COURT OF APPEALS
DECISION
DATED AND FILED

May 1, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-2785-CR **Cir. Ct. No. 00-CF-136**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ERIC R. GEORGE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Ozaukee County: JOSEPH D. McCORMACK, Judge. *Affirmed*.

Before Brown, Anderson and Snyder, JJ.

¶1 PER CURIAM. Eric R. George appeals from the judgment of conviction entered against him and the order denying his motion for postconviction relief. George brought a motion for postconviction relief asking for a new trial on the same two grounds he raises in this appeal. George argues that the circuit court erred when it prevented him from offering certain testimony,

and when it denied his motion for a new trial based on newly discovered evidence. Because we conclude that the trial court did not err, we affirm.

¶2 George was convicted after trial of one count each of second-degree sexual assault with the use of force, and third-degree sexual assault, both as an habitual offender. The court sentenced him to seventeen years in prison. The victim of the assault was the sister of the woman with whom he lived. At trial, the victim testified about the assault. In addition, the victim's sister testified to a conversation she had with George after the assault. In this conversation, George told her that he was going to jail for a long time, and that he had forced her sister to have sex with him.

¶3 Testifying in his own defense, George stated that the sexual intercourse was consensual. He also attempted to explain what he had meant when he told the victim's sister that he was going to jail for a long time. The following exchange took place between George and defense counsel:

> Q When you said that you should go to jail forever, is that true as well?
>
> A I said I should go to jail because I got a probation officer and I had been drinking and doing marijuana, and I had called him the next day and I was going to get a treatment program for that. That's the reason why I should go to jail, not because I had raped [the victim].

And later:

> Q You weren't supposed to be drinking and smoking and using drugs?
>
> A No, no, I wasn't.
>
> Q And what would happen if you did?
>
> [Prosecutor]: I'm just going to object.

THE COURT: Sustained.

Q That's a violation of your probation, correct?

A Yes. They would send me to jail if I did that.

[Prosecutor]: Judge, I'm going to ask that that answer be stricken from the record. I would object to it.

THE COURT: So ordered. The jury is instructed to disregard.

¶4 George first argues that the circuit court erred when it sustained the State's objection to this evidence. He argues that this testimony was being offered to refute the State's theory that his statements that he was "going to jail for a long time" showed his guilty knowledge. He argues that these statements showed that he worried about violating his probation by drinking and smoking marijuana.

¶5 "A trial court's decision to admit or exclude evidence is a discretionary determination that will not be upset on appeal if it has 'a reasonable basis' and was made 'in accordance with accepted legal standards and in accordance with the facts of record.'" ***State v. Jenkins***, 168 Wis. 2d 175, 186, 483 N.W.2d 262 (Ct. App. 1992) (citations omitted). We conclude that the circuit court did not erroneously exercise its discretion when it excluded this evidence. The testimony which the court ordered stricken was cumulative. It contained the same information which had just been allowed. George stated: "I said I should go to jail because I got a probation officer and I had been drinking and doing marijuana, and I had called him the next day and I was going to get a treatment program for that. That's the reason why I said that I should go to jail, not because I had raped [the victim]." The testimony which the court ordered stricken was that George had violated his probation and he would go to jail for that. The stricken testimony was not substantially different from the prior testimony. The jury heard George's explanation as to why he said he would go to jail. Excluding this

additional testimony was harmless. We conclude that the circuit court properly exercised its discretion when it excluded this testimony.

¶6 George also argues that the circuit court erred when it did not order a new trial on the basis of newly discovered evidence. 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 be merely 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. ***State v. Coogan***, 154 Wis. 2d 387, 394-95, 453 N.W.2d 186 (Ct. App. 1990). If the newly discovered evidence fails to satisfy any one of these five requirements, it is not sufficient to warrant a new trial. ***State v. Kaster***, 148 Wis. 2d 789, 801, 436 N.W.2d 891 (Ct. App. 1989). A motion for a new trial is addressed to the sound discretion of the trial court and we will not reverse the trial court decision unless it erroneously exercised its discretion. ***Id.***

¶7 The newly discovered evidence George sought to introduce was the testimony of two additional witnesses. The two witnesses testified at the hearing on George's motion for postconviction relief. Both testified about a conversation they had with the victim in a bar. In this conversation, one of them asked the victim about the sexual assault. The witness testified that the victim told her that "it just happened," that she did not say yes or no to George but "just laid there," and it was not "brutal." The second witness corroborated this testimony and said that the victim described the incident in a laughing and joking manner.

¶8 George argues that he was entitled to a new trial based on this evidence. The circuit court rejected this argument, finding that it was not

reasonably probable that a different result would have been reached based on this new evidence. We agree. As the circuit court stated, George's defense was that the victim consented to the sexual contact. This evidence does not show consent, but rather impeaches the victim's credibility. "[N]ew evidence which merely impeaches the credibility of a witness is not a basis for a new trial on that ground alone." ***Simos v. State***, 53 Wis. 2d 493, 499, 192 N.W.2d 877 (1972). We conclude that the circuit court properly exercised its discretion when it denied the motion for a new trial based on this evidence.

By the Court.—Judgment and order affirmed.

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