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DISTRICT I

April 26, 2022

To:

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Circuit Court Judge
Electronic Notice

Hon. Michelle Ackerman Havas
Circuit Court Judge
Electronic Notice

George Christenson
Clerk of Circuit Court
Milwaukee County
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You are hereby notified that the Court has entered the following opinion and order:

2021AP316-CR	State of Wisconsin v. Keith Allen Erickson (L.C. # 2015CF4920)
2021AP317-CR	State of Wisconsin v. Keith Allen Erickson (L.C. # 2016CF1192)

Before Brash, C.J., Dugan and White, 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).

Keith Allen Erickson appeals judgments of conviction entered after a jury found him guilty of ten counts of possessing child pornography and one count of child enticement. He also appeals an order denying postconviction relief. He contends that the evidence was insufficient to sustain the child pornography convictions and that the circuit court wrongly rejected his postconviction

claim that a new factor warranted sentence modification.[1] Based upon a review of the briefs and records, we conclude at conference that these matters are appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2019-20).[2] We affirm.

In Milwaukee County Circuit Court case No. 2015CF4920, which underlies appeal No. 2021AP316-CR, the State charged Erickson with ten counts of possessing child pornography, each count a Class D felony arising on January 13, 2015. *See* WIS. STAT. § 948.12(1m), (3)(a). In Milwaukee County Circuit Court case No. 2016CF1192, which underlies appeal No. 2021AP317-CR, the State charged Erickson with second-degree sexual assault of a child younger than sixteen years old, a Class C felony, and with child enticement, a Class D felony, each count arising on an unspecified date in 2014. *See* WIS. STAT. §§ 948.02(2), 948.07(6).

The two circuit court cases were joined for trial, which commenced in June 2016. The jury was unable to reach a verdict on the charge of second-degree sexual assault of a child and found Erickson guilty of the remaining eleven counts.

At sentencing, Erickson faced a twenty-five-year term of imprisonment and a $100,000 fine for each of his eleven convictions. *See* WIS. STAT. § 939.50(3)(d). The State sought a global disposition of seventeen to twenty years of initial confinement, arguing that Erickson's crimes

[1] The Honorable Jeffrey A. Conen presided over the trial, pronounced sentence, and entered the judgments of conviction in these matters. We refer to Judge Conen both as the trial court and as the sentencing court. The Honorable Michelle Ackerman Havas presided over the postconviction motion and entered the order denying postconviction relief. We refer to Judge Havas as the circuit court.

[2] Although one of these consolidated appeals involves a criminal case that arose while the 2013-14 version of the Wisconsin Statutes was in effect, and the other appeal involves a case that arose while the 2015-16 version was in effect, the portions of the statutes relevant to the issues raised on appeal are materially unchanged from the current 2019-20 version. Therefore, all references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

warranted a "substantial" prison term. The State noted that Erickson had a "voluminous collection of child pornography" and had apparently possessed it for a significant period of time. The State further argued that the victim of the child enticement had been substantially affected by Erickson's behavior and that children depicted in pornographic images are victims of exploitation.

Erickson urged the trial court to impose four years of initial confinement. He emphasized that he was fifty-eight years old and had no prior criminal record, that he was disabled, and that his age and ill-health rendered him vulnerable to abuse by other inmates while imprisoned.

The trial court discussed the gravity of the offenses, Erickson's character and rehabilitative prospects, and the need to protect the community. The trial court found that Erickson was a poor candidate for rehabilitative measures in light of his failure to accept responsibility, that he was likely to reoffend, and that he posed a potential danger to the community. The trial court determined that the primary sentencing goal was public protection and that the secondary goal was punishment. For the ten counts of possessing child pornography, the trial court imposed ten concurrent, evenly bifurcated twenty-year terms of imprisonment. For the child enticement count, the trial court imposed a consecutive nineteen-year term of imprisonment bifurcated as nine years of initial confinement and ten years of extended supervision.

Erickson filed a motion for postconviction relief. He alleged that a psychosexual evaluation conducted after sentencing reflected that he was both a low risk to reoffend and amenable to treatment, and he argued that this information constituted a new factor warranting sentence modification. The circuit court rejected the claim.

Erickson appeals, raising two issues. He argues that the evidence at trial was insufficient to support his convictions for possessing child pornography under WIS. STAT. § 948.12(1m),

(3)(a), because, he says, the State failed to prove that he was at least eighteen years old when he committed the crimes. He also renews his claim that a new factor warrants sentence modification.

We begin with Erickson's challenge to the sufficiency of the evidence. When a jury finds a defendant guilty of possessing child pornography, the defendant stands convicted of a Class D felony if the jury also finds beyond a reasonable doubt that the defendant was at least eighteen years old at the time of the offense. *See* WIS. STAT. § 948.12(1m), (3)(a); WIS JI—CRIMINAL 2146A. If the jury does not find that the defendant was at least eighteen years old at the time of the offense, the defendant stands convicted of a Class I felony.[3] *See* § 948.12(1m), (3)(b). Here, as to each count of possessing child pornography, the circuit court instructed the jury to determine whether the State had proved beyond a reasonable doubt that Erickson was at least eighteen years old at the time of the crime. The jury answered "yes" to that question.

