COURT OF APPEALS
DECISION
DATED AND FILED

August 7, 2001

Cornelia G. Clark
Clerk of Court of Appeals

No. 00-1889-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BRADLEY W. SEXTON,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Oconto County: RICHARD D. DELFORGE, Judge. *Affirmed*.

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Bradley W. Sexton appeals a judgment, entered upon a jury's verdict, convicting him of five counts of felony failure to support a

child, contrary to WIS. STAT. § 948.22(2).[1] Sexton argues that this court should exercise its discretionary power of reversal pursuant to WIS. STAT. § 752.35 because justice has miscarried and the real controversy has not been fully tried. Specifically, Sexton contends that (1) the trial court failed to properly instruct the jury; and (2) the trial court erroneously excluded medical evidence generated after December 31, 1998. Sexton also argues that there was insufficient evidence to support his convictions. We reject Sexton's arguments and affirm the judgment.

BACKGROUND

¶2 In October 1993, Sexton was ordered to pay child support for his two minor children in an amount equal to twenty-five percent of his income, but no less than $100 per month. Sexton failed to make any payments during calendar years 1994, 1995, 1996, 1997 and 1998. On May 12, 2000, Sexton was convicted upon a jury's verdict of five counts of criminal non-support, one count for each year he failed to make payments. This appeal followed.

ANALYSIS

¶3 WISCONSIN STAT. § 948.22(2) provides:

> Any person who intentionally fails for 120 or more consecutive days to provide … child support which the person knows or reasonable should know the person is legally obligated to provide is guilty of a Class E felony. A prosecutor may charge a person with multiple counts for a violation under this subsection if each count covers a period of at least 120 consecutive days and there is no overlap between periods.

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

Section 948.22(6) provides an affirmative defense if the defendant can establish an inability to provide support. Under that section:

> Affirmative defenses include but are not limited to inability to provide child … support. A person may not demonstrate inability to provide child … support if the person is employable but, without reasonable excuse, either fails to diligently seek employment, terminates employment, or reduces his or her earnings or assets. A person who raises an affirmative defense has the burden of proving the defense by a preponderance of the evidence.

WIS. STAT. § 948.22(6).

I. JURY INSTRUCTIONS

¶4 Sexton argues that the trial court erred by failing to give a curative jury instruction regarding the relevance of his incarceration history and by failing to give a jury instruction that would have placed the burden of proof on the State to disprove Sexton's inability to pay defense. We are not persuaded.

¶5 With regard to his curative jury instruction argument, Sexton claims that the prosecutor's comments during the State's closing argument encouraged the jury "to employ an erroneous legal standard in evaluating the inability to pay defense." Thus, Sexton argues that the trial court should have given a curative jury instruction regarding the proper legal standard to apply in dealing with the evidence of incarceration. At trial, however, Sexton failed to object to the prosecutor's comments and otherwise failed to request the jury instruction to which he now claims he was entitled.

¶6 Although Sexton waived this argument by failing to raise it at trial, he urges this court to nevertheless reverse the judgment pursuant to WIS. STAT.

§ 752.35.[2] Although we have the discretionary power to reverse judgments in the interests of justice, we exercise an extremely limited review in such appeals. Section 752.35 permits us to grant relief if we are convinced "that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried." These tests are disjunctive. ***State v. Schumacher***, 144 Wis. 2d 388, 401, 424 N.W.2d 672 (1988).

¶7 In order to establish that the real controversy has not been fully tried, Sexton must convince us "that the jury was precluded from considering 'important testimony that bore on an important issue' or that certain evidence which was improperly received 'clouded a crucial issue' in the case." ***State v. Darcy N.K.***, 218 Wis. 2d 640, 667, 581 N.W.2d 567 (Ct. App. 1998) (quoting ***State v. Hicks***, 202 Wis. 2d 150, 160, 549 N.W.2d 435 (1996)). To establish a miscarriage of justice, Sexton "must convince us 'there is a substantial degree of probability that a new trial would produce a different result.'" ***Darcy***, 218 Wis. 2d at 667 (quoting ***State v. Caban***, 210 Wis. 2d 597, 611, 563 N.W.2d 501 (1997)).

