

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 29, 2013

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2011AP2638-CR

Cir. Ct. No. 2010CF1408

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

DAVID F. SALSURY,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEAN A. DIMOTTO, Judge. *Affirmed.*

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

¶1 PER CURIAM. David Salsbury appeals from a judgment of conviction for five felonies related to the sexual abuse of four children and from an order denying his motion for resentencing. He argues that he is entitled to resentencing because: (1) the trial court was not impartial at sentencing; and

(2) the trial court erroneously exercised its discretion at sentencing by placing “undue weight on one factor and failing to adequately explain the necessity” of the lengthy prison sentence it imposed. We reject Salsbury’s arguments and affirm the judgment and order.

BACKGROUND

¶2 Salsbury was charged with eighteen felonies in connection with the sexual abuse of four children over an eleven-year period. He entered a plea agreement with the State pursuant to which he pled guilty to five felonies, including one count of sexual exploitation of a child, one count of repeated first-degree sexual assault of the same child, and three counts of repeated sexual assault of the same child, contrary to WIS. STAT. §§ 948.05(1)(a) and 948.025(1) (2009-10).¹ Salsbury’s total exposure for those five crimes was two hundred and sixty years. The remaining thirteen counts were dismissed and read in for sentencing. The State agreed to recommend a prison sentence of unspecified length. Both parties agreed to request a presentence investigation report that would not include a recommended sentence.

¶3 The trial court accepted Salsbury’s guilty pleas and found him guilty.² A presentence investigation report was prepared, and the defense also submitted a sentencing memorandum. In addition, the trial court received victim impact statements and statements written on Salsbury’s behalf.

¹ All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted. In this case, the crimes spanned several versions of the Wisconsin Statutes, but we will cite to the 2009-10 version for simplicity’s sake.

² The Honorable David A. Hansher accepted Salsbury’s pleas, while the Honorable Jean A. DiMotto sentenced him and denied his postconviction motion.

¶4 The sentencing hearing included extensive argument from both parties.³ The State opened its presentation by reading a poem written by one of the victims that discussed her pain. The State urged the trial court to look at the seriousness of the offenses and the effect they had on the victims. It argued that the sexual assaults were “in the aggravated to high aggravated range” of seriousness due to the number of victims and the age of the victims. The State also discussed the discovery of “263 pornographic videos, including 56 videos depicting children engaging in sexual activity.” The State indicated that eight of the videos depicting sexual activity were created by Salsbury and involved the children he admitted abusing.⁴

¶5 Next, trial counsel urged the trial court to impose a sentence of ten to fifteen years of initial confinement. He argued that several factors justified that recommendation, including: Salsbury’s acceptance of responsibility; his military service, including two deployments to Iraq; his service to the community; and his efforts to make sure that his family does not suffer financially from his imprisonment. Trial counsel noted that a psychologist had completed a psychosexual risk assessment on Salsbury and had concluded that although he is a pedophile, he is at low risk to reoffend. Trial counsel also discussed the fact that Salsbury had been a sexual abuse victim as a teen, which could provide some explanation for his actions.

³ The sentencing transcript was seventy-one pages in length.

⁴ According to the criminal complaint, Salsbury also took photographs of two of the children he admitted abusing.

¶6 After hearing arguments from counsel, the trial court heard from Salsbury, who expressed his remorse and pledged to rehabilitate himself. Then, the trial court said that before sentencing Salsbury, it wanted to speak with the thirteen-year-old victim whose poem had been read aloud and who had left the courtroom.

¶7 The trial court spoke directly to the child. It gave the child a pen and a pad of paper and encouraged her to “jot a couple notes” to help her remember the trial court’s advice. The judge explained that she was a nurse before she became a judge and had a master’s degree in psychiatric nursing. The trial court told the child that she did not deserve what had happened to her and encouraged the child to use writing to begin the healing process. The trial court suggested that the child “allow water to be your cleansing, healing spirit” and encouraged her to plant some seeds or plants and think of their growth as the child’s own. The trial court also told the child that she should not cut herself, as she had apparently been doing. The trial court suggested that when the child was angry or felt pain, she should cut a doll or use a plastic Wiffle Ball bat to hit things, rather than physically harming herself. The trial court also encouraged the child to learn about female warriors and goddesses and learn to be a determined warrior. The trial court told the child that she could “have a childhood again whenever you’d like, and in that spirit,” the trial court gave her a children’s book that the court said it still enjoyed reading.

¶8 When the trial court finished talking to the victim, trial counsel stated that he “want[ed] to make a record” of his concerns about the trial court’s conversation with the victim. He explained:

While I appreciate the court's efforts to talk with the victim and gather information, and express empathy, I'm a little bit concerned by the court's efforts to essentially counsel the victim, and especially with respect to the [advice about safe] expressions of anger ... and I just want to place that on the record.

