

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**December 6, 2011**

A. John Voelker  
Acting Clerk of Court of Appeals

**NOTICE**

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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. 2010AP2176-CR**

**Cir. Ct. No. 2007CF1280**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**TODD ENNIS,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Brown County: KENDALL M. KELLEY, Judge. *Affirmed.*

Before Hoover, P.J., Peterson, J., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Todd Ennis appeals a judgment convicting him of first-degree reckless homicide in the beating death of Justin Thomas. He also appeals an order denying his postconviction motion in which he alleged newly discovered evidence consisting of Eric Basinski's recantation of his trial

testimony. The circuit court found Basinski's postconviction testimony not credible. Because that finding is not clearly erroneous and Ennis established no reasonable probability that Basinski's recantation would lead a jury to reasonably doubt Ennis's guilt, we affirm the judgment and order.

## **BACKGROUND**

### **I. The Trial**

¶2 Thomas's autopsy concluded that he died of cranial cerebral trauma caused by multiple blunt force injuries. He suffered at least three blows to the head. Ennis admitted striking Thomas with a baseball bat, but claimed it was in self-defense or defense of others. Basinski was one of several State's witnesses who testified about the beating.

¶3 According to Basinski's trial testimony, he and six friends left a party after an initial confrontation between Jeremy Ninham and Jacob Kneiss in which Ninham displayed brass knuckles. As Basinski's group was about to leave in Ashley Gorecki's car, five to seven people in Ninham's group approached. Ninham struck Jacob Feagles in the face with his brass knuckles, knocking Feagles to the ground. Ninham came toward Ennis and Kneiss and said, "If you want to fight, I got brass knuckles." Someone, possibly Ninham, then said, "I got a gun." As Ninham attempted to swing at Feagles, Ennis hit him over the head with a beer bottle. Ninham then left the scene, although others remained and began throwing beer bottles at Kneiss.

¶4 Basinski then saw Ennis with a bat that Thomas tried to grab from him. They struggled over the bat and eventually Ennis pulled the bat out of Thomas's grip. Thomas then turned around and started running. Ennis chased

him until Thomas stopped and turned, standing approximately one yard from Ennis. At that point Ennis swung the bat “like a baseball player would” striking Thomas on the left side of his face. Thomas fell to the ground. Ennis then stepped on Thomas’s stomach. When Thomas sat up, Ennis hit him again on the same spot on his face, causing Thomas to fall back again. At that point, Basinski got into Gorecki’s car and they left the scene. Gorecki took Basinski to a nearby gas station and dropped him off. Basinski testified that their friend, Michael Mylen was not in the car, but remained at the scene.

¶5 Basinski testified that later on the same night, he, Ennis, Kneiss and Mylen went to a friend’s house where Ennis told Kneiss he should not have given him the bat because “a switch went off in my head and put me into anger mode.” Basinski testified that Ennis was defending Kneiss “big time” and he believed Ennis’s primary purpose was to defend himself and Kneiss.

¶6 Detective David Argall testified regarding a statement Basinski made after the incident. Argall prepared a written version of Basinski’s statement for his signature, but Basinski refused to sign the document stating, “he gave us all the information that he knew and that we need and he did not feel he had to sign it.” According to Argall, Basinski told him he saw Kneiss grab a bat from inside Ennis’s jeep and hand it to Ennis. Ennis then swung the bat “like a tomahawk, downward from his shoulder onto Thomas.” At trial, Basinski denied telling Argall that Kneiss handed Ennis the bat and could not recall whether he described how Ennis swung the bat. In a second interview, initiated by Basinski, Basinski related statements Ennis made shortly after the incident. Ennis told Kneiss, “You should have never given me the bat. A switch went off in my head and put me in an anger mode.” At trial, Basinski confirmed this statement. Argall also testified

that Basinski said Ennis admitted, “I killed the dude.” At trial, Basinski denied telling Argall that Ennis made that statement.

