COURT OF APPEALS
DECISION
DATED AND FILED

April 15, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-1388-CR **Cir. Ct. No. 00CF1494**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BOBBY D. ARTHUR,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: KITTY K. BRENNAN and JOHN J. DiMOTTO, Judges.[1] *Affirmed.*

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

---

[1] Judge Brennan presided over the trial and sentencing. Judge DiMotto heard the postconviction motion.

¶1 PER CURIAM. Bobby D. Arthur appeals the judgment convicting him of one count of child enticement, two counts of second-degree sexual assault, one count of exposing a child to harmful material, and one count of false imprisonment, contrary to WIS. STAT. §§ 948.07(1), 940.225(2)(a), 948.11(2)(a), and 940.30 (1999-2000).[2] Arthur also appeals from the trial court's order denying postconviction relief. On appeal, Arthur makes five separate claims of error. He argues: (1) there was insufficient evidence to convict him of count two, a charge of second-degree sexual assault–hands to vagina contact; (2) counts two and three were multiplicitous, and thus, violated his rights against double jeopardy; (3) his trial attorney was ineffective for failing to raise issues one and two, requiring a new trial; (4) an alternate juror's impropriety in bringing a City of Milwaukee map into the jury room, which was seen by one regular juror, requires a new trial; and (5) the trial court's seventy-five-year sentence was harsh and excessive. We affirm.

I. BACKGROUND.

¶2 Sixteen-year-old J.K. told police that, while walking home from school on March 21, 2000, she was approached by Arthur, a man she did not know, who asked her if she could baby-sit his two-year-old son. J.K. agreed and entered a nearby home with Arthur. Once inside, Arthur locked the door and told her, "You can do this the hard way or the easy way." Arthur then smoked some crack cocaine and took off his clothes. He then started a pornographic movie on the television. Arthur instructed J.K. to take off her clothes and he removed her

[2] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

shirt and her underwear. Arthur told her that if she did not do as she was told, he would "smack" her. Arthur then placed his hands on her vagina and then touched her vagina with his mouth. Arthur also ordered J.K. to smoke the crack pipe with him. Later, Arthur told her to "suck his dick," which she did because of his threats. Afterwards, he again placed his mouth on her vagina. Following this, Arthur gave her a green robe to wear and directed her to go down into the basement. Once in the basement, Arthur told her to again "suck his dick," which she did while he licked her vagina. Arthur then left briefly and went upstairs. When he returned, he had a bag of crack cocaine. He began smoking the cocaine and told her to again "suck his dick." She complied as she feared he was going to beat her up. They then went back upstairs and Arthur stated she could put her clothes back on and leave. He also told her to come back later and he would give her $200. He unlocked the door and she left. When she got home she related the events to her stepmother, who called the police.

¶3 A police investigation led them to Arthur's house. A search warrant was issued for the home and the police recovered men's clothing similar to that described by J.K. as that worn by her assailant, a pornographic video, and letters addressed to Arthur bearing the address of the home being searched, as well as paraphernalia consistent with the use of crack cocaine. J.K. picked out Arthur's picture from a photo array and a warrant was issued for Arthur. He was later arrested and charged with two felonies. On the day set for a jury trial, the State filed an amended information charging Arthur with six counts.

¶4 At trial, J.K. testified, but Arthur did not. Arthur was convicted of all counts, except one count of second-degree sexual assault, alleging mouth-to-penis sexual contact. Following the jury trial, the trial court learned that an alternate juror had brought a City of Milwaukee map into the jury room. After

learning of the map, the trial court held a hearing. The testimony of almost all of the jurors revealed that an alternate juror brought a map to the jury room, but only one other juror looked at the map and the map was never discussed during jury deliberations. The trial court ruled that while the map was extraneous information, it was not prejudicial to Arthur because the location of Arthur's home and the route taken by J.K. were of little relevance to his defense, as the defense posture centered on challenging J.K.'s credibility. Consequently, the trial court denied the motion for a new trial.

¶5 At sentencing, the trial court remarked that the effects of the crimes on J.K. were considerable, that Arthur had a prior sexual assault conviction, making him an extremely dangerous person, and he had a serious drug problem which he had not sought to correct. Arthur was then sentenced to seventy-five years, consisting of forty-five years' confinement and thirty years' extended supervision. Arthur brought both a postconviction motion and a supplementary motion. In his motions, he argued that: several of the charges were multiplicitous, insufficient evidence was presented on one of the charges, his attorney was ineffective, and his sentence was harsh and excessive. The motions were denied.

