COURT OF APPEALS
DECISION
DATED AND FILED

May 1, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-2117-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

CASS A. MACDONELL,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Burnett County: JAMES H. TAYLOR, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 HOOVER, P.J. Cass MacDonell appeals a conviction for interfering with his ex-wife's custody of their two children, contrary to WIS. STAT.

§§ 948.31(1)(b) and (3)(a).[1] He also appeals an order denying postconviction relief. He argues that (1) the evidence is insufficient to support the conviction, (2) the court improperly excluded evidence and thereby violated his right to present a defense, and (3) the seven-year prison sentence is excessive. We disagree and affirm.

BACKGROUND

¶2 MacDonell and his ex-wife, Wendy Rechsteiner, had two children together: Cassie, age eleven; and Ian, age nine. Pursuant to their divorce decree, the parents shared joint custody. Rechsteiner had primary placement.

¶3 On Friday, May 28, 1999, MacDonell picked up the children from Rechsteiner's house for a visit scheduled to last through Sunday, May 30. Rechsteiner consented to let MacDonell take the children to his father's house in Minnesota for the weekend. On Sunday, Cassie called her mother to request to stay an additional day and Rechsteiner consented. Cassie stated that she and Ian expected to be home around 5 or 6 p.m. on Monday. Cassie called again on Monday around 4:30 p.m. saying that they had stopped for dinner in Duluth, but still expected to be home at 6 p.m.

¶4 When the children had not arrived home by 10:30 p.m. on Monday night, Rechsteiner called the police. Rechsteiner testified that she did not give MacDonell consent to keep the children beyond suppertime on Monday, May 31.

[1] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

¶5 Cheryl MacDonell, MacDonell's wife, testified as a State's witness. She indicated that she and MacDonell took the children to his father's home in Minnesota for the weekend. She stated that before MacDonell picked up the children, he made arrangements to have their mail delivered to a post office box near his father's home in Grand Rapids, Minnesota. The mail was already being delivered there when the MacDonells arrived in Minnesota with the children. She told the court that until they were in Duluth, she had no indication that MacDonell did not intend to bring the children back to Rechsteiner. The first time Cheryl was aware that MacDonell intended not to return the children to Rechsteiner was sometime after Cassie called her mother to tell her they would be late. She stated that MacDonell told her that he felt God did not want him to return the children to Rechsteiner.

¶6 The MacDonells and the children traveled as far south as Mexico, and stopped in San Diego, California, where authorities located them. Rechsteiner was reunited with the children on June 17, 1999. The district attorney filed an amended information charging MacDonell with two counts of taking a child without consent of the mother and with the intent to deprive her of custody rights, contrary to WIS. STAT. § 948.31(1)(b), and two counts of concealing a child from a parent in violation of § 948.31(3)(a).

¶7 The jury found MacDonell guilty of all four charges. The court sentenced him to serve seven years in prison concurrently for each of the counts involving Cassie and five years of concurrent probation for each of the counts involving Ian, to be served consecutively to the prison sentence. MacDonell filed a postconviction motion alleging error on three grounds: insufficiency of the evidence, improper exclusion of evidence denying MacDonell his right to present

a defense, and excessive sentence. The trial court denied the motion on all grounds. MacDonell now raises the same arguments on appeal.

ANALYSIS

I. STATUTORY FRAMEWORK

¶8 WISCONSIN STAT. § 948.31(1) through (3) evidences the legislature's broad concern for deterring parental child snatching by imposing felony sanctions.[2] *See* ***State v. McCoy***, 143 Wis. 2d 274, 290, 421 N.W.2d 107 (1988)

[2] WISCONSIN STAT. § 948.31(1) through (3) describes violations for interfering with child custody by a parent or others as follows:

