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September 26, 2018

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

2017AP665-CR

State of Wisconsin v. David J. Korzinek (L.C. #1990CF453)

Before Neubauer, C.J., Gundrum and Hagedorn, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

David J. Korzinek appeals from a judgment of conviction entered following the revocation of his probation and from an order denying his postconviction motion for a sentence modification. Based upon our review of the briefs and record, we conclude at conference that

this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2015-16).¹ We affirm.

In 1992, Korzinek was convicted of two counts of first-degree sexual assault of a child for having sexual contact with young members of his immediate family: a four-year-old girl (count one) and her two-year-old brother (count two). The circuit court imposed an eighteen-year prison sentence on count one. On count two, the court withheld sentence and ordered a consecutive twenty-year term of probation. Korzinek was paroled three times during his prison sentence; each time he violated the rules of supervision and was revoked. Korzinek began his probation on count two in October 2013 and was revoked in November 2015. The circuit court imposed a ten-year indeterminate prison sentence.

Korzinek filed a postconviction motion to modify his sentence, asserting that the circuit court erroneously exercised its discretion in considering and weighing the sentencing factors and that its ten-year sentence was unduly harsh. The court denied his motion without a hearing. Korzinek appeals.

In fashioning a sentence, the circuit court must consider the gravity of the offense, the character of the offender, and the protection of the public. *State v. Harris*, 2010 WI 79, ¶28, 326 Wis. 2d 685, 786 N.W.2d 409. The weight attributed to each factor is within the circuit court's wide discretion. *State v. Grady*, 2007 WI 81, ¶31, 302 Wis. 2d 80, 734 N.W.2d 364. On review, we afford the sentencing court a strong presumption of reasonability, and if discretion was properly exercised, we follow "a consistent and strong policy against interference" with the

¹ All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

circuit court's sentencing decision. *State v. Gallion*, 2004 WI 42, ¶18, 270 Wis. 2d 535, 678 N.W.2d 197 (citation omitted).

Korzinek has not met his “heavy burden” to show that the circuit court erroneously exercised its discretion at sentencing. *Harris*, 326 Wis. 2d 685, ¶30. The circuit court appropriately considered the three primary sentencing factors and did not consider irrelevant or improper factors. In addressing Korzinek's character and rehabilitative needs, the court acknowledged his “[g]ood quality characteristics” but gave little weight to his promise to “obey and abide by the rules” in light of his repeated failures on supervision. The circuit court also referred to Korzinek's refusal to accept responsibility for his criminal conduct. The court considered Korzinek's crimes to be very serious and stated they caused “significant harm” to his family. With regard to community protection, the circuit court determined a prison sentence was necessary given Korzinek's inability, “despite his best commitment, [to] abide by the rules.” The circuit court applied the correct law to relevant facts and reached a reasonable, explainable sentencing decision with which we will not interfere. *Loy v. Bunderson*, 107 Wis. 2d 400, 414-15, 320 N.W.2d 175 (1982).

As part of his allocution, Korzinek told the court he was sorry “for all the pain and trouble and suffering that I've caused my family.” The circuit court inquired: “You said you were sorry, Mr. Korzinek. What are you sorry for?” Upon Korzinek's vague response, the court again asked what he was sorry for and if he was sorry for his conduct. Korzinek argues that these questions coupled with the circuit court's determination that he did not accept responsibility for his criminal conduct constitute an erroneous exercise of discretion. He cites *State v. Fuerst*, 181 Wis. 2d 903, 915, 512 N.W.2d 243 (Ct. App. 1994), pointing out that the

circuit court cannot impose a harsher sentence solely based on a defendant's refusal to admit guilt.

Korzinek's reliance on *Fuerst* is wholly misplaced. The court's questions were in response to Korzinek's family apology which focused on his own suffering and the harm caused by his incarceration rather than by his actions. The circuit court permissibly considered Korzinek's refusal to accept responsibility as indicating his lack of remorse, *see State v. Williams*, 2017 WI App 46, ¶17, 377 Wis. 2d 247, 900 N.W.2d 310, and as relevant to his rehabilitative needs, *see State v. Wickstrom*, 118 Wis. 2d 339, 356, 348 N.W.2d 183 (Ct. App. 1984). Further, Korzinek's refusal to accept responsibility cannot reasonably be characterized as the sole factor considered at sentencing.

Korzinek also claims that the circuit court erroneously exercised its discretion by referring to the harm he caused his family. The male victim, a closely-related member of Korzinek's immediate family, did not submit a victim impact statement. According to Korzinek, the lack of specific affirmative evidence on the record precluded the circuit court from considering the impact of the sexual assault on the victim. We disagree. The very nature of Korzinek's relationship to the young boy supports a reasonable inference that Korzinek's offense harmed his family, including the boy. The circuit court's assessment that Korzinek harmed the young male victim is further supported by Korzinek's own statements at sentencing and by the female victim's letter to the court.

Next, we reject Korzinek's contention that the circuit court erroneously exercised its discretion by disregarding "well-established risk assessment results" placing him at a low risk of reoffense. Here, Korzinek refers to a defense-commissioned report by Dr. Westendorf opining

that he presented a low risk of sexual reoffense and the COMPAS assessment included in his revocation summary. The circuit court explained why it did not credit Westendorf's report and why it gave more weight to the probation agent's "Plotkin Analysis." The weight to be given the assessments is a matter for the circuit court's discretion. *Grady*, 302 Wis. 2d 80, ¶31. Further, the revocation summary discloses facts not considered by Westendorf; the record supports the circuit court's discretionary decision.

Finally, Korzinek claims that the circuit court's ten-year sentence "far exceeded" his "treatment plan needs." Korzinek's complaint seems to be twofold—that the sentence "disregard[ed]" information suggesting that he needs only short-term treatment and that assuming long-term treatment is warranted, the program lasts only two to three years. Nothing in Korzinek's briefs supports a claim that the circuit court erroneously exercised its discretion in considering his treatment needs. The Department of Corrections recommended a long-term program only available in the institution, and it is unclear why the circuit court's choice of a ten-year sentence that would allow for long-term treatment in prison is improper.

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.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals