COURT OF APPEALS
DECISION
DATED AND FILED

January 24, 2001

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-1125-CR **Cir. Ct. No. 99-CT-924**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CARRIE K. ELMER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County: STUART A. SCHWARTZ, Judge. *Reversed and cause remanded.*

¶1 ROGGENSACK, J.[1] Carrie K. Elmer appeals a judgment of conviction entered after a jury found her guilty of operating a motor vehicle while

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (1999-2000). Additionally, all further references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

intoxicated and operating a motor vehicle with a suspended license. At trial, Elmer attempted to show that she had not operated the vehicle and that, instead, she had switched seats with the intoxicated driver after police had stopped them. Her primary contention is that the circuit court committed reversible error by restricting the testimony of the other occupant of the vehicle. Because we conclude that the circuit court erroneously exercised its discretion when it limited relevant testimony which was not unfairly prejudicial to the prosecution and because the State has not carried its burden to show that the circuit court's evidentiary error was harmless, we reverse the judgment of conviction and remand for a new trial.

BACKGROUND

¶2 Two City of Madison police officers observed a vehicle that was speeding, and they activated the squad car's flashing lights. After the vehicle pulled into a parking lot and came to a stop, the officers approached the car. They found Carrie Elmer in the driver's seat and the vehicle's owner, Dean Smith, in the front passenger's seat.

¶3 The officer who approached the driver's side of the car noticed a strong odor of intoxicants. After Elmer told the officer that she had been drinking, he asked her to exit the vehicle so that she could perform field sobriety tests. Elmer failed the tests and was arrested for driving under the influence of an intoxicant. At the police station, Elmer took a breath test, which showed a blood-alcohol level of 0.17, and she admitted she had operated the car.

¶4 At trial, Elmer's theory of defense was that Smith had been driving and that, when the police car began following them with its lights flashing, Smith repeatedly asked her to switch seats so that "he wouldn't get in any more trouble."

Elmer testified that she initially refused to switch places, but that Smith pleaded with her. Then, according to Elmer, once Smith pulled into the parking lot and stopped the car, she "made the movement, and we just switched."

¶5 Smith's testimony corroborated Elmer's version of the events. Smith further testified that after the police arrested Elmer, he immediately went to Elmer's home. Smith told the jury that he was very upset that he had permitted Elmer to take his place and that he wanted to explain the situation to Elmer's father so that he could get her out of jail. Because Elmer's father is deaf, the communication between Smith and Mr. Elmer occurred in writing. The note that Smith wrote to Mr. Elmer read, in pertinent part:

> I don't have a [license] and I've been arrested 8 times for driving without a license. If I got arrested 1 more time I would do a year and a half for driving. So she took my place and it's all my fault cause she didn't want to see me go away that long. I am SO SORRY and nothing I could ever do would make up for it. Please go get her and I'll pay for [whatever] it costs.

As far as their written communication during the visit, Mr. Elmer testified that Smith wrote that he and Carrie Elmer had switched places. However, the circuit court refused to admit the note, itself.

¶6 The testimony provided by Elmer, Smith, and Elmer's father was countered by Elmer's station-house admission that she had operated the car and by the testimony of the police officers who stopped the vehicle. Both officers testified that they were watching the vehicle closely as it pulled into the parking lot and after it was parked. They did not observe any movement by the two passengers in the car. They also did not observe the car itself moving back and forth in a manner indicating that weight was being redistributed. However, neither

officer testified that he saw Elmer prior to the time that the parked vehicle was approached.

¶7 The jury found Elmer guilty on each of the charged counts, and the circuit court sentenced her to thirty days in jail, consecutive, on each count, fined her and revoked her license. On appeal, Elmer challenges the circuit court's ruling that evidence concerning Smith's beliefs about his driving record and the jail time he believed he faced were irrelevant and inadmissible, whether in the form of Smith's testimony or in the written communication to her father.

DISCUSSION

Standard of Review.

¶8 The admissibility of evidence is within the circuit court's discretion. ***State v. Alexander***, 214 Wis. 2d 628, 640, 571 N.W.2d 662, 667 (1997). When we review a circuit court's exercise of discretion, we examine the record to determine whether the circuit 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, 892-93 (Ct. App. 1997).

Relevant Evidence.

¶9 Evidence is relevant if it has any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. WIS. STAT. § 904.01; ***Alexander***, 214 Wis. 2d at 641-42, 571 N.W.2d at 668. Evidence may be relevant even if it is only a "'link in the chain of facts which must be proved to make the proposition at issue appear more or less probable.'" ***State v. Mordica***, 168 Wis. 2d 593, 604, 484

N.W.2d 352, 357 (Ct. App. 1992) (quoting ***Oseman v. State***, 32 Wis. 2d 523, 526, 145 N.W.2d 766, 768-69 (1966)).

¶10 The State moved *in limine* seeking to exclude "any mention of the past driving record or the driving record in general of Mr. Dean Smith, a potential defense witness." The asserted basis for the motion was that any reference to Smith's driving record would be irrelevant under WIS. STAT. § 904.01 and also highly prejudicial and misleading to the jury under WIS. STAT. § 904.03.

