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October 3, 2018

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

2017AP920-CR State of Wisconsin v. Corey D. Kuenn (L.C. #2014CF1362)

Before Reilly, P.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).

Corey D. Kuenn appeals from an order of the circuit court denying his postconviction motion for a new sentencing hearing. 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 (2015-16).[1] We affirm.

Kuenn was convicted of one count of first-degree sexual assault of a child under the age of thirteen. A charge of first-degree sexual assault of a child under the age of twelve and two counts of exposing genitals to a child were dismissed and read in.

Kuenn agreed, through counsel, to using the criminal complaint as a factual basis for his plea. That complaint indicates that D.A.L. and P.L., who both lived with Kuenn for a period of time, reported, and Kuenn admitted, that when they were respectively ages seven or eight and five or six, Kuenn exposed his penis to them individually. Following the exposure to her, P.L. "ran upstairs because she was scared but didn't tell anyone." D.A.L. reported that Kuenn "did do something that made him feel weird." On one occasion, Kuenn had D.A.L. touch Kuenn's penis and Kuenn also touched D.A.L.'s penis; on another occasion, Kuenn touched D.A.L.'s penis with Kuenn's hand and also sucked on D.A.L.'s penis. The circuit court sentenced Kuenn to ten years of initial confinement followed by fifteen years of extended supervision.

On appeal, Kuenn does not dispute these events, but instead asserts that the circuit court erred in its sentencing of him by failing to sufficiently articulate "the factors it used to come up with this particular sentence" and relying upon inaccurate information. The court did not err.

In sentencing a defendant, the primary factors a circuit court is to consider are the seriousness of the offense, the defendant's character, and the need to protect the public. ***State v.***

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

Smith, 207 Wis. 2d 258, 281 n.14, 558 N.W.2d 379 (1997). The weight to be given to various factors is within the circuit court's discretion. ***State v. Evers***, 139 Wis. 2d 424, 452, 407 N.W.2d 256 (1987). We will uphold a circuit court's sentence unless the court erroneously exercised its discretion. ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197.

The sentencing transcript contains approximately nine pages of the circuit court's explanation for the sentence it imposed. Addressing the seriousness of the offense, the court noted that "multiple families" had been harmed as a result of Kuenn's offenses, and "everybody else" had to "deal[] with the issues and … circumstances" Kuenn created. The court pointed out that D.A.L. had "ongoing behaviors that he's exhibiting" and noted that "some individuals are permanently damaged when they're abused as children, and they're never able to get over it and … it affects their ability to have any kind of relationship with other people." The court expressed that at least in this instance "everybody is aware of what occurred, which allows for, at least, starting to get addressed and dealt with." The court stated that Kuenn had "taken away the childhood and permanently changed what are small children.… Whatever may have been their life path, it's been changed." But the court acknowledged that it would be quite some time into the future before the true effects of Kuenn's crimes on the children are understood.

With regard to Kuenn's character, the court agreed with Kuenn's defense counsel that the fact Kuenn was "anywhere from 15 to 17" years old when he committed the offenses was "certainly" "part of the consideration" in sentencing Kuenn and "does put a somewhat different context on it, as opposed to … if you had been 30 or 35." The court recognized that if Kuenn's offenses had come to light when he originally committed them, they may have been addressed in juvenile court; however, the court also noted that Kuenn may have been waived into adult court. The court agreed with Kuenn's defense counsel in expressing its recognition that Kuenn was

"not a fully-formed adult" when he committed his crimes, even discussing scientific developments showing "the brain continues to develop well into the twenties," particularly the part of the brain that deals with "executive functioning, … where we have logic and reason and decision making."

Returning to the seriousness of the offenses, as well as the need to protect the victims and the community, however, the circuit court expressed that Kuenn's youth at the time of the offenses "doesn't change, in terms of the harm and the damage that you have caused to what are children," who, like other children, had "no ability to defend themselves" against such acts. "[T]ak[ing] away their childhood" was also "a very significant and substantial consideration that needs to be addressed, one, in terms of the protection of the community, and in terms of … essentially the protection of the … victims that have been harmed, and … we will do that." The court again recognized that the harm to the victims "may continue for many, many years … and be a continuing and ongoing struggle" for them. The court noted that Kuenn's crime of conviction was a Class B felony, which was "one of the most serious offenses."

