COURT OF APPEALS
DECISION
DATED AND FILED

December 20, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP333-CR **Cir. Ct. No. 2002CF779**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOHN PATRICK FEENEY,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Outagamie County: DENNIS C. LUEBKE, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. John Feeney appeals a judgment of conviction on four sexual assault-related charges and an order denying his motion for postconviction relief. Feeney argues: (1) the statute of limitations had run or the State should be precluded from filing charges, and the trial court therefore erred by

denying his motion to dismiss; (2) there was insufficient evidence to support two of the verdicts; and (3) the trial court erroneously exercised its sentencing discretion. We reject Feeney's arguments and affirm the judgment and order.

Background

¶2 Feeney was a Catholic priest associated with the Green Bay diocese. At the time in question, his assignment was to the St. Nicholas parish in Freedom. Todd M., then fourteen years old, and his brother Troy, then twelve, attended religious education classes at the parish even though they belonged to and worshipped at a different parish. On May 21, 1978, Feeney visited the boys' home. Their mother, Sharon, thought the visit was unusual because they were not members of St. Nicholas, but was nonetheless honored by the visit. After Todd and Troy headed to bed, Feeney told Sharon and her husband that he would go hear the boys' prayers.

¶3 Feeney went into Todd's room, turned on the light, and sat on the edge of the bed. He began asking Todd questions about girlfriends while rubbing the boy's chest under his pajama top and moving his hand down Todd's abdomen. As Feeney's hand approached Todd's waist, Todd pushed Feeney away and rolled over, putting his back to the priest. Feeney left but returned shortly thereafter, making a comment to the effect of "you are not that tired" and pinching Todd's buttocks before leaving the room.

¶4 Feeney also went into Troy's room, turning on the light and sitting on the bed. Feeney pulled the blankets down from Troy's shoulders, but Troy pulled them back up. Feeney removed and Troy replaced the blankets at least twice more before Feeney pulled them down and held them down. As with Todd, Feeney reached under Troy's pajama top and began rubbing his chest, moving his

hand downward. His hand was within an inch of Troy's penis before Troy stopped him and told him to leave. Feeney kissed Troy's forehead and made the sign of the cross before leaving. After Feeney returned downstairs—just as the boys' father was coming up to see why Feeney had been upstairs so long—he stayed a short while longer at the home, then left.

¶5 When Sharon learned of these incidents the next morning, she sought guidance from the church hierarchy before filing a police report in January 1979. The district attorney at the time initially declined to prosecute the case. In 1983, Feeney left Wisconsin and moved to California where his brother resided. Feeney became affiliated with the Reno/Las Vegas diocese in Nevada.

¶6 The complaint Sharon filed appears to have resurfaced when, in response to another victim's allegations made in April 2002, detectives began searching records for any similar abuse complaints against Feeney. Finding the 1979 complaint, detectives contacted and re-interviewed Todd and Troy. During the new interviews, Troy reported an event that happened one or two months prior to the May 1978 incident in his home. At face-to-face confession, Feeney asked Troy if he had any girlfriends. When Troy said yes, Feeney put his hand on Troy's jeans over his penis and asked if any of the girls had ever touched him there. Feeney then asked Troy if he knew what Feeney was touching. Troy responded, "a penis," and Feeney asked him to spell it. When Troy spelled the word correctly on his second attempt, Feeney removed his hand. This incident was not in the original 1979 police report.

¶7 The district attorney filed a complaint in September 2002, amending it in November 2002. The complaint charged Feeney with one count of first-degree sexual assault against Troy for the confession incident; one count of

attempted first-degree sexual assault for attempting to touch Troy's penis in his bedroom; and one count of attempted second-degree sexual assault for attempting to touch Todd's penis in his bedroom. An Information filed in March 2003 added one count each of first-degree and second-degree sexual assault for touching the boys' chests.

