COURT OF APPEALS
DECISION
DATED AND FILED

October 25, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP734-CR **Cir. Ct. No. 2003CF592**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARK J. CHARLES,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Brown County: RICHARD J. DIETZ, Judge. *Affirmed*.

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Mark Charles appeals from a judgment of conviction for sexual assault of a child under thirteen years of age, contrary to WIS. STAT. § 948.02(1), and an order denying postconviction relief. Charles argues that he is entitled to a new trial based upon newly discovered evidence and

that a new trial is warranted in the interests of justice. We reject Charles' arguments and affirm the judgment and order.

BACKGROUND

¶2 On June 23, 2003, the State filed a criminal complaint charging that between May 1, 2003, and June 21, 2003, Charles had sexual contact with Ashley K., a child under the age of thirteen years. A jury trial was held on February 24 and 25, 2004.

¶3 At trial, Ashley testified about an incident that occurred the previous June. Ashley was unsure of the date, but thought it happened after her mother's birthday on June 2, but before school got out, on June 11. It was evening but it was still light out. Ashley's mother was home. Ashley was kicking a ball to her little brother in a grassy area in front of their apartment. Her brother asked her to kick the ball up high, which she did, but it went crooked and instead of going to her brother, it went over the building to the grassy area on the side where Charles lived.

¶4 Ashley and her brother ran to the other side to retrieve the ball. Charles' door was open and Ashley saw Charles sitting at the table in his apartment. Ashley bent over to pick up the ball and Charles came out and grabbed her buttocks with one hand. In an angry, somewhat loud voice, Ashley told him to let go and to stop it. Charles let go after the second time Ashley told him to, and then told Ashley her "butt was cute." Ashley grabbed the ball and ran home with her brother. No one was present during this incident except Ashley, her younger brother, and Charles.

¶5 Ashley's mother testified that almost immediately after they moved into the apartment, she became aware that Charles was giving gifts to Ashley, including bags of candy, a mountain bike, dolls and a board game. She told Ashley to stay away from Charles. She also had the building manager and her ex-boyfriend speak to Charles about it. Eventually, the gift-giving stopped.

¶6 A neighbor who lived in the apartment complex testified at trial that she frequently saw Charles lingering by Ashley's bedroom window and heard talking. Occasionally she heard him calling for Ashley or trying to get her attention. This occurred most often in the evenings.

¶7 At trial, the defense did not contend that Ashley was lying, but rather that she was confused. The defense contended that Ashley attended an outdoor party at Charles' apartment where there were several adult men of the same age and two other girls. While they were playing, another adult male accidentally hit Ashley on the buttocks. The defense theory was that Ashley was mistakenly referring to this accidental hitting and mistakenly said it was Charles because she remembered his party, but did not remember who touched her.

¶8 In support of this defense, Nicole Fristad testified that she and her then-husband Andy Fristad, together with their eleven-year-old daughter Kelly, were at Charles' apartment to celebrate Nicole's thirtieth birthday on Saturday, June 14, 2003. The event was also attended by others.

¶9 Nicole testified that she was inside the apartment with Charles fixing supper when she heard Ashley say "stop touching my butt." Nicole went to the door, looked outside and everything looked okay. Other adult men were also outside at the time. All of the people outside were in the same area as Ashley. The children continued to play for another hour or two after Nicole allegedly

heard the comment, and then Nicole took her child home and returned to the party thereafter.

¶10 On cross-examination, Ashley testified that the incident in which she and her younger brother were playing ball was the only time in June that she was touched on her buttocks. She stated that the person she knows by the name of Andy Fristad never touched her buttocks and the only person who ever touched her buttocks was Charles.

¶11 On February 25, 2004, the jury found Charles guilty of first-degree sexual contact with a child under the age of thirteen years. On January 10, 2005, by new counsel, Charles filed a motion for a new trial based upon newly discovered evidence and/or in the interests of justice. The motion was based upon the assertion that Andy Fristad "has admitted committing the act that was the basis for the charge."

¶12 An evidentiary hearing was held on the motion on February 25, 2005. The defense presented Andy Fristad's testimony. He testified that he is a friend of Charles. He testified that at one point while attending the birthday party at Charles' for Nicole, he was outside playing ball with three children. Fristad identified a handwritten statement that he had signed. The statement reads:

> On June 14 we went to a cookout we were playing ball I was the one that in the buttox [sic].
>
> Andrew Fristad
>
> I was the one that was that hit [Ashley] on the but [sic].
>
> Andrew Fristad

¶13 Fristad testified that he never talked to or contacted Charles' trial attorney and did not even know who the attorney was. He also testified that some

time before he gave his statement, he learned Charles had been charged with inappropriate touching.

