COURT OF APPEALS
DECISION
DATED AND FILED

March 30, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP1573-CR **Cir. Ct. No. 2006CF413**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TERENCE DEANDREA CASEY,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DENNIS P. MORONEY, Judge. *Affirmed.*

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Terence Deandrea Casey appeals from a judgment of conviction, entered upon a jury's verdict, on two counts of first-degree sexual assault of a child and two counts of second-degree sexual assault of a child. Casey also appeals from an order denying his motion for postconviction relief, asserting

that trial counsel was ineffective for failing to seek severance of the fourth count, which involved a different victim than the first three counts, and that the trial court erred in exercising its sentencing discretion. We conclude that severance would not have been granted, so trial counsel was not ineffective for failing to seek it, and that the trial court properly exercised sentencing discretion. We therefore affirm the judgment and order.

Background

¶2 A criminal complaint filed in 2006 charged Casey with four counts of sexual assault. These were: (1) one count of first-degree sexual assault of a child for an act of finger-to-vagina sexual intercourse with victim Keywaunda H., before she had reached age thirteen for an incident occurring between July 6, 2001, and June 30, 2002; (2) one count of second-degree sexual assault of a child for an act of penis-to-vagina intercourse with Keywaunda H., before she had reached age sixteen, for an incident between June 3, 2002, and September 1, 2002; (3) one count of second-degree sexual assault of a child, for an act of mouth-to-vagina intercourse with Keywaunda H., before she had reached age 16, for an incident between September 1, 2002, and June 30, 2003; and (4) one count of first-degree sexual assault of a child for an act of finger-to-vagina sexual contact with victim Miracle S., before she had reached age 13, for an incident between May 5, 2004, and December 27, 2004.

¶3 The case was tried to a jury, which convicted Casey on all four counts. The trial court sentenced Casey to fifteen years' initial confinement and five years' extended supervision on each of the first-degree counts, and ten years' initial confinement and five years' extended supervision on each of the second-degree counts. All four sentences were set to run consecutively, resulting in a total

of fifty years' initial confinement and twenty years' extended supervision. The court also imposed a $1,000 fine on the first count.

¶4 Casey filed a postconviction motion seeking a new trial or, alternatively, resentencing. In seeking a new trial, Casey alleged counsel was ineffective for failing to seek severance of count four, involving Miracle S., from the three counts involving Keywaunda H. Casey alternatively sought resentencing on the grounds that the trial court failed to properly explain the sentence and failed to consider the applicable sentencing guidelines. The trial court denied the motion after briefing but without a hearing, ruling that evidence regarding the fourth count would have been admissible "other acts" evidence in a trial on the first three counts, so counsel was not ineffective in failing to seek severance. Regarding resentencing, the court stated it had adequately considered the relevant factors and that, although it had not so stated at sentencing, it considered the guidelines.[1]

Discussion

I. Ineffective Assistance of Counsel

A. Standard of Review

¶5 A defendant claiming ineffective assistance of counsel must show that counsel's performance was deficient and that the deficiency prejudiced the defense. ***State v. Jeannie M.P.***, 2005 WI App 183, ¶6, 286 Wis. 2d 721, 703 N.W.2d 694. Deficient performance and prejudice present mixed questions of fact and law. ***Id.*** We uphold the trial court's factual determinations unless clearly

[1] Casey does not re-raise the sentencing guidelines issue on appeal.

erroneous. *See* ***State v. Swinson***, 2003 WI App 45, ¶57, 261 Wis. 2d 633, 660 N.W.2d 12. Whether the facts reveal deficient performance or prejudice is a question of law we review independently. ***Id.***

¶6 To prove deficient performance, a defendant must establish that his or her attorney made errors so serious that the lawyer was not performing as constitutionally guaranteed counsel. ***Id.***, ¶58. To demonstrate 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. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Strickland v. Washington***, 466 U.S. 668, 694 (1984). We may begin our analysis with either the deficient performance or prejudice prong. ***Id.*** at 697. If the defendant fails to make a sufficient showing on one of the prongs, we need not address the other. ***Id.***

¶7 Casey alleges counsel was ineffective for failing to seek severance of count four, which Casey asserts would have been granted because of misjoinder or prejudice. The trial court, ruling on the postconviction motion, stated it "would have denied a motion to sever had trial counsel raised the issue."

