

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 6, 2001

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.

No. 01-0838-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TERRANCE A. GARNER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DENNIS P. MORONEY, Judge. *Affirmed.*

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

¶1 PER CURIAM. Terrance A. Garner appeals from a judgment entered after a jury found him guilty of first-degree reckless homicide, while using a dangerous weapon, as party to a crime, contrary to WIS. STAT. §§ 940.02(1),

939.05 and 939.63 (1999-2000).¹ He also appeals from an order denying his postconviction motion. Garner claims: (1) his brother's affidavit constitutes newly discovered evidence warranting a new trial; (2) he was denied the opportunity to present a defense; (3) the evidence was insufficient; and (4) he is entitled to a new trial in the interests of justice. Because the trial court did not erroneously exercise its discretion when it determined that the affidavit did not constitute newly discovered evidence, because Garner was not denied the opportunity to present a defense, because the evidence was sufficient to uphold the conviction, and because there are no grounds upon which to grant a new trial in the interests of justice, we affirm.

I. BACKGROUND

¶2 Henry Williams testified that on July 2, 1999, at approximately 4:30 p.m., he was in a car owned and operated by Garner and his brothers. It was a 1975 blue Oldsmobile Delta with license plate number UTC-105.² He indicated that Toriano Garner was driving, and Terrance was in the back seat. Williams indicated that while stopped at a red light, the victim, Adrian Russell, pulled up next to the car and said, "What the fuck are you looking at?" Toriano and Russell began to argue, and then Russell said, "Don't make me go to my trunk." At that point, Toriano pulled out a gun and shot at Russell, who sped off. Toriano followed Russell and handed the gun to his brother, Terrance, who was in the back seat.

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

² The record reflects that the Garner vehicle was actually registered to a third Garner brother, Jeffrey, but that Toriano and Terrance were the ones who drove the car.

¶3 Williams indicated that Russell had an accident, which caused his car to stop. Toriano then pulled up alongside Russell's vehicle and Terrance shot at Russell several times. Toriano then drove away. Russell died as a result of the gunshot wounds.

¶4 Leann Hausman was riding in her car with her husband when she observed the shooting. Leann stated that she was positive the license plate number of the car bearing the shooter read: UTC-105, and that she saw three black men in the car. After some investigation, Terrance was charged with first-degree reckless homicide, which was later amended to first-degree intentional homicide. An arrest warrant was issued for Toriano, but the police were unable to locate him.

¶5 After a jury trial, Terrance was convicted of the lesser-included offense of first-degree reckless homicide. He filed a postconviction motion alleging newly discovered evidence. The new evidence consisted of an affidavit from his brother, Toriano, who indicated that he was not driving the blue Oldsmobile, and that he did not have keys to the car on the date in question. Toriano averred that he saw Terrance on July 2, 1999, at about 1:00 p.m., and that Terrance did not have the keys. Toriano indicated that Williams was familiar with the car and often borrowed it. Toriano suggested that Williams and Jerome Johnson were actually the perpetrators, and that Williams and Johnson blamed the Garner brothers in order to protect themselves. The trial court ruled that the evidence was cumulative and would not alter the outcome of the trial. Accordingly, the trial court denied the motion based on newly discovered evidence. Terrance now appeals.

II. DISCUSSION

A. *Newly Discovered Evidence.*

¶6 Terrance's first claim is that the trial court erroneously exercised its discretion when it denied his motion for a new trial based on newly discovered evidence. We disagree.

¶7 A motion for a new trial upon the grounds of newly discovered evidence is addressed to the sound discretion of the trial court, and this court will reverse the trial court if it erroneously exercised its discretion. *State v. Boyce*, 75 Wis. 2d 452, 457, 249 N.W.2d 758 (1977). The requirements for granting a new trial for newly discovered evidence are:

“(1) The evidence must have come to the moving party's knowledge after a trial; (2) the moving party must have not 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.”

