COURT OF APPEALS
DECISION
DATED AND RELEASED

February 5, 1997

No. 95-3524-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JACK L. COX,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Sheboygan County: JAMES J. BOLGERT, Judge. *Affirmed*.

Before Snyder, P.J., Brown and Nettesheim, JJ.

SNYDER, P.J. Jack L. Cox was convicted of intentionally failing to provide child support contrary to § 940.27(2), STATS., 1985-86. He now contends that the trial court erred when it: (1) denied defense counsel's request for prepaid travel expenses to secure the testimony of out-of-state witnesses; (2) denied defense counsel's request to allow the jury to

consider the fact that the child at issue did not reside in Sheboygan County for 120 consecutive days; and (3) allowed evidence of a prior payment Cox made of $2000 as satisfaction for arrearages totaling $16,000. He also argues that the guilty verdict was not supported by sufficient evidence. Because we conclude that the trial court properly exercised its discretion with regard to the first three evidentiary issues and that there was sufficient evidence to support the verdict, we affirm.

Cox married Carol in April 1963. During the course of their marriage they had three children. The third child, Dawn, was born on August 25, 1969, and is the child whose support is at issue in this action. After Cox left his family, Carol obtained a judgment of divorce from him in absentia. As part of the divorce judgment, Cox was ordered to pay $70 per week in child support. Carol received no payments from Cox until 1978 when he was picked up in Texas on a warrant for nonsupport. He was released after posting $2000 bail; subsequent to that, Cox agreed to pay the bail money "in compromise and settlement of arrearage[s]," and further agreed to make continued child support payments of $50 per week. Although he made some payments over the next four years, he was always behind in his child support obligations.

Cox was picked up again in 1982, and as his eldest child had turned eighteen, the child support order was modified. The first year after the modification he made a substantial number of payments, but following that,

payments again became sporadic. In 1984 he made no payments. The period with which he was charged with nonsupport began on October 17, 1983.[1]

Following a jury trial and the return of a guilty verdict, Cox was sentenced and this appeal followed.

The first three issues Cox raises on appeal all relate to the introduction or exclusion of evidence. The admissibility of evidence rests within the sound discretion of the trial court. *See* ***Ritt v. Dental Care Assocs.,*** 199 Wis.2d 48, 72, 543 N.W.2d 852, 861 (Ct. App. 1995). The issue on appeal is whether the trial court exercised its discretion in accordance with acceptable legal standards and the facts of record. *See* ***State v. Pharr,*** 115 Wis.2d 334, 342, 340 N.W.2d 498, 501 (1983). This court will not find a misuse of discretion if there is a reasonable basis for the trial court's determination. *See* ***id.*** A discretionary determination must be the product of a rational mental process whereby the facts of record and the law relied upon are stated together, leading one to conclude that the court has made a reasoned determination. *See* ***Hartung v. Hartung,*** 102 Wis.2d 58, 66, 306 N.W.2d 16, 20-21 (1981).

Cox first argues that the trial court erred when it denied his counsel's request for the prepayment of travel expenses in order to secure the testimony of four witnesses, three of whom resided in Canada and one in Texas. Cox was represented in this action by the state public defender's office in accordance with ch. 977, STATS. Defense counsel submitted a pretrial motion for

[1] The specific period the State focused on was July 20, 1985, through October 17, 1986.

funds to be provided for travel for witnesses or, in the alternative, for telephone testimony. The trial court denied this request.

Cox renewed his request for funds prior to the start of the trial. The trial court requested that defense counsel submit affidavits detailing the evidence each witness would testify to and held the motion open pending its review of the affidavits. After reviewing the submitted materials, the trial court again denied the requested authorization of prepaid funds for witness travel. We now consider whether this was an appropriate determination by the trial court.

Two statutory sections are relevant to this issue. Section 885.10, STATS., provides in part:

> **Witness for indigent respondent or defendant.** Upon satisfactory proof of the financial inability of the respondent or defendant to procure the attendance of witnesses for his or her defense, *the judge ... may direct the witnesses to be subpoenaed as he or she determines is proper and necessary*, upon the respondent's or defendant's oath or affidavit .... Witnesses so subpoenaed shall be paid their fees in the manner that witnesses for the state therein are paid. ... [Emphasis added.]

