COURT OF APPEALS
DECISION
DATED AND RELEASED

January 11, 1996

NOTICE

No. 95-1871-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RANDAL H. KUHNKE,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Vernon County: MICHAEL J. ROSBOROUGH, Judge. *Reversed and cause remanded with directions*.

DYKMAN, J. This is a single-judge appeal decided pursuant to § 752.31(2)(c), STATS. Randal H. Kuhnke appeals from a judgment convicting him of operating a motor vehicle while intoxicated, contrary to § 346.63(1)(a), STATS., and operating a motor vehicle after revocation, contrary to § 343.44(1), STATS. Kuhnke raises two issues on appeal: (1) whether the trial court erroneously exercised its discretion when it excluded a statement against interest because under § 908.045(4), STATS.,[1] it was not corroborated; and

[1] Section 908.045(4), STATS., provides that the following is not excluded by the hearsay

(2) whether the court erroneously exercised its discretion when it gave the *falsus in uno* jury instruction. We conclude that the court erroneously exercised its discretion when it excluded the statement against interest because the court applied the wrong legal standard of corroboration. We also conclude that the court did not erroneously exercise its discretion when it gave the *falsus in uno* instruction. Accordingly, we reverse the judgment and remand for a new trial.

BACKGROUND

On the evening of May 27, 1994, Randal Kuhnke had been drinking at a tavern with his brother, Rick Kuhnke, and other family members. Randal and Rick left the tavern at about 11:30 p.m. and drove home together in Randal's car.

On the way home, the car was involved in a one-car accident. Randal testified that the two of them were not hurt, and walked to Randal's home. Chad Kuhnke, Randal's son, testified that he was home when the brothers arrived and that Rick told him that he wrecked the car. Randal testified that during this conversation, he was looking for a chain to pull the car.

Randal and Rick drove back to the scene of the accident in Randal's van. They tried to push the car upright but were unsuccessful so they returned to Randal's home. Along the way, Randal's neighbors saw the van and noted that Rick was driving it. The neighbors testified that Rick drove the van

(..continued)
rule if the declarant is unavailable as a witness:

> 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 ... 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.

back to the scene of the accident by himself. Rick left the scene before the police arrived.

Vernon County Deputy Sheriff Scott Bjerkos went to Randal's home after he learned of the accident and that the car was registered in Randal's name. At the house, Deputy Bjerkos found that Randal was intoxicated. He arrested Randal, and after Randal waived his Miranda rights, he questioned him further about the accident. Randal said that he was driving the car at the time of the accident.

Several days after the accident, Randal told Deputy Bjerkos that he had lied to him on the night of the accident and that it was Rick, not he, who was driving the car at the time of the accident. He stated that the reason he had lied earlier was to protect his brother. Deputy Bjerkos later questioned Rick for the first time. Rick told Deputy Bjerkos that he was the driver of the car at the time of the accident. Subsequently, Rick left Wisconsin.

Randal was charged with driving while intoxicated and driving with a revoked license. During his trial, he maintained that he was not the driver on the night of the accident. He offered evidence that Rick admitted to driving the car when the accident occurred. The trial court, however, refused to admit the evidence, reasoning that it did not qualify as an exception to the hearsay rule under § 908.045(4), STATS., because there was no "extrinsic corroboration" of Rick's admissions. Moreover, the court gave the *falsus in uno* instruction to the jury because Randal lied about a material point in at least one of his statements. The jury convicted Randal. Randal appeals.

