COURT OF APPEALS
DECISION
DATED AND FILED

November 1, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP2832-CR **Cir. Ct. No. 2009CF4869**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BERNARD SHAW,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: KEVIN E. MARTENS, Judge. *Affirmed.*

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 PER CURIAM. Bernard Shaw appeals from a judgment of conviction for second-degree sexual assault of a child, contrary to WIS. STAT.

§ 948.02(2) (2001-02).[1] He also appeals from an order denying his postconviction motion for sentence modification. Shaw argues that he was sentenced based on inaccurate information concerning the facts of the assault and that he is therefore entitled to sentence modification. We reject his argument and affirm the judgment and order.

BACKGROUND

¶2 In September 2002, the police interviewed a thirteen-year-old girl (hereafter, "the victim") who told the police that earlier in the day she had been sexually assaulted by a man who approached her while she was on her porch. After the victim called a friend and told her about the assault, the police were contacted. The victim told the police that Shaw told her to go into the house, followed her, and forced her to engage in oral sex and sexual intercourse. The victim was taken to the sexual assault treatment center at a hospital and examined. Vaginal swabs were taken. Seven years later, the DNA from the swabs was matched to Shaw, a felon whose DNA was in the state's DNA databank.

¶3 According to the criminal complaint, when Shaw was questioned, he initially denied ever having seen the victim or having had sexual intercourse with her. When provided with the DNA evidence, he said that he had "'consensual' sexual intercourse" with the victim on the date and location identified by the victim. At the time he had sexual intercourse with the victim, Shaw was twenty-three years old.

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

¶4 Shaw and the State reached a plea agreement pursuant to which Shaw pled guilty to second-degree sexual assault of a child under the age of sixteen, and a repeater charge was dismissed. The State agreed to recommend a sentence of three years of initial confinement and three years of extended supervision, to run consecutive to any other sentence. The defense was free to argue for a lesser sentence.

¶5 Shaw did not stipulate to the facts in the criminal complaint as a basis for the conviction. Rather, trial counsel provided a statement of facts. He said that Shaw and the victim had consensual sexual intercourse at her home, although trial counsel acknowledged that the victim was underage at the time. Trial counsel continued: "It was not an act where my client forced her or pushed her on a bed or did anything of that nature…. He denies having her perform oral sex on him, however, he does agree that they had penis/vagina sex." Shaw personally confirmed to the trial court that those facts were accurate.

¶6 The State said it would not stipulate to those facts, but would also not object to allowing the trial court to accept those alleged facts as the basis for the conviction, because under either the victim's version of events (as detailed in the complaint) or Shaw's version, Shaw was guilty of the crime. The trial court then warned Shaw in detail about the fact that at sentencing, the trial court would make findings as to what occurred and both sides would be free to present evidence as to what actually occurred during the assault. Shaw indicated that he understood.

¶7 Prior to sentencing, Shaw provided a statement to the presentence investigation (PSI) writer, which was discussed at sentencing. According to that statement, he met the victim on a telephone chat line, went to her house at her

invitation, and ultimately had consensual sexual intercourse with her.[2] The PSI writer contacted the victim, who said she was not able to talk at that time and asked the writer to call back. The writer could not subsequently reach the victim, who has not given a statement to police about this incident since the initial investigation in 2002.

¶8 At sentencing, the State noted that the victim had not appeared for sentencing and had not been involved in the criminal prosecution. The State asserted that the crime had occurred as the victim originally told officers in 2002 and summarized the facts from the criminal complaint. The State described the crime as aggravated, noting that the victim told police that Shaw forced her to engage in oral sex, holding her head while his penis was in her mouth, and then forced her to engage in sexual intercourse. The State also noted that Shaw had been convicted of fourth-degree sexual assault of a fourteen-year-old child one year before this incident and subsequently had been accused of a third sexual assault in 2008.

¶9 Trial counsel noted that Shaw said he met the victim on a chat line and that Shaw's previous sexual assault conviction also involved sexual contact following a chat line conversation. Trial counsel implied that Shaw's story that he likewise met the victim on a chat line was credible. Shaw did not discuss the facts of the crime in his statement to the trial court.

¶10 The trial court addressed the varying accounts of the sexual assault. It found that Shaw's version of events was not credible. It noted that Shaw had a

[2] Shaw's claim that he met the victim on a chat line was not part of the statement of facts offered at the guilty plea hearing.

