COURT OF APPEALS
DECISION
DATED AND RELEASED

April 1, 1997

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

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-0413-CR

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

State of Wisconsin,

Plaintiff-Respondent,

v.

Anthony James Daniels,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DOMINIC S. AMATO, Judge. *Affirmed*.

Before Wedemeyer, P.J., Schudson and Curley, JJ.

PER CURIAM. Anthony James Daniels appeals from a judgment of conviction, following a jury trial, for first-degree sexual assault, contrary to § 948.02(1), STATS., and from the trial court order denying his motion for postconviction relief. He presents several issues and also contends that the trial

court erred in denying his postconviction motion without first having held an evidentiary hearing. We affirm.

I. FACTUAL BACKGROUND

On November 12, 1994, twelve-year-old Monique P. spent the night at her girlfriend's house where Daniels, a cousin of the girlfriend, also resided. At approximately 10:00 p.m., the girls went to bed. After she had fallen asleep, Monique was partially awakened when she felt something between her legs. Moments later, she again felt something between her legs, awoke, and found Daniels in bed with her.

A struggle ensued; Monique fled to the bathroom and locked the door behind her. After staying in the bathroom for approximately thirty minutes, she left the bathroom, entered the living room, and saw Daniels through the bedroom doorway. He began whispering to her, trying to lure her back to bed. She told him to leave her alone and threatened to tell someone.

The next evening Monique told her mother about the assault. Following an investigation, Daniels was charged with two counts of second-degree sexual assault. The information was later amended to two counts first-degree sexual assault. The jury acquitted him of the first count and convicted him of the second. The court sentenced him to twenty-five years in prison. After sentencing, Daniels moved for a new trial based on newly discovered evidence and ineffective assistance of counsel. He also moved for sentence modification. In a written order, the trial court concluded that no hearing was necessary and denied the motion.

II. ANALYSIS

A. Newly Discovered Evidence

Daniels first argues that newly discovered evidence requires a new trial. He contends that newly discovered inconsistent statements "cast[ ]

considerable doubt on the complaining witness's credibility." According to the allegations in the affidavits offered in support of the postconviction motion, Daniels drove Monique to a baby shower less than twenty-four hours after the assault. During the ride to the shower, Monique was sitting in the back seat, laughing and singing with her friends. Later in the afternoon, she was dancing with other children and making provocative overtures to Daniels. Monique also made statements to Daniels's cousin, Bridget, asking what she (Bridget) would do if she (Bridget) would be sexually abused by her (Bridget's) mother's boyfriend. Daniels contends that the information contained in these affidavits meets the requirements for newly discovered evidence and requires a new trial. We disagree.

"Motions for new trial based on newly discovered evidence are entertained with great caution." ***State v. Terrance J.W.***, 202 Wis.2d 497, 501, 550 N.W.2d 445, 447 (Ct. App. 1996). A reviewing court will affirm the trial court's exercise of discretion as long as it has a reasonable basis and was made in accordance with accepted legal standards and facts of record. ***State v. Jenkins***, 168 Wis.2d 175, 186, 483 N.W.2d 262, 265 (Ct. App.), *cert. denied*, 506 U.S. 1002 (1992). The trial court may grant a new trial based on newly discovered evidence only if: (1) the evidence came to the moving party's knowledge after the trial; (2) the moving party has not been negligent in seeking to discover it; (3) the evidence is material to the issue; (4) the evidence is not merely cumulative to that which was introduced at trial; and (5) it is reasonably probable that a new trial will reach a different result. ***State v. Kaster***, 148 Wis.2d 789, 801, 436 N.W.2d 891, 896 (Ct. App. 1989). If the newly discovered evidence fails to meet any of these tests, the moving party is not entitled to a new trial. ***Id.***

In reviewing Daniels's claim, we need not consider all the tests because it is clear that most of Daniels's "newly discovered" evidence fails the first test and the rest fails the third. Daniels knew most of the information contained in the affidavits before the trial; he witnessed Monique's alleges conduct in the car and at the baby shower. Further, if Daniels was unaware of Monique's alleged conversation with Bridget, this "new evidence" is not, as Daniels claims, an inconsistent or exculpatory statement material to any issue. Contrary to Daniels's assertion on appeal, the conversation cannot be interpreted as an accusation against Monique's mother's boyfriend. As the trial court noted:

> [Monique's] questioning of Bridget ... is wholly consistent with her fear or her reluctance to tell her mother about the incident. The affidavit of Bridget ... states Monique said she was "scared." The evidence adduced at trial supports this characterization of Monique's state of mind and her statement regarding the same. [Furthermore,] if the defendant is suggesting that it was the boyfriend of Monique's mother who committed the assault rather than the defendant ... there is absolutely no support for this assertion. There is no affidavit to the effect that [Monique's mother] had a boyfriend at the time, that he had met Monique, or that he was in a position to sexually assault the victim....

