COURT OF APPEALS
DECISION
DATED AND FILED

November 11, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-3203-CR **Cir. Ct. No. 01CF3069**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHARLES E. CIANCIOLA,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JOHN J. DiMOTTO, Judge. *Affirmed.*

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

¶1 PER CURIAM. Charles E. Cianciola appeals from a judgment entered following a jury verdict convicting him of one count of first degree sexual assault of a child, pursuant to WIS. STAT. § 948.02(1) (1997-98),[1] and one count of

[1] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

incest with a child, pursuant to WIS. STAT. § 948.06(1) (1997-98). He also appeals from an order denying his motion for postconviction relief. Cianciola contends that: (1) the trial court erroneously excluded expert testimony, and in doing so deprived him of his right to present a defense; (2) there was insufficient evidence to support the jury's verdict; and (3) the trial court erroneously exercised its discretion by improperly relying upon certain factors at sentencing. Because the trial court did not erroneously exclude the expert testimony, there was sufficient evidence, and the trial court properly exercised its sentencing discretion, we affirm.

I. BACKGROUND.

¶2 In March of 1997, Cianciola traveled to Milwaukee with his two daughters, his son, and his son's friend. They attended a Milwaukee Admirals hockey game and spent the night at a local hotel. After they returned to the hotel from the game, the children went to bed and Cianciola left the room. One of Cianciola's daughters, C.M.C., age eight, was sleeping on a cot in the room. When Cianciola returned to the room, C.M.C. claims that he fondled her breast and vaginal areas. Cianciola was not charged until four years later, in June 2001. He was charged with one count of first-degree sexual assault of a child and one count of incest with a child.

¶3 Prior to trial, the trial court denied the State's request to introduce "other acts" evidence under WIS. STAT. § 904.04(2), regarding the same child's allegations that other improper sexual activity occurred in Outagamie and Calumet Counties, finding that its probative value would be substantially outweighed by the danger of unfair prejudice, pursuant to WIS. STAT. § 904.03. Thus, the trial court limited examination of C.M.C. to what occurred on March 21, 1997 in Milwaukee.

The trial court warned, however, that the defense could open the door to the "other acts" evidence if it attempted to impeach the victim with statements made to police officers at different times, over a period of years, when she was being questioned in regard to the other incidents. The trial court noted: "I think this is a balancing of the rights of the State as well as the rights of the defendant." Defense counsel stated: "And on balance, I don't think I want the door opened."

On the morning before the trial was to begin, the trial court granted the State's motion to exclude the proffered testimony of Cianciola's expert witness on the grounds that it would be of little assistance to the trier of fact, pursuant to WIS. STAT. § 907.02:

> Clearly whether to allow the testimony of [the expert] is discretionary. As I've indicated, I'm satisfied it's relevant. I'm satisfied he's qualified. But I am not satisfied that it is of the nature that it will truly be of assistance to the jury. We're in the 21st century. Circumstances surrounding police interaction with a child, family circumstances in terms of divorce, separation, hostility between mother and father, a child potentially playing one parent off against another, these are all circumstances that the jurors, I think within their own life experience, can figure out on their own. They can figure out whose testimony or what testimony has a ring of truth.
>
> Could I admit it? Yes. But in the exercise of my discretion, I don't believe it will be of assistance. Quite frankly, I think it will detract from the issue of fact that this jury has to decide, and that is whether the defendant committed the sexual assault or not.
>
> Quite frankly to allow [the expert] to testify puts a whole new layer in this case in terms of whether he should be believed or not, whether he is qualified or not, whether he has bias or motivation to testify one way or the other, and it's going to deflect the jury from the true issue they have to decide. And in essence that is, do they believe the testimony of [C.M.C.], who I assume is going to testify that her father sexually assaulted her.

> So I don't find under these circumstances that the testimony will truly assist the jury. And therefore in the exercise of my discretion, neither [the expert] nor [his partner] will be allowed to testify.

A two-day jury trial was held and Cianciola was found guilty on both counts. He was later sentenced to twelve years of imprisonment on each count, to be served concurrently.