B. Severance Based on Misjoinder

¶8 Before counts can be severed, they must first have been joined. WISCONSIN STAT. § 971.12(1) (2007-08)[2] states, in part, that two or more crimes "may be charged in the same complaint … in a separate count for each crime if the

[2] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

crimes charged … are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constitute parts of a common scheme or plan." Whether crimes are properly joined in a complaint is a question of law. ***State v. Hoffman***, 106 Wis. 2d 185, 208, 316 N.W.2d 143 (Ct. App. 1982). The statute is broadly construed in favor of initial joinder. ***Id.***

¶9 Crimes are not of the same character merely because they constitute violations of the same statute. ***Id.*** "Crimes are of the same or similar character if they are 'the same type of offenses occurring over a relatively short period of time, and the evidence as to each count overlaps.'" ***Id.*** (quoting ***United States v. Shearer***, 606 F.2d 819, 820 (8th Cir. 1979)). Casey asserts count four should not have been joined because it alleged only sexual contact, not intercourse; the victim in count four was eight years old, but the other victim was twelve or thirteen; the fourth count allegedly occurred in the day while the other three charged incidents occurred at night; there was no threat of harm in the fourth count; and the events were at separate locations and occurred on separate dates.

¶10 We conclude the charges were properly joined in the complaint because WIS. STAT. § 971.12(1) is to be liberally construed in favor of initial joinder. ***Hoffman***, 106 Wis. 2d at 208. Here, all four counts involved sexual assaults, conducted in a similar manner, of minor girls over whom Casey exercised a position of trust and authority. The crimes thus appear to be of the same or similar type. Although the first three incidents are separated from the fourth by a period of one to three years, this does not foreclose a determination that the events occurred over a relatively short time period. *See* ***State v. Locke***, 177 Wis. 2d 590, 596, 502 N.W.2d 891 (Ct. App. 1993) (citation omitted) (two years' time can be a "relatively short period of time" for joinder analysis). The first three incidents

happened over a two-year continuum; the fourth incident could thus be viewed as a continuation of Casey's assaultive or exploitative behavior. In addition, the complaint permits an inference of overlapping evidence. The first assault against Keywaunda H. occurred before she turned thirteen and involved finger-to-vagina intercourse. Similarly, the assault against Miracle S. also occurred before she turned thirteen and involved finger-to-vagina contact. In all four instances, Casey was alleged to have removed the victim's clothing, at times when no other adult was present in the homes. Liberally construed, there is an inference that the evidence would overlap, perhaps to show a particular plan, intent, or lack of accident. The counts were properly joined in the complaint, so a motion for severance based on misjoinder would not have succeeded.

C. Severance Due to Prejudice

¶11 Although WIS. STAT. § 971.12(1) is liberally construed in favor of initial joinder, relief may still be had if the otherwise proper joinder appears prejudicial. Under § 971.12(3), if a defendant appears prejudiced by joinder, "the court may order separate trials of counts … or provide whatever other relief justice requires." Casey asserts he was prejudiced by "the cumulative effect of the evidence and commingling of the charges" and counsel was thus ineffective for failing to move for severance on the basis of prejudice.

¶12 A motion for severance is committed to the trial court's discretion. ***Locke***, 177 Wis. 2d at 597. The court must determine what, if any, prejudice would result from a joined trial, then weigh the potential prejudice against the public interest in conducting a trial on multiple counts. ***Id.*** An erroneous exercise of discretion does not exist unless the defendant can establish that failure to sever the counts resulted in substantial prejudice. ***Id.***

¶13 "Some" prejudice is insufficient to justify severance, as any joinder is likely to involve some prejudice. *See* ***Hoffman***, 106 Wis. 2d at 209. This expected prejudice comes from a jury's propensity to feel that a defendant charged with several crimes "must be a bad individual who has done something wrong." ***Id.*** at 209-10. However, the danger of prejudice from joinder of offenses is "generally not significant" if evidence of the counts would be admissible in separate trials. *See* ***State v. Bettinger***, 100 Wis. 2d 691, 697, 303 N.W.2d 585 (1981). The logic behind this notion is that "when evidence of one crime is relevant and material to the proof of a second crime, virtually identical evidence will be submitted to the jury whether or not one crime or [all] crimes are being tried." ***Id.*** The test for failure to sever thus requires an analysis of admissibility of other acts evidence. ***Locke***, 177 Wis. 2d at 597.

