COURT OF APPEALS
DECISION
DATED AND FILED

January 23, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP16-CR **Cir. Ct. No. 2005CF294**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROBERT J. WOHLFEIL,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Kenosha County: BARBARA A. KLUKA, Judge. *Affirmed*.

Before Brown, C.J., Anderson, P.J., and Snyder, J.

¶1 PER CURIAM. Robert J. Wohlfeil challenges the sentence imposed on four crimes involving two juvenile victims. He argues that his right to due process was violated when confidential information about the impact of the crime on one of the juvenile victims was revealed at sentencing. He also contends

the sentence is excessive and disproportionate to the sentence of his accomplice in the crimes. We reject his claims and affirm the judgment of conviction and the order denying his postconviction motion.

¶2 Wohlfeil was charged with fifteen crimes for masturbating in front of two juveniles and one adult female who had been promised money for observing Wohlfeil's conduct. Pursuant to a plea agreement, Wohlfeil entered a guilty plea to two counts of child enticement for the purpose of exposing a sex organ to the child, one count of soliciting a child for prostitution, and one count of causing a child under the age of thirteen to view sexually explicit conduct. The other charges were dismissed but read in at sentencing. Wohlfeil was sentenced to consecutive terms of eight years' initial confinement and ten years' extended supervision on the child enticement convictions and consecutive terms of probation of nineteen years and eleven years, six months on the other two convictions.

¶3 At sentencing, and before any sentencing argument, the case worker for victim Jayce J.H., age twelve, addressed the court. The case worker indicated that Jayce suffered extreme trauma from the incident, she was psychiatrically hospitalized on two separate occasions, she engaged in cutting behavior, she suffers from depression, and she is on psychiatric medication. The prosecutor then argued that because of Jayce's exhibited trauma, the seriousness of the crimes could not be diminished simply because it did not involve sexual contact or intercourse. The prosecutor commented that Jayce was engaging in self-mutilation as a result of what happened. When the prosecutor started to refer to his "off the record" discussions with the case worker and that Jayce's cutting was a "new type of behavior," Wohlfeil objected. He pointed out that the prosecutor's argument was not based on psychological reports and was unsubstantiated in the

record. The sentencing court overruled the objection indicating that the prosecutor was relying on what the case worker told him and Wohlfeil would have the opportunity to question the case worker if he wanted to do so. Upon resuming his sentencing argument, the prosecutor did not discuss the psychological effects on Jayce any further.

¶4 Wohlfeil points out that the records of the county's health and family services department are confidential. He argues that because he was denied access to those records and the opportunity to test the accuracy of confidential information related at sentencing, his due process right to disclosure of favorable evidence material to guilt or punishment was violated. *See* ***Brady v. Maryland***, 373 U.S. 83, 87 (1963). *See also* ***State v. Spears***, 227 Wis. 2d 495, 508, 596 N.W.2d 375 (1999) (a criminal defendant has a due process right to be sentenced only upon materially accurate information and the right to rebut evidence at sentencing). Whether a defendant has been denied the right to due process is a question of constitutional law that we review de novo. ***State v. Tiepelman***, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1.

¶5 Wohlfeil first focuses on the case worker's statement to the court and suggests he was surprised by the confidential information she gave to the court. However, he did not object to the case worker addressing the court. Wohlfeil waived any objection. ***State v. Edwards***, 2002 WI App 66, ¶9, 251 Wis. 2d 651, 642 N.W.2d 537. *See also* ***State v. Mosley***, 201 Wis. 2d 36, 46, 547 N.W.2d 806 (Ct. App. 1996) (the sentencing court does not erroneously exercise its discretion in considering evidence not objected to). Trial counsel did not follow up his objection to the prosecutor's reliance on what the case worker told the prosecutor by questioning the case worker as offered by the sentencing court. We tend to agree with Wohlfeil's contention that it would have been folly for trial

counsel to question the case worker as a means of testing her statements and counsel was not ineffective for failing to do so. Still, the case worker's statement to the court did not vary from the information from Jayce's mother reported in the presentence investigation report (PSI).[1] Wohlfeil did not object to that information in the PSI. Wohlfeil waived any objection to information about Jayce's condition since the crimes against her.

