**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**November 12, 2009**

**David R. Schanker**
**Clerk of Court of Appeals**



**Appeal No. 2008AP2673-CR** **Cir. Ct. No. 2005CF498**

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

**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**PETER J. KING, JR.,**

**DEFENDANT-APPELLANT.**

APPEAL from judgments and an order of the circuit court for Sauk County: JAMES EVENSON, Judge. *Affirmed*.

Before Lundsten, Higginbotham and Bridge, JJ.

¶1 BRIDGE, J. Peter J. King, Jr., appeals from judgments of conviction entered against him and the order denying his motion for postconviction relief. Following a jury trial, King was convicted of one count of use of a computer to facilitate a child sex crime, in violation of WIS. STAT.

§ 948.075(1) (2003-04),[1] and child enticement, in violation of WIS. STAT. § 948.07(1) (2003-04).[2] King contends on appeal that the circuit court improperly admitted evidence of his prior conviction for fourth-degree sexual assault and evidence that he was in possession of child pornography. We disagree with both contentions and affirm.

## BACKGROUND

¶2 King was charged on December 30, 2005, with one count of child enticement, one count of use of a computer to facilitate a child sex crime, and one count of possession of tetrahydrocannabinols. All three charges stemmed from online chats King had with "wellgurl90," a person described as a fifteen-year-old girl named "Sarah" who was actually an officer with the Sauk-Prairie Police Department, and a rendezvous King arranged with "wellgurl90" at a motel for the

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[1] WISCONSIN STAT. § 948.075(1) (2003-04) provided:

> Whoever uses a computerized communication system to communicate with an individual who the actor believes or has reason to believe has not attained the age of 16 years with intent to have sexual contact or sexual intercourse with the individual in violation of s. 948.02 (1) or (2) is guilty of a Class D felony.

Section 948.075(1) has since been amended to change the penalty from a Class D felony to a Class C felony and renumbered as § 948.075(1r). *See* 2005 Wis. Act 433, § 22 (May 22, 2006). Throughout the opinion we will refer to § 948.075(1) (2003-04). However, all other references to the Wisconsin Statutes will be to the 2007-08 version unless otherwise noted.

[2] WISCONSIN STAT. § 948.07 (2003-04) provides:

> Whoever, with intent to commit any of the following acts, causes or attempts to cause any child who has not attained the age of 18 years to go into any vehicle, building, room or secluded place is guilty of a class D felony:
>
> (1) Having sexual contact or sexual intercourse with the child in violation of s. 948.02 or 948.095.

purpose of having sexual intercourse with both "wellgurl90" and "wellgurl90's" fourteen-year-old friend.

¶3 Prior to trial, King filed a motion *in limine* with the circuit court seeking an order prohibiting the State from presenting "other acts evidence other than the number of convictions agreed upon by both parties." The evidence he sought to exclude included any reference to the acts alleged in any prior criminal case, including his 1986 conviction for the sexual assault of a thirteen-year-old girl, and child pornography seized from King's residence in the present matter. At the hearing on the motion, the State informed the court that it did not intend to present any other acts evidence in its case-in-chief, but stated, however that it was:

> potentially possible that Mr. King could open the door that is relevant to both the possession of the child pornography … and the 1[9]86 felony sexual assault case involving a 13-year-old underage female, and that certainly is something that could be subject to a hearing at the time.

¶4 The court ultimately deferred its decision on these issues. With respect to evidence relating to King's 1986 conviction, the court stated:

> If Mr. King testifies and the State believes that the area of inquiry is appropriate, we will conduct the hearing outside the presence of the jury and the State can establish the basis why it believes something would be admissible and what that would be then.

With respect to the child pornography evidence, the court explained:

> Obviously, at this point I don't believe I can make an appropriate ruling. Assuming that Mr. King does testify and if the State then intends to raise these issues, we can do further hearing outside the presence of the jury, but I think I'm going to need more context than what can be provided today. So that motion will certainly abide further proceedings.

