COURT OF APPEALS
DECISION
DATED AND FILED

April 7, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP1220-CR **Cir. Ct. No. 2007CF815**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BRUCE E. BURNS,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Dane County: DANIEL R. MOESER, Judge. *Affirmed.*

Before Vergeront, P.J., Higginbotham and Sherman, JJ.

¶1 PER CURIUM. Bruce E. Burns appeals from judgments convicting him of several counts of sexual crimes against children and an order denying his postconviction motion to withdraw his no contest plea. Burns contends that he is

entitled to withdraw his plea based on newly discovered evidence establishing his plea and conviction resulted in a manifest injustice. We disagree and affirm.

BACKGROUND

¶2 In 2007, the State charged Burns with multiple counts of sexual crimes against children, based on allegations by his former girlfriend's daughters, A.B. and C.B. A.B. and C.B. testified at a preliminary hearing that Burns had repeatedly sexually assaulted them when he lived with them and their mother. As part of a plea agreement, Burns pled no contest to two counts of causing a child under thirteen years of age to view sexual activity, one count of causing a child between thirteen and eighteen years of age to view sexual activity, and one count of exposing genitals to a child. *See* WIS. STAT. §§ 948.055(1) and 948.10(1) (2009-10).[1] After sentencing, Burns moved to withdraw his plea based on newly discovered evidence, asserting that statements by A.B. and C.B.'s siblings indicated A.B. and C.B. had lied about the abuse.

¶3 The circuit court held an evidentiary hearing on Burns' postconviction motion. Burns presented testimony by: (1) a private investigator who had spoken to A.B. and C.B.'s siblings; (2) Burns' mother, who is grandmother to A.B. and C.B.'s younger siblings; (3) Burns' trial attorney; and (4) one of A.B. and C.B.'s siblings. Another of A.B. and C.B.'s siblings was called to testify, but refused to respond to questions. The parties stipulated that another sibling would testify at trial as to A.B. and C.B.'s reputation for untruthfulness.

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

¶4 After reviewing the original allegations and the proffered newly discovered evidence, the circuit court found that the victims' siblings' statements did not establish a reasonable probability of a different result at trial. It explained that while the victims' credibility would be very important at a trial, Burns previously had other information to attack the victims' credibility. It also explained that the probative value of the statements alleged to have been made by the victims was very low. Burns appeals.

STANDARD OF REVIEW

¶5 We review a circuit court's decision denying a motion to withdraw a plea based on manifest injustice for an erroneous exercise of discretion. *See* ***State v. McCallum***, 208 Wis. 2d 463, 473, 561 N.W.2d 707 (1997) ("The withdrawal of a plea under the manifest injustice standard rests in the circuit court's discretion."). A circuit court properly exercises its discretion if it relies on the facts in the record and applies the proper legal standard to reach a reasonable decision. *See* ***State v. Edmunds***, 2008 WI App 33, ¶8, 308 Wis. 2d 374, 746 N.W.2d 590.

DISCUSSION

¶6 Burns contends that statements impeaching A.B. and C.B.'s credibility constitutes "newly discovered evidence" that entitles him to withdraw his plea. First, he asserts the circuit court properly determined that he had established the first four factors for plea withdrawal based on newly discovered evidence: "(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."[2] *See* ***McCallum***, 208 Wis. 2d at 473. He then asserts that there is a reasonable probability that a jury, presented with the original allegations and the newly discovered impeaching evidence, would have a reasonable doubt as to his guilt.[3] *See* ***id.*** at 473-74. We disagree.

¶7 The test for whether there is a reasonable probability of a different outcome is whether a jury, faced with the evidence in the record and the proffered newly discovered evidence, would have a reasonable doubt as to Burns' guilt. *See* ***McCallum***, 208 Wis. 2d at 468 & n.1. However, before we turn to whether the newly discovered evidence established a reasonable probability that a jury would have a reasonable doubt as to Burns' guilt, we must determine what constituted the newly discovered evidence at the motion hearing.

¶8 In ***State v. Bembenek***, 140 Wis. 2d 248, 252-57, 409 N.W.2d 432 (Ct. App. 1987), we explained that proffered evidence that would be inadmissible at trial does not constitute "newly discovered evidence." We begin, then, with an analysis of what evidence presented at the postconviction motion hearing would be admissible at trial.

