**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**May 1, 2012**

**Diane M. Fremgen**
**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. 2011AP2019-CR**

**Cir. Ct. No. 2009CF1470**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS**
**DISTRICT I**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**THAYING LOR,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Milwaukee County: KEVIN E. MARTENS, Judge. *Affirmed*.

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

¶1 CURLEY, P.J. Thaying Lor appeals the judgment convicting him of five counts of sexual assault and one count of attempted sexual assault. He also appeals the order denying his postconviction motion. Lor argues that he ought to be granted a new trial because his trial counsel was ineffective, and because the

evidence was insufficient to convict him of the first count of sexual assault. In the alternative, Lor argues that he should be resentenced because his sentence was overly harsh. We reject Lor's arguments and affirm.

## BACKGROUND

¶2 A jury convicted Lor of five counts of sexual assault and one count of attempted sexual assault in December 2009. All counts involved Lor having sexual intercourse, or attempting to have sexual intercourse, with his then-wife, V.Y.—who, according to the criminal complaint and evidence adduced at trial, was not yet thirteen when the assaults began. Specifically, Lor was convicted of one count of first-degree sexual assault of a child, contrary to WIS. STAT. § 948.02(1); three counts of second-degree sexual assault of a child, contrary to § 948.02(2); one count of second-degree sexual assault with the use of force, contrary to WIS. STAT. § 940.225(2)(a); and one count of attempted second-degree sexual assault with the use of force, contrary to § 940.225(2)(a) & WIS. STAT. § 939.32 (2009-10).[1] The incidents relating to the first four counts took place in the early 1990s, when V.Y. was between twelve and fifteen years old. The incidents relating to the second two counts occurred around 2003 and 2007, respectively, when V.Y. was in her twenties.

¶3 After he was convicted, Lor was sentenced to eight years of imprisonment on count one; placed on probation for seven years on each of count

[1] The incidents precipitating Lor's criminal charges and convictions occurred at varying times between 1991 and 2007, and the dates provided for each offense are approximations rather than specific dates. The judgments of conviction do not indicate what version(s) of the Wisconsin Statutes under which Lor was convicted, although from the court's research on the matter, the statutes at issue have not changed from 1991 to the present. Therefore, all statutory references in this opinion are to the 2009-10 version unless otherwise noted.

two through four, sentence withheld, to be served concurrent to each other but consecutive to any other sentence; four years of imprisonment on count five, to be served consecutive to any other sentence; and two years of imprisonment on count six, to be served consecutive to any other sentence.[2] Lor filed a postconviction motion, which was denied. Lor now appeals. Further facts will be developed as necessary.

## ANALYSIS

¶4 Lor brings several arguments on appeal. He argues that he is entitled to a new trial because trial counsel was ineffective, and because the evidence was insufficient to convict him of the count of first-degree sexual assault. In the alternative, Lor argues that he should be resentenced because his sentence was overly harsh. We discuss each argument in turn.

*1) Trial counsel was not ineffective.*

¶5 Lor first argues that he is entitled to a new trial because trial counsel was ineffective. Specifically, he argues that trial counsel was ineffective for: (1) failing to file a pretrial motion to admit impeaching statements of V.Y.; (2) failing to review Lor's statement to the police and to properly advise Lor about challenging the statement before trial; and (3) failing to object to prior bad act evidence that Lor claims impacted his decision to testify.

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[2] We note that Lor appears to have been sentenced under the indeterminate scheme that predates the current truth-in-sentencing scheme. Wisconsin's sentencing structure changed in June 1998 when the Legislature enacted Truth-in-Sentencing Part I, 1997 Wis. Act 283, which abandoned Wisconsin's indeterminate sentencing system in favor of a truth-in-sentencing regime. *See* ***State v. Brown***, 2006 WI 131, ¶31, 298 Wis. 2d 37, 725 N.W.2d 262; 1997 Wis. Act 283.

