COURT OF APPEALS
DECISION
DATED AND FILED

February 15, 2000

Cornelia G. Clark
Acting Clerk, Court of Appeals
of Wisconsin

No. 98-2605-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL CHESIR,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DAVID A. HANSHER and LAURENCE C. GRAM, JR., Judges. *Affirmed.*

Before Wedemeyer, P.J., Schudson and Curley, JJ.

¶1 PER CURIAM. Michael Chesir appeals from a judgment of conviction for two counts of second-degree sexual assault, contrary to WIS. STAT.

§ 940.225(2)(a) (1997-98),[1] and two counts of child enticement, contrary to WIS. STAT. § 948.07.[2] He also appeals from an order denying postconviction relief.

¶2 Chesir raises three issues: (1) whether the trial court improperly joined the two counts of sexual assault and two counts of child enticement with two counts of witness intimidation and one count of bail jumping; (2) whether the evidence was insufficient to sustain the convictions of child enticement; and (3) whether the trial court's sentence of sixty years was harsh and excessive.

¶3 Because the trial court did not erroneously exercise its discretion in consolidating the sexual assault and child enticement counts with the witness intimidation and bail jumping counts, because the evidence was sufficient to sustain the convictions of child enticement, and because the trial court did not erroneously exercise its sentencing discretion, we affirm.

BACKGROUND

¶4 Chesir lived with his wife, Danita, their two daughters, and Danita's daughter, Nicole. Chesir and Danita had different work schedules. Chesir had a history of inflicting physical abuse or punishment upon both Danita and Nicole.

¶5 The trial record shows that on June 5, 1996, Chesir awakened Nicole from her sleep and told her to come to his bedroom. When Nicole entered the bedroom, Chesir removed her clothing, pushed her onto the bed and inserted his

[1] All references to the Wisconsin Statutes will be to the 1997-98 version unless otherwise noted.

[2] Chesir was also convicted of two counts of witness intimidation and one count of bail jumping. He does not challenge those convictions.

penis into her anus. The following day, Nicole informed her mother relative to what had transpired, but Danita did nothing about it.

¶6 On July 9, 1996, Chesir again awoke Nicole from her sleep and requested her to come to his bedroom and disrobe. When Nicole did not immediately comply, Chesir told her to hurry up or that he would give her a "whooping." He then forced her onto the bed and inserted his penis into her vagina. The following day, Nicole informed her mother, "it happened again." Again, Danita did nothing about the incident. Later in the day, Nicole informed her cousin about the assaults and then reported them to the police. After she met with the police, she was taken to the Sexual Assault Treatment Center for a medical examination. It was learned that Nicole's hymen had been lacerated in several places, consistent with penetration.

¶7 The State charged Chesir with two counts of second-degree sexual assault and two counts of child enticement. He was ordered by the court not to have any contact with either Danita or Nicole. Disregarding this admonition, Chesir telephoned Danita and told her not to bring Nicole to his preliminary hearing. When she objected to the request, Chesir stated: "Fuck you, bitch. I don't need you either if you're not going to support me, well when I get out, she can get out and you can too. I should have killed you January first."[3] As a result of this conversation, the State filed two additional counts of witness intimidation. Again, the court instructed Chesir to have no contact with Danita, including phone calls. He persisted in his efforts to call her and, after he left a message at her place of work, the State filed a charge of bail jumping. Chesir denied all the charges.

[3] On New Year's Eve, 1991, Chesir argued with Danita, knocked her down, and kicked her in the right side of her face. She spent eight days in the hospital recovering.

¶8 Pursuant to WIS. STAT. § 971.12(1) and (4),[4] the State moved to consolidate all the charges. Over Chesir's objection,[5] the trial court granted the motion. A jury then found Chesir guilty on all seven counts. The trial court sentenced him to twenty years in prison for the first sexual assault charge, twenty years consecutive for the second sexual assault charge, twenty years consecutive for the first child enticement charge, twenty years concurrent for the second child enticement charge, five years concurrent for the first witness intimidation charge, nine months concurrent for the second witness intimidation charge, and five years concurrent for the bail-jumping charge, for a total prison term of sixty years. Chesir moved to reconsider his sentence, but to no avail. He now appeals.

