COURT OF APPEALS
DECISION
DATED AND FILED

April 4, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP205-CR **Cir. Ct. No. 2009CF376**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DANIEL W. FRISCH,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Manitowoc County: DARRYL W. DEETZ, Judge. *Affirmed*.

Before Lundsten, P.J., Sherman and Blanchard, JJ.

¶1 PER CURIAM. Daniel Frisch appeals a felony judgment convicting him of a twelfth offense of operating a motor vehicle while under the influence of an intoxicant (OWI-12th). The issues on appeal all center on the admission at trial of the investigating officer's testimony about out-of-court

statements made by an anonymous informant. For the reasons discussed below, we affirm the conviction.

BACKGROUND

¶2 Shortly after ten o'clock p.m. on the night in question, Keith Christenson contacted police to report having seen an older model, full-sized dark pickup truck weave a bit, and then cross the median and drive on the wrong side of the road before turning into a Dairy Queen parking lot. Christenson did not see the driver and could not give a more detailed description of the pickup.

¶3 City of Manitowoc Police Officer Jeremy Kronforst responded to the dispatch call. He drove around the Dairy Queen, but could not see any vehicle matching the description. A man then approached the officer to inform him that an older model black pickup truck had been driving on the wrong side of the road just before it turned into the Dairy Queen parking lot and almost hit the gas pumps at a nearby gas station. The informant recognized the driver as "Dan" and observed that he appeared intoxicated when he exited the pickup truck. The informant gave the officer two possible addresses at a nearby trailer park where he believed Dan lived and thought he may have been headed when he left the gas station. The officer did not obtain the informant's name or contact information.

¶4 After having dispatch cross-check the name Dan against the two addresses given by the informant and obtaining a match, Officer Kronforst proceeded to the trailer park where he observed Frisch standing outside a dark, older model pickup truck, appearing to retrieve something from the vehicle through the open passenger door. The officer noted that Frisch was exhibiting signs of intoxication. The officer asked Frisch where he had been coming from,

and Frisch told him he had been on the south side of town renting an apartment, and that he was the only one in the vehicle.

¶5 The officer transported Frisch to the police department to perform field sobriety tests, which Frisch failed. While at the police station, Frisch asked the officer what the complaint against him was. After the officer explained, Frisch commented that he may have been on the wrong side of the road while changing his radio. The officer next took Frisch to the hospital for a blood draw, which the parties stipulated showed a blood alcohol level of 0.218.

¶6 On this appeal, Frisch argues that the admission of the anonymous informant's statements through the testimony of the police officer violated the evidentiary rules against the admission of hearsay and of evidence whose probative value is substantially outweighed by its prejudicial effect, and further deprived him of his constitutional right to confront the witnesses against him. Based upon these alleged errors, Frisch contends that he is entitled to a new trial either under the plain error doctrine or in the interest of justice.

STANDARD OF REVIEW

¶7 Circuit courts have broad discretion to admit or exclude evidence and to control the order and presentation of evidence at trial. ***State v. James***, 2005 WI App 188, ¶8, 285 Wis. 2d 783, 703 N.W.2d 727. We will set aside such discretionary determinations only if the circuit court has failed to apply a relevant statute or consider legally relevant factors, or has acted based upon mistaken facts or an erroneous view of law. ***Id.***; ***Duffy v. Duffy***, 132 Wis. 2d 340, 343, 392 N.W.2d 115 (Ct. App. 1986). We will, however, independently determine whether a circuit court has properly interpreted the law, including any applicable constitutional provisions. ***James***, 285 Wis. 2d 783, ¶8.

DISCUSSION

¶8 Hearsay is defined as an out-of court statement—that is, an oral or written assertion or nonverbal conduct intended as an assertion—offered in evidence "to prove the truth of the matter asserted," other than a prior inconsistent statement by a witness or an admission by a party opponent. WIS. STAT. §§ 908.01(3) and (4) (2011-12).[1] Hearsay is generally not admissible unless it falls within one of the statutory exceptions set forth in Chapter 908, which are designed to provide some guarantee of trustworthiness. WIS. STAT. § 908.02; *see also* WIS. STAT. § 908.03(24). Moreover, even statements that would otherwise be admissible as exceptions to the hearsay rule may need to be excluded pursuant to the Confrontation Clause of the Sixth Amendment if they were testimonial in nature. ***Crawford v. Washington***, 541 U.S. 36, 67-68 (2004) (testimonial statements from absent witnesses can be admitted only when witness is unavailable and defendant had prior opportunity to cross-examine, regardless of other indicia of reliability that may be codified in hearsay exceptions). However, out-of-court statements that are admitted for purposes other than the truth of the matter asserted—and thus fall outside of the definition of hearsay—do not raise a Confrontation Clause issue so long as the jury was properly instructed as to the permissible use of the statements. ***Tennessee v. Street***, 471 U.S. 409, 413-15 (1985).

¶9 Here, the State offered the out-of-court statements of the anonymous informant for the stated purpose of showing why the officer went to Frisch's house

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

after being unable to locate any vehicles fitting the description relayed to the officer by dispatch. The circuit court instructed the jury that:

> it's not being offered for the truth of the matter asserted. So the jury should not use the information that's provided to him as proof of what was stated to him. So it should only be used as an explanation as to why the officer did what he did next.

Frisch nonetheless contends that the statements could only have been offered for the truth of the matter asserted because the anonymous informant's observations about the quality of Frisch's driving, his apparent intoxication, and his identity went far beyond simply relating that the officer received information from someone that pointed him to the trailer park. We disagree.

¶10 First of all, we are satisfied that all of the information provided to the officer by the anonymous informant was relevant to explain the officer's subsequent actions. While it may have been possible to more narrowly limit the scope of the out-of-court statement related by the officer, we do not agree that the jury must have considered the statements for an improper purpose. To the contrary, jurors can be presumed to have followed the circuit court's instructions. ***Id.***; *see also* ***State v. LaCount***, 2008 WI 59, ¶23, 310 Wis. 2d 85, 750 N.W.2d 780. Moreover, as will become evident from our discussion of relevance and prejudice below, we are satisfied that even if the informant's statements should be classified as hearsay, their admission was at most harmless error, given the other evidence before the jury.

¶11 Evidence is not admissible unless it is relevant. WIS. STAT. § 904.02. Relevant evidence is defined as that "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." WIS. STAT.

§ 904.01. Evidence that has some relevance may still be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." WIS. STAT. § 904.03.

¶12 Frisch asserts that if the use of informant's statements was properly limited to explaining the officer's actions, the relevance of those statements to establishing the elements of the offense was likewise limited. Given that limited relevance, Frisch then argues that the probative value of the statements was substantially outweighed by the danger of unfair prejudice because the anonymous informant was the only one who identified Frisch as driving the pickup truck.

¶13 The flaw in the appellant's theory is that his own statements to the police officer established both that he had been driving his pickup truck and that he had been driving on the wrong side of the road. Given that the officer found Frisch standing outside of his vehicle with an open door, it was reasonable to assume that Frisch had been driving immediately prior to the police contact, and was therefore the driver described by Keith Christenson.

¶14 For the reasons above, we conclude that there was no error in admitting the statements. And, even if admission were error, it was harmless error. Finally, the interest of justice does not require a new trial.

By the Court.—Judgment affirmed.

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