¶6 To establish a claim for ineffective assistance of counsel, Lor must show that trial counsel's performance was deficient and that this deficient performance was prejudicial. *See* ***State v. Mayo***, 2007 WI 78, ¶33, 301 Wis. 2d 642, 734 N.W.2d 115. To establish deficient performance, Lor must show facts from which a court could conclude that trial counsel's representation was below the objective standards of reasonableness. *See* ***State v. Wesley***, 2009 WI App 118, ¶23, 321 Wis. 2d 151, 772 N.W.2d 232. To demonstrate prejudice, he "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *See* ***Strickland v. Washington***, 466 U.S. 668, 694 (1984). If Lor fails to make a sufficient showing on one ***Strickland*** prong, we need not address the other. *See* ***id.*** at 697.

a) *Trial counsel was not ineffective for failing to file a pre-trial motion regarding alleged impeachment evidence against V.Y.*

¶7 Lor argues that trial counsel was ineffective for failing to timely file a motion to admit a potentially untruthful sexual assault allegation made by V.Y.

¶8 Before jury selection, trial counsel made the following offer of proof: "I will offer to the Court that my client can testify that the complaining witness[,] in order to be rid of an unpleasant tenant[,] made a charge of sexual assault against that tenant which she later admitted was totally for that improper purpose." The trial court denied trial counsel's offer of proof, concluding, among other things, that the oral motion was untimely.

¶9 We conclude that trial counsel's failure to file a pretrial motion regarding V.Y.'s purported untruthful sexual assault allegation was not ineffective. This is because, even if Lor could show that trial counsel's performance was

deficient, he cannot show prejudice. Lor does not provide—nor did he provide in his pretrial offer of proof or his postconviction motion—any evidence substantiating his claim that V.Y. did in fact previously allege that a tenant sexually assaulted her simply as an excuse to evict him. *See* ***id.***, 466 U.S. at 694. As the trial court noted: "there [are] no other items of evidence or information provided nor other reports … that give any other indications as to whether [trial counsel's offer of proof] is anything more than a bare assertion." The alleged statement at issue is unsubstantiated and conclusory, and the trial court correctly denied Lor's pretrial offer of proof and postconviction motion. Therefore, because Lor cannot show prejudice regarding the alleged statement, he cannot show that trial counsel was ineffective. *See* ***id.*** at 697.

*b) Trial counsel was not ineffective for failing to review Lor's recorded interrogation statement prior to trial.*

¶10 Lor next argues that trial counsel was ineffective for failing to review the statement that he (Lor) gave to police while in custody prior to charges being filed against him.

¶11 The parties agree that trial counsel had not reviewed Lor's recorded statement before trial. During a sidebar, the trial court admonished trial counsel to review the statement before cross-examining Detective Steve Wells, who recorded the statement.

¶12 The morning following the sidebar, the trial court confirmed that trial counsel had listened to the complete recording of the statement. The trial

court then asked whether there were any ***Miranda-Goodchild***[3] issues, to which trial counsel responded that there were not. Trial counsel further stated that he and Lor had sufficient time to discuss any issues regarding the recorded statement, and that they had in fact done so. The court then inquired if Lor felt that he had sufficient time to discuss the matter with counsel, and engaged Lor in a colloquy to ensure that: waiver of a possible ***Miranda-Goodchild*** hearing was his choice; Lor had not been coerced into waiving his right to a hearing; and Lor had been properly informed of his rights prior to the interview. The trial court also gave Lor additional time to confer with trial counsel, as Lor had not done so prior to being brought into court that morning. After doing so, the trial court then accepted Lor's waiver of a ***Miranda-Goodchild*** hearing.

