COURT OF APPEALS
DECISION
DATED AND FILED

March 2, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-2830-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

GEORGE REED,

DEFENDANT-APPELLANT,

MAURICE JOHNSON,

DEFENDANT.

APPEAL from a judgment and orders of the circuit court for Milwaukee County: DAVID A. HANSHER, Judge. *Affirmed.*

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

PER CURIAM. George Reed appeals from a judgment entered after a jury found him guilty of first-degree intentional homicide, as party to a crime, and possession of a firearm by a felon, contrary to §§ 940.01(1), 939.05 and

941.29(2), STATS. He also appeals from orders denying his postconviction motions. Reed claims that: (1) the trial court erred in denying his motion for a new trial based on newly discovered evidence; (2) he received ineffective assistance of trial counsel because counsel failed to call his brother, Michael Reed, as a witness; (3) the trial court erroneously exercised its discretion when it refused to give the *falsus in uno* jury instruction; and (4) the trial court erroneously exercised its sentencing discretion by imposing an unduly harsh sentence. Because the trial court did not err in denying Reed's motion for a new trial, because Reed received effective assistance of counsel, and because the trial court did not erroneously exercise its discretion in instructing the jury or in imposing sentence, we affirm.

I. BACKGROUND

On April 21, 1996, Omar Hooper was fatally shot at 3200 North 34th Street in Milwaukee. It was not disputed that Reed was at the scene of the shooting. Co-defendant Maurice Johnson pled guilty and testified against Reed at Reed's trial. Johnson told the jury that he and Reed had gone to confront Hooper because Hooper had threatened Reed's brother (Dannyell) and his friend, Kinah Anderson. Johnson testified that both he and Reed had guns and they pulled their guns on Hooper. Johnson said that he shot Hooper in the leg, but Reed did not fire his gun. Anderson was with them and Johnson testified that Anderson also shot Hooper.

Reed testified in his own defense. He told the jury that when he saw his brother, Michael, talking to "a dude" (later identified as Hooper) on the corner, he went to get Michael. Reed said he was unarmed. Reed asked Hooper if he knew who had pulled a gun on his other brother, Dannyell, and Hooper said it was

some people from 33rd and Auer. Reed testified that Johnson and Anderson approached them, and Anderson said Hooper was the one who had shot at him earlier. At this point, according to Reed, Johnson opened fire and Anderson shot Hooper in the back of the head.

The State also introduced the testimony of eyewitness Floyd Figures, a friend of Dannyell. Figures testified that when Dannyell told Johnson and Reed that Hooper had pulled a gun on him, Reed said: "They made a mistake. They shouldn't never mess with my brother. Now I'm going to have to do him in." Subsequently, Johnson, Anderson, Dannyell and he approached Hooper on the corner. Figures said both Reed and Johnson were armed. When the group confronted Hooper, Figures stated that both Reed and Johnson opened fire.

The State produced another eyewitness, Patrick Evans, who was talking to another friend on the street when he saw four people approach Hooper. He testified that two came up close and two stayed further back. Evans said it sounded as if there was an argument occurring and then he heard "June" tell his companions to shoot Hooper. "June" is Reed's nickname. Evans also identified Johnson. He said that both Johnson and Reed had guns and he saw Johnson fire at Hooper.

The jury convicted. Reed filed a postconviction motion, alleging that newly discovered evidence warranted a new trial. The evidence he submitted was an affidavit from Johnson, recanting some of his trial testimony. Johnson claimed he lied about Reed's involvement with the shooting and that Reed had nothing to do with the shooting. Reed also asserted in his motion that the trial court should have given the *falsus in uno* instruction and that he received ineffective assistance. The trial court denied the motion, ruling that the newly

discovered evidence was not corroborated and that there was no reasonable probability of a different result upon retrial. The trial court also denied the ineffective assistance claim without a hearing. Reed appealed.

Before this court decided the appeal, however, Reed moved to remand the case, arguing that he could corroborate his newly discovered evidence claim. We ordered the case remanded to allow Reed to supplement his postconviction motion and seek reconsideration of his request for a new trial.

Reed filed a motion for reconsideration and included an affidavit from his brother, Michael, which was submitted both to serve as corroboration to Johnson's recantation and to establish the ineffective assistance claim. The trial court denied the motion, ruling that there was no probability of a different result on retrial and that failure to call Michael as a witness was not prejudicial. Reed now appeals.

II. DISCUSSION

A. Newly Discovered Evidence.

Reed asserts that the trial court erred when it denied his motion for a new trial on the basis of newly discovered evidence. The trial court ruled that the criteria for a new trial had not been satisfied because there was no reasonable probability that a retrial would bring a different result. We agree.

