COURT OF APPEALS
DECISION
DATED AND FILED

November 4, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 96-3324-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

FRANKIE GROENKE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEFFREY A. WAGNER and DAVID A. HANSHER, Judges.[1] *Affirmed.*

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

[1] The Hon. Jeffrey A. Wagner presided over the trial. The Hon. David A. Hansher presided over the postconviction motion.

PER CURIAM. Frankie Groenke appeals from a judgment entered after a jury convicted him of two counts of armed robbery and one count of armed burglary, all as party to a crime, contrary to §§ 943.32(1)(a)&(2), 943.10(1)(a)&(2)(a), and 939.05, STATS. He also appeals from an order denying his postconviction motion. Groenke claims that: (1) the trial court erroneously exercised its discretion in allowing testimony by Police Detective Fred Krenzke, which tied the stolen property to Groenke's residence; (2) the trial court erred in denying his motion for a new trial based on newly discovered evidence; and (3) the judgment should be reversed in the interests of justice. Because the trial court did not erroneously exercise its discretion in allowing the testimony, because the trial court did not err in denying Groenke's motion regarding newly discovered evidence, and because "justice" does not require a reversal in this case, we affirm.

I. BACKGROUND

On June 18, 1994, two armed men accosted Michael Grosse at 10:15 p.m. They forced him into his home at 1635 North 52nd Street in Milwaukee, where they ransacked his room and stole clothes, a cellular telephone, a video game and a pager. During this time, they also held at gunpoint Grosse's mother, Susan, and his girlfriend, Stephanie Preisler, who were in the home. On August 9, 1994, the same two assailants robbed Grosse again, stealing his shoes and everything in his mother's car.

Several months later, Detective Krenzke interviewed Anthony Kane, who was in custody at the Pewaukee Police Department. Kane told the Milwaukee detective that he and Groenke committed the Grosse robberies. Based on this information, Grosse, his mother, and his girlfriend were each shown a six-person photo array. Each identified Groenke as the robber. Groenke's photo was

obtained from the West Allis police. Groenke resided in West Allis at 2006 South 58th Street. In executing a search warrant at his residence, the police located items stolen from Grosse.

Groenke was charged with two counts of armed robbery and one count of armed burglary, all as party to a crime. During his trial to a jury, Detective Krenzke testified that he had interviewed Kane, who gave him information about the Grosse robberies. Kane did not testify at Groenke's trial, although he was listed as a witness.

Without objection, Detective Krenzke testified that a search warrant was executed at Groenke's address to obtain potential physical evidence and that items stolen from Grosse were recovered when the search warrant was executed. Krenzke was then asked: "Did there come a time that you displayed these items, or were present when these items were displayed to Michael Grosse?" At this point, Groenke's counsel objected. The following colloquy occurred:

> [DEFENSE COUNSEL]: Judge, I'm going to object. I think there's been an improper foundation that's been laid relative to this information about a search warrant. Um, it has not been established that this officer has any firsthand knowledge of a search warrant, or the execution of the search warrant. I think that this is improper the way it's being presented.
>
> THE COURT: You want to put some more foundation in then?
>
> [PROSECUTOR]: Well, it's untimely, that information. We're well past that.
>
> [DEFENSE COUNSEL]: I'm moving to strike it, Your Honor.
>
> THE COURT: The Court's not going to strike it. If you want to ask some additional questions then – – subsequently, ask the next question, the Court's going to allow you to do so.

Krenzke then testified at length about the items recovered from Groenke's home which were identified by the robbery victim as items stolen from him. Groenke's counsel placed a continuing foundational objection on the record, which the trial court overruled.

The jury convicted Groenke on all three counts. After sentencing, Groenke filed a postconviction motion alleging that newly discovered evidence existed which warranted a new trial. The evidence was an affidavit from Kane asserting that he had lied to police, that Groenke really was not involved in robbing Grosse and the only reason the stolen items were found in Groenke's home was because Kane was Groenke's roommate. The trial court denied the motion without a hearing. Groenke now appeals.

II. DISCUSSION

A. Detective Krenzke's Testimony.

Groenke claims that the trial court erroneously exercised its discretion in admitting Krenzke's testimony linking the items recovered via the search warrant to Groenke's home. He claims this was inadmissible hearsay. The State responds that Groenke waived this issue because his objection at trial was untimely and not specific.

Our review on this issue is limited to determining whether the trial court erroneously exercised its discretion. *See* ***State v. Larsen***, 165 Wis.2d 316, 320 n.1, 477 N.W.2d 87, 89 n.1 (Ct. App. 1991). Trial courts are granted broad discretion in determining whether to admit or exclude proffered evidence. *See* ***id.*** at 319-20, 477 N.W.2d at 88. We will not overturn a trial court's evidentiary ruling unless there was no reasonable basis for it. *See* ***State v McConnohie***, 113

Wis.2d 362, 370, 334 N.W.2d 903, 907 (1983). We look for reasons to sustain a discretionary ruling. *See* ***Larsen***, 165 Wis.2d at 320 n.1, 477 N.W.2d at 89 n.1.

In reviewing the record, we conclude that the trial court did not erroneously exercise its discretion. The trial transcript demonstrates that before any objection was made, the prosecutor had moved into a separate area of inquiry. Krenzke had already testified that a search warrant was issued to search Groenke's residence for the stolen property, and that stolen property had been recovered incident to the search warrant. Groenke did not object until the prosecutor asked Krenzke whether he showed the recovered items to the victim. At this point, the trial court invited the prosecutor to provide additional foundation. The prosecutor declined, contending that the foundation objection was untimely. The trial court denied Groenke's motion to strike. Under the circumstances presented here, this was within the trial court's discretion.

