COURT OF APPEALS
DECISION
DATED AND FILED

June 5, 2018

Diane M. Fremgen
Acting Clerk of Court of Appeals

Appeal No. 2017AP289 **Cir. Ct. No. 1993CF934492A**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAVID MICHAEL MURRELL,

DEFENDANT-APPELLANT.

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

Before Brennan, P.J., Kessler and Dugan, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. David Michael Murrell was convicted in 1993 after a jury trial of five counts of first-degree reckless injury while armed with a

dangerous weapon. The charges stemmed from a shooting at the Roxbury Nightclub at which multiple people were injured. Murrell appeals the circuit court's order denying his third motion for postconviction relief. He contends that he is entitled to a new trial based on newly discovered evidence. In the alternative, he argues that he should be given a new trial in the interest of justice. We reject these arguments and affirm the circuit court's order.

¶2 Murrell submitted four affidavits in support of his motion for a new trial. In the first affidavit, Murrell's private investigator averred that Kamau Bentley, who is incarcerated at Fox Lake Correctional Facility, told her the following information over the telephone: Bentley was present at the Roxbury Nightclub on the night of the shooting; Bentley went into the bathroom and saw Murrell and a person nicknamed "Buck" shooting dice; Murrell left the bathroom to make a telephone call; three to four minutes later, Bentley left the bathroom and went to the dance floor, leaving Buck and others in the bathroom still shooting dice; a minute later, Bentley saw Buck walk out of the bathroom; minutes later, Bentley heard shots; Murrell was not in the immediate area of the shooting; Bentley "believes that Murrell wasn't even in the nightclub at the time of the shooting"; Bentley saw Buck in the area of the shooting and saw Buck fire a gun at people; Bentley has come forward now because he is more mature and "is willing to help [Murrell] out if he can."

¶3 In the second affidavit, Anthony Jones averred that he met Bentley in prison. Bentley told Jones he was present during the Roxbury shooting and said that Murrell did not fire the shots. In the third affidavit, Murrell averred that he met Jones in prison, who told him that Bentley said he knew that Murrell was not the perpetrator. In the fourth affidavit, Murrell's private investigator averred that she spoke to inmate Terrell Douglas, who told her that another inmate nicknamed

"Mellow" told Douglas that he (Mellow) was in the bathroom playing dice with Murrell at the nightclub when the shooting occurred.

¶4 To obtain a trial based on newly discovered evidence, a defendant must establish 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. Plude***, 2008 WI 58, ¶32, 310 Wis. 2d 28, 750 N.W.2d 42 (citation omitted). If the defendant establishes all four of these criteria, then the court must determine "whether a reasonable probability exists that had the jury heard the newly-discovered evidence, it would have had a reasonable doubt as to the defendant's guilt." ***Id.*** This determination is a question of law. ***Id.***, ¶33.

¶5 Assuming for the sake of argument that Bentley would have testified in accord with the private investigator's affidavit if the circuit court had held a hearing on the postconviction motion, there is not a reasonable probability that had the jury heard the newly-discovered evidence, it would have had a reasonable doubt as to Murrell's guilt. According to the private investigator's affidavit regarding her conversation with Bentley, he would testify that Murrell left the bathroom to use the phone before the shooting. Bentley would state that he did not see Murrell again. However, Bentley's testimony would not place Murrell outside the building when the shooting took place. Bentley told the private investigator that he "believes" that Murrell was not present at the time of the shooting, but Bentley did not say that *he saw that Murrell was not there* during the shooting. Because Bentley's testimony would not give rise to an inference that Murrell was not the perpetrator, there is no reasonable probability that it would have changed the jury's verdict.

¶6 Turning to Bentley's would-be testimony that he saw Buck discharge a gun, while this evidence would be relevant, Bentley's statement would not be enough, without more, to create a reasonable doubt about Murrell's guilt in light of the other evidence connecting Murrell to the crime, as outlined in our prior decisions.

¶7 As for the other affidavits, the second and third affidavits are second-hand statements about what Bentley told Jones. Jones would be unable to testify to Bentley's hearsay statements on retrial. *See* WIS. STAT. § 908.02 (2015-16).[1] The heart of the matter is *what Bentley would say*, and, as we previously explained, his testimony would not create a reasonable probability that had the jury heard the newly-discovered evidence, it would have had a reasonable doubt about Murrell's guilt. As for the fourth affidavit about an inmate nicknamed "Mellow," it contradicts Bentley's would-be testimony, and thus would add nothing to Murrell's defense. In sum, then, the evidence proffered by Murrell does not warrant a new trial.[2]

¶8 Murrell next argues that he is entitled to a new trial in the interest of justice. *See* WIS. STAT. § 752.35. After reviewing Murrell's arguments and the record, we conclude that a new trial in the interest of justice is not warranted.

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

[2] The State cites ***State v. Bembenek***, 140 Wis. 2d 248, 256, 409 N.W.2d 432 (Ct. App. 1987), for the proposition that the private investigator's affidavit recounting statements that Bentley made to her is inadmissible hearsay evidence. ***Bembenek*** is inapposite. In ***Bembenek***, a private investigator's affidavit recounting statements of a third party was proffered because the third party *was unavailable to testify*. ***Id.*** at 253. Here, there is no indication that Bentley would be unavailable to testify.

By the Court.—Order affirmed.

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