COURT OF APPEALS
DECISION
DATED AND FILED

September 1, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-2166-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

ALFONSO DENNIS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: LEE E. WELLS, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

PER CURIAM. Alfonso Dennis appeals from a judgment entered after a jury convicted him on one count of misconduct in public office, contrary to § 946.12(2), STATS. He claims: (1) the evidence is insufficient to support the conviction; (2) the trial court erroneously exercised its discretion in admitting certain "other acts" evidence; and (3) the trial court erroneously exercised its

discretion in instructing the jury regarding misconduct in public office. Because the evidence is sufficient to sustain the conviction, and because the trial court did not erroneously exercise its discretion in admitting the "other acts" evidence or in instructing the jury, we affirm.

I. BACKGROUND

On December 17, 1995, at about 1:30 or 2:00 a.m., Angela Doss was in the area of South 11th Street and West National Avenue and was attempting to make money by prostitution. Dennis, a City of Milwaukee police officer, was patrolling the area in a squad car and arrested her. While Doss was in the back seat of the squad car, Dennis asked her to lift up her shirt, which she did voluntarily. He fondled her breasts. He then gave her his phone number and told her to call him when she got out of jail.

Doss called Dennis and the two met and engaged in sexual relations. Subsequently, Doss reported these activities to the police and placed a phone call to Dennis from the Police Academy, which was recorded. During the conversation, Dennis told Doss that he was supposed to give her a $600 ticket. Doss responded that she could not pay that and asked if there was any other way. Dennis responded "Yep. Keep giving me some good head and some good pussy." Dennis testified that later in this conversation, he retracted this statement, indicating he would not give her a ticket in any event.

As a result of this conduct, Dennis was charged with one count of prostitution and one count of misconduct in public office, on the basis that he "did an act he knew was in excess of his lawful authority." During the trial, the State presented the testimony of three other prostitutes, Valerie Pagan, Debra Dunaway and Candi Rex. Each testified that Dennis had requested sexual favors from them.

The State offered this testimony to show intent on Dennis's part that his statement to forgo issuing Doss a ticket in exchange for sex was not simply a "bad joke."

The jury convicted on the misconduct charge and acquitted on the prostitution charge. Dennis now appeals.

II. DISCUSSION

A. Insufficient Evidence.

Dennis claims the evidence was insufficient to support his conviction. Specifically, he argues this is so for two reasons: (1) the State failed to present any evidence concerning the "lawful authority" of a police officer, which was an element of the crime charged; and (2) there was no evidence that he committed the crime of prostitution or any other crime through the use of his public office. We reject his claim.

In reviewing a claim of insufficiency of the evidence, we are bound by the following standard of review.

> [I]n reviewing the sufficiency of the evidence to support a conviction, an appellate court may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn a verdict even if it believes that the trier of fact should not have found guilt based on the evidence before it.

State v. Poellinger, 153 Wis.2d 493, 507, 451 N.W.2d 752, 757-58 (1990) (citations omitted). Our review of the evidence demonstrates that there is sufficient evidence to support the conviction.

Dennis first argues that the evidence is insufficient because the State failed to introduce any evidence regarding the "lawful authority" element of the misconduct charge. Section 946.12, STATS., sets forth the crime of misconduct in public office and provides in pertinent part:

> Any public officer or public employe who does any of the following is guilty of a Class E felony:
>
> ….
>
> (2) In the officer's or employe's capacity as such officer or employe, does an act which the officer or employe knows is in excess of the officer's or employe's lawful authority ….

Dennis argues that because the State did not introduce evidence setting forth what constitutes the "lawful authority" of a police officer, there is no way a jury could convict. We disagree. We adopt the reasoning of the trial court when it rejected this same argument:

> Another defense position here is basically that there was no evidence that would support that this was an act done by the defendant that was in excess of his lawful authority. I think the suggestion in part is that the jurors had to be advised as to what … the lawful authority of an officer might be. And, in particular, may very well require testimony from experts in the area of the police rules and regulations or police authority to advise the jurors as to what was or was not done within the lawful authority of Mr. Dennis.
>
> My reaction is that in some unique circumstances, other situations, that very well may be the case.… But in the predominant number of cases … you won't need that kind of specialized expert testimony to be presented.… I think this case falls into that category. And, that is, that in this situation, I think it's reasonable for jurors to conclude that the police have a right to arrest somebody for solicitation of prostitution or prostitution.
>
> They have a right to issue a citation against them, and they have a right to go to the district attorney and ask that the district attorney issue a criminal complaint against them. But they don't have some right to bargain with the

> prostitutes; that you … give me some sex and I will restrain myself from arresting you or issuing a citation against you.
>
> ….
>
> And that is so obviously a violation of the lawful authority--in excess of the lawful authority of the defendant or any other officer that no specialized expertise would be required, and that when you call upon jurors to act within their experiences in life and common sense and general understanding of things, I think this is something that would fit very well into that category. And, as such, I find that that is--that I'm also going to deny the motion on the basis that there is nothing that requires that kind of expertise to be presented.

