COURT OF APPEALS DECISION DATED AND FILED

October 1, 2015

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. 2014AP433-CR

Cir. Ct. No. 2009CF89

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

P. J. G.,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Juneau County: PAUL S. CURRAN, Judge. *Affirmed.*

Before Kloppenburg, P.J., Lundsten and Higginbotham, JJ.

¶1 PER CURIAM. P.J.G. appeals a judgment convicting him of two counts of first-degree sexual assault of a child under thirteen years of age and one count of second-degree sexual assault of a child under the age of sixteen and an order denying him postconviction relief. He was acquitted on another count

involving the same victim and two additional counts involving a different child. P.J.G. challenges the sufficiency of the evidence to support the verdicts; raises three claims of ineffective assistance of counsel; requests a new trial in the interest of justice; and, alternatively, seeks resentencing based upon a new factor, undue reliance on a single factor, or a determination that his sentences were unduly harsh. For the reasons set forth below, we reject each of these claims and affirm the judgment of conviction and postconviction order. We incorporate the relevant facts and standard of review in our discussion of each issue.

Sufficiency of the Evidence

¶2 "In reviewing challenges to the sufficiency of evidence, we give great deference to the trier-of-fact and do not substitute our judgment unless the evidence, viewed most favorably to the verdict, is so lacking in probative value and force that no reasonable fact-finder could have found guilt beyond a reasonable doubt." ***State v. Routon***, 2007 WI App 178, ¶17, 304 Wis. 2d 480, 736 N.W.2d 530.

¶3 The victim, H.R.G., testified that, following her parents' divorce, she and her brother would stay with their father, P.J.G.—who was living in his mother's basement at that time—every other weekend and one night a week. She told the jury that her father would molest her "almost every time" she visited him at her grandmother's house, from the time she was about nine, and that she could not specify an exact number of assaults since it "happened so frequently."

¶4 The first incident the victim could remember occurred in a bed she was sharing with her father in a bedroom in her grandmother's basement, after everyone else had gone to sleep. The victim explained that she and her brother would take turns sleeping in the basement bedroom, or on a pullout couch in the

main area of the basement, sometimes sharing a bed with each other, or one or both of them with their father. On that particular occasion, the victim said her brother was out in the main room on the couch and the bedroom door was closed when her father started touching her "boobs" over her clothing and then "tried putting his penis in [her] mouth." The victim said he got "just the tip of it" in before she rolled away. The jury acquitted on this count, based upon an instruction that to convict it needed to be convinced beyond a reasonable doubt that: (1) P.J.G. had sexual intercourse with H.R.G. in the form of fellatio, that is, oral stimulation of the penis; and (2) H.R.G. was under the age of thirteen at the time.

¶5 On a second occasion, the victim testified that she was sleeping with a teddy bear on the pullout couch bed in her grandmother's basement, while her brother slept in the bedroom, when her father pulled down her pants and started touching her vagina. The victim said that incident ended when she started crying and ran upstairs and locked herself in the bathroom. The jury convicted on this count based upon an instruction that it needed to be convinced beyond a reasonable doubt that: (1) P.J.G. intentionally touched the breasts and vagina of H.R.G. with the intent to become sexually aroused or gratified; and (2) H.R.G. was under the age of thirteen at the time of the sexual contact.

¶6 The victim testified about a third incident that occurred when she was twelve years old when the victim and her brother were staying in a backyard cabin with their father. On that occasion, the victim said that her father climbed into a loft where she was sleeping, got into bed with her, started touching her breasts and vagina through her clothes, then pulled down her pants and put his mouth on her vagina. While the victim was crying, her father next tried to force her to take his penis into her mouth, but she kept her mouth tightly closed. The

jury convicted on this count based upon an instruction that it needed to be convinced beyond a reasonable doubt that: (1) P.J.G. had sexual intercourse with H.R.G. in the form of cunnilingus, that is, oral stimulation of the clitoris or vulva; and (2) H.R.G. was under the age of thirteen at the time.

¶7 The victim described a fourth incident that occurred in a different cabin where her father later lived. She said she was sleeping on the couch when her father came in, sat by her feet, and began touching her vagina through her clothes. That encounter ended when the victim kicked her father. The jury convicted on this count based upon an instruction that it needed to be convinced beyond a reasonable doubt that: (1) P.J.G. intentionally touched the vagina of H.R.G. with the intent to become sexually aroused or gratified; and (2) H.R.G. was under the age of sixteen at the time of the sexual contact.

