

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

March 1, 2001

Cornelia G. Clark  
Clerk, Court of Appeals  
of Wisconsin

**NOTICE**

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**No. 00-1729-CR**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**JESSE J. C., III**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Rock County: JAMES P. DALEY, Judge. *Affirmed.*

Before Dykman, P.J., Roggensack and Lundsten, JJ.

¶1 PER CURIAM. Jesse J.C., III appeals a judgment convicting him of incest upon a guilty plea and an order denying his motion to withdraw the plea based upon on the victim's and her brother's subsequent recantations. He claims the trial court erroneously exercised its discretion when it ruled he had failed to

meet the corroboration requirement for the recantations. We conclude the trial court's determinations that Jesse failed to establish a feasible motive for falsely making the original accusation and that the recantations were not supported by substantial guarantees of trustworthiness represent a reasonable application of the appropriate standard to the facts of record and affirm.

### **BACKGROUND**

¶2 Jesse was charged with first degree sexual assault of a child based on allegations that he had inserted his finger into the vagina of his six-year-old daughter, Joy, in the presence of her five-year-old brother, Billy. Joy reported the abuse to an adult babysitter, Hope, and the babysitter's friend, Laura. Hope then called the girl's mother, Anita, and they<sup>1</sup> contacted the police. Both children described the incident in statements to the police, and Joy's statement was videotaped.

¶3 The State amended the charge to incest and agreed to cap its sentence recommendation at ten years in exchange for Jesse's agreement to plead guilty. The court accepted the plea and subsequently sentenced Jesse to eight years in prison concurrent to another sentence he was then serving.

¶4 Several months after sentencing, Jesse moved to withdraw his plea on the grounds that both children had recanted their accusations. At the plea withdrawal hearing, Joy testified that Hope had threatened to put her in a foster home if she did not say that her father had touched her private area. On cross-

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<sup>1</sup> Hope testified that Anita had called the police and Anita testified that Hope had called the police. The police report listed Hope as the complainant and stated that Anita had waited with Hope for the police to arrive.

examination Joy admitted that she wanted her dad home, that her mom would be happier if her dad were home, and that her dad had promised in letters to give her airplane trips, an ATV and to let her be the flower girl at his remarriage if he got out of prison. Billy testified that Hope had threatened to kill him and Joy if they did not say that their father had touched Joy. Billy also said his dad had promised in letters to take him fishing, to take him riding on a motorcycle, and to take him on an airplane ride if he got out of prison. Both children testified that they had told their mother shortly after the police were contacted that Hope had threatened them, before giving their statements at the Care Center.

¶5 Anita testified that her children had not told her that Hope had threatened them until several months after Jesse had been in prison. She said she cut off all contact with Hope after the recantations. She said that Jesse was angry that she had loaned money to Hope while he was in jail. She admitted that she wanted Jesse home to ease the financial stress. She also admitted that her children knew she cried a lot because Jesse was in prison and that she had mentioned, at least once in their presence, that she might kill herself if Jesse could not come home.

¶6 Hope denied ever having threatened the children or put them up to lying. She said Joy had told Laura about the incident after experiencing pain while going to the bathroom and that Laura had then told Joy to tell Hope.<sup>2</sup> Hope testified that she hardly knew Jesse and that she had worked off the loan from Anita by babysitting for the children. She also testified that the children had spent

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<sup>2</sup> The trial court excluded Joy's actual comments to Laura as hearsay, but admitted Laura's statement to Joy that she should tell Hope what she had told her for the purpose of explaining how Joy had come to tell Hope about the incident.

the night at her house several times after the recantations and that Anita had been at her house when the officer came with her subpoena. She said that Anita had told her she was going to say someone else told the children to lie but decided it would be more believable if she accused Hope of having put them up to it.

¶7 The trial court decided that the asserted motive for Hope to encourage the children to lie—that Hope would be able to borrow money from Anita more easily if Jesse was in prison—was not rational. It further determined that the recantations lacked circumstantial guarantees of trustworthiness because there were inconsistencies between Anita’s and the children’s accounts of the recantations and all three family members had strong motives for lying to get Jesse out of prison. Accordingly, it denied the motion for plea withdrawal, and Jesse appeals.

