COURT OF APPEALS
DECISION
DATED AND FILED

September 26, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-0452-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TAMMY M. JORGENSEN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Brown County: SUSAN E. BISCHEL, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Tammy Jorgensen appeals a judgment convicting her of felony bail-jumping resulting from her failure to appear for a preliminary examination on a charge of operating a vehicle without the owner's consent (OMVWOC). Her defense at trial to the court was that she understood the

complainant would drop the charge and that she did not have to appear. Her mother testified that Jorgensen told her she believed the charge was being dropped and she did not have to appear at the preliminary hearing. The court sustained the State's hearsay objection and struck the testimony. Jorgensen argues that the court improperly excluded evidence that negates her state of mind essential to the crime. Because we conclude that the error was harmless, we affirm the judgment.

¶2 The State concedes that the stricken testimony was admissible under WIS. STAT. § 908.03(3) (1997-98)[1] to show Jorgensen's state of mind, although that hearsay exception was not argued to the trial court. We need not determine whether it was admissible because there is no reasonable possibility that Jorgensen was prejudiced by its exclusion. *See* ***State v. Dyess***, 124 Wis. 2d 525, 543, 370 N.W.2d 222 (1985). A reasonable possibility is one that undermines confidence in the outcome of the proceeding. *See* ***State v. Patricia A.M.***, 176 Wis. 2d 542, 556, 500 N.W.2d 289 (1993).

¶3 The stricken testimony would not have changed the outcome of the trial because it was cumulative and would not have affected the trial court's assessment of the witnesses' credibility. Jorgensen testified that she told her mother and her roommate that she did not need to go to court because the charges were being dropped. Her roommate corroborated Jorgensen's statement, testifying without objection that Jorgensen told her she thought the charges would be dropped. Jorgensen' mother's testimony would have been cumulative.

¶4 Jorgensen admitted that she did not contact anyone to discuss whether she should appear, but believed she did not have to appear based on a

[1] All references to the Wisconsin Statutes are to the 1997-98 version.

conversation with her attorney who told her "[the victim of the auto theft] wanted to drop the charges." Her attorney for the OMVWOC charge testified that, although he did not specifically recall Jorgensen's case, he would not tell a client not to appear for a preliminary hearing under the circumstances Jorgensen described. The victim also testified that she never spoke to Jorgensen's attorney. The trial court simply did not believe Jorgensen's self-serving statement that she thought she did not have to appear because the charges were being dropped. Jorgensen's mother's testimony that Jorgensen made a similar self-serving statement to her would not have altered the court's finding that the attorney and the victim presented more credible testimony.

¶5 Finally, Jorgensen requests a new trial in the interest of justice, arguing that the real controversy has not been fully tried. Because the proffered testimony of Jorgensen's mother was cumulative, would not have provided a complete defense, and would not have altered the trial court's assessment of the witnesses' credibility, we conclude that the issue was fully and fairly tried.

By the Court.—Judgment affirmed.

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