

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 29, 2009

David R. Schanker
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.

Appeal No. 2008AP2178-CR

Cir. Ct. No. 2005CF004753

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHRISTOPHER A. SMITH,

DEFENDANT-APPELLANT.

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

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

¶1 PER CURIAM. Christopher A. Smith appeals from a judgment of conviction and postconviction order. A jury found Smith guilty of three counts of first-degree intentional homicide and one count of possession of a firearm by a

felon. *See* WIS. STAT. §§ 940.01(1)(a) and 941.29(2) (2005-06).¹ The court imposed three consecutive life sentences without eligibility for extended supervision for the homicides and a concurrent ten-year sentence for the possession of a firearm by a felon count. In a postconviction motion, Smith moved for a new trial based on newly-discovered evidence.² The trial court denied the motion without a hearing. We affirm the judgment of conviction and postconviction order.

BACKGROUND

¶2 On August 20, 2005, Armando Pena, Roberto Vela, and Daniel Vela were shot and killed at a Milwaukee tavern. Roberto Vela and Daniel Vela were shot in the tavern's bathroom while Pena was shot in the front of the tavern. Several persons who were at the tavern identified Smith as the shooter. Smith was not arrested until approximately two months later when he was found in Florida. Smith gave police a false name when he was arrested. As noted, Smith was convicted of all counts by a jury. We defer our description of additional trial evidence until later in this opinion.

¶3 Smith filed a postconviction motion for a new trial based on newly-discovered evidence. The motion was accompanied by a report of a private

¹ All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

² In his postconviction motion, Smith also sought a new trial based on the ineffective assistance of trial counsel. Smith does not raise that issue on appeal, and we deem it abandoned. *See State ex rel. Peckham v. Krenke*, 229 Wis. 2d 778, 782 n.3, 601 N.W.2d 287 (Ct. App. 1999), *overruled on other grounds by State v. Popenhagen*, 2008 WI 55, 309 Wis. 2d 601, 749 N.W.2d 611 (An issue raised in the trial court but not argued in a party's appellate brief is deemed abandoned and will not be considered.).

investigator. The report identified three persons—William Ramos, Guillermina Rodriguez, and Annette Martinez—who gave statements to police but did not testify at trial. According to the report, Ramos told police he lived near the tavern and was watching the commotion outside the tavern after the shooting. The intersection near the tavern was wrapped in crime scene tape. Ramos told police that, about thirty minutes after the shooting, a car containing three or four girls parked, and the girls tried to enter the crime scene. Police turned them away, and the girls then walked across the street and watched the crime scene. Ramos told police that another girl then emerged from the alley behind the tavern, and one of the girls from the car began yelling, “It was your brother who killed him. He did this.” The investigative report states that neither of Smith’s sisters was in the area of the tavern on the night of the shootings. Ramos was not called to testify at trial.

¶4 Rodriguez is Ramos’s mother, and according to the report, she gave a similar statement to police after the shootings. Rodriguez was not called to testify at trial.

¶5 Martinez also gave a statement to police on the night of the shootings. Martinez was in the tavern, and she told police that she saw the shooter as he came out of the bathroom. Martinez told police that the shooter had acne scars on his face. Martinez was not called to testify at trial. Martinez later told Smith’s private investigator that the shooter had a tattoo on his neck. Smith’s booking photo shows neither acne scars nor neck tattoos.

¶6 The report also stated that Martinez was shown a seven-person photo array of suspects that included Smith’s photograph. Martinez identified a photograph of a Christopher Sandy as the shooter. Martinez was then shown a

photograph of Smith, and Martinez told the private investigator that she did not recognize the man in that picture.

¶7 In his postconviction motion, Smith acknowledged that several witnesses at trial identified him as the shooter. He discounted that testimony, however, as coming from witnesses “connected in some way to the victims.”³ Smith asserted that the private investigator’s report identified “a number of witnesses who cast doubt on the identification of Smith as the shooter” and because the witnesses did not testify at trial, “the jury was given an unfair (and untrue) version of the evidence.” Smith argued that neither Ramos nor Rodriguez was “connected” to the victims and that their statements “provide [him] the platform from which to argue that [he] was not the shooter”—because neither of Smith’s sisters was at the tavern that night, the yelled accusation overheard by Ramos and Rodriguez supports the inference that someone other than Smith was the shooter. Additionally, Smith contended that he lacked the “physical attributes” present in Martinez’s description of the shooter, that is, acne scars and neck tattoos. Smith concluded that the statements of Ramos, Rodriguez and Martinez “create[d] substantial doubt as to whether Smith was the shooter.”

