COURT OF APPEALS
DECISION
DATED AND FILED

September 28, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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* § 808.10 and RULE 809.62, STATS.

No. 98-1354-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

SEAN FITZGERALD ROWELL, II,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: VICTOR MANIAN and DAVID A. HANSHER, Judges. *Affirmed.*

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

PER CURIAM. Sean Fitzgerald Rowell, II, appeals the judgment, entered after a jury trial, convicting him of first-degree intentional homicide while using a dangerous weapon, as a habitual criminal, contrary to §§ 940.01(1),

939.63(1)(a)2, and 939.62, STATS. He also appeals from the order denying his postconviction motion seeking a new trial.

Because the trial court did not erroneously exercise its discretion when it refused to strike a potential juror for cause who claimed she was uncomfortable serving on a homicide jury, nor did it erroneously exercise its discretion when it denied Rowell's postconviction motion seeking a new trial based on the recantation of a witness, we affirm.

I. BACKGROUND.

Rowell was charged with first-degree intentional homicide while using a dangerous weapon, as a habitual criminal. The charge emanated out of the following facts testified to during his jury trial. Thomas Hall testified that he was on the front porch of a home on North 20th Street in Milwaukee with Willie Cathey, whose nickname is "Pig." While there, Hall overheard a conversation between Rowell and the victim, Christopher Perkins. Hall stated that upon seeing Perkins reach for what he thought was a gun, Hall ran. While he was running he heard several shots, but he did not see who was shooting.

Cathey also testified. He said he was the victim's brother.[1] He confirmed that Rowell and Perkins had had an argument over a ring given by Rowell to his girlfriend, Natasha Dennis. Cathey testified that he saw Perkins and Rowell walking down the street, heard two shots, and saw Perkins fall to the ground. Cathey identified Rowell as the shooter at the lineup. Cathey acknowledged at trial that he had eleven prior criminal convictions.

[1] Although Cathey was not actually Perkins's biological brother, the two were raised together in the same household.

Another witness to the incident, Willie Luckett, known as "Ray Ray," also testified. Luckett proved to be an uncooperative witness. Although he testified at the preliminary hearing to facts consistent with the testimony of Hall and Cathey and, at the preliminary hearing he identified Rowell as the shooter, at trial, he related a different version of the crucial events and he claimed he was unable to identify the shooter. At the preliminary hearing, he claimed he saw the two men (Rowell and Perkins) walk off and he observed Rowell push Perkins and then shoot him. At trial, he told the jury he saw very little. Luckett was impeached with this earlier testimony and ultimately he admitted that his preliminary hearing testimony was the truthful version. Luckett had also attended the lineup in which Rowell was participant number four. He originally indicated that he was unable to identify anyone, but he changed his answer and wrote "number 4" (Rowell's number) on his card. At trial he claimed that he changed his answer because Cathey told him to circle Rowell's number.

The motive for this shooting was supplied by Natasha Dennis. She testified she was Rowell's girlfriend and that a ring given to her by the defendant was taken by Perkins, who refused to give it back. After she made inquiries as to the whereabouts of the ring, Cathey told her that Perkins had sold the ring for drugs. Dennis related to Rowell that Perkins had taken the ring from her and that he had sold it for drugs.

At voir dire, a juror indicated that she was uncomfortable at the prospect of listening to the evidence in a homicide case. Rowell moved to strike her for cause. The motion was denied. Rowell then removed her with one of his peremptory strikes.

Rowell was convicted and sentenced to life imprisonment with a parole eligibility date of April 25, 2022. He brought a postconviction motion asserting the existence of new evidence and seeking a new trial. His motion was based upon an affidavit given by Luckett in which he stated Cathey, the victim, and an unknown black man—not the defendant—walked away from the porch. Luckett claimed that, just before the shots were fired, he saw Cathey signal the unknown man and he heard Cathey state "that's enough" or something to that effect. The trial court denied Rowell's motion.

