COURT OF APPEALS
DECISION
DATED AND FILED

May 8, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP394-CR **Cir. Ct. No. 2008CF3168**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DEMONE ALEXANDER,

DEFENDANT-APPELLANT.

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

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

¶1 KESSLER, J. Demone Alexander appeals from a judgment of conviction for first-degree intentional homicide while armed and for possession of a firearm by a felon. Alexander also appeals from an order denying his motions for postconviction relief. Alexander contends that: (1) the trial court erred when

it interviewed two jurors in his absence and subsequently dismissed those jurors, thereby denying Alexander his due process right to be present during jury selection; (2) his trial counsel was ineffective with regard to her handling of a defense witness; and (3) newly discovered evidence warrants a new trial. We affirm.

BACKGROUND

¶2 On June 24, 2008, Alexander was charged with one count of first-degree intentional homicide, while armed, and one count of possession of a firearm by a felon, both as a repeat offender. The charges stemmed from the shooting death of Kelvin Griffin that had taken place the previous year. According to the complaint, on the afternoon of June 10, 2007, officers were dispatched to 2600 West Victory Lane, Milwaukee, to investigate a shooting. When officers arrived at the scene, they observed a group of people gathered outside of the residence at 2605 West Victory Lane, where Griffin resided in an upper-level apartment. Among those gathered were Kianna Winston, a resident of the residence's lower-level, and her brother, Steven Jones. Jones told police that Winston, among others, was outside of the residence and was yelling for Griffin to come out. Jones stated that he witnessed Griffin exit his residence with an assault rifle and then heard multiple shots coming from a direction different from where Griffin was standing. Jones told police that he saw Alexander shoot approximately thirteen times at Griffin, even as Griffin attempted to run from the gunfire. There is no evidence that Griffin fired his assault rifle at any point.

¶3 After a jury trial, Alexander was convicted of first-degree intentional homicide. The court then found Alexander guilty of possession of a firearm by a felon.

¶4 Alexander filed two postconviction motions for a new trial, claiming that: (1) the trial court erroneously examined two jurors in his absence and subsequently removed those jurors over his objection; (2) his trial counsel was ineffective for: (a) asking a defense witness a question which permitted the State to impeach the witness; and (b) providing a copy of the defense investigator's notes of an interview with the defense witness to the State before the witness testified; and (3) newly discovered evidence required a new trial. The trial court denied the motions in all respects. This appeal follows. Additional facts are provided as necessary to the discussion.

DISCUSSION

I. Examination of the jurors.

¶5 Alexander first contends that his constitutional right to be present during jury selection was violated when the trial court conducted in-chambers interviews with two jurors in his absence, though in the presence of his counsel. We disagree.

¶6 A defendant's right to be present at the *voir dire before the trial jury* is selected cannot be waived. *See* WIS. STAT. § 971.04(1)(c) (2009-10);[1] *see also*

[1] WISCONSIN STAT. § 971.04(1) provides:

> (1) Except as provided in subs. (2) and (3), the defendant *shall be present*:
>
> (a) At the arraignment;
>
> (b) At trial;
>
> (c) *During voir dire of the trial jury*;
>
> (d) At any evidentiary hearing;

(Continued)

State v. Harris, 229 Wis. 2d 832, 839, 601 N.W.2d 682 (Ct. App. 1999). However, once the jury has been selected and sworn and the trial has begun, a defendant may voluntarily absent himself from various trial proceedings. ***State v. Koopmans***, 210 Wis. 2d 670, 678-79, 563 N.W.2d 528 (1997).

¶7 "[A] defendant's presence is required as a constitutional condition of due process only to the extent that a fair hearing would be thwarted by his absence." ***State v. David J.K.***, 190 Wis. 2d 726, 736, 528 N.W.2d 434 (Ct. App. 1994). The denial of a defendant's right to be present at a particular stage of trial does not automatically entitle him or her to a new trial where the error is found to be harmless beyond a reasonable doubt. ***Id.*** A tactical waiver by counsel, even of some constitutional rights, is binding on the defendant. *See* ***State v. Wilkens***, 159 Wis. 2d 618, 622-23, 465 N.W.2d 206 (Ct. App. 1990) ("When a defendant accepts counsel in the defense of his case, the decision to assert or waive certain constitutional rights is delegated to that attorney."); *see also* ***State v. Brunette***, 220 Wis. 2d 431, 443, 583 N.W.2d 174 (Ct. App. 1998) ("[W]hen a defendant accepts counsel, the defendant delegates to counsel the decision whether to assert or waive constitutional rights, … as well as the myriad tactical decisions an attorney must make during a trial."). With these standards in mind, we review Alexander's assertions.