¶8 A trial court's decision whether to give an instruction, and, if so, the wording of the instruction, is a discretionary one. *See* ***D'Huyvetter v. A.O. Harvestore***, 164 Wis. 2d 306, 334, 475 N.W.2d 587 (Ct. App. 1981). Here, the jury was given a standard jury instruction for the crime of failure to pay child support. The jury was further instructed regarding the inability to pay defense:

[2] We may use our discretionary power of reversal under WIS. STAT. § 752.35 where an error in the jury instructions has been waived by failure to object. *See* ***Vollmer v. Luety***, 156 Wis. 2d 1, 20, 456 N.W.2d 797 (1990).

> If you are satisfied beyond a reasonable doubt that the defendant intentionally failed to provide child support for 120 consecutive days or more and that the defendant knew that he was legally obligated to provide such support, you must consider whether the defendant had the ability to provide support.
>
> Wisconsin law provides that it is a defense to the crime of failure to support if the person was unable to provide support. A person may not demonstrate inability to provide support if the person is employable but without reasonable excuse either fails to diligently seek employment, terminates employment or reduces his earnings or assets.
>
> The burden is on the defendant to satisfy you to a reasonable certainty by the greater weight of the credible evidence that he was unable to provide support.
>
> By the greater weight of the evidence is meant evidence which when weighed against that opposed to it has more convincing power. Credible evidence is evidence which in the light of reason and common sense is worthy of belief. If you are satisfied to a reasonable certainty by the greater weight of the credible evidence that the defendant was unable to provide support, you must find the defendant not guilty. If you are not satisfied to a reasonable certainty by the greater weight of the credible evidence that the defendant was unable to provide support and you are satisfied beyond a reasonable doubt that the defendant intentionally failed to provide child support for 120 consecutive days or more and that the defendant knew or should have known that he was legally obligated to provide such support, you should find the defendant guilty.

See WIS JI—CRIMINAL 2152.

¶9 Sexton claims that the prosecutor's comments during the State's closing argument invited the jury to ignore evidence of Sexton's incarceration, contrary to this court's holding in ***State v. Stutesman***, 221 Wis. 2d 178, 585 N.W.2d 181 (Ct. App. 1998). Sexton thus argues that the trial court should have given a curative jury instruction regarding the proper legal standard to apply in dealing with the incarceration evidence. The facts of ***Stutesman***, however, are distinguishable from the present case.

¶10 In ***Stutesman***, the defendant was charged with fifteen counts of felony failure to pay child support and one count of misdemeanor failure to pay child support. ***Id.*** at 180. During a portion of the time periods of nonsupport alleged in the information, the defendant had been incarcerated. The trial court concluded that evidence of Stutesman's incarceration was irrelevant and ultimately granted the State's motion to exclude it. ***Id.*** at 181. On appeal, this court concluded that:

> incarceration is relevant to a defense of inability to pay because, depending on the circumstances of incarceration, incarceration may prevent a person from being employed, and therefore, may prevent a person from having earnings with which to pay child support. Whether a person commits a crime in order to avoid paying child support is a question of fact for the jury.

Id. at 184.

¶11 Here, unlike in ***Stutesman***, the jury heard significant evidence of Sexton's incarceration history. Sexton nevertheless argues that the prosecutor's comments erroneously encouraged the jury to ignore evidence of Sexton's incarceration. During closing arguments, the prosecutor stated, in relevant part:

> The point is that the defendant is solely responsible for why we're here, and he is the person that's on trial. It is the defendant who failed to pay a penny for child support over a five-year period. It's the defendant who admittedly caused himself to be placed in jail. No one else. It was the defendant's conduct. It was the defendant who terminated work. It wasn't anybody else. It was his decision. He didn't tell anybody about it. He just didn't show up for work.
>
> The defendant worked for cash in 1998. He worked for cash. He didn't pay a penny for child support. I think he would be dying to pay some money for the support of his two children, but he didn't pay a penny. He didn't pay a dime. Even if he would have paid $10, $20, and if he would have, that certainly would have looked a lot better than paying nothing. Not a penny for five years ….

¶12 Contrary to Sexton's assertions, the prosecutor did nothing more than argue his assessment of the evidence at trial—specifically, he argued that even in consideration of Sexton's periods of incarceration, Sexton alone was responsible for his failure to pay child support.[3] Consistent with ***Stutesman***, whether Sexton had committed a crime in order to avoid paying child support was a question of fact for the jury. *See* ***id.*** at 184.

