

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 21, 2008

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. 2007AP2803

Cir. Ct. No. 2005CF38

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DEREK A. WELCH,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Door County:
D. TODD EHLERS, Judge. *Affirmed.*

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

¶1 PER CURIAM. Derek Welch appeals orders denying his motions for plea withdrawal following the revocation of his probation. Welch argues the circuit court erred by denying his motions on grounds of recantation testimony. We reject Welch's arguments and affirm the orders.

BACKGROUND

¶2 An Information charged Welch with five counts of sexual assault of a child and one count of child enticement. The sexual assault charges involved two victims, Carrie T. and Amy D. The child enticement charge involved a victim identified as Angel B.

¶3 Pursuant to a plea agreement, Welch pled no contest to two amended counts of fourth-degree sexual assault and one count of child enticement, as well as one count of misdemeanor bail jumping arising from Door County Circuit Court case No. 2005CF117.¹ In exchange for Welch's pleas, the State agreed to dismiss and read in the remaining counts from both cases and recommend ten years' probation. The court withheld sentence and imposed concurrent probation terms consisting of two years on each of the fourth-degree sexual assault convictions and eight years on the child enticement conviction.

¶4 After Welch's probation was later revoked, he filed a motion for plea withdrawal. That motion was denied after a hearing. Two supplemental motions for plea withdrawal were likewise denied. The court ultimately imposed concurrent sentences consisting of two and one-half years' initial confinement followed by six years' extended supervision on the child enticement conviction, and six months' jail time on each of the fourth-degree sexual assault convictions. This appeal follows.

¹ Welch's conviction in Door County Circuit Court case No. 2005CF117 is not the subject of this appeal.

DISCUSSION

¶5 Welch argues he is entitled to withdraw his plea to child enticement on grounds of recantation testimony.² A plea withdrawal motion that is filed after sentencing should only be granted if it is necessary to correct a manifest injustice. *State v. Duychak*, 133 Wis. 2d 307, 312, 395 N.W.2d 795 (Ct. App. 1986). Welch has the burden of proving by clear and convincing evidence that a manifest injustice exists, and the request for plea withdrawal is addressed to the sound discretion of the circuit court, whose decision will be reversed only for an erroneous exercise of discretion. *See State v. Booth*, 142 Wis. 2d 232, 237, 418 N.W.2d 20 (Ct. App. 1987).

¶6 Newly discovered evidence may be sufficient to establish that a manifest injustice has occurred.

For newly discovered evidence to constitute a manifest injustice and warrant the withdrawal of a plea the following criteria must be met. First, the defendant must prove, by clear and convincing evidence, that: (1) the evidence was discovered after conviction; (2) the defendant was not negligent in seeking evidence; (3) the evidence is material to an issue in the case; and (4) the evidence is not merely cumulative. If the defendant proves these four criteria by clear and convincing evidence, the circuit court must determine whether a reasonable probability exists that a different result would be reached in a trial.

State v. McCallum, 208 Wis. 2d 463, 473-74, 561 N.W.2d 707 (1997) (citations omitted). Where, as here, the claimed evidence is a witness's recantation, we have

² Welch does not challenge the circuit court's denial of his second supplemental plea withdrawal motion. That motion was based on the affidavit of Carrie T., the victim of one of the fourth-degree sexual assault charges. Noting that he wishes to withdraw his plea to only the child enticement charge, Welch concedes that Carrie's affidavit "does not support his motion to withdraw his plea to child enticement." Based on Welch's concession, our review is limited to whether Welch should have been allowed to withdraw his plea to the child enticement charge.

stated the recantation must be corroborated by other newly discovered evidence. *Id.* The corroboration requirement in recantation cases is met if there is a feasible motive for the initial false accusation and there are circumstantial guarantees of the trustworthiness of the recantation. *Id.* at 477-78.

¶7 In applying the reasonable probability of a different outcome criterion, the court must determine “whether there is a reasonable probability that a jury, looking at both the accusation and the recantation, would have a reasonable doubt as to the defendant’s guilt.” *Id.* at 474. A determination that the recantation is not credible, however, “is sufficient to conclude that it is not reasonably probable that a different result would be reached at a new trial.” *State v. Terrance J.W.*, 202 Wis. 2d 496, 501-02, 550 N.W.2d 445 (Ct. App. 1996).

