COURT OF APPEALS
DECISION
DATED AND FILED

March 29, 2018

Sheila T. Reiff
Clerk of Court of Appeals

Appeal No. 2016AP2347-CR **Cir. Ct. No. 2010CF554**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

HENRY D. WESTON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and orders of the circuit court for Rock County: KENNETH W. FORBECK and MICHAEL A. HAAKENSON, Judges. *Affirmed*.

Before Lundsten, P.J., Sherman and Blanchard, JJ.

¶1 PER CURIAM. Henry Weston appeals a judgment of conviction following a jury trial convicting him of first-degree intentional homicide, attempted first-degree intentional homicide, and aggravated battery, and orders denying Weston's postconviction motions.[1] Weston contends that he is entitled to a new trial based on: (1) newly discovered evidence in the form of victim A.G.'s recantation of his trial testimony; (2) violation of Weston's right to confrontation when the circuit court denied Weston's request to impeach A.G. with specific prior acts of dishonest conduct; (3) ineffective assistance of counsel by failing to investigate and present additional evidence to impeach A.G. at trial; and (4) the circuit court allowing the State to introduce Weston's statements to police, which Weston claims were involuntary. For the reasons set forth below, we reject these contentions. We affirm.

¶2 In March 2010, Weston was charged with first-degree intentional homicide for the shooting death of David Davis, and attempted first-degree intentional homicide and aggravated battery for shooting injuries to A.G. According to the criminal complaint, the shooting occurred on June 28, 2009, in the early morning hours, on Vine Street in Beloit.

¶3 Prior to trial, Weston moved to suppress his statements to police at a probation office, arguing that the statements were coerced. The circuit court denied the suppression motion.

[1] The Honorable Kenneth W. Forbeck presided over trial and sentencing, and issued an oral ruling denying Weston's postconviction motion and supplemental postconviction motion. The Honorable Michael Haakenson presided over the hearing on Weston's second supplemental postconviction motion, issued an oral ruling denying that motion, and issued the orders denying the original, supplemental, and second supplemental postconviction motions.

¶4 At trial, the State introduced police testimony that Weston had made statements to police at the probation office in answer to questioning about the shooting, that we now summarize. In the early morning hours of June 28, 2009, Weston had been speaking with a woman named Cocoa Steward on Vine Street when a car drove by at a high rate of speed. Weston yelled at the car for driving too close to him, and the driver backed up to where Steward and Weston were talking. Weston and Steward both spoke to the driver, who Steward called "Banks." The car then drove to the end of the block near a group of men at the street corner, and Weston heard an argument and then gunshots from that direction.

¶5 A.G. testified to the following. A.G. had driven down Vine Street with Davis as his passenger, heard Weston yell to him, and backed up to where Cocoa and Weston were standing. A.G. and Weston argued, and Weston then shot into the car, killing Davis and injuring A.G. A.G. admitted that, when questioned by police, he had repeatedly lied about the facts related to the shooting, including whether he knew who had shot him. A.G. stated that he only decided to admit to police that Weston, who he knew as "Head," was the shooter after A.G. saw Weston while A.G. and Weston were both visiting the Rock County jail. A.G. repeatedly stated that he failed to recall whether he had made specific statements when talking to police and when testifying in prior proceedings in this case. A.G. also admitted to ten prior convictions, and that he held the belief that helping the police was not the right thing to do. However, the court denied the defense's request to impeach A.G. with specific acts of dishonest conduct.

¶6 Steward testified as follows. On the night of the shooting, she met Weston on Vine Street and they were talking when a vehicle sped past and almost hit Weston. She testified that Weston called out to the car, and the car backed up

to where Steward and Weston were talking. She stated that she recognized A.G. as the driver of the car, and there was a passenger as well. Steward testified that Weston and A.G. argued, and then gunshots came from behind Steward towards A.G.'s car, from where Weston was standing. Steward admitted on cross-examination that she did not see Weston with a gun and did not see who fired the shots.

