

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 22, 1999

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. 97-3801-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CLEOPHUS AMERSON,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County:
JEFFREY A. WAGNER, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Schudson, JJ.

PER CURIAM. Cleophus Amerson appeals from the trial court's order denying his motion for postconviction relief. A jury convicted Amerson of two counts of first-degree sexual assault of a child. See § 948.02(1), STATS. Amerson argues that the trial court erred in refusing to permit him to call the child-victim to testify at his postconviction hearing, and that the trial court failed

to apply the proper legal standard in denying his postconviction motion. We affirm.

BACKGROUND

Amerson was tried on March 7 and 8, 1994. At trial, Denise M., Amerson's girlfriend, testified that on the evening of December 20, 1993, Amerson and Denise's daughter, nine-year-old Tawanda M., walked to the store together. She testified that when they returned home from the store, Tawanda entered a few minutes before Amerson, and that Tawanda looked scared and hurt. Denise M. testified that she asked Tawanda what was wrong, but that before Tawanda could answer, Amerson entered. Denise M. then stopped questioning Tawanda. Denise M. testified that she waited until Amerson left and then she took Tawanda into the bathroom, out of the presence of Amerson's nephew, who was also at the home, and again asked her what was wrong. She testified that Tawanda was afraid to tell her what had happened. She testified that she then checked Tawanda's vaginal area and saw that Tawanda's vagina was red and swollen. Denise M. also testified that she saw a white fluid on Tawanda, and that the fluid smelled like semen.

Denise M. testified that she then hugged Tawanda, told her that everything would be all right, and asked her what had happened. Tawanda told her that Amerson had touched her and hurt her. Denise M. testified that both she and Tawanda were crying during this exchange.

Denise M. testified that Amerson returned about fifteen minutes later, and she then confronted him with what Tawanda had told her. She testified that Amerson denied having had sexual contact with Tawanda, and that she and Amerson then got into a physical fight. Denise M. testified that she pulled a knife

on Amerson, but that he overpowered her and got the knife away. She further testified that her son called the police, and Amerson then left the home. Denise M. chased him for a few blocks, but then returned home.

Officer Ivory Britton testified that she went to Denise M.'s home to investigate the reported knife fight. Denise M. was not home when Officer Britton first arrived, but when she returned, she told Officer Britton that Amerson had raped Tawanda. Officer Britton testified that she then interviewed Tawanda outside her mother's presence and asked her what had happened. Officer Britton testified that Tawanda seemed terrified, and that she kept ducking her head down while she was talking. Officer Britton testified that Tawanda described penis-to-vagina intercourse, and said that Amerson did it to her. Officer Britton testified that Tawanda described another incident of penis-to-vagina intercourse with Amerson in addition to the one that occurred that evening. Tawanda told Officer Britton that the previous sexual assault occurred near the time she first moved into her home, around August of 1993, and that she had not previously told anyone of the previous assault because she was scared.

After Officer Britton spoke to Tawanda, she took Tawanda and her mother to the hospital. At the hospital, Detective William Stawicki spoke to Tawanda. Tawanda told Detective Stawicki about the two sexual assaults by Amerson. Tawanda told Detective Stawicki that the first sexual assault occurred in the summer, inside a burned and abandoned house. Tawanda told Detective Stawicki that the second sexual assault occurred earlier that evening, on the way home from the store; she said that Amerson took her into a lot full of phone company trucks and sexually assaulted her.

Detective Stawicki testified that he drove Tawanda and her mother to the area near the store, and Tawanda identified the Warner Cable parking lot as the location of the sexual assault. Detective Stawicki testified that there was a fence surrounding the lot, and that Tawanda directed him to an opening in the fence through which they entered the lot. Tawanda then led Detective Stawicki to a spot between two trucks on the far south end of the lot and told him that the sexual assault occurred there. They then returned to the hospital and Tawanda was physically examined.

Doctor Ellen Klandrud testified that she examined Tawanda's genitalia and found two healed tears in Tawanda's hymenal ring that were consistent with a penetration on a prior date. She also testified that a portion of Tawanda's hymen was red and swollen, evidencing a recent trauma to the tissue.

