COURT OF APPEALS
DECISION
DATED AND FILED

November 29, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP188-CR **Cir. Ct. No. 2014CM169**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CONNIE MAE APFEL,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for St. Croix County: EDWARD F. VLACK III, Judge. *Affirmed*.

¶1 HRUZ, J.[1] Connie Apfel appeals a judgment of conviction for misdemeanor battery and disorderly conduct, both with a domestic abuse

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

enhancer, and for possession of drug paraphernalia as party to a crime. Apfel also appeals an order denying her postconviction motion. She argues the circuit court erroneously exercised its discretion when it admitted prior inconsistent statements of a witness into evidence without a proper foundation. We disagree with Apfel and affirm.

BACKGROUND

¶2 This case arises from a domestic incident between Apfel and her husband, John, which occurred at their residence.[2] Officer Ryan Miller, assisted by officers Christopher Kober and Beth Posel, responded to the incident and made initial contact with John, who claimed he had called the police. Miller arrested Apfel after a short investigation, after which Kober took a statement from John further inculpating Apfel. Apfel was charged with disorderly conduct and misdemeanor battery, both with domestic abuse enhancers, as well as possessing drug paraphernalia as party to a crime. Apfel was tried before a jury on these charges.

¶3 At trial, the State called John as a witness. At the beginning of his testimony, John indicated he was reluctant to testify against his wife. When asked if he remembered calling the police on the day of the incident, John said, "Yes, I did." When asked about his reasons for calling the police, John testified that he "thought they'd serve and protect and help us out," but he was unable to remember if he had told the police why he called.

[2] We refer to the victim by a pseudonym pursuant to WIS. STAT. RULE 809.86.

¶4 When asked if the police had arrived at his residence and spoken to anyone, John testified the police had spoken to him. John then testified, however, that he could not recall either the reason for his argument with Apfel or anything that he had said to the police officers:

> Q: Do you remember telling the police why you called them?
>
> A: No, I don't.
>
> Q: And did the police arrive at your residence?
>
> A: Yes they did.
>
> Q: And they spoke to you?
>
> A: Yes they did.
>
> Q: Do you remember talking with them?
>
> A: No I don't.
>
> Q: Do you remember what you may have told them?
>
> A: No I don't.

¶5 John was further asked if he remembered any yelling between him and Apfel that day, whether he was injured that night and received a cut above his eye, or telling the police he was injured. John denied that he sustained any injury or that he remembered telling the police anything related to a cut. After he was cross-examined, John was dismissed, but the circuit court stated he was not released from subpoena.

¶6 Called by the State, Miller testified he had questioned John after having spoken with Apfel at the scene. Miller testified that, during this questioning, John stated Apfel struck him upon finding out John was having an affair, and it appeared to Miller that John had suffered an injury. Miller also

overheard John making a statement to Kober that day in which John said he did not give Apfel permission to strike him and he felt pain from being struck. The circuit court overruled Apfel's hearsay objection to Miller's statements.

¶7 Kober subsequently testified he took a statement from John in which John described that he had an altercation with Apfel where she punched, kicked, shoved, pushed, slapped and scratched him. Kober testified that John stated he did not give permission to be struck and he experienced pain as a result of being hit. Apfel was the only witness for the defense. John was not recalled to testify. John's prior statements were admitted into evidence through the officers' testimony. The jury found Apfel guilty of all counts.

¶8 Apfel filed a motion for postconviction relief challenging, on hearsay grounds, the admission of the officers' testimony regarding John's statements to the police on the day of the incident. In particular, she contested the admissibility of the officers' testimony that John told them (1) Apfel had hit him, (2) he did not consent to being hit, and (3) he experienced pain when hit. These statements tracked the elements of the battery offense. *See* WIS JI—CRIMINAL 1220 (2015). The circuit court denied Apfel's motion. Relying on ***State v. Lenarchick***, 74 Wis. 2d 425, 247 N.W.2d 80 (1976), the court, in reviewing the trial record, noted John was a reluctant witness who recalled very few details about the incident with Apfel, including whether he even talked with the officers or what he may have told them. The court concluded John's lack of memory to be in bad faith and, as a result, declared his disavowal of remembering his making a statement to the police to be inconsistent with his prior statements to the police. The court concluded that admission of Miller's and Kober's testimony as extrinsic evidence of John's prior statements was proper because John had not been released from subpoena and was available for cross-examination.

DISCUSSION

¶9 On appeal, Apfel challenges the circuit court's decision to admit Miller's and Kober's testimony regarding certain statements John made to them on the day of the incident. When reviewing a circuit court's decision to admit or exclude evidence, we generally review for erroneous exercise of discretion. ***State v. Muckerheide,*** 2007 WI 5, ¶17, 298 Wis. 2d 553, 725 N.W.2d 930. We will uphold a circuit court's decision when, based upon the relevant facts and the proper legal standard, it reaches "a reasonable conclusion using a demonstrated rational process." ***Id.*** We review de novo whether the circuit court considered the proper legal standard, and whether the evidence presented to it "was legally sufficient to support its rulings." ***State v. Keith***, 216 Wis. 2d 61, 69, 573 N.W.2d 888 (Ct. App. 1997).

¶10 Under WIS. STAT. § 908.01(4)(a)1., a witness's prior statement is not hearsay if "[t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is ... [i]nconsistent with the declarant's testimony." In addition, under WIS. STAT. § 906.13(2)(a)2., "[e]xtrinsic evidence of a prior inconsistent statement by a witness is not admissible unless … [t]he witness has not been excused from giving further testimony in the action." If a witness has been cross-examined, prior inconsistent statements may then be admitted as substantive evidence rather than merely for impeachment. ***State v. Prineas***, 2012 WI App 2, ¶18, 338 Wis. 2d 362, 809 N.W.2d 68. Importantly, our supreme court has held that when "a witness denies recollection of a prior statement, and where the [circuit court] has reason to doubt the good faith of such denial, [it] may in [its] discretion declare such testimony inconsistent and permit the prior statement's admission into evidence."

