**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

July 15, 1998

**Marilyn L. Graves**
**Clerk, Court of Appeals**
**of Wisconsin**

**NOTICE**

**This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.**

**A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.**

**No. 97-1534-CR**

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

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**MICHAEL J. WHIPP,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Walworth County: ROBERT J. KENNEDY, Judge. *Affirmed.*

Before Snyder, P.J., Brown and Nettesheim, JJ.

PER CURIAM. Michael J. Whipp appeals from a judgment convicting him of first-degree sexual assault of and incest with a child as a repeater and from an order denying his postconviction motion for a new trial. We address the issues seriatim and affirm.

The four-year-old victim, a relative of Whipp's, alleged that Whipp had sexual contact with her on or about September 30, 1995, in her bedroom after she went to bed. The victim's mother and stepfather were also in bed at the time of the alleged assault. Whipp, the brother of the victim's mother, was staying at the house and sleeping on the couch.

Whipp's first argument on appeal relates to his repeater status. He argues that trial counsel was ineffective for failing to collaterally attack a 1993 felony drug conviction on the ground that Whipp did not validly waive his right to counsel in that case. Had the prior conviction been challenged, Whipp would have had to admit to one prior conviction, not two,[1] when he testified at the sexual assault trial. He also would not have received an enhanced sentence in the sexual assault case.

To establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that it prejudiced the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). However, we need not consider whether trial counsel's performance was deficient if we can resolve the ineffectiveness issue on the grounds of lack of prejudice. *See* ***State v. Moats,*** 156 Wis.2d 74, 101, 457 N.W.2d 299, 311 (1990). Whether counsel's performance prejudiced the defendant is a question of law which we decide independently of the circuit court. *See* ***id.***

We conclude that Whipp cannot establish prejudice because the basis for his collateral attack on the 1993 conviction is not supported in Wisconsin law. At

[1] The other prior conviction was for domestic battery arising out of an incident involving Whipp's wife.

the postconviction motion hearing in the sexual assault case, Whipp acknowledged that the trial court advised him during the 1993 proceedings of his right to counsel, either through the state public defender or privately retained. The public defender declined to appoint counsel for Whipp because he was not financially eligible. Whipp then spoke to two attorneys regarding their fees, which he stated he could not afford.[2] At the preliminary hearing waiver, Whipp advised the court that he could not afford to retain counsel. Whipp complains that the court did not then take any steps to assist him in locating counsel.

The postconviction court found that Whipp was advised of his right to counsel and he had a colloquy with the trial court about waiving that right. The court concluded that Whipp freely, knowingly and voluntarily waived his right to counsel. The court found that Whipp received a packet of materials from the public defender explaining how to challenge the public defender's indigency determination in the circuit court and that Whipp did not avail himself of the remedies discussed therein after the public defender declined to appoint counsel. The court also found that the information on the WIS J I—CRIMINAL SM-30 Waiver of Counsel form was conveyed to Whipp. Whipp did not ask the court to appoint an attorney for him. Whipp proceeded pro se and reached a plea agreement with the prosecutor. The court concluded that had defense counsel in the sexual assault case explored Whipp's lack of counsel in the 1993 proceedings, counsel would not have been successful because Whipp knowingly waived his right to counsel in the 1993 proceedings.

[2] At the postconviction motion hearing, Whipp testified that if he had to choose between retaining counsel or purchasing new (as opposed to used) clothing for his children, he would allocate scarce resources to the clothing purchase.

The postconviction court's findings of fact regarding the waiver of counsel are not clearly erroneous on the record. *See* ***State v. Hubert,*** 181 Wis.2d 333, 339, 510 N.W.2d 799, 801 (Ct. App. 1993). That leaves us with the legal question as to whether Whipp should have been advised that the trial court had the authority to appoint counsel for him independent of the public defender's indigency determination. *See* ***State v. Dean,*** 163 Wis.2d 503, 513-14, 471 N.W.2d 310, 314-15 (Ct. App. 1991). Because Whipp was informed of the method by which he could challenge the public defender's indigency determination and because a "defendant also has a well-defined role" in bringing the question of indigency and appointment of counsel to the trial court's attention, *see* ***id.*** at 513, 471 N.W.2d at 314, we do not discern any support for Whipp's contention that the trial court should have advised him that it had the authority to appoint counsel for him. Trial counsel in the sexual assault case cannot be faulted for failing to challenge the 1993 waiver of counsel. *See* ***State v. Simpson,*** 185 Wis.2d 772, 784, 519 N.W.2d 662, 666 (Ct. App. 1994).

