COURT OF APPEALS
DECISION
DATED AND FILED

June 3, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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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. 98-3667-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

DAVINA A. PIERCE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for La Crosse County: JOHN J. PERLICH, Judge. *Affirmed.*

EICH, J.[1] Davina Pierce appeals from a judgment convicting her of theft by fraud, a misdemeanor. Pierce was a temporary office worker employed by Tempo Employment Services. Tempo assigned her to work for APAC Teleservices and the theft charge was based on the State's claim that she had

[1] This appeal is decided by a single judge pursuant to § 752.31(2)(f), STATS.

falsified weekly "time cards" while working for APAC, resulting in a substantial overpayment of her wages.

She asks us to reverse her conviction based on the circuit court's erroneous exercise of discretion in allowing various items in evidence, specifically: (1) copies, rather than the originals, of the time cards; (2) evidence of her brother's complicity in the same or similar acts; and (3) a document used by the State to impeach one of the defense witnesses, which had not been provided to Pierce in advance. We reject the arguments and affirm the conviction.

I. Standard of Review

All of Pierce's arguments challenge the admission of evidence—decisions committed to the sound discretion of the trial court. Admission or rejection of evidence is discretionary with the circuit court. ***State v. Keith,*** 216 Wis.2d 61, 68, 573 N.W.2d 888, 892 (Ct. App. 1997). We will not disturb an evidentiary ruling where the court, in making its ruling, has exercised discretion in accordance with accepted legal standards and the facts of record. ***State v. Clark***, 179 Wis.2d 484, 490, 507 N.W.2d 172, 174 (Ct. App. 1993). Stated another way, "we will not reverse a discretionary determination … if the record shows that discretion was in fact exercised and we can perceive a reasonable basis for the court's decision." ***Prahl v. Brosamle***, 142 Wis.2d 658, 667, 420 N.W.2d 372, 376 (Ct. App. 1987). The court's discretionary determinations are not tested by some subjective standard, or even by our own sense of what might be a "right" or "wrong" decision in the case, but rather will stand unless it can be said that no reasonable judge, acting on the same facts and underlying law, could reach the same conclusion. ***State v. Jeske***, 197 Wis.2d 905, 914, 541 N.W.2d 225, 228 (Ct. App. 1995). And where the court has failed to adequately explain the reasons for its decision, we

will independently review the record to determine whether it provides a reasonable basis for the ruling. ***Keith***, 216 Wis.2d at 68, 573 N.W.2d at 892.

II. The Time Cards

Prior to trial, Pierce moved to dismiss the charges on grounds that the State had failed to produce her original time cards. Initially, the court directed the State to produce them, on pain of dismissal. The district attorney provided the "bottom copies" of the cards, which he said he had obtained from Tempo, and he stated that he had been informed by APAC that it did not possess the "top copies." Those copies, according to APAC and Tempo officers, were not subject to any specific policy and were sometimes retained by the employer and sometimes given to the employee. It appears from the trial exhibits that the "bottom copies" are simply carbon-copy imprints of the top sheet. They list the hours certified by Pierce to APAC, and contain her signature and that of her supervisor at APAC.

Pierce renewed her motion on the day of trial, claiming that admission of the "bottom copies" was barred by the "best evidence rule," § 910.02, STATS. The statute states that (with exceptions not relevant here), "[t]o prove the content of a writing … the original writing … is required." Opposing the motion, the district attorney stated that the "top copies" weren't in the State's possession, referring the court to a letter from APAC's manager on which he had based his earlier representations on the subject. Defense counsel objected in brief and general terms that there was no real evidence that the prosecutor and APAC didn't have the top sheets, and the circuit court denied the motion, stating that "without some showing that, in fact, the State has or should have possession of the document, I can't grant you the relief that you are asking for." The court stated that it couldn't force the State to "turn over something … they don't have," and

that if the absence of the "top copies" should raise a factual issue at trial, that would be a matter of the "weight of the evidence, and the jury can make those determinations."

Other than to refer us to a case where the supreme court held that a typewritten reproduction of information contained in handwritten ledgers was not the best evidence of the information in the ledgers[2]—a case we think is particularly inapposite to the situation here, where we are dealing with carbon copies—Pierce's argument is largely devoted to repeating its earlier assertions that the State never proved that APAC didn't have the "top copies." The trial court felt otherwise, as we have indicated above, and Pierce has not persuaded us that its decision was unreasonable.

Neither was it contrary to law. We note first in this regard that the common-law rule on which § 910.02, STATS., is based recognized that the "contents of a document may be proved by other means when the writing is unavailable or for some other legitimate reasons it is not possible or feasible to produce the original document." ***Mack Trucks, Inc. v. Sunde***, 19 Wis.2d 129, 134, 119 N.W.2d 321, 323 (1963). Second, the rule is not violated by the use of carbon copies. Indeed, § 910.03 specifically provides that "[a] duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original"—and it has been held that, under this statute, a carbon copy is admissible as a "duplicate original." *See* ***State v. Klein***, 25 Wis.2d 394, 407, 130 N.W.2d 816, 823 (1964). Pierce doesn't maintain the

[2] ***Harper, Drake & Assocs., Inc. v. Jewett & Sherman Co.,*** 49 Wis.2d 330, 182 N.W.2d 551 (1971).

