COURT OF APPEALS
DECISION
DATED AND FILED

March 10, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-0722-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

STEVEN R. CALHOUN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DOMINIC S. AMATO and JEFFREY A. KREMERS, Judges.[1] *Affirmed.*

Before Fine, Schudson and Curley, JJ.

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[1] Hon. Dominic S. Amato presided over the jury trial and entered the judgment of conviction. Hon. Jeffrey A. Kremers entered the order denying the motion for postconviction relief.

PER CURIAM. Steven R. Calhoun appeals from a judgment of conviction entered after a jury found him guilty of second-degree sexual assault of a child, contrary to § 948.02(2), STATS. Calhoun also appeals from the trial court's order denying his motion for postconviction relief. Calhoun claims that the trial court erred by admitting hearsay testimony concerning the results of DNA and pregnancy tests, and that the admission of the evidence violated the confrontation clause and the due process clause of both the federal and state constitutions. Prior to his conviction in this case, Calhoun pleaded guilty to another count of second-degree sexual assault of a child. The trial court sentenced Calhoun to a ten-year prison term for that offense, and to another consecutive ten-year prison term for the instant offense. Calhoun claims that the two consecutive sentences were unconstitutionally cruel and unusual under both the federal and state constitutions. We affirm.

I. BACKGROUND.

On June 30, 1995, and August 3, 1995, Calhoun was charged in two criminal complaints. Each complaint charged one count of second-degree sexual assault of a child, contrary to § 948.02(2), STATS. Calhoun pleaded guilty to one count, and the other count was set for trial.

At trial, E.K., the victim, testified that she was 15 years old and that she had had sexual contact with Calhoun on four occasions. She further testified that in the summer of 1995 she became very ill and was subsequently taken to the hospital. At the hospital she was told that she had had a miscarriage or spontaneous abortion. Calhoun also testified at trial. Calhoun testified that, although he had met E.K., they had not had sexual intercourse.

Dr. Julie Carmody testified at trial that she treated E.K. in the hospital emergency room, and that she diagnosed E.K. as being pregnant and having a miscarriage. Dr. Carmody also testified concerning the results of a beta HCG urine pregnancy test, which was positive, and of a DNA test, which was inconclusive. Carmody testified that the DNA test was inconclusive because the material tested contained only blood clots, rather than fetal material, and therefore could not in any way connect Calhoun or anyone else to the crime. Calhoun objected to the admission of Dr. Carmody's testimony on the grounds that it was hearsay and denied his right of confrontation. The objection was overruled.

The jury found Calhoun guilty as charged. Calhoun was subsequently sentenced to two consecutive ten-year prison terms on both this count and the count to which he pleaded guilty. Calhoun then filed a motion for postconviction relief which was denied. Calhoun now appeals.

II. ANALYSIS.

A. Testimony concerning DNA and pregnancy test results.

Calhoun claims that the trial court erred by admitting hearsay testimony concerning the results of DNA and pregnancy tests.[2] We need not address whether the trial court erred in admitting the testimony because, even if the trial court erred, the error was harmless.

Calhoun claims on appeal that the trial court erred by admitting testimony by the State's physician witness, Dr. Julie Carmody, concerning the

[2] Calhoun specifically argues that the evidence was not admissible because: (1) the DNA report was not admissible as a record of regularly conducted activity, pursuant to § 908.03(6), STATS.; and (2) the pregnancy test results were not disclosed in a proper manner.

results of a DNA blood test and a beta HCG urine pregnancy test. The testimony which Calhoun objects to was very limited and can easily be repeated in full:

> PROSECUTOR: Now did you run tests on [E.K.]?
>
> DR. CARMODY: Yes, we did.
>
> Q: What tests did you run?
>
> A: We performed a physical examination and then we sent off some laboratory data of her urine and of her blood. The urine was a pregnancy test and the blood tests were to look for anemia and for a coagulation disorder.
>
> Q: Were you able to determine whether or not [E.K.] was pregnant?
>
> A: Yes, we were.
>
> Q: And what were the results of the tests?
>
> A: The beta HCG, which is our urine pregnancy test, was positive.
>
> …
>
> Q: During the course of your treatment of [E.K.], did you collect any samples from the material that she was passing?
>
> A: Yes, we did. We – on initial examination there were some – there was some material in the vaginal vault and there was some material extending through the cervical canal, that's part of the uterus, and I initially collected a specimen out of [the] vault, and the gynecology doctor who was asked to come and see the patient also collected a second specimen that was pulled from within the uterine cavity.
>
> Q: Do you know what was done with these specimens, doctor?
>
> A: These specimens were taken to our pathology department and then I have since then become aware they were sent to Minnesota for testing, DNA testing.
>
> Q: And do you know whether this DNA testing was able to determine anything about the paternity of [E.K.]'s child?
>
> A: The specimens appeared to have been just specimens of clotted blood from [E.K.], because the DNA type was the same as [E.K.]'s. So it appeared to be blood clots rather than actual fetal tissue.

