COURT OF APPEALS
DECISION
DATED AND FILED

October 7, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 96-2430-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

AGUSTIN VELEZ,

DEFENDANT-APPELLANT.

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

Before Fine, Schudson and Curley, JJ.

PER CURIAM. Agustin Velez appeals from a judgment of conviction, following a jury trial, for first-degree intentional homicide, party to a crime. He also appeals from an order denying his motion for postconviction relief. Velez raises three issues on appeal: (1) whether he is entitled to a new trial because a member of the jury allegedly received tips from a bailiff for the purpose of convincing at least one holdout

juror of his guilt; (2) whether he is entitled to a new trial because an eyewitness said that he gave a false statement to investigators and named another as the perpetrator; and (3) whether the trial court erred by failing to conduct an evidentiary hearing to determine if the State manipulated the system to avoid juvenile court jurisdiction. We affirm.

According to the trial testimony, at approximately 10:15 p.m. on June 14, 1994, James Lovett and his friend, Brett Szyszkiewicz, were walking on South 6th Street toward Arthur Avenue when they saw a group of Latin King gang members standing on a balcony of an apartment on the corner of South 6th and Arthur. Lovett and Szyszkiewicz stopped outside the building after someone from the balcony called to them. Moments later, two men from the balcony approached Szyszkiewicz and Lovett, and started talking to Lovett. Szyszkiewicz testified that at one point during the interaction, he heard Lovett reply, "forget it," and that he and Lovett started to walk away from the men. As they walked away, someone struck him (Szyszkiewicz) from behind. Szyszkiewicz testified that Lovett immediately stepped in between the aggressor and himself, and at the same time, a second individual, later identified as Agustin Velez, pulled out a chrome-colored gun and waved it in their direction. Lovett then yelled, "break," and he and Szyszkiewicz started to run from the men. When Szyszkiewicz realized that Lovett was not right behind him, he ran to a friend's house and called the police.

According to City of Milwaukee Police Officer Jeffery Mosley, Lovett's body was found shortly after 1:00 a.m. on June 15, near the building where the initial confrontation took place. Lovett had suffered two gunshot wounds, one to the left forearm and the other to the left side of his torso. He was pronounced dead at the scene.

Keith Loomis told the police that, on June 14, 1994, he was living at an apartment on 6th and Arthur and was a witness to the shooting of Lovett. At trial, Loomis testified that, on that night, he and a number of fellow Latin King gang members

were "partying" at the second floor apartment. Loomis recounted that at some point during the party he heard someone from outside yell, "chill out," at which time he and the rest of his friends went outside. On his arrival outside, he saw Velez boxing with Lovett. Loomis testified that he heard someone yell, "buck his ass," and then observed Velez pull a chrome handgun from his waistband and shoot Lovett. According to Loomis, Lovett then raised his arm, made a grunting noise, and staggered toward the back of Loomis's yard where he collapsed between two parked cars. Loomis testified that Velez followed Lovett, stood directly over him, and pulled the trigger. Loomis stated that he heard the gun click but that it did not fire a second time.

The State also offered the testimony of Felix Guzman, a Latin King gang member and close friend of Velez. Guzman, testifying as a hostile witness, admitted that he had been at the party the night of the shooting, but claimed not to remember very much about the incident and insisted that he had never seen the victim before being shown his photograph. He denied making statements to the police implicating Velez as the shooter. When shown his signed statements, Guzman claimed that he had never read them. The State impeached his trial testimony with the testimony of Detective Ricky Burems who had taken Guzman's statements.

Velez first argues that he is entitled to a new trial, or at least an evidentiary hearing, because one of the jurors allegedly received "tips from a bailiff" on how to persuade at least one holdout juror of his guilt. According to the affidavit offered in support of Velez's postconviction motion, two months after the conclusion of the trial, Thomas Wilmouth, an attorney who was uninvolved in the case, overheard William Siewert, a member of the jury, make comments regarding his jury service. In his affidavit, Wilmouth asserts that on May 2, 1995, while at a local tavern, he heard Siewert comment that he had recently been a juror in a gang-related homicide. Siewert stated that he was convinced of the defendant's guilt and was prepared to relate to another juror that

he would cancel or delay an upcoming skiing trip in order to continue deliberations if necessary. In his affidavit, Wilmouth contends that he heard Siewert state that while he was convinced of the defendant's guilt at least one other juror was not, and that Siewert also said something about "tips from a bailiff."

