COURT OF APPEALS
DECISION
DATED AND FILED

November 4, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-3128-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JOHNNY L. THOMAS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Kenosha County: MICHAEL FISHER, Judge. *Affirmed.*

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

PER CURIAM. Johnny L. Thomas appeals from a judgment convicting him of repeated sexual assault (by intercourse) of the same fourteen-year-old girl contrary to § 948.025(1), STATS. On appeal, he challenges the admission of evidence of a prior conviction for sexual assault of a child and the

fact that jurors viewed him in shackles while he was being transported to the courtroom. We conclude that admitting evidence of the prior sexual assault conviction was harmless error. As to the jurors' view of Thomas in shackles, we conclude that the prejudice was *de minimus* because the encounter was inadvertent and evidence came in at trial that while in prison, Thomas spoke openly about his sexual relationship with the victim in this case.

At a pretrial hearing, the State moved the court to admit evidence that Thomas was convicted in 1993 of second-degree sexual assault (by intercourse) of a fourteen-year-old girl. The court admitted the evidence because there was sufficient similarity between the charged crime and the prior conviction and that the evidence related to intent or motive.

The members of this appellate panel, having considered ***State v. Sullivan,*** 216 Wis.2d 768, 576 N.W.2d 30 (1998), which discusses the admissibility of other acts evidence, and ***State v. Rushing,*** 197 Wis.2d 631, 541 N.W.2d 155 (Ct. App. 1995), are divided on the admissibility of Thomas' prior sexual assault conviction under § 904.04(2), STATS. However, the panel members agree that even if it was error to admit this evidence, the error was harmless in light of the other evidence adduced at trial.

An error is harmless if there is no reasonable possibility that the error contributed to the conviction. *See* ***Sullivan,*** 216 Wis.2d at 792, 576 N.W.2d at 41. The burden is on the State to show that the error did not contribute to the conviction. *See* ***id.*** We "examine the erroneously admitted evidence and the remainder of the untainted evidence in context to determine whether the error was harmless." ***State v. Harris,*** 199 Wis.2d 227, 256, 544 N.W.2d 545, 557 (1996).

The victim testified at trial that she had sexual intercourse with Thomas on several occasions and kept track of the times they had intercourse by noting them on a poster on her bedroom wall. She testified that she tracked all of her sexual partners in that manner.

Latrice C., a friend of the victim, testified that Thomas wrote to her while he was incarcerated to request pictures of the victim because "he was making love to her." She also testified that she had a conversation with Thomas in which he stated that he and the victim had been having sex, that he knew the victim was young and that her mother probably would not approve.

Donald B., the victim's step-grandfather, testified that he met Thomas while they were incarcerated at Racine Correctional Institute. While they were on the recreation field, Thomas brought up the subject of the victim and told Donald B. and Quentin Pompy, another inmate, that he had a sexual relationship with the victim. Even after Donald B. disclosed that the victim was his step-granddaughter, Thomas persisted in discussing the nature of their relationship. Pompy testified that he was present during the conversation between Thomas and Donald B. regarding the victim and confirmed Thomas' description of his sexual relationship with the victim.

Thomas testified that he did not have a sexual relationship with the victim. He admitted conversing with Donald B. but denied admitting a sexual relationship with the victim. He denied having any conversation with Pompy beyond a greeting. He also denied writing to Latrice C. about the victim. He claimed that the victim and the other witnesses fabricated their testimony against him. Thomas' girlfriend also testified on his behalf.

It was the jury's province to fairly resolve conflicts in the testimony, weigh the evidence and draw reasonable inferences from the facts. *See* ***State v. Poellinger,*** 153 Wis.2d 493, 506, 451 N.W.2d 752, 757 (1990). We conclude that the untainted evidence from the victim, Latrice C., Donald B. and Pompy, which is overwhelming and forceful, was sufficient to convict Thomas of the charged crime. The totality of the record convinces us that the error in admitting his prior sexual assault conviction was harmless because there is no reasonable possibility that the erroneously admitted evidence contributed to Thomas' conviction.

We turn to Thomas' claim that he was prejudiced because jurors saw him in shackles while he was being transported to the courtroom. Before testimony began, defense counsel moved for a mistrial on this basis. The court noted that evidence would be presented at trial that Thomas made incriminating statements while in prison and "it's not going to be any big surprise to the jurors nor will it create any prejudicial effect which is inappropriate for them to be aware that [Thomas] is still in custody …. I think the jurors must have some inkling that Mr. Thomas is in custody already."

On appeal, Thomas argues that being viewed in shackles was one more instance of inflammatory information being placed before the jury. We disagree. "[A] juror's observation of a restrained defendant outside a courtroom is not likely to arouse a juror's prejudice because people expect to see prisoners in restraint when they are in a position where they could escape." ***State v. Knighten,*** 212 Wis.2d 833, 844, 569 N.W.2d 770, 774 (Ct. App. 1997).[1] "Courts have generally found brief and inadvertent confrontations between a shackled accused

[1] The record does not indicate exactly where the jurors encountered Thomas. Nevertheless, the principle cited here applies to this case.

and one or more members of the jury insufficient to show prejudice." ***Id.*** (quoted source omitted).

Knighten controls here. Furthermore, evidence that Thomas was incarcerated came in via testimony that while incarcerated, he spoke freely about his sexual relationship with the victim. Thomas' status as an incarcerated person was not prejudicial under these circumstances.

Because we discern no reversible error, we decline to grant Thomas a new trial.

By the Court.—Judgment affirmed.

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