II. ANALYSIS.

A. The State met its burden of proof that Arthur's actions were done for sexual gratification purposes.

¶6 Arthur argues that the State failed to meet its burden of proof with regard to count two, which charged him with unlawfully touching J.K.'s vagina with his finger, because the State failed to prove that this touching was motivated by a desire for sexual gratification. Although the testimony was scant, we are satisfied that the State met its burden of proof with regard to this count.

¶7 The standard of review for a claim of insufficient evidence is high. In reviewing the sufficiency of the evidence to support a conviction,

> … an appellate court may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn a verdict even if it believes that the trier of fact should not have found guilt based on the evidence before it.

State v. Poellinger, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990) (citation omitted).

¶8 Here, the crime of second-degree sexual assault required the State to prove three elements. It had to prove, as alleged, that Arthur had sexual contact with the victim consisting of his finger touching the victim's vagina; that the victim, J.K., did not consent to these acts; and the contact occurred because Arthur used force or the threat of force. *See* WIS JI—CRIMINAL 1208. Additionally, with respect to intent, the State had to show that the sexual contact, *i.e.*, his finger touching her vagina, was done with the intent of becoming sexually aroused or gratified. *See* WIS JI—CRIMINAL 1200A.

¶9 The testimony of J.K. concerning this count consists of the following exchange:

> Q. Did his hands ever touch your vagina?
>
> A. Yes.
>
> Q. When?
>
> A. Before he touched – licked my private.

Q. What, specifically, did he do with his hands?

A. I put his hands on my lips.

Q. Of your vaginal area.

A. Yes.

These actions occurred after J.K. had been threatened, after she was ordered to undress, and after she had already been the victim of Arthur's false imprisonment. The jury was instructed that "intent must be found … if found at all, from any acts, words, or statements bearing on his intent." Given the circumstances under which the touching occurred, the jury could easily and reasonably infer that the act of Arthur's touching her vagina with his finger was done for the purpose of becoming sexually aroused or gratified. Thus, we reject Arthur's contention that there was insufficient evidence to convict him of this count.

B. Counts two and three are not multiplicitous.

¶10 Arthur contends that counts two and three are multiplicitous and violate his constitutional rights because both counts charge him with violating the second-degree sexual assault statute and the claimed contact merely describes "one continuous offense and not two separate offenses."

¶11 As the State notes, Arthur failed to raise this issue until after trial. The holding in ***State v. Koller***, 2001 WI App 253, 248 Wis. 2d 259, 635 N.W.2d 838, instructs that the failure to raise this issue at trial constitutes waiver. *See* ***id.*** at ¶¶25-26. However, because Arthur also asserts that his attorney was ineffective for failing to raise this issue in a timely manner, we address it. *See* ***id.***

¶12 Multiple punishments for the same offense violate both state and federal constitutions' double jeopardy protection. *See* ***State v. Sauceda***, 168

Wis. 2d 486, 492, 485 N.W.2d 1 (1992). When reviewing a claim for multiplicitous charges, this court reviews the claim *de novo*. ***State v. Reynolds***, 206 Wis. 2d 356, 363, 557 N.W.2d 821 (Ct. App. 1996).

¶13 Arthur asserts the facts here are similar to the facts in ***State v. Hirsch***, 140 Wis. 2d 468, 410 N.W.2d 638 (1987), where this court found three counts of sexual assault with a child were multiplicitous and required dismissal. Borrowing from ***Hirsch***, Arthur contends the conduct claimed in counts two and three are "not so significantly different in fact that they may be properly denominated separate crimes." ***Id.*** at 474 (citation omitted). Rather, Arthur submits that the touchings here were "part of the same general transaction or episode." We disagree.

¶14 In any analysis of a claim of multiplicity we must apply the supreme court's two-part test found in ***State v. Rabe***, 96 Wis. 2d 48, 63, 291 N.W.2d 809 (1980). "First, in regard to the question of double jeopardy, the courts [must] determine[] whether the severed offenses are 'identical in the law and in fact.'" ***Id.*** (citing ***State v. Van Meter***, 72 Wis. 2d 754, 758, 242 N.W.2d 206 (1976)). "The second component of the test for multiplicity focuses on the legislative intent as to the allowable unit of prosecution under the statute in question." ***Id.*** Here, the answer to the question of whether the charges are identical in law is a simple one. Arthur was charged with violating the same statute and subsections in each count. Therefore, the crimes were identical in law.

¶15 Next, we look to see if the acts were identical in fact. This inquiry requires this court to see if the charged acts were separated in time or were of a significantly different nature. *See* ***State v. Multaler***, 2002 WI 35, ¶¶56-57, 252 Wis. 2d 54, 643 N.W.2d 437. Further, in assessing whether the acts are

significantly different in nature requires us, when, as here, the acts claimed are of the same type, to look to see if the acts involved "a new volitional departure in the defendant's course of conduct." ***Id.*** at ¶57 (citations omitted).

