COURT OF APPEALS
DECISION
DATED AND FILED

August 17, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal Nos. 2009AP3140-CR
2009AP3141-CR

Cir. Ct. Nos. 2009CM1988
2009CM2230

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOHN D. HARRIS,

DEFENDANT-APPELLANT.

APPEAL from judgments of the circuit court for Milwaukee County: DAVID L. BOROWSKI, Judge. *Affirmed*.

¶1 CURLEY, P.J.[1] John D. Harris appeals from judgments convicting him of battery and intimidation of a victim, both as a repeater. *See* WIS. STAT.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2007-08).

§§ 940.19(1), 940.44(2), and 939.62(1)(a), (b) (2007-08).[2] Harris takes issue with the trial court's decision to allow into evidence testimony regarding the content of recorded phone conversations and a letter that Harris allegedly wrote to Susan M. while he was in jail. Harris argues that the trial court erred in admitting both the testimony and the letter into evidence and requests that this court reverse his convictions and grant a new trial. This court disagrees with Harris and affirms the judgments of the trial court.

I. BACKGROUND.

¶2 On April 19, 2009, Harris was charged with misdemeanor battery, with the use of a dangerous weapon, as a repeater. The charges arose out of an incident involving his girlfriend, Susan M. According to the complaint, Susan M. told police that Harris "kick[ed] her numerous times, slap[ped] her in the head numerous times, whipped her in the head with a belt buckle, and grabbed her and punched her." Harris was arrested immediately after Susan M.'s call to the police.

¶3 Approximately three weeks later, in a separately filed complaint, Harris was charged with misdemeanor intimidation of a victim for allegedly pressuring Susan M. not to assist with the battery prosecution. This charge arose out of a letter Harris allegedly sent to Susan M. at her place of employment approximately one week after the battery incident. The letter's return address bore Harris's name and the Milwaukee County House of Corrections address. In the

[2] Harris's convictions arose out of two separate criminal cases. The two cases were tried together and this court consolidated the subsequent appeals.

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

letter, Harris purportedly urged Susan M. to recant her allegations against him and provide his attorney with a notarized statement to this effect. The complaint further relayed that Carl Buschmann, an investigator for the Milwaukee County District Attorney's office, reviewed recordings of telephone calls between Harris and Susan M. The calls were made while Harris was in the House of Corrections. During one of the calls, Harris referenced the letter that was sent to Susan M.'s place of work.

¶4 The two cases were the subject of a single jury trial, following which Harris was convicted of battery and intimidation of a victim, both as a repeater. The jury did not find that Harris used a dangerous weapon while committing the battery. Additional facts are provided in the remainder of this decision as relevant to the issues Harris raises on appeal.

II. ANALYSIS.

A. Standard of Review

¶5 The admission or exclusion of evidence at trial rests within the sound discretion of the trial court. ***State v. Roberson***, 157 Wis. 2d 447, 452, 459 N.W.2d 611 (Ct. App. 1990). The trial court's decision to admit or exclude evidence will not be upset on appeal if there is a reasonable basis for that decision and if it was made in accordance with accepted legal standards. ***State v. Jenkins***, 168 Wis. 2d 175, 186, 483 N.W.2d 262 (Ct. App. 1992). These standards apply to evidence admitted pursuant to both WIS. STAT. § 910.06 and WIS. STAT. § 906.11(1). ***State v. Olson***, 217 Wis. 2d 730, 737, 579 N.W.2d 802 (Ct. App. 1998). "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." ***State v. Clark***, 179 Wis. 2d 484, 490, 507 N.W.2d 172 (Ct. App. 1993).

B. Requirement of Original

¶6 Harris's first argument is that the trial court erroneously exercised its discretion when it overruled his attorney's objection to Investigator Buschmann's in-court testimony regarding recorded phone conversations between Harris and Susan M., made while Harris was in jail. Harris claims that the best evidence rule, codified in WIS. STAT. § 910.02, rendered Investigator Buschmann's testimony inadmissible because the purpose of the testimony was to prove the content of a recording.

¶7 At trial, Investigator Buschmann testified that analysts monitored Harris's jail phone calls to Susan M. and that he had reviewed those calls. When asked about the content of those recorded conversations Harris's attorney objected, based on the best evidence rule, stating that Investigator Buschmann's in-court testimony was not the best evidence available. The trial court twice overruled Harris's attorney's objections and later explained, "[o]nce I knew that the defense did know about those calls, that they had been turned over in discovery … I overruled the objection … and allowed the [S]tate to continue with [its] questioning." After Harris's attorney's second objection was overruled, Investigator Buschmann summarized the content of the recorded jail phone calls between Harris and Susan M. The jury did not hear the recorded phone conversations.

