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110 EAST MAIN STREET, SUITE 215  
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MADISON, WISCONSIN 53701-1688  
Telephone (608) 266-1880  
TTY: (800) 947-3529  
Facsimile (608) 267-0640  
Web Site: [www.wicourts.gov](http://www.wicourts.gov)

**DISTRICT II**

July 15, 2015

*To:*

Hon. Timothy D. Boyle  
Circuit Court Judge  
Racine County Courthouse  
730 Wisconsin Avenue  
Racine, WI 53403

Rose Lee  
Clerk of Circuit Court  
Racine County Courthouse  
730 Wisconsin Avenue  
Racine, WI 53403

W. Richard Chiapete  
District Attorney  
730 Wisconsin Avenue  
Racine, WI 53403

George Tauscheck  
4230 N. Oakland Ave. #103  
Milwaukee, WI 53211

Gregory M. Weber  
Assistant Attorney General  
P.O. Box 7857  
Madison, WI 53707-7857

You are hereby notified that the Court has entered the following opinion and order:

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2014AP2270-CR

State of Wisconsin v. Shaquellie T. Evans (L.C. #2012CF153)

Before Neubauer, P.J., Reilly and Gundrum, JJ.

Shaquellie Evans appeals from a judgment convicting him of second-degree sexual assault of a child as a repeat offender and from an order denying his sentence modification motion. On appeal, he argues that the circuit court should have granted his request for sentence modification due to a new factor. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. WIS. STAT. RULE 809.21

(2013-14).<sup>1</sup> The circuit court correctly denied the sentence modification motion. We affirm the judgment and order.

Evans pled no contest to second-degree sexual assault (intercourse) of a thirteen-year-old victim. At the plea hearing, counsel noted that in light of the likely proof at trial, Evans would plead no contest, even though Evans believed that the thirteen-year-old victim consented to sexual intercourse. The prosecutor reiterated that Evans and the State had differing views about consent. With regard to the factual basis for his no contest plea, Evans stated that subject to his remarks about consent, the complaint provided a factual basis for the plea.

At sentencing, the prosecutor noted that Evans told the presentence investigation report author that he and the victim had planned to have intercourse, and while the victim experienced pain, she never asked him to stop. In contrast, the complaint alleged that the victim vociferously protested during intercourse, tried to get Evans to stop, Evans declined to stop and continued to force himself upon her, leaving her with injuries that required surgery to repair. Evans also had a significant criminal history extending back to the age of ten.

At sentencing, the court noted Evans's prior offenses and the very aggravated nature of the crime. The court characterized the case as a rape case and found that the victim was clearly traumatized and injured by the experience. The court imposed a fifteen-year sentence consisting of six years of initial confinement and nine years of extended supervision.

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

Postconviction, Evans filed a motion to modify his sentence on the grounds that the victim actually consented to have intercourse with him.<sup>2</sup> Because the circuit court took the view at sentencing that Evans engaged in a forcible assault, Evans argued that the victim's "consent" constituted a new factor because it indicated that Evans did not force the victim into intercourse, which should have weighed in Evans's favor at sentencing. To support his consent claim, Evans provided the court with a statement the victim made as part of Evans's post-assault probation revocation proceedings. The victim stated that while she was initially willing to have intercourse with Evans, she found intercourse very painful and tried to get him to stop, resisting both physically and verbally. Evans did not relent, continued to force himself upon her, and abused her verbally as he did so.

The circuit court denied Evans's new factor sentence modification motion without a hearing. While the court acknowledged that it did not have the victim's revocation interview before it at the time of sentencing, the court noted that the interview substantiates that Evans forcibly assaulted the victim and verbally abused her after she began resisting him. Evans appeals.

"A new factor is one that was 'not known to the trial judge at the time of original sentencing, either because it was not then in existence or because, even though it was then in existence, it was unknowingly overlooked by all of the parties.'" *State v. Harbor*, 2011 WI 28, ¶57, 333 Wis. 2d 53, 797 N.W.2d 828 (citation omitted).

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<sup>2</sup> Under WIS. STAT. § 948.02(2) (2011-12), the statute under which Evans was convicted, consent is not relevant. *State v. Lackershire*, 2007 WI 74, ¶29, 301 Wis. 2d 418, 734 N.W.2d 23.

Evans conceded that the complaint provided the factual basis for the plea. The complaint described a forcible sexual assault. The victim's statement in the revocation summary also describes a forcible sexual assault. Evans did not meet his burden to show, by clear and convincing evidence, the existence of a new factor requiring sentence modification. ***State v. Vaughn***, 2012 WI App 129, ¶35, 344 Wis. 2d 764, 823 N.W.2d 543.

Upon the foregoing reasons,

IT IS ORDERED that the judgment and order of the circuit court are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

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*Diane M. Fremgen*  
*Clerk of Court of Appeals*