COURT OF APPEALS
DECISION
DATED AND FILED

September 6, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal Nos. 2016AP1893-CR
2016AP1894-CR
2016AP1895-CR

Cir. Ct. Nos. 2013CF5263
2013CF5567
2014CF2242

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LAMONTE ALTON EALY,

DEFENDANT-APPELLANT.

APPEALS from judgments and an order of the circuit court for Milwaukee County: DANIEL L. KONKOL and M. JOSEPH DONALD, Judges. *Affirmed*.

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

¶1 PER CURIAM. Lamonte Alton Ealy appeals judgments of conviction from three circuit court cases and an order denying his motion for postconviction relief.[1] We affirm the judgments and order.

¶2 A jury found Ealy guilty of one count each of first-degree sexual assault of a child and exposing genitals to a child and two counts of attempted felony intimidation of a witness. The victim of the sex offenses was ten-year-old BG. BG alleged that Ealy made her watch "nasty" videos with him while he masturbated, then touched her breasts beneath her clothes and rubbed her vaginal area over her clothes. BG and her mother, TG, were the targets of the attempted-intimidation charges, which arose a few months later, while Ealy was jailed on the sex offenses. The two cases were charged separately but joined for trial. Ealy later pled guilty to a separate charge of possession of a firearm by a felon. The trial court imposed a total sentence of thirty-two years: twenty-one years' initial confinement (IC) and eleven years' extended supervision (ES). His postconviction motion was denied. He appeals.

¶3 Ealy first contends the evidence at trial was insufficient to prove attempted intimidation of a witness. "In a challenge to the sufficiency of the evidence, we view the evidence in the light most favorable to the jury's verdict."

[1] The Honorable Daniel L. Konkol presided over the jury trial and plea and sentencing hearings. The Honorable M. Joseph Donald entered the order denying the postconviction motion filed in regard to all three. This court granted Ealy's motion to consolidate the cases for briefing and disposition.

State v. Nelson, 2006 WI App 124, ¶52, 294 Wis. 2d 578, 718 N.W.2d 168. We will not overturn the jury's finding "if there is any credible evidence, under any reasonable view, that leads to an inference supporting the jury's finding." ***Id.*** (citation omitted). We review de novo whether evidence the jury had before it was sufficient to support its verdict. ***State v. Booker***, 2006 WI 79, ¶12, 292 Wis. 2d 43, 717 N.W.2d 676.

¶4 The State had to prove that BG and TG were witnesses—a matter not in dispute—and that Ealy knowingly and maliciously attempted to dissuade them from attending a proceeding or giving testimony at a proceeding authorized by law. *See* WIS. STAT. §§ 940.42, 940.43 (2015-16);[2] *see also* ***State v. Moore***, 2006 WI App 61, ¶10, 292 Wis. 2d 101, 713 N.W.2d 131, and WIS JI—CRIMINAL 1292 (2015). "'[M]aliciously' means an intent to vex, annoy or injure in any way another person or to thwart or interfere in any manner with the orderly administration of justice." WIS. STAT. § 940.41(1r).

¶5 The State introduced the following evidence. TG told the district attorney's [DA's] office that Ealy's mother, Latosha, told her that Ealy wanted TG and BG to not appear in court. Based on TG's report, an investigator with the DA's office executed a search warrant at Latosha's address and found "multiple letters" from Ealy.[3] In one, Ealy stated to Latosha: "[M]y only way out of here alive is if for whatever reason [TG] and [BG] don't come to my court date at trial.

[2] All references to the Wisconsin Statutes are to the 2015-16 version unless noted.

[3] The search also turned up the firearm leading to the felon-in-possession charge.

Understand me!"[4] Ealy told Latosha to "let TG read the letter" and then "get it back … [so] she won't give it to [the] DA, [and] say I been contacting her."[5] Latosha acknowledged at trial that Ealy also contacted her through phone calls from the jail and asked her to try to dissuade TG and BG from coming to court.

¶6 At least one of the letters found at Latosha's home was directed to TG's attention. It read in part:

> If you want to help a little write a letter saying B[G] admitted to lying about me touching her, watching sex movies with her etc... and [TG] get it notarized and take a copy [to] the DA office and give one to my Attorney[.] [Y]ou will not get in trouble trust me if you don't come to my trial. Do what's right!!

Latosha claimed she did not give TG the letter or otherwise relay her son's requests. TG testified that Latosha in fact did convey Ealy's message to her.

¶7 Ealy also wrote to his brother Daunte at their mother's address. One letter asked Daunte to tell TG not to come to court "[r]egardless what Police say. Or the DA. Say she or [BG] won't get in trouble especially if [TG] and B[G] say [BG] was lying." Another read in part:

> [T]ell [TG] to call my lawyer and give a statement is the only way I can honestly get out of here. They must withdraw/recant the old statement. All she gotta say is B[G] told her she lied to her and police because "Monte" [Ealy] hurt her mother. And [TG] acted as any mother should have and believe her daughter but she have gotten to the bottom of it all.