Whipp next argues that trial counsel was ineffective for failing to investigate all available defenses and adequately cross-examine the State's witnesses in the sexual assault case. In particular, he contends that counsel was not prepared to present evidence and argue that another person, a friend of the family whose first name is also Michael (hereafter Michael), assaulted the victim. Whipp contends that counsel did not investigate whether Michael, who was baby-sitting with his wife for the victim and her sister on the night of the assault, committed the assault.

Here, we focus on whether counsel's performance was deficient. *See* ***Strickland,*** 466 U.S. at 687. "[T]he test for measuring an attorney's performance is the *reasonableness* of counsel's challenged conduct on the particular facts of the case, viewed as of the time of counsel's conduct." ***Hubert,*** 181 Wis.2d at 339, 510 N.W.2d at 801. We review the trial court's factual findings as to what counsel did or

did not do under the clearly erroneous standard. *See* ***id.*** There is a strong presumption that counsel's conduct fell "within the wide range of reasonable professional assistance." ***Id.*** at 340, 510 N.W.2d at 802 (quoted source omitted).

At the postconviction motion hearing, trial counsel testified that he discussed with Whipp the possibility of arguing that Michael assaulted the victim. However, counsel discounted this approach in light of the victim's videotaped statement to the police that "Uncle Mike," whom the victim further described as "my mommy's brother," assaulted her. The victim's statement negated in counsel's mind the chance that the victim was confused between Michael Whipp and Michael, the family friend.[3] Instead of pursuing an identity defense which counsel did not believe was supported by the evidence, counsel made the strategic decision that it would be more effective to argue that neither Whipp nor anyone else assaulted the child and that she was confused or mistaken in her accusation. Counsel did not want to argue both that the victim was confused and that Michael committed the assault because he believed that the theories were inconsistent and might put off the jury.

The trial court found that a mistaken identity defense would not have been effective because Whipp and Michael did not really resemble each other. The court also noted that the postconviction testimony of Janice, Michael's wife, indicated that her husband was absent from the victim's residence for several hours on the evening of the assault while Janice baby-sat for the children. Janice testified that during the time she and Michael baby-sat, they were always physically together. The court noted that the victim had known Michael since birth, and that the two

[3] According to the victim's mother, the victim referred to the family friend as "Uncle Mike" and referred to Whipp as "Uncle Michael."

families began sharing a residence approximately one month after the assault and the victim never expressed any concern or fear about Michael.

The court also found that the victim identified her assailant the next morning as her mother's brother, i.e., Whipp. Although the victim's trial testimony regarding her assailant was confused, she pointed to Whipp when asked to identify "Uncle Mike" at trial. Finally, the evidence at trial indicated that the creaking door and floor grate, noises associated with entry into the victim's bedroom, occurred after Michael and Janice left. This undermined Whipp's theory that Michael assaulted the victim. Based upon the foregoing, the court concluded that pursuing a mistaken identity defense would not have profited Whipp's case and that trial counsel's strategy was well founded. The trial court's findings are not clearly erroneous on the record. Counsel's conduct was reasonable on the facts of this case. *See* ***id.*** at 339, 510 N.W.2d at 801.

Defense counsel admitted at the postconviction motion hearing that he did not investigate Michael as a possible perpetrator. However, this was not deficient performance because counsel made a reasonable decision in selecting a theory of defense. Having made a strategic decision regarding the offense, it was unnecessary to investigate Michael. *See* ***id.*** at 343-44, 510 N.W.2d at 803.

Whipp also contends that counsel did not cross-examine the victim's mother and stepfather more extensively to undermine the stepfather's testimony as to when he returned to the house on the night of the assault. Whipp contends that this testimony was important because the stepfather testified that he heard the victim's bedroom door and the floor grate outside of her room creak at approximately 1:30 a.m., a time during which Whipp was the only other adult male in the residence.

We fail to see how impeaching the stepfather's testimony regarding the time he arrived home would undermine his testimony regarding the noises he heard a few hours later after he and his wife went to bed. Whipp also argues that if the stepfather arrived home later than he said he did, Michael had the opportunity to assault the victim. However, we have already discussed the evidence relating to Michael's opportunity to assault the victim and declared it lacking. We fail to see how greater cross-examination regarding the time the stepfather returned to the house would have raised a reasonable doubt in the jurors' minds as to Whipp's guilt. Even if trial counsel should have conducted a more thorough cross-examination, we see no prejudice to Whipp. *See* ***Moats***, 156 Wis.2d at 101, 457 N.W.2d at 311.

Whipp next challenges the trial court's ruling on the State's motion in limine to bar Whipp from presenting witnesses who would opine that Whipp did not act inappropriately when around children. Pretrial, the State moved the court to exclude any defense testimony that Whipp had a character for not sexually assaulting children because the foundation questions for this testimony would touch on areas prohibited by Wisconsin law. The trial court concluded that evidence of Whipp's public conduct with children was neither a pertinent character trait under § 904.04, STATS., nor relevant to whether he assaulted the victim in this case.

