COURT OF APPEALS
DECISION
DATED AND FILED

October 22, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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* § 808.10 and RULE 809.62, STATS.

No. 97-3715-CR

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

DEBORAH C. WESTBURY,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dane County: RICHARD J. CALLAWAY, Judge. *Affirmed.*

Before Eich, Vergeront and Roggensack, JJ.

VERGERONT, J. Deborah C. Westbury appeals an amended judgment of conviction on three counts of possessing a controlled substance with intent to deliver as a party to the crime within 1,000 feet of a youth center, and one count of maintaining a dwelling used to keep controlled substances, all as a repeater. She also appeals the order denying her postconviction motion.

Westbury argues that the conviction and sentencing for two counts of possession with intent to deliver violate the constitutional prohibition against double jeopardy because the two counts are based on one continuous course of conduct.[1] Westbury also argues that the cumulative effect of several evidentiary errors deprived her of a fair trial, and a jury instruction was an erroneous exercise of the trial court's discretion. We conclude the separate convictions and punishments did not violate the double jeopardy clause; although evidentiary errors did occur, they were harmless; and the jury instruction was within the trial court's discretion. Therefore, we affirm.

BACKGROUND

On April 26, 1994, police officers executed a search warrant at Westbury's house and found paraphernalia consistent with cocaine trafficking. Based on the results of the search and allegations that Westbury had participated in a business of processing and selling crack cocaine out of her house, she was charged with various violations of the Controlled Substances Act, ch. 161, STATS.[2]

Count one charged Westbury with possession with intent to deliver cocaine base (crack cocaine) on or about November 1, 1993, through and including December 24, 1993, under §§ 161.41(1m)(cm)1 and 161.14(7)(a), STATS., 1991-92, as a party to the crime. Effective December 24, 1993, § 161.14(7)(a), which referred specifically to cocaine base, was repealed and

[1] Article I, § 8 of the Wisconsin Constitution and the Fifth Amendment to the United States Constitution both prohibit "for the same offense [being] twice put in jeopardy."

[2] At the time of Westbury's prosecution and conviction, the Controlled Substances Act was Chapter 161. It has since been renumbered to Chapter 961. All citations to specific statutes of the Act in this case will be to Chapter 161, STATS., 1993-94, unless otherwise noted.

§ 161.41(1m)(cm) was amended to include possession with intent to deliver both cocaine base and cocaine, and the penalty structure for the amended § 161.41(1m)(cm) was altered. 1993 Wis. Act 98, §§ 85, 86 and 96g. This revised statute was the basis for count two, possession with intent to deliver more than forty grams of cocaine on or about December 25, 1993, through and including April 23, 1994, as party to the crime.[3] Westbury was also charged with possession with intent to deliver cocaine on or about April 26, 1994, as a party to the crime, and maintaining a dwelling used to keep controlled substances, contrary to § 161.42, STATS.[4] She was convicted on all four counts.[5]

Prior to trial, Westbury filed a motion to dismiss based on double jeopardy. The trial court denied the motion.

---

[3] Section 161.41(1m)(cm), STATS., 1993-94, provides, in pertinent part:

> (1m) Except as authorized by this chapter, it is unlawful for any person to possess, with intent to manufacture or deliver, a controlled substance. … Any person who violates this subsection with respect to:
> ….
>
> (cm) A controlled substance under s. 161.16(2)(b) [cocaine, which no longer excepts cocaine base], is subject to the following penalties:
> ….
>
> 4. If the amount possessed, with intent to manufacture or deliver, is more than 40 grams but not more than 100 grams, the person shall be fined not more than $500,000 and shall be imprisoned for not less than 5 years nor more than 30 years.

[4] All four of the counts discussed in this opinion were enhanced under the repeat offender provision, § 161.48(3), STATS., and counts one through three were enhanced under § 161.49, STATS., as crimes committed while within 1,000 feet of a youth center, because Westbury ran a daycare center in her home.

[5] Westbury was also charged and convicted of possession of cocaine without a tax stamp, but the conviction was dismissed by the trial court pursuant to ***State v. Hall***, 207 Wis.2d 54, 557 N.W.2d 778 (1997).

