**IN THE COURT OF APPEALS OF IOWA**

No. 2-165 / 11-0166
Filed July 11, 2012

**JIMMIE JORDAN,**
Applicant-Appellant,

**vs.**

**STATE OF IOWA,**
Respondent-Appellee.

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Appeal from the Iowa District Court for Johnson County, Paul D. Miller, Judge.

Jordan appeals the denial of his application for postconviction relief. **AFFIRMED.**

Philip Mears, Iowa City, for appellant.

Thomas J. Miller, Attorney General, Kyle Hanson, Assistant Attorney General, and Janet M. Lyness, County Attorney, for appellee State.

Heard by Vaitheswaran, P.J., and Doyle and Danilson, JJ.

**DANILSON, J.**

Jimmie Jordan appeals the denial of his application for postconviction relief (PCR). Jordan alleges new evidence, including telephone records and a new witness who allegedly overheard the victim recant, justifies a new trial.[1] However, the phone records were available prior to trial and do not constitute newly discovered evidence. The district court concluded the new witness's testimony was not credible because of her memory problems, illegal drug abuse, and uncertainty as to whether she heard the alleged recantation from the victim or if she simply heard others talking about the incident. We conclude the new witness's testimony could only serve as impeachment evidence, and in light of her credibility issues, there was substantial evidence to support the district court's denial of relief. We affirm.

**I. Background Facts and Proceedings.**

On December 31, 2003, Coralville police officers responded to a 911 hang-up call at J.W.'s apartment. Officers knocked on the door and heard J.W. calling out, "help me, help me, he's trying to rape me." Officers attempted to open the door, but it was chained. Shortly after they identified themselves, J.W. came to the door shaking, crying, and disheveled. Her shorts were torn, and she had marks that appeared to be handprints on her biceps. Inside the apartment, officers found Jimmie Jordan. Officers questioned J.W. and Jordan separately and obtained two different versions of the events preceding the 911 call.

[1] Jordan's application also alleged ineffective assistance of counsel, but he withdrew that claim prior to the postconviction hearing.

J.W. told officers she met Jordan approximately one week earlier when Jordan helped James Walker remove his belongings from her apartment. On that occasion, Jordan was in her apartment for five or ten minutes. J.W. reported that was the only time she had ever seen Jordan until he arrived at her apartment around 2:00 a.m. the day of the incident.

Jordan awakened J.W. by knocking on the door and asked to be let into her apartment. J.W. talked with Jordan through the chained door for three or four minutes, but out of concern that he would disturb her neighbors, J.W. unchained the door and told Jordan to wait there while she called him a cab.

J.W. went to retrieve her phone and heard Jordan entering her apartment. Instead of dialing a cab, she called 911. Jordan grabbed the phone and threw it across the room. He threw J.W. onto a bed. She resisted and got up briefly before Jordan threw her onto a different bed. Jordan held her down, tore her shorts, and repeated "baby, I want you" over and over. J.W. told Jordan she was gay, but he would not let her go. The struggle was interrupted by the arrival of police officers. The above recitation of J.W.'s version of events is consistent with her report to police officers the day of the incident, her deposition testimony, and trial testimony.[2]

Jordan also told officers he met J.W. and had been in her apartment one week earlier. However, Jordan claims he met J.W. at a free meal and she invited him back to her apartment, where he gave her thirty dollars to buy him crack cocaine. J.W. left him in the apartment for three hours and returned without the

[2] However, at the postconviction hearing, over six years after the trial, J.W. stated that she had never met Jordan prior to December 31, 2003.

drugs or the money. Jordan admits being very angry, grabbing her possessions, and threatening to throw J.W. out the window. He claims he told her she was going to do something for the money and she offered him sex. After having sex with her, he left.

December 31, 2003, was a cold winter night. Jordan was homeless. He was still angry from the earlier encounter. Jordan alleges he returned to J.W.'s apartment with the intent to procure crack and stay at her apartment through the night. Jordan testified, "If I had (crack) on me then . . . I would have did (sic) what we did the week before, and I would have left the next morning."

Jordan claims that when he awakened J.W. he told her he had crack and she invited him into her apartment. Once inside, he told her to get dressed so they could go buy crack together. Jordan alleges when J.W. learned he did not have crack, she got angry and called police. Jordan admitted to police that he grabbed J.W., took the phone, and threw it down. He was arrested at the scene and quickly became belligerent.

