

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 5, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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No. 98-0945-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SHANNAN M. NIPPLE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Green County: JAMES R. BEER, Judge. *Reversed and cause remanded.*

Before Dykman, P.J., Vergeront and Roggensack, JJ.

ROGGENSACK, J. Shannan Nipple appeals from a judgment of the circuit court convicting her of recklessly causing bodily harm and great bodily harm to her infant daughter and from an order denying her motion for a new trial based on newly discovered evidence. The circuit court reasoned that there was no reasonable probability that the new evidence would affect the verdict. We

conclude that the newly discovered evidence is not merely cumulative to other evidence presented at trial and that there is a reasonable probability that the new evidence would change the outcome. Therefore, we reverse Shannan's convictions and remand to the circuit court for a new trial.

BACKGROUND

On November 5, 1995, Shannan left for work at about 3:00 or 3:30 p.m. While she was at work, Daniel Nipple, Shannan's husband, cared for the couple's two-month old daughter, M.N., three-year old son, B.N., and five-year old son, L.N. Daniel was unemployed at the time, and he often cared for the three children while Shannan worked nights as a waitress. At approximately 10:00 p.m. that night, Daniel noticed that M.N. was having problems breathing. He summoned his mother, Mary Carpenter, who was trained in cardiopulmonary resuscitation (CPR), and who lived five houses away. Mary performed CPR on M.N., while Mary's husband called 911.

When the emergency medical service arrived at the Nipple home, they found M.N. semi-conscious. They transported her to the Monroe Hospital emergency room, where a computer assisted tomography (CAT) scan revealed a subdural hematoma. M.N. was then transferred to the pediatric intensive care unit of University Hospital in Madison for further neurological observation. There, the doctors discovered that M.N. also had a recently broken left tibia, as well as nine older bone fractures.

The police conducted a child abuse investigation during which they interviewed Shannan and Daniel Nipple and other family members. Shannan was eventually arrested and charged with two counts related to M.N.'s injuries. Count 1 charged that she intentionally caused bodily harm to M.N., contrary to

§ 948.03(2)(b), STATS., based on nine older bone fractures, which were in various stages of healing. Count 2 charged that she caused great bodily harm to M.N., contrary to § 948.03(2)(a) by throwing, dropping or shaking M.N., causing a subdural hematoma, and by intentionally applying undue force to her lower left leg, causing a recent fracture of her left tibia. After a preliminary hearing, Shannan was bound over for trial on an information alleging those two counts and two lesser included offenses: recklessly causing bodily harm to a child, contrary to § 948.03(3)(b) and recklessly causing great bodily harm to a child, contrary to § 948.03(3)(a).

At trial, Daniel and Mary testified that on several occasions they had seen Shannan handle M.N. in a rough manner; however, neither they, nor any other witness, had seen Shannan abuse the baby in a manner which could cause the injuries M.N. had sustained. In addition, two doctors testified for the State regarding M.N.'s head injury. Mohan Mysore, M.D., the pediatrician in charge when M.N. was admitted to University Hospital, testified on cross-examination that the trauma which caused M.N.'s hematoma was "probably," "[m]ost likely," inflicted within "one or two" hours, or "minutes to a few hours," before she stopped breathing. John Frey, M.D., a pediatrician practicing in Monroe, testified that M.N.'s difficulty breathing was caused by edema, which is brain swelling. He said there was no way to tell how long it took between the time M.N.'s brain was injured and the time the symptoms manifested themselves, since it depended on how rapidly the bleeding and swelling occurred.

Shannan's defense at trial was that Daniel caused M.N.'s injuries while she had been at work. Shannan presented no evidence; but instead, elected to present her case entirely through cross-examination and in opening and closing

statements. The jury returned verdicts finding Shannan guilty of the lesser included offenses on both counts.