> [(1)] … (b) Except as provided under chs. 48 and 938, whoever intentionally causes a child to leave, takes a child away or withholds a child for more than 12 hours beyond the court-approved period of physical placement or visitation period from a legal custodian with intent to deprive the custodian of his or her custody rights without the consent of the custodian is guilty of a Class C felony. This paragraph is not applicable if the court has entered an order authorizing the person to so take or withhold the child. The fact that joint legal custody has been awarded to both parents by a court does not preclude a court from finding that one parent has committed a violation of this paragraph.
>
> (2) Whoever causes a child to leave, takes a child away or withholds a child for more than 12 hours from the child's parents or, in the case of a nonmarital child whose parents do not subsequently intermarry under s. 767.60, from the child's mother or, if he has been granted legal custody, the child's father, without the consent of the parents, the mother or the father with legal custody, is guilty of a Class E felony. This subsection is not applicable if legal custody has been granted by court order to the person taking or withholding the child.
>
> (3) Any parent, or any person acting pursuant to directions from the parent, who does any of the following is guilty of a Class C felony:
>
> (a) Intentionally conceals a child from the child's other parent.
>
> (b) After being served with process in an action affecting the family but prior to the issuance of a temporary or final order determining child custody rights, takes the child or causes the child to leave with intent to deprive the other parent of physical custody as defined in s. 822.02 (9).

(continued)

(interpreting WIS. STAT. § 946.715 (1985-86), one statute replaced by § 948.31). Section 948.31(4) provides affirmative defenses.[3] Because these defenses relieve a person from liability, ***McCoy*** concluded that the subparagraphs can only be harmonized if the court imposes a reasonable person standard to assess whether the action taken was appropriate. ***Id.*** "A test, as proposed by the defendant, based strictly on subjective belief would vitiate this purpose [encouraging the protection of parental rights against unlawful interruption], permitting a child to be concealed any time harm seemed imminent to a parent, no matter how irrational the belief." ***Id.*** at 290-91. The supreme court concluded that a subjective standard alone would not fulfill the statute's purpose. ***Id.*** at 291. The statute has since been

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> (c) After issuance of a temporary or final order specifying joint legal custody rights and periods of physical placement, takes a child from or causes a child to leave the other parent in violation of the order or withholds a child for more than 12 hours beyond the court-approved period of physical placement or visitation period.

[3] WISCONSIN STAT. § 948.31(4)(a) provides:

> It is an affirmative defense to prosecution for violation of this section if the action:
>
> 1. Is taken by a parent or by a person authorized by a parent to protect his or her child in a situation in which the parent or authorized person reasonably believes that there is a threat of physical harm or sexual assault to the child;
>
> 2. Is taken by a parent fleeing in a situation in which the parent reasonably believes that there is a threat of physical harm or sexual assault to himself or herself;
>
> 3. Is consented to by the other parent or any other person or agency having legal custody of the child; or
>
> 4. Is otherwise authorized by law.

amended to include "reasonable belief," reflecting the ***McCoy*** interpretation favoring an objective test.[4]

II. SUFFICIENCY OF THE EVIDENCE

¶9 MacDonell argues that even if the evidence would support the conviction for improperly withholding the children, it does not support the conviction for taking the children without Rechsteiner's consent and with the intent to deprive her of custody rights. Therefore, he contends that the WIS. STAT. § 948.31(1)(b) conviction must be reversed.[5]

¶10 A WIS. STAT. § 948.31(1)(b) violation may be proved three ways: causing a child to leave, taking a child away or withholding a child for more than twelve hours beyond the court-approved physical placement. In this case, the jury was instructed to determine whether MacDonell intentionally took the children beyond the court-approved period of physical placement. Accordingly, even if evidence would support a conviction for withholding the children from their mother, we review the evidence to determine if it supports his criminally taking the children.[6] *See* ***State v. Wulff***, 207 Wis. 2d 143, 152, 557 N.W.2d 813 (1997)

[4] The defense at issue in ***State v. McCoy***, 143 Wis. 2d 274, 279-80 n.2, 421 N.W.2d 107 (1988) (citing WIS. STAT. § 946.715(2) (1985-86)), stated: "No person violates sub. (1) if the action: (a) is taken to protect the child from imminent physical harm …."

