COURT OF APPEALS
DECISION
DATED AND FILED

July 21, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP2079-CR **Cir. Ct. No. 2013CF1114**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ERIC PAUL DILLARD,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: WILLIAM S. POCAN, Judge. *Affirmed*.

Before Kessler, Brennan and Bradley, JJ.

¶1 PER CURIAM. Eric Paul Dillard appeals from a judgment of conviction, entered upon a jury's verdict, on one count of possession of narcotic drugs as a second or subsequent offense. Dillard contends that the circuit court

erred when it declined to admit certain testimony at trial. We conclude the circuit court properly exercised its discretion, so we affirm the judgment.

BACKGROUND

¶2 Police responded to a complaint from B.B., who reported that Dillard had destroyed her kitchen. When police arrived, B.B. also told them Dillard had drugs on him. Dillard was arrested for vandalism and disorderly conduct. When police searched him incident to that arrest, they discovered a cellophane bag with four small bindles of something in Dillard's back pocket. The product in the bindles field-tested positive for heroin. Dillard was charged with one count of possession of narcotic drugs as a second or subsequent offense.

¶3 At trial, B.B. invoked her right against self-incrimination and refused to testify. As a result, Dillard sought to admit hearsay evidence of statements B.B. purportedly gave to defense investigator William Kohl and Dillard's first trial attorney Daryl Kastenson. Dillard claimed that although B.B.'s statements were hearsay, they should be admitted, under an exception, as statements against B.B.'s interest. The circuit court heard preliminary testimony outside the presence of the jury to determine the admissibility of the statements.

¶4 Kohl reported that he interviewed B.B., and she told him that she had an argument with Dillard, who tore up her kitchen before leaving her apartment. After she called police, B.B. followed Dillard outside and waited in her yard for the police to arrive. As she waited, she found a small plastic package in the yard and picked it up. She saw Dillard head towards the garage, and she feared he might do something to her car. They approached each other, and Dillard grabbed documents or identification from B.B.'s pocket. He turned and left, but she followed him, grabbing at his back pocket. B.B. told Kohl that Dillard might

have obtained the plastic bag when he took items from her pocket, or that she might have inadvertently put the bag in Dillard's pocket when she grabbed at it.

¶5 Kastenson reported receiving a phone call from someone claiming to be B.B., though he was unable to verify the caller's identity. The caller said she found the small bag on the street and took it home to determine what was in it. She also told Kastenson that she might have put the bag in Dillard's pocket when she reached in to grab some keys.

¶6 The circuit court declined to allow the testimony from Kohl or Kastenson. It determined that B.B. had made no statement against her interest, it was not clear she had spoken to Kastenson, and there was no corroboration on at least one key issue. Trial resumed, and the jury ultimately convicted Dillard. The circuit court imposed a sentence of fifteen months' initial confinement and twenty-four months' extended supervision. Dillard now appeals.

DISCUSSION

¶7 "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." WIS. STAT. § 908.01(3) (2013-14).[1] Hearsay is inadmissible except as provided by statute or rule. *See* WIS. STAT. § 908.02. One exception under which hearsay can be admitted is the "statement against interest" exception. *See* WIS. STAT. § 908.045(4). A statement against interest includes a statement which, when it was made, "so far tended to subject the declarant to civil or

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

criminal liability … that a reasonable person in the declarant's position would not have made the statement unless the person believed it to be true." ***Id.*** However, "[a] statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborated." ***Id.*** Further, the declarant of a statement against interest must be unavailable. *See* WIS. STAT. § 908.045 (intro.).

¶8 The decision to admit or exclude evidence is a matter of circuit court discretion. *See* ***Weborg v. Jenny***, 2012 WI 67, ¶41, 341 Wis. 2d 668, 816 N.W.2d 191. We do not disturb the circuit court's discretionary decision unless the circuit court erroneously exercised that discretion.[2] The question on review is not whether this court would have admitted the evidence but whether the circuit court properly exercised its discretion in accord with the proper legal standards and facts of record. *See* ***State v. Pharr***, 115 Wis. 2d 334, 342, 340 N.W.2d 498 (1983).

