COURT OF APPEALS
DECISION
DATED AND FILED

February 27, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-1709-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

DAWN M. BRANTMEIER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Brown County: SUE E. BISCHEL, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 CANE, C.J. Dawn Brantmeier appeals from a judgment convicting her of one count of extortion, contrary to WIS. STAT. § 943.30(1).[1] A jury found Brantmeier guilty of extorting money from Mark L., who testified that over the course of four years he paid Brantmeier a total of $18,000 so that she would not inform his wife that he had paid Brantmeier for sex.

¶2 Brantmeier argues that she is entitled to a new trial on four bases: (1) the trial court erroneously excluded testimony by Brantmeier's psychotherapist regarding hearsay statements Brantmeier made to the psychotherapist; (2) the trial court erroneously excluded testimony by the same psychotherapist concerning the general character traits of a sexual predator; (3) Brantmeier was denied the opportunity to present a complete defense; and (4) a new trial is warranted in the interests of justice. We reject these arguments and affirm the conviction.

BACKGROUND

¶3 Mark testified that the following events led him to complain to police that he was the victim of extortion. In 1994, he was driving down a street in Green Bay when he saw Brantmeier walking. He pulled over and offered her a ride, which she accepted. Brantmeier asked him what he was looking for, and he

[1] All references to the Wisconsin Statutes are to the 1997-98 version. WISCONSIN STAT. § 943.30(1) provides:

> Whoever, either verbally or by any written or printed communication, maliciously threatens to accuse or accuses another of any crime or offense, or threatens or commits any injury to the person, property, business, profession, calling or trade, or the profits and income of any business, profession, calling or trade of another, with intent thereby to extort money or any pecuniary advantage whatever, or with intent to compel the person so threatened to do any act against the person's will or omit to do any lawful act, is guilty of a Class D felony.

responded, "a good time." The two went to her apartment, and she performed oral sex on Mark. He paid her $50.

¶4 Mark testified that while he was at Brantmeier's apartment, he told her where he worked. Several days later, Brantmeier called Mark at work and asked whether he could "come out and play." Although Mark declined, he agreed to meet her after Brantmeier called several more times. He picked up both Brantmeier and her friend and returned to her apartment. Brantmeier performed oral sex on Mark in the other woman's presence. Mark paid each of the women $50.

¶5 Brantmeier called Mark again and offered to introduce Mark to another friend of hers. Mark agreed to meet them. On this occasion, he and the two women drove around in his car. No sexual encounters took place, and no money was exchanged.

¶6 A week later, after receiving another call from Brantmeier, Mark made arrangements to meet Brantmeier and her friend. On this occasion, Mark had sexual intercourse with Brantmeier's friend. He paid each of the women $50. Mark testified that this was the third and final time he paid Brantmeier to have sex with him or arrange sexual encounters for him.

¶7 A week or two later, Brantmeier called Mark and asked to borrow $20. Mark agreed to her request and drove to a store parking lot to deliver it to her. Throughout 1994, Brantmeier called Mark every couple of weeks seeking to borrow between $20 and $60 each time she called. Although Brantmeier initially called the payments "loans," Mark testified that he did not believe Brantmeier would repay him and that ultimately, she did not repay him.

¶8 Over time Brantmeier asked for larger amounts of money and began to say things like, "Get your ass over here today" and "Don't mess with me." She told Mark that if he did not pay, she would tell his wife about the sexual encounters. By 1996, Brantmeier was asking for $430 per month, and demanded that Mark pay her $25 for each day that his payment was late. Mark paid Brantmeier in cash, delivering the money to Brantmeier at her home or at her friends' homes. Mark testified that Brantmeier threatened to expose his behavior if he did not continue to pay her.

¶9 Mark testified that this pattern of extortion continued through 1997 and into 1998. Brantmeier also began to demand that Mark fix her car or buy her a new one. Mark said he began falling into significant financial difficulties and his wife finally confronted him. Mark confessed that he had been paying Brantmeier so that she would not reveal their sexual encounters. Mark and his wife decided to report the extortion to the police.

