

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 30, 2003

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 02-3002-CR
STATE OF WISCONSIN**

Cir. Ct. No. 97CF 974023

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

LUTHER WADE COFIELD,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: KITTY K. BRENNAN, Judge. *Judgment affirmed; order affirmed in part, reversed in part and cause remanded with directions.*

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

¶1 PER CURIAM. Luther Wade Cofield appeals from an amended judgment of conviction after a jury found him guilty of kidnapping while armed, one count of first-degree sexual assault, and two counts of second-degree sexual assault, all as a habitual offender. He also appeals from an order denying his

motion for postconviction relief. Cofield contends that the trial court erred in: (1) rejecting the defense request for access to the victim's medical records revealing what he considers to be her untruthful statement to medical personnel regarding her cocaine use, and refusing to allow them to be introduced in evidence; and (2) sentencing him to an aggregate ninety-year sentence, despite the fact that the judge from his previous trial sentenced him to only seventy years. We conclude that the trial court did not erroneously exercise discretion in denying Cofield's evidentiary motion; thus, we affirm the judgment of conviction. We also conclude, however, that the trial court erred, under *State v. Church*, 2003 WI 74, __ Wis. 2d __, 665 N.W.2d 141, in imposing an aggregate ninety-year sentence after Cofield's successful appeal and retrial; accordingly, we reverse that portion of the postconviction order and remand for resentencing.

I. BACKGROUND

¶2 On September 5, 1997, Cofield lured a female neighbor, Lee H., into his apartment, put a knife to her throat and forced her to engage in sex acts. In April 1998, a jury found Cofield guilty of one count of kidnapping, while armed, and three counts of first-degree sexual assault, all as a habitual offender. On October 2, 1998, Judge Laurence C. Gram, Jr., sentenced Cofield to a fifty-year prison term on one count of sexual assault, enhanced due to his repeater status, and a consecutive twenty-year term for another count of sexual assault. Judge Gram withheld sentence on the third count of sexual assault and the kidnapping, and imposed forty years' probation, concurrent to each other but consecutive to the prison sentence. Cofield appealed and this court reversed and remanded for a new trial after concluding that other-acts evidence, detailing Cofield's prior sexual assault convictions, was erroneously admitted. *State v. Cofield*, 2000 WI App 196, 238 Wis. 2d 467, 618 N.W.2d 214.

¶3 At Cofield's first trial, Lee testified that Cofield sexually assaulted her after he smoked cocaine. She also testified that, after the assault, she accepted his offer to smoke cocaine in order to assuage him lest he harm her or her child. Cofield, attempting to establish that Lee's cocaine use and sexual conduct were entirely voluntary, asked the court before the first trial for an *in camera* inspection of Lee's medical records. Cofield sought to determine, among other things, whether the records demonstrated that the victim had used cocaine in the *three months preceding the crimes*.

¶4 Following remand, the case came to Judge Kitty K. Brennan who conducted an *in camera* inspection of the victim's medical records. As summarized by Judge Brennan, the records established that on April 15, 1997, Lee was admitted to a hospital on an emergency basis after a suicide attempt in jail. She was released after a few days but was re-admitted on May 9. Between May 10 and May 12, she had a urine screening that was positive for cocaine. The records also indicated that in August and June of 1997, Lee had claimed to medical personnel that she had not used cocaine since her April 15 hospital admission.

¶5 Upon learning from the court, in its summary of its *in camera* inspection, that the records indicated Lee had tested positive for cocaine on May 12, and had possibly failed to disclose that usage to medical personnel, the defense sought to introduce the records. The court concluded, however, that the records were not admissible, reasoning that Lee's alleged cocaine use almost four months before the crimes was not relevant.

¶6 At the retrial, Lee testified that on the afternoon of September 5, 1997, she left a note on Cofield's apartment door, requesting that he return the

television antenna he had borrowed earlier in the week. Lee stated that shortly after leaving the note and returning to her apartment, Cofield knocked on her door and lured her into his apartment under the guise of needing her assistance to detach the antenna. As Lee approached Cofield's apartment with her three-year-old daughter at her side, Cofield asked her to leave the child outside in the hallway, and Lee complied. On entering the apartment, Lee went to the television and quickly and easily removed the antenna. When she turned to exit, however, she saw that Cofield had closed the apartment door. Seconds later, Cofield put his hand over Lee's mouth, held a knife to her throat, and told her that he would not hurt her if she remained quiet.