WISCONSIN STAT. § 948.31(4)(a)1 now provides that the action is permissible if it "[I]s taken by a parent … to protect his … child in a situation in which the parent … reasonably believes that there is a threat of physical harm or sexual assault to the child …." *See* 1993 Wis. Act 302.

[5] MacDonell does not argue that the evidence was insufficient to support the WIS. STAT. § 948.31(3)(a) conviction.

[6] Because we conclude that the evidence supports "taking," we need not address the State's argument that the amended information may be again amended under WIS. STAT. § 971.29(2) to charge MacDonell with withholding the children for more than 12 hours. *See* ***Sweet v. Berge***, 113 Wis. 2d 61, 67, 334 N.W.2d 559 (Ct. App. 1983).

("we cannot affirm a criminal conviction on the basis of a theory not presented to the jury") (citations omitted).

¶11 We review the record to determine if the evidence was sufficient to prove the defendant's guilt beyond a reasonable doubt. *See* ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). We review the facts most favorable to the verdict and we will not substitute our judgment for that of the jury unless, after reviewing all the evidence, we conclude that the jury, acting reasonably, could not have found guilt beyond a reasonable doubt. ***Id.*** A jury may base its findings in whole or in part on circumstantial evidence. ***Id.***

¶12 In arguing that the evidence was sufficient to sustain the conviction, the State contends that ***State v. Inglin***, 224 Wis. 2d 764, 592 N.W.2d 666 (Ct. App. 1999), is substantially identical to the MacDonell case. In ***Inglin***, the defendant and his ex-wife had joint custody of a child with the ex-wife having primary physical placement. ***Id.*** at 768. Inglin picked up his son for a scheduled extended vacation and failed to return the child at the end of the vacation. ***Id.*** at 768-69. Inglin was convicted of violating WIS. STAT. § 948.31(1)(b), taking the child without consent. ***Id.*** at 767. On appeal, Inglin argued unsuccessfully that he could not be convicted under that theory because he took his son with the mother's consent. ***Id.*** at 772. The court rejected Inglin's arguments and concluded that the mother had not given consent. ***Id.*** at 774-75. Applying the statutory definition of "without consent" found in WIS. STAT. § 939.22(48),[7] the court concluded that she

[7] WISCONSIN STAT. § 939.22 provides:

> In chs. 939 to 948 and 951, the following words and phrases have the designated meanings unless the context of a specific section manifestly requires a different construction or the word or phrase is defined in s. 948.01 for purposes of ch. 948:
>
> ….

(continued)

had given her consent based on a mistake in fact perpetrated by the father or ignorance of his true plans and therefore that did not constitute consent in fact. ***Id.*** at 775.

¶13 MacDonell argues that his case is different from ***Inglin***. He contends that this case is distinguished because in ***Inglin***, the father had a plan in place to take the child away permanently before he even picked the child up. ***Id.*** at 769. MacDonell states that he had no prior plan or intent at the time he picked up the children. He submits that he only first had the idea to keep the children when they stopped in Duluth on the way home, and no evidence refutes that claim. We disagree with MacDonell's view of the evidence.

¶14 The record demonstrates that before MacDonell picked up the children, he made arrangements to have his mail delivered to a post office box near his father's home in Grand Rapids, Minnesota. The mail was already being delivered there when MacDonell arrived in Minnesota with the children. The record further shows that MacDonell demonstrated unequivocally his decision not to return the children. Cheryl testified that he talked about starting a new life in Mexico and that she could see her children from a previous marriage in a year or so. MacDonell in fact did take the children to Mexico and California and refused to let the children or Cheryl communicate with authorities or family about their location. Thus, similar to ***Inglin***, the evidence demonstrating MacDonell's

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> (48) "Without consent" means no consent in fact or that consent is given for one of the following reasons:
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> ….
>
> (c) Because the victim does not understand the nature of the thing to which the victim consents, either by reason of ignorance or mistake of fact ….

preparation and actual acts is sufficient to sustain the jury's verdict. *See* ***id.*** at 769 n.4, 776.