During the trial, the State presented the following evidence of Westbury's involvement in purchasing, processing and selling cocaine base during the time period from November 1, 1993, through April 23, 1994, the time period relevant to counts one and two.[6]

Tyrees Scott testified that, while he was visiting Westbury's house on December 23, 1993, he observed her sell crack cocaine. Scott knew it was before Christmas because he saw wrapped presents under the Christmas tree. Scott also testified that he sold cocaine base for Westbury and Stacey Miller "ten to twelve times or more" from late December 1993 or early January 1994 through the middle of February 1994. Scott specifically stated that Westbury, rather than Miller, gave him the crack cocaine two or three times in the middle of January 1994. In January or February of 1994, Scott assisted Westbury and Miller in manufacturing and packaging crack cocaine in Westbury's basement. He also accompanied Westbury and Miller to Chicago to obtain cocaine on three occasions in January of 1994.

Detective Summers testified that he had interviewed Miller, who told him that Westbury had paid Miller to purchase cocaine for Westbury to sell to her customers. Miller told Detective Summers this occurred several times prior to a personal "falling out" between Westbury and himself in December of 1993. Miller said he and Westbury patched up their differences in late 1993 and resumed doing business together.

Detective Ricky testified that he interviewed Seri Harris, a long-time friend of Westbury whom Westbury paid to clean her house and help in the

[6] Other evidence concerning other counts will be discussed later in the opinion.

daycare center she ran in her home. Harris told Detective Ricky that she knew Westbury was "dealing drugs" while she was employed by Westbury, which was from mid-1993 to April 1994.

After she was convicted, Westbury again raised the double jeopardy claim, which the trial court again denied. Westbury appeals that decision as well as the convictions on all four charges based on evidentiary errors and an allegedly erroneous jury instruction.

ANALYSIS

Double Jeopardy

Whether Westbury's convictions and punishments on counts one and two violate her right against double jeopardy is a question of law, which we decide de novo. ***State v. Sauceda,*** 168 Wis.2d 486, 492, 485 N.W.2d 1, 3 (1992). One of the protections embodied in the double jeopardy clause is the protection against multiple punishments for the same offense. ***State v. Anderson,*** 219 Wis.2d 740, 747, 580 N.W.2d 329, 332-33 (1998). Multiplicitous charges—charging more than one count for a single criminal offense—can lead to multiple punishments and violate the double jeopardy clause. ***Id.*** In ***Anderson***, the supreme court explained the process of analyzing claims of multiplicity.

> It is well-established that this court analyzes claims of multiplicity using a two-prong test: 1) whether the charged offenses are identical in law and fact; and 2) if the offenses are not identical in law and fact, whether the legislature intended the multiple offenses to be brought as a single count.

Id. at 747, 580 N.W.2d at 333. If the offenses are identical in law and fact under the first part of the test, the charges are multiplicitous in violation of the double jeopardy clause. ***Id.*** at 748, 580 N.W.2d at 333.

Westbury contends the offenses charged in counts one and two are identical both in law and in fact. They are identical in law, she asserts, because they both charge a violation under the same statute, § 161.41(1m)(cm), STATS., and the changes made to § 161.41(1m)(cm) by 1993 Act 98—combining cocaine base and cocaine in one statute and revising the quantities of cocaine that relate to specific penalty ranges—simply altered the penalty structure and did not affect the elements of the crime. We assume without deciding that the two versions of § 161.41(1m) charged in counts one and two are the same in law.

However, we disagree with Westbury's position that counts one and two are identical in fact. Two counts are the same in fact when neither count requires proof of an additional fact that the other did not. ***State v. Carol M.D.***, 198 Wis.2d 162, 170, 542 N.W.2d 476 (Ct. App. 1995). Charged offenses are not multiplicitous if the facts are "*either* separated in time *or* of a significantly different nature." ***Anderson***, 219 Wis.2d at 749, 580 N.W.2d at 334 (emphasis added). Offenses are separated in time if the defendant had time to reconsider his or her course of action between each offense. ***Carol M.D.***, 198 Wis.2d at 170, 198 N.W.2d at 479.

The events underlying Westbury's conviction on counts one and two are separated by time, the first occurring "on or about November 1, 1993 through and including December 24, 1993," and the second occurring "on or about December 25, 1993 through and including April 23, 1994." There is sufficient evidence in the record for a jury to find a violation of § 161.41(1m) (cm), STATS.,

in each of these time periods,[7] and, since each time period involved evidence of several distinct actions by Westbury that violate § 161.41(1m)(cm), she could have reconsidered her course of action on December 24, 1993. Instead, Westbury chose to continue her criminal activity.

Westbury acknowledges that offenses are different in fact if they are separated by time, but argues that "the separation in time cannot be manufactured by the State." The separation was "manufactured" by the State here, she contends, because the State selected the effective date of the statutory change as the "separation" between the two counts.[8] In support of her contention, Westbury quotes this passage from ***Brown v. Ohio***, 432 U.S. 161, 169 (1977):

> The Double Jeopardy Clause is not such a fragile guarantee that prosecutors can avoid its limitations by the simple expedient of dividing a single crime into a series of temporal or spatial units.

