

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 4, 2009

David R. Schanker
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. 2008AP2681

Cir. Ct. No. 2001CF124

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL BAUDELAIRE VERNIO,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Trempealeau County:
JOHN A. DAMON, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Michael Baudelaire Vernio appeals an order¹ denying his postconviction motion in which he requested a new trial based on newly discovered evidence. Because the trial court correctly concluded the new evidence would not have altered the result of the jury trial, we affirm the order.

¶2 Vernio was charged with first-degree intentional homicide, attempted burglary while armed and two counts of conspiracy. The State's witnesses included co-conspirators who testified that Shannon Ristau, Scott Kujak, Eric Corey and Vernio met at Vernio's home in March 1997, where they conspired to burglarize Aloyzie Przybilla's home and, if necessary, to rob him by force. They drove from Winona, Minnesota, to look for Przybilla's residence. Several days later, someone shot and killed Przybilla. Ristau testified she drove Vernio to the Przybilla residence and waited in the car while he walked to the farmhouse alone. When Vernio returned from the farmhouse moments later, he told her he had shot the man.

¶3 Vernio denied any involvement in the murder. However, in an interview with police, he acknowledged that others conspired at his house to commit burglary and robbery. He insisted he never joined the conspiracy or, if he briefly had, soon withdrew from it. The jury acquitted Vernio of the homicide and the attempted burglary. It convicted him of the inchoate crimes of conspiracy to commit burglary and conspiracy to commit armed robbery.

¹ The notice of appeal also purports to appeal the judgment of conviction. Vernio had a previous appeal from the judgment of conviction. This is not an appeal under WIS. STAT. RULE 809.30. Our jurisdiction is limited to review of the order denying the motion for a new trial. All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

¶4 After this court affirmed Vernio's convictions, he discovered two witnesses who testified Daniel Roach told them he had murdered an "old man" in Trempealeau County during a robbery. Troy Gustavson, Roach's friend, said Roach made the statement in the summer of 2000 when Roach was undergoing treatment for a life-threatening liver problem. Roach did not explain when the shooting occurred or who was with him. Gustavson also acknowledged that he told an investigator he did not believe Roach at the time and thought Roach might have been hallucinating. Although he spoke with Roach weekly between the summer of 2000 and Roach's death in November 2001, the subject never came up again.

¶5 Dr. Katherine Piderman, the chaplain at Mayo Clinic, also testified regarding conversations with Roach. Roach admitted his involvement in the murder of an elderly man with "a bunch of people." He did not specify who, when, where, or if he was the one who committed the murder. He told Piderman in December 2000 that the murder was "a long time ago."

¶6 In rebuttal, the State called an investigator who interviewed Roach on June 13, 2000. At that time, Roach denied any involvement in the homicide or any participation in the conspiracy. Roach told investigators that any information he had about the case came from Kujak.

¶7 A defendant seeking a new trial based on newly discovered evidence 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 makes this showing, the circuit court must determine whether a reasonable probability exists that a different result

would be reached in a trial. A reasonable probability of a different outcome exists if there is a reasonable probability that a jury, looking at both the old evidence and the new evidence, would have reasonable doubt as to the defendant's guilt. *See State v. Love*, 2005 WI 116, ¶¶43-44, 284 Wis. 2d 111, 700 N.W.2d 62.

¶8 We need not review all of the requirements for a new trial based on newly discovered evidence because we conclude the trial court properly exercised its discretion when it concluded the new evidence would not change the verdicts. *See State v. Plude*, 2008 WI 58, ¶31, 310 Wis. 2d 28, 750 N.W.2d 42. The evidence of Roach's statements would not create a reasonable doubt regarding the only two crimes for which Vernio was convicted, conspiracy to commit robbery and conspiracy to commit burglary.

¶9 The elements of conspiracy are that the defendant intended that a felony be committed, that he was a member of a conspiracy to commit the crime, and that one or more of the co-conspirators performed an act toward the commission of the intended crime that went beyond mere planning and agreement. *See WIS JI—CRIMINAL 570 (2001)*. The State is not required to prove the agreed-upon crime actually occurred, distinguishing the inchoate crime of conspiracy under WIS. STAT. § 939.31 from the party to a crime statute, WIS. STAT. § 939.05. The jury believed the testimony of co-conspirators that Vernio conspired to commit burglary and robbery, and in furtherance of the conspiracy, the conspirators traveled to Trempealeau County to try to find the Przybilla residence. At that time, Vernio had committed all of the elements of both counts of conspiracy. Even if Przybilla had not been subsequently killed or if Vernio had nothing to do with his murder, he was guilty of conspiracy to commit robbery and burglary.

¶10 Roach's confessions, even if generously construed to take sole responsibility for Przybilla's murder, do nothing to disprove the formation of the conspiracy and the act of driving to the vicinity in furtherance of the conspiracy. Roach's confessions, assuming he was not hallucinating and assuming Vernio was not one of the "bunch of people" involved in the murder, relates only to the homicide and attempted burglary charges for which Vernio was acquitted. Roach's confession does nothing to corroborate Vernio's denial of involvement in the conspiracy nor his claim that he withdrew from the conspiracy. Therefore, the newly discovered evidence does not create a reasonable probability of a different outcome on the conspiracy verdicts.

By the Court.—Order affirmed.

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

