COURT OF APPEALS
DECISION
DATED AND FILED

May 1, 2019

Sheila T. Reiff
Clerk of Court of Appeals

Appeal No. 2017AP2184-CR **Cir. Ct. No. 2011CF1136**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BRIAN J. FARMER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Kenosha County: MARY KAY WAGNER, Judge. *Affirmed*.

Before Neubauer, C.J., Gundrum and Hagedorn, JJ.

¶1 PER CURIAM. Brian J. Farmer appeals his life sentence without the possibility of parole pursuant to the persistent repeater statute, WIS. STAT. § 939.62(2m)(a)1m., (b)2., and (c) (2017-18),[1] after a jury convicted him of two counts of second-degree sexual assault of a child contrary to WIS. STAT. § 948.02(2). He challenges the application of the persistent repeater enhancer to his sentence on statutory and constitutional grounds. For the reasons that follow, we affirm.

¶2 C.V. was thirteen years old in the summer of 2011. She met twenty-two-year-old Farmer while visiting her father. One night, as they watched a movie with a group of people, Farmer put his hand into C.V.'s vagina. The next day, he began kissing her and they had intercourse in his truck. About three weeks later, Farmer again convinced C.V. to have intercourse, and told her not to tell anyone.

¶3 C.V.'s grandmother reported the assaults to police and Farmer confessed. He was charged with three counts of second-degree sexual assault of a child, all with the persistent repeater enhancer. A jury acquitted Farmer of the first count but convicted him of the other two.

¶4 Prior to sentencing, the circuit court scheduled briefing and a hearing to determine the application of the persistent repeater enhancer. As the predicate offense, the State relied on a 2005 Illinois adult conviction for aggravated criminal sexual abuse of a twelve-year-old child, which occurred in 2004, when Farmer was fifteen years old. The State provided a certified mittimus from Illinois establishing that in 2005, Farmer, then sixteen years old, pled guilty to and was

[1] All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

convicted of one count of aggravated criminal sexual abuse of twelve-year-old K.H. The State also provided the case information sheet showing the case history, Farmer's grand jury indictment for seven counts relating to the offense, and the police reports describing the facts of the offense. Farmer filed a motion to dismiss the persistent repeater enhancer on grounds that its application deprived him of procedural due process, and that its life-without-parole sentence constituted cruel and unusual punishment.

¶5 The circuit court considered the parties' written and oral arguments and rejected Farmer's constitutional claims. After determining that the State met its burden to show that Farmer was a persistent repeater, the circuit court allowed Farmer to allocute and then imposed the mandatory sentence of life in prison without the possibility of parole.

The circuit court properly applied the persistent repeater statute to the facts of this case.

¶6 Under WIS. STAT. § 939.62(2m)(b)2., a defendant is a persistent repeater if he or she "has been convicted of a serious child sex offense on at least one occasion at any time preceding the date of violation of the serious child sex offense for which he or she presently is being sentenced under [WIS. STAT.] ch. 973, which conviction remains of record and unreversed." Pursuant to § 939.62(2m)(a)1m.,

> 1m. "Serious child sex offense" means any of the following:
>
> > a. A violation of s. 948.02, 948.025, 948.05, 948.051, 948.055, 948.06, 948.07, 948.08, 948.081, 948.085, 948.095 or 948.30 or, if the victim was a minor and the convicted person was not the victim's parent, a violation of s. 940.31.

> b. A crime at any time under federal law or the law of any other state or, prior to July 16, 1998, under the law of this state that is comparable to a crime specified in subd. 1m. a.

¶7 An out-of-state conviction is a "comparable" crime and may be counted as a prior conviction for persistent repeater purposes "only if the court determines, beyond a reasonable doubt, that the violation relating to that conviction would constitute" one of the crimes set forth in WIS. STAT. § 939.62(2m)(a)1m.a., "if committed by an adult in this state." WIS. STAT. § 939.62(2m)(d).

¶8 Farmer questions the applicability of the persistent repeater statute to the facts of his case, arguing that ambiguities in the statute cast doubt on whether the predicate offense can be an out-of-state conviction committed by a juvenile. The State asserts that the language of the statute is clear and that it unambiguously requires the court to impose a life sentence under the facts of this case.

¶9 We agree with the State that the persistent repeater statute is unambiguous and that it clearly applies to Farmer's case. It is undisputed that Farmer was facing sentencing on two violations of WIS. STAT. § 948.02, and that these violations constitute "Serious child sex offense[s]" as set forth in WIS. STAT. § 939.62(2m)(a)1m.a. *See* § 939.62(2m)(b)2. In charging Farmer as a persistent repeater, the State alleged as a predicate serious child sex offense an Illinois adult conviction that preceded the offense date for the instant charges, and which remained "of record and unreversed." *See* ***id.*** Because the conviction was from Illinois, the State introduced documents establishing that the conduct underlying Farmer's Illinois conviction for aggravated criminal sexual abuse included sexual contact with a twelve-year-old victim. The State proved, "beyond a reasonable doubt, that the violation relating to that conviction would constitute a felony

specified under par. (a) 1m. a. … if committed by an adult in this state." *See* § 939.62(2m)(d). Engaging in sexual contact with a twelve year old is "[a] violation of s. 948.02" under § 939.62(2m)(a)1m.a.