¶7 Lee testified that over the next sixty-to-seventy-five minutes, Cofield held her against her will and, with a knife close at hand, sexually assaulted her, forcing her to engage in penis-to-vagina and penis-to-mouth sexual contact. Lee said that she did not run or resist Cofield because she feared he would kill her and her daughter. Lee also explained that she truthfully told Cofield of her own struggle with cocaine addiction and, to assuage him, agreed to smoke some cocaine with him during her captivity. Cofield eventually let Lee return to her apartment and, within moments of permitting her to leave, he knocked at her door and apologized. Shortly thereafter, Lee's boyfriend returned home and, after she told him what had happened, they went to his mother's apartment to call police.

¶8 Debra Donovan, a nurse from Sinai Samaritan's Women's Assessment Center, also testified at the second trial. She confirmed that semen was present in Lee's vagina. She also noted that Lee herself requested a blood test for drugs and alcohol, which proved positive for cocaine.

¶9 Cofield did not testify, and the defense rested without presenting any evidence. As presented through opening statement, cross-examination, and closing argument, however, his defense theory was that this was a “dope date” in which Lee exchanged sex for cocaine.

II. ANALYSIS

A. *In camera* review of medical records.

¶10 Cofield contends that the trial court’s refusal to provide him with Lee’s medical records, which he claims indicate that she was untruthful with medical personnel, denied him a fair trial. We disagree.

¶11 The admission or exclusion of evidence is a discretionary decision of the trial court and should not be overturned on appeal absent an erroneous exercise of discretion. *State v. Patino*, 177 Wis. 2d 348, 362, 502 N.W.2d 601 (Ct. App. 1993). A court erroneously exercises discretion when it fails either to consider the proper factors or to apply the correct law. *State v. Johnson*, 118 Wis. 2d 472, 480-81, 348 N.W.2d 196 (Ct. App. 1984). We will not find an erroneous exercise of discretion if the record shows the trial court exercised discretion and if a reasonable basis supports the court’s decision to exclude the evidence. *State v. Oberlander*, 149 Wis. 2d 132, 140-41, 438 N.W.2d 580 (1989). However, if evidence has been erroneously excluded, we will independently determine whether that error was harmless or prejudicial. See *State v. Patricia A.M.*, 176 Wis. 2d 542, 556-57, 500 N.W.2d 289 (1993).

¶12 Before Cofield’s retrial, the trial court ruled that evidence of Lee’s May 12, 1997 positive cocaine test was not relevant impeachment evidence, and,

thus, the records relating to the test would not be disclosed to the defense. *See* WIS. STAT. § 904.01.¹ The trial court did not err in this determination.

¶13 Relevant evidence is “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” WIS. STAT. § 904.01 (1999-2000). Evidence that is not relevant to any issue in a case is not admissible. *State v. Horn*, 126 Wis. 2d 447, 457-58, 377 N.W.2d 176 (Ct. App. 1985) (citing WIS. STAT. § 904.02).

¶14 After reviewing Lee’s medical and treatment records, the trial court concluded:

And the result of my review is that there is nothing in these three sets of documents that impeaches in any way [Lee’s] statement that she had been absent from cocaine for the three months prior to the incident. There are many references to her usage of cocaine in April of ’97. There is urinalysis (sic) that shows a positive screen for cocaine . . . 5/[12] of ’97, and she had stated that she had used just prior to her admission in April, and there is nothing regarding any self-report or lab report of any usage after that time period and before the date in question. There is nothing in the reports or in any way that would be a recant of the September 5th, ’97 incident.

¶15 Defense counsel then revised his argument and asserted that the evidence of the May 12 test might contradict statements Lee made to medical personnel in which she reported her cocaine usage. Judge Brennan rejected the argument and added that, from her experience in drug court, it was her understanding that cocaine remained in the body for thirty or more days and that

¹ All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

Lee's records reflected only the date of the positive test, not the date of ingestion. The court then concluded that since the records reflected no cocaine use within the three-month period prior to Lee's assault, any drug use prior to that was irrelevant. As a result, Judge Brennan ruled that the medical records would remain sealed.

¶16 Following his conviction, Cofield moved for a new trial, claiming that the trial court erred in excluding Lee's medical records. Denying Cofield's motion for postconviction relief, the trial court noted:

The victim's statements have to be viewed in context. The court reported that the medical reports['] entries were:

“On June 24th, '97 there is a self-report of no cocaine usage since mid-April. There is a June 10th, '97 self-report that she hasn't used cocaine in about two months, et cetera.”