¶15 The evidence further established that Rechsteiner gave her consent for the children to go with MacDonell for the weekend, nothing more. Rechsteiner did not know that MacDonell planned to take the children to Mexico and California. She testified that she did not give consent to take the children there, or for any time beyond dinnertime on May 31, 1999.

¶16 MacDonell contends that ***Inglin*** should have put the State on notice that circumstances such as those in this case would not be properly charged as a taking, but instead as withholding a child. However, even if the ***Inglin*** court stated that this sort of offense is more logically prosecuted as a withholding case, a taking violation may be affirmed if the evidence supports that conclusion. ***Id.*** at 776. The ***Inglin*** precaution does not change the outcome of this case.

¶17 At the postconviction hearing, the trial court correctly determined that the record permitted the jury to find that "[MacDonell] took [the children] without consent and he held them beyond the regular visitation period, but he didn't have consent at the time he walked down the steps [away from Rechsteiner's house] to do anything more than exercise his regular visitation period." MacDonell's intent can be determined from his conduct. The jury was entitled to make reasonable inferences and the record supports its conclusion that MacDonell violated WIS. STAT. § 948.31(1)(b).[8]

[8] The State also responds that MacDonell has waived his right to argue the sufficiency of the evidence. It contends that MacDonell waived appellate review because he did not timely raise the issue in the trial court by moving for dismissal at the close of the State's case or at the close of all evidence. Waiver is a rule of judicial administration, not jurisdiction, and we have the discretion to make exceptions. ***Wirth v. Ehly***, 93 Wis. 2d 433, 443-44, 287 N.W.2d 140 (1980). (continued)

III. RIGHT TO PRESENT A DEFENSE

¶18 MacDonell contends that the court prevented him from presenting his defense under WIS. STAT. § 948.31(4)(a)1 and 4 when it precluded him from introducing evidence supporting his belief that "an accumulation of small things … led his son to become suicidal and have dark thoughts that [MacDonell] felt were an imminent danger to his son …." He argues that the following evidence should have been admitted to show that his son was suicidal: (1) allegations that Dr. Hans Rechsteiner, the children's stepfather, physically abused the son; (2) MacDonell and his ex-wife's dispute over Ian's behavioral diagnosis and medications for attention deficit hyperactivity disorder (ADHD); (3) their dispute over the sexual education program at Ian's school; (4) their disputes concerning the children's religious upbringing, social activities, and educational needs; and (5) the Rechsteiners' social "intoxicating beverage" use. He also contends that the court denied his right to present a defense when it refused to instruct the jury with WIS JI—CRIMINAL 2169 (encompassing the WIS. STAT. § 948.31(4)(a)1 and 4 defenses).

¶19 We conclude that the trial court properly analyzed the law and to the extent that it excluded evidence, it did so reasonably. We also conclude that the court appropriately declined jury instruction WIS JI—CRIMINAL 2169.

We choose to address the merits. Moreover, the State has not persuaded us that waiver is appropriate in this case. MacDonell argued in his postconviction motion that the evidence was insufficient to support conviction. Under ***State v. Gomez***, 179 Wis. 2d 400, 404, 507 N.W.2d 378 (Ct. App. 1993), he has not waived appellate review.

Further, the State asks this court to expand the ***Inglin*** rule and recognize a second "taking" when, at the end of the permitted visit, MacDonell took the children to Mexico. *See* ***State v. Inglin***, 224 Wis. 2d 764, 773-74 n.6, 592 N.W.2d 666 (Ct. App. 1999) (the State also raised a "second taking" argument, but the court declined to address it). Because we dispose of the issue on other grounds, we need not address this argument. *See* ***Sweet***, 113 Wis. 2d at 67.

