COURT OF APPEALS
DECISION
DATED AND FILED

May 7, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP1178-CR **Cir. Ct. No. 2009CF3770**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

EDWARD DEVON SMART,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DENNIS R. CIMPL, Judge. *Affirmed*.

Before Fine, Kessler and Brennan, JJ.

¶1 FINE, J. Edward Devon Smart appeals a judgment of conviction entered after he pled no contest to felony murder. *See* WIS. STAT. § 940.03. He also appeals the order denying his postconviction motion to withdraw his plea,

claiming that his co-actor's post-sentencing assertion that he forced Smart to do the crime was newly discovered evidence. We affirm.

I.

¶2 In August of 2009, the State charged Smart with felony murder for "caus[ing] the death of Ytrissus Day while committing the crime of robbery while armed, party to a crime." Smart pled not guilty, and the trial started in August of 2010. Smart's defense was that his co-actor and cousin, Antonio Rushing, forced him to participate in the robbery. On the trial's second day, the parties told the circuit court that they had reached a plea bargain pursuant to which Smart pled no contest to felony murder. In October of 2010, the circuit court sentenced Smart to twenty-seven years' imprisonment (twenty years of initial confinement, followed by seven years of extended supervision).

¶3 In December of 2011, Smart sought to withdraw his guilty plea, claiming that Rushing, who had already been convicted of the crime when Smart sought to withdraw his plea, had admitted forcing him to rob the victims, and that this was newly discovered evidence. The circuit court held an evidentiary hearing at which Rushing testified that:

- Smart "and two other guys, they came into the building in the hallway" where Rushing was selling marijuana to the victims.
- After the drug sale, Rushing and the victims walked out of the building and started "fighting, exchanging blows."
- During the fight, Smart came out of the building with "a couple other guys" and told Rushing "to stop" "fighting and stuff."

- When Rushing pointed his gun at the victims, "Mr. Smart, he was trying to tell me to stop. Like, no, leave. No, don't do that. Just chill, … You know, trying to basically like calm me down." "[W]hen [Smart] tried to like grab me, I told him -- I pushed him and I pointed the gun at him."

- Rushing told Smart if "you riding with these mother fuckers, I kill you too." He testified that he "pointed the gun at" Smart and told him to "take the money out of [the victims'] pockets. Get the money out of [the victims'] pockets." According to Rushing, when Smart initially refused, Rushing said, "if you don't go in they pockets, I'm going to shoot you in your fucking face."

- There was no "plan between [Rushing and Smart] to rob" the victims.

¶4 The circuit court then asked Rushing some questions:

> THE COURT: When Mr. Smart came out, where were the two guys when this was all happening? You said two guys came out with him.
>
> THE WITNESS: With Mr. Smart.
>
> THE COURT: The whole time?
>
> THE WITNESS: When they came out, they came out with him.
>
> THE COURT: Yeah. So they were there for this whole thing?
>
> THE WITNESS: Yes.

¶5 At this point, the circuit court stopped the hearing and denied Smart's motion because "[t]his [was] not newly discovered evidence." The circuit court found:

> [Smart's] two buddies were there when the whole thing happened. His two buddies were available to him at the trial. He didn't need Mr. Rushing. He could have had his two buddies come to circuit court in the trial and testify as to what Mr. Rushing just testified about. … He knew it at the time of trial because it just wasn't him, and the [victims], and Mr. Rushing there, it was him, the [victims], Mr. Rushing, and his two friends. So he fails on the first [aspect of the test for "newly discovered evidence"].

II.

¶6 We will affirm a circuit court's ruling denying a motion to withdraw a guilty plea as long as the circuit court acted within its discretion, which requires a proper consideration of the facts of Record and application of the pertinent legal standards. ***State v. Canedy***, 161 Wis. 2d 565, 579–580, 469 N.W.2d 163, 169 (1991). The circuit court should grant a motion for post-sentencing plea withdrawal only if the defendant shows "that a manifest injustice would result if the withdrawal were not permitted." ***State v. Booth***, 142 Wis. 2d 232, 235, 418 N.W.2d 20, 21 (Ct. App. 1987). "For newly discovered evidence to constitute a manifest injustice and warrant the withdrawal of a plea," "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; (3) the evidence is material to an issue in the case; and (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, 710–711 (1997).

¶7 Smart argues that Rushing's testimony *is* new because he did not know Rushing would testify that he forced Smart to rob the victims. We disagree. A post-conviction statement by a co-actor exculpating a defendant is not newly discovered evidence if: (1) the defendant was aware of the potential testimony before trial, and (2) the co-actor did not testify at the defendant's trial as a result of the co-actor's right against self-incrimination. ***State v. Jackson***, 188 Wis. 2d 187, 201, 525 N.W.2d 739, 745 (Ct. App. 1994). Here, Smart had to be aware of Rushing's potential testimony because, according to Rushing's testimony, Smart was there to see it, as were the "two other guys" Rushing said were with Smart. Smart's choice not to call Rushing either because he did not think Rushing would testify about the coercion or because Rushing would not testify based on his right not to incriminate himself does not change things. Smart could have called the "two other guys" to get before the jury what he now claims is newly discovered evidence. There is nothing in the Record to show that Smart attempted to get either Rushing or the "two other guys" to testify on his behalf. Accordingly, he has also failed to satisfy the second "newly discovered evidence" factor: that "the defendant was not negligent in seeking evidence." Further, Rushing has already been convicted of the crime. Thus, he lacks credibility as a matter of law. *See* ***id.***, 188 Wis. 2d at 200 n.5, 525 N.W.2d at 744 n.5 ("'Once sentence is imposed … there is very little to deter [a co-actor] from untruthfully swearing out an affidavit in which he purports to shoulder the entire blame.'") (quoted source omitted).

¶8 Smart also asks us to exercise our discretionary reversal authority under WIS. STAT. § 752.35, and allow him to withdraw his plea "in the interest of justice." This is a non-starter. The evidence against Smart in this case was strong: he confessed to participating in the crime and eyewitnesses gave statements

incriminating him. Indeed, one witness was prepared to testify that it was Smart's idea to rob the victims.

¶9 We affirm.

By the Court.—Judgment and order affirmed.

Publication in the official reports is not recommended.