¶6 What is really at issue is Wohlfeil's desire to test whether his crime caused Jayce's psychological problems or merely aggravated preexisting problems. The case worker's statement to the court cannot be read to indicate that the crime was the sole cause of Jayce's problems.[2] Thus, only the prosecutor's statement that Jayce's cutting behavior was "new" suggested the crime was the sole cause. The prosecutor did not even finish his sentence on that point. We are left to wonder what possibly inaccurate information was conveyed at sentencing. Moreover, whether the crime was the sole cause or merely aggravated Jayce's

[1] We reject Wohlfeil's claim that plain error occurred when the sentencing court received confidential information relating to Jayce without a showing that the information had been obtained and disclosed. ***State v. Bellows***, 218 Wis. 2d 614, 582 N.W.2d 53 (Ct. App. 1998), on which Wohlfeil relies, has no application here. In ***Bellows***, the admission of information from CHIPS proceedings without inquiry of whether the appropriate process for release of that information was followed was one reason for reversing Bellows's conviction in the interests of justice. ***Id.*** at 626-27. Bellows was the mother of the children and objected that proper procedures for release of the information had not been followed. ***Id.*** at 626. We held: "Once counsel raised the issue of the propriety of the State's possession of this evidence, it was necessary for the trial court to address this issue before ruling on the admissibility of the information." ***Id.*** at 627. Wohlfeil did not object and ***Bellows*** does not require the circuit court to sua sponte concern itself with the proper release of potentially confidential information in the absence of an objection from a parent. Further, Jayce's mother revealed the same information to the sentencing court via her statements to the PSI author. Wohlfeil is not entitled to resentencing in the interests of justice.

[2] Wohlfeil suggests that a reasonable interpretation of the statements of Jayce's mother related in the PSI is that Jayce had been suffering ongoing personal problems for some time before the crime.

psychological problems is of little consequence. There was no suggestion that Jayce led a happy and charmed life before her contact with Wohlfeil.[3] The sentencing court was considering the impact of the crime on Jayce and her condition after the crime. It confined itself to her current condition. That the crime had a significant impact on Jayce remains unchanged by the information Wohlfeil contends is necessary to satisfy his due process rights.

¶7 A related claim is Wohlfeil's contention that the circuit court erred in refusing to conduct an in camera inspection of Jayce's confidential records when his postconviction motion requested the court do so for the purpose of assuring that Wohlfeil was sentenced on accurate information.

> [T]he preliminary showing for an in camera review requires a defendant to set forth, in good faith, a specific factual basis demonstrating a reasonable likelihood that the records contain relevant information necessary to a determination of guilt or innocence and is not merely cumulative to other evidence available to the defendant.

State v. Green, 2002 WI 68, ¶34, 253 Wis. 2d 356, 646 N.W.2d 298. Whether the defendant's preliminary evidentiary showing is sufficient to prompt an in camera review raises a question of law that we review de novo. ***Id.***, ¶20.

¶8 The circuit court found, and Wohlfeil acknowledges, that pretrial discovery documents demonstrated that Jayce had preexisting psychological problems. The review Wohlfeil sought was for the purpose of developing cumulative evidence. The circuit court was not required to make the in camera

[3] Wohlfeil's postconviction motion acknowledged that pretrial discovery materials included a statement by Jayce's mother to police that Jayce suffers from depression, is on medication, and "has cut herself in the past." Wohlfeil had information that Jayce was troubled before the crimes and did not develop it at sentencing.

review for that purpose. Moreover, as we have already held, whether Jayce had preexisting psychological problems is of no consequence since the sentencing court was only concerned with the significant impact the crime had on Jayce. Wohlfeil cannot meet his burden that the error in not conducting the in camera review, if any, was not harmless. ***Id.***

¶9 The remaining issues on appeal concern the exercise of sentencing discretion. Sentencing is left to the discretion of the circuit court and appellate review is limited to determining whether there was an erroneous exercise of discretion. ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. When the proper exercise of discretion has been demonstrated at sentencing, appellate courts have a strong policy against interference with that discretion and the sentencing court is presumed to have acted reasonably. ***Id.***, ¶18.

