

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

July 16, 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. 96-0723-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RAYMOND F. GOSE,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Winnebago County: PETER L. GRIMM, Judge. *Affirmed.*

Before Brown, Nettesheim and Anderson, JJ.

PER CURIAM. Raymond F. Gose appeals from judgments convicting him of two counts of first-degree sexual assault, two counts of incest with a child and one count of exposing a sex organ, and from an order denying his postconviction motion. On appeal, he argues that the trial court erred when it

denied his motion for a new trial after the victim recanted her accusations. Because we conclude that the trial court did not err, we affirm.

The charges against Gose arose out of sexual contact with a grandchild. At trial, the victim testified that her grandfather asked her to accompany him to the bathroom. He shut and locked the bathroom door, told her to remove her clothes, and then removed his pants and fondled her. He also directed her hand to his penis. She also testified to other incidents of sexual contact. After seeing a movie in school about sexual abuse, she told her school counselor of the sexual contact. The jury convicted Gose of all five counts.

In a motion for postconviction relief, Gose sought a new trial due to the victim's recantation of the sexual contact allegations which he claimed was newly discovered evidence.¹ In an affidavit supporting the motion, the victim stated that she did not remember any incident of sexual contact with her grandfather and that she was confused between her mother's alleged sexual contacts with the grandfather and her own. She denied telling her school counselor or police that her grandfather touched her. The trial court found the recantation to be incredible and denied the new trial motion.

Motions for a new trial based on newly discovered evidence are decided by the trial court in its sound discretion. *See State v. Terrance J.W.*, 202 Wis.2d 497, 501, 550 N.W.2d 445, 447 (Ct. App. 1996). We will affirm the trial court's discretionary decision as long as it has a reasonable basis and was made in accordance with accepted legal standards and the facts of record. *See id.*

¹ Gose also alleged ineffective assistance of trial counsel. The trial court rejected this claim and Gose does not raise it on appeal.

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.

Id. at 501, 550 N.W.2d at 447 (citations omitted).

The trial court applied the foregoing criteria in denying Gose's motion for a new trial. The dispositive criterion was reasonable probability that a different result would be reached at a new trial. The trial court found that the victim's recantation was not credible because it resulted from pressure applied by the victim's father and grandmother. The court based this finding on the victim's reaffirmation of her trial testimony during the postconviction evidentiary hearing and repudiation of the recantation affidavit. The victim testified that a portion of the recantation affidavit reflected what her grandmother told her to say. The trial court found that the grandmother and father were present during the posttrial interview which culminated in the recantation affidavit. The victim's demeanor at the postconviction hearing convinced the court that she was emotionally victimized by her grandmother and father regarding the outcome of the jury trial. The court deemed incredible the grandmother's testimony that she did not pressure the victim into recanting. The victim testified that she made the affidavit to "get those people off her back." The court concluded that a reasonable jury would not find the recantation affidavit credible in light of the victim's testimony that she was pressured by her grandmother and father and made the affidavit to appease them. Having found the recantation affidavit to be incredible, the court concluded

that it was not reasonably probable that a different result would be reached at a new trial.

The trial court's analysis is consistent with that employed by this court in *Terrance J.W.* In that case, the defendant was convicted of sexual assault of a child. The defendant moved for a new trial based upon the child's posttrial recantation of the sexual assault allegation. *See id.* at 500, 550 N.W.2d at 446. At the hearing on the motion for a new trial, the child testified that the sexual assault never occurred and that he had lied at trial because he was angry at his father for marrying a woman who was mean to him when his father was absent. *See id.* at 500, 550 N.W.2d at 446-47. The child testified that his uncle promised him a go-cart if he would say he had lied and that his paternal grandmother had also urged him to recant. *See id.* at 500-01, 550 N.W.2d at 447. The child denied that he recanted as a result of pressure from his grandmother or uncle. *See id.* at 501, 550 N.W.2d at 447. The trial court denied the motion for a new trial on the ground that the child's recantation was not credible. *See id.*

The court of appeals held that the defendant failed to demonstrate a reasonable probability that a different result would be reached at a new trial because the trial court determined that the child's recantation was not credible. Because that finding was not clearly erroneous, "[a] determination that the recantation is not credible is sufficient to conclude that it is not reasonably probable that a different result would be reached at a new trial." *Id.* at 502, 550 N.W.2d at 447.

Applying *Terrance J.W.* to this case, we conclude that the trial court properly exercised its discretion in denying Gose's motion for a new trial on the grounds that the recantation was not credible and it was not reasonably probable

that a different result would be reached at a new trial. A trial court's findings of fact regarding the credibility of witnesses will not be upset unless they are clearly erroneous. *See id.* Here, the trial court's finding that the victim's recantation was not credible is supported by the court's discussion regarding the victim's demeanor, her explanation for the recantation affidavit, and the incredible testimony offered by the grandmother.

Gose's reliance on the court of appeals decision in *State v. McCallum*, 198 Wis.2d 149, 542 N.W.2d 184 (Ct. App. 1995), to support his claim of trial court error is misplaced for several reasons. First, the controlling opinion in *McCallum* is that of the supreme court. *See State v. McCallum*, 208 Wis.2d 463, 561 N.W.2d 707 (1997). Second, *McCallum* does not overrule *Terrance J.W.* Both cases recognize that the trial court must determine on a threshold basis whether the recantation is credible to some degree or incredible in its entirety. *See McCallum*, 208 Wis.2d at 475, 561 N.W.2d at 711. *McCallum* recognizes that an incredible recantation "would not lead to a reasonable doubt in the minds of the jury." *Id.* "However, 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.*² If the recantation is credible in some degree, the trial court errs in determining there is not a reasonable probability of a different outcome. *See id.* at 475-76, 561 N.W.2d at 711. The credibility battle must be resolved via a new trial. *See id.* at 474-76, 561 N.W.2d at 711.

² Whether a jury could have a reasonable doubt goes to one of the criteria for a new trial based on newly discovered evidence: a reasonable probability that a different result would occur at trial. *See State v. McCallum*, 208 Wis.2d 463, 473, 561 N.W.2d 707, 710-11 (1997).

Here, the trial court found the victim's recantation to be incredible. Therefore, it did not engage in the prohibited weighing of the credibility of the recantation and the accusation. In *McCallum*, the trial court did as much, and for this reason *McCallum* is distinguishable.

Having held that the criteria for a new trial on the grounds of newly discovered evidence have not been satisfied in this case, we need not address whether the recantation was sufficiently corroborated by other newly discovered evidence. The threshold determination as to the credibility of the recantation was made by the trial court based upon its assessment of the credibility of the witnesses. Because those findings are not clearly erroneous, we affirm the trial court's refusal to grant a new trial as having a reasonable basis and having been made in accordance with accepted legal standards and the facts of record.

By the Court.—Judgments and order affirmed.

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

