

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 25, 2010

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. 2009AP1213-CR

Cir. Ct. No. 2008CF1022

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

VICTOR MERLIN HASEL,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Rock County: R. A. BATES, Judge. *Affirmed.*

Before Dykman, P.J., Vergeront and Higginbotham, JJ.

¶1 PER CURIAM. Victor Hasel appeals from a judgment convicting him of repeated sexual assaults of the same child, and an order denying his motion for postconviction relief. The issue is whether the victim's recantation entitles

him to a new trial, either because it is newly discovered evidence, or in the interest of justice. We affirm.

¶2 The State charged Hasel on evidence that he had repeated sexual contacts with Baylie M., the eight-year-old stepdaughter of his son. At his jury trial the evidence included videotaped statements from Baylie that Hasel repeatedly assaulted her by hand-to-genital contact, and by having anal intercourse with her. After the jury found him guilty but before sentencing, he moved for a new trial on newly discovered evidence, consisting of affidavits from Baylie, her mother, and a psychotherapist, Jean Berghammer. In her affidavit Baylie stated that the only contact she had with Hasel's penis was when it touched her lower leg, while Hasel was clothed. Her mother's affidavit asserted that Baylie recanted after a rectal examination was scheduled. Berghammer's affidavit included her opinion that Baylie suffered from "reactive attachment disorder," which caused her to fabricate the allegations against Hasel. The circuit court denied relief, however, concluding that a new trial was not warranted by the evidence presented in the affidavits.

¶3 Hasel brought essentially the same motion, relying on the same three affidavits, after the court sentenced him and entered his conviction. Additionally, at the hearing on his motion he introduced testimony from Berghammer regarding Baylie's reactive attachment disorder and the fact that a symptom of the disorder was "crazy lying." Berghammer further testified to a therapy session with Baylie during which Baylie denied that Hasel had sexually assaulted her, and asked "what's that?" when shown the penis on a male doll. Berghammer also testified that she was certain Baylie was not coached nor pressured into her recantation. After hearing the testimony the circuit court denied the motion, resulting in this appeal.

¶4 Whether to grant a new trial on newly discovered evidence is discretionary and we will not reverse the decision on a new trial motion unless it represents an erroneous exercise of that discretion. *State v. Eckert*, 203 Wis. 2d 497, 516, 553 N.W.2d 539 (Ct. App. 1996). Newly discovered evidence may warrant a new trial where: (1) the evidence is discovered after the trial; (2) the moving party is not negligent in discovering it; (3) the evidence is material; (4) the evidence is not merely cumulative; and (5) it is reasonably probable that a different result would be reached at a new trial. *State v. Coogan*, 154 Wis. 2d 387, 394-95, 453 N.W.2d 186 (Ct. App. 1990). To satisfy the fifth factor, the only one in dispute here, the appellant must prove it reasonably probable that a retrial with the new evidence would have resulted in acquittal. *State v. McCallum*, 208 Wis. 2d 463, 473-74, 561 N.W.2d 707 (1997).

¶5 Where, as is the case here, the new evidence is a witness's recantation, the defendant must corroborate the recantation by other newly discovered evidence. *See id.* The defendant meets that burden by showing a feasible motive for the initial false accusation and circumstantial guarantees of the trustworthiness of the recantation. *Id.* at 477-78. When a witness has recanted, the court must determine "whether there is a reasonable probability that a jury, looking at both the accusation and the recantation, would have a reasonable doubt as to the defendant's guilt." *Id.* at 474. The circuit court may not deny a motion for a new trial because the court finds the recantation less credible than the witness's trial testimony. *Id.* A determination that the recantation is not credible at all, however, "is sufficient to conclude that it is not reasonably probable that a different result would be reached at a new trial." *State v. Terrance J.W.*, 202 Wis. 2d 496, 501-02, 550 N.W.2d 445 (Ct. App. 1996).

¶6 The circuit court reasonably exercised its discretion when it denied the motion for a new trial. In Baylie’s most detailed post-trial recantation, she denied any familiarity with the male sex organ. However, her prior videotaped statement showed that she was clearly familiar with the penis, and even had a name for it. From that irreconcilable discrepancy, the circuit court concluded that Baylie’s recantation was not believable. We have no basis to overturn that credibility determination. See *Gehr v. City of Sheboygan*, 81 Wis. 2d 117, 122, 260 N.W.2d 30 (1977) (while acting as the finder of fact, the trial court is the ultimate arbiter of the credibility of witnesses). As noted, a finding that a recantation is not credible is sufficient grounds to deny a motion for a new trial based on it. See *Terrance J.W.*, 202 Wis. 2d at 501-02.

¶7 Additionally, Baylie’s recantations were insufficiently corroborated to entitle Hasel to a new trial. Hasel offered no motive for the original accusation except the symptomatic lying caused by Baylie’s behavioral disorder. But while there was testimony that the disorder caused Baylie to lie, there was no evidence that it led to lying about sexually assaultive behavior. Also, the testimony about Baylie’s disorder provided no means of determining whether it was the original statement or the recantation that was false. From the testimony, it was just as likely that Baylie was lying when she recanted, with the possible motive being the “crazy lying” Berghammer attributed to her, or to avoid the scheduled rectal examination, which the child might have perceived as invasive and unpleasant. The required guarantees of the recantation’s trustworthiness were therefore lacking. In short, Hasel had the burden of corroborating Baylie’s recantations, and did not meet that burden.

¶8 Hasel also seeks a new trial under WIS. STAT. § 752.35 (2007-08),¹ which permits this court to grant discretionary relief if we are convinced “that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried.” He does not clarify under which standard he seeks relief. We conclude that he has not demonstrated sufficient reason to grant him a new trial under either standard, because we have no grounds to conclude that the circuit court erred by denying a new trial on the grounds Hasel presented. An appellate court will exercise its discretion to grant a new trial in the interest of justice “only in exceptional cases.” *State v. Cuyler*, 110 Wis. 2d 133, 141, 327 N.W.2d 662 (1983). We do not believe that this case warrants such exceptional treatment.

By the Court.—Judgment and order affirmed.

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

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