¶13 In any event, arguments by counsel cannot substitute for an instruction by the court. Arguments by counsel are to be viewed as statements of advocacy, whereas a jury instruction is a definitive and binding statement of law. In this case, the jury was expressly instructed to base its verdict on the court's

[3] Likewise, we reject Sexton's argument that the prosecutor improperly commented on his failure to obtain medical treatment, thus warranting reversal of his judgment pursuant to WIS. STAT. § 752.35. Specifically, Sexton argues that the prosecutor's comments were "based on the erroneous legal proposition that evidence of a problem affecting a defendant's ability to pay child support … is relevant to the statutory defense [of inability to pay] only if the problem was created by circumstances entirely beyond the control of the defendant." The prosecutor argued:

> The defendant is certainly responsible for not addressing his own situation. There was some testimony that he wasn't cooperative with his treatment. That's his fault. He places himself in this position where he can't pay child support. In addition he made decisions on his own. He simply made a decision not to look for work, not to work. In 1994, 1995, 1996 and 1997 his testimony was I chose not to work and that was his decision. That wasn't anyone else's decision. That was his decision to make, and that was the testimony he gave, and he knew that if he didn't work, didn't seek work, he knew he couldn't pay his child support, and again that's his responsibility. That's no one else's but his own. That's not his ex-wife's. That's Mr. Sexton's responsibility. That's his obligation.

The prosecutor's comments do not indicate that Sexton's physical condition is relevant only if that condition was created by circumstances entirely beyond his control. Rather, the prosecutor's comments regarding Sexton's conscious decision not to pursue treatment were merely consistent with the argument that Sexton alone was responsible for his failure to pay child support.

instructions rather than on the attorneys' arguments.[4] Because Sexton has failed to establish that the trial court should have given a curative jury instruction, we cannot conclude that reversal is warranted under WIS. STAT. § 752.35.

¶14 Sexton further argues that the trial court erred by failing to grant his request for a jury instruction that would have placed the burden of proof on the State to disprove Sexton's inability to pay defense. The trial court has wide discretion in submitting jury instructions. *See* ***State v. Michels***, 141 Wis. 2d 81, 95, 414 N.W.2d 311 (Ct. App. 1987), and may refuse to give a requested instruction in a criminal case if the evidence does not reasonably require it. ***State v. Bjerkass***, 163 Wis. 2d 949, 954, 472 N.W.2d 615 (Ct. App. 1991). This court, on review, will not find error in a trial court's refusal to give special instructions to a jury unless the failure to give the instructions would be likely to prejudice the defendant. ***State v. Lenarchick***, 74 Wis. 2d 425, 455, 247 N.W.2d 80 (1976). Further, whether a jury instruction is an accurate statement of the law presents a question of law that we review without deference to the trial court. *See* ***State v. Neumann***, 179 Wis. 2d 687, 699, 508 N.W.2d 54 (Ct. App. 1993).

¶15 Sexton claims that the jury should have been instructed that after he raised the affirmative defense of inability to pay, the burden shifted to the State to prove beyond a reasonable doubt that he had the ability to pay. We disagree. The jury was properly instructed "that the burden is on the defendant to satisfy you to a reasonable certainty by the greater weight of the credible evidence that he was

[4] The trial court instructed the jury: "Consider carefully the closing arguments of the attorneys, but their arguments and conclusions and opinions are not evidence. Draw your own conclusions and your own inferences from the evidence and decide upon your verdict according to the evidence and under the instructions given to you by the court." *See* WIS JI—CRIMINAL 160.

unable to provide support." The jury was further instructed that it should convict only if it was not satisfied to a reasonable certainty by the greater weight of the credible evidence that Sexton was unable to provide support *and* if the State had proved each element of the crime beyond a reasonable doubt. *See* supra ¶8. We discern no error.

II. EXCLUSION OF MEDICAL EVIDENCE

¶16 Sexton argues that the trial court erred by excluding evidence of medical treatment occurring after December 31, 1998, thus preventing the real controversy from being fully tried. He therefore urges this court to exercise our discretionary authority under WIS. STAT. § 752.35 to reverse the judgment. Sexton claims that the evidence was necessary to establish his back and knee problems as an "ongoing concern" and that the evolution of these continuing conditions was relevant to his "inability to pay" defense. We are not persuaded.

