COURT OF APPEALS DECISION DATED AND RELEASED

July 17, 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

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 97-0481-CR

STATE OF WISCONSIN | **IN COURT OF APPEALS DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOYCE A. NEUMANN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dodge County: ANDREW P. BISSONNETTE, Judge. *Affirmed*.

EICH, C.J.[1] Joyce A. Neumann appeals from a judgment convicting her of operating a motor vehicle while intoxicated (third offense) contrary to § 346.63, STATS. The sole issue on appeal is whether the trial court

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

erred in admitting testimony regarding Neumann's behavior the night she was arrested.

In the early morning hours of June 24, 1995, Dodge County Deputy Sheriff Steven Moul stopped Neumann's car for passing oncoming cars without dimming its bright lights. Moul testified that when he reached the car, Neumann stated she had not been driving. He noted, however, that she was sitting in the driver's seat, the engine was running, her foot was on the brake, and the transmission was in "Drive."[2] After noting Neumann's glassy eyes, slurred speech, and the odor of intoxicants, Moul asked her to perform field sobriety tests. During the course of the tests—which she failed—Neumann became angry and belligerent, swearing at Moul and physically resisting his efforts to place her under arrest. To obtain a blood sample, Moul transported Neumann to a hospital, where her uncooperative and disruptive behavior escalated, and she used profanities and attempted to run away.

Neumann stipulated for purposes of the trial that when Moul stopped her vehicle, she was under the influence of an intoxicant and she had a prohibited blood-alcohol concentration of .216%. The sole issue tried was whether she was driving her car that night.

Neumann moved to exclude evidence of her behavior at the hospital, claiming that it was irrelevant and prejudicial. The trial court denied the motion,

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[2] Whether Neumann was driving her car on the night in question is not an issue on appeal. We mention it only as part of the overall factual situation leading up to the charges before us. In fairness to Neumann, we note her own testimony that the person driving her car when Moul activated the lights on his vehicle immediately stopped the car, shifted to "Park," jumped over Neumann into the passenger's seat and pushed her into the driver's seat. According to Moul, when he returned to Neumann's car after placing her in his squad car, the person who had been in the passenger's seat was gone.

and the case was tried to the court and a jury. She was found guilty and appeals, arguing that the trial court erroneously exercised its discretion in allowing the challenged evidence.

The admission or exclusion of evidence lies within the trial court's discretion. ***State v. Roberson***, 157 Wis.2d 447, 452, 459 N.W.2d 611, 612 (Ct. App. 1990). We uphold the trial court's discretionary determinations unless it can be said that "no reasonable judge, acting on the same facts and underlying law, could reach the same conclusion." ***State v. Jeske***, 197 Wis.2d 905, 914, 541 N.W.2d 225, 228 (Ct. App. 1995). Indeed, we generally look for reasons to sustain the trial court's discretionary decisions. ***State v. Thompson***, 146 Wis.2d 554, 559, 431 N.W.2d 716, 718 (Ct. App. 1988).

In arguing for admission of Neumann's belligerent and disruptive conduct at the hospital, the prosecutor claimed the evidence was relevant because it was "consistent with a person who's going to lie about driving." He stated, "[a] person who will run away from a police officer, [and] who will swear at a police officer" is "a person who lies to a police officer ...." The prosecutor contended that "the jury ought to be made aware of the totality of the circumstances.... [because] it would not be an accurate portrayal of the facts not to bring out her statements in addition to her conduct."

The trial court agreed, stating:

> [H]er credibility on the night in question is one of the essential issues the jury has to assess. [The prosecutor] suggested that they should be able to put her conduct into the context of what happened that evening. And I think that's a fair argument. It's evidence of the ... totality of the circumstances of this offense. It's not some other offense. So the court is going to deny this particular motion *in limine* as to her behavior at the hospital ... which … certainly is relevant. But again, in terms of the totality of

> the circumstances and what type of a person she is, how did she treat the officer ... and would she have lied or wouldn't she. I think what she said to the officer is relevant.

We will not find an erroneous exercise of discretion where, as here, the trial court sets forth the reasons for its decision by agreeing with or acquiescing in counsel's arguments. *See* ***Hagenkord v. State***, 100 Wis.2d 452, 464, 302 N.W.2d 421, 428 (1981). We are satisfied that the trial court exercised discretion in allowing the evidence and that it reached a conclusion a reasonable judge could reach.[3] The court did not exceed the bounds of its discretion in denying Neumann's motion.

