COURT OF APPEALS
DECISION
DATED AND FILED

October 26, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-3660-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ARETUS S. FENN,

DEFENDANT.

APPEAL from a judgment of the circuit court for Milwaukee County: JEFFREY A. KREMERS, Judge. *Affirmed.*

Before Wedemeyer, P.J., Schudson and Curley, JJ.

¶1 PER CURIAM. Aretus S. Fenn appeals from a judgment of conviction entered after a jury found him guilty of attempted second-degree intentional homicide while armed. Fenn argues that the trial court erred: (1) in denying his motion for a mistrial; (2) in admitting the statements of the victim's

four-year-old daughter under the excited utterance hearsay exception; and, (3) in denying his request for a *falsus in uno* jury instruction. We affirm.

I. BACKGROUND[1]

¶2 On January 9, 1997, following a four-day trial, Fenn was convicted of attempted second-degree intentional homicide while armed. Trial testimony established that on August 9, 1996, Fenn fought with his live-in girlfriend, Carisa Elam. During the argument, Fenn stabbed Elam. Residents of the couple's duplex testified that they heard Elam pleading with Fenn not to cut her. One witness testified that he heard Elam cry, "I'll do what you want if you don't stab me." Testimony also established that at the time of the fight, Elam called a friend, Stephen Brooks. Brooks testified that Elam told him that she was in trouble, and that he assured her that the police were on their way.

¶3 Upon their arrival at the scene, City of Milwaukee police officers found Fenn covered in blood and Elam lying on the floor in a back bedroom, covered in blood and gasping for air. The officers also discovered two children in the front bedroom. Detective Gary Schuster testified that he talked to Elam's frightened, teary-eyed daughter Zapora shortly after his arrival at the scene. Detective Schuster testified that Zapora told him that she had witnessed her parents' argument and had seen Fenn take a knife from the kitchen and stab Elam. She also told the detective that her mother was unarmed, and that she never saw her mother strike her father.

[1] No statement of facts is included in Fenn's brief-in-chief. We remind appellate counsel that failing to include a statement of facts violates RULE 809.19(1)(d), STATS.

¶4 Fenn's defense included Elam's testimony from Fenn's probation revocation hearing, which was read to the jury.[2] At that hearing, Elam stated that she had stabbed herself and denied that Fenn had tried to stab her. In addition, defense counsel called Fenn's probation and parole agent, Jolyn Haugen, who testified that Elam had previously admitted to having made false allegations about Fenn.

II. ANALYSIS

¶5 Fenn first argues that the trial court erred in denying his motion for a mistrial when, on the first day of trial, Brooks, "a self-described some time boyfriend of the alleged victim," referred to Elam's involvement with a man who "was in prison." Fenn contends that "there is no conceivable set of circumstances under which a jury could have failed to conclude" that Brooks was referring to him. The State responds that, given the lack of record of the unrecorded sidebar discussion of Fenn's mistrial motion, this court cannot assess the merits of his argument and, further:

> Even if the jury did infer from Brooks' comment that [Fenn] had been in prison, this fleeting reference was not grounds for a mistrial. The comment was oblique and occurred at the beginning of a four-day trial. Even without the comment, the jury later learned that [Fenn] was on probation when the stabbing occurred.

The State is correct.

¶6 Whether to grant a mistrial is a decision within the trial court's discretion. *See* ***State v. Bunch***, 191 Wis.2d 501, 506, 529 N.W.2d 923, 925 (Ct.

[2] Although Elam's sworn testimony from the probation revocation hearing was read into the record, the jury was never told that the proceeding was a probation revocation hearing; they were simply informed that the testimony was from a prior hearing.

App. 1995). We review a trial court's discretionary decision to determine whether the court examined the relevant facts, applied the proper standard of law, and engaged in a rational decision-making process. *See* ***id.*** at 506-07, 529 N.W.2d at 925.

