COURT OF APPEALS
DECISION
DATED AND FILED

May 13, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP2589 **Cir. Ct. No. 1990CF36**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TOMMY L. BROWN,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Racine County: GERALD P. PTACEK, Judge. *Affirmed.*

Before Anderson, P.J., Snyder and Neubauer, JJ.

¶1 PER CURIAM. Tommy L. Brown has appealed from an order denying his motion for a new trial based on newly discovered evidence. We conclude that the trial court properly denied Brown's motion. We also deny

Brown's request that this court order a new trial in the interest of justice. We therefore affirm the trial court's order denying relief.

¶2 Brown's motion for a new trial relates to convictions that occurred in October 1990. Brown was convicted by a jury of fourteen counts of armed robbery and one count of armed burglary, all as a party to the crime. Counts one through seven dealt with the armed robbery and armed burglary of a residence committed by Brown, Montell Horton, and Charles Givemore at approximately 1:00 a.m. on January 13, 1990 (the residential robberies). Counts eight through fifteen dealt with armed robberies at the Astro Deli on the night of January 11, 1990, and at the Port of Call Liquor Store, the Citgo gas station, and the Speedway gas station on January 12, 1990 (the commercial robberies). The evidence indicated that in each of the commercial robberies, two men entered the store, one armed with mace and the other with a handgun. Evidence indicated that a third man was also involved as a driver or scout of the premises.

¶3 Brown, Horton and Givemore were arrested a few hours after the residential robberies. At the time of their arrest, they were hiding on the roof of the apartment building in which they had been staying for approximately two weeks. The apartment belonged to a relative of Givemore's who was hospitalized. Items taken from the residential robberies were found on Brown at the time of his arrest. Items taken from the residential and commercial robberies were also found in the apartment, in a garbage can near the apartment, and in a car belonging to Horton. A handgun of the type identified in one of the commercial robberies was found stuck down a vent pipe on the roof. In addition, at the time of his arrest, Brown was wearing a gray coat and a pair of black and white shoes with checkered laces which were identified by one of the victims of the Port of Call robbery as being the same type and style as those worn by one of the robbers.

¶4 Brown was convicted of all fifteen counts after a jury trial. Horton was convicted in a separate trial and, according to defense counsel's postconviction argument, Givemore pled guilty.

¶5 Brown appealed from his judgment of conviction and an order denying postconviction relief. The judgment and order were affirmed in ***State v. Brown***, No. 1991AP2069-CR (Wis. Ct. App. Apr. 29, 1992). Brown subsequently filed a pro se motion for postconviction relief under WIS. STAT. § 974.06 (2007-08),[1] which was denied in 1994.

¶6 In June 2006, Brown filed the motion for a new trial based on newly discovered evidence that forms the basis for this appeal. He requested a new trial only on the commercial robberies. In support of the motion, Brown relied on an affidavit from his half-brother, Terry Lee Robinson, dated November 26, 2002, stating that he, not Brown, was the third participant in the commercial robberies with Horton and Givemore.

¶7 The trial court held two evidentiary hearings on the motion, along with a third hearing at which oral argument was presented. At the first hearing, Brown's wife, Cindy Brown, testified that Robinson telephoned her from the Pennsylvania prison where he was incarcerated in September 2002 and told her that he, not Brown, participated in the commercial robberies. Cindy testified that she subsequently asked Robinson to provide an affidavit attesting to what he told her. She testified that she received the requested affidavit from Robinson in late November 2002.

[1] All references to the Wisconsin Statutes are to the 2007-08 version.

¶8 At the second evidentiary hearing, Horton was called as a witness and testified that Robinson, not Brown, was the third person involved in the commercial robberies. Based on Robinson's affidavit and the testimony from Cindy Brown and Horton, Brown contends that the trial court erred in denying his motion for a new trial based on newly discovered evidence. He contends that this court should reverse the trial court's order and remand the matter for a new trial. Alternatively, he contends that he is entitled to a new trial in the interest of justice because the real controversy has not been fully tried and justice has miscarried.