A defendant is not automatically entitled to an evidentiary hearing on a postconviction motion. *See* ***State v. Bentley***, 201 Wis.2d 303, 310-11, 548 N.W.2d 50, 53 (1996). A circuit court must hold a hearing only if a defendant alleges facts which, if true, would require relief. ***Id.*** at 310, 548 N.W.2d at 53. Whether a defendant's motion alleges facts entitling him or her to a hearing is a question of law, which we review *de novo*. *See* ***id.*** These allegations must be "'factual-objective,'" *i.e.*, narrations relating what happened, not "'opinion-subjective,'" *i.e.*, comments voicing conclusory views about what happened. *See* ***State v. Saunders***, 196 Wis.2d 45, 51, 538 N.W.2d 546, 549 (Ct. App. 1995) (citations omitted). A defendant cannot rely on subjective conclusions in his pleadings, hoping to supplement them with objective facts at a hearing. *See* ***Bentley***, 201 Wis.2d at 313, 548 N.W.2d at 54. If the defendant presents only conclusory assertions which fail to raise a question of fact, or the record conclusively shows that the defendant is not entitled to relief, the court may exercise its discretion to deny the motion without a hearing. ***Id.*** at 309-10, 548 N.W.2d at 53. "An appellate court will affirm a circuit court's decision when the record shows that the circuit court looked to and considered the facts of the case and arrived at a conclusion consistent with applicable law." ***State v. Eison***, 194 Wis.2d 160, 171, 533 N.W.2d 738, 742 (1995).

To be entitled to an evidentiary hearing on a postconviction motion claiming misconduct involving a jury, a defendant must show both that the evidence is competent and therefore admissible, and that the facts, if found to be true, would require a new trial. *See* ***State v. Marhal***, 172 Wis.2d 491, 497-98, 493 N.W.2d 758, 761-62 (Ct. App. 1992). In addition, to be entitled to a new trial because of unauthorized

communications between a bailiff or other officer of the state and the jury, a defendant must show that he or she was probably prejudiced by the contact. *See* ***State v. Dix***, 86 Wis.2d 474, 491, 273 N.W.2d 250, 258, *cert. denied*, 444 U.S. 898 (1979).

Velez argues that the words "tips from a bailiff" must be construed as Siewert's assertion that he received advice or information from a bailiff for the purpose of convincing at least one holdout juror. Accordingly, Velez contends that he is entitled to a new trial or at least an evidentiary hearing. We disagree. Wilmouth did not aver that he heard Siewert state that any jurors were not convinced of Velez's guilt nor did he indicate what the "tips from a bailiff" were about. The affidavit provides Wilmouth's interpretation and "concern about the integrity of the verdict," not Siewert's assertions. The affidavit concedes that Wilmouth "cannot aver that the statement 'tips from a bailiff' made by Mr. Siewert was related to Mr. Siewert obtaining information from a bailiff as to how to convince the juror who was not convinced of the defendant's guilt."

As the trial court noted in its order denying Velez's motion for postconviction relief:

> In this instance, the defendant has failed to satisfy the first prong set forth in ***Eison***. There is not evidence presented which demonstrates that extraneous information was improperly brought to the jurors' attention. Unlike ***Eison***, there is no factual basis for defendant's speculative assertions. A defendant may not rely on conclusory allegations hoping to supplement them at a hearing…. [Velez] has not made a sufficient showing that any extraneous information pervaded the sanctity of jury deliberations herein outside of Attorney Wilmouth's opinion or belief that it might have happened.
>
> As the appellate court indicated in ***State v. Marhal***, 172 Wis.2d 491, 498 [Ct. App. 1992], "Marhal's request for an evidentiary hearing so as to, in the words of the postconviction motion, 'form a factual basis' for the motion's assertions thus put the proverbial cart before the horse." As in ***Marhal***, Velez has not made the requisite showing which would entitle him to an evidentiary hearing on the basis of the affidavit submitted. His motion is not supported by an affidavit setting forth any *facts* with

> respect to his allegations of jury tampering, and thus, his motion is insufficient to entitle him to an evidentiary hearing.