We agree with the trial court's discretionary ruling. *See* ***State v. Tabor,*** 191 Wis.2d 482, 488, 529 N.W.2d 915, 918 (Ct. App. 1995) (rulings regarding the admissibility of evidence are committed to the trial court's discretion). We conclude that this issue is governed by ***Tabor.*** In ***Tabor,*** the defendant wanted to present the testimony of the victim's brother that Tabor had never manifested any sexual interest in him. *See* ***id.*** at 496, 529 N.W.2d at 921. The testimony was offered to show that Tabor was not a child molester. *See* ***id.*** The trial court's decision to exclude this evidence was affirmed by this court. We

concluded that Tabor was not denied his right to present relevant evidence in his defense because

> [The brother's] testimony was not probative of Tabor's desire for sexual gratification with children. The fact that [the brother] was not sexually assaulted by Tabor is not relevant to Tabor's motive or intent to obtain sexual gratification from [the victim], nor does it show an absence of motive. 'Evidence of noncriminal conduct to negate the inference of criminal conduct is generally irrelevant.'

***Id.*** at 496-97, 529 N.W.2d at 921 (footnote and quoted source omitted).

Here, the fact that Whipp did not display inappropriate behavior toward children is not proof that he did not assault the victim in this case. The trial court applied the proper law to the facts and had a reasonable basis for its decision. *See* ***id.*** at 488, 529 N.W.2d at 918. In so holding we distinguish ***State v. Mainiero,*** 189 Wis.2d 80, 525 N.W.2d 304 (Ct. App. 1994), in which the trial court permitted the defendant, who was charged with sexually assaulting one of his children's baby-sitters, to call other baby-sitters to inquire whether they had an opinion as to his character for sexual morality in his dealings with them. *See* ***id.*** at 93, 525 N.W.2d at 309-10. Two baby-sitters testified that Mainiero did not engage in any inappropriate sexual behavior with them. *See* ***id.***

***Mainiero*** is distinguishable because the baby-sitter witnesses were in the same relationship to the defendant as the assaulted baby-sitter. Here, Whipp proposed calling adults to comment on his public conduct with children; Whipp would have been barred under ***Tabor*** from calling children to testify that he had not assaulted them.

Whipp makes numerous challenges to his sentence. He first argues that trial counsel was ineffective for not moving the trial judge to recuse himself at

sentencing owing to a controversy involving sentencing in a sexual assault case two weeks before Whipp was sentenced. At sentencing, trial counsel referred to the controversy surrounding the judge presiding in Whipp's case and expressed concern that the pressure would affect the judge's sentence in this case. However, counsel also expressed "great personal and professional regard and respect" for the judge and argued for a lesser sentence for Whipp. The court then sentenced Whipp to a total of sixty-six years in prison. In sentencing Whipp, the court acknowledged "this pressure that I've been under."

Whipp contends that the public uproar over the perceived lenient sentence brought the judge's impartiality into question and counsel should have moved the judge to recuse himself. At the postconviction motion hearing, the trial court rejected this claim because Whipp would not have prevailed on a recusal motion had one been made. The judge considered both the subjective test of his ability to act impartially and the objective (or actual bias) due process test for recusal. *See* ***State v. Jones,*** 181 Wis.2d 194, 205-06, 510 N.W.2d 784, 789 (Ct. App. 1993) (the subjective test) and ***State v. Sinks,*** 168 Wis.2d 245, 257, 483 N.W.2d 286, 291 (Ct. App. 1992) (the objective due process test). The judge acknowledged the controversy surrounding him at the time he sentenced Whipp, but stated that he would have recused himself had he felt he could not be fair to Whipp. The judge also concluded that he was not actually unfair to or prejudiced against Whipp. Because a recusal motion would not have succeeded, trial counsel cannot be faulted for not bringing it. *See* ***Simpson,*** 185 Wis.2d at 784, 519 N.W.2d at 666. Whipp cannot establish the prejudice prong of the ineffective assistance test. *See* ***Moats,*** 156 Wis.2d at 101, 457 N.W.2d at 311.

Whipp also contends that the maximum sentences he received were an erroneous exercise of the trial court's discretion because they are excessive and the

court relied on inaccurate information in sentencing him.[4] Although Whipp did not specifically argue for resentencing, the sentence was discussed in the context of Whipp's claim that trial counsel was ineffective for not seeking recusal at sentencing. In disposing of that claim, the trial court reviewed its sentencing rationale and concluded that it was fair to Whipp at sentencing. We will address Whipp's claim that the trial court's sentence was a misuse of discretion.