Jordan has vehemently contested his conviction for assault with intent to commit sexual abuse from the moment he was informed of the charge. Jordan did not testify at trial. His statement to police was substantially consistent with his testimony at sentencing and postconviction hearings. Although Jordan professes his innocence to the crime of assault with the intent to commit sexual abuse, he has acknowledged from the outset that he committed an assault on

J.W.[3] He challenges only one element of the offense: the allegation that he had the intent to commit sexual abuse upon J.W.

Jordan complained his first lawyer was not adequate. Thirteen days before trial, a new lawyer, Cory Goldensoph, was appointed to represent Jordan. Goldensoph sought a continuance that was denied by the court because Jordan was unwilling to sign a limited waiver of his speedy trial rights.

A jury found Jordan guilty of assault with intent to commit sexual abuse on March 29, 2004. Jordan was sentenced to two years in prison and a fine of $500. This court denied Jordan's direct appeal, but preserved his claims of ineffective assistance of counsel.

While Jordan's appeal was pending, Karla Jordan[4] approached Victoria Cole, the prosecutor for Jordan's case. Karla told Cole that she overheard J.W. admitting she took Jordan's money to buy crack and did not bring him drugs or return his money. Because Jordan was going to beat her up, J.W. said she called the police and lied about Jordan attempting to rape her. Cole wrote a letter to Jordan's trial counsel to notify him of Karla's statement.

Jordan filed a pro se application for postconviction relief on April 4, 2005, identifying grounds for relief including a constitutional violation and lack of jurisdiction, but offering no explanation of his claims or any allegations of fact. Jordan's postconviction counsel filed an amended and substituted application, alleging a new trial was justified because (1) a new witness overheard J.W.

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[3] However, at the postconviction trial, Jordan denied grabbing or threatening J.W. and also denied grabbing her phone on December 31, 2003.

[4] This witness is of no relation to Jimmie Jordan. Karla Jordan had changed her name to Karla Kosgard by the time of the postconviction trial.

admitting she made up the allegation; (2) new phone record evidence supports Jordan's position and is inconsistent with J.W.'s position about their previous encounter; and (3) Jordan received ineffective assistance of counsel. Before his postconviction trial, Jordan withdrew the ineffective assistance claim.

After many continuances, the postconviction trial was held August 19, 2010. The district court denied Jordan's application. The court found the new witness was not credible, concluding that, "she acknowledges memory problems from her illegal drug use and her mental health disability, and she has also given conflicting versions of the so-called recantation story." The court further found the phone records did not qualify as new evidence because they were available prior to trial. Jordan filed a motion to amend or enlarge the ruling, which was denied.

**II. Standard of Review.**

Generally, we review postconviction relief (PCR) proceedings for errors at law. *Ledezma v. State*, 626 N.W.2d 134, 141 (Iowa 2001). However, we apply an abuse-of-discretion standard when reviewing the postconviction court's ruling on newly discovered evidence. *See State v. Smith*, 573 N.W.2d 14, 17 (Iowa 1997). Abuse of discretion occurs when a trial court exercises its discretion "on grounds or for reasons clearly untenable or to an extent clearly unreasonable." *State v. Maghee*, 573 N.W.2d 1, 5 (Iowa 1997). "A ground or reason is untenable when it is not supported by substantial evidence or when it is based on an erroneous application of the law." *Graber v. City of Ankeny*, 616 N.W.2d 633, 638 (Iowa 2000). We do not disturb a denial of postconviction relief if the

findings of fact are supported by substantial evidence and are justified as a matter of law. *Carroll v. State*, 466 N.W.2d 269, 271 (Iowa Ct. App. 1990).

**III. Discussion.**

Under Iowa Code section 822.2(1)(d) (2009), an applicant may seek postconviction relief if "[t]here exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice." Jordan claims new witness testimony and phone records constitute "newly discovered evidence" entitling him to a new trial.

We follow the same analysis to assess claims of newly discovered evidence for section 822.2(1)(d) claims and motions for a new trial. *Grissom v. State*, 572 N.W.2d 183, 184 (Iowa Ct. App. 1997). "It is obvious the legislature intended the sufficiency of the showing necessary to obtain a new trial based on newly discovered evidence to be the same whether the ground is raised in a motion for new trial or in a postconviction application." *State v. Sims,* 239 N.W.2d 550, 555 (Iowa 1976).