In ***Brown***, the defendant stole one car and drove it for several days. The prosecution claimed that separate charges of auto theft and joy riding (a lesser included offense) on separate days were allowable as separate and distinct offenses separated by time. The Supreme Court disagreed because, "[t]he applicable Ohio statutes, as written and as construed in this case, make the theft and operation of a single car a single offense." ***Id***. We agree with Westbury that in the context of a statutorily defined single offense, the prosecutor does not have

[7] Westbury does not raise a claim of insufficient evidence.

[8] In responding to Westbury's pretrial double jeopardy claim, the prosecutor expressed her belief that not only were the two counts appropriate, but "there is simply no other method by which the defendant could be charged over a time frame which straddles a statutory amendment of this nature." Since we assume without deciding that counts one and two are the same in law, we do not decide whether the prosecutor's assumption was correct.

the discretion to divide "a single crime into a series of temporal or spatial units." ***Id.*** ***Brown***, therefore, raises the issue of whether the legislature intended that only one offense may be charged even if there is a separation in time, which is the essence of the second part of the multiplicity test. ***Brown*** does not provide support, however, for Westbury's contention that there is not a separation in time between the events underlying counts one and two. We conclude that there is, and turn to the second part of the test.[9]

When the first part of the multiplicity test is satisfied, as it is in this case, we begin the second part by presuming the legislature intended to permit cumulative punishments. ***Carol M.D.***, 198 Wis.2d at 173, 542 N.W.2d at 480. In determining whether the presumption that the legislature intended counts one and two be brought as a single count even though they are different in fact is correct, we consider (1) statutory language; (2) legislative history and context; (3) the nature of the proscribed conduct; and (4) the appropriateness of multiple punishment. ***Id.***

Although the express language of § 161.41(1m), STATS., does not define a unit of prosecution or penalty structure based on time, the lack of a graded

[9] Westbury also cites ***State v. Stevens***, 123 Wis.2d 303, 367 N.W.2d 788 (1985), for the proposition that the State cannot "artificially" divide a crime into two separate periods of time. The two charges of possessing drugs in ***Stevens*** resulted from the same supply. The supreme court rejected a double jeopardy claim, reasoning that, even though the drugs involved in both counts came from a single acquisition, the State properly charged two counts because the defendant separated some of the drugs out for personal use and hid them from the police. ***Id.*** at 323, 367 N.W.2d at 798. Therefore, Stevens' continued possession on a different date was not a distinction in time created by the State, the court held, but rather was created by Stevens who continued his possession on the later date. ***Id.*** ***Stevens*** does not support Westbury's argument that the State created the distinction in time in this case. As in ***Stevens***, it was Westbury's conduct in continuing to possess cocaine with the intent to deliver on subsequent dates that created the separation in time. The facts are even more compelling for separate charges in this case than in ***Stevens***—counts one and two each include several distinct acts of possession with intent to deliver with different supplies, different suppliers and different customers.

punishment system based on time indicates that multiple charges may be brought. ***Id.*** at 174, 542 N.W.2d at 480. Westbury has brought nothing to our attention from the legislative history or context of the statute that rebuts that presumption. We conclude that the legislature intended to permit multiple counts under § 161.41(1m), STATS., unlike the auto theft offense in ***Brown***.

Westbury's also argues that counts one and two are the same in fact because the prosecutor decided to charge a continuing course of conduct and party to the crime. She emphasizes the prosecutor's reference in closing argument to a "conspiracy starting in November of 1993, through and including the date of the search, warrant, April 26th of 1994." Westbury cites ***State v. Waste Management of Wis., Inc.***, 81 Wis.2d 555, 576-77, 261 N.W.2d 147, 156-57 (1978), for the proposition that one conspiracy cannot be charged as multiple conspiracies, even if the details surrounding the criminal activity change somewhat.

