

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 5, 2010

David R. Schanker
Clerk of Court of Appeals

NOTICE

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

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

Appeal No. 2009AP1020-CR

Cir. Ct. No. 2007CF377

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GERALD L. HAWLEY,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Walworth County: JAMES L. CARLSON, Judge. *Affirmed.*

Before Brown, C.J., Neubauer, P.J., and Anderson, J.

¶1 PER CURIAM. Gerald Hawley appeals from a judgment of conviction for repeated sexual assault of the same child, and the order denying his motion for a new trial. Hawley argues that he should be granted a new trial in the interest of justice because the real controversy was not fully tried. Specifically, he

argues that he has evidence that he did not have penile implant surgery until after the date the sexual assaults are alleged to have stopped, and that this evidence could be used to impeach the victim's testimony. We conclude that Hawley has not established a basis for granting a new trial. We affirm.

¶2 Hawley lived with Joyce B. and her daughter, VY, off and on between the fall of 2002 and about June 2004. In July 2003, Joyce B. and VY reported that Hawley had sexually assaulted VY on many occasions during the previous months. Shortly afterwards, they returned to the police and VY recanted her statements.

¶3 In August 2007, VY renewed her accusations against Hawley, and Hawley was charged with having sexually assaulted VY between July 1, 2002, and August 31, 2003, when VY was six and seven years old. At trial, VY described the sexual assaults in detail. VY also testified that Hawley had a penile implant. She said: “[t]here was a pump in him and if you would pump that it would make it so [his penis] could bend or stay firm.” She stated that the pump was “[i]n his ball part,” and that Hawley would pump it. She also testified that her mother had told her that Hawley was having surgery, but she did not know at the time what the surgery was for, nor did she remember when he had the surgery.

¶4 VY testified that after she reported the incident to the police in 2007, one of the detectives arranged for her to call Hawley. In this conversation, VY asked Hawley “why did you do what you did to me?” Hawley responded:

We had talked about that and I had told you that I was very, very sorry. And it was a very, very big mistake and I'm, I'm still very, very sick about it. Okay.

[VY]: Okay.

[Hawley]: And I can't, I, I really hurt because I know that wasn't the right thing. And I hope some day you can forgive me in your heart.

[VY]: Because it really did hurt when you put your dick in me, that really did hurt.

[Hawley]: Well, I'm very sorry. I really am.

¶5 VY's testimony was somewhat inconsistent about the actual time period during which the assaults occurred. VY first testified that all of the incidents occurred before July 4, 2003, but later stated that they continued after July 3, 2003. Hawley did not testify at trial. The jury found him guilty.

¶6 Hawley later moved for a new trial arguing that there was newly discovered evidence, that he had received ineffective assistance of trial counsel, and that he was entitled to a new trial in the interest of justice. Hawley argued that he did not have the penile implant surgery until January 2004, and consequently, VY could not have seen the device during the time period she alleged that the assaults had taken place. The court held a hearing on the motion. Trial counsel testified that Hawley never told her about the date of the implant surgery. Hawley also testified, and he admitted, that he had "access" to VY after he had implant surgery.¹

¶7 The circuit court denied the motion. The court found that the evidence of the date of the penile implant surgery was not newly discovered evidence because Hawley knew about it at the time of trial. The court concluded that trial counsel was not ineffective, and that Hawley was not entitled to a new trial in the interest of justice. The court noted that Hawley wanted to introduce the

¹ Joyce B. testified that Hawley moved out about June 2004. Hawley stated that he last lived with Joyce B. between November 2004 and March 2006.

evidence of the date of his surgery to impeach VY's and her mother's testimony about the dates of the assaults. The court also noted, however, that VY had made a statement to the police in which she said the assaults had taken place after the time of the surgery. The court noted that the State had argued that VY was very young at the time the assaults were alleged to have occurred, and eleven years old when she actually reported the incidents to the police, so she "should not be held to strict scrutiny of her recall of the times." The court also noted that the mother's testimony of the dates of the events were "all over the board" because of her physical and mental condition. The court finally noted that if Hawley had testified as to the date of his surgery, the State could have introduced the witness's prior statement. The court concluded that it could not find, based on the totality of the evidence, that justice had miscarried.

¶8 Hawley argues to us only that he is entitled to a new trial in the interest of justice. In order to grant a new trial in the interest of justice under WIS. STAT. § 752.35 (2007-08),² we must be convinced that there has been a miscarriage of justice or that the controversy has not been fully tried. *See Andersen v. Village of Little Chute*, 201 Wis. 2d 467, 480, 549 N.W.2d 737 (Ct. App. 1996). To establish that the real controversy has not been fully tried, the defendant must convince us "that the jury was precluded from considering 'important testimony that bore on an important issue' or that certain evidence which was improperly received 'clouded a crucial issue' in the case." *State v. Darcy N.K.*, 218 Wis. 2d 640, 667, 581 N.W.2d 567 (Ct. App. 1998) (citation omitted). To establish a miscarriage of justice, the defendant "must convince us

² All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

‘there is a substantial degree of probability that a new trial would produce a different result.’” *Id.* (citation omitted). An appellate court will exercise its discretion to grant a new trial in the interest of justice “only in exceptional cases.” *State v. Cuyler*, 110 Wis. 2d 133, 141, 327 N.W.2d 662 (1983). Further, WIS. STAT. § 752.35 “‘was not intended to vest this court with power of discretionary reversal to enable a defendant to present an alternative defense’ that may have not been advanced by trial counsel ... whose representation is alleged to be ineffective because of that failure.” *State v. Flynn*, 190 Wis. 2d 31, 49 n.5, 527 N.W.2d 343 (Ct. App. 1994) (citation omitted).

¶9 We conclude that Hawley is not entitled to a new trial in the interest of justice. Unlike our recent decision in *State v. Jeffrey A.W.*, 2010 WI App 29, ¶22, ___ Wis. 2d ___, 780 N.W.2d 231, this is not a case in which the missing evidence “was of utmost importance in determining the credibility of the parties.” In *Jeffrey A.W.*, the State’s case rested on the allegation that the defendant had herpes and had passed it on to the victim. *Id.*, ¶¶3-6. At the time of trial, defense counsel believed there was not an accurate test for herpes, and decided not to have the defendant tested. *Id.*, ¶10. It turned out, however, that there was an accurate test for herpes, and Jeffrey tested negative. *Id.*, ¶11. We concluded without this evidence at trial, we did not have confidence that justice had prevailed, and we reversed for a new trial. *Id.*, ¶22.

¶10 In Hawley’s case, however, the evidence of the date of his surgery was not central to the State’s case. The State’s case included VY’s detailed testimony about the sexual assaults, as well as the recorded conversation in which Hawley apologized to VY. The date he received his penile implant affected only a collateral issue—when the assaults actually stopped. The date of the surgery suggests that the assaults went on for the longer period of time than alleged in the

complaint, but does not suggest that the assaults did not occur at all. We are simply not convinced that justice did not prevail in this case. Hawley is not entitled to a new trial in the interest of justice, and we affirm the judgment and order of the circuit court.

By the Court.—Judgment and order affirmed.

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

