State of Wisconsin
Court of Appeals
District I
Appeal No. 2009AP003095 - CR

State of Wisconsin,

Plaintiff-Respondent,

v.

Devon Sheriff,

Defendant-Appellant.

Appeal from a judgment of conviction entered in the Milwaukee County Circuit Court, the Honorable Rebecca Dallet, presiding

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Defendant-Appellant's Brief

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Statement on Oral Argument and Publication

The issue presented by this appeal controlled by well-settled law and, therefore, the appellant does not recommend oral argument or publication.

Statement of the Issues

I. Whether the trial court abused its discretion when it excluded statements made by a co-defendant (Stepney) to police detectives where: (a) the statements were against Stepney's penal interest; (b) the statements exculpated the appellant (Sheriff); and, (c) the statements were corroborated by the physical evidence and by Sheriff's trial testimony.

Answered by the trial court: No.

II. Whether the trial court abused its discretion in excluding Stepney's statement's to the police, where the statements were inconsistent with the State's position that Stepney's statements to the police were made during the course of, and in in furtherance of, a conspiracy to to deliver crack cocaine.

Answered by the trial court: No.

Summary of the Argument

I. The trial court abused its discretion in excluding testimony about the statements that Stepny made to Detective Kohnert. These statements totally exonerated Sheriff. According to Stepney, Sheriff had nothing to do with the drug transaction. All agree that Stepny was unavailable (because he was out on a warrant). Likewise, there is no suggestion that Stepny's statements were not against his penal interest. The issue here, because the statements were offered to exculpate Sheriff, is whether Stepny's statements were corroborated (as is required by the statute). There was ample corroboration in the record. Stepny's interrogation was audio recorded, and therefore there can be no dispute about *what* Stepny said to the detectives. Moreover, Sheriff testified at trial consistently with what Stepny told the detectives-that is, that he (Sheriff) had nothing to do with the drug transaction. Finally, Stepny's statements were consistent, in many respects, with the State's own evidence. Stepny's cellular telephone was used to arrange the deal; Stepny took the money from the undercover officer, and he had it on him when he was searched; and Stepny was the one who handed the baggie of cocaine to the undercover officer. Thus, the trial court abused its discretion in excluding the testimony. The error is not harmless because, at the very least, there is a reasonable possibility that had the jury heard testimony about Stepny's interrogation, Sheriff would have been found not guilty.

II. Stepny's statements to Detective Kohnert are also admissible to impeach the conspiracy statements of Stepny admitted through Officer Ayala. There is an additional, and separate, reason for admission of Stepny's statements to Detective Kohnert. The State persuaded the trial court that Stepny's statements to Officer Ayala were not hearsay because the statements were made during the course of, and in furtherance of, a conspiracy between Stepny and Sheriff. Stepny's statements to Detective Kohnert, during his interrogation, were entirely inconsistent with the theory that a conspiracy existed between Stepny and Sheriff. Thus, Stepny's statements to Kohnert were admissible to impeach the State's evidence.

Statement of the Case

I. Procedural Background

The defendant-appellant, Devon Sheriff ("Sheriff"), was charged with one count of delivery of cocaine, and with one count of possession of cocaine with intent to deliver. Following a preliminary hearing, Sheriff entered pleas of not guilty.

The case proceeded to trial on June 15, 2009. Prior to the start of trial, the State made a motion for a preliminary ruling on the admissibility of statements made by a co-defendant, Tyrone Stepney, to undercover police officer Rudolfo Ayala prior to and during the drug transaction.[1] The State argued that Stepney's statements to Ayala were statements made during the course of, and in furtherance of, a conspiracy that existed between Sheriff and Stepney (to deliver controlled substances). (R:24-4).

The State specifically cited Sec. 908.01(4)(b)5, Stats.[2] Sheriff objected on the grounds that Stepney's statements to the undercover officer were hearsay. (R:24-8) The court informed the parties that, "I am inclined to let it in. I think some of those directions are not even hearsay. But to the extent that anything is offered for the truth of the matter asserted . . . I think that does meet the requirements set forth in (the statute)." (R:24-9)

Thus, during trial, Ayala testified concerning the cellular telephone conversations that he had with Stepney, as well as about the statements Stepny made during the transaction. The telephone conversations related mostly to arranging the transaction, and, especially, the location of the transaction.