Lenarchick, 74 Wis. 2d at 436; *see also* ***State v. Whiting***, 136 Wis. 2d 400, 421, 402 N.W.2d 723 (Ct. App. 1987).

¶11 Apfel concedes on appeal that the record supports the circuit court's finding that John's purported lack of memory was not in good faith. She also does not dispute that John made the prior statements to the police and that he was still under subpoena when Miller and Kober testified. Instead, Apfel merely contends the State's general, initial questioning of John and his answers were insufficient, under "an application of logic to the rules of evidence," to allow the officers to testify about John's specific prior statements to them. She argues that at no time did the State establish a basis upon which the court could exercise its discretion and admit these statements as extrinsic evidence—even if it found John was feigning memory loss—because the State did not specifically ask John, at minimum, whether Apfel had hit him, whether he consented to being hit, or whether he experienced pain when being hit.

¶12 We reject Apfel's argument. Neither the rules of evidence nor ***Lenarchick*** require the State to establish the foundation for the officers' testimony in the manner Apfel contends given John's complete, bad faith denial of remembering anything he had told the police. ***Lenarchick*** held that the admissibility of prior statements by a witness who claimed memory loss of those statements at trial rested within the discretion of the circuit court. ***Lenarchick***, 74 Wis. 2d at 436. In particular, our supreme court noted that while inconsistency is not automatically presumed upon a witness's lack of memory, the circumstances surrounding the asserted lack of memory may function as an effective disavowal of a prior statement. ***Id.*** at 435. It concluded that because the circuit court "with reason[] doubted the good faith of [the witness's] protestations of lack of memory," it could declare the witness's testimony inconsistent to "lay the ground

for the admission of the police statement" into evidence, not just a segment of what the witness had denied saying. ***Id.*** at 436.

¶13 ***Lenarchick*** does not require a circuit court to consider the purposes for which testimony is offered or to hear each specific question that would have been asked of the witness if he or she claimed to have remembered at least some of the "forgotten" conversation. *See generally* ***id.*** Instead, the fact that the entire conversation itself was not remembered is the basis upon which extrinsic evidence may be admitted regarding what the witness said during that earlier conversation. ***Id.*** at 434, 436. The dispositive question for purposes of admission is simply whether, in the circuit court's discretion, the testimony regarding memory loss is not made in good faith and, in that sense, is inconsistent with the now "forgotten" prior statements. ***Id.***

¶14 Under this standard, the circuit court had an adequate factual basis upon which to exercise its discretion and declare the statements John made to the police to be inconsistent with his statements at trial. John was a reluctant witness who recalled several specific details about the night in question, including, most importantly, that he called the police and that the officers spoke to him upon their arrival. Despite John testifying he remembered the police speaking to him, he stated he did not recall making any statements in response or sustaining any injury. *See supra* ¶¶4-5. This contradicted the police report filed regarding the incident, which noted that John did speak to Kober in part about an injury. With no argument from Apfel that John's lack of memory was genuine, we conclude the circuit court properly introduced the statements of both Kober and Miller as extrinsic evidence of John's statements to them.

¶15 Despite all but acknowledging that John would have stated he failed to recall in response to her proposed, minimum foundational questions, *see supra* ¶11, Apfel nevertheless argues the logic of the rules of evidence should prevent admission of prior inconsistent statements in this case. Without more detailed questions from the State, Apfel argues, the circuit court had nothing upon which it could find inconsistency and offer the statements into evidence when John never had opportunity to testify about the details of his conversation to the police once he claimed he had forgotten talking to them at all. On this point, Apfel claims that a prior inconsistent statement cannot be a "Trojan Horse" that serves as a means of admitting the entirety of an out-of-court statement. *See* ***Wikrent v. Toys R Us, Inc.***, 179 Wis. 2d 297, 309-10, 507 N.W.2d 130 (Ct. App. 1993), *overruled on other grounds by* ***Steinberg v. Jensen***, 194 Wis. 2d 439, 534 N.W.2d 361 (1995). True enough. ***Wikrent***, however, is readily distinguishable. There, the witness made one express contradiction at trial of a single statement within a prior written statement instead of claiming, as John did here, a lack of remembering either having made the prior statement at all or any parts of such a prior statement. *See* ***id.*** at 308-10.

¶16 Under ***Lenarchick***, if the circuit court properly concluded John's memory lapse about his statements to police was in bad faith and inconsistent as a result—as Apfel never attempts to dispute on appeal—the court did not need to ensure John had the opportunity to feign ignorance on specific matters within his entirely "forgotten" statement before admitting Kober's and Miller's testimony on that statement. *See* ***id.*** at 436. Furthermore, with respect to admission of the officers' testimony under WIS. STAT. § 906.13(2)(a)2., Apfel never claims she was denied an opportunity to cross-examine John on his challenged statements. Rather, she simply elected not to do so.

¶17 In sum, there is no argument the circuit court erred when it found John's lack of memory regarding his statements to police on the day of the incident was in bad faith. Meanwhile, the court followed and properly applied WIS. STAT. §§ 908.01(4)(a)1., 906.13(2)(a)2., and ***Lenarchick*** in allowing John's prior statements to the police to be admitted into evidence through the officers' testimony.

By the Court.—Judgment and order affirmed.

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