¶7 The record fails to reveal exactly what was discussed at the sidebar conference. All we can discern is that immediately after Brooks made the statement giving rise to Fenn's objection, an unrecorded sidebar was held. The sidebar was not mentioned on the record until after four other witnesses had testified, and the court's comments did not restate either party's argument, but merely ruled on Fenn's request for a mistrial.[3] Thus, the record does not disclose whether any curative instruction was requested. As the State notes:

> While here it was the trial court that summarized the content of the unrecorded sidebar, defense counsel had the responsibility to supplement the trial court's summary to include information on whether the remedy of a curative instruction had been proposed. Where, as here, the defendant has not even bothered to create a complete record for appellate review, this court should refuse to find an erroneous exercise of discretion in denying a mistrial motion.

We agree. Moreover, we conclude that Brooks's reference to a man who "was in prison" was inconsequential given that the jury was apprised of Fenn's criminal status when defense counsel called Fenn's probation agent as a witness later in the trial. The jury therefore knew Fenn had been convicted of a crime for which he was placed on probation. Consequently, the additional information implying that

[3] This court again emphasizes that, whenever possible, sidebar conferences should be on the record. And, as we have stated before, "[w]hen they are not, it is essential that the subsequent on-the-record comments repeat or summarize the arguments and *confirm exactly what was presented to the trial court at the time of its ruling*." ***State v. Munoz***, 200 Wis.2d 391,402-03, 546 N.W.2d 570, 575 (Ct. App. 1996).

Fenn had been in prison three years earlier was incidental and did not merit a mistrial.

¶8 Fenn next argues that the trial court erred when it allowed a police officer to recount the statements of Elam's four-year-old daughter shortly after she had witnessed the stabbing. We disagree.

¶9 Whether to admit an out-of-court statement under the excited utterance exception is a decision within the trial court's discretion. *See* ***State v. Moats***, 156 Wis.2d 74, 96, 457 N.W.2d 299, 309 (1990). We may not disturb the trial court's ruling unless it was manifestly wrong or a misuse of discretion. *See* ***id.*** "[W]e will uphold the court's determination that the evidence is admissible if it is based on a reasoned application of the proper legal standards to the facts." ***State v. Gerald L.C.***, 194 Wis.2d 548, 555, 535 N.W.2d 777, 779 (Ct. App. 1995).

¶10 Section 908.03(2), STATS., defines the excited utterance hearsay exception as "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." This exception is based on the belief that "excitement or agitation stills the declarant's capacity for conscious reflection, thus reducing the risks associated with fabricated or insincere testimony." ***Gerald L.C.***, 194 Wis.2d at 556, 535 N.W.2d at 779 (citation omitted). The principles governing the admission of out-of-court statements as excited utterances are well established:

> [T]ime is measured by the duration of the condition of excitement rather than mere time lapse from the event or condition described. The significant factor is the stress or nervous shock acting on the declarant at the time of the statement. The statements of a declarant who demonstrates the opportunity and capacity to review the [incident] and to calculate the effect of his [or her] statements do not qualify as excited utterances.... It is the condition of excitement

> that temporarily stills the capacity for reflection which is the significant factor assuring trustworthiness, assuring that the declarant lacked the capacity to fabricate.

Christensen v. Economy, Fire & Cas. Co., 77 Wis.2d 50, 57-58, 252 N.W.2d 81, 85 (1977) (footnotes omitted). The key to the time factor analysis is an examination of whether the individual making the statement was still under the impact of the event or condition described. *See* ***id.*** at 57, 252 N.W.2d at 85. The statement of a declarant who demonstrates the opportunity or capacity to review the incident and/or to calculate the effect of any statement made does not qualify as an excited utterance. *See* ***id.*** at 58, 252 N.W.2d at 85. In determining whether to apply the excited utterance exception to hearsay, the court must assess the "'special circumstances in which the statement is made [that] make it reliable and trustworthy.'" ***Id.*** (quoted source omitted).

¶11 Here, the record clearly establishes that Zapora was still under stress caused by having witnessed a portion of the brutal attack on her mother. Officer Brian Hinkle testified that Zapora and her brother, whom he found in the residence approximately six minutes after his arrival, appeared wide-eyed and very frightened. Officer Darren Picard, the officer assigned to "keep an eye on" the children, described the children as extremely frightened, trembling, and unable to talk to him. Detective Schuster, the officer who conducted the initial interview, stated that Zapora was teary eyed and visibly shaken at the time he spoke with her.