¶16 Applying these tests to the facts leads us to conclude that while the charged offenses were identical in law, they were not identical in fact. This is so because in count two, the information alleged that Arthur placed his finger to the victim's vagina. However, count three alleged that Arthur placed his mouth to the victim's vagina. Unlike the situation in ***Hirsch***, where charging Hirsch with three counts of sexual assault for touching the victim's "front butt," "back butt," and then again touching her "front butt," was found to be one continuous motion, the charges here required Arthur to complete two distinctly different acts. Thus, his actions were not part of the same continuous act or episode. Further, the two acts outlined in the information necessitated Arthur's engaging in separate independent deliberations, as the acts constituted different courses of conduct. Consequently, this court need not resort to the second part of the ***Rabe*** test – whether the legislature intended to permit separate charges for criminal conduct that is both identical in law and in fact because the acts here were not identical in fact. Thus, for the reasons stated, we are satisfied that counts two and three were not multiplicitous.

C. Arthur's attorney was not ineffective.

¶17 Arthur contends that he is entitled to a new trial because his attorney was ineffective in two ways. First, he asserts, his attorney's failure to challenge the lack of evidence in count two charging him with sexual assault finger-to-vagina contact, showing that he engaged in this conduct for purposes of sexual gratification, was substandard attorney performance. Second, he contends his

attorney's failure to raise the fact that counts two and three were multiplicitous is also indicative of an incompetent lawyer. We give Arthur's ineffective assistance of counsel arguments short shrift because we have previously concluded that sufficient evidence existed to allow the jury to infer that Arthur was motivated to commit count two by a desire for sexual gratification, and we have determined that counts two and three were not multiplicitous.

¶18 In order to prevail on a claim of ineffective assistance of counsel, a defendant must show that his attorney's performance was deficient and that he was prejudiced as a result of his attorney's deficient conduct. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); *see also* ***State v. Pitsch***, 124 Wis. 2d 628, 633, 369 N.W.2d 711 (1985). To prove deficient performance, the defendant must show specific acts or omissions of his attorney that fall "outside the wide range of professionally competent assistance." ***Strickland***, 466 U.S. at 687. To show prejudice, the defendant must demonstrate that the result of the proceeding was unreliable. ***Id.*** If the defendant fails on either prong—deficient performance or prejudice—his ineffective assistance of counsel claim fails. ***Id.*** at 697. We "strongly presume[]" counsel has rendered adequate assistance. ***Id.*** at 690.

¶19 Here, we reject Arthur's complaints that his attorney's conduct fell outside the wide range of professionally competent assistance because we can find no examples of deficient performance. Thus, the first prong under the Strickland test has not been met. Consequently, Arthur's attorney was not ineffective and Arthur is not entitled to a new trial on this basis.

D. A juror's bringing of a map into the jury room constituted extraneous information, but it was not prejudicial.

¶20 Arthur quarrels with the trial court's determination that while the bringing of a City of Milwaukee map into the jury room by an alternate juror was extraneous information, it caused him no prejudice "because the route testimony was a minor part of the credibility issue." Arthur submits that under ***State v. Poh***, 116 Wis. 2d 510, 343 N.W.2d 108 (1984), his convictions should be reversed because extraneous prejudicial information was erroneously brought into the jury room. We disagree.

¶21 WISCONSIN STAT. § 906.06(2) provides: "… [A] juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror."

¶22 Extraneous information has been defined as information which a juror obtains from a non-evidentiary source, other than the general wisdom jurors are expected to possess, and does not extend to statements which simply evince a juror's subjective mental process. *See* ***State v. Broomfield***, 223 Wis. 2d 465, 478, 589 N.W.2d 225 (1999). When a defendant seeks to overturn a jury verdict because of a claim of extraneous prejudicial information, the defendant must demonstrate to the court by clear, satisfactory and convincing evidence that the juror engaged in the conduct alleged, and if such a showing is made, then the court makes a legal determination of whether the extraneous information constitutes prejudicial error requiring reversal of the verdict. *See* ***State v. Faucher***, 227 Wis. 2d 700, 728-29, 596 N.W.2d 770 (1999). The test to be applied when one challenges the trial court's finding that extraneous information obtained by a juror is not prejudicial is to determine "whether there is a reasonable possibility that the

information in [the juror's] possession would have a prejudicial effect upon a hypothetical average juror." ***State v. Messelt***, 185 Wis. 2d 254, 282, 518 N.W.2d 232 (1994).

