

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 26, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

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No. 99-2597-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ODELL CARTER, JR.,

DEFENDANT-APPELLANT.

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

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

¶1 PER CURIAM. Odell Carter appeals from the judgment of conviction entered following a jury trial, for three counts of first-degree sexual assault of a child, contrary to WIS. STAT. § 948.02(1), and the order denying his postconviction motion for a new trial based on newly-discovered evidence. On

appeal, Carter argues that the trial court erred in denying his postconviction motion for a new trial which was based on recantation evidence of the victim. Because we conclude that there is no reasonable probability that a different result would be reached in a new trial, we affirm.

I. BACKGROUND.

¶2 On September 3, 1997, Odell Carter was charged with three counts of first-degree sexual assault of a child. Carter was charged with the offenses after his nine-year-old daughter, J.C., accused him of touching her inappropriately on three separate occasions. J.C. testified that on three different occasions her father covered her eyes with either bandages or a pillow, and touched her vaginal area. She testified further that after each incident, Carter told her not to tell anyone, and after two of the incidents, he gave her money to keep her quiet. The victim, however, eventually revealed the assaults to her mother.

¶3 The only other witness to testify for the State was a nurse at the Sexual Assault Treatment Center. She testified that she interviewed and examined J.C. following the alleged assaults. In her opinion, her physical examination of J.C. indicated that J.C. had been sexually assaulted. She explained that her examination of the victim's vaginal area revealed redness in the skin and small tears in the hymen, as well as thinning in some areas of the hymen, and thickness in others. She also testified that J.C. told her that Carter had touched her with his hands, as well as something other than his hands, but that she could not be sure what it was because her eyes had been covered.

¶4 Carter was convicted on all three counts and sentenced to forty years on each count to run consecutively. Carter subsequently filed a motion for a new trial based upon newly-discovered evidence, claiming that J.C. had recanted her

testimony. Attached to the motion was an affidavit from J.C., stating that none of the allegations she made was true, and that she fabricated the story because Carter had been hitting her mother and she wanted him to stop. The trial court held a hearing on the motion, at which time J.C. and her grandmother (Carter's mother) testified.

¶5 At the hearing, J.C. testified that although she told several people that her father had touched her inappropriately, and she testified at his trial that he assaulted her, her testimony was not true. At the hearing, she testified that she first told her grandmother that she had lied after her grandmother found a letter J.C. had written regarding her trial testimony. She testified that she told her grandmother that she had lied about her father because he was hitting her mother, and that she wanted to confess to the lie because she was now "saved" and the Bible says she should not lie. She stated that she formed the idea to fabricate the accusations against her father after watching a television movie about a little girl whose father abused her.

¶6 After hearing the testimony, the trial court denied the motion. In its oral decision, the trial court asserted that, normally, *State v. McCallum*, 208 Wis. 2d 463, 561 N.W.2d 707 (1997), would require it to apply a six-part test in deciding motions for new trial based on newly-discovered evidence, but that *McCallum* was distinguishable. Focusing on the credibility of the witnesses, the trial court denied Carter's postconviction motion. The court determined that, under the totality of the circumstances surrounding Carter's case, a new trial was not warranted.

II. ANALYSIS.

¶7 On appeal, Carter argues that the trial court erred in denying his postconviction motion for a new trial based on newly-discovered recantation evidence. We disagree.

¶8 Pursuant to *McCallum*, to obtain a new trial based on newly-discovered recantation evidence, Carter must satisfy six criteria:

(1) the evidence was discovered after conviction; (2) [he] 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. If [he] proves these four criteria by clear and convincing evidence, the circuit court must determine whether a reasonable probability exists that a different result would be reached in a trial. Finally, when the newly-discovered evidence is a witness's recantation ... the recantation must be corroborated by other newly-discovered evidence.

McCallum, 208 Wis. 2d at 473-74. Carter must meet all six criteria to warrant a new trial. See *State v. Sarinske*, 91 Wis. 2d 14, 38, 280 N.W.2d 725 (1979). Both parties argue that the test in *McCallum* controls the outcome of this case. While the trial court failed to directly address any of the first four criteria, the parties agree that the first four criteria have been satisfied. Instead, the parties concentrate on the fifth and sixth criteria, arguing that Carter's motion for a new trial turns on whether there is a reasonable probability of a different result at a new trial and whether the recantation is "corroborated by other newly-discovered evidence." *Id.* We adopt their view that Carter has satisfied the first four criteria, and we will consider only the fifth and sixth criteria.

