COURT OF APPEALS
DECISION
DATED AND FILED

April 19, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 99-1305-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

RICHARD F. PFEIFFER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Washington County: LEO F. SCHLAEFER, Judge. *Affirmed.*

Before Nettesheim, Anderson and Snyder, JJ.

¶1 PER CURIAM. Richard F. Pfeiffer appeals from a judgment of conviction of attempted first-degree intentional homicide and from an order denying his postconviction motion for a new trial. He argues that the prosecution should have been dismissed because a criminal information was not filed, the exclusion of evidence regarding the divorce proceedings between Richard and his

wife was an erroneous exercise of discretion, the evidence was insufficient to support the conviction, his motion for postconviction discovery should have been granted, and a new trial should be granted because of newly discovered evidence and in the interest of justice. We reject his claims and affirm the judgment and the order.

¶2 At approximately 6:20 a.m. on January 13, 1994, Amy Raddemann was shot at as she was driving to work. The shot was fired from a car that pulled aside her car. Amy was hit with debris after the bullet struck the car on the metal post between the driver's and backseat windows. She sped up and drove to a gas station to call the police. Amy could not give a description of the driver or the car.

¶3 In February 1996, Catherine Pfeiffer, Richard's wife, told the police that on the day of the shooting Richard called her to switch cars with him and he told her he had shot at Amy. Richard had left for work that morning driving Catherine's red four-door Ford Escort. Catherine reported that after exchanging cars, she found one or two shotgun shells in her car which she threw out. Amy was Richard's former wife and Richard was paying child support to her. Catherine explained that before the day of the shooting Richard had made numerous comments about getting rid of Amy.

¶4 Richard was charged with attempted homicide. The jury trial took seven days. A day care worker at the center where Amy had dropped off her son just before the shooting said she saw a red two-door car at the center the morning of the shooting. Catherine and Dan Stultz, Richard's friend, testified that Richard admitted the shooting to them. Dan admitted he was intoxicated at the time he spoke with Richard about the shooting. Richard testified that he left for work the morning of the shooting about 6:25 a.m. in his black Buick Regal. Richard's

theory of defense was that Catherine, out of hatred of Amy and her son Eric, committed the crime.

¶5 Before trial, Richard moved to dismiss the prosecution because a criminal information had not been filed. *See* ***State v. Woehrer***, 83 Wis. 2d 696, 699, 266 N.W.2d 366 (1978); WIS. STAT. § 971.01(2) (1997-98).[1] There was a joint preliminary hearing held on three prosecutions against Richard. Following bindover on the attempted homicide, the information charging attempted homicide was filed with the case number for the case against Richard for soliciting perjury. The cover letter transmitting the information to Richard's attorney included reference to the correct case number. The trial court found that the information was timely filed, albeit, by reason of clerical error, with the wrong case number. It also found that Richard had not been prejudiced by the technical error. These findings are not clearly erroneous. Under WIS. STAT. § 971.26, the nonprejudicial defect did not invalidate the timely filing.

¶6 The State moved to exclude any testimony regarding the property division issues in Richard and Catherine's divorce proceeding. Catherine started divorce proceedings after Richard's arrest. Richard sought to use such evidence to show that when it became apparent that Amy and Eric would remain a part of Richard's life, Catherine engaged in a plan to incriminate, incarcerate and ruin Richard financially so that no other woman could have him. Richard contends that the exclusion of the evidence deprived him of his constitutional right to present a defense.

[1] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

¶7 "Evidentiary rulings generally are reviewed with deference to determine whether the circuit court properly exercised discretion in accord with the facts of record and with accepted legal standards." ***Michael R.B. v. State***, 175 Wis. 2d 713, 720, 499 N.W.2d 641 (1993). Whether a defendant's right to present a defense has been improperly denied by the trial court is a question of constitutional fact which we review de novo. *See* ***id.***; ***State v. Heft***, 185 Wis. 2d 288, 296, 517 N.W.2d 494 (1994). The constitutional right to present a defense is not an unfettered right to present irrelevant testimony in one's defense. *See* ***State v. Maday***, 179 Wis. 2d 346, 354, 507 N.W.2d 365 (Ct. App. 1993). Relevancy is a function of whether the evidence tends to make the existence of a material fact more or less probable than it would be without the evidence. *See* ***State v. Denny***, 120 Wis. 2d 614, 623, 357 N.W.2d 12 (Ct. App. 1984).