¶23 As noted, after learning that a map had been brought into the jury room during the trial, the trial court conducted a hearing to determine what actually occurred; and, after finding extraneous information had been brought into the jury room, concluded that this fact did not require a reversal of the convictions and a new trial. The trial court heard testimony from almost all of the jurors. After listening to the testimony, the trial court found that the party bringing in the map was an alternate juror who did not take part in the deliberations. Further, although one other juror looked at the map, the map was never discussed during the deliberations. Consequently, the trial court ruled that while extraneous information was brought into the jury room, it did not rise to the level of creating any prejudice to Arthur.

¶24 Here, implicit in the trial court's decision was its finding that Arthur made a sufficient showing of extraneous prejudicial information reaching the jurors to require a hearing on the matter. After the hearing, the court concluded that the location on a map of various places where the victim walked was not general juror wisdom, and thus, was extraneous. The trial court then went on to determine that the extraneous information was not prejudicial. This determination is a legal question which we review *de novo*. ***Broomfield***, 223 Wis. 2d at 480.

¶25 We are satisfied that a hypothetical juror would not have been prejudiced by briefly viewing a city map brought in by an alternate juror. First, we note that the testimony of the jurors revealed that only one juror saw the map and the map was never discussed during the deliberations. Second, defense

strategy was focused almost entirely on the victim's credibility. Very little argument was made regarding the victim's route home from school. Indeed, the course taken by J.K. to reach Arthur's home was a minor part of the credibility issue. Thus, we conclude, as did the trial court, that Arthur was not prejudiced by this extraneous information.

E. The trial court properly exercised its discretion in sentencing Arthur.

¶26 Arthur's final complaint is that the trial court's sentence was harsh and excessive. He submits that he received a cumulative period of confinement of forty-five years, and since he was forty-nine-years-old at the time of sentencing, his release date is well beyond his life expectancy.[3] He claims that the trial court failed to explain its reasons for the long period of confinement. Relying on ***State v. Hall***, 2002 WI App 108, 255 Wis. 2d 662, 648 N.W.2d 41, Arthur argues the trial court erroneously exercised its discretion:

> A sentencing court needs to explain the reasons for imposing the specific level of severity for the sanction contained in the sentence…. When imposing consecutive sentences, the court must give *sufficient justification for the sentences and apply the same three factors to its determination of whether the sentences should be served consecutively or concurrently*.

Additionally, Arthur claims the trial court failed to find that his sentences were the minimum amount of confinement necessarily consistent with his character, his rehabilitative needs, and the needs to protect the community. Further, he asserts the trial court failed to explain why consecutive sentences for offenses occurring during a single criminal episode were necessary. We disagree.

[3] Arthur's life expectancy, per the National Vital Statistics Report, Vol. 50, no. 15, September 16, 2000, p.25, is 68.2 years.

¶27 We review sentencing determinations under the erroneous exercise of discretion standard. "When reviewing a sentence imposed by the [trial] court, we start with the presumption that the [trial] court acted reasonably. We will not interfere with the [trial] court's sentencing decision unless [it] erroneously exercised its discretion." ***State v. Lechner***, 217 Wis. 2d 392, 418-19, 576 N.W.2d 912 (1998) (citations omitted).

¶28 The trial court should consider three primary factors when sentencing: (1) the gravity of the offense; (2) the character and rehabilitative needs of the offender; and (3) the need for public protection. ***State v. Sarabia***, 118 Wis. 2d 655, 673, 348 N.W.2d 527 (1984). The trial court may also properly consider the following factors, *inter alia*: the defendant's past criminal offenses, any history of undesirable behavior patterns, the defendant's need for rehabilitative control, the defendant's age and educational background, the results of a presentence investigation, and the rights of the public. *See* ***State v. Harris***, 119 Wis. 2d 612, 623-24, 350 N.W.2d 633 (1984).

¶29 Arthur faced a maximum sentence of one hundred years in prison. The presentence report recommended sixty-four years. The State argued for thirty-five years. The trial court examined the three primary sentencing factors. The trial court noted that: Arthur's criminal acts were "hugely egregious"; Arthur had a horrible record; Arthur was a registered sex offender in Illinois who had failed to get sexual offender treatment; and Arthur, despite having a serious cocaine addiction, had not availed himself of drug treatment.

¶30 The trial court also recognized Arthur's positive qualities: he was remorseful, had held a job for long periods of time; and was a Vietnam veteran

with an honorable discharge. Despite his positive attributes, the trial court believed Arthur's risk of reoffending was high.

¶31 The trial court's sentences are supported by the facts. Although Arthur may not outlive his sentences, this factor does not make his sentences either harsh or excessive. Given Arthur's conduct, his prior record and the risk he poses to the community, we are not shocked by his sentences. Accordingly, we affirm the trial court.

By the Court.—Judgment and order affirmed.

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