

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

May 7, 1998

Marilyn L. Graves  
Clerk, Court of Appeals  
of Wisconsin

**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 § 808.10 and RULE 809.62, STATS.

**No. 98-0041-CR**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**STEVEN J. FISCHER,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Juneau County: JOHN W. BRADY, Judge. *Affirmed.*

ROGGENSACK, J.<sup>1</sup> Steven Fischer appeals from his conviction for disorderly conduct and from an order denying him postconviction relief. He claims that the circuit court erroneously exercised its discretion when it excluded evidence which explained the argument that resulted in the charge against him,

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<sup>1</sup> This appeal is decided by one judge pursuant to § 752.31(2)(f), STATS.

and when it conditioned his probation on a no-contact provision in regard to his stepchildren. Because this court concludes that the first decision was well within the circuit court's discretion and any objection to the second decision was waived, the judgment and order are affirmed.

## **BACKGROUND**

On April 4, 1996, Fischer was charged with one count of disorderly conduct following a heated argument with his estranged wife, Donna, in which she said that he had called her a bitch and threatened to throw her off the porch. Three of Donna's daughters witnessed the incident and corroborated Donna's story. Fischer initially admitted that he had called his wife a bitch and threatened to throw her off the porch, but subsequently he denied it. Fischer claimed that the dispute arose because of his attempts to stop the sexual activities of one of Donna's minor daughters. He sought to introduce evidence of that daughter's prior sexual activity to bolster his version of events. The State filed a motion *in limine* to prohibit the introduction of that evidence. The circuit court excluded the evidence on the grounds that it was not relevant, and even if it were marginally relevant, it would confuse or mislead the jury.

After Fischer was found guilty, the court gave him a stayed sentence of ninety days in jail, and placed him on eighteen months probation, conditioned on no contact with his stepchildren. Fischer did not object to the conditions of probation, either at sentencing or at a hearing on his postconviction challenge to the exclusion of evidence.

## DISCUSSION

### **Standard of Review.**

The exclusion of evidence is a discretionary determination which will not be reversed if the trial court rationally applied an appropriate standard of law to the facts of record to reach a reasonable conclusion. *State v. Pittman*, 174 Wis.2d 255, 267, 496 N.W.2d 74, 79-80 (1993). The imposition of conditions of probation is also a discretionary determination, and the same standard applies. *State v. Brown*, 174 Wis.2d 550, 553, 497 N.W.2d 463, 464 (Ct. App. 1993).

### **Exclusion of Evidence.**

Fischer offers several theories under which evidence of his stepchild's sexual activity should have been admitted: that it was relevant to intent; that it was relevant to provocation; or that it was relevant to privilege. None of these theories has merit.

Only evidence which is relevant is admissible. Section 904.02, STATS. Relevant evidence is that which has a "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Section 904.01, STATS. In addition, § 904.03, STATS., allows the circuit court to exclude otherwise relevant, admissible evidence if it concludes it may result in "confusion of issues, or misleading the jury ... [or] undue delay, waste of time, or needless presentation of cumulative evidence." *State v. Echols*, 175 Wis.2d 653, 677, 499 N.W.2d 631, 638 (1993).

Wisconsin's disorderly conduct statute is straightforward. Section 947.01, STATS., provides:

Whoever, in a public or private place, engages in violent, abusive, indecent, profane, boisterous, unreasonably loud or otherwise disorderly conduct under circumstances in which the conduct tends to cause or provoke a disturbance is guilty of a Class B misdemeanor.

The statute thus creates two elements for disorderly conduct: (1) conduct of the type enumerated in the statute; and (2) circumstances in which the conduct would tend to cause a disturbance. *City of Oak Creek v. King*, 148 Wis.2d 532, 540, 436 N.W.2d 285, 288 (1989).

Neither motive nor intent are elements of the crime of disorderly conduct, and thus evidence of what impact Fischer's concern over his stepchild's alleged sexual history may have had on his conduct was not relevant to the crime charged and was properly excluded under §§ 904.01 and 904.02, STATS.

Provocation may act to excuse the conduct of a defendant whose victim "engages in unlawful conduct of a type likely to provoke others to attack him." Section 939.48(2)(a), STATS. Here, however, the stepchild whose prior sexual history Fischer sought to introduce was not the victim of the disorderly conduct. Fischer's wife was the victim. Therefore, the testimony excluded was not relevant to the defense of provocation.

In order to justify his actions as a privileged attempt to prevent harm to his stepchild, Fischer would need to demonstrate "that a direct causal relationship be reasonably anticipated to exist between the defender's action and the avoidance of harm." *State v. Olsen*, 99 Wis.2d 572, 578 n.3, 299 N.W.2d 632, 636 n.3 (Ct. App. 1980). However, the proffered evidence was not relevant to the establishment of privilege. The stepchild's alleged past sexual history had nothing to do with the issue of whether the child was in some imminent danger *at the time of Fischer's conduct*. Moreover, Fischer fails to explain how screaming

profanities at his estranged wife or threatening to push her off of a porch would have prevented harm to the stepchild. The circuit court's exclusion of the evidence was well within its discretion.

### **Conditions of Probation.**

For the first time on appeal, Fischer challenges the no-contact condition of his probation, arguing that this court should review it under the plain error standard. However, the plain error doctrine applies only to evidentiary errors. *See State v. Damon*, 140 Wis.2d 297, 303, 409 N.W.2d 444, 447 (Ct. App. 1987). Because Fischer failed to give the circuit court an opportunity to consider his argument, we deem it waived. *State v. Holt*, 128 Wis.2d 110, 124, 382 N.W.2d 679, 686 (Ct. App. 1985).

### **CONCLUSION**

Fischer's conviction for disorderly conduct was based upon the loud and abusive manner in which he threatened his wife. His reasons for being upset with her were irrelevant, and evidence relating to the background for the argument was properly excluded.

*By the Court.*—Judgment and order affirmed.

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

