

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 28, 2002

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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. 01-0355-CR
STATE OF WISCONSIN**

Cir. Ct. No. 98-CF-221

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RONALD E. DION,

DEFENDANT-APPELLANT.

APPEAL from judgments of the circuit court for Columbia County:
DANIEL S. GEORGE, Judge. *Affirmed.*

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

¶1 PER CURIAM. Ronald Dion appeals from a set of judgments convicting him of burglary, aggravated battery, and two counts of interfering with the custody of the other parent. Dion challenges the trial court's exclusion of a prior consistent statement he made to his original defense attorney and the denial of his motion for mistrial following what Dion considers to have been an improper

remark made during the prosecution's closing argument. We conclude that the exclusion of the prior statement was a proper exercise of discretion that did not deprive Dion of his right to present a defense and that the prosecutor's statement did not rise to the level of a due process violation, warranting a mistrial. Accordingly, we affirm.

BACKGROUND

¶2 The charges in this case arose from allegations made by Dion's ex-wife, Ingrid Gottfried. She alleged that one afternoon following a postdivorce hearing on custody issues involving their two children, Dion had come over to her house, disconnected her telephone line, hit her and kicked her repeatedly in the face, and then took the children from her house in violation of a custody order, leaving her lying unconscious in the yard. A passing motorist observed Dion walking along the road with the children. Another passing motorist summoned help after observing Gottfried lying near the road, covered in blood. Medical personnel found her semiconscious and disoriented, and the examining doctor determined that she had a skull fracture, a punctured ear drum, a concussion with possible brain damage, a broken nose, numerous facial lacerations and contusions, and an eye which was swollen shut.

¶3 The police found the children at Dion's mobile home shortly thereafter and arrested Dion. Dion did not ask why he was being arrested or offer any explanation of what had happened. One of the children told an investigating officer later that evening that his dad had come to his mom's house and they had fought for a long time, until the child got scared and went to his bedroom. The child thought his mom must have left, because his dad came up to his room to get him and his younger sister.

¶4 At trial, Dion testified that Gottfried had agreed he could pick up the children a day early because she had a civil service examination the following morning. He said that he had parked his car along the road out of view of the house because it had overheated. He walked to the house, asked to use the telephone to call his girlfriend, and discovered the line was dead. He then attempted to check the junction box and accidentally pulled the telephone wire out, but lacked the tools to fix it. At that point, he and Gottfried got into an argument over whether he could or could not take the children that evening. He claimed that he grabbed Gottfried's arms and she pulled away, fell back, hit the back of her head on a slab of concrete, then bounced up and came back down on her face, resulting in a bloody nose. He said he asked Gottfried whether she was all right, and she responded that she thought so and told him to take the kids and leave, which he did. When he got to his car, he discovered that it had not overheated after all, and he drove away.

¶5 In response to defense counsel's questions, Dion testified that he had not summoned help because he did not think Gottfried's injuries looked serious. He said he had not asked why he was being arrested because he assumed that his ex-wife had made up some story about his beating her up, and that he had not volunteered any information to the police because he knew he had the kids at a time that was not specified in the custody order and wanted to speak to an attorney first.

¶6 On cross-examination, Dion confirmed that he had not told anyone on the day of the incident that Gottfried's fall was accidental. The defense then tried to introduce rebuttal evidence that Dion had related essentially the same story he had given at trial to his first defense attorney about two days after he had been arrested. The trial court excluded the evidence.

¶7 At the beginning of his closing argument, the prosecutor stated: “Imagine the humiliation, imagine the humiliation of being victimized on September 29, 1998, and having to sit in this courtroom—[Objection was asserted and overruled.] and listen to this.” Dion moved for a mistrial on the ground that the prosecutor’s statement impermissibly appealed to the sympathies of the jury, urging them to put themselves in the position of the victim. The trial court denied the motion and Dion now appeals that determination as well as the evidentiary ruling on his prior consistent statement.

STANDARD OF REVIEW

¶8 Although evidentiary decisions generally lie within the trial court’s discretion, we will independently determine whether the exclusion of particular evidence deprived the accused of his due process right to present a defense. *See Michael R.B. v. State*, 175 Wis. 2d 713, 720, 499 N.W.2d 641 (1993). Similarly, though the decision whether to grant a mistrial is usually a discretionary matter, we will consider de novo whether a particular remark “so infected the trial with unfairness as to make the resulting conviction a denial of due process.” *State v. Neuser*, 191 Wis. 2d 131, 136, 528 N.W.2d 49 (Ct. App. 1995) (internal quotations omitted).

ANALYSIS

Prior consistent statement.

¶9 Under WIS. STAT. § 908.01(4) (1999-2000):¹

A statement is not hearsay if:

(a) *Prior statement by witness.* The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is:

....

2. Consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive

In order to meet the probative value threshold for rebuttal against a charge of recent fabrication, the prior statement must have been made prior to the existence of the alleged motive to fabricate. *See Ansani v. Cascade Mountain, Inc.*, 223 Wis. 2d 39, 53, 588 N.W.2d 321 (Ct. App. 1998).

¶10 Here, the trial court reasoned that Dion already had a motive to fabricate a story by the time he spoke to his attorney. It therefore concluded that the statement failed to satisfy the predicate probative value criteria for admissibility as a prior consistent statement. We agree.

¶11 Dion argues that the trial court erred by focusing too narrowly on the question of when his motive to fabricate arose. He claims that a prior consistent statement made at a time when a motive to fabricate existed could still have

¹ All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

probative value sufficient to warrant its admission if the statement preceded the acquisition of information relevant to the details of the fabrication. Specifically, he claims that, even if he were inclined to lie to his attorney two days after the incident, he could not have fabricated a story that would have explained Gottfried's skull fracture at that time because he did not learn about the skull fracture until later.

¶12 We consider Dion's argument disingenuous at best. It was undisputed that Dion was present when Gottfried was injured. Therefore, Dion would have had all the information he needed to be able to fabricate a story by the time he spoke to his attorney. The jury could believe Dion's testimony or not, but the fact that Dion had told the same story after his arrest when he already had a motive to lie did not make the story any more likely to be true. Thus, the trial court properly exercised its discretion in concluding that the prior statement lacked sufficient probative value for admissibility under WIS. STAT. § 908.01(4), and the ruling did not infringe Dion's due process rights.

Mistrial

¶13 The parties dispute whether the prosecutor's statement during the closing argument was intended to invoke the jury's sympathy for the victim or merely to comment on the implausibility of Dion's testimony. Regardless of the propriety of the statement, however, we agree with the trial court that it did not render the trial unfair. First of all, the prosecutor's comment was hardly more likely to generate sympathy for the victim than the graphic photographs of Gottfried's injuries which had already been introduced. Furthermore, the prosecutor went on to explain, point by point, why Dion's account was inherently incredible. Taken in context, we are persuaded that there is no likelihood that the

prosecutor's isolated statement regarding the victim's humiliation at trial could have had any impact on the outcome of the trial. We conclude that the trial court acted within its discretion when it denied Dion's motion for a mistrial and the ruling did not violate Dion's due process rights.

By the Court.—Judgments affirmed.

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