To prevail in a postconviction relief action grounded in new evidence, the evidence must be newly discovered, relevant, and likely to change the result of the case. *Whitsel v. State*, 525 N.W.2d 860, 863 (Iowa 1994). Thus, before a new trial will be granted, Jordan must demonstrate that the evidence (1) was discovered after the verdict; (2) could not have been discovered earlier in the exercise of due diligence; (3) is material and not merely cumulative or impeaching; and (4) probably would have changed the result of the trial. *Id.*

Motions for new trial on the basis of newly discovered evidence are disfavored and should be granted sparingly. *Id*. Newly discovered evidence

must exist at the time of the trial proceeding, or qualify for an exception to that requirement "in extraordinary cases when an 'utter failure of justice will unequivocally result' if the new evidence is not considered." *Grissom*, 572 N.W.2d at 184 (quoting *Benson v. Richardson*, 537 N.W.2d 748, 762-63 (Iowa 1995)).

*A. Testimony of Karla Jordan.*

The first two elements of the newly discovered evidence test are undisputed with regard to Karla's testimony. Evidence of a victim's statement that she lied to police regarding her accusation is material to the case. No other evidence has been presented that would render the evidence cumulative. While the evidence did not exist at the time of trial, if credible and admissible, evidence of a victim's recantation would qualify for the exception set forth in *Grissom*.

*(1) Karla's credibility.*

We are not convinced Karla's testimony would likely have changed the result of the trial. While the evidence presented consisted primarily of conflicting accounts by Jordan and J.W., both of whom had multiple convictions which would call their veracity into question, J.W.'s version of the facts is consistent with officer observations and physical evidence, and she refuted the alleged recantation during the postconviction relief trial.

Moreover, recantations are looked upon with the utmost suspicion. *Jones v. State*, 479 N.W.2d 265, 275 (Iowa 1991). The "postconviction court is not required to believe the recantation, and has wide discretion to view the matter in its entirety to determine if a defendant had a fair criminal trial and if a new trial

would likely produce a different result." *Adcock v. State*, 528 N.W.2d 645, 647 (Iowa Ct. App. 1994).

Karla does not present persuasively credible testimony. She has bipolar disorder and admitted memory problems as a result of illegal drug use. Karla admitted she was using illegal drugs at the time she allegedly heard J.W. recant. Most importantly, Karla cannot state definitively that she personally observed J.W.'s alleged recantation. Karla admits she may simply be remembering overhearing someone else saying something about the incident.

When asked if she found Karla to be a credible witness, Prosecutor Victoria Cole limited her response to confirming that she believed Karla with regard to the account of her own victimization.[5] Cole did not offer any opinion as to the reliability of Karla's statement concerning J.W.'s alleged confession that she had lied to police about the incident on December 31, 2003. Cole testified she did not attempt to assess the credibility of Karla's statements at all. She simply memorialized the conversation and sent the information to Jordan's counsel.

However, we acknowledge there are some facts that could support a different conclusion regarding Karla's credibility. Karla had been sober for approximately three and a half years before her testimony at the PCR trial. She readily admitted to using crack cocaine and marijuana in the past, including

[5] Karla had been a victim of sexual abuse and her perpetrator was successfully prosecuted by Cole. Karla explained that her motivation for reporting the alleged recantation was her personal experience with the difficulty of testifying as a legitimate victim. In addition, in reference to Cole, Karla testified "I love her to death." Karla indicated she would stop by Cole's office "[a]ll the time" just to say hello. Cole testified, "Karla is somebody who has had a very difficult life. She has been repeatedly victimized. She used to be addicted to controlled substances. And I felt sorry for her."

during the general time period when she allegedly heard J.W.'s recantation and when she gave her deposition.

Karla provided the information in person to the prosecutor of the case, Cole, within approximately one week. The prosecutor responded by relaying the information via a letter to Jordan's trial attorney. Cole explained that she had never written a similar letter before, but as a matter of justice, she felt it necessary to inform Jordan's attorney. Significantly, Karla's recitation of the recantation is relatively consistent with Jordan's version of the facts. Moreover, J.W.'s own testimony during the PCR trial in August 2010 was inconsistent with her trial testimony in March 2004. J.W. could not even recall meeting Jordan before the night in question. There is also evidence she was using drugs during the time period of the alleged incident.