[2] The State argues that the record does not support the circuit court's finding that Burns met his burden on the second element: that he was not negligent in failing to discover the evidence sooner. Because we conclude that the circuit court properly exercised its discretion in denying Burns' motion, we need not reach this argument.

[3] Both the parties and the circuit court address the fifth element of the newly discovered evidence test in the plea withdrawal context as a question of whether there would be a reasonable probability of a different result at trial. We have not discovered any case law clearly on point directing how to apply the fifth element in the plea withdrawal context. We follow the framework set by the circuit court and the parties in this case.

¶9 Burns presented the following evidence at the postconviction motion hearing. Private Investigator Gwen Dunham testified that she spoke with A.B. and C.B.'s younger siblings, Josh B. and Shia B., regarding Josh's statements to his grandmother that A.B. and C.B. had indicated they lied about Burns in this case. Dunham testified that Josh would not speak with her, but Shia volunteered that she overheard A.B. and C.B. say that they were going to make something up to put Burns in jail, and that A.B. and C.B. had said, "He didn't do nothing. He's ugly and stupid. Who cares?" Burns' mother, Patricia Persinger, testified that after Burns was sentenced, Josh told her that A.B. and C.B. were laughing and joking while stating how happy they were that they had been able to get Burns in jail, even though they had to lie. Josh was not called to testify at the hearing. Shia refused to testify when she was called to the stand, and the court found that Shia was unavailable as a witness.

¶10 A.B. and C.B.'s brother, Keith B., testified that he knows A.B. to be a compulsive liar and completely untruthful, and that C.B. goes along with whatever A.B. says. He stated that he had observed A.B. and C.B. saying in a hurtful way to their younger siblings, Shia and Josh, "That's why we put your father in prison," that they were going to "get [Burns] locked up," and that they were laughing when they said it. Keith also stated he heard A.B. and C.B. say to their mother, "You're a terrible mom for letting this happen to me." The parties stipulated that A.B. and C.B.'s sister, Natasha K., would testify at trial that she knew A.B. and C.B. to be untruthful.

¶11 The parties dispute whether Burns introduced any admissible evidence as to the statements by Josh and Shia. The State asserts that the testimony by Dunham and Persinger was inadmissible hearsay under WIS. STAT. § 908.01(3), and that the record does not establish any reason to believe that Josh

or Shia would testify at trial when they did not testify at the postconviction motion hearing. Burns argues that Dunham's testimony as to Shia's statement is admissible under the residual exception to the hearsay rule, WIS. STAT. § 908.045(6), which provides that hearsay is admissible if it does not fit under any specific exception to the hearsay rule but has "comparable circumstantial guarantees of trustworthiness." Burns asserts that Dunham's testimony as to Shia's statements is admissible based on the following factors set forth in ***State v. Sorenson***, 143 Wis. 2d 226, 245-46, 421 N.W.2d 77 (1988), for assessing the admissibility of a child's statements under the residual hearsay exception:

> First, the attributes of the child making the statement should be examined, including age, ability to communicate verbally, to comprehend the statements or questions of others, to know the difference between truth and falsehood, and any fear of punishment, retribution or other personal interest, such as close familial relationship with the defendant, expressed by the child which might affect the child's method of articulation or motivation to tell the truth.
>
> Second, the court should examine the person to whom the statement was made, focusing on the person's relationship to the child, whether that relationship might have an impact upon the statement's trustworthiness, and any motivation of the recipient of the statement to fabricate or distort its contents.
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> Third, the court should review the circumstances under which the statement was made, including relation to the time of the alleged assault, the availability of a person in whom the child might confide, and other contextual factors which might enhance or detract from the statement's trustworthiness.
>
> Fourth, the content of the statement itself should be examined, particularly noting any sign of deceit or falsity and whether the statement reveals a knowledge of matters not ordinarily attributable to a child of similar age.
>
> Finally, other corroborating evidence, such as physical evidence of assault, statements made to others, and opportunity or motive of the defendant, should be

> examined for consistency with the assertions made in the statement.