¶8 The evidence Richard sought to use to prove Catherine's motive to lie about the shooting was other acts evidence. *See* ***State v. Johnson***, 184 Wis. 2d 324, 337, 516 N.W.2d 463 (Ct. App. 1994). In ***Johnson***, evidence that within days of Johnson's arrest the victim attempted to misappropriate Johnson's personal property was held admissible to bolster the theory of the defense that the victim falsely accused Johnson to gain access to his property. *See* ***id.*** at 338. The victim's attempt to gain Johnson's property was found to be directly linked to the criminal events charged against Johnson. *See* ***id.*** at 339.

¶9 Here, in contrast, the crime with which Richard is charged occurred in 1994 and did not involve Catherine. Catherine and Richard were not even married when the crime occurred; the marriage took place approximately six weeks later. Catherine's statement came in 1996 and the divorce proceeding followed Richard's arrest. Evidence of what Catherine did in the divorce

proceeding regarding property division is remote in time to the crime and is not directly linked to the commission of the crime. It was not relevant.

¶10 Richard was not denied the right to present a defense by exclusion of the evidence of the property division issues. It is not unusual for divorcing couples to have an acrimonious relationship. There was other evidence that Catherine was jealous of other women, that she did not like Amy and Eric, and that she resented Richard's obligation to pay child support. Catherine admitted that after their marriage Richard became very controlling of all aspects of her life, that she was never allowed to have any money, and that he was physically and verbally abusive. Catherine's motive to lie was developed without evidence regarding the divorce proceeding.

¶11 Where the sufficiency of evidence is challenged, we may not reverse a conviction "unless the evidence, viewed most favorably to the state and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). We must accept and follow the inference drawn by the trier of fact unless the evidence on which that inference is based is incredible as a matter of law. *See* ***id.*** at 506-07. It is the function of the jury to decide issues of credibility, to weigh the evidence and to resolve conflicts in the testimony. *See* ***id.*** at 506.

¶12 Richard argues that he presented evidence to refute most, if not all, of Catherine's testimony and evidence that Dan was intoxicated when Richard allegedly told Dan that he had shot at Amy. It was for the jury to determine whether these witnesses gave credible testimony. We defer to the jury's function

of weighing and sifting conflicting testimony in part because of the jury's ability to give weight to nonverbal attributes of the witnesses. *See* ***State v. Wilson***, 149 Wis. 2d 878, 894, 440 N.W.2d 534 (1989). It is only when the evidence that the jury has relied upon is inherently or patently incredible that the appellate court will substitute its judgment for that of the jury. *See* ***Finger v. State***, 40 Wis. 2d 103, 110-11, 161 N.W.2d 272 (1968). We acknowledge that the time line between when the crime occurred, when Catherine left to meet Richard to exchange cars and 6:53 a.m., when Richard punched in at work, may not have matched precisely. However, that does not render testimony that Richard was the shooter patently incredible since elements of the time line were approximations based on clocks that were not synchronized. Even Richard's expert conceded that it was possible for Richard to have committed the crime, although not very probable in light of the driving time between locations.

¶13 There was evidence that several weeks after the shooting Catherine told her daughter that Richard had done it. One of Catherine's friends also testified that in 1995 Catherine told her Richard had shot at Amy. Richard's testimony was that he left the house at 6:25 a.m. and that Catherine was still home when he left. By his own testimony, Richard eliminated the possibility that Catherine was the shooter. The evidence was sufficient to convict Richard of attempted homicide.

¶14 Richard filed a motion for a new trial based on newly discovered evidence. The motion first advanced that his posttrial investigator took a statement from Juanita Brath, Catherine's daughter, that around the time of the shooting Juanita observed her mother unloading guns from her red Ford Escort when Richard was not around. He contends that this evidence impeaches Catherine's testimony that she did not take the guns out of the car and that

Catherine's possession of the guns makes it more probable that she may have been the shooter.

¶15 Richard also discovered after trial that Catherine had phone conversations with the State's witnesses, Judy Brewer and Dan, while the trial was taking place. Richard alleged that this amounted to evidence of witness tampering as contact between witnesses violated the trial court's sequestration order.

¶16 "The decision whether to grant a new trial on grounds of newly-discovered evidence is normally a discretionary decision of the trial court. However, whether due process requires a new trial because of newly-discovered evidence is a constitutional question subject to independent review in this court." ***State v. Kimpel***, 153 Wis. 2d 697, 702, 451 N.W.2d 790 (Ct. App. 1989) (citation omitted). To obtain a new trial on the grounds of newly discovered evidence

> 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; and (3) the evidence is material to an issue in the case; (4) the evidence is not merely cumulative. 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 trial.

State v. McCallum, 208 Wis. 2d 463, 473, 561 N.W.2d 707 (1997).