The victim was making statements in June about her actions in “mid-April” or “about two months ago”. Neither statement is precise enough to be considered a *lie*, even if the May 10th (sic) drug test showed usage within a day previous. [The victim was] looking backward in time and giving rough time frames. So, neither statement is *relevant* to the defense theory that [Lee] lied on September 5, 1997 as to whether the defendant forced her to use drugs and have sex on that date [in time]....

....

The defense in this post conviction motion has focused on the court's apparently incorrect understanding of the length of time cocaine stays in a person's system. But that misunderstanding does not render the remainder of the court's relevance analysis incorrect. In fact, there is nothing in the record to show that the alleged consensual drug use lie in May 1997 to medical professionals in any way undermines the victim's credibility under oath and at trial as to her non-consensual drug use and sex on September 5, 1997.

(Record citations omitted.)

¶17 Cofield disagrees and contends that the evidence “would have called into question [Lee’s] claim that [he] forced her to use cocaine and would have supported [his] defense that she consensually engaged in sexual acts in return for cocaine.” In response, the State maintains that the circuit court’s decision should be affirmed because the evidence did not fit within the three-month scope of Cofield’s request. Additionally, the State argues that “it is utterly immaterial whether [Lee] could accurately recall whether her last use of cocaine was in mid-April of 1997 or two-to-three weeks later during the first twelve days of May.” The State is correct.

¶18 Even if Lee lied to medical personnel in reporting her last cocaine use, evidence of that has little, if any, tendency to disprove that Cofield sexually assaulted her in September 1997. The May test date was remote in time from the offense date. *See* WIS. STAT. § 906.08(2).² It had no tendency to prove that she was unable to recall and accurately testify about the September 5, 1997 assault. Further, it had no tendency to disprove her testimony that she took three puffs of cocaine during the assault to appear to be cooperating with Cofield in order to save herself and her child.

² WISCONSIN STAT. § 906.08(2), provides:

SPECIFIC INSTANCES OF CONDUCT. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness’s credibility, other than conviction of a crime or an adjudication of delinquency as provided in s. 906.09, may not be proved by extrinsic evidence. They may, however, subject to s. 972.11 (2)[, the rape-shield law], if probative of truthfulness or untruthfulness and not remote in time, be inquired into on cross-examination of the witness or on cross-examination of a witness who testifies to his or her character for truthfulness or untruthfulness.

¶19 Moreover, even if the evidence were relevant and admissible, any error in denying its admission was harmless. An evidentiary error is subject to a harmless-error inquiry. *State v. Britt*, 203 Wis. 2d 25, 41, 553 N.W.2d 528 (Ct. App. 1996); *see also* WIS. STAT. § 805.18(2).³ In this inquiry, the State has the burden of establishing, beyond a reasonable doubt, that there is no reasonable possibility that the error contributed to the conviction. *State v. Dyess*, 124 Wis. 2d 525, 543, 370 N.W.2d 222 (1985). Stated another way, an error is harmless if it is “clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.” *State v. Harvey*, 2002 WI 93, ¶46, 254 Wis. 2d 442, 647 N.W.2d 189 (quoting *Neder v. United States*, 527 U.S. 1, 18 (1999)). This presents a question of law we review *de novo*. *State v. Harris*, 199 Wis. 2d 227, 256-63, 544 N.W.2d 545 (1996). In determining whether an error is harmless, we weigh the effect of the trial court’s error against the totality of the credible evidence supporting the verdict. *Id.* at 255.

¶20 Here, we cannot conclude that cross-examination of Lee regarding her alleged lie to medical personnel would have so affected the jury’s view of her credibility so as to alter the verdict. Lee’s testimony about her struggle with

³ WISCONSIN STAT. § 805.18(2) provides, as material here:

Mistakes and omissions; harmless error. No judgment shall be reversed or set aside or new trial granted in any action or proceeding on the ground of ... the improper admission of evidence ... unless in the opinion of the court to which the application is made, after an examination of the entire action or proceeding, it shall appear that the error complained of has affected the substantial rights of the party seeking to reverse or set aside the judgment, or to secure a new trial.

addiction was extensive, and defense counsel thoroughly cross-examined her on her addiction, her struggle with recovery, and Cofield's defense theory. Lee gave strong testimony detailing her non-consent and her strategy to comply with Cofield to insure her survival. In addition, other testimony, including that of the police, the nurse, and Lee's boyfriend, corroborated Lee's version of what occurred on September 7, 1997.