¶9 A motion for a new trial based on newly discovered evidence is entertained with great caution. ***State v. Terrance J.W.***, 202 Wis. 2d 496, 500, 550 N.W.2d 445 (Ct. App. 1996). To obtain a new trial based on newly discovered evidence, a defendant must establish by clear and convincing evidence that (1) the evidence was discovered after conviction, (2) he 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. Edmunds***, 2008 WI App 33, ¶13, 308 Wis. 2d 374, 746 N.W.2d 590, *review denied*, 2008 WI 40, 308 Wis. 2d 612, 749 N.W.2d 663. If the defendant proves these four criteria, then the trial court must determine whether a reasonable probability exists that a different result would be reached at trial. ***Id.*** "The reasonable probability factor need not be established by clear and convincing evidence, as it contains its own burden of proof." ***Id.***

¶10 This court reviews the trial court's decision on the motion under an erroneous exercise of discretion standard. ***Id.***, ¶8. A trial court properly exercises its discretion when it relies on the relevant facts in the record and applies the proper legal standard to reach a reasonable decision. ***Id.*** An erroneous exercise of discretion will be found if the trial court's factual findings are not supported by the evidence or it applied an erroneous view of the law. ***Id.***

¶11 As set forth above, Cindy Brown testified that Robinson called her in September 2002 and admitted to his involvement in the commercial robberies, while exonerating Brown in those robberies. Cindy testified that she subsequently wrote to Robinson and asked him to contact her again, which he did. She testified that in the second telephone conversation, she asked Robinson to provide an affidavit, which she received at the end of November 2002. The affidavit allegedly received by Cindy was admitted into evidence at the evidentiary hearings. It bore a notary seal indicating that it was signed and sworn before a notary public named William D. Conrad in Pennsylvania on November 26, 2002.

¶12 In the affidavit, Robinson stated that he had a criminal history dating back to the 1970s, and has convictions for burglary and drug-related offenses. He stated that although he had committed burglaries and armed robberies in Pennsylvania, Illinois and Wisconsin, he had not been apprehended or charged with these offenses. He also stated that he had driven to Racine on or about January 6, 1990, to stay with Brown, Horton and Givemore, who had traveled to Racine on or about January 1, 1990, to stay in Givemore's half-sister's apartment. Robinson admitted that he was involved in the commercial robberies, and described his participation and knowledge of the offenses. He stated that he was wearing Brown's gray coat and black and white British Knights gym shoes during three of the commercial robberies.

¶13 Robinson stated that he, Horton, and Givemore committed the crimes to get drug money, and that Brown was not included because they did not want to divide the proceeds with anyone else and Brown already had as much as $3000 of his own cash. Robinson stated that he left Racine after the Port of Call liquor store robbery on January 12, 1990. He stated that Brown, Horton, and Givemore were arrested the next day, so he fled to Pennsylvania, where he has

resided ever since. He stated that he made the affidavit with the realization that he could be prosecuted for the commercial robberies, but was compelled to do so by a guilty conscience and in the interest of justice because he, not Brown, was guilty of the crimes. In the affidavit, Robinson stated that he would testify consistently with his affidavit if called as a witness.

¶14 Robinson was called as a witness at the first evidentiary hearing. However, at that hearing he invoked his Fifth Amendment right to refrain from incriminating himself, and refused to testify concerning the crimes. Based upon his invocation of his Fifth Amendment rights, Robinson also did not testify about the execution and mailing of the affidavit or his alleged oral statement to Cindy Brown implicating himself.

¶15 After Robinson invoked his Fifth Amendment rights, Cindy Brown testified that when she received the affidavit from Robinson in November 2002, she provided Brown with a copy and put the original in her safe. She detailed attempts by her and Brown to retain counsel for Brown or to obtain pro bono counsel after receipt of the affidavit. She testified that they did not succeed in obtaining counsel until May or June 2004, with final arrangements made for preparation of the postconviction motion in March 2006.

¶16 Brown also testified at the evidentiary hearings. In his testimony, he admitted participating in the residential robberies, but denied participating in the commercial robberies. He pointed out that after his trial and prior to sentencing, he had admitted to the presentence writer that he had participated in the residential robberies, but told the trial court that he was not guilty of all of the crimes.

¶17 Montell Horton was also called as a witness at the second evidentiary hearing. Horton testified that he had participated in the commercial

robberies with Robinson, not Brown, and would be willing to so testify at a new trial. When confronted with police reports indicating that he had implicated Brown in the commercial robberies in statements to a detective at the time of his arrest, Horton testified that the reports were inaccurate, and that he had never implicated Brown. Brown also produced an excerpt from the detective's testimony at Horton's 1990 ***Miranda*/*Goodchild***[2] hearing indicating that Horton did not implicate Brown in any of the robberies.

