COURT OF APPEALS
DECISION
DATED AND FILED

April 30, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal Nos. 2013AP1305-CR
2013AP1306-CR

Cir. Ct. Nos. 2010CF245
2011CF122

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JONATHAN L. GURATH,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Fond du Lac County: ROBERT J. WIRTZ, Judge. *Affirmed.*

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

¶1 PER CURIAM. In these consolidated appeals, Jonathan L. Gurath appeals from judgments of conviction and an order denying his motion for postconviction relief. He contends that (1) there was insufficient evidence to support his conviction for second-degree sexual assault of a child, (2) the circuit

court erroneously exercised its discretion in denying his motion to sever the sexual assault charge from two drug possession charges, (3) the circuit court erroneously exercised its discretion in allowing a state expert witness to render an opinion as to whether the sexual assault victim was drugged, and (4) the circuit court erroneously exercised its discretion in sentencing him on the sexual assault charge. We reject Gurath's claims and affirm the judgments and order.

¶2 Gurath was convicted following a jury trial of one count of possession of the controlled substance clonazepam, one count of possession of the narcotic drug morphine sulfate, and one count of second-degree sexual assault of a child. The latter count was based on the allegation that Gurath had sexually assaulted his thirteen-year-old daughter, R.P., while she slept in his home.[1]

¶3 After the jury trial, Gurath entered into plea negotiations with the State that resulted in the dismissal of several other pending charges and pleas to one count of felony possession with intent to deliver marijuana and four counts of capturing images of nudity without consent of the victim. For all of Gurath's offenses, the circuit court imposed a total of thirty-two years and sixty days of initial confinement followed by sixteen years of extended supervision.

¶4 Gurath subsequently filed a motion for postconviction relief, challenging only his sentence for second-degree sexual assault, which consisted of twenty-five years of initial confinement followed by seven years of extended supervision. He sought modification of the sentence based on alleged weaknesses

[1] The count of second-degree sexual assault of a child was a lesser-included offense of the charged offense of repeated sexual assault of the same child, for which the jury returned a not guilty verdict.

in the State's case. The circuit court denied the motion. This appeal follows. Additional facts are set forth below.

¶5 On appeal, Gurath presents multiple arguments for our review. He first contends that there was insufficient evidence to support his conviction for second-degree sexual assault of a child.

¶6 In reviewing the sufficiency of the evidence to support a conviction, this court may not substitute its judgment for that of the jury unless the evidence, viewed most favorably to the State and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990). If any possibility exists that the jury could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, this court may not overturn a verdict even if we believe that the jury should not have found guilt based on the evidence before it. ***Id.***

¶7 To convict Gurath of second-degree sexual assault of a child, the State was required to prove two elements: (1) Gurath had sexual contact or intercourse with the victim and (2) the victim was under the age of sixteen at the time of the sexual contact or intercourse. *See* WIS JI—CRIMINAL 2104; WIS. STAT. § 948.02(2) (2011-12).[2] Sexual contact is defined, in relevant part, as the defendant's intentional touching of the victim's intimate parts either directly or through the victim's clothing by any body part or any object. WIS. STAT. § 948.01(5). Sexual intercourse is defined, in relevant part, as the defendant's

[2] All references to the Wisconsin Statutes are to the 2011-12 version.

"intrusion, however slight, of any part of [his] body or of any object, into the genital or anal opening [of the victim]." Sec. 948.01(6).

¶8 At trial, R.P. testified about an experience she had while sleeping over at Gurath's home when she was thirteen years old. Before going to sleep, Gurath gave her a prescribed thyroid pill along with a glass of water that was cloudy and tasted stale. R.P. awoke in the middle of the night unable to move and feeling extreme pain to her nipples and buttocks. She noticed that her legs were spread apart and saw Gurath crouching up and down at the side of her bed. She felt penetration "down there" in her vaginal area and said that Gurath had his hands "down there." She then fell back asleep.

¶9 R.P.'s testimony was supported by subsequent medical findings of bruising and abrasions to the labia minora inside her vagina and abrasions to the rectal area. It was also supported by the discovery of clonazepam and morphine sulfate in Gurath's bedroom, which could have been used to facilitate the assault and explain R.P.'s recollection of events.[3] Finally, it was supported by Gurath's largely inculpatory statements to police. In them, he admitted that (1) he likes to videotape people while they are sleeping, (2) he has a fetish with the female body and with breasts, and (3) he is a sex addict who is addicted to pornography. He also blamed "paranormal activity" for what happened to R.P. and theorized that if he did it, he did it while sleepwalking.

[3] At trial, a State expert witness testified that clonazepam has been used in higher doses to facilitate sexual assault by causing sedation and adversely affecting muscle control and memory. The expert further testified that morphine sulfate can at higher doses cause sedation, memory loss, and slowed breathing. A side effect is somnolence; that is, going in and out of consciousness.

¶10 Viewing this evidence in a light most favorable to the State and the conviction, we are satisfied that a jury, acting reasonably, could have found that Gurath had sexual contact or intercourse with R.P. while she was under the age of sixteen.

¶11 Gurath next contends that the circuit court erroneously exercised its discretion in denying his motion to sever the sexual assault charge from two drug possession charges. The court denied the motion after determining that evidence of the drug possession would be admissible at the sexual assault trial to establish Gurath's scheme or plan to drug his daughter to facilitate the sexual assault.

