COURT OF APPEALS
DECISION
DATED AND FILED

February 19, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-1119-CR **Cir. Ct. No. 98 CF 6420**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LUIS VASQUEZ,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: MEL FLANAGAN and JOHN J. DiMOTTO, Judges. [1] *Affirmed.*

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

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[1] The Honorable Mel Flanagan presided over the jury trial and entered the judgment of conviction; the Honorable John J. DiMotto entered the order denying Vasquez's motion for postconviction relief.

¶1 PER CURIAM. Luis Vasquez appeals from the judgment of conviction entered after a jury found him guilty of one count of first-degree intentional homicide, while using a dangerous weapon, as a party to the crime, and one count of second-degree intentional homicide, while using a dangerous weapon, as a party to the crime. He also appeals from the order denying his motion for postconviction relief. He argues that the postconviction court erroneously exercised discretion in denying his motion for a new trial, based on newly discovered evidence, without holding an evidentiary hearing. He also argues that the trial court erred in denying his motion for a mistrial, based on comments of the prosecutor in closing argument. We affirm.

I. BACKGROUND

¶2 The trial evidence established that Vasquez was having a dispute with his former landlord, Thomas Ericson. According to Ericson's neighbor, sometime in late November 1998, she observed Vasquez threatening to kill Ericson for withholding his security deposit. Trial testimony also established that approximately a week after having made this threat, Vasquez and his friend, Christopher Berrisford, went to Ericson's residence, confronted James Minter, Ericson's roommate, and told him to get Ericson. When Minter turned to go into the rear of the residence, Vasquez shot him. Vasquez then went after Ericson, who had fled, brought him back to the residence, forced him into a bathroom, and attempted to shoot him, pulling the trigger five times while holding the gun to Ericson's head. Because the gun did not fire, Vasquez told Berrisford to watch Ericson in the bathroom while he went to reload. Six minutes later, Vasquez returned and shot Erickson.

¶3 The State's case was based primarily on Berrisford's testimony. In exchange for his cooperation, Berrisford entered into an agreement, which resulted in his guilty plea to first-degree reckless homicide, while armed, and a thirty-year sentence.

¶4 Following his conviction Vasquez moved for a new trial, submitting affidavits from two of Berrisford's cellmates—one who had been incarcerated with Berrisford before Vasquez's trial, and the other who had been with him after the trial. The affidavits stated that Berrisford said that he had committed the homicides, but that he had blamed Vasquez to avoid potential criminal charges. Subsequent police interviews of the cellmates elicited statements in which they recanted, in whole or in part, the information in the affidavits. In fact, in one case the cellmate even recanted having made the affidavit. The court denied Vasquez's motion.

II. DISCUSSION

¶5 Vasquez contends that the postconviction court erred in denying his motion for a new trial without first holding a hearing. We disagree.

¶6 A new trial will be granted on the basis of newly discovered evidence only if the defendant establishes by clear and convincing evidence, that: (1) the evidence was discovered after conviction; (2) the defendant was not negligent in seeking to discover it; (3) the evidence is material to an issue in the case; (4) the evidence is not merely cumulative to the testimony introduced at trial; and (5) it is reasonably probable that, with the evidence, a different result would be reached at a new trial. ***State v. Carnemolla***, 229 Wis. 2d 648, 656, 600 N.W.2d 236 (Ct. App. 1999). Moreover, "evidence which merely impeaches the credibility of a witness does not warrant a new trial on this ground alone." ***Greer v. State***, 40

Wis. 2d 72, 78, 161 N.W.2d 255 (1968). Under such circumstances, corroboration of the newly discovered evidence is required. ***State v. McCullum***, 208 Wis. 2d 463, 476, 561 N.W.2d 707 (1997).