Further considering the need to protect the public, the court expressed that Kuenn "need[ed] to be monitored and supervised for a very long period of time" and that "the victims themselves need to have some sense of security, that they just simply will not … have any likelihood of having to deal with or have involvement with you … for what essentially … is their childhood." It stated that the victims and "the community as a whole" were "certainly entitled to that protection." The court was "satisfied that [it] is appropriate" for the victims "in terms of their—dealing with … their issues, as well as their own sense of well-being" that they would be "well into" adulthood before Kuenn would "be released or potentially released back into the community."

We conclude that the sentence was reasonable and the reasons for it were sufficiently explained by the circuit court. We see no error in the factors the court considered in sentencing Kuenn and the weight it put upon those factors.

Kuenn next asserts that his due process right was violated because he was sentenced based upon inaccurate information. He fails to persuade.

Kuenn must first establish by clear and convincing evidence that the information the circuit court purportedly erred in relying upon was in fact inaccurate.[2] *See* ***State v. Payette***, 2008 WI App 106, ¶46, 313 Wis. 2d 39, 756 N.W.2d 423. We review de novo whether he has established this. ***Id.*** Kuenn falls short.

Kuenn complains that in sentencing him the circuit court relied upon the following "inaccurate" statements at the sentencing hearing:

Letter from the victims' father, read by the victims' grandmother:

> What Mr. Kuenn has done will affect my son for the rest of his life.… [W]hen these crimes were committed, he was only seven.
>
> ….
>
> [D.A.L.] will never truly be over this.

Grandmother:

> [D.A.L.] is now almost twelve and has spent the last one and a half years undergoing counseling.
>
> …. He still suffers from physical ailments with his stomach and bowels.

[2] We assume without deciding that the circuit court in fact relied upon the statements of which Kuenn complains.

> As a result of the trauma both children sustained, they were unable to concentrate on their school work and had a lot of absences from school.…
>
> As a result, both children have been put back a grade in school.

Victims' mother:

> My boy lives with terrible anxiety every day. He has an unhealthy distrust of everyone he encounters because of what you have done to him.
>
> ….
>
> What you have done to him follows him into his dreams.…
>
> My son was held back a year in school due to the inability to concentrate on school.
>
> ….
>
> He is sad and depressed all the time. He is dealing with many physical ailments that cause him chronic pain every day, and it is all because of your actions, Corey.

Kuenn complains that the statements are

> all speculation and conjecture as to what the connection is between the troubles of D.A.L. and P.L. from the time of the incidents and continuing to the time of the sentencing hearing. They provided to the court no information as to how the behaviors are tied solely to the actions of Mr. Kuenn and not to any other intervening action over the prior four to six years before the sentencing date.

To begin, it is reasonable to infer, as the victim's father does in his letter, that a young boy who is sexually assaulted by a boy eight years his senior, who is presumably larger and stronger, will be affected by the incident in some way "for the rest of his life." It is also reasonable to infer, as the mother and grandmother collectively expressed, that D.A.L. is sad, depressed, suffers from anxiety and stomach/bowel problems, underwent counseling, distrusts people, and has bad dreams, and that both children had problems concentrating in and were absent from school and were held back a grade, as a result of Kuenn's actions against them. The

connections are not farfetched, and Kuenn has identified no law that requires such connections be definitively proven by a victim's family members. More significantly for this appeal, it is Kuenn's burden to demonstrate by clear and convincing evidence that the statements were in fact inaccurate, and he has not even made an attempt to do so. To meet his burden of showing the information was inaccurate, Kuenn would have to demonstrate by clear and convincing evidence that his crimes against the children *did not cause* the harms expressed at sentencing. He has not met that burden.

Upon the foregoing reasons,

IT IS ORDERED that the order of the circuit court is 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