¶7 The State introduced police testimony that bullet fragments and glass were located on Vine Street, partway down the block. A State Crime Lab expert testified that an analysis of the ballistics evidence collected from the scene of the shooting indicated that the shots were fired from outside the right side of the vehicle, that the first shots came through the window, and that as the vehicle sped away the shots were more towards the passenger side of the vehicle. The expert testified that he believed that one of the shots was fired from fewer than ten feet from the vehicle.

¶8 The jury found Weston guilty of all three charges. Weston filed a postconviction motion arguing that he was denied his right of confrontation at trial when the court denied his request to impeach A.G. with specific acts of dishonest conduct, and that his trial counsel was ineffective by failing to investigate and present additional evidence to impeach A.G. Weston filed a supplemental postconviction motion seeking a new trial on grounds of newly discovered evidence in the form of a statement that A.G. gave to his probation officer prior to trial, stating that A.G. did not know the identity of the shooter. The circuit court held evidentiary hearings on the postconviction motion and supplemental postconviction motion, and then denied Weston's claims for postconviction relief.

¶9 Weston then filed a second supplemental postconviction motion, seeking a new trial on grounds of newly discovered evidence in the form of A.G.'s recantation of his trial testimony. Weston asserted that, after the trial, A.G. had provided the following statements to Weston's defense counsel: (1) A.G. did not know who shot him; (2) A.G.'s initial statements to police that he did not know who shot him were truthful; (3) A.G.'s statements identifying "Head" as the shooter were not truthful; (4) A.G. identified "Head" as his shooter due to pressure from police to identify a shooter; (5) because A.G. had heard rumors "Head" was the shooter, and because A.G. believed police wanted him to identify "Head" as the shooter; and (6) no one had threatened or promised A.G. anything for his recantation, and A.G. was now coming forward only because it was the truth. Weston acknowledged that A.G. had not signed the affidavit that defense counsel had prepared, but asserted that a defense investigator had spoken with A.G. and verified that A.G. asserted the statements in the affidavit were truthful. At a hearing on the second supplemental postconviction motion, A.G. refused to testify. The defense investigator testified that he had talked with A.G., and A.G. had verified the information in the proposed affidavit. The circuit court denied Weston's additional newly discovered evidence claim. Weston appeals.

¶10 Weston argues first that he is entitled to a new trial based on the newly discovered evidence of A.G.'s recantation of his trial testimony. A defendant seeking a new trial based on newly discovered evidence must "prove, by clear and convincing evidence, that '(1) the evidence was discovered after conviction; (2) the defendant was not negligent in seeking the evidence; (3) the evidence is material to an issue in the case; and (4) the evidence is not merely cumulative.'" ***State v. Avery***, 2013 WI 13, ¶25, 345 Wis. 2d 407, 826 N.W.2d 60 (quoted source omitted). If the defendant establishes those four criteria, "'the

circuit court must determine whether a reasonable probability exists that a different result would be reached in a trial.'" ***Id.*** (quoted source omitted). "A reasonable probability of a different outcome exists if 'there is a reasonable probability that a jury, looking at both the [old evidence] and the [new evidence], would have a reasonable doubt as to the defendant's guilt.'" ***State v. Love***, 2005 WI 116, ¶44, 284 Wis. 2d 111, 700 N.W.2d 62 (quoted source omitted). Whether to grant or deny a motion for a new trial based on newly discovered evidence is a matter within the circuit court's discretion. ***State v. Plude***, 2008 WI 58, ¶31, 310 Wis. 2d 28, 750 N.W.2d 42.

¶11 "Recantations are inherently unreliable," because a recantation is an admission to having lied under oath at trial. ***State v. McCallum***, 208 Wis. 2d 463, 476, 561 N.W.2d 707 (1997). Thus, when a claim of newly discovered evidence relies on a recantation, the recantation must be corroborated by other newly discovered evidence. ***Id.*** Because there may be situations in which no physical evidence or witnesses corroborates a recantation, the corroboration element may also be met by showing that there is a feasible motive for the initial false statement and there are circumstantial guarantees of the trustworthiness of the recantation. ***Id.*** at 477-78.