Neumann next argues that even if the evidence was relevant, it was still inadmissible because it was unfairly prejudicial—especially evidence of her use of foul language. She begins by pointing to § 904.03, STATS., which provides that relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, and her argument—in its entirety—is that evidence of what she said to Moul was prejudicial because it "invited [the jury] to decide the case on evidence that [she] was disrespectful and insulting to the officer." The State disagrees, contending that the standard for unfair prejudice is not whether the evidence harms the other party's case but whether the evidence influences the outcome of the case by "improper means." *See* ***State v. Johnson***, 184 Wis.2d 324, 340, 516 N.W.2d 463, 468 (Ct. App. 1994).

The trial court did not comment at length on the question of probative value versus possible prejudice. It is well settled, however, that in cases

[3] We note in this regard that the outcome of this case was largely dependent on the jury's assessment of Neumann's credibility because, as the trial court noted in ruling on the admissibility of the evidence, her defense focused solely on her assertion that she had not been driving. And evidence that possibly influenced or assisted a jury in resolving a credibility question—here, evidence of her behavior that night—has probative value. *See* ***State v. Johnson***, 184 Wis.2d 324, 340, 516 N.W.2d 463, 468 (Ct. App. 1994).

where the trial court does not set forth the reasons underlying a discretionary decision "we will independently review the record to determine whether it provides a reasonable basis for the trial court's ruling." ***State v. Clark***, 179 Wis.2d 484, 490, 507 N.W.2d 172, 174 (Ct. App. 1993). Another rule applicable here is that where it appears that the trial court, although not expressly articulating a rationale for its decision, either acquiesced in the explanations or arguments of counsel or was governed by them in its determination, we will not find an erroneous exercise of discretion for the court's failure to explain its decision. ***Hagenkord***, 100 Wis.2d at 464, 302 N.W.2d at 428.

Neumann argued to the trial court that evidence of her language was only slightly probative of her credibility, and prejudicial in that the language would "inflame[] the emotions" of the jurors. The State argued that her behavior, including her language, was "consistent with a person who's going to lie about [whether she was] driving." The prosecutor said:

> I don't think that behavior is consistent with [Neumann's defense that she was] an innocent person who is falsely accused. I think the jury can draw that conclusion. If she takes the stand today and says, "Whoa, this was all a big mistake," why is she so belligerent and actually tries to flee from the officer before she gets a blood sample.

The State's position, in a nutshell, was that a person who would resist and swear at an officer is a person who would lie about her involvement in the offense.

The prosecutor also pointed out to the court that Neumann's concerns about jurors being offended by profanity could be addressed during *voir dire*, and the court itself noted that Neumann could explain her excited conduct after the arrest by repeating her assertion that she was not driving the car. We are

satisfied that the record contains sufficient evidence to support the trial court's discretionary ruling on Neumann's motion.[4]

By the Court.—Judgment affirmed.

This opinion will not be published. RULE 809.23(1)(b)4, STATS.

[4] Neumann also argues that evidence that she swore at Moul was impermissible evidence of "other acts" under § 904.04(2), STATS., which prohibits the introduction of other wrongs or acts to show that a person's behavior conformed with those acts. While Neumann moved to bar any evidence of prior wrongs or criminal conduct in her motion in limine, the record is clear that the parties' arguments to the trial court were limited to whether Neumann had prior criminal convictions that would be introduced at her trial. The prosecutor stated that he did not know of any; Neumann's attorney confirmed this, the trial court's ruling on the motion in limine contains no further references to character evidence, and Neumann refers us to no other place in the record where she objected on such grounds. We need not consider the argument further. ***Wingad v. John Deere & Co.***, 187 Wis.2d 441, 455, 523 N.W.2d 274, 280 (Ct. App. 1994) (when basis of objection in the trial court differs from argument made on appeal, issue is not preserved for appeal); ***State v. Shaffer***, 96 Wis.2d 531, 545-46, 292 N.W.2d 370, 378 (Ct. App. 1980) (argument unsupported by proper citation to the record does not comply with § 809.19(1)(e), STATS., and will not be considered).

Even if the evidence of Neumann's behavior at the hospital constituted "other acts" evidence within the meaning of § 904.04(2), STATS., Neumann was not prejudiced by the admission of such evidence in light of the other substantial evidence supporting her conviction. *See* ***Bere v. State***, 76 Wis.2d 514, 529, 251 N.W.2d 814, 820 (1977).