[4] WISCONSIN STAT. § 971.12, Joinder of crimes and of defendants, provides:

> **(1)** JOINDER OF CRIMES. Two or more crimes may be charged in the same complaint, information or indictment in a separate count for each crime if the crimes charged, whether felonies or misdemeanors, or both, are of the same or similar character or are based on the same act or transaction or on 2 or more acts or transactions connected together or constituting parts of a common scheme or plan.
>
> ….
>
> **(4)** TRIAL TOGETHER OF SEPARATE CHARGES. The court may order 2 or more complaints, informations or indictments to be tried together if the crimes and the defendants, if there is more than one, could have been joined in a single complaint, information or indictment. The procedure shall be the same as if the prosecution were under such single complaint, information or indictment.

[5] Chesir did not move, pursuant to WIS. STAT. § 971.12 (3), to sever the charges.

ANALYSIS

A. Consolidation, "Other Acts" Evidence.

¶9 Chesir first claims that the trial court erred when it consolidated all of the charges. He claims that the consolidation resulted in the erroneous admission of "other acts" evidence. He raises these issues together asserting that they are "inextricably intertwined." We shall first examine the "other acts" issue.

¶10 A trial court decides the admissibility of "other acts" evidence under WIS. STAT. § 904.04(2), by applying a three-prong test. *See* ***State v. Sullivan***, 216 Wis. 2d 768, 771-72, 576 N.W.2d 30 (1998). First, the trial court must determine whether the evidence is offered for an acceptable purpose. *See* ***id.*** at 772. Second, the trial court must determine whether the proposed "other acts" evidence is relevant, i.e., whether the evidence is related "to a fact or proposition that is of consequence to the determination of the action" and "whether the evidence has a tendency to make the consequential fact or proposition more probable or less probable than it would be without the evidence." ***Id.*** Third, the trial court must determine whether the prejudicial effect of the "other acts" evidence substantially outweighs its probative value. *See* ***id.*** at 772-73.

¶11 The first step necessitates the offering of evidence for an acceptable purpose. The testimony of an individual's "other acts" is not admissible to prove the character of the individual in order to show that the individual acted in conformity therewith. The list, however, of acceptable purposes set forth in WIS. STAT. § 904.04(2), is illustrative and by no means exclusive. *See* ***State v. Shillcutt***, 116 Wis. 2d 227, 236, 341 N.W.2d 716 (Ct. App. 1983), *aff'd*, 119 Wis.2d 788, 350 N.W.2d 686 (1984). Additional acceptable purposes noteworthy for the purpose of our current analysis are to show the context in which the

charged crimes took place, to show the full presentation of the case, *see* ***id.***, and "to complete the story of the crime on trial by proving its immediate context of happenings," ***State v. Bettinger***, 100 Wis. 2d 691, 697, 303 N.W.2d 585 (1981).

¶12 Here, the "other acts" evidence consisted of the history of physical abuse suffered by Danita, particularly the battery suffered on New Year's Eve, 1991. Throughout the course of this trial, the trial court expressed concern about the propriety of this "other acts" evidence that had been received into evidence and how its application might be restricted. Finally, prior to final instruction resolution, the trial court inquired as to the purpose for which the State was offering this evidence. The State responded that the evidence of Chesir's physical abuse of Danita was offered: (1) to demonstrate the context of the family system in which the sexual assaults took place; (2) to show Danita's fear of Chesir; and (3) to rebut the challenge made by Chesir to Nicole's credibility for tardiness in reporting the assaults to authorities and to Danita's complete failure to do the same.

¶13 The trial court accepted the State's rationale and reasoned that the evidence was also admissible to show "intent." Under the evidentiary facts of record, the trial court did not erroneously exercise its discretion in determining that there was an acceptable purpose for allowing the admission of the "other acts" evidence.

¶14 The second step addresses relevancy. Evidence is relevant if it relates to a fact or proposition of consequence to the determination of the action and has the tendency to make the consequential fact or proposition more or less probable. *See* ***Sullivan***, 216 Wis. 2d at 772.

