

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 17, 2011

A. John Voelker
Acting 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. 2010AP157

Cir. Ct. No. 2000CF5118

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JIMMIE JOHNSON,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County:
REBECCA F. DALLET, Judge. *Affirmed.*

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

¶1 PER CURIAM. Jimmie Johnson appeals from an order denying his motion for a new trial based on newly-discovered evidence. Because Johnson does not demonstrate that the evidence he relies on would raise a reasonable doubt about his guilt, we affirm.

BACKGROUND

¶2 In 2001, a jury found Johnson guilty of two counts of first-degree reckless homicide as a party to a crime, three counts of first-degree recklessly endangering safety as a party to a crime, and one count of possessing a firearm as a felon. The charges all arose from a shooting incident in Milwaukee, Wisconsin, on September 30, 2000, outside of the Cream City Tavern. At trial, the State contended that Johnson was the person wearing a gray hooded sweatshirt, black pants, and a tan baseball cap who shot into a crowd in front of the tavern, killing two people and wounding others. The State's evidence included Johnson's confession, testimony from corroborating witnesses, and Johnson's gray sweatshirt, black pants, and tan baseball cap. We affirmed Johnson's convictions in *State v. Johnson*, No. 2002AP1484-CR, unpublished slip op. (WI App Sept. 9, 2003).

¶3 In 2009, Johnson filed the postconviction motion underlying this appeal. He alleged that newly-discovered evidence warrants a new trial. In support, Johnson submitted the statement of Andre Hill. Hill first contacted Johnson in 2008 while Hill was incarcerated, and Hill gave a statement to Johnson's investigator during that same year. Hill asserted in his statement to the investigator that he was outside the Cream City Tavern in September or October of 2000 when he heard gun shots and saw Kevin Smith holding a gun. Hill claimed that he drove Smith from the scene, and Smith admitted that he "shot into a crowd." Hill further reported hearing Smith brag on approximately thirty occasions about committing the homicides at the tavern.

¶4 Hill's statement included a description of Hill's relationship with Smith. Hill stated that the two men were formerly close friends. Hill, however,

now believes that Smith is the confidential informant whose disclosures to the police led to Hill's arrest for narcotics offenses. Hill is presently serving a sixteen-year prison sentence for those offenses, and he no longer has any contact with Smith.

¶5 The circuit court entered a decision and order without a hearing denying Johnson's motion for a new trial. Johnson appeals.

DISCUSSION

¶6 The decision to grant or deny a motion for a new trial based on newly-discovered evidence rests in the circuit court's sound discretion. *See State v. Morse*, 2005 WI App 223, ¶14, 287 Wis.2d 369, 706 N.W.2d 152. Such motions, however, "are entertained with great caution." *Id.* (citation omitted). To obtain a new trial based on newly-discovered evidence, the defendant must prevail in a multi-pronged inquiry. *See State v. Love*, 2005 WI 116, ¶¶43-44, 284 Wis.2d 111, 700 N.W.2d 62. The defendant must first prove by clear and convincing evidence 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." *Id.*, ¶43 (citation omitted). If the defendant satisfies the burden of proof as to these four criteria, "then it must be determined whether a reasonable probability exists that had the jury heard the newly-discovered evidence, [the jury] would have had a reasonable doubt as to the defendant's guilt." *State v. Plude*, 2008 WI 58, ¶32, 310 Wis. 2d 28, 750 N.W.2d 42. To answer this question, a court must determine, as a matter of law, "whether a jury would find that the newly-discovered evidence had a sufficient impact on the other evidence presented at

trial that a jury would have a reasonable doubt as to the defendant's guilt." *Id.*, ¶33.

¶7 On appeal, as in the circuit court, the State concedes that Johnson has proved the first four criteria necessary to obtain a new trial. The State maintains, however, that Hill's statement would not raise a reasonable doubt at trial about Johnson's guilt. Our review is *de novo*. See *State v. Corey J.G.*, 215 Wis. 2d 395, 405, 572 N.W.2d 845 (1998) (we review questions of law *de novo*). We conduct our review in light of both the evidence offered at trial and the evidence that Johnson proffered in his postconviction motion. See *Plude*, 310 Wis. 2d 28, ¶33.

