COURT OF APPEALS
DECISION
DATED AND FILED

February 18, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP760 **Cir. Ct. No. 2005CF86**

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

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

DAMIEN L. WILSON,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Jefferson County: RANDY R. KOSCHNICK, Judge. *Affirmed*.

Before Lundsten, Higginbotham, and Blanchard, JJ.

¶1 PER CURIAM. The State appeals an order granting a new trial to Damien Wilson on the ground of newly discovered evidence. We affirm.

¶2 After a trial in 2005, Wilson was convicted of second-degree sexual assault of a child. In 2014, Wilson moved for a new trial on the ground of newly discovered evidence. Wilson's motion was based on evidence that in 2008 the alleged victim, a child, made a false allegation of sexual assault against a bus driver. The circuit court granted the motion, and the State appeals.

¶3 The parties appear to agree on the relevant legal standard. The defendant must first satisfy a four-part test by showing that the new "'evidence was discovered after conviction'"; "'that the defendant was not negligent in seeking the evidence'"; that "'the evidence is material to an issue in the case; and that the evidence is not merely cumulative.'" ***State v. Plude***, 2008 WI 58, ¶32, 310 Wis. 2d 28, 750 N.W.2d 42 (quoted source omitted). If the defendant satisfies the four-part test, the court must determine "whether a reasonable probability exists that had the jury heard the newly discovered evidence, it would have had a reasonable doubt as to the defendant's guilt." ***Id.*** In this case, the State concedes that Wilson's motion satisfies the four-part test, and the State's arguments all focus on whether there is a reasonable probability of reasonable doubt.

¶4 The State first argues that "Wisconsin courts will not grant a new trial on the basis of newly discovered evidence that does no more than impeach a witness, even a complaining witness." In support of this alleged blanket rule the State relies on this statement in ***Plude***: "'It may well be that newly discovered evidence impeaching in character might be produced so strong as to constitute [a] ground for a new trial; *as for example where it is shown that the verdict is based on perjured evidence.*'" ***Id.***, ¶47 (quoting ***Birdsall v. Fraenzel***, 154 Wis. 48, 52, 142 N.W.2d 274 (1913) (emphasis added in ***Plude***)).

¶5 In response, Wilson notes that this quotation does not state the asserted blanket rule, but instead states only that perjury is an "example" of a situation in which impeachment evidence would be sufficiently strong to justify a new trial. In reply, the State appears to retreat from its original position. The State asserts that Wilson's new evidence "should at least directly demonstrate that some aspect of [the alleged victim's] testimony was incorrect." However, the State cites no legal authority for modification to its initial position either. Therefore, we do not measure Wilson's evidence by this standard.

¶6 The State argues that there is not a reasonable probability of reasonable doubt for several reasons. One reason, the State argues, is that the new evidence would not be admissible at trial. The State asserts that the evidence lacks relevancy and that its probative value would be outweighed by unfair prejudice or confusion of the jury. The State also argues that its admissibility would be limited to only what Wilson could elicit on cross-examination, as provided in WIS. STAT. § 906.08(2) (2013-14),[1] which would not help him in a new trial because the alleged victim has already testified that she does not recall making the accusation against the bus driver.

¶7 The State begins its admissibility argument by noting that the circuit court "did not specifically address whether and to what extent" the evidence would be admissible. A review of the record shows an obvious reason for that omission: the State did not dispute admissibility in the circuit court. Wilson has not asked us to hold that the State forfeited these arguments, but we conclude that it has.

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

¶8 One purpose of the forfeiture rule is to encourage parties to make all available arguments in circuit court, and thus prevent unnecessary appeals by giving the circuit court an opportunity to avoid or correct its own errors. ***State v. Ndina***, 2009 WI 21, ¶30, 315 Wis. 2d 653, 761 N.W.2d 612. The State did not give the court that opportunity in this case.

¶9 Failure to give the circuit court that opportunity is particularly problematic where, as here, the admissibility decisions that the court would have made are discretionary. In particular, the exclusion of evidence based on its probative value being outweighed by other considerations is highly discretionary. Because the State did not make any argument about admissibility in circuit court, we have no exercise of discretion to review. The State apparently wants this court to exercise that discretion. Or, perhaps the question before us, for purposes of deciding a new trial motion, should be only whether the evidence *must* be excluded, meaning that no reasonable exercise of discretion could allow its admission. However, either way, we decline to decide these issues for the first time on appeal.

¶10 Stripped of the above arguments, the State's argument appears to boil down to one that Wilson's motion should be denied because the probative value of the alleged victim's 2008 false accusation against the bus driver is too low to cause a reasonable probability of reasonable doubt. The State argues that the bus driver incident is not sufficiently similar to Wilson's case to have significant probative value. We reject that argument for two reasons.

¶11 First, we do not agree that the incidents must be similar in small details for the false accusation to have substantial probative value. Much of the

probative value of this evidence lies simply in the larger fact that the complainant made a false allegation of a type similar to the allegation against Wilson.

¶12 Second, there is at least one detail in which the two accusations are at least arguably similar. Wilson points out, and the State does not dispute, that it can reasonably be inferred that the false accusation against the bus driver was made in retaliation for the driver's involvement in discipline against the child. Wilson argues that a similar motive of retaliation can be inferred in his case, because there was evidence that Wilson had tried to get the alleged victim to go back to sleep instead of being awake and watching television. Wilson notes that his attorney suggested such a motive during opening statement in the first trial.

¶13 In reply, the State argues that in the first trial, despite the suggestion of Wilson's attorney during opening statement, Wilson did not make "any serious argument" that retaliation was the reason for the child's accusation. The State does not explain why it is necessary for Wilson to have made a "serious" argument in the first trial. We see no reason why Wilson would be required in any second trial to rely on precisely the same arguments that he made in the first one. The concept of newly discovered evidence necessarily implies that a defendant might rely on new evidence to make an entirely new argument, or to change emphasis among arguments previously made.

¶14 Instead, the real question for determining the reasonable probability of reasonable doubt is whether the *evidence* supports Wilson's suggestion of similar motivation for the accusation. Here, while the evidence of that motivation may not be especially compelling in Wilson's case, there is a parallel, in the form of an accusation made after a relatively minor adverse action taken against the child by the accused adult male.

¶15 For the above reasons, we conclude that the circuit court properly granted Wilson a new trial based on newly discovered evidence. Accordingly, we need not discuss the recantation part of Wilson's motion.

By the Court—Order affirmed.

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