¶8 Although the circuit court denied Smith’s motion without a hearing, it did order the State to file a memorandum in response to the motion. With that memorandum, the State provided a police report to the court that addressed Martinez’s identification of Christopher Sandy from the private investigator’s photo array. The report indicated that Sandy was on parole supervision status at

³ The only “connection” identified by Smith is racial—Smith states “[t]he victims were Hispanic and Smith is white.”

the time of the shooting and that his parole agent had approved Sandy's request to move from Wisconsin. The request had been approved in 2004, and Sandy had moved two more times, most recently to North Carolina. The parole agent told police that he had no indication that Sandy had moved back to Wisconsin or was in Milwaukee on the date of the shooting. The State also submitted an additional report recounting a detective's conversation with Martinez about the photo array. Martinez told the detective that she was "almost positive" that the person she picked out from the photo array, that is, Sandy, was the shooter. Martinez told the detective that she believed that the shooter had a tattoo on his neck but that she was not sure whether the shooter or another person in the bar that night had the tattoo.

¶9 In addition to the information provided by the police reports, the State contended that the information that Smith now claimed was "newly discovered" was contained in police reports available to Smith before trial. The State conceded that the evidence was not cumulative and that it was "material," but pointed out that the Ramos/Rodriguez testimony involved hearsay statements from unidentified persons. The State also recounted the trial testimony that showed Smith to be the shooter and concluded that Smith had not shown a reasonable probability of a different result if the Ramon/Rodriguez/Martinez testimony had been introduced at trial.

¶10 The trial court denied Smith's motion without a hearing. For purposes of its decision, the court assumed the facts in Smith's motion to be true.⁴

⁴ The court did not consider whether the four preliminary criteria were met but rather moved directly to the question of whether a reasonable probability exists that a different result would be reached in a trial that included the newly-discovered evidence.

The court agreed with the State's argument that there "is not a reasonable probability that the proffered evidence would have resulted in a different verdict at trial" because "the evidence of guilt at trial was overwhelming, whereas the witness reports upon which [Smith] now relies are weak." The court noted that neither Ramos nor Rodriguez was in the tavern at the time of the shooting and "[t]heir observations occurred outside the bar thirty minutes later and involved a hearsay statement made by an unidentified female." The court also noted that the police reports provided by the State indicated that Martinez was not sure about whether the shooter had a tattoo on his neck and that she was "almost positive" in her identification of Sandy as the shooter. The court pointed out, however, that police reports indicated that Sandy was not in Milwaukee at the time of the shooting. The court concluded that Smith had not met his burden of establishing sufficient grounds for a new trial based upon newly-discovered evidence.

DISCUSSION

¶11 The decision to grant or deny a motion for a new trial based on newly-discovered evidence is committed to the circuit court's discretion. *State v. Plude*, 2008 WI 58, ¶31, 310 Wis.2d 28, 750 N.W.2d 42. A circuit court erroneously exercises its discretion when it applies an incorrect legal standard to newly-discovered evidence. *Id.*

In order to set aside a judgment of conviction based on newly-discovered evidence, the newly-discovered evidence must be sufficient to establish that a defendant's conviction was a "manifest injustice." When moving for a new trial based on the allegation of newly-discovered evidence, a defendant must prove: "(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."

Id., ¶32 (citations and quoted sources omitted). Those four criteria must be proven by “clear and convincing evidence.” *State v. Love*, 2005 WI 116, ¶43, 284 Wis. 2d 111, 700 N.W.2d 62.

If the defendant makes that showing, then “the circuit court must determine whether a reasonable probability exists that a different result would be reached in a trial.” A reasonable probability of a different outcome exists if “there is a reasonable probability that a jury, looking at the [old evidence] and the [new evidence], would have a reasonable doubt as to the defendant’s guilt.”