"propensity to minimize behaviors and circumstances" and had lied when first asked whether he had ever met the victim. The trial court said that the victim's version of what occurred was credible, noting that the victim had given a "fairly immediate report" of the assault, which the trial court said was "indicative of somebody who's indeed being honest and forthright, at least with respect to the sexual assault that occurred."

¶11 The trial court declined to determine how Shaw came to be at the victim's house. It said it did not know whether Shaw had contact with the victim on a chat line before the assault or whether he approached the victim's home as the victim told police. The trial court said that regardless of how Shaw came to be at the house, "what happen[ed] once you're in that house and the door closes I find to be consistent with the victim's recitation of events. It's the only credible, quite frankly, recitation I can find. I will make that finding to a preponderance standard based on all of the surrounding circumstances." The trial court added: "I'm very comfortable making the findings … [that] the assault took place in the home and finding that it did so in a manner consistent [with] what she reported. If indeed it was consensual, there's the basic question of why there would have been a report in the first place[.]"

¶12 The trial court sentenced Shaw to eight years of initial confinement and seven years of extended supervision, which was more than either party asked for but far less than the maximum sentence of twenty-five years of initial confinement and fifteen years of extended supervision.

¶13 Represented by new counsel, Shaw filed a postconviction motion seeking sentence modification. He argued that he had been sentenced based on inaccurate information.[3] Specifically, he asserted that in making its determination that the victim's version of events—which included Shaw "forcing himself" on her—was the more credible account, the trial court did not take into account a police report from the initial investigation that "called into question the victim's version of the facts." The police report, which Shaw provided with his postconviction motion, indicates that a detective who canvassed the area after the victim reported the assault spoke with two girls who reported that they were playing across the street from the victim's house the afternoon of the assault. The girls, ages nine and eleven, told the officer that they were playing outside when they saw a red car pull up to the victim's house and four men get out. The men went onto the front porch and were let into the home "by someone." The girls then went to the park and when they returned thirty-five minutes later, the red car was gone. According to the report, when the detective asked the victim about the red car and the men, she "flatly denie[d] she let anyone into her home [and said she] was never visited today by 4 people in a red car." The postconviction motion asserted that the report "at the very least, calls into question the forcible nature of the victim's version of the events." The motion stated: "The question is, why would the victim have reason not to tell the truth about the four men entering her home[?]"

[3] Shaw also asserted that sentence modification was justified because his sentence was "far greater than the sentence that had been agreed upon at the plea taking." The trial court rejected that argument as undeveloped and Shaw has not addressed it on appeal. We deem it abandoned. *See* ***Reiman Assocs., Inc. v. R/A Adver., Inc.***, 102 Wis. 2d 305, 306 n.1, 306 N.W.2d 292 (Ct. App. 1981) (issues not briefed are deemed abandoned).

¶14 Shaw argued that the victim's story was also undermined by two other facts already known to the trial court. First, after the assault, the victim first called a friend to ask whether she needed an appointment to get tested for pregnancy, rather than calling the police.

¶15 Second, the victim gave police a physical description that did not match Shaw. Specifically, the victim told police that the man who entered the house was six-foot-one-inch tall, weighed 200 pounds, was between the ages of seventeen and nineteen and had a tattoo on his right ankle that said, "Greg." Shaw is five-foot-six-inches tall, weighs 165 pounds, was twenty-three years old at the time of the assault and does not have a tattoo on his right ankle, although he has other tattoos. The motion suggested that the fact the description did not match Shaw "raises the question … whether she had purposely given the wrong description to the police because although she had obviously had sexual intercourse with a man, she did not want the man to be found and to state that it had not been a forcible encounter."

¶16 The trial court issued a written order denying the postconviction motion. It discussed the police report concerning the two girls who saw a red car and concluded that Shaw had failed to prove that the trial court relied on inaccurate information at sentencing. The trial court explained:

> The defendant's motion suggests that [the report] establishes that the victim was inviting men to her house for sex, which would operate to lessen her credibility.
>
> The suggestion is entirely speculative and without a factual basis in support. How many people were residing in the house at the time? Did one of the men live there or have a relative living there? "Someone" opened the door for them; who opened the door? A claim that the court the court relied on inaccurate information cannot be predicated on vague goings-on that have no actual basis in fact. The defendant has not established that that the court relied on

> inaccurate information about the victim. The information he has presented requires the court to do an enormous amount of speculation to reach the same conclusion that the defendant would like the court to believe about the victim, and it contains no hard facts to allow any specific findings about her. Because the defendant has not established that the court relied on inaccurate information about the victim in this case, neither resentencing nor modification is warranted.