A. Exclusion of Evidence

¶20 MacDonell first claims that the trial court improperly excluded evidence that would have supported a defense under WIS. STAT. § 948.31(4)(a)1.[9] We disagree. The record shows that the court did not improperly prevent MacDonell from presenting relevant evidence. In fact, on cross-examination, the State's witnesses provided some of the same evidence MacDonell sought to introduce.

¶21 Ordinarily, the admissibility of evidence lies within the trial court's sound discretion. ***State v. Pepin***, 110 Wis. 2d 431, 435, 328 N.W.2d 898 (Ct. App. 1982). Evidentiary issues may, however, extend beyond the question whether the trial court properly exercised its discretion and may implicate a defendant's right to present a defense. ***State v. Johnson***, 118 Wis. 2d 472, 479, 348 N.W.2d 196 (Ct. App. 1984). A trial court may not preclude an accused's opportunity to present "crucial evidence" absent a "compelling state interest." ***Id.*** However, the right to present a defense is not absolute. ***Id.*** A defendant has the right to present only relevant evidence that is not substantially outweighed by its prejudicial effect. ***State v. Pulizzano***, 155 Wis. 2d 633, 646, 456 N.W.2d 325 (1990). Further, a court does not violate a defendant's right to present a defense if it excludes evidence that confuses the issues or is marginally relevant to the case. *See* ***id.*** at 647.

[9] We note that MacDonell's stated purpose for introducing the questioned evidence under WIS. STAT. § 948.31(4)(a)1 was to support his claim that his son was suicidal and that as a result he "reasonably believed" the son would be physically harmed if he returned to his mother's custody. Because he does not argue that the excluded evidence would have supported any similar claim for the daughter, we address MacDonell's argument only as it relates to the son. *See* ***Reiman Assoc. v. R/A Advertising***, 102 Wis. 2d 305, 306 n.1, 306 N.W.2d 292 (Ct. App. 1981) (an issue not briefed is deemed abandoned).

¶22 Contrary to MacDonell's claim, the following evidence was admitted. Concerning MacDonell and Rechsteiner's dispute over Ian's behavioral diagnosis and medications, Rechsteiner testified that Ian had been diagnosed with ADHD and that the school was having trouble controlling his behavior. Cheryl testified that MacDonell was upset about not knowing what was occurring with Ian at school and with his medical care. Respecting their dispute over the children's religious upbringing, social activities, and educational needs, Rechsteiner admitted that she and MacDonell were having problems communicating concerning these issues. She also testified that the parochial school had issued a warning because of Ian's behavior and had finally asked Rechsteiner to remove him from the school. Because Ian was removed from the school that MacDonell wanted the child to attend and was instead enrolled at a public school, MacDonell sought to demonstrate that Rechsteiner had disregarded MacDonell's religious education plans for Ian and that this led in part to Ian's suicidal thoughts. MacDonell did not offer any evidence that Rechsteiner caused Ian to be expelled or that Ian suffered physical or psychological problems as a result.

¶23 Moreover, the court specifically asked MacDonell if he wanted to testify and gave him the option of testifying, reading aloud all or part of a statement MacDonell had prepared, entering the written statement into evidence, or having his attorney read all or part of the statement during closing arguments. MacDonell decided against taking the stand. Instead his counsel read MacDonell's seventeen-page written statement during closing arguments. By not testifying, MacDonell was not subject to cross-examination. A deliberate choice of strategy is binding on a defendant, and an appellate claim of error based on a defendant's own choice will not be considered by a reviewing tribunal, even if the chosen

strategy backfires. *See* ***State v. McDonald***, 50 Wis. 2d 534, 538, 184 N.W.2d 886 (1971).