Erickson argues that the State did not present any testimony or documentary evidence establishing either his age on January 13, 2015, or his date of birth. He acknowledges that the State both alleged in the charging documents that he was born in March 1958, and referred to him during closing argument as a fifty-six-year-old man, but he points out that neither the charging documents nor the State's arguments are evidence. *See* ***State v. Gilles***, 173 Wis. 2d 101, 117, 496 N.W.2d 133 (Ct. App. 1992) (regarding charging documents); ***State v. Draize***, 88 Wis. 2d 445, 455, 276 N.W.2d 784 (1979) (regarding the arguments of counsel).

Whether evidence was sufficient to support a verdict is a question of law that we review *de novo*. *See* ***State v. Smith***, 2012 WI 91, ¶24, 342 Wis. 2d 710, 817 N.W.2d 410. In conducting

[3] A Class I felony carries penalties of three years and six months of imprisonment and a $10,000 fine. *See* WIS. STAT. § 939.50(3)(i).

that review, "we give deference to the jury's determination and view the evidence in the light most favorable to the State." ***State v. Long***, 2009 WI 36, ¶19, 317 Wis. 2d 92, 765 N.W.2d 557. We reverse only if the evidence is so lacking in probative value and force that no jury acting reasonably could have concluded, beyond a reasonable doubt, that the defendant was guilty. *See* ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990). "If more than one inference can be drawn from the evidence, we must adopt the inference that supports the conviction," *see* ***Long***, 317 Wis. 2d 92, ¶19, and we may not overturn the verdict if there is any possibility that the jury could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, *see* ***Poellinger***, 153 Wis. 2d at 507.

Erickson was present in the courtroom throughout his trial, and his presence afforded the jurors an opportunity to observe him and to draw reasonable inferences about his age. Erickson does not dispute that proposition, but he argues that his "physical appearance, on its own, is not sufficient to affirm a criminal conviction when one of the elements of the offense is the defendant's age." In support, he cites ***State v. Fries***, 246 Wis. 521, 524, 17 N.W.2d 578 (1945). According to Erickson, that case requires the State to "introduce other evidence corroborating that the defendant's appearance supports finding beyond a reasonable doubt that the defendant was the age specified as an element of the offense." We are not persuaded that ***Fries*** mandates corroborating evidence, or that such a broad rule exists.

Fries involved a crime that included the element that the defendant was at least eighteen years old at the time of the offense. *See* ***id.*** at 523. Our supreme court concluded that the defendant's appearance in the courtroom, the witnesses' references to the defendant as "this gentleman," coupled with evidence that the defendant held a liquor license, proved that the defendant was at least eighteen years of age. *See* ***id.*** at 523-24. In reaching that conclusion, the

court examined ***Knox v. Bigelow***, 15 Wis. 415 (1862), and considered that in ***Knox***, "the court held that the jury was at liberty to look at parties in the courtroom for the purpose of determining questions as to identity." *See* ***Fries***, 246 Wis. at 524. The ***Fries*** court then stated: "No reason exists for refusing to allow such observation as a means of determining the relative age or maturity of the defendant." ***Id.***

The ***Fries*** court went on to discuss a Maine case holding that "[t]he appearance of the defendant in the courtroom was sufficient evidence of defendant's age." *See* ***id.*** (citing ***State v. Dorathy***, 170 A.506 (Me. 1934)). In ***Dorathy***, the court took judicial notice of the indictment, which charged that the defendant was seventy-four years old when the alleged crime occurred. *See* ***id.***, 170 A. at 508. The court then stated that "men and women, of intelligence sufficient to serve as jurors, have been drawing conclusions as to age, as a matter of everyday experience, from the appearance of people with whom they come in contact." ***Id.*** Therefore, said the court, jurors "are not required to consider that they have no evidence of the age of a respondent in a prosecution for a felony because there is no verbal or written testimony of age." ***Id.***

The ***Fries*** court also examined ***Hermann v. State***, 73 Wis. 248, 41 N.W. 171 (1888). There, our supreme court considered the sufficiency of the evidence presented to prove the defendant's knowledge that the sixteen-year-old victim was younger than twenty-one years old. *See* ***id.*** at 250. The court stated that it "kn[e]w of no good reason why the personal appearance of this young girl, on view in presence of the jury, was not very satisfactory evidence that the defendant knew that she was under the age of twenty-one years." *See* ***id.*** The court added that "[i]n cases where the girl is much nearer the age of twenty-one, such evidence would be more unreliable, as a matter of course. Each case must be tried upon its own facts." ***Id.***

In the case before us, where the State alleged that Erickson was fifty-six years old when he committed his crimes in January 2015, and where Erickson admitted at sentencing nineteen months later that he was fifty-eight years old, we conclude that the jury could rely on its observations of him in the courtroom to decide whether the State had proved beyond a reasonable doubt that he was at least eighteen years old at the time of the offenses. Erickson was simply too far past the age of eighteen to render such observations "unreliable" evidence. *See* ***id.***