¶8 Investigator Buschmann testified that each recorded phone conversation between Harris and Susan M. lasted approximately fifteen minutes. When asked how many recorded conversations there were, Investigator

Buschmann responded that "there were several." Defense counsel further clarified that there were several recorded conversations between Harris and Susan M. when he asked, "[s]o there were multiple calls, and you listened to them once; is that right?" The record reflects that there was no dispute at trial concerning either the number of phone calls between Harris and Susan M., or the length of those phone calls.

¶9 WISCONSIN STAT. § 910.02 states, "[t]o prove the content of a writing, recording or photograph, the original writing, recording or photograph is required except as otherwise provided in chs. 901 to 911, s. 137.21, or by other statute." According to Harris, because the best evidence rule provides that in order to prove the content of a writing, recording, or photograph, the original is required, Investigator Buschmann was prohibited from testifying as to the content of the recorded jail phone conversations between Harris and Susan M.

¶10 The State disagrees and argues that two reasons justify the admission of Investigator Buschmann's in-court testimony regarding the recorded conversations between Harris and Susan M. The State first asserts that WIS. STAT. § 910.06 provides an exception to the best evidence rule by allowing, *inter alia*, voluminous recordings to be summarized by a witness on the stand.[3] The State argues that Investigator Buschmann's testimony was merely the summary of

[3] WISCONSIN STAT. § 910.06 states:

> **Summaries.** The contents of voluminous writings, recordings or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at a reasonable time and place. The judge may order that they be produced in court.

"lengthy conversations" that qualify as "voluminous and inconvenient to play." The State further asserts that WIS. STAT. § 906.11(1)(a)-(c) grants the trial judge broad discretion over the mode and the order of the presentation of evidence.[4] In light of this statutory law, the State argues that there was a rational basis for the trial court's decision to admit Investigator Buschmann's testimony, and this court should affirm that decision. *See* ***State v. Shomberg***, 2006 WI 9, ¶11, 288 Wis. 2d 1, 709 N.W.2d 370 ("'We will not find an erroneous exercise of discretion if there is a rational basis for a [trial] court's decision.'") (citation omitted).

¶11 Although the best evidence rule generally requires an original recording to be played in court in order to prove the content of the recording, WIS. STAT. § 910.06 allows the contents of voluminous recordings that cannot be conveniently examined in court to be presented in the form of a summary. The narrow issue here is whether the recorded phone calls between Harris and Susan M. are "voluminous" within the meaning of § 910.06. This court agrees with the State and concludes that Investigator Buschmann's testimony regarding the recorded conversations between Harris and Susan M. was properly admitted because the multiple recorded phone calls satisfy the requirements for voluminous recordings pursuant to § 910.06. Furthermore, the trial court's failure to articulate

[4] WISCONSIN STAT. § 906.11(1) states:

> **Mode and order of interrogation and presentation. (1)** CONTROL BY JUDGE. The judge shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to do all of the following:
>
> (a) Make the interrogation and presentation effective for the ascertainment of the truth.
>
> (b) Avoid needless consumption of time.
>
> (c) Protect witnesses from harassment or undue embarrassment.

§ 910.06 as its reason for admitting Investigator Buschmann's testimony does not prevent this court from affirming the trial court's discretionary decision. *See* ***Clark***, 179 Wis. 2d at 490 ("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.").

¶12 There is a reasonable basis for the trial court's decision to allow Investigator Buschmann to testify as to the content of the recorded phone conversations between Harris and Susan M. *See* ***Jenkins***, 168 Wis. 2d at 186. Given Investigator Buschmann's undisputed testimony that there were multiple recorded phone calls, each lasting approximately fifteen minutes, it is reasonable to conclude that these recordings could not be conveniently examined in court. *See* WIS. STAT. § 910.06. Since the admission of evidence at trial is within the trial court's discretion, and the trial court had a reasonable basis for admitting Investigator Buschmann's testimony, this court will not upset that decision. *See* WIS. STAT. § 906.11(1); ***Roberson***, 157 Wis. 2d at 452; ***Jenkins***, 168 Wis. 2d at 186; *see also* DANIEL D. BLINKA, *Wisconsin Practice Series: Wisconsin Evidence* § 1006.1, at 947 (3d ed. 2008) (explaining that the trial court has "considerable discretion" in determining whether something is so voluminous that it cannot be conveniently examined in the courtroom).