There is a strong public policy against interfering with a trial court's sentencing discretion. *See* ***State v. Mosley,*** 201 Wis.2d 36, 43, 547 N.W.2d 806, 809 (Ct. App. 1996). The record must show that the trial court exercised its discretion and stated its reasons for the sentence it imposed. *See* ***id.*** The primary factors to be considered at sentencing include the gravity of the offense, the defendant's character and the need to protect the public. *See* ***State v. Paske,*** 163 Wis.2d 52, 62, 471 N.W.2d 55, 59 (1991).

Our review of the sentencing transcript reveals that the trial court considered these factors. The weight to be given to each sentencing factor is within the trial court's broad discretion. *See* ***State v. Thompson,*** 172 Wis.2d 257, 264, 493 N.W.2d 729, 732 (Ct. App. 1992). That discretion is exceeded only where the sentence imposed 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* ***id.***

[4] The State argues that this issue is waived because the record does not contain a sentence modification motion. *See* ***State v. Chambers,*** 173 Wis.2d 237, 261, 496 N.W.2d 191, 200 (Ct. App. 1992). In response to this argument, Whipp moved the court to supplement the record on appeal with a letter to the trial court indicating that resentencing was sought in addition to the other matters to be taken up at the postconviction motion hearing. We granted the motion. At the bottom of the letter, the trial judge noted that resentencing would be addressed at the hearing. Accordingly, we conclude that this issue is not waived and we address the merits of Whipp's appellate claims.

On this record, the sentences were not unreasonable. The trial court properly considered Whipp's extensive history of undesirable behavior, s*ee* ***id.*** at 264-65, 493 N.W.2d at 732, including his use of the telephone to threaten and harass women, his involvement with drugs as a juvenile and as an adult, battery to his wife, and operating after revocation (fourth offense). The court also considered the severity of the crime and the need to protect the public, along with Whipp's other individual characteristics, including his demonstrated disrespect for the law, his failure to take responsibility for his conduct, and the need for close rehabilitative control. The court considered the effect of the crime on the victim and her family and the defendant's lack of remorse or acceptance of responsibility for the assault. The court also expressed its fear that Whipp would offend again, which argued in favor of a lengthy sentence.

The court noted the twenty-year sentence recommended by the presentence investigation report (PSI) author. The court stated its disagreement with that recommendation and the PSI author's apparent focus on Whipp's youth and the effect of long-term imprisonment. Rather, the court focused on the severity of the crime. A trial court is charged with exercising independent judgment at sentencing and is not bound by others' recommendations. *See* ***State v. Johnson,*** 158 Wis.2d 458, 465, 463 N.W.2d 352, 355 (Ct. App. 1990).

Whipp contends that the trial court placed too much emphasis on his prior use of the telephone to harass women. The trial court discussed harassment by telephone in the context of Whipp's attitude toward women. As stated before, the weight of such factors is within the trial court's discretion.

Whipp also protests the trial court's statement that he is a "pedophile" because there was no expert testimony to that effect. The trial court's

"pedophile" remark cannot be considered out of the context in which it was made. The remark was made as the trial court evaluated Whipp's prior bad conduct with women and the serious child sexual assault for which he was being sentenced. In employing the term "pedophile," the trial court was not reaching a clinical conclusion regarding Whipp. Rather, the trial court was considering the scope of Whipp's previous conduct and the likelihood that he would reoffend in the area of sex-related crimes against women and children.

Whipp also argues that the trial court's consecutive sentences for first-degree sexual assault of a child and incest with a child present a double jeopardy problem because he received two punishments for the same conduct. We disagree. The two crimes require proof of different facts, i.e., the incest charge requires proof of a degree of kinship, *see* § 948.06(1), STATS., while first-degree sexual assault does not require such proof. *See* ***State v. Stevens***, 123 Wis.2d 303, 321, 367 N.W.2d 788, 797 (1985). Once it is determined that the offenses are different in fact, double jeopardy concerns disappear. *See* ***State v. Grayson***, 172 Wis.2d 156, 159 n.3, 493 N.W.2d 23, 25 (1992). There are no double jeopardy problems with the sentences. *See also* § 973.15(2), STATS. ("[T]he court may impose as many sentences as there are convictions and may provide that any such sentence be concurrent with or consecutive to any other sentence ....").

Finally, Whipp seeks a new trial in the interests of justice because the real controversy of identification of the assailant was not tried and because the 1993 conviction should have been vacated. These bases for a new trial have been rejected. Therefore, we also reject his claim for a new trial. *See* ***Jones***, 181 Wis.2d at 206, 510 N.W.2d at 789.

*By the Court.*—Judgment and order affirmed.

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