In response, the trial court told trial counsel: "I appreciate your raising your concern," but said that it did not believe that its advice was inappropriate.

¶9 The trial court then proceeded to sentence Salsbury. It discussed the serious nature of the crimes and said that "there's nothing that mitigates the aggravated nature of these crimes." It agreed with the parties that Salsbury's service to his country and community were "not a facade," but added that there was an "irreconcilable" part of Salsbury that led him to repeatedly abuse the children.

¶10 The trial court also noted several positive character traits: Salsbury had no criminal record, cooperated with law enforcement after being arrested, was doing what he could to provide for his family financially in light of his incarceration, and had a "laudable" employment history. The trial court recognized that Salsbury had expressed remorse, but it added that it did not think that Salsbury "really understand[s]" the damage he had inflicted on the children.

¶11 The trial court said that the primary purpose of its sentence was punishment, because Salsbury "knew what you were doing was wrong," and it was left to the children to "come forward and stop" the abuse. It said the second purpose of the sentence it was imposing was "deterrence ... related to protection of the community which includes four [victims] that we know of." The trial court said the third purpose of the sentence was rehabilitation for Salsbury, which had "to take place in a confined setting." Finally, it said that confinement was "needed

to protect the community, and probation would so seriously undermine the seriousness of these crimes as to be an unspeakably lenient sentence.” The trial court imposed five consecutive sentences totaling thirty-four years of initial confinement and nineteen-and-one-half years of extended supervision.

¶12 Salsbury, represented by new counsel, filed a postconviction motion seeking resentencing on grounds that “he was denied his right to a neutral and detached judge” when the trial court “placed [it]self in the position of acting as an advocate and counselor to [the victim,] not a judge deciding the fate of the defendant.” Salsbury also argued that the trial court erroneously exercised its sentencing discretion by focusing too much “on the effect the crimes had on the victims.”

¶13 The trial court held a hearing on Salsbury’s motion and ultimately denied the motion on both grounds. With respect to the argument that it was subjectively or objectively biased, it stated:

This was a sentencing hearing. It wasn’t an initial appearance. It wasn’t a preliminary hearing. It wasn’t a jury trial. And it wasn’t a plea. This man on that date was in a court that I presided over for sentencing. There’s no presumption of innocence.... It’s a fact of guilt.

When a court conducts a sentencing hearing ... [it] looks at the purposes of sentencing and evaluates or weighs, various factors in determining what it believes is the appropriate sentence for the person before the court....

....

We know by statute and by case law in Wisconsin that a victim’s point of view must be considered.... Whenever a victim comes to court in ... any kind of felony case, I invite the victim forward.... I do that because their voice is so important, and there’s something about what they say and how they say it.... This victim particularly concerned me ... because of what she endured and the length of time she’d endured it....

....

The court is aware of the fact that I sit in a black robe, in a big chair, three steps up from ... everyone else in the courtroom.... [I]t's a view that can be intimidating but also, can be a useful accoutrement of the power of the position.

And for a judge to talk to a child, especially one who's been through what this child has been through I find to be a salutary exercise.

It is part of the sentencing hearing. The sentencing is not just of the Defendant, it's a sentencing that involves input, not only from the Defendant and each of the attorneys, but also, from the victim.

(Some paragraphs combined for easier reading.)

¶14 The trial court also explained its decision for giving the victim a children's book and pen. It said that it buys copies of that particular children's book in advance so that it has them available to give to children who appear in court and that it allowed the victim to keep the pen because she indicated she was a writer.

¶15 The trial court concluded that its decision to give the victim a book and pen and its conversation with the victim did not prejudice Salsbury, explaining:

It doesn't demonstrate bias that the court speaks to the victim in a way that addresses her needs, based on [Salsbury's] ... criminal behavior, towards her.

It's part ... of acknowledging the gravity of his offenses against her, [the other victims], and the community's interests....

... [T]he community's interests in rehabilitation extends as well, to the victims of the crime.

And it does not prejudice or show bias to a Defendant, when the victim is addressed by the court, even in a very personal manner.

....

... He certainly didn't get the maximum sentences, and if the court were demonstrating bias towards him, then his sentence in all likelihood, would have been a heavier sentence.

¶16 The trial court denied the motion on the record. Subsequently, the Honorable J.D. Watts, who was filling in while the trial court was on leave, signed the written order denying the postconviction motion for the reasons the trial court stated on the record at the motion hearing. This appeal follows.