II. ANALYSIS.

A. The trial court properly excluded the expert testimony.

¶4 Cianciola proffered testimony from an expert witness regarding, *inter alia*, the suggestibility of children, false accusations of sexual abuse, the incidence of false abuse accusations in intact versus broken homes, and the generalized (and, according to the expert, incorrect) belief that children would not lie about sexual abuse. Cianciola contends that the trial court erred in concluding that the expert's testimony, although relevant, would have been of little assistance to the trier of fact. He insists that "significant portions" of the expert's testimony would have been admissible, despite the trial court's "other acts" ruling, and that "[i]t would have been of significant import to the defense to educate the jury about the capacity of children to tell falsehoods regarding sexual abuse and potential reasons for false accusations against family members, as has been established through the literature." He argues that testimony from the expert would have contained information not generally known by the average citizen or trier of fact, and constituted information that could have been used to weigh the credibility and reliability of C.M.C.'s allegation. Cianciola thus urges this court to conclude that the exclusion of the expert testimony denied him the right to present a defense. He further argues that this court should "exercise its discretionary authority in

reversing the judgment of conviction pursuant to WIS. STAT. § 752.35, because the real controversy was not fully tried as a result of the exclusion" of the expert testimony.

¶5 Cianciola, however, never argued that exclusion of the expert testimony would deny him the constitutional right to present a defense when he opposed the State's motion in the trial court. He briefly touched on that issue in his postconviction motion, but failed to do so in his earlier argument. Accordingly, while we will briefly address the analysis of the constitutional issue set forth by ***State v. St. George***, 2002 WI 50, 252 Wis. 2d 499, 643 N.W.2d 777, we will address Cianciola's contention that the trial court erroneously exercised its discretion in excluding the proffered testimony without an extended constitutional analysis.

¶6 "The admissibility of expert opinion testimony lies in the discretion of the [trial] court. A [trial] court erroneously exercises its discretion if it makes an error of law or neglects to base its decision upon facts in the record." ***Id.***, 252 Wis. 2d 499, ¶37 (footnotes omitted). WISCONSIN STAT. § 907.02 governs the introduction of expert testimony:

> **Testimony by experts.** If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Thus, "[t]he admissibility of the testimony of an expert witness depends on a combination of the witness's qualifications, the relevancy of the testimony, the

assistance of the testimony to the trier of fact and considerations set forth in [WIS. STAT.] § 904.03[.]"[2] ***St. George***, 252 Wis. 2d 499, ¶40 n.30.

¶7 "[E]xpert testimony is *required* only if the issue to be decided by the jury is beyond the general knowledge and experience of the average juror. Expert testimony is *permitted*, however, even though it may not be required, when it will assist the trier of fact to understand the evidence." ***State v. Whitaker***, 167 Wis. 2d 247, 255-56, 481 N.W.2d 649 (Ct. App. 1992) (citations omitted). Further, "[d]etermining whether expert testimony assists the fact finder is a discretionary decision of the trial court." ***State v. Richardson***, 189 Wis. 2d 418, 424, 525 N.W.2d 378 (Ct. App. 1994). Indeed, "[g]enerally, expert testimony will assist the jury when the issue to be decided requires an analysis that would be difficult for the ordinary person in the community." ***State v. Blair***, 164 Wis. 2d 64, 75, 473 N.W.2d 566 (Ct. App. 1991).

¶8 Here, after hearing argument from both sides, the trial court underwent a lengthy analysis in deciding whether to exclude the expert testimony. The trial court recognized that defendants have a constitutional right to present a defense. It then evaluated the relevancy of the evidence and concluded that the expert testimony was relevant. The court went on to consider whether the probative value of the evidence was substantially outweighed by the danger of

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[2] WISCONSIN STAT. § 904.03 provides:

> **Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time.** Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

unfair prejudice, noting the law in regard to the admissibility of expert testimony. It indicated that "[t]here is no requirement that an expert testify regarding interviewing techniques or perhaps motivation of a child in a certain type of relationship to testify truthfully or falsely." Thus, the question became whether the testimony should be permitted.

