COURT OF APPEALS
DECISION
DATED AND FILED

November 6, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2004AP2607-CR **Cir. Ct. No. 2001CF1783**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

EDWARD D. ANDERSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and orders of the circuit court for Milwaukee County: MARTIN J. DONALD, RICHARD J. SANKOVITZ and CHARLES F. KAHN, JR., Judges.[1] *Affirmed.*

Before Curley, P.J., Wedemeyer and Fine, JJ.

[1] The Honorable Martin J. Donald was initially assigned to this case. The Honorable Richard J. Sankovitz presided over the court trial and heard several of the motions. The Honorable Charles F. Kahn, Jr., presided over the proceedings after remand.

¶1 PER CURIAM. Edward D. Anderson appeals from a judgment convicting him of two counts of third-degree sexual assault of a child. *See* WIS. STAT. § 940.225(3) (2003–04).[2] He also appeals from orders denying his postconviction motion. He contends that the circuit court violated his constitutional right to present a defense when it barred evidence of the child victim's prior sexual conduct. He further contends that the circuit court erroneously exercised its sentencing discretion. We disagree and affirm.

Background

¶2 This case returns following remand. *See* ***State v. Anderson***, No. 04AP2607-CR, unpublished slip op. (WI App Sept. 27, 2005) (***Anderson I***). We summarize here the pertinent facts that are more fully set out in our earlier opinion, supplemented with information subsequently developed.

¶3 Anderson was charged in May 2001, with two counts of first-degree sexual assault of four-year-old A.P., specifically mouth-to-vagina and penis-to-anus contact. Approximately nine months later, Anderson moved to admit evidence of A.P.'s prior sexual conduct pursuant to ***State v. Pulizzano***, 155 Wis. 2d 633, 456 N.W.2d 325 (1990). Anderson's motion was based on his mother's[3] claim that she observed A.P., then approximately two years old, licking the crotch of a Barbie doll. The circuit court denied the motion without taking

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

[3] The defendant's mother, Susan King, is referred to throughout the pretrial proceedings and in our earlier decision as the victim's grandmother. King's testimony during the postconviction hearing clarified that she is unrelated to the victim. Another of her sons lived for a time with the victim's mother and fathered the victim's half-sister.

testimony, holding the evidence barred by the rape shield statute, WIS. STAT. § 972.11(2)(b).

¶4 Anderson eventually waived his right to a jury trial. The State amended the charges to two counts of third-degree sexual assault and the matter was tried to the court on stipulated facts. The only evidence presented was a videotaped interview of the victim made for purposes of the criminal investigation.

¶5 The court found Anderson guilty of both counts. It imposed an aggregate sixteen-year sentence, comprised of eight years' initial confinement and eight years' extended supervision, to run consecutive to sentences previously imposed in unrelated offenses. Anderson appealed.

¶6 In ***Anderson I***, we held that Anderson was wrongly denied a hearing where he might establish his constitutional right to introduce evidence of the victim's prior sexual conduct. We remanded this matter, directing that the circuit court take testimony to determine whether the proffered evidence of prior sexual conduct satisfied the ***Pulizzano*** criteria for admission. We held in abeyance Anderson's claim that the circuit court erroneously exercised its sentencing discretion.[4]

¶7 On remand, the circuit court heard testimony from Anderson's mother, Susan King, and from the victim's mother, Julie Wapp. King testified that she babysat for A.P. in 1998 and observed A.P. licking a Barbie doll between its

[4] Anderson's third claim on appeal, that he was denied his right to a speedy trial, was fully resolved in ***Anderson I***.

legs. A.P. stated that "mommy" showed her this activity. King testified that she told Wapp about the incident that same day.

¶8 Wapp testified that she had no recollection of discussing the Barbie doll incident until it arose during the pendency of the criminal case against Anderson. Wapp further testified that A.P. had never enjoyed playing with dolls.

¶9 The circuit court ruled that Anderson's offer of proof failed to satisfy the ***Pulizzano*** test for admitting evidence of a victim's prior sexual conduct. The propriety of this decision, as well as the circuit court's exercise of its sentencing discretion, are now before us for review.

