COURT OF APPEALS
DECISION
DATED AND FILED

July 5, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP546-CR **Cir. Ct. No. 2014CF4500**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

FLOYD C. SAUVE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DANIEL L. KONKOL, Judge. *Affirmed*.

Before Brennan, P.J., Brash and Dugan, JJ.

¶1 PER CURIAM. Floyd C. Sauve appeals a judgment of conviction entered after a jury found him guilty of using a computer to facilitate a child sex crime. He also appeals an order denying his motion for postconviction relief. He claims the trial evidence was insufficient to prove his guilt, the circuit court erroneously admitted evidence that he used a computer to communicate with children other than the victim in this case, and he received an excessive sentence. We reject his arguments and affirm.

BACKGROUND

¶2 Sauve used a computer application to exchange sexually suggestive messages with T.N.S., a fourteen-year-old girl. Following a few weeks of communication, and soon after she told him her age, he twice successfully arranged meetings with her. Police arrested Sauve when he arrived for a third meeting. The State charged him with using a computer to facilitate a child sex crime. *See* WIS. STAT. § 948.075(1r) (2015-16).[1]

¶3 During pretrial proceedings, the State moved to admit electronic messages that Sauve sent to other preteen and teenage girls. The State contended that the messages showed Sauve's motive, plan, and intent to commit the charged crime. After a hearing, the circuit court ruled that the State could present five of the proffered message streams as evidence.

¶4 The matter proceeded to trial. T.N.S. testified that she used a computer application to exchange text messages with someone she met on the

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

Internet who subsequently turned out to be Sauve. Initially, he told her he was a fifteen-year-old boy but later he acknowledged he was thirty-six years old. After approximately two weeks of communicating electronically, he met her at the library and spent several hours with her. During the meeting, he told her she could come to his house "if she felt comfortable enough." He met with her a second time at a park. At the end of that encounter, he hugged and kissed her.

¶5 The State presented evidence of electronic messages Sauve sent to T.N.S. These included his statements that "if we meet and hang out, I won't try to grab your boobs or anything unless you let me, L-O-L," and "as long as you don't say anything and only do private stuff in private places, no one would get in trouble. I just have to trust you to keep our secret, secret."

¶6 As permitted by the circuit court's pretrial ruling, the State also presented the text of certain electronic messages that Sauve sent to other young girls. Those messages included such communications as: (1) "because of your age, our age difference you have to keep it a secret. Plus, I like to do things with women I date that you might not be ready to do yet"; (2) "what if we were making out and I grabbed your booty? What if my hands wandered to other places?"; and (3) "even at eleven you [will] still be my youngest kiss." In another message to a preteen girl, Sauve described in lurid detail the sexual activities that would take place "if you were here and we went to the park."

¶7 An investigating officer testified that he received a report from T.N.S. about her interactions with Sauve. The officer next described how, following the report, he pretended to be T.N.S. and exchanged text messages with Sauve. In those exchanges, Sauve agreed to meet the person he thought was T.N.S., said he would have time to "make out or whatever," and further said he

hoped to receive a hug and a kiss from her. The officer went on to testify that, when Sauve arrived at the meeting place, police arrested him and discovered he had a loaded handgun, several knives, and a handcuff key.

¶8 Sauve testified on his own behalf. He admitted having online conversations with T.N.S., and he described those conversations as "stupid" and "flirtatious." He also admitted that he met with T.N.S. twice and that he hugged and kissed her, but he denied any intention to have sexual relations with her.

¶9 The jury found Sauve guilty as charged, and the matter proceeded to sentencing. The circuit court imposed a bifurcated sentence of fifteen years of initial confinement and ten years of extended supervision.

¶10 Sauve filed a postconviction motion requesting reversal of his conviction on the grounds that the State did not meet its burden of proof and that the circuit court erroneously admitted evidence of his electronic communications with girls other than T.N.S. Alternatively, he requested sentence modification. The circuit court denied his claims without a hearing, and he appeals.

DISCUSSION

¶11 We begin with Sauve's challenge to the sufficiency of the evidence. We consider such a challenge under a highly deferential standard: we uphold the verdict unless the evidence, viewed most favorably to the conviction, is so lacking in probative value and force that no reasonable jury could have found guilt beyond a reasonable doubt. ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990). "If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial ... an appellate court may not overturn a verdict." ***Id.***

¶12 Before the jury could find Sauve guilty of using a computer to facilitate a child sex crime in violation of WIS. STAT. § 948.075(1r), the State was required to prove that he: (1) used a computerized communication system to communicate with an individual; (2) acted with intent to have sexual contact with the individual; (3) believed or had reason to believe that the individual was under the age of sixteen years; and (4) did an act, in addition to using a computerized communication system, to carry out the intent to have sexual contact with the individual. *See* WIS JI—CRIMINAL 2135. On appeal, Sauve focuses solely on the fourth element, asserting that "no act was introduced at the trial to prove ... he intended to accomplish, execute or carry out an intent to have sexual contact or sexual intercourse with the victim."

