COURT OF APPEALS
DECISION
DATED AND FILED

September 28, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal Nos. 2004AP126-CR
2004AP127-CR

Cir. Ct. No. 2000CF639
2001CF380

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DENNIS L. HOHOL,

DEFENDANT-APPELLANT.

APPEAL from judgments of the circuit court for Waukesha County: MARK S. GEMPELER, Judge. *Affirmed*.

Before Snyder, P.J., Brown and Anderson, JJ.

¶1 PER CURIAM. In these consolidated appeals, Dennis Hohol appeals from judgments convicting him of three counts of second-degree sexual assault of a child contrary to WIS. STAT. § 948.02(2) (2001-02)[1] and one count of child enticement contrary to WIS. STAT. § 948.07(1) after a trial to the court. On appeal, Hohol challenges the circuit court's decision to admit other acts evidence, the sufficiency of the evidence to convict him, and the severity of his sentence. We are not persuaded by any of these challenges and affirm.

¶2 In appeal no. 2004AP126-CR, Hohol was charged with second-degree sexual assault for having sexual contact and sexual intercourse with a boy who was ten years old when the contact began in 1989. The contact continued through most of 1995. In appeal no. 2004AP127-CR, Hohol was charged with having sexual contact with a twelve-year-old boy in 1996 and 1997 after enticing the child into his vehicle. Hohol waived his right to a jury trial and had a trial to the court. The court convicted Hohol of the charges against him and imposed a thirty-five year sentence.

¶3 Prior to trial, the State moved the circuit court under WIS. STAT. § 904.04 to admit evidence that Hohol had sexual contact with boys other than the victims in the charged offenses. The State offered the evidence to establish motive, intent, preparation, and plan. The State claimed that between 1987 and 1996, Hohol engaged in sex acts with five other juvenile boys between the ages of eleven and fourteen. After a hearing, the court admitted the other acts evidence.

[1] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

¶4 On appeal, Hohol argues that the circuit court erroneously exercised its discretion when it admitted the other acts evidence. We fail to see the harm to Hohol because the circuit court specifically and clearly stated that it did not consider the other acts evidence in finding Hohol guilty of the charged crimes.[2] The court stated:

> [I] am going to note for the record that, as is readily apparent to the attorneys, that I have not in any way relied upon the other crimes, wrongs or acts evidence which I permitted to be used and which I heard at length in this trial. I have not done that on the side of caution. I have done so because it was unnecessary for me to consider that testimony. Indeed, as I would consider the testimony [of the victims in the uncharged acts], I found them to be highly credible witnesses and laudably motivated, and in considering their testimony as to the findings I have already made it's easy for me to come to the conclusion that the defendant is not only guilty of these four offenses beyond a reasonable doubt but beyond any doubt whatsoever. So I want the record to be clear on that subject.

¶5 Because the record bears out the court's determination to find guilt based only upon the evidence of the charged crimes, we will not address this issue further. *Cf.* ***Sweet v. Berge***, 113 Wis. 2d 61, 67, 334 N.W.2d 559 (Ct. App. 1983) (if a decision on one point disposes of an appeal, we will not decide other issues raised).

¶6 Hohol next claims that the evidence was insufficient to convict him. The circuit court observed that the case amounted to a credibility contest and that the court, as the fact finder, had the burden to evaluate the witnesses' credibility. The court found that the testimony of the victims was more credible than that of Hohol. The court found that the victims were resolute in their testimony and conceded when

[2] Hohol concedes in his appellant's brief that the circuit court did not base its finding of guilt on the other acts evidence.

a clear memory of events eluded them. The victims withstood "highly intense and highly skillful" cross-examination by defense counsel. The victims' demeanor and nonverbal attributes suggested that they testified truthfully that the sexual assaults and enticement occurred. In contrast, the court found that Hohol's testimony on direct examination was the product of leading questions, and his cross-examination was marked by a lack of memory, evasiveness and unresponsiveness. The court did not find Hohol truthful. The court concluded that the State proved its case beyond a reasonable doubt.

¶7 The following principles apply to a challenge to the sufficiency of the evidence before a circuit court as the fact finder. ***State v. Watkins***, 2002 WI 101, ¶67, 255 Wis. 2d 265, 647 N.W.2d 244.

> [I]n determining whether the evidence was sufficient to support a conviction … "an appellate court may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt."
>
> Our review of a sufficiency of the evidence claim is therefore very narrow. We give great deference to the determination of the trier of fact. We must examine the record to find facts that support upholding the [fact finder's] decision to convict.