In ***Waste Management,*** the defendant was charged with the crime of engaging in a single conspiracy to illegally restrain trade under the Wisconsin Antitrust Act, ch. 133, STATS. The issue was not double jeopardy, but rather whether the evidence showed one conspiracy or several, and if several, whether that variance from the charging document prejudiced the defendant. The court ruled that the jury, acting reasonably, was entitled to find one overall conspiracy, even though the conspirators changed during the conspiracy. ***Id.***

Waste Management has no bearing on this case. Besides not addressing double jeopardy, that case dealt with a charge of conspiracy. Westbury

was not charged with a conspiracy as defined in § 939.31, STATS.[10] She was charged as party to the crime under § 939.05, STATS.; which provides conspiracy as one of three subsets, the other two being direct commission of the crime and intentionally aiding and abetting the commission of the crime.[11] The State is not

---

[10] Section 161.41(1x), STATS., 1993-94, provided: "Any person who conspires, as specified in s. 939.31, to commit a crime under sub. … (1m)(cm) … is subject to the applicable penalties under sub. … (1m)(cm)…." Westbury was not charged under § 161.41(1x).

Section 939.31, STATS., provides:

> Except as provided in ss. 940.43 (4), 940.45 (4) and 961.41 (1x), whoever, with intent that a crime be committed, agrees or combines with another for the purpose of committing that crime may, if one or more of the parties to the conspiracy does an act to effect its object, be fined or imprisoned or both not to exceed the maximum provided for the completed crime; except that for a conspiracy to commit a crime for which the penalty is life imprisonment, the actor is guilty of a Class B felony.

[11] Section 939.05, STATS., provides in full:

> **Parties to crime.** (1) Whoever is concerned in the commission of a crime is a principal and may be charged with and convicted of the commission of the crime although the person did not directly commit it and although the person who directly committed it has not been convicted or has been convicted of some other degree of the crime or of some other crime based on the same act.
>
> (2) A person is concerned in the commission of the crime if the person:
>
> (a) Directly commits the crime; or
>
> (b) Intentionally aids and abets the commission of it; or
>
> (c) Is a party to a conspiracy with another to commit it or advises, hires, counsels or otherwise procures another to commit it. Such a party is also concerned in the commission of any other crime which is committed in pursuance of the intended crime and which under the circumstances is a natural and probable consequence of the intended crime. This paragraph does not apply to a person who voluntarily changes his or her mind and no longer desires that the crime be committed and notifies the other parties concerned of his or her withdrawal within a reasonable time before the commission of the crime so as to allow the others also to withdraw.

required to elect which party to a crime theory is applicable. *See* ***Hardison v. State,*** 61 Wis.2d 262, 272, 212 N.W.2d 103, 108 (1973).[12] We are not persuaded that the prosecutor's use of the term "conspiracy" to describe the criminal activity in any way limited the jury's options, or that it has any bearing on either part of the test for multiplicity. The prosecutor's reference does not affect the separation in time of the events underlying counts one and two, and it is not relevant to whether the legislature intended to allow party to the crime of possession with intent to deliver to be charged as more than one offense if the two offenses are not the same in fact. Westbury presents no argument on the legislature's intent.

We conclude that conviction and punishment for counts one and two did not put Westbury in jeopardy twice for the same offense.[13]

---

[12] Consistent with the statute and ***Hardison***, the jury was instructed as follows:

> As applicable in this case, a person is concerned in the commission of a crime if he: (a) Directly commits the crime, or (b) Intentionally aids and abets the commission of it, or (c) Is a party to a conspiracy with another to commit it or advises, hires, counsels, or otherwise procures another to commit it.
>
> ….
>
> The State is not required to elect which party to a crime theory is applicable in this case. The jury need not unanimously agree which party to a crime theory upon which it relies in reaching its verdicts.

[13] Westbury also argues, without further explanation or discussion:

> [I]t would be an equal protection violation for those people engaged in a conspiracy to possess controlled substances for a period of time which straddled the effective date of 1993 Act 98 to be convicted of two counts based solely on the inopportune timing, while those engaged in a conspiracy either ending prior to that date or beginning after that date to be only convicted of one count.

(continued)

Evidentiary Rulings

Westbury contends the trial court made several evidentiary errors and these errors, either individually or as an aggregate, require reversal of her convictions. Although we agree there were erroneous evidentiary rulings, we conclude that those errors, even when considered in the aggregate, are harmless and do not warrant a reversal.

Generally the admissibility of evidence is within the trial court's discretion. ***State v. Tarantino***, 157 Wis.2d 199, 207, 458 N.W.2d 582, 585 (Ct. App. 1990). However, when an evidentiary ruling involves the interpretation of an evidentiary rule, or the application of hearsay rules to undisputed facts, we are presented with a question of law, which we review de novo. *See* ***State v. Peters***, 166 Wis.2d 168, 175, 479 N.W.2d 198, 200-01 (Ct. App. 1991). We will not disturb an evidentiary ruling where the trial court has exercised its discretion in accordance with accepted legal standards and the facts of record. ***State v. Clark***, 179 Wis.2d 484, 490, 507 N.W.2d 172, 174 (Ct. App. 1993). Where the trial court fails to adequately explain the reasons for its decision, we will independently review the record to determine whether it provides a reasonable basis for the trial court's discretionary ruling. ***Id.*** If an error was committed, we set aside the verdict unless we are convinced there is no reasonable possibility that the error contributed to the conviction. ***State v. Dyess***, 124 Wis.2d 525, 543, 370 N.W.2d 222, 231-32 (1985).