¶15 The consequential fact in this case is whether Chesir sexually assaulted Nicole. Chesir posited that the allegations were false. He reasoned that if Danita had believed Nicole, she would have confronted him or reported the incidents. Chesir claimed that because Danita failed to take either course of action, she did not believe Nicole's claim that the assaults occurred.

¶16 The State, however, refused to accept Chesir's assertions and instead proffered a third alternative. The history of physical abuse logically suggested another reason why Danita did not act on Nicole's behalf. Danita testified that she feared what Chesir would do to her if she confronted him or reported the incidents to authorities. Thus, it is reasonable to infer that Chesir's physical abuse of Danita related to her reaction to Nicole's claims, and ineluctably to Nicole's credibility. Because the evidence of the past physical abuse demonstrated that it was more likely that Danita failed to report the incidents because of fear of retaliation, rather than any disbelief in what Nicole had told her about the assaults, the trial court did not erroneously exercise its discretion in concluding that the evidence of past physical abuse was relevant.

¶17 The last of the three-pronged test is whether the danger of unfair prejudice substantially outweighs the probative value of the evidence. *See* ***Sullivan***, 216 Wis. 2d at 772-73; ***State v. Speer***, 176 Wis. 2d 1101, 1114, 501 N.W.2d 429 (1993). When the State moved *in limine* for the admission of the "other acts" of physical abuse by Chesir against Danita, it explained:

> The facts include that Nicole told her mother within a few hours of each of the two sexual assaults. Her mother did nothing. Danita … will say that she did not know what to do, and was afraid of Chesir's reaction.
>
> These facts are part of the context in which the sexual assaults themselves took place, and the manner in which they eventually came to the attention of the authorities.

> Context is a relevant area of inquiry because it provides the jury with a more complete history against which to judge the credibility of the various players.

¶18 In response, Chesir argued that the "other acts" evidence of physical abuse did not involve Nicole in the sexual assault cases, and to allow the "other acts" testimony would be highly prejudicial to him because there is no physical evidence of the "other acts." We are not persuaded for three reasons. First, as set forth earlier in this opinion, the "other acts" evidence of physical abuse inflicted upon Danita in Nicole's presence provided a basis for Nicole's tardiness in contacting the authorities, and the similar failure of Danita to act after the assaults occurred. Second, contrary to Chesir's claims, there is testimony from Danita, from Charles Marfitt, Jr., and from Nicole herself about physical abuse she sustained at the hands of Chesir. Third, the trial court gave the jury a limiting instruction directing it only to consider the "other acts" evidence for context and intent, and admonished the jury not to use the evidence to draw any conclusions about character. This fact-specific instruction was sufficient to eliminate any potential unfair prejudice to Chesir. *Cf.* ***Sullivan***, 216 Wis. 2d at 791 (concluding that the cautionary instruction, although "reducing the risk that a jury will find an accused guilty simply because he or she was a bad person," was too broad to reduce the risk of prejudice in this instance). Thus, the trial court did not erroneously exercise its discretion by admitting the "other acts" evidence.

¶19 We now turn to the correlative matter of consolidation. The granting or denying of a motion for consolidation, or its flip side, a motion for severance, is addressed to the discretion of the trial court. *See* ***State v. Nelson***, 146 Wis. 2d 442, 455, 432 N.W.2d 115 (Ct. App. 1988). In making its decision, the trial court must balance any potential prejudice to the accused against the public's interest in avoiding unnecessary or duplicative trials. *See* ***id.*** The test for improper

consolidation or for failure to sever often turns to an analysis of the admissibility of the "other acts" evidence under ***Whitty v. State***, 34 Wis. 2d 278, 149 N.W.2d 557 (1967). *See* ***State v. Locke***, 177 Wis. 2d 590, 597, 502 N.W.2d 891 (Ct. App. 1993). Such is the case here. Because we have carefully examined the "other acts" evidence and have concluded that no unfair prejudice resulted to Chesir, there is no need to further examine the consolidation issue.

