

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**August 11, 2005**

Cornelia G. Clark  
Clerk of Court of Appeals

**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 WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2004AP2141-CR**

**Cir. Ct. No. 2002CF3370**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

---

**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**EARL DEWAYNE PHIFFER,**

**DEFENDANT-APPELLANT.**

---

APPEAL from a judgment and order of the circuit court for Rock County: MICHAEL J. BYRON, Judge. *Affirmed.*

Before Dykman, Lundsten and Higginbotham, JJ.

¶1 PER CURIAM. Earl Phiffer appeals a judgment convicting him of second-degree sexual assault of a child, as a repeat offender, and an order denying his motion for postconviction relief. Phiffer claims he was denied a fair trial based

on certain testimony given by the victim's mother. We conclude that Phiffer was not prejudiced by any of the statements to which he objects, and therefore affirm.

### **BACKGROUND**

¶2 The State charged Phiffer with sexual assault of a child under the age of sixteen based on allegations that he had impregnated a fifteen-year-old girl, Sharkeisha O. Prior to trial, the trial court ruled that no reference should be made to the fact that Phiffer had ever been in jail.

¶3 There were only three witnesses at trial: Sharkeisha, her mother and the investigating officer. Sharkeisha testified that she had met Phiffer when she was in ninth grade, and that she had sex with him about ten times over the course of the following months, until she became pregnant. Sharkeisha couldn't remember exact dates, but thought she was fifteen and Phiffer was nineteen at the time. She said she had told Phiffer that she was eighteen, however.

¶4 Sharkeisha's mother testified that she had a conversation with Phiffer after learning that her daughter was pregnant, in which Phiffer admitted that he was the father, but claimed he had thought Sharkeisha was seventeen. Over Phiffer's objection, the mother testified that she said to him:

Well, I told him he should have known that she was not seventeen. She didn't look seventeen. And, you know, based on, you know, her being in high school and what grade she's in, that he should have known that she was not as old as she was.

The State then asked the mother why she had waited to report the incident to the police, and she responded, "He was in jail all the time." The trial court ordered that answer stricken, and subsequently instructed the jury to disregard all stricken testimony, but it denied a contemporaneous defense motion for a mistrial.

¶5 The final witness was the investigating police officer. Like Sharkeisha's mother, the officer testified that Phiffer had admitted to having had intercourse with Sharkeisha, although he claimed that he thought she was eighteen.

¶6 After the jury convicted Phiffer, he moved for a new trial, claiming that he was prejudiced by the mother's statements that Phiffer should have known that her daughter was underage and that he had been in jail. The trial court denied the motion, concluding that Phiffer had not been sufficiently prejudiced by either statement to warrant a new trial. Phiffer now appeals, renewing his claims for a new trial based on both of the mother's statements.

## DISCUSSION

¶7 Although Phiffer does not explicitly state the framework under which he believes he is entitled to a new trial,<sup>1</sup> he argues generally, as he did in the trial court, that the mother's testimony rendered his trial unfair. A trial court's decision whether to grant a new trial is discretionary. *Goff v. Seldera*, 202 Wis. 2d 600, 614, 550 N.W.2d 144 (Ct. App. 1996). We give great deference to the trial court's decision because the trial court is in the best position to observe and evaluate whether such relief is appropriate. *Id.* Accordingly, we will look for reasons to sustain the trial court's decision and will set it aside only if the trial

---

<sup>1</sup> We do not directly review either of the statements Phiffer objects to under the standard for alleged evidentiary errors on this appeal. First, while we agree with Phiffer that the reference to his having been in jail was prior bad act evidence that the State should have directed its witness to avoid mentioning, the trial court already properly excluded the testimony and ordered it stricken. Therefore, the trial court committed no evidentiary error. Similarly, while we tend to agree with Phiffer that the mother's comments regarding whether Phiffer should have been able to tell her daughter was underage constituted improper opinion testimony, Phiffer waived that specific evidentiary issue by only arguing relevance as the basis for his objection.

court fails to provide a reasonable explanation for its decision or grounds the decision upon a mistaken view of the evidence or an erroneous view of the law. *Sievert v. American Family Mut. Ins. Co.*, 180 Wis. 2d 426, 431, 509 N.W.2d 75 (Ct. App. 1993), *aff'd*, *Sievert v. American Family Mut. Ins. Co.*, 190 Wis. 2d 623, 528 N.W.2d 413 (Wis. Mar. 2, 1995) (No. 93-0272).

¶8 We are satisfied that the trial court properly exercised its discretion in denying Phiffer's motion for a new trial. The trial court's findings that the State did not anticipate the mother's statement that Phiffer had been in jail and thus had not intentionally violated the pretrial order were supported by the record and not clearly erroneous. Therefore, there was no basis to order either a mistrial or new trial based on prosecutorial misconduct.

¶9 The trial court also reasoned that the mother's statement that Phiffer had been in jail had limited prejudicial effect because the case turned largely on the credibility of the victim, not Phiffer, who did not testify. The court further noted that the very fact that the victim had borne a child made it obvious that she had had sexual contact with someone, and that there was nothing in the record to suggest any reason why she would falsely name Phiffer as the father. Therefore, the court reasonably concluded that the reference to jail did not render Phiffer's trial unfair.

¶10 Similarly, the court did not see any prejudicial effect from the mother's comments regarding whether Phiffer should have been able to tell her daughter was underage, in light of what it considered to be "relatively overwhelming" evidence against Phiffer. First of all, it was irrelevant whether Phiffer should have known the victim was underage, since ignorance of her age was not a defense. Moreover, in addition to the victim's account, there was

testimony from both her mother and the police officer that Phiffer had admitted to having intercourse with the victim and being the father of her child. The only reasonable inference the jury could have drawn based on the victim's testimony and Phiffer's undisputed admissions was that Phiffer had had sexual contact with a child under the age of sixteen.

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

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

