

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

March 21, 1996

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.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-0753-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

APOLINAR GONZALES,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Dane County:
STUART A. SCHWARTZ, Judge. *Affirmed.*

Before Eich, C.J., Dykman and Sundby, JJ.

PER CURIAM. Apolinar Gonzales appeals from a judgment convicting him of felony child abuse as a repeater, contrary to § 948.03(2)(a) and (5), STATS., and § 939.62, STATS. The issue is whether the trial court properly exercised its discretion by denying Gonzales's motion for a mistrial. We conclude that the court's discretionary determination was reasonable, and therefore affirm.

The State charged Gonzales with one child abuse count in this proceeding. However, at the start of *voir dire*, the trial court mistakenly informed the prospective jurors that Gonzales also faced misdemeanor and felony bail jumping charges. When counsel informed the court of its mistake, the court told the prospective jurors:

Ladies and gentlemen, the attorneys in this matter have just pointed out to me that I was in error when I indicated the nature of the charges. The only charge we have here is the physical abuse of a child charge. That's the only thing that we are going to be dealing with.

The court denied Gonzales's subsequent motion for a mistrial. The trial proceeded and a jury found Gonzales guilty.

In ruling on a motion for mistrial, the trial court must determine whether the error or defect in the proceeding would likely affect the outcome of the proceeding. *State v. Tappa*, 123 Wis.2d 210, 213-14, 365 N.W.2d 913, 915 (Ct. App.), *rev'd on other grounds*, 127 Wis.2d 155, 378 N.W.2d 883 (1985). The court's determination on that issue is reviewed for an erroneous exercise of discretion. *State v. Pankow*, 144 Wis.2d 23, 47, 422 N.W.2d 913, 921 (Ct. App. 1988). We will sustain a discretionary decision if the trial court examined the relevant facts, applied a proper standard of law, and used a demonstrated rational process to reach a reasonable conclusion. *Loy v. Bunderson*, 107 Wis.2d 400, 414-15, 320 N.W.2d 175, 184 (1982).

Gonzales contends that the misinformation was inherently prejudicial because it caused the jurors to believe that he was a bad person, and invited them to convict him for that reason. We disagree. The court spoke of other charges, not other crimes or bad acts, and then quickly corrected its mistake. The prospective jurors would have understood child abuse, the correctly identified charge, to be far more serious than unspecified bail jumping. The unavoidable prejudice from learning the correct charge far outweighed any unfair prejudice resulting from the knowledge that Gonzales might have other charges against him as well. At trial, the jury heard evidence that a small infant was grievously injured in Gonzales's presence, that he had a motive to injure

the baby, and that during police interrogation he impeached himself with contradictory versions of the incident. Under these circumstances, the court reasonably concluded that the brief, quickly retracted reference to bail jumping would not affect the trial's outcome.

By the Court.—Judgment affirmed.

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