COURT OF APPEALS
DECISION
DATED AND FILED

September 25, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP2498-CR **Cir. Ct. No. 2012CF31**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MANUEL VILLARREAL FRAUSTO,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Jefferson County: JACQUELINE R. ERWIN and DAVID WAMBACH, Judges. *Affirmed*.

Before Blanchard, P.J., Lundsten and Kloppenburg, JJ.

¶1 PER CURIAM. Manuel Villarreal Frausto[1] appeals a judgment of conviction for use of a computer to facilitate a child sex crime and an order denying postconviction relief.[2] Villarreal contends that: (1) the sentencing court erred by considering a fact that satisfied an element of the offense as an aggravating factor; (2) the court erred by imposing the presumptive minimum sentence without adequate explanation; and (3) his sentence was unduly harsh in light of newly discovered evidence as to sentences received by other defendants who were convicted based on similar conduct. We reject these contentions, and affirm.

¶2 Villarreal was charged with one count of use of a computer to facilitate a child sex crime and one count of child enticement. The criminal complaint alleged that Villarreal communicated in an on-line chat room with an undercover police officer who identified himself as a fourteen-year-old girl named "Hannah." It alleged that Villarreal made sexual comments to "Hannah" and proposed sexual contact. Villarreal arranged a meeting with "Hannah," and then drove to the meeting location and pulled up next to an undercover officer posing as "Hannah." Villarreal was arrested, and condoms were discovered in his car.

¶3 Villarreal pled guilty to use of a computer to facilitate a child sex crime, and the enticement charge was dismissed and read in for sentencing purposes. The State argued for the court to impose the presumptive minimum

[1] The appellant's brief refers to Manuel Villarreal Frausto as "Villarreal." We do the same.

[2] Judge Jacqueline Erwin presided over the circuit court during Villarreal's plea and sentencing, while Judge David Wambach presided over the circuit court during postconviction proceedings.

sentence of five years of initial confinement, as well as five years of extended supervision. *See* WIS. STAT. § 939.617 (2009-10).[3] Villarreal offered a psychological evaluation indicating that he had a low risk to reoffend, and argued for the circuit court to deviate from the presumptive minimum and impose a sentence of probation.

¶4 The circuit court imposed five years of initial confinement and five years of extended supervision. The court explained that it determined that a sentence of probation would unduly depreciate the seriousness of the offense. The court considered the following as aggravating facts: that Villarreal traveled from Madison to Watertown to meet "Hannah"; that Villarreal pulled up next to the undercover officer posing as "Hannah"; and that Villarreal had condoms in his car. The court determined that the defense psychological evaluation did not give enough consideration to the action Villarreal took to make contact with "Hannah." The court described Villarreal as a "nightmare" for parents of rebellious, lonely, or depressed teenage girls, noting that there was every indication that sexual contact or intercourse would have occurred if "Hannah" had been a real fourteen-year-old girl. The court recognized that it could deviate from the presumptive minimum of five years of initial confinement if it found that the public would not be harmed and that it would be in the community's best interest, but stated that it did not make either finding. *See* WIS. STAT. § 939.617(2). The court determined that five years of initial confinement and five years of extended supervision were necessary based on the sentencing goals of deterrence, rehabilitation, public protection, and punishment.

[3] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

¶5 Villarreal moved for postconviction relief, arguing that the sentencing court erroneously considered a fact that met an element of the offense as an aggravating factor and that the court failed to adequately explain why it rejected Villarreal's argument for less than the presumptive minimum. Villarreal also argued that his sentence was unduly harsh in light of newly discovered evidence that other defendants who were convicted for similar conduct had recently received lesser sentences than Villarreal. The circuit court denied the motion. Villarreal appeals.