After the transaction, both Stepney and Sheriff were arrested. Stepney was then questioned by Detective Britt Kohnert. The State called Detective Kohnert as a witness, but it did not elicit from Kohnert any of the statements Stepney made during his interrogation. However, during his cross-examination of Detective Kohnert, Sheriff attempted to elicit Stepney's responses. The State objected on the grounds of hearsay. Initially, Sheriff argued that the State had opened the door by eliciting, through Ayala's testimony, the statements of Stepney. Later, Sheriff argued that Stepney's statements to Detective Kohnert were addmissible as statements against Stepeny's

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1. Briefly, it was alleged in the criminal complaint that officer Ayala made telephone arrangements with Stepney to purchase the cocaine. This involved a number of telephone calls, mostly having to do with the location of the transaction. When Ayala finally found Stepney's car, Stepney was driving, and Sheriff was in the passenger seat

2. "A statement by a coconspirator of a party during the course and in furtherance of the conspiracy," is defined out of the hearsay rule.

penal interest. The trial court sustained the State's objection and did not admit Stepny's statements to Kohnert.

On, June 16, 2010, the jury returned verdicts finding Sheriff guilty on both counts.

The court sentenced Sheriff to two years initial confinement and two years extended supervision on each count, concurrent to each other, but consecutive to any other sentence.

Sheriff timely filed a notice of appeal.

II. Factual Background

On March 19th, 2009, the Milwaukee Police were conducting a routine drug investigation. As part of that investigation, the police obtained the telephone number of a person who was allegedly willing to sell crack cocaine. Posing as a drug user, detective Rudolfo Ayala called the number and made arrangements with the person to purchase $60 worth of crack cocaine. After a number of additional telephone calls, Ayala located the car and approached it. (R:25-61) Significantly, Ayala had testified in other hearings that he believed the person on the other end of the telephone calls was Tyrone Stepney; however, at trial, Ayala testified that he was not sure. (R:25-76) In any event, when the officer got to the vehicle, Tyrone Stepney was the driver, and Sheriff was seated in the passenger seat. (R:25-64)

According to Ayala, he exchanged greetings with the occupants of the car, and then Sheriff said, "Get in the back seat. We ain't going to serve you on the street." (R:25-65) Once Ayala got into the back seat, Sheriff asked him about the money. (R:25-66) Ayala gave the money to Stepney, and then Stepney handed Ayala a baggie containing the cocaine. *Ibid.* As Ayala was getting out of the vehicle, he asked for a ride. At

first, Stepney declined; then, according to Ayala, after he asked again, Sheriff said, "We got to get going, man, we got other people to serve that are waiting on us." (R:25-69)

Ayala then gave a signal, and the car was stopped by other officers, and then it was searched. (R:25-70) During the search the police discovered, inside the ceiling panel of the car, an additional baggie containing thirteen rocks of crack cocaine. (R:25-97) The premarked buy money was found in Stepney's pocket. (R:25-102) Additionally, a cellular telephone was taken from Stepney, and the police determined that the number to that telephone was the number that the officers had been calling to set up the deal. (R:25-58 & 110)

Following the arrest, Detective Britt Kohnert questioned Stepney. (R:25-120) When Sheriff's attorney attempted to elicit the content of that conversation, though, the State objected on the grounds of hearsay, and the trial court sustained the objection. *Ibid.* According to Sheriff's offer of proof, Stepney told Kohnert that it was he (Stepney) who had been selling the cocaine; Stepney explained that he had started out with an eight-ball (3.5 gms of cocaine base), and broke it down into ten; and that he had made $1,500 doing so. (R:25-123) Furthermore, Stepney was asked whether "his guy" (meaning Sheriff) was involved, and Stepney told the police that Sheriff had not been involved. (R:25-124). According to Stepney's trial counsel, Stepney was not available because the attorney had been unable to locate him. Stepney was a codefendant and, at the time of Sheriff's trial, he was on bench warrant status.[3] (R:25-126)

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3. So, apparently, the police had not been able to locate Stepney either.

