COURT OF APPEALS
DECISION
DATED AND FILED

August 17, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal Nos. 2004AP1946-CR
2004AP1947-CR

Cir. Ct. No. 2002CF839
2002CF922

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KENNETH J. MATHERS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Waukesha County: PATRICK L. SNYDER, Judge. *Affirmed.*

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

¶1 PER CURIAM. Kenneth J. Mathers has appealed from a judgment convicting him after a jury trial of eleven counts of first-degree sexual assault of a

child and one count of attempted first-degree sexual assault of a child. He has also appealed from an order denying postconviction relief.

¶2 The convictions arose from assaults on Jessica E.F. and Rebecca A.F., the daughters of Elizabeth A.H., a woman with whom Mathers resided. On appeal, Mathers contends: (1) that the trial court erred in granting the State's motion for joinder; (2) that the evidence was insufficient to support his convictions; and (3) that the trial court erroneously exercised its discretion in sentencing him. Because these arguments lack merit, we affirm the judgment of conviction and the order denying postconviction relief.

¶3 We first address Mathers' challenge to joinder. On August 15, 2002, in Waukesha County Circuit Court Case No. 2002CF839, Mathers was charged with six counts of sexually assaulting Jessica and Rebecca at their mother's village of Hartland residence between February 1, 1997, and August 1, 1998. On September 16, 2002, in Waukesha County Circuit Court Case No. 2002CF922, he was charged with seven counts of sexually assaulting Jessica and Rebecca at their mother's residence in the town of Merton between January 1, 1994, and December 31, 1995. The trial court granted the State's motion for joinder of the cases for trial over Mathers' objection.

¶4 A trial court may order joinder of two cases for trial if the crimes could have been joined in a single criminal complaint. WIS. STAT. § 971.12(4) (2003-04).[1] Whether charges are properly joined in a criminal complaint presents

[1] All references to the Wisconsin Statutes are to the 2003-04 version.

a question of law. ***State v. Hamm***, 146 Wis. 2d 130, 138, 430 N.W.2d 584 (Ct. App. 1988).

¶5 Two or more crimes may be charged in separate counts in the same complaint if the crimes are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan. WIS. STAT. § 971.12(1). Crimes are of the same or similar character if they are the same type of offense occurring over a relatively short period of time and evidence as to each offense overlaps. ***Hamm***, 146 Wis. 2d at 138. The time-period factor is determined on a case-by-case basis relative to the similarity of the offenses and the overlapping of the evidence. ***Id.*** at 139-40.

¶6 If the charged offenses meet the criteria for joinder, it is presumed that the defendant will suffer no prejudice from a joint trial. ***State v. Leach***, 124 Wis. 2d 648, 669, 370 N.W.2d 240 (1985). However, a defendant may rebut the presumption by proving that he would be prejudiced by joinder in a particular case. ***Id.*** Any potential prejudice must be weighed against the interests of the public in conducting a single trial on the multiple counts. ***State v. Bellows***, 218 Wis. 2d 614, 623, 582 N.W.2d 53 (Ct. App. 1998). The balancing of competing interests involves the exercise of discretion by the trial court. ***Id.*** An erroneous exercise of discretion will not be found unless the defendant can establish that the failure to sever the counts caused substantial prejudice. ***State v. Locke***, 177 Wis. 2d 590, 597, 502 N.W.2d 891 (Ct. App. 1993). When evidence as to the counts sought to be severed would be admissible in separate trials, the risk of prejudice arising from joinder is generally not significant. ***Id.***

¶7 The cases were properly joined for trial pursuant to WIS. STAT. § 971.12(1) and (4). Both cases charged multiple violations of the same sexual assault statute, alleged to have occurred over a two-year period between January 1994 and December 1995, followed by a one and one-half year period between February 1997 and August 1998. The evidence and witnesses overlapped. Both cases involved testimony from the same child-victims, the same investigating officers, and the children's mother, who testified that she was aware that the children were sexually assaulted but failed to report the crimes when they occurred because she was afraid of Mathers. The evidence applicable to both cases indicated that Mathers resided with the children's mother in Merton and Hartland, and assaulted the children when they visited her, establishing a common scheme of achieving sexual satisfaction by taking advantage of the visiting children. The time periods involved in the two cases were sufficiently close together to permit joinder. *See* ***Locke***, 177 Wis. 2d at 595 (joinder of two sexual assault cases was permissible even though different child-victims were involved and the offenses occurred two years apart); ***Hamm***, 146 Wis. 2d at 139-40 (fifteen to eighteen months period of time between offenses was deemed relatively short, permitting joinder, when offenses involved similar sexual assaults and burglaries).

¶8 As contended by the State, the charged acts were part of a continuing course of conduct, involved the same child-witnesses, were corroborated by the same adult witness, took place in the same context and for the same purpose, and occurred over a relatively short period of time. Joinder was therefore proper under WIS. STAT. § 971.12(1) and (4).