¶9 The trial court noted that even if a lay witness could understand the subject matter, expert testimony nonetheless could be permitted if it would assist the trier of fact. The court went on to state that no witness should be allowed to give an opinion as to whether another mentally and physically competent adult is lying. It noted that while Cianciola maintained that the expert was not being offered to testify that C.M.C. lied, his anticipated testimony regarded "the circumstances surrounding interviews, the circumstances surrounding the child's life to assist the jury potentially in determining whether they wish to believe the testimony of the child or not."

¶10 The trial court then went on to state that "Wisconsin judges do serve a limited and indirect gatekeeping role in reviewing the admissibility of expert testimony, … [although] it does not involve a direct determination as to the reliability of the scientific principle." The court explained that there are a number of reasons why expert testimony could be precluded, one of which is that it would not assist the trier of fact. Citing ***Richardson***, 189 Wis. 2d 418, the trial court reiterated that "expert testimony does not assist the finder of fact if it conveys to the jury the expert's own beliefs regarding the credibility of another witness." Acknowledging that Cianciola was not offering the expert testimony to directly say that the child should not be believed, it concluded that "by attacking the interview process or the circumstances of the child's life, it comes close to doing that."

¶11 Although the expert testimony was relevant, and the expert was qualified, the trial court was ultimately "not satisfied that [the expert's proposed testimony] is of the nature that it will truly be of assistance to the jury." The court decided that the effects of divorce, family problems, hostility amongst family members, and police interaction on a witness's testimony were factors that the jurors could weigh on their own, using their own life experiences. The trial court concluded that admitting the expert testimony would detract from the central issue and add a new layer to the case, without truly assisting the trier of fact.

¶12 When arguing in opposition to the motion to preclude the expert from testifying, defense counsel even stated:

> I think the method to work the problem out that we're having is for me to put [the expert] on the stand, let him talk about suggestibility, if we reach a point in the case that that is relevant. And we may not, depending on whether the case goes – whether we go into the defense case with a very stripped down version that would exist with the court's ruling or whether the door gets opened. If I keep the door shut, I'll concede that the relevance of [the expert's] testimony is substantially diminished, and I would not be putting as much on just because I don't want that door back open again.

That door was never opened. Yet, Cianciola now insists that the expert would have testified regarding matters not generally known by the average juror. He insists that, regardless of the "other acts" ruling, the expert testimony regarding a child's capacity to falsify allegations of sexual abuse and the reasons therefor "would have been of significant import to the defense."

¶13 However, as indicated above, the trial court conducted a lengthy analysis of the issue, examined the relevant facts, applied the proper standard of law, and reached a reasonable conclusion. The determination of whether expert

testimony will assist the trier of fact is a determination well within the discretion of the trial court, and

> [t]he court's discretionary determinations are not tested by some subjective standard, or even by our own sense of what might be a "right" or "wrong" decision in the case, but rather will stand unless it can be said that no reasonable judge, acting on the same facts and underlying law, could reach the same conclusion.

State v. Jeske, 197 Wis. 2d 905, 913, 541 N.W.2d 225 (Ct. App. 1995). We cannot conclude that no reasonable judge could reach the same conclusion.

¶14 We also cannot conclude that Cianciola's constitutional right to present a defense was violated. As noted, Cianciola did not even raise this issue before the trial court in making his original argument. Nevertheless, the trial court did recognize this right in its analysis, and impliedly determined that it was not violated when it excluded the evidence. Citing ***St. George***, 252 Wis. 2d 499, Cianciola argues that "if the trial court concludes that the testimony fails to satisfy one or more of the [WIS. STAT.] § 907.02 criteria, appellate review requires an examination of whether the exclusion results in a denial of the defendant's constitutional right to present a defense (assuming such violation is claimed by the defense)."