¶8 P.J.G. challenges the sufficiency of the evidence on two grounds: that the victim's testimony was insufficiently specific and consistent with prior accounts she had provided, and that it was irrational for the jury to convict on counts two through four while acquitting on count one. However, it is well established that the trier of fact "may choose to believe some assertions of the witness and disbelieve others." ***State v. Kimbrough***, 2001 WI App 138, ¶29, 246 Wis. 2d 648, 630 N.W.2d 752. Thus, it was for the jury to resolve which, if any, of the victim's allegations relating to different counts were sufficiently specific or consistent to be credible. For instance, the jury could rationally have concluded from the victim's description that her father "tried" to put his penis in her mouth during the first incident and that he was unsuccessful, and acquitted on the first fellatio count on that basis. In sum, the victim's testimony was sufficient to establish all of the elements of each of the counts of conviction, even if the jury found some reason to acquit on another charge involving the same victim.

Assistance of Counsel

¶9 Claims of ineffective assistance of counsel present mixed questions of law and fact. ***Strickland v. Washington***, 466 U.S. 668, 698 (1984). We will not set aside the circuit court's factual findings about what actions counsel took or the reasons for them unless they are clearly erroneous. ***State v. Pitsch***, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985). However, whether counsel's conduct violated the defendant's constitutional right to have effective assistance of counsel is ultimately a legal determination, which this court decides *de novo*. ***Id.***

¶10 A claim of ineffective assistance of counsel has two parts: (1) deficient performance by counsel and (2) prejudice resulting from that deficient performance. ***State v. Swinson***, 2003 WI App 45, ¶58, 261 Wis. 2d 633, 660 N.W.2d 12. To prove deficient performance, a defendant must overcome a strong presumption that his or her attorney acted reasonably within professional norms and show that his or her attorney made errors so serious that the attorney was essentially not functioning as the counsel guaranteed the defendant by the Sixth Amendment of the United States Constitution. ***Id.*** To prove prejudice, the defendant must additionally show that the attorney's errors rendered the resulting conviction unreliable in light of the other evidence presented. ***Id.*** We need not address both components of the test if the defendant fails to make a sufficient showing on one of them. ***Id.***

¶11 P.J.G. first contends that counsel provided ineffective assistance by failing to interview and present testimony from the victim's brother and grandmother about what they witnessed in the grandmother's basement, where one of the counts of conviction and the first count on which P.J.G. was acquitted were alleged to have occurred. However, the testimony that both the brother and

grandmother presented at the postconviction hearing was consistent with the victim's trial testimony about the layout of the basement and general sleeping arrangements. In particular, the brother's testimony that he "usually" slept on the couch and sometimes slept in the bedroom does not contradict the victim's testimony that each of the siblings sometimes slept in the bedroom and sometimes slept on the sectional couch with the pullout bed in the living room area. Moreover, the brother's additional testimony that he was *generally* the last person to go to bed and that he never witnessed any sexual conduct between his father and sister does not undermine the victim's account that the incidents would occur after everyone had gone to sleep, because the implication of the victim's testimony was that her father would approach her late at night *after* she and her brother had gone to bed, sometimes waking her up. Similarly, the grandmother's testimony that she did not generally go into the basement at night was consistent with the victim's testimony and did not show that the grandmother would have been in position to witness any of the alleged incidents.

¶12 P.J.G. also faults counsel for failing to move to remove an America's Most Wanted plaque commemorating his arrest from a courthouse hallway. P.J.G. did not, however, present any evidence at the postconviction hearing to suggest that any juror had seen the plaque, much less noticed P.J.G.'s name on it. The circuit court determined that it was unlikely that any juror had done so because the plaque was not prominently placed, and no juror mentioned having seen it when questioned about knowledge of the case during voir dire. We therefore conclude that P.J.G. failed to establish any prejudice from any of counsel's alleged errors.

