COURT OF APPEALS
DECISION
DATED AND FILED

June 24, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP1332-CR **Cir. Ct. No. 2011CF005789**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BRYANNTTON A. BROWN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: REBECCA F. DALLET, Judge. *Affirmed.*

Before Fine, Kessler and Brennan, JJ.

¶1 BRENNAN, J. Bryanntton A. Brown appeals from a judgment of conviction entered after a jury found him guilty of one count of repeatedly

sexually assaulting the same child, *see* WIS. STAT. § 948.025(1)(d) (2011-12),[1] and from an order denying his postconviction motion. Brown contends that: (1) he received ineffective assistance from his trial counsel; (2) the trial court erred in concluding that new evidence revealing a witness's mental illness did not entitle Brown to a new trial; and (3) the trial court erroneously exercised its discretion at sentencing. We disagree and affirm.

BACKGROUND

¶2 In December 2011, Brown was charged with repeated sexual assault of a child, after his sister, AW, told police that Brown had engaged in penis-to-mouth, mouth-to-vagina, and mouth-to-anus sexual contact with her. A trial was held before a jury. The testimony relevant to Brown's appeal is set forth below.

¶3 AW and Brown's mother, Susie, testified at trial that in July 2011, when AW was nine years old, AW told her that Brown had touched her butt over her clothes. At the time, Brown, AW, their sister Danirees, and three other siblings, were living with Susie. Susie stated that she did not immediately call the police, but instead called Danirees. Susie and Danirees agreed that AW should move out and live with Danirees until Brown was able "to get … on his feet, get his own small apartment." Susie stated that she talked to Brown about touching AW and that he denied doing so.

¶4 Danirees testified at trial that, after AW reported Brown's abuse in July 2011, she and AW moved out of Susie's house. Danirees said that AW told

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

her that Brown had asked her to give him oral sex on four occasions, and that she had done so. Danirees testified that she asked Brown about the allegations, and that Brown admitted that he and AW had penis-to-mouth sexual contact. Danirees decided to call the police and report AW's allegations in November 2011.

¶5 City of Milwaukee Police Officer Louise Cosgrove testified that she interviewed AW and her mother Susie after the abuse was reported to police. Officer Cosgrove testified that Susie told her that AW reported four incidents in 2010 involving AW licking Brown's penis, and that he "had put his penis on her behind."[2] Officer Cosgrove testified that AW told her that Brown had licked her anus and taken pictures of her anus, that she had licked Brown's penis "until white stuff came out," and that Brown had put his mouth on her vaginal area.

¶6 City of Milwaukee Police Officer Howard Joplin also interviewed AW, and the jury viewed a DVD recording of the interview. The DVD depicts AW telling Officer Joplin that Brown had made her suck his "private" on three or four occasions, and that "white stuff came out" of Brown's private and she would spit it out. She said that on a number of occasions Brown would lick her anus after she defecated, and that he would take pictures of her anus. She also said that one time Brown put his penis in her butt, causing her pain.

¶7 Officer Cosgrove testified that she interviewed AW again in February 2012, after AW had moved back in with Susie, and that AW recanted her allegations. AW told Officer Cosgrove that she made up the allegations because she wanted her own room. AW told Officer Cosgrove that her mother had said

[2] At trial, Susie denied telling police that AW had told her that Brown had done anything other than touch AW's butt over her clothes.

that Brown had to sleep on a thin bed and eat bad food while he was in jail. AW said she had learned about oral sex and anal sex from watching the movie *Dirty Dancing*, the television show *Family Guy*, and a princess movie. However, AW was only able to give Officer Cosgrove a "vague description" of what she saw in the movies and on television and told Officer Cosgrove that "the people in the movies were under the covers so she couldn't really see what they were doing." Officer Cosgrove testified that "[a] lot of what [AW] was describing obviously wasn't the same thing" that AW had previously told her that Brown had done. Susie testified that she spoke to AW every day about Brown, asking her what had happened, but denied pressuring AW to recant.