¶17 At the postconviction hearing, Juanita could not remember making the statement to the investigator that she had seen her mother removing guns from the car around the time of the shooting. Juanita was not able to pinpoint when she had seen her mother remove the guns and confirmed that her mother had "oftentimes" either put guns in the car or removed them. Because Juanita could not recall the statement, Richard failed to meet his burden of proof that the newly

discovered evidence actually existed. Further, as the trial court observed, Juanita was uncertain that she had observed her mother with guns around the time of the shooting. The trial court properly exercised its discretion in concluding that it was not probable that Juanita's unspecified observation would change the outcome of the trial.

¶18 Judy acknowledged at the postconviction hearing that she had many conversations with Catherine during the trial. She explained that she and Catherine were close friends who spoke often. Yet Judy stated that she had been told not to talk about the trial and that she did not do so with Catherine. She and Catherine spoke about personal family issues affecting Judy. Catherine confirmed that she and Judy did not talk about the trial.

¶19 The sequestration order did not prevent the witnesses from talking to each other but only from talking about the trial. The trial court found Judy's and Catherine's testimony that they spoke but not about the trial to be credible. The credibility of a witness is for the trial court to determine. *See* ***State v. Lukensmeyer***, 140 Wis. 2d 92, 105, 409 N.W.2d 395 (Ct. App. 1987). Judy was a rebuttal witness and testified that Catherine had said in February 1995 that Richard had shot at Amy. There was no showing of how Catherine may have influenced Judy's testimony. Evidence that the two spoke during the trial would not make a different result in a new trial probable.

¶20 In an attempt to prove that Catherine had spoken with Dan during the trial, Richard moved for but was denied a subpoena of Catherine's telephone records regarding calls between Catherine and Dan. A defendant has a right to postconviction discovery when the sought-after evidence is evidence that probably

would have changed the outcome of the trial. *See* ***State v. O'Brien***, 223 Wis. 2d 303, 321, 588 N.W.2d 8 (1999).

¶21 At the postconviction hearing, Dan testified that he could not recall having spoken with Catherine during the trial but it was possible that he had. He confirmed that if they had spoken, it would have been about the trial since it was the only thing they had in common. Dan indicated that his testimony at trial was truthful and based on what he remembered as opposed to someone telling him what to say.

¶22 Catherine's opportunity or even desire to influence Dan's testimony had not gone unexplored at trial. Dan's trial testimony included the confirmation that he and Catherine, despite not having any friendly bond between them, had spoken at least three times after Richard was arrested and before Dan gave a statement to the police. Dan acknowledged that he and Catherine would have spoken about the details of the shooting in at least two of those three conversations. He indicated that some of the information in his police statement could have been from Catherine. Given that Catherine's potential influence before trial was explored at trial, the trial court properly exercised its discretion in determining that evidence of conversations during the trial would not make a different result at a new trial probable. Dan's trial testimony was consistent with the statement he gave to the police except that at trial he expressed possible confusion about what Richard told him because of his intoxication.

¶23 Richard further suggests that with the phone records in hand he could have impeached Catherine's postconviction "blanket denial" that she had not spoken with Dan during the trial. Catherine did not make a "blanket denial" of no communication with Dan during the trial. She testified that she did not recall

such conversations but that it was possible. There was much impeaching evidence against Catherine at trial. Further impeachment, on a matter collateral to the circumstances of the crime, would not have made a different result probable. We affirm both the trial court's refusal to grant postconviction discovery and the denial of the motion for a new trial based on newly discovered evidence.

¶24 Based on what he perceives as limitations on his ability to present a defense, newly discovered evidence and posttrial evidence of witness tampering, Richard argues that a new trial should be granted in the interest of justice. *See* WIS. STAT. § 752.35. A new trial may be ordered where the real controversy has not been fully tried or there was a probable miscarriage of justice. *See* ***State v. Ray***, 166 Wis. 2d 855, 875, 481 N.W.2d 288 (Ct. App. 1992). The controversy has not been fully tried when a jury was erroneously not given an opportunity to hear important testimony that bore on an important issue in a case or where evidence was not before the jury because it was not yet in existence. *See* ***State v. Hicks***, 202 Wis. 2d 150, 160, 549 N.W.2d 435 (1996). "Reversal based on a miscarriage of justice may be ordered only when this court is persuaded that there is a substantial probability of a different result on retrial." ***State v. Smith***, 153 Wis. 2d 739, 742, 451 N.W.2d 794 (Ct. App. 1989).

¶25 We have not found error with respect to the evidentiary rulings. Given that the evidence at trial touched upon Catherine's possible motive for falsely accusing Richard and her possible involvement, we cannot conclude that the real controversy was not fully tried or that there is a substantial probability of a different result on retrial.

By the Court.—Judgment and order affirmed.

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