COURT OF APPEALS
DECISION
DATED AND FILED

January 29, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-1988 **Cir. Ct. No. 00-JV-43A**

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

IN THE INTEREST OF BRANDON J. N.,
A PERSON UNDER THE AGE OF 18:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

BRANDON J. N.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Shawano County: EARL W. SCHMIDT, Judge. *Reversed.*

¶1 PETERSON, J.[1] Brandon J.N. appeals a dispositional order adjudicating him delinquent of theft contrary to WIS. STAT. § 943.20(1)(a) and

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f).

(3)(a). Brandon argues that the trial court erroneously exercised its discretion by admitting a portion of a hearsay statement as a statement against interest. *See* WIS. STAT. § 908.045(4). We agree and, because the statement was the only evidence against Brandon, we reverse the order.

BACKGROUND

¶2 At approximately 11 p.m. on July 25, 2000, Shawano police officer Brian Magee was on bicycle patrol when he heard two loud thumps and the sound of breaking glass coming from a Clark gas station. Magee observed three juveniles fleeing the scene. The juveniles were later identified as Brandon, James F.C., and Bryan P.R.

¶3 Magee saw James throw away a bottle, later determined to be alcohol. Magee also noticed that Bryan was carrying an unopened twelve-pack of Sun Drop soda. A backup officer detained the three boys, while Magee went to the Clark station to investigate. At the station, Magee observed a broken glass door on a Sun Drop soda cooler. The juveniles were arrested and transported to the local police station.

¶4 The owner of the Clark station was contacted. After inspecting the station, the owner indicated that a single can of soda as well as a twelve-pack were missing.[2]

[2] Magee expressed doubt that the owner could have determined whether one can of soda was missing or not. At trial, Magee testified that he put the "one can on the last report, because of the information [he] received from [James]."

¶5 Magee interviewed James at the police station. After the interview, James signed a written statement:

> This evening at about 11:00 PM on 07-25-00 Brandon [N.], Brian (unknown last name) and I were walking around town. Brandon waited at the Sacred Heart playground while Brian [and] I went to the Clark Station on south Main St. I was a look-out for Brian as he kicked out the glass door on a Sun-Drop cooler. Brian kicked the door 3 times then the glass broke. Brian grabbed a 12-pack of Sun-Drop then we took off running. An officer on bike stopped us near the Sacred heart church as we were running from the Clark station.
>
> I had a bottle of Dr. Magillacuddy's (sic) that I threw into the playground area when I saw the officer. I won't say who I got the bottle from.
>
> Early in the evening Brandon pulled on the same cooler door until he was able to reach in [and] get a can of Sun-Drop out.

A delinquency petition was filed against Brandon charging him with theft of the single can of soda.[3]

¶6 Before Brandon's trial, a subpoena was issued to compel James to attend. However, at the commencement of the trial, the State informed the trial court that James was not present. The State asked that, because James was unavailable, his statement be received into evidence as a statement against interest pursuant to WIS. STAT. § 908.045(4).

¶7 The trial court determined that James was unavailable as a witness and admitted his written statement because the statement was inculpatory and

[3] In addition, delinquency petitions were issued against James and Brian. James and Brian were also charged with party to a crime of criminal damage to property and theft contrary to WIS. STAT. §§ 943.01 and 943.20(1)(b).

against James' interest. Officer Magee was the only witness who testified. The court adjudicated Brandon delinquent of theft.

STANDARD OF REVIEW

¶8 Circuit courts are permitted broad discretion in determining whether to admit or exclude evidence. ***State v. Larsen***, 165 Wis. 2d 316, 319-20, 477 N.W.2d 87 (Ct. App. 1991). We review evidentiary decisions under the erroneous exercise of discretion standard and will not overturn the court's ruling if there was a reasonable basis for the decision. ***State v. McConnohie***, 113 Wis. 2d 362, 369-70, 334 N.W.2d 903 (1983).