(e) At any view by the jury;

(f) When the jury returns its verdict;

(g) At the pronouncement of judgment and the imposition of sentence;

(h) At any other proceeding when ordered by the court.

(Emphasis added.) All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

¶8 Alexander's argument concerns three matters, involving two jurors, which occurred long after *voir dire* was completed, after the jury[2] was selected and sworn, and shortly before the concluding trial testimony. All three matters were brought to the attention of the trial court and counsel.

¶9 Near the end of trial, "Juror 10" told the bailiff that she might be acquainted with a woman (later identified as "Monique") in the gallery of the courtroom. Prudently, the trial court explored the matter further in chambers with both counsel for Alexander and the State present, as well as with Juror 10.[3] Before Juror 10 entered the judge's chambers, counsel for Alexander expressly waived Alexander's presence at the hearing in the following colloquy:

> COURT: And at this point, counsel, do you waive the appearance of Mr. Alexander for purposes of this?
>
> COUNSEL: We do.

Thereafter, in response to the trial court's initial questions, Juror 10 described her connection with Monique as "an old friend of the family. We grew up together." The colloquy continued:

> COURT: Do you know her name?
>
> JUROR 10: Monique. I'm not sure of her last name.…
>
> COURT: And how do you know her?
>
> JUROR 10: She went to school with my sister, and she's always around my family. We party together, go out together, stuff like that. Recently, we're not cool like that anymore.

[2] Fourteen jurors were selected so that there would be two alternates available if needed. The alternates were not identified as such until immediately before the jury retired to deliberate.

[3] The trial court's in-chambers interview with Juror 10 occurred on the record.

> COURT: Was there some kind of issue between you and her?
>
> JUROR 10: Actually, she's really my sister's friend. So they're not talking anymore so, you know.
>
> ….
>
> COURT: … And do you know what kind of relationship she has to this case?
>
> JUROR 10: I'm not sure. I'm not even sure.

The trial court then allowed additional questioning:

> STATE: When's the last time, ma'am, that you saw her?
>
> JUROR 10: I'd say about six months ago when she was working on 76th at a clothing store.
>
> STATE: And you recognized her today?
>
> JUROR 10: Yes.
>
> STATE: Immediately?
>
> JUROR 10: Yes.
>
> STATE: You know her well?
>
> JUROR 10: Yes.
>
> STATE: When's the last time you went out socially with her?
>
> JUROR 10: I'd say six months ago.
>
> STATE: So this kind of breakup between your sister and her, or falling out, has occurred within the last six months?
>
> ….
>
> JUROR 10: Yes, yes.
>
> STATE: Prior to that, she had been at your family home?
>
> JUROR 10: Yes.
>
> STATE: On many occasions?

> JUROR 10: Yes.
>
> STATE: Did you grow up with her?
>
> JUROR 10: Yes.
>
> ….
>
> STATE: Your sister is the one who had the closer relationship?
>
> JUROR 10: Yes.
>
> STATE: [W]hat's the age difference between you and your sister?
>
> JUROR 10: She's one year older than me.

¶10 Monique, according to information provided by Alexander to the court bailiff, was the mother of his child. Counsel for Alexander declined to ask additional questions and argued that there was no reason to remove Juror 10. The State argued that it was "dangerous to keep her on the jury." The trial court asked Alexander's counsel to "go out and talk to Mr. Alexander. Find out what his sense is. Maybe he's not comfortable. I don't know." Alexander's counsel responded:

> COUNSEL: Just so the record is clear, I'm going to object to my client making any statements on the record.
>
> COURT: About what?
>
> COUNSEL: About anything at this point…. But I'll go talk to him.
>
> COURT: … Well, talk to him first and then tell me what you want to do.
>
> ….
>
> COUNSEL: Okay. I don't want him making any statements on the record.

Later, in chambers, counsel for Alexander reported:

> We talked to Mr. Alexander. He said that the woman by the name of Monique is, in fact, his baby's momma. But

> he has not seen her in 16 months. He's not close to her. He does not know the juror. He's never seen her before. He doesn't know the juror's sister. He doesn't know any of Monique's friends.… We explained to him the falling out between the juror and the sister and Monique, and he said he does not want this juror struck. He does not want her taken off the jury.

