

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

February 10, 2000

Cornelia G. Clark  
Acting Clerk, Court of Appeals  
of Wisconsin

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**No. 98-2863**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**v.**

**JODY MAYO,**

**DEFENDANT-APPELLANT.**

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APPEAL from an order of the circuit court for Rock County:  
JOHN H. LUSSOW, Judge. *Affirmed.*

Before Dykman, P.J., Roggensack and Deininger, JJ.

¶1 PER CURIAM. Jody Mayo appeals from the fourth trial court order denying her postconviction motion for a new trial. She challenges the trial court's determination that another woman's postconviction statements of sole culpability in the crime for which Mayo was convicted lacked sufficient guarantees of reliability to be admissible. We affirm the latest order determining that Mayo is

not entitled to a new trial, however, because we conclude the trial court properly exercised its discretion on remand. We also reject the argument that this court should grant Mayo discretionary reversal.

## BACKGROUND

¶2 In 1984, Mayo was convicted of the first-degree murder of Randall Bleiler. In a separate trial, another woman, Michelle Lambert, was also convicted of Bleiler's murder. This court on direct appeal held that sufficient, properly admissible evidence existed from which a reasonable jury could have found Mayo guilty. *See State v. Mayo*, No. 84-2277-CR, unpublished slip op. (Wis. Ct. App. Apr. 17, 1986).

¶3 Several years after her appeal, Mayo learned that Lambert had made a number of oral and written statements confessing to the crime and professing that Mayo did not have anything to do with it. Mayo brought a postconviction motion under WIS. STAT. § 974.06 (1991-92) requesting a new trial based on these statements. The trial court denied her postconviction motion without a hearing, but this court reversed the summary order and remanded the matter for further proceedings. The trial court then conducted *in camera* proceedings and entered a supplemental decision denying the postconviction motion. In an order dated December 22, 1994, this court again reversed the trial court, ordered the *in camera* proceedings unsealed, and required that an open evidentiary hearing be conducted on the effect of Lambert's statements.

¶4 On remand, Mayo took the stand for the first time. She denied that she had participated in the murder, and said she had learned details of the crime from Lambert the following day. Lambert claimed she had a right not to incriminate herself on grounds of perjury or pending possible federal habeas

corpus relief, and she refused to testify at the postconviction hearing even after the trial court had rejected her Fifth Amendment claim. The trial court then declared her unavailable and admitted her prior statements through several witnesses.

¶5 One of these witnesses, Dr. Darold Treffert, was a psychiatric consultant at Taycheedah who treated Lambert on a biweekly basis from June of 1984 until September of 1992. He diagnosed Lambert as suffering from schizo-affective schizophrenia, involving both thought and mood disorders and characterized by disorganized thinking, suspicions, and hallucinations. He noted that Lambert's schizophrenia would not prevent her from knowing and telling the truth, except to the extent that she suffered from hallucinations or delusions. He further noted that her symptoms would naturally appear and disappear in cycles, that they could be managed with psychotropic medications, and that it would generally take several weeks for Lambert to decompensate, that is, work the medication out of her bloodstream and begin showing symptoms again, on those occasions when she would periodically discontinue her medication.

¶6 Treffert testified that Lambert tended to maintain her innocence during her early<sup>1</sup> treatment sessions, as she had at trial. However, on a few occasions, she indicated that she was considering changing her plea to not guilty by reason of insanity. During a session on December 16, 1986, she expressed concern that if she changed her plea, all of the family and friends with whom she had maintained her innocence would feel misled, and might no longer continue to visit her in prison. She also said, "If Jody Mayo finds this out, she's going to kill

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<sup>1</sup> Treffert only testified as to conversations which had occurred prior to the point in time when Lambert waived her doctor patient confidentiality by raising her own mental status in postconviction proceedings.

me,” and worried that she might face reprisals from outside the institution. Dr. Treffert believed that Lambert was asymptomatic during this session.

¶7 Another witness, Robert Owens, was a clinical psychologist at Taycheedah. He testified that Lambert burst into his office in an agitated state on either December 5 or 6,<sup>2</sup> 1990. She told him she could not live with the guilt anymore. She said Mayo did not belong at Taycheedah because she was not even at the scene of the murder that night. Lambert insisted it was all her fault, that she had lied at trial. She asked to talk to her attorney. Owens placed the call for her, and heard her make similar statements to her attorney. He thought Lambert seemed less agitated after speaking to the attorney, but the attorney had apparently indicated that he could not help her. Owens believed Lambert was sincere, and did not notice any overt evidence of hallucinations. He did not know whether she was having a delusion because he did not know what the truth of the matter was. But, he thought that the manner in which Lambert came in to his office, blurting out her confession all at once, could indicate she was operating under a fixed false belief, possibly as a product of her guilt.