¶9 B.B. was undisputedly unavailable, having invoked her right against self-incrimination. *See* WIS. STAT. § 908.04(1)(a). The only question is whether her statements, hearsay because they were being offered through the testimony of others, were admissible under WIS. STAT. § 908.045(4) as statements against B.B.'s penal interest. The circuit court excluded the statements, concluding that they were neither against her interest nor corroborated.[3] Dillard contends this was erroneous, because B.B.'s statements were in fact against her penal interest and

[2] Dillard's brief refers to "abuse of discretion," but that phrase was replaced by "erroneous exercise of discretion" more than twenty years ago. *See* ***City of Brookfield v. Milwaukee Metro. Sewerage Dist.***, 171 Wis. 2d 400, 423, 491 N.W.2d 484 (1992).

[3] For purposes of this appeal, we can assume that B.B. did, in fact, call Kastenson—the result does not change.

were corroborated by Kohl and Kastenson. Dillard also argues that exclusion of B.B.'s statements violated his constitutional right to present a defense. We disagree with Dillard's assessment.

¶10 First, Dillard never explains how B.B.'s statements are against her penal interest. One element of possession of a controlled substance requires that the defendant knew or believed the substance to be a controlled substance. *See* WIS JI—CRIMINAL 6030. In neither of B.B.'s statements does she claim to know the nature of the substance she found in the plastic bag. To the extent there may be some criminal liability for "framing" Dillard, all of B.B.'s possible scenarios for how the heroin ended up in Dillard's pocket involve accident or inadvertence, not intent. *See, e.g.*, ***State v. Caldwell***, 154 Wis. 2d 683, 686, 454 N.W.2d 13 (Ct. App. 1990) (*knowingly* providing false information *with intent* to mislead constitutes obstruction of an officer). Thus, as the State points out, both of B.B.'s statements "seem very carefully designed to exculpate Dillard without implicating [B.B.] in any criminal activity." Statements that are not against the declarant's penal interest are not admissible under WIS. STAT. § 908.045(4).

¶11 Second, B.B.'s statements are uncorroborated. To be admissible, a statement against penal interest must be "corroborated by evidence that is sufficient to enable a reasonable person to conclude, in light of all the facts and circumstances, that the statement could be true." *See* ***State v. Guerard***, 2004 WI 85, ¶24, 273 Wis. 2d 250, 682 N.W.2d 12; ***State v. Anderson***, 141 Wis. 2d 653, 662, 416 N.W.2d 276 (1987).

¶12 Contrary to Dillard's claim, the mere fact that B.B. gave statements to both Kohl and Kastenson, or that Kohl memorialized B.B.'s statement to him in writing, does not corroborate her statements. *Cf.* ***Guerard***, 273 Wis. 2d 250, ¶38.

Kohl's and Kastenson's accounts, and Kohl's written report, at best corroborate the simple fact that B.B. gave a statement to each person; those accounts do not corroborate any of the factual assertions within the statements. Written reports in ***Guerard*** served as corroboration not because the statements were put to paper but because the details within each report were sufficiently similar to each other. *See* ***id.***, ¶38 n.6. That is, statements against penal interest may be sufficiently self-corroborating "by virtue of having been repeated in substantially the same form" to multiple witnesses. *See* ***id.***, ¶34.

¶13 B.B.'s two statements, though, were not "repeated in substantially the same form." *See* ***id.*** She either found the bag of heroin in her yard after fighting with Dillard, or she found it in the street and brought it home to determine its contents. The drugs made their way into Dillard's pocket because he took documents from B.B., or because she grabbed onto his pocket as he walked away from her, or because she reached into his pocket to grab keys. Given the variations in important details between the two statements, no reasonable person would conclude that one of these statements could be true. Each statement is, therefore, uncorroborated, and statements against interest that inculpate the declarant while exculpating the defendant are inadmissible under WIS. STAT. § 908.045(4) if uncorroborated.

¶14 Finally, Dillard complains that by excluding testimony about B.B.'s statements, the circuit court deprived him of the right to present a defense. *See, e.g.*, ***Pennsylvania v. Ritchie***, 480 U.S. 39, 56 (1987) ("[C]riminal defendants have … the right to put before a jury evidence that might influence the determination of guilt."). However, our supreme court has already determined that Wisconsin's standard for corroboration, relative to the admission of hearsay statements against penal interest, is constitutionally adequate to balance a

defendant's right to present a defense with concerns underlying the hearsay rules, like concerns about excluding untrustworthy statements. *See* ***Anderson***, 141 Wis. 2d at 662-65. Accordingly, we conclude the circuit court properly exercised its discretion in excluding hearsay testimony about B.B.'s statements.

By the Court.—Judgment affirmed.

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