Affirmed*.

Before Wedemeyer, P.J., Curley and Kessler, JJ.

¶1 PER CURIAM. Leonard Remone Avery appeals from an order denying his WIS. STAT. § 974.06 (2003-04)[1] postconviction motion for a new trial

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

based on newly discovered evidence. Avery claims he should be granted a new trial because: (1) the circuit court erred in finding witness Sackie Roby's recantation incredible; (2) the trial court erred in finding there was no error for the prosecutor to correct and no exculpatory evidence for the prosecutor to disclose; and (3) the doctrines of plain error and manifest injustice demand a new trial. Because we conclude that the trial court did not err in finding Roby's recantation incredible, because the trial court's factual determinations of credibility were not clearly erroneous, and because no plain error is visible from the record and justice does not demand a new trial, we affirm.

BACKGROUND

¶2 The facts, charges, and evidence on which Leonard Avery was tried and convicted are as follows. In 1994, Leonard Avery (Leonard) was convicted of first-degree intentional homicide while possessing a dangerous weapon, as a party to a crime. The jury was presented with conflicting and contradictory versions of the events leading up to the shooting of victim Christopher Davis (Davis). All parties agreed that Andre Avery (Andre), Leonard's brother, shot Davis as the two men were exiting the Tapp I Tavern after an angry exchange of words. The testimony presented to the jury differed as to the events leading up to the shooting. However, only Roby's testimony is pertinent to this appeal. Roby testified at trial that Leonard, Andre and Roby made a collective decision to go to the bar and ambush Davis. Roby testified that Leonard's role was to enter the bar and entice Davis to come outside where Andre and Roby were waiting. Roby testified he saw Leonard walking out of the tavern door, but did not see Davis following him.

¶3 For his role, Roby subsequently pled guilty to a lesser homicide charge in exchange for his testimony at Leonard's trial. The trial court record indicates Roby understood he had not been promised anything relative to his

sentence and that he understood his plea negotiation called for him to testify truthfully to receive the lesser charge. Roby acknowledged that he had strong motivations to testify against Leonard in hopes that he would one day see his kids again, despite admitting it was difficult to be in court because he and Leonard were best friends and members of the same street organization. Based partly on Roby's testimony, Leonard and Andre were convicted of first-degree homicide.

¶4 Leonard filed a motion for a new trial on the grounds of newly discovered evidence, namely an affidavit in which Roby recanted some of his trial testimony.[2] A hearing was held regarding the motion on January 27, 2005, and on February 1, 2005. Roby testified at the hearings on both dates.

¶5 At the January 27, 2005 hearing, on direct examination by Leonard's attorneys, Roby said no one told him what to say in the affidavit. When asked if everything in the affidavit was true, Roby said: "No, it's not." When asked what in the recanting affidavit was not true, Roby said: "Pretty much ain't none of it true." However, Roby did say the recanting affidavit was correct in stating that he saw Davis following Leonard out of the tavern and that Davis had a gun in his hand pointed at Leonard's back. Roby also claimed to have dismantled the 9mm firearm while Andre was driving.

¶6 On cross-examination by the State, Roby recanted. Roby revealed that Andre solicited the affidavit and told him what to write in the affidavit. Roby said that his motivation behind writing an affidavit that he knew was "primarily false" was to help Andre out as best as he could. Roby said that he testified

[2] Andre Avery actually filed the motion; Leonard's subsequent joinder has no bearing on this appeal.

truthfully and unscripted at the trial. Roby admitted that he got the information as to what he was supposed to write in the affidavit from another Avery brother, Tony. Roby also said that from 2003 to the spring of 2004, he received about ten three-way phone calls between him and the Avery family. During one of the phone calls, Andre told Roby it would be worth his while to change his trial testimony. Roby stated that he spoke to Derrick Avery, another Avery brother, and subsequently went to a check cashing station to cash a wire he received from Derrick Avery in the amount of $300.

¶7 At the February 1, 2005 hearing, Roby admitted that he saw Davis exit the tavern, but did not see Davis pointing a gun at Leonard's back; thus, he recanted this portion of his affidavit. Roby said he did not see a gun in Davis's hand, but thought he had a gun because Davis was known to carry a gun. In fact, Roby said he could not even see Davis when he exited the tavern. Roby stated he told Assistant District Attorney Carol Kraft and Milwaukee Police Detective Randolph Olson during a January 30, 2005 interview, that he knew where the guns from that night were located and that he was the one who had broken them down and disposed of them. Roby said that after she heard this information, Kraft declined to accept the guns used in the homicide. Kraft testified Roby never made such a statement, and that she certainly would have wanted the guns if Roby had made such a statement before the trial. Olson corroborated Kraft's testimony.

¶8 After the hearings, Leonard filed a motion for postconviction relief in which he asked for a new trial based on newly discovered evidence, because the State failed to disclose that Roby told Kraft before the trial that he had broken down the guns and that he knew where the guns were. On May 6th, the circuit court denied Leonard's motion because the court found that Roby's recantation was incredible. The court further found that Roby did not make the alleged

statements to Kraft and that, in totality, there was no credibility to any of Leonard's grounds for requesting a new trial.

ANALYSIS

A. The trial court's finding that Roby's recantation was incredible.

¶9 Leonard first argues he is entitled to a new trial because the circuit court mischaracterized the factual issues raised by the hearings, and thus, applied an erroneous standard of law. We reject this argument.