Sheriff argued that the State had opened the door by eliciting, through the testimony of Ayala, the statements Stepney made to Ayala during the telephone calls, and in the car during the transaction. (R:25-122). The state argued that the statements of Stepney to Ayala were admissible because they were the *res gestae* of the crime, and they were made during the commission of the crime (i.e. the statements were made during the course of a conpiracy). (R:25-123).

The trial court ruled:

> THE COURT: And my ruling was and is that I don't believe that the statements made in furtherance of the conspiracy as an exception to hearsay open the door to these statements made during an interview after the crime has already been committed.
>
> I think that the offer of proof illustrates why these exceptions exist when they are there and why we don't allow hearsay otherwise unless there's an exception, and it's because in the -- In the course of a crime those kind of statements have some kind of reliability.
>
> There's no-- In this case, he didn't even know that he was selling to an undercover officer in any way. So there's a certain sense of reliability in co-conspirator statements made during the course of and in furtherance of a conspiracy.
>
> Whereas as to the interview afterwards, without Mr. Stepney here nobody can cross-examine him and find out what he meant by some of those statement that are on that interview tape.
>
> So I believe it is hearsay. It's a statement. It's offered for the truth of the matter that Mr. Sheriff is not involved. That's

> what it's being offered for, and there's no exception, hearsay exception that allows the reliability to be established without Mr. Stepney here to cross-examine.
>
> So I'm going to go ahead and not allow those statements. I did not allow Miss Patterson to get into the substance of what was said during the interview with Detectiver Kohnert.

(R:25-125, 126).

Thereafter, Sheriff asked the trial court to reconsider on the grounds that Stepney's statements were an exception to the hearsay rule because he was unavailable, and the statements were against his penal interest. *See,* Sec. 908.045(4), Stats.[4] Once again, the court sustained the State's hearsay objection. The court said:

> My belief about this particular exception also looking at the law is that specifically in this situation is not intended to be an exception.
>
> Because that's exactly what would happen here. The last line of that exception talks about not being able to use a statement against interest that exposes the declarant to criminal liability and exculpates the accuse.

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4. **(4) Statement against interest.** 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.

> It's the same situation. The declarant is not here. We can't cross-examine him. As Mr. Lonski can't cross-examine him. It would be offered to exculpate Mr. Sheriff, and there's no corroboration that's independently offered here.
>
> And I will think that the statement is firmly a hearsay statement without any exception that allows the court to--allows its introduction.

(R:27-8).

Sheriff testified at trial. He denied that he said any of the things that Officer Ayala claimed. (R:27-48) Likewise, Sheriff testified that he was not in any way involved with Stepney's drug transaction. (R:27-50)

Argument

I. The trial court abused its discretion in excluding Stepney's statements to Detective Kohnert, because the statements were against Stepney's penal interest, he was unavailable, and Stepney's statements were corroborated by Sheriff's trial testimony.

The trial court abused its discretion in excluding testimony about the statements that Stepny made to Detective Kohnert. These statements totally exonerated Sheriff. According to Stepney, Sheriff had nothing to do with the drug transaction. All agree that Stepny was unavailable (because he was out on a warrant). Likewise, there is no suggestion that Stepny's statements were not against his penal interest. The issue here is whether, because the statements were offered to exculpate

Sheriff, Stepny's statements were corroborated (as is required by the statute). There was ample corroboration in the record. Stepny's interrogation was audio recorded, and therefore there can be no dispute about *what* Stepny said to the detectives. Moreover, Sheriff testified at trial consistently with what Stepny told the detectives- that he (Sheriff) had nothing to do with the drug transaction. Finally, Stepny's statements were consistent, in many respects, with the State's own evidence. Stepny's cellular telephone was used to arrange the deal; Stepny took the money from the undercover officer, and had it on him when he was searched; and, Stepny was the one who handed the baggie of cocaine to the undercover officer. Thus, the trial court abused its discretion in excluding the testimony. The error is not harmless because, at the very least, there is a reasonable possibility that had the jury heard testimony about Stepny's interrogation, that they would have found Sheriff not guilty.

