COURT OF APPEALS
DECISION
DATED AND FILED

September 30, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP218 **Cir. Ct. No. 2005CF004983**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DOMINIQUE LASHAWN GRAFTON,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed*.

Before Brennan, Brash, JJ., and Daniel L. LaRocque, Reserve Judge.

¶1 PER CURIAM. Dominique Lashawn Grafton appeals an order denying his postconviction motion seeking resentencing based on newly discovered evidence. We conclude that the postconviction court properly denied Grafton's motion for two reasons: (1) there is not a reasonable probability that a

jury, looking at both the accusation and the recantation, would have a reasonable doubt as to Grafton's guilt; and (2) the recantation lacks corroboration. Accordingly, we affirm.

I. BACKGROUND

¶2 In 2006, a jury found Grafton guilty of felony murder. The circuit court sentenced him to forty-eight years of imprisonment, and Grafton's appellate counsel filed a no-merit appeal. We set forth the facts surrounding Grafton's conviction in our opinion resolving that appeal:

> In the early morning hours of August 30, 2005, Terrance Thomas drove a Chevrolet Suburban to a Milwaukee gas station for gas. The Suburban had custom tires and wheel rims. A man approached the Suburban as Thomas was getting out of it, shot him, and then stole the car. Thomas died almost immediately. About two-and-one-half hours later, the Suburban, which had been stripped and put up on blocks, was found in a rear yard a few miles from the gas station. Its tires and wheel rims had been removed and it had been set on fire.
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> ….
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> [A woman] had been with Thomas in the Suburban. They had gone out for dinner and to a nightclub. [The woman] testified that she had not drank any alcohol or used any drugs that night. [The woman] testified that she had fallen asleep and she was awakened by a gunshot. She looked toward the driver's seat and saw "smoke" coming out of Thomas's shoulder. [The woman] testified that she ran out of the car after Thomas was shot. She was in "shock" and a "panic," and she ended up coming back to the Suburban. [The woman] testified that when she returned to the Suburban, the man who had shot Thomas was near the driver's door. [The woman] testified that she "looked straight at" the man and asked him not to shoot her. [The woman] testified that she looked at the man for about five to ten seconds before he got into the Suburban and drove away. [The woman] identified Grafton as the man who shot Thomas and stole the Suburban. [The woman] testified that, on September 4, 2005, she picked Grafton out of a five-person lineup. [The woman] admitted

> that she did not immediately select Grafton, but she did so after a second viewing of the lineup. [The woman] testified that there was "no question" in her mind that Grafton was the shooter.
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> Jerome Davis, a co-defendant, also testified at trial. Davis testified that he, Grafton, Antoine Payne and Keith Hughes were out driving when Grafton told Davis to "bust a U-turn" after he saw the Suburban at the gas station. Davis testified that Grafton said that his "kids need to eat" and "need to get school clothes." After Davis parked his car near the station, Payne and Grafton got out of the car. Davis testified that Grafton pulled out a .380 handgun and "r[a]n over there [to] rob [the] dude." Within five minutes, Davis heard a gunshot. Payne got back in the car and they left. Payne said that Grafton had "popped" the man. Grafton drove off in the Suburban and the two vehicles stopped in an alley a short distance away. Eventually, Grafton, Davis and the others took the Suburban to a rear yard a few miles away, stripped the car's interior and took the tires and rims from the car. Davis testified that after the Suburban was stripped, Hughes poured gasoline in the front seat and set it on fire. Davis later tried to sell the rims, and had one of the rims with him when he was arrested.
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> ….
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> Several other persons involved in the stripping of the Suburban also testified at trial. Devontes King testified that he heard Grafton say that he had to "pop the nigga." James Jefferson testified that he was helping Grafton sell the rims and that Grafton had told him about the robbery. Frederick Brookshire testified that he heard Grafton called Payne "a pussy" because Payne ran when he heard the shot at the gas station.

State v. Grafton, No. 2007AP158-CRNM, unpublished op. and order at 2-4 (WI App Mar. 24, 2008) (footnotes omitted).

¶3 Following our no-merit review, we summarily affirmed Grafton's conviction. ***Id.*** at 1. The Wisconsin Supreme Court denied the petition for review that followed.