"bottom copies" are not authentic. And while she does state at one point in her brief that there was an issue as to "whether [she] had forged or altered her time cards," she really doesn't explain why, if that were true, the top copies would provide any better evidence on that point than the bottom copies. And, as the circuit court noted, the jury would be able to consider that issue, should it arise at trial.

The circuit court considered the arguments of both sides, and the facts as they had been developed by the parties at the time it made its ruling, and it ruled that because the State had apparently made a good-faith effort to locate the top copies, and because the evidence was inconclusive as to whose possession they were (or had been) in, good cause had been shown as to their unavailability within the meaning of the best evidence rule. It was a decision a reasonable judge could reach on the facts known to it, and on the applicable law; as such, it was a sustainable exercise of discretion.

III. Pierce's Brother's Complicity

Pierce's brother, Javan Pierce, was also charged with theft by fraud, based upon substantially similar actions while temporarily employed through Tempo. On the morning of trial, Pierce's attorney informed the court that he believed the State wanted to put on evidence of Javan Pierce's charges, and he asked that such evidence be barred as inadmissible character evidence. The State made an offer of proof indicating that a group of six people, including Pierce and her brother—all of whom were working for the Tempo agency (and several of whom were interrelated)—had altered time cards to obtain more wages than they were entitled to. The circuit court denied Pierce's motion, noting that it was clear from the *voir dire* proceedings and the representations of counsel that one of the

issues in the case would be "whether or not this was deliberate [on Pierce's part] or whether [it] was a mistake or computer error"; and the court stated that "if there's a pattern with others that were associated with this defendant, that she was part of a group, that shows obviously it was not just an accident." The evidence was brief: testimony that only six of twenty Tempo employees at APAC had submitted similarly inaccurate time cards, and those six were all either related to, or friends of, Pierce—including her brother, Javan.

Pierce argues on appeal that the evidence was not relevant because it "did not help the jury to understand the charges against Pierce, nor to ... make [the] existence of any fact ... of consequence … more … or less probable than it would have been without the evidence." The quoted phrase is, of course, the definition of "relevant evidence" under the Code. Pierce also argues that even if relevant, the evidence was highly prejudicial because "the jury, upon heading that Pierce's brother also had problems with his time cards, would tend to assume … based on the fact that Javan had the same problems, that Pierce was also guilty of theft by fraud." She states, without explanation or elaboration, that the evidence "misled the jury [and] confused the issues. Again, we disagree.

First, the circuit court could reasonably conclude that the evidence would indeed make the existence of a fact of consequence more or less probable—whether, as the court indicated, Pierce's misstatement of hours worked for APAC were the result of a mistake or were put forth knowingly. As to prejudice, all evidence bearing on guilt may be said to be prejudicial to a defendant in a criminal case. The question is whether otherwise relevant evidence should be barred because of the danger of "unfair prejudice"; and Pierce's argument on the point, which we have quoted in its near entirety, is little more than a general statement that the jury would assume that because her brother "had the same problems," she

must also be guilty. To us, the substance of the evidence is not simply that her brother was involved in a similar scheme, but that Pierce herself was involved in a group effort to be paid for work not performed while in Tempo's and APAC's employ. In that sense, the evidence is similar to "other-wrongs" character evidence, which is admissible to show things like plan, or lack of mistake, *see* § 904.04(2), STATS.

The circuit court, in its ruling, followed the applicable law and reached a result a reasonable judge could reach; and that is the very definition of an appropriate discretionary determination. *See* ***Prahl v. Brosamle***, *supra*, 142 Wis.2d at 667, 420 N.W.2d at 376 (we will not reverse a discretionary determination if the record shows that discretion was exercised and we can perceive a reasonable basis for the court's decision).

IV. Discovery Violation

Finally, Pierce argues that her conviction should be reversed because the State violated § 971.23, STATS., when, attempting to impeach a defense witness, it used a document which had not been provided to defense counsel prior to trial. The statute requires the prosecution to respond to defense discovery demands and imposes a "continuing duty to disclose … additional material … subject to discovery, inspection or production." *See* § 971.23(7). Like matters relating to the admission or exclusion of evidence, matters of discovery, its enforcement and sanctions for violations, are committed to the trial court's discretion. *See* ***State v. Martinez***, 166 Wis.2d 250, 259, 479 N.W.2d 224, 228 (Ct. App. 1991); ***State v. Lederer***, 99 Wis.2d 430, 437, 299 N.W.2d 457, 462 (Ct. App. 1980).

