

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

September 17, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-2787-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

Defendant-Respondent,

v.

CLEOPHUS AMERSON,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Schudson, JJ.

PER CURIAM. Cleophus Amerson appeals from a judgment of conviction after a jury found him guilty of two counts of first-degree sexual assault of a child, contrary to § 948.02(1), STATS. He also appeals from an order denying him postconviction relief. Amerson raises two issues for our consideration: (1) whether the trial court erroneously exercised its discretion when it denied his request for a new trial based on newly discovered evidence;

and (2) whether he was denied his constitutional right to effective assistance of counsel. Because the trial court did not erroneously exercise its discretion in denying his motion for a new trial, and because the manner in which trial counsel conducted Amerson's defense did not prejudice him, we affirm.

I. BACKGROUND

On March 8, 1994, a jury convicted Amerson of two counts of first-degree sexual assault of nine-year-old, Tawanda M. The two assaults occurred in August 1993, and on December 20, 1993. The State presented its case through the testimony of Tawanda, Denise M. (Tawanda's mother and Amerson's girlfriend), medical experts, and investigating police personnel who interviewed Tawanda. Amerson rested his case without presenting any witnesses. He claimed the sexual assault never occurred, arguing that Denise M. forced Tawanda to make the false accusation because Amerson failed to buy drugs for Denise.

Post-trial, but before sentencing, Amerson moved for a new trial alleging that Tawanda had recanted her trial testimony accusing him of the sexual assaults and had admitted that the assaults never occurred. The State stipulated that a recantation had occurred and the matter was adjourned to allow Amerson to present other corroborating evidence. At the hearing on May 9, 1994, Amerson submitted an affidavit signed by Denise M., which averred that: (1) Tawanda admitted that Amerson had not assaulted her, and (2) Tawanda had been previously sexually assaulted when she was two years old, in Chicago by a Danny Hamilton, which could explain the scarring to Tawanda's vaginal area. Denise also testified at the hearing regarding the Chicago assault, explaining that Tawanda was treated at Mount Sinai Hospital in Chicago.

The trial court allowed Amerson to introduce the audio tape recording of Tawanda's recantation (that Amerson never assaulted her), but did not permit Amerson's counsel to question Tawanda. The State introduced into evidence the affidavit of Val Chambers, a counselor in the Sexual Assault Counseling Unit of the district attorney's office. The contents of that affidavit indicated that Chambers had talked with Tawanda after the trial and, although Tawanda denied that Amerson assaulted her in December, she explained that

the injuries to her vaginal area must have resulted from the summer incident when Amerson raped her in an abandoned second floor residence. Lastly, the State submitted into evidence the presentence report prepared by Glenda Meeks, which contained Tawanda's recounting of both incidents that formed the bases for the two charges.

The trial court denied the motion stating "a recantation standing on its own without any type of corroboration from any other newly discovered evidence is not a sufficient ground for any type of post conviction relief." The trial court further concluded that the evidence presented was not corroborative.

Subsequent to sentencing, Amerson moved for postconviction relief, again claiming newly discovered evidence and additionally alleging ineffective assistance of counsel. After hearing additional testimony on the newly discovered evidence claim, the trial court reaffirmed its "lack of corroboration" holding and further concluded that Amerson was not prejudiced by his trial counsel's performance. Amerson now appeals.

II. DISCUSSION

A. *Newly Discovered Evidence.*

Whether to grant a new trial on grounds of newly discovered evidence is normally a discretionary decision of the trial court. *State v. Boyce*, 75 Wis.2d 452, 457, 249 N.W.2d 758, 760 (1977). For a movant to be successful in its petition for a new trial, the evidence must meet the following conditions:

- (1) The evidence must have come to the moving party's knowledge after a 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 on a new trial.

State v. Kimpel, 153 Wis.2d 697, 701-02, 451 N.W.2d 790, 792 (Ct. App. 1989). Moreover, an admission of a witness that he or she committed perjury at trial is not grounds for a new trial based upon newly discovered evidence unless the proposed facts by testimony or affidavit are corroborated by other newly discovered evidence. *Zillmer v. State*, 39 Wis.2d 607, 615-16, 159 N.W.2d 669, 673 (1968). We conclude that the trial court in the instant case did not erroneously exercise its discretion when it denied Amerson's motion for a new trial based on newly discovered evidence.

