COURT OF APPEALS
DECISION
DATED AND FILED

November 14, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-0811-CR **Cir. Ct. No. 00-CF-677**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JASON S. SMITH,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for La Crosse County: DENNIS G. MONTABON, Judge. *Affirmed*.

Before Vergeront, P.J., Roggensack and Lundsten, JJ.

¶1 PER CURIAM. Jason Smith appeals from a judgment convicting him of being party to the crime of criminal damage to property and from an order denying his postconviction motion for a new trial. We affirm for the reasons discussed below.

BACKGROUND

¶2 This case arises out of vandalism committed at a golf course. The sod on one of the greens was torn up, several golf carts were tipped on their sides, one was tipped all the way over onto its canopy and set afire, and the windows of a van parked nearby were smashed. An anonymous tip led investigators to Smith and another man, Jeffrey Schein. Upon questioning, both admitted that they had been present during the incident, but each accused the other of instigating things and doing the majority of the damage.

¶3 The State eventually granted Schein immunity to testify against Smith. Schein testified that he had fallen asleep while Smith was driving them home from an out-of-town trip, and that when he woke up, they were on the golf course driving in circles, termed "donuts." Schein said he yelled at Smith to get off the golf course, and Smith then drove to where the van was parked, got out of the truck and smashed the van's windows with a baseball bat. Smith next drove to where the carts were and started trying to tip them. When he could not do so alone, Smith threatened to tell school officials that Schein was skipping school unless Schein helped him. Schein then helped Smith tip the carts, and Smith unscrewed some of the gas tanks and used a lighter to set one of the carts on fire.

¶4 In contrast, Smith testified that Schein was driving his own truck, and that he stopped near the van, got out of the car and smashed the van's window's with a baseball bat. Smith then asked to be taken home, but Schein said he had a few more stops to make. Schein next started doing "donuts" on the green, and then drove to the pro shop where he started tipping over the carts and lit one on fire.

¶5 In closing arguments the State suggested that both Schein and Smith were lying about their own lack of involvement, and that it was improbable that one person had tipped over the 700-pound carts. Defense counsel pointed out that Schein was a big kid and argued that it would have been possible for him to tip the carts alone. The jury found Smith guilty of criminal damage.

¶6 Smith filed a postconviction motion for a new trial alleging that he had learned after his conviction that Schein had told a jail cellmate that he had damaged the golf carts himself while Smith watched. Smith further argued that the issue of whether a single person could tip the golf carts over was not fully tried because defense counsel failed to present expert testimony that golf carts could be tipped over by one person.

¶7 At the postconviction hearing the cellmate testified that Schein had given four different versions of events that: (1) Schein had done all of the damage by himself while Smith watched; (2) Smith had only hit a couple of taillights on the van; (3) Smith did a couple of donuts, hit the taillights and broke a window on the van; and (4) both participated equally. An employee from a golf cart company testified that he had seen maintenance workers tip golf carts by themselves, and that a person with substantial strength could do so. The trial court denied Smith's motion.

STANDARD OF REVIEW

¶8 A motion for a new trial is addressed to the sound discretion of the trial court, and we will ordinarily not reverse the trial court's decision unless it failed to rationally apply the proper legal standard to the facts of record. *See* ***State v. Eckert***, 203 Wis. 2d 497, 516, 553 N.W.2d 539 (Ct. App. 1996). We will independently determine, however, whether the denial of a new trial based on

newly discovered evidence deprives the defendant of due process. *See* ***State v. Coogan***, 154 Wis. 2d 387, 394-95, 453 N.W.2d 186 (Ct. App. 1990).

ANALYSIS

¶9 The test we employ to determine whether newly discovered evidence warrants a new trial has five factors: (1) the evidence must have been discovered after the trial; (2) the moving party must not have been negligent in seeking to discover it; (3) the evidence must be material to the issue; (4) the testimony must not merely be cumulative to the testimony which was introduced at trial; and (5) it must be reasonably probable that a different result would be reached at a new trial. ***Coogan***, 154 Wis. 2d at 394-95. There is a sixth element required when the newly discovered evidence contradicts prior sworn testimony. In order to warrant a new trial, recantation testimony must either be corroborated by other newly discovered evidence, or the defendant must show: (1) there is a feasible motive for the initial false statement, and (2) there are circumstantial guarantees of the trustworthiness of the recantation. ***State v. McCallum***, 208 Wis. 2d 463, 477-78, 561 N.W.2d 707 (1997). The appellant must prove all of requirements by clear and convincing evidence. ***State v. Avery***, 213 Wis. 2d 228, 235, 570 N.W.2d 573 (Ct. App. 1997).

¶10 The State does not contest that Smith can satisfy the first four elements of the test. It argues, however, that Schein's recantation was uncorroborated and unsupported by any circumstantial guarantees of trustworthiness, and that it is not reasonably probable that the testimony would produce a different result upon retrial.

¶11 We agree that the proffered evidence fails to meet either of the additional requirements for recantations. First, Smith offers no independent corroborating evidence supporting Schein's recantation. Second, while Schein's

desire to minimize his own exposure to punishment is a feasible motive for having given false trial testimony, Smith has failed to show that Schein's postconviction exculpatory statement was inherently reliable.

¶12 Smith argues that the cellmate had no reason to lie about Schein's having made a statement tending to exculpate Smith. The question, however, is not whether there are inherent guarantees that the cellmate was telling the truth in relating Schein's exculpatory statement, but rather, whether there are inherent guarantees of the reliability of the statement which Schein made to the cellmate. We are not persuaded that Schein's exculpatory postconviction version of events is any more inherently trustworthy than his other postconviction versions, much less his trial testimony. Indeed, given that three out of the four postconviction statements attributed to Schein implicate Smith in some fashion, the statements supporting Smith's participation appear to be more reliable than the one exculpatory statement.

¶13 Smith further argues that the very fact that Schein had given so many different versions of events would undermine his credibility at a new trial. However, the State did not rely on Schein's credibility at the first trial—instead arguing that both Schein and Smith were lying. The jury was given the opportunity to hear each of their conflicting accounts, and to determine for itself whether it believed Smith's story that he was at the golf course but did not participate in the vandalism.

¶14 Smith nonetheless claims that the real controversy was not fully tried because jurors did not hear expert testimony on the likelihood that a cart could be tipped by one person. We are not persuaded, however, that this was a question for which expert testimony was required. In addition to Smith's direct assertion that

he had witnessed Schein tip the carts alone, the jury heard testimony that the golf carts weighed 700 pounds each, and that the golf course owner was unable to tip a cart over by himself. The jury could use its common sense and experience to determine whether a stronger person might have been able to tip a cart without assistance, as Smith claimed had occurred. We therefore decline to order a new trial in the interest of justice.

By the Court.—Judgment and order affirmed.

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