

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**May 16, 2002**

Cornelia G. Clark  
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. 01-2232  
STATE OF WISCONSIN**

**Cir. Ct. No. 91-CF-1660**

**IN COURT OF APPEALS  
DISTRICT IV**

---

**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**v.**

**HERMAN WHITERABBIT,**

**DEFENDANT-APPELLANT.**

---

APPEAL from an order of the circuit court for Dane County:  
ANGELA B. BARTELL, Judge. *Affirmed.*

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

¶1 PER CURIAM. Herman Whiterabbit appeals from an order denying his postconviction motion for a new trial based on newly discovered evidence.<sup>1</sup> We affirm the trial court's order.

## BACKGROUND

¶2 Whiterabbit was charged with three counts of second-degree sexual assault as a repeat offender, based on a woman's allegations that he had driven her to a park despite her objections and there forced her to engage in a series of sexual acts, including digital penetration and intercourse. We summarize here only the evidence and procedural history most relevant to this appeal.

¶3 At trial, the victim testified that she had met Whiterabbit at a bowling alley across from her home sometime after 9:07 p.m. on the night in question to discuss buying a carpet from him. She got into Whiterabbit's car, believing that they were going to pick up the carpet. However, Whiterabbit told her in the car that he did not have keys to the place where the carpet was stored. Ignoring her repeated requests to be taken home, he instead drove to a grocery store and picked up some non-alcoholic beer. When he got back into the car, he showed her some porn videos. He next drove her to the park where he sexually assaulted her, both inside and outside of the car. He then drove her back to her apartment and returned to his own home.

¶4 A witness from a video store produced a transaction sheet indicating that Whiterabbit had rented two porn videos at 5:10 p.m. on the night in question.

---

<sup>1</sup> Whiterabbit also asked for a new trial in the interest of justice in his opening brief, but conceded in his reply brief that this court lacks authority to grant such relief given the procedural posture of this case. We therefore do not address that issue.

The employee indicated, however, that the computer clock was intentionally set four hours slow, so that transactions occurring after midnight would show up as having occurred on the same business day. Therefore, he explained that the videos were actually rented at 9:10 p.m. in the evening.

¶5 Whiterabbit did not take the stand. Whiterabbit's wife testified that her husband had returned home at 10:15 p.m. that evening. She also testified that she had seen the porn videos Whiterabbit rented when he had come home for supper around 5:45 p.m. Relying on his wife's testimony, Whiterabbit argued that he did not have time to perpetrate the assaults and drive all of the places alleged by the victim.<sup>2</sup>

¶6 The jury returned guilty verdicts on all three counts and the trial court sentenced Whiterabbit to three consecutive twelve-year prison terms. Whiterabbit filed a postconviction motion seeking a new trial on various grounds, including ineffective assistance of counsel based on his attorney's alleged failure to present exculpatory evidence undermining the time frame given by the victim. The trial court denied the motion after a hearing.

¶7 This court affirmed the trial court's denial of postconviction relief and also rejected Whiterabbit's request for a new trial in the interest of justice. Among other things, we concluded that additional evidence regarding the times it would have taken to drive to each of the places described by the victim would not have changed the outcome of the trial because the jury "could not have reasonably

---

<sup>2</sup> Although the opening and closing arguments were not recorded and are not in the record before us, there does not appear to be any dispute between the parties as to the defense theory at trial.

concluded that all of [the activities described by the victim] occurred in a sixty-minute period,” anyway. In other words, it was implicit in the verdicts that the jury had rejected the testimony of Whiterabbit’s wife as to when Whiterabbit had returned home. We further concluded that Whiterabbit was not entitled to a new trial in the interest of justice because the State’s case was dependent upon the victim’s testimony, and trial counsel had made sufficient efforts attacking her credibility to ensure that the matter was fully tried.

¶8 Six years later, Whiterabbit filed the present motion for postconviction relief on the grounds of newly discovered evidence. He alleged that he had hired an investigator to make additional inquiries regarding the computer clock at the video store. The investigator obtained a signed affidavit from a coworker of the video store employee who had testified, stating that there was no business reason for the computer clock to have been set four hours slow, since the times in the transaction record had no relevance to the day-to-day operations, and that Whiterabbit’s rental therefore could have, but did not necessarily, take place at 5:10 p.m. The investigator also obtained a signed affidavit from a subsequent owner of the video store, who stated that the computer clock had not been more than an hour off in the years since she had purchased the store. In addition, the investigator provided his own affidavit, stating that he had interviewed the original video store witness, and that the witness had acknowledged that the computer clock had not intentionally been set slow by anyone, and could have been off by any indeterminable amount of time.