Doris Tourville, a former APAC employee, was a witness for the defense whose testimony was offered for the apparent purpose of verifying the

hours Pierce claimed she had put in at APAC. Tourville testified that overtime opportunities existed at APAC, that she saw Pierce at work often, and she stated that she (Tourville) had problems with "shorted hours" on her own paychecks. At one point in his cross-examination of Tourville, the district attorney asked whether she had worked during a period in July and August, 1997, and when she stated that she worked all during August, the prosecutor had a document marked as an exhibit, presumably preparing to question her from it. Defense counsel objected, stating that the document—which appears to be a record indicating that her employment at APAC was terminated on August 14, 1997, for "job abandonment"—had never been supplied to the defense, despite the fact that Tourville had been on their witness list for several weeks. The prosecutor noted first that Tourville's name had been misspelled on the witness list, and, second, that he just received the document a few hours earlier by fax. The court overruled Pierce's counsel's objection, noting that the document was a corporate record and really didn't appear to come under the listing of discoverable items in § 971.23(1), STATS.—written or recorded statements of the defendant, a list of witnesses, expert opinions and reports, or any "physical evidence."[3] The court also noted that

[3] Section 971.23(1), STATS., in its entirety, reads as follows:

> WHAT A DISTRICT ATTORNEY MUST DISCLOSE TO A DEFENDANT. Upon demand, the district attorney shall, within a reasonable time before trial, disclose to the defendant or his or her attorney and permit the defendant or his or her attorney to inspect and copy or photograph all of the following materials and information, if it is within the possession, custody or control of the state:
>
> (a) Any written or recorded statement concerning the alleged crime made by the defendant, including the testimony of the defendant in a secret proceeding under s. 968.26 or before a grand jury, and the names of witnesses to the defendant's written statements.

(continued)

the statute only applies to material in the State's possession, and overruled Pierce's objection. The prosecutor went on to question Tourville briefly about the fact of her termination—she denied that she had abandoned her job—and also on a disciplinary report indicating that she had been disciplined for abusing telephone privileges and taking unassigned breaks.

We agree with the circuit court that the business record about which Pierce complains was just as available to her as it was to the State. We also note that, despite the circuit court's remarks that the document does not appear to come

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> (b) A written summary of all oral statements of the defendant which the district attorney plans to use in the course of the trial and the names of witnesses to the defendant's oral statements.
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> (bm) Evidence obtained in the manner described under s. 968.31 (2) (b), if the district attorney intends to use the evidence at trial.
>
> (c) A copy of the defendant's criminal record.
>
> (d) A list of all witnesses and their addresses whom the district attorney intends to call at the trial. This paragraph does not apply to rebuttal witnesses or those called for impeachment only.
>
> (e) Any relevant written or recorded statements of a witness named on a list under par. (d), including any videotaped oral statement of a child under s. 908.08, any reports or statements of experts made in connection with the case or, if an expert does not prepare a report or statement, a written summary of the expert's findings or the subject matter of his or her testimony, and the results of any physical or mental examination, scientific test, experiment or comparison that the district attorney intends to offer in evidence at trial. This paragraph does not apply to reports subject to disclosure under s. 972.11 (5).
>
> (f) The criminal record of a prosecution witness which is known to the district attorney.
>
> (g) Any physical evidence that the district attorney intends to offer in evidence at the trial.
>
> (h) Any exculpatory evidence.

within any of the items listed in § 971.23(1), STATS., Pierce appears to take the position that the statute imposes on the State a continuing duty to "supplement any and all evidence they intend[] to produce at trial." As the circuit court recognized, however, the statute applies only to specified items, *see* note 3, *supra*, and Pierce has made no real effort to tie the two reports to the statute.

Finally, we will overturn a conviction for trial court error only when it appears that "there is a reasonable possibility that the error contributed to the conviction." ***State v. Dyess***, 124 Wis.2d 525, 543, 370 N.W.2d 222, 231-32 (1985). Again, Pierce's argument is very general—she states only that, had she known of the two documents in advance, she may not have chosen to call Tourville as a witness. Yet, only a page earlier in the brief, she emphasizes that Tourville's testimony "was very crucial to [her] case" because she could "show that Pierce was working on the days that she indicated ... she was."

The prosecutor's cross-examination of Tourville on the two documents occupies only four pages in a 250-page transcript, and the supreme court has recognized that, even in cases where the evidence has a "high potential for prejudice," the "infrequency of the references in the context of the entire trial mitigated any possible prejudicial effect on the jury." ***State v. Brecht***, 143 Wis.2d 297, 318, 421 N.W.2d 96, 104 (1988); *see also*, ***State v. Fencl***, 109 Wis.2d 224, 238-39, 325 N.W.2d 703, 711-12 (1982) (six references to defendant's silence during a five-day trial were harmless beyond a reasonable doubt). Pierce has not persuaded us that, even if we were to hold that the circuit court erred in allowing the prosecutor to use the two documents—which we do not—the brief examination of Tourville in that regard was so prejudicial as to warrant a new trial.

By the Court.—Judgment affirmed.

This opinion will not be published in the official reports. *See* RULE 809.23(1)(b)4, STATS.