¶4 In 2014, more than nine years after the crime was committed, Grafton filed the motion for resentencing based on newly discovered evidence that underlies this appeal. With his motion, Grafton presented the affidavit of Antoine Payne. Payne averred that he gave police a false statement identifying Grafton as the shooter. Payne further asserted that Grafton did not "point or discharge any weapon," that there were multiple shooters, and that Payne shot his weapon and "may have been responsible" for Thomas's death. The postconviction court denied Grafton's motion after concluding that Payne's affidavit was not corroborated. In its decision, the postconviction court also highlighted the lack of detail and inconsistencies as to the information contained within the affidavit and the evidence that was presented at Grafton's and Payne's trials.

II. DISCUSSION

¶5 The sole issue on appeal is whether the circuit court erred when it denied Grafton's motion for resentencing based on newly discovered evidence.[1] We review the decision for an erroneous exercise of discretion. *See* ***State v. Edmunds***, 2008 WI App 33, ¶8, 308 Wis. 2d 374, 746 N.W.2d 590.

¶6 To succeed on his motion, Grafton had to prove "by clear and convincing evidence, that: (1) the evidence was discovered after conviction; (2) the defendant was not negligent in seeking evidence; (3) the evidence is material

[1] We note in passing our agreement with the State's assessment that the facts of this case lend themselves to an analysis under sentence modification based on a new factor. *See* ***Rosado v. State***, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975) (defining a "'new factor'" as "a fact … highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in existence or because, even though it was then in existence, it was unknowingly overlooked by all of the parties"). However, because the postconviction court and the State analyzed the motion as Grafton presented it, we will do the same.

to an issue in the case; and (4) the evidence is not merely cumulative." ***State v. McCallum***, 208 Wis. 2d 463, 473, 561 N.W.2d 707 (1997). If the evidence meets these criteria, the circuit court must then determine "whether a reasonable probability exists that a different result would be reached in a trial." ***Id.*** When it comes to recantation evidence, there is one additional requirement: "the recantation must be corroborated by other newly discovered evidence."[2] *See* ***id.*** at 474.

¶7 Even if we accept that the first four ***McCallum*** elements have been satisfied, Grafton's claim of newly discovered evidence nevertheless fails. First, we are not convinced that there is a reasonable probability of a different outcome. In other words, Grafton has not established that "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* ***id.*** Second, Grafton's claim fails because Payne's recantation of his original statement to police lacks corroboration.

[2] To the extent Grafton argues that the standard set forth in ***State v. Kivioja***, 225 Wis. 2d 271, 592 N.W.2d 220 (1999), which relates to recantation evidence in the context of a motion for *presentence* plea withdrawal, applies here, he is incorrect. *See* ***id.*** at 294-95 (explaining its modified ***McCallum*** standard); *see also* ***State v. McCallum***, 208 Wis. 2d 463, 561 N.W.2d 707 (1997). In its response brief, the State explains why the ***McCallum*** standard is appropriate here. Grafton simply re-cited ***Kivioja*** in his reply without attempting to refute the State's position. Consequently, we deem the issue conceded for purposes of this case: the ***McCallum*** standard applies. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments are deemed conceded).

(1) There is not a reasonable probability that a jury, looking at both the accusation and the recantation, would have a reasonable doubt as to Grafton's guilt.

¶8 Payne's recantation raises serious questions of credibility. Payne avers that he observed Grafton during the robbery and Grafton did not point or discharge any weapon. Payne additionally submits: "I did[,] however, shoot my weapon during the robbery that may have been responsible for the death of the victim in the above-mentioned case. There were multiple shooters in this case, but I did not observe Mr. Grafton as one of the shooters."

¶9 These representations are contrary to the evidence that was presented at both Grafton's and Payne's trials. The medical examiners who testified consistently described Thomas's gunshot wound as a contact wound, i.e., the muzzle of the gun was in contact with Thomas's body. Moreover, the postconviction court found—and Grafton does not dispute on appeal—that there was no evidence at either trial that anyone other than Grafton approached Thomas with a gun.

