COURT OF APPEALS
DECISION
DATED AND FILED

April 27, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 99-2074

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

STEVEN D. CATHEY,

DEFENDANT-APPELLANT.

APPEAL from a judgment and orders of the circuit court for La Crosse County: JOHN J. PERLICH, Judge. *Affirmed.*

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

¶1 PER CURIAM. Steven Cathey appeals from a judgment convicting him of third-degree sexual assault of a child and from two orders denying his motion to withdraw his plea. He claims the trial court should have allowed him to withdraw his plea based upon an affidavit from a newly discovered witness who averred the victim had told her that no sexual assault occurred. In the alternative, he asks that the matter be remanded for a new plea withdrawal hearing at which

the trial court would compel the attendance of the impeachment witness. For the reasons discussed below, we reject his contentions and affirm.

BACKGROUND

¶2 Cathey was charged with two counts of second-degree sexual assault of a child and one count of bail jumping after fourteen-year-old Stephanie S. reported that Cathey and another man had met her and her friend Angela D. on the street and taken them back to their motel room, where they had sex. Stephanie, who has a comprehension deficit which somewhat limits her understanding and vocabulary, testified at the preliminary hearing that she had sex with Cathey once in the bathroom and once on the bed. She said she did not offer any verbal objections, even though she did not want to have sex, because she did not know that Cathey wanted to have sex with her until he started kissing her and removing her clothes in the bathroom, and she was afraid. She said she and Angela told the men they were seventeen.

¶3 After the preliminary hearing, the State added an additional party-to-the-crime sexual assault count, relating to Angela. Cathey then agreed to plead no contest to one count of third-degree sexual assault of Stephanie in exchange for dismissal of the other charges. At the sentencing hearing, counsel asked for a continuance in order to interview some witnesses whom she had learned about after the plea hearing, but with whom she had not yet been able to speak. Cathey did not move to withdraw his plea at that time. The trial court denied the continuance based on the speculative nature of the information to be gained, and to sentenced Cathey to five years in prison.

¶4 Counsel was subsequently able to locate a witness, Amy Ehlo, who signed an affidavit saying that Stephanie had told her that she never had sex with

Cathey. Cathey moved to withdraw his plea based on Ehlo's statement, and subpoenaed Ehlo. After Ehlo twice failed to appear at scheduled hearings, the trial court denied the plea withdrawal motion for lack of proof. Cathey moved to reconsider, and asked for a body attachment to secure Ehlo's presence at a new hearing. The trial court denied the renewed motion, and Cathey appealed.

STANDARD OF REVIEW

¶5 In order to withdraw a plea after sentencing, a defendant must demonstrate by clear and convincing evidence that plea withdrawal is necessary to correct a manifest injustice. ***State v. Krieger***, 163 Wis. 2d 241, 250-51, 471 N.W.2d 599 (Ct. App. 1991). The determination of whether a manifest injustice has occurred lies within the trial court's discretion. *See* ***State v. Farrell***, 226 Wis. 2d 447, 453-54, 595 N.W.2d 64 (Ct. App. 1999). We will not disturb a discretionary determination by the trial court so long as it considered the facts of record under the proper legal standard and reasoned its way to a rational conclusion. *See* ***Burkes v. Hales***, 165 Wis. 2d 585, 590, 478 N.W.2d 37 (Ct. App. 1991).

ANALYSIS

¶6 Newly discovered evidence may create a manifest injustice warranting plea withdrawal when: (1) the evidence was discovered after the entry of the plea; (2) the defendant was not negligent in seeking evidence; (3) the evidence is material to an issue in the case; and (4) the evidence is not merely cumulative. *See* ***State v. McCallum***, 208 Wis. 2d 463, 473, 561 N.W.2d 707 (1997). If these four criteria are satisfied by clear and convincing evidence, the circuit court must then determine whether a reasonable probability exists that a

jury considering both the evidence supporting the plea and the newly discovered evidence would have a reasonable doubt as to the defendant's guilt. *See* ***id***.

¶7 The State does not dispute that Cathey discovered Ehlo's statement after he had entered his plea, and that Ehlo's testimony would be material impeachment evidence which would not be merely cumulative. It contends, however, that Cathey failed to exercise due diligence in discovering the evidence, and that the evidence fails to create a reasonable probability of acquittal.

¶8 Trial counsel testified that she was not aware of Ehlo's existence until after the plea had already been entered, and therefore had no reason to interview her before that time. However, the due diligence standard for investigation is applied not to what counsel knew, but to what the defendant knew. *See* ***State v. Albright***, 98 Wis. 2d 663, 674, 298 N.W.2d 196 (Ct. App. 1980). The record shows that Cathey knew that Thomas Owen was a confidential informant for the State, and knew that Ehlo was referred to as Owen's girlfriend in a police report. Cathey indicated in a discovery motion that he was investigating whether Owen could be pressuring Stephanie to make a false allegation against Cathey in order to obtain favorable treatment on charges pending against Owen. Cathey also indicated at a pretrial hearing on the substitution of counsel that there were two more unidentified witnesses he would like to get in touch with to help him show the charges were untrue. Under these circumstances, it would be reasonable to expect Cathey to find out whether Ehlo knew anything which would help show that Owen was pressuring Stephanie into fabricating the charges before Cathey entered his plea.

¶9 Furthermore, we agree with the State that there is no reasonable probability that Ehlo's testimony impeaching Stephanie's testimony would have

led to an acquittal, because the State's case did not rely solely on Stephanie's credibility. Angela would also have testified that she saw Cathey and Stephanie having sex on the motel room bed, and the newly discovered evidence Cathey offers would do nothing to impeach Angela's testimony. We therefore conclude that the trial court properly exercised its discretion when it denied Cathey's motions to withdraw his plea and to issue a body attachment compelling Ehlo's testimony at a new plea withdrawal hearing.

By the Court.—Judgment and orders affirmed.

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