¶8 Here, the probable cause portion of the complaint indicated, in relevant part, that Amy told investigator Beth Moeller she had sexual intercourse with Welch in January 2005 as Angel watched. According to Amy’s statement, Welch asked Angel “to join in,” but Angel declined. At the hearing on Welch’s plea withdrawal motion, Angel denied that Welch enticed or encouraged her to have sex with him. On cross-examination, the State asked Angel whether she remembered telling investigators that she witnessed Welch and Amy having sex. Although Angel conceded talking to the investigators “about it,” she testified she did not remember the conversation well. When asked if she recalled witnessing Welch and Amy having sex, Angel testified she barely remembered that day. Angel further testified, “I would remember somebody offering me to have sex, especially when they are having sex with somebody else.” Angel then recalled telling investigators that Amy “jokingly asked” her to join them in having sex. When asked about her relationship with Welch, Angel indicated they were “really close friends.”

¶9 Amy likewise testified at the motion hearing that Welch never enticed Angel to have sex with him. On cross-examination, Amy denied telling Moeller that Welch asked Angel to join the two of them during sex. The State then played a videotape of Amy's interview with Moeller, taken approximately one month after the subject incident, in which Amy told the investigator that Welch offered Angel to join in but she indicated she would rather watch. After viewing the video, Amy stated she did not remember that happening but conceded her memory would have been better at the time of the interview.

¶10 In its oral decision denying Welch's plea withdrawal motion, the circuit court stated, "[W]hat we have today is victims recanting their stories and, quite frankly, based on what I heard today from those two witnesses after viewing that video, I don't buy it for a minute. I think they've recanted for whatever reasons, but that's not newly discovered evidence. That's a recantation." Based on the court's statements, Welch challenges what he construes as the court's conclusion that it did not "buy" that the evidence was newly discovered. We are not persuaded by Welch's interpretation of the court's statement.

¶11 Although the court stated the evidence was not newly discovered, in context, the court's statement that it did not "buy it for a minute" was a commentary on the credibility of the witnesses' testimony. Even assuming the recantations satisfy the criteria necessary to be categorized as "newly discovered," the circuit court implicitly found the recantations to be incredible based on the testimony and the videotaped interview. *See State v. Echols*, 175 Wis. 2d 653, 672, 499 N.W.2d 631 (1993) (implicit finding of fact sufficient when facts of record support court's decision). The record supports the court's implicit finding. Angel's and Amy's direct examinations were carefully scripted, they exhibited poor memory for the events and the videotaped interview did not support the

recantations. “When the [circuit] court makes findings of fact as to the credibility of witnesses, we will not upset those findings unless they are clearly erroneous.” *Terrance J.W.*, 202 Wis. 2d at 501. Because Welch has failed to establish that the circuit court’s credibility determination is clearly erroneous, its implicit finding that the recantations were incredible “is sufficient to conclude that it is not reasonably probable that a different result would be reached at a new trial.” *Id.* at 501-02.

¶12 Moreover, Welch failed to present newly discovered evidence to corroborate the recantations. *See McCallum*, 208 Wis. 2d at 473-74. To the extent Welch claims the recantations corroborated each other, we are not persuaded. As the *McCallum* court observed, recantations are inherently unreliable. *Id.* at 476. Because the recanting witnesses are friends and seemingly sympathetic to Welch, we conclude these inherently unreliable recantations did not adequately corroborate each other.

¶13 With his first supplemental plea withdrawal motion, Welch submitted the affidavit of Laura S., the mother of Carrie T., one of the fourth-degree sexual assault victims. To the extent Welch claims Laura’s affidavit provides the necessary corroboration, that argument is likewise rejected. In her affidavit, Laura indicated she overheard her daughter speaking on the telephone to Amy. During the conversation, Carrie said “if Derek Welch breaks up with me, we should set him up with a lie related to sex with young girls.” Even accepting Laura’s averments as true, the statement Laura claimed to have heard was made after Welch was charged. The statement would therefore not provide a motive for charges that had already been filed. Even assuming Laura was mistaken about the date she heard the statement, the affidavit does not support Welch’s plea withdrawal motion or otherwise corroborate the recantations. Carrie was not a

witness to the child enticement and Laura did not hear Amy's side of the conversation. Further, Amy's videotaped interview undermines any suggestion that Amy accused Welch as part of a "set up." It is undisputed that Amy's revelation that she had sex with Welch came out toward the end of the interview, and only after Moeller specifically asked Amy for the name of the man with whom she had sexual intercourse. The reference to Angel then arose while describing the encounters.

¶14 Because the recanting witnesses' testimony was incredible and Welch failed to provide corroboration, the circuit court properly denied Welch's plea withdrawal motions.

By the Court.—Orders affirmed.

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