State v. Hayes, 2004 WI 80, ¶¶56-57, 273 Wis. 2d 1, 681 N.W.2d 203 (footnotes omitted). If more than one inference can be drawn from the evidence, the inference which supports the fact finder's finding must be followed unless the testimony was incredible as a matter of law. ***State v. Wilson***, 149 Wis. 2d 878, 894, 440 N.W.2d 534 (1989). We defer to the fact finder's ability to "weigh and sift conflicting testimony," recognizing the fact finder's ability to assess "those nonverbal attributes of the witnesses which are often persuasive indicia of guilt or

innocence." ***Id.*** (citation omitted). Accordingly, Hohol's attempt on appeal to reargue the witnesses' credibility is unavailing.

¶8 The circuit court made credibility determinations and also cited "nonverbal attributes of the witnesses" as influencing its credibility determinations. Our task on appellate review is to determine whether the testimony deemed credible by the court satisfied the elements of the offenses.[3]

¶9 Hohol argues that the State did not meet its burden of proof in the enticement case. The elements of child enticement are set forth in WIS JI—CRIMINAL 2134: while having an intent to have sexual contact with a child, the defendant caused a child under the age of eighteen to go into a vehicle.

¶10 The victim in the enticement case testified that Hohol was his flag football coach. Hohol ingratiated himself to the victim's parents and expanded his involvement with the victim via snowmobile and hunter's safety courses. The victim traveled in Hohol's vehicle to Hohol's northern cabin during the time period charged. The victim testified that during some of these visits, Hohol had sexual contact with him.

¶11 Hohol argues that the elements of enticement were not satisfied because the victim willingly accompanied him with his parents' permission and sexual contact neither occurred nor was discussed in the vehicle. We do not find this argument convincing. The evidence at trial was that Hohol established a coaching relationship with the victim, ingratiated himself to the victims' parents,

[3] Because Hohol does not specifically argue that the elements of the sexual assault case were not proven, we do not review that evidence in detail. The victim gave testimony in support of the elements of second-degree sexual assault of a child.

took the victim to his cabin on numerous occasions and had sexual contact with him. The circuit court reasonably inferred Hohol's intent to have sexual contact with the victim when he caused the victim to enter his vehicle.

¶12 Hohol next argues that the circuit court erroneously considered other acts evidence at sentencing. Hohol is wrong. "In determining the character of the defendant and the need for his incarceration and rehabilitation, the court must consider whether the crime is an isolated act or a pattern of conduct. Evidence of unproven offenses involving the defendant may be considered by the court for this purpose." ***State v. McQuay***, 154 Wis. 2d 116, 126, 452 N.W.2d 377 (1990). While the circuit court did not consider the other acts evidence for purposes of guilt, the court properly considered such evidence at sentencing.

¶13 Finally, Hohol argues that the circuit court misused it discretion when it imposed a sentence totaling thirty-five years out of a possible fifty years. The court noted that Hohol was convicted of four serious felonies. The court considered the need to protect the public, the gravity of the offenses, Hohol's character, and the fact that he groomed his victims and ingratiated himself to the victims' families to facilitate his criminal conduct. These are all valid sentencing factors, ***State v. Jones***, 151 Wis. 2d 488, 495, 444 N.W.2d 760 (Ct. App. 1989), and the weight to be given to sentencing factors is within the wide discretion of the circuit court, ***State v. Curbello-Rodriguez***, 119 Wis. 2d 414, 434, 351 N.W.2d 758 (Ct. App. 1984). The record reveals that the discretionary decision of the sentencing judge had a "rational and explainable basis." ***State v. Gallion***, 2004 WI 42, ¶76, 270 Wis. 2d 535, 678 N.W.2d 197.

¶14 Hohol's sentence was substantially less than the maximum. A sentence which is well within the limits of the maximum sentence is unlikely to be

unduly harsh or unconscionable. *See* ***State v. Daniels***, 117 Wis. 2d 9, 22, 343 N.W.2d 411 (Ct. App. 1983).[4]

By the Court.—Judgments affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2003-04).

[4] To the extent we have not addressed an argument raised on appeal, the argument is deemed rejected. ***State v. Waste Mgmt. of Wis., Inc.***, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978). ("An appellate court is not a performing bear, required to dance to each and every tune played on an appeal.").