COURT OF APPEALS
DECISION
DATED AND FILED

June 2, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP50-CR **Cir. Ct. No. 2002CF186**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DON ALLAN RAY DOUGAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for St. Croix County: ERIC J. LUNDELL, Judge. *Affirmed*.

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Don Allan Ray Dougan appeals a judgment, entered upon a jury's verdict, convicting him of two counts of repeated sexual assault of the same child and one count of possession of a firearm by a felon. Dougan also challenges the order denying his motion for postconviction relief.

Dougan argues he was denied the effective assistance of trial counsel, the presentence report writer violated his constitutional rights, and the circuit court erroneously exercised its sentencing discretion. We reject these arguments and affirm both the judgment and order.

BACKGROUND

¶2 In May 2002, the State charged Dougan with two counts of repeated sexual assault of the same child arising out of actions that occurred between May 2001 and May 2002 with his long-time girlfriend's two daughters, Tessa K. (d.o.b. 09/91) and Mercedes K. (d.o.b. 05/90). The felon in possession of a firearm charge arose after police searched Dougan's home and found three firearms. At trial, Dougan denied the allegations and defended the firearm charge by arguing that his felony had been reduced to a misdemeanor in Minnesota. The jury found Dougan guilty of the crimes charged and a presentence investigation report was ordered. The court ultimately imposed consecutive sentences totaling eighty-two years' initial confinement followed by forty-three years' extended supervision. Dougan's postconviction motions were denied after a hearing and this appeal follows.

DISCUSSION

I. Ineffective Assistance of Trial Counsel

¶3 Dougan claims he was denied the effective assistance of trial counsel. This court's review of an ineffective assistance of counsel claim is a mixed question of fact and law. ***State v. Erickson***, 227 Wis. 2d 758, 768, 596 N.W.2d 749 (1999). The trial court's findings of fact will not be disturbed unless they are clearly erroneous. ***Id.*** However, the ultimate determination whether the

attorney's performance falls below the constitutional minimum is a question of law that this court reviews independently. ***Id.***

¶4 "The benchmark for judging whether counsel has acted ineffectively is stated in ***Strickland v. Washington***, 466 U.S. 668 (1984)." ***State v. Johnson***, 153 Wis. 2d 121, 126, 449 N.W.2d 845 (1990). To succeed on his ineffective assistance of counsel claim, Dougan must show both (1) that his counsel's representation was deficient and (2) that this deficiency prejudiced him. *See* ***Strickland***, 466 U.S. at 694.

¶5 In order to establish deficient performance, a defendant must show that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Id.*** at 687. However, "every effort is made to avoid determinations of ineffectiveness based on hindsight … and the burden is placed on the defendant to overcome a strong presumption that counsel acted reasonably within professional norms." ***Johnson***, 153 Wis. 2d at 127. In reviewing counsel's performance, we judge the reasonableness of counsel's conduct based on the facts of the particular case as they existed at the time of the conduct and determine whether, in light of all the circumstances, the omissions fell outside the wide range of professionally competent representation. ***Strickland***, 466 U.S. at 690. Because "[j]udicial scrutiny of counsel's performance must be highly deferential … the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." ***Id.*** at 689. Further, "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." ***Id.*** at 690.

¶6 The prejudice prong of the ***Strickland*** test is satisfied where the attorney's error is of such magnitude that there is a reasonable probability that, absent the error, the result of the proceeding would have been different. ***Id.*** at 694. We may address the tests in the order we choose. If Dougan fails to establish prejudice, we need not address deficient performance. *See* ***State v. Sanchez***, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996).

¶7 Here, Dougan advances several ineffective assistance of counsel claims. First, Dougan argues counsel was ineffective in his cross-examination of a state crime lab analyst who examined the underwear Mercedes was wearing at the time of one of the alleged assaults. The analyst detected amylase—a digestive enzyme found in saliva and other bodily fluids—on the underwear. Dougan contends his trial counsel failed to cross-examine the analyst regarding sources of amylase other than saliva, "including substances like urine, which would also likely be present in the crotch of a young girl's underwear."

¶8 The state crime lab analyst prepared a written report that was received into evidence and sent to the jury during deliberations. In the report, the analyst noted that amylase is a digestive enzyme normally present in elevated levels in saliva, however, "[a]mylase is also found in other body fluids." Both in his report and during his trial testimony, the analyst noted that Dougan was eliminated as the source of the DNA present in the crotch area of the underwear. Dougan's forensic scientist also noted amylase was found in various bodily fluids, including urine. Dougan's forensic scientist likewise concluded the DNA profiles developed from the underwear were not consistent with Dougan's DNA profile.