Thus, we conclude the trial court correctly denied Daniels's motion for a new trial based on new discovered evidence.

B. Due Process

Daniels next argues that the trial court erred in denying his motion for mistrial. He claims that he was denied his state and federal due process rights to a fair trial because a police officer testified that he had obtained a photograph of Daniels from the Bureau of Identification,[1] thus allowing the jury to infer that he had a criminal record.

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[1] Daniels overstates the officer's testimony. The record reflects:

> Q[PROSECUTOR] And pursuant to that information which you had from [the victim] and your conversations with other officers, did you have occasion to put together a photo array for [the victim] to look at so that you had a picture of the person who did this?
>
> A[POLICE OFFICER] Yes, I did.
>
> ....

While this court has discretion to review constitutional claims made for the first time on appeal, we need not do so if the defendant fails to address the issue adequately in his brief to this court. *See* ***State v. Sharp***, 180 Wis.2d 640, 647-48 n.2, 511 N.W.2d 316, 320 n.2 (Ct. App. 1993). Daniels's very brief argument offers nothing in support of his claim. Moreover, we note that Daniels failed to move to strike the testimony and failed to request the court to admonish the jury to disregard it. Thus he waived this claim. *See* ***State v. Williamson***, 84 Wis.2d 370, 391, 267 N.W.2d 337, 347 (1978).

C. Ineffective Assistance of Counsel

Daniels further argues that the trial court should have held a ***Machner***[2] hearing to determine whether trial counsel was ineffective for failing "to present general reputation evidence for the untruthfulness of the complainant." Although Daniels, in his brief to this court, fails to identify what evidence he has in mind, and fails to explain the potential impact of such evidence on the result of the trial, we assume he again is referring to the previously-discussed information in the postconviction affidavits. In reviewing Daniels's motion and the affidavits, the trial court concluded that no hearing was necessary because it was not reasonably probable that this evidence would have produced a different result. We agree.

We review a trial court's denial of an evidentiary hearing under the two-part test enunciated in ***State v. Bentley***, 201 Wis.2d 303, 548 N.W.2d 50 (1996):

(..continued)

QAnd how did you go about doing that?

AWe ran a check through our Bureau of Identification to see —

QAll right, let me just stop you there. Were you able to get a photograph of Anthony Daniels?

AYes.

[2] *See* ***State v. Machner***, 92 Wis.2d 797, 285 N.W.2d 905 (Ct. App. 1979).

> If the motion on its face alleges facts which would entitle the defendant to relief, the circuit court has no discretion and must hold an evidentiary hearing. Whether a motion alleges facts which, if true, would entitle a defendant to relief is a question of law that we review de novo.
>
> However, if the motion fails to allege sufficient facts, the circuit court has the discretion to deny a postconviction motion without a hearing based on any one of the three factors enumerated in ***Nelson [v. State,*** 54 Wis.2d 489, 195 N.W.2d 629 (1972).]

Id. at 310-11, 548 N.W.2d at 53 (citations omitted). In ***Nelson***, the supreme court stated that "if the defendant fails to allege sufficient facts in his motion to raise a question of fact, or presents only conclusionary allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the trial court may ... deny the motion without a hearing." ***Nelson***, 54 Wis.2d at 497-98, 195 N.W.2d at 633.

In this case, the trial court correctly concluded that Daniels failed to offer anything more than conclusory allegations of ineffective assistance of counsel. Daniels's motion merely asserted that "defense counsel failed to impeach the complaining witness's credibility by presenting extrinsic evidence of her bad reputation for untruthfulness." Daniels has failed to allege facts that, if true, would have established that counsel's failure to use this information constituted deficient performance or was prejudicial. As the trial court explained:

> The victim's allegations were substantially consistent throughout the course of the investigation.... Throughout the trial, counsel repeatedly sought to impeach the victim's credibility. On many occasions, he brought out inconsistencies in the various statements Monique P. gave to family and police, as well as the preliminary hearing. Despite these minor inconsistencies, the jury believed her. The current affidavits ... do not set forth grounds which are

> reasonably probable to secure a different result or alter the jury's verdict.

The trial court's written decision demonstrates accurate examination of the facts, application of the correct legal standard, and a rational decision making process. *See* ***Bentley***, 201 Wis.2d at 318, 548 N.W.2d at 57. Accordingly, we conclude that the trial court did not erroneously exercise discretion in denying Daniels's motion without an evidentiary hearing.

D. Discretionary Reversal

Daniels next argues that we should grant discretionary reversal and order a new trial under § 752.35, STATS.[3] Daniel contends that his ability to question the complainant's credibility was compromised because the jury did not hear the evidence set forth in the affidavits. Thus, he believes the real controversy has not been tried. We disagree.

