

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**August 26, 2014**

Diane M. Fremgen  
Clerk of Court of Appeals

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**Appeal No. 2013AP1842-CR**

**Cir. Ct. No. 2009CF1024**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT I**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**v.**

**ROBERT KENTRELL GANT,**

**DEFENDANT-APPELLANT.**

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APPEAL of an order and a judgment of the circuit court for Milwaukee County: KEVIN E. MARTENS and JEFFREY A. WAGNER, Judges.<sup>1</sup> *Affirmed.*

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<sup>1</sup> The Honorable Kevin Martens handled both the first and second trials. The Honorable Jeffrey A. Wagner decided the postconviction motion.

Before Curley, P.J., Fine and Brennan, JJ.

¶1 FINE, J. Robert Kentrell Gant appeals the judgment entered on a jury verdict convicting him of first-degree intentional homicide. *See* WIS. STAT. § 940.01(1)(a). He also appeals the trial court’s denial of his motion for postconviction relief. He argues here that: (1) the trial court erred when it denied without hearing his claim that his trial lawyer gave him constitutionally deficient representation; (2) State witness Ashlee Bell’s recantation after his conviction was newly-discovered evidence; and (3) the real controversy was not tried. We affirm.

### I.

¶2 In February of 2009, the State charged Gant with burglary as party to a crime and first-degree intentional homicide following the shooting death of Davell Childs. Childs thought his neighbors, the Davis Family, and the Davises’ friend, Ramell Cook, had broken down his front door and taken his video game console. As material here, the Davis Family included brothers Jacoby Davis, Marquis Davis, and Christopher Davis, and their then fourteen-year-old sister, Ashlee Bell. At the time of the murder, Bell had an “on and off” relationship with Gant. She also had Gant’s nickname “Humpty” tattooed on her chest.

¶3 Childs confronted the Davises about the burglary by knocking on their door and displaying his machine gun. After Childs put his gun away, the State charged that Gant fatally shot Childs. The State tried the case twice. At the first trial, the jury found Gant guilty of the burglary but could not reach a verdict on the homicide. The trial court declared a mistrial on the homicide charge, and the State tried Gant a second time resulting in the conviction at issue in this appeal.

¶4 At Gant's first trial, Bell testified:

Q. So if I understand it, what you're telling us is that on the night this man was shot, you were there?

A. Yes.

Q. Mr. Gant was not?

A. No.

¶5 The prosecutor asked again who was present:

Q. So when you say that the person who got shot was in an argument with your brother Christopher?

A. Yes.

Q. And also there was your brother Marquis and Jacoby?

A. Yes.

Q. And your mother?

A. Yes.

Q. And yourself obviously?

A. And who?

Q. Yourself?

A. Yes.

Q. And Robert Gant?

A. No.

Q. He wasn't there?

A. No.

Q. Was he there at all during this day?

A. No. Earlier that morning.

Q. In the morning?

A. Yes.

The prosecutor then asked Bell about what she told the police the morning after the shooting. Bell testified that:

- She initially lied to police and told them she was not home when the shooting took place.
- She also lied to police when they asked her to identify a picture of her brother and a picture of Gant.
- She did not remember the police asking her about the shooting.

¶6 Bell denied telling the police that Gant was the shooter:

Q. Do you remember telling the police [at the time of the shooting] that Robert Gant was outside and approached from the middle of North 25th Street and that he was armed with a dark handgun?

A. No. Because I didn't see him all that day except for in the morning.

....

Q. And you recall telling the police that at the time of the shooting you saw Robert Gant extend his arm with this handgun and that you saw muzzle flashes coming from the end of his arm from the gun?

A. No.

Q. You don't remember telling them? Did you see that?

A. No.

Q. So if the police had that down that that's what you told them, that would be incorrect?

A. Yes.

Q. And do you remember telling the police that you heard the sound of three gunshots and then saw the victim fall to the ground?

A. No.

Q. Did you see who did the shooting?

A. No.

(Paragraphing altered.)

¶7 At the second trial, Bell testified:

- She was home at the time of the shooting and “Robert [Gant] was in the house.”
- “[A] minute and a half to two minutes after” Gant left the house, she heard “[p]robably around three or four” gunshots.
- She looked out the window and saw Gant running away and the victim fall to the ground.
- She did not see Gant with a gun and she did not know if Gant shot the man.
- Gant’s nickname was “Humpty.”

¶8 When the prosecutor asked Bell about what she told police, Bell testified:

Q. Do you remember telling this detective that what you saw on the night was that you saw Mr. Gant outside and that he approached the victim as he was talking to your brothers with his arm extended and that you saw muzzle flashes coming from the gun in his hand?

A. No.

Q. You don’t remember telling him that?

A. No.

....

Q. Did you see Robert with a gun extending it as he was running towards the victim?

A. No. When I -- I told you. When he went through the window, I didn't see anything. He didn't have anything. His hands was in his coat. I didn't see him raise up the window. I seen his body go out of the window. And when he went out of the window, I wasn't standing in the kitchen anymore.