¶9 That amylase is contained in substances other than saliva was presented to the jury. Moreover, because the evidence eliminated Dougan as a

source of the DNA, counsel was not deficient for failing to cross-examine the analyst about the various sources of amylase. Although Dougan's DNA was obtained from a blood draw, he also argues counsel was deficient for failing to obtain an additional DNA sample from his saliva. Because a person's DNA is the same regardless whether it comes from that person's saliva or blood, counsel was not deficient for failing to request a superfluous sample.

¶10 Next, Dougan contends counsel was ineffective for failing to seek pretrial dismissal of the felon in possession of a firearm charge. This argument is based on Dougan's belief that he was legally permitted to possess firearms. Dougan is mistaken. The felony conviction forming the basis for Dougan's felon-in-possession charge was his 1984 Minnesota conviction for the fourth-degree sexual assault of his thirteen-year-old cousin. According to the plea colloquy, Dougan admitted touching his cousin on her breast in a sexual manner. Because under Wisconsin law this conduct would constitute a felony, the Minnesota conviction was a proper basis for Dougan's felon-in-possession charge. *See* WIS. STAT. § 940.225(2)(e) (1983-84)[1] (defining second-degree sexual assault as "sexual contact … with a person who is over the age of 12 years and under the age of 16 years"); § 940.225(5)(a) (defining sexual contact); *see also* WIS. STAT. § 941.29(1)(b) (prohibiting a person from possessing a firearm if he or she has been convicted of a crime elsewhere that would be a felony if committed in this state).

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

¶11 Dougan argues that because the 1988 Minnesota probation-discharge order for this crime stated he could possess a firearm after "[ten] years have elapsed since restoration of civil rights," he reacquired his right to possess firearms in both Minnesota and Wisconsin in 1998. Citing federal case law, Dougan contends the United States government must honor a state's restoration of firearm privileges. *See* ***United States v. Brost***, 807 F.3d 1333 (D.C. Circ. 1996). We are not persuaded by Dougan's citation to case law from a foreign jurisdiction. Wisconsin's felon-in-possession statute specifies the methods of obtaining relief from the prohibition against firearm possession. *See* WIS. STAT. § 941.29(5). Neither of the specified methods were utilized here. Because language from the Minnesota probation-discharge order did not remove the prohibition against firearm possession in Wisconsin, counsel was not deficient for failing to seek dismissal of the charge. *See* ***State v. Wheat***, 2002 WI App 153, ¶14, 256 Wis. 2d 270, 647 N.W.2d 441 (counsel not deficient for failing to pursue meritless claim).

¶12 Dougan nevertheless claims counsel was deficient for failing to call his Minnesota probation agent to testify regarding reinstatement of his firearm privileges in that state. As we have already noted, however, whatever effect the Minnesota order restoring Dougan's civil rights may have had in that state, it did not remove his ineligibility to possess firearms in Wisconsin.

¶13 Dougan also claims counsel was ineffective for failing to move to sever the felon-in-possession charge from the sexual assault charges. Dougan claims that had the charges been severed, the jury would never have learned he had previously been convicted of a child sexual assault. The prosecutor, however, moved for admission of Dougan's prior sexual assault as other acts evidence and the trial court allowed it through a stipulation to the facts of the prior conduct.

¶14 The admissibility of evidence lies within the trial court's sound discretion. ***State v. Pepin***, 110 Wis. 2d 431, 435, 328 N.W.2d 898 (Ct. App. 1982). The court must engage in a three-step analysis to determine the admissibility of other acts evidence. ***State v. Sullivan***, 216 Wis. 2d 768, 771-73, 576 N.W.2d 30 (1998). The first inquiry is whether the other acts evidence is offered for an acceptable purpose under WIS. STAT. § 904.04(2), such as establishing motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. ***Id.*** at 772-73. After ascertaining whether the other acts evidence is offered for a permissible purpose under § 904.04(2), the analysis turns to whether the other acts evidence is relevant[2] and, finally, whether its probative value outweighs the danger of unfair prejudice. ***Id.*** Further, Wisconsin recognizes that in child sexual assault cases, courts permit "greater latitude of proof as to other like occurrences." ***State v. Davidson***, 2000 WI 91, ¶36, 236 Wis. 2d 537, 613 N.W.2d 606.

