COURT OF APPEALS
DECISION
DATED AND FILED

May 13, 2009

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. 2008AP1048-CR

Cir. Ct. No. 2006CF182

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROBERT A. CARDOZA,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Walworth County: JOHN R. RACE, Judge. *Affirmed*.

Before Brown, C.J., Anderson, P.J., and Neubauer, J.

¶1 PER CURIAM. Robert Cardoza appeals from a judgment of conviction for three counts of first-degree sexual assault of a child, three counts of incest, and ten counts of possession of child pornography. He argues that the trial court erroneously exercised its discretion when it required him to admit to ten

prior convictions if he elected to testify and that the introduction of his journal entries was error. We conclude the record supports the trial court's exercise of discretion on both evidentiary rulings and we affirm the judgment.

¶2 In April 2006, a search warrant was executed at Cardoza's apartment and a computer with multiple items of child pornography was seized. After the search, investigators spoke with Cardoza and he admitted to having showered with his granddaughter on two occasions in 2000 or 2001. His granddaughter was eight or nine years old at that time. When questioned, Cardoza's granddaughter confirmed that Cardoza had showered with her on at least one occasion and washed her chest, buttocks, and vagina and that Cardoza had an erection while in the shower with her. Cardoza was charged with three counts of sexual assault of a child, three counts of incest, and twelve counts of possession of child pornography.

¶3 The charges were severed for trial. With two different trial dates set, the prosecution asked that the child pornography charges be tried first because its primary officer on the sexual assault case wanted to be excused early on the first day of the first trial date. Cardoza objected suggesting that the State was trying to obtain convictions on the child pornography charges, the easier charges to prove, so that if Cardoza elected to testify at the subsequent trial he could be impeached at the subsequent trial with multiple prior convictions. He also explained that if he was convicted of twelve counts of child pornography before his trial on the sexual assault charges it could impact his decision to testify in the second trial. Over Cardoza's objection the trial court ordered that the pornography charges would be tried first. It noted its usual preference to have charges first in time tried first but altered that to accommodate the prosecution's witness.

¶4 At a hearing on Cardoza's motion for reconsideration Cardoza requested that the sexual assault trial be held first, or, in the alternative, that the court exclude the possession of child pornography convictions from the sexual assault trial. Cardoza again explained that his decision to testify in the sexual assault trial could be adversely affected by having to admit twelve prior convictions. Cardoza indicated a desire to testify in the sexual assault trial. When the motion was heard, the first trial date was just three days away. The prosecutor responded that the primary officer just had back surgery and would not be available for the sexual assault trial if it was held first in time and on the dates set for the child pornography trial. The prosecutor indicated that it was not prepared to try the sexual assault case on the approaching trial date because witnesses were released from their subpoenas. The prosecutor acknowledged that the child pornography case was easier to prove and required only one police officer witness. The trial court deemed the scheduling of the child pornography trial first to be "more of a function of the Court's calendar than it was a function of the State's alleged motivation to have convictions be set on the far more serious charges of sexual assault of a child." The court acknowledged there may be some prejudice to Cardoza but it was not unfair prejudice. Based entirely on the court's schedule and the availability of two days to try the child pornography charges first, the court denied the motion for reconsideration and for an adjournment of the child pornography trial.

¶5 Cardoza entered a guilty plea to ten counts of possession of child pornography.[1] Cardoza then filed a motion in limine to prohibit the use of his

[1] The prosecution dismissed two counts of child pornography because the charges involved duplicate computer files.

child pornography convictions to impeach him should he testify at the sexual assault trial. The motion was denied and the court ruled that Cardoza would have to admit that he had ten prior convictions if he elected to testify at the trial of the sexual assault charges. The trial court commented that "this is very traditional law."

¶6 Under WIS. STAT. § 906.09(1) (2007-08),[2] evidence that a witness has a prior conviction is admissible to attack the witness's credibility. The law permits the presumption that one who has been convicted of a crime is less likely to be a truthful witness than one who has not been convicted. ***State v. Kruzycki***, 192 Wis. 2d 509, 524, 531 N.W.2d 429 (Ct. App. 1995). Whether to allow impeachment by the admission of prior convictions is a discretionary determination for the trial court. ***Kruzycki***, 192 Wis. 2d at 525. Our review is confined to whether the trial court properly exercised its discretion and we do not find an erroneous exercise of discretion simply because this court may have reached a different conclusion. *See **id.*** Discretion is properly exercised when the trial court correctly applies the legal standards to the facts of record and uses a rational process to reach a reasonable conclusion. ***Id.*** In its reasoning process the trial court should consider: "(1) the lapse of time since the conviction; (2) the rehabilitation or pardon of the person convicted; (3) the gravity of the crime; and (4) the involvement of dishonesty or false statement in the crime." ***State v. Smith***, 203 Wis. 2d 288, 295-96, 553 N.W.2d 824 (Ct. App. 1996). The factors should be weighed in determining whether the probative value of the evidence of prior convictions is substantially outweighed by the danger of undue prejudice. *See **id.***

[2] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

at 296. When there are multiple prior convictions, the court should also consider the frequency of the convictions. ***State v. Gary M.B.***, 2004 WI 33, ¶21, 270 Wis. 2d 62, 676 N.W.2d 475.