¶12 To determine whether a circuit court's refusal to sever charges was proper, we must engage in a two-step analysis. ***State v. Locke***, 177 Wis. 2d 590, 596, 502 N.W.2d 891 (Ct. App. 1993). First, we must independently determine whether the charges were properly joined. ***Id.*** Second, even if the initial joinder was proper, we look to whether the defendant was unfairly prejudiced by the joinder. ***Id.*** at 596-97. The question of whether joinder is likely to result in prejudice is left to the discretion of the circuit court, and this court will find an erroneous exercise of discretion only if the defendant can establish that failure to sever the counts caused "substantial prejudice." ***Id.*** at 597.

¶13 Reviewing the allegations against Gurath, we conclude that the charges of sexual assault and drug possession constituted parts of a common plan or scheme (i.e., to drug R.P. to facilitate a sexual assault). Accordingly, their joinder was permissible. *See* WIS. STAT. § 971.12(1).

¶14 We further conclude that Gurath was not unfairly prejudiced by the joinder because his possession of such drugs would have been admissible at a separate trial on the sexual assault charge as other-acts evidence. Again, it would

have established his plan or scheme. It would have also served to defeat his innocent explanations for the crime. Additionally, it would have provided a complete picture of what happened on the night in question. Consequently, such evidence (1) would have been offered for acceptable purposes, (2) would have been relevant and probative of consequential facts, and (3) would not have been substantially outweighed by the danger of unfair prejudice or confusion of the issues. *See* ***State v. Sullivan***, 216 Wis. 2d 768, 772-73, 576 N.W.2d 30 (1998).[4] For these reasons, the refusal to sever was proper.

¶15 Gurath next contends that the circuit court erroneously exercised its discretion in allowing a state expert witness to render an opinion as to whether R.P. was drugged. He complains that such testimony ran afoul of the ***Haseltine*** rule, which prohibits witnesses from rendering an opinion that another competent witness is telling the truth. *See* ***State v. Haseltine***, 120 Wis. 2d 92, 96, 352 N.W.2d 673 (Ct. App. 1984).

¶16 At trial, Dr. Angela Rabbitt, a pediatrician and child sexual assault expert, testified about the uses and effects of clonazepam and morphine sulfate. When asked for her expert opinion as to whether R.P. was drugged, she responded as follows:

> If the symptoms that she's describing of lack of muscle control, very vague memories of waking up, and being confused, and experiencing pain in the genital area but not being able to move, if those are true, then I would say there's really no other explanation and I could say beyond a reasonable degree of medical certainty that she was drugged.

[4] Because the case involved a child sexual assault, the State would have also benefited from the greater latitude rule when introducing such evidence. *See* ***State v. Davidson***, 2000 WI 91, ¶44, 236 Wis. 2d 537, 613 N.W.2d 606.

¶17 Although Gurath now complains that such testimony ran afoul of the ***Haseltine*** rule, he did not make a contemporaneous objection at trial. Instead, he waited until after Dr. Rabbitt rendered her opinion on direct examination, and after his attorney explored that opinion on cross-examination, before objecting for the first time on redirect examination. Because his objection was untimely, he forfeited any right to appellate review of it. *See* ***State v. Davis***, 199 Wis. 2d 513, 517-19, 545 N.W.2d 244 (Ct. App. 1996).

¶18 Even if we were to look past Gurath's forfeiture, we would conclude that the circuit court properly allowed Dr. Rabbitt to render her opinion. After all, Dr. Rabbitt did not opine that R.P. was telling the truth about her allegations. Rather, she opined that *if* R.P. was telling the truth about what she experienced at Gurath's house, then she was drugged to a reasonable degree of medical certainty. It remained for the jury to determine whether R.P. was telling the truth. Accordingly, the ***Haseltine*** rule was not implicated.

¶19 Finally, Gurath contends that the circuit court erroneously exercised its discretion in sentencing him on the sexual assault charge. He submits that he should have received a lesser sentence because, in essence, the jury was wrong to find him guilty.

¶20 Sentencing is left to the discretion of the circuit court, and appellate review is limited to determining whether there was an erroneous exercise of discretion. ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. We afford a strong presumption of reasonability to the circuit court's sentencing determination because that court is best suited to consider the relevant factors and demeanor of the defendant. ***State v. Ziegler***, 2006 WI App 49, ¶22, 289 Wis. 2d 594, 712 N.W.2d 76.

¶21 Here, Gurath's challenge to the circuit court's sentencing discretion is nothing more than a warmed-over version of his earlier sufficiency of the evidence argument. That is not a valid reason to overturn a presumptively valid sentence. In any event, we are satisfied that the court's decision had a "rational and explainable basis" and considered appropriate sentencing factors. ***Gallion***, 270 Wis. 2d 535, ¶76 (citation omitted). Under the circumstances of the case, Gurath's sentence for the sexual assault charge does not "shock public sentiment and violate the judgment of reasonable people concerning what is right and proper." ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

¶22 For the reasons stated, we affirm the judgments and order.[5]

By the Court.—Judgments and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2011-12).

[5] To the extent we have not addressed an argument raised by Gurath on appeal, the argument is deemed rejected. *See* ***State v. Waste Mgmt. of Wis., Inc.***, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978) ("An appellate court is not a performing bear, required to dance to each and every tune played on an appeal.").