¶15 In ***St. George***, the supreme court determined, in reviewing the trial court's exercise of discretion, that there were two legal principles that the trial court was required to address in deciding whether to exclude the expert testimony: (1) the evidentiary rules applicable to expert witnesses, and (2) "*because the defendant asserted that the exclusion of the evidence would violate his constitutional right to present a defense*," the constitutional law principles applicable to the right to present a defense. 252 Wis. 2d 499, ¶38 (emphasis

added). ***St. George*** set forth a two-part inquiry the defendant must satisfy to establish a constitutional right to the admissibility of an expert witness's evidence; the inquiry allows the trial court "to determine the accused's interest in admitting the evidence," and whether the evidence is "clearly central to the defense," or if the exclusion is "arbitrary and disproportionate to the purpose of the rule of exclusion, so that the exclusion undermines fundamental elements of the defendant's defense." ***Id.***, ¶53 (citation omitted).

¶16 The first part requires the defendant to satisfy an offer of proof analysis: (1) the testimony must meet the WIS. STAT. § 907.02 expert witness standard; (2) the testimony is clearly relevant to a material issue; (3) the testimony is necessary to the defense; and (4) the probative value of the testimony outweighs it prejudicial effect. ***Id.***, ¶54. If the first part is satisfied, the defendant has established a constitutional right to present the evidence. The second part requires the trial court to determine whether the proffered evidence "is nonetheless outweighed by the State's compelling interest to exclude the evidence." ***Id.***, ¶55.

¶17 The ***St. George*** analysis, however, is only applicable to cases in which the defendant argues that exclusion of the evidence would violate his or her constitutional right to present a defense. Cianciola never made such an argument. He never argued that the expert testimony was clearly central to the defense or that its exclusion would undermine fundamental elements of his defense. While his failure to argue the issue does not make his constitutional right evaporate, it does "excuse" the trial court's "failure" to explicitly follow the analysis outlined above while considering his right to present a defense.

¶18 Cianciola insists that the expert testimony would have helped the jury assess C.M.C.'s credibility and reliability, the central issue of the case, and

that the defense was "severely hampered" by the exclusion. However, the exclusion of the expert testimony did not prohibit Cianciola from attacking her credibility. He did so during the trial. Further, the exclusion of the "other acts" evidence and, indirectly, any of C.M.C.'s statements made in relation to investigations and interviews concerning those acts, and Cianciola's strategic decision to keep the "door closed," rendered the expert testimony much less relevant than it would have been had the other incidents, and C.M.C.'s statements, come into play. Defense counsel admitted as much. Thus, we cannot conclude, after reviewing the trial court's lengthy analysis, the considerations it took into account, and the circumstances of the case, that the exclusion of the expert testimony violated Cianciola's right to present a defense.

¶19 Cianciola further urges this court to exercise its discretionary authority and reverse the conviction pursuant to WIS. STAT. § 752.35,[3] because he claims that the real controversy was never fully tried as a result of the exclusion of the expert testimony.

¶20 A new trial may be ordered: "(1) whenever the real controversy has not been fully tried; or (2) whenever it is probable that justice has for any reason

[3] WISCONSIN STAT. § 752.35 provides:

> **Discretionary reversal.** In an appeal to the court of appeals, if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried, the court may reverse the judgment or order appealed from, regardless of whether the proper motion or objection appears in the record and may direct the entry of the proper judgment or remit the case to the trial court for entry of the proper judgment or for a new trial, and direct the making of such amendments in the pleadings and the adoption of such procedure in that court, not inconsistent with statutes or rules, as are necessary to accomplish the ends of justice.

miscarried." ***State v. Hicks***, 202 Wis. 2d 150, 159-60, 549 N.W.2d 435 (1996). This court need not determine that there is a probability of a different result upon retrial to conclude that the real controversy has not been fully tried and a reversal is warranted. ***Id.*** at 160. One of several ways in which a controversy may not have been fully tried is when "important evidence was erroneously excluded, thereby depriving the jury of the opportunity to hear important testimony that bore on an important issue of the case." ***Vollmer v. Luety***, 156 Wis. 2d 1, 19, 456 N.W.2d 797 (1990).

¶21 Yet, a discretionary reversal, by definition, is not automatic when such circumstances allegedly exist. Here, relevant evidence was excluded and C.M.C.'s credibility was an issue, but we cannot conclude, in light of the circumstances of the case, the trial, and the proffered evidence, that the controversy was not fully tried as a result of the exclusion of the expert testimony. Accordingly, we decline to exercise our discretionary authority to reverse the conviction.

