COURT OF APPEALS
DECISION
DATED AND RELEASED

February 21, 1996

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

NOTICE

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

No. 95-0243-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DANIEL MAHNKE,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Waukesha County: KATHRYN W. FOSTER, Judge. *Affirmed*.

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

PER CURIAM. Daniel Mahnke appeals from a judgment of conviction of second-degree sexual assault of a child, as a habitual criminal, and an order denying his postconviction motion. He argues that his ability to present a defense was hampered by evidentiary rulings by the trial court and that the sentence was unduly harsh. We reject his claims and affirm the judgment and the order.

Mahnke was charged with the sexual assault of a fourteen-year-old girl who was babysitting the children of Mahnke's girlfriend. Mahnke went to his girlfriend's house and was to relieve the babysitter. The victim testified that Mahnke kissed her, rubbed her breast, laid on top of her, kissed her belly button, and partially removed her bra and suckled her breast. After returning home, the victim called a friend and told him of the assault. She then told her mother and the police were called. Mahnke testified that nothing sexual occurred between himself and the babysitter.

Mahnke first argues that the evidence was insufficient to support the conviction. However, in doing so he concedes that the existing record supports the conviction with the only issue for the jury being one of credibility. His principal contention is that the record would have been insufficient if the trial court had not precluded the admission of evidence which would have served to impeach the victim or provide an alternative explanation for her conduct following the alleged assault.

Mahnke's argument muddles the standard of review. We do not consider whether evidence which was not admitted renders other evidence insufficient. Our review of the sufficiency of the evidence is to determine whether the evidence, viewed most favorably to the State and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. ***State v. Ray***, 166 Wis.2d 855, 861, 481 N.W.2d 288, 291 (Ct. App. 1992). We defer to the jury's function of weighing and sifting conflicting testimony. *See* ***State v. Wilson***, 149 Wis.2d 878, 894, 440 N.W.2d 534, 540 (1989).

We need not recite in detail the trial testimony. As Mahnke recognizes, the victim's testimony, accepted as credible by the jury, was more than sufficient to support the conviction.

We turn to consider whether the trial court erroneously exercised its discretion in excluding evidence Mahnke sought to introduce. A circuit court has broad discretion in determining the relevance and admissibility of proffered evidence. ***State v. Brecht***, 143 Wis.2d 297, 320, 421 N.W.2d 96, 105 (1988). We will not find an erroneous exercise of discretion if any reasonable

basis exists for the decision. ***State v. Lindh,*** 161 Wis.2d 324, 361 n.14, 468 N.W.2d 168, 181 (1991).

Mahnke sought to impeach the victim's testimony that she had no relationship with her father and had not seen him until the Saturday before the trial by calling a woman who would testify that she had seen the victim and her father together at a restaurant about a week after the assault. He also wanted to introduce evidence that the victim was concerned about possibly being pregnant as evidence of an alternative cause for "assault symptoms" the victim exhibited after the assault.[1] The trial court denied admission of this evidence. Mahnke argues that the ruling violates his Sixth Amendment right of confrontation. We need not consider Mahnke's constitutional claim because it is raised for the first time on appeal. *See* ***State v. Sharp***, 180 Wis.2d 640, 647-48 n. 2, 511 N.W.2d 316, 320 (Ct. App. 1993) (unless an objection is made on confrontation grounds at trial, the issue is waived).

The trial court correctly excluded the testimony that the victim and her father had been seen together a week after the assault. It was extrinsic evidence offered solely for the purpose of attacking the victim's credibility and excluded by § 906.08(2), STATS.[2] Under § 906.08(2), the defense could only cross-examine the victim as to the specific instance. Even if we were to consider Mahnke's claim that his right of confrontation was violated, he is not entitled to relief. A defendant's right of confrontation is not denied when evidence is properly excluded under § 906.08(2). ***State v. Olson***, 179 Wis.2d 715, 724-25, 508 N.W.2d 616, 620 (Ct. App. 1993).

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[1] There was testimony at trial that after the assault the victim's psychological and emotional tenor changed.