We do not address arguments that are insufficiently developed and, therefore, do not give Westbury's equal protection argument any merit. ***Reiman Assoc., Inc. v. R/A Advertising, Inc.,*** 102 Wis2d. 305, 306 n.1, 306 N.W.2d 292, 294 (Ct. App. 1981).

We consider first whether the challenged rulings were error and then whether the errors, in the aggregate, were harmless.

Cross-Examination of Detective Bongiovani

Detective Bongiovani testified regarding a traffic stop in 1987 that led to an arrest of Westbury and a search of her purse. He testified, based on his experience in drug enforcement, that the contents of Westbury's purse at that time—cocaine, marked packaging materials, and a "deering grinder" commonly used by dealers to dilute cocaine for sale—were consistent with paraphernalia used in drug trafficking. On cross-examination, Westbury's attorney began to ask the detective about an occurrence on July 26, 1984. The trial court sustained the State's objection and ruled that the inquiry was beyond the scope of the direct examination. Westbury's counsel did not make an offer of proof on what the detective's testimony would have been.

Westbury argues that the trial court's ruling was based on an erroneous understanding of the law, citing ***Boller v. Cofrances***, 42 Wis.2d 170, 181-85, 166 N.W.2d 129, 134-36 (1969), *overruled on other grounds by* ***State v. Williquette***, 190 Wis.2d 677, 695 n.11, 526 N.W.2d 144, 151 (1995), which rejects the rule that cross-examinations can be conducted only within the scope of the direct examination. However, without an offer of proof or any indication of the nature of the excluded testimony in the record, we cannot consider the merits of this claim. *See* ***State v. Williams***, 198 Wis.2d 516, 538, 544 N.W.2d 406, 415 (1996).

Kordosky's Character for Untruthfulness

Susan Kordosky, a witness for the State, testified that she had purchased cocaine from Westbury at Westbury's house on several occasions in 1992 and early 1993. Westbury's counsel attempted to weaken the impact of this testimony by introducing evidence on Kordosky's reputation for dishonesty under § 906.08, STATS., through the testimony of Seri Harris. During the cross-examination of Harris, an acquaintance of Kordosky who had been in drug treatment programs with her for four or five years, Westbury's counsel asked Harris: "Do you know of [Kordosky's] reputation in the community for honesty?" The court sustained the State's objection without explaining its ruling on the record at that time. The State initially objected on the grounds of relevance,[14] and later argued "[t]he form of the question was not appropriate." The next day the State further explained this latter objection as one of foundation—that Harris's statement that she was in treatment with Kordosky and had known her for four or five years was not sufficient to establish that she had knowledge of Kordosky's reputation in the community. We understand the court to have adopted this reasoning for sustaining the objection.

Westbury argues that we should not consider the foundation objection because it was not timely. Westbury does not provide any authority for the proposition that a trial court cannot consider a party's request to change its basis for its ruling during a trial, and we are aware of none. However, when the court did adopt the inadequate foundation basis for its ruling after it had precluded testimony from a witness, fairness required the trial court to allow Westbury's

[14] The State does not pursue this argument on appeal.

counsel to make an offer of proof on the foundation he could have established had a timely foundation objection been made while Harris was still on the stand. Westbury's counsel attempted to do so in response to the State's foundation rationale the next day. He described the "close-knit" "recovery community" of Narcotics Anonymous and Alcoholics Anonymous. He also suggested that he could have had Harris testify as to her opinion of Kordosky's truthfulness, rather than her reputation in the community.[15] Although it is not entirely clear from the record, it appears the trial court sustained the objection based on its conclusion that, as a matter of law, the recovery community is not a community from which reputation evidence could be admitted under § 906.08(1), STATS. We conclude that this was error.

