COURT OF APPEALS
DECISION
DATED AND FILED

OCTOBER 27, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-3335-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TREDERICK NELSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Waukesha County: JOSEPH E. WIMMER, Judge. *Affirmed.*

¶1 ANDERSON, J.[1] Trederick Nelson appeals from his conviction for fourth-degree sexual assault and disorderly conduct. He first challenges the sufficiency of the evidence by claiming that the State's witnesses falsely testified during his trial. His second challenge asserts that the trial court erred in admitting

[1] This appeal is decided by one judge pursuant to § 752.31(2)(c), STATS.

hearsay evidence by commenting upon the facial expressions and gestures of Nelson and his witnesses. Finally, he insists the trial court misused its sentencing discretion by imposing an unduly harsh sentence. Because none of Nelson's challenges have merit, we affirm.

¶2 Nelson was charged with fourth-degree sexual assault in violation of § 940.225(3m), STATS., and disorderly conduct in violation of § 947.01, STATS., for an altercation he had with Angela B.S. at a school in Menomonee Falls on March 16, 1996. Nelson represented himself at the jury trial on February 25 and 26, 1997, and the jury convicted him of both counts. He was sentenced to nine months in the Waukesha County Jail for fourth-degree sexual assault and a consecutive three months for disorderly conduct.

¶3 Nelson is pursuing this appeal pro se and raises several issues that amount to a challenge to the sufficiency of the evidence. First, he contends that all of the State's witnesses either gave false information or were unsure of their answers and this is insufficient to support the finding of guilty. Second, Nelson maintains that when the trial court described facial expressions, gestures and verbalizations it saw or heard witnesses, members of the gallery and Nelson participate in, the court permitted hearsay evidence to be heard by the jury.

¶4 Our review of the sufficiency of the evidence is to determine whether 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. Ray***, 166 Wis.2d 855, 861, 481 N.W.2d 288, 291 (Ct. App. 1992). We shall affirm a conviction if we can conclude that the trier of fact, acting reasonably, could be convinced beyond a reasonable doubt by evidence it is

entitled to accept as true. *See* ***State v. Teynor***, 141 Wis.2d 187, 204, 414 N.W.2d 76, 82 (Ct. App. 1987). Of particular significance when the veracity of witnesses is challenged on appeal is the principle that when there are inconsistencies between witnesses' testimonies, it is the task of the trier of fact to determine both the credibility of each witness and the weight to be given to the testimony. *See* ***State v. Toy***, 125 Wis.2d 216, 222, 371 N.W.2d 386, 389 (Ct. App. 1985). We shall not assess the credibility nor weigh the evidence. Nor shall we substitute our judgment for that of the trier of fact, unless "the evidence supporting the jury's verdict conflicts with nature or the fully established facts, or unless the testimony supporting and essential to the verdict is inherently and patently incredible." ***State v. Sharp***, 180 Wis.2d 640, 659, 511 N.W.2d 316, 324 (Ct. App. 1993).

¶5 We will address Nelson's complaints in reverse order because his hearsay objection is easily disposed of. After a five-minute recess to permit the victim to compose herself, the court reconvened with all of the parties present to hear a motion by the assistant district attorney. Before the prosecutor made the motion, the trial court was careful to note that the jury was not present. The nature of the motion was a request that the court admonish Nelson, his witnesses and friends in the gallery not to react to testimony with facial expressions, gestures or verbalizations. In granting the motion, the court concurred in the prosecutor's description of some of the facial expressions that had been observed. It is these descriptions that Nelson contends are inadmissible hearsay. Nelson's argument fails because the jury was not present and was not exposed to the court's and the

prosecutor's description of the reactions of Nelson and his supporters to the victim's testimony.[2]

¶6 We turn to Nelson's challenge to the sufficiency of the evidence and begin with a summary of the evidence. On March 16, 1996, Angela was an eighteen-year-old high school senior who was employed by the Menomonee Falls Recreation Department as a basketball coordinator. Among her duties were to supervise pick-up games of basketball in a school gym and to collect an entrance fee from the players. Nelson and Angela had a brief dispute over Nelson paying the entry fee which was resolved with Nelson paying the fee.

¶7 Later that afternoon, Angela was standing with her hands on her hips when Nelson approached from behind, put his arms through Angela's arms, grabbed her breasts and squeezed. Angela immediately confronted Nelson, "You don't have the right to touch me." Angela testified that Nelson got very angry and started to swear. Angela started to walk away but Nelson grabbed her by the arm, threw a glove at her and started to swear again. Angela testified that Nelson was so angry that he was shaking. Nelson threatened Angela, he told her that he knew where she lived and went to school and he was going to kill her. Angela told the jury that she felt violated and threatened by Nelson. Angela left the gym and found a custodian who called 911.

