COURT OF APPEALS
DECISION
DATED AND FILED

May 1, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP1133 **Cir. Ct. No. 1994CF941771**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

VICTOR MARSHALL KENNEDY,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: KEVIN E. MARTENS, Judge. *Affirmed.*

Before Curley, P.J., Fine and Brennan, JJ.

¶1 PER CURIAM. Victor M. Kennedy, *pro se*, appeals from an order of the circuit court that denied both his motion for a new trial based on newly discovered evidence and his motion for postconviction discovery. We agree with the circuit court's decision and we affirm.

¶2 In 1994, a jury convicted Kennedy on one count of first-degree reckless homicide. Kennedy shot and killed his ex-girlfriend, Keywarner Young, because she would not return his car after they broke up. Kennedy claimed that Young had attempted to run him over and that he shot her in self-defense. Three eyewitnesses, including Michael Evans and Fernando Wilburn, contradicted that claim, testifying that Kennedy shot at Young as she drove away.

¶3 Kennedy had a direct appeal, and this court affirmed his conviction. Kennedy also had a direct appeal from the denial of a WIS. STAT. § 974.06 postconviction motion; we affirmed that as well. In January 2011, Kennedy filed a postconviction motion seeking a new trial based on newly discovered evidence and, later, a motion seeking postconviction discovery.

¶4 As newly discovered evidence, Kennedy presented an affidavit from Evans, recanting his trial testimony that he had seen Kennedy shoot at Young. Evans also claimed that a detective had paid him fifty dollars for his trial testimony. The motion for discovery[1] sought an order directing authorities at Jackson Correctional Institution to turn over and authenticate a copy of a recorded phone call between inmate Travis Harrell and Wilburn. This recording would ostensibly support a claim that Wilburn had also testified falsely.

¶5 The circuit court denied both motions. It ruled that Evans's "recantation" was not corroborated and also created "no reasonable probability of

[1] Kennedy captioned his motion as a "motion to stay courts decision for cause." Kennedy was implicitly seeking a stay of the circuit court's decision on his motion for a new trial until he could supplement it with the recording, though the relief requested was merely that the circuit court order the prison to produce the recording. The circuit court denied the stay, though we do not revisit that decision on appeal.

a different result at a new trial." It further ruled that there was no evidence that Wilburn had recanted his testimony, particularly because Kennedy's motion was based only on hearsay and double hearsay. The circuit court additionally noted that it would not order authentication of a recording because the prison could not authenticate the participants' identities. Kennedy appeals.

I. Newly Discovered Evidence

¶6 In order for newly discovered evidence to warrant a new trial, "'the defendant 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.'" ***State v. Armstrong***, 2005 WI 119, ¶161, 283 Wis. 2d 639, 700 N.W.2d 98 (citation omitted). "'If the defendant proves these four criteria by clear and convincing evidence, the circuit court must determine whether a reasonable probability exists that a different result would be reached in a [new] trial.'" ***Id.*** (citation omitted).

¶7 When the newly discovered evidence is a witness's recantation, the recantation must be corroborated by other newly discovered evidence. ***State v. McCallum***, 208 Wis. 2d 463, 473-74, 561 N.W.2d 707 (1997). "'The degree and extent of the corroboration required varies from case to case based on its individual circumstances.'" ***Id.*** at 477 (citation and brackets omitted). The corroboration requirement for recantation is fulfilled if "there is feasible motive for the initial false statement" and "there are circumstantial guarantees of the trustworthiness of the recantation." ***Id.*** at 477-78.

¶8 The circuit court opted to assume that Kennedy had made the first four showings identified in ***Armstrong*** and considered only whether the

recantation was corroborated and whether a different result was reasonably probable. However, we question whether Evans's recantation actually is newly discovered evidence. When Evans was interviewed after the shooting, he gave two statements to police: one statement that he saw Kennedy shooting and one statement that he merely heard shooting. In the decision affirming the denial of Kennedy's WIS. STAT. § 974.06 motion, we wrote that "the discrepancy in Evans's testimony about whether he heard or saw the shooting was fully explored at trial[.]" *See* ***State v. Kennedy***, No. 2003AP3212, unpublished slip op. ¶32 (WI App Nov. 23, 2004). Thus, the "recantation," to the extent Evans would now testify that he did not see the shooting, does not appear to be evidence discovered after the conviction and, further, would be cumulative in light of the known discrepancies in his statements and the exploration of those conflicts at trial.

¶9 In any event, the circuit court ruled that there was no corroboration of Evans's recantation, as there is no other newly discovered evidence in support of it. We agree. The only motive Kennedy offers for Evans's "initial false statement"—*i.e.*, his trial testimony that he saw the shooting—is that an unnamed police officer allegedly paid Evans fifty dollars for the "false" testimony. Kennedy argues that the payment was "a considerable amount of money for a [then-thirteen] year old child." However, there is no circumstantial guarantee of trustworthiness to this part of the recantation: there is no additional newly discovered evidence to support the bribery claim, and Evans never identifies the officer who allegedly bribed him. Though Kennedy contends Evans might have remembered the officer's name "had this matter been explored upon a hearing," Kennedy is not allowed to assert conclusory allegations and hope that he will be able to support his case later. *See, e.g.*, ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433.

¶10 There is also no circumstantial guarantee of trustworthiness to Evans's recantation as a whole. The lack of identification of the officer prohibits the State from investigating or verifying the bribery claim and, though Evans's affidavit[2] is purportedly sworn under oath, he has made no promise to testify that he committed perjury at Kennedy's trial.