The trial court withheld decision, and moved on to the issue involving a second juror, "Juror 33."

¶11 Again in chambers, with all counsel present, though without Alexander, Juror 33 told the trial court that he knew Jesse Sawyer, a witness who had just finished testifying for the defense, and that he recognized Sawyer as soon as he saw him. Juror 33 said that he knew Sawyer for about three years as a person who does custom work on Harley-Davidson motorcycles. Juror 33 stated that he had been over to Sawyer's house, but not in the house, and that he waves when he rides past Sawyer's house. Juror 33 further stated that: (1) he had seen Sawyer at a party and talked to him; (2) he had seen Sawyer at Harley-Davidson events the previous August; and (3) he had seen Sawyer three times in the past year, but that the two do not really spend time together or have each other's telephone numbers. Juror 33 also said that Sawyer did not know where Juror 33 lived.

¶12 Counsel for Alexander objected to Juror 33 being removed for cause. The State expressed concerns about Juror 33 because there had been testimony about Sawyer's house and work on motorcycles, but did not take a position on whether Juror 33 should be removed. The trial court postponed decision, stating: "I'm not convinced that I have to remove anyone from the panel at this time. I'm going to complete the rest of the trial, and I'll revisit this before we decide lots."

¶13 The following day, the day for closing arguments and deliberations, a third juror issue surfaced, again involving Juror 10. That morning, Juror 10 called another juror to say she would not be in because her boyfriend was in a car accident. This information was given to the trial court. However, by the time the trial court advised defense counsel and the State of this call, Juror 10 had arrived. A second interview with Juror 10 was conducted in chambers, on the record, to sort out the event. Again, counsel for Alexander and counsel for the State were present. Alexander was not. The trial court asked Juror 10 to summarize the morning's events. After explaining the accident and her own car troubles, Juror 10 was again asked by the trial court about her relationship with Monique:

> COURT: Let me ask you about your relationship indirectly and directly with the person you saw in the gallery the other day.
>
> How are you going to recognize that and keep that out? Because the trial should be decided on the evidence in this courtroom, not things that happened outside. And I'm concerned that [maybe] some of those things might affect your ability to look at this evidence. What are your thoughts?
>
> JUROR: I don't really talk to her. So I have no problem with just making – I don't talk to her at all. It doesn't bother me. I'll be able to go ahead and directly have my own decision.

¶14 In follow-up questions, the State asked Juror 10 why she originally notified the bailiff when she recognized Monique in the gallery. Juror 10 replied: "I felt it was very important because I didn't know if she was going to try to retaliate and try to contact me and ask me about some things or not. I just thought it was really important to tell, you know." The State then asked what Juror 10 meant by "retaliate." Juror 10 replied: "Because we don't get along. She doesn't really get along with my sister. If she wanted to do revenge, she'll try to get in

contact with me and try to talk to me about the case." In response to the State's question regarding whether Juror 10 thought Monique was connected to the case, Juror 10 responded, "I think so, yes."

¶15 The trial court then struck Juror 10, stating: "I am satisfied on this record despite her statement to the contrary that she could be fair when she told … us that she'd be concerned about whether this person might retaliate against her or someone else because of the knowledge they have of each other."

¶16 The State then asked the trial court to remove Juror 33 because of his connection to Sawyer. The State reminded the trial court that Sawyer was a key defense witness and that another witness, Lester Rasberry, testified that he and Alexander gave Sawyer the gun used to kill Griffin. The State expressed particular concern about the fact that Juror 33 had been to the scene where the gun had been brought (Sawyer's house), that Juror 33 had communicated his acquaintance with Sawyer to the other jurors, and that Juror 33 could provide "extraneous information" about Sawyer. Over vigorous objection by Alexander's counsel, the trial court concluded:

> [Juror 33] indicated that despite what we were advised of that he could be fair and impartial. He has been to the residence. He's not been inside the residence, but he's been to the garage area which is, in fact, a part of this case.
>
> He has been with [Sawyer] on more than one occasion. He did indicate they are not friends. He's an acquaintance. He's an acquaintance that he knows indirectly as a result of their mutual involvement with motorcycles and the customizing of motorcycles, but he has spent some time with him.
>
> I'm striking him for cause.

