**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

May 23, 2000

**Cornelia G. Clark**
**Clerk, Court of Appeals**
**of Wisconsin**



**No. 99-0582-CR**

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

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**JAMES PERKINS,**

**DEFENDANT-APPELLANT,**

**CAROLYN D. PERKINS,**
**DJUAN L. PERKINS AND**
**HOWARD A. PERKINS,**

**DEFENDANTS.**

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

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

¶1 PER CURIAM. James Perkins appeals from a judgment of conviction after a jury found him guilty of three counts of first-degree recklessly endangering safety, party to a crime, in violation of WIS. STAT. §§ 941.30(1) and 939.05 (1997-98),[1] and one count of first-degree reckless injury, party to a crime, in violation of WIS. STAT. §§ 940.23(1) and 939.05. He also appeals from an order denying his motions for a new trial based upon newly discovered evidence and insufficiency of the evidence.

¶2 Perkins raises two claims of error: (1) the trial court erroneously exercised its discretion when it denied his motion for a new trial based upon newly discovered evidence; and (2) the evidence is insufficient to support the jury verdict that he is guilty beyond a reasonable doubt of first-degree reckless injury, party to a crime. Because the trial court did not erroneously exercise its discretion and because the evidence is sufficient to support Perkins's conviction, we affirm.

## I. BACKGROUND

¶3 This appeal has its genesis at a planned Mother's Day celebration that lost sight of its purpose. The party was to occur at the Jackson residence, located at 2664 North 2nd Street in the City of Milwaukee. Prior to the party, a member of the Jackson family, Kenneth, engaged in an argument with his wife, Carolyn Perkins Jackson. As a result, Kenneth left for the party without his wife. Shortly thereafter, however, Carolyn appeared at the Jackson residence with her sister, Barbara Perkins Dancy, and several nieces. An argument and fight ensued outside, in front of the premises. During the fracas, Barbara departed and returned

[1] All references to the Wisconsin Statutes will be to the 1997-98 version unless otherwise noted.

with co-defendants Djuan and Howard Perkins. Soon, James Perkins also appeared on the scene. It is undisputed that guns were brandished and shots were fired by members of the Perkins clan. Three members of the Jackson family suffered bullet wound injuries. A fourth, an infant, suffered injuries from flying glass after one of the Perkinses broke a window.

¶4 The Perkinses, as co-defendants, were charged with three counts of first-degree recklessly endangering safety, while armed, as parties to a crime, and one count of first-degree reckless injury, as parties to a crime. A jury returned a guilty verdict on all four counts against all of the Perkinses involved. The jury, however, was unable to reach a verdict on whether the actions of the defendants occurred "while armed." James, alone, filed two postconviction motions. He claimed that the evidence was insufficient to convict him on any of the counts, and that a new trial was warranted based upon newly discovered evidence. The trial court denied both motions. James now appeals.

## II. ANALYSIS

*A. Newly Discovered Evidence.*

¶5 Perkins first claims that the trial court erred when it denied his motion for a new trial. The basis for his motion was newly discovered evidence, which allegedly proved that he was not in possession of a gun during the shooting incident at the Jackson residence.

¶6 The test we employ to determine whether newly discovered evidence warrants a new trial has five factors: (1) the evidence must have been discovered after the 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 merely be cumulative to the testimony which was introduced at trial; and (5) it must be reasonably probable that a different result would be reached at a new trial. *See* ***State v. Coogan***, 154 Wis. 2d 387, 394-95, 453 N.W.2d 186 (Ct. App. 1990). If the new evidence serves only to impeach the credibility of witnesses who testified at trial, it is insufficient to warrant a new trial as a matter of due process, because it does not create a reasonable probability of a different result. *See* ***State v. Kimpel***, 153 Wis. 2d 697, 700-01, 451 N.W.2d 790 (Ct. App. 1989).