¶8 Detective Kevin Armbruster testified that, after Brown was arrested and placed in jail, another detective informed him that an inmate, Gregory Carson, had information on a sexual assault suspect. When Detective Armbruster and the other detective met with Carson, Carson gave them a handwritten letter that he alleged was written by Brown. The other detective had met with Carson a few days earlier, but did not collect the letter at that time. In the letter, which the jury viewed, Brown confessed to having oral sex with AW on multiple occasions, licking AW's anus, and making a video of her defecating.

¶9 Carson testified that he was an inmate at the Waukesha County Jail and that he been convicted of more than twenty crimes. He told the jury that he met Brown in jail and that Brown had asked Carson if he would help him with his case. Carson agreed and told Brown to "write down everything that he had did to the best of his knowledge." Brown did so, and Carson handed the letter over to the police.

¶10 A handwriting expert also testified. The expert stated that he had examined the letter, handwriting samples from both Brown and Carson, and letters taken from Brown's cell in which Brown had been practicing writing numbers and letters. The expert testified that it was "inconclusive" whether Brown had written the letter, but that Carson "probably did not write the letter."

¶11 Brown testified at trial and denied sexually assaulting AW. He also denied telling his sister Danirees that he had sexually assaulted AW, or writing the letter confessing to sexually assaulting AW.

¶12 The jury found Brown guilty of repeated sexual assault of AW. The trial court entered the judgment of conviction, and sentenced Brown to twenty-six years of imprisonment, consisting of sixteen years of initial confinement and ten years of extended supervision.

¶13 Brown moved for postconviction relief, seeking a new trial on the grounds of ineffective assistance of trial counsel and newly discovered evidence, or, in the alternative, seeking a reduction of his sentence. The trial court denied Brown's motion in a written decision and order, without a hearing. Brown appeals.

DISCUSSION

¶14 Brown raises three issues on appeal: (1) whether his trial counsel was constitutionally ineffective; (2) whether the trial court erred when it concluded that evidence that Carson was a paranoid schizophrenic did not entitle Brown to a new trial; and (3) whether the trial court erroneously exercised its sentencing discretion. We address each concern in turn.

I. Brown did not receive ineffective assistance of counsel.

¶15 Brown argues that his trial counsel was constitutionally ineffective in two respects: (1) because he failed to present evidence showing alternative sources of AW's advanced sexual knowledge; and (2) because he failed to introduce evidence or argument to mitigate the impact of the Carson letter. We disagree.

¶16 The right to the effective assistance of counsel derives from the Sixth Amendment to the United States Constitution, made applicable here by the Fourteenth Amendment, and article 1, section 7 of the Wisconsin Constitution. *See* ***State v. Sanchez***, 201 Wis. 2d 219, 225-26, 548 N.W.2d 69 (1996). In order to prevail on a claim of ineffective assistance of counsel, a defendant must show that his attorney's performance was deficient and that he was prejudiced as a result of his attorney's deficient conduct. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). We need not address both aspects of the ***Strickland*** test if the defendant does not make a sufficient showing on either one. *See* ***id.*** at 697.

¶17 To prove deficient performance, the defendant must identify specific acts or omissions of his attorney that fall "outside the wide range of professionally competent assistance." ***Id.*** at 690. To show prejudice, the defendant must demonstrate that the result of the proceeding was unreliable. ***Id.*** at 687. Thus, in order to succeed on the prejudice aspect of the ***Strickland*** analysis, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** at 694.

¶18 Our review of an ineffective-assistance-of-counsel claim presents mixed questions of law and fact. *See* ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). A trial court's findings of fact will not be disturbed unless they are clearly erroneous. ***Id.*** Its legal conclusions as to whether the lawyer's performance was deficient and, if so, prejudicial, are questions of law that we review *de novo*. ***Id.*** at 128.