¶7 A defendant is not automatically entitled to an evidentiary hearing on a postconviction motion. *See* ***Nelson v. State***, 54 Wis. 2d 489, 497-98, 195 N.W.2d 629 (1972). In fact, an evidentiary hearing is required only if the motion alleges facts which, if proven, would entitle the defendant to relief. ***State v. Bentley***, 201 Wis. 2d 303, 310, 548 N.W.2d 50 (1996). If the motion on its face alleges facts which would entitle the defendant to relief, the circuit court has no discretion and must hold an evidentiary hearing. ***Id.*** Whether a motion alleges facts which, if true, would entitle a defendant to relief is a question of law we review *de novo*. ***Id.*** If the motion fails to allege sufficient facts, however, the circuit court has the discretion to deny a postconviction motion without a hearing. ***Id.*** at 310-11. Further, "'if the defendant fails to allege sufficient facts in his motion to raise a question of fact, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the trial court may in the exercise of its legal discretion deny the motion without a hearing.'" ***Id.*** at 309-10 (citations omitted). If the circuit court deems the motion deficient, its decision to deny the motion without a hearing is reviewed only for an erroneous exercise of discretion. ***Id.*** at 310-11.

¶8 Here, the record conclusively demonstrates that Vasquez was not entitled to relief. In a thorough and analytically astute written decision denying Vasquez's postconviction motion, the court concluded that the proffered evidence satisfied the first four criteria for a new trial based on newly discovered evidence, but not the fifth. The court found "that the necessary element of corroboration [was] lacking in that the affidavits [did] not contain circumstantial guarantees of

trustworthiness." The court explained: "This case is somewhat different from a typical recantation case because the principal witness, Berrisford, has not presented a sworn affidavit. Presented are merely affidavits from other people as to what they say they heard Berrisford say." The court observed, however, that if that was all that were here, an evidentiary hearing would have been required; after all, the weight and credibility afforded the statements of the cellmates, given the conflicts between the affidavits and the police accounts of their subsequent interviews, could not be determined without a hearing. The court noted, however, that here a critical fact obviated the need for a hearing: Vasquez's admission that he killed Minter.

¶9 At sentencing, Vasquez stated: "I was just trying to defend myself…. I admit killing him, yes…." Additionally, he had told the police that he had shot Minter three times. Thus, Vasquez's own accounts, standing alone, refuted even the most favorable versions of Berrisford's cellmates' accounts of Berrisford's recantation. Moreover, as the postconviction court observed, not only did Vasquez admit that he killed Minter, but also, "at a minimum, he was an aider and abettor to the Ericson murder." Hence, even assuming the cellmates' accounts of Berrisford's statements were presented to the jury, Vasquez still would have been convicted of the two homicides, as a party to the crimes. The postconviction court did not need an evidentiary hearing to make that determination.

¶10 Vasquez next argues that the prosecutor's remark, during his rebuttal closing argument, that Vasquez was a "wretched man," denied him a fair trial and, therefore, he contends that the court erred in denying his motion for a mistrial. We disagree.

¶11 A trial court's decision to grant or deny a motion for mistrial is discretionary. ***State v. Pankow***, 144 Wis. 2d 23, 47, 422 N.W.2d 913 (Ct. App. 1988). In making its decision, a trial court must consider the entire proceeding and determine whether the claimed error is sufficiently prejudicial to warrant a new trial. ***State v. Grady***, 93 Wis. 2d 1, 13, 286 N.W.2d 607 (Ct. App. 1979). We will reverse a trial court's denial of a motion for mistrial only upon a "clear showing" that the trial court erroneously exercised discretion. ***Pankow***, 144 Wis. 2d at 47. Here, the prosecutor's comment was not sufficiently prejudicial to warrant a mistrial.

¶12 The prosecutor's comment that Vasquez was a "wretched man" followed the prosecutor's characterization of Vasquez's acts as "wretched" ones. Vasquez's counsel contemporaneously objected to the comments, and moved for a mistrial. In response, the court withheld ruling on the motion and instructed the jury that the "remarks of the attorneys are not evidence." The court also told the jury that its verdict was to be decided solely on the law and the evidence admitted during the trial. After the jury retired to deliberate, the court considered Vasquez's motion and concluded that the prosecutor's comments were not unduly prejudicial. We agree.

¶13 Vasquez cannot dispute that these killings were "wretched" acts and, therefore, that whoever did them was, arguably, a "wretched" person. Thus, in context, the prosecutor's comment was not improper. The court properly denied Vasquez's motion for a mistrial.

By the Court.—Judgment and order affirmed.

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