¶9 Mathers has also failed to establish that the trial court erroneously exercised its discretion when it rejected his argument that the prejudice from joinder outweighed the public interest in a single trial. On appeal, Mathers

contends that joinder was prejudicial because it could have predisposed the jury to believe that because he was accused of the offenses that occurred at one residence, he also had to be guilty of the offenses alleged at the other residence at an earlier time. He contends that the jury was also unable to differentiate between the various charges.

¶10 As noted by the trial court when it granted the State's motion for joinder, the evidence from each case could have been presented as other-acts evidence in the trial of the other case.[2] *See* ***State v. Hunt***, 2003 WI 81, ¶¶58-61, 263 Wis. 2d 1, 666 N.W.2d 771 (other-acts evidence may be admitted to show the context of the crime and provide a complete explanation of the case, and as evidence of the defendant's motive, opportunity and purpose in committing a sexual assault). Because any prejudice arising from joinder was therefore insignificant, no basis exists to conclude that the prejudice to Mathers outweighed the interest of the public and the victims in having a single trial.

¶11 Mathers' next argument is that the evidence was insufficient to support his convictions. The test on appeal for the sufficiency of the evidence is not whether this court is convinced of the defendant's guilt beyond a reasonable doubt, but whether the jury, acting reasonably, could be so convinced by evidence that it had a right to believe and accept as true. ***State v. Poellinger***, 153 Wis. 2d 493, 506-07, 451 N.W.2d 752 (1990). The credibility of the witnesses and the weight of the evidence is for the jury. ***Id.*** at 504. Inconsistencies and

[2] "[I]n sexual assault cases, especially those involving assaults against children, the greater latitude rule applies to the entire analysis of whether evidence of a defendant's other crimes was properly admitted at trial." ***State v. Davidson***, 2000 WI 91, ¶51, 236 Wis. 2d 537, 613 N.W.2d 606.

contradictions in a witness' testimony are for the jury to consider in determining credibility. ***Kohlhoff v. State***, 85 Wis. 2d 148, 154, 270 N.W.2d 63 (1978).

¶12 Applying these standards, no basis exists to disturb Mathers' convictions. Jessica testified to numerous acts of sexual assault commencing when she was seven or eight years old and continuing throughout the charged time periods and beyond. She described the nature of the assaults, and testified that they occurred at her mother's residences in Merton and Hartland. She testified that her mother was in the room when some of the assaults occurred. Although she testified that she could not remember the number of times the assaults occurred, she confirmed that she had previously given a statement indicating that it could have been 200 to 300 times.

¶13 Rebecca described the same kinds of assaults as Jessica, commencing in 1994 and 1995 in the town of Merton, and continuing when her mother and Mathers resided in Hartland between February 1997 and August 1998. She testified that she was six years old in 1994. Her testimony was corroborated by her mother, who admitted seeing Mathers have sexual contact with Rebecca on a couple of occasions and seeing him have sexual contact with Jessica on numerous occasions.

¶14 Mathers' appellate argument challenging the sufficiency of the evidence is essentially a challenge to the credibility of Jessica, Rebecca and their mother. He notes that Jessica denied being assaulted in 1997 when the police were investigating allegations that Mathers had sexually assaulted Jennifer H., the older half-sister of Rebecca and Jessica. He contends that the timing of the reporting of the assaults was suspicious because it occurred when the girls' mother was involved with another man and did not want Mathers to move back into the

house. In addition, he contends that Jessica and Rebecca could not give detailed testimony as to the number of times the assaults occurred or when they occurred.

¶15 These arguments were made by defense counsel in his closing argument, along with an argument that if the children's claims were credible, they would have reported the sexual assaults sooner and would not have continued to visit their mother and Mathers. In addition, he contended that Jessica would not have moved in with her mother and Mathers in 2000 or denied being assaulted when questioned by the police in both 1997 and 2000. However, as already stated, the determination of the credibility of the witnesses was for the jury.[3] Because the jury was entitled to find that Jessica and Rebecca were credible, and because their testimony clearly provided a basis for convicting Mathers of the twelve sexual assault charges, his challenge to the sufficiency of the evidence fails.

¶16 Mathers' final argument is that the trial court erroneously exercised its discretion by sentencing him.[4] In support of this argument he notes that he has a good employment history and had helped provide a home for Jessica and Rebecca's mother. In addition, he alleges that the trial court appeared to hold it

[3] Standing alone, the victims' inability to specify dates and times of the sexual assaults provides no basis to disturb the jury's verdict because proof of the exact dates and times was not required. *See* ***State v. Fawcett***, 145 Wis. 2d 244, 250, 426 N.W.2d 91 (Ct. App. 1988).