Discussion

¶10 The text of WIS. STAT. § 972.11(2)(b) bars a defendant from offering evidence of a victim's past sexual history that does not satisfy an enumerated exception. Under some circumstances, however, the evidence of prior sexual conduct may be so relevant and probative that barring its presentation would infringe upon a defendant's constitutional rights to confrontation and compulsory process. *See* ***Pulizzano***, 155 Wis. 2d at 647–648, 456 N.W.2d at 331 (1990).

¶11 Whether application of WIS. STAT. § 972.11 would deprive Anderson of his constitutional rights presents a question of constitutional fact. *See* ***State v. St. George***, 2002 WI 50, ¶16, 252 Wis. 2d 499, 514, 643 N.W.2d 777, 782. On review, we resolve questions of constitutional fact independently of the circuit court while benefiting from its analysis. ***Ibid.*** We leave the circuit court's underlying findings of historical fact undisturbed unless they are clearly erroneous. ***State v. Smith***, 2002 WI App 118, ¶8, 254 Wis. 2d 654, 662, 648 N.W.2d 15, 18 (citation omitted).

¶12 To establish a constitutional right to present evidence that is otherwise barred by WIS. STAT. § 972.11, a defendant must satisfy the test developed in ***Pulizzano***. First, the defendant must make an offer of proof satisfying each of five criteria: (1) the prior act clearly occurred; (2) the act closely resembles that in the present case; (3) the prior act is clearly relevant to a material issue; (4) the evidence is necessary to the defendant's case; and (5) the probative value outweighs the prejudicial effect. ***Pulizzano***, 155 Wis. 2d at 656, 456 N.W.2d at 335. A defendant's offer of proof fails the ***Pulizzano*** test if any of the five criteria are not met and the court need not go further in applying the test. ***State v. Dunlap***, 2002 WI 19, ¶29, 250 Wis. 2d 466, 484, 640 N.W.2d 112, 120. If the defendant does satisfy the five ***Pulizzano*** criteria, the court must determine "whether the defendant's right to present the [] evidence is nonetheless outweighed by the State's compelling interest to exclude [it]." ***St. George***, 2002 WI 50, ¶20, 252 Wis. 2d at 516, 643 N.W.2d at 783.

¶13 In assessing Anderson's offer of proof, the circuit court accepted Wapp's testimony that A.P. simply did not play with dolls. It found that A.P. was "not a doll kid" and discounted King's recollection of observing the victim with a doll at all. The court further found that King raised the Barbie doll incident after her son was arrested and faced trial. It found that no one else recalled the event.

¶14 We defer to the circuit court in both its express and its implicit credibility determinations.[5] *See* ***Jacobson v. American Tool Cos.***, 222 Wis. 2d 384, 390, 588 N.W.2d 67, 70 (Ct. App. 1998). Such deference is appropriate

[5] The court made clear that it was assessing credibility by undertaking its analysis with reference to "factors in standard Wisconsin Jury Instruction 300," the instruction on credibility of witnesses. *See* WIS JI—CRIMINAL 300.

because the circuit court can observe the witnesses' demeanor and gauge the persuasiveness of their testimony. ***Ibid.*** The court's findings reflect that it did not find King to be a credible witness. We defer to that finding.

¶15 In considering the first ***Pulizzano*** criterion, the circuit court found that the Barbie doll incident did not "clearly occur." The issue was one of credibility. King testified that she observed the incident and reported it contemporaneously to Wapp; Wapp denied hearing of such an incident prior to the inception of the criminal charges against Anderson. We conclude that the circuit court did not believe King's testimony regarding her observations. *Cf.* ***State v. Hubanks***, 173 Wis. 2d 1, 27, 496 N.W.2d 96, 105 (Ct. App. 1992) (reviewing court accepts implicit finding that the circuit court believed one witness and disbelieved another). Nothing suggests that the court's determination was based on an erroneous exercise of discretion or an error of law and accordingly we accept it. *See* ***Board of Attorneys Prof'l Responsibility v. Lucareli***, 2000 WI 55, ¶32, 235 Wis. 2d 557, 572–573, 611 N.W.2d 754, 762.

