

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**February 5, 2003**

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. 02-0377-CR  
STATE OF WISCONSIN**

**Cir. Ct. No. 00-CF-155**

**IN COURT OF APPEALS  
DISTRICT II**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**v.**

**JAAMAL D. BELL,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Racine County: WAYNE J. MARIK, Judge. *Affirmed.*

Before Brown, Anderson and Snyder, JJ.

¶1 PER CURIAM. Jaamal D. Bell appeals from a judgment of conviction of second-degree sexual assault as a habitual offender and from an order denying his motion for a new trial on the ground of newly discovered evidence. He argues that phone records indicating that the victim called him in the days following the assault and a hotel receipt corroborating his testimony about his

activity the night following the assault would have changed the result of his trial. We reject his claim that the real controversy was not fully tried and that newly discovered evidence requires a new trial. We affirm the judgment and order.

¶2 Bell had a relationship with Linea M. The two lived together and their daughter was born in December 1998. Linea asked Bell to move out of their apartment in December 1999. For a short time after that the two talked about whether they could save their relationship. Linea ultimately told Bell she was not interested in working things out.

¶3 Linea reported that nonconsensual sexual contact occurred with Bell on January 12, 2000. She testified that Bell came to her apartment between 2:00 and 2:30 a.m. Although she asked him to leave after an argument, Bell slept in the apartment because he was unable to get a ride home. In the morning Linea took her older daughter to school and returned home to dress for work. Because he wanted to talk to her, Bell followed Linea throughout the apartment. He blocked doorways to not let her pass, removed her clothes from the bathroom as she showered, and said she could not dress unless she talked to him. Linea indicated that at one point Bell grabbed her from behind, unzipped her rear pants zipper, and placed his hand in the front of her pants to touch her vaginal area. Bell pushed her onto the bed and straddled her while holding her wrists down with one hand. Bell pulled down her pants and again touched her vaginal area. Bell pulled his own pants down and asked Linea for sex. After Linea began to cry, Bell got up and told her to go to work. Rather than go to work, Linea went to her mother's place of employment. She called the police and met with officers in the parking lot. She brought the officers back to the apartment, but Bell had left.

¶4 Linea further testified that after the incident she was afraid of Bell and did not see him. She indicated that he would call her and in one phone conversation he said he was sorry about the assault and that it was not his fault because someone had slipped something in his drink.

¶5 At trial, Bell's testimony conflicted with Linea's on many points. Bell indicated that he went to the apartment only to pick up some clothes. He then discovered his girlfriend had driven off in his car. Linea gave Bell permission to sleep on the living room floor. Contrary to Linea's testimony that she took their daughter with her when she drove her older child to school, Bell said he watched the couple's younger child. Bell agreed that the couple argued but said he was not trying to reunite with Linea. Bell denied pushing Linea onto the bed, denied sexually touching her, and indicated that they did not have any physical contact at all. He said he left the apartment before Linea. Finally, Bell testified that after the incident, Linea would call him and invite him over at all hours of the night.

¶6 Bell's arguments on appeal center on two pieces of evidence he procured after trial. The day after the jury's verdict, defense counsel discovered that records for telephone calls made from Linea's apartment for several days prior to and a substantial time after the assault had been filed with the court. The first response the telephone company made to defense counsel's subpoena for such information was that the requested period was beyond the retention time for such records. Yet the records were produced and filed without notice to defense counsel. The records indicated that Linea had placed twelve calls to Bell in the sixteen days following the assault.

¶7 After trial Bell remembered the name of the hotel where he and his girlfriend, Sherry, had spent the night on January 12, 2000. Sherry had testified at

trial that she and Bell spent the night of January 12, 2000, at a hotel and that she did not observe any marks on his body indicating that he had been involved in a struggle. Neither Sherry nor Bell could remember the name of the hotel during their trial testimony. In closing argument, the prosecutor suggested that both Sherry and Bell were lying since they were not able to recall the name of the hotel. As part of his postconviction motion, Bell produced a receipt from the hotel for the night of January 12, 2000.

¶8 Bell first argues that he is entitled to a new trial in the interests of justice under WIS. STAT. § 752.35 (1999-2000).<sup>1</sup> He explains that because the jury was deprived of evidence that Linea had made numerous calls to him after the assault, the issue of credibility was not fully tried. Bell further suggests the hotel receipt would have corroborated Sherry's and his testimony about where they spent the night after the assault and undermined the prosecution's suggestion that they were being evasive in their testimony.

¶9 This court may order a new trial under WIS. STAT. § 752.35 where the real controversy has not been fully tried or there was a probable miscarriage of justice. *State v. Ray*, 166 Wis. 2d 855, 875, 481 N.W.2d 288 (Ct. App. 1992). A claim that the jury was erroneously precluded from hearing crucial evidence falls under the category of the real controversy not being fully tried. *State v. Ward*, 228 Wis. 2d 301, 306, 596 N.W.2d 887 (Ct. App. 1999). We need not find a substantial likelihood of a different result on retrial when a new trial is ordered on the ground that the real controversy was not fully tried. *State v. Hicks*, 202

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<sup>1</sup> All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

Wis. 2d 150, 160, 549 N.W.2d 435 (1996). However, the evidence which the jury was deprived of hearing must be “important testimony that bore on an important issue of the case.” *Id.*

¶10 We conclude that the phone records were not important evidence bearing on an important issue in the case. While Linea indicated that Bell would call her, she was never asked if she initiated post-assault phone calls to Bell. The phone records did not directly impeach Linea’s testimony. The jury heard evidence that there was post-assault telephone contact and eventually Linea saw Bell on a more frequent basis. The couple had a child together and as Linea explained in her testimony, despite her fear she found it necessary to have contact with Bell for the child’s welfare and to discuss matters concerning the child. This was not a case where phone contact would have been unexpected. Further, Linea reported the assault immediately. Her testimony was consistent with her statement to police. Linea’s credibility was fully tested without details of the phone calls she placed to Bell following the assault.

¶11 The hotel receipt pertained only to the credibility of Sherry and Bell with respect to their activities that night following the assault. Their activities and actual whereabouts did not directly bear on whether or not the assault occurred. Through the evidence that he spent the night with Sherry, Bell was attempting to demonstrate that a struggle with Linea had not occurred because his body bore no signs of a struggle. The prosecutor’s suggestion that they were untruthful because they could not recall the name of the hotel was an attempt to impeach Sherry’s testimony that she had not found any evidence of a struggle on Bell’s body that night. However, Linea never indicated that she had left marks on Bell during their struggle. There was no basis for the inference Bell was trying to create. Further, the prosecutor’s suggestion that Sherry and Bell were lying about having stayed in

a hotel had little impact in light of Sherry's explanation that they had stayed so many different places during that period of their relationship that it was impossible to remember. The hotel receipt was not important evidence bearing on an important issue.

¶12 In short, we are not convinced that the real controversy—the competing credibility of the victim and the perpetrator—was not fully tried. Additionally, we reject Bell's claim that a new trial should have been granted because of the newly discovered evidence presented by the phone records. One of the five criteria for granting a new trial due to newly discovered evidence is that the new evidence must be such that it will be reasonably probable that a different result would be reached on a new trial. *State v. Boyce*, 75 Wis. 2d 452, 457, 249 N.W.2d 758 (1977). As already explained, the phone records did not constitute important evidence on an important issue. The trial court's determination that those records did not create a reasonable probability of a different result on a new trial was not an erroneous exercise of discretion.

*By the Court.*—Judgment and order affirmed.

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

