

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 2, 2007

David R. Schanker
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. 2006AP2818

Cir. Ct. No. 1997CF635

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RICHARD L. KITTLSTAD,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Eau Claire County:
BENJAMIN D. PROCTOR, Judge. *Reversed and cause remanded with
directions.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Richard Kittilstad appeals an order denying his WIS. STAT. § 974.06¹ postconviction motion in which he alleged ineffective assistance of trial counsel, newly discovered evidence, and requested a new trial in the interest of justice. We need not review the effectiveness of trial counsel or whether Kittilstad meets the test for newly discovered evidence because we exercise our discretionary power of reversal in the interest of justice.

¶2 A jury convicted Kittilstad of four counts of soliciting prostitution from Panamanian exchange students living in his home. The State presented evidence that Kittilstad invited a number of Panamanian students to live in his home. After one of them, Gabriel Morales, returned to Panama, four students alleged that Kittilstad offered them money in exchange for them having sex with women while Kittilstad watched through a ceiling vent. Their testimony was supported by an audiotape recording of a conversation between Kittilstad and one of the students, Francisco Sanjur, in which Kittilstad discusses sexual matters and money.

¶3 After Kittilstad's convictions and unsuccessful appeal, the audiotape was examined by Kittilstad's and the State's forensic experts who determined that the tape had been heavily edited and ultimately pieced together. The experts stated the tape was edited mid-conversation, and could not have been made from one continuous, unedited conversation. One expert opined that the original conversation was deliberately masked or otherwise recorded over, and the tape

¹ All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

was probably pieced together. This testimony contradicts Sanjur's trial testimony that the tape was unedited.

¶4 At the postconviction hearing, Morales testified that the other four students had asked him to help fabricate allegations of maltreatment by Kittilstad as a ploy to obtain hardship visas. Morales refused, and the other students did not come forward with their allegations until Morales returned to Panama. Morales's testimony, if believed by the jury, would provide a motive for the other students to accuse Kittilstad of misconduct and would show their efforts to falsely accuse Kittilstad.

¶5 In the interest of justice, we reverse the order denying the postconviction motion because we conclude the real controversy was not fully tried. *See* WIS. STAT. § 752.35. The jury was not given an opportunity to hear and consider evidence that bears on a significant issue in this case. *See State v. Maloney*, 2006 WI 15, ¶14, 288 Wis. 2d 551, 709 N.W.2d 436. Morales' testimony and the expert testimony about the audiotape, which affects the corroborative value of the tape and impugns the credibility of the student who made the tape, should be evaluated by a jury in order for this controversy to be fully and fairly tried.

¶6 Citing *State v. Allen*, 159 Wis. 2d 53, 55-56, 464 N.W.2d 426 (Ct. App. 1990), the State argues that this court lacks authority to grant a new trial in the interest of justice in a collateral attack to a conviction. *Allen*, as further interpreted in *State v. Armstrong*, 2005 WI 119, ¶¶110-114, 283 Wis. 2d 639, 700 N.W.2d 98, limits this court's authority to overturn a judgment of conviction when that judgment is not the subject of the appeal. Rather, this court only has the authority to overturn the order denying the WIS. STAT. § 974.06 motion. This

court has the authority to overturn the order denying the § 974.06 motion and, consistent with WIS. STAT. § 752.35, direct the trial court to grant the motion. That is the remedy the supreme court adopted in *Armstrong* after concluding that its power of discretionary reversal and this court's powers are "coterminous." *Id.*, 283 Wis. 2d 639, ¶113. On remand, the court shall grant Kittilstad's WIS. STAT. § 974.06 motion.

By the Court.—Order reversed and cause remanded with directions.

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

