COURT OF APPEALS
DECISION
DATED AND FILED

April 5, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal Nos. 2005AP285-CR
2005AP286-CR

Cir. Ct. Nos. 2002CF1094
2003CF51

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DUSTIN A. CUMMINGS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and order of the circuit court for Waukesha County: MICHAEL O. BOHREN and RALPH M. RAMIREZ, Judges. *Affirmed.*

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

¶1 PER CURIAM. Dustin A. Cummings appeals from a judgment of conviction of three counts of second-degree sexual assault of a child and one count

of exposing genitals to a child and from an order denying his motion for postconviction relief. He argues that the charges should not have been joined for trial, that the charging period of one of the assaults was overbroad, and that his sentence is unduly harsh. We affirm the judgment and order.

¶2 Cummings was first charged with engaging in sexual intercourse with fourteen-year-old Amy N.G. between March 19 and 20, 2002. Amy met and communicated with Cummings via the Internet. Amy let Cummings into her bedroom through the window very late one night, and they had sexual intercourse.

¶3 Cummings was subsequently charged with the sexual assault of two other girls, Ashley M.C. and Bonnie R.G, both age fourteen. The complaint alleged that Cummings had penis to vaginal contact with Ashley M.C. at some time between September 1 and 30, 2001. Ashley M.C. had introduced Cummings to Amy N.G, the victim in the first charged case. The complaint also alleged that Cummings had contacted Bonnie R.G. via the Internet and that they talked online for several weeks. On February 11, 2001, Cummings picked Bonnie R.G. up at her home. While in the back seat of his car, Cummings touched Bonnie R.G.'s breasts and there was oral-to-penis contact when Bonnie R.G. felt compelled to comply with his desire for oral sex. The prosecution immediately moved for joinder of all the charges.

¶4 Following the preliminary hearing, the information in the second filed case charged Cummings only with respect to his February 11, 2001 date with Bonnie R.G.[1] Ultimately the two cases were joined for trial. Cummings then gave

[1] The information charged Cummings with exposing his genitals to a child and two counts of sexual assault.

notice of an alibi defense. Subsequently, the prosecution's motion to amend the information was granted. The information was amended to allege that the assault of Amy N.G. occurred between March 1, 2002 and early April 2002.

¶5 A court may order two or more complaints or informations to be tried together if the crimes "could have been joined in a single complaint, information or indictment." WIS. STAT. § 971.12(4) (2003-04).[2] Two or more crimes may be charged in the same complaint, information or indictment if the crimes charged, "are of the same or similar character or are based on the same act or transaction or on 2 or more acts or transactions connected together or constituting parts of a common scheme or plan." Sec. 971.12(1). The joinder determination involves two inquires: first, whether the charges are of the same or similar character, and second, whether the defendant is prejudiced by a joinder of the crimes. *See* ***State v. Locke***, 177 Wis. 2d 590, 596-97, 502 N.W.2d 891 (Ct. App. 1993). The first inquiry is a question of law that we review without deference to the trial court. ***Id.*** 596. The second inquiry requires the trial court to exercise its discretion by balancing potential prejudice to the defendant, if any, against the interests of the public in conducting a single trial on the multiple counts. ***State v. Nelson***, 146 Wis. 2d 442, 455, 432 N.W.2d 115 (Ct. App. 1988). We review that determination for an erroneous exercise of discretion. ***Id.*** at 456.

¶6 Cummings argues that the two crimes are not similar and do not constitute parts of a common scheme or plan. We do not agree. To be of the "same or similar character" under WIS. STAT. § 971.12(1), the crimes "must be the

[2] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

same type of offenses occurring over a relatively short period of time and the evidence as to each must overlap. It is not sufficient that the offenses involve merely the same type of criminal charge." ***State v. Hamm***, 146 Wis. 2d 130, 138, 430 N.W.2d 584 (Ct. App. 1988) (citation omitted). Here the same crimes are charged and both cases involve fourteen-year-old victims. In each case, Cummings communicated with the victim via the Internet and after several conversations, arranged to be alone with the victim. The crimes are connected by the same modus operandi of targeting younger girls and grooming the victim via Internet chat. *See* ***State v. Hall***, 103 Wis. 2d 125, 139, 307 N.W.2d 289 (1981). Although the crimes occurred thirteen months apart, that is still a relatively short period of time that does not break the connection between them. *See* ***Hamm***, 146 Wis. 2d at 139-40 (lapse of fifteen to eighteen months deemed still within a relatively short time period). The connection between the crimes is also not broken by the fact that one case involved oral sex and the other sexual intercourse. The difference in the physical sexual act does not detract from the common plan and common intent. Joinder was proper.

¶7 Cummings claims that joinder is prejudicial to him because it allowed the jury to believe he had done something wrong since there were charges involving two different victims. "Substantial prejudice" is required. *See* ***Locke***, 177 Wis. 2d at 597. The risk of prejudice is not significant when evidence of the counts sought to be severed would be admissible in the separate trials of each. ***Id.*** "The test for failure to sever thus turns to an analysis of other crimes evidence under ***Whitty v. State***, 34 Wis. 2d 278, 149 N.W.2d 557 (1967)." ***Locke***, 177 Wis. 2d at 597. The trial court concluded that the allegations in each case would be admissible in separate trials as relevant and probative of intent and motive. *See* WIS. STAT. § 904.04(2).