B. There was sufficient evidence to support the jury's verdict.

¶22 Cianciola argues that there was insufficient evidence to support the jury's verdict. Specifically, he notes that while C.M.C. claimed that she slept in the bed with her sister after the assault, both her brother and her brother's friend testified that Cianciola slept in the bed with C.M.C.'s sister. He also argues that there were inconsistencies among the testimonies of C.M.C. and the boys regarding, for example, whether there was any talking and whether the lights were turned on when Cianciola returned to the hotel room. Cianciola also points to several inconsistencies in C.M.C.'s testimony regarding, for example, whether Cianciola went to the bathroom after his return. Thus, he contends that as a result

of the inconsistencies among the testimonies of C.M.C., her brother, and her brother's friend, "[t]here are no reasonable inferences which can be drawn from the evidence which supports the finding of guilt."

¶23 When reviewing the sufficiency of the evidence, "[a]ppellate courts in Wisconsin will sustain a jury verdict if there is any credible evidence to support it." ***Morden v. Continental AG***, 2000 WI 51, ¶38, 235 Wis. 2d 325, 611 N.W.2d 659 (citations omitted). Thus, "[i]f we find that there is 'any credible evidence in the record on which the jury could have based its decision,' we will affirm that verdict." ***Id.***, ¶39 (quoting ***Lundin v. Shimanski***, 124 Wis. 2d 175, 184, 368 N.W.2d 676 (1985)). Accordingly, "appellate courts search the record for credible evidence that sustains the jury's verdict, not for evidence to support a verdict that the jury could have reached but did not." ***Id.*** (citation omitted). Moreover, "[o]nly when the evidence is inherently or patently incredible will [the court] substitute [its] judgment for that of the factfinder." ***State v. Saunders***, 196 Wis. 2d 45, 54, 538 N.W.2d 546 (Ct. App. 1995) (citation omitted).

¶24 As the supreme court reiterated in ***State v. Poellinger***, 153 Wis. 2d 493, 503-04, 451 N.W.2d 752 (1990) (citations omitted) (alterations and omissions in original):

> The burden of proof is upon the state to prove every essential element of the crime charged beyond reasonable doubt. The test is not whether this court or any of the members thereof are convinced [of the defendant's guilt] beyond reasonable doubt, but whether this court can conclude the trier of facts could, acting reasonably, be so convinced by evidence it had a right to believe and accept as true. ... The credibility of the witnesses and the weight of the evidence is for the trier of fact. In reviewing the evidence to challenge a finding of fact, we view the evidence in the light most favorable to the finding. Reasonable inferences drawn from the evidence can support a finding of fact and, if more than one reasonable

> inference can be drawn from the evidence, the inference which supports the finding is the one that must be adopted.

¶25 An appellate court gives deference to a trial court's findings because of "the superior opportunity of the trial court to observe the demeanor of witnesses and to gauge the persuasiveness of their testimony." ***Kleinstick v. Daleiden***, 71 Wis. 2d 432, 442, 238 N.W.2d 714 (1976). It is the jury's job to resolve any conflicts or inconsistencies in the evidence and to judge the credibility of the evidence, ***State v. Pankow***, 144 Wis. 2d 23, 30-31, 422 N.W.2d 913 (Ct. App. 1988) ("The function of the jury is to decide which evidence is credible and which is not, and how conflicts in the evidence are to be resolved."), and "[i]t is certainly allowable for the jury to believe some of the testimony of one witness and some of the testimony of another witness even though their testimony, read as a whole, may be inconsistent." ***State v. Toy***, 125 Wis. 2d 216, 222, 371 N.W.2d 386 (Ct. App. 1985). Further, "[t]he jury, as the judge of credibility, ha[s] the right to believe the testimony of [one witness] and to disbelieve the unanimous testimony of witnesses to the contrary." ***Ruiz v. State***, 75 Wis. 2d 230, 234, 249 N.W.2d 277 (1977).