[4] At the June 13, 2003 sentencing hearing and in the original judgment entered on June 17, 2003, the combination of consecutive and concurrent sentences imposed by the trial court totaled seventy years in prison. Although Mathers includes only the original judgment in his appendix, the record includes an amended judgment dated June 25, 2003, in which the consecutive and concurrent sentences total sixty years in prison. This is consistent with the trial court's statement at the conclusion of the June 13, 2003 sentencing hearing, indicating that it had decided to structure the sentence in compliance with the State's request, which was for sentences totaling sixty years in prison.

against him that he continued to maintain his innocence and refrain from accepting responsibility for the crimes.

¶17 We conclude that the trial court properly exercised its discretion in imposing sentence.[5] Sentencing is left to the discretion of the trial court and appellate review is limited to determining whether there was an erroneous exercise of discretion. ***State v. Rodgers***, 203 Wis. 2d 83, 93, 552 N.W.2d 123 (Ct. App. 1996). Appellate courts have a strong policy against interference with that discretion and the sentencing court is presumed to have acted reasonably. ***State v. Harris***, 119 Wis. 2d 612, 622, 350 N.W.2d 633 (1984). To overturn a sentence, a defendant must show some unreasonable or unjustified basis for the sentence in the record. ***Id.*** at 622-23.

¶18 The primary factors the trial court must consider in imposing a sentence are the gravity of the offense, the character of the offender, and the need for protection of the public. ***Id.*** at 623. Additional relevant considerations include the defendant's past criminal record or history of undesirable behavior patterns; the defendant's personality, character and social traits; the results of a presentence investigation; the vicious or aggravated nature of the crime; the degree of the defendant's culpability; his remorse and cooperativeness; the need for close rehabilitative control of the defendant; and the rights of the public. ***Id.*** at

[5] The sentencing guidelines set forth in ***McCleary v. State***, 49 Wis. 2d 263, 182 N.W.2d 512 (1971), and its progeny were recently reinvigorated in ***State v. Gallion***, 2004 WI 42, 270 Wis. 2d 535, 678 N.W.2d 197. However, ***Gallion*** applies only to "future cases." ***Gallion***, 270 Wis. 2d 535, ¶76. Because ***Gallion*** was decided after Mathers was sentenced, it does not apply here. Nevertheless, Mathers' sentencing passes muster even under ***Gallion***'s revitalization of sentencing jurisprudence. *See* ***State v. Stenzel***, 2004 WI App 181, ¶9, 276 Wis. 2d 224, 688 N.W.2d 20 ("While ***Gallion*** revitalizes sentencing jurisprudence, it does not make any momentous changes.").

623-24. In addition, the trial court may consider the deterrent effect of the sentence. ***State v. Stenzel***, 2004 WI App 181, ¶16, 276 Wis. 2d 224, 688 N.W.2d 20. The weight to be attached to each factor remains within the wide discretion of the sentencing court. ***Id.***, ¶9.

¶19 A review of the trial court's sentencing decision establishes that it considered appropriate sentencing factors, and imposed a reasonable and reasoned sentence. The trial court acknowledged Mathers' good work history, his lack of a significant criminal record, and his alcohol problems. However, it gave greatest weight to the seriousness of the offenses and the need to protect the public. It considered that the assaults went on for years, involved the victims' mother, and had a profound effect on the victims' lives. Based on the scope of the offenses and the fact that Mathers had continued to sexually assault the children after being investigated for the alleged sexual assault of another child, it concluded that he was at great risk to reoffend if he was not incarcerated. It also considered the deterrent effect of sentencing, stating that it was important for people to know that if they commit offenses of this nature, they will be punished to the full extent of the law. Ultimately, it concluded that a sentence structure which incarcerated Mathers for the remainder of his life was necessary.

¶20 The trial court sentenced Mathers, who was fifty-four years old, to prison terms totaling sixty years. He could potentially have been sentenced to 340 years. A sentence which is well within the limits of the maximum available sentence presumptively does not shock public sentiment or violate the judgment of reasonable people concerning what is right and proper under the circumstances. *See* ***State v. Grindemann***, 2002 WI App 106, ¶¶31-32, 255 Wis. 2d 632, 648 N.W.2d 507.

¶21 We also reject any claim that the trial court erroneously exercised its discretion when it commented on Mathers' continued claim of innocence. The trial court merely noted that the jury had found him guilty, and stated that if the cases had been tried to the court, it would not have hesitated to find him guilty. A defendant's attitude toward the crime, including his refusal to admit his guilt, may be relevant to his need for rehabilitation and the public's need for protection from him. *See* ***State v. Baldwin***, 101 Wis. 2d 441, 459, 304 N.W.2d 742 (1981). In this case, the trial court did not give undue weight to Mathers' refusal to admit guilt, and merely considered that he had been found guilty, and that the seriousness of the offenses and the need to prevent future offenses by him established the need for lengthy incarceration. As such, no erroneous exercise of its sentencing discretion occurred. *See* ***id.***

By the Court.—Judgment and order affirmed.

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