¶10 Officers investigating Mark's complaint arranged for him to wear a microphone when he drove to Brantmeier's home to pay her the $530 she was demanding. The brief meeting was recorded on tape and ultimately played for the jury. During the meeting, Brantmeier agreed that if Mark would give her $7,000 so she could buy a car, she would leave him alone.

¶11 Brantmeier's testimony contradicted Mark's testimony in almost every respect. She testified that Mark offered her a ride in 1992 when he saw her walking down the road in the pouring rain. She accepted the ride. She said Mark asked her to have sex with him and offered to pay her. She declined, but the two talked for sixty to ninety minutes in his car outside her apartment. Brantmeier

testified that she enjoyed talking to Mark and that he told her to call him if she ever wanted to talk again.

¶12 Brantmeier said that she and Mark became friends and would talk or meet on a regular basis. Mark would sometimes give her money to buy clothes or get her hair styled. Brantmeier said that although Mark repeatedly asked her to have sex with him, she always refused.

¶13 Brantmeier said on several occasions, she helped Mark find apartments where he could have sex with other women. She testified that Mark told her about at least six women who he paid for sex. She described in detail specific sexual acts about which she claims Mark told her.

¶14 Brantmeier testified that Mark also asked her on several occasions whether she knew any teenagers with whom he could have sex. Brantmeier said she became angry with this question because she had been sexually assaulted as a child. She said she refused to talk with him about this issue and did not arrange for him to meet any teenagers.

¶15 Brantmeier stated that she discussed her relationship with Mark, as well as his statements and activities, with her psychotherapist, Suzanne Kosnar. Ultimately, Kosnar was allowed to testify about many of these activities and statements, although some were excluded.

¶16 The defense's theory at trial was that Mark is a sexual predator who used Brantmeier to meet other women. Further, the defense argued that Mark had fabricated the extortion story to disguise the fact that he was actually spending large amounts of money on prostitutes.

DISCUSSION

A. ADMISSIBILITY OF HEARSAY THROUGH PSYCHOTHERAPIST

¶17 On appeal, Brantmeier seeks a new trial on several bases. First, Brantmeier alleges that it was error for the trial court to prevent her psychotherapist from testifying to statements Brantmeier made, which allegedly repeated things that Mark told Brantmeier. Brantmeier argues that although these statements are hearsay,[2] they meet the hearsay exceptions found in WIS. STAT. §§ 908.03(4) (medical diagnosis and treatment exception), and 908.03(24) (residual hearsay exception).[3]

¶18 The decision whether to admit an out-of-court statement under a particular hearsay exception is within the trial court's discretion. *See* ***State v. Moats***, 156 Wis. 2d 74, 96, 457 N.W.2d 299 (1990). Significantly, appellate courts review trial court determinations that evidence is admissible as a hearsay exception with deference because the trial court "is best situated to weigh the

[2] It is undisputed that Brantmeier's statements to her psychotherapist are hearsay, out-of-court statements offered to prove the truth of the matter asserted. Mark's statements to Brantmeier are admissible admissions by a party opponent. *See* WIS. STAT. § 908.01(4)(b). Brantmeier can, and did, testify on direct examination about what she alleges Mark told her. At issue is whether Brantmeier can introduce these statements again through her psychotherapist.

[3] WISCONSIN STAT. § 908.03 provides that the following statements are not excluded by the hearsay rule, even where the declarant is available as a witness:

> **(4)** STATEMENTS FOR PURPOSES OF MEDICAL DIAGNOSIS OR TREATMENT. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.
>
> ....
>
> **(24)** OTHER EXCEPTIONS. A statement not specifically covered by any of the foregoing exceptions but having comparable circumstantial guarantees of trustworthiness.

reliability of the circumstances surrounding the decision." ***State v. Brown***, 96 Wis. 2d 238, 245-46, 291 N.W.2d 528 (1980). This court must affirm a trial court's discretionary ruling "if it is supported by a logical rationale, is based on facts of record and involves no error or law." ***In re Shawn B.N.***, 173 Wis. 2d 343, 367, 497 N.W.2d 141 (Ct. App. 1992).

