**COURT OF APPEALS**
**DECISION**
**DATED AND RELEASED**

December 21, 1995

**NOTICE**



**No. 95-1227**

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

**CITY OF MADISON,**

**Plaintiff-Respondent,**

**v.**

**WILLIAM J. SANDERS,**

**Defendant-Appellant.**

APPEAL from a judgment of the circuit court for Dane County: MICHAEL B. TORPHY, JR., Judge. *Affirmed*.

GARTZKE, P.J.[1] William Sanders appeals from a judgment assessing a forfeiture against him for a violation of § 24.02(1), MADISON GENERAL ORDINANCE. The ordinance incorporates § 947.01, STATS., making it unlawful to engage "in violent, abusive, indecent, profane, boisterous, unreasonably loud or otherwise disorderly conduct under circumstances in which the conduct tends to cause or provoke a disturbance."

[1] This appeal is decided by one judge pursuant to § 752.31(2)(b), STATS.

The issues are whether the trial court should have admitted evidence of Sander's reputation for peacefulness and admitted a transcript of a municipal court trial, the trial court should have permitted Sanders to examine a witness concerning her prior inconsistent statements, the prosecutor's closing argument was improper and prejudicial, and the guilty verdict is based on insufficient evidence. We conclude that the trial court did not erroneously exercise its discretion on the evidentiary issues or in preventing examination on the inconsistent statements, the prosecutor's argument was not improper or prejudicial, and the evidence supports the verdict. We therefore affirm.

The complaining witness, Ms. Knight, testified that in July 1993 Sanders spat on her leg in a parking lot. Sanders admits that he was near her in the parking lot but he denies spitting and specifically denies that he spat on her. Knight testified that no other person saw the incident. Sanders produced no eyewitnesses.

Sanders unsuccessfully sought to impeach Knight's testimony, using an audiotape of her former testimony on the same charge in municipal court and a transcript of that testimony. According to Sanders, she earlier testified that he had spat on her right leg. At the circuit court trial she testified it was her left leg. Sanders does not specify other inconsistencies. Defense counsel's secretary prepared the transcript. She executed a certification to its accuracy and defense counsel notarized the certification. The trial court ruled that neither it nor the jury was obliged to listen to the tape, and that a transcript had to be prepared by a reporter independent of a party to the case.

Sanders relies on § 889.07, STATS., which provides in substance that the original records in a court action produced by the legal custodian in a court of this state shall be received in evidence when relevant, "and a certified copy thereof shall be received with like effect as the original." The certificate of authenticity attached to the audiotape cassette by the municipal court administrator attesting that it is a copy of the original audiotape cures any problem regarding authenticity of the tape itself. But whether to allow the tape to be played in full or to permit counsel to retrieve specific questions and answers for the jury to hear is within the discretion of the trial court. The court properly exercised its discretion when it declined to compel the jury to sit through all of Knight's testimony in the municipal court or to give counsel time to search the tape for specific questions and answers.

The trial court properly refused to admit the transcript on the basis of the certification prepared by counsel's secretary. A transcript prepared by a party lacks the trustworthiness it would have, had it been prepared and certified by a neutral party.

Moreover, we are unconvinced that the transcript ruling affects Sanders's substantial rights. Unless "the error complained of has affected the substantial rights of the party," we may not reverse or set aside the judgment or order a new trial. Section 805.18(2), STATS. The question is whether Ms. Knight was spat upon. She testified that such was the fact. Which leg was spattered is not critical to that determination or to her credibility.

Sanders argues the trial court erred by not permitting him to examine Ms. Knight concerning prior inconsistent statements she is said to have made at the municipal court. Sanders contends that under § 906.13(1), STATS., he need only produce a copy of her prior statements upon request of opposing counsel. He concludes the trial court erred by insisting that a transcript containing those statements should have been prepared by an independent court reporter.

Section 906.13(1), STATS., provides:

> In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown or its contents disclosed to the witness at that time, but on request the same shall be shown or disclosed to opposing counsel upon completion of that part of the examination.

