

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 21, 2007

David R. Schanker
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. 2006AP2238-CR

Cir. Ct. No. 2005CT1783

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

CHAD C. CATLIN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County:
ROBERT A. DeCHAMBEAU, Judge. *Affirmed.*

¶1 LUNDSTEN, P.J.¹ Chad Catlin appeals the circuit court judgment convicting him, after a jury trial, of operating a motor vehicle while under the

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2005-06). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

influence of an intoxicant, fourth offense. Catlin argues that the circuit court erred by barring two witnesses from testifying that Catlin told them someone else was driving Catlin's vehicle. We affirm.

Background

¶2 At approximately 3:30 p.m. on June 1, 2005, Catlin was involved in an accident in which his truck skidded and then rolled over as it approached an exit ramp. His arrest and conviction resulted from this accident.

¶3 Catlin's defense at trial was that he was not driving at the time of the accident. He claimed that the true driver, Justin Simpson, was thrown from the truck and remained hidden at the scene. Simpson worked for Catlin and was the son of Catlin's girlfriend, Cynthia Christofferson.

¶4 Catlin testified that, between the time that the truck came to rest and the time that anyone else approached the truck, he and Simpson yelled back and forth to each other and Catlin told Simpson to leave after Simpson said he had "warrants out" for him. Catlin explained to the jury that, initially, he wanted to protect Simpson, but that the reality of the situation later "sunk in" and that Simpson felt badly that Catlin would receive a drunk driving conviction. Catlin further testified that, a day or two after the accident, he telephoned the state trooper who responded to the scene and attempted to explain the situation, but the trooper said or implied that both Catlin and Simpson would be charged with obstructing if Catlin changed his story.

¶5 Simpson also testified. He corroborated Catlin's account of the accident. In addition, two other men employed by Catlin, Shane Trotter and Scott Stafford, testified that they were present when Simpson agreed to give Catlin a

ride on the afternoon of the accident. Stafford also testified that he saw Catlin and Simpson drive away with Simpson in the driver's seat. Trotter, Stafford, and Christofferson all testified that Simpson had visible bruising after the accident.

¶6 The State's theory was that, regardless whether Simpson was driving when Stafford saw Catlin and Simpson drive away, Catlin was the driver at the time of the accident and Simpson was no longer in the vehicle. Foremost among the evidence supporting the State's theory was the extensive testimony of an eyewitness who saw the accident in progress and who was behind Catlin's truck when it skidded and rolled over. The eyewitness testified that, as Catlin's truck passed his vehicle, he saw only one person in the truck; that, as the truck skidded and rolled over, he never saw anyone ejected from the truck; that he pulled over once Catlin's vehicle came to rest; that he "immediately" went to the vehicle and observed Catlin exiting through the missing back window; and that he never heard anyone yelling.

¶7 In addition, the responding state trooper testified that, at the scene of the accident, Catlin never denied that he was the driver or made any statement indicating he was not the driver; that Catlin seemed upset and bothered and said something about how this would affect his job or income or pay; and that Catlin never mentioned that there was anyone else in the truck the officer should be concerned about.

¶8 The circuit court permitted both Trotter and Christofferson to testify that Simpson indicated to them the day after the accident that he was driving when the accident occurred. The circuit court, however, excluded testimony by Stafford and Christofferson that Catlin told them one or more days after the accident that Simpson was driving.

¶9 The jury found Catlin guilty. We reference additional facts as needed below.

Discussion

¶10 At issue is the admissibility of the testimony the circuit court excluded. This testimony consisted of two statements Catlin sought to introduce.

¶11 Catlin would have introduced the first statement through Stafford. Stafford would have testified that, one or two days after the accident, Catlin told Stafford that Simpson “rolled the truck,” which Stafford understood to mean that Simpson was the driver.

¶12 Catlin would have introduced the second statement through Christofferson. She would have testified that Catlin confirmed to her that Simpson was the driver after Simpson told her he was the driver. Based on Christofferson’s trial testimony, this statement occurred no earlier than the day after the accident.

¶13 Catlin asserts that the statements were admissible non-hearsay evidence under WIS. STAT. § 908.01(4)(a)2., which pertains to prior consistent statements. Catlin further argues that the exclusion of this evidence was prejudicial error.

¶14 We conclude that Catlin fails to demonstrate that the circuit court erred in excluding the statements. We also conclude that, even if the statements were admissible, it was harmless error for the circuit court to exclude them.

¶15 WISCONSIN STAT. § 908.01(4)(a)2. provides:

STATEMENTS WHICH ARE NOT HEARSAY. 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[.]

¶16 In order for a prior consistent statement to be admissible under WIS. STAT. § 908.01(4)(a)2., the general rule is that the statement “must *predate* the alleged recent fabrication or improper influence or motive.” *State v. Peters*, 166 Wis. 2d 168, 177, 479 N.W.2d 198 (Ct. App. 1991) (emphasis added); *see also Tome v. United States*, 513 U.S. 150, 167 (1995) (hearsay exception for prior consistent statement “permits the introduction of a declarant’s consistent out-of-court statements to rebut a charge of recent fabrication or improper influence or motive only when those statements were made before the charged recent fabrication or improper influence or motive”).

¶17 Catlin argues: “Since Mr. Catlin made the statements to these witnesses *shortly after the accident*, [the witnesses’] testimony would have rebutted the State’s charge of recent fabrication, *i.e., that Mr. Catlin had lied during his testimony* that Mr. Simpson was driving when the accident occurred.” (Emphasis added.) This imprecise argument does not focus in on the nub of the matter.

¶18 Catlin does not identify any evidence relating to some sort of event, *after* he allegedly told Stafford and Christofferson that Simpson was the driver, that might have appeared to the jury to cause Catlin to have a motive to fabricate.

Thus, Catlin has not explained why the circuit court should have concluded that Catlin's statements to Stafford and Christofferson predated some event triggering an apparent motive to fabricate. So far as the record discloses, Catlin's motive to fabricate likely arose shortly after the accident but before Catlin spoke with either Stafford or Christofferson.

¶19 Further, even if we agreed with Catlin that the exclusion of the statements was error, we would conclude that the error was harmless. *See State v. Harvey*, 2002 WI 93, ¶46, 254 Wis. 2d 442, 647 N.W.2d 189 (stating the test for harmless error).

¶20 First, assuming the jurors would have believed that Catlin told Stafford and Christofferson within a day or two of the accident that Simpson was the driver, there was no evidence showing that Catlin and Simpson lacked the opportunity to confer before telling anyone else that Simpson was driving. Thus, the statements were not very probative on the real issue: whether Simpson was the driver or whether, as the State contended, Catlin and Simpson conspired to shift the blame to Simpson.

¶21 Second, as previously indicated, the circuit court permitted both Trotter and Christofferson to testify that Simpson told them the day after the accident that Simpson was the driver. The jury thus knew that Simpson was telling other individuals the day after the accident that he was the driver. Because it would have been plain to the jury that Catlin and Simpson were either both testifying truthfully or both testifying falsely, the fact that Catlin was also telling other individuals the same information beginning around the same time added little or nothing to Catlin's theory of defense.

¶22 Third, Catlin's own theory created credibility problems. Catlin was asking the jury to believe that he and Simpson conspired at the scene to mislead the police to protect Simpson. That made the State's theory, which suggested that Catlin and Simpson must have conspired shortly after the accident instead, even more attractive.

By the Court.—Judgment affirmed.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)4.