Following Shannan's trial, postconviction counsel sought independent review of the medical evidence in the case by a forensic pathologist with expertise in child abuse, Daniel W. Davis, M.D. After examining the medical evidence, Dr. Davis concluded to a reasonable degree of medical certainty that Shannan could not have caused M.N.'s head injury. Shannan filed a motion for a new trial based on three contentions: (1) that she had newly discovered evidence, (2) that the real controversy had not been tried, and (3) that she was denied effective assistance of counsel.

The circuit court heard the testimony of Dr. Davis and, at an adjourned date, held a *Machner*¹ hearing. Dr. Davis testified that M.N.'s brain injury was caused by damage to her axon system, the electrical communication system within her brain. In support of his opinion, he referred to primate studies and presented photographs of fatally shaken babies, showing evidence of axon injury. Dr. Davis testified that M.N.'s injury could not have been caused as Dr. Frey described at Shannan's trial, and he presented detailed medical evidence to support his conclusions. According to Dr. Davis, whether M.N.'s brain injury was caused by edema or by axon damage is of critical importance to Shannan's culpability for the injury because axon damage causes immediate symptoms, whereas brain edema causes symptoms that may be delayed for some time after the trauma. He opined that M.N.'s clinical presentation in the days subsequent to her head injury was not consistent with significant edema, but it was consistent

¹ *State v. Machner*, 92 Wis.2d 797, 285 N.W.2d 905 (Ct. App. 1979), *rev'd on other grounds*, 101 Wis.2d 79, 303 N.W.2d 633 (1981).

with axon injury. Dr. Davis concluded that because Shannan left M.N. six hours before M.N. began to experience difficulty breathing, it was not medically possible for Shannan to have caused M.N.'s head injuries.² He also opined that the recent fracture of M.N.'s left tibia probably occurred at or near the same time as the head injury occurred, again excluding Shannan from culpability.³ However, he had no opinion about whether Shannan caused any of the older fractures upon which Count 1 was based.

The circuit court denied Shannan's motion for a new trial on the basis of the newly discovered evidence, concluding that there was no reasonable probability that Dr. Davis's testimony would have affected the verdicts. The court also ruled that the issue of when the trauma that caused M.N.'s brain injury was inflicted was sufficiently tried through cross-examination of the State's medical experts. Finally, the court denied Shannan's ineffective assistance of counsel claim because trial counsel's investigation of the medical evidence was reasonable. This appeal followed.

² "Q. [I]f Shannan Nipple left home approximately six hours before these symptoms occurred, would it – and if they were caused by axon injury, would it be medically possible for her to have caused [M.N.'s] brain injury?

A. No."

³ "Q. What about [M.N.'s] bone fractures?

A. ... There is evidence of a new injury to the left tibia, fracture of the tibia, or leg bone, approximately midshaft that does not show evidence of healing, and that likely would have happened at or around the time of the near fatal shaking episode."

DISCUSSION

Standard of Review.

A circuit court's decision to deny a new trial on the basis of newly discovered evidence is a discretionary determination. Section 805.15(1), STATS.; *State v. Kimpel*, 153 Wis.2d 697, 702, 451 N.W.2d 790, 792 (Ct. App. 1989). We will uphold a circuit court's discretionary determination so long as the record shows that it logically interpreted the facts and applied the proper legal standard to them. *State v. Rogers*, 196 Wis.2d 817, 829, 539 N.W.2d 897, 902 (1995). However, we independently determine whether the denial of a new trial deprived Shannan of constitutionally guaranteed due process. *State v. Coogan*, 154 Wis.2d 387, 394-95, 453 N.W.2d 186, 188 (Ct. App. 1990).

Newly Discovered Evidence.