Section 906.08(1), STATS., states, in pertinent part:

> (1) OPINION AND REPUTATION EVIDENCE OF CHARACTER. … [T]he credibility of a witness may be attacked or supported by evidence in the form of reputation or opinion, but subject to the following limitations:
>
> (a) The evidence may refer only to character for truthfulness or untruthfulness.
>
> (b) Except with respect to an accused who testifies in his or her own behalf, evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

The State argues that the "recovery community" is not a sufficiently broad community for Kordosky to have a reputation for Harris to testify on, citing ***Edwards v. State***, 49 Wis.2d 105, 181 N.W.2d 383 (1970). In ***Edwards***, the

[15] The trial court did not explain why Harris's opinion testimony on Kordosky's character for truthfulness was not admissible, and we can find no basis in the record for excluding such testimony.

supreme court held that one could not testify on another witness's reputation in a community for truthfulness when his basis for that reputation was that he knew twelve people who knew the witness and had varying opinions as to his truthfulness. ***Id.*** at 111, 181 N.W.2d at 386. ***Edwards*** limits the definition of a "reputation in a community," but in no way limits the definition of the community itself. In fact, the court states that "[w]e do not imply that the basis of a reputation must be more than 12 unanimous opinions." ***Id.*** We see no reason why a close-knit group of people who know each other and regularly attend meetings together cannot be considered a "community" within which a witness may know of another person's reputation for truthfulness. The trial court erred when it concluded that the community within which Harris and Kordosky knew one another could not, as a matter of law, provide adequate foundation for reputation of truthfulness or lack of truthfulness.

Westbury's counsel also attempted to bring in evidence of Kordosky's character for dishonesty through her probation agent. In an offer of proof, Westbury's counsel stated that the probation agent would testify that in his opinion, based on his experience with Kordosky over several years, she was not truthful. The prosecution objected on the ground that § 906.08(1)(b), STATS., requires that Westbury successfully impugn the credibility of Kordosky, which she had not done.

The State concedes on appeal that § 906.08(1)(b), STATS., does not apply because Westbury was attempting to present evidence of Kordosky's *untruthful* character. Section 906.08(1)(a) allows evidence of a witness's *truthful* character to rehabilitate a witness whose truthfulness has been attacked. *See* ***State v. Hilleshiem***, 172 Wis.2d 1, 20, 492 N.W.2d 381, 389 (Ct. App. 1992). We agree that excluding such testimony was error.

Kordosky's Prior Convictions

Before Kordosky took the stand, the court addressed the admissibility of her criminal record. Although she had seven prior convictions, the court determined that two of the convictions—retail theft and forgery—were inadmissible because they were over thirteen years old and more unfairly prejudicial than probative. Westbury appeals the trial court's determination and contends that all seven convictions should have been admissible.

Section 906.09(1), STATS., provides: "For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime … is admissible." However, § 906.09(2) allows the trial court to exclude such evidence "if its probative value is substantially outweighed by the danger of unfair prejudice." Whether to admit prior conviction evidence for impeachment purposes is a discretionary decision. ***State v. Kruzycki***, 192 Wis.2d 509, 525, 531 N.W.2d 429, 435 (Ct. App. 1995). The trial court should consider the lapse of time since the conviction, the rehabilitation or pardon of the witness, the gravity of the crime, and the involvement of dishonesty or false statements in the crime; and balance the probative value of that evidence against the danger of unfair prejudice. ***Id.*** Westbury argues that the court did not properly exercise its discretion because it considered only the lapse of time.[16]

The trial court heard argument on the nature of the two excluded convictions. No argument or evidence was presented on rehabilitation or pardon.

[16] Westbury also argues that the court erroneously relied on its incorrect belief that "it's a Wisconsin rule" that convictions over ten years old are not admissible as a matter of law. In light of our decision that the record provides a reasonable basis for the trial court's decision, we need not discuss an alternative basis for its decision that may have been erroneous.

We understand the trial court to have determined that the remoteness in time was of more significance than the nature of the offenses. While it would have been preferable for the trial court to articulate its reasoning, we conclude the record provides a reasonable basis for its decision.

Prior Instances of Kordosky's Untruthful Conduct

On cross-examination, Westbury's counsel asked Kordosky, "Have you ever been involved with the intentional falsification of information?" Kordosky replied, "No, I haven't." Two of her prior convictions—forgery (1981) and uttering[17] (1988)—arguably involve the intention to falsify information. However, the trial court did not allow counsel to conduct any further cross-examination on the conduct resulting in the two convictions. On appeal, Westbury argues she should have been allowed to cross-examine Kordosky further in regard to the conduct leading to these convictions.

Section 906.08(2), STATS., provides:

> Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's credibility … may not be proved by extrinsic evidence. They may, however, … if probative of truthfulness or untruthfulness and not remote in time, be inquired into on cross-examination of the witness….