¶13 Moreover, the State turned over the recorded phone calls to Harris prior to trial. The purpose of the best evidence rule is to prevent fraud on the trier of fact by denying it the ability to examine an original document. ***Grunwaldt v. Wisconsin State Highway Comm'n***, 21 Wis. 2d 153, 163, 124 N.W.2d 13 (1963). If Harris had serious concerns regarding the accuracy of Investigator Buschmann's summary of the recorded phone conversations, he was free to play the recordings for the jury. *See* BLINKA, *Wisconsin Practice Series: Wisconsin Evidence*

§ 1006.1, at 948 ("Nothing in [WIS. STAT. § 910.06] precludes opposing counsel from using the underlying originals (or duplicates) for impeachment purposes."). By not doing so, Harris implicitly conceded that Investigator Buschmann's summary of the recorded phone calls was accurate. Any danger of fraud on the trier of fact dissipated when Harris made the decision not to play the recordings for the jury.

¶14 Harris argues that the trial court's reasoning for overruling the best evidence objection was incorrect because "the Court concluded that Buschmann's testimony about the recordings was admissible because the recordings themselves had been turned over during discovery," and "that is irrelevant under [WIS. STAT. § 910.02]." While Harris is correct in that the trial court did not articulate WIS. STAT. § 910.06 as the rationale for its ruling, this, by itself, is not grounds for this court to upset the trial court's ruling. As stated, where a trial court does not adequately explain the reasons for its decision, this court will still uphold that decision if there is a reasonable basis for the trial court's discretionary ruling. *See* ***Clark***, 179 Wis. 2d at 490. Because the numerous recorded phone conversations between Harris and Susan M. meet the requirements for voluminous recordings under § 910.06, there is a reasonable basis for the trial court's discretionary ruling, notwithstanding the trial court's failure to articulate those grounds as support for its decision. Given the preceding statutory law, this court concludes that the trial court properly admitted Investigator Buschmann's in-court testimony regarding the content of recorded phone conversations between Harris and Susan M.

C. Chain of Custody

¶15 Harris's second argument is that the trial court erroneously exercised its discretion when it concluded that there was a sufficient chain of custody to admit into evidence a letter that Harris allegedly wrote in an effort to persuade Susan M. not to testify against him. Harris claims that because the State did not offer testimony from either the employee who first opened the letter or the investigator for the Milwaukee County District Attorney's Office who first recovered the letter, the letter was inadmissible at trial.

¶16 As stated, a letter was sent to Susan M.'s place of employment while Harris was in jail. Susan M. was not at work when the letter arrived, and one of her co-workers opened it. Sandra Rindt, a supervisor, testified that an employee brought the letter to her attention because "Susan [M.] had been missing due to being hurt and the letter appeared to be from the person who had hurt her." Rindt testified that she was able to read the letter at that time, and that it had not been altered in any way from the time she first saw it to the time she inspected it in court. At trial, she further identified the envelope the letter came in and testified that it was the same envelope that was in her possession at work. Finally, Rindt testified that the letter was put in a baggie and locked in a safe until it was picked up by someone from the district attorney's office.

¶17 The State also proffered evidence that the district attorney's office obtained the letter from Susan M.'s employer and that Investigator Buschmann was able to read the letter. Investigator Buschmann testified that he received the letter from his partner, who recovered it directly from Susan M.'s employer. After obtaining the letter, Investigator Buschmann placed it in a plastic envelope and sent it to the Milwaukee Police Identification Division to be processed for

fingerprints. Investigator Buschmann further identified both the letter and envelope in court as the letter and envelope that he obtained from his partner, noting that there was a small change to the condition of each in the form of a purple-ink substance resulting from an attempt to recover latent fingerprints at the Identification Division. Finally, at trial, Susan M. identified the handwriting on the letter as that of Harris.[5]

¶18 The State, however, did not present testimony from the investigator who actually recovered the letter from Susan M.'s employer and turned it over to Investigator Buschmann. The State only provided testimony from Investigator Buschmann. Also, although Rindt testified concerning the letter, the State did not offer testimony from the employee who actually opened the letter. Harris argues that by failing to offer testimony from either the employee who opened the letter or the investigator who picked up the letter, the State did not establish a sufficient chain of custody necessary for admission of the letter at trial.

¶19 The State responds by arguing that in order to meet the chain of custody requirements it need only present sufficient foundation and authentication to convince the court that the evidence it is seeking to admit "is what the proponent claims it is" and that it is improbable that it has been exchanged, contaminated, or tampered with. The State claims that it met both of these standards through Rindt's and Investigator Buschmann's testimony and through Susan M.'s identification of Harris's handwriting on the letter.

[5] During direct examination, Susan M. was asked if she ever had an opportunity to inspect Harris's handwriting. She answered that she had, and she then was handed two exhibits, one being the letter Harris allegedly wrote and sent to her at her place of employment. She inspected the handwriting on both exhibits and was asked, "Is that John Harris's handwriting?" She responded, "Yes."