¶18 After completion of the evidentiary hearings, briefing and oral argument, the trial court denied Brown's motion for a new trial. It determined that Brown did not satisfy his burden of establishing that he was not negligent in seeking the new evidence and moving for a new trial. It also determined that there was no reasonable probability that a different result would be reached at a new trial. Because these determinations are supported by the facts of record, we affirm the trial court's order denying a new trial based on newly discovered evidence.[3]

¶19 In determining that Brown failed to satisfy the "no negligence" prong of the newly discovered evidence test, the trial court considered that the crimes and Brown's convictions occurred in 1990, but Brown did not file this motion until June 2006, almost sixteen years after his convictions and almost four years after he obtained Robinson's affidavit. No basis exists to disturb the trial

[2] ***Miranda v. Arizona***, 384 U.S. 436 (1966); ***State ex rel. Goodchild v. Burke***, 27 Wis. 2d 244, 133 N.W.2d 753 (1965).

[3] Because we conclude that the trial court properly denied Brown's motion on the merits, we need not address the State's argument that Brown's motion was procedurally barred. *See* ***Sweet v. Berge***, 113 Wis. 2d 61, 67, 334 N.W.2d 559 (Ct. App. 1993) (If this court decides a case based on one issue, it need not decide other issues.).

court's determination that Brown failed to show a lack of negligence by clear and convincing evidence.

¶20 The test for newly discovered evidence is not what counsel knows or is aware of, but what the client is or should be aware of. ***State v. Williams***, 2001 WI App 155, ¶21, 246 Wis. 2d 722, 631 N.W.2d 623. As indicated in Robinson's affidavit and in the testimony of Brown and Horton at the evidentiary hearings, Robinson was staying with Brown, Horton and Givemore at the Racine apartment at the time of the commercial robberies. The evidence indicated that the men were consuming crack cocaine and alcohol, playing cards, and "partying" throughout their stay. Brown, Horton, and Robinson all stated that Brown permitted the other three men to wear his clothes, and knew that they did so.

¶21 Brown testified that despite knowing that one of the individuals involved in the commercial robberies was identified as wearing clothing like that owned by him, it did not occur to him to investigate or look into the actions of Robinson when the case was proceeding to trial. However, based on Brown's own testimony, it is clear that Brown should have been aware that, if he was not the third person involved in the commercial robberies, that third person was probably Robinson. As indicated by Brown, Horton, and Robinson, the men were closely associated at the time of the offenses. Moreover, Brown admits his involvement in the residential robberies in the early hours of January 13, 1990, confessing that he shot one of the victims and, because he had blood on his clothes, changed his clothes upon his return to the apartment the men were sharing. Brown knew that the clothes he put on were later identified as clothing like that worn in at least one of the commercial robberies committed on the preceding two days. He also knew, as he prepared for trial, that testimony regarding the clothing was going to be presented by the prosecution to connect him to the commercial robberies. Under

these circumstances, it was negligent of him not to investigate the possibility that Robinson was the third person involved in the commercial robberies.

¶22 Brown attempts to excuse his failure to investigate Robinson's involvement by contending that, prior to trial, he asked Horton who else was involved in the commercial robberies and Horton refused to answer. He also contends that he was aware of no physical evidence linking Robinson to the crimes and that, even if he had investigated Robinson, Robinson would not have admitted his involvement at the time, and did not do so until his guilty conscience had preyed on him for years.

¶23 These arguments do not obviate Brown's negligence in failing to investigate Robinson's participation in the commercial robberies prior to trial and before Cindy Brown was allegedly contacted by Robinson in September 2002. Brown's argument that Robinson would not have confessed prior to September 2002 is pure speculation. Moreover, even if Robinson was unwilling to confess to the crimes earlier, a prompt investigation, in conjunction with the facts within Brown's knowledge at the time of trial, could have assisted Brown in defending himself on the ground that Robinson, not he, was the third robber. Because of Brown's negligence, Robinson was never sought or questioned by the police, attempts were not made to have witnesses identify him, and no attempts were made to find other physical evidence linking him to the crimes. Failing to take steps to pursue or instigate an investigation of Robinson prior to the fall of 2002 constituted negligence in seeking evidence implicating Robinson. *Cf.* ***id.***, ¶18 (party must have been diligent in discovering new evidence).

¶24 As determined by the trial court, Brown also exhibited negligence by delaying returning to court for more than three-and-one-half years after Robinson

allegedly called Cindy Brown and sent her his affidavit. While Brown and Cindy testified concerning their attempts to obtain counsel during this period, the trial court could reasonably consider that Brown could have come to court pro se or informed the court of the affidavit and asked the court or the state public defender's office to appoint counsel. Under these circumstances, the trial court was entitled to view the delay in filing the motion after the fall of 2002 as additional evidence that Brown was negligent in seeking evidence of Robinson's guilt and a new trial.[4]

¶25 Because a defendant seeking a new trial based on newly discovered evidence must satisfy all five criteria, ***State v. Carnemolla***, 229 Wis. 2d 648, 656, 600 N.W.2d 236 (Ct. App. 1999), we could affirm the trial court solely on the ground that Brown did not prove, by clear and convincing evidence, that he was not negligent in seeking the new evidence. However, the trial court also concluded that there is no reasonable probability that the result of a new trial would be different.[5] We uphold this determination.

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[4] Brown contends that the delay between obtaining the new evidence in 2002 and the filing of his motion for a new trial in June 2006 may only be considered under the doctrine of laches. We need not consider whether laches applies. Brown had the burden of proving by clear and convincing evidence that he was not negligent in seeking Robinson's confession or other evidence of Robinson's guilt. For the reasons discussed above, the trial court correctly determined that Brown did not meet this burden. He was negligent in not seeking evidence of Robinson's guilt between 1990 and 2002. His delay in moving for a new trial after November 2002 was an additional indicator that he was negligent in seeking evidence that Robinson, not he, was guilty of the commercial robberies.

[5] A statement that tends to expose the declarant to criminal liability and is offered to exculpate the accused is not admissible unless it is corroborated. WIS. STAT. § 908.045(4). The corroboration must be sufficient to permit a reasonable person to conclude, in light of all the facts and circumstances, that the statement could be true. ***State v. Guerard***, 2004 WI 85, ¶5, 273 Wis. 2d 250, 682 N.W.2d 12. This standard does not involve an evaluation by the trial court of the credibility or weight of the statement against penal interest itself. ***Id.***, ¶32.

(continued)

¶26 When applying the "reasonable probability of a different outcome" criterion, the standard is whether there is a reasonable probability that a jury, looking at both the old and new evidence, would have a reasonable doubt as to the defendant's guilt. ***Edmunds***, 308 Wis. 2d 374, ¶22. In determining whether there is a reasonable probability of a different result on retrial, the trial court may determine whether new testimony proffered by the moving party is credible. *See* ***Carnemolla***, 229 Wis. 2d at 660-61; ***Terrance J.W.***, 202 Wis. 2d at 501. The trial court's finding as to the credibility of a witness will not be disturbed unless it is clearly erroneous. ***Terrance J.W.***, 202 Wis. 2d at 501. If the trial court determines that newly discovered evidence is credible, it determines whether a jury, hearing all of the evidence, would have a reasonable doubt as to the defendant's guilt. *See* ***Edmunds***, 308 Wis. 2d 374, ¶18. In making this latter determination, the trial court does not weigh the evidence. ***Id.***

¶27 Brown contends that there is a reasonable probability of a different result because a jury, presented with Robinson's affidavit, Cindy Brown's testimony regarding Robinson's statement implicating himself and exonerating Brown, and Horton's testimony, would in all probability acquit him. In

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In reviewing the trial court's decision on this issue, we do not understand the trial court to have determined that Robinson's affidavit was so insufficiently corroborated as to be inadmissible at a new trial. Instead, we understand the trial court to have determined that, even if Robinson's affidavit and his statement to Cindy Brown were admissible, no reasonable probability existed that a different result would be reached on retrial. In its oral decision denying Brown's motion, the trial court stated that it agreed that Robinson's affidavit was self-authenticating because it bore a notary seal. In discussing the fifth prong of the newly discovered evidence test, the trial court also stated that "assuming that if Mr. Terry Lee Robinson were called, he would not be available. His affidavit would be admissible. That the jury would then hear other testimony from other people, which in part may corroborate what Mr. Robinson said in his affidavit." However, it then determined that, based on all of the information that would be before the jury in a new trial, "It is not reasonable to conclude that the jury looking at the old and new evidence would have a reasonable doubt as to the guilt of the defendant, and therefore, I'm satisfied it's appropriate to deny the motion for a new trial."

conjunction with this argument, Brown also contends that the State's original case against him was weak, consisting primarily of evidence that he committed the residential robberies, and was guilty of the commercial robberies by association. The trial court rejected Brown's argument, concluding that the new evidence proffered by him was not credible and that a jury, looking at the old and new evidence, would not have a reasonable doubt as to Brown's guilt.

¶28 In making this determination, the trial court found that Robinson's submission of an affidavit implicating himself and exonerating Brown was suspect based on the amount of time that had passed since trial and the manner in which the new evidence came forward. In reaching this conclusion, the trial court also considered that the affidavit sounded like a document prepared by a lawyer and, while it bore a notary seal, there was no testimony from Robinson as to how it came to be drafted, executed, and sent to Cindy Brown.