This appeal follows.

LEGAL STANDARDS

¶17 "A defendant has a constitutionally protected due process right to be sentenced upon accurate information." ***State v. Tiepelman***, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1. "Whether a defendant has been denied this due process right is a constitutional issue that an appellate court reviews de novo." ***Id.***

¶18 When a defendant seeks relief on grounds that the trial court used inaccurate information at sentencing, the burden is on the defendant to show that: (1) the information was inaccurate; and (2) the trial court "'actually relied on the inaccurate information in the sentencing.'" ***Id.***, ¶26 (citations and one set of quotation marks omitted). The defendant is required to prove both prongs by clear and convincing evidence. ***State v. Harris***, 2010 WI 79, ¶34, 326 Wis. 2d 685, 786 N.W.2d 409 (clear and convincing burden of proof applies to due process claim of improper sentencing). Only if the defendant meets that burden does the burden shift to the State to prove that the error was harmless. ***Tiepelman***, 291 Wis. 2d 179, ¶31.

DISCUSSION

¶19 On appeal, Shaw renews his assertion that the trial court relied on inaccurate information at sentencing and argues that he is entitled to sentence

modification because the police report "seriously call[s] into question the victim's version." (Some capitalization omitted.) He states:

> The Court had to do an enormous amount of speculati[ng] to determine that the victim's version, that the sexual acts had been forcible, had been true, especially in the face of [the] two girls' report to [a detective], made on the same day as the incident. That report, along with the completely false description the victim had given of [the] man with whom she had had sexual intercourse that day, and along with the fact that she never testified under oath in any proceeding in this matter and then had refused to speak to the agent who had prepared the presentence report, made her version of the incident completely questionable.
>
> At the very least, given all of these factors that had been made known to the Court in the Motion to Modify the Sentence, the Court denied the defendant due process of law by insisting upon accepting the victim's version of the incident, without any question, and, therefore, refusing to consider modifying the defendant's sentence.

¶20 We are not persuaded by Shaw's argument. We agree with the trial court that Shaw failed to meet his burden of proving, by clear and convincing evidence, that the trial court relied on inaccurate information at sentencing. *See* ***Tiepelman***, 291 Wis. 2d 179, ¶26; ***Harris***, 326 Wis. 2d 685, ¶34. The police report that Shaw offered in support of his assertion that the victim was lying does not conclusively prove that her version of events was false. The girls may have been mistaken or lying. Likewise, the victim may have been mistaken or lying about whether the four men came to the home. Even if the men came to the home, there is no evidence that they witnessed or participated in the assault; Shaw has never suggested that the men were present when he had sexual intercourse with the victim. Thus, one can only speculate on the significance of the alleged visit to the home the same afternoon as the assault. In short, nothing in the report constitutes clear and convincing evidence that the victim's detailed statement to police about the forcible nature of the sexual assault was false.

¶21 Finally, we note that while Shaw's postconviction motion highlighted two additional facts that he believed were evidence that the victim lied about the assault being forcible—the fact that the victim called a friend before the police and later gave the police a physical description that did not match Shaw—he has not developed those arguments on appeal, and he did not file a reply brief refuting the State's interpretation of the significance of those facts.[4] We decline to develop Shaw's argument for him, *see* ***Kristi L.M. v. Dennis E.M.***, 2007 WI 85, ¶20 n.7, 302 Wis. 2d 185, 734 N.W.2d 375 (undeveloped arguments need not be addressed), and we conclude that Shaw has conceded the State's unrefuted arguments, *see* ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (arguments not refuted are deemed conceded).

By the Court.—Judgment and order affirmed.

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

[4] In his appellate brief, Shaw noted that those facts had been included in the postconviction motion, but he did not present specific argument on either of them. The State nonetheless discussed the potential meaning of those facts in its response brief. No reply brief was filed.