¶7 We recognize that the trial court did not specifically mention any of the factors listed above. Where the trial court does not explicitly engage in balancing on the record, we are obliged to determine if the record supports the decision made. *See* ***Gary M.B.***, 270 Wis. 2d 62, ¶26; ***State v. Pittman***, 174 Wis. 2d 255, 268-69, 496 N.W.2d 74 (1993). Looking to the factors outlined in ***Smith***, 203 Wis. 2d at 295-96, we are compelled to affirm the trial court's exercise of discretion.

¶8 The prior convictions Cardoza was required to admit were very recent and involved conduct that had recently occurred. There had been no lapse of time suggesting that Cardoza had been rehabilitated since the prior convictions occurred. Although the possession of child pornography is not a violent crime or one verbalized by a live victim, it is a serious crime. It has been observed that as the number of convictions increases so does the intensity of the presumption of untruthfulness. *See* ***State v. Bowie***, 92 Wis. 2d 192, 203, 284 N.W.2d 613 (1979) ("this court has held that a person who has been convicted eleven times previously is considerably less credible than a person who has been convicted only once"). The strength of the presumption of untruthfulness does not amount to undue prejudice. It is the presumption allowed by law. A magic number cannot be set where the probative value that a defendant has been previously convicted of crime is substantially outweighed by prejudice. Although we recognize that Cardoza had to admit ten prior convictions simply because the sexual assault trial could not be scheduled before the pornography trial, it is not undue prejudice to admit what is in fact true—that Cardoza had amassed ten prior convictions. *See* ***Gary M.B.***, 270

Wis. 2d 62, ¶32 ("Unlike gruesome photos from the scene of a crime, a witness stating the number five cannot possibly arouse the jury's sense of horror, provoke its instinct to punish, or appeal to its sympathies.").

¶9 Citing ***United States v. Burkhead***, 646 F.2d 1283 (8th Cir. 1981), Cardoza argues that his right to due process was violated because it was only the trial court's congested calendar that forced him to amass the ten prior convictions. Burkhead was charged with conspiracy and the substantive crimes underlying that conspiracy and the trials were severed. ***Id.*** at 1284. Burkhead was first convicted on five of the underlying substantive crimes. ***Id.*** On appeal from the conspiracy conviction he argued it was error for the district court to refuse to make a pretrial ruling on whether the convictions on the underlying crimes could be used to impeach his credibility if he testified in the second trial. ***Id.*** Like Cardoza, Burkhead did not testify in the second trial. ***Id.*** at 1285. The court ruled that Burkhead was entitled to a pretrial ruling on whether the prior convictions would be admitted for impeachment purposes and that the convictions on the underlying crimes were not admissible in the second trial. ***Id.*** at 1286. The court wrote:

> [T]he conspiracy count was tried separately only because the trial court, on its own motion, determined that severance was desirable. Permitting impeachment following such a severance of counts would virtually ensure a second conviction in every case in which the first trial resulted in conviction. It would allow the government to try the strongest counts of an indictment first in order to "bootstrap" the weaker counts in a subsequent trial. There can be no doubt that the probative value of prior conviction evidence such as is involved in this case is outweighed by its prejudicial effect on the defendant.

Id. at 1285.

¶10 Despite the ***Burkhead*** court's recognition that it would be unfairly prejudicial to require the stronger counts to be tried first and then use those