¶8 Marilyn Morris, the Taycheedah chaplain, testified that Lambert came into her office on December 6, 1990, without an appointment, crying that nobody loved her. Lambert told Morris that Mayo had not committed the murder, and that she had killed Bleiler by herself. Morris believed Lambert to be sincere, but noted that she seemed very focused on her own statements. Morris understood from staff that Lambert had not been taking her medications that week.

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<sup>2</sup> Owens had not made any contemporaneous notes of the conversation. He thought that it occurred the same day that Lambert spoke to Susan Lopau. However, Lopau, who had made contemporaneous notes, thought that Lambert had spoken to Owens the day before she spoke with her.

¶9 Susan Lopau was Lambert's social worker at Taycheedah for six or seven years. She testified that Lambert was consistently resistant to discussing or confronting her crime. However, on one occasion, Lambert told her that she feared some of the people in Janesville who had committed the crime, and expressed concern that "[i]n Janesville, they're going to come get me."

¶10 Lopau testified that Administrative Captain Jim Carpenter called her on December 6, 1990, to tell her he had Lambert in his office and would like to send her down to make some phone calls because she was talking about her crime. Shortly thereafter, Lopau found Lambert sitting in the hallway outside the chaplain's office saying "Jody didn't do it." Lambert was agitated and crying. Lopau brought Lambert into her office. Lambert pleaded for Lopau to allow her to call the Janesville D.A. to tell him Jody did not do it, that she was not even there. Lopau thought Lambert's thoughts were well-organized and noted Lambert was very insistent. Lopau advised Lambert to call her own attorney before calling the D.A. Lambert told Lopau that she had already spoken to her attorney the day before and he was unable to help her, so she called trial counsel.

¶11 After Lambert told Lopau that trial counsel could not help her either, Lopau called Ken Streit at the Legal Aid for Institutionalized Persons Program, and arranged to have him come to see Lambert the following week. Lambert then calmed down, and Lopau let her leave without calling clinical services, which she would have done if she had believed Lambert was delusional. When Lopau checked back with Lambert on Monday, Lambert told her, "I'm not going to talk to anyone. I'm done talking about it," so Lopau called Streit and told him not to come. She also advised Lambert that if it was really important, she could write the D.A. a letter. Lopau did not know whether Lambert was being truthful or not,

because she did not know the details of the crime. She did not, however, believe Lambert had been scheming with Jody Mayo.

¶12 Sometime between January and July of 1992, Lambert wrote a letter to her future husband Gayle Ellis which said, “I’m afraid I’d lose you if I told you all my secrets. I have problems I’ve never talked about with anyone. It’s pretty scary cause I’m all alone in this misery.” Lambert also wrote an undated letter to the Taycheedah warden and a letter to the Janesville Police Department, postmarked August 3, 1993, confessing that she had killed Bleiler and stating that Mayo was innocent.

¶13 Based on the evidence at the evidentiary hearings, the trial court entered another order denying Mayo’s postconviction motion. Mayo again appealed. In a published decision dated February 26, 1998, this court again reversed the circuit court. *See State v. Mayo*, 217 Wis. 2d 217, 579 N.W.2d 768 (Ct. App. 1998). We remanded the matter for a circuit court determination on whether Mayo’s newly discovered evidence was sufficiently corroborated under the test set forth in *State v. McCallum*, 208 Wis. 2d 463, 561 N.W.2d 707 (1997), and if so, whether there was a reasonable probability of a different result on retrial. *See Mayo*, 217 Wis. 2d at 229-30. By an order dated September 22, 1998, the trial court again denied Mayo’s postconviction motion, finding no reasonable probability that a jury, considering both Lambert’s original trial testimony and her later statements, would have a reasonable doubt as to Mayo’s guilt.

## STANDARD OF REVIEW

¶14 The decision whether to grant a new trial based upon newly discovered evidence lies within the trial court's discretion.<sup>3</sup> See *State v. Kimpel*, 153 Wis. 2d 697, 702, 451 N.W.2d 790 (Ct. App. 1989). In order to exercise its discretion whether to grant a new trial when the new evidence offered is recantation testimony, the trial court may first need to make determinations as to whether the recantation is incredible as a matter of law, or the circumstances surrounding the recantation provide sufficient assurances of its trustworthiness.<sup>4</sup> See *State v. Kivioja*, 225 Wis. 2d 271, 296, 592 N.W.2d 220 (1999).