¶8 Feeney filed a motion to dismiss for lack of jurisdiction, arguing the statute of limitations had expired. The trial court denied the motion. Following a jury trial in February 2004, the jury acquitted Feeney of the attempted second degree sexual assault against Todd but found him guilty of the four remaining counts. The court sentenced Feeney in April 2004. On each of the counts two, four, and five, the court sentenced Feeney to ten years' imprisonment under the indeterminate sentencing structure. These three terms were to run concurrently. On count one, for the assault during confession, Feeney received a five-year indeterminate sentence to run consecutively to the other three sentences. Feeney filed a postconviction motion for relief, which the trial court denied. Feeney appeals, raising three arguments relating to the statute of limitations, sufficiency of the evidence, and the trial court's sentencing discretion.

Discussion

Statute of Limitations and Estoppel

¶9 Feeney committed the assaults in 1978 but was not charged until 2002. He acknowledges that the six-year statute of limitations for filing felony charges can be tolled. Nonetheless, he argues the statute should not be tolled here because he remained "publicly a resident" of Wisconsin, he did not leave Wisconsin to avoid prosecution and, in any event, the State should be precluded

from filing the charges because the first district attorney declined to prosecute him.

¶10 Whether the statute of limitations has expired presents us with a question of law we review de novo. ***State v. Slaughter***, 200 Wis. 2d 190, 196, 546 N.W.2d 490 (Ct. App. 1996). WISCONSIN STAT. § 939.74(1) (1977) requires prosecution of a felony begin within six years of its commission.[1] However, under § 939.74(3), "In computing the time limited by this section, the time during which the actor was not publicly a resident within this state or during which a prosecution against him for the same act was pending shall not be included."

¶11 Feeney left Wisconsin for California and Nevada in November 1983, before the statute of limitations would have expired in 1984 for assaults committed in March or April and May 1978. He asserts he was still "publicly a resident within this state" through the expiration of the statute because he was attached to the Green Bay diocese until at least June 1, 1984. We disagree.

¶12 We conclude Feeney's "incardination" or affiliation with the Green Bay diocese is insufficient to establish his residency for the following reasons. First, he was no longer physically present in the state. *See* ***State v. Whitman***, 160 Wis. 2d 260, 266, 466 N.W.2d 193 (Ct. App. 1991) ("The statute of limitations will run as long as the residency in question is both public and within the state."). Second, Feeney obtained new employment with a different diocese when he left, which undermines his assertion that he was still affiliated with Green Bay. Third, a letter from the Green Bay diocese states that Feeney left the diocese as of

[1] All references to the Wisconsin Statutes are to the 1977 version unless otherwise noted.

November 20, 1983, and it considered him living in California as of December 19, 1983.

¶13 In ***Whitman***, we rejected a similar argument from a soldier on active duty with the United States Army. While Whitman remained a resident of Wisconsin for voting purposes, he was stationed in Louisiana. ***Id.*** at 264-65. We concluded that his physical presence outside the state meant he was not publicly a resident and the statute of limitations was tolled for the time he was away. ***Id.*** at 266. If a soldier stationed where the United States government places him is subject to tolling based on WIS. STAT. § 939.74(3), so too is a priest who voluntarily leaves the state.

¶14 Finally, to the extent Feeney argues that we should consider his motive in leaving the state to be relevant, he is incorrect. "[T]he motivation behind a defendant's absence from the state [is] not an issue in determining whether he was publicly a resident for purposes of the tolling statute." *See* ***Whitman***, 160 Wis. 2d at 267.

¶15 Related to Feeney's statute of limitations argument is his contention that the State should be precluded from prosecuting because the district attorney in 1979 did not file charges.[2] We disagree.

¶16 First, a district attorney has great discretion in deciding whether to prosecute a particular case. ***State v. Kramer***, 2001 WI 132, ¶14, 248 Wis. 2d 1009, 637 N.W.2d 35. As part of that discretion, district attorneys may, at any

[2] Feeney actually argues that the State should be collaterally estopped from prosecuting him. "Collateral estoppel" has been replaced by the term "issue preclusion." *See* ***Northern States Power Co. v. Bugher***, 189 Wis. 2d 541, 550, 525 N.W.2d 723 (1995).

time until the statute of limitations has run, revisit a charging decision and modify that decision as appropriate. *See* ***Pengov v. White***, 766 N.E.2d 228, 232 (Ohio Ct. App. 2001).