We agree. Wilmouth expressly acknowledged that he could not specify that Siewert said the bailiff tipped him on ways to convince a supposed holdout. Further, Siewert allegedly said only that he was "prepared" to convey information to another juror "if necessary." Thus, the affidavit failed to allege that any extraneous statement was conveyed to any holdout juror. *See* ***Marhal***, 172 Wis.2d at 496, 493 N.W.2d at 761-62.

Velez next argues that newly discovered evidence warrants a new trial. In support of his motion, Velez submitted an unsworn statement of trial witness, Felix Guzman, in which Guzman asserts that his statement to Milwaukee Police Detectives Eric Moore and Ricky Burems on February 16, 1994, identifying Velez as the shooter, was false. Guzman also states that he is now prepared to name Keith Loomis as the shooter. Velez claims that Guzman's recantation is corroborated by the statement of Patrick Copus, a fellow gang member, that Loomis tried to sell him a .380 semi-automatic handgun for forty dollars on June 15, 1994 at 3:30 p.m. According to Copus, Loomis also told him that "he had just shot a guy with it on 6th Street." Velez claims that the trial court should have granted him an evidentiary hearing to present this "newly discovered evidence." We reject his claim.

A trial court may grant a new trial based on newly discovered evidence only if the defendant proves by clear and convincing evidence, that: (1) the evidence came to the defendant's knowledge after trial; (2) the defendant has not been negligent in seeking to discover it; (3) the evidence is material to the issue; and (4) the evidence is not merely cumulative to that which was introduced at trial. ***State v. McCallum***, 208 Wis.2d 463, 473, 561 N.W.2d 707, 710-11 (1997). "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." ***Id.*** at 473, 561

N.W.2d at 711. "[I]n determining whether there is a reasonable probability of a different outcome, the circuit court must determine whether there is a reasonable probability that a jury, looking at both the accusation and the recantation, would have a reasonable doubt as to the defendant's guilt." ***Id.*** at 475, 561 N.W.2d at 711. Further, if the newly discovered evidence is a witness's recantation, the recantation must be corroborated by other newly discovered evidence. ***Id.*** at 176, 561 N.W.2d at 711. "The corroboration requirement in a recantation case is met if: (1) there is a feasible motive for the initial false statement; and (2) there are circumstantial guarantees of trustworthiness of the recantation." ***Id.*** at 477-78, 561 N.W.2d at 712.

"Motions for 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 reviewing court will affirm the trial court's denial of such a motion as long as it had a reasonable basis and was made in accordance with accepted legal standards and facts of record. ***State v. Jenkins***, 168 Wis.2d 175, 186, 483 N.W.2d 262, 265 (Ct. App.), *cert. denied*, 506 U.S. 1002 (1992). On appeal, we review the trial court's determination for erroneous exercise of discretion. *See* ***McCallum***, 208 Wis.2d at 472, 561 N.W.2d at 710.

Velez's "new evidence" is not newly discovered evidence and, further, Guzman's recantation fails because there is not a reasonable probability that a different result would be reached in a new trial. *See* ***id.*** at 479-80, 561 N.W.2d at 713. The alleged corroboration provided by Copus is incredible as a matter of law because it irreconcilably conflicts with a fully established fact: Loomis was in custody at the time of Copus's alleged meeting with him. *See generally* ***State v. King***, 187 Wis.2d 548, 562, 523 N.W.2d 159, 163 (Ct. App. 1994) ("Evidence is incredible as a matter of law when it conflicts with the uniform course of nature or with fully established or conceded facts."). Velez presented Copus's affidavit, in which Copus claimed that he had encountered

Loomis on June 15, 1994 at 3:30 p.m. The State countered with affidavits and court records which established that Loomis was in secure detention at the Children's Court Center as of 2:50 p.m. on June 15, 1994, and remained there until July 13. Further, as the trial court explained in its decision denying Velez postconviction motion:

> [Velez] was given an opportunity to reply to the State's response and reinterviewed Copus, who steadfastly adhered to the specifics of his statement concerning the date Loomis approached him (June 16, 1994). [Velez] submits that a factual issue is thereby presented and that the court must make a credibility determination. Velez is mistaken…. The Copus affidavit does not create an issue of fact in dispute; it is conclusory and without factual substantiation. Accordingly, Guzman's affidavit is not corroborated by other independent evidence … and does not constitute newly discovered evidence entitling Velez to a new trial.

The trial court was correct.

