

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 6, 2007

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

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

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.

Appeal No. 2006AP1485-CR

Cir. Ct. No. 2004CF73

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SHARON M. FISHER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Door County: D. TODD EHLERS, Judge. *Affirmed.*

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

¶1 PER CURIAM. Sharon Fisher appeals a judgment of conviction and an order denying her postconviction motion seeking a new trial on the grounds of newly discovered evidence and the interests of justice. Fisher seeks a new trial with respect to her convictions for false imprisonment and second-degree sexual

assault. Fisher claims the victim made a false allegation of being raped on the evening of her cross-examination and this impeachment testimony was not available at trial. The circuit court concluded there was not a reasonable probability that a different result would have occurred at trial had this evidence been presented, and that the matter was fully tried. We agree and affirm.

¶2 The victim testified that she was abducted by Fisher and Fisher's husband, who forced her with a knife and a stun gun into a small basement room where she was forced to be a sex slave for the several weeks of her captivity. The victim was handcuffed and gagged, and Fisher's husband threatened to kill her if she attempted to escape. When the victim eventually escaped, and police executed a search warrant on the Fisher home, they confirmed the existence of a secret room with the layout and furnishings as described by the victim. Also obtained were the stun gun and various pornographic magazines including "*Bound to Please*," depicting pictures of bondage, "*Master's Dream Book*," "*Bizarre Fantasy Situations*" and other pornographic magazines and DVDs.

¶3 Trial was held March 7-9, 2005, and Fisher was subsequently found guilty. On June 22, 2005, Fisher filed a motion for a new trial based in part on depositions conducted of persons involved in an incident with the victim on the night before her cross-examination. On July 15, 2005, a hearing was held at which time the court denied the motion for a new trial. Fisher subsequently filed a motion for postconviction relief, which was denied after a hearing on June 9, 2006. This appeal followed.

¶4 Motions for a new trial based on newly discovered evidence are entertained with great caution. *State v. Terrance J.W.*, 202 Wis. 2d 496, 500, 550 N.W.2d 445 (Ct. App. 1996). Such motions are committed to the sound discretion

of the trial court. *Id.* 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. *Id.*

¶5 There is no dispute regarding the legal standards that must guide a trial court in deciding a motion for a new trial on the basis of newly discovered evidence. Here, the determinative issue is solely whether it is reasonably probable that a different result would be reached at a new trial. *See State v. Kaster*, 148 Wis. 2d 789, 801, 436 N.W.2d 891 (Ct. App. 1989).

¶6 The evidence not presented to the jury at Fisher’s trial that is purportedly new evidence was the victim yelled “rape” when she was being sedated the night before her cross-examination. Fisher insists this evidence “would have been admissible as a prior false allegation of sexual assault by a complaining witness under Sec. 972.11(2)(b), Wis. Stats.” The trial court concluded “I don’t see it being that significant of an issue and I can’t find that the defense has met their burden today to convince me that it must be reasonably probable that a different result would be reached on a new trial.” The court noted that Randall Fisher, Fisher’s husband and co-defendant, had this information at his trial and presented it to the jury. The jury still convicted Randall of similar charges. The court concluded this fact undercut Fisher’s allegation that a different result would have been reached in her case.¹ The victim testified that Fisher and her husband held her hostage and sexually assaulted her from May 26 to

¹ Significantly, Fisher does not discuss this conclusion in her briefs to this court.

June 10, 2004. Even though the victim's credibility was challenged on cross-examination, the jury still convicted Fisher. We agree that it is unlikely a second jury hearing on the new evidence would reach a different result.

¶7 Indeed, Fisher's own words were strong evidence that she committed the crimes. Fisher admitted committing the crime to three trial witnesses. Fisher told her cellmate, Samantha DeGrave, that she held the victim against her will. DeGrave testified that Fisher went into detail about the sexual acts between her and the victim. Fisher admitted to DeGrave that they held the victim in a room in the basement. DeGrave testified that Fisher had daily breakdowns where she would "talk about her case or she would just sit and cry and she felt everything was her fault so she constantly broke down about it, constantly talked about it." Fisher felt it was her fault because the idea for holding the victim had come from a book Fisher was reading.

¶8 Fisher's co-worker, Dawn Prokash, also testified that Fisher admitted committing the crimes. Prokash testified that:

She had told me about Randall and her going to get [the victim] that night. She had told me incidents about a stun gun. She had told me that [the victim] was held there. She had told me about sexual relations between her and [the victim], her and Randall.

¶9 Another cellmate, Ashley Martin, testified Fisher told her that Fisher and her husband "kidnapped a girl and that they were going or that they used her for a white sex slave or white slave or something." Fisher told Martin the victim's name and Martin testified that Fisher told her "there was a point where she said that her and Randall and [the victim] had a threesome and that she said she forced [the victim] to have oral sex with [Randall]." Fisher also admitted that she and her husband kidnapped the victim using a stun gun and a knife.

¶10 Fisher suggests the testimony from these three witnesses should be discounted because each was impeached on cross-examination. However, simply because witnesses are impeached does not mean the jury cannot believe their direct testimony. The jury is the sole judge of witness credibility. *State v. Givens*, 217 Wis. 2d 180, 197, 580 N.W.2d 340 (Ct. App. 1998).

¶11 Given the weight of the evidence presented at trial and the fact that the newly discovered evidence would only be used to impeach the victim's credibility, we conclude the trial court did not erroneously exercise its discretion in denying Fisher's motion for a new trial based on newly discovered evidence. The newly discovered evidence is insufficient to meet the burden of proving a reasonable probability that the jury would reach a different result.

¶12 Fisher is not entitled to a new trial in the interest of justice. It does not appear from the record that the real controversy has not been tried or that it is probable that justice has miscarried. *See* WIS. STAT. § 752.35 (2003-04).

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(b)5 (2003-04).