¶5 During King's direct examination at trial, he testified that during his online conversation with "wellgurl90," he believed that he was chatting with "an adult who had engaged in three-way sex prior to the conversation." He explained that this belief stemmed in part "from past experience with my son's growing up in life, women or girls that young don't engage in pre—in sex in that way." On cross-examination, the following exchange occurred between King and the prosecutor:

> Q: Now, you testified that your knowledge is is that girls that young—and I think you were talking about 14 and 15 years of age—don't do three-ways; is that correct?
>
> A: That is correct.
>
> Q: What do you base that knowledge on?
>
> A: I base that knowledge upon my son growing up visiting with his friends and working at the amusement park.
>
> Q: So you're saying that in the setting with your son, you did not participate in any three-ways with his friends? That's how you knew that they didn't do it?
>
> A: That definitely is true. I did not participate with any of his friends, period. But I've never heard of any talk between people that he has hung around with at that age that participated in sex.
>
> Q: And through your employment, you never saw anybody participating at your place of employment in three-way sex?
>
> A: Correct.
>
> Q: Does that cover the bases of your knowledge as far as underage persons involved in three-way sex?
>
> ….
>
> A: (By the Witness:) Other than hearsay or role playing, yes.

¶6 Following this questioning, the circuit court excused the jury and, outside the jury's presence, held a discussion regarding the State's desire to present evidence of child pornography found at King's residence for the purpose of impeaching King's testimony "that he has no knowledge in regards to three-somes of any kind." This evidence included computer discs containing images of underage individuals involved in three-way sexual activity. The court acknowledged that the evidence was prejudicial, but ruled that its admission was appropriate for purposes of impeachment. Accordingly, the court granted the State's request.

¶7 After the jury returned, the prosecutor resumed her cross-examination of King. She showed King six computer discs and a photograph taken from one of those discs. King testified that he recognized three of the discs, but that he did not recognize the others. He also testified that he recognized the photograph, which came from one of the discs he did not recognize, because he "viewed it in a file that was on that computer," referring to a computer located in his residence. He also testified that he could not remember whether he sent that photo to "wellgurl90." However, the officer who engaged in the online conversation with King as "wellgurl90" had previously testified that he had received the image from King during his online chat with King.

¶8 The State also questioned David Griffin, a police officer with the Sauk Prairie Police Department, about the child pornography found at King's residence. Griffin testified as to seven photographs recovered from the discs seized from King's residence. He testified that one of the disks contained an image which depicted "three persons, actually two males, one female, on a bed. One male is laying down on his back. There's a female on top of him and there's another male next to them on the bed." Griffin testified that, based on her body

size, the female in the photo "look[ed] to be very young." Another of the discs contained a photo depicting:

> two young males on a bed. They are both laying down on their backs. There's a very young female laying on her side. She has her right hand on the penis of one of the males, has her mouth over the penis of another male. The bed in the setting looks similar to that of the three in [the previously discussed image].

Griffin testified that all three individuals appeared to be underage. That same disc contained another photograph which Griffin described as depicting:

> the legs and the penis of a male. You don't see the rest of his body or his face. There's a young female—or you can see her face; it looks to be young, has her mouth on the penis. And there's a female sitting down next to the male's right leg. She looks to me to be maybe seven or eight years old, and she's holding onto the penis of the male with her right hand.

Griffin based his estimate of the female's age on her absence of pubic hair and breast tissue development, the size of her face and body in relation to the man's leg, and her face, which he described as "somebody that I would maybe see at the elementary school."

¶9 During cross-examination, King again testified that he did not intend to have sex with a fifteen-year-old girl on the day of his arrest. When asked why not, King testified, "[b]ecause it's illegal and immoral." The State then asked, "Mr. King, how long have you held the rule that it's immoral to have sexual contact or intercourse with someone 15 years or younger?" King responded, "I would say at least 20-plus years."