¶11 The circuit court ruled in the State's favor, concluding that defense counsel would be permitted to ask Smith why he wanted to change seats and that Smith would be permitted to respond in a general manner that he thought he would be in trouble and go to jail. However, Smith was not permitted to testify to the length of jail time he thought he faced (which was eighteen months per an offer of proof) or to any specifics of his driving record.[2] In addition, Smith's written communication to Mr. Elmer on the night of the incident—which expressly mentioned eight arrests and Smith's fear that he faced eighteen months in jail—was denied admission through the court's decision on the State's motions *in limine* and also in a renewed defense motion to admit it prior to submission of the case to the jury.[3]

[2] The scope of Smith's testimony that the circuit court would permit persisted as an issue during the trial.

[3] Mr. Elmer testified that when Smith came to the house on the night of the incident, Smith "wrote about Carrie being in jail, and about them switching, and having nine convictions." The judge instructed the jury to "disregard any references to any convictions in this matter."

¶12 The circuit court's explanation appears to implicitly accept that Smith's motivation for initiating a switch was relevant because it permitted limited testimony about why Smith was anxious to switch:

> I think it's sufficient for Mr. Smith to indicate that he was concerned that he would go to jail. The length of time that he thought he would go to jail, the nature of his driving record I don't think are relevant. If you're looking for his state of mind, the state of mind is that he thought he would find himself in difficulty and he could go to jail. That's his state of mind.
>
> The length doesn't impact necessarily on his state of mind, and I don't see that that's relevant, and his driving record I don't see as relevant either.

However, the circuit court distinguished between a general explanation of Smith's motive and a more specific explanation of his motive, concluding the latter was not relevant.

¶13 Elmer contends that Smith's "vague and abstract" testimony that he was "in a lot of trouble and … may be getting put away for a while" was a court-constructed response that did not allow the jury to fully assess the likelihood of a switch occurring under all the circumstances of the case. And, it was necessary for the jury to determine whether a switch had occurred in order to evaluate Elmer's defense that she had not operated the vehicle at the time of her arrest.

¶14 We examined relevancy questions similar to those presented here in ***Mordica***. There, the circuit court ruled that Mordica, who was accused of possession with intent to deliver, could testify that he made statements incriminating himself as the owner of drugs in order to shield a friend from possible prosecution because he knew that the friend was on probation for a felony conviction, but the circuit court refused to permit him to testify that the friend's conviction was a felony *drug* conviction. ***Mordica***, 168 Wis. 2d at 601, 484

N.W.2d at 355. We concluded that the circuit court had erroneously exercised its discretion, and as we explained, evidence which travels to the heart of a defendant's defense (*i.e.*, that he was trying to shield a friend from the potential of another drug-related conviction when he said the drugs were his) is relevant. ***Id.*** at 597-98, 484 N.W.2d at 354.

¶15 As we did in ***Mordica***, we conclude here that there is no relevancy distinction under WIS. STAT. § 904.01 between Smith's motivation in general and Smith's motivation in detail. A complete explanation of why Smith would ask Elmer to switch places with him and an understanding of the intensity with which he made the request could have a tendency to make the purported switch more probable. For example, if the jury found that Smith's explanation showed he sincerely believed that he faced eighteen months of jail time, then that may have made it appear more reasonable to the jury both that he "pleaded" with Elmer to change places with him and that his requests caused Elmer to do as he asked. It also helps to explain why Elmer said Smith was a "little panicked" when he asked her to switch places and therefore, it could have provided the link in the chain of facts necessary to the jury's determination of whether the purported switch occurred. Accordingly, we conclude that Smith's specific belief about potential jail time was relevant within the meaning of § 904.01 to whether Elmer had operated the vehicle, an element of all the charged offenses on which the State bore the burden of proof. We also conclude that the circuit court erroneously exercised its discretion because it applied the wrong legal standard in deciding that Smith's testimony that he believed he was facing eighteen months in jail because of his prior record was not relevant.

Unfair Prejudice.

¶16 The State argues, in the alternative, that even if the evidence is relevant, it was still properly excluded because it was unfairly prejudicial to the State's case. It is true that even relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice." WIS. STAT. § 904.03; ***State v. McCall***, 202 Wis. 2d 29, 33, 42, 549 N.W.2d 418, 419, 423 (1996). However, "unfair prejudice" does not apply to evidence that simply damages the opposing party's case because damage to the other side of a legal controversy will always result from the introduction of relevant evidence that supports the theory of the proponent's case. ***Mordica***, 168 Wis. 2d at 605, 484 N.W.2d at 357. Stated another way, "[e]vidence which *fairly prejudices* the cause of the party against whom it is offered *is* relevant." ***Id.*** at 604, 484 N.W.2d at 357 (citing ***Christensen v. Economy Fire & Cas. Co.***, 77 Wis. 2d 50, 61-62, 252 N.W.2d 81, 87 (1977)) (emphasis added). Unfair prejudice applies only to evidence that, if introduced, would "have a tendency to influence the outcome by improper means." ***Mordica***, 168 Wis. 2d at 605, 484 N.W.2d at 357.