¶7 If the newly discovered evidence fails to satisfy any one of these five requirements, it is not sufficient to warrant a new trial. *See* ***State v. Kaster***, 148 Wis. 2d 789, 801, 436 N.W.2d 891 (Ct. App. 1989). The appellant must prove all five requirements by clear and convincing evidence. *See* ***State v. Avery***, 213 Wis. 2d 228, 235, 570 N.W.2d 573 (Ct. App. 1997). A motion for a new trial is addressed to the sound discretion of the trial court, and we will not reverse the trial court's decision unless it erroneously exercised its discretion. *See* ***State v. Eckert***, 203 Wis. 2d 497, 516, 553 N.W.2d 539 (Ct. App. 1996).

¶8 James's claim of newly discovered evidence is based on the assertion that there are witnesses, who either withheld or inadvertently failed to disclose information that he did not possess a firearm during the incident. In his motion, James identifies four witnesses who form the support for the motion. Two witnesses, Barbara Perkins Dancy and Kenneth Jackson, did not testify at the trial; Hattie Jackson Chairse and Debra Jackson did testify. All four witnesses were present during the incident. For reasons that follow, we conclude that James has not met the criteria warranting a new trial based upon newly discovered evidence.

¶9 To present a motion for a new trial, James hired a private investigator to interview individuals whose testimony might form the basis for

newly discovered evidence. His report and affidavit are part of the record. We now review the report as it affects each of the named witnesses, and as their proposed testimony may relate to the trial record.

¶10 During trial, Hattie Jackson Chairse testified that she did not see James with a gun. The affidavit of the investigator clearly states that he was unable to conduct a post-trial interview with her. Fundamental to our consideration on this issue is the principle that new evidence means "new," not "old" evidence. Succinctly put, there has been nothing presented that would make any information that Chairse might present "new." Thus, restating Chairse's trial testimony is of no help in supporting the motion for a new trial.

¶11 Kenneth Jackson's contribution to the pool of newly discovered evidence is unknown. He was one of the victims. The investigator concedes he was unable to interview him. His affidavit avers, "I have learned from other witnesses that he may have told people that James Perkins did not possess a firearm during the shooting incident and that Perkins also did not participate in the incident." This averment, lacking supporting affidavits, is nothing more than inadmissible hearsay built upon hearsay to which no evidentiary value can be assigned.

¶12 At trial, the third allegedly newly discovered witness, Debra Jackson, stated that James "had a gun, and that he said he was going to cap that motherfucker." In her post-trial interview, however, she qualified her trial testimony in that she could not positively say that the object James had in his hand was a gun. In the words of the investigator, "Debra told me she was not sure if she saw him shoot at anything or not because everything is a 'blur' to her since this

happened two years ago." Thus, argues James, Debra changed her story. We are not convinced.

¶13 Newly discovered recantation evidence must be corroborated by other newly discovered evidence. *See* ***Zillmer v. State***, 39 Wis. 2d 607, 616, 159 N.W.2d 669 (1968). Corroboration 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 the trustworthiness of the recantation. *See* ***State v. McCallum***, 208 Wis. 2d 463, 477-78, 561 N.W.2d 707 (1997). Here, there is the absence of several important factors. We have no sworn statement of Debra that she, in fact, recanted her trial testimony. We only have the investigator's version of his conversation with her. Even the contents of that interview do not reject the trial testimony, but rather introduce uncertainty as to her recollection. Furthermore, even if we assume for the purposes of argument that the contents of the interview constitute recantation, because the evidentiary value of any new evidence attributed to Chairse and Kenneth is non-existent, there is no corroboration by other newly discovered evidence. Thus, the evidence attributed to Debra, which is proposed as "new," fails.

¶14 Barbara Perkins Dancy, in her post-trial interview, claimed that James did not have a gun during the shooting incident. This assertion does not constitute newly discovered evidence for two reasons. First, her version of events is cumulative to the testimony of Hattie Jackson Chairse and Marie Chairse, who both testified that they did not observe James with a gun. Second, the trustworthiness of her version of events is questionable because of internal inconsistencies in her story to the investigator who himself characterized her change of story as not very credible.