¶19 We agree with the State that Brantmeier's brief does not specifically identify which statements she alleges should have been admitted. Brantmeier makes one specific reference to an excluded statement in her statement of facts. There, Brantmeier points out that defense counsel sought to admit testimony from Kosnar that Brantmeier talked about Mark seeking teenagers for sex. Notably, the trial court admitted this testimony pursuant to the hearsay exception for excited utterances.[4] Because this statement was not excluded, it logically cannot form the basis of Brantmeier's present challenge.

¶20 In an effort to respond to Brantmeier's argument, the State assumed that the statements at issue relate to statements Brantmeier made to Kosnar, allegedly relaying comments Mark had made about his sexual relations with other women. Outside the jury's presence, the trial court specifically asked Kosnar what her testimony would be. Kosner informed the court that Brantmeier told her of specific sexual acts between Mark and other women that Mark allegedly recounted for Brantmeier. The court excluded these statements, and it does not appear that these statements came in through Kosnar under a different hearsay exception.

[4] WISCONSIN STAT. § 908.03(2) states the excited utterance hearsay exception: "A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition."

Because Brantmeier in her reply brief did not further clarify the specific statements she believes were erroneously excluded, we will approach this issue as the State suggests.

¶21 The trial court excluded Brantmeier's statements about Mark's alleged encounters with other women on several bases: (1) the hearsay exception for medical treatment and diagnosis does not encompass statements made to a psychotherapist; (2) the particular proffered statements did not constitute statements for the purpose of medical treatment or diagnosis; and (3) the statements were not inherently trustworthy under the residual hearsay exception. Our review of the transcript leads us to conclude that the trial court did not erroneously exercise its discretion when it excluded the statements on these bases.

¶22 Brantmeier argues that her statements to Kosnar in which she repeats things Mark allegedly told her fit within the hearsay exception for medical diagnosis or treatment. Brantmeier notes that this hearsay exception has previously been applied to statements made to psychologists and psychiatrists. She acknowledges that our supreme court in ***State v. Huntington***, 216 Wis. 2d 671, 695, 575 N.W.2d 268 (1998), rejected attempts to apply this exception to statements made to counselors or social workers. However, she argues, her statements to Kosnar should be admissible because a psychotherapist is "much more closely aligned with a psychiatrist/psychologist than a social worker."

¶23 The trial court rejected this argument, noting that Kosnar was neither a psychologist nor a psychiatrist and instead was licensed as a clinical social worker, professional counselor, marriage and family therapist, and a sex therapist. Kosnar did not have a doctorate, such as an M.D. or Ph.D. Rather, Kosnar had

obtained a bachelor's degree in psychology and a master's degree in education, counseling and personnel services. We agree with the trial court's analysis.

¶24 In ***Huntington***, our supreme court explicitly declined to apply this hearsay exception to statements made to counselors or social workers. *See* ***id.*** The court explained:

> Such an expansive application of the doctrine would strain the traditional grounds for the exception. Receipt of proper medical diagnosis and treatment requires doctors to obtain basic information about a patient implicating that diagnosis and treatment. The doctor is focused on diagnosis and treatment of the individual, "not on the process of providing larger social remedies aimed at detecting abuse, identifying and punishing abusers, and preventing further mistreatment, which involves skills and social intervention lying beyond the expertise of doctors."

Id.

¶25 The trial court, on its own initiative, questioned Kosnar about the nature of her relationship with Brantmeier in order to address Brantmeier's argument that the relationship was most similar to that of a psychologist or psychiatrist and her patient. The court concluded that based on Kosnar's testimony, Kosnar was not "diagnosing and treating how [Mark] was in her life. I think it is more of a social worker/counselor type of relationship than the other type of relationship."