Tawanda testified that on the evening of December 20, 1993, she went to the store with Amerson, and on the way home, Amerson took her into a parking lot full of gas company trucks. She testified that he took her between two trucks, pulled down her pants and underwear, and then his own pants and underwear, lay on top of her on the ground, placed his penis in her vagina, and moved back and forth on top of her. Tawanda testified that after the sexual assault they went home, where she told her mother that Amerson had raped her. Tawanda said that Amerson's nephew was present when she talked to her mother.

Tawanda testified that the previous sexual assault occurred a few months earlier, shortly after the school year had begun. She said that she went to a store with Amerson, and that, on the way home, he took her into a burned-up house, where he had penis-to-vagina sexual intercourse with her. Tawanda

testified that Amerson threatened to kill her and her mother if she told anyone about the sexual assault.

The jury found Amerson guilty of both counts of sexual assault. Before sentencing, Amerson filed a motion for a new trial, asserting that Tawanda had recanted, and requesting a hearing on the matter. The motion asserted that, after trial, Tawanda, her uncle and her mother met with Amerson's attorney, who recorded the following conversation. Tawanda's uncle and her mother both said Tawanda told them that Amerson had not touched her. They then asked Tawanda whether Amerson touched her, and Tawanda said, "No." They also asked her whether anyone had forced her to say what she was saying, and whether what she was saying was the truth. Tawanda answered those questions, "No," and "Yes," respectively. In support of the motion, Amerson also filed an affidavit by Denise M., attesting to the foregoing information.

In response to Amerson's motion, the State stipulated that Tawanda had recanted as indicated in the motion, but asserted that Amerson was not entitled to a hearing on his motion for a new trial because he had not provided any corroboration for the recantation. The State also presented affidavits indicating that Tawanda was pressured into recanting. Specifically, the State offered an affidavit from Valerie Chambers, a counselor who had been assigned to Tawanda's case, and the presentence investigation report, which was written by Glenda Meeks. Meeks swore under oath that the information in the report was true.

Chambers's affidavit related that she spoke to Tawanda, Denise M., and Tawanda's uncle after they had spoken to Amerson's attorney. Both Denise M. and Tawanda's uncle told Chambers that they had visited Amerson in

jail, and that he had professed his innocence to them. Chambers then spoke to Tawanda, and Tawanda told Chambers that Amerson did not touch her. When Chambers asked her why she previously said that he did touch her, Tawanda said she didn't know. Chambers then told Tawanda that it was important to tell the truth, and Tawanda began crying. Tawanda told Chambers that if she said it had never happened, they would let Amerson out of jail. She told Chambers that she had been to the jail to visit Amerson, and that her mother was sad because Amerson was in jail. Chambers then asked Tawanda what did happen on the day she first told her mother she had been raped, and Tawanda struggled with her explanation when she reached the point at which she and Amerson had been near the trucks; Chambers asked Tawanda to continue, but Tawanda looked at her tearfully and claimed that Amerson didn't do it. Chambers asked Tawanda how her genitalia had gotten hurt, and Tawanda said that she didn't know, and that she had fallen down. Chambers also asked Tawanda about the healed tears of her hymen, and Tawanda said that they had resulted from Amerson raping her at the abandoned house. Chambers again asked Tawanda about the later injury to her genitalia, but Tawanda said she didn't know how it happened, cried, and asked if they would let Amerson out of jail.

In the presentence investigation report, which was apparently prepared before Tawanda recanted, Meeks related that Tawanda's version of the two sexual assaults was consistent with her trial testimony. Meeks also related that Tawanda was having bad dreams about Amerson and his family trying to hurt her. Tawanda told Meeks that Amerson's family warned her that something bad would happen to her if she did not help get Amerson out of jail, and that Amerson's family offered her things to encourage her to say that Amerson had not touched her. Meeks further reported that Denise M. said she loved Amerson and

was having trouble accepting what had happened. Denise M. also told Meeks that Amerson's family had been questioning Tawanda on a daily basis.