¶10 In its decision, the postconviction court emphasized the lack of important details in Payne's affidavit, namely an explanation as to where Payne was positioned in relation to Thomas and Payne's co-defendants so as to observe that Grafton did not point or discharge any weapon. Also, the postconviction court noted Payne's failure to identify the "multiple shooters," the circumstances surrounding Payne's decision to shoot his weapon, or how it was that he "may have been responsible for the death" given the nature of the contact wound. We agree with the State that a fair reading of the postconviction court's decision supports the conclusion that the circuit court found Payne's recantation incredible. "A finding that the recantation is incredible necessarily leads to the conclusion that

the recantation would not lead to a reasonable doubt in the minds of the jury." *See* ***id.*** at 475.

(2) The recantation lacks corroboration.

¶11 Beyond these shortcomings, Grafton's newly discovered evidence claim also fails because Payne's recantation is not corroborated. Grafton contends he has corroboration of this newly discovered evidence insofar as the jury found him not guilty on the charge of first-degree homicide. The acquittal, however, is not newly discovered evidence given that it has been known from the time the jury returned its verdict in 2006. *See* ***id.*** at 474 ("the recantation must be corroborated by other newly discovered evidence").

¶12 Grafton likens the circumstances of this case to those present in ***McCallum*** by claiming that Payne's motive for his original false statement satisfies the corroboration requirement. Grafton submits:

> In this case, the witness Payne gave a statement to the police denying being the shooter. Payne explains in his affidavit he just stuck with his story when he realized there was a misidentification accusing Mr. Grafton as the shooter. Mr. Payne also knew that this recantation was against his interests.

(Record citations omitted.)

¶13 This is underdeveloped in terms of a feasible motive and distinctly different than the scenario presented in ***McCallum***. In that case, the recanting witness's motive was her desire to have her divorcing parents reconcile, her resentment toward McCallum for trying to take the place of her father, and the fact that she was angry at McCallum for disciplining her. *See* ***id.*** at 478. There were also circumstantial guarantees of trustworthiness of the recanting witness's recantation that are lacking here. For instance, the ***McCallum*** witness's

recantation was internally consistent, was given under oath, and was consistent with circumstances existing at the time of the witness's initial allegations, as testified to by her mother. *See* ***id.*** Lastly, as an additional circumstantial guarantee of trustworthiness, the ***McCallum*** court noted that the recanting witness was advised at the time of her recantation that she faced criminal consequences if her initial allegations were false. *See* ***id.***

¶14 Here, Payne's recantation lacks the requisite circumstantial guarantee of trustworthiness. While the affidavit is sworn under oath and against Payne's penal interest, it is nevertheless in conflict with the testimony offered at trial by other witnesses as to the circumstances that existed at the time of the shooting. This testimony included that of the woman who identified Grafton as the shooter and of the others who testified to Grafton bragging about shooting the victim and about Payne running from the scene when he heard a gunshot.

¶15 The recantation's internal consistency is also ambiguous. Again, Payne's recantation provided, in relevant part:

> 3. I observed Mr. Grafton during the robbery and Mr. Grafton did not point or discharge any weapon. I do not know why other people would have stated he was the shooter.
>
> 4. I did[,] however, shoot my weapon during the robbery that may have been responsible for the death of the victim in the above-mentioned case. There were multiple shooters in this case, but I did not observe Mr. Grafton as one of the shooters.

One could infer from these statements that Grafton did not shoot the victim while Payne was observing him. Payne does not state that he was watching Grafton the entire time before Thomas was shot.

¶16 Additionally, while Grafton writes that he "is mindful of the [postconviction c]ourt's decision that is based on the fact [that] Mr. Payne's affidavit does not have detail or does not fit with the medical examiner's testimony," he argues that the postconviction court did not hold a hearing to ask these additional questions. To the extent Grafton is implying that he would be able to explain away these challenges, he is not allowed to assert conclusory allegations and hope that he will be able to support his case later. *See, e.g.*, ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433.

¶17 "Recantations are inherently unreliable." ***McCallum***, 208 Wis. 2d at 476. Because Grafton has not established that Payne's affidavit is sufficiently corroborated by other newly discovered evidence, he has not overcome the hurdle that accompanies such evidence.

¶18 The postconviction court properly denied Grafton's postconviction motion seeking resentencing.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2013-14).