Discretionary Reversal

¶13 WISCONSIN STAT. § 752.35 (2013-14)[1] authorizes this court to reverse a judgment by the circuit court "if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried." Such decisions are committed to this court's discretion. In order to establish that the real controversy has not been fully tried, a party must show "that the jury was precluded from considering 'important testimony that bore on an important issue' or that certain evidence which was improperly received 'clouded a crucial issue' in the case." ***State v. Darcy N. K.***, 218 Wis. 2d 640, 667, 581 N.W.2d 567 (Ct. App. 1998) (quoted source omitted). To establish a miscarriage of justice, there must be a "substantial degree of probability that a new trial would produce a different result." ***Id.*** (quoted source omitted). In either case, however, we will exercise our discretionary reversal power only sparingly. ***Vollmer v. Luety***, 156 Wis. 2d 1, 11, 456 N.W.2d 797 (1990). We have already explained why we do not view the additional testimony that the brother or grandmother could have provided as undermining the victim's account in any significant way. We decline to exercise our discretionary reversal power.

Sentence Modification

¶14 P.J.G. presents three theories for sentence modification: a new factor (which he alternately characterizes as correcting inaccurate sentencing information); undue reliance on a single factor; and the proposition that his sentences were unduly harsh. We address each contention in turn.

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[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

New Sentencing Factor and/or Inaccurate Sentencing Information

¶15 At P.J.G.'s original sentencing hearing, the circuit court was presented with information in the PSI that P.J.G. scored in the lowest risk categories for both general recidivism and violence under the COMPAS actuarial assessment tool. However, the PSI agent explicitly noted that no actuarial instruments more narrowly focused on the risk of *sex offense* recidivism had been administered, and that such risk assessments could be helpful.

¶16 In discussing P.J.G.'s history, the PSI agent included information that—in addition to the charges of sexual abuse involving the daughter of a prior live-in girlfriend on which P.J.G. was acquitted in the same trial as the current convictions—there were other charges of sexual abuse involving the niece of P.J.G.'s current wife that were dropped by Canadian authorities when P.J.G. was extradited. The PSI agent further reported that during interviews conducted during the preparation of the PSI, P.J.G.'s younger sister alleged that P.J.G. had sexually touched her from the time she was twelve to the time she was fourteen; and P.J.G.'s ex-wife alleged that P.J.G. was emotionally and verbally abusive, manipulative and controlling throughout their eight-year marriage, and became increasingly insistent that she engage in unwanted sexual acts, which led to their divorce. The PSI agent noted that P.J.G. denied any sexual abuse of the victim, his sister, or his ex-wife, and gave no opinion as to why the daughter of his former girlfriend and niece of his current wife would accuse him of sexual assault. The agent subsequently stated, "Sex Offenders in denial is an aggravating factor, are at higher risk, and are not amenable to treatment."

¶17 After he was sentenced, P.J.G. hired Dr. Christopher Tyre to conduct a psychosexual evaluation of him. Dr. Tyre assessed P.J.G. based upon clinical

observations, the Psychopathy Checklist Revised (PCL-R), the RRASOR, the Static 99, and the Static 99-R. Dr. Tyre diagnosed P.J.G. with "Adjustment Disorder with Mixed Emotional Features, secondary to current legal situation; [and] Alcohol Use Disorder, in remission, in a controlled environment" and concluded that P.J.G. was "in the lowest risk category in terms of future sexual offending." Dr. Tyre characterized his findings as "consistent" with the results of the COMPAS risk assessment, but also specifically noted that "within the area of sexual offender risk assessment, denial is not a risk factor associated with increased recidivism risk."

¶18 P.J.G. now contends that the results of the actuarial tools evaluating his risk of sexual recidivism constitute a new sentencing factor and/or that Dr. Tyre's assertion that denial is not a risk factor associated with increased recidivism shows that the PSI agent's comment that sex offenders in denial "are at higher risk" was inaccurate.

¶19 In order to obtain resentencing based upon a new factor, a defendant must establish by clear and convincing evidence that there was a fact or set of facts highly relevant to the imposition of sentence that was not known to the trial judge at the time of sentencing, either because it was not then in existence or because it was unknowingly overlooked by all the parties. ***State v. Harbor***, 2011 WI 28, ¶¶40, 52, 333 Wis. 2d 53, 797 N.W.2d 828 (reaffirming holding of ***Rosado v. State***, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975)). In order to establish a due process violation based upon inaccurate sentencing information, a defendant must establish by clear and convincing evidence both that information before the court was inaccurate and that the court relied upon the misinformation in reaching its determination. ***State v. Tiepelman***, 2006 WI 66, ¶¶9, 26, 291 Wis. 2d 179, 717 N.W.2d 1. Whether a particular set of facts constitutes a new factor and whether a

defendant has been denied due process are both questions of law that we review de novo. ***Harbor***, 333 Wis. 2d 53, ¶33; ***State v. Groth***, 2002 WI App 299, ¶21, 258 Wis. 2d 889, 655 N.W.2d 163.