"Motions for a new trial based on newly discovered evidence are entertained with great caution." ***State v. Terrance J.W.***, 202 Wis.2d 496, 500, 550 N.W.2d 445, 447 (Ct. App. 1996). We will affirm the trial court's denial of such a motion as long as it has a reasonable basis and is made in accordance with accepted legal standards and facts of record. *See* ***State v. Jenkins***, 168 Wis.2d

175, 186, 483 N.W.2d 262, 265 (Ct. App. 1992). On appeal, we review the trial court's determination under the erroneous exercise of discretion standard. *See* ***State v. McCallum***, 208 Wis.2d 463, 473, 561 N.W.2d 707, 710 (1997).

In order to grant a motion for a new trial based on newly discovered evidence, a defendant must show: (1) that new evidence was discovered after trial; (2) that the defendant was not negligent in failing to discover the evidence before trial; (3) that the evidence is material; (4) that the evidence is not cumulative; and (5) that there exists a reasonable probability of a different result at a new trial. *See* ***State v. Coogan***, 154 Wis.2d 387, 394-95, 453 N.W.2d 186, 188 (Ct. App. 1990). When the newly discovered evidence is a recantation, the evidence must also be corroborated by other newly discovered evidence. *See* ***Zillmer v. State***, 39 Wis.2d 607, 616, 159 N.W.2d 669, 673 (1968).

Here, the trial court initially rejected Reed's motion because the Johnson affidavit was not corroborated by other newly discovered evidence and because it was not reasonably probable that a jury, looking at both the accusation and the recantation, would have a reasonable doubt as to Reed's guilt. Subsequently, Reed filed an additional affidavit from his brother, Michael, which averred that Michael did not see Reed pull out a gun and did not see Reed shoot Hooper. The trial court again denied Reed's motion, ruling that Michael's affidavit does not alter its original conclusion that there is no reasonable probability for a different result upon retrial. This was a reasonable conclusion based on the facts and law and, therefore, was not an erroneous exercise of discretion.

At trial, Johnson testified that Reed pulled a gun on Hooper, but did not fire any shots. In his recantation, Johnson says that Reed had nothing to do

with the shooting. There is no reasonable probability, given the other evidence presented at trial, that the jury would believe the recantation. The State produced testimony from Figures who testified that Reed had a gun and pointed it at Hooper during the confrontation. Another eyewitness, Evans, testified that Reed had a gun and that Reed instructed his companions to shoot Hooper.

Further, Michael's affidavit does not corroborate Johnson's recantation. Michael says he did not see Reed with a gun and did not see Reed shoot at Hooper. However, Michael avers that when he heard shots, he "took off running." Thus, his affidavit testimony does not preclude the fact that Reed had a gun or fired it. As noted by the trial court, "Michael Reed's affidavit does not undermine or interfere with the jury's factual determination of this issue in any respect."

Accordingly, the trial court did not erroneously exercise its discretion when it concluded that the evidence Reed presented did not warrant a new trial.

B. Ineffective Assistance.

Next, Reed claims he received ineffective assistance because trial counsel did not call his brother, Michael, to testify in his defense. He claims Michael's testimony would have been beneficial because, although present at the scene, Michael did not see Reed shoot Hooper. The trial court rejected this claim on the basis that failure to call Michael did not prejudice the outcome. We agree with the trial court's assessment.

To sustain a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient, and that counsel's

errors were prejudicial. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). A court need not address both components of this inquiry if the defendant does not make a sufficient showing on one. *See* ***id.*** at 697.

Whether counsel's actions constitute ineffective assistance is a mixed question of law and fact. *See* ***State v. Pitsch***, 124 Wis.2d 628, 633-34, 369 N.W.2d 711, 714 (1985). The trial court's determinations of what the attorney did, or did not do, and the basis for the challenged conduct are factual and will be upheld unless they are clearly erroneous. *See* ***id.*** at 634, 369 N.W.2d at 714. The ultimate conclusion, however, of whether the conduct resulted in a violation of defendant's right to effective assistance of counsel is a question of law for which no deference to the trial court need be given. *See* ***State v. Harvey***, 139 Wis.2d 353, 376, 407 N.W.2d 235, 245 (1987).

The affidavit submitted on Reed's behalf indicates that, if called, Michael would have testified that he saw Johnson and Anderson pull out guns but that "at no time did I see George Reed get into any argument with Omar Hooper" or "pull out a gun or fire any shots at or in the direction of Omar Hooper." Significantly, Michael also avers that when Johnson and Anderson pulled out their guns, he had started to move away and "as I heard shots I took off running."