On appeal, Groenke argues that this line of questioning allowed inadmissible hearsay because Krenzke did not obtain or execute the search warrant. Groenke, however, did not present a hearsay objection to the trial court. Accordingly, this argument was waived. *See* § 901.03(1)(a), STATS., (Party must make an appropriate, specific objection to evidence he deems inadmissible in order to preserve a claim of evidentiary error for appellate review.). Groenke claims that under ***State v. Peters***, 166 Wis.2d 168, 479 N.W.2d 198 (Ct. App. 1991), his objection should be interpreted to be specific enough to preserve a hearsay objection. In ***Peters***, this court held that "[l]ack of personal knowledge is but another way of asserting a hearsay objection." ***Id.*** at 175, 479 N.W.2d at 200. Groenke argues that his foundation objection included the statement that "it has not been established that this officer has any firsthand knowledge of a search

warrant," which is sufficiently specific to apprise the court that he was raising a hearsay objection. We do not agree.

In ***Peters***, the defendant had objected to similarly offered testimony by other witnesses on hearsay grounds prior to his lack of personal knowledge objection. *See* ***id.*** In that context, the grounds for the objection, without specifically asserting hearsay, was apparent. This was not the case at Groenke's trial. Neither party, nor the trial court, discerned from Groenke's objection that hearsay was at issue. In the context of the case a hearsay issue was not apparent. Accordingly, the State was not allowed to present argument relative to the hearsay rule and the trial court was not given an opportunity to consider the issue. We therefore deem this issue waived.

B. Newly Discovered Evidence.

Groenke claims the trial court erred in denying his motion for a new trial based on newly discovered evidence. He claims the affidavit submitted by Kane, which stated that Groenke was not involved in the robberies, constitutes newly discovered evidence sufficient to justify a new trial. We disagree.

Our review on this issue is *de novo* because the trial court that decided the new trial motion was different than the trial court that presided at trial. *See* ***State v. Coogan***, 154 Wis.2d 387, 395 n.1, 453 N.W.2d 186, 188 n.1 (Ct. App. 1990). In order to obtain a new trial based on newly discovered evidence, Groenke must establish by clear and convincing evidence, that:

> (1) The evidence must have come to the moving party's knowledge after a trial; (2) the moving party must not have been negligent in seeking to discover it; (3) the evidence must be material to the issue; (4) the testimony must not be merely cumulative to the testimony which was introduced

> at trial; and (5) it must be reasonably probable that a different result would be reached on a new trial.

State v. Sarinske, 91 Wis.2d 14, 37, 280 N.W.2d 725, 736 (1979). We agree with the trial court that Groenke has failed to satisfy his burden with respect to the fifth factor.

The Kane affidavit, which forms the basis for Groenke's motion, provides:

> 1. While I was being held in custody at the Pewaukee Police Department on November 1, 1994, I was questioned by Milwaukee police officers about some robberies in Milwaukee.
>
> 2. The Milwaukee police officers told me that Frankie Groenke had implicated me in a robbery on Vliet Street and a carjacking.
>
> 3. I believed them, because I had seen Frankie be released from custody. I was angry at Frankie. Therefore, I lied and told the police officers that Frankie was the person who robbed Michael Grosse with me.
>
> 4. I did rob Michael Grosse, but Frankie did not.
>
> 5. The stolen items which were recovered at Frankie Groenke's home were there because I had taken them, and I was living with Frankie at the time. He did not know they were stolen.
>
> 6. I am willing to testify under oath in court that Frankie Groenke did not participate in either robbery of Michael Grosse.

Having reviewed this, we are not convinced by clear and convincing evidence that such testimony is likely to produce a different result in a new trial. Groenke was identified as one of the robbers by three eyewitnesses: Susan Grosse, Stephanie Preisler and Michael Grosse. Each was separately shown a six-person photo array. Each identified Groenke as the robber. All three witnesses observed Groenke in a lighted kitchen and a lighted bedroom during the crime. Both Preisler and Michael observed Groenke at close range.

Given the strength of these identifications, it is not likely that testimony from a convicted felon who gave a prior inconsistent statement, would alter the outcome. Therefore, we conclude that the trial court did not err in denying Groenke's motion for a new trial based on newly discovered evidence.[2]

C. Interests of Justice.

Groenke also claims that he should be granted a new trial in the interests of justice–that the real controversy was not tried because the jury did not hear testimony from co-participant Kane. We reject his claim.

A new trial in the interests of justice is warranted under § 752.35, STATS., when the jury does not hear important evidence that bears on an important issue in the case. *See* ***State v. Wyss***, 124 Wis.2d 681, 735, 370 N.W.2d 745, 770-71 (1985), *overruled on other grounds by* ***State v. Poellinger***, 153 Wis.2d 493, 451 N.W.2d 752 (1990). If Kane's testimony were important evidence, Groenke should have called him as a witness. Groenke chose to call no witnesses in his own defense. He cannot be heard to complain about that choice now.

By the Court.—Judgment and order affirmed.

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

[2] We are further unaffected by Groenke's claim that the identifications are suspect because the victims were unable to identify Groenke from Milwaukee Police Department suspect photos shortly after the robbery. The record indicates that after Groenke was identified as a suspect, the Milwaukee Police needed to obtain a photo of Groenke from the West Allis Police Department. From this fact, it is reasonable to infer that the Milwaukee Police Department suspect photos reviewed by the victims shortly after the robberies did not contain a photo of Groenke.