¶17 Second, the record reveals that the district attorney's decision in 1979 not to charge Feeney was unrelated to the merits of the case. Instead, the district attorney was concerned about the stress Todd and Troy would face as witnesses in the trial, as well as publicity regarding the trial because of Feeney's well-known brother, a singer on the popular *Lawrence Welk* television program.

¶18 Third, when we look at the test for issue preclusion it is apparent that the doctrine is wholly inapplicable.[3] Issue preclusion limits relitigation of issues actually decided in a previous case. ***Paige K.B. v. Steven G.B.***, 226 Wis. 2d 210, 219, 594 N.W.2d 370 (1999). This is immediately telling—there was no initial litigation so there is no relitigation to limit.

¶19 In any event, whether a preclusion doctrine applies presents us with a question of law. ***State v. Kasian***, 207 Wis. 2d 611, 615, 558 N.W.2d 687 (Ct. App. 1996). The burden is on the party seeking to apply preclusion. ***State v. Miller***, 2004 WI App 117, ¶19, 274 Wis. 2d 471, 683 N.W.2d 485. The factors we consider are:

> (1) could the party against whom preclusion is sought, as a matter of law, have obtained review of the judgment; (2) is the question one of law that involves two distinct claims or intervening contextual shifts in the law; (3) do significant differences in the quality or extensiveness of proceedings

[3] Feeney never sets forth or applies this test in his argument. Indeed, while he liberally employs terms such as "fundamentally unfair" and "due process," he does not actually engage in any analysis of the law and the facts. For example, he merely posits "that under [the] Due Process Clause of the Constitution, it guarantees a defendant due process."

> between the two courts warrant relitigation of the issues; (4) have the burdens of persuasion shifted such that the parties seeking preclusion had a lower burden of persuasion in the first trial than in the second; and (5) are matters of public policy and individual circumstances involved that would render the application of [issue preclusion] to be fundamentally unfair, including inadequate opportunity or incentive to obtain a full and fair adjudication in the initial action?

Kasian, 207 Wis. 2d at 615-16 (citation omitted).

¶20 Implicit in these factors is the idea that there was some prior trial or adjudication. Accordingly, all the factors here weigh against issue preclusion. As to the first factor, there is no judgment of which the State could obtain review. As to the second factor, the underlying "question" Feeney seeks to preclude is whether to charge, which is not a question of law but a matter of discretion. For the third factor, there were no proceedings in any court, much less between two courts. As to factor four, there was no prior trial. And under factor five, there was no initial action or adjudication.

¶21 Although Feeney tangentially references fairness, relative to factor five, he does not develop the argument. While Feeney challenges the elapsed time, he fails to account for the fact that the legislature, by enacting a tolling statute, implicitly acknowledged and approved of the possibility that some cases might be charged beyond the ordinary six-year time frame. Issue preclusion does not apply to preclude the State from charging Feeney even though a previous district attorney declined to prosecute.

Sufficiency of the Evidence

¶22 "In a criminal case, the standard for reviewing the sufficiency of the evidence is whether the evidence was sufficient to prove the defendant's guilt beyond a reasonable doubt." ***State v. Sharp***, 180 Wis. 2d 640, 658-59, 511 N.W.2d 316 (Ct. App. 1993). This court will affirm a conviction if it can conclude that a reasonable jury could be convinced of the defendant's guilt, beyond a reasonable doubt, by the evidence it was entitled to accept as true. *See* ***id.*** at 659. We will not substitute our judgment for the jury's "unless the evidence supporting the jury's verdict conflicts with nature or the fully established facts, or unless the testimony supporting and essential to the verdict is inherently and patently incredible." ***Id.***

¶23 Feeney contends there is insufficient evidence to support the convictions on counts four and five, the sexual assaults based on his touching the boys' chests. He argues there is insufficient evidence regarding his motive. We disagree.