¶20 The law respecting chain of custody requires proof that is sufficient "to render it improbable that the original item has been exchanged, contaminated or tampered with." ***B.A.C. v. T.L.G.***, 135 Wis. 2d 280, 290, 400 N.W.2d 48 (Ct. App. 1986). WISCONSIN STAT. § 909.01 states that the requirements for authentication or identification are satisfied "by evidence sufficient to support a finding that the matter in question is what its proponent claims." "Alleged gaps in a chain of custody 'go to the weight of the evidence rather than its admissibility.'" ***State v. McCoy***, 2007 WI App 15, ¶9, 298 Wis. 2d 523, 728 N.W.2d 54 (citation omitted). "The degree of proof necessary to establish a chain of custody is a matter within the trial court's discretion." ***B.A.C.***, 135 Wis. 2d at 290.

¶21 This court agrees that the trial court did not err when it found that the State met the chain of custody requirements concerning the admissibility of the letter Harris allegedly wrote to Susan M. While there were some gaps in the chain of custody, the trial court properly admitted the letter into evidence, leaving any issues concerning the letter to go to the weight of the evidence and not its admissibility.

¶22 Given the facts, the testimony of Rindt and Investigator Buschmann provides sufficient proof that the letter had not been exchanged, contaminated, or tampered with. *See* ***B.A.C.***, 135 Wis. 2d at 290. By identifying the letter and envelope at trial and testifying that they were not altered in any way, Rindt provided "evidence sufficient to support a finding that the matter in question is what its proponent claims." *See* WIS. STAT. § 909.01. Investigator Buschmann did the same by testifying that the letter in court was the same letter that he received from his partner. While the State may have been wise to present testimony from the employee who initially received and opened the letter, failure to do this was not enough to prevent admission of the letter at trial. The trial court

properly admitted the letter, allowing Harris to exploit any alleged gaps in the chain of custody on cross-examination. *See* ***McCoy***, 298 Wis. 2d 523, ¶9.

¶23 Furthermore, not having the investigator testify who initially obtained the letter from Susan M.'s employer is not a fatal gap in the chain of custody requiring the trial court to exclude the letter. ***McCoy*** articulates the rule that public officers are presumed to have discharged their duty when returning evidence to secure storage. ***Id.***, ¶19. This court presumes that the investigator who initially recovered the letter from Susan M.'s employer did so properly. Harris has not presented any evidence indicating that the letter was tampered with, contaminated, or exchanged from the time it was originally retrieved up to the time it was given to Investigator Buschmann. Once Investigator Buschmann testified concerning the physical condition of the letter and envelope, sufficient evidence necessary to meet the chain of custody requirements for admission of the letter was met. The trial court properly exercised its discretion in determining that the letter was admissible at trial.

¶24 Harris argues that although it is true that gaps in the chain of custody generally do not render evidence inadmissible at trial, "the ***McCoy*** Court limited that principle … to situations in which there has already been a showing that the exhibit is in the same condition as when the crime was committed." Harris further argues that presumptions of regularity only attach when evidence is in official custody, and does not attach to Rindt's testimony regarding the letter. Harris's syllogism results in his conclusion that "when the evidence was not in law enforcement custody, when the person who first received and handled the evidence does not testify, and when there is otherwise no showing that the evidence is in the same condition as when the crime was committed, the evidence is inadmissible."

¶25 Harris's understanding of ***McCoy*** is too narrow in construction given the legal authority governing chain of custody issues and would result in illogical and impractical results. As the State points out, if Harris's narrow interpretation were adopted, a gun used in a homicide and recovered weeks after the crime would almost never be admissible at trial because no one would be able to authenticate that the gun was in the same condition at trial as it was when the crime was committed. The weight of authority controlling chain of custody issues does not support Harris's narrow interpretation of ***McCoy***. *See* ***State v. T.J. McQuay, Inc.***, 2008 WI App 177, ¶20, 315 Wis. 2d 214, 763 N.W.2d 148 (holding that chain of custody requirements were met after establishing that the matter in question is what its proponent claims and citing ***McCoy*** as authority). The necessary proof required for admission of the letter at trial was proof sufficient to support a finding that the letter was in fact what the State claimed it was, and a showing that it was improbable that the letter had been exchanged, contaminated, or tampered with. Both of these standards were met through the testimony of Rindt, Susan M., and Investigator Buschmann.

¶26 Furthermore, Harris is arguing for a bright-line rule regarding the admissibility of evidence in an area where judicial judgment and discretion are essential. "The fixing of bright line chain of custody or authentication rules for all cases is impossible because each case requires a judgmental determination whether sufficient guarantees exist that the evidence proffered truly relates to those matters or things which are relevant to the case." ***B.A.C.***, 135 Wis. 2d at 291. Here, the trial court determined that the State established the necessary chain of custody requirements for admission of the letter. There was sufficient evidence for the trial court's conclusion to admit the letter, and this court will not upset that discretionary determination. Accordingly, this court affirms.

By the Court.—Judgments affirmed.

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