¶17 We review a trial court's decision to admit or exclude evidence under an erroneous exercise of discretion standard. ***Morden v. Continental AG***, 2000 WI 51, ¶81, 235 Wis. 2d 325, 611 N.W.2d 659; ***State v. Pharr***, 115 Wis. 2d 334, 342, 340 N.W.2d 498 (1983). In making evidentiary rulings, the trial court has broad discretion. ***State v. Oberlander***, 149 Wis. 2d 132, 140, 438 N.W.2d 580 (1989). As with other discretionary determinations, this court will uphold a decision to admit or exclude evidence if the trial court examined the relevant facts, applied a proper legal standard, and, using a demonstrated rational process, reached a reasonable conclusion. ***Glassey v. Cont'l Ins. Co.***, 176 Wis. 2d 587, 608, 500 N.W.2d 295 (1993); ***Loy v. Bunderson***, 107 Wis. 2d 400, 414-15, 320 N.W.2d 175 (1982).

¶18 Our inquiry into whether a trial court properly exercised its discretion in making an evidentiary ruling is highly deferential—the question on appeal is not whether this court, ruling initially on the admissibility of the evidence, would have permitted it to come in, but whether the trial court exercised its discretion in accordance with accepted legal standards and in accordance with the facts of record. ***McCleary v. State***, 49 Wis. 2d 263, 182 N.W.2d 512 (1971). The test is not whether this court agrees with the ruling of the trial court, but whether appropriate discretion was in fact exercised. ***State v. Wollman***, 86 Wis. 2d 459, 464, 273 N.W.2d 225 (1979). We will not find an erroneous exercise of discretion if there is a rational basis for the trial court's decision. ***State v. Hammer***, 2000 WI 92, ¶43, 236 Wis. 2d 686, 613 N.W.2d 629. For a discretionary decision of this nature to be upheld, the basis for the trial court's decision should be set forth. ***Pharr***, 115 Wis. 2d at 342. If the trial court fails to provide reasoning for its evidentiary decision, however, this court independently reviews the record to determine whether the trial court properly exercised its discretion. ***Id.*** at 343.

¶19 Evidence is not admissible unless it is relevant. *See* WIS. STAT. § 904.02. Relevant evidence is defined as "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." WIS. STAT. § 904.01. However, even relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." WIS. STAT. § 904.03. When the admissibility of proffered evidence is challenged, the burden is on the

proponent of the evidence to show why it is admissible. *See* ***State v. Jenkins***, 168 Wis. 2d 175, 187-88, 483 N.W.2d 262 (Ct. App. 1992).

¶20 Here, the trial court, concluding that the period of time relevant to Sexton's case was from January 1, 1994 to December 31, 1998, admitted records of medical treatment received both during and previous to that time. The trial court excluded records of medical treatment Sexton received in 1999, concluding that they were not relevant to the time period in question. The trial court explained that it had reviewed all ninety-two pages of the proffered records and although some of the records pertained to back pain, only one entry discussed Sexton's knee problem. Upon our review of the record, we conclude that any error in excluding the proffered records was harmless at best. *See* ***State v. Dyess***, 124 Wis. 2d 525, 543, 370 N.W.2d 222 (1985).

¶21 At trial, Sexton testified that he was unable to work primarily because of problems with his knee. Although both Sexton and his medical expert referred to a back injury, the expert never opined that the back injury made Sexton unemployable. Because the evidence at trial did not suggest that Sexton's back injury rendered him unemployable and therefore unable to pay child support, evidence of his back pain in 1999 was not relevant to his defense and therefore, it was not error to exclude it. *See* ***id.***

¶22 Similarly, with regard to the single proffered reference to Sexton's 1999 knee injury, the jury heard testimony from Sexton, his half-brother and his physician regarding the condition of his knee between 1994 and 1998. Because Sexton could have used these repeated references to the condition of his knee to support the argument that his knee problems were an "ongoing concern," we conclude that the records of Sexton's 1999 knee injury to establish this "ongoing

concern" theory would have been merely cumulative. Thus, again, the trial court did not err by excluding the records. *See* ***id.***; *see also* WIS. STAT. § 904.03. We therefore cannot conclude that reversal is warranted under WIS. STAT. § 752.35.