¶15 A court properly exercises discretion when it considers the facts of record under the proper legal standard and reasons its way to a rational conclusion. *Burkes v. Hales*, 165 Wis. 2d 585, 590-91, 478 N.W.2d 37 (Ct. App. 1991). Thus, we will not overturn a discretionary determination merely because we would have reached a different result. Rather, “[b]ecause the exercise of discretion is so

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<sup>3</sup> Mayo argues that we should review the trial court's decision de novo because it presents a “constitutional question.” It is true that we may independently review whether the denial of a new trial deprives the defendant of any constitutional rights, such as due process. See *State v. Coogan*, 154 Wis. 2d 387, 394-95, 453 N.W.2d 186 (Ct. App. 1990). However, Mayo raises no specific constitutional claims on this appeal. Mayo's confusion about the standard of review may arise from the fact that, in the previous appeal, we independently evaluated whether the trial court had exercised its discretion under the proper standard of law. Upon concluding that it had not because it was operating under an erroneous view of the law, we remanded to allow it to exercise its discretion under the proper standard. Thus, we did not reach the discretionary component of the trial court's decision, and did not apply the more deferential standard.

<sup>4</sup> It is not entirely clear from the case law whether a corroboration determination is factual, discretionary, or legal in nature. Recent cases, such as *State v. McCallum*, 208 Wis. 2d 463, 561 N.W.2d 707 (1997), appear to decide the question independently. But cf. *State v. Brown*, 96 Wis. 2d 238, 242-46, 291 N.W.2d 528 (1980) (treating corroboration as a factual finding). However, because we would reach the same result in this case regardless of whether we employed a deferential or de novo standard of review, we need not decide that question here.

essential to the trial court's functioning, we generally look for reasons to sustain discretionary decisions.” *Id.* We review the legal determinations underlying a trial court’s exercise of discretion de novo, but we will not disturb the trial court’s factual findings unless they are clearly erroneous. *See State v. Keith*, 216 Wis. 2d 61, 69, 573 N.W.2d 888 (Ct. App. 1997); WIS. STAT. § 805.17(2) (1997-98).<sup>5</sup>

## ANALYSIS

¶16 In order to obtain a new trial based upon newly discovered evidence, Mayo needed to show, by clear and convincing evidence, that: (1) Lambert’s statements came to her knowledge after the trial; (2) Mayo’s failure to discover the evidence earlier had not resulted from a lack of diligence; (3) the statements are material to an issue in the case; (4) the statements are not merely cumulative to evidence adduced at trial; and (5) the statements create a reasonable probability that a different result would be reached at a new trial. *See* WIS. STAT. § 805.15(3). The State conceded on the prior appeal that Mayo had made a sufficient showing on the first four criteria. *See Mayo*, 217 Wis. 2d at 219-20. Therefore, the question again before us following remand is whether the trial court reasonably determined that a jury, looking at both the evidence introduced at the original trial and Lambert’s postconviction statements, would have no reasonable doubt as to Mayo’s guilt.

¶17 A third-party confession of sole responsibility which is completely unworthy of belief could not persuade a reasonable juror of the defendant’s innocence. *See Kivioja*, 225 Wis. 2d at 296. Thus, the admissibility and probable

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<sup>5</sup> All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.



effect of Lambert's statements upon retrial depends in large part upon their credibility and reliability.

¶18 As we explained the last time this case was before us, because Lambert's statements can be categorized as inherently unreliable recantations of her earlier testimony,<sup>6</sup> they cannot be deemed sufficiently trustworthy to warrant a new trial unless they are corroborated by other newly discovered evidence. *See Mayo*, 217 Wis. 2d at 229-30. Where, as here, there is no physical evidence to corroborate the original testimony, the corroboration requirement may be satisfied either by: (1) "significant independent corroboration" of the falsity of the earlier testimony; or (2) "the existence of a feasible motive for the false testimony together with circumstantial guarantees of the trustworthiness of the recantation." *McCallum*, 208 Wis. 2d at 477.

¶19 By adopting the State's arguments, the trial court determined that there was no new evidence offered at the postconviction hearing to corroborate Lambert's statements to correctional personnel under either of the two standards set forth in *McCallum*. Due to the brevity of the trial court's analysis of this issue, we will search the record to determine whether it represents a proper exercise of discretion.

¶20 We first consider whether the trial court reasonably determined that Lambert's multiple postconviction statements of culpability failed to provide independent corroboration for one another. Mayo emphasizes that Lambert's

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<sup>6</sup> The recantations in this case vary from the typical recantation in that they do not involve the withdrawal of an accusation made at trial. They do, however, involve a significant change from Lambert's testimony given at trial, as well as contradict some pretrial statements Lambert made implicating Mayo which were introduced at trial.

statements were made to a number of different people over a substantial period of time. However, while multiple statements by the same person might be *self*-corroborated in this manner, we do not see how they have been *independently* corroborated. No one else has stepped forward with information which would show that Lambert and Mayo parted company before the murder, and there is no new physical evidence to support that theory. Nor did Lambert's new statements offer any details which could be investigated, such as the identity or location of the murder weapon, which was never found. We therefore have little difficulty concluding that the trial court's determination in this regard was reasonable.