Shannan contends that the circuit court erroneously exercised its discretion when it refused to grant her postconviction motion for a new trial based on Dr. Davis's testimony that M.N.'s brain injury resulted from axon damage which had to have been caused immediately before she had trouble breathing. In order to warrant a new trial on the basis of newly discovered evidence, Shannan must show by clear and convincing evidence: (1) that she was unaware of the evidence until after the trial; (2) that she was not negligent in failing to discover the evidence; (3) that the evidence is material to an issue in the case; (4) that the evidence would not be merely cumulative to evidence already produced at trial; and (5) that there is reasonable probability that the evidence would lead to a different result at a new trial. *State v. Brunton*, 203 Wis.2d 195, 200-08, 552 N.W.2d 452, 455-58 (Ct. App. 1996).

The State agrees that Shannan has met the first three criteria in regard to Count 2; however, it maintains that Shannan has failed to meet her burden of proof on the fourth factor, that the evidence was not merely cumulative, and the fifth factor, that there was a reasonable probability that the evidence would lead to a different result. It also contends that Dr. Davis's testimony is not material to the first count.

1. Cumulative evidence.

Cumulative evidence is that evidence which tends to prove a fact which is supported by other evidence that was previously received. BLACKS LAW DICTIONARY 380 (6th ed. 1990). The State argues that Dr. Davis's testimony is cumulative because it proves the same point made by Dr. Mysore on cross-examination, that M.N.'s symptoms would develop shortly after she was shaken, and was not contradictory to Dr. Frey's conclusion, that there was no way to tell how long it would take for the symptoms to develop from M.N.'s subdural hematoma. We disagree with the State's analysis.

Although Dr. Davis's testimony tends to prove the timing of M.N.'s injury, relative for the onset of her symptoms, his testimony is both qualitatively and quantitatively different from that of Dr. Mysore and Dr. Frey. First, Dr. Davis offered an entirely different theory for what caused M.N. to stop breathing and why the explanation offered by the other doctors was not medically possible. He opined that M.N.'s symptoms of brain injury were caused by axon damage and could not have resulted from edema as hypothesized by Dr. Frey. Therefore, Dr. Davis's testimony directly contradicted the testimony of Dr. Frey and was substantially different from the testimony of Dr. Mysore.

Second, Dr. Davis testified concerning Shannan's potential culpability for M.N.'s injury. He concluded that because Shannan left M.N. six hours before the baby's symptoms occurred, it was not medically possible for Shannan to have caused M.N.'s brain injury, if it resulted from axon damage, because axon damage produces symptoms immediately after the injury is inflicted. Neither Dr. Frey nor Dr. Mysore concluded that Shannan could not have caused M.N.'s head injury; therefore, Dr. Davis's testimony was not cumulative on that point. Since it was also his opinion, based on the freshness of the injury, that the recent fracture to M.N.'s left tibia was inflicted by the same perpetrator as the head injury, his testimony was not cumulative in that respect, as well.

Third, Dr. Davis's testimony was quantitatively different from Dr. Mysore's testimony. Dr. Mysore's opinion that M.N.'s symptoms of a brain injury would develop within one or two hours of the shaking was elicited by three questions during cross-examination, whereas Dr. Davis's opinion was developed through extensive testimony, including diagrammatic descriptions and scientific studies. It is not accurate to say that Dr. Davis's testimony is simply cumulative to three questions answered by the State's witness.

Furthermore, even if Dr. Davis's testimony were cumulative in part to other evidence on the timing issue, we would not deny a new trial solely on that ground because "[w]here uncorroborated evidence is sharply conflicting, new evidence which is cumulative for one version may add sufficient weight and credibility for a jury to accept that version as true." *John Mohr & Sons, Inc. v. Jahnke*, 55 Wis.2d 402, 406, 198 N.W.2d 363, 366 (1972). The State's version of when M.N. was shaken or struck causing her head injury conflicts with the defense's version, and the expert opinions offered by the State were not corroborated by any eyewitnesses to M.N.'s injury or by any other evidence.

Therefore, Dr. Davis's reasoned opinion, although potentially cumulative to Dr. Mysore's opinion that the shaking or striking occurred shortly before M.N.'s symptoms developed, may add sufficient weight and credibility to that version of the facts. We conclude Dr. Davis's testimony is not merely cumulative.