III. DIRECTED VERDICT/SUFFICIENCY OF THE EVIDENCE

¶23 Sexton argues that the trial court erred by denying his motion for directed verdict at the close of the prosecution's case. After the denial of his motion, Sexton chose to introduce evidence in his defense. A defendant who moves for dismissal at the close of the State's case and then chooses to introduce evidence waives appeal of the motion to dismiss. *See* ***State v. Gebarski***, 90 Wis. 2d 754, 773-74, 280 N.W.2d 672 (1979). Therefore, in considering Sexton's challenge to the sufficiency of the evidence, we need not restrict our examination to the State's evidence, but may instead review all of the evidence presented by both sides at trial.

¶24 Appellate review of the sufficiency of the evidence to support a jury verdict is highly deferential. *See* ***State v. Poellinger***, 153 Wis. 2d 493, 503-04, 451 N.W.2d 752 (1990). The ***Poellinger*** court held:

> [I]n reviewing the sufficiency of the evidence to support a conviction, an appellate court may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn a verdict even if it believes that the trier of fact should not have found guilt based on the evidence before it.

Id. at 507 (citation omitted). Under this standard of review, we conclude that the record is sufficient to uphold the convictions.

¶25 Pursuant to WIS. STAT. § 948.22(4), "the following is prima facie evidence of intentional failure to provide child … support: For a person subject to a court order requiring child … support payments, when the person knows or reasonably should have known that he or she is required to pay support under an order, failure to pay the child … support payment required under the order."

¶26 During its case-in-chief, the State presented evidence that Sexton had been ordered to pay child support, that he knew about the order and that he failed to pay as alleged in the information. The State also presented evidence that Sexton had sporadic employment during the time of the charged offenses. Sexton ultimately testified that he made no attempt to look for work for years but that he sometimes worked for cash, knowing that money would not then be withheld for child support. Sexton also testified that during the times when he was employed, he did not use his income to satisfy his child support obligation.

¶27 As noted above, Sexton raised the affirmative defense of inability to pay and thus bore the burden of establishing that defense by a preponderance of the evidence. *See* WIS. STAT. § 948.22(6). Sexton's orthopedic surgeon, Dr. James A. Hinckley, testified regarding a knee injury that Sexton had sustained in 1981. Hinckley testified that Sexton's recovery had been frustrated when Sexton prematurely removed his cast and then failed to follow through with the prescribed post-operative treatment regimen. Hinckley further testified that he last saw Sexton for his knee injury in 1990 and that he saw him for an alleged back injury in 1996.

¶28 With respect to Sexton's 1996 back injury, Hinckley opined that Sexton appeared to be exaggerating the extent of his back injury at that time. Although Hinckley testified that Sexton had significant difficulties with particular

types of heavy physical labor, Hinckley declined to opine that Sexton was unemployable. On cross-examination, the prosecutor asked Hinckley, "[Y]ou're not saying that Mr. Sexton was unable to do any type of physical work at all, are you?" Hinkley responded, "No. I'm not saying that." Hinckley testified that "[F]or a lighter work setting, sedentary work setting particularly, one would expect that he would be able to do that."

¶29 Sexton nevertheless argues that he met his burden of proving an inability to pay by establishing that he was incarcerated for a large portion of the time during which he failed to pay child support. Although incarceration is relevant to a defense of inability to pay, *see* ***Stutesman***, 221 Wis. 2d at 184, it "does not, in itself, automatically establish a defense of inability to pay." ***Id.*** at 187 n.2. Here, Sexton testified that while incarcerated, he did not request work-release privileges or otherwise seek sedentary or light work, consistent with his claimed physical limitations. Based on the evidence presented, the jury reasonably concluded that Sexton failed to establish his inability to pay defense. We further conclude that there was sufficient evidence for the jury to convict Sexton of the charged offenses.

¶30 Based upon the foregoing, we are satisfied that the real controversy has been fully tried, and that there has been no miscarriage of justice. Therefore, we conclude that there is no reason to exercise our discretionary authority under WIS. STAT. § 752.35 to reverse the judgment. We further conclude that there was sufficient evidence to support Sexton's convictions and therefore affirm the judgment.

By the Court.—Judgment affirmed.

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