Id., ¶44 (citations and quoted source omitted) (bracketing in *Love*).

¶12 On appeal, Smith maintains that he would not have been convicted if Ramos, Rodriguez, and Martinez had testified, and that the postconviction court made an inappropriate credibility determination when it characterized the newly-discovered evidence as “weak.” Smith also complains that he was not afforded the opportunity to fully develop the newly-discovered evidence at an evidentiary hearing.

¶13 When a defendant requests an evidentiary hearing in his postconviction motion, the initial question is “whether the motion on its face alleges sufficient material facts that, if true, would entitle the defendant to relief. This is a question of law that we review de novo.” *State v. Allen*, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. If the answer to that question is “yes,” then the court must hold an evidentiary hearing. *Id.* “However, if the motion does not raise facts sufficient to entitle the movant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the circuit court has the discretion to grant or deny a hearing.” *Id.* We review a circuit court’s discretionary decision under the deferential erroneous exercise of discretion standard of review. *Id.*

¶14 Because the facts set forth in Smith’s motion conclusively demonstrate that Smith is not entitled to a new trial based on newly-discovered evidence, the circuit court did not err when it denied Smith’s motion without a hearing.

¶15 As noted above, a defendant seeking a new trial based on newly-discovered evidence must first meet all four preliminary criteria before a court need consider whether a reasonable probability exists that a different result would be reached in a new trial. *See Love*, 284 Wis. 2d 111, ¶¶43-44. Smith does not survive the initial criterion, that is, that the evidence must be discovered after his conviction.⁵

¶16 In his postconviction motion, Smith acknowledged that the “discovery materials” contained police reports detailing the statements that Ramos, Rodriguez, and Martinez gave to police after the shooting. Thus, the overheard statement of the unidentified girl and Martinez’s description of the shooter as having acne scars were disclosed to Smith before trial and he could have pursued those lines of inquiry at trial. Smith cannot claim that the evidence is newly discovered when it was disclosed to him in the pretrial discovery materials.⁶ *See State v. Morse*, 2005 WI App 223, ¶21, 287 Wis. 2d 369, 706 N.W.2d 152 (police reports known to the defendant before guilty plea entered did not satisfy the first element of the newly-discovered evidence test).

⁵ The State acknowledges, and we agree, that the evidence is material because it is relevant to the identification of the shooter and that the evidence is not cumulative.

⁶ In his postconviction motion, Smith did not address the second, and somewhat related, criterion—whether he was negligent in seeking the evidence. And, as noted in n.2, Smith does not argue on appeal that his trial counsel was ineffective for not introducing the evidence at trial.

¶17 The only portion of the claimed newly-discovered evidence not included in pretrial discovery materials is Martinez’s identification of Sandy as the shooter. On that piece of evidence, therefore, it is appropriate to consider whether there is a reasonable probability that a different result would be reached in a new trial. We concur with the trial court’s conclusion that Smith has not met that test.

¶18 Smith is relying on Martinez’s identification of Sandy as the shooter. The State showed, however, that the identification was not absolute—Martinez told a detective that she was “almost positive” in her identification—and, more importantly, the State showed that Sandy was not in Wisconsin at the time of the homicides.

¶19 On the other hand, the record contains overwhelming evidence of Smith’s guilt from a multitude of witnesses:

- Jesse Flores, a cousin of two of the victims, was at the tavern. He saw Smith and Roberto Vela argue but appear to settle their differences by drinking shots together. Shortly thereafter, Flores heard four or five gunshots coming from the rear of the tavern, and he saw Pena running toward the front door of the tavern. Flores saw Smith with a gun chasing Pena out of the bar. Flores heard Smith say something to the effect of “what now mother fucker” while chasing Pena. Flores ran out the back door of the tavern and saw Smith, another man, and a woman running down the alley. Flores saw Roberto Vela and Daniel Vela shot in the bathroom and Pena shot to death outside the front door. Flores had no question that Smith was the person he saw chasing Pena out the door with a gun.
- Christina Manvilla was at the tavern. She knew the victims and Flores for several years. She saw Smith and the Velas look like they were going to

get into a fight. A short time later, the Velas went into the bathroom, and Smith followed them. Manvilla heard gunshots coming from the bathroom. Smith came out of the bathroom, holding a gun. Smith pointed the gun at Pena and said, “you’re next motherfucker.” Pena ran out the door, and Smith followed him. Manvilla saw Smith fire his gun at Pena. She went into the bathroom and saw that the Velas were both shot. Manvilla testified that she had a good look at Smith that night, and there was “no question” in her mind that Smith was the person she saw shooting Pena.

