COURT OF APPEALS
DECISION
DATED AND RELEASED

October 26, 1995

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(1), 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. 94-1806-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

STEVEN WARNER,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Monroe County: JAMES W. RICE, Judge. *Affirmed*.

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

PER CURIAM. Steven Warner appeals from a judgment convicting him on four felony counts, following a jury trial. The issues are: (1) whether the trial court improperly limited Warner's access to his victim's medical records; (2) whether the presiding judge should have recused himself; and (3) whether the trial court should have selected an out-of-county jury because of prejudicial pretrial publicity.

On August 18, 1993, Warner was tried on ten felony charges that included four counts of first-degree sexual assault of a child, two counts of intentional physical abuse of a child, one count of exposing a child to harmful materials, one count forced viewing of sexual activity, one count sexual exploitation of a child, and one count child enticement. All of the charges involved the same victim. One month before trial, the court allowed Warner's counsel to review and take notes on, but not copy, the victim's medical and counseling records. The trial court subsequently allowed Warner's psychologist expert to review them.

Six days before the trial, the presiding judge, James W. Rice, published a letter in the MONROE COUNTY DEMOCRAT concerning a prosecution of an unrelated sexual assault of a child. In his letter, the judge expressed outrage and criticized defense counsel, the prosecutor and this court for delaying the proceeding. Judge Rice noted,

> It is embarrassing and difficult for little girls to appear before a judge, jurors and the public to speak of the unspeakable invasions of their little bodies.
>
> ....
>
> I wanted to get [the trial] behind them before school started.
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> ....
>
> The trial will be held later. In the meantime, the girls will worry and fret, cry in the night and wonder if anyone cares.

The LA CROSSE TRIBUNE also published the letter, and several area newspapers printed follow-up articles noting the judge's concerns. As a result, Warner brought motions for Judge Rice to recuse himself and for jury selection in a different county. The trial court denied both motions.

Warner contends that the court erred by its "piecemeal granting of discovery" of the victim's records. However, he offers no explanation how the discovery procedure prejudiced him other than the conclusory statement that it was unfair. We will not search the record to discover the alleged prejudice for him. Warner must develop his own argument. ***State v. West***, 179 Wis.2d 182, 195-96, 507 N.W.2d 343, 349 (Ct. App. 1993), *aff'd*, 185 Wis.2d 68, 517 N.W.2d 482, *cert. denied*, 115 S. Ct. 375 (1994).

The trial judge should have recused himself and it was error not to. The judge's published letter gave the unmistakable appearance that he was predisposed to believe children who are alleged victims of sexual assault. "Due process requires a neutral and detached judge. If the judge evidences a lack of impartiality, whatever its origin or justification, the judge cannot sit in judgment." ***State v. Washington***, 83 Wis.2d 808, 833, 266 N.W.2d 597, 609 (1978).

Any such error is harmless, however, unless the judge, in fact, treats the defendant unfairly. ***State v. Rochelt***, 165 Wis.2d 373, 381, 477 N.W.2d 659, 662 (Ct. App. 1991). Here, Warner does not claim that the trial judge conducted the trial unfairly.

The trial court properly denied Warner's motion for an out-of-county jury. Warner asserts that the judge's letter and the publicity surrounding it tainted the Monroe County jury pool. We review the trial court's decision on the question under the erroneous exercise of discretion standard. ***State v. Albrecht***, 184 Wis.2d 287, 306, 516 N.W.2d 776, 783 (Ct. App. 1994). On review we independently review the circumstances to determine if the trial court properly exercised its discretion. ***Id***. at 306, 516 N.W.2d at 783-84. Here, although many potential jurors knew about the judge's comments, the trial court fully developed the issue on voir dire, and received no indication that the letter had provoked wholesale prejudice. Significantly, Warner's counsel did not request any strikes for cause on those grounds. Additionally, the fact that the defendant was acquitted on six of ten counts creates a persuasive after-the-fact demonstration of a nonbiased jury. Therefore, although the timing and inflammatory nature of the letter were unfortunate, the trial court reasonably determined that it did not irrevocably taint the jury pool.

By the Court.—Judgment affirmed.

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