COURT OF APPEALS
DECISION
DATED AND FILED

February 3, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP320 **Cir. Ct. No. 1999CF166**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

PATRICK ALAN PETERSON,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Douglas County: GEORGE L. GLONEK, Judge. *Affirmed*.

Before Hoover, P.J., Stark and Hruz, JJ.

¶1 PER CURIAM. Patrick Peterson appeals an order denying a postconviction motion seeking reversal of Peterson's conviction for shooting his father. We reject Peterson's contention that he is entitled to withdraw his plea based on newly discovered evidence and affirm the order.

¶2 On July 3, 1999, Carl Peterson was shot in the temple at close range while sleeping on his couch. The following day, Alejandro Rivera and David Williams were arrested on outstanding warrants after police searched Rivera's residence for evidence of drug dealing and gang activity. Peterson was also present during the search, but he was not initially detained.

¶3 Soon after his arrest, Rivera asked to talk to police about a dead body. Rivera voluntarily told police they could find the body of someone named Peterson in the trunk of a small gray car parked in the City of Superior. There is no indication in the record that police knew anything about Carl Peterson's murder before this time.

¶4 Police determined the vehicle belonged to Carl Peterson, whose wallet was found in Rivera's residence during the drug search preceding his arrest. Rivera told police that Williams and Patrick Peterson had planned to kill Peterson's father in order to gain respect and gang rank, and also to obtain Carl Peterson's property. Rivera initially stated that Williams took credit for the killing. Rivera and Williams later said Peterson shot the victim.

¶5 Peterson was charged with first-degree intentional homicide and hiding a corpse in connection with his father's death. Pursuant to a November 1999 plea agreement, Peterson entered a plea of guilty to amended charges including party to the crime of conspiracy to commit first-degree intentional homicide, with a criminal gang enhancer, and one count of hiding a corpse. This lowered Peterson's maximum potential sentence from life imprisonment to a total of fifty years. As part of the plea agreement, Peterson was required to testify against Williams and Rivera. At a November 12 plea hearing, the circuit court accepted Peterson's pleas and found him guilty.

¶6 Several days later, the State moved to terminate the plea agreement on grounds that Peterson had changed his story and could no longer be an effective witness against his co-defendants. The circuit court granted the State's motion, and the original charges were reinstated.

¶7 Peterson and the State entered into another plea agreement in December 1999. Peterson pled guilty to one count of first-degree intentional homicide and one count of hiding a corpse, both as party to a crime.[1] The circuit court accepted a joint sentencing recommendation of life imprisonment, with the possibility of parole after twenty-seven years, on the homicide count; and five years' concurrent prison on the hiding a corpse count. We affirmed Peterson's conviction on appeal. *See* ***State v. Peterson***, No. 2001AP598-CR, unpublished slip op., ¶¶4, 5 n.2 (WI App Oct. 9, 2001).

¶8 More than a decade later, Peterson filed a WIS. STAT. § 974.06 postconviction motion to withdraw his guilty plea. Among other things, Peterson insisted he had received new evidence that Rivera lied when he informed investigating officers that Peterson shot his father. Peterson asserted that he was "able to secure a sworn affidavit from Rivera attesting to the fact that he and co[-]defendant David Williams … made up the story [that Peterson was the shooter] out of fear that Peterson would inform police that Williams had actually killed Carl Peterson." Peterson insisted that "had he known that Rivera would testify to the truth, without any doubt … he would have invoked his right to trial by jury." The circuit court denied the motion. Peterson now appeals.

[1] Williams and Rivera were also charged as parties to the crime. Williams pled guilty and was sentenced to life in prison with the possibility of parole in twenty years. Rivera went to trial and was found guilty. He was sentenced to life in prison without the possibility of parole.

¶9 A defendant may withdraw a plea after sentencing only if necessary to avoid a manifest injustice. *See* ***State v. Kivioja***, 225 Wis. 2d 271, 286, 592 N.W.2d 220 (1999). Recantation evidence is inherently unreliable, especially the recantation of a convicted co-defendant who has nothing to lose by testifying untruthfully. *See* ***State v. Jackson***, 188 Wis. 2d 187, 200 & n.5, 525 N.W.2d 739 (Ct. App. 1994). However, recantations may be sufficient to warrant plea withdrawal if the following criteria are proven by clear and convincing evidence: (1) new evidence was discovered after conviction; (2) the defendant was not negligent in failing to find the evidence before he was convicted; (3) the evidence is material to an issue in the case; (4) the evidence is not merely cumulative; and (5) the recantation evidence is corroborated by other newly discovered evidence. *See* ***State v. Sorenson***, 2002 WI 78, ¶26, 254 Wis. 2d 54, 646 N.W.2d 354.