¶14 WISCONSIN STAT. § 904.04(2) prohibits admission of "other crimes, wrongs, or acts … to prove the character of a person in order to show that the person acted in conformity therewith." The admissibility of "other acts" evidence under § 904.04(2) is governed by a three-step analytical framework. *See* ***State v. Sullivan***, 216 Wis. 2d 768, 771, 576 N.W.2d 30 (1998). These steps require the consideration of three questions: (1) is the other acts evidence offered for an acceptable purpose under § 904.04(2), such as establishing motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident?; (2) is the other acts evidence relevant, considering the two facets of relevance set forth in WIS. STAT. § 904.01?; and (3) under WIS. STAT. § 904.03, is the probative value of the other acts evidence substantially outweighed by the danger of unfair prejudice, confusion of issues or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence? ***Id.*** at 772-73.

¶15 Also at play when we conduct the ***Sullivan*** analysis is the "greater latitude rule." *See* ***State v. Davidson***, 2000 WI 91, ¶51, 236 Wis. 2d 537, 613 N.W.2d 606. This "rule" reflects the "longstanding principle that in sexual assault cases, particularly cases that involve sexual assault of a child, courts permit a 'greater latitude of proof as to other like occurrences.'" ***Id.***, ¶36 (citations omitted). Reasons supporting this more liberal admissibility standard include the difficulty that sexually abused children experience in testifying and the difficulty prosecutors have in obtaining admissible evidence in such cases. ***Id.***, ¶42.

¶16 Here, the question we must address is whether the trial court properly concluded evidence of the assault against Miracle S., including her testimony, would have been properly admitted as other acts evidence in a trial of the assaults against Keywaunda H.

1. Acceptable Purpose

¶17 The first step in the ***Sullivan*** analysis is to determine whether the other acts evidence would be admissible for an acceptable purpose under WIS. STAT. § 904.04(2), including "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." While the statute provides several examples of acceptable purposes, the list is not exclusive or exhaustive. *See* ***State v. Hunt***, 2003 WI 81, ¶54, 263 Wis. 2d 1, 666 N.W.2d 771. In the trial court, the State argued the facts of each case would be admissible in the

other, notably to show Casey's intent, motive, plan, and *modus operandi*. The trial court appears to have adopted the State's reasoning on this point.[3]

¶18 Casey asserts that: (1) intent was never in dispute, so evidence of Keywaunda H.'s assaults is not relevant to Miracle S.'s case; (2) none of the evidence was relevant to a "plan"; (3) the evidence was not probative as to motive; and (4) dissimilarities defeat any notion of a *modus operandi*. However, we agree with the State that evidence of the assault against Miracle S. was admissible for showing a common design as to the assaults on Keywaunda H.—in essence, for showing Casey's *modus operandi*.

¶19 As noted in the joinder discussion, the assaults involved grade-school-aged girls, assaulted in their homes while other adults who resided in the home were absent. Casey occupied a position of authority and trust as to each girl—he was a father figure to Keywaunda H., and he is Miracle S.'s father. The first assault of Keywaunda H., like the assault on Miracle S., involved finger-to-vagina contact; in all of the assaults, Casey removed the girls' clothes himself. Because of the common elements and in view of the greater latitude rule, we agree that the evidence as to Miracle S. was admissible for a proper purpose as to Keywaunda H. *See* ***Davidson***, 236 Wis. 2d 537, ¶¶60-62.[4] As long as the

[3] Because of the trial court's abbreviated analysis, we search the record for reasons to sustain the court's evidentiary rulings. *See* ***State v. Pharr***, 115 Wis. 2d 334, 347, 340 N.W.2d 498 (1983).

[4] The State is incorrect that evidence of the assault on Miracle S. was relevant to intent on counts two and three, the second-degree charges involving Keywaunda H. The State asserts that evidence of the assault against Miracle S. "tended to prove the element … necessary to establish second-degree sexual assault … that Casey intentionally touched [Keywaunda H.] for the purpose of becoming sexually aroused or gratified." However, such intent was not an element of any charges involving Keywaunda H., as arousal and/or gratification are not elements where sexual intercourse is charged, only where sexual contact is alleged. *Cf.* WIS. STAT. § 948.01(5)(a) (definition of sexual contact) and § 948.01(6) (definition of sexual intercourse).

proponent identifies one acceptable purpose for other acts evidence, the first ***Sullivan*** prong is satisfied. *See* ***State v. Payano***, 2009 WI 86, ¶63, 320 Wis. 2d 348, 768 N.W.2d 832.