### STANDARD OF REVIEW

¶8 The decision whether to allow a defendant to withdraw a plea based upon newly discovered evidence lies within the trial court’s discretion. *State v. McCallum*, 208 Wis. 2d 463, 473, 561 N.W.2d 707 (1997). A court properly exercises discretion when it considers the facts of record under the proper legal standard and reasons its way to a rational conclusion. *Burkes v. Hales*, 165 Wis. 2d 585, 590-91, 478 N.W.2d 37 (Ct. App. 1991). We review the legal determinations underlying a trial court’s exercise of discretion *de novo*, but we will not disturb the trial court’s factual findings unless they are clearly erroneous. *State v. Keith*, 216 Wis. 2d 61, 69, 573 N.W.2d 888 (Ct. App. 1997); WIS. STAT. § 805.17(2) (1999-2000).<sup>3</sup> In addition, “[b]ecause the exercise of discretion is so

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<sup>3</sup> All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

essential to the trial court's functioning, we generally look for reasons to sustain discretionary decisions." *Burkes*, 165 Wis. 2d at 591 (citation omitted).

### ANALYSIS

¶9 In order to withdraw his plea based upon newly discovered evidence, Jesse needed to show, by clear and convincing evidence, that: (1) his children's recantations came to his knowledge after the trial; (2) he was not negligent in seeking to discover them; (3) the recantations were material to an issue in the case; (4) the recantations were not merely cumulative to evidence known prior to the plea; (5) the recantations were corroborated by other newly discovered evidence, and (6) a jury, looking at both the original accusations and later recantations would have a reasonable doubt as to Jesse's guilt. WISCONSIN STAT. § 805.15(3); *McCallum*, 208 Wis. 2d at 473-74 and 477-78. The record plainly shows that the trial court applied the *McCallum* test, and the State concedes that Jesse has made a sufficient showing on the first four criteria. The question before us is whether the trial court reasonably determined on the facts before it that Jesse had failed to meet the corroboration requirement. We are satisfied that it did.

¶10 The corroboration requirement is premised on the idea that recantations are inherently unreliable, since the recanting witness's conflicting statements cannot both be true. *McCallum*, 208 Wis. 2d at 476. Where, as here, there is no physical evidence to corroborate the original statement, the corroboration requirement may be satisfied either by: (1) "significant independent corroboration" of the falsity of the earlier testimony; or (2) "the existence of a feasible motive for the false testimony together with circumstantial guarantees of the trustworthiness of the recantation." *Id.* at 477. "Assurances of trustworthiness can include the spontaneity of the statement, whether the statement is corroborated

by other evidence in the case, the extent to which the statement is self-incriminatory and against the penal interest of the declarant, and the declarant's availability to testify under oath and subject to cross-examination." *State v. Kivioja*, 225 Wis. 2d 271, 296-97, 592 N.W.2d 220 (1999). Conversely, a recantation may contain so many internal inconsistencies as to be incredible as a matter of law. *Id.* at 298.

¶11 Jesse asserts that Hope's threats provided a feasible motive for the children to lie and that the possibility of Hope getting more money from Anita if Jesse were in prison provided a feasible motive for Hope to prompt the children to make up the accusation. There was nothing in the record, however, to show that Hope ever requested or obtained any additional funds from Anita after Jesse was incarcerated or that she had any urgent need for extra money. Moreover, Hope was aware at the time the allegations were made that Anita was in the process of filing for divorce and that she had obtained a restraining order against Jesse. The trial court's finding that Jesse had failed to establish a feasible motive for making a false accusation was not clearly erroneous.

¶12 Jesse points out that the children's plea withdrawal testimony was given under oath, while their prior statements to the police were not. However, as the trial court pointed out, the children had strong motivation to lie in order to get their father out of prison. Furthermore, their claim that they had told their mother about Hope's alleged threats before giving their police interview did not correspond to Anita's claim that she had first learned of the recantations after sentencing. It was also inherently implausible. The trial court's determination that the recantations lacked substantial guarantees of trustworthiness was reasonable. We therefore conclude that the trial court did not erroneously exercise its discretion when it decided that Jesse had failed to corroborate the recantations

by clear and convincing evidence and denied the plea withdrawal motion on that basis.

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

This opinion will not be published. WISCONSIN STAT. RULE 809.23(1)(b)5.

