

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 29, 2005

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2004AP2641-CR

Cir. Ct. No. 2003CF350

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

ALEXANDER F. GODLEWSKI,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEFFREY A. CONEN, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

¶1 FINE, J. Alexander F. Godlewski appeals a judgment entered after a jury found him guilty of three counts of felony failure to pay child support, *see* WIS. STAT. § 948.22(2), and an order denying his motion for postconviction relief.

Godlewski claims that the trial court erroneously exercised its discretion when it denied his motion for a mistrial. We affirm.

I.

¶2 Alexander F. Godlewski and Terri L. Walker married in 1994, and had one child, Alexander E. Godlewski. They divorced in 1997. Under a pre-divorce agreement, Godlewski agreed to pay child support. A family-court judge gave Walker sole custody and primary placement of the boy, and gave Godlewski periods of supervised visitation.

¶3 In 2003, Godlewski was charged with seven counts of failure to pay child support. He pled not guilty and was tried to a jury. At the trial, when the assistant district attorney asked Walker why she was “here today,” she testified: “I’m here mostly for my son. It’s-- Obviously the money would help. One income is very hard. But to be able to just have a child and walk away and not[] financially or even see the child I just think he needs to have some sort of accountability.” Godlewski’s lawyer immediately objected and moved to strike Walker’s answer. The trial court excused the jury and Godlewski’s lawyer moved for a mistrial. After considering the parties’ arguments, the trial court denied Godlewski’s motion for a mistrial, but ordered Walker’s testimony struck. When the jury returned to the courtroom, the trial court gave it the following instruction:

There has been testimony from Miss Walker as to visitation between Alex and his father, Mr. Godlewski. What opinions Miss Walker may have about why Mr. Godlewski should be found guilty is not relevant in this case.

You, the jury, are the sole determiners of the facts and you, the jury, will determine Mr. Godlewski’s guilt or innocence.

You are instructed to disregard and ignore any of Miss Walker's opinions as to the outcome of this case.

¶4 The jury found Godlewski guilty of three of the seven counts of failure to pay child support. Godlewski filed a motion for postconviction relief, alleging that the trial court erroneously exercised its discretion when it denied his motion for a mistrial. The trial court summarily denied the motion.

II.

¶5 The decision whether to grant a mistrial lies within the sound discretion of the trial court. *State v. Ross*, 2003 WI App 27, ¶47, 260 Wis. 2d 291, 317, 659 N.W.2d 122, 134. “The trial court must determine, in light of the whole proceeding, whether the claimed error was sufficiently prejudicial to warrant a new trial.” *Ibid*. Not all errors warrant a mistrial, and it is preferable to employ less drastic alternatives. *State v. Adams*, 221 Wis. 2d 1, 17, 584 N.W.2d 695, 702 (Ct. App. 1998). “A trial court properly exercises its discretion when it has examined the relevant facts, applied the proper standard of law, and engaged in a rational decision-making process.” *State v. Bunch*, 191 Wis. 2d 501, 506–507, 529 N.W.2d 923, 925 (Ct. App. 1995).

¶6 Godlewski claims that the trial court's instruction to “disregard and ignore” Walker's testimony was insufficient to cure the prejudice, and that the trial court did not adequately explain at the trial or in the order denying his motion for postconviction relief its decision to deny the motion for a mistrial. Although we agree that the trial court did not place on the Record its explicit reasons, we may independently review the Record to determine whether it supports what the trial court did. *See, e.g., State v. Davidson*, 2000 WI 91, ¶53, 236 Wis. 2d 537, 565, 613 N.W.2d 606, 619. It does.

¶7 First, Walker’s testimony that Godlewski should be held accountable for not “even see[ing]” his son was an isolated comment; any prejudice that may have flowed from it was *de minimis* as shown by the fact that the jury acquitted Godlewski of four of the seven counts. Second, during the trial, the jurors heard testimony showing that, contrary to Walker’s assertion, Godlewski *had* shown interest in the boy, including:

- that Godlewski had contested the trial court’s custody and placement decisions, and sought appellate review from decisions adverse to him;
- a clinical psychologist’s opinion that Godlewski was so “hyper-focused ... on custody and seeing his son” and so “worr[ied] about his son and all the trauma” from the divorce that Godlewski had trouble talking about anything else; and
- testimony from Godlewski that he ate at restaurants with the boy.

Third, the trial court told the jury that Godlewski’s “visitation” record with the boy was “not relevant” to their decision, and that it must “disregard and ignore any of Miss Walker’s opinions as to the outcome of this case.” The jury is presumed to follow the trial court’s admonitions. *See State v. Truax*, 151 Wis. 2d 354, 362, 444 N.W.2d 432, 436 (Ct. App. 1989) (jury presumed to follow instructions).

¶8 Finally, there was substantial and convincing evidence to support the guilty verdicts. In a stipulation read to the jury, Godlewski admitted two of the three elements of failure to pay child support: (1) that he was legally obligated to pay child support, and (2) that he had not paid child support during the pertinent periods. *See State v. Smith*, 2005 WI 104, ¶15, 283 Wis. 2d 57, ___, 699 N.W.2d 508, 513 (elements of failure to pay child support are: (1) an intentional failure to

provide child support; (2) that continued for 120 or more consecutive days; and (3) actual or constructive knowledge of the legal obligation to provide the child support). Thus, the only issue was whether Godlewski had intentionally failed to pay child support. *See ibid.* In his defense, Godlewski claimed that mental illness kept him from finding employment. *See* WIS. STAT. § 948.22(6) (inability to provide child support affirmative defense). This was contradicted, however, by evidence that: (1) during one of the periods he received an unemployment-compensation check; (2) during parts of two of the pertinent periods he worked as a bus driver; and (3) during part of the third pertinent period he worked for a temporary-employment agency and a tree-service company. The trial court did not erroneously exercise its discretion in denying Godlewski's motion for a mistrial. Accordingly, we affirm.

By the Court.—Judgment and order affirmed.

Publication in the official reports is not recommended.

