COURT OF APPEALS
DECISION
DATED AND FILED

January 29, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-0809-CR **Cir. Ct. No. 99CF504**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RAHEIM CASON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: BONNIE L. GORDON, Judge. *Affirmed*.

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

¶1 PER CURIAM. Raheim Cason appeals the judgment entered after a jury convicted him of attempted first-degree intentional homicide while using a dangerous weapon and first-degree reckless injury while using a dangerous weapon pursuant to WIS. STAT. §§ 940.01(1)(a), 939.32, 939.63 and 940.23(1)(a)

(1999-2000).[1] Cason also appeals from the trial court's order denying his postconviction motion. Cason argues that the trial court erroneously exercised its discretion in both denying his motion for a new trial following the post-trial confession to the shooting by an alibi witness, Danielle Carrington, and in refusing to admit the statement of another witness to the shooting after the witness failed to appear at trial. Because the alibi witness's confession is recantation testimony needing corroboration under ***State v. McCallum***, 208 Wis. 2d 463, 561 N.W.2d 707 (1997), and Cason has failed to corroborate the witness's confession, the confession does not merit a new trial. Additionally, the trial court's failure to admit the statement of the other witness, while perhaps error, was harmless. Thus, we affirm.

I. BACKGROUND.

¶2 The events that led to Cason's convictions began with the first of two shootings, at which time Jevon Hunt was shot while attending a party. One of the suspects in this shooting was a cousin of Precious LeFlore, the victim in Cason's shooting. LeFlore, who was present at the party where Hunt was shot, left the party with her cousin, who was suspected of shooting Hunt. Danielle Carrington, Cason's sometimes girlfriend and the mother of his daughter, was related to the victim of the first shooting.

¶3 Several days after the first shooting, LeFlore received a phone call from Cason, whom she knew socially, asking if he could drop by. She agreed. Upon seeing Cason coming from the alley, LeFlore went down the back steps,

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

opened the door and had a brief conversation with Cason. She testified that Cason then suddenly took out a silver handgun and shot her. Although she was struck twice, she was able to close the back door as the shots were being fired. The police later found ten .357 shell casings and numerous bullet holes in the door. The day after the shooting, Carrington reported to police that her .357-caliber semiautomatic handgun had been stolen from her car prior to LeFlore's shooting.

¶4 At trial, the State theorized that Cason was assisting Hunt in trying to locate LeFlore's cousin when he shot LeFlore, as LeFlore had received several hostile phone calls from others seeking the whereabouts of her cousin. Cason's defense to the charges was that he was not the shooter, and he called several alibi witnesses to establish his whereabouts at the time of the incident. He also called several impeachment witnesses who claimed to have heard LeFlore say that she did not know who shot her, she was being pressured by the district attorney to prosecute Cason, and she did not want to testify. During the trial, Cason attempted, without success, to introduce a statement made to the police by a neighbor who claimed the shooter was standing in the alley when the shots were fired towards LeFlore's back door. The witness, Lisa Weddles, failed to appear at trial, although her daughter was served with her subpoena.

¶5 The jury convicted Cason of both charges and he was sentenced to thirty-five years' imprisonment. Shortly after the verdict, but before sentencing, Carrington confessed to several people that she was LeFlore's attacker. Both before sentencing and afterwards, Cason filed a motion seeking a new trial based upon Carrington's confession and the trial court's failure to admit the neighbor's statement to police. These motions were denied.

II. ANALYSIS.

¶6 Cason first seeks a new trial in the interest of justice based upon Carrington's confession. Cason notes that this court can reverse a conviction under WIS. STAT. § 752.35 "if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried." He claims that the trial court applied the wrong legal standard when it determined that Carrington's recantation of her trial testimony and her confession to LeFlore's shooting did not meet the standards required of newly-discovered evidence and witness recantations. Relying on ***State v. Hicks***, 202 Wis. 2d 150, 549 N.W.2d 435 (1996), ***State v. Wyss***, 124 Wis. 2d 681, 370 N.W.2d 745 (1985), *rev'd on other grounds by* ***State v. Poellinger***, 153 Wis. 2d 493, 451 N.W.2d 752 (1990), and ***State v. Harp***, 161 Wis. 2d 773, 469 N.W.2d 210 (Ct. App. 1991), in deciding whether Carrington's confession merited a new trial, Cason submits that the trial court should have applied the "totality of the circumstances test" found in those cases. Further, he argues that had the correct test been applied, he would be entitled to a new trial. In any event, Cason contends that the trial court erroneously exercised its discretion because even under the test applied by the trial court, he met the burden of proving the admission of newly-discovered recantation evidence. We disagree.

