

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 8, 2012

Diane M. Fremgen
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. 2010AP966

Cir. Ct. No. 1999CF2788

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

CHARLES EDWARD HENNINGS,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County:
PATRICIA D. McMAHON, Judge. *Affirmed.*

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

¶1 PER CURIAM. Charles Edward Hennings, *pro se*, appeals from an order denying his postconviction motion. He contends that he is entitled to a new trial on the basis of newly discovered evidence. We affirm.

¶2 Hennings was charged with first-degree intentional homicide and armed robbery. His first trial resulted in a hung jury and mistrial. After a second trial, a jury convicted Hennings of the lesser-included offense of felony murder, with armed robbery as the predicate offense. At the second trial, two witnesses, Jevashaun Ward and his mother Charlotte Ward, were unavailable. Their testimony from the first trial was read to the jury. Hennings contends that Jevashaun Ward has now recanted elements of his testimony. After a hearing at which multiple witnesses testified, the circuit court denied Hennings's motion for a new trial based on Jevashaun Ward's purported recantation.

¶3 A defendant seeking a trial on the basis of newly discovered evidence must prove: “(1) the evidence was discovered after conviction; (2) the defendant was not negligent in seeking the evidence; (3) the evidence is material to an issue in the case; and (4) the evidence is not merely cumulative.” *State v. Plude*, 2008 WI 58, ¶32, 310 Wis. 2d 28, 48, 750 N.W.2d 42, 52 (citation omitted). If the defendant proves all four criteria, then the circuit court must determine whether a reasonable probability exists that had the jury heard the newly discovered evidence, it would have had a reasonable doubt about the defendant's guilt. *Ibid.* “The decision to grant or deny a motion for a new trial based on newly-discovered evidence is committed to the circuit court's discretion.” *Id.*, 2008 WI 58, ¶31, 310 Wis. 2d at 47, 750 N.W.2d at 52.

¶4 In support of his motion for a new trial, Hennings relied primarily on the testimony of Jevashaun Ward.¹ Ward testified that he lied in court during the

¹ Hennings's other witnesses in support of his motion were Desha Cox, who testified that Jevashaun Ward urged him to falsely report that Hennings had confessed to the crimes, and Antonio Thornton, who testified that he heard Jevashaun Ward and Charlotte Ward talk about lying to the authorities to get Hennings in trouble.

first trial about several things: (1) he lied when he testified that Hennings told him he had robbed and killed Nash; (2) he lied when he testified that Hennings said he had an arrest warrant for homicide; and (3) he lied when he testified that he was not angry at Hennings and therefore had no motive to implicate Hennings.

¶5 At the outset, we note that Ward did *not* testify at the first trial that Hennings told him he robbed and killed Nash. Ward testified that Hennings told him *he was wanted for homicide*, but Ward also testified that Hennings told him *he did not commit the crime*. Ward's new testimony is not, therefore, a recantation of testimony that Hennings confessed to him, as Hennings is now attempting to characterize it. We are left with two key points. Ward now admits lying when he said that Hennings told him he was wanted on a homicide warrant after the victim was murdered and Ward admits he was angry at Hennings when he testified at the first trial, and therefore had a motive to falsely implicate him, because Hennings had stolen drugs from Ward's girlfriend.

¶6 Although the facts and procedural history of this case are long and quite complicated, Hennings's motion for a new trial fails for a relatively simple reason. Hennings's new evidence does not impeach or in any way undermine the testimony of the only eyewitness to the murder in this case, Douglas Boyd. Boyd was the only other person present when Patrick Nash was shot and killed by the perpetrator, who was purchasing drugs from Nash. Boyd described the shooter to police, then identified Hennings as the shooter from photos and in a line-up. Boyd testified consistently at both trials about what occurred when Nash was killed and identified Hennings at both trials.

¶7 A defendant is entitled to a new trial based on newly discovered evidence only if a reasonable probability exists that the jury would have had a

reasonable doubt about the defendant's guilt if it had heard the newly discovered evidence. *Id.*, 2008 WI 58, ¶32, 310 Wis. 2d at 48, 750 N.W.2d at 52. Hennings does not meet that standard. The circuit court found that the testimony of Hennings's witnesses in support of his motion for a new trial was not credible based on their demeanor, their poor memories, inconsistencies in their testimony, and their extensive criminal records. Most importantly, the new evidence Hennings has presented does not cast doubt on Boyd's key testimony against Hennings; it simply undermines Ward's testimony that Hennings said he was wanted on a homicide warrant. This was relatively weak circumstantial evidence against Hennings, especially because Ward made no connection between the homicide warrant and Patrick Nash's murder. Therefore, we conclude that the circuit court properly exercised its discretion in denying Hennings's motion for a new trial.

¶8 Hennings next argues that he is entitled to a new trial in the interest of justice. We have discretionary power to reverse a judgment in the interest of justice if the real controversy was not fully tried or if we conclude that there has been a miscarriage of justice. *See* WIS. STAT. § 752.35; *Vollmer v. Luety*, 156 Wis. 2d 1, 19, 456 N.W.2d 797, 805 (1990). Nothing in the new evidence Hennings has presented convinces us that the real controversy was not fully tried or that there has been a miscarriage of justice. We therefore decline to award Hennings a new trial under § 752.35.

By the Court.—Order affirmed.

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