¶19 A defendant is entitled to an evidentiary hearing on a motion for postconviction relief alleging ineffective assistance of counsel only if the defendant alleges facts that, if true, would entitle him to relief. ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. "Whether a defendant's postconviction motion alleges sufficient facts to entitle the defendant to a hearing for the relief requested is a mixed standard of review." ***Id.*** We first look to "whether the motion on its face alleges sufficient material facts that, if true, would entitle the defendant to relief. This is a question of law that we review de novo." ***Id.*** If the motion raises sufficient facts, the trial court must hold a hearing. ***Id.*** "[I]f the motion does not raise facts sufficient to entitle the movant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the [trial] court has the discretion to grant or deny a hearing." ***Id.*** "We review a [trial] court's discretionary decisions under the deferential erroneous exercise of discretion standard." ***Id.***

A. *Brown's trial attorney was not ineffective for failing to introduce alternate sources for AW's advanced sexual knowledge*.

¶20 Brown first asserts that his trial counsel was ineffective for failing to introduce evidence at trial demonstrating that AW could have gained her advanced sexual knowledge by: (1) watching the television show *Family Guy*; or (2) talking to her older sister Danirees. Both arguments are completely without merit.

Family Guy Episodes

¶21 After initially detailing Brown's sexual abuse to police, AW later recanted, testifying at trial that she fabricated the allegations because she wanted Brown's bedroom. She also told the jury that she had learned about the various sex acts she described to police from "watching a lot of movies at [her] sister's house," specifically "a movie that's called Dirty Dancing[,] [a]nd Sprung, and Family Guys." Officer Cosgrove also testified at trial that when AW came to police to recant her statement, she told police that she learned about sex from watching movies and television, specifically the movie *Dirty Dancing* and episodes of the television show *Family Guy*.

¶22 At trial, the State attempted to discredit AW's recantation by arguing that her advanced sexual knowledge could only have come from sexual contact with Brown. In her opening statement, the prosecutor stated: "when you use your common sense and your life experience … common sense will tell you there is nothing about licking anuses in either of those shows." During her closing argument, the prosecutor asked the jury rhetorically: "[R]eally? [AW] didn't learn [about these sexual acts] from the The Family Guy or Dirty Dancing."

¶23 In his postconviction motion and before this court, Brown contends that *Family Guy* episodes do contain explicit sexual content similar to AW's allegations against Brown. As such, he argues that his trial counsel was constitutionally ineffective for failing to perform a cursory internet search to locate clips of *Family Guy* depicting these acts and for failing to introduce them at trial to counter the State's allegations. In his postconviction motion, Brown included website addresses to four YouTube clips from *Family Guy* episodes to demonstrate "the type of material" on the television show but he did not describe

the content of the clips in his postconviction brief. He believes these clips entitle him to a new trial, or at the very least, a postconviction hearing at which he can enter into evidence the actual *Family Guy* episodes.

¶24 In his brief before this court, Brown, again, fails to provide a written description of what is included in the clips he alleges prove his allegations that AW could have obtained her advanced sexual knowledge from episodes of *Family Guy*. Instead, he merely refers this court back to his postconviction motion, in which he included the four website addresses for YouTube videos. However, as of the time of this writing, three of those four videos have been removed from YouTube's website due to copyright claims by Twentieth Century Fox Film Corporation. It is Brown's responsibility, as the appellant, to ensure that the record is adequate and sufficiently complete to facilitate appellate review.[3] *See* ***Seltrecht v. Bremer***, 214 Wis. 2d 110, 125, 571 N.W.2d 686 (Ct. App. 1997). However, because we wish to resolve Brown's ineffective-assistance-of-counsel claim on its merits, we accept the State's descriptions of each of the clips as included in its brief to this court, to the extent that those descriptions are relied upon and not contradicted by Brown in his reply brief.

The State's description of the four *Family Guy* clips, which is not contradicted by Brown in his reply brief, is as follows:

[3] We note that Brown provides an alternate website in his reply brief on appeal for one of the clips, along with a transcript of what he alleges can be seen in the clip. However, that webpage has also been removed. Furthermore, even if the page still existed, this court has no way of verifying that the clip on that webpage is the same one included in Brown's postconviction motion, and we reject arguments or evidence introduced for the first time in a reply brief. *See* ***Schaeffer v. State Pers. Comm'n***, 150 Wis. 2d 132, 144, 441 N.W.2d 292 (Ct. App. 1989) (court does not generally "consider arguments raised for the first time in a reply brief").