The trial court, in rendering its decision, had the benefit of hearing and observing Tawanda and Denise M. during the jury trial. Tawanda related how the two incidents took place that gave rise to the two charges of sexual assault: the first occurring in August 1993, in a vacant upstairs residence of a duplex and the second occurring on December 20, 1993, in the parking lot near a Pick 'N Save food store. Denise M. testified as to the manner in which Tawanda reluctantly informed her about the circumstances of the December assault. Among other State's witnesses, the trial court heard the testimony of: (1) Officer Ivory Britton, who also related information given to him by Tawanda about the assault; (2) Detective William Stawicki, who also related information given to him by Tawanda about both the August and December assaults; and (3) Dr. Ellen Klandrud, who examined Tawanda the night of the second incident.

At the first hearing on the motion regarding newly discovered evidence, Denise M. testified in support of a previously filed affidavit that Tawanda informed her that Amerson had not assaulted her. In a second affidavit, Denise M. claimed to have pressured Tawanda to assert the charges against Amerson "for her own personal reasons" but then equivocated about this aspect of her affidavit when cross-examined by the State. When questioned by the trial court about pressuring Tawanda into fabricating the allegation, Denise M. denied that she had done so. In reference to the basis for the assault charge of earlier vintage, she stated that Tawanda had been assaulted in Chicago when she was two years old by a Danny Hamilton, and was treated at Mount Sinai Hospital in Chicago following that incident.

State witness, Chambers, by affidavit, stated that although Tawanda denied Amerson assaulted her in the parking lot, Tawanda explained that any evidence of vaginal injury stemmed from the August incident in the upstairs residence. The presentence report was also received into evidence,

which contained Tawanda's statement recounting the two instances when Amerson assaulted her.

Post-sentencing, the trial court again had the opportunity to consider additional evidence in support of a renewed newly discovered evidence motion. It heard from Amerson's trial counsel who affirmed that Tawanda had recanted about the December parking lot incident. It also received into evidence medical records from Mount Sinai relating to Tawanda's admission on July 31, 1987, which indicated a damaged hymen and multiple fissures of the rectal area. This was confirmed by a letter from the district attorney's office that a Danny Hamilton had been sentenced in the State of Illinois to three years of incarceration for this sexual assault of Tawanda.

Amerson argues that the affidavit and testimony of Denise M., the newly discovered medical records of an 1987 incident, and the proffered testimony of an absent witness, supply sufficient corroboration to warrant a new trial on the basis of newly discovered evidence. We are not persuaded.

In reviewing all the evidence before it, the trial court necessarily employed its fact-finding role to resolve conflicts in the testimony, assess credibility of the witnesses, and assign degrees of weight to the individual pieces of evidence before it. *State v. Poellinger*, 153 Wis.2d 493, 506, 451 N.W.2d 752, 757 (1990). When the trial court reviewed the written and oral submissions made by Denise M., taking into account Denise M.'s averment in her affidavit of bringing pressure to bear on her daughter to change her testimony and then vehemently denying such intention in open court, the fact finder had a reasonable basis to discount her testimony and to conclude that Denise M.'s testimony could not serve as the necessary corroboration because it was not credible. In contrast, the trial court noted the detail, consistency, and strength of Tawanda's pre-trial and trial version of what happened on each occasion. There is a reasonable basis in the record for the trial court to conclude: "There's never been any evidence that Tawanda [M.] made the whole thing up."

The trial court also rejected Amerson's assertion that the 1987 medical records from Chicago's Mount Sinai Hospital corroborated Tawanda's recantation because it determined "they do not offer any evidence that they

would change the result of the trial.” Amerson reasons that part of Dr. Klandrud's testimony pointed to older tears to the hymenal ring, which the State connected to the August assault, when, in fact, the older tears could be explained by the 1987 medical records. This would be consistent with Amerson's claim of innocence because the older injuries could have been the injuries documented in 1987. The record, however, contradicts Amerson's assertion and supports the trial court's conclusion. Dr. Klandrud testified that there were two old scars at the three and nine o'clock positions on Tawanda's hymenal ring. The 1987 medical reports, however, do not note any tearing of the hymenal ring nor show any tearing in the drawing contained in the report. Thus, the 1987 medical reports would not explain away the earlier scars. Accordingly, the conclusion reached by the trial court is firmly based.

