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June 23, 2017

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You are hereby notified that the Court has entered the following opinion and order:

2016AP78

State of Wisconsin v. Matthew D. Campbell (L.C. # 2008CF1)

Before Lundsten, Sherman and Blanchard, JJ.

Matthew Campbell appeals an order that denied his postconviction motion for a new trial without a hearing. After reviewing the record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2015-16).¹ We affirm for the reasons discussed below.

¹ All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

In order to obtain a hearing on a postconviction motion, a defendant must allege material facts sufficient to warrant the relief sought. *State v. Allen*, 2004 WI 106, ¶¶9, 36, 274 Wis. 2d 568, 682 N.W.2d 433. Here, Campbell sought relief based on newly discovered evidence. The test to determine whether newly discovered evidence warrants a new trial has five 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 an issue; (4) the testimony must not merely be cumulative to the testimony that 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).

Campbell was convicted of second-degree sexual assault of a child, using a computer to facilitate a child sex crime, and causing a child to view sexual activity. At trial, the child testified that Campbell had first contacted her online by an instant messaging program, using a false name. After about a week of exchanging messages, including several sexually explicit ones, the child invited Campbell to come hang out at her home while her mother was away. After Campbell arrived, the child finished her breakfast, then took Campbell up to her bedroom, where they watched television. At some point, the child went downstairs to let the dogs out and, when she returned to her bedroom, Campbell was naked on her bed, masturbating. The child said that she then went to use her laptop, so that she could face away from Campbell and ignore him, but Campbell came up behind her at her computer desk and squeezed her breast. Shortly thereafter, the child realized that her mother's boyfriend had come home, and when she advised Campbell of that, he got dressed quickly. The child told Campbell that he had forgotten to put his underwear on, and saw him put a pair of dark red, Speedo-type underwear into his pocket. When Campbell was arrested shortly thereafter, he was not wearing underwear.

Campbell testified in his own defense. He acknowledged that he had engaged in sexually explicit chats with the child under a false computer user name, but claimed that he did not know the child's age during the chats and that he had taken Ambien the day of the incident and could not remember any of the sexually explicit chats or why he had gone over to the child's house. Campbell testified that he did remember he had been laying on the child's bed, fully clothed, watching television, when the child had undressed and tried to get him to have sex with her, and that at no time during the encounter did the child use her computer.

Campbell alleged in his postconviction motion that, after trial, he discovered expert opinion to the effect that “[r]elying solely on the last accessed time stamp [of a computer file] as a means of validating human user activity is faulty” because “[a]utomated operating systems processes ... can alter the last accessed time stamp without any human user action, knowledge, or physical presence.” Campbell asserted that he had no reason to seek out this expert opinion until after a forensic computer expert who testified for both the State and the defense “affirmatively testified that because an index.dat file showed a specific last accessed time stamp, a human user was on the computer and on the internet.” Campbell further asserted that his newly discovered expert opinion evidence was material because: (1) the child testified that she went to her computer desk immediately after seeing Campbell nude on her bed, and was on the internet when Campbell came up behind her and touched her breast; (2) Campbell testified that the child never used her computer while the two of them were in the bedroom; and (3) the prosecutor argued that the forensic computer expert's testimony supported the child's version of events. For multiple reasons, Campbell's allegations are insufficient to warrant relief under the test for newly discovered evidence.

First, the general rule is that new evidence that serves only to impeach the credibility of a witness who testified at trial is insufficient to warrant a new trial as a matter of due process. *See State v. Kimpel*, 153 Wis. 2d 697, 700-01, 451 N.W.2d 790 (Ct. App. 1989). Moreover, the newly discovered expert opinion proffered here was weak impeachment evidence because it would not *disprove* the child's account. Rather, at best, it simply would provide less corroboration for the child's account.

We note that nothing in Campbell's postconviction motion suggests that it is untrue that looking at a web page would in fact create a last access time stamp. Therefore, the prosecutor's argument that the last access time stamp for a web page on the child's computer supported the child's account that she had been using her laptop while Campbell was in her bedroom would still be a fair inference that could be made at a new trial, even if additional expert opinion were offered about alternate ways a last access time stamp could have been made.

Along those same lines, we also note that the forensic computer expert who testified at trial did not explicitly state that a last access time stamp could *only* be created on a computer file by human activity. Rather, the expert first agreed with the proposition that a last access time stamp indicated "the last time that ... the computer drew upon that temporary internet file," and then agreed with the proposition that "the computer would be drawing upon that temporary internet file because somebody is looking at that web page on the web." Therefore, we do not agree with Campbell's characterization of the computer expert's testimony as "faulty."

Moreover, Campbell does not allege that he was unaware of the last access time stamp information prior to trial. And, given the nature of the information, we conclude that Campbell was negligent in failing to pursue the information he now offers as newly discovered evidence.

This information was easily discoverable by questioning the forensic computer expert who testified at trial or by questioning his own expert on that point.

Finally, we are also satisfied that it is not reasonably probable that the newly discovered expert opinion would lead to a different result at a new trial, given the strength of other evidence such as the sexually explicit chat logs between Campbell and the child and the fact that, when he was arrested immediately following the incident, Campbell was not wearing any underwear. We therefore conclude that the circuit court properly denied Campbell's motion for a new trial without a hearing.

IT IS ORDERED that the postconviction order denying Matthew Campbell's motion for a new trial based on newly discovered evidence is summarily affirmed under WIS. STAT. RULE 809.21(1).

IT IS FURTHER ORDERED that this summary disposition order will not be published and may not be cited except as provided under WIS. STAT. RULE 809.23(3).

Diane M. Fremgen
Clerk of Court of Appeals