STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

Case No. 2016AP000188-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CONNIE MAE APFEL,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION
AND DENIAL OF POSTCONVICTION MOTION,
ST. CROIX COUNTY CIRCUIT COURT,
THE HONORABLE EDWARD F. VLACK PRESIDING

PLAINTIFF-RESPONDENT'S BRIEF

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STATEMENT OF THE ISSUE

At trial, victim C.A. could not recall statements made to law enforcement officers, and the State was allowed to elicit testimony from the officers regarding C.A.'s prior inconsistent statements. Did the circuit court appropriately exercise its discretion by admitting victim C.A.'s prior inconsistent statements?

The circuit court answered "yes" in denying Ms. Apfel's postconviction motion.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The parties' briefs will adequately address the issue presented, and oral argument will not significantly assist the court in deciding this appeal.

The State takes no position on publication of this Court's decision and opinion.

STATEMENT OF THE CASE

As plaintiff-respondent, the State exercises its discretion to not present a statement of the case. *See* Wis. Stat. § (Rule) 809.19(3)(a)2. The State cites to relevant facts in the Argument section below.

ARGUMENT

C.A.'S DENIED RECOLLECTION OF HIS PRIOR STATEMENTS WAS INCONSISTENT, AND THUS, C.A.'S PRIOR STATEMENTS WERE PROPERLY ADMITTED INTO EVIDENCE THROUGH THE TESTIMONY OF THE RESPONDING OFFICERS.

A. STANDARD OF REVIEW.

This Court reviews the circuit court's decision to admit evidence for an erroneous exercise of discretion. State v. Muckerheide, 2007 WI 5, ¶ 17, 298 Wis. 2d 553, 725 N.W.2d 930. The circuit court's decision will be upheld "if the circuit court examined the relevant facts, applied a proper legal standard, and reached a reasonable conclusion using a demonstrated rational process." Id. If a circuit court does not explain its reasoning, this Court may review the record to determine whether the record supports the court's decision. State v. Gonzalez, 2013 WI App 105, ¶ 32, 349 Wis. 2d 789, 837 N.W.2d 178.

B. THE CIRCUIT COURT PROPERLY EXERCISED ITS DISCRETION BY ALLOWING OFFICERS TO TESTIFY REGARDING C.A.'S PRIOR STATEMENTS.

At trial, C.A. generally testified that he did not recall specific statements he had made to law enforcement on the night of the incident. (51:108-110). The State subsequently sought to introduce C.A.'s prior inconsistent statements through the testimony of law enforcement officers. The circuit court properly exercised its discretion by allowing the officers to testify about C.A.'s prior inconsistent statements.

Hearsay is an out of court statement offered to prove the truth of the matter asserted. Wis. Stat. § 908.01(3). Hearsay is generally inadmissible unless it falls within one of the proscribed exceptions. Wis. Stat. § 908.02. Certain out of court statements are not hearsay, such as prior inconsistent statements. Wis. Stat. § 908.01(4)(a)1.

Prior inconsistent statements are not hearsay. Id. Specifically, such statements are not hearsay where, "The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is…[i]nconsistent with the declarant's testimony." Id. Extrinsic evidence regarding a prior inconsistent statement of a witness may be admissible if "[t]he witness has not been excused from giving further testimony in the action." Wis. Stat. § 906.13(2)(a)2.

The Wisconsin Supreme Court discussed prior inconsistent statements in State v. Lenarchick. 74 Wis. 2d 425, 247 N.W.2d 80 (1976). In Lenarchick, a witness denied recollection of admissions by the defendant. 74 Wis. 2d at 429. This witness also denied recollection of repeating these admissions to law enforcement. Id. The circuit court allowed the State to introduce the witness's statements through the testimony of the officer who took this witness's statement. Id. at 430. The defendant argued that testimony by law enforcement officers was not admissible as a prior inconsistent statement because the witness "never testified to any inconsistent facts but merely disclaimed any recollection of the particular conversation with Lenarchick or of the

particular conversation and statement to the police." Id. at 430-431.