¶13 When evaluating the sufficiency of evidence necessary to prove the fourth element of using a computer to facilitate a child sex crime, a court properly looks at the defendant's actions in conjunction with the computerized communications. *See* ***State v. Schulpius***, 2006 WI App 263, ¶13, 298 Wis. 2d 155, 726 N.W.2d 706. Here, the State showed that Sauve twice met T.N.S. in person, and on the second occasion he hugged and kissed her. Sauve also went to a place where he thought he would have a third meeting with T.N.S., and he arrived heavily armed and carrying a handcuff key. Sauve took these actions in the context of sending computerized messages to T.N.S. and to the person he thought was T.N.S. in which he discussed "grab[bing her] boobs" and "do[ing] private stuff in private places," stated he would have time to "make out or whatever," and expressed his hope for "a hug and a kiss." We must conclude that Sauve committed multiple acts permitting the inference that he intended to have sexual contact with T.N.S. *See* ***id.***

¶14 Sauve nonetheless argues that the evidence was insufficient to prove him guilty because, he says, while his actions permit inferences that he was grooming the child for a sexual encounter, "inferences about his intentions w[ere] not sufficient." To the contrary, the law is well settled that "[j]uries often must infer intent." *See* ***State v. Williams***, 2002 WI 58, ¶79, 253 Wis. 2d 99, 644 N.W.2d 919. Indeed, "[i]ntent is by its very nature rarely susceptible to proof by direct evidence." ***Id.*** Moreover, "where more than one inference might be drawn from the evidence presented at trial, we are bound to accept the inference drawn by the jury." ***State v. Forster***, 2003 WI App 29, ¶2, 260 Wis. 2d 149, 659 N.W.2d 144. Accordingly, we must reject Sauve's challenge to the sufficiency of the evidence.

¶15 We next consider Sauve's claim that the circuit court improperly applied WIS. STAT. § 904.04(2), and wrongly admitted evidence of his communications with other young girls. The statute provides that, with an exception not relevant here, "evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith." *See* § 904.04(2)(a). The statute, however, "does not exclude the evidence when offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." ***Id.*** Whether to admit other acts evidence lies within the circuit court's discretion. *See* ***State v. Sullivan***, 216 Wis. 2d 768, 780, 576 N.W.2d 30 (1998). Our review is deferential: if the record reveals a basis for the circuit court's decision, we must uphold it. *See* ***State v. Payano***, 2009 WI 86, ¶41, 320 Wis. 2d 348, 768 N.W.2d 832.

¶16 A circuit court conducts a three-step inquiry to determine the admissibility of evidence under WIS. STAT. § 904.04(2). The circuit court must

determine whether: (1) the evidence is offered for a permissible purpose, as required by § 904.04(2)(a); (2) the evidence is relevant within the meaning of WIS. STAT. § 904.01; and (3) the probative value of the evidence is substantially outweighed by unfair prejudice or other concerns enumerated in WIS. STAT. § 904.03. *See* ***Sullivan***, 216 Wis. 2d at 772-73. Moreover, in prosecutions of sex offenses involving children, Wisconsin courts "permit a 'greater latitude of proof as to other like occurrences.'" *See* ***State v. Davidson***, 2000 WI 91, ¶36, 236 Wis. 2d 537, 613 N.W.2d 606 (citation omitted); *see also* WIS. STAT. § 904.04(2)(b)1.[2]

¶17 The first step of the ***Sullivan*** analysis requires an acceptable purpose for the proffered evidence. *See* ***Payano***, 320 Wis. 2d 348, ¶63. "[T]his 'first step is hardly demanding.'" ***Id.*** (citation and emphasis omitted). Here, the State proposed admitting Sauve's electronic conversations with multiple young girls to show Sauve's intent, motive, and plan to use electronic communication as a

[2] This case arose after passage of 2013 Wis. Act 362, amending WIS. STAT. § 904.04(2)(b). As relevant here, the statute provides:

> (b) *Greater latitude*. 1. In a criminal proceeding alleging a violation of s. 940.302(2) or of ch. 948, alleging the commission of a serious sex offense, as defined in s. 939.615(1)(b), or of domestic abuse, as defined in s. 968.075(1)(a), or alleging an offense that, following a conviction, is subject to the surcharge in s. 973.055, evidence of any similar acts by the accused is admissible, and is admissible without regard to whether the victim of the crime that is the subject of the proceeding is the same as the victim of the similar act.