DISCUSSION

¶17 Salsbury presents two arguments: (1) the trial court was not impartial at sentencing; and (2) the trial court erroneously exercised its discretion at sentencing by placing “undue weight on one factor and failing to adequately explain the necessity” of the lengthy prison sentence. We consider each argument in turn.

I. Judicial bias.

¶18 As detailed above, the trial court at sentencing spoke directly with one of the victims and gave her a children's book and pen. Salsbury asserts that in doing so, the trial court demonstrated judicial bias. He argues that the trial court placed itself “in the position of acting as an advocate and counselor” to the victim, rather than acting as “a judge deciding the fate of Mr. Salsbury.” Therefore, he contends, “[a]ny plain reading of the transcript reveals the court appears overly focused on the victim and adopted the role of counselor and abdicated the role of judge.”

¶19 We begin our analysis with the applicable legal standards. Criminal defendants are entitled to “an impartial and unbiased judge.” See *State v. Sarinske*, 91 Wis. 2d 14, 34, 280 N.W.2d 725 (1979). “When analyzing a judicial bias claim, we always presume that the judge was fair, impartial, and capable of ignoring any biasing influences.” *State v. Gudgeon*, 2006 WI App 143, ¶20, 295 Wis. 2d 189, 720 N.W.2d 114. The presumption of impartiality is, however, rebuttable. *Id.* To determine “whether a defendant has rebutted the presumption in favor of the court’s impartiality, we generally apply two tests, one subjective and one objective.” *State v. Goodson*, 2009 WI App 107, ¶8, 320 Wis. 2d 166, 771 N.W.2d 385. “Either sort of bias can violate a defendant’s due process right to an impartial judge.” *Gudgeon*, 295 Wis. 2d 189, ¶20.

¶20 The State contends that Salsbury “forfeited the right to complain” about the trial court’s alleged bias because although trial counsel expressed his concern about the trial court’s conversation with the victim, he did not move for the trial court’s recusal. We agree that the lack of a motion for recusal constituted a forfeiture of Salsbury’s right to directly challenge the trial court’s impartiality. See *State v. Marhal*, 172 Wis. 2d 491, 505, 493 N.W.2d 758 (Ct. App. 1992) (“A challenge to a judge’s right to adjudicate a matter must be made as soon as the alleged infirmity is known and prior to the judge’s decision on a contested matter” so that litigants cannot “test the mind of the trial judge” and later attempt to disqualify the judge.) (two sets of quotation marks and citations omitted).

¶21 *Marhal* also recognized, however, that there may be grounds to vacate a sentence if the trial court should have recused itself *sua sponte*. See *id.* at 505-06. Given that, plus the fact that the trial court had an opportunity to analyze the bias issue at the postconviction motion hearing, we will address the merits of

Salsbury's claim that the trial court was subjectively and objectively biased against him.

¶22 First, the record demonstrates that in denying Salsbury's motion for resentencing, the trial court determined that it was not subjectively biased. Salsbury agrees with this assessment. The trial court's determination that it was not subjectively biased is binding, *see State v. McBride*, 187 Wis. 2d 409, 415, 523 N.W.2d 106 (Ct. App. 1994), and we will not discuss it further.

¶23 Whether the trial court was objectively biased requires greater analysis. The objective test "asks whether a reasonable person could question the judge's impartiality." *Gudgeon*, 295 Wis. 2d 189, ¶21. We must consider whether there was actual bias, which "certainly meets this objective test," or apparent bias, which can satisfy the objective test "only where the apparent bias revealed a great risk of actual bias." *See id.*, ¶¶21-24.

¶24 We conclude that Salsbury has not shown the existence of actual bias. As the State points out, a party alleging the existence of actual bias must present "objective facts" that the trial court "in fact treated [the defendant] unfairly." *See McBride*, 187 Wis. 2d at 416 (citation omitted). We agree with the State that Salsbury has failed to do so.

¶25 Salsbury has not explained how the trial court's conversation with the victim constituted unfair treatment of Salsbury. As the trial court explained when it denied Salsbury's postconviction motion, at the time it spoke with the victim, Salsbury had already conceded his guilt and it was undisputed that the victim had suffered sexual abuse for a long period of time. The trial court's

acknowledgement of the victim's suffering and its encouraging words were not unfair to Salisbury.⁵

¶26 Further, we reject Salisbury's argument "that the mere act of a court giving gifts to the victim of a crime during a sentencing hearing establishes by a preponderance of the evidence that the court was not impartial." As the trial court explained, it offered the children's book and pen as a means of encouraging the victim to move forward with her life, despite the suffering she endured as a result of Salisbury's admitted crimes against her. We are unconvinced this demonstrated actual bias against Salisbury.

