

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

April 10, 1997

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.

NOTICE

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No. 96-2542-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ARTHUR RICHARD EDWARDS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Clark County:
EDWARD F. ZAPPEN, JR., Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

ROGGENSACK, J. Clark County Officer Arthur Richard Edwards appeals a judgment convicting him of obstructing an officer, contrary to § 946.41, STATS. Edwards claims that the trial court erroneously exercised its discretion, and deprived him of his Sixth Amendment rights, when it admitted his daughter Paula's statements, which he claims are inadmissible hearsay. Edwards also

maintains that the trial court erroneously excluded evidence from a related employee-disciplinary proceeding, and he challenges the sufficiency of the evidence. We conclude the trial court properly exercised its discretion when it refused to admit the findings and conclusions of the grievance committee. However, Paula's statements which implicated her father in obstruction were hearsay and improperly admitted. Because that error was not harmless, we reverse the judgment of conviction and remand the cause for a new trial.¹

BACKGROUND

On the evening of November 1, 1993, Paula Edwards² called the Clark County Sheriff's dispatcher and asked for Dick Edwards. When told he was unavailable, she identified herself as Edwards' daughter and said, "there's been a beating," and left a message for her father to stop by her place as soon as possible. At 7:57 p.m., the dispatcher contacted Edwards and informed him that his daughter had called for him and requested that he come to her residence. Edwards asked to have a City of Loyal police officer meet him near Paula's apartment, and the dispatcher delivered that message to Loyal Officer Joel Flewellen.

Edwards met Flewellen outside Paula's apartment at 8:27 p.m., and asked him to wait in the parking lot while he spoke with his daughter. About twenty minutes later Edwards asked Flewellen to come to the apartment. Upon entering, Flewellen saw that Paula's right eye was black and blue. Based on his experience and training and the color of Paula's eye, Flewellen estimated that the injury was a few hours old. Edwards told Flewellen that the reason Paula had

¹ This appeal is decided by one judge pursuant to § 752.31(2)(f), STATS.

² Paula has a criminal record and was on parole on the date of the incident.

called was because her live-in boyfriend had taken off with some of her money and left her with the bills. He asked his daughter whether the beating she had called about would be the “financial beating” she was taking, to which she responded in the affirmative. Edwards then said that it was not a police matter. Flewellen felt that Paula seemed shaky and nervous during this exchange, and that the conversation seemed rehearsed. He suspected that Paula had been battered by her boyfriend. However, he did not ask Paula how she had gotten the black eye, because he assumed that Edwards would tell him what was going on when they left the apartment. Also, he did not want to accuse Edwards of withholding information from him. He admitted that nothing stopped him from asking questions of Paula or following up, other than his own discomfort with the situation. Just before the officers left, a woman came to the door to inquire whether Paula was okay. Paula said she was, and the woman left. At 9:04 p.m., Edwards notified dispatch that he was cleared from the call and ready for another assignment.

The next day, Flewellen filed an incident report,³ and contacted the Clark County Sheriff’s office to express his concern that Edwards may have been withholding information of domestic abuse. Chief Deputy Matthew Del Fatti investigated, and after seeing the dispatcher’s phone log and Flewellen’s report, sent Edwards a memo requesting that he disclose the substance of his twenty-minute conversation with Paula. On November 4, Edwards told Del Fatti and Sheriff Dale Olson that no report was necessary because it was a personal matter, and reiterated that his daughter had been talking about a financial beating. Del

³ Prior to filing his report, Flewellen consulted with Loyal Chief Markow because he was uncertain how the incident should be classified.

Fatti then asked Edwards to explain Paula's black eye, and Edwards asked whether he had considered the possibility that Paula might have received the black eye from a traffic accident in which she had been involved a few days earlier. Del Fatti asked whether that was in fact the case, and Edwards said no, and explained that the black eye had occurred when Paula was accidentally struck with a briefcase. Edwards filed a report on November 5, explaining that Paula had told him her boyfriend had left her with approximately \$1,000 in bills; her rent was past due; she had no food in the apartment; and no way to get groceries because she had no car.

