COURT OF APPEALS
DECISION
DATED AND RELEASED

November 28, 1995

NOTICE

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

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

No. 94-3356-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ERIC P. RUSSELL,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEFFREY A. KREMERS, Judge. *Affirmed.*

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

PER CURIAM. Eric P. Russell appeals from a judgment, entered after a jury convicted him of second-degree sexual assault of a child, contrary to § 948.02(2), STATS. He also appeals from an order denying his postconviction motions. Russell claims: (1) that he received ineffective assistance of trial counsel; and (2) that the trial court erroneously exercised its sentencing discretion. Because Russell received effective assistance of trial counsel and

because the trial court did not erroneously exercise its sentencing discretion, we affirm.

I. BACKGROUND

Russell was charged with sexually assaulting a fourteen-year-old girl, Sharon F. The case was tried to a jury. During the trial, Detective Edward Benish volunteered his opinion that Sharon was telling the truth. Instead of objecting to Benish's statement, Russell's trial counsel chose to deflate the objectionable testimony on cross-examination.

Sharon's stepmother also testified during the State's case. She explained that when Sharon gets scared, Sharon often says "I don't know" in response to questions. At the close of the trial, the jury was instructed with the pattern instruction on reasonable doubt, WIS J I—CRIMINAL 140 (1991). Russell was convicted and sentenced to eight years in prison.

Russell filed postconviction motions alleging ineffective assistance of trial counsel and improper sentencing. The trial court denied his motions. He now appeals.

II. DISCUSSION

A. Ineffective Assistance Claims.

The United States Supreme Court set out the two-part test for ineffective assistance of counsel under the Sixth Amendment in ***Strickland v. Washington***, 466 U.S. 668 (1984). The first prong of ***Strickland*** requires that the defendant show that counsel's performance was deficient. ***Id.*** at 687. This demonstration must be accomplished against the "strong presumption that counsel acted reasonably within professional norms." ***State v. Johnson***, 153 Wis.2d 121, 127, 449 N.W.2d 845, 848 (1990). The second ***Strickland*** prong requires that the defendant show that counsel's errors were serious enough to render the resulting conviction unreliable. ***Strickland***, 466 U.S. at 687. In

reviewing the trial court's decision, we accept its findings of fact, its "'underlying findings of what happened,'" unless they are clearly erroneous, while reviewing "the ultimate determination of whether counsel's performance was deficient and prejudicial" *de novo*. ***Johnson***, 153 Wis.2d at 127-28, 449 N.W.2d at 848.

First, Russell claims that trial counsel was ineffective because he failed to object to Benish's statement that Sharon was telling the truth. We reject this claim. Although Benish's statement may have violated the rule announced in ***State v. Haseltine***, 120 Wis.2d 92, 96, 352 N.W.2d 673, 676 (Ct. App. 1984) (that no witness should be allowed to opine as to whether another witness is telling the truth), trial counsel's strategy of attacking the statement on cross-examination was within the range of professionally competent assistance.

As documented by the record, trial counsel was effective in his cross-examination of Benish on this point. Trial counsel queried: "You really can't tell me whether or not [Sharon is] telling the truth, the absolute truth?" Benish responded: "No, sir." We have previously held that trial counsel's decision to forego an objection based on his intent to impeach the statement at a later time constitutes effective performance. ***State v. Vinson***, 183 Wis.2d 297, 307-08, 515 N.W.2d 314, 318-19 (Ct. App. 1994). We conclude that trial counsel's strategy in the instant case was to avoid drawing unnecessary attention to the statement volunteered by Benish because he felt cross-examination would more effectively refute it. Such strategy does not constitute deficient performance.

Next, Russell claims that his trial counsel should have objected to the stepmother's testimony regarding Sharon's typical reaction to questions. Russell asserts that this testimony was irrelevant. However, he does not offer any citation to authority to support his argument and, therefore, we decline to consider it. *See* ***State v. Pettit***, 171 Wis.2d 627, 646-47, 492 N.W.2d 633, 642 (Ct. App. 1992) (appellate court may decline to address issues that are inadequately briefed; arguments that are not supported by legal authority will not be considered).

Finally, Russell claims that his trial counsel should have objected to the pattern jury instruction on reasonable doubt because it conflicts with the standard of proof for criminal cases described in ***In re Winship***, 397 U.S. 358

(1970). Our supreme court recently addressed and rejected this contention in ***State v. Avila***, 192 Wis.2d 870, 886-89, 532 N.W.2d 423, 429-30 (1995). Accordingly, we cannot fault trial counsel for failing to object to a jury instruction that our supreme court has held is not objectionable.

B. Sentencing Discretion.

Russell claims that the trial court relied on improper factors in imposing sentence. Specifically, he claims that the trial court's reference to the victim's lower mental age was improper because that fact was not a part of the record, and that the trial court imposed a greater sentence because Russell refused to admit guilt.

Our standard of review when reviewing a criminal sentencing is whether or not the trial court erroneously exercised its discretion. ***State v. Plymesser***, 172 Wis.2d 583, 585 n.1, 493 N.W.2d 367, 369 n.1 (1992).

Russell claims that the trial court's reference to Sharon's mental age of ten years was improper because there was no basis in the record to support such a statement. We disagree. The sentencing transcript demonstrates that Sharon's stepmother represented to the trial court that Sharon's mental age was ten years.[1] In addition, at the sentencing hearing, the prosecutor referred to similar representations contained in the presentence investigation report. This is sufficient for the trial court to reference this fact and accordingly, we conclude that the trial court did not erroneously exercise its discretion in considering this factor. *See* ***Dawson v. Delaware***, 503 U.S. 159, 164 (1992) (a sentencing court is "'largely unlimited either as to the kind of information [it] may consider, or the source from which it may come'").

Russell also claims that the trial court's reliance on Russell's refusal to admit guilt was improper. We disagree. Relying on this factor is improper

[1] The stepmother told the sentencing court: "When I first met Sharon, she was 13. However, judging by her behavior, if I as a mother were asked to estimate her age as all mothers do, I would have said she was nine or ten. Her behaviors were consistent with that age group."

only when the trial court bases its sentencing decision exclusively on the defendant's refusal to admit guilt. ***State v. Carrizales***, 191 Wis.2d 85, 96, 528 N.W.2d 29, 34 (Ct. App. 1995). It is clear from the record that the trial court in the instant case did not rely solely on Russell's failure to admit guilt when it imposed sentenced. The trial court discussed Russell's refusal to admit guilt as it related to his rehabilitation needs, which is appropriate. *See* ***State v. Baldwin***, 101 Wis.2d 441, 459, 304 N.W.2d 742, 752 (1981) (defendant's refusal to admit guilt may be relevant to sentencing factor regarding the defendant's need for rehabilitation). Further, the record demonstrates that the trial court considered the three primary factors: the gravity of the offense, the character of the offender, and the need to protect the public, when it imposed sentence. ***State v. Harris***, 119 Wis.2d 612, 623, 350 N.W.2d 633, 639 (1984).

Accordingly, we cannot say that the trial court erroneously exercised its sentencing discretion.

By the Court.—Judgment and order affirmed.

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