> The [first] YouTube clip depicts a woman, "Lois Griffin," choking on a scone. A man attempts to dislodge the scone from her throat by standing in back of her and squeezing her abdominal area.
>
> …
>
> The [second] video Brown cited depicts a young child, "Stewie Griffin," eating cereal with milk. His father, "Peter Griffin," explains that the numerous bottles of what appears to be milk in the refrigerator is actually "horse sperm." Stewie eats the cereal.
>
> …
>
> In [the third] video, a man, "Peter Griffin" is in bed when a horse licks his bare buttocks.
>
> …
>
> The [fourth] clip depicts "Stewie Griffin" in a soiled diaper. The family's dog "Brian" changes the diaper, and it is intimated on the video that the dog eats the feces in the diaper. The video does not show feces, or the animated dog actually eating feces.

¶25 None of these *Family Guy* clips are similar to AW's allegations, and as such, they do not convince us that a reasonable person would believe that she obtained her advanced sexual knowledge from *Family Guy*. AW, who was nine years old at the time she reported Brown's behavior, initially alleged that Brown licked her anus and vagina, licked feces off her anus, had her lick his penis until "white stuff came out," put his penis on her anus, and took photographs of her anus with feces. The *Family Guy* clips Brown relies on fall far short of depicting any of those acts in a manner that would enable a nine-year-old girl to describe them in detail. If anything, the clips only serve to support the State's assertions at trial that AW did not obtain her advanced sexual knowledge from watching *Family Guy* and could therefore only have obtained it from Brown.

¶26 In short, we see no basis for Brown's assertions that his trial counsel was ineffective for failing to introduce specific *Family Guy* episodes into evidence because the clips he relies on are not sufficiently similar to AW's allegations to lead anyone to believe she obtained her advanced sexual knowledge from the show. The fact that the show may be sexually explicit is not enough. Because Brown has failed to demonstrate that episodes of *Family Guy* were relevant to support AW's testimony that she learned about the sex acts she described to the police from watching television, he has not demonstrated that his trial counsel was deficient for failing to introduce the episodes or that he was prejudiced by trial counsel's failure to introduce them. *See* WIS. STAT. § 904.01 ("'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."); *see also* WIS. STAT. § 904.02 ("Evidence which is not relevant is not admissible."); ***Strickland***, 466 U.S. at 687 (requiring a defendant to show both deficient performance and prejudice to establish an ineffective-assistance-of-counsel claim). As such, Brown is not entitled to a hearing on his postconviction motion, and we affirm the trial court's decision to deny him a new trial.

Talking to her sister

¶27 Brown also argues that his trial counsel was constitutionally ineffective for failing to present evidence that AW could have gained her advanced sexual knowledge from her sister Danirees. To support this claim in his postconviction motion, Brown submitted an affidavit from a law student working on his behalf. In the affidavit, the law student stated:

> AW informed me that she and her sister, Danirees …, watched movies together while AW lived at Danirees's residence. AW told me that when the movies contained

> sexual content, Danirees would ask AW what the characters were doing when they engaged in sexual acts. When AW told Danirees she did not know, Danirees would explain the various sexual acts to AW.

Brown contends that his trial counsel should have introduced this evidence at trial to explain AW's advanced sexual knowledge. We disagree.