¶10 At this point, the jury was excused again and a conversation was held outside the jury's presence regarding the State's desire to present evidence of

King's 1986 conviction. The State argued that the conviction went to King's credibility with respect to whether or not he would have intended to have sex with a minor in the present case. The circuit court granted the State's motion, explaining that:

> Mr. King volunteered the information that it was a moral decision as well as a question of legality, having sex with a 15-year-old. The information the State refers to and which was addressed in the motion in limine before trial are that he was convicted of sexual assault of a child. It ended up as a fourth-degree assault but involved a 12- to 16-year-old child, that being the age limit in the statute at that particular time in 1986.
>
> I'm going to permit the inquiry by the State to the extent that he was convicted of a sexual assault, that the victim in that case was under the age of 16. The defense can then determine where it wishes to go to that. I don't want to get too far into the other details of that and certainly not try that case, but I believe that not allowing the State to do that leaves an impression that by the nature of the conviction Mr. King's acts are in direct contradiction to his testimony.

The court also ruled that admissions recounted in the criminal complaint relating to the 1986 conviction could also be presented to the jury. The court explained that it was doing so "because the question asked of [King] was specific as to 15-year-old girls and his response was no because it's illegal and immoral, and so I believe that's an appropriate area of inquiry because by his own admission he has done that contrary to what he's testified to here today."

¶11 When the State resumed its cross-examination of King, it questioned King regarding his 1986 conviction as follows:

> Q: Mr. King, are you familiar with a case entitled State of Wisconsin versus Peter J. King, Case No. 86 CF 32?
>
> A: I'm familiar. It has to deal with me, yes.

> Q: And it would be fair to say that as a result of that case, you received a conviction for sexual assault, would it not?
>
> A: Fourth-degree sexual assault, yes.
>
> Q: And it would be fair to say that the victim in that case was between the ages of 12 and 16 years of age; is that correct?
>
> A: That is correct.
>
> Q: At the time of this offense, you would have been 25 years of age; is that correct?
>
> A: Around there, yes.

In addition, the State introduced the criminal complaint from King's 1986 conviction.

¶12 King was ultimately convicted of use of computer to facilitate a child sex crime and child enticement.[3] King sought postconviction relief, arguing he was entitled to a new trial because evidence that he possessed child pornography and had been convicted in 1986 of having sexual intercourse with a minor was highly prejudicial and erroneously admitted. The circuit court denied King's motion, ruling that King's own testimony opened the door for the admission of the evidence, that it was used for the proper purpose of impeaching King's testimony, and that it was relevant. The court also implicitly ruled that the evidence was not unduly prejudicial. King appeals.

[3] King was also convicted of possessing tetrahydrocannabinols, in violation of WIS. STAT. § 961.41(3g)(e), and was sentenced to ninety days in jail. However, he does not appeal this conviction.

## DISCUSSION

¶13 King first argues that the circuit court improperly admitted evidence relating to his 1986 conviction for fourth-degree sexual assault and evidence that he was in the possession of child pornography. The admission of evidence is generally a discretionary decision for the circuit court. *See* ***State v. Sullivan***, 216 Wis. 2d 768, 780, 576 N.W.2d 30 (1998). We will uphold the court's evidentiary ruling if we determine that the court "examined the relevant facts; applied a proper standard of law; and using a demonstrative rational process, reached a conclusion that a reasonable judge could reach." ***Id.*** at 780-81. We address each contention in turn.

### 1986 CONVICTION

¶14 King contends the circuit court erred in permitting the State to impeach him by presenting other acts evidence, over his objection, that he was convicted in 1986 of fourth-degree sexual assault.[4] To determine the admissibility of evidence of a defendant's other acts, a three-part inquiry is employed. ***Id***. at 771-72. First, the court must determine whether the other acts evidence is being offered for a permissible purpose under WIS. STAT. § 904.04(2).[5] ***Id.*** at 772.

[4] King also argues that the circuit court erred in overruling his relevancy objection to a question by the State as to how long King had believed that having sexual intercourse with a fifteen-year-old girl is immoral. This argument is not sufficiently developed and, therefore, does not warrant a response. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992).

