COURT OF APPEALS DECISION DATED AND RELEASED

March 4, 1997

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

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No. 96-0587-CR

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

State of Wisconsin,

Plaintiff-Respondent,

v.

Gary D. Perry,

Defendant-Appellant.

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

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

FINE, J. Gary Donovan Perry appeals from a judgment entered on a jury verdict convicting him of two counts of Second Degree Sexual Assault of a Child, *see* § 948.02(2), STATS., and the trial court's order denying him postconviction relief. He raises two issues on this appeal. First, he contends that the trial court improperly declined to order a new trial based on the

victim's recantation. Second, he claims that the trial court erroneously exercised its discretion in imposing sentence. We affirm.

I.

The Information in this case charged Perry with sexually assaulting thirteen-year-old Craig P. According to Craig, Perry assaulted him several months after Craig started the seventh grade in school. At that time, Craig lived with his sister, Christina, an aunt Ruby P. and her sons, and Perry, whom Craig described as "[o]ur uncle." Ruby P. testified that Perry was her "boyfriend" to whom she was engaged. At the time of trial, Ruby P. was pregnant with a child by Perry, with whom she had another child.

Craig told the jury that he did not like living with Ruby P. and Perry because they both beat him, and admitted on cross-examination that he was angry at Perry for punishing him. Craig's trial testimony was corroborated by his sister Christina, who was sixteen years old at the time of trial. She told the jury that one day Craig came to her crying and told her that Perry had "molested him." Christina testified, and Ruby P. admitted, that Craig also told Ruby P. about Perry's assaults. Ruby P. did not call the police or order Perry from her home. She testified that she was pregnant with Perry's child at the time and did not want to upset the status quo. Ruby P.'s sister Tammy P. testified that Craig also told Brian and Marilyn P., his aunt and uncle, that Perry had sexually assaulted him. Brian P. is Ruby P.'s brother.

Although Perry did not testify at the trial, the thrust of the defense theory was that Craig made up the assaults to get even with Perry. Thus, Ruby P. testified that Craig was a terror to live with, and that she and Perry both disciplined Craig. Ruby P. testified that Craig was involved in some 300 "violent incidents" before Perry moved into her house, and 100 such incidents afterward, and that Craig kicked her in the stomach when she was pregnant. Although she testified that she had tried to find somewhere else for Craig to live but that "nobody wants Craig," she also complained that Brian and Marilyn P. tried to entice Craig into living with them, presumably so they could benefit from social-security money paid on his behalf. Ruby P. told the jury that Brian and Marilyn P. made Craig falsely accuse Perry. Ruby P.'s nine-year-old son Joey testified that after the police came to the P. home to investigate the

complaint that Perry had sexually assaulted Craig, Craig told him that he was going to get Perry "in a lot of trouble."

In support of the defense theory that Craig's accusation against Perry was false, Perry's counsel called two of Craig's teachers and Ruby P.'s niece who testified that Craig was generally not very truthful, and, according to the niece, "hated" Perry. Indeed, Christina, Craig's sister, testified that Craig often got into trouble for lying, and Perry's lawyer also got Craig to admit on cross-examination that "lying's okay with you as long as you get what you want?"

The jury returned its verdicts on August 5, 1995, and, on September 13, 1995, the trial court ordered that Perry serve two consecutive indeterminate ten-year terms in prison. On October 16, 1995, two private investigators and Ruby P., with whom Craig was then living, brought Craig to the offices of Perry's lawyers, and, in a taped interview that was not under oath, Craig recanted his accusations against Perry. Craig told the lawyer that he came in "because my Uncle Gary was put in jail for something that he didn't do." Craig claimed that he lied at the trial because Brian and Marilyn P. told him to, and because accusing Perry of sexual assault would get him out of Ruby P.'s house, although he professed that he had "[n]ot that many problems" with Perry. Craig also said that Marilyn P. gave him a piece of paper to help him testify, and that he used the paper while testifying.[1]

According to Craig, Brian and Marilyn P. promised him that if he lived with them he "would have better things than they would, and they said that I would have my own-- my own stereo and stuff like that." Craig also said that Brian and Marilyn P. promised to give him $200 out of the $541 social security payment they would be getting every month on his behalf if he lived with them rather than with Ruby P. He said that he stayed with the assault story because Brian and Marilyn P. threatened to "start hitting me like Ruby"

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[1] There is nothing in the trial transcript that corroborates this contention. It is highly unlikely, to say the least, that either the trial court, the prosecutor, or Perry's lawyer would see Craig referring to notes while testifying without making some comment on the record. Moreover, Perry's counsel ably and vigorously represented him at trial. Under RULE 906.12, STATS., he would have been able to see the paper if Craig was referring to it during his testimony. Perry's counsel never asked to see such a paper.

and abandon him if he recanted earlier. Craig claimed at the October 16 taping that Tammy P. and a person identified only as "Rocky" knocked him unconscious the previous week because they learned that he was planning on recanting.