¶10 All the above criteria must be proven to show that evidence warrants plea withdrawal. *See* ***State v. Sarinske***, 91 Wis. 2d 14, 37-38, 280 N.W.2d 725 (1979). If the recantation fails to meet any of the criteria, the defendant fails to meet the required burden of proof. ***Sheehan v. State***, 65 Wis. 2d 757, 768, 223 N.W.2d 600 (1974). If all these criteria are met, it must then be determined 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. *See* ***Sorenson***, 254 Wis. 2d 54, ¶26.

¶11 Here, Peterson cannot prove the first criteria by clear and convincing evidence. Rivera recanted statements that he made to police in July 1999. The basic premise of Rivera's affidavit is that Peterson did not commit the murder. In fact, the first line of Rivera's affidavit states: "That on July 3, 1999, David Williams told me that he accidentally shot and killed Mr. Carl E. Peterson."

¶12 However, Rivera told police on July 4, 1999, that Williams took credit for killing Peterson's father. On July 5, 1999, Rivera again told police that Williams told him Williams had killed Carl Peterson.

¶13 The cornerstone of a claim of newly discovered evidence is the discovery of the evidence after the defendant was convicted. *See* ***State v. McCallum***, 208 Wis. 2d 463, 473, 561 N.W.2d 707 (1997). A new appreciation of the importance of evidence previously known does not transform the old evidence into newly discovered evidence. *See* ***State v. Williams***, 2001 WI App 155, ¶16, 246 Wis. 2d 722, 631 N.W.2d 623. Rivera's claim that Williams told him he killed the victim was not newly discovered because it was known to have been made more than a decade earlier, well before Peterson's conviction.

¶14 Peterson insists, without citation to the record, "It is the entire affidavit, taken in full context that is newly discovered evidence and not merely one line from it." However, Peterson's briefs to this court fail to specify how, looking at Rivera's affidavit, the recantation may be considered new evidence. We will not consider undeveloped, unsupported and conclusory arguments. *See* ***M.C.I., Inc. v. Elbin***, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988).

¶15 Moreover, even if we could assume that Rivera's recantation satisfied the first criteria, the recantation was not corroborated. When the recantation depends solely on the credibility of the declarant, the requirement of corroboration may be met when the defendant shows both a feasible motive to make an initial false statement and circumstances that guarantee the trustworthiness of the subsequent recantation. *See* ***Sorenson***, 254 Wis. 2d 54, ¶26.

¶16 Here, there is no feasible motive to make an initial false statement. In his recantation affidavit, Rivera states that the story he created against Peterson

"was completely false." He claims he lied about Peterson being the shooter because he was worried:

> Peterson would share his suspicions with the police that [Rivera] might have been involved in his father's death and cause me to be arrested and possibly made a suspect [and] [t]hat because of these concerns, Mr. Williams and I both had agreed, when we were alone together, that if Patrick Peterson went and told the police these accusations that he and I would then tell the police that Patrick Peterson had actually shot Mr. Carl E. Peterson.

¶17 However, Rivera could not possibly have a motive to pin Peterson as the shooter because of a concern that Peterson might involve him, because Rivera involved himself in the murder. Rivera and Williams were arrested on July 4, 1999, after police searched Rivera's residence for evidence of drug dealing and gang activity. Shortly after his arrest, Rivera initiated contact with police and voluntarily told them where they could find the victim's body. In an interview with police on the day of his arrest, Rivera initially said that Williams took credit for the killing. In an interview on July 6, 1999, Rivera admitted he was deeply involved in a conspiracy to kill the victim as a gang activity. After thoroughly inculpating himself in the shooting, Rivera stated that Peterson was the one who actually shot the victim.

¶18 It does not matter who actually pulled the trigger in a conspiracy since each conspirator is responsible for the acts of any associate committed in the prosecution of the common design, which become the acts of all the conspirators. *See, e.g.*, ***Haskins v. State***, 97 Wis. 2d 408, 413, 294 N.W.2d 25 (1980). Further, there is no suggestion in the record that Peterson ever made any statements to the police, much less any statement inculpating Rivera, that could have given Rivera any motive to retaliate, or defend himself, against Peterson.

¶19 In fact, Peterson's only known statement regarding the shooting was made to his friend Loren Frikart, indicating that Peterson shot the victim when they were alone. Thus, contrary to Rivera's asserted fears, Peterson actually deflected any responsibility for the crime away from Rivera. Rivera's purported motive to make a false statement inculpating Peterson therefore simply did not exist. Equally non-existent is any motive Rivera may have had to falsely inculpate himself as a conspirator in the crime.

