COURT OF APPEALS
DECISION
DATED AND FILED

November 12, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP2154-CR **Cir. Ct. No. 2005CF895**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAY THOMAS MAGNON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Outagamie County: JOSEPH M. TROY and GORDON MYSE, Judges.[1] *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

[1] Judge Troy presided over the trial court proceedings, and Judge Myse presided over the postconviction proceedings.

¶1 PER CURIAM. Jay Magnon appeals a judgment, entered upon a jury's verdict, convicting him of using a computer to facilitate a child sex crime and of child enticement with the intent to have sexual contact, contrary to WIS. STAT. §§ 948.075(1) and 948.07(1).[2] Magnon also appeals the order denying his motion for postconviction relief. Magnon argues: (1) the circuit court lacked territorial, personal and subject matter jurisdiction; (2) he was denied the effective assistance of trial counsel; and (3) the circuit court erroneously exercised its sentencing discretion. We reject these arguments and affirm the judgment and order.

BACKGROUND

¶2 An Information charged Magnon with using a computer to facilitate a child sex crime and with child enticement with the intent to have sexual contact.[3] At trial, Kristen Gordon, a thirty-eight-year-old woman from Illinois, testified that she was a volunteer for an organization known as "Perverted Justice," an internet watchdog group whose volunteers enter chat rooms pretending to be underage children in order to root out child sex offenders. Posing as a thirteen-year-old-girl from Appleton, Gordon entered a "Wisconsin chat room" on the Yahoo website, where Magnon, then twenty-seven years old, initiated a conversation under the

[2] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

[3] An amended Information added charges for possession of THC and possession of drug paraphernalia. The parties agreed the possession charges would not be pursued at trial because they were relatively minor when compared to the felony charges and could distract from the jury's focus. The State agreed that if the jury convicted Magnon on the felony charges, it would dismiss and read in the possession charges. In turn, Magnon agreed to plead no contest to the possession charges if he was acquitted on the felony charges. Consistent with this agreement, the possession charges were ultimately dismissed and read in.

user name "Hotntastymale." During the course of their online chat, the two talked about body piercings and Magnon indicated his genitalia was pierced. Magnon asked if Gordon was a virgin and whether her father allowed her to spend the night with friends. Magnon, who was from Minnesota, indicated he wanted to come see Gordon the next weekend and wanted them to get a hotel room. Magnon told Gordon she would have to tell her father she was spending the night at a friend's house if he came for a visit. Magnon also told Gordon he wanted to kiss her, show her his piercing and give her oral sex. Magnon gave Gordon his phone number, suggesting that Gordon call him. Gordon explained at trial that if a phone conversation is suggested, there is a list of people who are able to simulate the voice of an underage person. Gordon consequently contacted Laura McDade, to brief her on the situation and forward Magnon's phone number. McDade testified that during her conversation with Magnon, he verified his name was "Jay" and told McDade she sounded sexy. McDade ended the call after two minutes and Gordon resumed the online chat.

¶3 During an online chat a few days later, Magnon reiterated his name was "Jay" and provided Gordon with an updated telephone number. Magnon again broached the possibility of coming to meet Gordon on the upcoming weekend. Magnon indicated he wanted to "hang out" with Gordon for about four hours, but expressed concern about Gordon's father finding out. Magnon suggested picking Gordon up from a fast food restaurant, noting that he preferred Subway. The two agreed to meet at 12:30 p.m. at a Subway on College Avenue in Appleton, as Magnon indicated he wanted to have Gordon home before dark. During the course of their online chat, Magnon inquired about Gordon's pubic hair and asked if she had been naked with a boy or touched a penis. McDade later called Magnon to confirm the meeting details.