¶20 In addition to the "other acts" objection to consolidation, Chesir advances the following arguments: (1) the various alleged crimes do not have the same victims; (2) the sexual assault and enticement charges involve more emotionally sensitive issues for the jury than the issues raised in the witness intimidation and bail-jumping charges; (3) the cumulative effect of trying all seven counts together could lead the jury to inevitably convict Chesir of something; (4) his Fifth Amendment right would perhaps be denied because he was undecided whether or not to testify in his own defense on all the charges; and (5) he would be prejudiced by the consolidation because the jury would be exposed to evidence not admissible in the sexual assault case. We are not persuaded.

¶21 On appeal, our review of joinder is a two-step process. *See* ***id.*** at 596. First, we review the initial joinder determination. *See* ***id.*** Whether the initial joinder was proper is a question of law that we review without deference to the trial court, and "[t]he joinder statute is to be construed broadly in favor of initial joinder." ***State v. Hoffman***, 106 Wis. 2d 185, 208, 316 N.W.2d 143 (Ct. App. 1982). Joinder is appropriate when two or more crimes "are of the same or similar character or are based on the same act or transaction." WIS. STAT. § 971.12(1). "To be of the 'same or similar character,' … crimes must be the same type of offense occurring over a relatively short period of time and the evidence as to each

must overlap." ***State v. Hamm***, 146 Wis. 2d 130, 138, 430 N.W.2d 584 (Ct. App. 1988).

¶22 Here, joinder was appropriate. The cases were connected. The witness intimidation charges and bail-jumping charge flow from the earlier crimes. Like ***Bettinger***, where our supreme court found consolidation appropriate when the defendant sexually assaulted the victim and then tried to bribe her to drop the charges, consolidation is similarly appropriate here. Like Bettinger, Chesir committed a crime and then attempted to get the victim to drop the charges. Under these circumstances, the charges were connected and properly joined.

¶23 The second step in analyzing joinder is whether the consolidation will cause undue prejudice. *See* ***Locke***, 177 Wis.2d at 597; WIS. STAT. § 971.12(3). Our analysis of prejudice under the "other acts" challenge resulted in the conclusion that Chesir was not unfairly prejudiced. We reach the same conclusion here. Chesir's prejudice claims are conclusory and, therefore, not persuasive. He talks about possibilities, rather than submitting any specific facts suggesting prejudice. Accordingly, he has failed to show that the joinder unfairly prejudiced him.

B. Insufficiency of Evidence.

¶24 Chesir next claims that the evidence educed at trial was insufficient to convict him of two counts of child enticement. We disagree.

¶25 Upon review, we shall uphold a conviction unless the evidence viewed most favorably to the State and the conviction is so insufficient in probative value and force that it can be said, as a matter of law, that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. *See*

State v. Poellinger, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). The test for reviewing whether the evidence is sufficient to sustain a criminal conviction is not whether the evidence is sufficient to exclude every reasonable hypothesis of innocence, but whether the trier of fact could have been reasonably convinced of the accused's guilt beyond a reasonable doubt by any direct or circumstantial evidence upon which it had a right to rely. *See* ***id.*** at 503-04.

¶26 The jury, as the finder of fact, is free to determine which testimony it finds credible, regardless of any conflicts in the testimony, and is permitted to piece together any evidence it finds credible to construct a chronicle of the alleged crime. *See* ***id.*** at 503. Here the evidence is more than sufficient to sustain the conviction.

¶27 A conviction for child enticement under WIS. STAT. § 948.07,[6] requires proof that a defendant, with intent to commit any of the prohibited sexual acts, including the exposure of a sex organ, causes or attempts to cause a child under eighteen years of age to go into any vehicle, building, room or secluded place. Although it is not totally clear, we assume that the main thrust of Chesir's

[6] WISCONSIN STAT. § 948.07, provides:

> **Child enticement.** Whoever, with intent to commit any of the following acts, causes or attempts to cause any child who has not attained the age of 18 years to go into any vehicle, building, room or secluded place is guilty of a Class BC felony:
>
> **(1)** Having sexual contact or sexual intercourse with the child in violation of s. 948.02 or 948.095.
>
> **(2)** Causing the child to engage in prostitution.
>
> **(3)** Exposing a sex organ to the child or causing the child to expose a sex organ in violation of s. 948.10.
>
> **(4)** Taking a picture or making an audio recording of the child engaging in sexually explicit conduct.
>
> **(5)** Causing bodily or mental harm to the child.
>
> **(6)** Giving or selling to the child a controlled substance or controlled substance analog in violation of ch. 961.