¶8 There is a greater latitude of proof of other like occurrences in cases involving the sexual assault of children. *See* ***State v. Davidson***, 2000 WI 91, ¶36, 236 Wis. 2d 537, 613 N.W.2d 606. As the trial court recognized, the other crimes evidence was admissible for purposes of intent and motive. Cummings does not specifically argue that the evidence of each crime would not have been admissible as other acts evidence. His contention that joinder led to confusion of the issues may be read to suggest that the probative value of other crime evidence was substantially outweighed by the danger of unfair prejudice, confusion, or delay. *See* ***id.***, ¶35. But his suggestion falls far short of establishing that the other crime evidence would not have been admissible in separate trials. We conclude the trial court properly exercised its discretion in determining that there was not sufficient prejudice requiring separate trials.

¶9 Cummings argues that the allegation that the assault against Amy N.G. occurred between March 1, 2002 and early April 2002, is overbroad and prevented him from developing and offering an alibi defense. He contends there should be no liberality in the date of the assault because the victim was not of such a young age as to render her unable to pinpoint the date. *See* ***State v. Fawcett***, 145 Wis. 2d 244, 249, 426 N.W.2d 91 (Ct. App. 1988) ("Young children cannot be held to an adult's ability to comprehend and recall dates and other specifics."). Although a criminal charge must be sufficiently stated to allow the defendant to plead and prepare a defense, time is not of the essence in sexual assault cases, and proof of an exact date is not required. ***Id.*** at 250. Whether the complaint is constitutionally sound with respect to allowing the defendant to plead and prepare a defense is a question of law. ***Id.*** The factors to consider in determining whether the charge is sufficiently stated are:

> (1) the age and intelligence of the victim and other witnesses; (2) the surrounding circumstances; (3) the nature of the offense, including whether it is likely to occur at a specific time or is likely to have been discovered immediately; (4) the length of the alleged period of time in relation to the number of individual criminal acts alleged; (5) the passage of time between the alleged period for the crime and the defendant's arrest; (6) the duration between the date of the indictment and the alleged offense; and (7) the ability of the victim or complaining witness to particularize the date and time of the alleged transaction or offense.

Id. at 253.

¶10 In ***Fawcett***, a six-month charging period was reasonable in light of the victim being ten years old. ***Id.*** at 254. Amy N.G. was fourteen at the time of the crime, and nothing suggests that she can be held to an adult standard of date retention. She was still a child, and some leeway must be allowed. Here the assault was not reported to authorities until August 2002, more than four months after it happened. Amy N.G. thought the incident occurred on a Tuesday in late March 2002, possibly March 19 and 20. She also believed she spoke on the phone with Cummings the night he came over. Phone records indicated calls to Cummings' house on other dates in that time period but not on March 19 and 20. There was no nearby remarkable event that would have seared the date in the victim's memory. The time period in which the assault occurred was narrowed as was reasonably possible given the victim's recollection. Moreover, Cummings' only claim of prejudice is that he could not develop an alibi defense. ***Fawcett*** rejected the notion that a defendant's desire to present an alibi defense makes time a necessary element of the offense. ***Id.*** at 254 n.3. Cummings was not denied the right to present a defense by the amendment of the charging period.

¶11 Cummings' final claim is that his sentence is unduly harsh because he had no prior criminal record. Cummings faced a maximum sentence of ninety

years and nine months, with a maximum of sixty years and nine months of initial confinement. He was sentenced to a total of five years' initial confinement and five years' extended supervision for the three crimes against Bonnie R.G. For the sexual assault of Amy N.G., a consecutive term of five years' initial confinement and five years' extended supervision was imposed but stayed in favor of ten years' consecutive probation.

¶12 A strong presumption of reasonableness is afforded sentencing decisions because the trial court is in the best position to consider the relevant factors and assess the defendant's demeanor. *See* ***State v. Setagord***, 211 Wis. 2d 397, 418, 565 N.W.2d 506 (1997). A sentence will be deemed excessive "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 (1975). "A sentence well within the limits of the maximum sentence is unlikely to be unduly harsh or unconscionable." ***State v. Scaccio***, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449.

¶13 The sentence imposed is well within the maximum. The trial court explained that probation would depreciate the seriousness of the offenses. It considered the offenses serious because Cummings engaged in a pattern of targeting girls much younger than himself for sex and he was bold enough to sneak into one girl's house. The court identified the need to protect the public as the objective to be served by the sentence. We reject Cummings' contention that by commenting that Cummings refused to accept responsibility for his action, the trial court impermissibly punished him for taking the cases to trial. Rather, the trial court's observation pertained to Cummings' maturity and risk to reoffend

without his acknowledgement that his behavior was inappropriate. It was a permissible consideration. *See* ***State v. Baldwin***, 101 Wis. 2d 441, 459, 304 N.W.2d 742 (1981) (Sentencing courts are "obligat[ed] to consider factors such as the defendant's demeanor, his need for rehabilitation, and the extent to which the public might be endangered by [the defendant's] being at large. A defendant's attitude toward the crime may well be relevant in considering these things." (Citation omitted.)). The sentence was a proper exercise of discretion and is not unduly harsh.[3]

By the Court.—Judgment and order affirmed.

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

[3] Although we need not specifically address it, the postconviction court's ruling that the sentence is not unduly harsh was a proper exercise of discretion. *See* ***State v. Grindemann***, 2002 WI App 106, ¶30, 255 Wis. 2d 632, 648 N.W.2d 507 (we review the trial court's conclusion that the sentence imposed was not unduly harsh for an erroneous exercise of discretion).