¶21 We next consider whether the trial court reasonably determined that Lambert's post-conviction statements failed to satisfy the second, more relaxed corroboration alternative under *McCallum*. Unlike the usual situation in which the testimony being recanted is an accusation, the testimony being recanted here was Lambert's own denial of any involvement in the crime. In these circumstances, it is clear that Lambert had a "feasible motive" for falsifying her statements at trial. As Dr. Treffert explained at the postconviction hearing, Lambert exhibited concern during a treatment session that the family and friends who had supported her claims of innocence would feel misled if she were to change her plea to not guilty by reason of insanity. This leaves us with the question whether the circumstances surrounding Lambert's postconviction statements were sufficient to guarantee their trustworthiness.

¶22 "Assurances of trustworthiness can include the spontaneity of the statement, whether the statement is corroborated by other evidence in the case, the extent to which the statement is self-incriminatory and against the penal interest of the declarant, and the declarant's availability to testify under oath and subject to cross-examination." *Kivioja*, 225 Wis. 2d at 296-97. Conversely, a recantation

may contain so many internal inconsistencies as to be incredible as a matter of law. *See id.* at 300-01.

¶23 Mayo argues that Lambert's statements were trustworthy because they were self-incriminatory, spontaneously made, and consistently repeated on a number of different occasions. While these circumstances do tend to weigh in Mayo's favor, there are other factors present here which undermine the inherent reliability of Lambert's statements.

¶24 Lambert did not make her postconviction statements under oath and she refused to testify at Mayo's postconviction hearing. Lambert's unwillingness to swear to her recantations in court leaves some doubt as to whether she continues to maintain Mayo's innocence. Furthermore, because the postconviction statements were not subject to cross-examination, the State never had an opportunity to ascertain whether Lambert was claiming to have acted all alone, or in concert with a person or persons other than Mayo. It is therefore difficult to harmonize Lambert's claim that Mayo wasn't at the crime scene with the evidence produced at trial which suggested multiple assailants.

¶25 Regardless of whether Mayo's current defense theory is that Lambert committed the murder alone or with help from others, other evidence still contradicts the premise that Mayo and Lambert parted company before the murder was committed. One witness testified he dropped Mayo and Lambert off on a corner half a block from the victim's house and saw them heading in that direction shortly before midnight. Three others testified they saw Lambert walking on a nearby sidewalk at approximately 12:30 a.m., with a large dark stain on her shirt at the very height where an expert had testified the murderer would have been spattered with blood. Yet Mayo, Lambert and the Sjuggerud brothers all testified

that Mayo and Lambert both came over to the Sjuggerud's house around midnight, and spent at least an hour there before Lambert and John Sjuggerud walked Mayo home. Lambert's postconviction assertions that Mayo was not there when Lambert committed the murder cannot be easily reconciled with the evidence at trial that Mayo was with Lambert until somewhere between one and two in the morning, and that Lambert already appeared to have blood on her shirt by 12:30 a.m. Nor can Lambert's assertions that Mayo was not at the murder scene be reconciled with the testimony of those witnesses who overheard Mayo discussing her involvement in the murder. Therefore, Lambert's recantation was not corroborated by other evidence in the case.

¶26 In addition, the State presented evidence that Lambert had been diagnosed with schizo-affective schizophrenia, and had apparently discontinued taking her medication a week to ten days before several of the statements were made. The trial court was in the best position to resolve any conflict between the witnesses as to whether Lambert was delusional when she spoke to the prison officials. Taking all of these factors into account, we are satisfied the trial court properly determined Lambert's statements lacked sufficient guarantees of trustworthiness.

¶27 Because Lambert's statements were not independently corroborated, and were not sufficiently trustworthy to satisfy the relaxed corroboration requirement under *McCallum*, it is not reasonably probable that they would have produced a different outcome at a new trial. Therefore, the trial court properly exercised its discretion when it denied Mayo's motion for a new trial on the basis of newly discovered evidence.

¶28 Finally, we decline to order a new trial in the interest of justice. In her *McCallum* concurrence, Chief Justice Abrahamson suggested that a discretionary reversal might be available on appeal, even after a circuit court has determined that there is no reasonable probability of a different result on retrial. *See McCallum*, 208 Wis. 2d at 491 n.13 (Abrahamson, C.J., concurring). However, because we previously have explicitly prohibited such a result in a WIS. STAT. § 974.06 situation, Mayo's only possibility for discretionary reversal comes before the supreme court. *See State v. Allen*, 159 Wis. 2d 53, 464 N.W.2d 426 (Ct. App. 1990).

*By the Court.*—Order affirmed.

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