¶9 The trial court denied the motion because it concluded that Whiterabbit was negligent for failing to obtain the evidence earlier and that he had failed to show that the evidence would have affected the outcome of the trial.

## ANALYSIS

¶10 A motion for a new trial is addressed to the sound discretion of the trial court, and we will ordinarily not reverse the trial court's decision unless it failed to rationally apply the proper legal standard to the facts of record. *See State v. Eckert*, 203 Wis. 2d 497, 516, 553 N.W.2d 539 (Ct. App. 1996). We will independently determine, however, whether the denial of a new trial based on newly discovered evidence deprives the defendant of due process. *See State v. Coogan*, 154 Wis. 2d 387, 395, 453 N.W.2d 186 (Ct. App. 1990).

¶11 The test to determine whether newly discovered evidence warrants a new trial has five factors: (1) the evidence must have been discovered after the trial; (2) the moving party must not have been negligent in seeking to discover it; (3) the evidence must be material to the issue; (4) the testimony must not merely be cumulative to the testimony which was introduced at trial; and (5) it must be reasonably probable that a different result would be reached at a new trial. *See id.* The appellant must prove all five requirements by clear and convincing evidence. *See State v. Avery*, 213 Wis. 2d 228, 235, 570 N.W.2d 573 (Ct. App. 1997).

¶12 There is a sixth element required when the newly discovered evidence contradicts prior sworn testimony. In order to warrant a new trial, recantation testimony must either be corroborated by other newly discovered evidence, or the defendant must show: (1) there is a feasible motive for the initial false statement; and, (2) there are circumstantial guarantees of the trustworthiness of the recantation. *State v. McCallum*, 208 Wis. 2d 463, 477-78, 561 N.W.2d 707 (1997). If the new evidence serves only to impeach the credibility of witnesses who testified at trial, it is insufficient to warrant a new trial as a matter of due

process, because it does not create a reasonable probability of a different result. *See State v. Kimpel*, 153 Wis. 2d 697, 700-01, 451 N.W.2d 790 (Ct. App. 1989).

¶13 Here, Whiterabbit asserts that the video store employee's statement to the investigator contradicts his sworn trial testimony. As the trial court noted, the contradiction is perhaps not as plain as Whiterabbit would like to make it appear. The employee's altered belief regarding whether the time clock had been deliberately set back did not rule out the possibility that the clock had indeed been four hours off. Nonetheless, for the purposes of this discussion, we will treat the statement to the investigator as recantation evidence.

¶14 We agree with the trial court that the video store employee's statement to the investigator was discovered after trial, that it was relevant to the wife's credibility, and that it was not cumulative to other evidence produced at trial. We are further satisfied that the co-employee's affidavit provides a measure of corroboration for the statement. The remaining questions, then, are whether Whiterabbit demonstrated due diligence in obtaining the evidence and whether the evidence would have likely produced a different outcome at trial. We are not persuaded of either proposition.

¶15 Whiterabbit argues that he could not have been expected to obtain the employee's statement sooner because he had no reason to believe that the employee would recant until he heard some rumors to that effect. The fact remains, however, that Whiterabbit himself knew when he rented the videos. If there was a conflict between the time Whiterabbit believed he rented them and the time when the store employee said they had been rented, Whiterabbit had sufficient knowledge to investigate the matter. At a minimum, he could have

discovered the co-employee's statements when he filed his initial postconviction motions.

¶16 Whiterabbit claims that if the video store employee had not undermined his wife's credibility regarding whether she saw her husband with the videos at supper, the jury would have been more likely to believe her testimony that Whiterabbit had returned home at 10:15 p.m., thus establishing a time frame too narrow to accommodate the victim's account. The essence of the case, however, was the victim's credibility, not the wife's. The jury heard evidence challenging the victim's credibility based on her mental health problems and flashbacks stemming from childhood abuse, her delay in reporting the assault, inconsistencies in her accounts of the assault, and the logistics of whether the assault could have occurred as described given the space constraints in the car. If none of that evidence undermined the jury's confidence in the victim's credibility, we see no reasonable probability that additional evidence regarding the time the videos were rented would have bolstered the wife's credibility to the extent that the jury would have accepted the wife's alibi rather than the victim's account.

¶17 In sum, the additional evidence regarding the computer clock at the video store was not so favorable to the defense that its absence prevented Whiterabbit from having a fair trial. The trial court properly exercised discretion when it denied Whiterabbit's motion for a new trial.

*By the Court.*—Order affirmed.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)5 (1999-2000).