¶4 Michael Nofzinger, a detective sergeant with the Appleton Police Department, testified he was contacted by Perverted Justice to help investigate Magnon. Gordon provided Nofzinger with Magnon's profile, including his picture, information from the chat room conversations and Magnon's phone number. Nofzinger instructed Gordon to let Magnon initiate the majority of the conversation and dialogue. Because Gordon was not from Appleton, Nofzinger also suggested area hotels. During the course of his investigation, Nofzinger used several different tools to confirm Magnon's identity. Once the meeting at Subway was arranged, an officer, posing as the minor girl, waited at Subway at the appointed time. Once Magnon's identity and other details were confirmed at the restaurant, he was arrested.

¶5 During his testimony, Magnon conceded chatting with a girl who identified herself as "Sarah." According to Magnon, Sarah claimed to be thirteen years old and her profile and picture were consistent with that claim. Magnon stated that despite Sarah's age, he did not end the conversation because he was bored and "wanted somebody to talk to." When asked why the conversation turned sexual, Magnon claimed he did not actually believe Sarah was thirteen because they were chatting in a "romance room" that he believed was intended for adults. Magnon also indicated that during his telephone conversation with Sarah, he believed she was an adult based on the pitch and rasp of her voice. To that end, Magnon testified that he asked Sarah if she was "trying to sound young," thinking "she might recognize that I knew that she was older." Magnon testified that although he believed Sarah was deceiving him about her age and other details, he was interested in meeting her because of her "dimensions."

¶6 Magnon was ultimately convicted upon the jury's verdict. The court imposed concurrent sentences consisting of one year of initial confinement

followed by two years' extended supervision. After a ***Machner***[4] hearing, the court denied Magnon's motion for postconviction relief and this appeal follows.

DISCUSSION

I. Jurisdiction

¶7 Magnon argues the circuit court lacked territorial, subject matter and personal jurisdiction on grounds that Magnon was in Minnesota and "the alleged victims at all times relevant, were located in Illinois and California." We are not persuaded. WISCONSIN STAT. § 939.03 sets forth the scope of Wisconsin's territorial jurisdiction. ***State v. Anderson***, 2005 WI 54, ¶28, 280 Wis. 2d 104, 695 N.W.2d 731. The pertinent provision governing territorial jurisdiction provides: "While out of this state, the person does an act with intent that it cause in this state a consequence set forth in a section defining a crime." WIS. STAT. § 939.03(1)(c). Here, Magnon used his computer to facilitate a meeting in Appleton for the purpose of having sexual contact with a female under sixteen years old. Then, Magnon drove to an agreed-upon Appleton restaurant at a prearranged date and time for the purpose of having sexual contact with a child by attempting to cause her to go into a building. Because Magnon engaged in acts intended to have prohibited consequences in Wisconsin, the court had territorial jurisdiction over him.

¶8 Turning to the issue of subject matter jurisdiction, "[t]he circuit court lacks criminal subject matter jurisdiction only where the complaint does not charge an offense known to law." ***State v. Aniton***, 183 Wis. 2d 125, 129, 515

[4] *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

N.W.2d 302 (Ct. App. 1994). Because Magnon was charged with offenses known to law, *see* WIS. STAT. §§ 948.075(1) and 948.07(1), he fails to demonstrate the circuit court lacked subject matter jurisdiction over his case. With respect to personal jurisdiction, Magnon waived any challenge to the circuit court's personal jurisdiction by failing to raise his objection before entering his plea at the arraignment. ***State v. Dietzen***, 164 Wis. 2d 205, 210, 474 N.W.2d 753 (Ct. App. 1991).

II. Ineffective Assistance of Counsel

¶9 Magnon claims he was denied the effective assistance of trial counsel. This court's review of an ineffective assistance of counsel claim is a mixed question of fact and law. ***State v. Erickson***, 227 Wis. 2d 758, 768, 596 N.W.2d 749 (1999). The court's findings of fact will not be disturbed unless they are clearly erroneous. ***Id.*** However, the ultimate determination whether the attorney's performance falls below the constitutional minimum is a question of law that this court reviews independently. ***Id.***

¶10 "The benchmark for judging whether counsel has acted ineffectively is stated in ***Strickland v. Washington***, 466 U.S. 668 (1984)." ***State v. Johnson***, 153 Wis. 2d 121, 126, 449 N.W.2d 845 (1990). To succeed on his ineffective assistance of counsel claim, Magnon must show both: (1) that his counsel's representation was deficient; and (2) that this deficiency prejudiced him. ***Strickland***, 466 U.S. at 694.

