COURT OF APPEALS
DECISION
DATED AND RELEASED

MARCH 25, 1997

No. 96-2064-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

PERRY E. HAGLER,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Eau Claire County: PAUL J. LENZ, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

LaROCQUE, J. Perry E. Hagler appeals his conviction on one count of possession of child pornography, contrary to § 948.12, STATS. Hagler asserts he is entitled to a new trial based on evidentiary errors and in the interest of justice due to numerous errors committed by the trial court. In the alternative, Hagler challenges his sentence as excessive. We reject Hagler's arguments and affirm.

The evidence adduced at trial reveals that Hagler first met E.F. in the summer of 1994, when E.F. was fourteen years old. The two maintained a relationship, which apparently continued after Hagler was confined in the Eau Claire County jail in December of 1994. During his incarceration there, the two exchanged correspondence and E.F. sent pictures of herself to Hagler. On December 28, 1994, Hagler received pictures from E.F. depicting herself in a variety of nude and sexually-explicit positions. Later that day, a prison guard demanded Hagler surrender the pictures upon learning that E.F. was a minor.[1] Hagler claims this is when he first learned that E.F. was a minor. Hagler surrendered the pictures.

Hagler was subsequently charged with a violation of § 948.12, STATS., making it unlawful to possess photos of a child engaged in sexually explicit conduct. At trial, the State attempted to introduce sexually explicit letters Hagler had written E.F. discussing the pictures. Hagler objected, arguing that the letters were not relevant and that a proper foundation for their introduction had not been laid. The trial court disagreed and admitted the letters. After the jury returned a guilty verdict, Hagler was sentenced to six years in prison.

Hagler first asserts that proper foundation was not laid for the introduction of the letters. A trial court may not admit evidence unless it is satisfied that "the matter in question is what its proponent claims." Section 909.01, STATS. A trial court possesses broad discretion in determining the admissibility of proffered evidence. ***State v. Larsen***, 165 Wis.2d 316, 319-20, 477 N.W.2d 87, 88 (Ct. App. 1991). We will not disturb the trial court's determination unless there is no reasonable basis for the ruling. ***Id.*** at 320, 477 N.W.2d at 88. We conclude that there is a reasonable basis in the record for the trial court's decision.

Section 909.015(1), STATS., provides that testimony of a witness with knowledge that a matter is what it is claimed to be is sufficient authentication. The State presented Hagler's letters to E.F. at trial, asked her to review them, and then asked her:

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[1] Eau Claire County jail policies allow inmates to possess nude pictures of adults, but do not allow nude pictures of minors.

Q. Are those copies of letters and cards that you received from Perry Hagler during December of 1994 and early 1995?

A. Yes.

A layperson may authenticate the handwriting of a correspondent with whom he or she is familiar. ***Daniels v. Foster***, 26 Wis. 686, 693 (1870). E.F. was in a position to know if the letters were received from Hagler during the period indicated, and her testimony to that effect authenticates the documents under § 909.015(1). We therefore do not disturb the trial court's ruling that the letters had a proper foundation.

Hagler next contends that his letters to E.F. were not relevant. We disagree. Hagler does not challenge the trial court's determination of the elements of the crime. The court required the State to establish the existence of four elements: First, the defendant must knowingly possess the photographs. Second, the photographs must show a minor engaged in sexually explicit conduct.[2] Third, the defendant must know that the photographs depict sexually explicit conduct. Finally, the defendant must know, or reasonably should have known, that the person depicted in the photographs is a minor. WIS J I—CRIMINAL 2146.

Many of the letters refer to Hagler's habit of masturbating to the pictures and to his sexual desire for E.F. The court implicitly found that they were therefore relevant to the third element, that Hagler knew the pictures depicted sexually-explicit conduct, when it stated that "I think it's a reasonable inference that these—he's not masturbating about looking at trees or something ...." We conclude that this reasoning constitutes a proper exercise of discretion. The court also found the letters relevant to the fourth element, Hagler's knowledge of E.F.'s age. The record reveals that one of the letters refers to E.F. as a "sweet little girl." One talks about showing her "the ropes of the game of life." Another letter states "I was scared to mess with you because you are young and I don't have time for more trouble ...." Finally, Hagler in another letter states "Don't let the Police break us up ok ...." Presumably, if he was

[2] "Sexually explicit conduct" is defined in § 948.01(7), STATS. Hagler does not contend that the pictures of E.F. did not depict sexually explicit conduct.

certain E.F. was older than eighteen he would have no reason to fear "trouble" from the police due to his relationship with her.

Hagler claims the letters are not relevant because there is no evidence to show when they were written. Specifically, Hagler argues that if the letters were written after December 28, 1994, the date Hagler claims he first learned that E.F. was a minor, they would not be relevant to Hagler's knowledge of E.F.'s age on the date of the offense, December 28, 1994. The trial court reasonably concluded that a fact finder could infer the letters were written prior to December 28, 1994. While the letters at issue were undated, each was attached to an envelope bearing a postmark on or earlier than December 28, 1994.[3]

Hagler seeks a new trial in the interest of justice, contending that the trial court erred by allowing the State to "badger" and harass a defense witness on cross-examination. He also contends that the State "abused" its right to use leading questions in that examination and that the State's line of questioning went "too far." Section 906.11(1), STATS., gives the trial court broad discretion to control the mode of witness questioning. We will not disturb the trial court's discretionary ruling unless the rights of the parties have been prejudiced. ***Dutcher v. Phoenix Ins. Co.***, 37 Wis.2d 591, 606, 155 N.W.2d 609, 617 (1968).

