

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 30, 2014

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. 2014AP299-CR

Cir. Ct. No. 2012CF1637

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

NICHOLAS JAMES FUCHS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: REBECCA F. DALLET, Judge. *Affirmed.*

Before Kessler and Brennan, JJ., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Nicholas James Fuchs appeals a judgment convicting him of two counts of child abuse/recklessly causing harm, one count of child abuse/recklessly causing *great* harm, and one count of second-degree recklessly endangering safety. He also appeals an order denying his motion to

modify his sentence. He argues that he is entitled to sentence modification based on two “new factors.” We affirm.

¶2 Sentence modification motions require a two-step process: (1) the defendant must demonstrate by clear and convincing evidence that a new factor exists; and (2) if a new factor exists, the circuit court must exercise its discretion to determine whether the new factor justifies sentence modification. *State v. Harbor*, 2011 WI 28, ¶¶36-37, 333 Wis. 2d 53, 797 N.W.2d 828. A new factor is ““a fact or set of facts highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in existence or because, even though it was then in existence, it was unknowingly overlooked by all of the parties.”” *Id.*, ¶40 (citation omitted). Whether a new factor exists is a question of law that we review *de novo*. *Id.*, ¶36.

¶3 Fuchs first argues that there is a “new factor” because two psychological evaluations done after sentencing conclude that he does *not* suffer from bipolar disorder, contrary to what the circuit court was told at sentencing. We agree with the State that the fact that the more recent evaluations reach different conclusions about Fuchs’ mental health is not a new factor because Fuchs’ mental health diagnosis was not highly relevant to the circuit court’s sentencing decision. To the contrary, the circuit court did not even mention Fuchs’ bipolar disorder diagnosis in framing its sentence. The only reference the circuit court made to Fuchs’ mental health was to direct him to obtain a mental health evaluation and treatment as a condition of his extended supervision. Fuchs has not shown that the new information entitles him to sentence modification.

¶4 Fuchs next argues that there is a “new factor” because the Department of Corrections decided that he did not need sexual offender treatment.

Fuchs contends this new information is highly relevant to his sentence because the circuit court based its sentence in part on an incorrect belief that Fuchs' physical abuse of one of the child victims was sexually motivated.

¶5 We disagree with Fuchs' characterization of the circuit court's sentencing remarks. The circuit court first addressed at length the horror experienced by Fuchs' victims due to his brutal treatment, which included putting a young girl in a clothes dryer and turning it on, and choking a young boy. The circuit court then turned to the child abuse count premised on the fact that Fuchs' repeatedly pinched the young boy's penis and scrotum:

And then, frankly, I am quite concerned about the grabbing of the scrotum and penis. I am concerned because it's sexual, that it is a sexual part clearly, that while there's not any indication it was for any kind of sexual gratification on your part, it certainly was a humiliation to [the victim] and a place that is extremely sensitive, that is extremely painful to have to take your underwear down in front of you and have you do that. I mean, the humiliation, and then your actual touching. It concerns me. It does. It concerns me also because of the prior sexual offense, that I know was resolved with a deferred prosecution agreement, but that involved a significant touching also. And it was a long time ago, and you were young, but the fact that I now have two in front of me of touching, I have concerns about that frankly for you in terms of why those parts? Why? Why to do that, indicates to me some kind of, if I didn't call it an attraction, it may not be, but it's some connection there with that, and it's concerning. And I think for the child, as I said before, I think the humiliation of being touched and grabbed and bruised in that area was significant.

¶6 The circuit court's comments show that it posited three possible reasons for Fuchs' actions. Fuchs may have chosen to pinch the child's groin area because it is particularly sensitive to pain, he may have wanted to humiliate the child, or there may have been an underlying sexual motivation for Fuchs' actions. While suggesting that there may have been a sexual component to Fuchs' conduct,

the circuit court also noted that “there is not any indication that it was for any kind of sexual gratification on your part.” The circuit court’s sentencing remarks, read in their entirety, show that the circuit court did not place emphasis on a potential sexual motivation for Fuchs’ conduct, although it noted the possibility in passing. Instead, it focused primarily on the pain and the humiliation Fuchs caused to the victim by targeting the child’s groin area. The fact that the Department of Corrections has concluded that Fuchs does not need sexual offender treatment is not a new factor because the circuit court did not premise its sentence on a belief that Fuchs was a sex offender.

By the Court.—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5. (2011-12).