At the end of the taped interview, Perry's lawyer and Craig had the following colloquy:

Q.This-- Do you know that [Perry] is a [*sic*] appealing his conviction?

A. Yes.

Q.And do you know that the main focus of the appeal, the main part of the appeal is going to be the fact that you completely changed your story? Do you know that?

A. Yes.

Q.And that as part of the appeal you know you're going to have to come to court and swear under oath that you made this whole story up and no sexual assault ever occurred? Do you know that?

A.No.

Q.Are you willing to do that?

A. No.

Q.You're not willing to come to court?

A. No.

[One of the private investigators]: Are you afraid?

A.I just don't want to go to court.

> [Perry's lawyer]: Is there something about going to court?

A.I don't want to go to court, I'm leaving.

Craig walked out, the camera was turned off, and after what Perry's lawyer represented was eight minutes, Craig returned and said that he was now willing to go to court and testify in support of Perry's efforts to get a new trial.

After reviewing the tape of Craig's recantation, the trial court denied Perry's motion without an evidentiary hearing.

II.

A. *Craig's Recantation.*

An evidentiary hearing on a motion for postconviction relief is not required unless a defendant alleges facts, which, if true, would entitle him or her to the relief sought. ***State v. Washington***, 176 Wis.2d 205, 215, 500 N.W.2d 331, 336 (Ct. App. 1993). We have recently summarized the legal principles that govern our review of a trial court's decision whether to grant a motion for a new trial based on a victim's recantation:

> Motions for a new trial based on newly discovered evidence are entertained with great caution. Such motions are submitted to the sound discretion of the trial court. We will affirm the trial court's exercise of discretion as long as it has a reasonable basis and was made in accordance with accepted legal standards and the facts of record. The trial court may grant a new trial based on newly discovered evidence only if the following requirements are met: (1) the evidence was discovered after trial; (2) the moving party was not negligent in seeking the evidence; (3) the evidence is material to an issue in the case; (4) the evidence is not merely cumulative to the evidence that was introduced at trial; and (5) it is reasonably probable that a different result would be reached at a new trial. In addition, a recantation must be sufficiently corroborated by other newly discovered evidence before a new trial is warranted.

State v. Terrance J.W., 202 Wis.2d 497, 501–502, 550 N.W.2d 445, 447 (Ct. App. 1996) (citations omitted).

Perry has not pointed to any "newly discovered evidence" that corroborates Craig's recantation. The trial court recognized this in its written decision denying Perry's motion. Moreover, as explained below, we agree with

the trial court's assessment that it is not reasonably probable that Perry would be acquitted at a new trial. The trial court made a reasonable decision "in accordance with the accepted legal standards and the facts of record," *see **id.***, 202 Wis.2d at 501, 550 N.W.2d at 447, and did not, therefore, erroneously exercise its discretion in denying Perry's motion.

B. *Discretionary Reversal.*

Perry also argues, in the alternative, that he is entitled to a new trial in the interests of justice under the auspices of § 752.35, STATS. Section 752.35 provides:

> **Discretionary reversal.** In an appeal to the court of appeals, if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried, the court may reverse the judgment or order appealed from, regardless of whether the proper motion or objection appears in the record and may direct the entry of the proper judgment or remit the case to the trial court for entry of the proper judgment or for a new trial, and direct the making of such amendments in the pleadings and the adoption of such procedure in that court, not inconsistent with statutes or rules, as are necessary to accomplish the ends of justice.

Under this provision, we have the discretionary power to reverse a conviction "1) when the real controversy has not been fully tried; or, 2) when it is probable that justice has for any reason miscarried and the appellate court can conclude that a new trial would probably produce a different result." ***Vollmer v. Luety***, 156 Wis.2d 1, 27, 456 N.W.2d 797, 809 (1990) (Bablitch, J., concurring on behalf of six members of the court).

