**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**February 22, 2006**

**Cornelia G. Clark**
**Clerk of Court of Appeals**



**Appeal No. 2004AP3169-CR** **Cir. Ct. No. 2002CF6591**

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

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**JOSEPH H. GRAY,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Milwaukee County: MARY M. KUHNMUENCH, Judge. *Affirmed*.

Before Brown, Nettesheim and Anderson, JJ.

¶1 PER CURIAM. Joseph Gray appeals from a judgment convicting him of first-degree intentional homicide and from a circuit court order denying his motion for a new trial without a hearing. On appeal, Gray challenges the denial of

his new trial motion, the admission at trial of his inculpatory statements, and the sufficiency of the evidence. We affirm.

¶2 Gray was interrogated twice after his arrest for the murder of his girlfriend. He moved the circuit court to suppress the inculpatory statements resulting from the interrogations. In his statements, Gray admitted that he shot his girlfriend after she told him she was leaving him for another man, fled the scene of the shooting, disposed of the firearm and called for medical help for the victim after he returned to the scene. Gray also offered to show the detectives where he disposed of the firearm.

¶3 At the suppression hearing, a detective who interviewed Gray after his arrest testified that Gray was advised of his ***Miranda***[1] rights and stated that he understood them before he was questioned. Gray was coherent during the interrogation, did not ask for counsel, and confirmed that the inculpatory statement taken down by the detective was true. The detective testified that Gray was not coerced or threatened and was given refreshments and a restroom break.

¶4 The detective who accompanied Gray to retrieve the firearm testified that he did not question Gray about anything other than where the firearm would be found. The detective testified that Gray was provided with food while in his custody.

¶5 Gray testified at the suppression hearing that he did not receive his ***Miranda*** rights before he made his inculpatory statements, he asked for counsel before the first interrogation, he felt threatened by the first detective who

[1] ***Miranda v. Arizona***, 384 U.S. 436 (1966).

interrogated him, and he was denied food. On cross-examination, Gray identified his signature on the ***Miranda*** rights waiver form and conceded that he had received food during the first interrogation. Gray claimed to have been intoxicated during part of the interrogation.

¶6 In rebuttal, the State offered testimony from detectives that Gray was read his ***Miranda*** rights, waived the right to counsel and agreed to give a statement, and was not threatened during the interrogation.

¶7 The circuit court found that Gray's testimony was less credible than that of the detectives. The court deemed credible the detectives' testimony that they advised Gray of his ***Miranda*** rights before interrogating him on two occasions and before taking him to retrieve the firearm, and Gray waived those rights. The court further found that Gray was coherent and not confused, Gray did not request counsel or demand an end to the interrogation, the detectives did not threaten Gray or coerce him, and Gray conceded that he gave a true statement to the detectives. The court concluded that Gray's inculpatory statements were voluntarily made and were not the product of coercion or other police misconduct.

¶8 On appeal, Gray essentially argues that his suppression hearing testimony was more credible than that of the officers and that the court placed too much weight on the presence of his signature on the ***Miranda*** rights waiver form. Gray also claims that because he was intoxicated, his inculpatory statements should have been suppressed.

¶9 We will sustain a circuit court's findings of historical or evidentiary fact unless they are clearly erroneous. ***State v. Turner***, 136 Wis. 2d 333, 343-44, 401 N.W.2d 827 (1987). We do not reweigh the suppression hearing testimony. When we review a suppression motion, we defer to the circuit court's credibility

determinations. ***State v. Owens***, 148 Wis. 2d 922, 929-30, 436 N.W.2d 869 (1989).

¶10 The court's historical findings of fact that Gray was coherent, received and waived his ***Miranda*** rights, and was not threatened or coerced are not clearly erroneous based on the evidence adduced at the suppression hearing. Therefore, we affirm the circuit court's denial of Gray's motion to suppress.

¶11 Gray next argues that the evidence was insufficient to convict him. Specifically, Gray contends that there was insufficient evidence that he intended to kill the victim because he was intoxicated at the time of the shooting and he did not realize that he had shot the victim until he saw her collapse.

