COURT OF APPEALS
DECISION
DATED AND FILED

October 2, 2001

Cornelia G. Clark
Clerk of Court of Appeals

No. 01-0238-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL L. SCHEIWE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Outagamie County: HAROLD V. FROEHLICH, Judge. *Reversed and cause remanded with directions.*

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

¶1 CANE, C.J. Michael Scheiwe appeals from a judgment of conviction for fourteen counts of criminal nonsupport, contrary to WIS. STAT.

§ 948.22(2).[1] Scheiwe argues that twelve of the counts should be dismissed because they are barred by the statute of limitations or the doctrine of laches. He also seeks a new trial on grounds that the trial court erroneously admitted hearsay testimony concerning Scheiwe's intention to avoid paying child support and erroneously failed to strike opinion evidence by one of the State's witnesses. We conclude that none of the counts is barred by the statute of limitations or the doctrine of laches. However, we conclude that Scheiwe is entitled to a new trial based on the erroneous admission of evidence and, therefore, reverse the judgment and remand for a new trial on all counts.

BACKGROUND

¶2 Scheiwe and Peg Abendroth, parents of two sons, divorced in 1984. They stipulated that Scheiwe would pay Abendroth child support of $70 per week. At the time, Scheiwe lived in Appleton, Wisconsin, and worked for a landscaping company.

¶3 In 1987, Scheiwe moved to Michigan. He created and was employed by a nonprofit environmental education center. He taught environmental studies and sometimes led small groups of students on wilderness outings. During some of the years he worked for the center, he had additional employment.

¶4 It is undisputed that from 1984-1998, Scheiwe did not always make his child support payments, which were later reduced to $51 a week. On several occasions, Outagamie County filed motions based on Scheiwe's nonpayment of

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

child support. Scheiwe appeared in court eleven times between 1984 and 1998 to attend hearings on those motions.

¶5 In 1999, the State charged Scheiwe with thirteen misdemeanor counts and one felony count of criminal nonsupport. The charges alleged that from 1984 through 1998, Scheiwe had failed to pay support for periods of time ranging from twenty-seven to 141 days.

¶6 At trial, the State presented evidence that Scheiwe owed nearly $43,000 in arrearages and interest to Abendroth and the State. Although Scheiwe conceded that he knew he had to pay child support and that he did not pay during certain periods, he argued that he did not intentionally fail to pay child support. He also offered the affirmative defense that he was unable to pay support.

¶7 The jury convicted Scheiwe of all fourteen counts. Scheiwe filed a motion for postconviction relief seeking dismissal of twelve counts based on the statute of limitations and the doctrine of laches. He also sought a new trial based on the erroneous admission of evidence. Specifically, Scheiwe objected to the trial court's decision to allow Abendroth to testify that Scheiwe's friend, Thomas Sykes, told Abendroth that Scheiwe said he would never pay child support. The court allowed the testimony after concluding that Sykes was an unavailable witness under WIS. STAT. § 908.04.[2] The court denied Scheiwe's postconviction motion and this appeal followed.

[2] At the postconviction motion hearing, Sykes testified that he had never told Abendroth that Scheiwe said he would never pay child support, and that Scheiwe had never made such a statement to Sykes. Sykes also testified that he was never contacted to testify at trial, even though his telephone number is correctly listed in the local telephone directory and his address is correctly listed on his Wisconsin driver's license.

DISCUSSION

I. Applicability of the WIS. STAT. § 939.74(3) tolling provision

¶8 Scheiwe challenges twelve of the counts on grounds that they were not brought within the three-year statute of limitations applicable to misdemeanors. He argues that the tolling provision of WIS. STAT. § 939.74(3) is inapplicable even though he resided in Michigan because he repeatedly appeared in Outagamie County court in response to orders to appear.

¶9 Twelve misdemeanor counts for criminal nonsupport were filed more than three years after Scheiwe failed to pay support. The statute of limitations for misdemeanors is three years. *See* WIS. STAT. § 939.74(1). However, the statute of limitations is tolled for "the time during which the actor was not publicly a resident within this state." *See* WIS. STAT. § 939.74(3). Scheiwe argues that this tolling provision is inapplicable and, therefore, twelve of the counts are time barred.

¶10 Scheiwe, a Michigan resident, returned to Outagamie County Circuit Court on numerous occasions over the years for hearings related to his child support obligations. He argues that because he frequently returned to Wisconsin, he was not absent from the state and, therefore, the tolling provisions of WIS. STAT. § 939.74(3) are inapplicable. Resolution of this issue requires interpretation of § 939.74(3), a question of law that we review de novo. *See* ***State v. Whitman,*** 160 Wis. 2d 260, 265, 466 N.W.2d 193 (Ct. App. 1991).