convictions for impeachment purposes, we conclude that ***Burkhead*** does not apply here. The trial court specifically found that the prosecution had no motivation to influence Cardoza's decision to testify in the sexual assault case by first gaining convictions on the child pornography charges. Further, as the State points out, the federal rule of evidence permits the date, nature and penalties imposed on prior convictions to be admitted for impeachment purposes. *See* ***United States v. Albers,*** 93 F.3d 1469, 1480 (10th Cir. 1996) (FED. R. EVID. 609 permits defendant's credibility to be tested only by the existence of the prior conviction, its general nature, and punishment); ***Gora v. Costa***, 971 F.2d 1325, 1330 (7th Cir. 1992) (evidence of conviction is limited to the crime charged, the date, and disposition). Wisconsin's rule does not permit the jury to learn of the nature of the crime if the witness correctly answers how many prior convictions exist. ***State v. Kuntz***, 160 Wis. 2d 722, 752, 467 N.W.2d 531 (1991). Undue prejudice existed in ***Burkhead*** because the jury learned that Burkhead had already been convicted of the crimes that supported the conspiracy. *See* ***United States v. Causey***, 9 F.3d 1341, 1345 (7th Cir. 1993). Thus, ***Burkhead*** is deemed to apply "only where the jury was aware that the conduct in the prior conviction was the same conduct on trial." ***Causey***, 9 F.3d at 1345. That is not the case here. The trial court's ruling that Cardoza would have to admit all ten prior convictions does not rise to the level of a due process violation.

¶11 The second issue on appeal relates to four notebooks written by Cardoza detailing his daily activities. The notebooks were seized by police and their content compelled police to interview Cardoza about his relationship with his granddaughter. Cardoza's pretrial motion in limine sought to exclude the introduction of all or portions of his personal journals as irrelevant. The journals date from 2004 forward and contain numerous entries concerning daily activities with his granddaughter, such as shopping, movies, eating at restaurants, and

transportation to and from school. Various entries profess Cardoza's love for his granddaughter. Some entries reflect an interest in her sexual activities, a sexual interest in her, and a near obsession with her comings and goings.

¶12 Cardoza argued that the selected entries from the journals were inadmissible other acts evidence, that they were irrelevant to the alleged acts of sexual contact that took place years earlier, and that their probative value was outweighed by unfair prejudice. The prosecution argued that the journals did not represent other acts evidence because they showed thoughts only and that they constituted admissions of Cardoza's intent toward his granddaughter. The trial court did not fully resolve whether an other acts analysis was required. It determined the journals were relevant as to motive and because the prosecutor had to overcome the disbelief that a grandfather would have a sexual interest in his grandchild. It found that the journals demonstrated that Cardoza had an erotic interest in his granddaughter.

¶13 Various entries were read to the jury.[3] On October 11, 2004 Cardoza wrote: "I guess [granddaughter] just had an inch [sic] in her pussy she could not wait to have sex." That day's entry references the granddaughter having given a "hand job" to another male and Cardoza urging another individual to find out from his granddaughter about her first time with sex. The October 19, 2004, entry indicates that Cardoza kissed his granddaughter on the side of her mouth and he was mad that she proceeded to wipe away where he had kissed her. On November 8, 2004, Cardoza wrote how his granddaughter had changed and that

[3] The journals were admitted into evidence in their entirety. It is not clear from the record if the journals were sent to the jury room. In closing argument the prosecutor invited the jury to examine the journals and referenced various entries that were not read to the jury.

"there is no connection between us like there used to be when we lived at the old house on Salt Box Road. Over there she was different and we had affection for one another."[4] The December 3, 2004 entry contained some writing obliterated with white-out but readable. That day Cardoza asked his granddaughter if he could make love to her with his tongue and she refused. The entry reflects that Cardoza kept talking to her about it and that he would pursue the issue the next time he got a chance. Cardoza also noted that his granddaughter was "on her period." On February 22, 2006 Cardoza wrote about a letter his granddaughter wrote saying she "wanted to fuck some guy" and that she had given another guy a "blow job." He wrote "so she is into fucking and sucking cocks." In this entry Cardoza laments about his granddaughter participating in loveless sex and how he would show her what real love making is, he would take her to the heights of sexual enjoyment she has never experienced, he would caress and kiss every part of her body, and he would give her sexual fulfillment.

¶14 We first clarify that the journal entries did not constitute "other acts" evidence the admissibility of which must be tested under WIS. STAT. § 904.04(2), or the three-step analysis outlined in ***State v. Sullivan***, 216 Wis. 2d 768, 771-774, 576 N.W.2d 30 (1998). In ***State v. Bauer***, 2000 WI App 206, ¶7 n.2, 238 Wis. 2d 687, 617 N.W.2d 902, we noted a trend in criminal cases to misidentify evidence as "other acts" evidence. We stated: "However, the trial bar and bench should note that simply because an act can be factually classified as 'different'—in time, place and, perhaps, manner than the act complained of—that different act is not necessarily 'other acts' evidence in the eyes of the law." ***Id.*** When the purpose of

[4] Cardoza lived with his daughter and granddaughter on Salt Box Road when the shower incidents occurred.