¶28 As a preliminary matter, the evidence from Brown's postconviction affidavit was insufficient to warrant a postconviction hearing. First, the content of AW's statement that Danirees explained various sexual acts to her is not specific as to *which* sex acts and *when* Danirees' explanation occurred. Thus, it fails to demonstrate materiality to the types of acts AW reported to the police and any knowledge by AW *at the time* of the report to police. Second, there is no allegation in the affidavit that if trial counsel had talked to AW before trial, AW would have told him this same information. As such, it does not demonstrate under ***Allen*** that Brown is entitled to a hearing. *See* ***Allen***, 274 Wis. 2d 568, ¶9. Talking to a law student post-trial cannot be assumed to be the same to a child as talking to her brother's trial counsel pretrial. Trial counsel cannot be found deficient for not knowing something that, even if relevant, there is no showing he would have been told.

¶29 And more importantly, the majority of AW's statements in the affidavit came in at trial and were rejected by the jury. AW testified at trial that she "had made up a lie [about Brown] 'cause I was watching a lot of movies at my sister['s] house. And that's where I got all the stuff from." While she did not explicitly state that Danirees explained the various sex acts in the movies she alleged they had seen, AW told the jury that her advanced sexual knowledge was not from sex acts she was forced to engage in with Brown but from movies. The jury's verdict makes it clear that it did not find AW's testimony at trial credible.

As such, it is not reasonably probable that AW's additional testimony, to wit, that Danirees explained sex acts in the movies to her, would lead to a different result at trial. Because Brown was not prejudiced by his counsel's failure to present this minor detail to the jury, his trial counsel was not constitutionally ineffective. *See* ***Strickland***, 466 U.S. at 694 (to show prejudice a "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different").

B. Brown's trial attorney was not ineffective for failing to introduce evidence to mitigate the impact of the Carson letter.

¶30 Brown also argues that his trial counsel was constitutionally ineffective for failing to introduce evidence to mitigate the impact of the Carson letter. Specifically, Brown argues that his trial counsel: (1) failed to argue to the jury that the Carson letter was unreliable because police did not immediately collect the letter from Carson upon becoming aware of its existence; (2) failed to object to the prosecutor's mischaracterization of the handwriting expert's testimony regarding whether Carson wrote the letter; and (3) failed to argue that Carson authored the letter and could have altered his handwriting to deceive the handwriting expert. We disagree because the other evidence against Brown was so compelling that additional attacks on the Carson letter would have had no reasonable prospect of producing a different verdict, and as such, Brown suffered no prejudice.

¶31 The trial court denied Brown's ineffective-assistance-of-counsel claim regarding the Carson letter, concluding that Brown failed to demonstrate that he suffered any prejudice resulting from counsel's alleged failures. The court held that:

> More emphasis on the way[,] the "curious" way[,] the letter was collected would not have been reasonably probable to alter the outcome of the trial. The testimony of Danirees … was very strong, and the testimony of Officer Cosgrove, who originally interviewed [AW] and her mother, along with the videotape of [AW], were equally compelling. This court heard and observed the witnesses and finds there is not a reasonable probability that the verdict would have been any different had trial counsel been more forceful about the manner in which the letter was retrieved.
>
> The defendant next claims that trial counsel failed to argue that the State mischaracterized [the handwriting expert's] testimony regarding the authorship of the Carson letter and that Carson could have altered his handwriting. This claim suffers the same fate as the last claim involving the Carson letter. There is simply not a reasonable probability of a different result due to the strength of the evidence *without* the Carson letter.

(Footnote omitted.) We agree.

¶32 The jury viewed a DVD of AW's original statement to police. In the DVD, nine-year-old AW explains to Officer Joplin how Brown would lick her anus after she defecated and take pictures of it. She demonstrated how she would be on her knees, and Brown would be on his knees. She said it happened more than one time. AW also explains on the DVD how Brown had her suck his private three or four times. She said that one time she was on the bed, sucking Brown's private, while he licked her anus. AW said that other times she would be on her knees on the floor while Brown sat on the bed. The jury heard AW explain how "white stuff came out" of Brown's private and that she spit it out.

¶33 Officer Cosgrove testified that AW originally told her that Brown "would lick her butt where the poop came out after she had used the bathroom." AW said that this happened more than one time. Officer Cosgrove testified that AW "described a camera that [Brown] used to take pictures of her butt after she

went poo poo." Officer Cosgrove said that AW told her that "she licked his private part and white stuff came out." Officer Cosgrove further testified that AW told her that Brown put his mouth on her vaginal area and her butt. AW told Officer Cosgrove this happened when she was seven or eight years old.