¶7 First, we are satisfied that the trial court properly applied the correct legal standard when it judged the proffered confession according to the test set forth in ***State v. McCallum***, 208 Wis. 2d 463, 561 N.W.2d 707 (1997), and correctly refused to address the totality of the circumstances test governing requests for a new trial under the interests of justice statute. As noted by the State in its brief, "Our appellate courts have crafted specific and sound criteria applicable to motions for a new trial based on newly discovered evidence when

that evidence involves recantation of testimony." *See, e.g.,* ***State v. Kivioja***, 225 Wis. 2d 271, 592 N.W.2d 220 (1999); *see also* ***State v. Mayo***, 217 Wis. 2d 217, 579 N.W.2d 768 (Ct. App. 1998). Thus, the tests touching on the admissibility of newly-discovered witness recantation testimony, not the ***Hicks/Wyess/Harp*** "totality of the circumstances test" dealing with requests for a new trial under the interests of justice statute, must be applied here.

¶8 The standard of review afforded a request for a new trial based upon a recanting witness is set out in ***State v. Terrance J.W.***, 202 Wis. 2d 496, 550 N.W.2d 445 (Ct. App. 1996). "We 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.*** at 500.

¶9 Under pertinent case law, the trial court may grant a new trial based on newly-discovered evidence only if the following requirements are met: (1) the evidence was discovered after trial; (2) the moving party was not negligent in seeking the evidence; (3) the evidence is material to an issue in the case; (4) the evidence is not merely cumulative to the evidence that was introduced at trial; and (5) it is reasonably probable that a different result would be reached at a new trial. ***Id.*** "If the newly-discovered evidence fails to meet any of these tests, the moving party is not entitled to a new trial." ***State v. Avery***, 213 Wis. 2d 228, 234, 570 N.W.2d 573 (Ct. App. 1997). Additionally, when the new evidence presented in a motion for new trial is the recantation of a trial witness's testimony, the recantation must be corroborated by other newly-discovered evidence. ***Nicholas v. State***, 49 Wis. 2d 683, 694, 183 N.W.2d 11 (1971).

¶10 In some fact situations, like the one present here, it is difficult to corroborate the recantation evidence of a witness. In those instances, case law has

permitted a finding that the recantation was corroborated if: (1) there is a feasible motive for the initial false statement; and (2) there are circumstantial guarantees of the trustworthiness of the recantation. *See* ***McCallum***, 208 Wis. 2d at 477-78.

¶11 In applying the above stated tests to the evidence submitted here, we are satisfied that the trial court properly exercised its discretion when it denied Cason's motion for a new trial based on Carrington's recantation of her earlier testimony and her confession to the shooting of LeFlore. The trial court initially ruled that Cason failed to corroborate Carrington's confession with newly-discovered evidence. Later, the trial court expanded its ruling in its written decision denying Cason's motion for a new trial, finding that Cason had failed to demonstrate that there was a reasonable probability that a jury, looking at both the accusation and the recantation, would have had a reasonable doubt as to Cason's guilt. The trial court also found that there were no guarantees of trustworthiness in Carrington's statement as her confession was totally inconsistent with all the facts adduced at trial.

¶12 While Cason contends that he met all the necessary conditions to obtain relief, the State submits that Cason has fallen woefully short in meeting his burden of proof. The State observes that, under the test for newly-discovered evidence: (1) Cason knew of Carrington's confession prior to trial, so her confession does not constitute "newly discovered evidence"; and (2) Carrington's recantation does not create a reasonable probability that a jury would have a reasonable doubt as to Cason's guilt. Moreover, the State posits that, under the ***McCallum*** corroboration test: (1) Cason does not provide a feasible motive for Carrington's initial false testimony; and (2) Carrington's recantation does not carry with it circumstantial guarantees of trustworthiness.

¶13 We agree with the trial court's conclusion that, under the ***McCallum*** corroboration test, there are no circumstantial guarantees that Carrington's recantation was trustworthy. Because Cason has failed to meet this initial requirement of ***McCallum***, we need not address his subsequent arguments related to the corroboration of the recantation. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663 (1938) (stating that if decision on one point disposes of appeal, appellate court need not decide other issues raised).

¶14 When the undisputed facts adduced at trial are compared to Carrington's claimed actions, only one reasonable conclusion can be reached – that Carrington's confession is untrustworthy. First, the confession contradicts the physical evidence admitted at trial. Carrington stated that when she got to LeFlore's home, she rang the doorbell. However, police investigating her alleged confession discovered that LeFlore's home does not have a doorbell. Next, her confession contradicts LeFlore's trial testimony. Carrington insisted that she shot LeFlore through a closed door and that LeFlore never saw her. On the contrary, LeFlore testified she saw Cason and had a brief friendly conversation with him before he shot her. Further, her confession is inconsistent with the testimony of LeFlore's mother, who stated she heard her daughter have a conversation of several minutes length with a man before the shooting. Carrington, however, claimed that she uttered only the words, "It's Raheim," before shooting through the door. Ms. LeFlore also testified that she knew someone else had to be in Carrington's car parked in the alley because the brake lights went on and off while her daughter was talking to the person at the bottom of the steps. Her observation was confirmed by LeFlore, who testified that Cason told her that "his baby's mother was in the car." This contradicts Carrington's trial testimony that she and

Cason (and her car) remained at Hunt's residence, as well as her confession in which she claimed she drove to LeFlore's house by herself.