¶26 In this case, the jury was presented with some inconsistent evidence. Yet, we cannot conclude, as urged by Cianciola, that there are no reasonable inferences that can be drawn from the evidence that support a finding of guilt. In finding Cianciola guilty of the offense, the jury apparently found C.M.C. to be a credible witness and believed her testimony, notwithstanding the inconsistencies. At sentencing, the trial court agreed, indicating: "[F]rom the testimony adduced at this trial, I found [C.M.C.] to be a most credible witness, and the jury's verdict has this court's approval." It also noted: "There was a tremendous ring of truth to her testimony."

¶27 The inconsistencies in C.M.C.'s testimony do not automatically render her an incredible witness. "Even though there [may] be glaring discrepancies in the testimony of a witness at trial, or between [her] trial testimony and [her] previous statements, that fact in itself does not result in concluding as a matter of law that the witness is wholly incredible." ***Id.*** at 232. Indeed, "[i]t is only where no finder of fact could believe the testimony that we would be impelled to conclude that it was incredible as a matter of law." ***Id.*** at 235 (citation omitted). We simply cannot conclude that no finder of fact could believe C.M.C.'s testimony.

¶28 The jury presumably considered the whole of C.M.C.'s testimony, in addition to all of the other evidence introduced at trial. It weighed and considered the credibility of all of the evidence, and returned a finding of guilt. It was reasonable for the jury to believe C.M.C.'s account of the incident, as nothing in the record appears to indicate that she was an inherently or patently incredible witness. Accordingly, as there is credible evidence to support the verdict, we reject Cianciola's challenge to the sufficiency of the evidence.

C. The trial court properly exercised its sentencing discretion.

¶29 Cianciola insists that the trial court "improperly relied upon and placed disproportionate weight upon other unproven allegations of sexual assault." He urges this court to "revisit" our earlier rejection, in ***State v. Hubert***, 181 Wis. 2d 333, 345, 510 N.W.2d 799 (Ct. App. 1993),[4] of a formal burden of proof

[4] In ***State v. Hubert***, 181 Wis. 2d 333, 345, 510 N.W.2d 799 (Ct. App. 1993), this court stated:

(continued)

requirement for factual findings that impact on sentencing, and adopt a clear and convincing or preponderance of the evidence standard of proof for "other acts" evidence used at sentencing. He further insists that the trial court "clearly relied upon the other allegations of sexual abuse in its imposition of sentence[,]"for purposes other than assessing character. He contends that, as a result, his sentence was excessive and unduly harsh.

¶30 Sentencing is well within the discretion of the trial court, ***State v. Larsen***, 141 Wis. 2d 412, 426, 415 N.W.2d 535 (Ct. App. 1987), and "[t]he trial court has great latitude in passing sentence[,]" ***State v. J.E.B.***, 161 Wis. 2d 655, 662, 469 N.W.2d 192 (Ct. App. 1991). Our review "is limited to determining whether there was an [erroneous exercise] of discretion." ***Larsen***, 141 Wis. 2d at 426. Further, there is a "strong public policy against interference with the sentencing discretion of the trial court and sentences are afforded the presumption that the trial court acted reasonably." ***State v. Harris***, 119 Wis. 2d 612, 622, 350 N.W.2d 633 (1984). "An [erroneous exercise] of discretion will be found 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." ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

We decline Hubert's invitation to fix a specific burden of proof as to "other acts" which bear upon a sentencing. We are satisfied that the present law which places all sentencing under the standard of judicial discretion remains the more practical and workable rule for both the trial court when imposing a sentence and the appellate court when reviewing a sentence.

¶31 The trial court is to consider three primary factors in passing sentence: (1) the gravity of the offense; (2) the defendant's character; and (3) the need for the protection of the public. ***Elias v. State***, 93 Wis. 2d 278, 284, 286 N.W.2d 559 (1980). The trial court may also consider:

> the vicious or aggravated nature of the crime; the past record of criminal offenses; any history of undesirable behavior patterns; the defendant's personality, character and social traits; the results of a presentence investigation; the degree of the defendant's culpability; the defendant's demeanor at trial; the defendant's age, educational background and employment record; the defendant's remorse, repentance and cooperativeness; the defendant's need for rehabilitative control; the right of the public; and the length of pretrial detention.

