COURT OF APPEALS
DECISION
DATED AND RELEASED

May 7, 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.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-1620-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

GUY N. GIESE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Waukesha County: LEE S. DREYFUS, JR., Judge. *Affirmed.*

Before Snyder, P.J., Nettesheim and Anderson, JJ.

PER CURIAM. Guy N. Giese appeals from a judgment of conviction of two counts of first-degree sexual assault of a child. He argues that evidence concerning secret trips he made to the liquor store was improperly admitted, that the evidence was insufficient to support the conviction, and that his sentence was the result of an erroneous exercise of discretion. We affirm the judgment.

Giese was convicted of sexual contact with his eleven-year-old niece. The niece had a close relationship with Giese and his wife and often spent weekends at the Giese home to help with the Gieses' infant daughter. When the niece stayed overnight, she slept between Giese and his wife in their king-sized bed. The sexual assaults occurred when the niece stayed over after a family Easter celebration in 1994. The niece testified that she went to bed in the shared bed, that at some point during sleep hours Giese woke her and placed her hand on his penis, that Giese wrapped his fingers around her hand and made her squeeze his penis, and that he held her hand on his penis for some period of time. Giese then went to the bathroom. When he returned, he again placed the niece's hand on his penis and kept it there for some period of time. During the second occurrence, the niece felt her hand get wet with a warm and sticky feeling.

The niece testified that the morning after the incident, Giese asked her if she had been awake at night. While Giese was dressing his infant daughter he told the child that they probably would not be seeing the niece for awhile. The niece interpreted this to mean that if she told anyone about the alleged assaults, she would not be allowed to visit the Giese home and visit the baby anymore.

The niece further testified that on many occasions she rode in the car with Giese for a mid-afternoon trip to a liquor store. On those occasions, Giese would purchase beer or little bottles of liquor and consume his purchase in the car. Giese admonished his niece that these trips were their secret and warned that if his wife found out about them, she would divorce him. Giese contends that this evidence was irrelevant and prejudicial because it permits an inference that he had a problem with alcohol and was therefore more likely to commit the offenses.

Giese's claim falls under § 904.04(2), STATS., because it pertains to the admission of other acts not directly related to the charged offenses.[1] The question of whether "other acts" evidence is admissible is a matter within the trial court's discretion. *See* ***State v. C.V.C.***, 153 Wis.2d 145, 161, 450 N.W.2d 463, 469 (Ct. App. 1989). We will not disturb a discretionary determination if the trial court correctly applied accepted legal standards to the facts and, using a rational process, reached a conclusion that a reasonable judge could reach. *See* ***State v. Grande***, 169 Wis.2d 422, 430, 485 N.W.2d 282, 284 (Ct. App. 1992).

"Other acts" evidence must be subjected to a two-step analysis before being admitted. First, the evidence must be relevant to one of the exceptions listed in § 904.04(2), STATS. Second, the evidence must be shown to be more probative than prejudicial. *See* ***State v. Mink***, 146 Wis.2d 1, 13, 429 N.W.2d 99, 103 (Ct. App. 1988). Although courts have been cautioned in ***Whitty v. State***, 34 Wis.2d 278, 297, 149 N.W.2d 557, 565-66 (1967), to use evidence of other acts sparingly and only when reasonably necessary, such evidence has generally been found admissible when it is offered for any purpose other than inadmissible character evidence. *See* ***State v. Johnson***, 184 Wis.2d 324, 341, 516 N.W.2d 463, 468 (Ct. App. 1994).

The trial court recognized that the evidence of Giese's trips to the liquor store and his request that his niece keep the trips a secret was relevant to explain the relationship between Giese and his victim. Indeed, the evidence suggested that Giese was "grooming" his victim to keep secrets. Thus, the evidence was relevant to the plan and preparation exception under § 904.04(2), STATS.

[1] This is true even though the evidence is not "classic 'other acts' evidence" but more part of the "panorama of evidence" surrounding the offense. *See* ***State v. Johnson***, 184 Wis.2d 324, 348-49, 516 N.W.2d 463, 471 (Ct. App. 1994) (Anderson, P.J., concurring).

In considering the prejudice prong of the two-part test, we recognize that by its very nature nearly all evidence operates to the prejudice of the party against whom it is offered. *See* ***Johnson***, 184 Wis.2d at 340, 516 N.W.2d at 468. The test is whether the resulting prejudice of relevant evidence is fair or unfair. *See* ***id.*** Exclusion of evidence is only warranted when it is likely that admitting the evidence would be unfairly prejudicial in its effect by influencing the jury by improper means, appealing to its sympathy, arousing its sense of horror, promoting its desire to punish or otherwise causing the jury to base its decision on extraneous considerations. *See* ***State v. Bedker***, 149 Wis.2d 257, 266-67, 440 N.W.2d 802, 805 (Ct. App. 1989).

The trial court considered the limited nature of the questions about the trips to the liquor store. There was no emphasis on the fact that Giese consumed alcohol in secret or in the middle of the day. We applaud the prosecution for the narrow questions asked about the trips. There was no suggestion that Giese was an alcoholic. The questions elicited the nature of the niece's relationship with Giese in light of the secret that they shared and kept from another person.[2] The prosecution adhered to the limited purpose for which the evidence was admitted in closing argument as well.[3] Even in the absence of a limiting instruction on the relevancy of

[2] The first question posed to Giese's niece was: "[W]ere there any type of secrets that your uncle wanted you to keep before April of '94?" After the witness explained that Giese would buy liquor and consume it and had asked her to keep the secret, the prosecution asked: "[D]id you ever tell anybody about that secret?" and "You kept that secret for your uncle?" That was the extent of the examination regarding Giese's trips to the liquor store.

