COURT OF APPEALS
DECISION
DATED AND RELEASED

MAY 28, 1997

NOTICE

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

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No. 96-3374-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

TILFORD O. THOMPSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Walworth County: JOHN R. RACE, Judge. *Affirmed.*

ANDERSON, J. Tilford O. Thompson appeals from a judgment of conviction for one count of party to a crime (PTAC) prostitution and one count of PTAC contributing to the delinquency of a child, both as a repeater, in violation of §§ 944.30(1), 948.40(1), 939.05(1) and 939.62(1)(a), STATS. He also appeals from an order denying his motions for postconviction relief and modification of sentence. Thompson claims the trial court made several errors

pertaining to the admissibility of evidence, juror bias, venue, judicial recusal, and sentencing. We reject his arguments and we therefore affirm.

The following facts are undisputed. In early November 1994, Thompson approached his girlfriend, Lisa Meyer, about him providing a juvenile female, Stacey M., with $20, a dinner and a new outfit as "a reward" for Stacey having sexual intercourse with Thompson. Thompson stated to police that the idea was based on his "past … relationship with Beth [D.]" and that Stacey was to sign a contract to have sexual relations with him. Thompson wanted Meyer to discuss this with Stacey.

About a week later, while on a trip from Delavan to Milwaukee, Meyer asked Stacey if she would be interested in having sex with Thompson in exchange for $20, an outfit and dinner. Stacey informed Meyer that she was not interested. Meyer told Thompson that she had propositioned Stacey with his offer of gifts for sex, but that Stacey was only sixteen. At that point both Meyer and Thompson avoided Stacey.

Thompson was subsequently charged with prostitution and contributing to the delinquency of a child. Thompson filed several motions in limine which were denied.[1] The case was tried to a jury and Thompson was adjudged guilty on both counts. Thereafter, Thompson filed a motion for postconviction relief and for modification of sentence. His motion was denied.

[1] Thompson also filed a motion requesting recusal by the Honorable Robert J. Kennedy. Judge Kennedy was one of the attorneys involved in Thompson's 1986 conviction in which a mother solicited her fourteen-year-old daughter to Thompson for food and money in exchange for sexual intercourse. Thompson was convicted of second-degree sexual assault; the mother was convicted of selling her child for prostitution purposes. Judge Kennedy granted the motion and the Honorable John R. Race was assigned.

Thompson appeals both the judgment and the subsequent order. Additional facts will be included within the body of the decision as necessary.

EVIDENTIARY ISSUES

Thompson first argues that the other acts evidence—details of his 1986 conviction and the sexual contracts—should not have been admitted into evidence. We will look to the 1986 conviction first. Thompson now argues that the "facts about the 1986 offense served only to re-try that offense and to prove to the jury that Mr. Thompson was a bad person who had to be punished." We conclude that this evidence was textbook other acts evidence and was therefore admissible to establish motive, intent and plan.

In this case, Thompson was charged with offering Stacey some money, a dinner and clothes in exchange for nonmarital sexual intercourse. Thompson asked Meyer to be the go-between and arrange the desired tryst. Thompson indicated in a police interview that the idea of money, dinner and a new outfit arose from his "past … relationship with Beth [D.]."

The 1986 case was strikingly similar. In that case, Thompson was convicted of second-degree sexual assault for having sex with Beth D., a fourteen-year-old child.[2] Thompson "purchased" the child for "prostitution purposes" through the child's mother. The purchase price was a bucket of chicken and some gas money.

[2] Although Thompson was convicted in 1986, he received a ten-year sentence and was incarcerated during a substantial portion of the time between acts. Nearness in time is therefore not an issue. *See* ***State v. Speer***, 176 Wis.2d 1101, 1117, 501 N.W.2d 429, 434 (1993) ("'periods of confinement will not be included in computing the time between incidents'") (quoted source omitted).