¶12 Weston argues that A.G.'s recantation is corroborated by a feasible motive for A.G. to lie at trial and circumstantial guarantees of the trustworthiness of the recantation. Weston contends that A.G.'s feasible motive for lying at trial was established by A.G.'s claim that law enforcement and his probation agent placed extreme pressure on A.G. to identify a suspect, and specifically that A.G. believed they wanted him to identify Weston. Weston asserts that the circumstantial guarantees of the trustworthiness of the recantation include A.G.'s statement that he was not threatened or promised anything to make the recantation,

the reasonable inference from A.G.'s refusal to sign the affidavit or testify at the postconviction motion hearing that A.G. is aware of the legal repercussions of admitting that he lied at trial, and the consistency of the recantation with A.G.'s previous statements to authorities that he did not know who shot him. He asserts that the circuit court erred by relying on facts weighing against a feasible motive and trustworthiness and failing to consider the facts supporting the recantation's reliability.

¶13 Alternatively, Weston argues that A.G.'s recantation is corroborated by three other items of newly discovered evidence: (1) A.G.'s statement to his probation officer that he did not know the identity of his shooter; (2) a document in A.G.'s jail file in which A.G. stated he believed that the last name of "Head" was "Reed"; and (3) the audio recording of A.G.'s jail visit that occurred at the same time as Weston's jail visit, which did not contain any indication that A.G. expressed any recognition of Weston. Weston asserts that the court erred by determining that those additional items were cumulative to evidence presented at trial and by indicating that they were not material. He argues that there was no evidence at trial specifically establishing that: A.G. made a statement to his probation officer, under penalty of revocation, that he did not know who had shot him; that A.G. had identified the last name of "Head" as "Reed"; or that A.G. had no audible reaction when he encountered Weston at the jail visit. He also asserts that these three items of evidence were material to show that A.G. did not, in fact, know the identity of his shooter. Weston argues that the other newly discovered evidence corroborates the recantation and that all of that newly discovered evidence, together, creates a reasonable probability of a different result at trial.

¶14 We conclude that the court properly determined that A.G.'s recantation was not corroborated by a feasible motive for lying or circumstantial

guarantees of trustworthiness. The court determined that Weston had not shown a feasible motive for A.G. to falsely identify Weston as the shooter and that the recantation lacked circumstantial guarantees of trustworthiness. The court explained that, based on the transcript of A.G.'s testimony at trial and the court's observations of A.G. at the motion hearing, it was not feasible that A.G. falsely identified Weston due to police pressure. The court also determined that there were no circumstantial guarantees of the trustworthiness of the recantation because there was no risk to A.G. for lying to Weston's defense counsel or investigator, and because A.G. had refused to sign the affidavit setting forth the recantation or to testify at the motion hearing in support of the recantation. We conclude that the circuit court relied on the facts in the record, applied the proper legal standard, and reached a reasonable conclusion, and therefore properly exercised its discretion. *See* ***State v. Edmunds***, 2008 WI App 33, ¶8, 308 Wis. 2d 374, 746 N.W.2d 590 ("A court properly exercises its discretion if it relies on the relevant facts in the record and applies the proper legal standard to reach a reasonable decision.").

¶15 Moreover, we conclude that there is not a reasonable probability that a jury looking at the recantation[2] and the other asserted newly discovered evidence, together with the evidence presented at trial, would have a reasonable doubt as to Weston's guilt. As set forth above, at trial, A.G. admitted to lying repeatedly to police as to whether he knew the identity of his shooter, and stated

[2] As the State asserts, and Weston concedes in his reply brief, the recantation evidence is limited to the defense investigator's testimony as to what A.G. stated to him, since A.G. refused to sign an affidavit or testify at the motion hearing. Weston also contends, however, that the investigator's testimony that A.G. verified the statements in the affidavit renders the statements in the affidavit admissible as prior inconsistent statements under WIS. STAT. § 908.01(4)(a)1. (2015-16). For purposes of this opinion, we assume that the statements in the affidavit would be admissible.