¶12 Burns argues Dunham's testimony as to Shia's statements meets this test because: (1) Dunham stated Shia appeared reasonably intelligent and was willing to talk with her; (2) Dunham was not previously acquainted with Shia, and had no reason to misrepresent the statements Shia made; (3) Shia spontaneously offered the information without prompting, Dunham then spoke with Shia privately, and did not try to influence Shia's statements; (4) Shia's statements did not contain any signs of deceit, but rather indicated that Shia was attempting to convey what she remembered, as well as when and where her sisters' statements occurred; and (5) Keith's testimony as to A.B. and C.B. saying similar things to Shia corroborated Shia's statements. Burns also cites ***State v. Petrovic***, 224 Wis. 2d 477, 592 N.W.2d 238 (Ct. App. 1999), to support admission of Dunham's hearsay testimony as to Shia's statements based on exigent circumstances to justify excusing Shia from personally testifying. He points to the fact that Shia is only seven years old, and that there must be pressure on Shia not to testify that her sisters lied.

¶13 We conclude that the facts of this case are not sufficient to give rise to the residual hearsay exception for child witnesses under ***Sorenson*** and ***Petrovic***. We do not agree that the facts establish that it would be significantly emotionally scarring to expect Shia, a seven-year-old child, to testify as to what she heard her older sisters say that would tend to exonerate her father. Additionally, Keith's statements did not significantly corroborate what Dunham said Shia told her; Keith testified A.B. and C.B. taunted Shia about having her father arrested, while Dunham stated Shia told her A.B. and C.B. said they were going to fabricate a story about Burns, and Burns had not done anything to them. There is a

significant distinction between the statements reported by Keith and the statements reported by Dunham on Shia's behalf. Thus, there is neither sufficient reason to allow Dunham to provide the hearsay testimony as to what Shia reported nor sufficient corroboration of the statements to support admissibility under the residual exception to the hearsay rule.

¶14 Burns does not dispute that the testimony by Persinger as to Josh's statements is inadmissible hearsay. Therefore, Burns has not met his burden to establish that the hearsay evidence provided by Dunham and Persinger would be admissible at trial, and therefore Burns did not present any admissible evidence as to what Shia or Josh heard A.B. or C.B. say regarding Burns.

¶15 It follows that the only potential "newly discovered evidence" presented at the postconviction motion hearing was Keith's testimony that he knows A.B. to be a compulsive liar and completely untruthful, and that C.B. goes along with whatever A.B. says; Natasha's testimony that she knows A.B. and C.B. to be untruthful; and Keith's testimony that he had observed A.B. and C.B. laughing and saying hurtfully to Shia and Josh, "That's why we put your father in prison," and that they were going to "get [Burns] locked up," and stating to their mother, "You're a terrible mom for letting this happen to me." On our review of the evidence in the record, we conclude that this evidence does not establish a reasonable probability that a jury would have a reasonable doubt as to Burns' guilt.[4]

[4] Burns asserts that whether there is a reasonable probability that the jury would have a reasonable doubt as to Burns' guilt is a question of law, citing ***State v. Plude***, 2008 WI 58, ¶33, 310 Wis. 2d 28, 750 N.W.2d 42. The State does not dispute this assertion. We review questions of law de novo. *See* ***Pawlowski v. American Family Mut. Ins. Co.***, 2009 WI 105, ¶16, 322 Wis. 2d 21, 777 N.W.2d 67.

¶16 We examine the newly discovered evidence described above together with the allegations in the criminal complaint and information and the evidence at the preliminary hearing. The complaint and information alleged that A.B. reported to police that Burns had masturbated in front of her on two occasions when she was between eight and twelve years old. C.B. reported to police that Burns had masturbated in front of her when she was thirteen to fourteen years old and had exposed his erect penis to her on a separate occasion. A.B. and C.B. testified to the same facts at the preliminary hearing.

¶17 Viewing the above allegations and evidence together with the newly discovered evidence, we conclude that the newly discovered evidence does not establish a reasonable probability that a jury would have a reasonable doubt as to Burns' guilt. Evidence that Natasha considers A.B. and C.B. untruthful, and Keith considers A.B. untruthful, does not significantly impeach A.B.'s and C.B.'s credibility. Additionally, evidence that Keith heard A.B. and C.B. taunting their younger siblings about putting Burns in jail, even laughingly, does not negate the original accusations. Nothing in Keith's testimony indicates that A.B. and C.B. fabricated the allegations, only that they were pleased with the outcome. Finally, Keith's testimony that A.B. and C.B. called their mother "a terrible mom for letting this happen" tends to bolster rather than negate the complaint/information allegations and preliminary hearing evidence. In the totality, the evidence does not establish a reasonable probability that a jury would have a reasonable doubt as to Burns' guilt. We therefore affirm.

By the Court.—Judgments and order affirmed.

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