¶10 Farmer argues that the legislature did not intend for his prior Illinois adult conviction to serve as a predicate offense under the persistent repeater statute because he was fifteen years old at the time of its offense. He claims that the language in WIS. STAT. § 939.62(2m)(d) stating that an out-of-state violation must constitute one of the specified felonies "if committed by an adult" is ambiguous because it could be read to mean *only* if committed by an adult. In other words, Farmer suggests that because he was fifteen years old at the time of the Illinois offense, Wisconsin's persistent repeater statute does not allow its use as a predicate offense despite the fact that it was an adult conviction, because it was not "committed by an adult."

¶11 Farmer isolates the phrase "if committed by an adult" and reads into the statute a nonexistent ambiguity. He ignores the preceding portion of the statute, which clearly states that the court must determine "*if* ... the violation relating to that conviction *would* constitute [a serious child sex offense or a serious felony] *if* committed by an adult in this state." WIS. STAT. § 939.62(2m)(d) (emphasis added). There is nothing ambiguous about this provision. Use of the conditional words "would" and "if" plainly contemplates that the conduct need not have actually been committed by an adult. It is black-letter law that courts do not interpret statutory language in isolation. ***State ex rel. Kalal v. Circuit Court for Dane Cty.***, 2004 WI 58, ¶46, 271 Wis. 2d 633, 681 N.W.2d 110. Reading the sentence in its entirety provides the circuit court a clear directive on how to determine whether a prior conviction applies that is at odds with Farmer's interpretation.

¶12 Farmer also claims that "[t]he ambiguity is enhanced" because juvenile adjudications from Wisconsin are excluded from being counted as priors under WIS. STAT. § 939.62(3)(a). This argument is unpersuasive, however, considering that the legislature also excluded out-of-state juvenile adjudications from counting as priors under the persistent repeater statute. *See* § 939.62(3)(b) ("In case of crimes committed in other jurisdictions, the terms do not include those crimes which are equivalent ... to offenses handled through proceedings in the court assigned to exercise jurisdiction under [WIS. STAT.] chs. 48 and 938."). Farmer makes no mention of this subsection. The logical reading of the statute as a whole is that the legislature intended convictions for which a juvenile was prosecuted as an adult to count for the persistent repeater statute, provided the underlying conduct would constitute a qualifying felony if an adult committed the act in Wisconsin.

¶13 Next, Farmer argues that the State did not meet its burden to prove beyond a reasonable doubt that the underlying conduct from his Illinois conviction would constitute one of the crimes set forth in WIS. STAT. § 939.62(2m)(a)1m.a. We disagree.

¶14 The court was presented with ample evidence from which to determine beyond a reasonable doubt that the conduct underlying Farmer's Illinois conviction would constitute second-degree sexual assault of a child by sexual contact under WIS. STAT. § 948.02[2] if committed by an adult in Wisconsin. Along

[2] The persistent repeater statute states that any violation of WIS. STAT. § 948.02 qualifies as a serious child sex offense for purposes of the sentence enhancer. *See* WIS. STAT. § 939.62(2m)(a)1m.a. WISCONSIN STAT. § 948.02(1)(e) provides that "[w]hoever has sexual contact … with a person who has not attained the age of 13 years is guilty of a Class B felony," while § 948.02(2) proscribes sexual contact with a person under the age of sixteen, a Class C felony.

with the certified judgment of conviction, the State also provided the court with the police reports from the investigation of Farmer's Illinois sexual abuse. The police reports included a detailed explanation from the victim about what Farmer did to her, which included Farmer and a friend forcibly groping and digitally penetrating a twelve-year-old girl, and attempting to force her to perform oral sex on them. Farmer admitted this conduct to the police. It was also corroborated by Farmer's co-actor. Additionally, the PSI, which the court had before it, gave a detailed description of the Illinois sexual abuse. Farmer himself admitted to the court that this conduct satisfied the elements of § 948.02.[3]

¶15 Farmer argues that because his Illinois conviction arose from a guilty plea, "the circuit court was obligated to ensure that the State had provided evidence, beyond a reasonable doubt, that the facts stipulated to and relied upon in accepting Mr. Farmer's guilty plea in Lake County, Illinois established a factual basis that would support a conviction for a serious felony in Wisconsin." Farmer characterizes this as an issue "of first impression" and asserts that the State failed to meet this burden. Farmer suggests that the State needed to introduce a transcript of the Illinois plea or sentencing hearing, or perhaps "documentation of memorialized facts admitted to by the [then] sixteen-year-old Mr. Farmer or accepted by the Lake County Court."