A. Standard of Appellate Review

The standard of appellant review is not whether the appellate court agrees with the trial court's ruling, but rather whether the trial court exercised its discretion in accordance with accepted legal standards, and in accordance with the facts of record. The appellate court will not find an abuse of discretion of there is a reasonable basis for the trial court's determination. *State v. Pharr,* 115 Wis.2d 334, 342, 340 N.W.2d 498, 501 (1983).

B. Stepney's statement to Kohnert was sufficiently corroborated and, therefore, it should have been admitted.

Sec. 908.045(4), Stats., provides:

> (4) Statement against interest. 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.*

(Emphasis added.)

In this case, it is uncontroverted that Stepney was unavailable. Likewise, there is no suggestion that Stepney's statement was not against his penal interest. Rather, the central issue is whether the statement is sufficiently corroborated to permit it to be admitted to exculpate Sheriff.

An over-arching concern when considering this issue is, "The critical need for hearsay evidence, *in particular statements against penal interest*, . . . (when) in criminal trials . . . the exclusion of a statement exculpating an accused could result in an erroneous conviction." *State v. Anderson*, 141 Wis. 2d 653, 662 (Wis. 1987) In, *State v. Guerard*, 2004 WI 85, P24 (Wis. 2004), the Wisconsin Supreme Court addressed the level of corroboration that is necessary where a statement against penal interest is offered to exculpate the defendant. The court wrote:

> Thus, under *Anderson*, Wis. Stat. §§ 908.045(4) and 901.04(2) together permit the admission of an out-of-court statement

> against penal interest by a declarant who is unavailable if: 1) the statement when made tended to expose the declarant to criminal liability; and 2) the statement is corroborated by evidence that is sufficient to enable a reasonable person to conclude, in light of all the facts and circumstances, that the statement could be true. *Id.* If a statement satisfies these specific conditions, a court may still exclude it on the general grounds that its probative value "is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Wis. Stat. § 904.03; Anderson, 141 Wis. 2d at 664.

Significantly, the Supreme Court emphasized that "corroboration" of the statement does not require that there be an independent source, or that the statement be uncontested. According to the Supreme Court:

> Thus, corroboration sufficient to meet the Anderson test will usually be "debatable," at least to the extent that the term "debatable" suggests a conflict between two distinct points of view, or, in this context, evidence that points in different directions. Nothing in Anderson or Wis. Stat. § 908.045(4) requires the exclusion of a hearsay statement against penal interest merely because there is conflicting evidence in the record--that is, where the corroboration is "debatable." If this were true, then no corroboration would ever be sufficient, because the declarant's self-inculpatory statement is being offered to exculpate the accused and is therefore by definition

> inconsistent with at least some of the state's evidence, and hence any corroboration of the statement will necessarily be "debatable."

Guerard, 2004 WI at P33.

Here, Stepney's statement to Detective Kohnert is corroborated by the following evidence: (1) the statement was audio recorded by the detective (i.e. there is no question as to *what* Stepney told the detective); (2) the statement was corroborated by Sheriff's sworn testimony at trial that he (Sheriff) had nothing to do with Stepney's drug transaction; and, (3) Stepny's statement to the detective *could be true* given the fact that no contraband or drug curency was found on Sheriff, and Sheriff was not involved in any of the telephone calls that were made to set up the transaction.

For these reasons, the trial court abused its discretion in sustaining the State's objection.

C. The error is not harmless

An error excluding evidence is harmless if no reasonable possibility exists that the error contributed to the conviction. *State v. Dyess*, 124 Wis.2d 525, 543, 370 N.W.2d 222, 231-32 (1985).