Q. And after you heard the shots and you saw him running, did you see the gun at that time?

A. No.

¶9 As a defense theory, Gant claimed he had an alibi for the homicide. Several of Gant's family members (grandmother, mother, aunt, brother and sister) testified that he was home when the shooting took place. The jury convicted Gant of the homicide.

¶10 After sentencing, Gant filed a postconviction motion claiming his trial lawyer gave him ineffective assistance for not impeaching Bell with her testimony from the first trial where she said Gant was not present when the shooting took place. Gant also submitted his investigator's report claiming Bell recanted the testimony she gave at the second trial:

"Ashlee [Bell] stated that she had testified at both of Robert Gant's trials however her testimony in the first trial was true as to the date of the incident; Robert Gant was not the shooter nor was he at the scene on the day of the shooting.

Ashlee stated that prior to the second trial, her family and the detectives were continuously pressuring her to testify; none of them made any threats or promises, but the constant questioning and pressure caused her to become extremely upset. She also added that she had been going through a bout of depression during this time.

Ashlee stated that she did not want to testify at Robert's second trial because she had already explained what happened on the day of the shooting in his first trial. Ashlee was tired of all the pressure and questioning that she

just wanted the whole thing to go away. Ashlee told me that she didn't even show up to the second trial because she didn't want to testify again, however the detectives came and picked her up on the day of trial. Ashlee again stated that her testimony in the second trial was not accurate as to what happened on the day of the shooting; her testimony in the first trial was and is the truth.”

¶11 The trial court denied the motion.

## II.

### A. *Alleged Ineffective Assistance.*

¶12 Gant claims his lawyer should have questioned Bell about her testimony at the first trial where she said Gant was not present. He argues the trial court erred in denying his ineffective assistance claim without having a hearing under *State v. Machner*, 92 Wis. 2d 797, 804, 285 N.W.2d 905, 908–909 (Ct. App. 1979) (normally, the trial court must hold an evidentiary hearing to decide whether a trial lawyer gave his or her client constitutionally ineffective representation). To establish ineffective assistance of counsel, a defendant must show: (1) deficient performance; and (2) prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To prove deficient performance, a defendant must point to specific acts or omissions by the lawyer that are “outside the wide range of professionally competent assistance.” *Id.*, 466 U.S. at 690. To prove prejudice, a defendant must demonstrate that the lawyer’s errors were so serious that the defendant was deprived of a fair trial and a reliable outcome. *Id.*, 466 U.S. at 687.

¶13 To be entitled to a *Machner* hearing, Gant must show facts that, if true, would entitle him to the relief he seeks. See *State v. Allen*, 2004 WI 106, ¶¶9–10, 274 Wis. 2d 568, 576–577, 682 N.W.2d 433, 437–438 (The trial court has the discretion to deny a postconviction motion for a *Machner* hearing “if the

motion does not raise facts sufficient to entitle the movant to relief, or presents only conclusory allegations, or if the [R]ecord conclusively demonstrates that the defendant is not entitled to relief.”). Whether a motion was sufficient to require a hearing is a legal issue that we review *de novo*. *State v. Bentley*, 201 Wis. 2d 303, 309–310, 548 N.W.2d 50, 53 (1996).

¶14 Here, the trial court found that Gant failed to sufficiently assert facts to show he had been prejudiced by his lawyer’s failure to impeach Bell with her earlier testimony because: (1) Bell had a relationship with Gant and at both trials evaded questions that would implicate him as the shooter; and (2) other witnesses’ testimony, including police detective Michael Sykes and Marquis Davis’s live-in girlfriend, Davinia Mims, clearly pointed to Gant as the shooter. These factors showed that not questioning Bell about her earlier testimony did not make the trial unreliable and did not affect the result.

¶15 We agree. Detective Sykes testified that:

- He had been a police detective for eighteen years and a police officer for twenty-five years.
- Bell told him “that she saw the person who did the shooting.” It was “Robert Gant”—“her boyfriend.”
- “[Bell] had indicated while inside her residence in the kitchen, she looked out of an east-facing window in the kitchen and observed her brother and the victim engaged in an argument. She indicated that she observed Mr. Gant approach both her brother and the victim armed with a dark handgun and she observed Mr. Gant extend the arm holding the firearm. She heard three gunshots, observed the



muzzle flashes coming from the extended arm, and observed the victim fall to the ground.”

The prosecutor questioned Mims:

Q. And I want to ask you some questions with regards to [the night of the shooting]. When you were over at [the Davis] home, were some of the individuals that I asked you if you knew or met before, were they also over at that home?

