

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**April 3, 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. 02-0999-CR  
STATE OF WISCONSIN**

Cir. Ct. No. 98-CF-17

**IN COURT OF APPEALS  
DISTRICT IV**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**JACQUELINE FARENCE,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Dodge County: DANIEL W. KLOSSNER, Judge. *Affirmed.*

Before Roggensack, Deininger and Lundsten, JJ.

¶1 PER CURIAM. Jacqueline Farence appeals a pair of related judgments of conviction and an order denying her motion for a new trial based on newly-discovered evidence. We conclude the trial court properly exercised its discretion in denying the motion and affirm.

¶2 Farence was charged with two counts of theft by false representation based on allegations that she had made claims for payment under a work-at-home program for work which had not been done.<sup>1</sup> Farence's defense was that any discrepancy in the number of items she or her family members had produced was attributable to her employer's inaccurate recordkeeping, and she made repeated discovery requests for certain work order history records which might support her claim. The State and her employer repeatedly denied that any such records still existed. However, on the last day of trial, another employee testified that such records could still be available in computer archives.

¶3 The trial court offered Farence the options of having a mistrial declared, obtaining a continuance, or proceeding, but precluding further testimony by the State's witness. Defense counsel advised taking the mistrial option. Farence chose to proceed, however, citing exhaustion and lack of financial resources to retry the matter.

¶4 After trial, Farence was finally able to obtain many of the documents she had sought. She ultimately moved for a new trial based on those documents. The trial court denied her motion, and she appeals.

¶5 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). The test to determine whether newly discovered evidence warrants a new trial has five

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<sup>1</sup> There were additional counts in the complaint that are not relevant to this appeal.

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 evidence must not merely be cumulative to the evidence which was introduced at trial; and (5) it must be reasonably probable that a different result would be reached at a new trial. *See State v. Coogan*, 154 Wis. 2d 387, 394-95, 453 N.W.2d 186 (Ct. App. 1990). 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).

¶6 Here, the trial court determined that Farence failed to satisfy the newly-discovered evidence test because she became aware during, not after, trial that the documents she sought might still be available, and was given an opportunity to obtain them, either during a continuance or following a mistrial. We are satisfied that the trial court's decision represents a reasonable application of the law to the facts of record. Although Farence had made earlier attempts to obtain the records, she did not exercise due diligence in taking one of the opportunities presented to her at trial. She cannot request a new trial based on the contents of the documents now, when, during trial, she explicitly rejected the offer of a new or continued trial with the opportunity to examine the documents.

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

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)5 (2001-02).