¶16 We are not persuaded. Farmer provides no legal authority requiring such an undertaking. Additionally, Farmer's argument ignores the record before

[3] At the persistent repeater hearing, trial counsel did not dispute that the violation relating to Farmer's Illinois conviction constituted second-degree sexual assault of a child, acknowledging that it involved "sexual contact according to how it's defined in Wisconsin of a child that's under the age of thirteen."

the circuit court amply establishing that the conduct relating to his Illinois conviction easily constitutes a violation of WIS. STAT. § 948.02.

¶17 Farmer also claims that the circuit court retained discretion not to apply the persistent repeater enhancer because WIS. STAT. § 939.62(2m)(d) says that "the conviction *may* be counted as a prior conviction … only if the court determines" that it is a qualifying serious child sex offense. (Emphasis added.) He asserts that the court's discretion "applied within the court's decision as to whether the statutes put before the court were comparable, and whether the circumstances surrounding Mr. Farmer's prior made it comparable to a Wisconsin statute."

¶18 Though Farmer's argument is somewhat convoluted, it appears to be another challenge to the circuit court's analysis determining that Farmer's Illinois conviction was comparable to a Wisconsin serious child sex offense. For example, he asserts as "a clear error" the circuit court's admission "that it felt it did not have the discretion to consider whether or not the juvenile nature of Illinois statutes affected the comparison of Mr. Farmer's Illinois conviction to a Wisconsin statute." Here, he suggests that the circuit court should have compared Illinois' and Wisconsin's waiver procedures as well as the maximum penalties of the predicate Illinois offense and the comparable Wisconsin offense.

¶19 Nothing in the persistent repeater statute supports the relevance of Farmer's proffered comparisons. As we previously concluded, the circuit court properly determined beyond a reasonable doubt that Farmer was a persistent repeater. To the extent Farmer is asserting that the circuit court may, in its discretion, decide not to impose a life sentence even after determining that the defendant is a persistent repeater, we disagree. Pursuant to WIS. STAT.

§ 939.62(2m)(c), the circuit court is required to impose a life sentence if the enhancer is pled and proven.

Farmer has not established that the persistent repeater statute is unconstitutional as applied to him.

¶20 As Farmer acknowledges, the Wisconsin Supreme Court has previously upheld the persistent repeater statutory scheme as facially constitutional. ***State v. Radke***, 2003 WI 7, 259 Wis. 2d 13, 657 N.W.2d 66. Farmer's motion to dismiss in the circuit court asserted that "as applied to the defendant, WIS. STAT. § 939.62(2m)(b) is so grossly disproportionate that it violates procedural due process and the prohibition on cruel and unusual punishment under the Eighth Amendment to the United States Constitution and Article I, Section 6, of the Wisconsin Constitution." On appeal, he argues that "[t]he application of the Persistent Repeater Statute to Mr. Farmer, despite his not having received the protections and procedures available in the Wisconsin juvenile system, deprives Mr. Farmer of Substantive Due Process and treats him disparately from similarly situated individuals within Wisconsin."

¶21 In making his as-applied challenge, Farmer asserts that his case is distinguishable from ***Radke***, and proceeds to list the differences he deems relevant to a constitutional analysis. He asks this court to consider that he did not go through a waiver process in Illinois even though he was fifteen years old when the predicate offense occurred and sixteen upon conviction; that had Illinois charged only the offense to which he pled, his prosecution would have commenced in Illinois juvenile court; that the predicate crime carries a lower penalty than WIS. STAT. § 948.02, the Wisconsin offense to which it was deemed comparable; that had the predicate offense occurred in Wisconsin he would have been charged as a

juvenile and would have faced an adult conviction only if waived into adult court; and that his predicate conviction cannot be used in Illinois to enhance a subsequent Illinois sentence.

¶22 The State's brief sets forth the constitutional concepts referenced by Farmer, including substantive due process, procedural due process, the Eighth Amendment's prohibition on cruel and unusual punishment, and the Full Faith and Credit Clause. As to each potential constitutional claim, unlike Farmer's brief, the State's brief addresses the relevant legal principles and standards, and explains why none of these principles and standards support Farmer's "as applied" challenge. For example, the State effectively argues that Farmer has no substantive due process right to be treated as a juvenile in Illinois, that there was no procedural due process violation because Farmer had no protectable liberty interest in Wisconsin's juvenile waiver procedures where his crime and conviction occurred in Illinois, that the Full Faith and Credit Clause does not prevent Wisconsin from recognizing an Illinois judgment and applying its repeater statute based on the Illinois conviction, and that Farmer's Eighth Amendment claim is wholly undeveloped.

¶23 We agree with the State that Farmer erroneously conflates multiple distinct legal concepts, and fails to set forth a cognizable as-applied constitutional challenge. Farmer's reply brief does not discuss the problems pointed out in the State's brief, and offers no effective response to the State's analysis. To the extent Farmer intended to make a different argument, we will neither develop his argument for him, *see* ***State v. Gulrud***, 140 Wis. 2d 721, 730, 412 N.W.2d 139 (Ct. App. 1987), nor address inadequately briefed issues, *see* ***State v. Flynn***, 190 Wis. 2d 31, 58, 527 N.W.2d 343 (Ct. App. 1994).

By the Court.—Judgment affirmed.

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