¶8 We begin by considering the evidence of Johnson's guilt presented by the State at trial. First, the State presented Johnson's confession. In that confession, Johnson admitted shooting into a crowd gathered at the Cream City Tavern. He described the clothing that he wore at the time: a gray hooded sweatshirt, black jeans, and a brown baseball cap. He admitted a motive for the crimes: people at the tavern were laughing at him because a woman bumped into him and gave him a bloody nose, so he fired into the crowd to retaliate for the ridicule.

¶9 Numerous witnesses corroborated Johnson's confession. Shyrell Caldwell testified that he owned the Cream City Tavern and that he knew Johnson by name. According to Caldwell, he was standing in the doorway of the tavern on September 30, 2000, when he noticed Johnson in a group of people lingering outside at closing time. Caldwell saw that Johnson was wearing a gray hooded sweatshirt, black pants, and a tan baseball cap, and Caldwell observed Johnson bleeding. Caldwell heard another person tease Johnson, and Caldwell heard

Johnson's mumbled response about "get[ting] this piece of trouble." Caldwell told Johnson to calm down and encouraged him to "take the stuff up the road somewhere" because Caldwell did "n[o]t want any problems" in front of the tavern. When Caldwell started to go back inside the tavern, he heard shots fired. He turned and saw people "screaming, crying, running [and] ducking." Then he saw Johnson standing nearby and heard Johnson say "yeah, how do you like that?"

¶10 Vicko Battle, a tavern employee, testified that he heard gunshots and a few moments later he saw Johnson walking away from the scene holding a gun. Battle also testified that when he saw Johnson shortly before the shooting, Johnson was wearing a gray sweatshirt and he was bleeding.

¶11 Terry Farmer, another tavern employee, saw people in front of the tavern teasing a man wearing a gray shirt, jeans, and a tan hat. Farmer saw that the man was bleeding, and Farmer heard the man say, "I should get something started." Shortly thereafter, Farmer heard gunshots. After the shooting stopped, Farmer saw the man in the gray shirt standing up while everyone else was on the ground or fleeing, and Farmer heard the man say, "[t]here's something started now."

¶12 Timothy Williams, one of the victims, told the jury that he and Johnson first met in middle school. Williams saw Johnson bleeding in front of the tavern, and Williams spoke briefly to Johnson at that time. When Williams turned away from Johnson, Williams was shot in the back of the leg.

¶13 The State also presented the testimony of Clinton Harrison, a Milwaukee homicide detective. He stated that several days after the shootings at the tavern, he met with Lisa Carter, Johnson's girlfriend. With Carter's assistance, Harrison collected the clothing that Johnson wore on the night of the shooting.

The clothing included a gray hooded sweatshirt and black jeans. Additionally, Harrison examined the property that Johnson had with him when he was arrested two days after the shootings, and Harrison determined that Johnson had a “light green to tan Brewer’s baseball cap” on inventory at the jail.

¶14 We turn to an examination of Hill’s statement, the only evidence that Johnson offered to support his motion for a new trial. Hill claimed that he saw Smith, not Johnson, outside of the Cream City Tavern on the night of the homicides and that Smith had a gun. Hill additionally claimed that he heard Smith confess to the homicides on multiple occasions. Our review discloses that Hill did not claim that he saw Smith fire the gun. Further, Hill’s statement posited no motive for the shooting, but rather reflected that Hill “was upset that [Smith] shot people and shot them for no reason.” Additionally, Hill’s statement suggests that Hill has a basis for harboring hostility towards Smith, because Hill believes that he is serving a substantial prison sentence due to Smith’s actions.

¶15 The circuit court properly exercised its discretion when it rejected Johnson’s claim for a new trial. A circuit court may deny a postconviction motion without a hearing if the record conclusively demonstrates that the defendant is not entitled to relief. *See State v. Bentley*, 201 Wis. 2d 303, 309-10, 548 N.W.2d 50 (1996). The State presented overwhelming evidence against Johnson at trial. In light of the State’s trial evidence, Johnson cannot demonstrate any likelihood that a jury would have a reasonable doubt about his guilt based on Hill’s belated, uncorroborated, and self-serving allegations. *See Plude*, 310 Wis. 2d 28, ¶32.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2009-10).