¶14 Charles' trial attorney testified that the defense theory was that there was another incident, which occurred during the same time period that involved Fristad. Fristad never called Charles' trial attorney, and the trial attorney never spoke to Fristad because it was the trial attorney's understanding, from Charles and Nicole, that Fristad was uncooperative. The trial attorney acknowledged that he could have subpoenaed Fristad to testify at trial, or had an investigator attempt to obtain a statement from him.

¶15 Charles testified that he talked to Fristad three or four weeks after he was charged. Charles asked Fristad to cooperate with his defense and he told Fristad "I was being charged for somethin' that he did …." Fristad "basically laughed," which made Charles allegedly believe that Fristad was not going to cooperate.

¶16 Charles testified that after he was convicted, he spoke to Fristad again, and Fristad's reaction was to come forward and admit what he did. Fristad then signed the statement. Charles testified that he did not think Fristad would have cooperated prior to trial because "he was scared about being charged for what I was charged for; so I don't think he would have cooperated back then." Charles testified that prior to trial he talked to his attorney about subpoenaing Fristad and bringing him in for questioning, but his attorney did not follow up on this suggestion.

¶17 After the evidentiary hearing, the trial court concluded that Charles had not met his burden of proving by clear and convincing evidence that the newly discovered evidence was discovered after the conviction and that it was not merely

cumulative. In reaching this conclusion, the trial court noted that Fristad's story about the touching "would have been significantly different than the other persons who testified with regard to what occurred." The trial court also emphasized that Fristad's statement was not given until eleven months after the trial. The statement was not spontaneous, but was specifically requested by Charles. Furthermore, the trial court concluded that Fristad's statement was not self-incriminatory or against his interest in any real sense, and did not constitute an inculpatory statement. The trial court also denied the request for a new trial in the interests of justice, finding there was neither a probable miscarriage of justice, nor a probability of a different result and that the case had been fairly and fully tried.

DISCUSSION

¶18 Charles argues that a new trial should be ordered based upon newly discovered evidence, or alternatively, in the interests of justice. A circuit court's decision to grant or deny a new trial based upon new evidence will not be overturned absent an erroneous exercise of discretion. ***State v. Carnemolla***, 229 Wis. 2d 648, 656, 600 N.W.2d 236 (Ct. App. 1999). Proper discretion is demonstrated if the record shows the trial court applied the correct legal standard to the facts of record and reached a result a reasonable court could reach. ***Id.***

¶19 The trial court must address the following criteria when deciding a motion for a new trial based on newly discovered evidence: (1) the evidence was discovered after conviction; (2) the defendant was not negligent in seeking to discover it; (3) the evidence is material to an issue in the case; and (4) the evidence is not merely cumulative to the evidence presented at trial. The burden is upon the defendant to prove the existence of these criteria by clear and convincing evidence. If the defendant proves these criteria by clear and convincing evidence,

the circuit court must then determine whether a reasonable probability exists that a different result would be reached in a new trial. ***State v. McCallum***, 208 Wis. 2d 463, 473, 561 N.W.2d 707 (1997). The defendant is not entitled to a new trial if the newly discovered evidence fails to meet any of the above criteria. ***State v. Sarinske***, 91 Wis. 2d 14, 37-38, 280 N.W.2d 725 (1979).

¶20 Here, the trial court appropriately examined the facts and considered the proper factors in rendering its decision. First, the trial court concluded that "clearly this is not evidence that was discovered after conviction." Charles admits on appeal that the defense knew about Fristad's involvement before the trial, because the whole defense strategy was to convince the jury that it was Fristad all along. Charles argues that Fristad's postconviction testimony was not available before the trial, and only came into a useable form after Fristad decided to cooperate because Fristad did not indicate he was willing to testify until after Charles' trial.

¶21 We disagree that Fristad's postconviction testimony was newly discovered evidence. In ***State v. Jackson***, 188 Wis. 2d 187, 525 N.W.2d 739 (Ct. App. 1994), Jackson called his co-defendant as a witness at trial. The co-defendant had pled guilty to the armed robbery but had not yet been sentenced. The co-defendant declined to testify, citing his Fifth Amendment guarantee against self-incrimination. After Jackson was convicted, and the co-defendant had been sentenced, the co-defendant allegedly would have testified that Jackson was not involved in the armed robbery. ***Id.*** at 196-97. Jackson claimed the evidence was newly discovered because even though he knew about it at the time of trial, he could not use it. This court rejected that theory, and stated that newly available evidence is not the same as newly discovered evidence. ***Id.*** at 198-201.

