

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

MAY 29, 1996

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(1), STATS.

NOTICE

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No. 95-3269-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

KENNETH HAUG,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Burnett County: ROBERT H. RASMUSSEN, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. Kenneth Haug appeals a judgment of conviction for first-degree sexual assault of a child and incest, and an order denying his motion for postconviction relief. He argues that a new trial in the interest of justice should be granted because important evidence bearing on the victim's credibility was not presented at trial. We affirm the judgment and the order.

The trial was to the court. At the time of the assault, M. was twelve years old. M. testified at trial that Haug entered her bedroom when she

was reading and touched her thighs and breasts and made her touch his penis. Portions of her testimony were inconsistent with pretrial statements. For example, before trial she told the police that Haug was wearing a robe with nothing underneath and that he said, "wait a minute ... make me feel good." At trial, however, she testified that he wore only underwear and said nothing while assaulting her. A friend testified that M. told her that Haug had slept with her and had raped her. This is contrary to her testimony that only touching occurred.

Haug denied the allegations. Defense's theory was that the victim fabricated the assault allegations in order to return to California to live with her mother. There was evidence that M. did not want to live in Wisconsin with her father, had plans to run away and wanted to return to California.

The trial court observed that the case turned almost exclusively on the issue of credibility. "I have watched very carefully each of the witnesses on the witness stand, because their appearance and demeanor on the witness stand is certainly one of the factors which is first and foremost in the fact-finder's mission of determining the credibility" The court acknowledged inconsistencies in M.'s testimony, but determined that M.'s testimony was more credible than Haug's, stating that Haug's was "too perfect." The trial court found Haug guilty of first-degree sexual assault and incest and sentenced him to three years' probation on each count, running concurrently, with a condition of 120 days in jail.

After the trial, M. wrote a diary entry that stated that she felt guilty that her father was going to jail and that "I'm definitely going to hell. I can't believe I lied on the stand so many times. I still can't believe the judge believed the inconsistency (sic) of my testimony." She wrote that she split the family apart and that she did not know how she could live with herself. At the postconviction hearing, M. testified that her reference to lying on the stand meant only that she had lied about her brother's drug use at a juvenile court hearing three weeks after Haug's trial. She acknowledged that her false testimony about her brother was motivated by her desire to return to California to live; she feared that if she testified that her brother in California used drugs she would not be allowed to return there and live with him.

M. also testified she was very religious and felt strongly that it was wrong to lie or steal. However, she admitted that when living with foster parents, after accusing Haug of the assault, she stole a marijuana pipe and then lied to her foster parents about it. M. also testified that she lied about watching pornographic videos with other children. She testified that she did not lie about anything that Haug did to her.

The trial court denied Haug's postconviction motion for a new trial. It concluded that it was clear, both during the trial and the postconviction hearing, that M. wanted to go to California. The court stated it weighed that at the time of trial, and that the additional evidence impeaching her credibility does not require a new trial in the interest of justice. It further concluded that M.'s postconviction admissions of untruthfulness were collateral to the issues at trial and that a new trial is not warranted on the basis of newly discovered evidence.

Haug argues that the real controversy was not fully tried because the trial court did not hear important evidence bearing on the key witness's credibility.¹ Haug contends that even if the additional evidence did not affect the trial court's assessment of credibility, the key issue is whether a rational fact finder at a new trial, be it judge or jury, would find M. less credible and have a reasonable doubt that her accusation was false in light of her diary entries and motive to return to California.

At the outset, we address the parties' dispute regarding the standard of review. The State asks us to review the issue deferentially to the trial court. In reply, Haug asks us to exercise our independent authority to grant a new trial in the interest of justice under § 752.35, STATS. Consistent with Haug's request, we address de novo the question whether the post-trial evidence bearing on M.'s credibility warrants a new trial in the interest of justice. We conclude it does not.

¹ Haug explains that at his postconviction proceeding, Haug relied not only on the interest of justice basis, but also on the newly discovered evidence as a ground for relief. However, because of M.'s postconviction hearing testimony, which needs to be considered in connection with the diary entry, Haug relies on the interest of justice rationale on appeal.

A new trial in the interest of justice is warranted when justice has miscarried or when the real controversy has not been fully tried. *State v. Wyss*, 124 Wis.2d 681, 734-35, 370 N.W.2d 745, 770 (1985), *overruled on other grounds by State v. Poellinger*, 153 Wis.2d 493, 451 N.W.2d 752 (1990). It is not necessary to consider whether a different result at trial is probable when seeking a new trial on the basis that the real controversy was not fully tried. *Id.* at 739, 370 N.W.2d at 772. The real controversy may not have been fully tried when the fact finder does not hear important evidence that bore on an important issue. *Id.* at 735, 370 N.W.2d at 770.

We conclude that the issue of M.'s credibility was fully tried. First, M.'s credibility was called into question at trial when defense counsel presented testimony of children who briefly viewed the pornographic videotapes in contradiction to M.'s testimony that she had not shown them. Second, M.'s trial testimony was in some respects inconsistent with pretrial statements and this was brought out by defense counsel.

Third, the trial court, in analyzing the evidence at trial, recognized that its function at this trial was almost exclusively to assess credibility. It paid special attention to demeanor, focused on motive for testifying, and considered the context of the testimony. It recognized inconsistencies in M.'s testimony. It considered her age and emotional maturity. The court also considered the theory of the defense, stating:

I don't buy for a minute this motive for falsifying that she wanted to move to California. She had friends here. She was doing well in school ... I see nothing in this that would indicate that she had this compelling underlying motive for falsification. If she had, there were plenty of opportunities for revealing these charges in a different form. There were plenty of opportunities for her to embellish on this.

Because the record establishes that the issue of M.'s credibility was fully tried, we decline to exercise our discretionary powers to order a new trial.

Haug relies on *State v. Romero*, 147 Wis.2d 264, 432 N.W.2d 899 (1988), for the proposition that in a credibility battle, key items of evidence can

cloud the issue and pervade the entire trial. In that case, improperly admitted evidence consisted of opinion testimony that the victim's accusations were true. Our supreme court concluded that the opinion testimony "tended to usurp the jury's role" thus preventing the controversy to be fully tried. *Id.* at 278, 432 N.W.2d at 905. We conclude that was not the case here because the trial court fully weighed witness credibility.

Haug also relies on *State v. Cuylar*, 110 Wis.2d 133, 142, 327 N.W.2d 662, 667 (1983), that held that erroneously excluded evidence bearing on the defendant's credibility prevented a full trial on the issue of credibility. Here, the evidence that came to light after trial pertained not to the defendant's credibility but to the victim's credibility, which had been subjected to impeachment and scrutiny at trial, resulting in a full trial of her credibility.

Haug further relies on *Logan v. State*, 43 Wis.2d 128, 136, 168 N.W.2d 171, 175 (1969), where defense counsel's misunderstanding of an alibi witness led him to withdraw an important defense witness. Here, there was no misunderstanding by defense counsel. The new evidence did not provide an alibi, but rather tended to show that M. lied about certain things. Because evidence that tended to cast doubt on her credibility, as well as to show a motive for testifying falsely, was presented at trial, additional evidence on this issue brought out at the postconviction hearing does not demonstrate the need for a new trial. The trial court noted problems with M.'s credibility at trial. It weighed those problems against those posed by Haug's testimony, which in the trial court's view was almost too perfect to be credible. The record shows the issue of credibility was fully and fairly tried.

By the Court. – Judgment and order affirmed.

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