¶17 Contrary to Alexander's assertion , the trial court did not dismiss the jurors during the jury selection process. The trial court's decision was made on

the day scheduled for closing arguments—well after jury selection had been completed. At that point in the trial, Alexander's counsel was entitled to make the strategic decision to waive Alexander's presence at the in-chambers meetings with the jurors. *See* ***Wilkens***, 159 Wis. 2d at 622-23. Alexander's counsel was adamant that Alexander not make any statements to the trial court, or in the jurors' presence regarding the jurors on the record; however, the record indicates that Alexander's counsel consulted with him outside of the presence of the trial court and the State during the interviews. Alexander's counsel spoke with him privately about the jurors' statements and the trial court's questions, relayed relevant information in chambers that had been obtained from Alexander and consistently argued against removing either juror. Therefore, Alexander was not ignorant about what was occurring and being discussed in chambers. He also does not suggest how his physical presence during the in-chambers interviews and arguments might have altered the trial court's decision.

¶18 Alexander also argues, essentially, that the trial court erroneously found juror bias regarding Jurors 10 and 33, leading to their erroneous dismissal. Had the two jurors remained, he contends, the results of his trial could have been different. We disagree.

¶19 A biased juror may be removed by the trial court if the trial court determines that one of the three types of juror bias exists. *See* ***State v. Kiernan***, 227 Wis. 2d 736, 744-45, 596 N.W.2d 760 (1999). Statutory bias is based on WIS. STAT. § 805.08(1),[4] which declares certain categories of persons ineligible to be

[4] WISCONSIN STAT. § 805.08(1) provides, in relevant part:

> The court shall examine on oath each person who is called as a juror to discover whether the juror is related by blood, marriage

(Continued)

jurors, and describes other disqualification factors. ***Kiernan***, 227 Wis. 2d at 744. Subjective bias may be found when the record reflects that the juror is a reasonable person who is sincerely willing to set aside any opinion or prior knowledge that the juror might have, yet who the trial court concludes, based on the juror's verbal responses to questions and demeanor in giving those responses, cannot actually be objective. ***Id.*** at 745. Objective bias inquires whether a reasonable person in the juror's position could set aside the opinion or prior knowledge. ***Id.*** at 745-46. A reviewing court "will uphold the [trial] court's factual findings regarding a … juror's subjective bias unless they are clearly erroneous." ***Id.*** at 745. We will reverse the trial court's conclusion regarding objective bias only if as a matter of law a reasonable court could not have reached such a conclusion. ***Id.***

¶20 Although the trial court did not explicitly use the term "subjective bias," the trial court made implicit findings that both jurors were subjectively biased. *See* ***id.*** at 745. The trial court made the decision to remove the jurors, despite their statements of impartiality, after observing their respective verbal responses to questions, their demeanor in the interviews, and after having the time to consider the issues carefully. Juror 10 was concerned about "revenge" by a former friend who Juror 10 believed was connected to the case. Juror 33 knew an important witness for the defense whose credibility was challenged by other witnesses. The rest of the jury knew of Juror 33's acquaintance. Additionally, Juror 33 had been at the garage outside of the witness's house—a place that was a

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> or adoption to any party or to any attorney appearing in the case, or has any financial interest in the case, or has expressed or formed any opinion, or is aware of any bias or prejudice in the case. If a juror is not indifferent in the case, the juror shall be excused….

subject of testimony during the trial. The trial court was reasonably concerned about the ability of either juror to be impartial in spite of the jurors' statements to the contrary. The record supports the trial court's implicit conclusion that neither juror could actually be objective.

II. Ineffective Assistance of Counsel.

¶21 Alexander also argues that his trial counsel was ineffective with regard to one witness, David Benson. Specifically, Alexander contends that his trial counsel should not have given the State notes of the public defender's investigator's interview with Benson and should not have asked Benson whether his trial testimony was consistent with what he had told the investigator. Doing so, Alexander contends, allowed the State to impeach Benson—Alexander's primary alibi witness. We conclude that Alexander has not met the standard for demonstrating ineffective assistance of counsel.

¶22 A criminal defendant who claims his attorney was ineffective has a dual burden to prove both that his attorney's performance was deficient and that the deficient performance prejudiced his defense. ***State v. Allen***, 2004 WI 106, ¶26, 274 Wis. 2d 568, 682 N.W.2d 433. A claim of ineffective assistance fails if the defendant fails to prove either one of these requirements. ***State v. Taylor***, 2004 WI App 81, ¶14, 272 Wis. 2d 642, 679 N.W.2d 893. On review, an appellate court will uphold the circuit court's findings of fact unless they are clearly erroneous. ***State v. Thiel***, 2003 WI 111, ¶21, 264 Wis. 2d 571, 665 N.W.2d 305. Whether counsel's performance was deficient and/or prejudicial to the defense are questions of law which are determined independently. ***Id.***, ¶23.