Section 904.04(2)(b)1. The State indicates that, in its view, the current statute does not alter the analysis required under ***State v. Sullivan***, 216 Wis. 2d 768, 780, 576 N.W.2d 30 (1998), and ***State v. Davidson***, 2000 WI 91, ¶51, 236 Wis. 2d 537, 613 N.W.2d 606. We are aware that issues concerning the meaning and application of § 904.04(2)(b)1. are now pending before the supreme court. *See* ***State v. Dorsey***, No. 2015AP648-CR, unpublished slip op. (WI App Dec. 6, 2016), *review granted*, (WI Apr. 10, 2017). Sauve, however, did not file a reply brief and did not challenge the State's treatment of § 904.04(2)(b)1. as a codification of the long-standing "greater latitude" rule. We deem the point conceded. *See* ***Schlieper v. DNR***, 188 Wis. 2d 318, 322, 525 N.W.2d 99 (Ct. App. 1994) (party cannot complain if proposition is taken as confessed that the party does not undertake to refute).

mechanism for facilitating a sexual relationship with T.N.S. The State thus identified acceptable purposes for the proposed evidence, and Sauve does not appear to argue otherwise.

¶18 The second step in the ***Sullivan*** analysis requires that the evidence be relevant. *See* ***id.***, 216 Wis. 2d at 772. The suggestive messages Sauve sent to children about, *inter alia,* sexual activities in the park, "hiding spots," "making out," and his "wandering hands" illuminate his intent, motive, and purpose in communicating electronically with T.N.S. As the circuit court explained, the messages "paint[] a picture ... of someone who's basically trolling for victims." Accordingly, the State satisfied this step of the analysis.

¶19 The third step requires that the probative value of the proffered evidence outweigh the risk of unfair prejudice. *See* ***id***. at 772-73. Sauve asserts that the jury "must have been completely disgusted and even outraged" by the messages that he sent to other children, and he concludes that "there was therefore a very great danger of unfair prejudice." Unfair prejudice, however, refers to '"whether the evidence tends to influence the outcome of the case by improper means.'" ***State v. Marinez***, 2011 WI 12, ¶41, 331 Wis. 2d 568, 797 N.W.2d 399 (citations and internal quotation marks omitted). Thus, Sauve must demonstrate that the other acts evidence exerted an *improper* influence on the jury even though the evidence was admitted for proper purposes and was relevant to prove the crime charged. Sauve fails to carry that burden. Moreover, the record shows that the circuit court explicitly instructed the jury not to consider Sauve's electronic communications with other children as evidence that he "ha[d] a certain character trait" or that he "acted in conformity with that trait or character with respect to the offense charged in this case." The circuit court further instructed the jury that it could consider the communications only for specific proper purposes, namely,

motive, intent and plan. We presume that juries follow instructions, and we view limiting instructions as "an effective means to reduce the risk of unfair prejudice." ***Id.***, ¶41. We are satisfied that the probative value of the evidence here outweighed any risk that the jury would forsake its obligations and consider the evidence improperly.

¶20 In sum, the record reflects a proper basis for the circuit court's decision to admit the disputed other acts evidence as well as sufficient protections to avoid the risk of improperly influencing the outcome of the trial. Accordingly, we must reject Sauve's second claim for relief.

¶21 We turn to Sauve's contention that the circuit court imposed an excessive sentence. To obtain relief on this basis, a defendant must show that 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.'" ***State v. Mursal***, 2013 WI App 125, ¶24, 351 Wis. 2d 180, 839 N.W.2d 173 (citation omitted). As we recognized in ***Mursal***, however, '"[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.'" ***Id.*** (citation and one set of brackets omitted).

¶22 Using a computer to facilitate a child sex crime in violation of WIS. STAT. § 948.075(1r) is a Class C felony. Upon conviction of that crime, Sauve faced forty years of imprisonment, a $100,000 fine, or both. *See* WIS. STAT. § 939.50(3)(c). The circuit court imposed a twenty-five-year term of imprisonment, a penalty well within the maximum sentence allowed by law.

Accordingly, the sentence is not unduly harsh or excessive. *See* ***Mursal***, 351 Wis. 2d 180, ¶24.