¶20 Here, it is true that the circuit court did not have before it at the time of sentencing specific information relating to P.J.G.'s scores on instruments designed to evaluate the risk of sexual recidivism. However, P.J.G. offers no explanation as to why he could not have obtained a psychosexual evaluation prior to sentencing. Nor does P.J.G. demonstrate that the court or the parties unknowingly "overlooked" that information. To the contrary, the PSI explicitly pointed out that it had not been collected. It appears that P.J.G. was simply content to rely, for sentencing purposes, upon the COMPAS evaluation of P.J.G.'s low risk of general recidivism and violence—which was to his advantage—without risking that additional negative information could have been revealed by a psychosexual evaluation. Now, dissatisfied with his sentence and with nothing left to lose by submitting to evaluation, P.J.G. wishes to go back and bolster the arguments he made regarding his risk to the community by undergoing a post-sentencing evaluation and presenting the court with additional evidence about sexual recidivism rates for offenders with his background. This situation does not present a new sentencing factor.

¶21 As to the PSI agent's comment that sexual offenders in denial are not amenable to treatment and present a greater risk of sexually reoffending, P.J.G. has not demonstrated that this comment is false. Rather, he has presented one expert's opinion that this is false. We cannot conclude that the PSI agent's comment was "inaccurate" just because it differed from the opinion of P.J.G.'s postconviction expert. Furthermore, the circuit court's view of P.J.G.'s dangerousness to the community could properly take into account allegations of

sexual abuse relating to P.J.G.'s sister, his ex-wife, the daughter of his former girlfriend and the niece of his current wife, which were not reflected in the calculation of P.J.G.'s risk of sexual recidivism because they did not result in convictions that could be plugged into the actuarial instruments.

Undue Weight on Single Factor

¶22 While on signature bond prior to trial, P.J.G. moved from the Cayman Islands—where he had been granted permission to reside during the pendency of the case—to his new wife's home country, Canada. P.J.G. did not inform the court or his attorney that he had moved to another country, and subsequently missed a mandatory court appearance. At sentencing, the court commented that "the idea that somehow this court case slipped his mind is just simply not credible…I have to conclude that that indicates a consciousness of guilt."

¶23 P.J.G. argues that the court "read too much into" his missed court appearance, and asserts that the "reality" is that he moved because he had been laid off from work in the Cayman Islands, not that he fled to avoid prosecution. However, the circuit court was in the best position to judge P.J.G.'s credibility regarding his motives for moving, and the court's inference of flight was amply supported not only by the move itself, but also by P.J.G.'s failure to notify anyone about his new address and his failure to appear following the move. Moreover, the court explained that it did not view P.J.G.'s flight as the "be-all and end-all" reason for the sentences, and had only discussed the factor first because it was not certain which of the standard factors it fit under. In short, we are satisfied that the amount of weight that the circuit court placed on this factor was well within its discretion.

Harshness

¶24 A sentence may be considered unduly harsh or unconscionable only 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." ***State v. Grindemann***, 2002 WI App 106, ¶31, 255 Wis. 2d 632, 648 N.W.2d 507 (quoted source omitted). There is a presumption that a sentence "well within the limits of the maximum sentence" is not unduly harsh. ***Id.***, ¶¶31-32 (quoted source omitted).

¶25 P.J.G. faced 160 years of imprisonment, with a potential 105 years of initial confinement. *See* WIS. STAT. §§ 973.01(2)(b)1. and (d)1. (providing maximum terms of forty years of initial confinement and twenty years of extended supervision for a Class B felony); 973.01(2)(b)3. and (d)2. (providing maximum terms of twenty-five years of initial confinement and fifteen years of extended supervision for a Class C felony). The circuit court imposed thirty-three years of initial confinement, which is less than a third of the time available. Given the extended length of time over which the offenses occurred, and the resulting impact on the child victim, we do not view the sentences as excessive or disproportionate to the offenses.

By the Court.—Judgment and order affirmed.

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