

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**June 7, 2012**

Diane M. Fremgen  
Clerk of Court of Appeals

**NOTICE**

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2010AP3122-CR**

**Cir. Ct. No. 2007CF1445**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**JAMES P. BOHANAN,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Dane County:  
STUART A. SCHWARTZ, Judge. *Affirmed.*

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

¶1 PER CURIAM. James Bohanan appeals a judgment of conviction for first-degree intentional homicide. Bohanan asserts that the circuit court erred by: (1) precluding defense counsel from questioning a witness about the victim's involvement in drug dealing; and (2) admitting hearsay testimony by Bohanan's

girlfriend's employer indicating that the girlfriend had said she was not coming to work because Bohanan had been involved in a homicide. Bohanan contends that the evidentiary errors denied him his constitutional rights to confrontation and to a fair trial. We disagree, and affirm.

### *Background*

¶2 In 2007, Bohanan was charged with first-degree intentional homicide based on the shooting death of Kevin Cobbins. At trial, several witnesses testified that they saw Bohanan shoot Cobbins multiple times, including several shots at close range after Cobbins had fallen to the ground. Additionally, Sherise Blair testified that Blair and Cobbins had been romantically involved at the time of the shooting, and that prior to that Blair and Bohanan had been romantically involved. Blair testified that Bohanan was Cobbins' only enemy at the time of the shooting. During cross-examination, defense counsel attempted to elicit testimony from Blair as to Cobbins' involvement in drug dealing. The State objected on relevance grounds. At sidebar, defense counsel argued that he was trying to establish that it was possible Cobbins had enemies other than Bohanan. The court sustained the State's objection.

¶3 The State also presented testimony by Arvetta Busch, who testified that she was romantically involved with Bohanan at the time of the shooting. Busch testified that, immediately following the shooting, she and her children moved from Madison to Chicago with Bohanan. Busch testified about a phone call she made to her work after she moved to Chicago, but denied stating that she was not coming back to work because Bohanan had committed a shooting. On cross-examination, Busch stated that she told her supervisor, Michael Wortham,

that she was not returning to Madison because people thought Bohanan was the shooter, and she feared retaliation.

¶4 The State called Wortham to the stand. Wortham testified that Busch called him a day or two after not appearing for work. Over defense counsel's hearsay objection, the court allowed the State to question Wortham about what Busch said on the phone. Wortham testified that Busch told him that she was not returning to work because Bohanan had committed a shooting. He also stated that, during a subsequent three-way conversation between Busch, Wortham, and Wortham's boss, Busch stated that Bohanan had been involved in a homicide. On cross-examination, Wortham stated that Busch did not say that Bohanan had committed a shooting, but stated only that Bohanan had been in an altercation.

¶5 Bohanan was convicted, and was sentenced to life in prison with no eligibility for release to extended supervision. Bohanan appeals his conviction and sentence.

#### *Standard of Review*

¶6 A circuit court's evidentiary rulings are subject to review for an erroneous exercise of discretion. *State v. Mainiero*, 189 Wis. 2d 80, 97-98, 525 N.W.2d 304 (Ct. App. 1994). Whether a circuit court's evidentiary rulings violated a defendant's constitutional rights is a question of law that we review de novo. See *State v. Hale*, 2005 WI 7, ¶41, 277 Wis. 2d 593, 691 N.W.2d 637.

*Discussion*

¶7 Bohanan asserts that two evidentiary errors at trial denied him his constitutional rights to confrontation and to a fair trial. Thus, Bohanan asserts, he is entitled to a new trial. We disagree.

¶8 Bohanan argues that the circuit court denied him his constitutional rights to confrontation and to present a defense by preventing him from eliciting testimony from Blair that Cobbins was involved in dealing drugs. *See State v. Evans*, 187 Wis. 2d 66, 82-83, 522 N.W.2d 554 (Ct. App. 1994) (“The due process rights of a criminal defendant are[,] ‘in essence, the right to a fair opportunity to defend against the State’s accusations.’ The right to present evidence is rooted in the Confrontation and Compulsory Process Clauses of the United States and Wisconsin Constitutions.” (citation omitted)). Bohanan asserts that testimony that Cobbins had been involved in dealing drugs would have been relevant other acts evidence, citing WIS. STAT. § 904.04(2) (2009-10).<sup>1</sup> He argues that the testimony was necessary for his defense, to negate the false impression that Bohanan was necessarily Cobbins’ only enemy and thus the only one who would have killed him. Bohanan argues that the court erred by preventing him from asking the question because it was the jury’s role to assess the credibility of the answer, citing *State v. Yang*, 2006 WI App 48, ¶¶15-16, 290 Wis. 2d 235, 712 N.W.2d 400.

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

¶19 The problem with Bohanan's argument is that there is no evidence in the record suggesting that Blair would have testified that Cobbins was involved in drug dealing. The testimony leading up to the State's objection was the following:

Q. Now, when you say that Mr. Cobbins had no enemies except [Bohanan], that's based upon your limited knowledge of Mr. Cobbins's affairs, right?