We conclude the trial court properly exercised its discretion in preventing questions to Knight regarding prior inconsistent testimony. The purpose of § 906.13(1), STATS., is to ensure that the statement on which the witness is examined was in fact made and is not misrepresented to the witness. ***State v. Hereford***, 195 Wis.2d 1054, 1075, 537 N.W.2d 62, 70 (Ct. App. 1995). The transcript Sanders had prepared lacked trustworthiness. It would not ensure that the statement on which the witness was examined was in fact made.

Sanders offered the testimony of Dr. Laura Kiessling and attorney Daniel Bach that he has a reputation as a peaceful individual. The court permitted the witnesses to testify that Sanders is a truthful person, but ruled that peacefulness is not a pertinent character trait under the disorderly conduct charge. For that reason the jury heard nothing about Sanders' nonviolent nature.

Section 904.04(1)(a), STATS., makes admissible evidence of a "*pertinent* trait of the accused's character offered by an accused, or by the prosecution to rebut the same; ...." (Emphasis added.) The trial court ruled that spitting upon a person would be abusive but not violent, and in any event the City relied on the "otherwise disorderly conduct" provision in the disorderly conduct statute/ordinance.

The ruling is correct as a matter of law. We held in ***State v. Brecht***, 138 Wis.2d 158, 171, 405 N.W.2d 718, 724 (Ct. App. 1987), *rev'd on other grounds*, 143 Wis.2d 297, 322, 421 N.W.2d 96, 106 (1988), that a person charged with a violent act may call witnesses to testify to the person's nonassaultive, nondangerous character. However, although spitting on another person is abusive and "otherwise disorderly," within the meaning of § 947.01, STATS., it is not a violent act. This is true enough even though, as Sanders contends, spitting on another person is an assault (more accurately, a battery). The Wisconsin Criminal Code defines battery, in part, as a crime causing either "bodily harm" or "great bodily harm." Section 940.19, STATS. The statutes equate those terms with physical injury. *See* § 939.22(4) and (14), STATS. Spitting does not cause physical injury.

During closing argument the prosecutor told the jury, "I do believe that you will find Ms. Knight's testimony as more credible." When defense counsel objected, the court instructed the jury it was responsible for determining credibility, but did not sustain the objection. The prosecutor again asserted his own opinion regarding Knight's credibility, despite defense counsel's previous objections, and again the court gave the same instruction.[2] The court did not err.

[2] That Sanders failed to move for a mistrial is immaterial. A mistrial is necessary if an error has occurred of so serious a nature that it warrants a mistrial. ***Lobermeier v. General Tel. Co.***, 119 Wis.2d 129, 136, 349 N.W.2d 466, 470 (1984). We may review a claimed error,

According to ***State v. Bergenthal***, 47 Wis.2d 668, 682, 178 N.W.2d 16, 24 (1970), during closing argument a prosecutor may express an opinion on the guilt of the defendant if the expression makes it clear "that it was the evidence in the case which convinced him, not sources of information outside of the record." In any event, the court's supplemental instructions to the jury are presumed to have cured whatever prejudice Sanders suffered by reason of the prosecutor's comments. ***State v. Bembenek***, 111 Wis.2d 617, 634, 331 N.W.2d 616, 625 (Ct. App. 1983).

When we review the sufficiency of the evidence, the question is not whether we would have found Sanders guilty but whether the evidence, viewed in light most favorable to the verdict, is such that the jury could be convinced of his guilt under the applicable standard. ***State v. Wachsmuth***, 166 Wis.2d 1014, 1022-23, 480 N.W.2d 842, 846 (Ct. App. 1992).

This was a credibility contest. The jury chose to believe Ms. Knight. The fact-finder resolves the relative credibility of the witnesses. Indeed, credibility is the sole province of the fact-finder. ***Nabblefeld v. State***, 83 Wis.2d 515, 529, 266 N.W.2d 292, 299 (1978). We cannot set aside the fact-finder's decision unless it is based on evidence that is incredible as a matter of law. ***Id***. We cannot say that the testimony of Ms. Knight is incredible as a matter of law.

We recognize the odiousness of the conviction but being spat upon is equally odious.

*By the Court.*—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.

(..continued)
even if the appellant had failed to move for a mistrial. ***Pophal v. Siverhus***, 168 Wis.2d 533, 545, 484 N.W.2d 555, 559 (Ct. App. 1992). The supreme court has reviewed claimed errors, in spite of the mistrial/waiver rule. ***Id***.