¶10 To obtain relief in a WIS. STAT. § 974.06 motion, the appellant has the burden of proving the facts to support the motion by clear and convincing evidence. ***State v. Walberg***, 109 Wis. 2d 96, 101, 104, 325 N.W.2d 687 (1982). A new trial may be granted based on newly discovered evidence only if the appellant meets the criteria set forth in ***State v. McCallum***, 208 Wis. 2d 463, 473-74, 561 N.W.2d 707 (1997):

> 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 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 the recantation must be corroborated by other newly discovered evidence.

Id. A defendant may show corroboration if: "(1) there is a feasible motive for the initial false statement; and, (2) there are circumstantial guarantees of the trustworthiness of the recantation." ***Id.*** at 478. "The determinative factors to be considered [with a recantation] are whether it is reasonably probable that a different result would be reached at a new trial and whether the recantation is

sufficiently corroborated by other newly discovered evidence." ***State v. Terrance J.W.***, 202 Wis. 2d 496, 501, 550 N.W.2d 445 (Ct. App. 1996).

¶11 A finding that the recantation is incredible "is the equivalent of finding that there is no reasonable probability of a different outcome on retrial." ***State v. Carnemolla***, 229 Wis. 2d 648, 661, 600 N.W.2d 236 (Ct. App. 1999). The trial court is to determine whether the recanting witness is worthy of belief and whether the recantation has any indicia of credibility persuasive to a reasonable juror if presented at a trial. ***State v. Kivioja***, 225 Wis. 2d 271, 296, 592 N.W.2d 220 (1999).

¶12 On review, the appellate court defers to the trial court's determination of credibility, ***McCallum***, 208 Wis. 2d at 479-80, and should not upset a finding of credibility unless it is clearly erroneous, *see* ***State v. Schmidt***, 2004 WI App 235, ¶13, 277 Wis. 2d 561, 691 N.W.2d 379. Similarly, motions for a new trial based on newly discovered evidence are left to the "sound discretion of the trial court." ***Terrance J.W.***, 202 Wis. 2d at 500. The appellate court will "affirm the trial court's exercise of discretion as long as it has a reasonable basis and was made in accordance with accepted legal standards and the facts of record." ***Id.***

¶13 We conclude the trial court did not improperly exercise its discretion in denying the motion for a new trial. The facts of the record clearly support the trial court's finding that Roby's recantation was incredible. This equates to no reasonable probability that a different outcome would result on retrial. *See* ***Carnemolla***, 229 Wis. 2d at 661. Additionally, the record demonstrates that Roby disavowed his entire recantation under oath and thus affirmed his trial testimony; such behavior is clearly an indication of lack of trustworthiness. Further, the record supports the trial court's finding that Roby's motivation for writing the

affidavit arose from the three-way telephone calls with the Avery family and culminated when Roby received $300 from an Avery family member. Thus, we conclude that the trial court's findings with respect to this issue are not clearly erroneous.

¶14 Based on those findings, the trial court concluded that Leonard failed to satisfy the requisite burden for proving his claim of newly discovered evidence. Because we find the trial court conclusions have a reasonable basis, are in accordance with accepted legal standards and are based on facts from the record, we conclude the trial court did not erroneously exercise its discretion in denying Leonard's motion for a new trial.

B. The trial court's finding that there was no factual error to correct.

¶15 Leonard argues that the trial court erred in concluding that there was no error for the prosecutor to correct and no exculpatory evidence for the prosecutor to disclose. This assertion is based upon the belief that the portion of Roby's affidavit that claims Roby told Assistant District Attorney Kraft where the guns used that night were located is newly discovered exculpatory evidence that demands a new trial.

¶16 The appellate court defers to the trial court's determination of credibility because the trial court has the advantage of seeing the witness's demeanor and all the facts. ***McCallum***, 208 Wis. 2d at 479-80. We should not upset a finding of credibility unless it is clearly erroneous. ***Schmidt***, 277 Wis. 2d 561, ¶13.

¶17 In this case, the trial court weighed the credibility of Assistant District Attorney Kraft and Detective Olson against the credibility of Roby, who recanted nearly everything in his signed affidavit that is the backbone of this

appeal. At a minimum, the testimony of Kraft and Olson supports the trial court's findings. The trial court had an opportunity to observe the demeanor of the witnesses to assess which version of events was truthful. There is a basis in the record to support the trial court's findings that the officers were telling the truth and that Roby's statement to the contrary was not credible. Accordingly, this court cannot find the trial court's findings clearly erroneous.

¶18 That leaves only Roby's incredible statement to support Leonard's claims that exculpatory evidence existed and the prosecutor failed to disclose it. Obviously, a motion based solely on an incredible statement cannot prevail. There is no evidence that the prosecutor failed to correct an error or failed to disclose exculpatory evidence. Therefore, we reject Leonard's claim to the contrary.

C. Motion for a new trial in the interest of justice or because of plain error.

¶19 Leonard moves this court for a new trial based on the doctrines of plain error or manifest injustice. *See* ***Vollmer v. Luety***, 156 Wis. 2d 1, 456 N.W.2d 797 (1990); ***State v. Sonnenberg***, 117 Wis. 2d 159, 344 N.W.2d 95 (1984). We reject Leonard's request as he has not provided a basis to substantiate this claim. The real controversy in this case was decided at trial, and nothing in this appeal creates a substantial probability of a different result at a new trial. Accordingly, plain error and the interest of justice do not demand a new trial.

By the Court.—Order affirmed.

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