¶20 The circumstances of the recantation also make it especially untrustworthy because Rivera had something to gain. Rivera was convicted for his part in conspiring to intentionally kill the victim, and he was sentenced to life in prison without the possibility of parole. Rivera's recantation actually exculpated himself as much as it exculpated Peterson. Rivera recanted not only his original statement that Peterson shot the victim, but all the statements he originally made to police admitting his involvement in a conspiracy to kill the victim.

¶21 In his recantation, Rivera asserted that the shooting was accidental, he was not present when the victim was shot, he had no knowledge of the shooting, there was never any conspiracy to intentionally kill the victim, no one had any motive to intentionally kill the victim, and the shooting was not gang related. In short, Rivera asserted that he was not guilty of being a party to the crime of intentional murder and, in fact, that no such crime had been committed. If Peterson got a new trial, or better yet, an acquittal, based upon Rivera's belated claim that the shooting was accidental and not conspiratorial, perhaps then Rivera too could get a chance at reversing his own conviction. "There is nothing inherently trustworthy about a statement which … attempts to exculpate [a

defendant] as to first-degree murder and an automatic life sentence." ***State v. Pepin***, 110 Wis. 2d 431, 440, 328 N.W.2d 898 (Ct. App. 1982).

¶22 Accordingly, Rivera's recantation was not corroborated by either a feasible motive to make an initial false statement or circumstances that guaranteed the trustworthiness of the subsequent recantation. Rather, just the opposite was the case, as Rivera had an obvious self-interest in making a false recantation, simultaneously seeking to exculpate both Peterson and himself, making his recantation even more untrustworthy than most.

¶23 In addition, Rivera's recantation was incredible as a matter of law, because no reasonable juror could believe it. If a recantation would not be believed by a reasonable juror, it would not create any doubt about the defendant's guilt. *See* ***Kivioja***, 225 Wis. 2d at 295-98.

¶24 Rivera told police they could find Carl Peterson's body in the trunk of a small gray car parked at a residence in Superior. That evening, police observed the small gray car leave the premises towing a boat. Frikart was driving and Peterson was the passenger. The victim's body was in the boat wrapped in a tarp and chained to weights. Frikart later told police that Peterson asked him to drive to a boat landing so they could throw a body out of the boat. Frikart said Peterson told him that he shot the victim by accident, and the victim's body was in the boat.

¶25 The next day, Williams told police that while he was traveling from Chicago to Superior with Peterson and Rivera, Rivera suggested killing the victim so that Rivera and Peterson could get his property. Rivera suggested the act be done on the Fourth of July so the gunshot would be mistaken for fireworks. Williams said that Rivera gave Peterson a 9mm handgun, which Peterson took to

the victim's residence and used to shoot his father in the head as he lay sleeping on the couch. Williams also admitted that he helped clean up and hide the body, together with Rivera and Peterson. Peterson gave Rivera the victim's wallet and the gun.

¶26 Rivera also told police that about a week before the killing, the victim broke up a party that he, Peterson and Williams were having with some girls at the victim's residence. Rivera stated that Peterson was angry and said he should "kill the motherfucker." Rivera said that was when the plan to kill the victim was initiated, and Peterson wanted help from Rivera's gang because they had the means to cover up the murder.

¶27 Rivera admitted that he was involved in the decision to kill the victim, and the plan was further developed during the drive from Chicago to Superior. Finally, everyone decided that Williams would shoot the victim in the head while he was sleeping. The shooting would take place around the Fourth of July so the shot would be mistaken for fireworks.

¶28 In addition, Rivera told police that Williams and Peterson would advance in the gang as a result of committing the murder. Rivera also said that the victim's property, including a Corvette coveted by Rivera, would be divided among them.

¶29 These facts, available at the time Peterson was convicted, provide great credibility to Rivera's original statements and show Rivera's recantation is not credible. Rivera had no reason to lie at the time he made the original statements, and his recantation claim that Williams shot Carl Peterson in the temple at close range by accident is absurd on its face. Quite simply, the recantation was completely contrary to statements made by the other witnesses

and other nontestimonial evidence known to police, and a jury would not have any reasonable doubt about Peterson's guilt if Rivera's recantation were presented at a trial.

¶30 Finally, Peterson asks for an evidentiary hearing, but he fails to explain any purpose for such a hearing. Aside from potentially repeating what is already in the recantation affidavit, he does not identify evidence that is not already in the record, or any witnesses who would testify on his behalf, which conclusively shows that he is not entitled to a hearing.[2]

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2011-12).

[2] In his reply brief to this court, Peterson fails to specifically address the issue but merely states in passing, "[T]he record does not indicate whether defendant-appellant would inherit anything, or whether that property was mortgaged or had outstanding loans securing it, much less what defendant-appellant's knowledge of that situation was. These are all relevant questions for an evidentiary hearing …."