¶26 Based on the trial court's review of Kosnar's credentials and the relationship between Kosnar and Brantmeier, we conclude that the trial court properly exercised its discretion when it concluded the hearsay exception was inapplicable. Furthermore, we decline to accept Brantmeier's suggestion that this court should extend the hearsay exception to include psychotherapists. We are

bound by prior decisions of the Wisconsin Supreme Court. *See* ***State v. Olsen***, 99 Wis. 2d 572, 583, 299 N.W.2d 632 (Ct. App. 1980). Unless and until our supreme court decides to extend this hearsay exception to include statements to psychotherapists, they will remain inadmissible under the medical diagnosis and treatment hearsay exception.

¶27 The trial court also concluded that the WIS. STAT. § 908.03(4) hearsay exception was inapplicable because the specific statements sought to be admitted (Brantmeier's repetition of Mark's alleged statements about women he had sex with) were not made for the purpose of medical diagnosis or treatment. The trial court stated:

> Brantmeier didn't go to this therapist for the purpose of discussing victimization by [Mark]. I mean, she has been in therapy most of her life. … "The primary guarantee of trustworthiness surrounding a declarant's statements offered for purposes of medical diagnosis or treatment is that, because any proposed treatment will be based in part on the exactitude and veracity of those statements, the declarant has a substantial self-interest in being truthful."
>
> I think it is just a reach to say that these [statements] were made for purposes of medical diagnosis or treatment.

¶28 We agree with the trial court's analysis. The record lacks sufficient evidence that Brantmeier was seeking medical diagnosis or treatment related to Mark's sexual activities with other women. Brantmeier may have been able to argue that she repeated to Kosnar Mark's alleged statements about having sex with teens because the statements potentially affected her therapy related to sexual abuse she suffered as a child, but that issue became irrelevant when those statements were admitted as excited utterances. We conclude the trial court did not erroneously exercise its discretion when it concluded the medical diagnosis

and treatment hearsay exception was inapplicable to statements about Mark's activities with other women.

¶29 Finally, Brantmeier argues that her statements to Kosnar fall within the residual hearsay exception, WIS. STAT. § 908.03(24). The residual hearsay exception allows the admission of hearsay statements that are not covered by the other hearsay exceptions included in WIS. STAT. § 908.03, if the statements were made under a situation ensuring "comparable circumstantial guarantees of trustworthiness."

¶30 After considering the proffered hearsay statements, the trial court determined that the statements did not contain a guarantee of trustworthiness and consequently excluded the statements. Although Brantmeier argued that the statements were made during a continuing therapeutic relationship long before charges were initiated or filed against her, the court found that "there is a lot of evidence that Ms. Brantmeier had motive to falsify regarding any monies that she was receiving from [Mark] at the time these statements were made."

¶31 The court went on to cite Mark's testimony that by 1995 he complained to Brantmeier that he could not afford to continue paying her. The court concluded that Mark's reluctance to pay Brantmeier "would certainly constitute a motive for her to falsify and [make] things up about statements he had made in fear that he was going to no longer pay and go to the cops."

¶32 We conclude that the trial court reasonably excluded Brantmeier's statements to Kosnar regarding Mark's sexual activities with other women. There was a sufficient basis in the record for the trial court to conclude that Brantmeier's statements to her psychotherapist lacked the requisite guarantees of trustworthiness to fall within the residual hearsay exception.

B. EXCLUSION OF PSYCHOTHERAPIST'S TESTIMONY ON SEXUAL PREDATORS

¶33 Brantmeier next claims that the trial court erroneously excluded relevant testimony offered by Kosnar listing the general characteristics of a sexual predator. Brantmeier maintains:

> [I]t was the defense's position that the victim preyed upon the Defendant in order to allow him to get in contact with other women for sexual pleasure. It cannot be seriously … disputed that an expert's opinion to the dynamics of a sexual predator could aid a jury in [its] deliberations. The relevance of the sought-after testimony went directly to Defendant's defense.