Amerson also argues that the testimony of missing witness Robert Amerson offered at the postconviction hearing is other evidence which corroborates Tawanda's recantation. Specifically, he asserts that Robert's testimony shows Tawanda originally denied to her mother that the defendant assaulted her. He also testified he heard Tawanda get a “whooping” when she originally said nothing had happened. Again, the record belies Amerson's assertions. The trial court found from its review of the testimony that Robert never stated Tawanda denied being sexually assaulted by Amerson, only that Tawanda stood silent when her mother asked her what was wrong. Our reading of Robert's testimony confirms the correctness of the trial court's finding. Moreover, Robert's testimony was *known prior to trial* and, therefore, not “newly discovered.” Thus, the trial court appropriately concluded that Robert did not offer any new evidence that would change the outcome of the trial and Robert's testimony cannot serve as the necessary corroboration to Tawanda's recantation. From this analysis, we conclude the trial court did not erroneously exercise its discretion in denying Amerson's motion for a new trial because of newly discovered evidence.¹

¹ Amerson also claims the trial court erred by denying Amerson's request to allow Tawanda to testify at the motion hearing. He failed to adequately develop this argument, however, and as a result, we are not obliged to address it. *State v. Pettit*, 171 Wis.2d 627, 647, 492 N.W.2d 633, 642 (Ct. App. 1992).

B. Ineffective Assistance.

Amerson's second claim of error is that he was deprived of effective assistance of counsel. His claim is based on trial counsel's failure to investigate the 1987 sexual assault that occurred in Chicago and his failure to present testimony from Robert Amerson.

To show ineffective assistance of counsel a defendant is required to prove both that his trial counsel's performance was deficient and that the deficiency prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Pitsch*, 124 Wis.2d 628, 633, 369 N.W.2d 711, 714 (1985). "Unless a defendant makes both showings, it cannot be said that the conviction ... resulted from a breakdown in the adversary process that renders the result unreliable." *Strickland*, 466 U.S. at 687. Both the performance and the prejudice components are mixed questions of fact and law. *Pitsch*, 124 Wis.2d at 633-34, 369 N.W.2d at 714. The trial court's findings of fact will not be disturbed unless clearly erroneous. *Id.* at 634, 369 N.W.2d at 714-15. The ultimate determination of whether counsel's performance was deficient and prejudicial to the defense are questions of law that this court reviews independently. *Id.* at 634, 369 N.W.2d at 715. Review of the performance prong may be abandoned "if it is easier to dispose of an ineffectiveness claim on the ground of lack of prejudice." *Strickland*, 466 U.S. at 697. The burden is on the defendant under the prejudice test to show that the errors committed by counsel were so serious that they deprived him of a fair trial, a trial whose result is reliable. *Id.* at 687. In other words, the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* at 694.

We shall first examine Amerson's ineffective assistance claim based on trial counsel's failure to investigate the 1987 assault. The trial court concluded that trial counsel's performance was indeed deficient because of his failure to investigate the prior assault. Nevertheless, it concluded the deficiency did not prejudice his defense. The trial court did not err.

As set forth earlier in this opinion, the trial court gave considerable weight to Tawanda's testimony because of its original consistency regardless of who interviewed her. Additionally, it determined that the 1987 Mount Sinai

medical reports would not have altered the result of the trial. Again as noted earlier, since the 1987 report makes no mention of the type of injury to the hymenal ring as observed in Dr. Klandrud's report, the 1987 report is not even relevant. Thus, there was no prejudice to Amerson for his trial counsel's failure to investigate and obtain a report about the earlier incident.

Lastly, defendant claims ineffective assistance of counsel for failure to call Robert Amerson as a witness or ask for an adjournment for the same purpose. The trial court concluded that this omission was neither deficient nor prejudicial. We shall review this assertion of error only from the prejudicial prong of the Strickland test. The trial court concluded there was no prejudice as a result of Robert Amerson's non-appearance because "Amerson's testimony did not significantly alter what occurred; specifically, he never testified that Tawanda M[.] denied being sexually assaulted by [the defendant]." The record supports this finding by the trial court and provides a reasonable basis for its conclusion that there was not a probability that a different result would have occurred if an adjournment had been requested and Robert Amerson had testified.²

For the reasons set forth, we affirm.

By the Court. – Judgment and order affirmed.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.

² Defendant argues in his brief that Robert Amerson testified "the victim originally denied to her mother that anything happened when she was with the defendant." The fact is that Tawanda simply did not respond to the question.