¶23 At trial, the defense called Benson to testify that Alexander could not have been the shooter that caused Griffin's death. Benson testified that he

encountered Alexander at around noon in June 2007, in the area between 26th and 27th Street and West Glendale Avenue. Benson stated that Alexander and his children were walking their poodle. Benson also testified that Alexander's poodle was barking at Benson, prompting Benson to yell "[g]et the killer" at Alexander. Benson stated that his encounter with Alexander only lasted about forty seconds before Benson heard gunshots and saw Alexander and his kids run. Benson stated that he did not see Alexander with a gun in his hand during that encounter.

¶24 As stated, Alexander's ineffective assistance of counsel claim is grounded in two aspects of Benson's testimony. First, Alexander's trial counsel asked Benson whether his (Benson's) testimony was consistent with the statements given to the public defender's investigator, to which Benson replied affirmatively. Second, trial counsel provided a copy of the investigator's notes to the State before Benson testified, which Alexander argues permitted the State "to destroy [Alexander's] primary witness."[5] The State filed a discovery demand, which counsel may have believed required disclosure of the notes. Without determining whether the question and the disclosure were deficient performance, we cannot conclude that counsel's actions prejudiced Alexander's defense because: (1) Benson's trial testimony was not totally exculpatory; and (2) substantial other evidence in the record supports the jury's verdict.

[5] Benson told the jury that he did not see Sheila (the woman with whom he had driven to the area) during the shooting. The investigator testified that Benson told him that at the time of the shooting he (Benson) did see Sheila run into an apartment building when the shooting began.

Benson told the jury that he specifically recalled the incident being on June 10, 2007. The investigator testified that Benson never said the incident he witnessed occurred on June 10, 2007.

Benson told the jury he did not see who was shooting the gun. The investigator testified that Benson told him a white vehicle came down North 26th Street, onto Glendale, and stopped. An individual extended his arm up over the car and started firing a weapon. Benson gave a very detailed physical description of the shooter.

¶25 With regard to Benson's trial testimony, we note first that Benson placed Alexander at the scene of the shooting at the time it occurred. Benson admitted shouting "[g]et the killer" at Alexander seconds before the shots were fired, claiming that he was referring to a small barking poodle Alexander was walking at the time. The jury was not required to believe that Benson would call a small poodle a "killer" just because the dog was barking at him or that Alexander was walking a dog with his children.

¶26 Next, multiple other witnesses either put Alexander at the scene of the shooting or in possession of a handgun. Jones testified that he saw Alexander shoot at Griffin and said that Alexander continued to shoot even as Griffin tried to run away. Jones further testified that he knew Alexander and could see Alexander clearly as he was shooting. Jones also stated that he saw Alexander later that day at the home of Gretharia Smith, where Alexander admitted to killing the victim. Detective Jeffrey Norman testified that Smith told him that Alexander came to his (Smith's) house on the day of the shooting and, in the presence of Jones, admitted shooting the man with the assault rifle.

¶27 Further, Rasberry testified that Alexander kept a Glock .40 semi-automatic pistol in Rasberry's home, which was just seven doors away from where the shooting occurred. Rasberry testified that Alexander asked him for the gun at about 11:00 a.m. on June 10, 2007, saying he needed it to help a friend. Rasberry stated that he loaded the gun and gave it to Alexander. About ten or fifteen minutes later, Rasberry stated, Alexander came back to the house and asked Rasberry for another clip. Rasberry said Alexander told him that he had just been shooting on Victory Lane and that he fired at, and "dropped," a man who came out of an apartment building with a long gun.

¶28 Another witness who testified to seeing Alexander at the scene of the shooting was Keith Bradley, a resident on Victory Lane. Bradley testified that although he could not be 100 percent sure, Alexander looked like the person he saw from the door of his apartment on Victory Lane holding a gun after the shots were fired.

¶29 Finally, police found a dozen .40 shell casings in the area where the shooting occurred. State Crime Laboratory tests revealed that all twelve casings had been fired from a Glock semi-automatic pistol. However, the pistol was never recovered.