¶7 A private investigator working for Kneiss also interviewed Basinski. Basinski gave the investigator a signed statement. Basinski told the investigator that Ennis hit Thomas with “100 percent full force strength with the bat.” He also told her that Ennis hit Thomas three times and he witnessed the beating from inside Gorecki’s car. At trial, Basinski confirmed that he made these statements to the investigator.

¶8 Numerous other witnesses testified regarding the beating. Jamie Cornish did not know who hit Thomas, but saw someone hit him with the bat when his head was against the ground. Shawn Glover testified that he saw both Ennis and Kneiss beat Thomas on the head with a baseball bat. He saw Kneiss with the bat first and then Ennis. He thought each man struck Thomas twice. At least once, Ennis hit Thomas with the bat while Thomas was lying on the ground in the middle of the street. Glover estimated that Thomas was hit four times.

¶9 Gorecki testified that when the group left the party, she, Basinski and Mylen went toward her car and Ennis and Kneiss went toward Ennis’s Jeep. She then saw people running, but was not sure whether Ennis was being chased or was chasing someone else. Ennis was holding a “long and skinny” object that “stuck out a little past his shoulder.” She left the scene with Basinski and Mylen, and dropped Basinski off at a nearby gas station. Shortly thereafter, she picked up Ennis and Kneiss a few blocks from the scene.

¶10 Mackenzie Collins was a part of the group that left the party with Ninham and Thomas. She saw Ennis try to hide something. Soon, “beer bottles [were] getting smashed everywhere.” After Ninham was struck on the head with a

beer bottle, everybody started fighting. She saw Ennis hit Thomas with a baseball bat that he got from somewhere in the back of or behind his Jeep. She saw Ennis and Glover struggling over the bat. Then Ennis hit Thomas in the face with the bat, followed by additional blows. After the first strike, she testified that Thomas was “dazed ... and then [Ennis] hit him again and [Thomas] completely fell to the ground. She was sure that Ennis struck Thomas’s head at least twice.

¶11 Casey Gogos testified that just before Thomas was hit, he ran from Ennis, but Ennis chased him and eventually caught up to him and started hitting him with the bat. Using two hands, Ennis raised the bat above his head and used “just about all” of his force to strike Thomas. Thomas remained standing the first two times he was hit but fell after the third blow. Ennis continued hitting Thomas after he collapsed. He estimated that Ennis hit Thomas close to ten times, six or seven of the blows occurring after Thomas was on the ground.

¶12 Mylen testified that a baseball bat was taken out of the Jeep around the time Ninham was hit by the beer bottle. Mylen heard Ennis tell Kneiss to get the bat out of the jeep. After Ninham was hit, Glover and Thomas jumped on Ennis. Ennis broke free, grabbed the bat from Kneiss, cocked it back as if he were going to swing, but did not swing. Thomas grabbed the bat and pulled Ennis closer to him. They struggled over the bat until Ennis secured the bat. At that point, Gorecki drove them away from the scene and Mylen saw Ennis hit Thomas on the head with the bat and knock him to the ground. He saw Ennis strike Thomas twice with the bat.

¶13 Andrew Rusch testified that Ennis grabbed the baseball bat out of a trunk, took about twelve steps toward the middle of the street and hit Thomas in the head with the bat. Thomas fell to the ground. Ennis was holding the bat “like

a baseball player would ... with both hands.” He struck Thomas “with all his force ... right in the head.” Ennis hit Thomas a second time and he fell to the ground. After Thomas fell, Rusch saw Ennis stand over Thomas and strike him four or five more times in the head.

## II. The Recantation

¶14 At trial, Ennis testified that he was “scared” because of the threat about a gun. He struck Ninham with a beer bottle because Ninham was about to swing at Kneiss. Ennis grabbed the bat from Kneiss and started swinging to get other men away from him, but did not hit anyone at that time. A short time later, Ennis swung the bat again and hit someone who “was in the process of hitting me.” Ennis hit the man two times in rapid succession and the man fell down. Someone else then grabbed the bat and started wrestling Ennis for it. Ennis denied striking the fallen man again. After struggling for a while with the other person, Ennis testified that he “just dropped the bat and ran.” Ennis denied telling Mylen and Basinski that he thought he killed Thomas. He also denied saying a switch went off in his head that put him in anger mode.