- James Brienzo, who did not know Smith or any of the victims, was also at the tavern. Brienzo played pool with Smith. Brienzo saw two men walk into the bathroom, followed shortly by Smith. Brienzo then heard gunshots and saw Smith leave the bathroom. Brienzo was standing near the bathroom, and as Smith walked past, he pointed his gun at Brienzo and asked him if he “had a problem” or if he “wanted some too.” Smith then walked toward the front of the tavern, and another man ran toward the front door. Brienzo then heard more shots. After the shooting, Brienzo was in the back alley when Smith walked by. Smith again pointed his gun at Brienzo and asked if he “want[ed] some.” Brienzo believed that the two men who were shot in the bathroom were the two men who went into the bathroom just before Smith entered it.
- Lamonte Barfoot was working security at the tavern on the night of the shootings. Barfoot broke up an argument between two Hispanic men and Smith by telling them to “chill out.” Barfoot later saw the men having drinks together. About forty-five to sixty minutes later, Barfoot heard gunshots coming from the rear of the tavern. He ran to the area and saw Smith come out of the bathroom with a gun in his hand. Smith pointed the

gun at Barfoot and asked, “you want some next?” Barfoot put his hands up and dove into the women’s bathroom. He then heard shots coming from the front of the tavern. After the shooting, Barfoot went into the alley and saw Smith running through the alley. Barfoot saw two gunshot victims in the bathroom and one victim on the sidewalk outside the front door.

- Dennis Wappes also did not know Smith or the victims. About 12:30 a.m., Wappes heard “what sounded like someone had a hammer and was banging on the walls in the bathroom.” People began running for the doors. Wappes saw a Hispanic man running as fast as he could toward the door and Smith chasing the man out the door. Smith had a gun in his hand, extended straight out, and pointed at the man’s head. As the Hispanic man exited the tavern, Wappes heard a gunshot. Wappes testified there was absolutely no doubt that Smith was the man with the gun chasing the Hispanic man out of the bar.
- Lorene Gross went to the tavern with a group of people to celebrate her birthday. Gross knew Smith who was also at the tavern that night. Smith got into an argument with some men and Gross told him to “[j]ust leave it alone.” Smith replied that he was not going to leave it alone. A woman named Cueryn was in Gross’s group. At some point during the evening, Cueryn left the tavern and returned about thirty to forty minutes later. When Gross was getting ready to leave, she heard gunshots. Gross got under a table and heard another gunshot. Gross heard Smith say, “[w]e’re coming for you, don’t run” and heard a woman named Laurie tell Smith, “German, no.” Gross testified that “German” was Smith’s nickname. Gross then went out the back door of the tavern and saw someone who she

thought was Smith walking down the alley with a gun. Later, Gross went to a friend's house where she saw Smith again, shaving his head.

- Trinidad Santos went to the tavern with Smith and others to celebrate Gross's birthday. While there, her boyfriend, Lupe, got into an argument with Pena, but the dispute broke up quickly. Shortly before 1:00 a.m., Santos heard gunshots coming from the men's bathroom. She then saw Smith, with a gun in his hand, chasing Pena toward the front door of the tavern. Santos yelled, "German, what the fuck." Santos then heard another shot. Santos left the tavern after the shooting. When she got to her house, about four blocks away, Smith was on the porch. She let Smith use her bathroom. Other people arrived at the house, and Santos and Lupe left. When she returned home early the next morning, Smith, who had shaved his head, was asleep in a bedroom with Cueryn. Santos fell asleep, and when she woke up, Smith was gone.
- Cueryn Wiorek went to the tavern to celebrate Gross's birthday. She had gone out with Smith previously and wanted to date him. About an hour or two after she got to the tavern, a man from her group got into an argument with a man from another group. The argument seemed to settle down. Smith then asked her to go to his house and into his "top dresser drawer to get the first thing, get the second thing, put it together and bring it back." Wiorek drove to Smith's house, opened his top dresser drawer and retrieved a gun and ammunition clip. Wiorek put the clip into the gun, put it under the seat of her car, and drove back to the tavern. When she got back to the tavern, Smith held out his hand. She assumed that Smith wanted the gun, and she told him it was in her car if he wanted it. Smith then left the tavern. A short time later, Wiorek heard four or five gunshots and saw Smith come

