

**COURT OF APPEALS  
DECISION  
DATED AND RELEASED**

**JULY 9, 1996**

**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. 95-3210-CR**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

**STATE OF WISCONSIN,**

**Plaintiff-Respondent,**

**v.**

**EDWARD D. WERCHOWSKI,**

**Defendant-Appellant.**

APPEAL from a judgment and an order of the circuit court for Bayfield County: ROBERT E. EATON, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. Edward Werchowski appeals his conviction for first-degree sexual assault of a child as a repeater, having had a trial by jury and received a twenty-year prison term. The nine-year-old victim testified that while she was sitting on Werchowski's lap, he began bouncing her vertically; she then felt his genitals alone touching her buttock area through their respective clothes. Werchowski raises several arguments on appeal: (1) trial counsel furnished ineffective representation by failing to impeach the nine-year-old victim at trial with an inconsistent statement she made at the preliminary hearing; (2) trial counsel was ineffective in failing to poll the jury and advise

Werchowski of his right to poll the jury; and (3) the trial court issued an excessive sentence, improperly predicated on Werchowski's decision to exercise his right to a jury trial. We reject these arguments and therefore affirm Werchowski's conviction.

We first conclude that trial counsel did not provide ineffective representation in failing to impeach the victim at trial with her testimony at the preliminary hearing. We grant new trials for ineffective counsel only if the deficient performance prejudiced the outcome of the trial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). According to Werchowski, the victim's trial testimony departed from her preliminary hearing testimony in terms of what she felt while sitting on Werchowski's lap. At trial, she maintained that she had felt his genitals touch her buttock area through their respective clothes. At the preliminary hearing, however, she testified that she did not know how she was able to distinguish Werchowski's genitals from his knee. Trial counsel's failure to use this alleged contradiction did not amount to *Strickland* ineffective representation. First, had Werchowski's trial counsel used this evidence, it might have opened the door for other aspects of the victim's preliminary hearing testimony with damaging effect. Second, the victim's preliminary hearing testimony had little value as an impeaching prior inconsistent statement. It did not directly contradict her trial testimony. At best, it may have raised doubt regarding the meaning of the earlier statement. The jury would have had considerable freedom to ascribe the somewhat indefinite variance in the nine-year-old victim's testimony to her youth or other factors. In short, the testimony's absence did not prejudice the verdict.

We next reject Werchowski's argument that his trial counsel supplied ineffective representation in failing to poll the jury. Here, we have no indication that any ineffective representation or prejudice took place under *Strickland*. First, these proceedings enjoyed a presumption of regularity. *State ex rel. LaFollette v. Circuit Court*, 37 Wis.2d 329, 344, 155 N.W.2d 141, 149 (1967). This means that the law presumes that all jurors voted in conformity with the verdict. Second, the trial court instructed the jury that its verdict must be unanimous. Jurors are presumed to have followed such instructions. *State v. Truax*, 151 Wis.2d 354, 362, 444 N.W.2d 432, 436 (Ct. App. 1989). Third, the trial court collectively polled the jury, asking all jurors if guilty was their verdict. The transcript records that the jury collectively responded "Yes"; this process cured any defect. See *State v. Ritchie*, 46 Wis.2d 47, 56, 174 N.W.2d 504, 509 (1970). Moreover, without some indication in the record that a verdict was

nonunanimous, trial counsel's failure to poll the jury was not ineffective representation. See *State v. McMahon*, 186 Wis.2d 68, 96, 519 N.W.2d 621, 632-33 (Ct. App. 1994). As a result, this issue provides no basis for a new trial. See also *State v. Yang*, No. 95-0583-CR, slip op. (Wis. Ct. App. Apr. 18, 1996) (publication ordered May 28, 1996).

Last, we reject Werchowski's argument that the trial court issued an excessive sentence. The trial court's sentencing decision was discretionary. *State v. Macemon*, 113 Wis.2d 662, 667-68, 335 N.W.2d 402, 405-06 (1983). Sentencing courts have discretion to determine the weight to give to each of the relevant factors, *Ocanas v. State*, 70 Wis.2d 179, 185, 233 N.W.2d 457, 461 (1975), and may base their sentences on any of the factors after all have been reviewed. *Anderson v. State*, 76 Wis.2d 361, 366-67, 251 N.W.2d 768, 771 (1977). Relevant sentencing factors include the gravity of the offense, the protection of the public, the rehabilitative needs of the defendant, and the interests of deterrence. *State v. Sarabia*, 118 Wis.2d 655, 673-74, 348 N.W.2d 527, 537 (1984). Other relevant factors are the defendant's age, character, personality, social traits, remorse, repentance, cooperativeness, educational level, employment background, degree of culpability, demeanor at trial, his need for close rehabilitative control, the rights of the public, and the vicious or aggravated nature of his crime. *State v. Killory*, 73 Wis.2d 400, 408, 243 N.W.2d 475, 481 (1976). Like other discretionary matters, trial courts' sentencing decisions must have a reasonable basis in the record and demonstrate a logical process of reasoning based on the facts of record and proper legal standards. *McCleary v. State*, 49 Wis.2d 263, 277, 182 N.W.2d 512, 519-20 (1971).

Here, the trial court correctly exercised its discretion. At the outset, the court identified Werchowski's criminal history, including convictions for third-degree murder, armed robbery, attempted armed robbery, three counts of robbery, and resisting or obstructing an officer. The court viewed Werchowski's first-degree sexual assault conviction as both a continuation of his criminal past and a new willingness to victimize a new class of individuals. In the court's view, Werchowski's actions spoke more loudly than his words. The court also pointed out that Werchowski resumed his use of drugs and alcohol after release from prison, despite knowing that these substances had contributed to his past criminal behavior. Moving from the accused's to the victim's perspective, the trial court noted that the crime was aggravated; it had been committed against a defenseless child, with long lasting effects, something which the child might remember for the rest of her life and for which

Werchowski could never truly compensate. The trial court also noted that the crime had had a devastating impact on the victim's immediate and extended family members.

As a mitigating factor, the court recognized that Werchowski ended his criminal act when the child asked. Nonetheless, the court felt that Werchowski's remorse amounted to self-pity arising from the fact that he now faced a prison term. From his criminal history and nature of the crime, the court believed that Werchowski posed a considerable danger to the community, especially the most helpless people in the community. The trial court noted that Werchowski's prior prison terms had failed to reform his behavior and that Werchowski had been on parole at the time of the first-degree sexual assault. After estimating Werchowski's parole eligibility, the trial court believed that a twenty-year sentence, consecutive to other sentences, was an appropriate term of incarceration. We conclude that the trial court properly considered the relevant factors and issued a sentence proportionate to Werchowski's crime, his character, and his dangerousness to children. Although the trial court briefly referred to the fact that the victim had to relive the crime on the witness stand, we reject Werchowski's claim that this shows trial court punished him for exercising his right to a jury trial. This was one statement among many by the trial court. It also merely referred to the continuing effect Werchowski's crimes had on the victim. Viewed as a whole, the trial court's sentencing findings reveal a proper exercise of discretion.

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

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