COURT OF APPEALS DECISION DATED AND FILED

October 21, 2008

David R. Schanker
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. 2008AP574-CR **Cir. Ct. No. 2004CF69**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GLENN S. GESSNER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Outagamie County: MARK J. MCGINNIS, Judge. *Affirmed*.

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Glenn Gessner appeals a judgment of conviction from jury verdicts on two counts of failure to pay child support for more than 120

days, contrary to WIS. STAT. § 948.22(2), and one count of failure to pay child support for less than 120 days, contrary to § 948.22(3).[1] Gessner requests that we exercise our discretionary power of reversal under WIS. STAT. § 752.35 because justice has miscarried. Specifically, he contends the uncontroverted evidence demonstrated he was unable to pay child support. We reject Gessner's argument and affirm the judgment.

BACKGROUND

¶2 Gessner's convictions stem from three time periods during which he failed to pay child support in 2001 through 2003. At trial, he asserted the affirmative defense that he did not have the ability to pay child support. *See* WIS. STAT. § 948.22(6).[2]

¶3 At the time of trial, Gessner was fifty years old. He admitted having four criminal convictions. He has been obligated to pay child support since 1990. Gessner testified he has suffered from rheumatoid arthritis since 1993. In 1994, Gessner qualified for Social Security disability benefits, and his child support was paid directly from those benefits. In 1996, he had surgery on one of his hands,

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

[2] WISCONSIN STAT. § 948.22(6) states:

> Under this section, affirmative defenses include but are not limited to inability to provide child, grandchild or spousal support. A person may not demonstrate inability to provide child, grandchild or spousal support if the person is employable but, without reasonable excuse, either fails to diligently seek employment, terminates employment or reduces his or her earnings or assets. A person who raises an affirmative defense has the burden of proving the defense by a preponderance of the evidence.

which improved his condition enough that he was able to work again. In 1997, his disability benefits ceased after he failed to appear for a hearing.

¶4 Gessner stated he subsequently became disabled again and was no longer able to work. He explained that the arthritis in his hands made it difficult to perform routine tasks such as turning pages of a book, grasping fine objects, or gripping objects generally. He indicated he needed surgery on his hands, but could not get a referral to a plastic surgeon because he did not have a primary care physician.

¶5 During the relevant time periods in 2001 through 2003, Gessner stated he attempted to find work, but was unemployed most of the time.[3] He testified his disability inhibited his ability to find employment. Contrary to the child support order, he did not notify the child support agency of his efforts to find employment. When asked why he did not reapply for disability benefits, Gessner stated he would need a new doctor's statement. Gessner admitted he had contact with doctors, but did not explain why he had not obtained a new doctor's statement.

DISCUSSION

¶6 Gessner asks that we exercise our discretionary power of reversal under WIS. STAT. § 752.35, which allows us to reverse a judgment or order "if it

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[3] Gessner testified that, for the years 2001-2003, his total income was about $1,000. It is unclear what portion of this income was earned during the portions of the years for which he was charged with not paying child support. When asked about whether he was employed during the charged periods, he generally answered he was not. He did testify he had one job doing manual labor, but he quit after two days because his hands swelled up. He made no child support payments during the periods charged.

appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried …." Gessner does not dispute the real controversy was fully tried; he argues that justice has miscarried. We may conclude justice has miscarried if there is a substantial probability a new trial would produce a different result. ***State v. Murdock***, 2000 WI App 170, ¶31, 238 Wis. 2d 301, 617 N.W.2d 175. To conclude such a probability exists, "[W]e would at least have to be convinced that the defendant should not have been found guilty and that justice demands the defendant be given another trial." ***State v. Wyss***, 124 Wis. 2d 681, 736, 370 N.W.2d 745 (1985), *overruled on other grounds*, ***State v. Poellinger***, 153 Wis. 2d 493, 506, 451 N.W.2d 752 (1990).

¶7 Gessner relies on our supreme court's decision in ***Kemp v. State***, 61 Wis. 2d 125, 211 N.W.2d 793 (1973), and our decision in ***Murdock***, 238 Wis. 2d 301. ***Kemp*** involved a jury's determination of a defendant's mental responsibility. ***Kemp***, 61 Wis. 2d at 127. Six expert witnesses testified. Three testified the defendant lacked mental responsibility. None opined that the defendant was mentally responsible. ***Id.*** at 135, 138. However, a jury concluded he was responsible. ***Id.*** at 127. Our supreme court reversed, concluding the evidence weighed "quite heavily" in favor of the defendant on the mental responsibility question, and that it was probable that justice had miscarried. ***Id.*** at 137-38.

¶8 Similarly, ***Murdock*** also involved a jury's determination of a defendant's mental responsibility. ***Murdock***, 238 Wis. 2d 301, ¶30. The jury found the defendant mentally responsible, though the only two experts testified the defendant lacked the capacity to appreciate the wrongfulness of his acts and conform his behavior to the requirements of the law. ***Id.***, ¶40. After considering the totality of the evidence, we concluded there was a substantial probability that a new trial would produce a different result. ***Id.***

¶9 Relying on ***Kemp*** and ***Murdock***, Gessner contends the testimony supporting his inability to pay was uncontroverted and the evidence weighed heavily in his favor. Therefore, he argues, a new trial would likely have a different result. We are not convinced.

¶10 First, the testimony here was different from that in ***Kemp*** and ***Murdock***. The evidence about Gessner's ability to pay came *solely* from Gessner, whose credibility the jury had reason to question. Gessner admitted having four criminal convictions. As arbiter of witness credibility, the jury was free to reject Gessner's testimony as incredible. *See* ***State v. Poellinger***, 153 Wis. 2d 493, 503, 451 N.W.2d 752 (1990).

¶11 Further, Gessner's testimony about his failure to seek disability benefits supported inferences that he was able to pay child support. While Gessner stated he needed a new doctor's statement to reapply for disability benefits, he did not explain why, despite his contact with doctors, he did not obtain a new doctor's statement. The jury could infer that Gessner did not believe he was sufficiently disabled to qualify for disability benefits. Alternatively, the jury could conclude he was disabled, but, because his previous disability benefits were used to pay child support, he chose not to apply for disability benefits to avoid paying child support.

¶12 Contrary to Gessner's argument, the evidence does not weigh in his favor as it did for the defendants in ***Kemp*** and ***Murdock***. Instead, Gessner's own testimony supported the jury's rejection of his affirmative defense. Gessner had the burden of proving his affirmative defense by a preponderance of the evidence. WIS. STAT. § 948.22(6). We are not convinced a new jury receiving the same evidence would reach a different result. *See* ***Wyss***, 124 Wis. 2d at 736.

By the Court.—Judgment affirmed.

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