Sheehan v. State, 65 Wis. 2d 757, 768, 223 N.W.2d 600 (1974). If the newly discovered evidence fails to meet any one of these tests, the defendant is not entitled to a new trial. *Id.*

¶8 Terrance's theory is that if Toriano had testified at the trial, he would have supported the defense theory that neither Garner brother was in the blue Oldsmobile at the time of the shooting, and that Williams was blaming the Garners to protect himself and Johnson. The trial court found that Toriano's testimony would have been cumulative as to what was presented at trial and it was not reasonably probable that a different result would have been reached in a new trial.

¶9 Although Terrance points out that some of Toriano’s information was not cumulative, we cannot reverse the trial court’s order because it fails to satisfy the fifth factor: Toriano’s affidavit does not show a *reasonable probability* of a different outcome. The trial court reached its determination that there was not a reasonable probability of a different outcome in a reasoned decision. The trial court indicated that the jurors had an opportunity to listen to both Williams, Terrance, and Terrance’s alibi witnesses. The jury assessed the credibility of the accounts of each and concluded that Williams’s account was more credible. Thus, even if Toriano had testified and also denied being in the car, this fact would not, in all likelihood, have exonerated Terrance, especially in light of the fact that Toriano indicated he did not know where Terrance was at the time of the crime. Accordingly, we cannot conclude that the trial court erroneously exercised its discretion when it denied Terrance’s motion for a new trial based on newly discovered evidence.

B. Right to Present a Defense.

¶10 Terrance claims that the trial court erred when it refused to allow him to present evidence in support of his theory that someone named “Detroit” was the individual who may have shot the victim. The trial court refused to allow the evidence because there was no showing that “Detroit” was connected to the crime. We conclude that the trial court’s decision was correct.

¶11 Evidentiary rulings are reviewed with deference to the trial court and are therefore governed by the erroneous exercise of discretion standard. *Michael R.B. v. State*, 175 Wis. 2d 713, 720, 499 N.W.2d 641 (1993). We will not reverse an evidentiary ruling if the trial court properly exercised its discretion by “applying the relevant law to the applicable facts in order to reach a reasonable

conclusion.” *State v. Jackson*, 188 Wis. 2d 187, 194, 525 N.W.2d 739 (Ct. App. 1994).

¶12 Whether a defendant’s right to present a defense was violated is, however, a question of “constitutional fact” which we will review independently. *State v. Heft*, 185 Wis. 2d 288, 296, 517 N.W.2d 494 (1994). A defendant has a due process right which grants him or her the “fair opportunity to defend against the State’s accusations.” *State v. Evans*, 187 Wis. 2d 66, 82, 522 N.W.2d 554 (Ct. App. 1994) (citation omitted). A defendant does not have a constitutional right to present evidence that is not relevant. *State v. Jackson*, 188 Wis. 2d 187, 196, 525 N.W.2d 739 (Ct. App. 1994).

¶13 The standard for admitting evidence that someone other than the defendant had a motive to commit the crime is the “legitimate tendency test.” *State v. Denny*, 120 Wis. 2d 614, 623, 357 N.W.2d 12 (Ct. App. 1984). This test allows the admission of such evidence if the defendant can show the other person had the motive, opportunity and a direct connection to the crime. *Id.* at 624. The proffered evidence here included testimony from the victim’s family that “Detroit” had shot the victim six months before the incident in the instant case, and had a confrontation with the victim the day of the shooting. Although this evidence would support the “motive” aspect of the legitimate tendency test, it cannot satisfy the “opportunity” or “direct connection” aspects of the test.

¶14 The trial court did not rule on the motion to admit this evidence until after the State presented its witnesses, all of whom testified that the victim was shot at 4:30 p.m. on July 2 during a “road rage” incident involving the victim’s car and the Garners’ blue Oldsmobile. There was testimony that Williams, Terrance, and Toriano were in the blue car. There was testimony that Terrance was not in

the blue car. There was no testimony given, nor none proffered, that “Detroit” was in the blue car, that he was at or near the scene, or that he participated in the shooting. The evidence proffered by Terrance regarding “Detroit” as the shooter was simply speculative. There was no evidence directly connecting “Detroit” to the shooting and, therefore, Terrance failed to satisfy the legitimate tendency test. The trial court properly excluded this evidence.