¶15 After the trial, a private investigator employed by Ennis’s postconviction counsel interviewed Basinski. The investigator submitted an affidavit memorializing the interviews. According to the investigator, Basinski said he and Mylen “discussed together what version of events they would tell police.” Basinski told the investigator that “specific aspects of his trial testimony were false.” He said he was not present during the altercation and never saw Ennis strike Thomas with a baseball bat. Basinski also told the investigator he never heard Ennis say he thought he had killed Thomas. Basinski told the

investigator that he and Mylen were afraid of being charged and therefore concocted a version of the events that would not lead to either being charged.

¶16 The investigator also interviewed Basinski's mother, who indicated that, before trial, Basinski told her he intended to testify falsely because he believed that would reduce his chances of being charged. She stated that both she and Basinski's grandfather "unsuccessfully attempted to persuade him to testify truthfully."

¶17 At the postconviction hearing, Basinski testified that he left the scene before the real fight started. He denied seeing Ennis hit Thomas with a baseball bat. He testified that his mother picked him up from the gas station, but he told her nothing about what he had seen that night. Basinski testified that he lied about seeing the attack "to help out my friend." He explained that he was "trying to get the self-defense back in the picture."

¶18 Basinski stated that before the trial, he told Mylen what his testimony was going to be, but Mylen did not tell Basinski what he planned to say. Mylen knew that Basinski was not at the scene. After the trial, Basinski told Mylen, "My testimony and statement that I gave the police was all false." Contradicting the investigator's affidavit, Basinski said it was true that he had a conversation with Ennis after the attack on Thomas in which Ennis said he believed he had killed Thomas. However, this conversation did not take place in the hours after the beating, as Basinski said at trial. Basinski stated the first time he spoke to Ennis after Thomas's death was about one week after the incident. That statement contradicted Basinski's statement that he did not talk to Ennis until after Ennis had been arrested. When the district attorney noted the inconsistency, Basinski admitted that the testimony he just gave was false: "Q: So you just lied

today. A: Sure. I'm sorry." At the postconviction hearing, Ennis's counsel asked whether Basinski told anyone he intended to testify falsely at trial. Basinski answered, "No," contradicting the investigator's affidavit.

¶19 Regarding Basinski's assertion that he wanted to "insert self-defense," the district attorney noted Basinski's trial testimony that Ennis stepped on Thomas's stomach and, when Thomas sat up, Ennis struck him in the head with the bat with 100 percent full strength. The district attorney also noted Basinski's testimony that Ennis said a switch went off in his head and put him in anger mode, that Ennis told Basinski he struck Thomas three times and admitted he probably killed Thomas. When asked whether he would agree that none of this testimony would indicate Ennis was acting in self-defense, Basinski replied, "Correct."

¶20 The district attorney also questioned Basinski about his postconviction testimony that he lied at trial in order to avoid being charged. Basinski replied that he was mainly trying to help Ennis. When asked whether it would have helped Ennis more if Basinski had said he was not there and did not see what happened, Basinski responded, "Yeah. Now I realize that." When asked by the court what he believed he could have been charged with, Basinski admitted that he did not know.

¶21 When asked to explain his reason for recanting his trial testimony, Basinski explained that he decided to come forward "when I realized I had no friends." When questioned by the court about his thought process, Basinski stated that he lost all of his friends.

¶22 On recross-examination, Basinski admitted the statements that he made at trial matched the information he gave the police a few days after the incident. Basinski stated he was telling the police what he heard from others.



However, when asked who told him that Ennis stepped on Thomas's stomach, Basinski replied, "No one." When asked who told him about Thomas's head springing up and then Ennis hitting him on the head with a bat, Basinski replied, "No one." When asked who told Basinski about Ennis saying a switch went off in his head and put him in anger mode, Basinski replied, "No one." Basinski also testified that no one told him Ennis struck Thomas three times with the bat or that Ennis said "I think I killed the dude."

