COURT OF APPEALS
DECISION
DATED AND FILED

February 13, 2007

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2005AP1038-CR **Cir. Ct. No. 2003CF4010**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BENNETT CANADY,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEAN W. DIMOTTO, Judge. *Affirmed*.

Before Fine, Curley and Kessler, JJ.

¶1 PER CURIAM. Bennett Canady appeals from a judgment of conviction for the second-degree sexual assault of a child, and from a postconviction order denying his motion for resentencing. The issue is whether Canady's constitutional rights to due process of law and to a jury trial were

violated when the trial court considered the evidence from the kidnapping and first-degree sexual assault charges for which he was acquitted when it imposed the maximum sentence. Evidence from a related crime for which the defendant was acquitted may be used when imposing sentence for the convicted crime, as long as the sentence imposed does not exceed the statutory maximum penalty for the convicted offense. *See* ***State v. Bobbitt***, 178 Wis. 2d 11, 16-19, 503 N.W.2d 11 (Ct. App. 1993). Therefore, we affirm.

¶2 The State charged Canady with kidnapping, and the first- and second-degree sexual assaults of his wife's fourteen-year-old niece. At trial, Canady admitted that he had sexual relations with his under-age step-niece, although he denied that it was at gunpoint or that he had kidnapped her. His counsel urged the jury to acquit him of the kidnapping and first-degree sexual assault charges, but acknowledged Canady's admission to the second-degree charge. The jury returned a guilty verdict for the second-degree sexual assault, and not guilty verdicts for the kidnapping and first-degree sexual assault charges. The trial court imposed the twenty-year maximum penalty for the second-degree sexual assault conviction. *See* WIS. STAT. §§ 948.02(2) (1999-2000); 939.50(3)(bc) (1999-2000).[1]

¶3 At trial, the State portrayed these incidents as forced sexual assaults, whereas Canady portrayed the victim as cooperative.[2] At sentencing, the

[1] This offense occurred on January 7, 1999, but was not charged until after the return of DNA evidence several years later. It was tried in 2004. Although WIS. STAT. § 939.50(3)(bc) (1999-2000) was amended and became effective on December 31, 1999, and increased the maximum potential penalty for a BC felony from twenty to thirty years, the amendment became effective after the commission of this offense.

[2] Consent (or cooperation) is not a defense to statutory rape; when we use that terminology in this case we mean that the contact was not forcible in the factual sense, we do not (continued)

prosecutor urged the trial court to impose the maximum sentence, insisting that these were forced sexual assaults. Defense counsel objected, arguing that the "[j]ury has spoken," and again explained the defense theory of the case. Defense counsel then urged the trial court to limit its consideration of the evidence to the convicted count, and requested a fifteen-year stayed sentence in favor of a four-year probationary term conditioned upon a one-year term in the House of Correction with Huber release privileges.[3]

¶4 The trial court expressly addressed whether it is proper to "consider the full extent of the crime as it was charged or whether [it is] precluded from doing that because this gentleman was acquitted of the kidnapping and first degree sexual assault." It concluded that "[t]he law allowing [it] to in fact consider it is long-standing." It then analyzed the ***Bobbitt*** line of cases, explaining that Wisconsin law allows the "consider[ation of] conduct for which the [d]efendant has been acquitted."[4] ***Bobbitt***, 178 Wis. 2d at 16-19.

¶5 In his postconviction motion Canady seeks resentencing, contending that the trial court's consideration of the charges for which he was acquitted was a denial of his right to a jury trial because it essentially superseded the findings of the jury, citing ***Blakely v. Washington***, 542 U.S. 296 (2004), and ***Apprendi v. New***

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mean it was consensual in the legal sense. *See* ***State v. Fisher***, 211 Wis. 2d 665, 674-76, 565 N.W.2d 565 (Ct. App. 1997).

[3] *See* WIS. STAT. § 303.08(1) (amended Mar. 25, 2004).

[4] In addition to ***State v. Bobbitt***, 178 Wis. 2d 11, 16-19, 503 N.W.2d 11 (Ct. App. 1993), the trial court also addressed ***State v. Marhal***, 172 Wis. 2d 491, 501-04, 493 N.W.2d 758 (Ct. App. 1992), ***State v. Whitaker***, 167 Wis. 2d 247, 265, 481 N.W.2d 649 (Ct. App. 1992), ***State v. McQuay***, 154 Wis. 2d 116, 126, 452 N.W.2d 377 (1990) and ***State v. Damaske***, 212 Wis. 2d 169, 195-96, 567 N.W.2d 905 (Ct. App. 1997). ***McQuay*** and ***Damaske*** address the more general issue of proper sentencing considerations.

Jersey, 530 U.S. 466 (2000). The trial court denied the postconviction motion, distinguishing these cases because they were based on mandatory sentencing guidelines, unlike the advisory sentencing guidelines in Wisconsin, and noted that ***Apprendi*** involved a sentence in which the trial court exceeded the prescribed statutory maximum penalty for the convicted offense. *See* ***Apprendi***, 530 U.S. at 490.

¶6 Canady was convicted of the second-degree sexual assault of a child, which carried a maximum penalty of twenty years. *See* WIS. STAT. §§ 948.02(2) (1999-2000) and 939.50(3)(bc) (1997-98). The trial court imposed the maximum twenty-year sentence for that offense; it did not exceed that maximum. Considering the evidence on the related kidnapping and first-degree sexual assault charges for which Canady was acquitted was proper. *See* ***Bobbitt***, 178 Wis. 2d at 16-19. The federal cases on which Canady relies are distinguishable because both involved sentences that exceeded the statutory maximum for the convicted offense. *See* ***Blakely***, 542 U.S. at 313; ***Apprendi***, 530 U.S. at 490. Consequently, the trial court did not erroneously exercise its discretion when it imposed (not exceeded) the maximum sentence for the convicted offense after considering evidence of Canady's conduct on the related kidnapping and first-degree sexual assault charges for which he was acquitted. *See* ***Bobbitt***, 178 Wis. 2d at 16-19.

By the Court.—Judgment and order affirmed.

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