¶6 Villarreal contends that he was denied his due process right to a fair sentencing process because the circuit court sentenced Villarreal based on its mistaken belief that a fact that met one of the elements of the charged offense could be an aggravating factor.[4] *See, e.g.*, ***State v. Travis***, 2013 WI 38, ¶17, 347 Wis. 2d 142, 832 N.W.2d 491 ("A defendant has a constitutional right to a fair sentencing process 'in which the court goes through a rational procedure of selecting a sentence based on relevant considerations and accurate information.'" (quoted source omitted)). Villarreal points out that his driving to the arranged meeting location satisfied the required element of an act other than use of a computerized communication system to effect his intent to have sexual contact. *See* WIS. STAT. § 948.075. He contends that a fact that satisfies an element of the offense cannot be an "aggravating" factor for purposes of sentencing. We disagree.

[4] The State contends that Villarreal forfeited this argument by failing to raise it at sentencing. Because we reject Villarreal's argument on the merits, we do not reach the State's forfeiture argument. Rather, we assume without deciding that the issue is properly before us on appeal.

¶7 Villarreal cites no authority for the proposition that a factor may not be considered "aggravating" if it satisfies an element of an offense. As the State points out, different acts can satisfy an element of an offense, and some acts will be aggravating and others will not. Here, Villarreal's actions in pursuit of sexual contact with fourteen-year-old "Hannah"—including driving to the proposed meeting location—may reasonably be viewed as aggravating factors, and we discern no error in the circuit court characterizing the conduct in that manner.

¶8 Next, Villarreal argues that the circuit court erroneously exercised its sentencing discretion by failing to explain why it did not find that a sentence below the presumptive minimum was justified. Villarreal argues that the circuit court was required to explain why it did not find that the statutory criteria for a lesser sentence were met. *See* WIS. STAT. § 939.617(2) (circuit court may impose less than presumptive minimum if the court finds that the public will not be harmed and that the best interests of the community will be served). Villarreal argues that the evidence before the circuit court established that Villarreal's conduct was not as serious as the conduct of other similar offenders; that Villarreal had a very low risk to reoffend; and that it was in the community's best interest to keep Villarreal in the community rather than send him to prison. Villarreal contends that the circuit court was required to apply the legal standard to those facts and explain why it did not make the necessary findings to impose a sentence less than the presumptive minimum.

¶9 The problem with Villarreal's argument is that it is contrary to the plain language of the presumptive minimum statute. WISCONSIN STAT. § 939.617(1) provides that, when a defendant is convicted of certain crimes—including use of a computer to facilitate a child sex crime—the circuit court *shall* impose at least five years of initial confinement. Subsection (2) provides that, "if

the court finds that the best interests of the community will be served and the public will not be harmed and if the court places its reasons on the record," the court may impose a sentence that is less than the presumptive minimum of five years of initial confinement. Thus, the statute plainly states that the circuit court must place its reasons on the record if the court deviates from the presumptive minimum; nothing in the statute indicates that the court must make specific findings to support its decision not to deviate from the presumptive minimum.

¶10 We also reject Villarreal's argument that the circuit court failed to properly articulate the reasons for its sentence.[5] *See* ***State v. Gallion***, 2004 WI 42, ¶¶17-51, 270 Wis. 2d 535, 678 N.W.2d 197. The circuit court explained that it considered probation but determined that probation would unduly depreciate the seriousness of the offense, and also that it did not find that deviating from the presumptive minimum would not harm the public or that it would serve the best interests of the community. The court considered facts relevant to the standard sentencing factors and objectives, including the need for punishment and deterrence, Villarreal's character, and the gravity of the offense. *See* ***id.*** The court then determined that the appropriate sentence was the presumptive minimum of five years of initial confinement plus five years of extended supervision. While Villarreal points to facts that would have supported a lesser sentence, we cannot say on this record that the court's sentence was an erroneous exercise of its discretion.

[5] The parties dispute whether a circuit court is required to follow the sentencing framework of ***State v. Gallion***, 2004 WI 42, 270 Wis. 2d 535, 678 N.W.2d 197, when imposing a presumptive minimum sentence. Because we conclude that the circuit court in this case properly exercised its sentencing discretion as required by ***Gallion***, we need not resolve that dispute.