¶16 King provided the only evidence that the Barbie doll incident took place. Because the circuit court found that King was not credible in this regard, nothing supports a finding that the incident clearly occurred. We agree with the circuit court's conclusion that Anderson therefore failed to satisfy the first ***Pulizzano*** criterion.

¶17 We further concur in the circuit court's assessment of the second ***Pulizzano*** criterion and hold that the prior sexual conduct described by King does not closely resemble the act in the present case. In considering this factor, the court described A.P.'s accusation as acts "during the same period of time … with the same victim and involving different types of sexual assault conduct…. The

acts in the present case are multiple, and the act reported by King is singular and they are substantially different." The court compared the details of A.P.'s accusation to the Barbie doll incident: "the licking is substantially different than the assault that A.[P.] reported on her butt…. [S]he told her mother that he stuck her in the butt with his potty. That was hard and it hurt a lot."

¶18 Our review is limited because the record does not contain either the videotape of the victim's testimony or a transcript of that videotape. When the record is incomplete, we will assume that the missing material supports the ruling under attack. *See* ***Fiumefreddo v. McLean***, 174 Wis. 2d 10, 26–27, 496 N.W.2d 226, 232 (Ct. App. 1993). We therefore take the facts to be as the court described them: a sequence of assaultive behaviors upon A.P., including intrusion into her "butt."

¶19 King's description of A.P. licking the crotch of a Barbie doll is not sufficiently like A.P.'s accusation against Anderson as to satisfy the second ***Pulizzano*** criterion. The behavior with the doll does not resemble a sequence of behaviors encompassing hard and painful anal intrusion. *Cf.* ***Dunlap***, 2002 WI 19, ¶27, 250 Wis. 2d at 483–484, 640 N.W.2d at 120 (complainant touching men in the genital area, among other behaviors, not similar to finger-to-vagina contact with possible digital penetration). Therefore, Anderson did not satisfy the second ***Pulizzano*** factor, requiring the prior conduct to closely resemble that in the instant case. *See* ***Pulizzano***, 155 Wis. 2d at 656, 456 N.W.2d at 335.

¶20 We part company with the circuit court in its determination that the probative value of the prior sexual conduct evidence outweighs any prejudicial effect. We cannot agree with the court's assessment of this final ***Pulizzano*** factor.

¶21 Probative value is a facet of relevance, specifically, whether the proffered evidence has a tendency to make the consequential fact or proposition more or less probable than it would be without the evidence. *See* ***State v. Sullivan***, 216 Wis. 2d 768, 772, 576 N.W.2d 30, 32–33 (1998). Anderson offered the Barbie doll incident to show an alternative source for A.P.'s sexual knowledge.

¶22 The circuit court determined that A.P.'s accusation involved conduct encompassing different kinds of sexual assaults; the probative value of an alternative source for A.P.'s knowledge of just one kind of assault is therefore minimal. Any such value does not outweigh the possibility of trauma from questioning A.P. regarding the incident. *See* ***Pulizzano***, 155 Wis. 2d at 653, 456 N.W.2d at 333 (recognizing trauma as a "principal danger" from exploring prior conduct). Nor does it outweigh the prejudice that can arise from "improperly focus[ing] attention on the complainant's character and past actions, rather than on the circumstances of the alleged assault." *See* ***Dunlap***, 2002 WI 19, ¶19, 250 Wis. 2d at 480, 640 N.W.2d at 118.

¶23 A defendant must satisfy all of the ***Pulizzano*** criteria to overcome the bar to presenting evidence of prior sexual conduct imposed by WIS. STAT. § 972.11. Because Anderson has failed to do so, we go no further in applying ***Pulizzano***. *See* ***Dunlap***, 2002 WI 19, ¶29, 250 Wis. 2d at 484, 640 N.W.2d at 120. The proffered evidence of A.P.'s prior sexual conduct with a Barbie doll was not admissible.