¶34 Danirees testified that when she asked AW what had happened, AW told her that Brown "had told her to give him oral sex over four different occasions" and that AW had done so. Danirees also testified that when she confronted Brown with AW's accusations, "[h]e admitted to it. He told me that it happened."

¶35 Brown downplays the significance of this testimony, arguing that it is called into doubt by AW's recantation at trial. The record belies this assertion. AW did not recant her allegations against Brown until after she moved back into Susie's house, and there was ample evidence in the record to suggest that Susie pressured AW into recanting, specifically, Officer Cogrove's testimony that when AW recanted her statement to police she told Officer Cosgrove that her mother had told her that Brown was sleeping on a thin mattress and had to eat bad food. And while Susie denied pressuring AW to recant, her credibility was severely undermined by: (1) the inconsistencies between Susie's testimony at trial and her previous statement to police about AW's initial reports; and (2) Susie's decision to not call the police and to protect Brown after AW told her of the abuse. The jury obviously rejected AW's recantation and instead believed her original reports. The court stated at sentencing that, having heard all of the evidence, it concluded that Danirees told the truth about what had happened, and that AW's mother, Susie, had pressured AW into recanting.

¶36 In short, the evidence at trial against Brown was overwhelming, despite AW's recantation, and without the Carson letter. There is simply not a reasonable probability of a different outcome at trial, even if Brown's trial counsel had more forcefully attacked the legitimacy of the Carson letter. Because Brown was not prejudiced, his trial counsel was not ineffective. *See* ***Strickland***, 466 U.S. at 687.

II. The trial court did not err in ruling, without a hearing or *in camera* review of Carson's mental health records, that evidence that Carson was a paranoid schizophrenic did not entitle Brown to a new trial.

¶37 Brown contends that he was entitled to a new trial based on newly discovered evidence that Carson was a paranoid schizophrenic. He further argues that the trial court erred when it denied his request for postconviction discovery of Carson's mental health records and for an *in camera* review of those records. We disagree.

¶38 A defendant may be entitled to a new trial on the ground of newly discovered evidence if the evidence meets five criteria:

> (1) The evidence must have come to the moving party's knowledge after a trial; (2) the moving party must not have been negligent in seeking to discover it; (3) the evidence must be material to the issue; (4) the testimony must not be merely cumulative to the testimony which was introduced at trial; and (5) it must be reasonably probable that a different result would be reached on new trial.

State v. Brunton, 203 Wis. 2d 195, 200, 552 N.W.2d 452 (Ct. App. 1996) (citation omitted). A defendant has the burden of proof on each of the five criteria. *See* ***State v. Armstrong***, 2005 WI 119, ¶161, 283 Wis. 2d 639, 700 N.W.2d 98. The first four must be proved by clear and convincing evidence. ***Id.*** The fifth requires a defendant to show a reasonable probability of a different result. ***Id.***, ¶162.

Newly discovered evidence that fails to satisfy any one of these five requirements is insufficient to warrant a new trial. ***State v. Kaster***, 148 Wis. 2d 789, 801, 436 N.W.2d 891 (Ct. App. 1989).

¶39 Motions for a new trial based on newly discovered evidence are entertained with great caution and are addressed to the trial court's sound discretion. ***State v. Terrance J.W.***, 202 Wis. 2d 496, 500, 550 N.W.2d 445 (Ct. App. 1996). We must affirm the trial court's ruling on the motion if the ruling has a reasonable basis and accords with accepted legal standards and the facts of record. ***Id.***