¶11 Our supreme court considered a similar challenge to the applicability of WIS. STAT. § 939.74(3) (1977), in ***State v. Sher***, 149 Wis. 2d 1, 437 N.W.2d 878 (1989). In ***Sher***, the circuit court found that (1) the defendant had moved

from Wisconsin and taken up residency in Florida; (2) he made numerous trips back to Wisconsin for business matters, personal matters and litigation matters; (3) he never left Wisconsin in an attempt to conceal or prevent knowledge of his whereabouts; and (4) information on his residency status and whereabouts was available to both private parties and law enforcement. ***Id.*** at 7.

¶12 Nonetheless, interpreting WIS. STAT. § 939.74(3), our supreme court held that the tolling provision applied to Sher. *See* ***Sher***, 149 Wis. 2d at 9. The court concluded that the statute creates only two categories of persons: public residents and others. ***Id.*** The court further concluded that public residents are the only group of persons for whom the statute of limitations does not toll. ***Id.*** Thus, even though Sher did not conceal his whereabouts and was, therefore, in his terms a "public nonresident," the tolling provision applied because he was not a public resident in Wisconsin. *See* ***id.*** The court also rejected Sher's constitutional challenge to the statute. *See* ***id.*** at 18.

¶13 Scheiwe attempts to distinguish ***Sher***:

> In ***Sher***, the defendant returned to Wisconsin "for business matters, personal matters, and litigation matters." … The supreme court's decision does not indicate what were the "litigation matters." This phrase could refer to meetings with a lawyer to discuss contemplated litigation. In contrast, Mr. Scheiwe was ordered to appear in court and he did appear in court. He was completely available to the state for prosecution.

We reject Scheiwe's distinction and conclude that ***Sher*** is applicable.

¶14 First, ***Sher*** concluded that the tolling provisions applied except to public residents of Wisconsin. *See* ***id.*** at 9. It is undisputed that Scheiwe is not a resident of Wisconsin, public or otherwise. Second, there is no language in ***Sher*** that suggests its conclusion would be different if Sher had traveled to Wisconsin

more frequently. Indeed, the fact that the court applied the tolling provisions even though Sher returned to Wisconsin for personal, business and litigation matters *enforces* the argument that ***Sher***'s conclusion applies here. We conclude that the tolling provisions of WIS. STAT. § 939.74(3) apply and, therefore, the statute of limitations does not bar the twelve challenged counts.

II. Applicability of the doctrine of laches

¶15 Scheiwe contends the same twelve counts should also be dismissed pursuant to the doctrine of laches. The timeliness of the commencement of actions at law is governed by statutes of limitations, whereas equitable actions are governed by considerations of laches. ***Suburban Motors of Grafton v. Forester***, 134 Wis. 2d 183, 187, 396 N.W.2d 351 (Ct. App. 1986). Because a criminal prosecution is an action at law and not an equitable action, the timeliness of the charges against Scheiwe is determined by the statute of limitations. Scheiwe's reliance on the doctrine of laches is therefore misplaced and will not be considered further.

III. Erroneous admission of trial testimony

¶16 Scheiwe objects to the admission of: (1) hearsay evidence that Scheiwe told Sykes that he would never pay child support; and (2) the State's witness's opinion evidence that Scheiwe's nonpayment was based on vindictiveness against his ex-wife. He argues that the admission of this evidence was erroneous and prejudicial, and that he is entitled to a new trial.

¶17 The State concedes that the hearsay evidence was erroneously admitted, but argues that the error was harmless. The State does not concede error concerning the State's witness's opinion, but alternatively argues that any error

was harmless. We conclude that the challenged testimony was erroneously admitted and that there is a reasonable possibility that the error contributed to the conviction. Therefore, we reverse and remand for a new trial.

A. Challenged testimony

¶18 At trial, Abendroth was allowed to testify about statements she claims Sykes made to her. She testified: "[Sykes] told me [Scheiwe] said he would never pay for those kids of mine. If he couldn't have them he didn't want to pay for them either." The State concedes that Sykes was not an unavailable witness as defined by WIS. STAT. § 908.04, and that the testimony should not have been admitted.

¶19 The second instance of challenged testimony came from an assistant corporation counsel, Traycee England, who appeared as a witness for the state:

> [State:] You indicated before that you're familiar with the defendant's nonpayment history?
>
> [England:] Yes.
>
> [State:] Did you form a view, based on your review of the nonpayment records as to why the defendant had failed to pay and had only paid sporadically [in response to court orders], the child support that he was ordered to pay?
>
> [England:] Yes.
>
> [State:] And what was that view?
>
> [England:] I believe that some of it is a vindictiveness that he doesn't want her to have the money she is owed. And I believe he also has some kind of belief that maybe he is helping the environment. But in my belief it's at the cost of his –
>
> [Scheiwe's attorney:] Objection to this answer. She is testifying to his state of mind, which is something that can't be done.