¶12 Despite this testimony, Fenn claims that the record does not support the trial court's conclusion that Zapora was still under the stress caused by witnessing her parents' fight. In support of his claim, Fenn refers to Officer Schuster's testimony that after he got down on one knee so he would be on Zapora's level, Zapora "swung [herself] over [the bed and sat] with her feet dangling off the side of the bed" and was then able to talk to him. Fenn argues

that this shows that Zapora's "sense of shock, of stress, and of apparent fear had subsided to the point where she could not only speak with [Detective Schuster], but was sitting comfortably at the foot of the bed with her feet dangling over the side." We reject Fenn's argument.

¶13 As this court explained in ***State v. Teynor***, 141 Wis.2d 187, 414 N.W.2d 76 (Ct. App. 1987), "[a] broad and liberal interpretation is given to what constitutes an excited utterance when applied to young children [because they] produce declarations 'free of conscious fabrication' for a longer period after [an] incident than do adults [and because] [i]t is unlikely that a young child will review an incident and calculate the effect of his or her statement." ***Id.*** at 215, 414 N.W.2d at 86 (internal quotation marks and quoted source omitted). Here, Zapora's statements were nearly contemporaneous with the incident. Under these circumstances, and given the officers' descriptions of her physical and emotional condition, we conclude that Zapora's statements to Detective Schuster were admissible under the excited utterance exception. [4]

¶14 Finally, Fenn argues that the trial court erred in denying his request for a *falsus in uno* jury instruction regarding Elam. He contends that "[t]he trial court judge denied the [defendant's] request . . . based, in part, upon the court's perception that such an instruction was not appropriate if the witness against whom it was sought had not appeared in person and testified during the course of

[4] Fenn also argues that the admission of Zapora's statement violated his right of confrontation under the state and federal constitutions. Because the child's statement was admissible as an excited utterance, a firmly rooted hearsay exception, we reject his confrontation clause argument. *See* ***White v. Illinois***, 502 U.S. 346, 353-57 (1992) (out-of-court statement, admissible under the "firmly rooted" excited utterance hearsay exception, does not violate right of confrontation).

the trial, [and], most importantly, on the court's conclusion that such an instruction was *never* appropriate."

¶15 A trial court has broad discretion in deciding which instructions should be submitted to the jury. *See* ***State v. Robinson***, 145 Wis.2d 273, 281, 426 N.W.2d 606, 610 (Ct. App. 1988). Such decisions will be upheld if they "are the result of a rational mental process and are reasoned and reasonable." ***Id.*** Moreover, if the instructions adequately cover the applicable law, "we will not find error." ***Id.***

¶16 The trial court's refusal to give the *falsus in uno* instruction was not an erroneous exercise of discretion. Here, the trial court gave the standard jury instruction on witness credibility, which directs the jury to scrutinize each witness's testimony. *See* WIS JI-CRIMINAL 300.[5] As this court has held, it is not error to refuse to give the *falsus in uno* instruction where the instruction given

[5] WIS JI-CRIMINAL 300 provides:

> 300 CREDIBILITY OF WITNESSES
>
> It is the duty of the jury to scrutinize and to weigh the testimony of witnesses and to determine the effect of the evidence as a whole. You are the sole judges of the credibility of the witnesses and of the weight and credit to be given to their testimony.
>
> In determining the weight and credit you should give to the testimony of each witness, you should consider interest or lack of interest in the result of this trial, conduct, appearance, and demeanor on the witness stand, bias or prejudice, if any has been shown, the clearness or lack of clearness of recollections, the opportunity for observing and knowing the matters and things testified to by the witness, and the reasonableness of the testimony.
>
> You should also take into consideration the apparent intelligence of each witness, the possible motives for falsifying, and all other facts and circumstances appearing on the trial which tend either to support or to discredit the testimony, and then give to the testimony of each witness such weight and credit as you believe it is fairly entitled to receive.

adequately states the law, "and the credibility of the witnesses was extensively discussed during closing arguments." ***State v. Lagar***, 190 Wis.2d 423, 435, 526 N.W.2d 836, 840-41 (Ct. App. 1994). Here, the instructions correctly stated the law, and defense counsel's closing argument recounted Elam's conflicting accounts of the incident. Accordingly, we conclude that the trial court did not err in refusing to give the *falsus in uno* instruction.

By the Court.—Judgment affirmed.

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