Not long after this episode, Paula's parole was revoked. On February 23, 1994, while at the Wood County Jail, Paula made a lengthy statement accusing her live-in boyfriend, Joe Troia, of battering her on numerous occasions, including the night of November 1, 1993. Paula also said that her father had suggested she tell the police that the beating she had referenced in her call to the sheriff was a "financial beating." In another statement to police made on June 7, 1994 from the Ellsworth Correctional Center in Racine, Paula elaborated on her father's role in concealing the beating by Troia on the night that Edwards and Flewellen came to her apartment.

On October 27, 1994, the Marathon County District Attorney, as a special prosecutor, filed a complaint charging Edwards with obstructing an officer, contrary to § 946.41(1), STATS. In December of 1994, based on Flewellen's complaint and Del Fatti's investigation, Olson also filed an employee-disciplinary complaint against Edwards, for telling Paula to say that she was taking a financial beating, instead of accurately reporting the battery. After a hearing on January 27, 1995 before the Clark County Grievance Committee, the disciplinary complaint was dismissed. Edwards sought a pretrial ruling on the admissibility of the

grievance committee's findings and decision pursuant to § 908.03(8)(c), STATS. Without deciding whether it was admissible under § 908.03(8)(c), the trial court excluded it pursuant to §§ 904.02 and 904.03, STATS. The trial court also made a pretrial ruling that Paula's out-of-court statements to the police were admissible as statements against interest pursuant to § 908.045(4), STATS., if she invoked the Fifth Amendment at trial.

A jury trial was held on April 25, 1996. As expected, Paula invoked her privilege against self-incrimination, and was declared unavailable pursuant to § 908.04(1)(a), STATS. Her out-of-court statements to the police were then admitted through the testimony of Officers John St. George and Garth Rolbiecki. In addition, Paula's parole agent Mary Mills testified that Paula had told her that her father had suggested she lie to Flewellen. Edwards was convicted of obstruction. He now appeals the trial court's evidentiary rulings and the sufficiency of the evidence to support the verdict. For the reasons set forth below, we affirm in part; reverse in part; and remand for a new trial.

DISCUSSION

Standard of Review.

The question of the admissibility of evidence lies within the sound discretion of the trial court. *State v. Pepin*, 110 Wis.2d 431, 435, 328 N.W.2d 898, 900 (Ct. App. 1982). When we review a discretionary decision, we examine the record to determine if the trial court logically interpreted the facts and applied the proper legal standard. *State v. Rogers*, 196 Wis.2d 817, 829, 539 N.W.2d 897, 901 (1995).

In considering whether the proper legal standard was applied, however, no deference is due. This court's function is to correct legal errors. Therefore, we will review *de novo* the requirements of § 908.045(4), STATS. *See Pepin*, 110 Wis.2d at 437, 328 N.W.2d at 901; *State v. Carter*, No. 94-2001-CR, at 2 n.1 (Wis. March 19, 1997) (applying *de novo* review to the legal standard used in a sentencing context).

Evidentiary Rulings.

When deciding whether to admit evidence alleged to be hearsay in a criminal trial, “The threshold question is whether the evidence fits within a recognized hearsay exception. If not, the evidence must be excluded. If so, the confrontation clause must be considered.” *State v. Bauer*, 109 Wis.2d 204, 215, 325 N.W.2d 857, 863 (1982). Edwards claims that the findings and conclusions of the grievance committee were improperly excluded; that Paula's testimony was inadmissible on evidentiary grounds because it did not qualify as an exception to hearsay under § 908.045(4), STATS., and that the admission of Paula's testimony violated the federal and state confrontation clauses. Each contention will be considered in turn.

1. Grievance Committee Report.

Edwards asserts that the trial court erred when it refused to admit the factual findings and decision of the Clark County grievance committee. He asserts they were admissible pursuant to § 908.03(8)(c), STATS. The trial court, while implicitly agreeing that the proffered evidence may come within the purview of § 908.03(8)(c), excluded them, pursuant to § 904.02 and 904.03, STATS., finding them irrelevant and even if relevant, capable of creating confusion in the issues the

jury was to try. The trial court also ruled against admissibility because their admission would be a “direct invasion into the fact finding function of the jury.”