¶40 "[A] defendant has a right to post-conviction discovery when the sought-after evidence is consequential to the case." ***State v. O'Brien***, 223 Wis. 2d 303, 323, 588 N.W.2d 8 (1999). "The defendant bears the burden of making a preliminary evidentiary showing before an in camera review is conducted by the court." ***State v. Green***, 2002 WI 68, ¶20, 253 Wis. 2d 356, 646 N.W.2d 298. We review the trial court's factual findings under the clearly erroneous standard. ***Id.*** However, "[w]hether the defendant submitted a preliminary evidentiary showing sufficient for an in camera review implicates a defendant's constitutional right to a fair trial and raises a question of law that we review de novo." ***Id.***

¶41 The trial court denied Brown's motion for post-trial discovery, as well as for a new trial, on the fifth ground "for the same reasons set forth above in conjunction with the other issues dealing with Carson," to wit, "[b]ased on the other witnesses' testimony, there is not a reasonable probability such evidence would have altered the verdict in any respect." In other words, the trial court concluded that the other evidence pointing to Brown's guilt was so persuasive that Brown would have been found guilty even without admission of the Carson letter.

As such, Brown failed to demonstrate that even with admission of his allegedly newly discovered evidence, that is, evidence of Carson's mental illness, there is a reasonably probability of a different result at a new trial. *See* ***Brunton***, 203 Wis. 2d at 201. Because the trial court's finding has a reasonable basis in the record, it did not erroneously exercise its discretion in denying Brown's motion for a new trial based on newly discovered evidence. *See* ***Terrance J.W.***, 202 Wis. 2d at 500. Furthermore, the trial court properly denied Brown's request for postconviction discovery because Brown failed to demonstrate that Carson's mental health records were "relevant to an issue of consequence." *See* ***O'Brien***, 223 Wis. 2d at 323; *see also* ***Green***, 253 Wis. 2d 356, ¶20.

III. The trial court did not erroneously exercise its discretion at sentencing.

¶42 Finally, Brown argues that the trial court erroneously exercised its discretion in imposing sentence because the court failed to adequately explain why it imposed a twenty-six year sentence, failed to explain why it did not place him on probation, overemphasized the conduct of Brown's family, and imposed a sentence that was unduly harsh and unconscionable. All of these arguments are without merit.

¶43 The trial court must consider three primary factors when fashioning an appropriate sentence: the gravity of the offense, the defendant's character, and the need to protect the public. ***State v. Harris***, 2010 WI 79, ¶28, 326 Wis. 2d 685, 786 N.W.2d 409. Within this framework, the court may consider a vast number of relevant factors, including: the nature of the crime; the defendant's remorse, repentance, and cooperativeness; the defendant's need for rehabilitation; and the rights of the public. ***Id.*** "Sentencing courts have considerable discretion as to the weight to be assigned to each factor." ***Id.***

¶44 Our review of a sentencing decision is limited to determining whether the trial court erroneously exercised its discretion. ***Id.***, ¶30. "Discretion is erroneously exercised when a sentencing court imposes its sentence based on or in actual reliance upon clearly irrelevant or improper factors." ***Id.*** (emphasis omitted). Given our strong public policy against interference with the trial court's discretion, we afford sentencing decisions a presumption of reasonableness. ***Id.*** "Accordingly, the defendant bears the heavy burden of showing that the [trial] court erroneously exercised its discretion." ***Id.*** The defendant must establish, under the "clear and convincing" burden of proof, that it is "'highly probable or reasonably certain'" that the trial court relied on an irrelevant or improper factor. ***Id.***, ¶¶34-35 (citation omitted).

A. The trial court adequately explained the sentence it imposed.

¶45 Brown argues that the trial court erroneously exercised its discretion by not providing sufficient reasons for the sentence it imposed and not considering probation. The record belies Brown's assertions.

¶46 The trial court began sentencing by noting that when imposing sentence it was to consider "the seriousness of the offense, the character of the defendant and the need to protect the public," and stated that it felt the need in this case to "impose a significant prison term" to protect the community. In so concluding, the trial court found that "[t]his was a very disturbing case," emphasizing the age of the victim, the length of time the assaults occurred, and the types of acts Brown engaged in with the victim. The trial court also cited with concern Brown's "attempts to subvert the process once [he was] caught," calling him "calculating" and "dangerous." The court was also troubled by Brown's refusal to accept responsibility for the harm he caused AW.