¶13 Under these circumstances, trial counsel's failure to review Lor's interrogation statement before trial was neither deficient nor prejudicial. Contrary to what Lor argues, counsel's performance was not deficient because he did in fact review the recorded statement in its entirety during trial, and, as Lor does not contest, used the statement to cross-examine Detective Wells. Moreover, Lor himself affirmed during trial that there were no issues regarding the statement or counsel's conduct. Additionally, Lor does not sufficiently explain how counsel's review of the statement during trial, as opposed to before trial, prejudiced him. While Lor argues that the "failure to review the recorded statement" prior to trial "prohibited trial counsel from properly and effectively evaluating the merits of the defense, and from communicating with Lor and determining whether the

[3] Hearings considering the admissibility of confessions are known as ***Miranda-Goodchild*** hearings after ***Miranda v. Arizona***, 384 U.S. 436 (1966), and ***State ex rel. Goodchild v. Burke***, 27 Wis. 2d 244, 133 N.W.2d 753 (1965). *See* ***State v. Jiles***, 2003 WI 66, ¶25, 262 Wis. 2d 457, 663 N.W.2d 798.

statements were true and accurate, and whether any or all of the recording should be challenged," he does not specify how reviewing the statement prior to trial would have aided in Lor's defense, nor does he specify whether there truly were any evidentiary concerns with the statement.

¶14 As noted, trial counsel reviewed the statement during trial, conferred with Lor, and decided not to challenge the statement. On appeal, Lor does not explain what parts of the statement should have been challenged. Therefore, because trial counsel did not perform deficiently and there was no prejudice, counsel's performance was not ineffective. *See* ***Strickland***, 466 U.S. at 687.

*c) Trial counsel was not ineffective for failing to object to evidence that Lor had been charged with battery against V.Y.*

¶15 Finally, Lor argues that trial counsel was ineffective for failing to object to evidence that Lor had been charged with battery against V.Y. resulting from an incident on September 20, 2007. Lor argues, "[t]o the extent that counsel failed to object on those grounds, it tainted discussions between attorney and client relative to the client's decision to testify." However, trial counsel was not ineffective, first, because trial counsel did in fact object to this evidence. Second, as the State points out, and as Lor does not refute, the September 20, 2007 incident was not referenced at any point during trial. *See* ***State v. Alexander***, 2005 WI App 231, ¶15, 287 Wis. 2d 645, 706 N.W.2d 191 ("Arguments not refuted are deemed admitted."). The jury never heard about the alleged battery. Therefore, Lor could not have been prejudiced because there is no reasonable possibility that the battery charge contributed to Lor's conviction. *See* ***Strickland***, 466 U.S. at 694.

*2) The evidence was sufficient to convict Lor of sexual assault of a child who had not attained thirteen years of age.*

¶16 Lor also argues that there was insufficient evidence at trial for the jury to have concluded that V.Y. was under the age of thirteen at the time Count 1 occurred. *See*, *e.g.*, WIS. STAT. § 948.02(1)(e) ("Whoever has sexual contact with a person who has not attained the age of 13 years is guilty of a Class B felony.").

¶17 "The standard for determining whether sufficient evidence supports a finding of guilt … is … well established." ***State v. Watkins***, 2002 WI 101, ¶67, 255 Wis. 2d 265, 647 N.W.2d 244. We cannot reverse a criminal conviction unless the evidence, viewed most favorably to the State and the conviction, "'is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt.'" ***State v. Booker***, 2006 WI 79, ¶22, 292 Wis. 2d 43, 717 N.W.2d 676 (citing ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990)). If any possibility exists that the jury could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, we may not overturn the verdict, even if we believe that the jury should not have found Lor guilty. *See* ***Poellinger***, 153 Wis. 2d at 507.

¶18 We review sufficiency of the evidence claims in the light most favorable to the jury's verdict. ***Booker***, 292 Wis. 2d 43, ¶22; ***Bautista v. State***, 53 Wis. 2d 218, 223, 191 N.W.2d 725 (1971). Reasonable inferences drawn from the evidence can support a finding of fact and, if more than one reasonable inference can be drawn from the evidence, we must adopt the inference that supports the verdict. ***Poellinger***, 153 Wis. 2d at 506-07.

