COURT OF APPEALS DECISION DATED AND FILED

September 28, 2006

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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

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

Appeal No. 2005AP2024-CR **Cir. Ct. No. 2004CF34**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TIMOTHY D. DOPKE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Waupaca County: PHILIP M. KIRK, Judge. *Affirmed*.

Before Dykman, Deininger and Higginbotham, JJ.

¶1 PER CURIAM. Timothy Dopke appeals from a judgment convicting him of multiple Class C and D felonies arising from his sexual solicitation of what turned out to be a police officer posing as a fifteen-year-old

girl in an internet chat room. He also appeals from an order denying his postconviction motion. We affirm for the reasons discussed below.

¶2 Dopke first attempts to challenge the jury instruction which was given on the counts of attempted second-degree sexual assault of a fictitious child. He claims that the instruction failed to adequately inform the jury that the State had to prove that the defendant believed the person was under the age of sixteen years. We conclude that Dopke has waived any direct challenge to the jury instruction because he did not object to it at trial or in his postconviction motion. ***State v. Schumacher***, 144 Wis. 2d 388, 408-09, 424 N.W.2d 672 (1988).

¶3 Apparently recognizing that the issue was not properly preserved, Dopke also asks this court to exercise its discretionary reversal power based on the jury instruction. WISCONSIN STAT. § 752.35(2003-04)[1] allows this court to reverse a judgment "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." There are separate criteria for analysis under each of these two grounds for reversal. ***State v. Wyss***, 124 Wis. 2d 681, 732-36, 370 N.W.2d 745 (1985). We may conclude that the controversy has not been fully tried where an error in the jury instructions has been waived by failure to object. *See* ***Vollmer v. Luety***, 156 Wis. 2d 1, 20, 456 N.W.2d 797 (1990). We will exercise our discretionary reversal power only sparingly. ***Id.*** at 11.

¶4 Dopke has not persuaded us that the allegedly deficient jury instruction prevented the real controversy from being fully tried. As the State

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

points out, both counsel argued to the jury that the State needed to prove that Dopke believed he was chatting with and arranging to meet a fifteen-year-old girl under the instruction that was given. Therefore, we see no basis to exercise our discretionary reversal power.

¶5 Dopke next claims that his sentences were unduly harsh and that the trial court failed to adequately consider factors that would have supported probation terms. The court imposed concurrent terms of three years of initial incarceration and ten years of extended supervision on each of the four Class D felonies and concurrent terms of three years of initial incarceration and seven-and-a-half years of extended supervision on each of the two Class C felonies.

¶6 In order to properly exercise its discretion, a trial court should discuss relevant factors such as the severity of the offense and character of the offender and relate them to sentencing objectives such as the need for punishment, protection of the public, general deterrence, rehabilitation, restitution, or restorative justice. *See generally* ***State v. Gallion***, 2004 WI 42, ¶¶39-46, 270 Wis. 2d 535, 678 N.W.2d 197. The trial court may decide what weight to give each factor. ***State v. Schreiber***, 2002 WI App 75, ¶8, 251 Wis. 2d 690, 642 N.W.2d 621. A sentence will be considered unduly harsh or unconscionable only when it 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 it right and proper under the circumstances." ***State v. Grindemann***, 2002 WI App 106, ¶31, 255 Wis. 2d 632, 648 N.W.2d 507 (citation omitted). There is a presumption that a sentence "well within the limits of the maximum sentence" is not unduly harsh. ***Id.***, ¶¶31-32 (citation omitted).

¶7 The maximum imprisonment terms for Class C and D felonies are forty years and twenty-five years, respectively. WIS. STAT. § 939.50(3)(c) and (d). The sentences imposed here were well under the maximum available penalties, and were not so disproportionate as to shock the conscience, particularly since they were all ordered concurrent rather than consecutive. We do not deem them unduly harsh.

¶8 Nor are we persuaded that the trial court failed to adequately explain why it imposed prison time rather than probation. The court acknowledged that the seriousness of the offense was mitigated by the fact that there was no actual victim, and also that ninety-eight percent of Dopke's personality traits were good. However, it concluded that prison time was still warranted to protect the public because all the positive traits Dopke exhibited in public did not prevent him from displaying his "bad side" as a "high-tech playground pervert" in private. The court emphasized that Dopke not only believed that that he was going to have sex with a fifteen-year-old virgin, but that he was also planning to webcast images of her. We are satisfied that the court's explanation of the sentences was sufficient under ***Gallion***.

By the Court.—Judgment and order affirmed.

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