¶24 Sexual assault under WIS. STAT. § 940.225, whether first or second degree, occurs when one person "has sexual contact or sexual intercourse with another person without consent of that person…." Feeney had sexual contact with the boys, and sexual contact has a specific statutory meaning.[4] Sexual contact "means any intentional touching of the intimate parts … of another, if that intentional touching can reasonably be construed as being for the purpose of

[4] While Feeney cites WIS. STAT. § 939.22(34) (2003-04) for the definition of sexual contact, the appropriate statute is WIS. STAT. § 940.225(5)(b) (1977).

sexual arousal or gratification…." WIS. STAT. § 940.225(5)(b).[5] Feeney does not dispute that the boys' chests meet the definition of "intimate parts." *See* ***State v. Forster***, 2003 WI App 29, ¶15, 260 Wis. 2d 149, 659 N.W.2d 144.

¶25 Feeney contends there is no evidence he touched Troy or Todd for sexual arousal or gratification, and he attempts to analogize to ***Forster*** to support his position. In that case, the defendant massaged the male victim's nipple for approximately twenty-five minutes while kissing his neck. ***Id.***, ¶9. Feeney suggests these factors—the length of the assault and the "additional element" of kissing—are dispositive. He argues that because the boys could not pinpoint any length of time that Feeney touched them and "there is not an additional factor such as the kissing," there is no evidence he touched them for arousal or gratification.

¶26 Intent is inferable from conduct. ***State v. Hecht***, 116 Wis. 2d 605, 623, 342 N.W.2d 721 (1984). There is sufficient evidence of Feeney's conduct from which to infer the requisite intent.

¶27 First, when Feeney assaulted the boys in their rooms and asked Todd about a girlfriend, he had already assaulted Troy during confession after asking about girlfriends. He lied to Sharon about why he was going to the boys' rooms, claiming he was going to hear prayers. He assaulted both boys in similar fashion, starting with his hands on their chests but evidently seeking their genitalia. In Troy's case, Feeney repeatedly pulled the covers from his body. These actions

[5] WISCONSIN STAT. § 939.22(34) (2003-04) defines sexual contact in part as "the intentional touching of the clothed or unclothed intimate parts of another person … if that intentional touching … is for the purpose of sexual humiliation, sexual degradation, sexual arousal or gratification." This version of the statute does not contain the "can reasonably be construed" language of WIS. STAT. § 940.225(5)(b) (1977).

sufficiently demonstrate intentional acts. The similarities and repetition destroy any inference the contact was accidental.

¶28 Second, Sharon estimated Feeney was upstairs with the boys at least ten minutes. This is consistent with Todd's estimate that Feeney was in his room five to ten minutes and Troy's estimate that Feeney was in his room for less than five minutes. While this is not as long as the assault in ***Forster***, neither ***Forster*** nor any case we know of establishes a minimum amount of time that an act must last to constitute assault. Indeed, the law does not require that intent exist for any particular length of time. *See* WIS JI—CRIMINAL 923A (2001).

¶29 Finally, Feeney appears to rely on the absence of some "additional factor" to disprove his intent, but he neglects certain facts he recited to us in his brief. After leaving Todd's room, he later returned and pinched the boy's buttocks. And when Troy told him to leave, Feeney kissed the boy on the forehead. We are not convinced any additional factor is required by ***Forster*** to prove Feeney's intent in touching the boys. However, to the extent Feeney asserts there are no such factors present in his case, we disagree. Ultimately, when taken as a whole, Feeney's actions would have allowed a reasonable jury to infer he touched Todd and Troy for the purpose of sexual arousal or gratification.

