COURT OF APPEALS DECISION DATED AND FILED

March 25, 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. 97-1525-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JESSE N. PEARSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Racine County: GERALD P. PTACEK, Judge. *Affirmed.*

Before Brown, Nettesheim, and Anderson, JJ.

PER CURIAM. Jesse N. Pearson appeals from a judgment of conviction of armed robbery as a habitual criminal. He claims error in the exclusion of evidence. We conclude that the trial court properly exercised its discretion in excluding hearsay evidence that Pearson had been threatened by the

person who identified him by name and in excluding evidence that witnesses against Pearson were drug users. We affirm the judgment.

The conviction arises out of a robbery which occurred at the apartment of Ruby Olson and Angela Laycock. In the afternoon on the day of the robbery, Olson admitted into the apartment Laycock's boyfriend, Sonny,[1] and a man introduced to her as Tony. The three sat around and drank beer. Sometime after 5:00 p.m. Laycock arrived home, went out and cashed her welfare check, and returned. She paid Olson $340 cash to cover the rent. Eventually Sonny and Tony were asked to leave. Tony returned later and was admitted into the apartment by Laycock. Tony asked to speak with Olson and the two went into the bathroom.

Olson testified that after she refused Tony's request for money, Tony pulled a knife and held it to her throat. Olson yelled to Laycock to call the police. Tony grabbed the money from Olson's pocket and ran down the stairs after Laycock. After some time, the police were called from the downstairs apartment of Victoria Burnette.[2] The next day Burnette told Olson and Laycock that Tony had used her phone earlier on the day of the robbery and that Tony was really Jesse Pearson. Burnette had learned of Tony's identity from her boyfriend's cousin, Tavares Martin. Olson, Laycock and Burnette identified Pearson from a photo array presented about a week after the robbery.

Pearson used an alibi defense. He and three witnesses testified that he was at home with his wife and children between 8:30 p.m. and 12:30 a.m. on

[1] At the time, neither Olson nor Laycock knew Sonny's real first or last name. The police were unable to locate Sonny.

[2] The police arrived at the apartment at 11:29 p.m.

the day of the robbery. Pearson also wanted to present evidence suggesting that Martin framed Pearson for the robbery in order to get even with Pearson because of a bad drug deal. It is the exclusion of this type of evidence that is at issue in this appeal.

The trial court sustained the prosecution's hearsay objection to Pearson repeating a threat made by Martin.[3] The trial court excluded evidence that Olson and Laycock were drug users on the grounds that it was a collateral issue and that the prejudicial effect of such evidence outweighed its minimal probative value. Evidentiary rulings are addressed to the trial court's discretion and we will affirm the trial court's ruling if it is supported by a logical rationale, is based on facts of record and involves no error of law. *See* ***Shawn B.N. v. State***, 173 Wis.2d 343, 366-67, 497 N.W.2d 141, 149 (Ct. App. 1992).

We first address the State's contention that Pearson waived his right to claim error because he did not make an adequate offer of proof of the evidence excluded. An offer of proof is a precondition to a claim that there was an erroneous exclusion of evidence. *See* ***State v. Williams***, 198 Wis.2d 516, 538, 544 N.W.2d 406, 415 (1996); § 901.03(1)(b), STATS. An offer of proof need not be stated with complete precision or in unnecessary detail. *See* ***State v. Jackson***, 212 Wis.2d 203, 210, 567 N.W.2d 920, 924 (Ct. App. 1997). Under § 901.03(1)(b), where the expected testimony is apparent from the context, no offer of proof is necessary. *See* ***Lambert v. State***, 73 Wis.2d 590, 605, 243 N.W.2d 524, 531 (1976).

---

[3] At the time of trial Martin was dead.

The evidentiary issue first arose during an unrecorded side bar. When a record was made of the side bar, the trial court stated its impression of what the defense intended to prove about Pearson being beaten by Martin. The trial court asked whether it was a correct summary. Defense counsel replied that the trial court's summary was correct and that Pearson himself would testify as to his belief of Martin's motive for the frameup. In a later discussion of Pearson's proposed testimony, the prosecutor raised a concern that Pearson would testify, as he had attempted to do in the past, that Martin said he would "get even with [Pearson] any way I can."

