

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 25, 2014

Diane M. Fremgen
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. 2013AP352-CR

Cir. Ct. No. 2009CF656

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

DARREN L. WINES,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: REBECCA F. DALLET, Judge. *Affirmed.*

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 PER CURIAM. Darren L. Wines appeals a judgment convicting him of one count of second-degree sexual assault with use of force and one count of battery. He also appeals an order denying his postconviction motion. Wines argues: (1) that Police Officer Isabel Monreal should not have been allowed to

testify about prior consistent statements made by child witness D.W.; and (2) that the circuit court erroneously exercised its sentencing discretion because it incorrectly inferred from the record that he exercised control over the actions of the victim, S.W., his wife. We affirm.

¶2 Wines's wife, S.W., went to the police station and reported that Wines, who had been living separately from her, had punched and slapped her the night before when they got in a fight, causing her eye and jaw to swell, splitting her lip, and causing abrasions on her neck. She also said that Wines forced her to have sexual intercourse against her will. S.W. was taken to the hospital where her injuries were treated. As the date for trial drew near, S.W. recanted her allegations and told the prosecutor she would not testify against Wines. The prosecutor subpoenaed her and eventually had her arrested and brought to court to testify.

¶3 At trial, S.W. testified that she and Wines had a relaxed evening at home playing games and drinking the night before she went to the police station and that they had consensual sex. She testified that she falsely reported that Wines had assaulted her because she was mad at him and wanted him out of her life. Later in her testimony, in apparent contradiction, she said that she falsely reported the assaults because she wanted more attention from Wines. D.W., one of the couple's children who was nine-years-old at the time of trial, testified that on the night of the assault he saw his father hit his mother. He also testified that he saw his father do "nasty stuff" to his mother on the bed while their mother was saying, "no, no, no."

¶4 The defense called Darlene Chu, who often babysat for D.W., to testify about the effect of D.W.'s attention deficit disorder on his ability to communicate. Chu testified:

Q. Let me ask you some questions about [D.W.]. Have you ever had any problems communicating with him?

A. I have problems with [D.W.] every time I have to watch him with communicating with him.

....

Q. Could you describe, what are the problems you have communicating with him?

....

A. [D.W.] has attention disorders, and you have to explain things to him several times over and over again.

....

Q. When you ask -- or when you have asked [D.W.] a question, does he give you a spontaneous answer and a direct spontaneous answer?

A. No, he does not. Sometimes like he has to think about what he wants to say. And he might give you an answer, then he will turn around and change his answers. For instance, if you ask him is he hungry, he might tell you no. And then while you fixing the other children something to eat, he might turn around, probably five minutes later, and said, "Well, auntie, where's mine?"

Q. How many times do you have to repeat a question so that he can give you an answer?

A. That's a hard one. Several times.

....

Q. Ha[ve] there been any circumstances in which you had to ask [D.W.] to provide you with an explanation of something that has happened?

....

A. Yes.

Q. What kind of answers does he give you?

A. I mean, one minute it's one answer, and then another minute, I mean, it's another answer. It's like it's not correspondent to a lot of things that was said to him.

¶5 To rebut Chu’s testimony about D.W., the State called Police Officer Isabel Monreal to testify about what D.W. had told her during her interview with him the morning after the assault. Officer Monreal testified that D.W. told her that his father had hit his mother, busted her lip and given her a red eye. D.W. also told her that his mother wanted to call the police but his father would not let her, and that his father had done “nasty stuff” to his mother while she was on the bed and she was saying “no, no, no.” The jury convicted Wines of both charges.

¶6 Wines first argues that the circuit court misused its discretion in allowing Officer Monreal to testify about D.W.’s prior consistent statement. The circuit court allowed the testimony on the grounds that Chu’s testimony about D.W. constituted an attack on D.W.’s credibility. *See* WIS. STAT. § 908.01(4)(a)2. (2011-12).¹ Whether to admit evidence at trial is committed to the circuit court’s discretion and we will affirm unless the circuit court misuses its discretion. *State v. Warbelton*, 2009 WI 6, ¶17, 315 Wis. 2d 253, 759 N.W.2d 557.

¶7 Prior consistent statements of a witness are admissible as an exception to the hearsay rule if: (1) the declarant testifies at trial and is subject to cross-examination concerning the statement; (2) the statement is consistent with the declarant’s testimony; and (3) the statement is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive. *See* WIS. STAT. § 908.01(4)(a)2.; *State v. Mares*, 149 Wis. 2d 519, 525-26, 439 N.W.2d 146 (Ct. App. 1989). The rationale underlying the prior consistent statement exception to the hearsay rule is that if a witness related a

¹ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

version of the events consistent with his courtroom testimony prior to testifying in court, the existence of a prior consistent statement rebuts the suggestion that the courtroom testimony is not trustworthy. See *State v. Peters*, 166 Wis. 2d 168, 177, 479 N.W.2d 198 (Ct. App. 1991).

¶8 Wine contends that the circuit court misused its discretion in admitting Officer Monreal’s testimony because Chu’s testimony was not an attack on D.W.’s credibility. We disagree. As aptly explained by the State, “[t]estimony that D.W. is not able to spontaneously answer a question, that D.W. changes his answers and that D.W. gives one answer one minute and another answer a minute later are all statements that imply D.W.’s testimony was not credible.” Because Chu’s testimony attacked D.W.’s credibility, the circuit court properly exercised its discretion in admitting Officer Monreal’s testimony on rebuttal about D.W.’s statement to her the morning after the assault as a prior consistent statement under WIS. STAT. § 908.01(4)(a)2.

¶9 Wines next argues that the circuit court misused its sentencing discretion because it improperly inferred from the record that he exercised control over the actions of his wife. He contends that there is nothing in the record to support the circuit court’s conclusions that he exercised power and control over her. Again, we disagree. As explained by the circuit court:

I agree with the assessment by Mr. Schoenfeldt, this is a really sad case. It’s really a sad, sad thing, and it’s, it’s sad that the control that Mr. Wines exercises over his wife extended to the point where she got up on the witness stand and said that this didn’t happen. This case was witnessed by the children....

....

The fact that the children witnessed this and that they came to, one of them came to court and told what he saw, and the jury heard all that and they believed it, and they didn't believe Mrs. Wines who clearly is still under your control.

I recall that I took you into custody during this trial because you had been having contact with her and you weren't to be while this case was pending. So you weren't listening to my order on that, and I believe the State when they say that you had told her to get out of town and had she not been arrested that day this case probably would have been dismissed and you would have gotten back with her and done the same thing again.

....

I see here as far as character goes from Mr. Wines a history of power and control over Mrs. Wines to the point where he will do [sexually humiliating things to her in front of the children].

We agree with the State that the record amply supports the circuit court's conclusion that Wines exercised power and control over his wife.

By the Court.—Judgment and order affirmed.

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