¶15 Here, Dougan does not appear to challenge the admissibility of the Minnesota conviction as other acts evidence. Even assuming his argument could be construed as such a challenge, the argument fails. First, the evidence was admitted for an acceptable purpose—namely Dougan's intent to commit the charged assaults. Second, the other acts evidence was relevant given the similarities between the victims. The victims were of similar ages and there was a familial or quasi-familial relationship between Dougan and each of the victims.

[2] In assessing relevance, we must first consider whether the other acts evidence relates to a fact or proposition that is of consequence to the determination of the action. The second consideration in assessing relevance is whether the other acts evidence has a tendency to make the consequential fact or proposition more probable or less probable than it would be without the evidence. ***State v. Sullivan***, 216 Wis. 2d 768, 772-73, 576 N.W.2d 30 (1998).

Although the prior conviction was remote in time—having occurred approximately nineteen years earlier—other acts evidence is not rendered irrelevant if the remoteness is balanced by the similarity of the incidents. *See* ***State v. Mink***, 146 Wis. 2d 1, 16, 429 N.W.2d 99 (Ct. App. 1988). Here, the earlier assault is relevant in that it suggests a pattern of seeking sexual gratification from young girls with whom Dougan has a familial-type relationship.

¶16 With respect to the third step of the ***Sullivan*** analysis, the probative value of the evidence substantially outweighed the danger of unfair prejudice. Our supreme court has recognized that "similarities between the other crimes evidence and the charged crime may render the other crimes evidence highly probative, outweighing the danger of prejudice." ***Davidson***, 2000 WI 91, ¶75. Further, the jury was specifically told not to consider the other acts evidence as proof "that the defendant is a bad person and for that reason is guilty of the offense charged." We presume the jury followed the court's instructions, *see* ***State v. Adams***, 221 Wis. 2d 1, 12, 584 N.W.2d 695 (Ct. App. 1998), and therefore conclude the trial court reasonably exercised its discretion by admitting the other acts evidence. Because the jury was going to learn of the Minnesota conviction regardless whether the felon-in-possession charge was severed, counsel was not deficient for failing to move for its severance.

¶17 Dougan also claims counsel was ineffective for failing to hire a private investigator or pursue an alternate presentence investigation report. Dougan contends "[i]t appears a private investigator, and an alternate PSI might have been beneficial here" because a private investigator or an alternate PSI might have provided additional information concerning Dougan's theories of defense: that the girls fabricated the allegations as part of a scheme concocted by their natural father to obtain a more favorable custody arrangement, or as part of a

scheme concocted by their mother so she could sell a parcel of property without sharing the proceeds with Dougan. Dougan, however, does not specify what facts either a private investigator or alternative PSI would have uncovered to support his defense theories. Dougan's speculative claims do not undermine this court's confidence in the outcome of the trial. *See* ***State v. Flynn***, 190 Wis. 2d 31, 48, 527 N.W.2d 343 (Ct. App. 1994).

II. Presentence Investigation Report

¶18 Dougan claims the PSI writer violated his Fifth Amendment rights by interviewing him without reciting his ***Miranda***[3] rights. Our supreme court has held that a presentence interview may be accusatorial thereby requiring ***Miranda*** warnings where the interview "seeks statements from a defendant on an element upon which the State still has the burden of proof." ***State v. Heffran***, 129 Wis. 2d 156, 165, 384 N.W.2d 351 (1986). Because no elements of the convicted crimes were outstanding at the time the PSI was being prepared, Dougan's Fifth Amendment claim fails.

III. Sentencing

¶19 Finally, Dougan claims the trial court erroneously exercised its discretion by imposing what he claims is an excessive sentence. Sentencing lies within the trial court's discretion. ***State v. Echols***, 175 Wis. 2d 653, 681, 499 N.W.2d 631 (1993). There is a strong public policy against interfering with the trial court's sentencing discretion, and sentences are afforded the presumption that the trial court acted reasonably. ***Id.*** at 681-82. If the record contains evidence that

[3] ***Miranda v. Arizona***, 384 U.S. 436 (1966).

the trial court properly exercised its discretion, we must affirm. ***State v. Cooper***, 117 Wis. 2d 30, 40, 344 N.W.2d 194 (Ct. App. 1983). Proper sentencing discretion is demonstrated if the record shows that the court "examined the facts and stated its reasons for the sentence imposed, 'using a demonstrated rational process.'" ***State v. Spears***, 147 Wis. 2d 429, 447, 433 N.W.2d 595 (Ct. App. 1988) (citation omitted). "To overturn a sentence, a defendant must show some unreasonable or unjustified basis for the sentence in the record." ***Cooper***, 117 Wis. 2d at 40.