State v. Borrell, 167 Wis. 2d 749, 773-74, 482 N.W.2d 883 (1992). The weight to be attributed to each factor "is a determination which appears to be particularly within the wide discretion of the sentencing judge." ***Ocanas***, 70 Wis. 2d at 185.

¶32 In regard to Cianciola's request that we revisit ***Hubert***, it is well settled that "only the supreme court, the highest court in the state, has the power to overrule, modify or withdraw language from a published opinion of the court of appeals." ***Cook v. Cook***, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997). Thus, we have no authority to do so.

¶33 The trial court reviewed the presentence investigation report, considered the victim impact statement and several letters submitted by the defense, and heard statements by the State, the defense, a clinical psychologist, Cianciola's father, and Cianciola himself. The record indicates that the trial court considered all three primary factors—the seriousness of the crime, Cianciola's background and character, and society's need to protect the children of the community. It considered Cianciola's life history and his severe alcohol problem.

It also noted that it was mindful of the other allegations of sexual abuse pending in other counties.

¶34 Cianciola argues that the trial court "improperly relied upon and placed disproportionate weight upon other unproven allegations of sexual assault." Yet, "the trial court in imposing sentence for one crime can consider other unproven offenses, since those other offenses are evidence of a pattern of behavior which is an index of the defendant's character, a critical factor in sentencing." ***Elias***, 93 Wis. 2d at 284. The trial court did just that. It noted on several occasions that it was mindful of the other allegations, but that it was sentencing Cianciola on the basis of the one incident in Milwaukee.

¶35 Cianciola further insists that the trial court improperly relied upon the unproven allegations of sexual assault for purposes other than assessing his character. He contends that "the frequency with which the court refers to the other conduct and context in which the other bad acts evidence was discussed is inconsistent with the court's assertion." We disagree.

¶36 The following are excerpts from the record of the sentencing hearing, and the statements cited by Cianciola are emphasized:

> I don't for a moment, I don't think the jury for a moment believed that she was making this up because she was trying to one-up one of her friends who had reported being sexually assaulted by a sibling. Quite frankly, if [C.M.C.] had wanted to set her father up and to get him, she could have done it in a much better way because clearly her recollection of the event was less clear than many allegations we hear of recent sexual assaults. There was a tremendous ring of truth to her testimony. *And so when it is reported by her that her father has harmed her similarly at other times, that resonates with this court. So I do consider that in terms of the harm he has caused towards her and with respect to his character.* But I want to make it

> clear, I'm not going to sentence him or give him any time per se for the allegations in the other counties.
>
> ….
>
> *The crime that brings you here, or crimes that bring you here are really crimes of manipulation and exploitation and abuse.* As your daughter says, your own flesh and blood, your own eight-year-old daughter manipulated, exploited, and abused by your sexually assaulting her. …
>
> Children are totally dependent on their parents. Children are totally trusting of their parents. Parents should guide and nurture and love and care for and protect their children from all harm. Parents should not perpetuate harm on their children. Unfortunately, you did not uphold your responsibility as a parent by always guiding, nurturing, loving and protecting her. You failed in your role towards your daughter, and in essence you violated the moral fabric of a father/daughter relationship and of your family.

Not only did the trial court repeatedly mention that it was sentencing Cianciola on the basis of the Milwaukee incident only and later state that it "did *not* rely on any other acts when it fashioned its sentence in this case" (emphasis in order) in its order denying postconviction relief, but nothing in the record seems to indicate that it did. When taken in context, the statements cited by Cianciola do not persuade us to conclude otherwise. The trial court considered the proper factors in sentencing.

¶37 The trial court sentenced Cianciola to twelve years on each count to be served concurrently. Cianciola was found guilty of both a Class B felony and a Class BC felony under the 1997-98 version of the Wisconsin Statutes. The former carried a forty-year maximum term, and the latter was subject to a twenty-year maximum. Served consecutively, that would amount to sixty years. Twelve years is significantly less than sixty. The sentence is not "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." ***Ocanas***, 70 Wis. 2d at 185. The trial court properly exercised its sentencing discretion. Accordingly, we affirm.

By the Court.—Judgment and order affirmed.

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