

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 30, 2001

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

No. 00-2734-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SIRVICTOR BRYANT,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: JACQUELINE D. SCHELLINGER, Judge. *Affirmed.*

Before Dykman, Roggensack and Deininger, JJ

¶1 PER CURIAM. Sirvictor Bryant appeals from a judgment convicting him of possessing cocaine with intent to deliver it and three misdemeanors. The issues are whether the trial court erred by allowing the State to present certain testimony at his trial and by denying him relief on a claim of newly discovered evidence. We affirm.

¶2 Police came to 2670 North Second Street in Milwaukee to investigate a drug dealing complaint. The premises are an upstairs/downstairs duplex, and Bryant's sister lived in the upstairs unit. Upon their approach, police saw Bryant on the porch with a male and a female. When Bryant saw the officers, he and the female went into the residence and locked the door. The other male fled the scene.

¶3 The officers knocked down the door and pursued Bryant into the duplex, through the lower unit, into the basement, and up a different flight of stairs to the upstairs unit, where they arrested him. During the chase, officers saw a person they identified as Bryant drop what turned out to be thirty-eight individually wrapped chunks of cocaine, totaling 5.1 grams.

¶4 During the search of the downstairs unit, officers found a hidden shotgun and a scale commonly used to weigh drugs. The lower unit had no food or personal effects in it, and very little furniture. An officer later testified that it appeared to be a drug house. At Bryant's jury trial, the scale and shotgun found in the downstairs unit were admitted, over his objection, as evidence of his intent to deliver the cocaine he had dropped during the chase.

¶5 Bryant testified that he fled into the building only because he had outstanding traffic warrants. He denied having any cocaine in his possession. He stated that two other people were in the downstairs unit when he ran through it and both followed him into the basement to evade police. While Bryant went upstairs and was arrested, the other two escaped detection by hiding in the basement.

¶6 One of the two other people Bryant testified to seeing in the lower unit was Romero Davis, Bryant's seventeen-year-old brother. Davis testified for

the defense and corroborated Bryant's account. He said he did not see anyone drop any cocaine.

¶7 After the verdict, Bryant's father approached defense counsel and the prosecutor, and he told them that Davis confessed to possessing the cocaine. Based on that statement, Bryant asked the trial court to set aside the verdict on newly discovered evidence.¹ The court allowed Bryant's father to testify in support of the motion. Upon hearing his testimony, the trial court deemed it not credible and denied the motion without allowing any further testimony. Bryant was sentenced, judgment was entered, and Bryant appealed.

¶8 The court properly admitted testimony that police recovered a shotgun and drug scale from the lower unit of the duplex. A trial court's ruling on evidence is a discretionary determination and will not be disturbed on appeal if it has a reasonable basis and is in accord with accepted legal standards and in accord with the facts of record. *State v. Weber*, 174 Wis. 2d 98, 106, 496 N.W.2d 762 (Ct. App. 1993). Here, Bryant characterizes the testimony as inadmissible other acts evidence. We disagree. Testimony concerning a gun and scale in a lower unit did not implicate Bryant in any other crime or wrongful act. Instead, it helped prove that the premises Bryant had easy access to were being used as a place for the sale and use of illegal drugs. As such, it was highly relevant to whether Bryant possessed the drugs with intent to deliver them, and the trial court reasonably allowed it.

¹ In the motion, defense counsel also reported that after the trial she observed Davis crying and saying "[i]t's all my fault."

¶9 The trial court properly refused to set aside the verdict. The trial court's decision to grant or deny a motion based on newly discovered evidence is also discretionary. *State v. Terrance J.W.*, 202 Wis. 2d 496, 500, 550 N.W.2d 445 (Ct. App. 1996). The trial court may grant relief on newly discovered evidence if the evidence was discovered after trial; the defendant was not negligent in discovering it; the evidence is material and not cumulative; and it is reasonably probable that a different result would be reached at a new trial. *State v. Brunton*, 203 Wis. 2d 195, 200-01, 552 N.W.2d 452 (Ct. App. 1996). Here, Bryant's father testified that he knew of Davis's alleged culpability before the trial. During the trial Bryant placed his brother at the scene as one of only two other people who could have possessed the cocaine. Davis testified at the trial. Additionally, the trial court reasonably concluded that the story of Davis's guilt was so obviously concocted after the fact that no reasonable fact finder could believe it. Consequently, Bryant was not entitled to relief because he failed to meet two of the four criteria necessary to obtain it.

By the Court.—Judgment affirmed.

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