second claim of error is the failure of the evidence to demonstrate an act of isolating Nicole from the protection of the public. In doing so, Chesir acknowledges the holding of ***State v. Gomez***, 179 Wis. 2d 400, 507 N.W.2d 378 (Ct. App. 1993), but asks us to reconsider our holding. Therein, we held that there was sufficient evidence to support the jury's conviction of child enticement where Gomez had caused his stepdaughter to go into her own bedroom, where he told her to remove her clothing, and then masturbated. We rejected the defense argument that, because the statute was intended to punish the act of separating a child from the public, its provisions could not be applied to the act of causing a child to go into his or her own room. *See* ***id.*** at 404-05. We declared: "The statute unambiguously requires that the defendant cause the child to *go into any room*. The statute does not require that the defendant's action separate the child from the public." ***Id.*** at 405 (citation omitted).

¶28 ***Gomez*** has been published and has not been reversed or qualified by our supreme court. Therefore, we are bound by its conclusion, and we deem it determinative. We decline Chesir's invitation to modify ***Gomez***. Based on that decision, we conclude there was sufficient evidence to support the convictions for child enticement.

¶29 To prove the charges of child enticement, the State relied primarily upon the evidence presented by the victim, Nicole. She testified that she was born on April 8, 1980, and was sixteen years of age at the time of the two incidents. In recalling the assault of June 5, 1996, she stated that Chesir "shook her awake" while she was sleeping in her bedroom with her two younger sisters. He told her to get up and go to his room. He had no clothes on. He told her to get on the bed and take off her clothes, pushed her down, got on top of her and put his penis in her "butt." As for the assault on July 9, 1996, she testified that Chesir "tapped"

her awake, and told her to go to his room and take off her clothes. He made her lie down and then stuck his penis into her vagina. Without dwelling on the sordid details of each incident, we conclude that there was sufficient evidence in the record from which the jury could reasonably infer that Chesir intended to commit sexual acts with her when he directed her to his bedroom. Clearly, a reasonable jury could conclude from this testimony that Chesir caused Nicole to go into a room with intent to commit prohibited sexual acts. Thus, this claim of error fails.

C. Sentencing.

¶30 Lastly, Chesir contends that the trial court erroneously exercised its sentencing discretion by giving improper weight to factors that were either irrelevant, or collateral to charges lodged against him, and by imposing what he terms an excessive sixty-year prison sentence. We are not convinced.

¶31 A trial court's sentence is reviewed for an erroneous exercise of discretion. *See* ***State v. Paske***, 163 Wis. 2d 52, 70, 471 N.W.2d 55 (1991). There is a consistent and strong policy against interfering with the discretion of the trial court in passing sentence. *See* ***id.***, 163 Wis. 2d at 61-62, 471 N.W.2d 55 (quoting ***McLeary v. State***, 49 Wis. 2d 263, 281, 182 N.W.2d 512 (1971)). This policy is based on the great advantage the trial court has in considering the relevant factors and the defendant's demeanor. *See* ***State v. Harris***, 119 Wis. 2d 612, 622, 350 N.W.2d 633 (1984). Further, the trial court is presumed to have acted reasonably, and the burden is on the appellant to show some unreasonable or unjustifiable basis in the record for the sentence he challenges. *See* ***State v. Thompson***, 172 Wis. 2d 257, 263, 493 N.W.2d 729 (Ct. App. 1992).

¶32 It is similarly well-established that trial courts must consider three primary factors in passing sentence. Those factors are "the gravity of the offense,

the character and rehabilitative needs of the defendant, and the need to protect the public." ***Id.*** at 62. The weight to be given to each of the factors, however, is a determination particularly within the discretion of the trial court. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). After consideration of all relevant factors, the sentence may be based on any one of the three primary factors. *See* ***State v. Krueger***, 119 Wis. 2d 327, 338, 351 N.W.2d 738 (Ct. App. 1984).