In analyzing this claim, we must consider whether this evidence, together with the trial evidence, is sufficient to undermine the confidence in the outcome of the trial. We conclude that it is not. The State presented witnesses who testified that Reed decided to confront Hooper about pulling a gun on Reed's brother, that Reed armed himself before doing so, that Reed made statements to the effect that he was going to shoot Hooper, and that Reed instructed his companions to shoot Hooper. Given this testimony, and the fact that Michael

cannot affirmatively state that Reed did not have a gun or shoot Hooper, the absence of his testimony cannot be viewed as prejudicial. If he had been called, according to his affidavit, Michael would have testified only that he did not see Reed with a gun. However, as noted, Michael took off running. Thus, his testimony does not preclude the fact that Reed pulled a gun on Hooper. Therefore, his testimony does not undermine this court's confidence in the outcome of the trial. We reject his ineffective assistance claim.

C. Jury Instruction.

Next, Reed claims that the trial court erroneously exercised its discretion when it declined Reed's request to give the *falsus in uno* instruction. Reed requested the instruction on the basis that one of the State's witnesses, Figures, admitted that he lied when he testified at the preliminary hearing. We cannot conclude that the trial court erroneously exercised its discretion in instructing the jury.

A trial court has wide discretion in determining which instructions to give to the jury. *See* ***State v. Lenarchick***, 74 Wis.2d 425, 455, 247 N.W.2d 80, 96 (1976). We generally will not hold that the trial court erroneously exercised its discretion if the instructions given adequately cover the law applicable to the facts. *See* ***State v. Lagar***, 190 Wis.2d 423, 433, 526 N.W.2d 836, 840 (Ct. App. 1994).

The *falsus in uno* instruction provides: "If you become satisfied from the evidence that any witness has willfully testified falsely as to any material fact, you may, in your discretion, disregard all the testimony of such witness which is not supported by other credible evidence in the case." WIS J I—CRIMINAL 305. The instruction may be given where a witness willfully and intentionally provides false testimony that relates to a material fact. *See* ***State v.***

Robinson, 145 Wis.2d 273, 281, 426 N.W.2d 606, 610 (Ct. App. 1988). Reed has failed to show that Figures's trial testimony meets this standard. There is no evidence that Figures lied in his trial testimony.

Further, the general credibility of witnesses instruction was given, instructing the jury that it may disregard any testimony it does not believe. In fact, Reed's counsel challenged Figures's credibility, arguing that Figures's testimony should not be believed because of his prior inconsistent statements. We conclude that under the facts and circumstances here, the trial court did not erroneously exercise its discretion when it refused to charge the jury with the *falsus in uno* instruction.

D. Sentencing.

Finally, Reed challenges the sentence imposed by the trial court. The trial court sentenced Reed to life imprisonment without the possibility of parole. Reed argues that this sentence was unduly harsh.

Appellate review of sentencing is limited to a two-step inquiry. *See* ***State v. Glotz***, 122 Wis.2d 519, 524, 362 N.W.2d 179, 182 (Ct. App. 1984). The first question is whether the trial court properly exercised its discretion in imposing the sentence and the second question is, if it did, whether the trial court erroneously exercised that discretion by imposing an excessive sentence. *See* ***id.***

The primary factors to be considered by the trial court are the gravity of the offense, the character and rehabilitative needs of the offender, and the need to protect the public. *See* ***State v. Echols***, 175 Wis.2d 653, 682, 499 N.W.2d 631, 640 (1993). Our review of the sentencing transcript reveals that the trial court considered the appropriate factors. It considered the nature of the crime, stating

"[t]here's nothing more horrendous than a first degree intentional homicide case. We're talking about the death of an individual, a human being." The trial court went on to address Reed's character, noting that his prior record and character are "damning." Reed had been involved with guns and the criminal justice system since 1989. The trial court observed that "every time [Reed is] released … he gets involved in guns and drugs and winds up back in prison." Finally, the trial court considered the needs of the community, noting that Reed is a dangerous individual. Thus, the trial court clearly considered the appropriate factors in imposing the sentence.

When the trial court imposed the sentence, it observed that "sentencing someone to life imprisonment without parole is only for the most egregious cases, the most outrageous cases, and … the reason I did it is a combination of your prior record and what you did that evening." A sentence is harsh and excessive when it is "so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." ***Ocanas v. State***, 70 Wis.2d 179, 185, 233 N.W.2d 457, 460 (1975). Under this standard, we cannot conclude that the sentence imposed was excessive. Reed committed a first-degree intentional homicide while out on parole. Given the nature of the crime and Reed's "damning" criminal record, which repeatedly demonstrates his inability to reform his conduct when he is released, the trial court's decision to sentence him to life imprisonment without the possibility of parole was not an excessive sentence.

By the Court.—Judgment and orders affirmed.

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