¶15 Further, the jury did not find that James possessed a gun; therefore, evidence that he did not possess a gun is of no consequence. For the reasons recited above, we conclude that the trial court was correct when it ruled that James did not meet his burden of establishing the proper criteria by clear and convincing evidence. The trial court did not erroneously exercise its discretion when it denied the motion for a new trial.

*B. Insufficiency of the Evidence.*

¶16 James also claims that the evidence was insufficient to support the verdicts rendered against him. In reviewing a challenge to the sufficiency of the evidence, we:

> may not substitute [our] judgment for that of the trier of fact unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn a verdict even if it believes that the trier of fact should not have found guilt based on the evidence before it.

***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990) (citation omitted). Under this standard of review, we conclude that the record is sufficient to uphold the conviction.

¶17 The jury convicted James of three counts of first-degree recklessly endangering safety, by conduct regardless of life, in violation of WIS. STAT. § 941.30(1), and one count of first-degree reckless injury, in violation of WIS.

STAT. § 940.23(1).[2] In each count, he was convicted as a party to the crime, as an aider and abettor.[3] He contends that the evidence is insufficient to convict him of the four offenses as party to the crime. From our reading of the briefs, we surmise that James's claim of insufficiency of the evidence to warrant conviction on the

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[2] WIS JI—CRIMINAL 1345, in part, sets forth the elements of first-degree recklessly endangering safety:

> The first element requires that the defendant endangered the safety of another human being.
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> The second element requires that the defendant endangered the safety of another by criminally reckless conduct. This requires that the defendant's conduct created an unreasonable and substantial risk of death or great bodily harm to another person and that the defendant was aware that his conduct created such a risk.
>
> ….
>
> The third element requires that the circumstances of the defendant's conduct showed utter disregard for human life.

WIS JI—CRIMINAL 1250, in part, sets forth the element of first-degree reckless injury:

> First, that the defendant caused great bodily harm to [the victim].
>
> Second, that the defendant caused great bodily harm by criminally reckless conduct.
>
> Third, that the circumstances of the defendant's conduct showed utter disregard for human life.

[3] The jury instructions read to the jury provided in pertinent part:

> Section 939.05 of the Criminal Code of Wisconsin provides that whoever is concerned in the commission of a crime may be charged with and convicted of the commission of the crime although he or she did not directly commit it.
>
> As applicable in this case in all of the counts … a person is concerned in the commission of a crime if he a) directly commits the crime, or b) intentionally aids and abets the commission of it.
>
> A person intentionally aids and abets the commission of a crime when, acting with knowledge or belief that another person is committing or intends to commit a crime, he or she knowingly either a) renders aid to the person who commits the crime, or b) is ready and willing to render aid if needed and the person who commits the crime knows of his willingness to aid him.
>
> However, a person does not aid and abet if he or she is only a bystander or spectator innocent of any unlawful intent and does nothing to assist the commission of a crime.

four counts is based on the fact that the jury was unable to reach a determination on the use of a dangerous weapon to support the penalty enhancer.

¶18 James reasons that because the jury was not convinced that he had a weapon, there was insufficient evidence to support the convictions under both statutes, which requires the element that a defendant's conduct must show an utter disregard for human life. We disagree with his analysis.

¶19 James turns his back on the implications of the party to the crime concept and the body of law interpreting it. There is no doubt that sometime during the melee that occurred at the Jackson residence, James was seen rushing to the scene. There is no doubt that either before or during the firing of the guns by the various participants, James was heard to exclaim, "cap that motherfucker." Because the evidence of record must be viewed in the light most favorable to the verdict, regardless of whether he actually possessed a gun or used it, it was not unreasonable for the jury to determine that his actions at the scene were intended to render aid to whoever actually fired the shots and broke the window. Although the trial court denied the motion on different grounds, we conclude that a party to the crime analysis sustains the trial court's ultimate conclusion.

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

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