[5] WISCONSIN STAT. § 904.04(2) provides:

(continued)

Second, the court must determine whether the other acts evidence is relevant under WIS. STAT. § 904.01. ***Id***. Third, the court must determine, as required by WIS. STAT. § 904.03, whether the probative value of the other acts evidence is substantially outweighed by the danger of unfair prejudice. ***Id.*** at 772-73.

¶15 Under WIS. STAT. § 904.04(2), "evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith." If, however, the other acts evidence is offered for another purpose, the admissibility of the evidence is not prohibited by § 904.04(2). ***State v. Payano***, 2009 WI 86, ¶63, 768 N.W.2d 832. This includes the admission of evidence of the conviction of a crime for the purpose of impeachment, which is authorized by WIS. STAT. § 906.09.[6]

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> OTHER CRIMES, WRONGS, OR ACTS. (a) Except as provided in par. (b), evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. This subsection does not exclude the evidence when offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

[6] WISCONSIN STAT. § 906.09 provides in part:

> (1) GENERAL RULE. For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime … is admissible….
>
> (2) EXCLUSION. Evidence of a conviction of a crime or an adjudication of delinquency may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.
>
> (3) ADMISSIBILITY OF CONVICTION OR ADJUDICATION. No question inquiring with respect to a conviction of a crime … nor introduction of evidence with respect thereto, shall be permitted until the judge determines pursuant to s. 901.04 whether the evidence should be excluded.

¶16 As noted above, the State presented evidence relating to King's 1986 conviction in order to impeach King's testimony that it was not his intent to have sexual intercourse with a fifteen-year-old girl on the day of his arrest because he was morally opposed to having sex with individuals fifteen years old or younger, a belief he claimed to have held "at least 20-plus years." King opened the door to the topic by making the assertion he did, and the evidence of which he complains was offered to rebut his assertion that he was not the type of person who would commit such a crime. It was therefore admitted for the proper purpose of impeachment.

¶17 We next consider whether the evidence was relevant. Evidence that is offered to prove or disprove intent is plainly relevant, *see* WIS. STAT. § 904.04(2), and King does not contend that evidence of his 1986 conviction was not relevant on the issue of his intent to have sex with a minor in the present case. King argues that evidence relating to his 1986 conviction was not relevant because he "had not been convicted of the sexual assault in the 20-year period in question." King testified, however, that his moral opposition to having sexual intercourse with individuals fifteen years old or younger dated back "20-*plus* years." (Emphasis added.) By his own testimony, King had been morally opposed to such conduct for *more than* twenty years. King's 1986 conviction occurred twenty-one years prior to his testimony at trial, well within the timeframe King claimed to have been morally opposed to having sexual intercourse with fifteen-year-old girls. We conclude that the evidence was plainly relevant.

¶18 With respect to the last step in the ***Sullivan*** analysis, King argues that the circuit court failed to balance the probative value of the evidence against its potential prejudicial effect. In conclusory fashion, he argues that had the court

done so, "it would have been apparent the probative value of the evidence was far outweighed by the danger of unfair prejudice."

¶19 However, even assuming for the sake of argument that the circuit court did not sufficiently set forth its reasoning in weighing the probative value and prejudicial effect of the evidence, King's argument fails. "[R]egardless of the extent of the trial court's reasoning, we will uphold a discretionary decision if there are facts in the record which would support the trial court's decision had it fully exercised its discretion." ***Payano,*** 768 N.W.2d 832, ¶41 (citation omitted). The opponent of the admission of other acts evidence bears the burden of showing that the probative value of the evidence is substantially outweighed by unfair prejudice. ***State v. Hunt***, 2003 WI 81, ¶53, 263 Wis. 2d 1, 666 N.W.2d 771. King did not argue at trial that the evidence was unfairly prejudicial, nor did he make a showing to that effect. Although he asserts on appeal that the evidence was unfairly prejudicial, he does not explain why, nor does he address why its probative value was outweighed by the danger of unfair prejudice. We therefore conclude that King has failed to meet his burden.

