

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 19, 2003

Cornelia G. Clark
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. 03-1165

**Cir. Ct. Nos. 02TR007508
02TR007510**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

COUNTY OF FOND DU LAC,

PLAINTIFF-RESPONDENT,

v.

MELISSA M. WONDRA TARRANT,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Fond du Lac County: ROBERT J. WIRTZ, Judge. *Affirmed.*

¶1 SNYDER, J.¹ Melissa M. Wondra Tarrant appeals from a judgment finding her guilty of operating a motor vehicle while intoxicated (OWI), first offense, and operating a motor vehicle with a prohibited alcohol concentration

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(g) (2001-02). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

(PAC), first offense. She contends that the trial court erred when it refused to allow all of the available defense witnesses to testify at trial. We disagree and affirm the judgment of the trial court.

¶2 The facts are undisputed. On June 16, 2002, Officer John Dille of the Fond du Lac County Sheriff's Department observed a vehicle cross the center line of the road and pulled the car over to investigate. Dille noticed an odor of intoxicants and asked Tarrant to submit to field sobriety tests. Tarrant failed the field sobriety tests and was placed under arrest for OWI. A subsequent Intoximeter test indicated that Tarrant had a blood alcohol level of 0.158%.

¶3 Tarrant testified that she had been at a wedding reception with her husband on the night of the arrest. She estimated that she had two old fashioned cocktails and eight beers over the course of the evening. After the reception, Tarrant drove home.

¶4 Tarrant pled not guilty to charges of OWI, contrary to WIS. STAT. § 346.63(1)(a), and operating a motor vehicle with a PAC, contrary to § 346.63(1)(b). A jury trial was held on January 16, 2003. Prior to the commencement of the trial, Tarrant's attorney indicated that one expert witness and three lay witnesses would be testifying on Tarrant's behalf. The trial judge inquired as to the substance of the lay witness testimony and defense counsel explained that each had observed Tarrant at the wedding reception and would testify as to her condition on the night of the arrest. The court ruled that it would exclude cumulative lay witness testimony and limited the defense to one of the three. Defense counsel subsequently objected to the court's decision to limit the number of witnesses, and the court confirmed its original ruling to exclude two of the three.

¶5 The jury found Tarrant guilty on both charges. Tarrant appeals, arguing that the trial court abused its discretion in limiting the witness testimony. We disagree.

¶6 The question presented is whether the trial court erred when it allowed only one of Tarrant's three available lay witnesses to testify about her condition prior to her arrest. "A trial court has broad discretion in determining the relevance and admissibility of proffered evidence." *State v. Wiese*, 162 Wis. 2d 507, 512, 469 N.W.2d 908 (Ct. App. 1991). To sustain a discretionary ruling, we need only find that the trial court examined the relevant facts, applied a proper standard of law and, using a rational process, reached a reasonable conclusion. *Franz v. Brennan*, 150 Wis. 2d 1, 6, 440 N.W.2d 562 (1989).

¶7 In this case, the defense offered three lay witnesses to testify about Tarrant's condition at the wedding she had attended shortly preceding her arrest. The courtroom exchange went as follows:

THE COURT: In terms of witnesses, who are you going to have? Is your client going to testify?

[THE DEFENSE]: Yes, your honor. I also have, including the witness, four other witnesses. I mean, including the expert witness. I'm sorry.

THE COURT: What are their names?

....

THE COURT: Renee Wondra is going to testify about what?

[THE DEFENSE]: That she and my client were at the same wedding. That's where Ms. -- my client was coming home from and she will testify as to what her condition was.

THE COURT: Okay. Heather Peters?

[THE DEFENSE]: Same.

THE COURT: Angel Schrauth?

[THE DEFENSE]: Same.

THE COURT: That's cumulative. You can have one of the three but, otherwise, this trial is going to go on forever. So, pick the one who you believe is going to be the most helpful to your client, but we don't need three people all saying that Ms. Wondra-Tarrant was in perfect condition. So, I'm not going to -- And the jury isn't going to listen to three people saying the same thing.

¶8 Tarrant subsequently objected to the court's ruling, arguing that the jury had the "right to hear that more than one person, and not just one isolated person, did not feel that Ms. Wondra-Tarrant was impaired." The trial judge observed that "[b]y that same logic, we could have the entire wedding party here." The court confirmed its earlier ruling, stating:

The sum and substance of the testimony, as I understand it, from any of these three witnesses, would be the condition of Ms. Wondra-Tarrant and, frankly, I find that having more than one person do that, to have three people, is going to be cumulative. Their testimony isn't going to be different.... And, so, I think it's reasonable to have one person testify to the facts about Ms. Wondra-Tarrant's good condition.

¶9 According to WIS. STAT. § 904.03, a judge may exclude otherwise admissible evidence when the probative value is substantially outweighed by certain factors:

Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time. Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, *or needless presentation of cumulative evidence.* (Emphasis added.)

¶10 Tarrant presented the anticipated substance of the proffered testimony not once, but twice. Twice the judge determined that the testimony would be cumulative and could be adequately presented by one of the three available witnesses.

¶11 Tarrant also challenges the trial court's decision, alleging that the exclusion of the two lay witnesses violated her constitutional right to a fair trial. Tarrant contends that the discretion granted to judges under WIS. STAT. § 904.03 is outweighed by the constitutionally protected right of the accused to present a defense. *See Chambers v. Mississippi*, 410 U.S. 284, 302 (1973). Arguing that due process protections extend to civil defendants as well as criminal, Tarrant claims a violation of her right to present a defense. We agree that constitutional rights are not limited to criminal matters. *Oddsens v. Bd. of Fire & Police Comm'rs*, 108 Wis. 2d 143, 159, 321 N.W.2d 161 (1982). We also agree that Tarrant had the right to present a defense and to offer witness testimony to support her defense. "Few rights are more fundamental than that of an accused to present witnesses in his [or her] own defense." *Chambers*, 410 U.S. at 302. We do not, however, adopt Tarrant's position that these rights were denied her.

¶12 In *Chambers*, the United States Supreme Court reviewed the murder trial of Leon Chambers. *Id.* at 285. The trial court had refused to allow Chambers to introduce the testimony of three witnesses. *Id.* at 298. Each of these witnesses would have testified that another man, Gable McDonald, on three separate occasions, confessed himself as the murderer. *Id.* The trial court excluded all three witnesses on hearsay grounds. *Id.*

¶13 We, however, are not reviewing a trial court's application of the hearsay rule, nor any other rule that exists to preclude untrustworthy evidence

from reaching the jury. *See id.* Furthermore, the *Chambers* trial court excluded all witnesses who would testify about the alleged third-party confession. *Id.* In contrast, Tarrant's trial judge did not exclude all testimony about her prearrest condition; rather, the court excluded only *cumulative* evidence of her condition. For these reasons, Tarrant's attempt to draw an analogy between her own trial and that of Chambers fails.

¶14 Exercising the discretion granted under WIS. STAT. § 904.03, the trial judge determined that the second and third lay witnesses, whose testimony was to be the same as the first, would not advance the defense beyond what was achievable through one witness's testimony.

¶15 In sum, we hold that the trial judge considered the substance of the proffered testimony, applied the correct standard under WIS. STAT. § 904.03 for excluding cumulative evidence, and reached a reasonable conclusion. We further hold that Tarrant was able to present a defense, including witness testimony of her prearrest condition, and was not denied due process in this regard.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.