DISCUSSION

¶9 Brandon argues that the trial court erroneously exercised its discretion by admitting James' hearsay statement as a statement against interest. *See* WIS. STAT. § 908.045(4). Brandon contends that the portion of James' hearsay statement incriminating Brandon should not have been admitted because it was not closely connected with James' statement against interest and was not equally trustworthy.[4]

¶10 Hearsay statements that are against an unavailable declarant's interest are admissible as an exception to the hearsay rule. WIS. STAT. § 908.045(4) defines a statement against interest as:

[4] Brandon also argues that the trial court erroneously exercised its discretion by finding that James was unavailable as a witness. We do not address this argument because our resolution of the statement against interest issue is dispositive of the appeal. ***Sweet v. Berge***, 113 Wis. 2d 61, 67, 334 N.W.2d 559 (Ct. App. 1983).

> A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability or to render invalid a claim by the declarant against another or to make the declarant an object of hatred, ridicule, or disgrace, that a reasonable person in the declarant's position would not have made the statement unless the person believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborated.

¶11 The Judicial Council Committee Note on WIS. STAT. § 908.045(4), referring to ***Meyer v. Mutual Serv. Cas. Ins. Co.***, 13 Wis. 2d 156, 161-65, 108 N.W.2d 278 (1961), states:

> This sub. does not modify the rule of *Meyer* that evidence of so much of a hearsay declaration is admissible as consists of a declaration against interest and such additional parts thereof, including matter incorporated by reference, as the judge finds to be so closely connected with the declaration against interest as to be equally trustworthy. 13 Wis.2d at 164, 108 N.W.2d at 282. 40L W.S.A. 530 (1975).

State v. Pepin, 110 Wis. 2d 431, 434, 328 N.W.2d 898 (Ct. App. 1982).

¶12 Recognizing the ***Meyer*** rule is still law in Wisconsin, we have held that: "the test for the admissibility of such an against-interest statement is whether the exculpatory portions are sufficiently closely connected to the inculpatory portion so as to be equally trustworthy." ***Pepin***, 110 Wis. 2d at 435. In ***Pepin*** the defendant attempted to admit his own statement implicating himself in an armed robbery, but denying involvement in the shootings that occurred at the time of the robbery. The trial court excluded the statement as hearsay. We held that the court erroneously exercised its discretion because it did not apply the proper legal standard found in ***Meyer***. ***Pepin***, 110 Wis. 2d at 437-38. However, we applied the proper standard and concluded that the exculpatory portion of the statement was not closely connected and was therefore untrustworthy. ***Id.*** at 438.

¶13 The portion of James' statement about Brandon is not inculpatory as to the declarant – James. The rest of the statement admitting James' involvement in the theft of the twelve-pack is inculpatory. As held in ***Pepin,*** the test of the admissibility of the non-inculpatory part is whether it is closely connected with the rest of the statement. ***Id.*** at 435. Here, as in ***Pepin***, the trial court did not apply the test.

¶14 Often the introduction of "those parts" of a statement having "some bearing and connection with the admission" serve "to explain or give the proper setting to the declaration," ***Meyer***, 13 Wis. 2d at 162. Here, however, James' statement about Brandon does not explain anything about the "proper setting to the declaration." Instead, the full statement is in two separate parts: (1) James describing how he was a lookout while Bryan kicked in the glass door; and (2) what Brandon had done earlier in the evening. The single sentence incriminating Brandon is set as its own paragraph and refers to a time and event that is distinctly separate from the incident that is described in previous portion of the statement. In short, the sentence is not "closely connected" to the inculpatory portion of the statement.

¶15 Therefore, we conclude that James' statement incriminating Brandon was not admissible as a statement against James' interest under WIS. STAT. § 908.045(4). Because the statement was the only evidence tying Brandon to the allegation in the petition, we reverse the order finding Brandon delinquent.

By the Court.—Order reversed.

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