¶24 MacDonell failed to show that the remaining evidence was relevant. MacDonell did not offer to show that Ian's sexual education program at school physically or psychologically affected Ian. He did not offer to show that the Rechsteiners' social drinking affected Ian in any way. We conclude that this evidence was not relevant.[10]

¶25 MacDonell also contends that excluding the evidence prevented him from presenting a defense under WIS. STAT. § 948.31(4)(a)4. This section provides a defense if MacDonell's actions were otherwise authorized by law. He contends that his acts were authorized because he was complying with WIS. STAT. § 948.04, which requires a parent to act if the parent "has knowledge that another person has caused, is causing or will cause mental harm to that child [and] is physically and emotionally capable of taking action which will prevent the harm …."[11] As discussed above, MacDonell does not show that the excluded evidence would have demonstrated any mental harm to Ian, much less that Rechsteiner's custody was causing the harm.

[10] To the extent that MacDonell contends that Hans Rechsteiner physically abused Ian and therefore gave him a reason for taking Ian independent from the suicide threat, MacDonell's proffered evidence was properly excluded. MacDonell's counsel conceded that social services investigated the allegation and found it unsubstantiated.

[11] Again, because MacDonell does not argue that the excluded evidence would have supported a defense under WIS. STAT. §§ 948.31(4)(a)4 and 948.04(2) for taking his daughter, we address MacDonell's argument only as it relates to the son. *See* ***id.***

B. Jury Instruction

¶26 Nevertheless, MacDonell argues that the court should have allowed the jury to consider whether he "reasonably believed" his son was threatened with physical harm if MacDonell had returned him to his mother's custody as articulated in WIS. STAT. § 948.31(4)(a)1, even if objectively there was no threat.

¶27 A trial court has broad discretion to determine what instructions should be given to the jury. ***Ansani v. Cascade Mtn., Inc.***, 223 Wis. 2d 39, 45, 588 N.W.2d 321 (Ct. App. 1998). We will uphold a discretionary decision if the trial court examined the relevant facts, applied the proper standard of law and reached a reasonable conclusion. ***Id.*** at 45-46. We review de novo whether the court applied the proper standard of law. ***Id.*** at 46.

¶28 Before trial, the court informed MacDonell that it would not give WIS JI—CRIMINAL 2169 (encompassing the WIS. STAT. § 948.31(4)(a)1 and 4 defenses) based on MacDonell's belief that Ian was suicidal unless he could substantiate that belief with expert testimony. MacDonell did not offer any support for his belief. Although the court specifically provided him an opportunity, MacDonell did not offer expert testimony that these circumstances individually or collectively caused an unreasonable risk of Ian's suicide. His offer of proof also failed to show that removing Ian from Rechsteiner's custody would have protected the child from the harm. Further, at the close of evidence, defense counsel conceded that WIS JI—CRIMINAL 2169 was not necessary, because he was not calling a witness and because he was not tendering an affirmative defense. We conclude as a matter of law that MacDonell's unsupported belief was unreasonable. *See* ***McCoy***, 143 Wis. 2d at 290-91. Thus, MacDonell was not

entitled to this jury instruction, and not submitting it to the jury did not violate his right to present a defense.

¶29 MacDonell was also not entitled to WIS JI—CRIMINAL 2169 for the defense under WIS. STAT. § 948.31(4)(a)4. This section only authorizes lawful acts. WIS. STAT. § 948.04(2), the section MacDonell claims directed his action, does not authorize him to protect the children with *any* act, lawful or unlawful. As discussed above, the record does not support the conclusion that MacDonell's unsubstantiated belief of taking Ian from his mother's custody or concealing him from her would remove Ian's alleged suicidal threat. The record also does not show that MacDonell took or concealed Ian in order to obtain professional psychological help for him. Rather, all evidence shows that he took both children to Mexico and California to begin a new life with them and conceal them from their mother. This record does not support any lawful taking or concealment of either child.

¶30 We conclude that the trial court did not erroneously exercise its discretion to the extent it excluded the challenged evidence and refused to instruct the jury as to WIS JI—CRIMINAL 2169. MacDonell did not show that the evidence was relevant to a defense. Further, he had the choice to testify, but he elected not to. Since his claim to the defenses hinged on inadmissible evidence, he has failed to show error. The exclusion of inadmissible evidence did not violate MacDonell's right to present a defense.