In reviewing the admissibility of evidence, the question is whether the trial court exercised its discretion in accordance with accepted legal standards and facts of record. *See* ***State v. Kourtidias***, 206 Wis.2d 573, 580, 557 N.W.2d 858, 861 (Ct. App. 1996). We will uphold the trial court's determination if there is a reasonable basis for the ruling. *See* ***id.*** The admissibility of other acts evidence is controlled by a two-pronged test; the trial court must first determine whether the evidence is admissible under an exception to § 904.04(2), STATS. *See* ***Kourtidias***, 206 Wis.2d at 580, 557 N.W.2d at 861. If the evidence is admissible under one of the exceptions, the trial court must then consider whether the probative value of the evidence is outweighed by its prejudicial nature. *See* ***id.***

Although the trial court did not specifically state its balancing analysis on the record, we recognize that it implicitly determined that the probative value of Thompson's 1986 conviction outweighed its prejudicial effect when it denied Thompson's motion in limine. Thompson's theory of defense was to dispute whether or not he withdrew his desire to make the offer before the crime was actually committed; he did not contest his desire to have this relationship with Stacey. We agree with the trial court that the other acts evidence was very relevant to show motive—Thompson's desire to set up sexual services with an underage child—as well as intent and plan.

Moreover, the trial court cautioned the jury during final instructions regarding the proper and limited use of this evidence. *See* WIS J I—CRIMINAL 275. By delivering a cautionary instruction, the trial court can minimize or eliminate the risk of unfair prejudice. *See* ***Kourtidias***, 206 Wis.2d at 581-82, 557 N.W.2d at 862. We conclude that the admission of the 1986 conviction was within the bounds of the trial court's discretion. We further conclude that the charge, coupled with the cautionary instructions, reasonably and adequately

explained the law to the jury. *See* ***State v. Amos***, 153 Wis.2d 257, 278-79, 450 N.W.2d 503, 511 (Ct. App. 1989).

We now turn to the sexual contract. This was a contract drawn up by Meyer and Thompson to protect Thompson from false allegations of rape from anyone he had sexual contact with. Thompson stated to the police that in exchange for the gifts, Stacey "was to sign a contract to have sexual relationship with me." The contract specified:

> I _____, consent to have sexual intercourse with Tilford O. Thompson, a.k.a. Red Thompson. I swear that this is done by my own free will. There is no coersion [sic], force, or monatary [sic] payments involved. I am over the age of 18 years of age and this is done through a friendship relationship and that is all. By signing this consent form, I swear this is all true and correct.
>
> SIGNED _____
> DATE _____
> TIME _____
> WITNESS_____
> DATE _____
> TIME _____

At trial, Thompson's statements to the police and the contract were admitted into evidence to prove motive and intent. The trial court concluded that: "[T]he issue is raised whether or not, indeed, Mr. Thompson intended to engage in prostitution with the child, and I believe that this is indicative of his intent and motive. And I believe, that the prejudicial effect is not unfair in this case …."

Again the question regarding the admissibility of evidence is whether the trial court exercised its discretion in accordance with accepted legal standards and facts of record. *See* ***Kourtidias***, 206 Wis.2d at 580, 557 N.W.2d at 861. We will uphold the trial court's determination if there is a reasonable basis for its application of the two-pronged test for other acts evidence. *See* ***id.***

Thompson argues that the sexual contracts "were merely forms that had been designed by Ms. Meyer and Mr. Thompson to protect Mr. Thompson against false allegations of sexual assault by Ms. Meyer in case their relationship went astray." He further maintains that the contract was totally unrelated to the solicitation of Stacey—she was never presented with a contract to sign and one was not found with her name or signature on it.

However, according to Thompson's own statement to the police, he "would not even be involved with anybody who does not sign a contract." Meyer had signed the contract and he indicated that Stacey would also have to sign it before Thompson would engage in sexual relations with her. Moreover, Meyer mentioned to Stacey that she would have to sign a contract prior to any sexual relations. We agree with the trial court that the contract, although unsigned, was relevant to show Thompson's intent to follow through with the proposal of sex for "gifts." The contract was relevant.

We also agree with the trial court that the probative value of the evidence outweighs its prejudicial effect. Although we agree with Thompson that the evidence was prejudicial, we conclude that it was more than equally valuable to the State which relied on the evidence of the contract to rebut Thompson's theory that he withdrew his intent to follow through with the proposal to Stacey. The decision to exclude probative evidence must be grounded on a conclusion that the evidence was not just prejudicial, but that the evidence's prejudicial effect *substantially outweighed* its probative value. *See* § 904.03, STATS. The trial court properly exercised its discretion when it permitted the State to submit the evidence pertaining to the contract.