[3] The prosecutor argued that "[s]he did keep a secret with him. He told you she was telling the truth about what happened when they used to go to the liquor store. That secret was okay so he thought he was safe with [her], but he wasn't." In another scant reference to the evidence, the prosecutor explained its limited purpose:

> [S]he did keep a secret for him and Guy Giese was not honest about telling [his wife] about it [trips to the liquor store]. He did tell her about it after everything came out

(continued)

this evidence, there was no possibility that the evidence improperly influenced the jury because the prosecution was professional in voluntarily limiting the purpose of the evidence. We conclude that the trial court properly exercised its discretion in determining that the evidence was relevant and that its probative value outweighed its potential prejudice.

Giese attacks the sufficiency of the evidence by contending that the niece's testimony was inherently incredible. He points out that she gave inconsistent accounts with regard to the time she arrived at the Giese home, the length of time she was in bed before the assaults occurred, and the length of time each assault lasted.[4]

Our review of the sufficiency of the evidence is to determine whether the evidence, viewed most favorably to the State and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. *See* ***Johnson***, 184 Wis.2d at 346, 516 N.W.2d at 470. We defer to the jury's function of weighing and sifting conflicting testimony. *See* ***State v. Wilson***, 149 Wis.2d 878, 894, 440 N.W.2d 534, 540 (1989).

> because of course he knew she was going to hear about it, and is that really so important that he went and had something to drink? Is he on trial because he's drinking? No. But why is it important? It's important because he did have a relationship with her and asked her to keep a secret from his wife, and [she] kept that secret.

[4] Giese's niece told a police detective and a child protective services worker different times as to when she and the Gieses arrived home from the Easter celebration. On cross-examination, she indicated that she could not remember when she returned to the Giese home. She also told the detective, a social worker, and a counselor different estimates for the duration of the assaults. She testified at trial that she had no idea how long either assault lasted.

Giese's niece gave consistent testimony about the facts directly bearing on the elements of the offenses—that Giese had touched her sexually. Her inconsistencies as to the time and duration do not go to the elements of the offenses. Moreover, evidence is incredible only when it is in conflict with the uniform course of nature or with fully established or conceded facts. *See* ***Haskins v. State***, 97 Wis.2d 408, 425, 294 N.W.2d 25, 36 (1980). There were no conceded facts with which the niece's testimony was inconsistent. Inconsistencies and contradictions in the statements of witnesses do not render the testimony inherently or patently incredible, but simply create a question of credibility for the trier of fact to resolve. *See* ***id.*** This is particularly true when dealing with a child victim. *See* ***State v. Sirisun***, 90 Wis.2d 58, 65, 279 N.W.2d 484, 487 (Ct. App. 1979). The jury accepted as credible the niece's testimony that Giese had sexual contact with her. We conclude that the evidence was sufficient to support the conviction.

The final claim is that the ten-year prison term and consecutive ten-year probation term imposed was an erroneous exercise of the sentencing court's discretion. No postconviction motion for sentence modification was filed. Generally a motion to modify a sentence is a prerequisite to appellate review of a defendant's sentence. *See* ***State v. Barksdale***, 160 Wis.2d 284, 291, 466 N.W.2d 198, 201 (Ct. App. 1991). However, we may address an issue subject to waiver in the interest of judicial economy. *See* ***State v. Harrell***, 182 Wis.2d 408, 417, 513 N.W.2d 676, 679 (Ct. App. 1994).

Sentencing is a discretionary function of the trial court. *See* ***State v. Cooper***, 117 Wis.2d 30, 39, 344 N.W.2d 194, 199 (Ct. App. 1983). Appellate courts have a strong policy against interference with that discretion. *See* ***id.*** If the record contains evidence that discretion was properly exercised when imposing sentence, this court must affirm. *See* ***id.*** at 40, 344 N.W.2d at 199. To overturn a sentence, a

defendant must show some unreasonable or unjustifiable basis for the sentence in the record. *See* ***id.***

A trial court must consider a variety of factors when imposing sentence. *See* ***State v. Paske,*** 163 Wis.2d 52, 62, 471 N.W.2d 55, 59 (1991). The weight to be given various factors at sentencing is within the sentencing court's broad discretion. *See* ***State v. Thompson***, 172 Wis.2d 257, 264-65, 493 N.W.2d 729, 732-33 (Ct. App. 1992). The only mandatory factors the court must consider are the gravity of the offense, the offender's character and the public's need for protection. *See* ***id.*** at 264, 493 N.W.2d at 732.

Giese first claims that the sentencing court did not consider the gravity of the offense or his character. We reject this contention inasmuch as the court expressed its concern that the sexual abuse of children can carry over into the victim's adulthood and acknowledged that the negative impact on the victim occurs even though the offenses could be viewed as minor sexual contact. The court also noted that the offenses had ripped apart family relationships. Giese's character was considered when the court expressed concern over Giese's lack of remorse and his acts in cultivating a special and secretive relationship with his niece. There was adequate consideration of the gravity of the offense and Giese's character.

Giese argues that the sentence was based on an unjustifiable basis—the prosecutor's unsubstantiated assertion that sexual contact had occurred before.[5] Giese believes that the trial court relied on the prosecutor's belief that there were

[5] The prosecutor argued, "I'm not so naïve to think that this is the first night that this happened …."

other instances of sexual contact between Giese and his niece because the court made reference to Giese's conduct fitting a "pattern." We read the sentencing court's remarks to have related to Giese's "pattern" of "grooming" his victim—acts creating a special relationship with his niece and testing whether she would maintain secrecy. The court did not rely on the vague allegations in the presentence investigation report to information contained in police reports suggesting other sexual assaults of his niece. Rather, the court stayed focused on the offenses for which Giese was convicted. The sentence is not marred by reliance on an unjustifiable basis.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.