COURT OF APPEALS
DECISION
DATED AND FILED

February 3, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-0372-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TROY DEXTER WILD,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Walworth County: ROBERT J. KENNEDY, Judge. *Affirmed.*

Before Brown, Nettesheim and Anderson, JJ.

PER CURIAM. Troy Dexter Wild appeals from a judgment of conviction of substantial battery, second-degree recklessly endangering safety, disorderly conduct, and two counts of second-degree sexual assault. He also appeals from an order denying his postconviction motion. Wild argues that the trial court judge should have sua sponte recused himself when he was under

pressure from a recall petition based on perceived leniency in sentencing in sexual assault cases, that other bad acts evidence was improperly admitted, that Wild should have been allowed to present evidence of the victim's past false accusations of sexual assault, that the evidence was insufficient to establish nonconsensual sexual intercourse or that the threat of force or violence existed, and that the sentence was an erroneous exercise of discretion. We reject his claims and affirm the judgment and the order.

Wild was charged with beating and sexual assaulting his wife, Kris, on August 20, 1995. He was tried before a jury May 20-22, 1996, and sentenced on July 25, 1996. Walworth county circuit court Judge Robert J. Kennedy presided over the case.

On March 25, 1996, a citizen's group started circulating a recall petition against Judge Kennedy. The petition was precipitated by perceived leniency in sentences Judge Kennedy imposed in two cases involving sexual assault. A similarly based recall petition had been launched against Judge Kennedy in 1989. The recall effort was terminated before Wild's trial. In May or June 1996, Judge Kennedy discussed his sentencing trends with an active proponent of the recall effort.[1]

[1] At Wild's sentencing, Judge Kennedy disclosed his contact with the proponent and indicated that he terminated the conversation when the Wild case was specifically mentioned. Judge Kennedy inferred from the conversation that the proponent believed Wild should receive a lengthy sentence. At the postconviction hearing, the proponent confirmed that Judge Kennedy refused to discuss the Wild case with her. A private investigator testified that the proponent said she told Judge Kennedy she hoped he would do better in sentencing Wild than he had in the cases which prompted the recall petition.

Wild argues that Judge Kennedy should have recused himself from presiding over this case because Judge Kennedy was publicly under attack for his handling of sexual assault cases, particularly at sentencing. He suggests that Judge Kennedy should have acted sua sponte in recusing himself when the recall petition was commenced while Wild's case was pending and prior to sentencing, immediately after Judge Kennedy had personal contact with the recall proponent.[2]

Under § 757.19(2)(f), STATS., a judge is required to disqualify himself or herself if, considered objectively, the judge has a significant financial or personal interest in the matter. *See* ***State v. American TV & Appliance of Madison, Inc.***, 151 Wis.2d 175, 181-82 & n.1, 443 N.W.2d 662, 664 (1989). A significant interest is required. Wild's guilt was decided by a jury, not the presiding judge. Even if the presiding judge could influence the jury's verdict at trial, an entirely speculative proposition, by the time of Wild's trial the recall petition effort was winding down. Only several days remained to obtain the needed signatures. There is no suggestion that the outcome of Wild's jury trial could have brought a surge of signatures needed to secure a recall vote. Moreover, the recall effort had failed by the time Wild stood before the court for sentencing. A judge's objectification by the political process is not enough to require disqualification. *See* ***State v. Santana***, 220 Wis.2d 674, 685, 584 N.W.2d 151, 156 (Ct. App. 1998) (Judge Kennedy was not required to disqualify himself during the recall campaign from hearing a postconviction motion challenging a sentence). *See also* ***State v. Sinks***, 168 Wis.2d 245, 256-58, 483 N.W.2d 286, 291 (Ct. App. 1992) (no suggestion that sua sponte disqualification was required when the judge

[2] Wild did not file a recusal motion. He could not seek substitution as of right since he had already exercised that right. *See* § 971.20, STATS.

sentenced the defendant just days before a contested election in which one of the issues was the judge's sentencing practices).