The trial court had already ruled the forgery conviction was not sufficiently probative given its remoteness in time. As we understand the record, this was also its basis for not permitting inquiry on cross-examination with respect

[17] The crime of uttering is codified in Wisconsin at § 943.24, STATS., which provides:

> Whoever issues any check … which, at the time of issuance, he or she intends shall not be paid is guilty….

to the conduct that led to that conviction—it was remote in time and that fact outweighed any probative value. We have already concluded that was reasonable in the context of § 906.09(2), STATS., and we reach the same conclusion with respect to § 906.08(2), STATS.

However, we are unable to determine a basis in the record for the trial court's decision not to permit further cross-examination of Kordosky with regard to the conduct leading to the 1988 uttering conviction. There was argument by the prosecutor before Kordosky took the stand that uttering may not be probative of truthfulness or untruthfulness, depending on the circumstances of the offense. However, assuming the trial court agreed with that argument, we cannot determine why Westbury's attorney was not given the opportunity to demonstrate that the conduct that was involved in Kordosky's uttering conviction was probative of truthfulness or untruthfulness. The State argues on appeal that Westbury was attempting to prove the conduct by extrinsic evidence, which § 906.08(2), STATS., clearly does not allow. However, the record does not show an attempt to introduce extrinsic evidence, only an attempt to further cross-examine Kordosky on the conduct in question.

Because we cannot determine that there was a reasonable basis for the trial court's ruling that Westbury's counsel could not cross-examine Kordosky regarding the conduct that led to the uttering conviction, we conclude the court erroneously exercised its discretion.

Kordosky's Prior Consistent Statements

After Kordosky testified, Detective Ricksecker testified that she had interviewed Kordosky approximately six days after arresting her on August 24, 1994. According to Detective Ricksecker, during that interview Kordosky said

she had purchased cocaine from Westbury in the past and knew cocaine was available at Westbury's house. Kordosky also revealed a few details about two specific purchases that occurred when it was very cold out, and the layout of Westbury's house. These statements attributed to Kordosky were consistent with her trial testimony.

Westbury objected to Detective Ricksecker's testimony on hearsay grounds, and then as cumulative. The trial court allowed some of the testimony, agreeing with the prosecutor that they were prior consistent statements, and then later sustained an objection to any further questions, apparently on grounds of cumulativeness. On appeal, Westbury contends that the prior statements did not meet the requirements of § 908.01(4)(a)2, STATS., because there was no express or implied charge of Kordosky's recent fabrication or improper influence or motive, and therefore they should have been excluded as hearsay.

Section 908.01(4)(a)2, STATS., provides that a prior statement by a witness is not hearsay, and therefore is admissible, if the statement is "[c]onsistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive." To be admissible the prior consistent statement must predate the recent fabrication or improper influence or motive. *See* ***State v. Peters***, 166 Wis.2d 168, 177, 479 N.W.2d 198, 201 (Ct. App. 1991). Once a hearsay objection has been made, it is the burden of the proponent to prove that the evidence fits into a specific exception of the hearsay rule. *See* ***id.*** at 174, 479 N.W.2d at 200.

The prosecutor did not argue before the trial court that there was an express or implied charge that Kordosky had recently fabricated her trial testimony or recently had a motive to do so. Rather, the prosecutor argued simply

that Kordosky's credibility was put in issue by the defense. However, that is not sufficient; there must be evidence that the prior statements predated the fabrication or the improper motive or influence. ***Id.*** at 177, 479 N.W.2d at 201. On appeal the State points to this evidence of an implied charge of recent fabrication or improper motive: Kordosky admitted that she had spoken with people in the district attorney's office in preparation for this case; and Westbury's counsel asked Kordosky, "at this time in your life, you have some very serious concerns, don't you, about problems that the State is able to cause in your personal family life, isn't that true?" This question was not answered due to an objection that was sustained. The time frame of the motive to lie that may be implied by Kordosky's admission, and by the unanswered question, is vague. However, in isolation, arguably at least the former refers to a time period shortly before trial, after the statement to Detective Ricksecker. But when read as a whole, defense counsel's cross-examination of Kordosky implied a charge that she had a motive to lie *before* she made her statements to Detective Ricksecker.[18] The defense wanted to discredit not simply Kordosky's trial testimony, but also the earlier statements to the police, which were consistent with the trial testimony.

This record does not provide a reasonable basis for concluding that the State met its burden to show that Detective Ricksecker's testimony is admissible under § 908.01(4)(a)2, STATS. We therefore conclude that her testimony of Kordosky's prior consistent statements was erroneously admitted.

