

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

August 31, 1995

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.

**Nos. 94-1801-CR
94-2487-CR**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

PEGGY SUE LOCKETT,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Dane county: MICHAEL B. TORPHY, JR., Judge. *Affirmed.*

Before Gartzke, P.J., Dykman and Sundby, JJ.

PER CURIAM. Peggy Sue Lockett appeals from a judgment of conviction and from an order denying her postconviction motion for a new trial on the ground of newly discovered evidence. Lockett makes three arguments: (1) the new evidence required the trial court to grant a new trial; (2) the trial court erred by concluding that a hearsay statement exculpating Lockett was not

a statement against penal interest under § 908.045(4), STATS.;¹ and (3) the trial court erred by concluding that a convicted defendant is not an accused person for the purposes of admitting a third-party confession. We conclude that the trial court properly exercised its discretion when it denied Lockett's motion for a new trial and therefore affirm.

BACKGROUND

Lockett was convicted of the retail theft of two fur coats from Savidusky Furquarters as a repeater, contrary to §§ 943.50(1m), 939.05 and 939.62, STATS. She was also convicted of obstructing an officer, contrary to § 946.41(1), STATS.

Lockett asserts that newly discovered evidence that another person confessed to the theft makes a different result upon retrial a reasonable probability. Lockett presented the affidavits of three Dane County Jail inmates who averred that another inmate, Thelma Smith, admitted that she stole the fur coats from Savidusky's, and a fourth inmate's affidavit, claiming that Smith confessed that she sold the fur coats. The trial court denied Lockett's motion for a new trial. Lockett appeals.

HEARSAY EXCEPTIONS

¹ Section 908.045(4), STATS., provides:

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.

Lockett concedes that the affidavits contain hearsay. She argues, however, that the hearsay statements were statements against penal interest under § 908.045(4), STATS., and, thus, are admissible. Section 908.045(4) creates an exception to the hearsay rule if declarant's statement is against his or her penal interest and the declarant is unavailable. A statement against penal interest offered to exculpate the accused must, however, be corroborated. Corroboration must be sufficient to allow a reasonable person to conclude that the statement could be true given all the facts and surrounding circumstances. *State v. Anderson*, 141 Wis.2d 653, 656, 416 N.W.2d 276, 277 (1987).

Smith denies that she made the statements or committed the crime. Her physical appearance is not consistent with Julie Savidusky's description of the thief as a slim woman with bright orange hair and a chipped front tooth. However, that description closely matches Lockett's appearance. There is no other evidence corroborating the affidavits; therefore, the allegation that Smith stole the furs lacks sufficient corroboration to allow a reasonable jury to conclude that the affidavits could be true.

Lockett and her male accomplice were the only customers in Savidusky's store at the time the two fur coats were stolen. Because their actions were suspicious, Savidusky made an inventory check immediately after Lockett had left the store and discovered that two fur coats were missing. The facts and circumstances surrounding the theft of the fur coats make it unlikely that Smith was involved in the crime. Because the affidavits were not corroborated, the trial court correctly excluded them. There was, therefore, no evidence supporting Lockett's claim of newly discovered evidence and the trial court correctly denied Lockett's motion for a new trial.

By the Court.—Judgment and order affirmed.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.