that he was not of the opinion that helping police was the right thing to do. A.G. testified that he later told police that he knew Weston as "Head," that Weston had been standing on Vine Street talking to Steward when A.G. drove by, and that Weston and A.G. then argued and Weston fired a gun at A.G.'s car. The defense investigator testified that A.G. verified that he had lied at trial when he identified Weston as his shooter, that his original statements to police that he did not know who shot him were true, that he had only identified Weston due to police pressures and because he believed that Weston was already a suspect, and that no one had threatened him or promised him anything to obtain the recantation. The investigator also testified, however, that A.G. told him that the shooter was the man who had been talking to Steward when A.G. drove by, that A.G. had stopped and backed up, and that the man had then shot at A.G.'s car. Thus, while the defense could offer evidence at a new trial that A.G. now claimed that he could not, in fact, identify his shooter as Weston, as he had originally claimed, the new evidence would also reinforce a key component of the State's case: that the shooter was the man talking to Steward when A.G. drove by and then backed up, whom Steward and Weston both identified at trial as Weston.

¶16 In addition, none of the other claimed newly discovered evidence that Weston sets forth changes our analysis. As to A.G.'s statement to his probation agent that he did not know who shot him, A.G. already testified at trial that he repeatedly told police that he did not know who shot him. The fact that he also made the same statement to his probation agent, on threat of revocation if he were lying, does not significantly support A.G.'s current claim that his initial statements to police were true. As to A.G.'s identification of "Head" as having a last name of "Reed," the evidence at trial was that A.G. knew Weston as "Head" rather than his real name. The fact that A.G. did not know Weston's real last

name at the time he knew him as "Head" does not significantly support A.G.'s current claim that he did not know the identify of his shooter. Finally, the alleged lack of any audible response by A.G. when he encountered Weston at a jail visit, when A.G. then told police that seeing Weston caused him to come forward to identify Weston as his shooter, does not necessarily lead to the conclusion that A.G. did not recognize Weston. It is at least equally probable that the lack of audible response was due to A.G.'s fear to show that he recognized Weston. A.G.'s lack of response does not significantly support A.G.'s recantation. In sum, A.G.'s recantation, together with the other claimed newly discovered evidence, does not create a reasonable probability of a different result at trial.

¶17 Next, Weston contends that he was denied his right of confrontation when the circuit court denied his request to impeach A.G. with specific acts of dishonesty. Weston contends that, on cross-examination, he should have been allowed to inquire into A.G.'s dishonest acts of lying to police by falsely identifying himself as another individual and running from police, to impeach A.G.'s credibility. *See* WIS. STAT. § 906.08(2) (2015-16). Weston argues that he was denied his right to fully cross-examine A.G. Weston further argues that the court's error in denying him the right to cross-examine A.G. about specific instances of dishonesty was not harmless because, according to Weston, A.G.'s credibility was crucial to establishing the State's case. The State responds that any error in denying Weston's request to impeach A.G. with inquiry into specific acts of dishonest conduct was harmless.

¶18 A circuit court has discretion to admit or exclude impeachment evidence. *See* ***State v. Rhodes***, 2011 WI 73, ¶22, 336 Wis. 2d 64, 799 N.W.2d 850. However, a court may not exclude evidence if the evidence is necessary for the defendant to confront his or her accuser. ***Id.***, ¶24. A circuit court's error in

limiting cross-examination, in violation of a defendant's right of confrontation, is subject to harmless error analysis. ***Id.***, ¶32. "The harmless error test … is focused on 'whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt.'" ***Id.***, ¶33. We consider "the importance of the witness's testimony, whether the testimony was cumulative, whether other evidence corroborated or contradicted the witness's testimony, the extent of the cross-examination allowed, and the overall strength of the prosecution's case against the defendant." ***Id.***