Here, as the Supreme Court noted in *State v. Anderson*, 141 Wis. 2d 653, when dealing with statements against penal interest in a criminal case, there is the very real danger that erroneous exclusion of the statements could lead to an erroneous conviction. Stepny's statements, if true, totally exonerate Sheriff. Thus, there is at the very least, a reasonably possibility that had the jury been able to consider the statements

that Stepny made to Detective Kohnert, Sheriff would have been acquitted. Therefore, the trial court's erroneous order excluding the testimony is not harmless.

II. The trial court abused its discretion in excluding Stepney's statements to Detective Kohnert because Stepney's statements were inconsistent with the State's theory that a conspiracy existed.

The State persuaded the trial court that Stepny's statements to undercover officer Ayala were not hearsay because the statements were made in furtherance of, and during the course of, a conspiracy to deliver cocaine that existed between Stepny and Sheriff. *See,* 908.01(4)(b)5, Stats. And, to be sure, a statement is made "in furtherance of the conspiracy" when the statement is part of the information flow between conspirators intended to help each perform his or her role. *United States v. Godinez*, 110 F.3d 448, 454 (7th Cir. 1997) Thus, Stepny's statements, themselves, were offered by the State as evidence that a conspiracy existed between Stepny and Sheriff.

At trial, Sheriff argued that the statements made by Stepny to Detective Kohnert during his interrogation were *inconsistent* with the theory that a conspiracy existed (i.e. the statements to Kohnert *impeached* the statements made by Stepny to Ayala), therefore, by eliciting Stepny's statement's to Ayala, the state opened the door to impeachment by inconsistent statements.

Sec. 908.06, Stats., provides:

> **Attacking and supporting credibility of declarant.** When a hearsay statement has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.

In, *State v. Evans*, 187 Wis. 2d 66, 79 (Wis. Ct. App. 1994), the Court of Appeals observed:

> Section 908.06, STATS., gives no further guidance on what form this evidence may take; however, two commentators have observed "it would seem that almost all forms of impeachment available to attack a trial witness could be used to impeach a hearsay declarant. Inconsistent statements … can be used. Bias evidence may be elicited. Character for truthfulness can be explored." 2 STEPHEN A. SALTZBURG & MICHAEL M. MARTIN, FEDERAL RULES OF EVIDENCE MANUAL 468 (5th ed., 1990).

Plainly, the State *did* open the door. The State offered Stepny's statements to Ayala as proof that a conspiracy existed. Thus, impeachment of Stepny's out-of-court statements was fair-play. Stepny made numerous statements to Detective

Kohnert that were entirely inconsistent with the existence of a conspiracy between Stepny and Sheriff. Stepny told Detective Kohnert that Sheriff had nothing to do with the delivery of cocaine.

It is not necessary to repeat the harmless error analysis here. For the reasons stated above, regardless of which theory of admissibility was overlooked by the trial court, the failure to admit Stepny's statements was reversible error. There is, at least, a reasonable possibility that, had the jury heard the testimony, that Sheriff would have been found not guilty.

Conclusion

For these reasons, it is respectfully requested that the Court of Appeals reverse Sheriff's conviction and remand the matter for a new trial with instructions that Stepny's statements to Detective Kohnert are independently admissible as statements against penal interest; and, additionally, the statements are admissible to impeach the statements Stepny made to Officer Ayala.

Dated at Milwaukee, Wisconsin this ____ day of _____, 2010.

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Certification as to Length and E-Filing

I hereby certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of the brief is 3808 words.

This brief was prepared using *Google Docs* word processing software. The length of the brief was obtained by use of the Word Count function of the software

I hereby certify that the text of the electronic copy of the brief is identical to the text of the paper copy of the brief.

Dated this _____ day of
_____, 2010:

_____
Jeffrey W. Jensen

State of Wisconsin
Court of Appeals
District I
Appeal No. 2009AP003095 - CR

State of Wisconsin,

Plaintiff-Respondent,

v.

Devon Sheriff,

Defendant-Appellant.

Defendant-Appellant's Appendix

A. Record on Appeal

B. Excerpt of trial court's ruling on State's hearsay objection

> I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19 (2) (a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.
>
> I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the

appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated at Milwaukee, Wisconsin, this _____ day of _____, 2010

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