> Q: Does that have any impact on your diagnosis of her pregnancy?
>
> A: No.

It should also be noted that, following these questions, Calhoun's counsel cross-examined Dr. Carmody, concluding with the question:

> Q: And it's your understanding that the DNA testing was inconclusive?
>
> A: Correct.

An error is harmless if there is no reasonable possibility that the error contributed to the conviction. ***State v. Dyess***, 124 Wis.2d 525, 543, 370 N.W.2d 222, 231-32 (1985). The State bears the burden of proving harmless error. ***Id.*** at 543, 370 N.W.2d at 232. In this case, the State argues that any alleged error in admitting Dr. Carmody's testimony regarding the test results was harmless because: (1) the pregnancy test only confirmed Dr. Carmody's prior diagnosis that E.K. was pregnant, which she based on E.K.'s symptoms and the size of her uterus; (2) the DNA test results did not affect Dr. Carmody's diagnosis that E.K. was pregnant; (3) the issue in the case was not whether Erica was pregnant, but who had had intercourse with her, and therefore, the pregnancy test could not have contributed to the jury verdict; (4) the DNA results were inconclusive, and this fact actually benefited, rather than harmed Calhoun, because it showed that the State was unable to match his DNA to the fetal DNA; and (5) Dr. Carmody's testimony concerning the test results was a minimal and incidental part of the overall evidence presented, and therefore could not have reasonably contributed to the jury's guilty verdict.

In rebuttal, Calhoun repeatedly argues that the evidence must have been prejudicial because: (1) the State "fought hard" to get it admitted; and (2) "a

jury understands that the reason evidence is admitted is because it is deemed by the court to be relevant." The fact, however, that the State sought to admit evidence cannot be determinative of whether the evidence's admission was harmless. If it were, no evidence offered by the State could ever be considered harmless. Calhoun's second argument is similarly absurd. According to Calhoun, because the jury understands that all evidence is admitted because it is deemed to be relevant, all evidence contributes to a jury's verdict. If we were to accept that theory, no admitted evidence could ever be considered harmless.

In his reply brief, Calhoun also attempts to rebut the State's claim that the DNA evidence actually benefited him. Calhoun claims that in order to benefit him, the results would have had to exclude him. According to Calhoun, the fact that the results were "inconclusive" did not benefit him. To the contrary, Calhoun claims that the fact that he was the only person whose DNA was tested for a possible match "linked" him to the alleged pregnancy. In his brief in chief, however, Calhoun contradicts this argument by stating that, "the evidence of the DNA test results did not make the existence of any fact which was of consequence to the determination of the action more probable or less probable." Additionally, during closing argument, Calhoun argued that the DNA test results actually supported his innocence, by stating:

> You heard Dr. Carmody testify the DNA testing was inconclusive. Use your common sense. If the State had DNA evidence supporting that Steven Calhoun had sexual intercourse with [E.K.], that evidence would have been presented here in the courtroom. There is no DNA evidence, there's no blood, there's no semen, there's no hair, there was nothing from the apartment, no samples from the car. There was no physical evidence that Mr. [K.] had – Mr. Calhoun had intercourse with Ms. [K.].

Therefore, while at trial Calhoun argued that the evidence supported his innocence, and while he argues in his brief in chief that it was irrelevant, he also argues that it benefited the State's case and made it more probable that he was the source of the pregnancy. Calhoun's arguments are not persuasive. The DNA and pregnancy test results in no way linked Calhoun to the crime. If a jury were to conclude anything at all from the test results, it would be that the State had failed to produce physical evidence that Calhoun had committed the crime.