¶11 In order to establish deficient performance, a defendant must show that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Id.*** at 687. However, "every effort is made to avoid determinations of ineffectiveness based

on hindsight … and the burden is placed on the defendant to overcome a strong presumption that counsel acted reasonably within professional norms." ***Johnson***, 153 Wis. 2d at 127. In reviewing counsel's performance, we judge the reasonableness of counsel's conduct based on the facts of the particular case as they existed at the time of the conduct and determine whether, in light of all the circumstances, the omissions fell outside the wide range of professionally competent representation. ***Strickland***, 466 U.S. at 690. Because "[j]udicial scrutiny of counsel's performance must be highly deferential … the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." ***Id.*** at 689. Further, "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." ***Id.*** at 690.

¶12 The prejudice prong of the ***Strickland*** test is satisfied where the attorney's error is of such magnitude that there is a reasonable probability that, absent the error, the result of the proceeding would have been different. ***Id.*** at 694. We may address the tests in the order we choose. ***State v. Sanchez***, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996). If Magnon fails to establish prejudice, we need not address deficient performance. ***Id.***

¶13 Here, Magnon argues trial counsel was ineffective by failing to assert an entrapment defense. We are not persuaded. "Entrapment is a defense available to a defendant who has been induced by law enforcement to commit an offense which the defendant was not otherwise disposed to commit." ***State v. Pence***, 150 Wis. 2d 759, 765, 442 N.W.2d 540 (Ct. App. 1989). Our supreme court has adopted a subjective test to determine the origin of the defendant's intent. ***Id.*** "The subjective test focuses on the reason for the defendant's state of

mind which led to the intent to commit the crime, *i.e.*, whether the police conduct affected or changed a particular defendant's state of mind." ***Id.***

¶14 Entrapment, however, necessarily admits the act charged. ***State v. Monsoor***, 56 Wis. 2d 689, 696, 203 N.W.2d 20 (1973). "Once entrapment becomes an issue, all essential elements of the crime are taken as having been proved beyond a reasonable doubt." ***State v. Saternus***, 127 Wis. 2d 460, 480, 381 N.W.2d 290 (1986). All that remains is the question of the State's "bad conduct" and the "origin of the intent" to commit the crime. ***Id.***

¶15 Magnon focuses on whether the evidence supported an entrapment defense. The State, however, does not dispute there was sufficient evidence to support an entrapment instruction, had it been requested. This concession notwithstanding, we are not convinced such a defense was viable under the facts of this case. In any event, the relevant question is whether counsel's decision to eschew the entrapment defense satisfied the constitutional standard for providing effective assistance.

¶16 At the ***Machner*** hearing, trial counsel testified that he discussed two strategic reasons with Magnon for not pursuing an entrapment defense. First, the defense required a showing that improper methods were used to induce Magnon to commit an offense he was *not otherwise disposed* to commit. Counsel was hesitant to open the door on the issue of Magnon's character—specifically, his disposition to commit the crime, fearing he would be impeached by the revelation that one of Magnon's chat room friends was a fifteen-year-old-girl. Second, counsel emphasized Magnon's defense was that he did not believe "Sarah" was thirteen years old. Rather, he thought she was role-playing. Counsel therefore

concluded the entrapment defense was inconsistent with Magnon's "lack of intent" defense.