¶34 In response, the State argues that the trial court correctly concluded that (1) testimony regarding the characteristics of sexual predators was irrelevant to this extortion case; (2) defense counsel had failed to establish an adequate foundation for the testimony; and (3) any slight probative value of the testimony was outweighed by its prejudicial nature.

¶35 Admissibility of evidence is determined by the trial court "subject to the limits of relevancy and adequacy of proof." ***In re Michael R.B.***, 175 Wis. 2d 713, 723, 499 N.W.2d 641 (1993). A trial court possesses wide discretion in determining whether to admit or exclude evidence. ***State v. Evans***, 187 Wis. 2d 66, 77, 522 N.W.2d 554 (Ct. App. 1994). When we review a discretionary decision, we examine the record to determine if the trial court logically interpreted the facts, applied the proper legal standard, and used a demonstrated rational process to reach a conclusion that a reasonable judge could reach. ***State v. Keith***, 216 Wis. 2d 61, 69, 573 N.W.2d 888 (Ct. App. 1997).

¶36 We conclude that the trial court reasonably exercised its discretion when it excluded the proffered evidence. First, if the defense's theory was that the extortion never occurred and that instead Mark used Brantmeier to meet other women, then we fail to see the relevance of information that the jury could use to infer Brantmeier was a sexual predator. The defense theory, supported by testimony from Brantmeier, was that Mark wanted to have sex with many women. If the jury chose to believe this testimony, they could have concluded there was no extortion regardless of whether they decided Mark was a sexual predator.

¶37 Second, Brantmeier made no offer of proof concerning the characteristics of a sexual predator. Without a list of the characteristics, there was no way for the trial court to determine whether there was evidence that Mark possessed any of the characteristics. Furthermore, Brantmeier did not detail for the trial court which characteristics from this list would apply to Mark. Without these offers of proof, we cannot conclude the trial court unreasonably exercised its discretion when it excluded the testimony. *See* WIS. STAT. § 901.03(1)(b) (error may not be predicated on a ruling which excludes evidence unless the party's substantial right is affected and the substance of the evidence was made known to the judge).

C. DENIAL OF RIGHT TO PRESENT A COMPLETE DEFENSE

¶38 Next, Brantmeier argues that she was denied the right to present a complete defense and is therefore entitled to a new trial. We agree with the State that Brantmeier's argument on this issue is conclusory and undeveloped. It consists of two paragraphs that essentially repeat her first two contentions: that the trial court erroneously excluded statements to Kosnar and Kosnar's list of sexual predators characteristics. We conclude that the issue is inadequately

briefed and we do not address it further. *See* ***State v. Pettit***, 171 Wis. 2d 627, 647, 492 N.W.2d 633 (Ct. App. 1992).

D. NEW TRIAL IN THE INTEREST OF JUSTICE

¶39 Finally, Brantmeier contends that she should be afforded a new trial in the interest of justice. She argues: "Defendant would contend that the interest of justice demands that a new trial be ordered. Appellant would contend that had she been able to properly present a defense and had the Court not erroneously excluded evidence in this matter, that a jury would most likely have rendered a verdict of 'not guilty' in this matter."

¶40 This court has the power to order a new trial if we determine that the real controversy has not been fully tried, either because the jury was erroneously not given the opportunity to hear significant testimony or because it heard evidence that should not have been admitted and that evidence clouded a crucial issue. *See* ***State v. Johnson***, 149 Wis. 2d 418, 429-30, 439 N.W.2d 122 (1989). We have reviewed the transcripts of the trial testimony and conclude that no evidence was improperly excluded from the trial. Furthermore, we conclude that the real issue was fully tried and, therefore, deny Brantmeier's request for a new trial in the interest of justice.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.