¶47 The trial court also acknowledged a number of mitigating factors, stating:

> you don't have a prior record other than this, and that's a good thing. You stay in the house a lot. That's fine. You have found skill in fixing things. And that's good. I mean, you took the stand and, you know, from the way you talk, you're obviously -- even though you haven't finished school, you've got brains in your head, you're smart, you're smart enough to try to change your handwriting and try to get this all to go away. So there certainly is hope in that sense.

The court took those mitigating factors into consideration at sentencing, noting that "I am not gonna write you off as never being able to [rehabilitate]" but noted that Brown has "got a lot of work to do in order to be this productive member of society, which I know you are capable of." Thereafter, the court sentenced Brown to sixteen years of initial confinement and ten years of extended supervision, less than half of the potential sixty-year sentence he was facing.

¶48 In sum, the trial court properly considered the three primary sentencing factors, including any possible mitigating factors. But ultimately, the court concluded that the seriousness of the offense, when coupled with Brown's refusal to accept responsibility for what he had done, made Brown a substantial threat to the public, warranting confinement. While the trial court did not explicitly state why it rejected probation, it is clear from the trial court's emphasis on protecting the public that it did not consider probation appropriate in this case. As such, the trial court did not erroneously exercise its discretion.

B. The trial court did not place undue influence on the conduct of Brown's family.

¶49 Brown argues that the trial court erroneously exercised its discretion by placing undue emphasis on an irrelevant and improper factor, namely, the fact

that Brown's family attempted to protect Brown at AW's expense. *See* ***Harris***, 326 Wis. 2d 685, ¶30 (noting that it is an erroneous exercise of the trial court's discretion to base a sentence on an improper factor). Brown points to the following statement made by the trial court:

> I am disgusted with [AW's] family, disgusted. I am not gonna hold that out on you. And the aunt just left. Now her mother is leaving. When all they can do is support the son and not the daughter who has been sexually assaulted repeatedly by her sons, it makes me sick…. And your mom gets up on the stand and lies for you, Mr. Brown. I don't think that helps you. I am not gonna hold what your family did against you, but I just don't think it helps you.

We disagree with Brown's assertion.

¶50 As we set forth above, the trial court properly considered the three principal objectives of sentencing, and properly exercised its discretion when imposing sentence. While the court did express frustration with Brown's family, noting with particular concern that, with the exception of Danirees, Brown's family attempted to protect Brown at AW's expense, the court explicitly stated that it was not going to hold that fact against Brown. Our review of the record shows that the trial court stayed true to its word, spending the majority of its time at sentencing discussing the seriousness of what Brown did, its impact on the victim, and the court's concern about Brown's calculated attempts to avoid punishment for his actions. The trial court did not take an inappropriate factor into consideration when imposing sentence. *See* ***id.***

C. The twenty-six-year sentence imposed was not unduly harsh or unconscionable.

¶51 Brown also argues that the sentence in this case was unduly harsh and unconscionable because the sixteen years of confinement imposed will result

in his being in prison "until he is thirty-six years old, depriving him of the opportunity to become a productive member of society." He is mistaken.

¶52 A sentence is deemed to be unduly harsh or unconscionable if it is "so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). A sentence well within the limits of the maximum sentence is presumptively not unduly harsh. ***State v. Grindemann***, 2002 WI App 106, ¶¶31-32, 255 Wis. 2d 632, 648 N.W.2d 507.

¶53 Here, a jury found Brown guilty of repeatedly sexually assaulting his sister when she was seven or eight years old—a crime that is unconscionable in its own right. The parties agree that the maximum sentence for Brown's crime was sixty years of imprisonment, consisting of forty years of initial confinement and twenty years of extended supervision. The twenty-six-year sentence imposed by the trial court was less than half of the maximum and as such does not shock the public's conscious. *See* ***id.***

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.