¶21 By contrast, Cofield's "consent" defense was presented only in defense counsel's opening statement and through cross-examination. He never testified, and no evidence was introduced countering Lee's convincing account, corroborated by her post-assault conduct. Thus, any error in denying access to and introduction of this evidence was harmless.

B. Resentencing.

¶22 Cofield also contends that the trial court erred in sentencing him. Specifically, he claims that the sentence imposed after his retrial was unsupported and violated his due process rights. We agree; accordingly, we remand for resentencing.

¶23 Whether an increased sentence imposed on a defendant after a successful appeal violates the defendant's right to due process presents an issue of law we review *de novo*. **Church**, __ Wis. 2d __, ¶17. While sentencing discretion permits consideration of a wide range of information relevant to the assessment of punishment, due process requires that it must not be exercised with the purpose of punishing a successful appellant. **Alabama v. Smith**, 490 U.S. 794, 798 (1989). The Supreme Court has declared:

[W]henver a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so

must affirmatively appear. Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding. And the factual data upon which the increased sentence is based must be made part of the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal.

North Carolina v. Pearce, 395 U.S. 711, 726 (1969), *overruled on other grounds* by *Alabama v. Smith*, 490 U.S. 794 (1989). “The *Pearce* presumption of vindictiveness can be overcome[, however,] if ‘affirmative reasons’ justifying the longer sentence appear in the record and if those reasons are ‘based upon objective information’ regarding events or ‘identifiable conduct on the part of the defendant’ subsequent to the original sentencing proceeding.” *Church*, __ Wis. 2d __, ¶55 (citation omitted).

¶24 In *Church*, the Wisconsin Supreme Court concluded that a longer sentence premised on the passage of time, the defendant’s continued denial, and his failure to seek sex offender treatment, did “not constitute ‘objective information’ of ‘identifiable conduct on the part of the defendant’ subsequent to the original sentencing.” *Id.*, ¶56. Rather, the court concluded that “[i]t constitute[d] a subjective evaluation of the status of [the defendant’s] rehabilitation at the time of resentencing, based not on any new factors but on the mere continued existence of the original facts.” *Id.*

¶25 Here, the sentencing court premised its sentence on factors similar to those rejected in *Church*. Following the first trial, Judge Gram ordered seventy years in prison with forty years of consecutive probation. Following the second trial (in which Cofield was convicted of lesser offenses and, therefore, faced considerably less exposure), Judge Brennan ordered an aggregate ninety years in prison. This raises the presumption of vindictiveness. Accordingly, we must

determine whether “‘affirmative reasons’ justifying the longer sentence appear in the record and if those reasons are ‘based upon objective information’ regarding events or ‘identifiable conduct on the part of the defendant’ subsequent to the original sentencing proceeding.” *Id.*, ¶55 (quoting *Pearce*, 395 U.S. at 726).

¶26 Here, we conclude the new, harsher sentence was not based on “objective information” of “identifiable conduct on the part of the defendant” subsequent to the original sentencing. Judge Brennan’s rationale for the harsher sentence related to Cofield’s failure to accept responsibility for his crimes and his failure to participate in sex offender treatment while incarcerated, factors which the supreme court has now held to be insufficient to justify an increase in sentencing. As the supreme court observed in *Church*:

Church was in denial and untreated at the time of the original sentencing. That he remained so four years later is not a new factor justifying a longer sentence after a successful appeal; it is merely a continuation of the status quo ante. Defendants who exercise their right to appeal often maintain their innocence. To premise an increased sentence after a successful appeal on a defendant’s continued denial of responsibility, without more, comes far too close to punishing the defendant for his right to appeal.

In addition, there is no evidence that Church refused any treatment opportunity while in prison. Indeed, the evidence at the resentencing hearing established that sex offender treatment was not typically offered until the end of an inmate’s prison term and was not available to Church during his first four years of incarceration.

Id., ¶¶57-58.

¶27 Given the sentencing court’s rationale here, we conclude that Cofield’s increased sentence was not supported by objective new factors in the record. Accordingly, he is entitled to be resentenced.

By the Court.—Judgment affirmed; order affirmed in part, reversed in part and cause remanded with directions

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