The State, therefore, did not need to introduce evidence on this point because jurors could rely on their "common knowledge" to determine that an offer by a police officer to forgo writing a ticket in exchange for sex constituted an act in excess of lawful authority. *See* ***State v. Martinez***, 210 Wis.2d 396, 413-14 n.16, 563 N.W.2d 922, 930 n.16 (Ct. App. 1997).

The record contains a tape recorded conversation during which Dennis tells Doss that he will not write her a $600 ticket, if she provides him with certain sexual favors. Moreover, the jury was instructed that in order to find Dennis guilty, they had to determine that he, in his capacity as a police officer, intentionally requested to commit an act of sexual contact in exchange for a decision not to issue a citation against Doss. The fact that the recording also contains Dennis's statements that he told Doss he would not write the ticket in any event is irrelevant. It was up to the jury to determine which statement should be believed.

Dennis also argues that the jury should not be able to convict him of misconduct for the consensual sexual contact that occurred while he was transporting Doss in the squad car because this was not an act of prostitution or

any other crime. This argument is irrelevant to our determination that the record supports the conviction.

There is evidence in the record from which a reasonable jury could find that Dennis was guilty of misconduct in public office. This evidence included Dennis's statement made during the tape recorded conversation between Doss and himself, where he offered to forgo issuance of the ticket in exchange for sexual favors. This is sufficient to support the verdict. Dennis's claim that his later contradiction of this statement, or retraction of this offer, should somehow negate the fact that he made the statement is without merit. When a witness has made conflicting statements, it is for the jury to determine which statement to believe. *See* ***State v. Dunn***, 158 Wis.2d 138, 143, 462 N.W.2d 538, 540 (Ct. App. 1990). The jury decided against Dennis. That decision was not unreasonable, especially given the repeated references throughout the tape recorded conversation where Dennis indicated he does not like to talk by telephone, telephones can be bugged, etc. Thus, we reject his claim that the evidence is insufficient to support the verdict.

B. "Other Acts" Evidence.

Dennis next claims the trial court erroneously exercised its discretion in admitting certain "other acts" evidence from three prostitutes, who testified regarding similar encounters with Dennis. We are not convinced.

In deciding whether to admit evidence of prior bad acts, the trial court must apply a two-part test. *See* ***State v. Kuntz***, 160 Wis.2d 722, 746, 467 N.W.2d 531, 540 (1991). First, the trial court must determine whether the evidence is admissible under Rule 904.04(2), STATS. As noted in ***Kuntz***, § 904.04(2) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that [the person] acted in conformity therewith. This subsection does not exclude the evidence when offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Kuntz, 160 Wis.2d at 746, 467 N.W.2d at 540. If a trial court finds that the other-acts evidence falls under one of the § 904.04(2) exceptions, it must then consider whether the probative value of such evidence, and the necessity for its admission, are substantially outweighed by the danger of unfair prejudice. ***Id.*** at 748, 467 N.W.2d at 541. An appellate court reviews the trial court's determination under the erroneous exercise of discretion standard. *See* ***State v. Pharr***, 115 Wis.2d 334, 347-48, 340 N.W.2d 498, 503-04 (1983).

Based on our review, there was no erroneous exercise of discretion. The first "other-acts" witness, Pagan, testified that she had had contact with Dennis on one occasion where he told her he was working undercover and he asked her "when he was going to get a blow job". She replied, "when [you pay] for it." After that, she testified that Dennis arrested her every time he saw her.

The second other-acts witness called by the State, Dunaway, testified that she gave Dennis oral stimulation for $20 on one occasion and on another occasion he approached her and told her there was an outstanding warrant for her arrest. Dennis then asked her, while rubbing his private part, if she "would like to."

The last other-acts witness, Rex, testified that she had interaction with Dennis on a number of occasions. She stated that Dennis told her "instead of taking you to jail, you could give me a blow job."

There appears to be no dispute that the evidence passes the first part of the test for admission because it was offered to show Dennis's intent that his tape recorded statement was a serious proposal to forgo issuance of the ticket in exchange for sexual favors, rather than simply a "bad joke" as Dennis contended. The dispute appears to center on the second part of the admissibility test, i.e., whether the reason for admitting this evidence was substantially outweighed by the danger of unfair prejudice. Dennis claims the evidence was prejudicial and should have been excluded because: (1) "it was utterly unfair to require [him] to defend against the allegations of the prostitutes"; (2) the evidence has little probative value; and (3) its admission confused the jury. We reject each in turn.