A. Yes.

Q. On that night?

A. Yes.

Q. And specifically, was Humpty over there at that time, that night of this -- the night the man got shot?

A. Yes.

Q. Was Ashlee [Bell] over there?

A. Yes.

Q. And obviously you were there?

A. Yes.

Q. And was Christopher there?

A. Yes.

Q. What about your boyfriend at the time Marquis?

A. Yes.

Q. And when you were over there on that night, do you recall some confrontation or argument or something going on outside that home?

A. Yes.

Q. Where were you at the time?

A. In the house.

Q. Inside the house. Do you remember where you were inside the house?

A. I was in the kitchen window.

Mims testified that the neighbor came over with a gun, “an Uzi,” and had an argument with the Davis brothers about the theft of the man’s video game console. Mims, Gant, Bell, and some children were inside the Davis house. Mims testified that she heard Gant say “‘He ain’t the only one got a gun’” and Gant pulled a .357 handgun “out of his pocket.” Mims next testified that Gant “went out the front window” because the front “door didn’t work.” Mims then testified that:

- “[Childs] went and gave his girlfriend, whatever she is, the gun after he got done yelling and everything. Now everybody like is calming down and -- I mean Humpty came over around while everybody was still calming down. So I thought everything was done.”
- “I heard shots. ... I heard five altogether.”
- After the shots, Bell “said ‘Humpty killed that boy. Humpty killed that boy.’”

¶16 These two witnesses’ testimony conclusively establish that failure to impeach Bell did not prejudice Gant; therefore, the trial court did not err in summarily denying Gant’s motion.

B. *Alleged Recantation.*

¶17 Gant’s next claim is that Bell’s recantation after his conviction created newly discovered evidence. We recently addressed whether a recantation satisfies the newly-discovered evidence test in *State v. Ferguson*, 2014 WI App 48, ¶¶24–33, 354 Wis. 2d 253, 266–277, 847 N.W.2d 900, 908–912.

¶18 To warrant a new trial, Bell’s recantation must meet five requirements: (1) it must have been discovered after conviction; (2) Gant must not have been negligent in discovering it; (3) it must be material to an issue in the case; (4) it must not be cumulative; and (5) “the recantation must be corroborated by other newly discovered evidence.” *Id.*, ¶24, 354 Wis. 2d at 268, 847 N.W.2d at 908 (quoted source omitted). Corroboration exists when ““(1) there is a feasible motive for the initial false statement; and, (2) there are circumstantial guarantees of the trustworthiness of the recantation.”” *Id.*, ¶25, 354 Wis. 2d 253 at 269, 847 N.W.2d at 908 (quoted source omitted). And, of course, a new trial is only required when “a reasonable probability exists that a different result would be reached in a new trial.” *State v. McCallum*, 208 Wis. 2d 463, 473, 561 N.W.2d 707, 711 (1997).

¶19 Here, assuming without deciding that the alleged recantation met the first four factors, we address whether Bell’s alleged recantation satisfies the corroboration factor. Gant proffers as a feasible motive for Bell’s “initial false statement” that she felt pressure from her family and police to say Gant was present at the time of the homicide. We assume without deciding that family and police pressure may be a feasible motive for Bell’s testimony at the second trial. Thus, the only remaining question is whether Bell’s alleged recantation has circumstantial guarantees of trustworthiness. A recantation may satisfy this requirement when: “(1) the recantation is internally consistent; (2) the recantation is consistent with circumstances existing when the recanting witness made his or her initial charge; and (3) whether the recanting witness knows that he or she could suffer criminal consequences stemming from the earlier false accusation.” *Ferguson*, 354 Wis. 2d at 268, 847 N.W. 2d at 908. (internal quotation marks and brackets omitted).

¶20 The alleged recantation here does not meet the requirements because it is not internally consistent. The alleged recantation asserts that “her testimony in the first trial was true as to the date of the incident” and that “Gant was not the shooter.” Bell did not testify at the first trial that Gant was not the shooter. When asked “Did you see who did the shooting?” she answered “No.” At the second trial, she did not testify that Gant *was* the shooter; rather, she said she did not know if Gant was the shooter. At both trials, she denied telling police that Gant was the shooter. Further, Bell’s alleged recantation was not sworn under oath in an affidavit, but rather came as a representation through Gant’s investigator. Her alleged recantation does not meet the circumstantial guarantee of trustworthiness requirement. Accordingly, the trial court did not err in denying Gant’s request for a new trial based on Bell’s alleged recantation when it ruled that there is no “reasonable probability that Bell’s current recantation would alter the outcome in any respect.”

C. *WISCONSIN STAT. § 752.35.*

¶21 Gant also claims the real controversy was not tried and wants us to reverse in the interests of justice under WIS. STAT. § 752.35 (“In an appeal to the court of appeals, if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried, the court may reverse the judgment or order appealed from.”). This argument, however, merely rehashes contentions that we have already rejected. *See State v. Arredondo*, 2004 WI App 7, ¶56, 269 Wis. 2d 369, 405, 674 N.W.2d 647, 663–664. Accordingly, we affirm.

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

Publication in the official reports is not recommended.