Amerson attempted to call Tawanda to testify regarding her recantation, but the trial court denied Amerson's request, and advised Amerson to make an offer of proof. The trial court also told Amerson to file additional affidavits to corroborate Tawanda's recantation, and gave Amerson additional time to file those affidavits. Amerson did not make an offer of proof regarding Tawanda's testimony. Amerson did, however, file additional affidavits in support of his request for a new trial, both before and after sentencing. Amerson also presented witnesses, whose testimony he claimed corroborated Tawanda's recantation.

Amerson presented an additional affidavit from Denise M., in which Denise M. stated that she pressured Tawanda into saying that Amerson sexually assaulted her "for her own personal reasons." Denise M. also related that Tawanda had been sexually assaulted when she was two years old, and that Denise M. believed that the healed injuries to Tawanda's hymen may have been caused by that assault. Amerson also presented medical records regarding the sexual assault to which Denise M. referred in her affidavit. At a hearing on Amerson's motion, however, Denise M. denied pressuring Tawanda into accusing Amerson of sexual assault. She testified that Tawanda may have felt pressured to say Amerson assaulted her because she questioned Tawanda about what was wrong and examined her genitalia.

Amerson also presented testimony from his nephew, who said that, on December 20, 1993, after Tawanda came home upset and went into the bathroom with her mother, he heard Denise M. whip Tawanda with a belt when

Tawanda told her that nothing was wrong. Amerson further presented evidence that Tawanda told Amerson's mother she was sorry for what she said, but that her mother made her say it. Amerson again attempted to present Tawanda's testimony, but the trial court did not permit him to call her.

Based upon all of the foregoing evidence, the trial court denied Amerson's request for a new trial. Amerson appealed, and the case was ultimately remanded to the trial court for the trial court to reconsider Amerson's motion in light of the Wisconsin Supreme Court's decision in *State v. McCallum*, 208 Wis.2d 463, 561 N.W.2d 707 (1997). The trial court again denied Amerson's motion without hearing Tawanda's testimony.

DISCUSSION

Amerson argues that the trial court failed to evaluate his motion under the standard announced in *McCallum*, and that the trial court, therefore, erred in denying his motion for a new trial. Specifically, he argues that the trial court improperly denied his motion based on a finding that Tawanda's accusation was more credible than her recantation. Amerson also argues that the trial court erred in refusing to permit him to present Tawanda's testimony under oath, in support of his motion. He asserts that Tawanda's testimony was necessary in order for the trial court to evaluate the credibility of her recantation before determining whether he was entitled to a new trial.

"[A] motion for a new trial upon the ground of newly discovered evidence is addressed to the sound discretion of the trial court, and [an appellate] court will reverse the trial court only for an [erroneous exercise] of discretion." *State v. Sarinske*, 91 Wis.2d 14, 37, 280 N.W.2d 725, 735–736 (1979). In order to obtain a new trial based on newly discovered evidence, a party must establish

by clear and convincing evidence that the following factors are met: “(1) the evidence was discovered after conviction; (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.” *McCallum*, 208 Wis.2d at 473, 561 N.W.2d at 710–711.¹ If the defendant proves these factors by clear and convincing evidence, the court must determine whether there is a reasonable probability that a different result would be reached in a new trial. *See id.*, 208 Wis.2d at 473, 561 N.W.2d at 711.

When the newly discovered evidence is a witness’s recantation, the recantation must be corroborated by other newly discovered evidence. *See id.*, 208 Wis.2d at 473–474, 561 N.W.2d at 711. “[T]he degree and extent of the corroboration required varies from case to case based on its individual circumstances.” *Id.*, 208 Wis.2d at 477, 561 N.W.2d at 712 (alteration in *McCallum*) (quoted source omitted). The corroboration requirement is met if: “(1) there is a feasible motive for the initial false statement; and, (2) there are circumstantial guarantees of the trustworthiness of the recantation.” *Id.*, 208 Wis.2d at 477–478, 561 N.W.2d at 712. “The correct legal standard when applying the ‘reasonable probability of a different outcome’ criteria [in the context of a recantation] is 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.*, 208 Wis.2d at 474, 561 N.W.2d at 711.