¶12 We determine whether the evidence at trial, viewed most favorably to the State and to 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). The credibility of the witnesses and the weight of the evidence was for the trier of fact, and we must adopt all reasonable inferences which support the jury's verdict. ***Id.*** at 504. The test is whether this court can conclude that the trier of fact could, acting reasonably, be so convinced by evidence it had a right to believe and accept as true. *See* ***id.*** at 503-04.

¶13 The following evidence was before the jury. Gray's inculpatory statements were admitted into evidence. In those statements, Gray admitted shooting the victim, who had informed Gray that their relationship was over. Gray admitted that he "snapped," retrieved his firearm and fired it three times at the victim's back from close range. On the day of the shooting, Gray wrote the victim a letter stating in part, "[Y]ou don't know what you want, but you are playing a

dangerous game." Gray also admitted to police that after he shot the victim, he realized that being in possession of a firearm would be problematic under the rules prohibiting felons from possessing weapons. He then drove to a park and threw the firearm into a river.

¶14 Gray's trial testimony contradicted his inculpatory statements; at trial, Gray denied shooting the victim and disavowed his inculpatory statements insofar as they admitted the shooting. Gray testified that when he returned home on the evening of the shooting, he found the victim on the floor, saw his firearm on the bed and panicked because as a convicted felon, he could not possess a firearm. Gray then drove to a park and threw the firearm into a river.[2] Gray returned home and called police.

¶15 Even though Gray denied shooting the victim, there was sufficient evidence to support the jury's finding that Gray acted intentionally when he shot the victim. *See* ***State v. Hecht***, 116 Wis. 2d 605, 623, 342 N.W.2d 721 (1984) (intent is inferable from conduct). As the fact finder, the jury was entitled to disregard Gray's trial testimony that he did not shoot the victim and rely upon his inculpatory statements, the threatening letter he wrote to the victim, and his disposal of the firearm as evidence of intent to kill.

¶16 Postconviction, Gray requested a new trial due to ineffective assistance of trial counsel. Gray's affidavit in support of the motion asserted that approximately eight months prior to trial, he informed his trial counsel that he had

[2] Gray contended that he was extremely intoxicated when he found the victim, but conceded that he was still able to realize that he had to dispose of the firearm due to his status as a convicted felon.

an alibi defense, and he gave counsel the names of seven alibi witnesses. Trial counsel neither filed a notice of alibi nor subpoenaed the alibi witnesses for trial.

¶17 The circuit court denied Gray's new trial motion without a hearing. The court found that the motion was neither supported by an affidavit from any witness to support Gray's alibi claim nor set forth what such a witness would have offered at trial in support of Gray's claimed alibi. The court concluded that Gray's allegations regarding an alibi and alibi witnesses were conclusory and did not warrant an evidentiary hearing on the motion. The court further noted that because Gray had admitted his involvement in the offense in his inculpatory statements, it was not reasonably probable that a jury presented with alibi evidence would have concluded that Gray was innocent.

¶18 The circuit court may deny a postconviction motion without a hearing "if all the facts alleged in the motion, assuming them to be true, do not entitle the movant to relief; if one or more key factual allegations in the motion are conclusory; or if the record conclusively demonstrates that the movant is not entitled to relief." ***State v. Allen***, 2004 WI 106, ¶12, 274 Wis. 2d 568, 682 N.W.2d 433 (footnote and citations omitted). A postconviction motion alleging ineffective assistance of counsel must allege material facts which permit the circuit court to meaningfully assess the defendant's claim. ***Id.***, ¶23. In particular, where a defendant contends that trial counsel erred by not presenting a witness, a motion alleges sufficient material facts if the motion identifies the witness, the reason for the witness' importance, and facts that can be proven relating to the witness and the trial. ***Id.***, ¶24. In other words, such a motion must allege "who, what, where, when, why, and how." ***Id.***, ¶23.

¶19 Gray's postconviction motion does not satisfy this standard. As previously stated, the motion does not identify any of the alleged alibi witnesses or describe their trial testimony. Because the postconviction motion was not sufficient, the circuit court did not err in denying the motion without a hearing.

*By the Court.*—Judgment and order affirmed.

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