¶19 We conclude that any error in limiting Weston's cross-examination of A.G., preventing Weston from inquiring into A.G.'s past conduct of falsely identifying himself to police and running from police, was harmless. While A.G.'s testimony that Weston was the shooter was important to the State's case, that importance was diminished by A.G.'s admission that he had lied repeatedly to police during their investigation of this case. It was also diminished by the other evidence the State presented, including testimony by Steward that Weston had argued with A.G. at the scene of the shooting and then shots were fired toward A.G. from the direction Weston was standing; police testimony that Weston admitted being at the scene of the shooting, speaking to Steward, and interacting with A.G. immediately before the shooting; and physical and expert testimony indicating that the shooter was near the passenger side of A.G.'s car when the shots were fired. Evidence of A.G.'s dishonesty to and running from the police would have been largely cumulative to the evidence at trial that A.G. repeatedly lied to police in this investigation. Weston was able to extensively cross-examine A.G. as to A.G.'s many inconsistent and false statements to authorities, and highlighted his claims that he did not recall many statements that he had made. As

the State points out, the State's case against Weston was strong, even without A.G.'s testimony. Thus, any error in failing to allow Weston to impeach A.G. as to specific instances of dishonesty was harmless.

¶20 Next, Weston contends that his trial counsel was ineffective by failing to discover additional evidence to use to discredit A.G. at trial. Specifically, Weston contends that his counsel should have discovered and introduced: (1) the jail record showing that A.G. had identified the last name of "Head" as "Reed"; (2) the audio recording of A.G.'s jail visit showing A.G. had no audible reaction to encountering Weston; (3) jail and police records that contained additional evidence of A.G.'s specific acts of dishonest conduct toward police; and (4) A.G.'s statement to his probation agent that he did not know who the shooter was.

¶21 A claim of ineffective assistance of counsel "must show that counsel's performance was deficient [in that] counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Strickland v. Washington***, 466 U.S. 668, 687-694 (1984). It must also show that "the deficient performance prejudiced the defense," that is, that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." ***Id.*** Weston has not made that showing here.

¶22 We conclude that Weston was not prejudiced by any deficiency by counsel failing to obtain and introduce the additional impeachment evidence. There is not a reasonable probability that the result at trial would have been different had counsel obtained and introduced the additional evidence that Weston argues counsel should have used to discredit A.G. Accordingly, Weston's argument fails on the prejudice prong. *See* ***State v. Swinson***, 2003 WI App 45,

¶58, 261 Wis. 2d 633, 660 N.W.2d 12 ("We need not address both components of the [ineffective assistance of counsel] test if the defendant fails to make a sufficient showing on one of them.").

¶23 As set forth above, evidence that A.G. did not know Weston's last name would not have been significant. A.G. identified Weston as "Head" at trial, and it would have been entirely consistent with that identification that A.G. did not know Weston's real last name. Evidence that A.G. had no audible reaction to seeing Weston at a jail visit would not have indicated one way or the other whether A.G. recognized Weston at that time. While Weston argues that a jury may have inferred from that evidence that A.G. did not know Weston and had not seen him commit the shooting, that possible inference is not sufficient to create a reasonable likelihood of a different outcome at trial, in light of the other evidence set forth above.

¶24 As to evidence showing that A.G. had committed multiple acts of dishonesty in interactions with the police, A.G. admitted at trial that he lied repeatedly to the police in this case, consistent with his general belief that it was not a good thing to assist the police, and that he had ten prior criminal convictions. Defense counsel was able to extensively cross-examine A.G. and highlight both his numerous inconsistent and false statements as well as his repeated denial of being able to remember statements he made to police and when testifying under oath. We are not persuaded by Weston's contention that the evidence of A.G.'s particular acts of dishonesty that Weston believes his counsel should have obtained, including that A.G. identified himself as his cousin to avoid criminal responsibility, is sufficiently different in kind that it would have significantly impacted the jury's assessment of A.G.'s credibility. Because A.G.'s credibility was extensively challenged at trial, we conclude that there is no reasonable

probability of a different outcome had counsel obtained and used additional evidence of A.G.'s dishonest conduct to impeach A.G.