> The sentencing court may also consider additional factors, including: the defendant's criminal record, history of undesirable behavior patterns, personality and social traits, results of a presentence investigation, the aggravated nature of the crime, degree of culpability, demeanor at trial, remorse, repentance and cooperativeness, educational and employment history, the need for close rehabilitative control and the rights of the public.

State v. Lewandowski, 122 Wis. 2d 759, 763, 364 N.W.2d 550 (Ct. App. 1985).

¶33 An erroneous exercise of discretion in sentencing "might be found if the trial court failed to state on the record the material factors that influence its decision, gave too much weight to one factor in the face of contravening considerations, or relied on irrelevant or immaterial factors." ***Krueger***, 119 Wis. 2d at 337-38.

¶34 The exercise of a sentencing court's discretion requires a demonstrated process of reasoning based on the facts of the record and a conclusion based on a logical rationale. *See* ***McCleary***, 49 Wis. 2d at 277. The trial court must engage in a reasoning process and provide the rationale for its actions. However, even if the trial court fails to adequately set forth its reasons for imposing a particular sentence, the reviewing court will not set aside the sentence for that reason. The reviewing court is "obliged to search the record to determine

whether in the exercise of proper discretion the sentence imposed can be sustained." ***Id.*** at 282.

¶35 Finally, the length of the sentence imposed by a trial court will be disturbed on appeal "only where the sentence 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***, 70 Wis. 2d at 185.

¶36 Chesir claims that the trial court gave too much weight to one factor—the abuse of Danita. He argues that the trial court ignored other contravening considerations such as: (1) his lack of a prior criminal record; (2) his consistent job history; (3) living with and supporting his children including an autistic child; and (4) that there is no basis whatsoever in the record that he was or is a danger to the community at large.

¶37 In passing sentence, the trial court, in part, stated:

> What's aggravating is the fact that every sexual assault is serious. There are different degrees. This is a sexual assault by different methods of a step daughter [sic] and it doesn't matter if it's a natural daughter or stepdaughter, this is her father, father figure, and even though he didn't bring her into this world, he was raising her with her mother and to have a father sexually assault a child, his own daughter as far as I'm concerned, is repr[e]hensible and makes this more repr[e]hensible than most second degree sexual assaults. As I said, there are different degrees and this is the worst degree.
>
> He's also -- as to the defendant's prior record and character, he was employed. He had no prior record and I have to give him credit for that. That's the only thing I can give him credit for. As to his character, he has an alcohol problem, a severe one, which he admits to both in the presentence and his chance for allocution. He also has a drug problem and I think [sic] contributed to what happened here.

> He's not only destroyed his life by the sexual assaults and the follow-up where he tried to get the witnesses to recant and not show up in court but also I think he's destroyed to a great extent his stepdaughter's life. I don't know how long she'll be in treatment. I don't know how long she'll have nightmares. Her mother -- his wife, her mother, has also been traumatized by what happened. She's basically losing a husband and also has lost a great deal of the daughter she knew. Nicole will never be the same. Most victims of sexual assaults are never the same.
>
> ….
>
> I have to consider the community's needs for punishment and the community views these types of offenses … as repr[e]hensible and demands punishment.
>
> I think in the last several years even though he hasn't had a prior adult or juvenile record due to his alcohol and drug abuse and the abusive relationship he was in with his wife that he's become a danger both to his wife and children and a danger to the community.

¶38 Contrary to Chesir's suggestions, the primary focus of the court was not the abuse visited upon Danita, but the assaults upon Nicole, and the perceived permanent damage to her personality. Contrary to Chesir's suggestion, in the court's judgment, his alcohol and drug abuse, when coupled with his sexual problems, rendered him a danger to the community. It is clear that the trial court considered the proper factors in imposing sentence. Given the nature of the crimes, the age of the victim, the threats made by Chesir to Danita concerning what he intends to do when he is released, and the additional factors referenced above, the sentence imposed was not "shocking to public sentiment." The trial court did not erroneously exercise its sentencing discretion.

By the Court.—Judgment and order affirmed.

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