¶19 Lor argues that the evidence is insufficient to prove that he was guilty of first-degree sexual assault because there was no credible evidence to establish that V.Y. was under the age of thirteen when he assaulted her in May 1991. According to Lor, this is because the month and day of V.Y.'s birth were not recorded when she was born in Laos; rather, her family later communicated her birthday to an immigration official and provided June 15 as the date because V.Y. was born around the planting season. Additionally, Lor points to testimony by V.Y. in which she stated that she had previously told others that she had been married when she was thirteen, not when she was twelve. In light of V.Y.'s testimony and the apparent ambiguity surrounding her actual birth date, Lor argues that "[t]here is no way a reasonable person could believe that [V.Y.'s mother] would be able to surmise that her daughter was born during the month of June according to a Western calendar."

¶20 There is another view of the evidence, however, that would allow a rational trier of fact to find that V.Y. was in fact only twelve years old when she married and was first assaulted by Lor. V.Y. and her mother both testified that V.Y.'s birthday is June 15, 1978. As V.Y. explained at trial, the reason she likely told others that she was thirteen and not twelve at the time of her May 1991 marriage was not because her birth date was *not* June 15, but because Hmong culture focuses on the year of one's birth, rather than the month and exact date:

> PROSECUTOR: I want to talk about how in your Hmong culture you guys measure birthdays. Now I've got the distinct sense that birthdays are not a big deal in Hmong culture, is that right?
>
> [V.Y.]: No, they're not.
>
> PROSECUTOR: Do you celebrate birthdays?
>
> V.Y.: No.

> PROSECUTOR: How do you mark moving from one age to the next age?
>
> V.Y.: By the year.
>
> PROSECUTOR: By the year?
>
> V.Y.: Yeah.
>
> PROSECUTOR: And is there any question in your mind that the year you were born was 1978?
>
> V.Y.: No.

Similarly, V.Y.'s mother testified that, when identifying age in Hmong culture, it is common to refer only to the year: "If you're talking about the year [V.Y.] would [have been] 13 but if you're talking about the month and the day she [would] not [have been] 13 yet."

¶21 Therefore, even though there are contrary inferences the jury could have drawn from the evidence, this does not mean that the jury could not have concluded that V.Y. was born on June 15, 1978, and, because the assault occurred in May 1991, that she was under the age of thirteen when Lor first assaulted her. V.Y. testified that the assault occurred in May 1991. V.Y. also testified that her family came to the United States from Laos in May 1989, and that she was eleven years old at the time. She further testified to the authenticity of two exhibits—a United States Department of State document from 1988 and a bio data sheet—both of which identified her birthday as June 15, 1978. Because a reasonable jury could logically conclude that V.Y. was under the age of thirteen when the assault described in count one occurred, we will not disturb the verdict. *See*, *e.g.*, ***Poellinger***, 153 Wis. 2d at 506-07.

*3) Lor's sentence was not overly harsh.*

¶22 Lor also argues that the trial court erroneously exercised its discretion because his sentence was excessive and overly harsh.

¶23 Sentencing is committed to the trial court's discretion. ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. A defendant challenging a sentence has the burden to show an unreasonable or unjustifiable basis in the record for the sentence at issue. ***State v. Lechner***, 217 Wis. 2d 392, 418, 576 N.W.2d 912 (1998). We start with a presumption that the trial court acted reasonably, and we do not interfere with a sentence if discretion was properly exercised. *See* ***id.*** at 418-19.

¶24 In its exercise of discretion, the trial court must identify the objectives of its sentence, including but not limited to protecting the community, punishing the defendant, rehabilitating the defendant, and deterring others. ***Gallion***, 270 Wis. 2d 535, ¶40. In determining the sentencing objectives, we expect the trial court to consider a variety of factors, including the gravity of the offense, the character of the defendant, and the need to protect the public. *See* ***State v. Harris***, 2010 WI 79, ¶28, 326 Wis. 2d 685, 786 N.W.2d 409. The weight assigned to the various factors is left to the trial court's discretion. ***Id.*** The amount of necessary explanation of a sentence varies from case to case. ***Gallion***, 270 Wis. 2d 535, ¶39.