The challenged questioning is as follows:

Q. Okay. That's all I'm asking you. Now, isn't it true that Mr. Hagler has asked you to lie in your testimony here today?

A. I don't recall any -- him asking me to lie or anything like that.

Q. Well --.

[3] Hagler argues that there is no evidence that the envelope attached to each letter was the envelope used to mail the letter. Thus, he argues, it is conceivable that all of the letters were mailed after December 28, 1994. Absent evidence to the contrary, a fact finder could reasonably infer that the letter was enclosed in the envelope to which it was attached.

A. I don't recall it.

Q. Well, whether he used the word lie or not, isn't it true that he's asked you to say things that are not true?

A. I don't recall it, but it might have been said, but I don't recall it.

Q. Okay. So he probably asked you to lie. Would that be fair?

[DEFENSE ATTORNEY:] Your Honor, I would object. That's not what the witness stated.

[PROSECUTOR:] I believe that's exactly what the witness stated.

THE COURT: You can answer the question.

[THE WITNESS:] Can you repeat it?

Q. ... You stated that you didn't know whether he had asked you to lie but that he may have; correct?

A. Yes.

Q. Okay. So then he did possibly ask you to lie?

A. Yes.

Q. Now, isn't it true that he asked you to testify that [E.F.] told you she was 19?

A. The only thing I recall about ages is that Perry told me she was telling people that -- she was telling everyone that she was between the age of 19 and 22.

Q. Let me just -- I understand it's probably difficult for you because you're not in court every day, but isn't it true that Mr. Hagler asked you to say that [E.F.] told you she was 19?

[DEFENSE ATTORNEY:] Your honor, how many times is [the prosecutor] going to be able to ask this same question?

[PROSECUTOR:] Until I get an answer, your honor.

[DEFENSE ATTORNEY:] Your honor, that was an objection I made.

THE COURT: ... Your objection is overruled. You may answer the question.

A. I don't think he told me to tell people that she was 19 to 22.

....

Q. ... Do you recognize that document as another letter that you received from Mr. Hagler within the last week?

A. Yes.

Q. What's the postmark on this one?

A. January 6th.

Q. Okay. Now could you read out loud the highlighted portion on page 2 of that document, please.

A. Yes. Anyway, if you aren't going to get on the stand and say the pictures were yours, all you have to say is that she told you she was 19.

Q. Mr. Hagler asked you to get on the stand and say the pictures were yours, didn't he?

A. It just states here that --

Q. Well, you've read what it says there. I'm asking you, Mr. Hagler asked you to get on the stand and say that the pictures were yours, didn't he?

A. I don't remember.

We conclude that Hagler was not unfairly prejudiced. The letter he wrote, which is the apparent basis for the questions, may fairly suggest a request that the recipient give false testimony.

Hagler next contends that a new trial is warranted because the jury was composed entirely of caucasians, while he is black. Hagler concedes that there is no evidence of intentional exclusion of blacks from the jury by the State, but asserts that "there is an appearance of impropriety."

The proper time to challenge the racial composition of a jury is before the petit jury is chosen. ***Brown v. State***, 58 Wis.2d 158, 164, 205 N.W.2d 566, 570 (1973). A failure to challenge the manner in which the jury pool is selected constitutes waiver of that issue. ***Id.*** Because Hagler did not raise this issue before the trial court, we conclude he has waived it.

Hagler next asserts that a new trial is warranted because his trial counsel died in an automobile accident and was unable to assist in this appeal. This assertion is patently without merit. Hagler has been represented on this appeal by counsel, and makes no showing how the absence of trial counsel hampers his appeal.

Hagler next contends that a new trial is warranted because the death of Hagler's trial counsel prevents Hagler from bringing a motion for ineffective assistance of counsel. Hagler identifies four "trial tactics" that "could have been questioned." To establish a claim of ineffective counsel, Hagler has the burden of proving that his trial counsel's performance was deficient and that the deficiency prejudiced his defense. *See* ***State v. Sanchez***, 201 Wis.2d 219, 236, 548 N.W.2d 69, 76 (1996). We conclude that Hagler has waived any right to challenge the constitutional adequacy of his trial counsel because he did not raise that issue before the trial court. *See* ***State v. Waites***, 158 Wis.2d 376, 392-93, 462 N.W.2d 206, 213 (1990).

We conclude that the real controversy in this case was fully tried and that there has been no showing of a miscarriage of justice. *See* § 752.35, STATS. We therefore decline to exercise our discretionary reversal power to order a new trial in the interest of justice.

Finally, Hagler contends that his six-year sentence is excessive. We do not address this issue because Hagler failed to seek a sentence modification in the trial court. *See* ***State v. Chambers***, 173 Wis.2d 237, 261, 496 N.W.2d 191, 200 (Ct. App. 1992).

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.