

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 17, 2006

Cornelia G. Clark
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. 2005AP2869

Cir. Ct. No. 1993CF934606

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAMES ANTHONY JACKSON,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County:
KAREN E. CHRISTENSON, Judge. *Affirmed.*

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

¶1 PER CURIAM. On May 24, 1994, James A. Jackson was convicted of first-degree homicide, while armed, party to a crime, and one count of armed robbery, party to a crime. Jackson appeals from a circuit court order denying his third postconviction motion seeking a new trial based on his allegation of newly

discovered evidence. Specifically, Jackson’s motion claims that he discovered evidence suggesting that a third-party, Coleonn Ward, was involved in the homicide. Because we conclude that Jackson’s motion and exhibits failed to demonstrate a reasonable probability that submission of the new evidence at a new trial would secure a different result as required by *State v. Denny*, 120 Wis. 2d 614, 357 N.W.2d 12 (Ct. App. 1984), we affirm the circuit court’s order denying Jackson’s motion for a new trial.

1. Background

¶2 Police found Robert Walker’s body in an alley near the 2500 block of North Teutonia Avenue in Milwaukee. Walker had been shot in the back of the neck. Jackson was convicted of Walker’s homicide following a jury trial. The circuit court imposed a life sentence for the homicide and a consecutive sentence for the armed robbery.

¶3 In 1995, Jackson filed a postconviction motion seeking a new trial based on newly discovered evidence. Jackson contended that he had discovered evidence that Derrick Loyde and Joeleonn Ward were the perpetrators of the crimes underlying his conviction. After conducting a hearing on the motion, the circuit court denied it, concluding the alleged new evidence was speculative and did not show a legitimate tendency that these third-parties “could have committed the crime” under *Denny*.¹ Jackson appealed. We affirmed Jackson’s judgment of

¹ *State v. Denny*, 120 Wis.2d 614, 623-24, 357 N.W.2d 12 (Ct. App. 1984) held that evidence suggesting that third parties committed a crime must meet a “legitimate tendency” test. This test requires evidence of motive and opportunity as well as evidence directly connecting “a third-person to the crime charged which is not remote in time, place or circumstances....” *Id.* at 624.

conviction and the order denying Jackson's motion for a new trial. *State v. Jackson*, No. 95-0524-CR, unpublished slip op. at 8 (Wis. Ct. App. June 4, 1996). The Wisconsin Supreme Court denied Jackson's petition for review.

¶4 In 1998, Jackson filed a second postconviction motion seeking a new trial based on newly discovered evidence. This motion claimed that Coleonn, a brother of Joeleonn Ward, was involved in the commission of the homicide. Jackson also contended that Robert Johnson, a trial witness who identified Jackson as involved in the homicide, was mistaken and had recanted his testimony. Jackson further argued that Johnson's recantation was corroborated by evidence not available at the time of his trial.

¶5 The circuit court rejected the motion, concluding that the new evidence allegedly connecting Coleonn to the crime was wholly speculative and that Johnson's recantation lacked all credibility. The circuit court also concluded that Johnson's alleged recantation was not corroborated by the "new evidence" Jackson submitted, evidence the circuit court characterized as "nebulous hearsay." Jackson did not appeal from the circuit court's order.

¶6 On November 2, 2005, Jackson filed his third postconviction motion for a new trial. In it, Jackson claimed that the State allegedly withheld a police report containing a witness statement of Anthony B. Archer indicating that Coleonn was responsible for the victim's death. The circuit court denied the motion, concluding that submission of Archer's statements at trial would not have changed its result. Jackson appeals.

2. Discussion

¶7 A request for a new trial brought pursuant to WIS. STAT. § 974.06 (2003-04),² on the basis of newly discovered evidence must meet the following criteria:

“(1) The evidence must have come to the moving party’s knowledge after a trial; (2) the moving party must not have been negligent in seeking to discover it; (3) the evidence must be material to the issue; (4) the testimony must not be merely cumulative to the testimony which was introduced at trial; and (5) it must be reasonably probable that a different result would be reached on a new trial.”

State v. Avery, 213 Wis. 2d 228, 234, 570 N.W.2d 573 (1997) (citation omitted). A moving party is not entitled to a new trial if the newly discovered evidence fails to meet any one of these tests. *Id.* “Whether due process warrants a new trial on grounds of newly-discovered evidence is a constitutional question which we review de novo.” *Id.*

¶8 We have reviewed Jackson’s new evidence—a police report of Archer’s statement concerning what he saw the night of the shooting. The police report stated that Archer indicated that he lived across the street from the scene of the homicide and after hearing a commotion outside, looked through a window to the street. Archer told police that “it was a rainy night.” Archer positively identified the victim as Robert Walker to police. However, he could not identify one of the two men confronting the victim at all and referred to the second individual as having an appearance similar to Coleonn Ward’s. As reported by the

² All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

interviewing officer, Archer never positively identified Coleonn Ward as participating in Walker's murder.

¶9 We conclude as a matter of law that this evidence is insufficient to support Jackson's request for a new trial. Archer did not place Coleonn at the scene of the crime. His statement merely suggested that one of the two men confronting Walker resembled Coleonn. This new evidence is equivocal at best, and without more, fails to meet the requirement of reasonable probability that its submission at a new trial would result in a different outcome. Accordingly, we hold that the circuit court properly denied Jackson's postconviction motion.

By the Court.—Order of the circuit court affirmed.

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