Scheiwe's attorney asked the court to strike the answer; the court denied the request.[3]

¶20 On appeal, the State argues that England's statements constituted admissible lay opinion testimony. The admissibility of lay opinion testimony is assessed in light of WIS. STAT. § 907.01, which provides:

> **Opinion testimony by lay witnesses.** If the witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences which are rationally based on the perception of the witness and helpful to a clear understanding of the witness's testimony or the determination of a fact in issue.

¶21 The admission of opinion evidence pursuant to WIS. STAT. § 907.01 lies within the sound discretion of the trial court. ***State v. Dishman***, 104 Wis. 2d 169, 173, 311 N.W.2d 217 (Ct. App. 1981). To sustain a discretionary ruling, we need only find that the trial court examined the relevant facts, applied a proper standard of law and, using a rational process, reached a reasonable conclusion. *See* ***Franz v. Brennan***, 150 Wis. 2d 1, 6, 440 N.W.2d 562 (1989).

¶22 We conclude that the trial court erroneously exercised its discretion when it refused to strike England's answer. England's opinion that Scheiwe's nonpayment of child support was intended to be vindictive "constitutes no more than lay opinion of an ultimate fact to be determined by the jury"—the type of testimony that patently fails admission as lay opinion because it is "not based upon the rational perception of a witness, nor helpful to a determination of a fact in issue." *See* ***State v. Dalton***, 98 Wis. 2d 725, 731, 298 N.W.2d 398 (Ct. App.

[3] The State does not contend that Scheiwe waived his objection by failing to object to the question (as opposed to moving to strike the answer), or that Scheiwe's motion to strike the testimony was insufficient to preserve the issue for appeal.

1980) (rejecting admission of testimony that defendant did not intend to kill victim); *see also* WIS. STAT. § 907.01.

B. Harmless error

¶23 The test for harmless error is whether there is a reasonable probability that the error contributed to the conviction. *See* ***State v. Dyess***, 124 Wis. 2d 525, 543, 370 N.W.2d 222 (1985). The conviction must be reversed unless the court is certain the error did not influence the jury. ***State v. Sullivan***, 216 Wis. 2d 768, 792, 576 N.W.2d 30 (1998). The burden of establishing that there is no reasonable possibility that the error contributed to the conviction is on the State. *See* ***id.*** at 792-93. Furthermore, if evidence has been erroneously admitted or excluded, we will independently determine whether the error was harmless or prejudicial. ***State v. Keith***, 216 Wis. 2d 61, 69, 573 N.W.2d 888 (Ct. App. 1997).

¶24 The State argues that because there was ample and credible evidence completely independent of the challenged testimony to support the jury's verdict, any error was harmless. We disagree. The parties agree that one of the key issues was intent. The jury was instructed:

> Intentionally means the defendant must have had the mental purpose to fail to provide child support or was aware that his or her conduct was practically certain to cause that result. Intentionally also requires that the defendant must have acted with knowledge that [he] failed to provide child support.
>
> You cannot look into a person's mind to find his intent. You may determine such intent directly or indirectly from all the facts and evidence concerning this offense. You may consider any statements or conduct of the defendant,

> which indicate his state of mind. You may find intent to fail to provide child support from such statements or [conduct], but you are not required to do so.[4]

¶25 Three witnesses specifically testified about Scheiwe's intent: Scheiwe, Abendroth and England. Scheiwe testified that he did not intend to avoid child support, while Abendroth and England were erroneously allowed to testify that Scheiwe had told a friend he would never pay child support and that Scheiwe's motivation was vindictiveness, respectively.

¶26 We conclude there is a reasonable probability that the jury, faced with this limited direct evidence of intent, relied on the erroneously admitted evidence in reaching its conclusion that Scheiwe intentionally failed to provide child support. Because there is a reasonable probability that the erroneous admission of the challenged testimony contributed to the conviction, the error was not harmless. We reverse and remand for a new trial.

By the Court.—Judgment reversed and cause remanded with directions.

Not recommended for publication in the official reports.

[4] This instruction is consistent with WIS JI—CRIMINAL 2152 and WIS. STAT. § 939.23.

¶27 HOOVER, P.J. (*dissenting*). I would conclude that the trial court did not err by permitting the corporation counsel to opine that Scheiwe's failure to support his children was in part due to vindictiveness. Moreover, because of the overwhelming evidence that Scheiwe's failure was intentional and that it was due to his failure to seek meaningful and available employment, admission of Thomas Sykes' hearsay was harmless. Therefore, I respectfully dissent.