¶11 Kennedy contends that Evans's recantation has a circumstantial guarantee of trustworthiness because it is internally consistent.[3] He relies on ***McCallum*** to support his point. *See* ***McCallum***, 208 Wis. 2d at 478. Internal consistency was a relevant factor in that case because McCallum's sexual assault conviction was based solely upon the victim's uncorroborated testimony, and McCallum was seeking a new trial based on the victim's uncorroborated recantation of that testimony. In other words, the supreme court recognized the

[2] The State asserts that the affidavit is irregular because it lacks the notarial officer's title and jurisdiction, as required by WIS. STAT. § 706.07(7) (2009-10). The State further notes that it was unable to locate the notary—whose name was only signed, not printed—in the state database.

The State's response brief, which points out these omissions, was filed September 26, 2011. On October 14, 2011, Kennedy sent Evans's affidavit to this court. The cover letter explained that it was "for the court verification" but made no reference to the State's brief. By order dated October 27, 2011, this court declined to take action on Kennedy's submission because it appeared that he was submitting a document that was either not relevant to, or not part of the record in, the current appeal. It now appears that Kennedy sent us the original Evans affidavit in an attempt to rebut the State's brief.

We observe that the affidavit in our correspondence file bears the raised seal of notary public Jodene Perttu; the State had completed its database search believing her first name started with the letters "JOA." The affidavit does, however, fail to note a proper jurisdiction: the notary did not designate one herself and, although there is a caption at the top of the affidavit, Green Bay is not a Wisconsin county. Accordingly, we decline to evaluate whether the affidavit is irregular, and we do not factor its form into our decision.

[3] Kennedy also contends that the State's use of Evans's statement, that he merely heard the shooting, in the criminal complaint is independent corroboration of the recantation. We disagree. The criminal complaint merely indicates the basis on which the State believes a defendant has committed a crime; the facts therein ultimately may or may not be proven true.

near impossibility of any independent corroboration of the recantation. *See* ***id.*** at 477. Kennedy, however, does not have the same problem; ***McCallum*** is inapposite.

¶12 The circuit court also concluded that, even if there were sufficient corroboration, there was no reasonable probability of a different result at trial. "The correct legal standard when applying the 'reasonable probability of a different outcome' criteria is whether there is a reasonable probability that a jury, looking at both the accusation and the recantation, would have a reasonable doubt as to the defendant's guilt." ***Id.*** at 474.

¶13 A jury has already considered that Evans claimed both to have seen the shooting, and also only to have heard it. In his testimony, Evans explained that he told police he only heard the shot because an acquaintance of Kennedy's threatened him. Further, Evans's affidavit claims only that he was paid for false *trial* testimony; he also testified at the preliminary hearing that he saw the shooting. Yet Evans does not claim he was paid to falsify that testimony, nor does he attempt to recant it. Thus, it is not reasonably probable that Evans's renewed denial of seeing the shooting would create reasonable doubt. The circuit court properly denied the motion.

II. Postconviction Discovery

¶14 "[A] defendant has a right to post-conviction discovery when the sought-after evidence is relevant to an issue of consequence." ***State v. O'Brien***, 223 Wis. 2d 303, 321, 588 N.W.2d 8 (1999). Evidence relevant to an issue of consequence "is evidence that probably would have changed the outcome of the trial." ***Id.*** Kennedy wanted to obtain a recording of a phone call between fellow inmate Travis Harrell and eyewitness Wilburn.

¶15 Kennedy's request is based on a discrepancy between Wilburn's statement to police and his trial testimony about where Kennedy was standing relative to the car when he shot at Young—either the rear of the vehicle as Wilburn told police, or the side of the vehicle as Wilburn testified at trial. Harrell claimed he asked Wilburn why he changed his trial testimony; Wilburn ostensibly answered that he was young and thought he was doing the right thing. In support of his request for the recording, Kennedy offered an affidavit from Harrell about his conversation with Wilburn and an affidavit from himself about his conversation with Harrell about the conversation with Wilburn.

¶16 According to Kennedy, it was physically impossible for him to have shot Young if he was at the rear of the car, so Wilburn's testimony was only beneficial to the State's case if he could put Kennedy at the side of the car. These discrepancies were also addressed in the prior appeal. Wilburn's statement to police was that the shooter was "approximately at the rear" of the car; when he testified, he said the shooter was at the side of the car. We have already concluded that any discrepancy between the two statements was *de minimis*. *See* ***Kennedy***, No. 2003AP3212, unpublished slip op. ¶¶34-35, 37.

¶17 The circuit court denied the discovery motion, finding that Wilburn had not changed his testimony at trial because the testimony was "substantially consistent" with his statement to police. The circuit court also concluded that there was insufficient evidence of any recantation, because the only "evidence" offered was affidavits based on hearsay and double hearsay. As the State points out, there is no affidavit from Wilburn himself, and certainly no offer from Wilburn to testify that his trial testimony was false.

¶18 We also note that the recording would not change the outcome of the trial. *See* ***McCallum***, 208 Wis. 2d at 474. Wilburn's testimony would not be substantially altered, and Kennedy never disputed being the shooter, only whether he was shooting in self-defense. Whether Kennedy was standing to the side of the vehicle or approximately to the rear of it is inconsequential. The circuit court properly denied the motion.

By the Court.—Order affirmed.

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