II. ANALYSIS.

A. The trial court properly denied motion to strike juror for cause.

Rowell argues that he is entitled to a new trial because the trial court erroneously exercised its discretion by refusing to honor his request that a juror be removed for cause—the juror who stated that she would not feel comfortable hearing the evidence in a homicide case. Rowell claims that the juror's response to his voir dire questions in which she indicated a desire not to serve because she did not "feel well" listening to testimony in a murder trial showed that she was not "indifferent" to the case, and thus, the trial court should have excused her for cause. The trial court denied the motion.

The standard of review for rulings on motions to dismiss jurors for cause is whether the trial court erroneously exercised its discretion. *See* ***State v. Ferron***, 219 Wis.2d 481, 499, 579 N.W.2d 654, 661 (1998).

A trial court's determination not to dismiss a juror can only be overturned where the prospective juror's bias is manifest. ***Id.*** at 496-97, 579

N.W.2d at 660. The trial court ruled that "just being uncomfortable was not a sufficient basis for dismissing a juror for cause." We agree.

A juror has demonstrated a manifest bias when a review of the record "does not support a finding that the prospective juror is a reasonable person who is sincerely willing to put aside an opinion or prior knowledge; or … does not support a finding that a reasonable person in the juror's position could set aside the opinion or prior knowledge." ***Id.*** at 498, 579 N.W.2d at 661.

Here, the juror did not express an opinion reflecting either bias or prejudice. The prospective juror did not display a "manifest bias" toward either party; rather, the juror, understandably, indicated that she would not "feel well" listening to what, presumably, would be sordid testimony dealing with the death of a young man. The trial court properly exercised its discretion in refusing to discharge the juror for cause.

B. The trial court properly denied the postconviction motion.

Next, Rowell claims the trial court erroneously exercised its discretion when it denied his request for a new trial based on newly-discovered evidence. "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). A motion for a new trial is addressed to the sound discretion of the trial court and this court will reverse only if the trial court erred in exercising its discretion. ***State v. Kaster***, 148 Wis.2d 789, 801, 436 N.W.2d 891, 896 (Ct. App. 1989). "We will affirm the trial court's exercise of discretion as long as it has a reasonable basis and was made in accordance with accepted legal standards and the facts of record." ***Terrance J.W.***, 202 Wis.2d at

500, 550 N.W.2d at 447. The specific requirements for granting a new trial based upon newly-discovered evidence are as follows:

> (1) The evidence must have come to the moving party's knowledge after a trial; (2) [T]he moving party must not have been negligent in seeking to discover it; (3) [T]he evidence must be material to the issue; (4) [T]he testimony must not be merely cumulative to the testimony which was introduced at trial; and (5) [I]t must be reasonably probable that a different result would be reached on a new trial.

State v. Boyce, 75 Wis.2d 452, 457, 249 N.W.2d 758, 760 (1977) (quoted source omitted).

Rowell based his motion on the recantation of Luckett. A recantation must be corroborated by other newly-discovered evidence before a new trial is granted, but the degree of corroboration required varies from case to case based on its individual circumstances. ***State v. McCallum***, 208 Wis.2d 463, 473-74, 476-77, 561 N.W.2d 707, 711-12 (1997) (applying the same standard to a motion to withdraw a guilty plea). The fourteen-year-old Luckett was, as noted, a difficult witness at trial. Despite testifying at the preliminary hearing that Rowell was the "dude" who shot Perkins, at trial, Luckett first claimed he never saw who shot Perkins and, contrary to his earlier testimony, he also refused to identify Rowell as the shooter.

Luckett recanted his earlier testimony in a post-trial affidavit. Luckett's post-trial affidavit contends that Cathey accompanied Perkins and an unknown male as they walked down the street. He also states that Perkins had told him several days earlier that he would be the victim of a "set-up" involving his brother, "Pig." Further, in his affidavit he wrote that he saw Cathey signal the unknown black male shortly before the shooting, and that after he heard Cathey

say "that's enough," the shots were fired. He also stated Rowell was not the unknown black male. With respect to Cathey's involvement, he continued to assert, as he had at trial, that Cathey told him who to pick out at the lineup, and further, that Cathey helped him practice his testimony (presumably Cathey assisted him in remembering falsified facts).