[4] For easier reading, we have omitted some internal capitalization and corrected certain spelling and punctuation errors in the portions of Ealy's letters quoted throughout this opinion.

[5] Ealy was subject to a no-contact order.

> Bro tell her if she don't do [it] these people gone [sic] take my life.
>
> Beside, nothin' can happen to [BG], she a minor, and [TG] good because she acted as a concern[ed] mother. Bro, all I need is for you to do this or make sure they don't come, even if she gotta take off work for the days … my trial is set for and stay at her mother's or a hotel paid with cash cuz they'll trace her debit card.
>
> Bro, do this for me. My life depend on it and is in yo' hands.

¶8 Law enforcement records show that between November 27, 2013, and May 13, 2014, Ealy mailed eleven letters to Latosha and three to Daunte at Latosha's address, and mailed additional letters to another address. Neither TG nor BG received, saw, or read any of the letters. Both testified at trial.

¶9 "Whoever attempts the commission of any act prohibited under [WIS. STAT. §§] 940.42 to 940.45 is guilty of the offense attempted without regard to the success or failure of the attempt." WIS. STAT. § 940.46. "Attempt" means that Ealy *intended* to prevent or dissuade TG or BG from attending a court proceeding or giving testimony and took action that indicated unequivocally that he had that intent and would have prevented or dissuaded them but for the intervention of another person or some other extraneous factor. *See* ***Moore***, 292 Wis. 2d 101, ¶10; *see also* WIS. STAT. § 939.32(3), the attempt statute. "Intent may be inferred from the defendant's conduct, including his [or her] words and gestures taken in the context of the circumstances." ***State v. Stewart***, 143 Wis. 2d 28, 35, 420 N.W.2d 44 (1988) (construing § 939.32). Once the person acts with the requisite intent and commits sufficient acts to constitute an attempt, it is not a defense to claim voluntary abandonment of the crime or that no one actually was intimidated. ***Stewart***, 143 Wis. 2d at 31.

¶10 Ealy insists, however, that ***Moore*** requires the State to show that he communicated *directly* with at least TG. There, while awaiting trial for the battery of a woman and her minor child, Moore was charged with attempted witness intimidation for repeatedly writing to and calling Mom to dissuade her and Child from testifying against him. ***Moore***, 292 Wis. 2d 101, ¶¶2-4. Moore conceded he tried to intimidate Mom through his letters and calls, but argued he could not be guilty of attempting to intimidate Child, as he did not communicate with Child directly. ***Id.***, ¶¶10-12. This court held that Moore's contact with Mom sufficiently supported his conviction for attempted intimidation of Child, as it was "obvious" under the circumstances that Moore attempted to indirectly dissuade Child through Mom, who had both the "parental responsibility and practical authority" to monitor third parties' communications with Child and the ability to influence Child's cooperation with court proceedings. ***Id.***, ¶13.

¶11 We do not read ***Moore*** as holding that communication efforts must be direct or that the "ability to influence" is limited to a parent. Here, Latosha is BG's step-grandmother, the grandmother of two of TG's children, and TG's sister-in-law;[6] Daunte is BG's uncle and TG's brother-in-law. Ealy attempted to influence TG through those familial conduits, and then to have TG influence BG. "[S]olicitation of an intermediary to perform the act of intimidation does not exonerate the person making the solicitation." ***State v. Rodriguez***, 2007 WI App 252, ¶15, 306 Wis. 2d 129, 743 N.W.2d 460.

[6] Latosha is married to TG's brother.

¶12 And as the postconviction court observed, "Nothing in the language of [WIS. STAT. §§] 940.42, 940.43, or 940.46 … or WIS JI—CRIMINAL 1292, requires the State to present evidence that the defendant *directly* communicated or attempted to *directly* communicate with a witness in order to obtain a conviction under [§] 940.43." We agree. "Our task is to construe the statute, not to rewrite it by judicial fiat." ***State v. Martin***, 162 Wis. 2d 883, 907, 470 N.W.2d 900 (1991).

¶13 The jury evidently found TG's testimony that Latosha did convey Ealy's message more credible than Latosha's claim that she did not. *See* ***State v. O'Brien***, 223 Wis. 2d 303, 326, 588 N.W.2d 8 (1999) (jury decides credibility issues and resolves conflicts in testimony). But even if Latosha testified truthfully, Ealy would not have been relieved of culpability. Latosha's decision not to carry out Ealy's illegal request constitutes intervention by another person that was beyond Ealy's control. *See* ***State v. DeRango***, 229 Wis. 2d 1, 32, 599 N.W.2d 27 (Ct. App. 1999), *aff'd*, 2000 WI 89, 236 Wis. 2d 721, 613 N.W.2d 833. He did not voluntarily abandon the attempt; he was unsuccessful. *See* ***id.*** at 32-33. There was sufficient evidence to convict Ealy of attempted witness intimidation.

¶14 Ealy next asserts that joinder of the sex-offense and attempted-intimidation cases was improper under WIS. STAT. § 971.12(1). He also argues that joinder was unduly prejudicial, as the jury could interpret his letters and phone calls as consciousness of guilt of the principal offense. We disagree.