The trial court found that the findings and decision of the grievance committee were not relevant to whether Edwards obstructed the investigation of his daughter’s battery. Relevant evidence is any evidence which tends to make more or less probable a fact in issue in the action. *State v. Sayles*, 124 Wis.2d 593, 596-97, 370 N.W.2d 265, 267 (1985). The grievance committee apparently heard evidence and found that it was not sufficient to prove that “Officer Dick Edwards knowingly falsified information that he received” It dismissed the complaint on that basis. The findings and conclusions of the committee were their opinions about the merits of the department’s action against Edwards. We agree that the findings and conclusion offered as a “report” did not tend to make Edwards’ theory of the case more or less probable. It was simply the opinion of the committee, based on the evidence it heard.

The trial court also found that even if the proffered evidence were marginally relevant, it could confuse the issues the jury was to determine. Relevant evidence may be excluded if the trial court finds it would cause confusion. *Peeples v. Sargent*, 77 Wis.2d 612, 634, 253 N.W.2d 459, 467 (1977). A trial court’s decision to exclude evidence is a discretionary determination that will not be upset on appeal if it has a reasonable basis and was made in accordance with proper legal standards and the facts in the record. *Lievrouw v. Roth*, 157 Wis.2d 332, 348, 459 N.W.2d 850, 855 (Ct. App. 1990). Here, the trial court found that the jury might be confused and believe they were bound in some way by the results of the grievance committee, so that even if the evidence did have some marginal relevance, the trial court reasoned it should be excluded. The trial

court did not erroneously exercise its discretion when it refused to admit the proffered testimony.

2. *Paula's Statements.*

The State asserts Paula's statements were properly admitted as statements against interest. Out-of-court statements which are against an unavailable declarant's⁴ interest are an exception to hearsay. Section 908.045(4), STATS., defines a statement against interest as:

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 defendant 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.

The hearsay exception for statements against interest is based on the assumption that people do not make statements that are damaging to themselves unless they have good reason to believe that they are true. *State v. Stevens*, 171 Wis.2d 106, 113, 490 N.W.2d 753, 757 (Ct. App. 1992) (review granted). In contrast, “[s]elf-exculpatory statements are exactly the ones which people are most likely to make even when they are false.” *Williamson v. United States*, 512 U.S. ___, 114 S. Ct. 2431, 2435 (1994). Furthermore, “[o]ne of the most effective ways to lie is to mix falsehood with truth, especially truth that seems particularly persuasive because of

⁴ A witness is “unavailable” under § 908.04(1)(a), STATS., when she has been exempted from testifying on the ground of privilege. The parties stipulated that this definition extends to a witness who exercises her Fifth Amendment right, regardless of whether the State has offered immunity. See *State v. Peck*, 143 Wis.2d 624, 644, 422 N.W.2d 160, 168 (Ct. App. 1988).

its self-inculpatory nature.” *Id.* Therefore, exculpatory portions of a generally self-inculpatory statement must be so closely connected to the declaration against interest as to be equally trustworthy in order to be admissible. *Pepin*, 110 Wis.2d at 434, 328 N.W.2d at 899.

The trial court ruled that Paula’s out-of-court statements were admissible. The court reasoned:

In several places throughout the statements proffered by the state, Paula Edwards, while implicating her father, also implicates herself in a plan conceived between them in order to obstruct the investigation relative to the beating which took place. It is consistent with human experience that a victim of a domestic battery will often tell lies in order to protect the perpetrator. The statements, which later implicate them in that ruse, are against both her penal interest and her proprietary interest (her proprietary interest being implication of a family member) She implicates her father, for whom, according to the remainder of the statement, she bears no animosity nor motive to fabricate.