¶25 As to A.G.'s statement to his probation agent that he did not know the identity of his shooter, we similarly conclude that the evidence would not have created a reasonable likelihood of a different outcome. A.G. admitted that he repeatedly told police that he did not know the identity of his shooter, and that he gave police multiple false and inconsistent details as to the shooting. We are not persuaded that A.G.'s statement to his probation officer would carry more weight than his statements to police, simply because it was made on threat of revocation. We conclude that the further impeaching evidence would have been largely cumulative, and there is not a reasonable probability that it would have led to a different outcome at trial. Finally, we conclude that the evidence Weston asserts that his counsel should have obtained, taken together, is insufficient to undermine our confidence in the outcome of trial. Accordingly, any deficiency of trial counsel in failing to obtain and introduce that evidence did not prejudice the defense.

¶26 Lastly, Weston asserts that the circuit court should have suppressed the statements Weston made to police at the probation office. He argues that he reasonably believed that his probation would be revoked if he refused to speak to the officers at the probation office. Thus, Weston asserts, his statements to police were compelled.

¶27 "[I]f a probationer is compelled by way of probation rules to incriminate himself or herself, the resulting statements may not be used in any criminal proceeding." ***State v. Peebles***, 2010 WI App 156, ¶19, 330 Wis. 2d 243, 792 N.W.2d 212. Weston concedes that there is no evidence that his probation

agent would have initiated revocation proceedings if Weston had refused to speak to the police at the probation office. He argues, however, that a probationer's subjective belief that he or she is required to answer questions on threat of revocation is sufficient to render the probationer's statements compelled. He contends that, in ***Peebles***, the court relied on the probationer's stated belief that he could be revoked if he refused to provide a statement to determine that the probationer's statement was compelled. *See* ***id.***, ¶¶5, 20-21. Weston also cites ***Minnesota v. Murphy***, 465 U.S. 420, 435-38, for the proposition that a probationer's reasonable subjective belief that he or she was required to answer police questions, on threat of revocation, renders the statements compelled.

¶28 Weston argues that, here, he had a reasonable belief that he would be revoked if he refused to answer police questions. He points to his probation agent's testimony at the suppression hearing that Weston was required by the rules of his probation to be at the probation office on the day he was questioned by police; that the agent told Weston that police wanted to speak with him; and that the agent then escorted Weston to the conference room where police were waiting for him. Weston also points out that his probation rules required him not to do anything against the best interests of his rehabilitation, and argues that the rule could be interpreted as requiring Weston to speak with police. Weston argues that the record supports his reasonable subjective belief that he was required to answer police questions under threat of revocation.

¶29 The State points out that Weston did not testify at the revocation hearing to support his claim that he believed his probation would be revoked if he did not speak to the police at the probation office. The State also asserts that Weston offered no affidavit to support his claim that he feared revocation. In reply, Weston cites a purported affidavit by Weston that Weston submitted in

support of his suppression motion, stating that Weston feared revocation if he failed to speak to police. The purported affidavit, however, was not signed or notarized.

¶30 Assuming, however, that Weston made a factual assertion in the circuit court that he feared revocation if he failed to speak to police, we conclude that the circuit court nonetheless properly denied Weston's suppression motion. The circuit court found that Weston's probation agent did not express to Weston in any way that he would be subject to revocation if he refused to speak to police, and that Weston could not have perceived any such threat. The court summarized and credited the testimony from the suppression hearing that the probation agent did not require Weston to speak with the police, that she never expressed any potential penalty to him for failing to talk to police, and that the agent escorted Weston to the conference room where police were waiting but did not enter the room. Thus, the circuit court made a factual finding that Weston did not fear revocation if he refused to speak with police. Because the circuit court's finding that Weston did not fear revocation if he refused to speak with police was supported by the facts in the record and the circuit court's weighing of the credibility of the witnesses, we will not disturb it. *See* ***State v. Eckert***, 203 Wis. 2d 497, 518, 553 N.W.2d 539 (Ct. App. 1996) (explaining that a circuit court's factual findings in ruling on a suppression motion will not be disturbed if not clearly erroneous); ***Chapman v. State***, 69 Wis. 2d 581, 583, 230 N.W.2d 824 (1975) (providing that the credibility of witnesses and the weight to be given their testimony are matters for determination by the factfinder). We affirm.

By the Court.—Judgment and orders affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2015-16).