COURT OF APPEALS
DECISION
DATED AND FILED

November 16, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2009AP3095-CR **Cir. Ct. No. 2009CF1367**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DEVON A. SHERIFF,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: REBECCA F. DALLET, Judge. *Affirmed*.

Before Curley, P.J., Fine and Kessler, JJ.

¶1 CURLEY, J. Devon A. Sheriff appeals a judgment of conviction for one count of manufacture, distribution or delivery of cocaine and one count of possession with intent to deliver cocaine as party to a crime. *See* WIS. STAT.

§§ 961.41(1)(cm), 961.41(1m)(cm), 939.05 (2007-2008).[1] Sheriff argues that the trial court erroneously exercised its discretion when it excluded statements by co-defendant Tyrone Stepney because the statements fell under the "statement against interest" hearsay exception, *see* WIS. STAT. § 908.045(4), and that the resulting error was not harmless. Alternatively, Sheriff argues that the trial court erroneously excluded the statements because they constituted admissible impeachment evidence. We affirm.

I. BACKGROUND.

¶2 Milwaukee police arrested Sheriff and Stepney after they sold crack cocaine to an undercover police officer. The officer had discovered them via a confidential informant, who had given him the phone number of a drug dealer known as "Black."

¶3 On the night of the arrest, the undercover officer called the number that the informant had given him and spoke with "Black." He told "Black" that he was looking to purchase drugs. The officer and "Black" agreed to meet at the gas station at 19th Street and National Avenue.

¶4 The undercover officer then went to the gas station at 19th and National, where he received a call from "Black" instructing him to look for a car with lights flashing on and off. The officer saw a Chevy flash its lights, and he walked towards it. When he got there he saw Sheriff and Stepney. Stepney was in the driver's seat and Sheriff was in the front passenger seat. The passenger

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

window was rolled down. Sheriff spoke first. He told the undercover officer, "Get in the back seat. We ain't going to serve you out here."

¶5 The officer did as he was told and got into the Chevy's back seat. He then took out three pre-recorded twenty-dollar bills and handed them to Stepney, who handed him a clear plastic bag containing crack cocaine. Sheriff, meanwhile, was acting as lookout.

¶6 The officer then asked for a ride, but Stepney refused. The officer asked again, and Sheriff said something to the effect of, "we got to get going, man, we got other people to serve that are waiting on us." The officer got out of the car, gave a signal, and other officers in the area moved in for the arrest.

¶7 The officers searched the car and recovered additional crack cocaine from the ceiling where the top liner meets the windshield. They also recovered the "buy" money and the cellular phone with "Black's" number from Stepney. No contraband of any kind was discovered on Sheriff.

¶8 Sheriff pled not guilty to the charges issued against him and went to trial. At trial, Sheriff's attorney attempted to elicit statements that Stepney made to one of the detectives who questioned him after the arrest. In these statements, Stepney indicated that he had been selling the cocaine. He admitted making the sale to the undercover officer. Stepney explained that he started with an eight ball, and broke it down into ten units. He had made about $1500 at the time of the arrest. He also told the detectives that he served the undercover officer. About $60 was in his pocket and more cocaine was in the ceiling of the car when he was stopped. Stepney also made the following statements regarding Sheriff:

STEPNEY: Inaudible

DETECTIVE: "The guy you were with?"

STEPNEY: "No."[2]

DETECTIVE: "Your guy [Sheriff], is that where the dope came from?"

¶9 The trial court excluded all of these statements on hearsay grounds, concluding that they were offered for the truth of the matter asserted that Sheriff was not involved in the crime. The trial court further concluded that the statements were not, as Sheriff argued, made in furtherance of a conspiracy because they were made after the crime had already been committed; therefore, they did not fall under any hearsay exception.

¶10 A jury found Sheriff guilty and he was convicted on both counts. He was sentenced to two years of initial confinement and two years of extended supervision on each count, to be served concurrently. Sheriff now appeals.

II. ANALYSIS.

¶11 Sheriff's sole complaint on appeal is that the trial court erroneously excluded the statements that Stepney made to the detective following his arrest. A trial court's decision to receive or exclude evidence is vested in its reasoned discretion. ***State v. Sullivan***, 216 Wis. 2d 768, 780, 576 N.W.2d 30 (1998). We will sustain an evidentiary ruling if we find that the trial court examined the

[2] We are unable to determine what Stepney said during the inaudible portions of this particular statement because the audio recording from which it derives has not been included in the record. *See* ***State v. Aderhold***, 91 Wis. 2d 306, 314, 284 N.W.2d 108 (Ct. App. 1979) ("The rule is well established that reviewing courts are limited to the record, and are bound by the record."). Because Sheriff was responsible for ensuring that the record on appeal was complete, we assume that the missing audio recording further supports the trial court's findings. *See* ***Fiumefreddo v. McLean***, 174 Wis. 2d 10, 27, 496 N.W.2d 226 (Ct. App. 1993).