¶23 Basinski's mother also testified at the postconviction hearing. She stated she did not discuss her son's intended trial testimony with him other than to tell him to testify truthfully. The first time she heard about Basinski's alleged false testimony was after Ennis was sentenced.

¶24 The circuit court denied the postconviction motion, finding that Basinski had no feasible motive for testifying falsely at trial. The court labeled "absurd" Basinski's alleged motivation to help his friend by raising an issue of self-defense because his trial testimony was not consistent with self-defense. Likewise, Basinski's alleged motive to lie to protect himself from criminal consequences was unpersuasive because, according to his postconviction testimony, he could not have been charged with any offense since he left the scene before the crime occurred. Rather, the court found that Basinski decided to recant his trial testimony after he was rejected by his friends. The court noted that Basinski's demeanor at the postconviction hearing, only displaying emotion when he spoke of losing his friends, supports the finding that he was motivated to falsely testify at the postconviction hearing, not at the trial. The court further found Basinski's recantation lacked circumstantial guarantees of trustworthiness. His recantation was not internally consistent and he admitted to lying even within his recantation. Basinski's mother's testimony did not corroborate the recantation.

The court found the recantation “wholly incredible,” and it was not “reasonably probable that a different result would be reached at a new trial” that included the recantation.

### DISCUSSION

¶25 A defendant alleging newly discovered evidence must establish a reasonable probability, that had the jury heard the newly discovered evidence, it would have had a reasonable doubt as to his guilt. *State v. Plude*, 2008 WI 58, ¶32, 310 Wis. 2d 28, 750 N.W.2d 42. A reasonable probability exists when the jury, looking at both the old evidence and the new evidence, would have had a reasonable doubt as to the defendant’s guilt. *Id.*, ¶33. Whether a jury would find the newly discovered evidence had such a significant impact on other evidence presented at trial that it would have a reasonable doubt is a question of law that we decide without deference to the circuit court. *Id.* However, the circuit court’s credibility findings must be upheld unless they are clearly erroneous. *See State v. Jenkins*, 2007 WI 96, ¶33, 303 Wis. 2d 157, 736 N.W.2d 24. When newly discovered evidence is based on a recantation, the defendant has an additional burden to present corroboration by other newly discovered evidence or a feasible motive for the initial false statement and circumstantial guarantees that the recantation is trustworthy. *State v. McCallum*, 208 Wis. 2d 463, 476-78, 561 N.W.2d 707 (1997). A finding that the recantation is incredible necessarily leads to the conclusion that the recantation would not create a reasonable doubt in the minds of the jury. *Id.* at 475.

¶26 The circuit court’s finding that Basinski’s postconviction testimony was not credible is not clearly erroneous. Basinski’s alleged motive for lying at Ennis’s trial was not credible because his testimony did not support Ennis’s claim

of self-defense and Basinski's fear of prosecution would be irrational if in fact he had left before the crime occurred. Ennis did not present any newly discovered evidence corroborating the recantation. At the time he filed his motion, Ennis apparently believed Basinski's mother would corroborate her son's recantation. However, her testimony did not support the recantation.

¶27 Basinski's recantation also lacked circumstantial guarantees of trustworthiness. It was internally inconsistent and, when confronted with the impossibility of parts of his testimony, he admitted he lied at the postconviction hearing. He also contradicted his testimony that the story he told police came from what other people told him when he repeatedly answered that no one told him most of the important details he related to the police. The court also reasonably found Basinski's recantation incredible based on his demeanor at the postconviction hearing. Because Ennis presented no newly discovered evidence corroborating Basinski's recantation, no feasible motive for Basinski to have testified falsely at trial and no circumstantial guarantees of trustworthiness of the recantation, the court appropriately concluded that the newly discovered recantation would not lead a jury to reasonably doubt Ennis's guilt.

*By the Court.*—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5. (2009-10).