Velez next contends that newly discovered evidence of an alibi witness, Shannon Carberry, constitutes grounds for a new trial. In addition, he seeks to corroborate Guzman's recantation with Carberry's statement. Again we reject his contentions.

In her June 11, 1996 affidavit, Carberry asserted that she was at the party just before the shooting. Carberry also claimed:

> At approximately 9:00 to 10:00 p.m. on 6-14-96, [sic] I was at the house where the party was with Augustin [sic] Velez and [we] were alone in the bedroom. We had just finished having sex and were unclothed when we heard a single gunshot. As I looked out the window, I could see many people running. Both Augustin [sic] and I put on our clothes and ran out of the house. We shortly thereafter split apart, and I have not seen him since. I did not wait for the police and even though I was aware that Augustin [sic] was being charged with the crime, I refused to give my name, phone number or address to anyone to contact me regarding the incident because I was scared for my life, due to the individuals in Augustin's [sic] gang.

Velez argues that while this evidence may not have been newly discovered, it was newly available. Although he acknowledges the rule that newly available evidence is not newly discovered, *see* ***State v. Jackson***, 188 Wis.2d 187, 198-201, 525 N.W.2d 739, 744-45 (Ct. App. 1994), he invites this court to limit this rule to the situation where a witness invokes the right against self-incrimination and refuses to testify. We decline his invitation.

The facts Velez alleges do not even qualify for the exception he seeks. This is not a case where the witness was unavailable before trial. Rather, it is simply one in which the defendant failed to obtain an available witness. Thus, the evidence is neither new nor newly available. Further, Carberry's statement fails the credibility test; it conflicts with a fact fully established at trial: Velez was at the scene of the crime. Four witnesses testified that Velez was on the street at the time the victim was shot. Defense counsel acknowledged in his opening statement that there was no question that Velez was present during the events which led to the shooting. Therefore, there is not "a reasonable probability that a jury, looking at both the accusation and the recantation, would have a reasonable doubt as to the defendant's guilt." ***McCallum***, 208 Wis.2d at 475, 561 N.W.2d at 711. Carberry's attempt to provide an alibi for Velez is incredible as a matter of law. Accordingly, we conclude that the trial court properly denied Velez's request for a new trial on the ground of newly discovered evidence.

Velez next contends that the trial court erred when it concluded that an evidentiary hearing was not warranted to review his allegation that the State had manipulated the system to avoid juvenile court jurisdiction. The State responds that in this case the non-evidentiary hearing the trial court held was sufficient to dispel Velez's contention. We agree with the State.

A criminal court cannot maintain jurisdiction over a defendant charged as an adult with a crime committed while still a child unless it is affirmatively shown that the delay was not for the purpose of manipulating the justice system to avoid juvenile court jurisdiction. ***State v. Montgomery***, 148 Wis.2d 593, 599, 436 N.W.2d 303, 305 (1989). "The burden of proof to show lack of manipulative intent is on the state." ***State v. LeQue***, 150 Wis.2d 256, 268, 442 N.W.2d 494, 499 (Ct. App. 1989). On appeal, the trial court's factual findings will not be disturbed unless they are clearly erroneous. ***Id.***

On October 31, 1994, the criminal court reviewed records of the juvenile court regarding an unrelated matter in which Velez was involved. They established that shortly before being charged with this crime, Velez had been waived into adult court but had failed to appear before the assistant district attorney for charging, as required after the waiver. A warrant was then issued for his arrest. Six days later, Lovett was killed. When police gathered evidence against Velez regarding Lovett's homicide, a second arrest warrant was issued. At the hearing, the prosecutor explained that it is the usual practice to issue a warrant rather than file a delinquency petition when a juvenile offender cannot be found. Velez was not apprehended until August 19, 1994, approximately two weeks after his eighteenth birthday.

After being presented with these records and explanation, the trial court asked defense counsel whether he had anything to offer to dispute the information. Defense counsel offered nothing. The court then concluded that there was no reason to hold an evidentiary hearing because the State had refuted Velez's claim of manipulative intent. The trial court stated, however, that an evidentiary hearing would be held if Velez could come up with anything prior to trial that created a factual dispute. Velez never offered anything. Accordingly, we conclude that the trial court properly exercised discretion in denying Velez's motion without a hearing.

By the Court.–Judgment and order affirmed.

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