The other relevant statutory section, § 885.06, STATS., is entitled "**Witness' fees, prepayment**" and provides:

> **(2)** *No witness ...* on behalf of either party in any criminal action or proceeding ... *shall be entitled to any fee in advance,* but shall be obliged to attend upon the service of a subpoena as therein lawfully required. [Emphasis added.]

The language of these two sections clearly contemplates a discretionary determination as to both the procurement of witnesses for an indigent defendant and how such witnesses will be paid.

We find further support for this interpretation in case law. The right of an indigent defendant to compel the attendance of witnesses "is not an unfettered right that requires the trial court to give an indigent defendant unlimited access to blank checks ...." ***State ex rel. Dressler v. Circuit Court for Racine County,*** 163 Wis.2d 622, 639, 472 N.W.2d 532, 539 (Ct. App. 1991). In order to secure the assistance of the trial court, a defendant must make some plausible showing of how the proposed witnesses will be both "material and favorable to his or her defense." ***Id.*** Neither the federal nor the state constitution creates a clear legal duty which mandates a trial court to provide witness funds upon a general request. ***Id.*** at 640, 472 N.W.2d at 540. Instead, the trial court must make a discretionary determination after a defendant has made a showing of "particularized need." *See* ***id.***

Our independent review of the witnesses' affidavits supports Cox's failure to present the requisite "particularized need" for prepayments. Two of the Canadian witnesses' affidavits purport to offer evidence of the status of Cox's business dealings for several years in the 1980's, but do not demonstrate the basis of either individual's knowledge. The third Canadian witness, an accountant, prepared tax returns for Cox, but none of the tax returns address the time period at issue in this case. Neither the Canadian affidavits nor the affidavit of the remaining witness, James Cox, the defendant's brother

and a bank vice-president in Texas, include any statement regarding the necessity of travel or expenses prepayment in order to obtain the witnesses' presence.[2]

We conclude that the trial court's decision to deny Cox's request for prepayment of witness fees was a proper exercise of its discretion.[3] A defendant's request for prepayment is but another factor to be weighed by a trial court in making this discretionary determination. Without some showing of "particularized need" for the prepayment, a trial court is under no obligation to prepay and fund a witness's travel and expenses in order to compel the attendance of defense witnesses. This was a proper exercise of discretion.

Cox's next evidentiary complaint relates to the trial court's denial of his request that it inform the jury that it should exclude from its calculation of

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[2] We also note that certain information in James Cox's affidavit would be damaging to Cox. For example, the affidavit relates that "Cox paid approximately $10,000 to $12,000 a year in interest from 1980-1985." This was for mortgage and interest payments on two pieces of Texas real estate Cox had purchased. During that same time period, State evidence indicated sporadic support payments.

[3] In examining the submitted affidavits, the trial court made the following findings: (1) the testimony of the witnesses would be relevant and favorable to Cox; (2) if the witnesses were paid before their appearances, there would be insufficient assurances they would appear; (3) granting the motion would require adjournment of the trial date; (4) most, if not all, of the information in the affidavits was corroborating testimony which the defendant could testify to, if he so desired; and (5) Cox qualified for state public defender representation, and there was no record of procedures used or reason the public defender's office would not fund the costs.

120 days any time period that his daughter Dawn resided outside of Sheboygan County. Defense counsel had intended to call several witnesses who would testify that Dawn had resided outside of Sheboygan County for portions of the time Cox was charged with nonsupport.

The trial court correctly ruled that the crime of nonsupport occurred in Sheboygan County where the defendant's act was required to be performed. Cox was required to make child support payments in Sheboygan County; thus, his daughter's residence during the time period in question was immaterial. As we stated in ***State v. Gantt,*** 201 Wis.2d 206, 212, 548 N.W.2d 134, 137 (Ct. App. 1996), we are not persuaded that "jurisdiction [should] not attach to the nonsupport prosecution of a father who is in violation of a valid Wisconsin child-support judgment simply because the child was not residing in the state during the charged period." Dawn's residence during the period in question is irrelevant.

Cox next contends that the trial court erred when it allowed evidence of a prior payment of $2000 as satisfaction for a debt of $16,000 which was due and owing for an earlier period of nonsupport. He maintains that the presentation of this evidence was prejudicial and "had the effect of showing that [he] received a prior deal and was not required to pay the full sum of support." Thus, he reasons that "the jury was allowed to infer that in the present case he had not properly paid his support for the periods at issue."

