

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 12, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

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.

No. 00-2625-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

EUGENE C. LEE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dane County: MARK J. FARNUM, Judge. *Affirmed.*

Before Roggensack, Deininger and Lundsten, JJ.

¶1 PER CURIAM. Eugene Lee appeals a judgment convicting him as a felon in possession of a firearm, as a repeat offender. He also appeals an order denying his motion for postconviction relief. The issue on appeal is whether the trial court properly admitted certain testimony at his trial. We affirm.

¶2 The State tried Lee on charges of possessing a firearm and possessing cocaine with intent to deliver. The firearm charge resulted from the discovery of a handgun hidden in Lee's shoe during a search of his motel room. When police officer Luedtke asked Lee about the gun, Lee stated that it was put there by a man named Trig. When Luedtke asked why Trig would put a gun in a shoe in Lee's room, Lee responded, "to use it to fuck your wife with."

¶3 Prior to his jury trial, Lee moved to exclude the above-quoted statement from evidence as irrelevant and unfairly prejudicial. The trial court denied the motion, concluding that the language Lee used no longer shocked the hearer as it once did. The court did conclude, however, that the statement had limited relevance.

¶4 The State did not use the statement until, on cross-examination, Lee denied that Luedtke asked him why Trig hid the gun in his room. The prosecutor then asked Lee if he made the statement, and Lee admitted he did. Later, on rebuttal, Lee objected when the prosecutor asked Luedtke what Lee said. The court allowed Luedtke to quote Lee after the prosecutor mistakenly asserted that Lee had denied the statement on cross-examination.

¶5 The jury subsequently found Lee guilty on the firearm charge and acquitted him of possessing cocaine with intent to deliver. The trial court entered judgment on the verdict and denied postconviction relief, resulting in this appeal.

¶6 Evidence is relevant and admissible if it has any tendency to make the existence of a consequential fact more or less probable than it would be

without the evidence. WIS. STAT. §§ 904.01 and 904.02 (1999-2000).¹ Relevant evidence may nevertheless be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. WIS. STAT. § 904.03. The trial court has broad discretion in applying these standards. *Ansani v. Cascade Mountain, Inc.*, 223 Wis. 2d 39, 45, 588 N.W.2d 321 (Ct. App. 1998). We will uphold discretionary determinations if the trial court examined the relevant facts, applied the proper standard of law and reached a reasonable conclusion. *Id.* at 45-46.

¶7 The trial court properly determined that Lee's statement was relevant to his guilt or innocence, despite its limited value. A reasonable jury could infer that an innocent person in Lee's position would not have responded to Luedtke's question with an insulting, confrontational statement.

¶8 The trial court also reasonably determined that Lee's statement was not so shocking to a modern-day jury as to render it unable to reach a fair verdict. Proof that using the statement did not prejudice Lee, unfairly or otherwise, is the jury's acquittal of him on the more serious of the two charges.

¶9 Lee cannot reasonably contend that twice placing the statement in evidence unfairly prejudiced him. Notwithstanding the trial court's admission of it the second time based on the prosecutor's misstatement, there was no cumulative unfairness because no unfair prejudice occurred the first time.

By the Court.—Judgment and order affirmed.

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

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