In a 2005 deposition, Karla was unsure whether she heard J.W. make the statement or someone else told her about the statement. During the PCR trial she testified she was "almost positive" that she heard J.W. herself. However, during cross-examination, she admitted she "probably" heard it from her friend, Eddie. We also note that Cole's letter to Jordan's attorney recited that Karla heard the statement directly from J.W.

Although the evidence is in conflict, we find no abuse of discretion in the court's determination that Karla's testimony is not sufficiently credible to change the result in the proceedings.

*(2) Hearsay.*

Although the facts in this case involve a recantation, it is significant that J.W. testified at the PCR trial and refuted that she ever recanted her explanation

of what occurred on the day she was victimized by Jordan. As a result, if a new trial was granted, Karla's testimony would be inadmissible hearsay and "[t]his evidence, given its greatest possible weight, has impeachment value only." *Varney v. State*, 475 N.W.2d 646, 651 (Iowa Ct. App. 1991) (denying a new trial based upon testimony of grandparents who overheard one or both grandchildren recant sexual abuse allegations after a trial resulting in conviction).

We acknowledge that our court has concluded where "the newly discovered evidence goes directly toward the central issue in the case, it is not impeaching." *State v. Adamson*, 542 N.W.2d 12, 14 (Iowa Ct. App. 1995). However, *Adamson* is distinguishable because it involved a prior inconsistent statement of the alleged victim. Generally, a prior, inconsistent, out-of-court statement offered for impeachment purposes falls outside the definition of hearsay. *State v. Hill*, 243 N.W.2d 567, 570 (Iowa 1976). In the case at bar, the alleged inconsistent statement was post-trial, and not otherwise admissible except to impeach. *Varney*, 475 N.W.2d at 651.

Somewhat similar to *Adamson* is the federal standard where "recanted testimony that bears on a victim's credibility or directly on the defendant's guilt will warrant a new trial if it would probably produce an acquittal on retrial." *United States v. Dogskin*, 265 F.3d 682, 685 (8th Cir. 2001). However, we are not convinced Karla's impeachment testimony would "probably produce an acquittal" if the federal standard was applied to these facts, because as noted by the district court, her testimony was "suspect."[6]

[6] If Karla heard about the alleged recantation from a third party, Karla's testimony at a retrial may constitute double hearsay. Evidence that would otherwise be double hearsay

Although different opinions may be reached regarding Karla's credibility, we conclude the district court's findings on this issue, as well as the denial of any relief, are supported by substantial evidence, and we do not disturb its judgment. *Brokaw v. Winfield-Mt. Union Cmty. Sch. Dist.*, 788 N.W.2d 386, 394 (Iowa 2010).

*B. Phone Records.*

Jordan further alleges he is entitled to a new trial because newly discovered phone records demonstrate that he made long distance telephone calls from J.W.'s apartment. Jordan's claim fails on every prong of the new evidence test: the evidence was not discovered after the verdict, the evidence was obtainable before trial by exercise of due diligence, the evidence is merely cumulative, and production of the records would not likely have changed the result of the trial.

To ensure finality of litigation, evidence that merits a new trial must be newly discovered, not merely newly available. *Jones v. Scurr*, 316 N.W.2d 905, 910 (Iowa 1982). Even "exculpatory evidence that was unavailable, but known, at the time of trial is not newly discovered evidence" when it becomes available after judgment. *Id.*

Like the defendant in *Jones*, Jordan seeks to present newly available evidence that was known to him since the minute he placed the calls. Jordan told his attorney about the phone records prior to trial. He also discussed the phone record evidence during the sentencing hearing. However, records were

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cannot be stripped of its hearsay nature by being offered for impeachment purposes. *State v. Souder*, 394 N.W.2d 368, 371 (Iowa 1986).

not obtained because Jordan had an irreconcilable conflict with his first attorney and was unwilling to sign a limited waiver of his speedy trial rights to give his second attorney an opportunity to subpoena the records.

Since the fact that calls were placed was known to Jordan, if he believed they were material to his litigation, he had a duty to make reasonable efforts to obtain the records for trial. *State v. Compiano*, 154 N.W.2d 845, 850 (Iowa 1967). At his criminal sentencing, Jordan testified that he talked on J.W.'s phone for about an hour and twenty minutes. He asserted that if records had been obtained, they would have proven J.W. was lying about the nature and duration of their previous meeting, bolstered his credibility, and possibly changed the verdict in his case.