relevant facts, applied a proper standard of law, and, using a demonstrative rational process, reached a conclusion that a reasonable judge could reach. *See* ***id.***, 216 Wis. 2d at 780-781. Generally, a trial court's decision to admit a hearsay statement is discretionary and we will not reverse unless the trial court erroneously exercised its discretion. ***State v. Sveum***, 220 Wis. 2d 396, 398, 584 N.W.2d 137 (Ct. App. 1998). Whether a statement is admissible under a hearsay exception, however, is a question of law that we review *de novo*. ***State v. Stevens***, 171 Wis. 2d 106, 112, 490 N.W.2d 753 (Ct. App. 1992).

¶12 We conclude that the statements that Sheriff sought to admit were properly excluded because they were irrelevant. *See* WIS. STAT. §§ 904.01, 904.02.[3] The proffered statements, at best, would allow a jury to infer that Sheriff did not supply Stepney with the cocaine sold to the undercover officer. They do not, however, make it more or less likely that Sheriff aided and abetted Stepney in possessing the crack cocaine while intending to distribute or deliver it, *see* WIS. STAT. §§ 961.41(1m)(cm), 939.05, and they do not make it more or less likely that Sheriff distributed or delivered the cocaine, *see* WIS. STAT. § 961.41(1)(cm). Contrary to what Sheriff argues, these statements do not "totally exonerate" him. Nor are they—as Sheriff argues—inconsistent with the State's theory that Sheriff and Stepney conspired to deliver or distribute cocaine; therefore, they could not be admitted as impeachment testimony. Furthermore, they do not show that "Stepney told [the questioning detective] that Sheriff had nothing to do with the delivery of [the] cocaine." They also do not show that "[a]ccording to Stepney, Sheriff had

[3] "Relevant evidence" is evidence that has "any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." WIS. STAT. § 904.01. "Evidence which is not relevant is inadmissible." WIS. STAT. § 904.02.

nothing to do with the drug transaction." Indeed, Sheriff's offer of proof regarding the materiality of these statements was incomplete. *See* ***Haskins v. State***, 97 Wis. 2d 408, 422-423, 294 N.W.2d 25 (1980) (trial court's evidentiary rulings will not be reversed where offer of proof is inadequate to support evidentiary hypothesis set forth by defense).

¶13 We further conclude that the statements at issue constitute inadmissible hearsay to which no exception applies. *See* WIS. STAT. §§ 908.01, 908.02. While Sheriff agrees that the statements are in fact hearsay, he argues that the trial court should have admitted them as "statements against interest" pursuant to WIS. STAT. § 908.045(4). We disagree.

¶14 WISCONSIN STAT. § 908.045(4) provides that if the declarant is unavailable, hearsay is admissible if it falls within the following definition:

> **Statement against interest.** A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability or to render invalid a claim by the declarant against another or to make the declarant an object of hatred, ridicule, or disgrace, that a reasonable person in the declarant's position would not have made the statement unless the person believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborated.

¶15 We review each statement that Stepney made to the questioning detective individually. *See* ***State v. Joyner***, 2002 WI App 250, ¶18, 258 Wis. 2d 249, 653 N.W.2d 290 ("when ruling upon a narrative's admissibility ... a court must break it down and determine the separate admissibility of each 'single declaration or remark.'") (citation omitted). We interpret "each particular assertion in a narrative … within the context of the circumstances under which it was made to determine if that assertion is in fact sufficiently against interest." ***Id.***

(citation omitted); *see also* ***State v. Jackson***, 2007 WI App 145, ¶20, 302 Wis. 2d 766, 735 N.W.2d 178 (hearsay exception for statements against interest does not allow admission of a non-self-incriminatory statement that is made within a broader narrative that is generally self-inculpatory).

¶16 There is, of course, no doubt that Stepney's statements were contrary to his penal interest; he admitted selling cocaine to an undercover police officer. The law, however, requires that these statements have relevance to *Sheriff's* defense to be admissible under the hearsay exception. *See* WIS. STAT. §§ 904.01, 904.02. As we explained above, none of the statements at issue are admissible because nothing that Stepney said to the detective following his arrest makes it more or less likely that Sheriff committed the felonies charged against him. *See* ***id.*** This was not a case where the State claimed that either Stepney or Sheriff distributed the cocaine; indeed, both were charged. Therefore, the trial court did not err in excluding the statements at issue, and we need not consider whether the statements were corroborated. *See* WIS. STAT. § 908.045(4). Accordingly, we affirm.

By the Court.—Judgment affirmed.

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