Although the trial court determined that Luckett's affidavit was not newly-discovered because it essentially tracked Luckett's trial testimony, we determine that Luckett's affidavit falls squarely within the first four requirements set out in ***Boyce.*** The trial court went on to find, however, that even if the Luckett affidavit was new evidence, the fifth requirement was not met. "Even if the submission of the defendant in his motion did constitute 'new' evidence, there is not a reasonable probability a new trial would produce a different result."

Our review of the record supports the trial court's ruling that there is not a reasonable probability that a new trial would produce a different result. The record reflects that Luckett was a poor trial witness. He contradicted what he originally testified to at the preliminary hearing and he was impeached with his earlier testimony, which he finally conceded was truthful. The jury witnessed his equivocation and heard both versions presented by Luckett. There is little likelihood that the jury would return a different verdict after hearing Luckett's third version of the events.

Moreover, other witnesses corroborated Luckett's preliminary hearing testimony. Besides Cathey, Hall saw the victim accompanied only by Rowell minutes before the shooting. Also, an expert witness testified that the physical evidence revealed the victim was shot at point-blank range, making it impossible for anyone to have shot Perkins from a distance. The State also called

the lineup's supervising detective and others in attendance at the lineup, all of whom testified that Cathey and Luckett were seated separately at the lineup and did not speak to one another when marking their cards. Further, Luckett's newest version is weak as it attempts to cast blame onto Cathey, who considered Perkins to be his brother. Additionally, it was Rowell who had given the ring to Dennis and it was Rowell who demanded that Perkins reimburse him for the ring. Under these circumstances, there would be little reason for Cathey to conspire with another person to kill his brother and then immediately call the police. Consequently, we determine that the trial court did not erroneously exercise its discretion when it determined that there was no reasonable probability of a different outcome.

The trial court also found there was no corroboration for Luckett's newest version of the events. Recantations are not favored under the law and where the newly-discovered evidence consists of a witness's post-trial admission of perjury, a new trial will be granted only if the recantation testimony is corroborated by other newly-discovered evidence. *See* ***McCallum***, 208 Wis.2d at 476, 561 N.W.2d at 712.

Rowell argues, relying on ***McCallum***, that corroboration can be met in this case if "(1) there is a feasible motive for the initial false statement; and (2) there are circumstantial guarantees of the trustworthiness of the recantation." ***Id.*** at 478, 561 N.W.2d at 712. With regard to the first factor, Rowell claims that Luckett was intimidated by Cathey, although no reason is given in the affidavit for Luckett's change of heart, nor does Rowell provide any support for this contention other than the fact that Cathey has eleven criminal convictions. That fact, standing alone, does not lead to a conclusion that Luckett was intimidated by Cathey. Further, his recantation has no circumstantial guarantee of being trustworthy. As

noted, this version differs from the testimony of the other witnesses and is illogical. More likely, the most trustworthy of Luckett's statements was the one he testified to at the preliminary hearing which was corroborated by others. Consequently, the trial court properly exercised its discretion in finding no corroboration for Luckett's recantation and in denying Rowell's motion for a new trial.

Finally, Rowell asks us to grant him a new trial under § 752.35, STATS.[2] This case does not present issues for us to exercise our right to order a new trial under § 752.35. We are satisfied that the real controversy was fully tried. Additionally, as noted, there is no substantial probability that a new trial would produce a different result. Accordingly, the trial court is affirmed.

By the Court.—Judgment and order affirmed.

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

[2] Section 752.35, STATS., provides:

> In an appeal to the court of appeals, if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried, the court may reverse the judgment or order appealed from, regardless of whether the proper motion or objection appears in the record and may direct the entry of the proper judgment or remit the case to the trial court for entry of the proper judgment or for a new trial, and direct the making of such amendments in the pleadings and the adoption of such procedure in that court, not inconsistent with statutes or rules, as are necessary to accomplish the ends of justice.