The records were eventually obtained and demonstrated that two calls were made to a 773 area code.[7] Each call lasted one minute. Contrary to his testimony at sentencing, Jordan later explained that he placed calls, but the people he tried to reach were unavailable. The content of the records merely corroborates testimony[8] that Jordan was in J.W.'s apartment a week before the incident. The records do not establish that J.W.'s trial testimony was false. The records do show J.W.'s testimony at the PCR trial that she had never met Jordan before the evening in question was inaccurate.[9]

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[7] The numbers correspond to Jordan's wife and ex-girlfriend.

[8] Both J.W. and Jordan testified at trial that Jordan was in J.W.'s apartment about a week before the incident. Their conflict is only about what happened while he was there and how long he was present.

[9] However, her report to police and all previous testimony is not inconsistent with the phone records. While J.W. did not believe Jordan used her phone, given that the calls were placed in two minutes or less, he could have made the calls while in her apartment with James Walker.

Nevertheless, the phone records cannot be described as newly discovered evidence. We find no abuse of discretion in the district court's denial of postconviction relief on the basis of the phone records.

**IV. Conclusion.**

We find no abuse of discretion in the district court's denial of postconviction relief. Substantial evidence supports the district court's findings of fact, and the evidence submitted by appellant was properly rejected as a matter of law.

**AFFIRMED.**

Doyle, J., concurs; Vaitheswaran, P.J., concurs specially.

**VAITHESWARAN, P.J.** (concurring specially)

I specially concur. I agree with the majority's analysis of the phone records, and I agree with the majority's conclusion that Jordan was not entitled to a new trial based on the statements of Karla Kosgard. However, I would base the decision exclusively on a conclusion that the proffered evidence was inadmissible hearsay rather than on an assessment of witness credibility.

As the majority acknowledges, many aspects of Kosgard's testimony had credence, notwithstanding her mental illness and drug use at the time she overheard the conversation. She clearly testified that she overheard J.W. recanting the assertion of an attempted sexual assault by Jordan; her testimony at the PCR hearing was consistent with a statement she gave a prosecutor six years earlier and within a week of overhearing the recantation; and the only material inconsistency in her hearing testimony and earlier deposition testimony related to whether J.W. made this statement directly to Kosgard or to a man sitting next to Kosgard.

In contrast, J.W.'s testimony at the PCR hearing was riddled with inconsistencies. Like Kosgard, J.W. stated she had "mental problems" and used drugs. Unlike Kosgard, J.W. could not remember such basics as whether she had been convicted of a felony, whether her deposition was taken, and whether she stayed alone or with others around the time of the incident, not to mention when and how she met the defendant. While the prosecutor wrote off these discrepancies as "memory problems" resulting from a lapse of time, Kosgard did not suffer from the same memory problems despite the years that had elapsed since she overheard the recantation.

The PCR court nonetheless determined that Kosgard's testimony was "suspect." The court based this determination on Kosgard's mental health and drug issues at the time she overheard the conversation, not on Kosgard's demeanor at the PCR hearing. *See State v. O'Shea*, 634 N.W.2d 150, 156 (Iowa Ct. App. 2001) ("[A] witness's composure and demeanor—things critical to credibility assessments—are beyond our power to review."). For this reason, I would not rely on the court's adverse credibility assessment of Kosgard in resolving the newly-discovered evidence question.

That said, Kosgard's testimony, at best, was of value to impeach J.W.'s trial testimony, and as the majority correctly notes, impeachment evidence does not warrant a new trial. *See Varney*, 475 N.W.2d at 651 ("The girls' grandmother testified that S.V. said she lied at the trial. The girls' grandfather testified that he heard both girls mention lying. This evidence, given its greatest possible weight, has impeachment value only. Newly-discovered evidence which is merely cumulative or impeaching does not entitle one to a new trial."); *State v. Westcott*, 857 S.W.2d 393, 398 (Mo. Ct. App. 1993) ("Tyler's and Atwell's testimony is hearsay, useful perhaps for impeaching the victim's testimony, but not as substantive evidence. If the only usefulness of newly-found evidence is to impeach, the motion for remand must be denied."). I agree with the majority that Kosgard's testimony would have been inadmissible hearsay if introduced for non-impeachment purposes. For that reason, I concur in the majority's decision to affirm the district court's denial of Jordan's postconviction relief application.