¶8 According to Angela's testimony, there were twenty to thirty people in the gym when this incident happened. Kenneth Gold was one of those people.

[2] We hasten to comment that the descriptions of Nelson's and his supporters' reactions to testimony is not hearsay because the jury was present as the victim testified and it is a reasonable inference to conclude that it observed the same impolite reactions. It is also a sensible conclusion that this behavior was not considered favorably by the jury.

He testified that the first thing he noticed was Angela being followed by Nelson and she appeared flustered and her face was red. Gold saw Nelson grab Angela by the arm and heard him swear at her. Two others present, Tom Krueger and Henry Bowles, testified that they heard Angela say, "Don't touch me," and Nelson respond, "I can touch you whenever I want." The final witness for the State was Joseph Nichols, the city of Menomonee Falls police officer who responded to the 911 call. Nichols testified that at the police station Nelson continued to be belligerent and use offensive language. Nelson told the officer that he better keep Angela safe.

¶9 Nelson argues that this evidence is insufficient to support his conviction because much of it springs from the false testimony of the victim, Gold, Krueger, Bowles and Nichols. He claims that their testimony is false because it is inconsistent with the testimony that he and his witnesses gave. We reject Nelson's invitation to us to independently assess the credibility of the witnesses. Where there are inconsistencies between witnesses' testimonies, it is the duty of the jury to determine the credibility of each witness and the weight it will give to the evidence. *See* ***Sharp***, 180 Wis.2d at 659, 511 N.W.2d at 324. In returning guilty verdicts, the jury found the witnesses for the State to be more believable than those presented by Nelson and concluded that the State's witnesses gave truthful testimony.

¶10 From our review of the record, we find sufficient and probative evidence to support the jury's guilty verdicts on the count of fourth-degree sexual assault and the count of disorderly conduct. Therefore, we affirm Nelson's judgment of conviction on both counts.

¶11 Nelson also challenges his sentence. He argues that the trial court misused its sentencing discretion because his and the witnesses' demeanor unduly influenced the court. He is seeking to either have the sentence reduced from nine months to time served as of the date of this decision or to be placed on probation.

¶12 Sentencing is within the sound discretion of the trial court and we will not reverse absent a misuse of that discretion. *See* ***State v. Tarantino***, 157 Wis.2d 199, 221, 458 N.W.2d 582, 591 (Ct. App. 1990). There exists a strong policy against interference with the discretion of the trial court in passing sentence. In reviewing a sentence to determine whether discretion has been misused, this court will start with the presumption that the trial court acted reasonably, and the defendant must show some unreasonable or unjustifiable basis in the record for the sentence disputed. *See* ***State v. Macemon***, 113 Wis.2d 662, 670, 335 N.W.2d 402, 407 (1983). To properly exercise its discretion, the trial court must give consideration to the recognized primary factors and other appropriate sentencing considerations. *See* ***State v. Iglesias***, 185 Wis.2d 117, 128, 517 N.W.2d 175, 178 (1994). The weight given to each factor is left to the trial court's broad discretion. *See* ***State v. Thompson***, 172 Wis.2d 257, 264, 493 N.W.2d 729, 732 (Ct. App. 1992).

¶13 Nelson does not offer any developed challenge to the trial court's exercise of discretion other than a general allegation that the trial court was unduly influenced by the facial expressions and gestures of he and his witnesses. Normally, a reviewing court does not consider undeveloped arguments. *See* ***State v. Gulrud***, 140 Wis.2d 721, 730, 412 N.W.2d 139, 142-43 (Ct. App. 1987). However, in an effort at being complete, we will summarize the reasons why the court imposed the sentence that it did.

¶14 The trial court discussed the gravity of the offense when it described Nelson's actions as "immoral, illegal and humiliating" and the psychological impact the crime had on the victim. The court considered Nelson's demeanor when it stated that he did not tell the truth during the trial. The court included the need to protect the public in its decision by discussing Nelson's criminal record—including felony burglary—and his criminal thinking. The court believed a substantial sentence was needed to serve as a deterrent to Nelson and others. Finally, the court also stated that Nelson needed close rehabilitative control, especially counseling for his criminal thinking.

¶15 We reject Nelson's argument that the sentence is unduly harsh. The reasons given for the sentence establish that the court properly exercised its sentencing discretion.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.