[18] In response to cross-examination by Westbury's counsel, Kordosky admitted that she was in jail when she first made statements to the police, she voluntarily went to be interviewed, she was given soda and cigarettes during the interview, she was in jail for two months after the interview and she reviewed her prior statements before testifying.

Harmless Error

We next consider whether the evidentiary errors were harmless. Errors are harmless if there is no reasonable possibility that the errors contributed to the conviction. *See* ***Dyess,*** 124 Wis.2d at 543, 370 N.W.2d at 231-32. The State bears the burden of establishing harmless error. *See* ***State v. Sullivan,*** 216 Wis.2d 768, 792, 576 N.W.2d 30, 41 (1998). Our examination convinces us there is no reasonable possibility the errors contributed to the conviction.

The errors all involve Westbury's attempts to impeach Kordosky and discredit her testimony—denying Westbury the opportunity to present evidence about Kordosky's reputation and character for dishonesty; denying Westbury the opportunity to cross-examine Kordosky on the conduct leading to the 1988 conviction for uttering; and erroneously admitting Detective Ricksecker's testimony of Kordosky's prior consistent statements. However, Kordosky's testimony did not provide any evidence directly supporting the elements of the crimes for which she was convicted. Kordosky testified that she purchased cocaine from Westbury in 1992 and early 1993,[19] which is prior to the time period of the charges—November 1, 1993, through April 26, 1994. In contrast, the State presented ample evidence that did support the convictions: the testimony of Scott regarding cocaine trafficking on December 23, 1993, and in January and February of 1994; the statements Miller made to detectives regarding Westbury's

[19] It is not clear from the parties' appellate briefs whether they interpret Kordosky's testimony as having purchased cocaine from Westbury five times in early 1993, after the Christmas of 1992; or as having made those purchases after the Christmas of 1993, in late December 1993. However, it is clear from the record that Kordosky testified that her purchases took place in 1992 and early 1993, before the time period involved in the charges. Kordosky testified that she recalled the time frame because she tried to hock a ring she received for Christmas in 1992. Moreover, during closing argument, both the prosecutor and Westbury's counsel referred to Kordosky's testimony of purchases as occurring in early 1993.

involvement in the cocaine business before and after December 1993; and the cocaine and other physical evidence consistent with processing and packaging crack cocaine found in Westbury's house and the cocaine residue found in her car on April 26, 1994.

Moreover, the jury did hear testimony that called Kordosky's credibility into question. She admitted she was a drug addict with five criminal convictions. She testified that she was in jail when she made her initial statements to the police. She also testified that she reviewed those statements and spoke with the district attorney's office in preparing for her testimony. We are persuaded that there is not a reasonable possibility that additional testimony impeaching Kordosky's character and credibility would have affected the jury's verdict. We are also persuaded there is not a reasonable possibility that Detective Ricksecker's erroneously admitted cumulative testimony on Kordosky's statement to the police contributed to the jury's verdict. We conclude the evidentiary errors were harmless.

Modified Jury Instruction

Westbury also contends that the trial court improperly modified the jury instruction regarding the testimony of accomplices. The trial court gave the following instruction:

> Tyrees Scott and Stacey Miller have testified, and if their testimony or prior statements introduced into evidence are true, Tyrees Scott and Stacey Miller participated in the crime charged against the defendant. Such persons are referred to as accomplices.

Westbury argues that Miller should not have been included in this instruction because at trial he denied any involvement and attempted to exonerate

Westbury. Westbury contends that the instruction was prejudicial because it impugned Miller's in-court testimony. Westbury also argues that the instruction should have included that Scott testified "on behalf of the State." By not stating that Scott testified on behalf of the State, Westbury contends, the impact the instruction should have had on the jury's assessment of Scott's credibility was diminished.

The trial court has wide discretion in choosing and modifying jury instructions, so long as they adequately cover the law applied to the facts. *See* ***State v. Morgan***, 195 Wis.2d 388, 448, 536 N.W.2d 425, 448 (Ct. App. 1995). Because Miller's pretrial statements were properly in evidence and, if believed, showed that Miller participated in the crime, the court did not erroneously exercise its discretion in including Miller in the instruction. Since the jury saw Scott testify and knew he was called by the State, we cannot conclude it was unreasonable for the court not to insert that phrase.

CONCLUSION

We affirm the judgment and order of the trial court because the convictions and sentencing on counts one and two do not violate Westbury's right to be free from double jeopardy, the evidentiary errors were harmless and the modified jury instruction was not an erroneous exercise of discretion.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.