¶28 This decision is not recommended for publication, and therefore I will set forth only an illustrative rather than an exhaustive recitation of the trial evidence. Traycee England was the assistant corporation counsel who testified that Scheiwe's failure to regularly pay child support was in part due to his vindictiveness toward Abendroth. England based her opinion on her contact with Scheiwe in connection with his child support obligation, including letters Scheiwe had sent her office describing his feelings about the divorce experience. Thus, England's opinion was based upon her perception of Scheiwe and the attitudes he expressed in writing. Because it informed on the defenses Scheiwe pursued, England's opinion was also helpful to an understanding concerning the issues.[5]

¶29 I agree with Scheiwe, the State and the majority that Sykes' statement to the effect that Scheiwe said he would refuse to pay child support was

[5] For the reasons indicated in the harmless error section, if England's opinion was erroneously admitted, the error was harmless. As the State notes in its brief, "[t]his small statement by England was but a raindrop in the pool of trial evidence pointing to Scheiwe's culpability."

inadmissible hearsay. But because of the "pool of trial evidence pointing to Scheiwe's culpability," I view the error as harmless. Considering the error in the context of the entire trial and the strength of the untainted evidence, my confidence in the trial's outcome is not undermined. *See* ***State v. Grant***, 139 Wis. 2d 45, 53, 406 N.W.2d 744 (1987). Again, I intend to only sample and summarize the evidence of Scheiwe's guilt.

¶30 First, the State introduced two additional statements Scheiwe made to others that were similar in nature to the one allegedly made to Sykes. But aside from this, the circumstantial evidence that Scheiwe had the ability but not the intent to pay child support was damning. It was uncontroverted that Scheiwe knew he was under court order to pay child support and that he nevertheless failed to pay or made inadequate payments many times over sixteen years. Indeed, apart from not paying, Scheiwe was almost completely noncompliant with his obligation to submit required completed job forms to the child support agency. According to England, Scheiwe filed "five out of probably hundreds that were due."[6]

¶31 While Scheiwe did make payments, it was usually for less than what he owed for any given period. Some of these payments were only made because of income assignment or tax intercept. Furthermore, there was evidence that Scheiwe was most likely to make payments when threatened with contempt. In a 1990 contempt action, Scheiwe was sentenced to six months in jail. According to the State, he "had no trouble coming up with the money [needed to purge his

[6] Another witness from the Child Support Agency, who had the agency's complete documentation, testified that Scheiwe submitted only four job search forms out of the hundreds due.

contempt and thus] avoid jail." And, as the State notes, Scheiwe has paid all of his support payments since he was arrested in connection with the instant action.

¶32 Scheiwe admitted making lifestyle choices that were incompatible with his nominal support obligation.[7] While Scheiwe raised an inability to pay defense, there was prodigious evidence that he was employable. He nevertheless reduced his earnings and later failed to diligently seek meaningful employment. *See* WIS. STAT. § 948.22. Scheiwe has a bachelor's degree in environmental science and is six credits short of a master's degree in botany. While he had demonstrated the ability to hold gainful employment, he explained to an Outagamie court commissioner that he removed himself "from the job market except for part-time and seasonal positions."[8] For a number of years, Scheiwe purposefully committed himself to an employment situation that paid him between $100 to $250 a month. Later, he and his partner converted this business into a nonprofit, tax exempt organization because "it was not our desire to make a profit." Indeed, Scheiwe testified that his financial goal was for subsistence only, meaning "enough (hopefully) to allow me to maintain my simple nonconsumptive, minimum environmental impact way."

¶33 Scheiwe was asked whether he could have met the minimum requirement of $35 a week by working one night a week at McDonald's. Scheiwe responded that he did not have time to "flip burgers" because of his hours at the

[7] His initial obligation was $70 a week. Scheiwe repeatedly moved for reduction, and in 1990, as a resolution of a contempt proceeding, his support obligation was lowered to $51 a week, with a required payment of $35 to stay out of jail. Later, Scheiwe moved to have his weekly obligation reduced to $12.52.

[8] In 1994, Scheiwe obtained the position as regional science director for Moorehead in Moorehead, Minnesota, but quit after seven days.

not-for-profit organization and because, essentially, he was unwilling to work at what he considered unimportant employment just to obtain money for child support.

¶34 Thus, the jury was presented with irresistible evidence, most of it comprised of Scheiwe's own material admissions by words and conduct, that he intentionally refused to obtain remunerative employment, his child support obligation notwithstanding. Any perceived effect the Sykes hearsay testimony may have had on the jury pales by comparison. I would affirm the convictions.