Our analysis is assisted by the capable work of the trial court. We first examine the nature of the statements Paula made and we conclude they are both self-inculpatory and self-exculpatory. Paula’s admission that she lied to police to protect her boyfriend was potentially self-inculpatory and might have implicated her in obstructing. However, Paula’s statements that she told her father about the beating and that *he suggested* that she lie, shift blame to her father and are self-exculpatory. Therefore, under *Pepin*, those statements relating what Edwards allegedly told her to do should not have been admitted unless they were so closely connected to Paula’s statement that she lied to protect her boyfriend that they actually became statements against her *own* interests, as well as Edwards’.

The proper legal standard to apply to each statement was whether each one “so far tended to subject [her] to ... criminal liability ... that a reasonable

person in [her] position would not have made the statement unless the person believed [it] to be true.” Section 908.045(4), STATS. The facts surrounding Paula’s statement about what Edwards said cannot fulfill this standard. Prior to each interview, officers told Paula she was being questioned only as a victim, thereby removing the self-inculpatory potential of her statements. For instance, when she was interviewed in the Wood County jail, Paula was told:

Paula, before we start talking, I’d like to make it clear that there’s an understanding between you and I. That we’re talking about some, an incident or incidents that happened to you, that you’re in fact a victim, an alleged victim in at least one and maybe more crimes that were committed against you and that that’s what the scope of this conversation is about I also understand that you’ve had a conversation with your attorney this morning and that the, that you’re talking to me now because the scope of this statement that I’m about to take is not about anything you could be involved in as far as, as crimes are alleged ... allegedly committed by you.

Similarly, Rolbiecki told Paula, “I am here to interview you as a victim of a battery,” before questioning her at Ellsworth prison. A reasonable person in Paula’s position would not understand that any statement given under those circumstances was likely to subject her to criminal liability for obstruction. Furthermore, having admitted lying to police, a reasonable person in Paula’s position might have proffered an explanation for the lie without necessarily believing it to be true. The trial court’s conclusion that Paula’s statements were contrary to her penal interest is inconsistent with the representations the officers made to Paula and with the substance of her statement about what Edwards allegedly told her to do. Therefore, the trial court erroneously exercised its discretion when it failed to apply the proper legal standard for analyzing penal interests. Paula’s statement that Edwards told her to lie was not an exception to hearsay and was inadmissible under Wisconsin’s rules of evidence.

Harmless Error.

Once it is established that evidence was erroneously admitted, it must be determined whether the error warrants reversal. *State v. Denny*, 163 Wis.2d 352, 359, 471 N.W.2d 606, 609 (Ct. App. 1991). The test for harmless error is whether there is a reasonable possibility that the error contributed to the conviction. *Id.* To determine whether the error contributed to the trial's outcome, the entire record must be examined to ascertain whether there was sufficient evidence to convict Edwards without Paula's statements.

It is not apparent that Edwards would have been found guilty without Paula's out-of-court statements. They were the heart of the State's case, and the only direct evidence that Edwards obstructed. Without Paula's statements, the State's case rested on Edwards spending twenty minutes alone with a daughter, whom several other witnesses believed had been recently beaten, and then telling another officer that Paula called him because of a financial crisis. Again, the issue in this case was *not* whether Paula had in fact been beaten, but whether Edwards helped her cover it up by suggesting she lie to Flewellen. Absent Paula's statements, it is possible a jury would have had a reasonable doubt about whether Edwards knowingly gave false information and told Paula to lie to officers about her battery. Edwards is entitled to a new trial without the admission of Paula's hearsay statements.⁵

⁵ Because we decide this evidentiary issue in Edwards' favor on statutory grounds, we do not address his confrontation clause and sufficiency of the evidence arguments.

CONCLUSION

The trial court properly excluded the findings and conclusions of the grievance committee. However, Paula Edwards' hearsay statements to police that her father had told her to lie about a domestic dispute were not contrary to her penal interest and should have been excluded from evidence. Because the admission of Paula's statements was not harmless, we reverse the judgment of conviction and remand for a new trial.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded with directions.

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