¶20 We note that we also agree with the State that the evidence was appropriately offered for the purpose of rebutting Casey's defense theory that the mothers of both victims had their daughters fabricate a story as revenge for disputes with Casey; and to prove absence of mistakes or accident, even though Casey denied assaulting the girls at all. *See* ***id.***, ¶64 n.13 (disproving defense theory); ***United States v. Best***, 250 F.3d 1084, 1092 n.3 (7th Cir. 2001) (absence of mistake/accident).

2. Relevancy

¶21 The second prong to the ***Sullivan*** analysis is to determine whether the proffered evidence is relevant as defined by WIS. STAT. § 904.01, which defines relevant evidence as "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." Put another way, the evidence must "relate[] to a fact or proposition that is of consequence to the determination of the action" and must have probative value, "a tendency to make the consequential fact or proposition more probable or less probable than it would be without the evidence." ***Sullivan***, 216 Wis. 2d at 772.

¶22 In the trial court, the State argued that the similarities between the two girls' assaults "make the consequential facts at bar more probable[,]" based on "the improbability of a like result being repeated by mere chance …. The stronger the similarity between the other acts and the charged offense, the greater will be the probability that the like result was not repeated by mere chance or

coincidence." ***Id.*** at 786-87. We agree that the evidence was both relevant and probative as to lack of a mistake or accident. It was also relevant and probative as to both victims' credibility,[5] *see* ***Davidson***, 236 Wis. 2d 537, ¶40, particularly in light of Casey's defense theory that the assault stories were concocted by vindictive ex-girlfriends, and as to the delay of Keywaunda H.'s reporting until after she learned of Miracle S.'s assault.

3. Probative Value v. Unfair Prejudice

¶23 The third admissibility prong for other acts evidence asks whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice, or confusion of the issues. *See* WIS. STAT. § 904.03.

> Unfair prejudice results when the proffered evidence has a tendency to influence the outcome by improper means or if it appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish or otherwise causes a jury to base its decision on something other than the established propositions in the case.

Sullivan, 216 Wis. 2d at 789-90. While it is certainly plausible that evidence of a fourth incident of sexual assault against another child may arouse a jury's "sense of horror," we conclude the danger of unfair prejudice does not diminish the importance of the evidence's probative value in this case.

¶24 First, a proper cautionary instruction was given to the jury. Cautionary instructions help limit the risk of unfair prejudice that can result from other acts evidence. ***Davidson***, 236 Wis. 2d 537, ¶78. More significantly, we simply do not agree that the danger of unfair prejudice outweighed the probative

[5] Both victims testified at trial.

value of Miracle S.'s testimony in regard to her and Keywaunda H.'s credibility, and for rebutting Casey's explanation for the girls' allegations. *See* ***Davidson***, 236 Wis. 2d 537, ¶41.

D. Summary

¶25 The cases were appropriately joined in the complaint, so any motion for severance due to misjoinder would have been unsuccessful. Evidence of Miracle S.'s assault was properly admissible in Keywaunda H.'s case, so any motion for severance based on unfair prejudice would have been denied. Therefore, counsel was not ineffective for failing to seek severance of the fourth count. *See* ***State v. Harvey***, 139 Wis. 2d 353, 380, 407 N.W.2d 235 (1987) (counsel not ineffective for failing to pursue meritless challenges).

II. Trial Court's Sentencing Discretion

¶26 Casey was sentenced to a total of fifty years' initial confinement and twenty years' extended supervision. He was also ordered to pay a $1,000 fine, with 120 days' jail time if the fine remained unpaid at the end of his extended supervision. Casey argues that the trial court failed to adequately explain the sentence.

¶27 Sentencing is committed to the trial court's discretion. ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 978 N.W.2d 197. The primary objectives of a sentence include protection of the community, punishment of the defendants, rehabilitation of the defendant, and deterrence of others. ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. A sentencing court should identify the objectives of greatest importance and explain how a particular sentence advances those objectives. ***Id.*** The necessary amount of

explanation "will vary from case to case." ***State v. Brown***, 2006 WI 131, ¶39, 298 Wis. 2d 37, 725 N.W.2d 262 (citation omitted).

¶28 In explaining a sentence, the court must identify relevant factors it considered. The three primary factors to be considered are the gravity of the offense, the character of the offender, and the need to protect the public. ***State v. Berggren***, 2009 WI App 82, ¶40, 320 Wis. 2d 209, 769 N.W.2d 110. The weight given to each factor is also a discretionary determination. ***Id.*** If the record reveals a proper exercise of sentencing discretion, we follow a strong public policy against interference with that discretion. ***Ziegler***, 289 Wis. 2d 594, ¶22; *see also* ***Berggren***, 320 Wis. 2d 209, ¶44 (this court has duty to affirm "if from the facts of record it is sustainable as a proper discretionary act") (quoting ***McCleary v. State***, 49 Wis. 2d 263, 282, 182 N.W.2d 512 (1971)).