JUROR BIAS

Thompson also complains that several jurors "admitted that they harbored some bias or prejudice against [him] or had personal experiences that may cause bias or prejudice" and should have been struck for cause. Juror bias may be inferred from surrounding facts and circumstances. *See* ***State v. Wyss***, 124 Wis.2d 681, 730, 370 N.W.2d 745, 768 (1985), *overruled on other grounds by* ***State v. Poellinger***, 153 Wis.2d 493, 451 N.W.2d 752 (1990). The test is whether "it is more probable than not that the juror was biased against the litigant." ***Id.*** Prospective jurors are presumed impartial, and the challenger to that presumption bears the burden of proving bias. *See* ***State v. Gesch***, 167 Wis.2d 660, 666, 482 N.W.2d 99, 102 (1992). The question of whether a prospective juror is biased and should be dismissed from the jury panel for cause is a matter of the trial court's discretion. *See* ***id.*** A determination by the trial court that a prospective juror can be impartial should be overturned only where the bias is manifest. *See* ***State v. Louis***, 156 Wis.2d 470, 478-79, 457 N.W.2d 484, 488 (1990).

Thompson specifically complains that five jurors had indicated that they knew someone who had been a victim of sexual abuse or sexual assault. Two of these five, Thompson maintains, "expressed some concern about their ability to be fair and impartial, and only after being pressed by the trial court did they admit they could try to be impartial." According to Thompson, "[t]he admitted prejudice and bias of several jurors interfered with [his] right to a fair trial."

First, Thompson mischaracterizes the jurors' answers. We have reviewed the voir dire and are unable to uncover any "admitted prejudice and bias" on the part of the jurors. All five of the "biased jurors" unequivocally stated that despite knowing someone who was sexually abused or sexually assaulted they could look impartially at the evidence in the case. "While such expressions are

not conclusive, evaluating the subjective sincerity of those expressions is a matter of the circuit court's discretion." ***Id.***.

The trial court determined that the jurors could decide the case fairly and impartially, without bias. It specifically refused to find that the jurors were biased against Thompson simply because they knew someone who was sexually abused or sexually assaulted. The record supports that conclusion and we accept the trial court's findings of fact because they are not clearly erroneous. *See* § 805.17(2), STATS.

We conclude that there are no facts or circumstances in the record from which juror bias may be inferred. Additional evidence must be elicited at voir dire to establish that a prospective juror is or was unable to decide a case impartially. *See* ***Louis***, 156 Wis.2d at 483, 457 N.W.2d at 490. Defense counsel attempted to show that the jurors were biased because of their experience with sexually abused family members, but the questions posed merely established that they could in fact be impartial in this case. *See* ***id.*** We conclude that the trial court's exercise of discretion was proper.

VENUE

Next, Thompson asserts that his "motion for a change of venue to Milwaukee county" should have been granted because of the "possible prejudice" in Walworth county. Thompson has mischaracterized both the motion and the arguments made before the trial court.

A defendant may move for a change of place for a criminal trial on grounds that an impartial jury cannot be had in the county. *See* § 971.22(1), STATS. If the court determines that such prejudice exists in the county where the action is pending and that a fair trial cannot be had, then it must order that the trial

be held in any county where an impartial trial can be had. *See* § 971.22(3). In lieu of changing the place of trial, the court may select a jury from a second county. *See* § 971.225(2), STATS. Irrespective of which county is chosen, the judge who orders the change in the place of trial must still preside at the trial. *See* § 971.22(3).

It is clear from the record that Thompson filed no such motion. Rather, Thompson filed a "motion to dismiss defective complaint" under § 971.31(2) and (5), STATS., which is quite different from a motion to change venue under § 971.22, STATS. Moreover, the affidavit in support of the motion averred that "statements by S.R.M. … strongly suggest that the alleged request to have sexual intercourse occurred in a county other than Walworth County." The statements are quite different from allegations that community prejudice would prevent Thompson from receiving a fair and impartial trial. Because Thompson did not file for a change of venue before the trial court, the argument has been waived. *See* ***Meas v. Young***, 138 Wis.2d 89, 94 n.3, 405 N.W.2d 697, 699 (Ct. App. 1987).

