COURT OF APPEALS
DECISION
DATED AND FILED

July 13, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP2806-CR **Cir. Ct. No. 2003CF4812**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RUBIN E. ARDS,

DEFENDANT-APPELLANT.

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

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

¶1 PER CURIAM. Rubin Ards appeals from a judgment convicting him of substantial battery, felony bail jumping, and two misdemeanor counts of knowingly violating a domestic abuse injunction. The complaint alleged that Ards went to Stacy Dotson's home, in violation of a domestic abuse injunction, and beat

her. At his jury trial, Dotson did not appear. To identify Ards as the attacker, the State instead relied on testimony from police officers who interviewed Dotson and heard her identify Ards. The first police interview occurred approximately two hours after the assault. The issues on appeal are whether the trial court properly allowed Dotson's statements to police into evidence as excited utterances, and whether the trial court properly determined that Ards forfeited his right to confront Dotson. Ards also contends that the trial court should have granted him a new trial on newly discovered evidence. We affirm.

¶2 A statement is admissible as an excited utterance if it relates to a startling occurrence and was made while the declarant was under the stress of excitement caused by the event. WIS. STAT. § 908.03(2) (2003-04).[1] The decision to admit a statement as an excited utterance is discretionary. ***State v. Huntington***, 216 Wis. 2d 671, 680, 575 N.W.2d 268 (1998). If we can discern a reasonable basis for the trial court's decision we will uphold its exercise of discretion. ***Id.*** at 681. The time elapsed from the event or condition described is less significant than the duration of the condition of excitement because the latter determines the spontaneity of the declarant's statement. *See* ***id.*** at 681-82.

¶3 The trial court reasonably admitted testimony concerning statements Dotson made two hours after her violent encounter with Ards. The officers present described her as shaky, sobbing, apparently frightened, and reluctant to speak. When they asked why she waited two hours to call for police assistance she stated that Ards remained in her residence after striking her and that she was

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

afraid of him. Under these circumstances, the trial court reasonably concluded that Dotson remained under the stress of excitement caused by the assault on her, and by Ards' continuing presence in her home for a substantial time afterward.

¶4 The court also admitted as excited utterances the statements Dotson made to police officers about four hours after the attack, after she was transported to a hospital. We need not determine whether it was error to admit those statements as excited utterances because doing so was harmless. Dotson's later statements were consistent with her first statements and added nothing significant to them. Additionally, photos corroborated Dotson's description of what happened, as did the evidence of Ards' turbulent relationship with Dotson. Consequently, a reasonable jury clearly would have found Ards guilty beyond a reasonable doubt even without testimony of Dotson's later statements. *See* ***Delaware v. Van Arsdall***, 475 U.S. 673, 684 (1986) (use of testimony in violation of the confrontation clause may be deemed harmless based on factors including whether the testimony is cumulative and corroborated by other evidence).

¶5 Ards next contends that admitting Dotson's statements into evidence violated his confrontation clause rights because there was insufficient evidence to find that Ards induced Dotson's unavailability for trial. However, in a hearing on the matter the State introduced evidence of recorded telephone conversations indicating that Ards and his mother not only persuaded Dotson not to appear at trial, but helped her avoid compulsory appearance on a material witness warrant. The record of these calls provided sufficient evidence to support the trial court's finding that Ards procured Dotson's failure to appear, under either the preponderance of the evidence standard most courts apply, or the clear and

convincing evidence standard that Ards wants applied. He therefore forfeited his right to confront Dotson. *See* ***Crawford v. Washington***, 541 U.S. 36, 62 (2004).[2]

¶6 Shortly before Ards' sentencing hearing, defense counsel learned that Dotson had recanted her accusations against Ards. At the hearing, counsel moved for a new trial based on the recantation. The trial court instructed counsel to file a brief on the issue. Counsel took no further action and never obtained a trial court ruling on the issue. Ards has therefore waived the issue on appeal. *See* ***State v. Wilkens***, 159 Wis. 2d 618, 624, 465 N.W.2d 206 (Ct. App. 1990) (deliberate decision not to pursue a previously filed motion is a binding waiver on appeal).

By the Court.—Judgment affirmed.

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

[2] The State does not contest Ards' contention that Dotson's statements were testimonial, such that the confrontation clause would protect Ards but for his role in procuring Dotson's absence from trial.