¶11 Finally, Villarreal argues that his sentence was unduly harsh in light of the newly discovered evidence of the lesser sentences received by defendants who were convicted based on similar or more aggravated acts.[6] Again, we disagree.

¶12 A court may modify a sentence if the court determines that the sentence was unduly harsh or that a new factor warrants sentence modification. *See* ***State v. Klubertanz***, 2006 WI App 71, ¶40, 291 Wis. 2d 751, 713 N.W.2d 116. A sentence is unduly harsh 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. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). A new factor is a fact or set of facts highly relevant to sentencing that is unknown to the circuit court at the time of sentencing. ***Rosado v. State***, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975). If facts constitute a "new factor," a circuit court has discretion whether to modify a sentence. ***State v. Hegwood***, 113 Wis. 2d 544, 546, 335 N.W.2d 399 (1983).

¶13 Villarreal bases both his "unduly harsh" and "new factor" arguments on post-sentencing evidence that other defendants received lesser sentences for

[6] The State argues that Villarreal failed to raise a new factor argument in the circuit court and that this court should not address that claim. Villarreal argues that he did raise that claim in the circuit court by arguing that the evidence of the sentences received by other defendants was new information before the court. Again, we need not resolve this dispute. We will assume that Villarreal adequately preserved this issue because, in any event, we reject it on the merits.

similar conduct.[7] We note that this issue is properly framed under "new factor" jurisprudence. *See* ***Klubertanz***, 291 Wis. 2d 751, ¶40 (explaining that, "in deciding whether a sentence is unduly harsh, the circuit court's inquiry is confined to whether it erroneously exercised its sentencing discretion based on the information it had at the time of sentencing"; in contrast, "[a] circuit court's authority to modify a sentence based on events that occurred after sentencing is defined by 'new factor' jurisprudence").

¶14 Assuming that the information as to sentences received by other defendants constituted a "new factor," we determine that the circuit court properly exercised its discretion by denying the motion for sentence modification. *See* ***State v. Harbor***, 2011 WI 28, ¶¶37-38, 333 Wis. 2d 53, 797 N.W.2d 828. The circuit court here explained that it determined that Villarreal's evidence of the sentences received by other defendants did not warrant sentence modification because the cases were not comparable. The court reasoned that because of differences between Villarreal's case and the other defendants' cases—such as different crimes of conviction, different sentencing judges, and different personal characteristics of the defendants—those cases did not establish that Villarreal's sentence was unduly harsh. The court acted within its discretion to determine that the sentences of other defendants did not warrant modifying Villarreal's sentence

[7] To the extent Villarreal argued in his postconviction motion that his sentence was unduly harsh based on the information before the sentencing court, he has not pursued that argument in this court. On appeal, Villarreal acknowledges the difficulty of claiming that the statutory presumptive minimum is unduly harsh, and therefore argues that his sentence is unduly harsh in light of the new information as to the sentences received by other defendants.

in this case.[8] *See, e.g.*, ***Ocanas***, 70 Wis. 2d at 189 (holding that "[d]isparity alone does not amount to a denial of equal protection"; when "[t]he sentence imposed upon the defendant was based upon relevant factors with no improper considerations on the part of the trial court" and "[t]he sentence was not excessive[,] '[u]ndue leniency in one case does not transform a reasonable punishment in another case to a cruel one'" (quoted source omitted)).

By the Court.—Judgment and order affirmed.

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

[8] Villarreal argues that the circuit court erroneously exercised its discretion by refusing to consider evidence offered by the State as to additional defendants who were recently convicted based on similar conduct. Villarreal argues that the State's evidence provided even more support for Villarreal's position, as some of the defendants in the State's evidence had been convicted of the same or more serious crimes as Villarreal and had received lesser punishments. However, the circuit court indicated that it did review that evidence, but that the court was able to determine, by review of the evidence offered by Villarreal, that a claimed disparity of sentences did not warrant sentence modification. Thus, the court in effect found that the State's evidence did not alter the court's analysis that the sentences received by other defendants did not warrant sentence modification in this case. As explained above, this was a proper exercise of the court's discretion.