The admissibility of "other acts" evidence is governed by § 904.04(2), STATS. *See* ***State v. Parr,*** 182 Wis.2d 349, 360, 513 N.W.2d 647, 650 (Ct.

App. 1994). "Other acts" evidence is not admissible to prove the character of the accused, but may be used to establish, inter alia, motive and intent.[4] *See* ***id.*** Under the well-established two-pronged test of admissibility, the court must first determine whether the proffered evidence is relevant. *See* ***id.*** If so, the second prong is whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice, confusion of issues or misleading the jury. *See* ***id.*** Unfair prejudice refers to the risk that a jury may conclude that because the actor committed one bad act, he or she necessarily committed the charged crime. *See* ***State v. Mink,*** 146 Wis.2d 1, 17, 429 N.W.2d 99, 105 (Ct. App. 1988).

The evidence of the stipulation and consent order signed by Cox in which he agreed to pay $2000 in satisfaction of more than $16,000 due and owing was relevant on several bases. The order established the fact that Cox was required to pay child support; this is an element of the crime of failure to support. *See* § 940.27(2), STATS., 1985-86. The order also established Cox's knowledge that he was required to make child support payments, which is another element of the crime of failure to support. *See* ***id.*** Finally, the order was relevant to establish Cox's intent to evade paying support he knew he owed. Cox did not contest the fact that he had made no required child support

[4] Section 904.04(2), STATS., provides:

> **(2)** OTHER CRIMES, WRONGS, OR ACTS. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. This subsection does not exclude the evidence when offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

payments in the period covered by the present charge. Rather, he claimed that he could not afford to make the payments, so he did not *intentionally* refuse to provide support for his child.

Evidence that Cox had earlier failed to make child support payments, when by his own admission his business was doing well, was probative of the issue of whether his charged failure was also intentional, despite his claimed inability to pay. In light of all of the foregoing, we conclude that the evidence of the stipulation and consent order was relevant and admissible on several bases and that the danger of unfair prejudice was not outweighed by its probative value. Thus, the trial court properly exercised its discretion in admitting this evidence.

As a final contention, Cox argues that the guilty verdict was not supported by sufficient evidence. He claims that because he offered an affirmative defense of inability to pay that "[c]learly, the record reflected that [he] was unable to make the necessary support payments and the jury should have acquitted him of this felony charge."

It is the function of the trier of fact to determine the credibility of the witnesses, weigh the evidence and draw reasonable inferences from the facts presented. *See* ***State v. Poellinger,*** 153 Wis.2d 493, 504, 506, 451 N.W.2d

752, 756, 757 (1990). The evidence and any inferences which may reasonably be drawn from it must be viewed in the light most favorable to the verdict. *See* ***id.*** at 504, 451 N.W.2d at 756. This court may not substitute its judgment for that of the trier of fact unless the evidence is so lacking in probative value that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. *See* ***id.*** at 507, 451 N.W.2d at 757-58.

The jury determines the credibility of the witnesses and the weight to be given to their testimony. *See* ***York v. National Continental Ins. Co.,*** 158 Wis.2d 486, 493, 463 N.W.2d 364, 367 (Ct. App. 1990). Here, the State presented a prima facie case of failure to support. *See* ***State v. Schleusner,*** 154 Wis.2d 821, 824-25, 454 N.W.2d 51, 53 (Ct. App. 1990). Cox did not contest the evidence presented by the State. Instead, he contended that during the period for which he was charged, he was financially unable to pay any support. He offered, through his own testimony, that he was unable to work due to back problems.

This was a credibility issue for the jury as to the weight to be given to Cox's own testimony of his inability to work in contrast to the State's prima facie case. *See* ***York***, 158 Wis.2d at 493, 463 N.W.2d at 367 (if more than one inference can be drawn from the evidence, the court accepts the inference drawn by the jury). The jury here concluded that Cox's testimony on his own behalf was not as compelling as the evidence presented by the State. Our review of the record does not persuade us that the jury's verdict was not supported by sufficient evidence.

By the Court. – Judgment affirmed.

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