¶15 Joinder may be proper when the offenses are of the same or similar character; based on the same act or transaction; connected together; or based on acts or transactions constituting a common scheme or plan. *See* WIS. STAT. § 971.12(1). Wisconsin courts favor initial joinder, particularly when the charged

offenses involve the same defendant. ***State v. Salinas***, 2016 WI 44, ¶36, 369 Wis. 2d 9, 879 N.W.2d 609. Such decisions are broadly construed to foster the purposes of § 971.12: trial economy and convenience; efficiency in judicial administration; and fiscal responsibility by avoiding multiple trials for the same defendant. ***Salinas***, 369 Wis. 2d 9, ¶36. Whether charges are properly joined is a question of law we review de novo. ***Id.***, ¶30.

¶16 Ealy argues that none of the WIS. STAT. § 971.12 categories allowing joinder was met. The State, by contrast, argues the charges were "connected together." When assessing whether charges are sufficiently "connected together" for the purpose of joinder, we consider whether: the charges are closely related; there are common factors of substantial importance; one charge arose out of the investigation of the other; the crimes are close in time or location or involve the same victims; the crimes are similar in manner, scheme, or plan; one crime was committed to prevent punishment for another; and joinder would serve the statute's goals and purposes. ***Salinas***, 369 Wis. 2d 9, ¶43.

¶17 Several of these factors support a conclusion that the charges against Ealy were "connected together." The crimes were close in time and location and involved a common victim; the State presented evidence at trial that Ealy asked his mother and brother to tell TG and BG not to come to court or to say they lied; and Ealy attempted to intimidate them to avoid punishment for the sex offenses. *See* ***id.***, ¶¶34, 44; *see also* ***State v. Bettinger***, 100 Wis. 2d 691, 698, 303 N.W.2d 585 (evidence of criminal acts devised to obstruct justice or avoid punishment admissible to prove consciousness of guilt of main criminal charge), *mandate amended*, 100 Wis. 2d 691, 305 N.W.2d 57 (1981). Joinder also served the goals and purposes of WIS. STAT. § 971.12, because by resolving related charges in a

single trial, it conserved judicial resources and prevented the victims from having to testify at multiple trials. *See* ***Salinas***, 369 Wis. 2d 9, ¶44.

¶18 The risk of prejudice arising due to joinder was not significant because, if tried separately, evidence of either crime would have been admissible as "other acts" evidence to complete the story of the crime on trial and to prove motive. ***Bettinger***, 100 Wis. 2d at 697-98; *see also* WIS. STAT. § 904.04(2).

¶19 In addition, Ealy forfeited this claim. While it is true that his first counsel, and he personally, opposed the State's motion to consolidate all three informations, Ealy asked that that attorney be allowed to withdraw. At the continued hearing, new counsel told the court that he believed joining the sex-offense and witness-intimidation cases was proper, in effect withdrawing former counsel's objection. Notably, this time Ealy stood silent. A defendant who selects a course of action "will not be heard later to allege error or defects precipitated by such action. Such an election constitutes waiver or abandonment of the right to complain." ***State v. Robles***, 157 Wis. 2d 55, 60, 458 N.W.2d 818 (Ct. App. 1990), *aff'd sub nom.* ***Martin***, 162 Wis. 2d 883.

¶20 Finally, Ealy asserts that the sentencing decision reflects an erroneous exercise of discretion, claiming it was inadequately explained and is unduly harsh and excessive. We disagree, and decline to remand for resentencing.

¶21 This court reviews a circuit court's sentencing decision for an erroneous exercise of discretion. ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. A "rational and explainable basis" for it must be set forth on the record. *See* ***id.***, ¶¶4, 22, 39 (citation omitted).

¶22 A review of the sentencing transcript reveals that, after explaining why probation was not appropriate, the circuit court addressed the gravity of the offense, Ealy's character and rehabilitative needs, and the need to protect the public. *See* ***id.***, ¶¶13, 25, 40. Specifically, it discussed the effects of the sexual assault on ten-year-old BG, *see* ***State v. Walker***, 2006 WI 82, ¶12 n.8, 292 Wis. 2d 326, 716 N.W.2d 498, the harm witness intimidation does to the integrity of our justice system, *see* ***State v. Scherreiks***, 153 Wis. 2d 510, 518, 451 N.W.2d 759 (Ct. App. 1989), and the easily tragic consequences of an unsecured, cocked and loaded gun being in a home with small children; Ealy's long involvement with the justice system and his failures on probation; that the victim and the public at large deserve to be protected from his criminality; and that a lengthy sentence will allow him to work on his criminal thinking patterns, education, and vocational skills.

¶23 Ealy's thirty-two-year sentence was well below the ninety-three-and-one-half-year sentence he faced. It thus "is not so disproportionate to the offense committed as to shock the public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." ***State v. Daniels***, 117 Wis. 2d 9, 22, 343 N.W.2d 411 (Ct. App. 1983). The sentence reflects a proper exercise of discretion.

By the Court.—Judgments and order affirmed.

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