The Court found that the witness's statement was admissible through the testimony of the officers because the trial judge doubted the "good faith" of the witness's failure to recollect her statement. Id. at 436. Thus, the circuit court judge properly exercised judicial discretion by finding the witness's testimony inconsistent and allowing law enforcement to testify to the witness's prior statement. Id. Ultimately, the Court held that if the trial judge has reason to doubt the good faith of such denial, then the trial judge may exercise discretion and declare the testimony inconsistent. Lenarchick, 74 Wis. 2d at 436. Upon declaring testimony inconsistent, the trial court may then allow the witness's prior statements to be admitted into evidence. Id.

In the present case, C.A. testified that he did not want to testify against his wife, nor did he want to be at the trial. (51:107). C.A. did recall some general details that were asked of him, such as where he was living on March 29, 2014 (the date of the incident), who he was living with, and that police arrived at his residence on March 29, 2014. (51:107-108). However, C.A.'s testimony at trial show that he denied recollection of his prior statement to law enforcement:

> Q (By the State): Did you and Connie get into an argument on that night?
>
> A (By C.A.): Yes we did.
>
> Q: What was that about?
>
> A: I can't recall.
>
> Q: Do you remember telling police officers what that was about?
>
> A: I don't recall.
>
> Q: Was there yelling?
>
> A: I don't recall.
>
> Q: Were you injured that night?

A: I – no, I wasn't.

Q: Would you have told police something different?

A: No.

Q: Did you have a cut above your eye?

A: I don't recall.

Q: Do you remember talking to officers about a cut above your eye?

A: No I don't.

(51:109-110).

Essentially, C.A. denied recollection of his prior statement, and the circuit court found this testimony to be inconsistent. (51:152-153). Under Lenarchick, the circuit court properly found C.A.'s failure to recall to be inconsistent. In the circuit court's order denying Ms. Apfel's postconviction motion, the court stated that the record supports the conclusion that C.A.'s failure to recall prior statements was in bad faith. (70:3). The circuit court was correct as the record shows C.A.'s that C.A. did not want to be in court and did not want to testify against his wife, Ms. Apfel. (51:107).

Once the circuit court found C.A.'s testimony to be inconsistent, C.A.'s prior statements were appropriately admitted into evidence through the testimony of the officers. See Lenarchick, 74 Wis. 2d at 436. As the circuit court pointed out, the testimony of the officers consistent of extrinsic evidence. (70:4). However, C.A. still available to testify and was not released from his subpoena. (51:138, 70:4). Thus, the requirements of Wis. Stat. § 906.13(2)(a)2 were satisfied.

Ms. Apfel contends that the State did not ask C.A. the proper questions to allow C.A.'s prior statements to be introduced through the testimony of the officers. However, Ms. Apfel fails to provide authority which sets forth a standard for the exact questions that must be asked of a witness before a trial court may declare the witness's failure

to recall inconsistent and then allow introduction of prior statements. Here, the circuit court's ruling demonstrated that the court followed the analysis in Lenarchick as well as the applicable statutes regarding prior inconsistent statements. See Wis. Stat. §§ 809.01(4)(a)1 and 906.13(2)(a)2. Therefore, the circuit court applied and followed the proper standard.

The circuit court's analysis and the record demonstrate that C.A.'s denial of recollection was inconsistent, and thus, C.A.'s prior statements were admissible through the testimony of the officers. The circuit court did not erroneously exercise its discretion. Thus, the circuit court properly exercised its discretion, and both its ruling and Ms. Apfel's convictions should be affirmed.

CONCLUSION

For the reasons stated above, the State respectfully requests that this Court affirm the decision of the circuit court.

Dated this ___ day of May, 2016.

Respectfully submitted,

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CERTIFICATION AS TO FORM AND LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 1,197 words.

Dated this ____ day of May, 2016.

Signed:

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this ____ day of May, 2016.

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CERTIFICATE OF MAILING

I certify that this brief was deposited into the United States mail for delivery to the Clerk of the Court of Appeals by first-class mail, or other class of mail that is at least as expedition, on May 13, 2016.

I further certify that on May 13, 2016, I served three copies of this brief via United States Mail upon all opposing parties.

I further certify that the brief was correctly addressed and postage was pre-paid.

Dated this ____ day of May, 2016.

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