out of the bathroom. Eventually, Wiorek left the tavern with two other people. As they were driving, they saw Smith walking, picked him up, and drove to a house. Inside the house, Smith admitted that he had “killed those people.” Smith went into the bathroom and shaved his head. He took a butcher knife from the kitchen and put it in his pants. Smith apologized to Wiorek for putting her through this and said that he “did it” for his friend, Lupe. A day or two later, Smith called Wiorek and again apologized. He called again later and told her that he was trying to cross the border and needed to learn to speak Spanish. He also told Wiorek that he needed his birth certificate and wanted her to get it for him.

- Detective Jason Smith testified about the police investigation into the shooting. That investigation culminated in Smith’s arrest in Florida where he had been sleeping in his vehicle. When arrested, Smith told police he was “Curt Smith.”

The evidence summarized above constitutes overwhelming evidence that Smith shot and killed the three men. Several witnesses described an argument between Smith and other men in the tavern. Wiorek testified that she retrieved a gun at Smith’s request and told him where he could find it. Witnesses saw Smith follow two of the victims into the bathroom and then leave the bathroom with a gun, shortly after shots were fired. Witnesses saw Smith chase Pena through the tavern while pointing a gun at him. Roberto and Daniel Vela were found shot and killed in the bathroom, and Pena was shot outside the front door. Wiorek testified that Smith admitted killing the men. Gross, Santos, and Wiorek testified that Smith shaved his head shortly after the shootings. Smith gave a false name to police when he was arrested two months later in Florida.

¶20 Contrary to Smith’s claim that the State’s witnesses were somehow “connected” to the victims, some witnesses, Gross, Santos, and Wiorek, were with Smith’s group that night, and other witnesses, Brienzo, Barfoot, and Wappes, were not associated with either Smith or the victims. Simply put, there is no reasonable probability that a different result would be reached in a new trial that would include Martinez’s later identification of Sandy as the shooter, particularly in the face of evidence that Sandy was not in Wisconsin at the time of the shooting.

CONCLUSION

¶21 Smith believes he is entitled to a new trial because of newly-discovered evidence. However, evidence derived from Ramos and Rodriguez and from Martinez’s reference to acne scars on the shooter was available to Smith before trial and, therefore, was not newly discovered. In light of the overwhelming evidence of Smith’s guilt, the evidence of Martinez’s subsequent identification did not constitute a reasonable probability of a different result. Accordingly, the record conclusively demonstrated that Smith was not entitled to a new trial, and the court properly denied his postconviction motion.⁷

⁷ Smith argues that, at the very least, he is entitled to an evidentiary hearing on his motion. Smith relies on *State v. Love*, 2005 WI 116, 284 Wis. 2d 111, 700 N.W.2d 62, a case in which the supreme court held that a defendant had alleged sufficient material facts to require an evidentiary hearing. *Id.*, ¶47. In *Love*, the question was whether the postconviction motion met the “who, what, where, when, why, and how” requirement explained in *State v. Allen*, 2004 WI 106, ¶23, 274 Wis. 2d 568, 682 N.W.2d 433. *Love*, 284 Wis. 2d 111, ¶¶27-29 and ¶¶47-50. The supreme court considered the facts alleged in the postconviction motion and concluded that the *Allen* test had been satisfied. In this case, however, Smith is not entitled to an evidentiary hearing for a different reason. His failing is not in the specificity of the factual allegations of his motion, but rather because the record conclusively demonstrates that he is not entitled to relief, even if those factual allegations are true.

By the Court.—Judgment and order affirmed.

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