¶27 We further conclude that Salisbury has not proven apparent bias. He has not presented any specific argument on apparent bias, and he did not respond to the State's statement in its response brief that Salisbury's brief did not specify whether he was asserting that the trial court's words constituted actual bias, apparent bias, or both. We decline to develop an argument on apparent bias for Salisbury. *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).

¶28 For the foregoing reasons, we conclude that Salisbury has not demonstrated that the trial court was subjectively or objectively biased against him. Therefore, we reject his argument that he is entitled to resentencing due to alleged judicial bias.

⁵ While the trial court's comments did not demonstrate bias against Salisbury, but, rather, appropriate concern for the victim, some of the trial court's suggestions to the victim arguably intruded on matters more properly within the scope of psychiatric or psychological counseling.

II. Erroneous exercise of sentencing discretion.

¶29 Salsbury challenges his sentence on grounds that the trial court erroneously exercised its discretion at sentencing by placing “undue weight on one factor”—the effect of the crimes on the victims—and failing to explain the reason for imposing a total sentence of over fifty-three years. We are unconvinced that the trial court erroneously exercised its sentencing discretion.

¶30 At sentencing, the trial court must consider the principal objectives of sentencing, including the protection of the community, the punishment and rehabilitation of the defendant, and deterrence to others, *State v. Ziegler*, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76, and it must determine which objective or objectives are of greatest importance, *State v. Gallion*, 2004 WI 42, ¶41, 270 Wis.2d 535, 678 N.W.2d 197. In seeking to fulfill the sentencing objectives, the trial court should consider a variety of factors, including the gravity of the offense, the character of the offender, and the protection of the public, and it may consider several subfactors. *State v. Odom*, 2006 WI App 145, ¶7, 294 Wis. 2d 844, 720 N.W.2d 695. The weight to be given to each factor is committed to the trial court’s discretion. *Gallion*, 270 Wis. 2d 535, ¶41.

¶31 In this case, the trial court applied the standard sentencing factors and explained their application in accordance with the framework set forth in *Gallion* and its progeny. Contrary to Salsbury’s argument, the trial court did not focus solely “on the effect the crimes had on the victims.”

¶32 The trial court began by discussing the gravity of the offenses, which it termed “aggravated” crimes that “forced suffering” on the victims. The trial court also considered Salsbury’s character, explicitly recognizing that Salsbury had a “laudable” employment history that included serving in Iraq and

award-winning work as an employee of the sheriff's department. Despite these successes, the trial court explained, there was another side of Salsbury that was "manipulative." The trial court referred to Salsbury as an "insatiable pedophile." Finally, the trial court explicitly concluded that "confinement is needed to protect the community." The sentencing transcript clearly demonstrates that the trial court considered proper sentencing factors. The fact that the trial court may have chosen to give more weight to the severity of the crimes and their effect on the victims does not constitute an erroneous exercise of discretion. *See id.*

¶33 We also reject Salsbury's argument that the trial court failed to adequately explain the reason for the sentence it imposed. It explicitly identified three purposes for the sentence it was imposing: punishment, deterrence, and rehabilitation. Its sentencing comments as a whole explain the reasoning for the sentence it chose to impose; the trial court was not required "to provide an explanation for the precise number of years chosen." *See State v. Taylor*, 2006 WI 22, ¶30, 289 Wis. 2d 34, 710 N.W.2d 466.

¶34 Although Salsbury does not explicitly state that he is challenging the severity of his sentence, he complains that he was given "what amounts to a likely life sentence" without being given "credit for his prompt acceptance of responsibility, his lack of criminal record, his continued financial support of his family, and his impressive background in the military and as a county employee."

¶35 While the trial court imposed a total term of initial confinement that was longer than that recommended by Salsbury, the total sentence of thirty-four years of initial confinement and nineteen-and-one-half years of extended supervision was less than one quarter of what could have been imposed and does not shock the public's sentiment. *See State v. Scaccio*, 2000 WI App 265, ¶18,

240 Wis. 2d 95, 622 N.W.2d 449 (“A sentence well within the limits of the maximum sentence is unlikely to be unduly harsh or unconscionable.”). Salsbury pled guilty to five serious felonies and thirteen additional felonies were read in for sentencing purposes. He will be released to extended supervision when he is in his late seventies. The sentence was not unduly harsh. *See Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975) (A sentence is unduly harsh when it 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.”).

¶36 For these reasons, we reject Salsbury’s challenge to the trial court’s exercise of sentencing discretion. Salsbury is not entitled to resentencing.

By the Court.—Judgment and order affirmed.

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