¶9 Carter acknowledges that the usual standard of review of motions for a new trial based on newly-discovered evidence is the deferential erroneous

exercise of discretion standard, but argues that here we must apply a *de novo* standard. Citing *State v. Herfel*, 49 Wis. 2d 513, 521, 182 N.W.2d 232 (1971), Carter submits that because the judge who decided his postconviction motion was not the same judge who presided over his trial, the standard is *de novo*. See *id.* at 521. The State agrees, but qualifies that Carter is only partially correct. The State argues that *Herfel* dealt exclusively with the fifth *McCallum* criterion—whether a reasonable probability exists that a different result would be reached in a new trial—and did not address the sixth criterion—corroboration. Therefore, the State maintains that, although under *Herfel* we must determine whether Carter satisfied the fifth criterion by exercising a *de novo* review, we must address the sixth criterion under the usual erroneous exercise of discretion standard. Because we conclude that Carter failed to establish the fifth criterion—that is, that there is a reasonable probability that a different result would be reached at trial—we need not resolve this debate. We review the fifth criterion *de novo*.

¶10 “The correct legal standard when applying the ‘reasonable probability of a different outcome’ criteria [sic] 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.” *McCallum*, 208 Wis. 2d at 474. We must not conclude that there is not a reasonable probability of a different outcome simply because the recantation was less credible than the accusation. See *id.* “[A] finding that a recantation is less credible than the accusation does not necessarily mean that a reasonable jury could not have a reasonable doubt.” *Id.* at 475. Therefore, to determine whether there is a reasonable probability of a different outcome, we must decide whether there is a reasonable probability that a jury, considering both the recantation and the accusation, would have a reasonable doubt as to Carter’s guilt. See *id.* After reviewing the record and comparing the

accusation and the recantation, we are satisfied that there is no reasonable probability that a jury could form a reasonable doubt as to Carter's guilt.

¶11 We first consider the trustworthiness of the recantation and then we compare it to the trustworthiness of the accusation.

¶12 The record reveals significant reasons why the trustworthiness of the recantation was in doubt. First, the credibility of the recantation was called into question by the victim's testimony at the hearing. J.C. testified that she fabricated the accusations against Carter so that he would stop hitting her mother. She gave differing versions of how she came to know of her mother's injuries inflicted by Carter. Originally, she stated that she saw scars on her mother's head caused by the beating. Later she stated that she saw her mother bleeding from her injuries, but she stated that it had only happened once and she could not remember precisely when it had taken place. She also admitted that she had never actually seen Carter hit her mother. J.C.'s ever-evolving reasons for falsely accusing her father are unconvincing.

¶13 J.C. also testified that she formed the idea to falsely accuse Carter after seeing a television movie about a girl whose father had touched her inappropriately; however, she could not remember the name of the movie or when she saw it. She also testified that she first told her grandmother that she had lied about Carter touching her, after her grandmother found a letter in which she recanted her testimony; however, she could not remember to whom she had written the letter. Finally, although she testified that she was present when the affidavit of recantation was prepared, she could not remember where it was prepared, or who was present. J.C.'s inability to recall meaningful details, coupled

with her changing story, strongly suggests a very real possibility that her recantation was untruthful.

¶14 Next, the State argues, and this court agrees, that “there is a very real possibility that the recantation was the product of undue influence or coercion.” The State’s concerns regarding the possibility of undue influence or coercion are well documented in the record and predate the jury trial. The record reflects that on at least three separate occasions—January 15, 1998, at the pretrial conference; April 1, 1998, at the hearing on defense counsel’s motion to withdraw; and April 24, 1998, at sentencing—the State voiced its concerns that J.C. was being subjected to undue influence or coercion in an effort to convince her to recant her accusations against Carter. These concerns included information that Carter was writing to J.C. and, despite a no contact order, that J.C. was taken to visit Carter in jail. In addition, J.C.’s mother’s level of cooperation with the prosecution of Carter disintegrated and the State feared that J.C.’s mother would move J.C. out of the state prior to trial. In fact, the prosecutor was so worried about J.C.’s availability at trial and her willingness to testify that J.C. was taken into protective custody.