We further decline Thompson's invitation to exercise our discretionary review under § 752.35, STATS. Even after clarification in the State's brief, Thompson still fails to allege community prejudice. Rather, he insists a new trial in a new venue is necessary because "the trial court first made [him] aware that every judge in Walworth County might harbor a bias against him." We again point out that a change of venue only changes the location from which the jurors will be chosen; it does not provide the defendant with a new judge. *See* § 971.22(3), STATS. A change of venue was unwarranted in this case.

RECUSAL

Thompson further maintains that Judge Race should have "informed the parties regarding his involvement [in the 1986 case] and recused himself sua sponte or asked the parties to waive the disqualification prior to trial." Thompson asserts that he was unaware of Judge Race's prior involvement until the postconviction hearing and Judge Race should have recused himself pursuant to § 757.19(2)(g), STATS., because of his prior history with Thompson.

Initially, we note that at the motion in limine hearing, Judge Race mentioned that he was not the trial judge, but was aware of the Barbara D. case in which Barbara D. was convicted of prostituting her daughter, Beth D. In addition, Judge Race again indicated at the sentencing that Beth D. came before him in juvenile court. Not once did Thompson question Judge Race's involvement. At either juncture, Thompson could have moved Judge Race to recuse himself pursuant to § 757.19(2)(g), STATS.

However, it was not until the postconviction motion that Thompson alleged Judge Race was unfairly biased. At that point, Judge Race explained that he was the juvenile court judge when the victim of Thompson's 1986 crime, Beth D., was brought in on a child in need of protection or services petition. Judge Race declared that he was not prejudiced against Thompson and denied his postconviction motion.

The mandatory disqualification statute, § 757.19(2), STATS., establishes seven situations in which a judge must disqualify himself or herself from an action or proceeding. *See* ***State v. American TV & Appliance***, 151 Wis.2d 175, 181-82, 443 N.W.2d 662, 664 (1989). The first six situations are susceptible of objective determination; however, the determination of a basis for

disqualification under § 757.19(2)(g) is subjective, "requiring the judge's determination of an actual or apparent inability to act impartially." ***American TV***, 151 Wis.2d at 186, 443 N.W.2d at 666. Disqualification is not required "where one other than the judge objectively believes there is an appearance that the judge is unable to act in an impartial manner; neither does it require disqualification … in a situation in which the judge's impartiality 'can reasonably be questioned' by someone other than the judge." *See* ***id.*** at 183, 443 N.W.2d at 665.

Thompson does not allege that Judge Race had determined that there was an appearance of his inability to act impartially. Neither does Thompson allege that Judge Race had determined that he could not act in an impartial manner in this case. In fact, Judge Race specifically denied manifesting bias in any of his discretionary determinations, in particular, Thompson's sentence. The determination of impartiality is for the judge to make, not someone other than the judge. *See* ***id***. Based on the record, we are unable to conclude that there was an appearance of Judge Race's inability to act in an impartial manner in this case or that his impartiality is open to reasonable question. We affirm the order denying postconviction relief.

SENTENCING

Finally, Thompson complains that his sentence constituted an erroneous exercise of discretion. A trial court has great discretion in sentencing. *See* ***Kourtidias***, 206 Wis.2d at 587, 557 N.W.2d at 864. An appellate court has a duty to affirm a sentence if the facts of record show that it is sustainable as a proper exercise of discretion. *See* ***id.***

Thompson challenges the sufficiency of the trial court's reasons for his six-year prison sentence. The trial court must articulate the basis for the

sentence imposed. *See* ***id.*** The primary factors to be considered are the gravity of the offense, the character of the defendant and the need for the protection of the public. *See* ***id.***

The trial court noted that Thompson has a history of criminal offenses, including the very same charge ten years ago. The trial court commented that Thompson's personality, character and social traits indicate that he has some real problems maintaining a stable relationship and staying out of trouble with the law. The trial court further considered the public's need for protection from Thompson who indicated to the court that he cannot be rehabilitated. The court then determined that the maximum sentence of three years on each charge should be imposed. We conclude that the trial court properly exercised its discretion and relied on correct information from which it drew proper and reasonable inferences in sentencing Thompson.

By the Court.—Judgment and order affirmed.

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