¶25 We also review an allegedly harsh and excessive sentence for an erroneous exercise of discretion. *See* ***State v. Giebel***, 198 Wis. 2d 207, 220, 541 N.W.2d 815 (Ct. App. 1995). A sentence is unduly harsh when it 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). "A sentence well within the limits of the maximum sentence is not so disproportionate to the offense committed as to shock the public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." ***State v. Daniels***, 117 Wis. 2d 9, 22, 343 N.W.2d 411 (Ct. App. 1983).

¶26 As noted, Lor was sentenced to eight years of imprisonment on count one; placed on probation for seven years on each of counts two through four, sentence withheld, to be served concurrent to each other but consecutive to any other sentence; four years of imprisonment on count five, to be served consecutive to any other sentence; and two years of imprisonment on count six, to be served consecutive to any other sentence. These sentences were well within the statutory maximums in effect at the times the crimes were committed. *See* WIS. STAT. §§ 948.02(1) & (2), 940.225(2)(a), 939.50(3)(a), (b) & (c).

¶27 Moreover, the trial court spoke at length during sentencing about its evaluation of the case and the cultural differences it considered prior to arriving at its sentence:

> This isn't just a Hmong marriage case. This isn't simply a case involving the marriage right, a ceremony, and then me basing a sentence on that alone. This case, particularly on the last two counts, [has] other components to it. The more recent and again forcible sexual acts that you engaged in against your wife again under the circumstances where it is not taking place after—a short time after having come to the United States. They're different….
>
> I know that there [are] a lot of fears expressed in the letters … this fear that … there is going to be a lot of spouses now living in fear after what happens, Judge, if you don't show real leniency, extreme leniency, and that's the fear.

> Again all I can say to that is that every case has to [be] judged individually on its fact[s] and what happened….
>
> Counts 5 and 6, again, I view distinctly. It's much more time in the United States…. It's not sort of merely coercion, but actual physical force, and grabbing, striking, and again victimization of the children to the extent that they had to intervene on the last attempted sexual assault in Count 6.

¶28 In other words, as the trial court noted, this case was not simply an example of a consensual but culturally dissimilar Hmong marriage. This case involved attempted forced sexual contact that took place in front of V.Y. and Lor's children. Therefore, we conclude that the trial court properly exercised its sentencing discretion utilizing proper factors, *see*, *e.g.*, ***Gallion***, 270 Wis. 2d 535, ¶¶39-46, and sentenced Lor within the applicable maximums, *see* ***Ocanas***, 70 Wis. 2d at 185; ***Daniels***, 117 Wis. 2d at 22. Consequently, the sentence was not unduly harsh or excessive.

¶29 As a final matter, we note that Lor has also argued that he should be resentenced because "his sentence is disproportionate to those imposed on other Hmong men who have married, and fathered children with, women under the age of 16." While Lor states that he "pointed the [t]rial [c]ourt to two other cases which were discussed during sentencing in which Hmong men had married underage Hmong women and, while there certainly was a technical violation of the law, the violation required only probation," Lor does not point this court to any such cases—Lor cites no authority for his argument in his brief—nor does he tell us where in the record these cases might be, or why the defendants in those cases are in any way factually similar to his case. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (we do not decide arguments that are inadequately briefed or unsupported by references to legal authority). Therefore,

we reject this argument as inadequately developed, and further note that in any event, we are satisfied that the trial court properly exercised its discretion in sentencing Lor. *See*, *e.g.*, ***Gallion***, 270 Wis. 2d 535, ¶¶39-46.

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

Not recommended for publication in the official reports.