admitting particular evidence is not to show a similarity between the other act and the alleged act then it is questionable whether it is "other acts" evidence at all. *See **id.***; ***State v. Seefeldt***, 2002 WI App 149, ¶21, 256 Wis. 2d 410, 647 N.W.2d 894, *aff'd.*, 2003 WI 47, 261 Wis. 2d 383, 661 N.W.2d 822. *See also* ***State v. Hereford***, 195 Wis. 2d 1054, 1069, 537 N.W.2d 62 (Ct. App. 1995) (citation omitted) ("Testimony of other acts for the purpose of providing the background or context of a case is not prohibited by § 904.04(2)"). The journal entries provide contextual information about the alleged sexual assaults in terms of Cardoza's history with his granddaughter. It was background of sorts even though the journals postdate the alleged assaults. It was not necessary for the trial court to employ an "other acts" analysis to determine their admissibility and a cautionary jury instruction was not needed.

¶15 We review the admission of the journal entries for a proper exercise of discretion in determining relevance and whether the probative value was outweighed by the undue prejudice. ***State v. Brecht***, 143 Wis. 2d 297, 320, 421 N.W.2d 96 (1988); ***State v. Mordica***, 168 Wis. 2d 593, 602-04, 484 N.W.2d 352 (Ct. App. 1992); WIS. STAT. §§ 904.02, 904.03. We reiterate that we will not overturn a discretionary determination simply because we may disagree with the decision made or may have ruled the other way. ***Brecht***, 143 Wis. 2d at 320.

¶16 Cardoza's intent for sexual gratification was at issue.[5] The trial court determined that the journal entries were relevant to show motive. It has been

---

[5] Cardoza's theory of defense was that he had not touched his granddaughter's buttocks or vaginal area and that he had engaged in contact only for the purpose of washing his granddaughter. Cardoza had indicated in his statement that he believed his erection was a natural consequence of seeing a naked girl and that it subsided as soon as the shower was over.

recognized that although motive is not an element of any crime, it may nevertheless be a proper subject of inquiry and admissible if it meets the same standards of relevance as other evidence. ***Id.*** at 320. "Matters going to motive ... are inextricably caught up with and bear upon considerations of intent ...." ***State v. Johnson***, 121 Wis. 2d 237, 253, 358 N.W.2d 824 (Ct. App. 1984). Cardoza's later expression of a sexual interest in his granddaughter makes it more probable that his touching of her in the shower was for the purpose of sexual gratification. The journal entries were relevant.

¶17 Cardoza argues that probative value of the journal entries was outweighed by the danger of unfair prejudice because the shower incidents occurred years earlier. Since nearly all evidence prejudices the party against whom it is offered the test is whether the prejudice is fair or unfair. ***State v. Johnson***, 184 Wis. 2d 324, 340, 516 N.W.2d 463 (Ct. App. 1994).

> "'Unfair prejudice' does not mean damage to a party's cause since such damage will always result from the introduction of evidence contrary to the party's contentions." Rather, unfair prejudice results where the proffered evidence, if introduced, would have a tendency to influence the outcome by improper means or if it appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish or otherwise causes a jury to base its decision on something other than the established propositions in the case.

State v. Doss, 2008 WI 93, ¶78, 312 Wis. 2d 570, 754 N.W.2d 510 (quoting ***Mordica***, 168 Wis. 2d at 605).

¶18 Despite the significant gap between the shower incidents in 2000 or 2001 and the 2004 to 2006 journal entries, the entries remained a strong indicator of Cardoza's sexual interest in his granddaughter. This is particularly so because Cardoza referenced his time with his granddaughter on Salt Box Road thereby

providing a link between his feelings for her then and feelings expressed in the journals. It was for the jury to decide the weight of the evidence in light of the time gap. Certainly prejudice resulted from evidence of Cardoza's provocative language and evidence that he had asked his granddaughter for sexual contact. However, the prejudice was not unfair in light of the probative value of the evidence and the purpose for which it was admitted. We conclude the trial court properly exercised its discretion in admitting the journal entries.

¶19 Arguing that the real controversy was not fully and fairly tried, Cardoza asks this court to exercise its discretion and grant a new trial in the interest of justice under WIS. STAT. § 752.35. We exercise our discretionary power to grant a new trial infrequently and judiciously. *See* ***State v. Ray***, 166 Wis. 2d 855, 874, 481 N.W.2d 288 (Ct. App. 1992). We have determined that no reversible error occurred on either issue raised on appeal. A new trial in the interest of justice is not justified on a combination of non-errors. *See* ***State v. Marshal***, 172 Wis. 2d 491, 507, 493 N.W.2d 758 (Ct. App. 1992).

By the Court.—Judgment affirmed.

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