2. *Reasonable probability.*

When examining newly discovered evidence, we must determine whether there is a reasonable probability that a jury, looking at both the old evidence and the new evidence, would have a reasonable doubt as to the defendant's guilt. See *State v. McCallum*, 208 Wis.2d 463, 474, 561 N.W.2d 707, 711 (1997). In *McCallum*, the defendant, who was convicted of sexual assault of a minor, moved to withdraw his guilty plea after the victim recanted her accusation. *Id.* at 468, 561 N.W.2d at 708. The supreme court determined that the correct legal standard was not whether the victim's recantation was less credible than her accusation, but whether a reasonable jury could have a reasonable doubt as to a defendant's guilt or innocence if it were given the opportunity to consider the new evidence. *Id.* at 474-75, 561 N.W.2d at 711.

In *State v. Avery*, 213 Wis.2d 228, 241-42 n.1, 570 N.W.2d 573, 579 n.1 (Ct. App. 1997), we used the same reasonable doubt standard established by the supreme court in *McCallum*. "If there is a reasonable probability that a jury would harbor a reasonable doubt as to guilt, it follows that [in a criminal case] there exists a reasonable probability of a different result." *Id.* Therefore, in assessing the question of a reasonable doubt as to who caused M.N.'s injuries, we have considered whether the new evidence excluded Shannan from potential culpability for either of the crimes of which she was convicted.

Dr. Davis presented an entirely new theory of the case which excluded Shannan from culpability for M.N.'s head injury and supported her theory that Daniel inflicted M.N.'s injuries while she was at work. In addition, the State presented virtually no direct evidence of acts which could have caused M.N.'s injuries. Therefore, we conclude that when weighed against the State's lack of direct evidence, Dr. Davis's testimony has a reasonable probability of creating a reasonable doubt in the minds of the jurors that Shannan was the perpetrator of M.N.'s head injury or the fractured left tibia, which resulted in Shannan's conviction of recklessly causing great bodily harm.

The State correctly points out that Dr. Davis had no opinion about when the nine older fractures, that were the bases for Count 1, occurred. Therefore, it contends that his testimony could not have affected the verdict as to Count 1. We agree with the State that if we were to analyze Dr. Davis's testimony relative to Count 1, without considering that the two counts were tried together, Dr. Davis's testimony would not likely lead to a different jury verdict on Count 1. However, the two counts against Shannan were tried together. Therefore, if the jury had heard and believed Dr. Davis's testimony that Shannan could not have caused the injuries underlying Count 2, then it may have believed that Daniel, the caregiver for M.N. at the time of her head injury, was the perpetrator of all of M.N.'s injuries.

Therefore, we conclude there is a reasonable probability that the addition of Dr. Davis's testimony to the testimony presented at trial, would change the outcome. This is so because Dr. Davis presented evidence the jury did not have an opportunity to consider, which evidence directly contradicts the evidence presented by Drs. Frey and Mysore, thereby raising a reasonable doubt about whether Shannan was responsible for M.N.'s injuries.

CONCLUSION

Dr. Davis's testimony concerning the cause and timing of M.N.'s head injury is not merely cumulative because the new evidence is qualitatively and quantitatively different from evidence presented at trial. Additionally, there is a reasonable probability that this newly discovered evidence would change the jury's verdict because Dr. Davis's theory directly contradicts evidence presented by Dr. Frey, thereby raising a reasonable probability that the jury would have a reasonable doubt about whether Shannan was the perpetrator of all of M.N.'s injuries. Therefore, we conclude Shannan is entitled to a new trial based on newly discovered evidence.⁴

By the Court.—Judgment and order reversed and cause remanded.

Not recommended for publication in the official reports.

⁴ Because we conclude that Shannan is entitled to a new trial based on the five-part *Brunton* test, we do not need to decide whether she is entitled to a new trial in the interest of justice, because the real controversy was not tried, or whether she was denied effective assistance of counsel.