¶20 The three primary factors that a sentencing court must address are: (1) the gravity of the offense; (2) the character and rehabilitative needs of the offender; and (3) the need for protection of the public. ***State v. Sarabia***, 118 Wis. 2d 655, 673, 348 N.W.2d 527 (1984). The weight to be given each of the primary factors is within the discretion of the sentencing court and the sentence may be based on any or all of the three primary factors after all relevant factors have been considered. ***State v. Wickstrom***, 118 Wis. 2d 339, 355, 348 N.W.2d 183 (Ct. App. 1984).

¶21 In considering the required factors, a sentencing court can also consider other relevant factors, including, but not limited to:

> (1) Past record of criminal offenses; (2) history of undesirable behavior pattern; (3) the defendant's personality, character and social traits; (4) result of presentence investigation; (5) vicious or aggravated nature of the crime; (6) degree of the defendant's culpability; (7) defendant's demeanor at trial; (8) defendant's age, educational background and employment record; (9) defendant's remorse, repentance and cooperativeness; (10) defendant's need for close rehabilitative control; (11) the rights of the public; and (12) the length of pretrial detention.

State v. Gallion, 2004 WI 41, ¶43, 270 Wis. 2d 535, 678 N.W.2d 197. When a defendant argues that his or her sentence is unduly harsh or excessive, we will hold that the sentencing court erroneously exercised its discretion "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).

¶22 Here, the court considered the appropriate factors in imposing sentence, noting that punishment and protection of the public were the factors it deemed most important, especially given the gravity of the offenses. The court noted: "[F]or the matters that you did to these girls, you must be punished and punished in a serious fashion. This is the most serious of crimes happening to the most vulnerable of victims by a person who should have and absolutely had to know better." The court expressed particular concern with Dougan's process of "grooming" his victims over the course of months and years.

¶23 With respect to Dougan's character, the court noted Dougan had exhibited no remorse for his crime and, based on a letter Dougan submitted shortly before sentencing, the court concluded Dougan was merely begging for yet another chance. The court acknowledged Dougan's prior record and other "examples of sexual deviancy" for which he was not prosecuted, which added up to "a significant prior record … that can't be ignored." Additionally, the court considered rehabilitation as a sentencing objective, but noted "probation and whatever counseling [Dougan] went through did not work" and should not be extended in this case. With respect to deterrence as an objective of the sentence, the court noted that given the nature of these particular crimes, it was not

convinced perpetrators read the newspaper to see what kind of sentences are imposed on other perpetrators. Ultimately, the court stated:

> [Y]ou have received the maximum that I believe I can give you for the reasons I have stated. And for the appellate courts, it is the maximum sentence because of the repeated nature of the counts that you were convicted of, and because of your prior record, because of the seriousness of the offense, because you lied on the stand, because of [the letter sent to the court]. All of that and more …. That's why you got the max.

¶24 To the extent Dougan argues that given his age, his sentence is tantamount to a life sentence, the court is not required to consider a defendant's life expectancy at sentencing. ***State v. Stenzel***, 2004 WI App 181, ¶20, 276 Wis. 2d 224, 688 N.W.2d 20. That the court imposed a sentence greater than the recommendations made by the PSI writer and the prosecuting attorney likewise fails to establish that the sentence was excessive. "As long as the trial judge exercises discretion and sentences within the permissible range set by statute, the court need not explain why its sentence differs from any particular recommendation." ***State v. Johnson***, 158 Wis. 2d 458, 469, 463 N.W.2d 352 (Ct. App. 1990) (internal quotations omitted). Finally, although Dougan argues his sentence is excessive when compared to the defendant in an unrelated case, the trial court is not bound by the sentencing determination of the judge in that or any other case. *See* ***Ocanas***, 70 Wis. 2d at 187-88. "[T]he exercise of discretion dictates that different judges will have different opinions as to what should be the proper sentence in a particular case." ***Id.*** Because the court considered the proper factors when imposing sentence, we conclude that it properly exercised its sentencing discretion.

By the Court.—Judgment and order affirmed.

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