¶29 Casey's complaints about his sentence are as follows: (1) because the sentence exceeds his life expectancy,[6] it is a life sentence; (2) the court failed to explain the general range of the sentence; (3) the court failed to identify objectives of greatest importance; (4) the court failed to explain why a life sentence was the minimum necessary consistent with the sentencing objectives; and (5) the court failed to explain why consecutive sentences were chosen. The postconviction court stated it had adequately considered the sentencing factors without discussing any other claimed errors.

¶30 Casey first seems to suggest that a sentence operating as a life sentence is somehow subject to heightened scrutiny. *See* ***State v. Hall***, 2002 WI

[6] Casey's statistical life expectancy is apparently 61.7 years; he will not be eligible for extended supervision until he is 81 years old.

App 108, ¶18, 255 Wis. 2d 662, 648 N.W.2d 41 ("The long length of Hall's [304-year] sentence renders it meaningless."). However, the ***Hall*** court did not accept Hall's argument that such a sentencing was *per se* unreasonable. ***Id.***, ¶1. Hall's sentence was rejected because the trial court gave inadequate reasons for the sentence imposed, not because it was effectively a life sentence.

¶31 Further, ***Hall*** did not establish a procedural requirement that a sentencing court separately articulate why it imposed consecutive, instead of concurrent, sentences. *See* ***Berggren***, 320 Wis. 2d 209, ¶45. ***Hall*** simply "emphasized the well-settled right of defendants" to have their sentences properly explained on the record. ***Id.*** Casey thus attempts to demonstrate the trial court's "lack of reasoned analysis" by relying on the fine. He argues that "[n]ot only is the $1000 fine completely unexplained but considering the life sentence imposed, the potential for a 120-day sanction at age 101 does not make any sense."[7] However, our review of the sentencing in Casey's case reveals a properly explained sentence of imprisonment, supported by the record.

¶32 The trial court's "exercise of discretion does not lend itself to mathematical precision …. We do expect, however, an explanation for the general range of sentence imposed." ***Gallion***, 270 Wis. 2d 535, ¶49. Casey concedes the court considered the primary sentencing factors—gravity of the offense, his character, and the need to protect the public—but asserts that the court did not explicitly link these factors to appropriate objectives. It is evident from the court's comments, however, that it placed primary emphasis on punishment and

[7] Casey does not appear to be challenging the fact that a fine was imposed; rather, he simply seeks to use its imposition as evidence of an overall lack of reasoning for the entire sentence. We therefore decline to address the fine in any other context.

protecting the public—in particular, Casey's two victims. The court also placed some emphasis on rehabilitation, and less emphasis on deterrence.

¶33 The court was critical of Casey's "despicable" and "disgusting" conduct "with young ladies at that stage of their life … because they're so impressionable and they're just coming into young womanhood." The court explained, "it's a very, very difficult thing for [these girls] to come to grips with, particularly when it involves a breach of trust" and noted how difficult it had been for Keywaunda H. and Miracle S. to testify at trial. The court further commented, "[T]hat's really what this is all about. We never want to put these kids back in that predicament."

¶34 The court went on to observe that it was not unusual that Casey maintained his innocence, but the lack of "necessary remorse" made it difficult for both Casey and his victims to recover. The court further observed that Casey, who told the presentence investigation report author that he had had more than one hundred sexual partners, seemed to use his "multiple arrangements with different women" to mask "some kind of underlying thing that you want some fresh, viriginistic type of girl or whatever else is bizarre going on there[,]" a mindset for which the court hoped Casey would get treatment.

¶35 Ultimately, the court imposed a total of seventy years' imprisonment out of a total 180 years' exposure and a $1,000 fine where up to $20,000 could have been imposed. Casey's sentence is well within the statutorily permitted maximums and is not so disproportionate to his offenses as to shock the sentiment of reasonable people. *See* ***Berggren***, 320 Wis. 2d 209, ¶47. Inclusion of a 120-day sanction for nonpayment of the fine is expressly authorized by statute. *See* WIS. STAT. § 973.07.

By the Court.—Judgment and order affirmed.

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