¶20 In summary, we conclude that the evidence of King's 1983 conviction was admitted for a proper purpose and was relevant, and that King has not demonstrated that it was unfairly prejudicial. Accordingly, we conclude that the evidence was properly admitted.

## CHILD PORNOGRAPHY

¶21 King contends the circuit court also erroneously exercised its discretion by admitting, for the purpose of impeachment, other acts evidence that he was in possession of child pornography. King deduces from the State's failure at trial to ask whether he had ever observed the child pornography in question that

the evidence was not actually introduced to impeach his testimony that he was not aware that children engaged in three-way sexual activity, and was thus not admitted for a proper purpose. King also argues in conclusory fashion that "[t]he evidence was of dubious relevance" and the benefit afforded by the admission of the evidence was outweighed by the danger of unfair prejudice. We conclude that even if the admission of the evidence was error, it was harmless.

¶22 An error is harmless if there is no reasonable possibility that the error contributed to the conviction. *See* ***Schwigel v. Kohlmann***, 2005 WI App 44, ¶11, 280 Wis. 2d 193, 694 N.W.2d 467; ***State v. Dyess***, 124 Wis. 2d 525, 542-43, 370 N.W.2d 222 (1985). "A reasonable possibility is a possibility sufficient to undermine our confidence in the conviction." ***State v. Williams***, 2002 WI 58, ¶50, 253 Wis. 2d 99, 644 N.W.2d 919.

¶23 King concedes that there was sufficient properly admitted evidence in the record to allow the jury to convict him. Citing factors set out in ***State v. Hale,*** 2005 WI 7, ¶¶59-61, 277 Wis. 2d 593, 691 N.W.2d 637, that aid in a harmless error analysis, however, he argues that admission of the child pornography evidence was not harmless error because it was inflammatory, and because the evidence was not duplicative of other properly admitted evidence. Although the factors articulated by King are among those that may be considered, they are not the only factors. We may also consider some or all of the following: (1) the frequency of the error; (2) the importance of the erroneously admitted evidence; (3) the presence or absence of corroborating or contradicting evidence; (4) the nature of the defense; (5) the nature of the State's case; and (6) the strength of the State's case. ***State v. Jorgensen***, 2008 WI 60, ¶23, 310 Wis. 2d 138, 754 N.W.2d 77. With all of these factors in mind, we conclude that there is no

reasonable possibility that the admission of the child pornography evidence contributed to the jury's verdict.

¶24 King's theory of defense at trial was that he was engaging in fantasy during his online chats with "wellgurl90," that he did not believe that he was chatting with a fifteen-year-old girl, and that he did not intend to have sexual intercourse with a fifteen-year-old girl. The evidence, however, does not support his claims. King's participation in the online chat would not lead one to believe that he was treating the interaction as a fantasy. He used a computer name which reflected his actual identity; he provided real information about himself, including his age, hobby, and the type of residence he lived in; he sent actual photographs of himself to "wellgurl90"; he rented a motel room for an actual, non-imaginary meeting with "wellgurl90"; and went equipped with items previously discussed in the online chats, including clothing, massage lotion, a digital camera, and condoms. Moreover, the credibility of his claim that it was not his intent to have sex with a fifteen-year-old girl was brought into serious question by the properly admitted evidence of his 1986 conviction.

¶25 We conclude that there is no reasonable possibility that the admission of the child pornography evidence contributed to the verdict on the charges of child enticement and use of a computer to facilitate a child sex crime. We therefore conclude that even assuming error in the admission of the child pornography evidence, any error was harmless.

## CONCLUSION

¶26 For the reasons discussed above, we conclude that the admission of evidence relating to King's 1986 conviction was proper and that the admission of

child pornography evidence, even if error, was harmless. Accordingly, we affirm the judgments of conviction and order denying King postconviction relief.

*By the Court.*—Judgments and order affirmed.

Not recommended for publication in the official reports.