COURT OF APPEALS DECISION DATED AND FILED

DECEMBER 16, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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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.

No. 97-1191-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

FRANK ITHIER,

DEFENDANT-APPELLANT.

APPEAL from judgment and order of the circuit court for Brown County: SUSAN E. BISCHEL, Judge. *Affirmed.*

Before Cane, P.J., Myse and Hoover, JJ.

PER CURIAM. Frank Ithier appeals his conviction for three counts of first-degree sexual assault of a child, after a trial by jury. The trial court sentenced Ithier to three consecutive twenty-year prison terms on the charges. Over Ithier's objection, the prosecution introduced "other acts" evidence of sexual acts Ithier committed against another child during 1987 in Milwaukee. The State

never charged Ithier with crimes for those acts, and Ithier denied that they ever took place. The trial court admitted the "other acts" evidence as probative of Ithier's intent, plan, and scheme; these are exceptions to the general rule barring litigants from using someone's "other acts" as evidence of character traits and thereby to prove that the same person committed new acts in conformity with his character traits. The trial court also ruled that the "other acts" evidence's probative value outweighed any prejudicial effect. After hearing the "other acts" evidence, the jury found Ithier guilty of committing a series of depraved sexual acts and assaults against his own and his girlfriend's children. On appeal, Ithier raises several arguments: (1) the trial court wrongly admitted the "other acts" evidence; (2) the prosecution failed to prove his guilt beyond a reasonable doubt; and (3) the sentence was excessive. We reject these arguments and therefore affirm Ithier's convictions.

We first conclude that the trial court properly admitted the other acts evidence. Trial courts may allow such evidence on such matters as intent, motive, plan, and scheme, as long its probative value outweighs its prejudicial effect. *See* ***State v. Bustamante***, 201 Wis.2d 562, 569, 549 N.W.2d 746, 749 (Ct. App. 1996). Here, the evidence was highly probative; it revealed Ithier's unique *modus operandi* in terms of women, their children and his sexual misconduct. *See* ***State v. Rutchik***, 116 Wis.2d 61, 72, 341 N.W.2d 639, 645 (1984). Ithier evidently liked to ingratiate himself with women heads of households, enter into relationships with them, obtain easy sexual access to the women's young children, and use that access for sexual abuse. The jury was entitled to hear this kind of testimony in making an informed examination of Ithier's guilt. This is not a case in which a jury wrongly considered the simple existence of a prior sexual incident as itself proof of an accused's guilt. Rather, Ithier's distinctive characteristics

operated like a signature. *See* MCCORMICK ON EVIDENCE § 190, at 449 (2d ed. 1972). They stood out from the rest. As such, they were strong circumstantial evidence of the perpetrator's intent, plan, and scheme; they left the inference that the current crimes were the latest manifestations of a longer-term, consistently executed strategy. Moreover, the trial court controlled any prejudicial effect with cautionary jury instructions, and we see little chance that the jury misapplied the evidence.

We next conclude the evidence supported Ithier's three first-degree sexual assault convictions. We review the evidence to determine whether a reasonable jury could find him guilty beyond a reasonable doubt. ***State v. Oimen***, 184 Wis.2d 423, 436-37, 516 N.W.2d 399, 405 (1994). The jury, not this court, decides the weight of the testimony and the credibility of witnesses. ***State v. Poellinger***, 153 Wis.2d 493, 503-04, 451 N.W.2d 752, 756 (1990). First, the victims implicated Ithier in the offenses, and the jury could reasonably accept their testimony and out-of-court statements. Second, medical evidence pointed toward sexual assaults. Third, the crimes fit Ithier's distinctive *modus operandi*. Such confluences of unusual features can be persuasive evidence on the issues of intent, plan and scheme. *See* MCCORMICK § 190, at 447-51. Ithier's prior sexual misconduct and the charged offenses posed remarkably similar features in terms of manner, place, degree, purpose, detail, condition and preparation. This commonality of factors raised the probability that Ithier was guilty. In short, a rational jury that fairly examined the evidence could rightfully find Ithier guilty beyond a reasonable doubt.

Nonetheless, Ithier challenges the evidence's sufficiency on the basis of discrepancies in two victims' accounts. First, he points out that one of the victims had actually experienced abuse-evincing "spotting" before making any

allegations of sexual assault. This victim's doctor also testified that this victim, while always forthright, never reported any sexual abuse. Second, Ithier points out that another victim initially accused a former babysitter of sexual assault, accusing Ithier only after the social services department conducted an investigation. The jury, not this court, had the duty to resolve these kinds of contradictions; we may intervene only if the testimony was inherently and patently incredible. *See* ***State v. Alles***, 106 Wis.2d 368, 376-77, 316 N.W.2d 378, 382 (1982). None of these discrepancies created a reasonable doubt about Ithier's guilt; each had explanations consistent with guilt. First, the jury could infer that a young victim might not draw a connection between "spotting" and sexual abuse. Second, it could infer that a young victim might not tell a doctor about sexual abuse, despite overall forthrightness. Third, it could infer that a young victim might have initially misaccused a former babysitter out of fear of Ithier, who had terrorized the children; the jury could thereby discount the first accusation and infer that the second represented the true state of affairs. Last, juries are always free to reasonably discount such discrepancies on the basis of the witness's overall immaturity. *See* MCCORMICK § 62, at 140-41. In sum, we have no basis to overturn the jury's verdict.

Last, we conclude that the trial court imposed a proper sentence. Sentencing is a determination left to the trial court's discretion. *See* ***State v. Macemon***, 113 Wis.2d 662, 667-68, 335 N.W.2d 402, 405-06 (1983). Trial courts base their sentences on such factors as the gravity of the offense, the character of the accused, the public's need for protection, and the interests of deterrence. *See* ***State v. Sarabia***, 118 Wis.2d 655, 673-74, 348 N.W.2d 527, 537 (1984). Here, the trial court sentenced Ithier to three consecutive twenty-year sentences on the three charges. This represented a proper exercise of sentencing discretion. Ithier had

committed a series of depraved sexual acts against children. On multiple occasions, he sodomized two young boys and raped a young girl, once during the child's drug-induced sleep. His assaults included the use of alcohol, drugs, torture, and the victims' forced ingestion of foul matter. The children were now displaying dysfunctional behaviors, and the trial court acknowledged their severe, long-term psychological damage. The presentence report condemned Ithier's actions in the strongest terms, while the trial court expressed revulsion at the evidence and believed that Ithier deserved greater punishment than the court had the power to impose. We are satisfied that the trial court issued sentences commensurate with Ithier's culpability, the severity of his crimes, the protection of the public, and the need to deter Ithier and like-minded wrongdoers from these kinds of crimes. In short, we see nothing excessive in his three consecutive twenty-year prison terms.

By the Court.—Judgment and order affirmed.

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