A. Yeah.

Q. Were you working during that time period?

A. Yeah.

Q. Was Mr. Cobbins working during that time period?

A. No.

Q. So there were many, many hours when you're at work and Mr. Cobbins was doing whatever he wanted to do, right?

A. Yeah.

Q. On July 27th of '07 did – did you use any drugs with Mr. Cobbins?

A. No.

Q. And was it your practice to use drugs?

A. No.

Q. Did Mr. Cobbins generally use drugs in front of you?

A. No.

Q. And do you – Have you ever been in a position to observe how Mr. Cobbins would obtain the drugs that he would be using?

A. No.

The State then objected, and defense counsel requested to approach the bench. At sidebar, the following exchange took place:

[Defense counsel]: Your Honor, I'd like to – My next question would be whether or not she was in a position to observe Mr. Cobbins engaging in drug trafficking or if she became aware of that in any way, shape or form.

THE COURT: And the relevance?

[Defense counsel]: She testified on direct that Mr. Cobbins had no enemies other than Mr. Bohanan, and I think it's relevant to show that if you engage in drug trafficking you make enemies, and I think this is the kind of showing that Mr. Cobbins engaged in a dangerous type of activities where enemies are created.

....

THE COURT: Yeah. I don't see how asking whether he was a drug dealer or not, even if she were to say yes, leads to the next question that you would then presumably have to ask [her], did he have any enemies as a result of his drug trafficking.

I think you can ask her if she is aware of any other enemies that he's had, and I don't have any problems with that, but I don't see the relevance of going into whether or not he was dealing drugs.

And I certainly wouldn't prohibit you from asking her if she knows about any other activities that he may have engaged in that would have created a situation where he had other enemies, but I don't think we need to be talking about drug dealing.

¶10 Bohanan argues that, had he been allowed to question Blair about whether Cobbins had been involved in drug dealing, either a yes or no answer would have aided his defense. He asserts that, if Blair answered yes, it would have established that Cobbins may have had other enemies based on Cobbins' involvement in dealing drugs. If Blair answered no, Bohanan asserts, that answer would have been implausible and would have undermined Blair's credibility. However, we do not agree that, if Blair had answered that Cobbins was not involved in drug dealing, that answer would have been incredible and impeached Blair's credibility. Bohanan points to no evidence in the record establishing that

Cobbins was a drug dealer. Indeed, if that evidence already existed, Blair's testimony to that effect would have been unnecessary. Additionally, it appears just as likely that Blair would have answered that she had no knowledge of whether Cobbins had been involved in dealing drugs, which also would not have lacked credibility on its face. In sum, because there was no offer of proof to establish that Blair would have testified that Cobbins was involved in dealing drugs, or would have provided an incredible response, we have no basis to conclude that the circuit court's evidentiary decision in any way denied Bohanan his constitutional rights.

¶11 Next, Bohanan asserts that the circuit court denied him the right to confrontation by admitting hearsay in the form of Wortham's testimony that Busch told him she was not returning to work because Bohanan had been involved in a homicide. Bohanan argues that Wortham's testimony as to Busch's statement during their telephone conversation was hearsay that was not subject to any exception, and that the circuit court erred by allowing the testimony as Busch's prior inconsistent statement. *See* WIS. STAT. § 908.01(3) and (4)(a)1. (a statement is not hearsay if the declarant testifies at trial, is subject to cross-examination concerning the statement, and the statement is inconsistent with the declarant's testimony). Bohanan asserts that Busch's statement was not a prior inconsistent statement because there was no foundation for that statement, such as testimony that Bohanan had actually told Busch that he was involved in the shooting.

¶12 Bohanan's argument misses the mark. Busch testified that she did not tell Wortham that Bohanan had committed the shooting. Wortham's testimony that Busch had told him that Bohanan had been involved in a homicide was a prior statement by Busch that was inconsistent with her trial testimony. The testimony was therefore not hearsay under WIS. STAT. § 908.01(4)(a)1. It was offered to

impeach Busch's credibility, not to establish the truth of Busch's statement to Wortham. Accordingly, the foundation for Busch's statement to Wortham was not relevant.<sup>2</sup>

¶13 Bohanan also argues that, because Wortham admitted on cross-examination that Busch said only that Bohanan had been involved in an "altercation," Busch's statement to Wortham was not inconsistent with her trial testimony. However, Busch testified that she did not remember telling Wortham that Bohanan had been in an altercation, and that she told Wortham she was not returning to work because Bohanan had been accused of murdering someone. Wortham's testimony on cross-examination did not alter the fact that Wortham was offering a prior inconsistent statement that was made by Busch. We affirm.

*By the Court.*—Judgment affirmed.

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

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<sup>2</sup> Bohanan acknowledges that defense counsel did not provide this explanation for his hearsay objection at trial, but asserts that the admission of that testimony was plain error. See *State v. Sonnenberg*, 117 Wis. 2d 159, 176-77, 344 N.W.2d 95 (1984) (a trial error is plain error if it is obvious and deprived the defendant of a constitutional right). Bohanan asserts that the error was not harmless because Busch's relationship with Bohanan made Busch's statement particularly damaging to the defense. See *State v. Jorgensen*, 2008 WI 60, ¶23, 310 Wis. 2d 138, 754 N.W.2d 77 (if evidentiary error was plain error, burden shifts to State to show error was harmless, that is, to "prove beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error" (citations omitted)). However, because we determine that the testimony was not inadmissible hearsay, we need not reach these arguments.