Perry argues that Craig's recantation provides the basis for granting him a new trial. We disagree. First, Perry had a fair trial. Craig's credibility as an accuser was vigorously contested during the trial. His

accusations against Perry were corroborated by his contemporaneous complaints to various relatives, including Perry's fiance, Ruby P. The jury thus had a basis for crediting Craig's trial testimony. Second, and, perhaps, most significant, Perry's contention that he is entitled to a reversal under § 752.35, STATS., if followed, would totally circumvent the rule that does not credit recantations unless they are "sufficiently corroborated by other newly discovered evidence," *see* ***Terrance J.W.***, 202 Wis.2d at 501, 550 N.W.2d at 447. If a defendant could get a new trial under § 752.35 when a victim recanted even though that recantation was not corroborated by any other newly discovered evidence, the rule that requires such corroboration would quickly become a dead letter. Finally, in connection with the second prong of the power granted to us by § 752.35, we have read the trial transcript and, as did the trial court, viewed Craig's taped recantation. The evidence elicited during the course of the trial amply supports the jury's verdicts, and, as the trial court recognized, Craig's recantation was far from spontaneous—Perry's lawyer appeared to be leading him in significant detail, and Craig appeared to strongly resist the suggestion that he would have to repeat his recantation under oath in court. Moreover, Perry's theory during the trial was that Craig's accusations were motivated by Craig's hatred and fear of Perry; during the taped recantation Craig said that he did not have "that many problems" with Perry. In light of all of this we are unable to conclude that a new trial "would probably produce a different result." Discretionary reversal under § 752.35 is not warranted.

C. *Sentence.*

Perry claims that the trial court's sentence of two consecutive ten-year terms was an erroneous exercise of discretion, and violates both his due-process rights and his right to be free from cruel and unusual punishment under both the federal and Wisconsin constitutions. Perry did not, however, file with the trial court a motion for sentence modification. "Failure to make such motion bars a defendant from raising an issue as to sentencing within statutory limits except under compelling circumstances." ***Gaddis v. State***, 63 Wis.2d 120, 129, 216 N.W.2d 527, 532 (1974). This rule also applies to constitutional challenges. ***Sears v. State***, 94 Wis.2d 128, 140, 287 N.W.2d 785, 790 (1980) (Eighth-Amendment challenge). Perry has not shown any

"compelling circumstances" that would warrant our ignoring this long-standing rule.[2]

By the Court.—Judgment and order affirmed.

Publication in the official reports is not recommended.

[2] Perry's constitutional arguments are not developed. *See* ***Barakat v. Department of Health & Soc. Services***, 191 Wis.2d 769, 786, 530 N.W.2d 392, 398 (Ct. App. 1995) (appellate court need not consider "amorphous and insufficiently developed" arguments).

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SCHUDSON, J. (*dissenting*). I agree with the majority's conclusion that "Perry has not pointed to any 'newly discovered evidence' that corroborates Craig's recantation." Majority slip op. at 8. I also conclude, however, that Perry has provided a sufficient basis for the trial court to hold an evidentiary hearing to determine whether "it is probable that justice has for any reason miscarried and ... a new trial would probably produce a different result." *See* ***Vollmer v. Luety***, 156 Wis.2d 1, 27, 456 N.W.2d 797, 809 (1990) (Bablitch, J., concurring on behalf of six members of the court).

At the trial, Craig testified that Perry sexually assaulted him. In his videotaped recantation, Craig stated that Perry did not sexually assault him. Craig's recantation was accompanied by no corroboration. Craig's trial testimony was accompanied by little or no corroboration, depending on one's view of additional testimony about the violence and motives of members of Craig's family. In a related legal context, this court recently commented:

> [T]he degree and extent of the corroboration required varies from case to case based on its individual circumstances. Here, the sexual assault allegation was made under circumstances where no others witnessed the event. Further, there is no physical evidence that could corroborate the original allegation or the recantation. Under these circumstances, requiring a defendant to redress a false allegation with significant independent corroboration of the falsity would place an impossible burden upon any wrongly accused defendant. We conclude, under the circumstances presented here, the existence of a feasible motive for the false testimony together with circumstantial guarantees of the trustworthiness of the recantation are sufficient to meet the corroboration requirement.

State v. McCallum, 198 Wis.2d 149, 159-60, 542 N.W.2d 184, 188 (Ct. App. 1995).

Although I appreciate the majority's linear legal analysis that would seem to foreclose any further consideration of the merits of Craig's recantation, I am troubled by the majority's conclusion "that a new trial 'would

probably [not] produce a different result.'" Majority slip op. at 10. Do we really suppose that a jury would not have reasonable doubt if the State's victim-witness offers a recantation as plausible (and as corroborated) as his allegation?