¶17 The circuit court concluded that under the facts of this case, an entrapment defense presented "a great deal of practical difficulties" and ultimately found that counsel's decision to not pursue the defense was "reasonable." Given this finding of reasonableness, counsel's chosen strategy is "virtually unassailable." ***State v. Maloney***, 2004 WI App 141, ¶23, 275 Wis. 2d 557, 685 N.W.2d 620. That counsel's chosen defense ultimately failed is not enough to demonstrate ineffective assistance of trial counsel. *See* ***State v. Robinson***, 177 Wis. 2d 46, 58, 501 N.W.2d 831 (Ct. App. 1993). "Effective representation is not to be equated with a not guilty verdict." ***Id.***

¶18 Next, Magnon contends counsel was ineffective by failing to file a motion to suppress evidence seized during the execution of a search warrant. As the State points out, however, Magnon offers only a perfunctory argument in support of this claim. This court declines to address arguments that are inadequately briefed. *See* ***State v. Flynn***, 190 Wis. 2d 31, 58 n.2, 527 N.W.2d 343 (Ct. App. 1994). Moreover, Magnon effectively abandoned this claim at the ***Machner*** hearing, where postconviction counsel was unable to identify for the court the basis upon which trial counsel should have objected to the search. The court reminded postconviction counsel that the onus was on him to show there was a meritorious motion that trial counsel should have made, "and the failure to make it prejudiced [Magnon]'s right to trial." Postconviction counsel responded: "I guess I'm hanging my hat on this entrapment issue." By abandoning the claim in the trial court, Magnon has no right to this court's review of the claim. ***State v. Ledger***, 175 Wis. 2d 116, 135, 499 N.W.2d 198 (Ct. App. 1993).

¶19 Finally, Magnon argues counsel was ineffective by failing to challenge jurisdiction. As noted above, the court had both territorial and subject matter jurisdiction over Magnon's case. Counsel is not deficient for failing to pursue a meritless claim. ***State v. Wheat***, 2002 WI App 153, ¶14, 256 Wis. 2d 270, 647 N.W.2d 441. To the extent Magnon claims counsel was ineffective for failing to object to personal jurisdiction, the State argues that trial counsel correctly determined there was personal jurisdiction. The State contends that a valid criminal complaint established personal jurisdiction over Magnon, *see* ***State v. Jennings***, 2003 WI 10, ¶26, 259 Wis. 2d 523, 657 N.W.2d 393, and Magnon's physical appearance in court completed the requirements for personal jurisdiction. *See* ***State v. Monje***, 109 Wis. 2d 138, 144, 325 N.W.2d 695 (1982). By failing to file a reply brief, Magnon concedes the State's argument. *See* ***Charolais Breeding Ranches, Ltd., v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (arguments not refuted are deemed admitted).

III. Sentencing

¶20 Magnon claims the circuit court erroneously exercised its sentencing discretion by imposing a sentence Magnon characterizes as "excessive, unusual [and] unduly harsh" and by considering improper factors. Sentencing lies within the discretion of the trial court. *See* ***State v. Echols***, 175 Wis. 2d 653, 681, 499 N.W.2d 631 (1993). In reviewing a sentence, this court is limited to determining whether there was an erroneous exercise of discretion. *See* ***id.*** There is a strong public policy against interfering with the sentencing discretion of the trial court, and sentences are afforded the presumption that the trial court acted reasonably. *See* ***id.*** at 681-82. If the record contains evidence that the trial court properly exercised its discretion, we must affirm. *See* ***State v. Cooper***, 117 Wis. 2d 30, 40, 344 N.W.2d 194 (Ct. App. 1983). Proper sentencing discretion is demonstrated if

the record shows that the court "examined the facts and stated its reasons for the sentence imposed, 'using a demonstrated rational process.'" ***State v. Spears***, 147 Wis. 2d 429, 447, 433 N.W.2d 595 (Ct. App. 1988) (citation omitted). "To overturn a sentence, a defendant must show some unreasonable or unjustified basis for the sentence in the record." ***Cooper***, 117 Wis. 2d at 40.