¶29 The trial court's doubt as to the credibility of Robinson's exoneration of Brown by affidavit was reasonable. As discussed by the trial court, Robinson waited twelve years to admit his guilt and exonerate Brown, and then, after allegedly doing so, refused to confirm that the information provided in his affidavit was truthful or that he had truthfully executed the affidavit. While Brown relies on Robinson's attestation that he understood he could be prosecuted for the crimes and was compelled to make the affidavit by his guilty conscience, when called as a witness at the first evidentiary hearing, Robinson invoked the Fifth Amendment. The trial court could reasonably conclude that Robinson's refusal to confirm that he committed the commercial robberies and that he was truthful when he signed the affidavit rendered incredible the attestation that his guilty conscience had finally compelled him to admit his guilt and exonerate Brown after twelve years. The trial court was entitled to find that Robinson's

twelve-year delay in producing the affidavit and his refusal to confirm the exoneration of Brown rendered the content of the affidavit unreliable and incredible.

¶30 As discussed by the trial court, the testimony of Cindy Brown and Horton was also suspect. As noted by the trial court, Cindy Brown had an interest in seeing her husband released from prison. The trial court also considered Cindy Brown's testimony that she received the affidavit in November 2002 and put it in her safe without filing it with a court or giving it to anyone in authority. The trial court found that Cindy's alleged response to receipt of information and an affidavit exonerating her husband was difficult to believe, diminishing her credibility as a witness.

¶31 The trial court also concluded that Horton's testimony lacked credibility. It considered the fact that he was incarcerated with Brown, noting that within the prison system, it is not uncommon for inmates to seek to curry favor with each other. Horton's credibility was further suspect based on his criminal history and because he had lied in his testimony at his own trial when he denied participating in any of the crimes. In addition, Horton never alleged that Robinson was involved in the crimes until 2006, sixteen years after the crimes occurred.

¶32 Horton's testimony exonerating Brown and implicating Robinson was also contradicted by police reports admitted at the evidentiary hearings indicating that both he and Givemore implicated Brown in the commercial robberies at the time of their arrests. While Horton relied on the transcript of a ***Miranda***/***Goodchild*** hearing to dispute the State's claim that he implicated Brown in 1990 and contended that he did not implicate Robinson earlier because he feared Robinson would hurt his children, based on the totality of the record, the

trial court was entitled to find that the testimony of Horton exonerating Brown was incredible. *See* ***Carnemolla***, 229 Wis. 2d at 661.

¶33 Based on the trial court's findings regarding the lack of credibility of the new evidence proffered by Brown, it reasonably concluded that a jury would not have a reasonable doubt as to Brown's guilt at a new trial. Based on this determination, the trial court properly rejected Brown's claim that the new evidence offered by him gave rise to a reasonable probability of a different outcome.

¶34 In his final argument, Brown asks this court to order a new trial in the interest of justice under WIS. STAT. § 752.35. A new trial in the interest of justice may be ordered (1) when the real controversy has not been fully tried or (2) it is probable that justice has for any reason miscarried. ***Vollmer v. Luety***, 156 Wis. 2d 1, 16, 456 N.W.2d 797 (1990). The real controversy has not been fully tried if the jury has not been given the opportunity to hear and examine evidence that bears on a significant issue in the case, even if this occurred because the evidence or testimony did not exist at the time of trial. ***State v. Maloney***, 2006 WI 15, ¶14 n.4, 288 Wis. 2d 551, 709 N.W.2d 436. To grant a new trial under the "justice has miscarried" prong, there must be a substantial probability of a different result on retrial. ***Id.*** However, when considering whether to order a new trial on the ground that the real controversy has not been fully tried, it is unnecessary for an appellate court to first determine that the outcome would be different on retrial. ***Vollmer***, 156 Wis. 2d at 19.

¶35 As already discussed, there is not a substantial likelihood of a different result on retrial. Brown has therefore failed to establish that a new trial should be ordered under the second prong of the interest of justice test. For the

reasons discussed above, this court is also not persuaded that the jury was denied an opportunity to hear evidence of such significance as to warrant a new trial on the ground that the real controversy has not been fully tried.[6]

By the Court.—Order affirmed.

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

[6] In assessing whether a new trial is warranted, courts may also consider whether the actions of the defendant affirmatively contributed to the exclusion of evidence which, on appeal, he contends should be admitted in the interest of justice. *See* ***State v. Gove***, 148 Wis. 2d 936, 944, 437 N.W.2d 218 (1989). As discussed earlier in this decision, based on what he knew prior to trial, Brown was negligent in failing to pursue evidence of Robinson's participation in the commercial robberies. He therefore contributed to the jury's failure to hear evidence of Robinson's involvement at his 1990 trial.