IV. EXCESSIVE SENTENCE

¶31 Next, MacDonell argues that the sentence is unduly harsh and excessive because he has no other adult or juvenile conviction, he is not a threat to

the general public and the evidence shows that he needs psychological treatment instead of incarceration.

¶32 Our standard of review is whether the trial court erroneously exercised its discretion. ***State v. Krueger***, 119 Wis. 2d 327, 336, 351 N.W.2d 738 (Ct. App. 1984). We begin with the presumption that the trial court acted reasonably. ***Id.*** The defendant must demonstrate an unreasonable or unjustifiable basis in the record for the sentence. ***Id.*** We will affirm a discretionary decision if the court in fact exercises discretion and the decision is based on the facts in the record and a "logical rationale founded upon proper legal standards." ***McCleary v. State***, 49 Wis. 2d 263, 277, 182 N.W.2d 512 (1971). Strong public policy considerations support deference to the trial court's sentencing determination. ***Id.*** at 276.

¶33 A sentencing court is required to impose "the minimum amount of custody or confinement which is consistent with the protection of the public, the gravity of the offense and the rehabilitative needs of the defendant." ***Id.*** (citation omitted). The court may consider the defendant's history of criminal offenses including pending charges, the defendant's personality, character and social traits, truthfulness, remorse, repentance and cooperativeness, need for close rehabilitative control, and the rights of the public. ***Krueger***, 119 Wis. 2d at 337. An erroneous exercise of discretion may be demonstrated "if the trial court failed to state on the record the material factors which influenced its decision, gave too much weight to one factor in the face of other contravening considerations, or relied on irrelevant or immaterial factors." ***Id.*** at 337-38. The court has particular discretion to weigh the factors, ***id.***, and to determine the sentence length, within the permissible statutory range. ***Hanson v. State***, 48 Wis. 2d 203, 207, 179 N.W.2d 909 (1970). We will reverse a sentence that "shock[s] public sentiment

and violate[s] 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).

¶34 MacDonell contends that the trial court erred in the manner in which it weighed the sentencing factors. He claims that the court failed to give sufficient consideration to his need for psychological help, thereby resulting in an excessive sentence. MacDonell's claim is without merit.

¶35 The trial court expressly considered MacDonell's need for psychological treatment. In addition to MacDonell's rehabilitative needs, however, it also weighed, as MacDonell concedes, the gravity of the offense and the protection of the public. MacDonell faced up to forty years in prison and $40,000 in fines for the four counts against him. *See* WIS. STAT. §§ 948.31(1)(b) and (3)(a) and 939.50(3)(c). Seven years in prison with five years of probation consecutive to the prison sentence is well within that limit. Moreover, the court acknowledged that MacDonell was not a threat to the general public, but noted that he was a continual threat to the children. It stated:

> In terms of whether [MacDonell] could take these children and start a new life again, even after this trial and after this conviction, I do not believe he has learned anything from this experience. He still believes that he is right. And I consider him to be a—an extreme danger to these children.
>
> And part of the reason for the seven-years sentence here was the age of the children. They cannot protect themselves. They cannot defend themselves. Every time they walk out of that schoolhouse door and start for home, they're in danger if he's on the street. I think that the seven years added onto their present age will put them at a time when they are old enough and mature enough to take steps to protect themselves.
>
> ….

> Seven years, in my belief, is minimum in this kind of case, because these children are going to end up in some other country someplace if we let him back into the community and seeing these children before they're old enough to protect themselves.

¶36 MacDonell does not challenge the trial court's finding that he failed to accept the wrongfulness of his act. This finding justified the court's concern for the children's protection, which was a proper factor. This concern, combined with the trial court's consideration of the other appropriate sentencing factors provides no basis for us to conclude that the trial court improperly exercised its sentencing discretion.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.