

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**January 22, 2004**

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. 03-1008-CR  
STATE OF WISCONSIN**

Cir. Ct. No. 00CF000153

**IN COURT OF APPEALS  
DISTRICT IV**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**BART E. JENSON,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Green County: JAMES R. BEER, Judge. *Affirmed.*

Before Vergeront, Lundsten and Higginbotham, JJ.

¶1 PER CURIAM. Bart Jenson appeals a judgment convicting him of second-degree sexual assault of a child and of attempting to commit the same crime. He also appeals an order denying his motion for a reduced sentence. The issues are whether the trial court properly exercised its sentencing discretion, and

whether the prosecutor's improper closing arguments warrant a new trial. We affirm on both issues.

¶2 At Jenson's jury trial, the State presented evidence that Jenson took the victim, a fourteen-year-old girl, fishing. While sitting together, Jenson fondled one of her breasts both over and under her clothing. She immediately pushed his hand away, walked off, and asked to go home. Instead, he drove her to another location, and attempted to fondle her again. He then took her home. The State's case primarily depended on the victim's credibility. The defense consisted of attempts to bring her credibility into question. In closing, the prosecutor, referring to defense counsel's forthcoming closing argument, said:

You have to use your common sense and decide why in the world are we here? ... Or are we going to believe the little stage show here with this other box?

Remember the Wizard of Oz? "Don't pay any attention to the man behind the curtain." Well, there he sits, and that's the show he is going to try and give you with the levers and the flashing lights.

After defense counsel suggested, in closing, that the victim's demeanor on the stand was inconsistent with her testimony, the prosecutor said in rebuttal:

Was her demeanor consistent on the stand with the—I just love this. Defense attorneys always use this. It doesn't matter what their behavior is on the stand. It's not consistent with the sexual assault victim.

Defense counsel did not object to either of the prosecutor's comments quoted above. The jury subsequently found Jenson guilty of sexual assault and the attempted assault.

¶3 In sentencing Jenson the trial court considered his two prior misdemeanor convictions, including one for sexual contact with a child sixteen

years or older, and a number of ordinance violations. The court commented on Jenson's failure to take responsibility for these and his present acts, his failure on probation on one of the prior convictions, his lack of remorse, the impact on the victim, and the threat he posed of continued anti-social behavior. The court concluded that these factors, particularly the protection of the public and Jenson's rehabilitation needs, required imprisonment. The court imposed consecutive sentences totaling six years of initial confinement followed by seven years of extended supervision. Jenson's appeal follows his unsuccessful attempt to reduce that sentence in postconviction proceedings.

### SENTENCING

¶4 Sentencing lies within the trial court's discretion. *See State v. Echols*, 175 Wis. 2d 653, 681, 499 N.W.2d 631 (1993). In exercising that discretion, the trial court must give primary consideration to the gravity of the offense, the character and rehabilitative needs of the offender, and the need to protect the public. *State v. Sarabia*, 118 Wis. 2d 655, 673, 348 N.W.2d 527 (1984). However, the weight given each of these factors lies within the trial court's discretion, and the court may base the sentence on any or all of them. *See State v. Wickstrom*, 118 Wis. 2d 339, 355, 348 N.W.2d 183 (Ct. App. 1984). We will affirm an exercise of sentencing discretion if the record shows that the court examined the facts and articulated its reasons for the sentence, using a demonstrated rational process, and reached a reasoned and reasonable conclusion. *State v. Spears*, 147 Wis. 2d 429, 447, 433 N.W.2d 595 (Ct. App. 1988). There is a strong public policy against interfering with the trial court's sentencing discretion, and we presume that the trial court acted reasonably in sentencing the defendant. *See Echols*, 175 Wis. 2d at 681-82. We will reverse a sentence as excessive only when it is so disproportionate to the offense as to shock public

sentiment and violate the judgment of reasonable people. *Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

¶5 Jenson contends that the sentences, totaling thirteen years, are excessive for what he describes as a brief touching of the victim, without force or injury. He adds that the victim was “not unusually young or vulnerable,” and that there were mitigating circumstances concerning Jenson’s cooperation in a drug investigation and his good employment record. The trial court gave due consideration to each of these circumstances but chose to give more weight to the various aggravating factors. We will not interfere with that exercise of discretionary authority, which the trial court fully explained on the record. *See State v. Curbello-Rodriguez*, 119 Wis. 2d 414, 434, 351 N.W.2d 758 (Ct. App. 1984) (the weight given any sentencing factor is particularly within the trial court’s discretion). Additionally, in our view, the sentence does not shock public sentiment or violate the judgment of reasonable people. As the trial court noted, sexual contact between a thirty-year-old man and a fourteen-year-old girl is a very serious offense. Jenson faced maximum terms totaling sixty years in prison.

#### PROSECUTOR’S REMARKS

¶6 Under the plain error doctrine, we may review Jenson’s arguments concerning the prosecutor’s remarks, despite his failure to object to them at trial. *State v. Street*, 202 Wis. 2d 533, 552, 551 N.W.2d 830 (Ct. App. 1996); WIS. STAT. § 901.03(4) (2001-02). On review of this issue we determine whether the prosecutor’s remarks “so infected the trial with unfairness as to make the resulting conviction a denial of due process.” *State v. Neuser*, 191 Wis. 2d 131, 136, 528 N.W.2d 49 (Ct. App. 1995). Here, the prosecutor’s comments quoted in this opinion were inappropriate because they were not comments on the evidence, but

were instead directed to the tactics of this defense counsel and of defense attorneys in general. However, we cannot conclude that the prosecutor's brief remarks, in passing, so infected the trial with unfairness as to make the resulting conviction a denial of due process. There is no reason to conclude that the remarks influenced the jury's verdict.

*By the Court.*—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2001-02).

