

**COURT OF APPEALS  
DECISION  
DATED AND RELEASED**

May 14, 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, STATS.

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

**No. 95-3545-CR**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT I**

**State of Wisconsin,**

**Plaintiff-Respondent,**

**v.**

**Spring Maclin,**

**Defendant-Appellant.**

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DANIEL L. KONKOL, Judge. *Affirmed.*

SCHUDSON, J.<sup>1</sup> Spring Maclin appeals from a judgment of conviction, following a jury trial, for battery (party to a crime), contrary to §§ 940.19(1) and 939.05, STATS. She also appeals from the trial court's order denying her postconviction motion for a new trial. She argues that the trial court improperly denied her a new trial based on its determination that an alibi witness was newly available instead of newly discovered. This court rejects her argument and affirms.

---

<sup>1</sup> This appeal is decided by one judge pursuant to § 752.31(2), STATS.

The victim, Meranda M., testified that on March 23, 1994, at approximately 2:45-3:00 p.m., Maclin and an unknown female kicked and punched her.

Shelline Magestro, the receptionist at St. Catherine's Residence for Women where Maclin lived at the time of the offense, testified that on March 23 Maclin left the residence at 2:30 p.m. with a female and returned at 3:30 p.m.

The victim's mother, Janice Griffin, testified that after her daughter arrived home injured and crying, she called St. Catherine's and was told that Maclin was not there.

Officer Al Young, the investigating officer, testified that he spoke with Meranda M. and Maclin about the offense. Officer Young testified that Maclin told him that she had not left St. Catherine's that day and that Tonya Coleman and Magestro would be able to verify her story. Officer Young also testified that he called Meranda M. from St. Catherine's and asked her what the assailant had been wearing at the time of the incident. Young stated that the description Meranda M. gave (a pink shirt and black sweats) matched what Maclin was wearing.

Maclin testified that she had been at her residence the entire day of the assault. She testified that she was in her room when she received a call from Magestro that she had a male visitor, Quentin Ferguson, and that she watched television with him from 2:26-3:00 p.m. She stated that she was wearing a pink t-shirt and white shorts when she met Ferguson. Maclin presented no witnesses to testify regarding her alibi.

Approximately six months after her conviction, Maclin brought a motion for a new trial based on the discovery of the whereabouts of Chantale Littleton, Maclin's roommate on the day Meranda M. was attacked. According to Maclin's affidavit, Maclin had been unable to locate Littleton to testify at trial. Maclin claims that Littleton would verify that Maclin was at St. Catherine's at the time Meranda M. was attacked. According to Littleton's affidavit, she answered the telephone call from Magestro, who said Ferguson was there to visit Maclin. Her affidavit also states that Maclin had been wearing clothing

that would have been “too light” for outdoor weather. Finally, Littleton's affidavit states that Maclin would not have been able to locate her at the time of trial because she had temporarily left the state, was not listed in the phone book, and had not provided a forwarding address to Maclin or Maclin's friends or relatives.

The trial court ruled that Littleton's testimony in support of Maclin's alibi theory was newly available but was not newly discovered evidence. The trial court reasoned that Maclin obviously would have been aware whether Littleton, as her roommate, had been with her on March 23. The trial court also noted that Maclin had failed to list Littleton on either of her two pre-trial notices of alibi.<sup>2</sup>

A decision whether to grant a new trial based on newly discovered evidence is governed by the following five factors:

“(1) The evidence must have come to the moving party's knowledge after a trial; (2) the moving party must not have been negligent in seeking to discover it; (3) the evidence must be material to the issue; (4) the testimony must not be merely cumulative to the testimony which was introduced at trial; and (5) it must be reasonably probable that a different result would be reached on a new trial.”

*State v. Johnson*, 181 Wis.2d 470, 489, 510 N.W.2d 811, 817 (Ct. App. 1993) (citations omitted). All five factors must be met. *Id.* This court will not reverse a trial court's denial of a motion for a new trial based on alleged newly discovered evidence unless the trial court acted outside the proper bounds of its discretion. *Id.*

---

<sup>2</sup> The trial court also concluded that Littleton's testimony would have been cumulative. Because this court concludes that Littleton's proposed testimony was known to Maclin before trial, this court need not address the trial court's “cumulative” ruling. See *Gross v. Hoffman*, 227 Wis. 296, 300, 277 N.W. 663, 665 (1938) (only dispositive issue need be addressed).

The trial court did not erroneously exercise its discretion in denying Maclin's motion for a new trial. Evidence that is known to a defendant but is not available is not newly discovered evidence warranting a new trial if the evidence later becomes available. *See State v. Jackson*, 188 Wis.2d 187, 198-199, 525 N.W.2d 739, 745 (Ct. App. 1994) (rejecting defendant's argument that newly discovered evidence consisted of evidence that defendant was not only aware of but also able to use). As the trial court accurately noted, at the time of trial Maclin would have been aware whether her roommate had been with her on March 23. Therefore, this court concludes that the trial court did not erroneously exercise its discretion in denying Maclin a new trial.

*By the Court.* – Judgment and order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.