¶10 Wohlfeil claims his sentence is excessive and the sentencing court failed to give due weight to his age, education, employment history, lack of prior criminal record, his cooperation, and that the criminal behavior was atypical. An erroneous exercise of sentencing discretion exists due to an excessive sentence "'only where the sentence is so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances.'" ***State v. Grindemann***, 2002 WI App 106, ¶31, 255 Wis. 2d 632, 648 N.W.2d 507 (quoting ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975)). Wohlfeil faced a total of fifty-two years and six months' initial confinement and thirty-five years' extended supervision. His sentence of a total of sixteen years' initial confinement and twenty years' extended supervision and nineteen years'

probation are well within the maximums and, therefore, not excessive.[4] *See* ***State v. Daniels***, 117 Wis. 2d 9, 22, 343 N.W.2d 411 (Ct. App. 1983) ("A sentence well within the limits of the maximum sentence is not so disproportionate to the offense committed as to shock the public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances."). The circuit court considered the mitigating factors that Wohlfeil cites but placed more weight on the nature of the offenses and the impact on the victims. The weight to be given to each of the factors is particularly within the discretion of the sentencing court. ***State v. Perez***, 170 Wis. 2d 130, 143, 487 N.W.2d 630 (Ct. App. 1992).

¶11 Wohlfeil contends his sentence is arbitrarily disparate to the sentence of his accomplice, the woman who brought the victims to her house for the purpose of meeting and getting paid by Wohlfeil. Wohlfeil's accomplice was convicted of two counts of child enticement, as a party to the crime, and six other counts were dismissed and four of those served as read ins. She was sentenced to terms of five years' initial confinement, ten years' extended supervision, and one term was stayed in favor of fifteen years' probation.[5] Wohlfeil compares his sixteen years of initial confinement to the five years his accomplice must serve. He argues that he and his accomplice committed the same crimes, are equally culpable, and that his rehabilitative prospects are better than his accomplice's because of his education, employment, acceptance of responsibility, and lack of mental health and drug abuse impediments his accomplice suffers.

[4] The probation terms on two counts were commuted to the maximums allowed by law. That the probation terms were originally imposed in excess of the maximum does not render the entire sentencing scheme excessive.

[5] Wohlfeil's accomplice entered her plea six months after Wohlfeil was sentenced. Her sentencing took place nearly eleven months after Wohlfeil's sentencing.

¶12 "A mere disparity between the sentences of codefendants is not improper if the individual sentences are based upon individual culpability and the need for rehabilitation." ***State v. Toliver***, 187 Wis. 2d 346, 362, 523 N.W.2d 113 (Ct. App. 1994). The defendant bears the burden of establishing that the disparity in sentences was arbitrary or based on irrelevant considerations. *See* ***Perez***, 170 Wis. 2d at 144. The difference between Wohlfeil's sentence and that of his accomplice is reasonable with the difference in the number of crimes charged and their individual conduct. As the sentencing court noted, Wohlfeil presented a danger to the community because he concealed his aberrant behavior behind the facade of a quiet man and was a person who should have known better than to repeat his harmful conduct. Wohlfeil's conduct had a direct impact on the sexual experience of his victims. Since his sentence was based on consideration of proper factors, the mere difference of his sentence from the sentence of his accomplice does not establish that Wohlfeil's sentence is unduly disparate. ***Id.***

By the Court.—Judgment and order affirmed.

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