Defense counsel indicated that two additional witnesses would testify about drug use by Olson and Laycock and drug activity at their residence. Counsel also indicated that Pearson would testify, as he had done at a revocation hearing, that he saw Olson and Laycock in Martin's drug house and that he believed Martin had offered the two women drugs in exchange for pinning the robbery on Pearson.

It is apparent from the record that the trial court and prosecutor knew the substance of the evidence that Pearson wanted to present. *See* ***State v. Tabor***, 191 Wis.2d 482, 496, 529 N.W.2d 915, 921 (Ct. App. 1995) (alleged error not waived where apparent from the record that the court and the parties were aware of the substance of the evidence). Given the awareness of the parties and the trial court that Pearson wanted to testify that Martin threatened him, it matters little that the substance of that testimony was described by the prosecutor and not by defense counsel. Additionally, it was not necessary to have the witnesses appear and be subject to examination. A summary by counsel is sufficient as an offer of proof. *See* ***Milenkovic v. State***, 86 Wis.2d 272, 284, 272 N.W.2d 320, 326 (Ct. App. 1978); *see also* ***State v. Garner***, 207 Wis.2d 520, 530 n.5, 558 N.W.2d 916,

920 (Ct. App. 1996) (trial court, in effect, received an offer of proof through defense counsel's summary). We reject the State's notion that after the trial court's ruling excluding certain evidence, defense counsel was required to attempt to elicit the excluded evidence and draw an objection in order to have been deemed to have offered the evidence at trial.

Pearson's offer of proof was sufficient to establish a record necessary for appellate review. However, the offer of proof failed to establish an evidentiary basis for admission of the evidence. An offer of proof must state an evidentiary hypothesis which is supported by a sufficient statement of facts to warrant the conclusion or inference that the trier of fact is urged to adopt. *See* ***Jackson,*** 212 Wis.2d at 210, 567 N.W.2d at 924.

Pearson wanted the jury to infer that Martin framed Pearson for the robbery. His theory was based only on his own conjecture that Martin had made a deal with the victims to identify him as the robber. There was no offer of proof of statements by Martin to the women by which he had actually offered the two women drugs in exchange for their allegations against Pearson.[4] There was no evidentiary link between Martin's threat, the victims' drug use and the victims' motive to fabricate. In short, the proffered evidence did not prove Pearson's theory. We conclude that the trial court properly excluded it.

---

[4] Martin was dead at the time of trial. The victims did not testify to any communications with Martin. Pearson did not offer any witness who was privy to the making of the agreement.

Even if exclusion of the evidence was error, it was harmless error.[5] Pearson testified that Martin had beaten him the month before the robbery. He explained that he owed Martin money "from when I was doing drugs" and that the fight occurred because there was a disagreement about whether the debt had been paid. He also stated that Martin was a gang member. There was the implication that Martin was a drug dealer. The jury was made aware of the bitterness between Martin and Pearson. Pearson also testified that he saw Olson, Laycock and Burnette at Martin's home on several occasions. He indicated that Burnette's boyfriend was Martin's cousin and also a gang member. The defense theory that Martin had a motive to frame Pearson was suggested to the jury by other evidence.

By the Court.—Judgment affirmed.

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

---

[5] With respect to Martin's threat, Pearson failed to preserve the evidentiary issue for appeal by not identifying at trial the grounds for admission of the evidence. Upon the prosecution's hearsay objection, the burden shifted to Pearson to cite the hearsay exceptions under which the evidence could be admitted. Pearson did not argue, as he does on appeal, that Martin's threat was admissible as a recent perception or as a declaration against interest. *See* § 908.045(2) and (4), STATS. Pearson waived his right to argue that evidence of Martin's threat was admissible under these exceptions to the hearsay exclusion. *See* ***State v. Romero***, 147 Wis.2d 264, 274, 432 N.W.2d 899, 903 (1988); ***State v. Friedrich***, 135 Wis.2d 1, 14, 398 N.W.2d 763, 769 (1987).