¶15 The trial court concluded that these concerns were well-founded. At sentencing, the trial court stated to Carter:

I have seen a lot of manipulation of victims, even young victims, but rarely have I seen the kind of manipulation of this [sic] young victim that has gone on and been engaged in by you, by the mother of the child, and by the entire family and it adds a layer of evil to this case . . . She is not destroying her father. Her father destroyed her childhood and needs to be held accountable for it and has taken a lot [of] guts and a lot of self-assurance on her part to stick to the truth when everybody is trying to squelch the truth and to get her to not tell the truth.

Thus, there is ample evidence of both undue influence and coercion. “Courts view recantation with great caution because of the possibility of undue influence or coercion.” *McCallum*, 208 Wis. 2d at 481 (Abrahamson, C.J., concurring).

¶16 Finally, the State argues that the reliability of the recantation is called into question by “the dishonesty displayed by those responsible for obtaining the recantation.” Once again, we agree. Following Carter’s sentencing, J.C. was sent to Ohio to live with her grandmother. It was during this time that her alleged “recantation” took place. It was revealed that in order to enroll J.C. in school, her grandmother gave the school a document entitled, “COURT OF COMMON PLEAS DIVISION OF DOMESTIC RELATIONS MILWAUKEE [sic] COUNTY WISCONSIN,” which purported to set out “A Permanent Custody Plan.” With regard to this document, J.C.’s grandmother testified that an individual, whom she failed to identify, had typed the agreement on a computer. She further testified that although the document had not been authorized by any Milwaukee County court, she never thought she was doing anything illegal because she simply needed a document specifying that she had temporary custody of J.C. so that J.C. could be enrolled in school.

¶17 This same grandmother testified that she discovered a letter written by J.C. allegedly recanting her accusations against Carter. She stated that the letter was one-half page in length, addressed to “Dear blank,” and read: “I wanted to write this letter to tell you that my father did not touch me”; J.C.’s grandmother could not recall anything else that was written in the letter. She told the court that after she found the letter, she confronted J.C., who then, she claims, recanted her accusations. J.C.’s grandmother then put her granddaughter in touch with a social worker whom she knew from church. The social worker met with J.C. and wrote the “AFFIDAVIT OF RETRACTION” attached to Carter’s motion. The social

worker attached a cover letter, written on the stationary of the Montgomery County Children Services, to the affidavit. The agency subsequently informed the Milwaukee County District Attorney's Office that it had no involvement with or knowledge of Carter's daughter and that while the social worker was an employee, her involvement with Carter's daughter was in no way official. The agency also took the position that her use of the agency's letterhead constituted a misrepresentation of her role as well as the agency's, and the social worker was eventually fired for her conduct. Thus, it appears that neither Carter's mother nor the social worker was above resorting to subterfuge to accomplish their ends. For all these reasons, we are satisfied that there were sufficient reasons to doubt the reliability of J.C.'s recantation.

¶18 Finally, we compare the recantation with the accusation. Unlike the recantation, the accusation was supported by external and internal indicia of trustworthiness. A review of J.C.'s testimony reveals that, unlike her testimony at the postconviction hearing, J.C.'s trial testimony was lucid and very specific. Despite the fact that she was only ten at the time of trial, she provided precise details of the incidents, including testimony demonstrating a knowledge of sexual activities not ordinarily possessed by a ten-year-old girl. She testified that she first told a friend about the incidents, then she told her brothers, and eventually she told her mother. She related that after her mother took her to the hospital, she informed a nurse about the assaults and then told the police. Logic suggests that if, indeed, she was simply trying to get her father in trouble so that he would stop hitting her mother, there would have been no need for her to first inform a friend, then her brothers, before telling her mother, a nurse, and then the police.

¶19 Further, the nurse's testimony provides external corroboration for J.C.'s original accusations. As noted, the nurse testified that she discovered

redness in the skin around J.C.'s vaginal area and she noted two places where the hymen was torn. She also observed a thinning of the hymen in one area, as well as a thickening in another area. The nurse testified that these observations were consistent with and corroborated the report of a sexual assault of J.C. Absent some other explanation for the nurse's observations, her testimony provides powerful external corroboration for J.C.'s original accusation. Thus, for all the reasons stated, we are satisfied that the original accusation is credible.

¶20 After reviewing the record and comparing the recantation and the accusation, we are satisfied that there is no reasonable probability that a different result would be reached at a new trial. Therefore, we conclude that the trial court properly denied Carter's postconviction motion for a new trial.

By the Court.—Judgment and order affirmed.

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