¹ The supreme court recently modified the test announced in *State v. McCallum*, 208 Wis.2d 463, 561 N.W.2d 707 (1997), for application in cases where the defendant’s conviction results from a plea and the defendant moves for plea withdrawal prior to sentencing. *See State v. Kivioja*, ___ Wis.2d ___, 592 N.W.2d 220 (1999). That modification has no application to the present case.

On remand, the trial court found both that Tawanda's recantation was not sufficiently corroborated, and that there was not a reasonable probability that a jury would have a reasonable doubt as to Amerson's guilt when considering "both the trial testimony with respect to the individual allegations and the victim's recantation with its supporting evidence." As noted, Amerson asserts that the trial court erred in reaching these conclusions without first taking Tawanda's recantation testimony under oath. We disagree.

The State stipulated to the fact that Tawanda had recanted as alleged in Amerson's motion; thus Tawanda's testimony was not necessary to support Amerson's factual contention. The trial court accepted as true Amerson's assertions regarding the substance of Tawanda's recantation and the manner in which she recanted. The trial court also listened to the tape recording of Tawanda's recantation. As noted, in addition to Amerson's evidence regarding the recantation, the State presented substantial evidence that Tawanda had been severely pressured into recanting. Under these circumstances, the trial court had abundant evidence from both parties from which to evaluate the credibility of Tawanda's recantation without subjecting her to the additional trauma of repeating the recantation under oath merely to observe her demeanor. Moreover, Amerson failed to make an offer of proof regarding what testimony Tawanda would have provided if she had testified. Therefore, to the extent Amerson is arguing that Tawanda would have corroborated her recantation by testifying about her motive for her original accusation, Amerson has waived that argument. *See State v. Hoffman*, 106 Wis.2d 185, 217–218, 316 N.W.2d 143, 160 (Ct. App. 1982) (a failure to make an offer of proof results in waiver).

The trial court properly applied the standard announced in *McCallum*, and determined both that Tawanda's recantation was not sufficiently

corroborated and that there is not “a reasonable probability that a jury, looking at both the accusation and the recantation, would have a reasonable doubt as to [Amerson’s] guilt.” *McCallum*, 208 Wis.2d at 474, 561 N.W.2d at 711. The circumstances surrounding Tawanda’s recantation strongly support the trial court’s implicit finding that she was pressured into the recantation. Moreover, Tawanda’s recantation did not explain why she originally accused Amerson if he was not guilty, and did not explain how she was injured. As noted, Amerson did not make an offer of proof that extended beyond, or differed from, Tawanda’s statement. Additionally, although Tawanda’s mother asserted by affidavit that, for personal reasons, she pressured Tawanda into saying Amerson sexually assaulted her, she never identified those reasons, and, when called to testify, she denied that she told Tawanda to accuse Amerson of sexually assaulting her.

The trial testimony, on the other hand, indicated that Tawanda consistently described to several people two instances of Amerson sexually assaulting her—once in an abandoned house, and once in a parking lot. Tawanda was also able to show the police the parking lot where Amerson sexually assaulted her, the opening through which to enter the fenced-in lot, and the specific place in the lot where she was assaulted. Further, a physical exam of Tawanda revealed that a portion of Tawanda’s hymen was red and swollen, evidencing a recent trauma to the tissue. Moreover, the circumstances under which Tawanda revealed the sexual assaults, and Denise M.’s initial reaction when she learned that Amerson assaulted Tawanda, as established by the trial testimony, lend additional credibility to Tawanda’s accusation. Considering both the trial testimony regarding Tawanda’s accusation and the totality of the evidence regarding Tawanda’s recantation, the trial court did not erroneously exercise its discretion in

determining that there was no reasonable probability that a new trial would result in Amerson's acquittal.

By the Court.—Order affirmed.

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