¶17 According to the State, Smith's asserted belief about the jail time he faced in light of his record was inaccurate. The State contends it would have been unfairly prejudicial to permit Smith to testify to his *mistaken* belief, and it would have been extremely confusing to the jury if Elmer's trial digressed into a discussion about the details of Smith's driving record and potential penalties that he faced. However, contrary to the State's argument, this case does not present the question of whether we should defer to the circuit court's limitation of Smith's explanation of his motive for initiating the switch with Elmer under WIS. STAT.

§ 904.03.[4] The circuit court's on-the-record explanation for its discretionary decision was that the proffered evidence was irrelevant, and relevancy is a question to be determined under WIS. STAT. § 904.01.

¶18 Moreover, we disagree that the probative value of the excluded evidence is substantially outweighed by the unfair prejudice to the State or by the potential for confusion. Under Elmer's theory of the case, what makes Smith's belief relevant is that it caused him to plead with her to switch. That his belief may have been mistaken does not affect his motivation for making the request or the intensity with which he made it. Additionally, the State has pointed out nothing about Smith's belief about his driving record and the penalties he believed he faced in the event of another conviction which would have caused the jury to decide the case on an improper basis. Accordingly, we conclude that the State has proffered no arguments which would cause us to conclude the circuit court would have concluded that the evidence was unfairly prejudicial.

Harmless Error.

¶19 The State also contends that even if the evidence concerning Smith's specific motivations for initiating the purported switch should have been admitted, the circuit court's exclusion of the evidence was harmless error under WIS. STAT. § 805.18(2)[5] and the applicable case law. The State argues that there is only a

[4] When the circuit court fails to explain its reasons for a discretionary decision on the record, we may independently review the record to determine whether it provides a reasonable basis for the court's conclusion. ***State v. Clark***, 179 Wis. 2d 484, 490, 507 N.W.2d 172, 174 (Ct. App. 1993).

[5] WISCONSIN STAT. § 805.18(2) states in relevant part:

(continued)

negligible difference between (1) Smith's actual testimony that he was in "a lot of trouble" and that he may "be getting put away for a while," and (2) Smith's excluded testimony that when the purported switch occurred, he believed he faced eighteen months in jail on account of his past driving record.

¶20 To determine whether the "substantial rights" of a party have been affected, we use the harmless error test. ***Heggy v. Grutzner***, 156 Wis. 2d 186, 196, 456 N.W.2d 845, 850 (Ct. App. 1990). An error is harmless if there is no reasonable possibility that the error contributed to the conviction. ***State v. Patricia A.M.***, 176 Wis. 2d 542, 556, 500 N.W.2d 289, 295 (1993). The beneficiary of the error, here the State, has the burden of proving that an error is harmless. ***State v. Dyess***, 124 Wis. 2d 525, 543, 370 N.W.2d 222, 231-32 (1985).

¶21 We conclude that the State has not carried its burden to show that the error was harmless. Assuming that the jury's decision came down to a question of whether it believed the purported switch occurred, the jury was faced with a credibility determination. Although there was sufficient evidence to support the conviction, the evidence the State presented on the element of Elmer's operation of the vehicle, when viewed as part of the total record, does not overwhelmingly point to her guilt. For example, neither officer had seen Elmer in the driver's seat

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> No judgment shall be reversed or set aside or new trial granted in any action or proceeding on the ground of selection or misdirection of the jury, or the improper admission of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court to which the application is made, after an examination of the entire action or proceeding, it shall appear that the error complained of has affected the substantial rights of the party seeking to reverse or set aside the judgment, or to secure a new trial.

prior to their approach of the vehicle after it was parked; Elmer did not know how to drive a manual shift vehicle; her purse was on the right hand side of the passenger's compartment when the officer asked her for identification; the rear window provided limited visibility of the occupants of the vehicle; and both she and Smith testified that she had not been driving. Had more detailed evidence concerning Smith's motive for initiating the purported switch been presented, it could have explained why Elmer said Smith "pleaded" with her to change places and made that testimony more credible. Because the verdict turned on the credibility of Smith's and Elmer's testimony, we conclude that the State has not established that there is no reasonable possibility that the exclusion of the evidence contributed to Elmer's conviction. As a result, we remand the case for a new trial to allow the presentation of evidence about the consequences Smith believed he faced if he were convicted of another driving violation.[6]

CONCLUSION

¶22 Because we conclude that the circuit court erroneously exercised its discretion when it limited relevant testimony which was not unfairly prejudicial to the prosecution and because the State has not carried its burden to show that the circuit court's evidentiary error was harmless, we reverse the judgment of conviction and remand for a new trial.

By the Court.—Judgment reversed and cause remanded.

[6] Because we are remanding this case on the basis that the circuit court erroneously determined that the evidence at issue was irrelevant, we do not reach Elmer's further constitutional argument or her request that we order a new trial in the interests of justice under WIS. STAT. § 752.35.

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