Sentencing

¶30 Sentencing is a discretionary decision of the trial court and we review it only for an erroneous exercise of discretion. ***State v. Harris***, 119 Wis. 2d 612, 622, 350 N.W.2d 633 (1984). The primary factors a court should consider when imposing sentence are the gravity of the offense, the character of the offender, and the public's need for protection. ***Id.*** at 623. There are several related factors the court may also consider, including a past record of criminal

offenses; a history of undesirable behavior patterns; the defendant's personality, character and social traits; the result of presentence investigation; the vicious or aggravated nature of the crime; 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; and the defendant's need for close rehabilitative control; the rights of the public; and the length of pretrial detention. ***Id.*** at 623-24.

¶31 The weight to be given to each factor also rests in the trial court's discretion. ***State v. Gallion***, 2004 WI 42, ¶¶41-43, 68, 270 Wis. 2d 535, 678 N.W.2d 197; ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). A defendant challenging a sentence must show some unreasonable or unjustified basis in the record for the sentence. ***Harris***, 119 Wis. 2d at 622-23. Feeney asserts, in a single paragraph without analysis, that the court did not consider his age of seventy-seven at sentencing. He also argues the court should have considered the gap between the date of the commission of the crimes and the dates of sentencing.

¶32 First, the court is not required to consider Feeney's age—it is not one of the three primary factors. And, even if the court considers a defendant's age, the court need not give significant weight to that factor. The record here reveals that the court did, in fact, consider Feeney's age. It stated, in relevant part:

> [W]hat does society do with a 77-year-old man who brings to this table a plate which is so full of the kinds of conflicting behaviors that you have demonstrated over the years?
>
> ….
>
> I recognize that you are 77 years of age, and according to mortality tables, you have a life expectancy of a probable another ten years of life.

> ….
>
> I want to structure a sentence that will bring us to the end of your life. I believe the sentence I'm about to impose will do that.
>
> ….
>
> Your mandatory release time will be just about when you are age 87, from all probabilities, near the end of your life, if, indeed, you live that long.

Quite clearly, Feeney is simply wrong to say the court did not consider his age. We suspect Feeney is more upset that, as the court noted, the sentence will likely take Feeney to the end of his life.

¶33 The court rejected probation, believing it minimized the impact of the crime and was therefore inappropriate. It also noted several factors that it believed required the sentence. It considered the gravity of the offense and the impact Feeney's conduct had on his victims. After Sharon went to the police, Feeney told his friends in his parish that Todd and Troy were accusing him of something he did not do. Children at school stopped talking to the boys and the community treated the family like pariahs. The court also noted that because of the time span, it was in the unique position of being able to observe the long-term emotional impact of Feeney's acts, rather than having to speculate on how Todd and Troy would continue to cope with the assaults. The court considered that while several supporters had sent letters praising Feeney, there were also other alleged sexual acts involving other victims.[6]

[6] This other acts evidence was excluded at trial. Sentencing courts, however, are allowed to consider uncharged and unproven offenses. *See* ***State v. McQuay***, 154 Wis. 2d 116, 126, 452 N.W.2d 377 (1990).

¶34 The court also noted that Feeney repeatedly talked in euphemisms to avoid directly taking responsibility for his actions. The court thus observed, "you don't have the kinds of rehabilitative insight into your thinking and why these behaviors occurred, and until you do … I must consider a sentence that is going to provide a measure of protection to the community."

¶35 Ultimately, Feeney fails to show any unjust or unreasonable basis for his sentence, ***Harris***, 119 Wis. 2d at 622-23, nor has he shown the court considered improper factors. ***Ocanas***, 70 Wis. 2d at 185.

¶36 Feeney also suggests that because twenty-six years passed between his crime and sentencing, time somehow "separates him from the normal request to have a sentenced reviewed. There is no evidence in the record to suggest that Feeney was nothing more than a law abiding citizen from 1978 until the date of his sentencing. He acted in accordance with the law and his vocation."

¶37 We are unfamiliar with any aspect of our law or Feeney's vocation that permits him to sexually assault children and remain unaccountable. Moreover, Feeney offers no authority for his suggestion that the time span requires us to deviate from the standard of review. We do not consider arguments unsupported by references to legal authority. ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

By the Court.—Judgment and order affirmed.

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