Judicial disqualification is also required when a judge subjectively determines that for any reason he or she cannot, or it appears he or she cannot, act in an impartial manner. *See* § 757.19(2)(g), STATS.; ***American TV***, 151 Wis.2d at 182, 443 N.W.2d at 665. Disqualification is not required if someone other than the judge can reasonably question the judge's impartiality or believes there is an appearance of partiality.[3] *See* ***State v. Harrell***, 199 Wis.2d 654, 663, 546 N.W.2d 115, 119 (1996). Our review of this subjective determination is limited to establishing whether the judge made a determination requiring disqualification. *See* ***id***. at 663-64, 546 N.W.2d at 119.

We conclude that Judge Kennedy subjectively determined that he could be impartial at sentencing despite his previous contact with the proponent of the recall effort. At sentencing, after disclosing his contact with the recall proponent, Judge Kennedy indicated that the meeting made little difference as he had received so many letters on both sides of the sentencing issue. Since Judge Kennedy did not disqualify himself, we can presume that he believed that he was capable of acting in an impartial manner. *See* ***State v. McBride***, 187 Wis.2d 409, 415, 523 N.W.2d 106, 110 (Ct. App. 1994). Therefore, any inquiry into the subjective propriety of Judge Kennedy's actions is at an end. *See* ***id.*** Recusal was not mandated under § 757.19(2)(g), STATS.

[3] Wild asserts that the appearance of impartiality requires recusal because the appearance of partiality is part of the Code of Judicial Ethics. *See* SCR 60.03 (West 1998). The Code of Judicial Ethics may not be a basis for a claim of disqualification. *See* ***State v. American TV & Appliance of Madison, Inc.***, 151 Wis.2d 175, 185, 443 N.W.2d 662, 666 (1989).

Wild claims that he was denied due process by Judge Kennedy's bias. Whether Judge Kennedy was a "neutral and detached magistrate" is a question of constitutional fact which we review de novo. *See* ***Santana***, 220 Wis.2d at 684, 584 N.W.2d at 156. Wild must overcome the presumption that a judge is free of bias and prejudice by a preponderance of the evidence. *See* ***id.*** We evaluate the existence of bias in both a subjective and objective light. *See* ***id.*** Our preceding discussion satisfies the subjective component. In examining the objective component, we must determine whether there are objective facts demonstrating that Judge Kennedy was actually biased; the mere appearance or speculation of partiality is insufficient. *See* ***id.*** at 685, 584 N.W.2d at 156.

Wild suggests partiality existed when Judge Kennedy, on his own motion, admitted "cycle of violence" evidence at trial. Judge Kennedy did not act on his own motion in admitting the domestic violence evidence but was responding to the prosecution's desire to present expert testimony. Moreover, the ruling was a proper exercise of discretion.

Wild claims that when Judge Kennedy questioned Wild's witnesses at the postconviction motion hearing, Judge Kennedy demonstrated actual bias. We disagree. A court may examine witnesses to aid in the discovery of the truth. *See* ***State v. Nutley***, 24 Wis.2d 527, 562, 129 N.W.2d 155, 170 (1964). Moreover, the questioning was not on a matter which would have influenced a jury but rather on a postconviction issue on which the trial court was required to make findings.

Actual bias is allegedly demonstrated by Judge Kennedy's record review of the numerous letters he received regarding sentencing and what Wild characterizes as unwarranted criticism of the letters supporting Wild. Judge Kennedy properly made a record of his review of the letters he had received. His

comments included criticism of the letters calling for a maximum sentence. There was no actual bias demonstrated in the handling of the letters.

Finally, we summarily reject Wild's suggestion that Judge Kennedy demonstrated bias because he decided a motion for sentence modification which Wild claims he never made. The postconviction motion alleged an erroneous exercise of sentencing discretion. It was in Wild's interest to preserve those issues for appeal by having Judge Kennedy rule on them.

Wild's claim of actual bias fails. Judge Kennedy was not required to recuse himself.

At trial three types of "other bad acts" evidence was admitted. Other acts evidence must be subjected to a three-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 relevant considering the two facets of relevance set forth in § 904.01, STATS. Third, the evidence must be shown to be more probative than prejudicial. *See* ***State v. Sullivan***, 216 Wis.2d 768, 772-73, 576 N.W.2d 30, 32-33 (1998). Our review of this issue is governed by the misuse of discretion standard. The trial court's decision to admit the other acts evidence will be upheld if it is in accordance with legal standards and facts of record, if the court undertook a reasonable inquiry and examination of the underlying facts, and if there exists a reasonable basis for the determination. *See* ***id.*** at 780, 576 N.W.2d at 36. Wild contends that the trial court erroneously exercised its discretion because none of the incidents is similar to the charge that he had intercourse with Kris while she was unconscious or under the threat of force or violence. He also claims that the incidents are grossly prejudicial.

