COURT OF APPEALS
DECISION
DATED AND FILED

July 21, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP2013-CR **Cir. Ct. No. 2008CF958**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHARLES J. HOMESLEY A/K/A CHARLES J. MAYBERRY,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dane County: PATRICK J. FIEDLER, Judge. *Affirmed.*

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

¶1 PER CURIAM. Charles J. Homesley appeals from a judgment of conviction for three counts of second-degree sexual assault with threat of force and one count of false imprisonment and the order denying his motion for postconviction relief. He argues on appeal that he is entitled to a new trial because

of newly discovered evidence. We conclude that Homesley did not establish that he was entitled to a new trial on the basis of newly discovered evidence, and we affirm.

¶2 Homesley was convicted after a jury trial of assaulting a woman named Anne S. Before he was sentenced, Homesley moved for a new trial based on an affidavit from Anne's former husband, Robert S., that said Anne had told him that Homesley was going to prison for a crime he did not commit. At the postconviction hearing, Robert testified that Anne had said that she "would send that nigger to jail," and that Homesley had done "nothing." Robert's mother, Marilyn S., also testified and said that Robert had phoned her to tell her that Anne had said "I'm going to send this … Nigger up—because he didn't do it." Anne testified at the hearing that she did not make these statements. Anne and Robert were going through a contentious divorce at the time.

¶3 The circuit court denied the motion. The court found that Marilyn's statements were pure hearsay and not credible, that there was no "feasible motive" for Anne to have made such a statement to Robert while they were in a contentious divorce proceeding, and that Anne's credibility had been fully explored during the trial. The court further found that evidence supporting the conviction, including Anne's testimony and the testimony of the nurse who examined her after the assault, was compelling. The court concluded that it had no doubt that the jury's verdict would have been the same even if this evidence had been admitted.

¶4 In order to receive a new trial based on newly discovered evidence:

> a defendant must establish by clear and convincing evidence that "(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." Once those four criteria have been established, the court looks to "whether a reasonable probability exists that a different result would be reached in a trial." The reasonable probability factor need not be established by clear and convincing evidence, as it contains its own burden of proof.

State v. Edmunds, 2008 WI App 33, ¶13, 308 Wis. 2d 374, 746 N.W.2d 590 (citations and quoted sources omitted). If the newly discovered evidence fails to satisfy any one of these five requirements, it is not sufficient to warrant a new trial. *See* ***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 circuit court and we will not reverse the trial court's decision unless it erroneously exercised its discretion. ***Id.***

¶5 We conclude that Homesley did not establish that he was entitled to a new trial based on newly discovered evidence, but our reasoning differs from that of the circuit court. *See* ***State v. Holt***, 128 Wis. 2d 110, 124, 382 N.W.2d 679 (Ct. App. 1985); *superseded by statute on other grounds by* WIS. STAT. § 940.225(7), *as recognized in* ***State v. Grunke***, 2008 WI 82, ¶33, 311 Wis. 2d 439, 752 N.W.2d 769. The circuit court addressed the issue applying the standard for recantation testimony. *See* ***State v. McCallum***, 208 Wis. 2d 463, 473-74, 561 N.W.2d 707 (1997). In so doing, the court noted that the facts of this case did not fit squarely within the recantation framework. We conclude that this is not a recantation case because a jury at a new trial would not be hearing recantation testimony from Anne. Anne testified at the postconviction hearing that she did not make the statement Robert claims she made. At a new trial, the newly discovered

evidence would be Robert's contested testimony that Anne lied.[1] The issue, therefore, is whether Robert's testimony would affect the result of a new trial.

¶6 We conclude that there is no reasonable probability that Robert's testimony would lead to a different verdict. It is implausible that Anne would have made the statement Robert claimed she made because Robert and Anne were involved in a contentious divorce and a custody battle for their children. Robert's testimony is also implausible because it was based, in part, on his contention that he was not aware of the criminal trial. Both Robert's mother and his brother testified at the trial on Homesley's behalf. Robert lived with his mother at the time of the trial and Robert's brother came to stay with their mother when he testified at Homesley's trial. Robert's testimony that he was unaware of the trial is not believable. Further, the defense attacked Anne's credibility at trial. We are not convinced that this additional evidence from Robert attacking her credibility would have affected the jury's verdict. We conclude that Homesley did not establish that he was entitled to a new trial based on newly discovered evidence.

¶7 We also decline Homesley's request to grant him a new trial in the interests of justice because we are not convinced that justice miscarried in this instance.

¶8 For the reasons stated, we affirm the judgment and order of the circuit court.

By the Court.—Judgment and order affirmed.

[1] We agree with the circuit court that Marilyn's statements were hearsay and would not, therefore, be admissible.

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