¶15 Also, Carrington's confession contradicted Cason's defense at trial. Cason testified that he never left Hunt's house on the evening in question, except for a quick trip to a fast food restaurant. Both Carrington and Hunt confirmed Cason's statement. Carrington's confession, however, throws doubt on both Hunt's and Cason's testimony. Additionally, Carrington's confession makes her testimony about her report to the police that her gun was stolen from her car before the shooting untrue. In her confession, Carrington claimed that she used the gun to shoot LeFlore and that it was not stolen until after the shooting. Carrington's explanation for failing to speak up before Cason's trial is also suspect. She averred that "voices were telling her it was Raheim's fault," and that is the reason she lied on the stand. Indeed, Carrington's post-trial attempts at showing that she suffers from a mental illness, apparently because she believes that if she is charged with a crime, her mental illness would be a mitigating factor at sentencing, are consistent with her decision to lie about the events with the hopes of securing Cason's release and a lesser sentence for herself.

¶16 Finally, Carrington's claim that her statement is trustworthy because it was admissible under WIS. STAT. § 908.045(4),[2] as a statement against her penal

[2] WISCONSIN STAT. § 908.045(4) provides:

908.045 Hearsay exceptions; declarant unavailable.

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(continued)

interest, does not square with the considerable distrust with which the law views recantations. "Recantations are inherently unreliable. 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." ***McCallum***, 208 Wis. 2d at 476 (citing ***Dunlavy v. Dairyland Mut. Ins. Co.***, 21 Wis. 2d 105, 114, 124 N.W.2d 73 (1963)).

¶17 Thus, the cumulative effect of the contradictions in Carrington's confession strongly suggests that she lied. As no circumstantial guarantees of trustworthiness exist, the trial court properly exercised its discretion in refusing to grant Cason a new trial.

¶18 Next, Cason argues that he is entitled to a new trial because the trial court erroneously exercised its discretion in refusing to admit the testimony of Lisa Weddles, a neighbor of the LeFlores, who lived across the alley and who reported to police that she saw the shooter.

¶19 Cason submits that the trial court's failure to admit Weddles's statement to police constitutes an erroneous exercise of discretion that prejudiced him. This court will assume without deciding that the trial court's determination

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> **(4)** STATEMENT AGAINST INTEREST. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability or to render invalid a claim by the declarant against another or to make the declarant an object of hatred, ridicule, or disgrace, that a reasonable person in the declarant's position would not have made the statement unless the person believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborated.

that the statement was not admissible was faulty. Nevertheless, the trial court's error was harmless.

¶20 Generally, an error is harmless if there is no reasonable possibility that it contributed to the conviction. ***State v. Keith***, 216 Wis. 2d 61, 75, 573 N.W.2d 888 (Ct. App. 1997). We review evidence erroneously admitted or excluded independently to determine whether the error was harmless or prejudicial. ***Id.*** at 69.

¶21 Weddles originally told the police that she heard a gunshot while walking towards her kitchen. She claimed that she saw a black male, approximately 5'9" to 6'1" with a medium build, wearing a puffy jacket with stripes. She contended that this person was shooting a gun into the rear of LeFlore's home while standing in the alley. She stated that after firing the handgun several times, the person ran down the alley. Weddles was subpoenaed for trial by the service of a subpoena on her daughter. The trial court ruled that the service was improper, and refused to find Weddles unavailable in order for her statement to be admitted into evidence under our hearsay rules. Later, Weddles submitted an affidavit stating that perhaps the person she saw was a woman, and that she assumed the person was a male from his actions.

¶22 Weddles's statement does not comport with the physical evidence found at the scene, nor is it consistent with the testimony of other eye witnesses. Weddles told police that the shooter fired the gun while standing in the alley. This observation is contrary to the discovery of ten shell casings immediately outside LeFlore's back door. Further, as the prosecutor argued at trial, it would be almost impossible to have such a narrow spread of bullet holes in the door if the gun had been shot from the alley.

¶23 Weddles's statement also contradicts those of the other witnesses, LeFlore and her mother. As noted, LeFlore saw Cason at the back door and talked to him briefly before he shot her. LeFlore's mother heard a man's voice at the bottom of the stairs and heard gunshots that were close by. Thus, the shooter being in the alley and firing the gun is contrary to the victim's and her mother's observations. As a result, Weddles's statement, had it been admitted, would not have changed the outcome of the trial. As the trial court noted, LeFlore was a very good and convincing witness and other undisputed evidence and testimony corroborated her observations. Nor would Weddles's testimony be helpful to Cason's newly-found defense based upon Carrington's confession because Weddles's recollections are also contrary to Carrington's later allegations that she shot LeFlore outside her back door out of jealousy. Consequently, the trial court's decision to exclude the evidence was harmless error.

By the Court.—Judgment and order affirmed.

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