I am also troubled by inaccuracies in what seems to emerge as the majority's fact-finding, which forms part of the basis for its conclusion. Significantly, the majority's account of Craig's recantation is misleading in three respects:

(1) "Craig also said that Marilyn P. gave him a piece of paper to help him testify, and that he used the paper while testifying." Majority slip op. at 4. The majority then adds a footnote stating, in part:

> It is highly unlikely, to say the least, that either the trial court, the prosecutor, or Perry's lawyer would see Craig referring to notes while testifying without making some comment on the record. Moreover, Perry's counsel ... would have been able to see the paper if Craig was referring to it during his testimony. Perry's counsel never asked to see such a paper.

Majority slip op. at 4 n.1.

In his recantation, however, Craig never stated that he referred to or "used the paper while testifying." He answered "Yes" to the question: "Did you *have* that paper when you were actually up on the stand testifying?" (Emphasis added.) He never stated that he had the paper in his hands, in front of him, or anywhere else where he, the trial court, or counsel would have been able to see it during his trial testimony. Unfortunately, the questioning of Craig failed to clarify whether he ever referred to the paper "while testifying."

Although the majority's speculation is plausible, it is no more plausible than another possibility consistent with Craig's statement: that he referred to the paper *before* he took the witness stand but not during his testimony.

(2) "Craig's recantation was far from spontaneous—Perry's lawyer appeared to be leading him in significant detail." Majority slip op. at 10.

Admittedly, whether a lawyer is leading a witness presents an issue open for considerable interpretation. Here, however, having viewed the videotape and studied the videotape transcript, I do not know how the majority reached its interpretation. If anything, counsel's questioning of Craig was remarkable for its slow, halting manner, for its restraint, for its use of apparently non-leading questions, and, unfortunately, for its failure to ask detailed questions on numerous subjects including whether Craig referred to a paper "while testifying." Although my view is no more scientific than that of any other judge, in this case, were I a betting man, I would wager that, if anything, most experienced lawyers and judges would fault counsel for *not* "leading [Craig] in *any* significant detail" even when such questioning would have been entirely fair and very helpful to a reviewing court.

(3) "Craig appeared to strongly resist the suggestion that he would have to repeat his recantation under oath in court." Majority slip op. at 10.

When Craig returned after an eight minute absence, he explained that he did not want "to see the jury" and some of his relatives again in a courtroom. He said, however, that he was willing to inform the judge, in chambers. The majority's characterization of Craig "strongly resist[ing] the suggestion that he would have to repeat his recantation under oath in court" is an interpretation that simply fails to convey Craig's stated position.

Still, I respect the majority's concern that any careless interplay between the newly-discovered-evidence standard and the interests-of-justice standard could render the corroboration rule "a dead letter." Majority slip op. at 10. Thus, at this point, I can conclude only that, under either standard, while Perry has not established the basis for a new trial, he has provided a sufficient basis for an evidentiary hearing. As the State explains in its brief to this court:

> If this court ... concludes that the defendant is entitled to relief, the proper remedy for the defendant at this stage is not an order for a new trial.... The proper remedy would be to reverse the order denying the motion for new trial and remand the matter to the trial court to conduct the evidentiary hearing. In ***Zillmer v. State***, 39 Wis.2d 607, 616, 159 N.W.2d 669 [, 673-74] (1968), the supreme court commended the trial court for conducting an evidentiary hearing on the motion for a new trial based on a witness's recantation of trial testimony. During an evidentiary hearing, the trial court could observe [Craig] testify to his recantation and could assess the credibility of the recantation. In ***Rohl v. State***, 64 Wis.2d 443, 453, 219 N.W.2d 385 [, 389] (1974), the court noted that the "trial judge is in a much better position to resolve the credibility and the weight to be given a recanting statement." If the trial court concludes that the recantation is not credible, the trial judge can deny the motion for a new trial on the ground that the defendant failed to show that it was reasonably probable that a different result would be reached in a new trial.... Also, at the hearing, the state would be provided an opportunity to introduce evidence on the validity of the

> recantation. Therefore, the defendant cannot be awarded a new trial before an evidentiary hearing at which the trial court is provided an opportunity to evaluate the credibility of [Craig's] recantation.

Clearly, as the parties agree, Perry's guilt or innocence depends on Craig's credibility. A fair reading of both the trial record and recantation record reverberates with uncertainty. A fair reading defies any judge's determination of whether justice has miscarried.

Perry is imprisoned for twenty years. Craig has given two equally-plausible accounts of whether Perry sexually assaulted him. Justice calls for the trial court to carefully consider Craig's credibility in light of all the evidence that can be offered at an evidentiary hearing. We should give the trial court the chance to do so. Accordingly, I respectfully dissent.