STATEMENTS AGAINST INTEREST

The admissibility of hearsay evidence rests within the sound discretion of the trial court. ***State v. Stevens***, 171 Wis.2d 106, 111, 490 N.W.2d 753, 756 (Ct. App.), *review granted*, ___ Wis.2d ___, 494 N.W.2d 210 (1992). A court erroneously exercises its discretion if its decision is based upon an erroneous view of law. ***Id.*** The question of admissibility of hearsay evidence is one of law. ***Id.***

Although hearsay evidence is generally not admissible, under § 908.045(4), STATS., a statement against interest is admissible if the declarant is not available as a witness. A statement which exposes the declarant to criminal liability and offered to exculpate the accused must be corroborated. ***Id.*** Corroborating evidence of another's confession must permit a reasonable person to conclude, in light of all of the facts and circumstances, that the confession could be true. ***State v. Anderson***, 141 Wis.2d 653, 662, 416 N.W.2d 276, 280 (1987). The trial court should not independently assess the defendant's credibility when deciding whether testimony sufficiently corroborates a statement against interest unless the testimony is incredible as a matter of law. ***State v. Anderson***, 137 Wis.2d 267, 275, 404 N.W.2d 100, 103 (Ct. App.), *aff'd*, 141 Wis.2d 653, 416 N.W.2d 100 (1987). The court should consider the spontaneity of the confession, the existence of corroboration, the extent to which the hearsay statement is self-incriminating and against the declarant's penal interest, and the declarant's availability to testify at trial. ***State v. Brown***, 96 Wis.2d 238, 243-45, 291 N.W.2d 528, 531-32, *cert. denied*, 449 U.S. 1015 (1980). A statement against interest need not be made to one adverse to the declarant but it may be made to one united in interest or to a neutral party. ***Meyer v. Mutual Service Casualty Ins. Co.***, 13 Wis.2d 156, 164, 108 N.W.2d 278, 282 (1961).

Rick's statement subjected him to criminal liability and, therefore, was against his penal interest. Rick is also unavailable to testify. To be admissible, however, his statement must be corroborated. The trial court erred when it concluded that the standard of corroboration required under § 908.045(4), STATS., is "extrinsic corroboration." The correct standard is whether, in light of all of the facts and circumstances, a reasonable person could find the statement to be true. ***Anderson***, 141 Wis.2d at 662, 416 N.W.2d at 280. After the accident and on the same night, Rick drove Randal's van several times. Because he drove illegally shortly after the accident, a reasonable person could conclude that he was doing so at the time of the accident. Additionally, the fact that Rick left Wisconsin could lead a reasonable person to believe that Rick was driving illegally that night, and is now escaping criminal liability. Because the trial court applied the wrong legal standard to decide the admissibility of this statement against interest, we conclude that it erroneously exercised its discretion when it excluded it. Accordingly, we reverse and remand for a new trial.

FALSUS IN UNO

Randal argues that the trial court erroneously exercised its discretion when it gave the jury the *falsus in uno* instruction. This instruction provides:

> If you become satisfied from the evidence that any witness has willfully testified falsely as to any material fact, you may, in your discretion, disregard all the testimony of such witness which is not supported by other credible evidence in the case.

WIS J I—CRIMINAL 305.

The *falsus in uno* instruction is appropriate only if a witness willfully and intentionally gives a false testimony on a material fact to the case. ***Ollman v. Wisconsin Health Care Liability Ins. Plan***, 178 Wis.2d 648, 659, 505 N.W.2d 399, 402 (Ct. App. 1993). The *falsus in uno* instruction may be appropriate even if a witness later admits to having testified falsely. ***Id.*** at 660-61, 505 N.W.2d at 403. It is inappropriate, however, when there are mere discrepancies in the testimony that are most likely attributable to defects of memory or mistake. ***Id***. at 659-60, 505 N.W.2d at 402. The decision to give the instruction rests within the broad discretion of the court. ***Id.*** at 658, 505 N.W.2d at 402.

The trial court knew that Randal admitted to driving the car but later claimed that he did not. From this, the court could reasonably conclude that Randal willfully and intentionally gave false testimony on a material fact to the case—the identity of the driver. Consequently, we cannot conclude that the court erroneously exercised its discretion when it gave this instruction.

By the Court.—Judgment reversed and cause remanded with directions.

Not recommended for publication in the official reports. *See* RULE 809.23(1)(b)4, STATS.