¶23 Sauve next argues that the circuit court erred by sentencing him without first ordering a presentence investigation report (PSI). A PSI is prepared by the Department of Corrections, *see* ***State v. Greve***, 2004 WI 69, ¶10, 272 Wis. 2d 444, 681 N.W.2d 479, and the document "is one 'means through which the sentencing court receives information' about a defendant," *see* ***id.***, ¶9 (citation omitted). Whether to order preparation of a PSI is a decision resting in the circuit court's discretion. *See* ***State v. Melton***, 2013 WI 65, ¶26, 349 Wis. 2d 48, 834 N.W.2d 345. We will uphold a circuit court's exercise of discretion if the circuit court considered the relevant facts and, consistent with applicable law, reached a conclusion that a reasonable judge could reach. *See* ***State v. Jeske***, 197 Wis. 2d 905, 912, 541 N.W.2d 225 (Ct. App. 1995).

¶24 Here, Sauve told the circuit court that he was not requesting preparation of a PSI, and the prosecutor similarly decided not to make such a request. Sauve argues now that the circuit court should have ordered a PSI nonetheless because, he says, a PSI generally contains information about a defendant's "family history, his upbringing, his vocational history, his educational history, and his mental health history." Sauve, however, was clearly free to disclose exactly as much of this information himself as he believed proper and helpful to his cause. He offers no reason, and we see none, that the circuit court could not reasonably grant his request to present information about himself and his background as he saw fit without filtering that information through the Department of Corrections.

¶25 Finally, Sauve contends the circuit court erroneously exercised discretion in fashioning his sentence. "When reviewing a sentence imposed by the circuit court, we start with the presumption that the circuit court acted reasonably. We will not interfere with the circuit court's sentencing decision unless the circuit court erroneously exercised its discretion." ***State v. Lechner***, 217 Wis. 2d 392, 418-19, 576 N.W.2d 912 (1998) (citations and footnote omitted). The proper exercise of sentencing discretion involves choosing the sentencing objectives, which may include "the protection of the community, punishment of the defendant, rehabilitation of the defendant, and deterrence to others." ***State v. Gallion***, 2004 WI 42, ¶40, 270 Wis. 2d 535, 678 N.W.2d 197. In seeking to fulfill the sentencing objectives, the circuit court must consider the primary sentencing factors of "the gravity of the offense, the character of the defendant, and the need to protect the public." ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. The circuit court may also consider a wide range of other factors concerning the defendant, the offense, and the community. *See* ***Gallion***, 270 Wis. 2d 535, ¶43 & n.11. The circuit court may determine both the factors that it believes are relevant in imposing sentence and the weight to assign to each relevant factor. ***State v. Stenzel***, 2004 WI App 181, ¶16, 276 Wis. 2d 224, 688 N.W.2d 20. We search the record for reasons to sustain the circuit court's exercise of sentencing discretion. *See* ***State v. Odom***, 2006 WI App 145, ¶8, 294 Wis. 2d 844, 720 N.W.2d 695.

¶26 The circuit court considered the mandatory sentencing factors here. It discussed the gravity of victimizing a child, acknowledged the remorse Sauve expressed in his allocution, and noted the risk to the public that Sauve posed in going armed to secret meetings with a fourteen-year-old girl. The circuit court further explained that protection of the public was the paramount sentencing goal

and that Sauve must be confined for a sufficient time to ensure the community is "safe from someone who is willing to do this type of activity."

¶27 Sauve complains that the circuit court "never mentioned anything about what was needed to rehabilitate" him, but we disagree. The circuit court explained that Sauve's actions showed that he was deluding himself when he professed a lack of intent to have sexual contact with children and that he required "extensive treatment along with sex offender counseling.... The first step in that treatment is to acknowledge ... what is going on."

¶28 Sauve is similarly wrong in contending that the circuit court disregarded mitigating factors. The circuit court expressly took into account that Sauve was an educated man with an associate's degree and a history of employment, and the circuit court acknowledged that he did not misuse drugs or alcohol. The circuit court also recognized that he had no prior criminal history. In the circuit court's view, however, Sauve's conduct with T.N.S., along with his disturbing and graphic communications with other children, reflected that he was a dangerous person who required fifteen years of initial confinement and ten years of extended supervision "to make sure that the community will be safe."

¶29 The circuit court properly considered the relevant factors and reached a reasonable conclusion. Accordingly, we reject Sauve's challenge to the circuit court's exercise of sentencing discretion.

By the Court.—Judgment and order affirmed.

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