C. Insufficiency of the Evidence.

¶15 Terrance argues that there was insufficient evidence to convict him of this crime. Terrance contends that the State’s witnesses were so incredible and “patently unreliable” that no jury, acting reasonably, could have convicted him. We disagree.

[I]n reviewing the sufficiency of the evidence to support a conviction, an appellate court may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn a verdict even if it believes that the trier of fact should not have found guilt based on the evidence before it.

State v. Poellinger, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990) (citations omitted). Terrance challenges the testimony of Williams. He points out that sometime after Williams’s statements to the police implicating Terrance and Toriano, Williams went to Terrance’s attorney’s office and stated that his original statement to the police was untrue. Williams addressed this conduct during his testimony at trial. He stated that he went to the attorney’s office and recanted

because he was scared and did not want to testify. Williams indicated that when the attorney asked him to sign a recantation statement, he could not because what he had told the police was correct.

¶16 Terrance challenges the testimony of the State's eyewitnesses because the eyewitnesses were inconsistent as to whether two or three people were in the blue Oldsmobile at the time of the shooting and they disagreed as to whether the gun was fired out of the front or back window of the passenger side of the car. Further, Terrance challenges the testimony of Delicia Davis and Demetria Taylor, who gave statements to the police that Terrance had told them that he shot at the victim. Both girls denied making these statements to the police at the time of the trial.

¶17 Terrance is correct that the record contains some inconsistencies, and some recantations of statements given to the police. Much of the State's case was contradicted. However, conflicting testimony does not render the State's witnesses inherently incredible. It was the jury's role to sort out the inconsistencies and make a determination as to which witnesses were more credible.

¶18 Five eyewitnesses established that the shooter was on the passenger side of the Garners' blue Oldsmobile and that the shooting took place at 4:30 p.m. on July 2, 1999. Some of the eyewitnesses were sure that the gun was pointed out of the rear passenger seat. One witness thought it was pointed out of the front passenger seat, but indicated that the back passenger could have been leaning forward. These eyewitnesses were not consistent as to whether there were two or three individuals in the blue Oldsmobile, but these observations can be explained by Williams's statement that he ducked down when the shooting took place.

¶19 Williams testified in detail as to what he, Terrance, and Toriano did in the hours before the shooting, lending credibility to his account. He admitted that he recanted at the attorney's office, but indicated he did so because he was scared. Also, Williams testified at trial how the incident happened, and how each Garner brother participated in the incident. There was an eyewitness who stated that the blue Oldsmobile was in the Garners' garage in the early morning of July 3.

¶20 There were statements from Demetria and Delicia that Terrance admitted his involvement in the shooting. Delicia's mother corroborated part of Delicia's statement regarding Terrance's involvement. Both girls denied making the statements to the police at trial, but Delicia's mother did not.

¶21 Thus, the trial record establishes that one witness, Williams, testified that Terrance was in the Garner vehicle and that he shot at the victim from the rear passenger seat. Other eyewitnesses corroborate the fact that the shooting occurred from the Garner vehicle, and other facts were consistent with Williams's testimony. Other witnesses made statements that Terrance admitted to the shooting. The jury could reasonably believe each of these witnesses and find Terrance guilty beyond a reasonable doubt. Although the record also contains evidence to exonerate Terrance, it was the jury's responsibility to assess the credibility of the conflicting testimony. The jury found the witnesses implicating Terrance more credible than the witnesses exonerating Terrance. Thus, there is evidence to support the jury's determination.

D. New Trial in the Interests of Justice.

¶22 Last, Terrance asks this court to exercise its authority under WIS. STAT. § 752.35 to reverse the judgment and order a new trial in the interests of justice. Terrance asserts that the real controversy has not been tried because he

was prohibited from introducing evidence that another shooter was responsible, and from introducing the testimony of his brother, Toriano. We decline Terrance's invitation.

¶23 As noted earlier in this opinion, we cannot conclude that error occurred when the trial court excluded the "other shooter" evidence, and we cannot conclude that Toriano's testimony would have probably affected the outcome of the trial. Accordingly, there is no basis to exercise our discretionary authority under WIS. STAT. § 752.35.

By the Court.— Judgment and order affirmed.

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