The power of discretionary reversal should be exercised "only in exceptional cases." ***Vollmer v. Luety***, 156 Wis.2d 1, 11, 456 N.W.2d 797, 802 (1990). Under § 752.35, STATS., we will grant discretionary reversal only where the real controversy has not been fully tried or where justice has miscarried.

Once again, we note that Daniels seized numerous opportunities to attack Monique's credibility; nevertheless, the jury believed her version of the events. We conclude, therefore, that Daniels has failed to establish that justice requires a new trial.

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[3] Section 752.35, STATS., in relevant part, states:

> **Discretionary reversal.** In an appeal to the court of appeals, 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, the court may reverse the judgment ... regardless of whether the proper motion or objection appears in the record and may ... remit the case to the trial court ... for a new trial, and direct the making of such amendments in the pleadings and the adoption of such procedure in that court, not inconsistent with statutes or rules, as are necessary to accomplish the ends of justice.

E. Sentencing Discretion

Daniels further claims that, in sentencing, the trial court was not impartial; that it erroneously exercised discretion and ordered a sentence that is unduly harsh.

In reviewing whether a trial court erroneously exercised its sentencing discretion, we consider whether the trial court considered appropriate factors and whether the trial court imposed an excessive sentence. ***State v. Glotz***, 122 Wis.2d 519, 524, 362 N.W.2d 179, 182 (Ct. App. 1984). Appellate review is tempered by a strong policy against interfering with the sentencing discretion of the trial court. ***State v. Larsen***, 141 Wis.2d 412, 426, 415 N.W.2d 535, 541 (Ct. App. 1987). Further, the trial court is presumed to have acted reasonably, and the defendant bears the burden of showing unreasonableness from the record. ***State v. Echols***, 175 Wis.2d. 653, 681-82, 499 N.W.2d 631, 640, *cert. denied*, 510 U.S. 889 (1993).

Our review is limited to a two-step inquiry. We first determine whether the trial court properly exercised discretion in imposing sentence. If so, we then consider whether that discretion was erroneously exercised by imposing an excessive sentence. *See* ***Glotz,*** 122 Wis.2d at 524, 362 N.W.2d at 182. When a defendant argues that his or her sentence is unduly harsh or excessive, we will find an erroneous exercise of discretion "only where the sentence 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." ***Ocanas v. State***, 70 Wis.2d 179, 185, 233 N.W.2d 457, 461 (1975).

The sentencing court must consider three primary factors: (1) the gravity of the offense; (2) the character of the offender; and (3) the need to protect the public. ***State v. Harris***, 119 Wis.2d 612, 623, 350 N.W.2d 633, 639 (1984). The court may also consider: the defendant's record; the defendant's history of undesirable behavior patterns; the defendant's personality, character and social traits; the presentence investigation reports; the viciousness or aggravated nature of the defendant's crime; the degree of the defendant's culpability; the defendant's demeanor at trial; the defendant's age, educational background and employment record; the defendant's remorse, repentance or cooperativeness; the defendant's rehabilitative needs; the rehabilitative needs of

the victim; the needs and rights of the public; and the length of the defendant's pretrial detention. ***State v. Jones***, 151 Wis.2d 488, 495-96, 444 N.W.2d 760, 763-64 (Ct. App. 1989). Additionally, the weight given each of these factors is within the trial court's discretion. ***State v. Curbello-Rodriguez***, 119 Wis.2d 414, 434, 351 N.W.2d 758, 768 (Ct. App 1984).

The record reflects the trial court's consideration of all the required sentencing criteria. The trial court referred to the gravity of the offense and the need to protect the public. The court also noted Daniels's criminal history and, relying extensively on the presentence report and its description of Daniels's history of violence, the court considered the appropriate sentencing factors and adequately explained the bases for the sentence it imposed. Daniels has offered nothing to support his claim that the sentencing court was not impartial.

Therefore, we cannot conclude that the sentencing court erroneously exercised its discretion. Further, we cannot conclude that "the sentence is so excessive and unusual and so disproportionate to the offense committed so as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." ***Ocanas***, 70 Wis.2d at 185, 233 N.W.2d at 461. The court sentenced Daniels to twenty-five years in prison for first-degree sexual assault; thus, the sentence is well within the statutory maximum of forty years. Under the circumstances, the sentence was not unduly harsh or excessive. *See* ***State v. Daniels***, 117 Wis.2d 9, 22, 343 N.W.2d 411, 417-18 (Ct. App. 1983) ("A sentence well within the limits of the maximum sentence 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.").

III. CONCLUSION

Accordingly, we reject Daniels's arguments and affirm the judgment of conviction and the order denying his motion for postconviction relief.

By the Court. – Judgment and order affirmed.

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