The first type of evidence was an incident of forced sexual intercourse. Kris testified that on May 8, 1995, while she was separated from Wild, he forced her to have sexual intercourse. The recounting of this incident included Wild's acknowledgment to Kris that he had raped her. Evidence of prior nonconsensual intercourse between a defendant and the victim is admissible. *See* ***State v. Conley***, 141 Wis.2d 384, 399, 416 N.W.2d 69, 75 (Ct. App. 1987), *vacated on other grounds*, 487 U.S. 1230 (1988). Here, the evidence that Wild had forced intercourse on a prior occasion bore directly on the disputed issue of consent. It also was admissible to show the context of the marital relationship, and, therefore, the absence of mistake. The jury was given the standard cautionary instruction, thereby reducing the prejudice of which Wild complains. *See* ***id.*** at 401, 416 N.W.2d at 76. We conclude that admission of this evidence was a proper exercise of discretion.

Another category of other acts evidence involved incidents in which Wild became angry, yelled and damaged objects. Those incidents did not involve physical harm to Kris.[4]

Without explicitly conceding that the admission of this evidence was error, the State argues that its admission was harmless. "The test for harmless error is whether there is a reasonable possibility that the error contributed to the conviction. The conviction must be reversed unless the court is certain the error did not influence the jury." ***Sullivan***, 216 Wis.2d at 792, 576 N.W.2d at 41 (citations omitted). Wild admitted that he had hit Kris and that he was worried

[4] One incident arose after Kris refused to have intercourse on a beach and Wild yelled at their children and kicked a cooler. Kris recounted that one time Wild became upset and threw silverware and pounded the coffee maker. She also testified that on one occasion Wild broke through a door to the room in which she, the children and her grandmother had sought refuge.

that she had a concussion. He also admitted that he had sexual intercourse with her. The evidence that Wild became angry and damaged property was harmless in light of these admissions. The evidence may have helped Wild in that it showed he could become angry and not vent that anger by physical or sexual assault. We conclude that admission of this type of evidence, if error, was harmless error.

The final other acts evidence that Wild complains of was an incident in which he hit Kris but did not sexually assault her. The incident occurred in 1986 after Wild came home very late from a bar. Kris testified that as she sought to take her newborn from Wild's arms, Wild hit her in the face with the back of his hand and then hit her in the stomach with a closed fist.

This evidence is not subject to the other acts admission test because Wild opened the door to its admission.[5] During his direct examination, Wild testified that "ten years ago I hit my wife in the side." This was a reference to the 1986 incident. On cross-examination, Wild denied that he had punched Kris in the face and stomach in 1986. The State was allowed to impeach Wild's testimony with Kris's version of the incident. Having opened the door to the incident, Wild cannot complain about Kris's expansion of what occurred. *See* ***State v. Wulff***, 200 Wis.2d 318, 344, 546 N.W.2d 522, 532-33 (Ct. App. 1996) (holding that defendant's trial tactics "opened the door" to prosecution's use of evidence), *rev'd on other grounds*, 207 Wis.2d 143, 557 N.W.2d 813 (1997). *See also* ***State v. Jackson***, 212 Wis.2d 203, 224, 567 N.W.2d 920, 929 (Ct. App. 1997) (Brown, J. dissenting), *rev'd*, 216 Wis.2d 646, 575 N.W.2d 475 (1998) (doctrine of curative admission is premised on a basic notion of "fair play").

[5] The State's motion to introduce this evidence in its case-in-chief was twice denied. Kris testified about the 1986 incident as a rebuttal witness.