First, he claims the prostitutes' testimony was self-serving and inherently unreliable and could not be conclusively proven or disproven and the incidents described were vague. The trial court recognized these concerns and gave Dennis extra time to prepare for trial and ensured full pretrial discovery relating to this evidence. Dennis, therefore, had ample opportunity to investigate these witnesses and prepare a defense. Dennis, in fact, had available to him cross-examination of these witnesses to discredit their accounts. He had partners testify that no such type of inappropriate behavior had been observed. The credibility of the witnesses was left to the jury to decide.

Moreover, Dennis does not cite any authority which precludes admission of testimony simply because it is difficult to defend against or because it involves a "he-said/she-said" situation. Thus, we are not prepared to conclude that this basis somehow renders the evidence inadmissible.

Dennis next claims the evidence had little probative value. We disagree. The evidence had sufficient probative value to warrant its admission.

The evidence tended to show which theory was more believable: either the State's theory that Dennis seriously intended to forgo writing Doss a ticket if she provided him with sexual favors or, Dennis's claim that the recorded statement was simply a bad joke. The evidence tended to show that Dennis had made similar proposals to other prostitutes or that he retaliated against a prostitute by arresting her for not acceding to his request for sexual favors. Thus, the evidence was directly relevant to a critical issue in the case.

Finally, Dennis claims admitting this evidence confused the jury and allowed it to convict him on the acts he allegedly committed with the "other-acts" witnesses, rather than what he was charged with in the instant case. We reject his claim.

The jury was clearly instructed on the basis for the misconduct charge. The instructions stated that the jury had to find "that the defendant, in his capacity as a public officer, intentionally requested to commit an act of sexual contact in exchange for a decision not to issue a citation against Angela Doss." Accordingly, the jury's attention was focused on the facts specific to the instant case and, given the specificity of the instruction, we are not persuaded by Dennis's arguments that the other-acts witnesses somehow confused the jury.

Moreover, the jury was instructed that the other-acts evidence is admitted only to prove intent (or motive, preparation or plan), and that the jury could not treat the evidence as proof of propensity. Accordingly, any danger of unfair prejudice in admitting this evidence was cured by instruction. *See* ***State v. Grande***, 169 Wis.2d 422, 436, 485 N.W.2d 282, 286-87 (Ct. App. 1992).

C. Jury Instruction.

Finally, Dennis claims the trial court erroneously instructed the jury with respect to the elements of the misconduct charge. In essence, Dennis claims that the following instruction was erroneous because there was no evidence at trial defining the "lawful authority" of a police officer. The subject instruction provided:

> Misconduct in public office as defined by Statute 946.12 (2) of the Criminal Code of Wisconsin, is committed by a public officer who, in his capacity as such officer, does an act which he knows is in excess of his lawful authority.
>
> Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present:
>
> The first element requires that at the time of the alleged offense, the defendant was a public officer. A City of Milwaukee Police Officer is a public officer.
>
> The second element requires that the defendant in his capacity as a public officer intentionally requested to commit an act of sexual contact in exchange for a decision not to issue a citation against Angela Doss.
>
> The third element requires that an intentional request by the defendant to commit an act of sexual contact in exchange for a decision not to issue a citation against Angela Doss was in excess of the defendant's lawful authority.
>
> The Fourth element requires that the defendant knew that such conduct was in excess of his lawful authority.
>
> If you are satisfied beyond a reasonable doubt that the defendant was a public officer, that in his capacity as such officer, the defendant did intentionally request to commit an act of sexual contact in exchange for a decision not to issue a decision against Angela Doss, and that the defendant knew that such conduct was in excess of his lawful authority, you should find the defendant guilty.
>
> If you are not so satisfied, you must find the defendant not guilty.

Dennis argues that instructing the jury with the "in excess of legal authority" language was erroneous and confusing because there was no evidence as to what constitutes legal authority. We are not persuaded.

"A trial court has wide discretion as to instructions. If the instructions of the court adequately cover the law applicable to the facts, this court will not find error …." ***State v. Lenarchick***, 74 Wis.2d 425, 455, 247 N.W.2d 80, 96 (1976) (citation omitted). This court looks to the instructions as a whole in determining whether they were an appropriate statement of the law. *See* ***id.***

The trial court's instruction accurately stated the law. As noted above, expert testimony as to what constitutes a police officer's lawful authority was not required. Accordingly, the trial court did not erroneously exercise its discretion when it instructed the jury.

By the Court.—Judgment affirmed.

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