¶24 We turn to Anderson's contention that the circuit court erred in refusing to modify his sentence. We review a trial court's conclusion that its sentence was not unduly harsh or unconscionable for an erroneous exercise of discretion. ***State v. Mata***, 2001 WI App 184, ¶13, 247 Wis. 2d 1, 11, 632 N.W.2d

872, 877. In doing so, we adhere to a strong policy against interference with the circuit court's sentencing discretion. ***Ibid.*** The defendant has the burden "to show some unreasonable or unjustified basis for the sentence imposed." ***Ibid.***

¶25 Anderson faced a maximum aggregate sentence of twenty years' imprisonment for two third-degree sexual assault convictions. The circuit court imposed an aggregate sentence of sixteen years. Generally, sentences within the limits of the maximum are not disproportionate to the offense committed and are therefore neither unduly harsh nor unconscionable. ***State v. Richard G.B.***, 2003 WI App 13, ¶20, 259 Wis. 2d 730, 743, 656 N.W.2d 469, 475.

¶26 The circuit court properly considered the primary sentencing factors of the gravity of the offense, the character of the offender, and the need for public protection. *See* ***State v. Larsen***, 141 Wis. 2d 412, 427, 415 N.W.2d 535, 541 (Ct. App. 1987). As to gravity of the offense, the court observed that the offense involved "very intrusive acts" perpetrated on a four-year-old with the concomitant risk that the child will be forever haunted by the occurrences. As to character, the court viewed Anderson as incorrigible, an individual who had failed to capitalize on prior efforts to reintegrate him successfully back into the community. It balanced this view by noting that Anderson had relieved the victim and her family of some worry and distress by agreeing to a trial on stipulated facts, reflecting that he was not "heartless." The court placed greatest emphasis on protection of the public. It took particular note of Anderson's lengthy record and observed that Anderson had demonstrated "over and over" that he could be controlled only by incarceration.

¶27 The court considered but rejected Anderson's request that his sentences run concurrently with those he was serving for unrelated prior offenses.

First, it noted that the sexual assaults were separate wrongs that deserved separate punishment. Second, it concluded that, given Anderson's history of reoffending, he could not be trusted back in the community until he was old enough to pose little danger. Third, it believed that Anderson would require observation for a significant time after release because prison time had not previously discouraged him from committing serious offenses. The court thus gave a sufficient "statement of reasons" for selecting consecutive terms. *See* ***State v. Ziegler***, 2006 WI App 49, ¶31, 289 Wis. 2d 594, 609, 712 N.W.2d 76, 83.

¶28 Anderson objects that the circuit court did not give him "more credit" for his acceptance of responsibility. The weight given to sentencing factors lies particularly within the wide discretion of the circuit court. ***State v. Stenzel***, 2004 WI App 181, ¶9, 276 Wis. 2d 224, 233, 688 N.W.2d 20, 24. Here, the court acknowledged that Anderson relieved the victim of having to testify by going to trial on stipulated facts. At the same time, the court was concerned with fashioning a sentence to reduce the likelihood that Anderson would reoffend upon release. While the court did not weigh these factors as Anderson would have wished, the court's decision does not reflect an erroneous exercise of discretion. *See* ***Hartung v. Hartung***, 102 Wis. 2d 58, 66, 306 N.W.2d 16, 20–21 (1981) (our inquiry is whether discretion was exercised, not whether it could have been exercised differently).

¶29 We may deem a sentence unduly harsh or unconscionable "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." ***State v. Grindemann***, 2002 WI App 106, ¶31, 255 Wis. 2d 632, 651, 648 N.W.2d 507, 517 (citation omitted). Sexual abuse of children is viewed by our society as

one of the most heinous crimes a person can commit. *See* ***Johnson v. Rogers Mem'l Hosp., Inc.***, 2005 WI 114, ¶80, 283 Wis. 2d 384, 422, 700 N.W.2d 27, 45 (Prosser, J., concurring). The abuse here included a painful and intrusive assault on a four-year-old. The sentence does not shock the public sentiment.

By the Court.—Judgment and orders affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2005–06).