

**COURT OF APPEALS
DECISION
DATED AND FILED**

NOVEMBER 4, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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 § 808.10 and RULE 809.62, STATS.

No. 97-3639

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JUAN C. AGUIRRE,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Fond du Lac County:
DALE L. ENGLISH, Judge. *Affirmed.*

Before Snyder, P.J., Nettesheim and Anderson, JJ.

PER CURIAM. Juan C. Aguirre was convicted in 1994 of first-degree homicide, § 940.01(1), STATS., and appeals from an order denying his § 974.06, STATS., motion for a new trial due to newly discovered evidence. Because we conclude that the evidence alleged by Aguirre to be newly discovered would have been inadmissible at trial, we affirm.

At the 1994 trial, Aguirre defended on the basis of self-defense and defense of others. Aguirre shot the victim, Thomas Guerrero, during an altercation at Rene Aguirre's house. Rene is the defendant's brother. Aguirre testified at trial that when Guerrero and his brother visited Rene's house the first time on the evening of the shooting, Jim Guerrero, Thomas' brother, stated "we got a pistola." The shooting occurred when the Guerrero brothers returned to Rene Aguirre's house for the second time and Thomas threatened Aguirre and appeared to be reaching into his pants; Aguirre feared he was reaching for a gun. A struggle ensued and Thomas was shot. No weapon was found on or near Thomas after Aguirre shot him. Aguirre claimed at trial that the Guerrero brothers were armed when they arrived at Rene's house the second time. In its closing argument, the State inquired about the whereabouts of the gun. The jury convicted Aguirre of first-degree homicide.

In his § 974.06, STATS., motion filed in 1997, Aguirre claimed newly discovered evidence and that his counsel was ineffective for not presenting that evidence at trial. While investigating the case, postconviction counsel learned that Joe Godina had contacted Aguirre's trial counsel after the verdict to advise that on the night of the shooting, he saw Tom Guerrero and "a smaller Hispanic male"¹ together at a tavern. The two men were harassing Godina and the shorter male told Godina that "he had a .38" and would "blow his ass away." Godina gave a statement to police the evening of the shooting describing this exchange in the tavern. However, no one contacted Godina regarding his statement prior to

¹ The identity of this Hispanic male is unclear. Aguirre claims an inference that the unidentified man was Jim Guerrero, the victim's brother. The State argues that the lack of certainty regarding the identity of the man undermines the utility of this evidence for the defense. We need not address this issue further given our conclusion that the evidence is inadmissible regardless of the identity of the Hispanic male.

trial. On cross-examination at the postconviction motion hearing, Godina testified that he did not actually see a gun in the tavern and that he did not know who Jim Guerrero was.

Aguirre claimed that Godina's experience at the tavern was relevant to Aguirre's contention that the Guerrero brothers were armed at the time of the shooting. Aguirre's trial counsel testified that he was aware of Godina's statement but had concluded it was inadmissible because it did not relate information which was within Aguirre's knowledge at the time of the shooting.

The trial court held that Godina's testimony would have been inadmissible hearsay under §§ 908.045(2) (statement of recent perception) and 908.045(4), STATS. (statement against interest). The court also concluded that the evidence was not newly discovered because it was cumulative to other evidence at trial and that it was not reasonably probable that the evidence would yield a different result at a new trial. Aguirre appeals.

Aguirre argues on appeal that he is entitled to a new trial due to newly discovered evidence. An appellate court is not required to address an appellate argument in the manner which a party has structured the issues. *See State v. Waste Management of Wis., Inc.*, 81 Wis.2d 555, 564, 261 N.W.2d 147, 151 (1978). We conclude that Godina's testimony would not have been admissible. Therefore, Aguirre is not entitled to a new trial on that basis.

“[A]n accused in a prosecution for assault or homicide [may] support a self-defense claim by proving prior specific instances of the victim's violence *of which the accused was aware at the time of the assault* to establish the accused's state of mind about the danger the victim posed.” *State v. Daniels*, 160 Wis.2d 85, 94, 465 N.W.2d 633, 635-36 (1991) (emphasis added). Here, the record indicates

that Aguirre was unaware of the incident in the tavern to which Godina testified. Therefore, the tavern incident could not have affected what Aguirre might reasonably have expected of the victim during their confrontation. *See id.* at 95, 465 N.W.2d at 636. Because the evidence would not have been admissible under *Daniels* and its predecessors, we conclude that it does not qualify as newly discovered evidence. *See State v. Eckert*, 203 Wis.2d 497, 516, 553 N.W.2d 539, 546-47 (1996) (newly discovered evidence is that evidence which would make it reasonably probable that a different result would be reached at a new trial).²

By the Court.—Order affirmed.

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

² In light of our holding, we need not address any other issues raised on appeal.