Moreover, as the State points out, circumstantial documentary evidence also supported the jury's findings. A detective testified that during a search of Erickson's computer, she found copies of Erickson's Wisconsin income tax returns from 2003 and 2004. The jury could reasonably infer that a person filing income tax returns in 2003 and 2004 had earned income in those years and therefore was likely an adult at that time. *Cf.* ***Fries***, 246 Wis. at 523. While that inference may not be the only one that the evidence allows, we must draw the inference that supports the conviction. *See* ***Long***, 317 Wis. 2d 92, ¶19. Accordingly, we conclude that the evidence was sufficient to prove that Erickson was at least eighteen years old more than a decade later on January 13, 2015. His challenge to the sufficiency of the evidence therefore fails.

We turn to Erickson's claim that a new factor warrants sentence modification. A new factor for purposes of sentence modification is "a fact or set of facts highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in existence or because ... it was unknowingly overlooked by all of the parties." ***State v. Harbor***, 2011 WI 28, ¶40, 333 Wis. 2d 53, 797 N.W.2d 828 (citation omitted). To obtain a sentence modification based on a new factor, the defendant must satisfy a two-prong test. *See* ***id.***, ¶¶35-36. One prong requires the defendant to demonstrate by clear and convincing evidence that a new factor exists. *See* ***id.*** This presents a question of law for our *de novo* review.

See ***id.***, ¶¶33, 36. The other prong requires the defendant to demonstrate that the new factor justifies sentence modification. *See* ***id.***, ¶37. This determination rests in the circuit court's discretion. *See* ***id.*** A court may consider either prong first, and if the defendant fails to satisfy one prong of the test, the court need not address the other. *See* ***id.***, ¶38.

Pointing to the sentencing court's remarks that Erickson was "likely to reoffend" and that rehabilitative efforts would not be "fruitful" given his failure to accept responsibility for his crimes, Erickson argued in his postconviction motion that his sentences were based on assumptions about his risk to recidivate. Building on that argument, he offered a psychologist's psychosexual evaluation showing that he presents a low risk to reoffend and that he is amenable to treatment. He concluded that this evaluation constituted a new factor warranting sentencing modification. The circuit court determined, however, that the evaluation was not "new," and, assuming *arguendo* that it was, it did not warrant sentence modification.

We begin our review with the second prong of the ***Harbor*** analysis, namely, whether the circuit court properly exercised its discretion in concluding that modification of the original sentences was unwarranted. As the postconviction order indicates, the original sentencing court sentenced Erickson in the manner required by ***State v. Gallion***, 2004 WI 42, ¶¶17, 40-43, 270 Wis. 2d 535, 678 N.W.2d 197 (explaining that sentencing rests in the circuit court's discretion and describing the framework for exercising that discretion). The sentencing court considered the gravity of the offenses, stating that they were "quite serious," and took into account Erickson's character, including his efforts to cast himself as the victim rather than the perpetrator of his crimes. The sentencing court also discussed the effect of Erickson's criminal conduct, noting particularly the exploitation of the children victimized by the pornographic materials. In considering the appropriate dispositions, the sentencing court found that Erickson had substantial rehabilitative

needs in light of the "serious nature" of the child pornography that he possessed and the indications that he had collected that material over a significant period of time. The sentencing court was particularly concerned that the expressions of community support submitted on Erickson's behalf suggested that he was skillful at hiding his misconduct and had earned unwarranted trust that permitted him to gain access to vulnerable people. Heightening this concern was Erickson's failure to acknowledge that "there's anything wrong with having the child pornography," which the sentencing court viewed as signaling his likelihood to reoffend. The sentencing court therefore determined that the sentencing objectives were protection of the community and punishment, and the sentencing court selected dispositions to advance those goals.

In postconviction proceedings, the circuit court indicated that the information Erickson submitted in support of sentence modification would not have had any impact on the original sentencing decisions. *See* ***Harbor***, 333 Wis. 2d 53, ¶62. The circuit court first observed that actuarial risk is not dispositive of recidivism and that a low risk score for future sexual misbehavior reflects that a percentage of offenders with a similar risk score will reoffend. The circuit court then emphasized that the sentencing court fashioned sentences that took into account multiple concerns in addition to the risk of reoffending. These included the gravity of Erickson's criminal conduct, which the sentencing court viewed as serious and deserving of punishment, as well as Erickson's character and demeanor, his rehabilitative needs, and the impact of his crimes on the victims. Accordingly, the circuit court determined that the psychosexual evaluation that Erickson offered did not justify sentence modification.

The circuit court thus properly exercised its discretion. The circuit court explained its reasons for denying sentencing modification and made no errors of law. *See* ***id.***, ¶63. Further analysis is not required. *See* ***id.***, ¶38. For all the foregoing reasons, we affirm.

IT IS ORDERED that the judgments of conviction and the postconviction order are summarily affirmed. *See* 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