Wild argues that he should have been allowed to introduce evidence that Kris had, on two prior occasions, made untrue remarks that other men had sexually assaulted her. In order for evidence of prior untruthful allegations of sexual assault to be admissible under the exception in § 972.11(2)(b)3, STATS., the trial court must be able to conclude from the evidence that a reasonable person could infer that the victim made the allegations and that the allegations were untruthful. *See* ***State v. DeSantis***, 155 Wis.2d 774, 788, 456 N.W.2d 600, 606-07 (1990). Even if untruthful allegations were made, they are not admissible unless there is sufficient probative value so as to outweigh the inflammatory and prejudicial nature of such evidence. *See* ***id.*** at 785, 791, 456 N.W.2d at 605, 608. Evidence has low probative value when it is vague, disputed or concerns an incident which is dissimilar from the crime charged or remote in time. *See* ***id.*** at 792, 456 N.W.2d at 608.

The evidence Wild sought to admit was equivocal in whether Kris alleged a sexual assault and whether such allegations were untruthful. Wild sought to establish that when Kris was a sophomore in high school, nineteen years earlier, she told Bret Wild, Wild's brother, that a previous boyfriend "had forced himself on her." The boyfriend denied ever sexually assaulting Kris. It is uncertain what Kris meant by the phrase "forced himself" on her. Was it a sexual assault or a wrestling incident? Not only is it not clear that an untruthful allegation of sexual assault was made, the event was remote in time and had low probative value. Its admission would have created a trial within a trial on collateral matters. It was a proper exercise of discretion to exclude it.

Wild's mother and a friend of Kris's would have testified that Kris told them that when she was eighteen years old and employed as a waitress, her employer forced her to have sex with him in the restaurant. Kris indicated to

Wild's mother that at the time the incident occurred she needed the money that her restaurant job provided. In an offer of proof, the employer denied that he sexually assaulted or raped Kris. When asked if the sex was consensual, he replied, "I would say so if somebody says to you, would you lay on the floor when, um—let me get on top of you." On cross-examination, the employer conceded that he had been sexually interested in Kris for a long period but denied pressuring her for sex.

Again, the evidence Wild sought to admit is equivocal as to whether the sexual contact was consensual or not. Kris may have properly viewed the incident with her employer as nonconsensual because of the employer-employee relationship. The employer himself did not affirmatively state that the incident was mutually consensual. The probative value of the evidence was weak. To inject this evidence at trial would have created a trial within a trial as to the veracity of peripheral witnesses. It would have confused the issues and wasted time on collateral matters. It was not an erroneous exercise of discretion to exclude this alleged false accusation.

Wild claims that the evidence was insufficient to support his convictions. We may not reverse a conviction on the basis of insufficient evidence "unless 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* ***State v. Poellinger***, 153 Wis.2d 493, 501, 451 N.W.2d 752, 755 (1990). It is the function of the jury to decide issues of credibility, weigh the evidence and resolve conflicts in the testimony. *See* ***id.*** at 506, 451 N.W.2d at 757.

The evidence was that Wild came to the house where Kris was house-sitting. At first she did not want to let him in but did so because she was afraid he would break the door. Wild began to talk about their marriage and trying to work things out. He struck Kris four times in the head and she believes she blacked out. As Wild led Kris past a gun cabinet, he spoke of killing himself and her too. Kris pleaded that she would do anything Wild wanted as she feared that he would kill her.

Wild points out that Kris was unable to recall that they engaged in sexual intercourse in the living room and that her testimony about having had sexual intercourse in the bathroom is vague. But Wild admitted that there was sexual intercourse in both the living room and the bathroom. The jury was free to reject Wild's testimony that Kris had instigated the sex. The jury, as the ultimate arbiter of credibility, has the power to accept one portion of a witness's testimony, reject another portion and assign historical facts based upon both portions. *See* ***O'Connell v. Schrader***, 145 Wis.2d 554, 557, 427 N.W.2d 152, 153 (Ct. App. 1988). Further, it was not necessary that Wild's physical assault on his wife was for the purpose of compelling her to submit to a sexual assault. *See* ***State v. Bonds***, 165 Wis.2d 27, 32, 477 N.W.2d 265, 266-67 (1991). Submission out of fear is not consensual. The evidence was sufficient to establish that Wild acted by threat of force or violence.