¶21 The three primary factors that a sentencing court must address are: (1) the gravity of the offense; (2) the character and rehabilitative needs of the offender; and (3) the need for protection of the public. *See* ***State v. Sarabia***, 118 Wis. 2d 655, 673, 348 N.W.2d 527 (1984). The weight to be given each of the primary factors is within the discretion of the sentencing court and the sentence may be based on any or all of the three primary factors after all relevant factors have been considered. *See* ***State v. Wickstrom***, 118 Wis. 2d 339, 355, 348 N.W.2d 183 (Ct. App. 1984).

¶22 In considering the required factors, a sentencing court can also consider other relevant factors, including, but not limited to:

> (1) Past record of criminal offenses; (2) history of undesirable behavior pattern; (3) the defendant's personality, character and social traits; (4) result of presentence investigation; (5) vicious or aggravated nature of the crime; (6) degree of the defendant's culpability; (7) defendant's demeanor at trial; (8) defendant's age, educational background and employment record; (9) defendant's remorse, repentance and cooperativeness; (10) defendant's need for close rehabilitative control; (11) the rights of the public; and (12) the length of pretrial detention.

State v. Gallion, 2004 WI 41, ¶43, 270 Wis. 2d 535, 678 N.W.2d 197. When a defendant argues that his or her sentence is unduly harsh or excessive, we will hold that the sentencing court erroneously exercised its discretion "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).

¶23 Here, the court considered the appropriate factors in imposing sentence. The court described Magnon's conduct as "a very serious offense" and a "horrible crime." The court nevertheless indicated its belief that Magnon did not have great rehabilitative needs and was not a great danger to the community. With respect to Magnon's character, however, the court described him as lacking both "character and a sense of responsibility." The court stated its belief that Magnon's defense was unbelievable, a fabrication Magnon developed to provide a defense to the charge. The court further noted that probation would have been more appropriate had Magnon "not lied to everyone connected with this so blatantly."

¶24 Despite the court's consideration of the appropriate sentencing factors, Magnon argues the court improperly treated the case as if an assault had occurred. Child enticement, pursuant to WIS. STAT. § 948.07(1), is committed by one who, with the intent to have sexual contact, causes or attempts to cause any child to go into a vehicle, building, room or secluded place. Under the statute's own definition, whether one causes or attempts to cause sexual contact is immaterial, as either action satisfies that element of the crime of child enticement. Moreover, Wisconsin regards an attempted crime and a completed crime as equally serious because "they demonstrate to the same extent the actor's criminal tendencies." ***State v. Moffett***, 2000 WI 130, ¶18 n.12, 239 Wis. 2d 629, 619 N.W.2d 918. The court, therefore, did not consider an improper factor by viewing Magnon's attempt at enticement as the functional equivalent of a completed enticement.

¶25 Magnon also claims the court violated his constitutional right to testify by questioning the truth of his trial testimony. The trial court's view of Magnon's credibility, however, bears on his character and his failure to accept responsibility for the crimes. Further, the court's consideration of Magnon's credibility did not penalize him for exercising his right to testify at trial. While Magnon has the right to testify, he does not have the right to testify untruthfully. *See* ***Harris v. New York***, 401 U.S. 222, 224 (1971); *see also* ***State v. Burroughs***, 117 Wis. 2d 293, 344 N.W.2d 149 (1984).

¶26 Out of a maximum possible fifty-year-sentence, the court ultimately imposed concurrent sentences consisting of one year of initial confinement followed by two years' extended supervision. Under these circumstances, it cannot reasonably be argued that Magnon's sentence is so excessive as to shock public sentiment. *See* ***Ocanas***, 70 Wis. 2d at 185. Because the court considered the proper factors when imposing sentence, we conclude that it properly exercised its sentencing discretion.

By the Court.—Judgment and order affirmed.

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