¶22 This court relied on federal decisions that distinguished between newly discovered evidence that was unknown at the time of trial and newly available evidence that was known to the defense but unavailable because of the witness's refusal to testify. In addition, this court held the evidence in ***Jackson*** lacked credibility because the co-defendant had nothing to lose by testifying untruthfully at a new trial. ***Id.*** at 200.

¶23 We conclude that same rationale applies in the present case. The substance of Fristad's testimony is not new because Charles admittedly always knew it. As mentioned previously, the whole defense strategy was to convince the jury that it was Fristad all along.

¶24 Furthermore, the trial court pointed out in accordance with ***Jackson*** that Fristad's non-incriminating testimony did not subject him to criminal liability, because Fristad claimed he touched Ashley by accident, and not for the purpose of sexual gratification. Therefore, Fristad's non-incriminating testimony did not subject him to the risk of prosecution or conviction, and thus did not carry with it the aura of truthfulness that might surround a self-incriminating statement.

¶25 Charles insists that he did not know what Fristad would say on the witness stand. However, the trial court correctly observed that the substance of Fristad's testimony was not new because Charles admittedly was already aware of it. In ***Sheehan v. State***, 65 Wis. 2d 757, 768-69, 223 N.W.2d 600 (1974), our supreme court explained that it is sufficient that a defendant know of the potential witness's existence and involvement. The court rejected the theory that evidence is newly discovered because the witness's exact testimony could not be determined prior to trial. "A witness' exact testimony is never known until it is given …." ***Id.***

¶26 Accordingly, we conclude that because the evidence was not discovered after conviction, Charles has failed to meet the first criteria that would entitle him to a new trial. However, we also agree with the trial court that Charles failed to meet the fourth criteria for a new trial: Fristad's statement that he accidentally touched Ashley's buttocks was cumulative to testimony presented at trial by other attendees at Charles' cookout party and the defense theory the jury heard at trial.

¶27 Finally, the trial court reasonably concluded that there was no reasonable probability that a new trial would produce a different result. Beyond presenting cumulative evidence, Fristad's statement was neither contemporaneous nor spontaneous, coming eleven months after the conviction. As the trial court noted, Fristad's written statement is conspicuously curt.

¶28 Charles asserts in his briefs on appeal that Fristad was afraid to come forward prior to trial "because he didn't want to bring the trouble on himself that he could see Charles was in. But after the verdict and the sentence, he could not just sit and do nothing and let an innocent man be punished for what he did." However, the record does not support this assertion. Fristad never testified that he was unwilling to give a statement prior to trial. Moreover, Fristad never provided an explanation for why he first provided his written statement almost one year after the conviction.

¶29 Perhaps most importantly, there is no reasonable probability of a different result. Even if Fristad testified at a new trial, and the jury believed his story that he accidentally touched Ashley's buttocks during a ball game at a birthday party, that does not provide any meaningful support for Charles' claim that Charles never touched Ashley's buttocks and told her it was cute in the

manner described by Ashley. As a result, we agree with the trial court that Fristad's testimony would have done nothing to undercut Ashley's description of the assault Charles committed against her. Even if Fristad accidentally brushed up against Ashley's buttocks, that does not make it less likely that at a different time and place, Charles intentionally grabbed Ashley's buttocks for the purpose of sexual gratification. We do not consider it clear and convincing that Fristad's story provides an explanation for how Ashley could be "confused" when she said Charles touched her in the manner she described at trial. Accordingly, we conclude that the trial court properly exercised its discretion when it denied Charles' motion for a new trial based on newly discovered evidence.

¶30 Alternatively, Charles seeks a new trial in the interests of justice. The standard for granting a new trial in the interests of justice is that the court must be convinced that there has been a probable miscarriage of justice, that the defendant would not have been found guilty, and that a new trial would lead to a different result. ***Schultz v. State***, 87 Wis. 2d 167, 174, 274 N.W.2d 614 (1979). An appellate court will not overturn a circuit court decision denying a new trial in the interests of justice absent an erroneous exercise of discretion. *See* ***id.*** at 174-75.

¶31 Here, the trial court noted that notwithstanding a potentially different witness, this case was fairly and fully tried. Charles has made no legitimate showing that the trial court erroneously exercised its discretion. On the contrary, Charles' argument is a rehash of his argument for a new trial based on newly discovered evidence. Adding the new label "interests of justice" adds nothing. *See* ***Mentek v. State***, 71 Wis. 2d 799, 809, 238 N.W.2d 752 (1976).

By the Court.—Judgment and order affirmed.

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