[2] Section 906.08(2), STATS., provides:

> Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's credibility, other than conviction of crimes as provided in s. 906.09, may not be proved by extrinsic evidence. They may, however, subject to s. 972.11(2), if probative of truthfulness or untruthfulness and not remote in time, be inquired into on cross-examination of the witness or on cross-examination of a witness who testifies to his or her character for truthfulness or untruthfulness.

The trial court ruled that evidence of the victim's concern that she might be pregnant was irrelevant and excluded under the rape shield law, § 972.11(2)(b), STATS. The relevancy ruling was correct in that the testimony indicated that the victim experienced emotional changes right after the assault and her concern about being pregnant occurred only two to three weeks before trial.[3] Concerns about being pregnant were not relevant to explain behavior that occurred after the assault.

Moreover, the evidence was not admissible under any exception in the rape shield law.[4] In his description of the relevancy of the evidence, Mahnke admits that it demonstrates that the victim was "a girl who at a very young age is potentially sexually active." This is the very type of evidence that the rape shield law is designed to exclude. *See* ***In re Michael R. B.***, 175 Wis.2d 713, 727, 499 N.W.2d 641, 647 (1993) (the law protects victims of sexual assault from themselves becoming the focus of scrutiny during trial). The rape shield law renders the sexual activity of the victim or the possible existence of a pregnancy inadmissible.[5] Even the confrontation clause does not require the admission of such evidence. *See* ***State v. DeSantis,*** 155 Wis.2d 774, 793-94, 456 N.W.2d 600, 609 (1990).

Finally, Mahnke argues that his ten-year sentence was unduly harsh. Sentencing is committed to the discretion of the sentencing court and appellate review is limited to determining whether there was an abuse of discretion. ***State v. J.E.B.***, 161 Wis.2d 655, 661, 469 N.W.2d 192, 195 (Ct. App. 1991), *cert. denied*, 503 U.S. 940 (1992). Appellate courts have a strong policy against interference with that discretion. ***Id.*** Thus, we begin with the

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[3] An offer of proof was made by the testimony of the victim's mother that the victim was concerned before trial that she was pregnant. The assault occurred on January 8, 1994. Trial commenced on March 29, 1994.

[4] Mahnke does not argue that an exception under § 972.11(2)(b), STATS., applies. The exception for a specific instance of sexual conduct showing the source of pregnancy does not apply because the degree of sexual assault or extent of injury suffered was not at issue. *See* § 972.11(2)(b)2.

[5] Mahnke's brief argues that the victim's symptoms "could very well have stemmed from the fact that she was pregnant, which fact was shown as a matter of physiological fact later." The record does not support appellate counsel's representations that the victim was in fact pregnant. Counsel's representation nears the edge of a fair and truthful portrayal of the record.

presumption that the trial court acted reasonably and the appellant must show some unreasonable or unjustifiable basis in the record for the sentence complained of. ***State v. Petrone***, 161 Wis.2d 530, 563, 468 N.W.2d 676, 689, *cert. denied*, 502 U.S. 925 (1991).

It may be a misuse of discretion if the sentencing court places too much weight on any one factor in the face of contravening considerations. ***State v. Spears***, 147 Wis.2d 429, 446, 433 N.W.2d 595, 603 (Ct. App. 1988). However, the weight to be accorded to particular factors in sentencing is for the sentencing court, not the appellate court, to determine. ***Id.*** We may not substitute our preference for a sentence merely because had we been in the sentencing court's position we would have meted out a different sentence. ***Id.***

Mahnke argues that the sentence is harsh because he is innocent and that the trial court failed to recognize that the victim was not telling the absolute truth. We have reviewed the trial court's sentencing remarks and do not find undue emphasis placed on its perception that Mahnke was evasive and vague in his answers regarding the offense. Rather, the sentence was based on appropriate considerations, including the nature of the offense and its effect on the victim, Mahnke's past record of criminal offenses, positive aspects of Mahnke's family and employment history, Mahnke's rehabilitative needs, and the need to protect the public. We reject Mahnke's contention that the reasons for the sentence have not been fully set forth.

A sentence may be excessive when it shocks public sentiment and violates the judgment of reasonable people concerning what is right and proper under the circumstances. ***Spears***, 147 Wis.2d at 446, 433 N.W.2d at 603. Nothing here persuades us that the sentence is unduly harsh.

By the Court.—Judgment and order affirmed.

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