Finally, Calhoun makes mostly vague and unsupported claims throughout his brief that the evidence "bolstered the state's case and its witnesses' credibility." Although Calhoun fails to fully develop this argument, he appears to be claiming that the prosecution introduced the evidence of the test results in order to prove to the jury that although it could not produce physical evidence, it had tried to do so. Two jurors indicated at voir dire that they believed it was difficult to make a decision based solely on testimony. In her closing argument, the prosecutor stated:

> Now this is a case where the evidence is solely sworn testimony. The two of you on this panel who were jurors before indicated in voir dire that it was difficult to make a decision based upon testimony, and we tried to give you more than testimony. You know that there were products of the spontaneous abortion collected at the hospital and we attempted to do DNA testing on that to give you scientific proof, but we were unable to do that, apparently because at the time the evidence was collected, all that was left were blood clots from [E.K.].

It may be that the prosecution attempted to introduce the test results in order to prove to the jury that they had tried to obtain scientific evidence. It also may be that this evidence may have arguably slightly "bolstered" the prosecution's

credibility. Even so, the State clearly has met its burden of proving that there is "no reasonable possibility that the error contributed to the conviction." *See* ***id.***

This case was a credibility battle where, as the prosecutor stated during her closing argument, "the only evidence [was] sworn testimony." The only really important testimony at trial came from E.K. and from Calhoun. E.K. claimed that Calhoun had sex with her on more than one occasion, at a time when she was 14 years old. Calhoun denied that he had ever had sex with E.K. The jury's task boiled down to determining who it should believe. By returning a guilty verdict, the jury communicated that it believed E.K. and disbelieved Calhoun. Dr. Carmody's entire testimony takes up only six pages of a trial transcript which is 179 pages long. Dr. Carmody's testimony did nothing to strengthen the State's case, and as the defense argued during closing argument, if it had any effect, it was favorable to Calhoun. Therefore, we conclude that the State has met its burden of proving that any possible error in admitting the evidence was harmless.

B. Sentencing claim.

Calhoun also claims that the two consecutive ten-year prison sentences which he received for this crime and for another second-degree sexual assault of a child were unconstitutionally cruel and unusual under both the federal and state constitutions. We conclude that the trial court properly exercised its discretion in determining Calhoun's sentences.

Sentencing is left to the discretion of the trial court, and appellate review is limited to determining whether there was an erroneous exercise of discretion. ***State v. Harris***, 119 Wis.2d 612, 622, 350 N.W.2d 633, 638 (1984). A strong policy exists against interfering with the trial court's discretion in

determining sentences. ***State v. Sarabia***, 118 Wis.2d 655, 673, 348 N.W.2d 527, 537 (1984). To obtain relief on appeal, the defendant "must show some unreasonable or unjustified basis in the record for the sentence imposed." ***Id.*** at 782, 482 N.W.2d at 895. The primary factors a court should consider when sentencing a defendant are the gravity of the offense, the character of the offender, and the need for protection of the public. ***Sarabia***, 118 Wis.2d at 673, 348 N.W.2d at 537. The court may also properly consider the vicious or aggravated nature of the crime; the defendant's past record of criminal offenses; any history of undesirable behavior patterns; the defendant's personality, character and social traits; the results of a presentence investigation; the degree of the defendant's culpability; the defendant's demeanor at trial; the defendant's age, educational background and employment record; the defendant's remorse, repentance and cooperativeness; the defendant's need for rehabilitative control; the right of the public; and the length of pretrial detention. ***Harris***, 119 Wis.2d 612 at 623-24, 350 N.W.2d at 639.

Additionally, a sentence constitutes cruel and unusual punishment only 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." ***Steeno v. State***, 85 Wis.2d 663, 669, 271 N.W.2d 396, 399 (1978) (citation omitted).

In the instant case, the trial court considered the proper factors before imposing sentence. The trial court considered the gravity of the offenses and found that they were severe. The court noted that Calhoun took advantage of and violated children, and that the children were harmed emotionally, psychologically and physically. The court considered Calhoun's character and

found that he had no excuse for his conduct, that he had chosen to act as he did, and that, although he was perhaps not technically a pedophile, he had a pattern of preying on children sexually. The court considered the need to protect the public and found that Calhoun presented a major risk to the community, partly because of comments from the presentence report indicating that Calhoun did not believe there was anything wrong with having unforced sex with people under the age of consent. After considering many factors, including Calhoun's past record, his background and family history, the psychologist's report and the presentence report, the court provided Calhoun with a detailed and lengthy explanation for his sentence. Although Calhoun may not agree with the trial court's decision to impose the maximum sentence on both counts, we cannot say that the sentences, given the facts, were "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." ***Id.*** Therefore, we affirm the trial court's discretionary sentencing decision.

By the Court.—Judgment and order affirmed.

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