¶30 Because of the substantial volume of evidence from other witnesses that contradicted Benson's testimony, Benson's testimony, even if not impeached, probably would not have created a reasonable doubt as to whether Alexander shot Griffin. Thus, we find no prejudice based on either counsel's question to Benson, or on the delivery of the investigator's notes.

III. Newly discovered evidence.

¶31 Finally, Alexander contends that newly discovered evidence warrants a new trial. Specifically, Alexander contends that a man he met in prison, Bicannon Harris, can prove that Alexander was not responsible for Griffin's shooting. We conclude that the affidavit provided by Harris, which Alexander offers as new evidence, is insufficient to warrant a new trial.

¶32 To be entitled to a new trial, the newly discovered evidence must be sufficient to establish that a defendant's conviction was a "'manifest injustice.'" ***State v. Plude***, 2008 WI 58, ¶32, 310 Wis. 2d 28, 750 N.W.2d 42 (citation omitted). A motion for a new trial is addressed to the sound discretion of the trial

court, and the trial court will be reversed on appeal only for an erroneous exercise of this discretion. ***Id.***, ¶31. Five factors are considered to determine whether the new evidence requires a new trial: (1) the evidence must have come to the moving party's knowledge after a 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 be merely cumulative to the testimony which was introduced at trial; and (5) it must be reasonably probable that a different result would be reached on a new trial. ***Id.***, ¶32. Whether the new evidence would have a sufficient impact on the other evidence such that a jury would have a reasonable doubt about the defendant's guilt is a question of law. ***Id.***, ¶33.

¶33 Harris's affidavit, provided in 2010, two years after Alexander's conviction, essentially said:

- "In June 2007," Harris traveled from Green Bay to Milwaukee with a woman named Coco, who took him to someplace near a drug house in Milwaukee so that she could purchase marijuana.

- Coco got out of the car and went to obtain the drugs. While Harris was waiting for her, Harris got out of the car and saw a brown-skinned, African-American male wearing all black and talking to himself.

- Harris saw the man pull out a black handgun, take a couple of steps towards an alley where about fifteen to twenty people were standing, and start shooting. The man shot the gun eight or nine times.

- Immediately after the shooting, Harris jumped in his car and left the area.

¶34 Alexander's postconviction counsel, after requesting Harris to provide the above-referenced affidavit, also retained an investigator to gather further information from Harris. After interviewing Harris, the investigator provided a report stating the following additional facts:

- Harris was in Milwaukee in "early June, 2007."
- The only streets Harris recalled seeing in Milwaukee were "Glendale Avenue and Teutonia Avenue."
- Harris described the man he saw as "a Brown skinned Afro-American [sic] with a tattoo on his neck[6] about 5'7" tall and 160 lbs. short wavy hair wearing black shorts and a black long sleeve T shirt [sic]." Harris did not know what the tattoo was of.
- Harris "said he would be able to" recognize this person if he saw him again "because he got a good look at him."

A street map attached to Alexander's motion shows that although the streets are in the vicinity of Victory Lane, where the incident in this case occurred, Teutonia Avenue and Glendale Avenue do not intersect with each other or with Victory Lane.

¶35 The report of what Harris told a third party is obvious hearsay. Even assuming Harris would say exactly what the report attributes to him, it does not enhance Alexander's request for a new trial. Neither the affidavit nor the report (or even a combination of the two) establish that Harris was probably in

[6] For purposes of this analysis, we accept Alexander's claim in his brief that he does not have a tattoo on his neck, and does not otherwise match Harris's description of the shooter.

Milwaukee on June 10, 2007. Nor does Harris identify where he was with sufficient specificity to suggest that he had a reasonable view of the scene of *this* homicide. Harris merely remembers the names of two streets, only parts of which are in the general vicinity of where this homicide occurred. This does not establish that he probably witnessed the shooting involved in this case. We cannot conclude that if the jury heard this testimony, there would be a reasonable probability of a different outcome. Thus, the trial court properly denied the motion for a new trial without a hearing.

CONCLUSION

¶36 We conclude that Alexander's presence in the trial court's chambers during the interview of the two jurors during trial was properly waived by his trial counsel. We also conclude that he has not alleged facts sufficient to support a finding that his trial counsel was ineffective, and thus be entitled to a hearing on that claim. We also conclude that Alexander has not presented new evidence sufficient to warrant a new trial.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.