Wild tries to avoid culpability by claiming that he was not aware that Kris was not consenting to sexual intercourse. He contends that even if Kris was using sex to diffuse the situation, he was not aware that this was merely a coping strategy. Whether or not a defendant knows that his or her victim has not freely consented is not an element which the prosecution must establish. All that must be shown is that there were no objective words or overt acts demonstrating freely

given consent. *See* ***State v. Clark***, 87 Wis.2d 804, 815, 275 N.W.2d 715, 721 (1979). Under the circumstances existing here, most notably the beating and the threats to kill, the jury could conclude beyond a reasonable doubt that Kris had not freely given her consent.

Finally, Wild challenges his twenty-seven year sentence. A strong presumption of reasonableness is afforded sentencing decisions because the trial court is in the best position to consider the relevant factors and assess the defendant's demeanor. *See* ***State v. Setagord***, 211 Wis.2d 397, 418, 565 N.W.2d 506, 514 (1997). Thus, Wild must show some unreasonable or unjustifiable basis in the record for the sentence complained of. *See* ***State v. Petrone***, 161 Wis.2d 530, 563, 468 N.W.2d 676, 689 (1991).

Wild's first complaint is that the sentencing court relied on uncharged acts of disorderly conduct.[6] "[U]ncharged offenses may be considered by a sentencing court because they indicate whether the crime was an isolated act or a pattern of conduct." ***State v. Johnson***, 158 Wis.2d 458, 469, 463 N.W.2d 352, 357 (Ct. App. 1990). The sentencing court was free to conclude that the instances it referred to showed a violent character. *See* ***State v. Bobbitt***, 178 Wis.2d 11, 17, 503 N.W.2d 11, 14 (Ct. App. 1993) (even violent acts that may have been unintentional may be considered).

Wild again suggests that the sentencing court exhibited partiality when it examined Wild's family members who testified at sentencing and

[6] The court referred to a fight with a foreman at work and a 1988 incident where Wild pushed an elderly neighbor who, as a result, fell and broke her arm. It also alluded to instances of disorderly conduct that Wild committed toward his wife and children.

criticized letters family members wrote to the court regarding sentencing.[7] The court's handling of the witnesses was merely an attempt to gain an accurate and balanced account of the incidents about which the witnesses testified. It was a truth-finding mission. Moreover, the court wanted to assure itself that the witnesses and letter authors had actual knowledge about the content of their presentations to the court. As we have already noted, the sentencing court criticized letter campaigns on both sides of the sentencing issue.[8] The court is not to blindly accept sentencing recommendations from any source. *See* ***Johnson***, 158 Wis.2d at 465, 463 N.W.2d at 355. Bias was not exhibited by the court.

Wild makes generalized complaints about the sentencing court's view of the parties' culpability for trouble in the marital relationship and Wild's employment record and alcoholism. He also contends that the court placed too much weight on pattern of domestic violence evidence. He claims that the court ignored his version of the offense and his remorse. The reflections made by the court are reasonable inferences from the record, including the court's worry that without lengthy incarceration there was a risk that Wild would kill Kris in an episode of domestic violence. In light of the jury's verdict, the court was free to reject Wild's version of the offense. We are not persuaded that the sentencing court relied on improper considerations or placed undue weight on any one factor.

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[7] Wild suggests that a letter writing campaign against him "appeared to have been orchestrated by the state." There is absolutely no foundation for this allegation in the record. Appellate counsel is admonished that such loose assertions are subject to ethical constraints. *See* SCR 20:3.3(a)(1) (West 1998).

[8] The sentencing court explicitly noted that it could not impose the maximum sentence simply because the case involved sexual assault. It limited its consideration of letters written by people who had seen Kris in a domestic abuse shelter to evidence of the terrifying effect the crime had on Kris.

As part of the postconviction proceeding, Wild presented the court with numerous letters from people who had come in contact with him as an inmate in a Texas correctional facility. The letters praised Wild's character and conduct while in these people's presence. The sentencing court was not required to modify the sentence based on this high praise. Good acts in prison are a matter for the parole board and have no bearing on the length of the sentence. *See* ***State v. Ambrose***, 181 Wis.2d 234, 240, 510 N.W.2d 758, 761 (Ct. App. 1993). *See also* ***State v. Wuensch***, 69 Wis.2d 467, 478, 230 N.W.2d 665, 671-72 (1975).

By the Court.—Judgment and order affirmed.

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