COURT OF APPEALS
DECISION
DATED AND FILED

June 21, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP958-CR **Cir. Ct. No. 2013CF113**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOHN WAYNE ALLEN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Marinette County: JAMES A. MORRISON, Judge. *Affirmed.*

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 PER CURIAM. John Wayne Allen appeals a judgment sentencing him to one hundred years' imprisonment and an order denying his motion for resentencing. He contends the sentencing court erroneously exercised its discretion by failing to acknowledge an actuarial assessment that scored Allen as a

low risk to reoffend, by imposing the maximum consecutive sentences instead of the least amount of confinement necessary, and by imposing an excessively harsh sentence. We reject these arguments and affirm the judgment and order.

BACKGROUND

¶2 The complaint charged Allen with second-degree sexual assault of an intoxicated adult, repeated sexual assault of a twelve-year-old child, exposing that child to harmful material, and two counts of sexual assault of a nine-year-old child. Pursuant to a plea agreement, Allen entered no contest pleas to one count of repeated sexual assault of a child and one count of first-degree sexual assault of a child. Allen was in his late fifties at the time of the crimes and was sixty-one years old at the time of sentencing.

¶3 The State recommended concurrent sentences of eight and one-half years' initial confinement and twelve years' extended supervision, explaining that the younger child who was assaulted would be an adult by the time Allen would be released from prison and that would put her in a better position to protect herself. The defense recommended four years' initial confinement and twelve years' extended supervision, and pointed to an actuarial tool, the STATIC-99R test, which indicated a low risk of Allen reoffending. The Department of Corrections' (DOC) presentence investigation report (PSI) recommended concurrent sentences of fifteen years' initial confinement and eight years' extended supervision. The PSI noted Allen's adult daughter reported he performed oral sex on her while she was intoxicated. His daughter reported, "He told me Adam and Eve and all of their sons and daughters did it, so it was okay. It was not intercourse, so it was okay." The PSI also described how Allen showed the twelve-year-old victim a video depicting intercourse. Allen told police the

children instigated the sexual activity. The PSI also reported that the younger victim's mother said the victim obtained counseling but was still having a hard time coping with what occurred. The older victim's mother reported the victim had not slept in her own bed since the incidents occurred because she was too afraid. She cannot be left home alone because she has started acting out sexually on another child.

¶4 The court imposed the maximum consecutive sentences, a total of sixty-five years' initial confinement and thirty-five years' extended supervision. The court emphasized protection of the public, stating, "Protection of the community is absolutely, positively 99 percent of everything in this case." The court went on to discuss other factors such as punishment, rehabilitation, deterrence and restitution, and explained why those factors carried little weight in this case. The court characterized Allen's offenses as "vicious" and "aggravated," with life-long consequences for the victims. The court stated it felt it had no choice but to confine Allen for as long as possible to "guarantee that [he would] never come out again."

¶5 Allen filed a postconviction motion for resentencing, raising the same issues as he raises in this appeal. The circuit court ruled that, although it did not specifically mention the STATIC-99R results at the sentencing hearing, it had considered those results. The court rejected the State's and the PSI's recommendations for concurrent sentences because it concluded consecutive sentences were necessary to signal to Allen and to the victims that he was being punished for the two counts separately. The court also found it necessary to impose sentences long enough to guarantee that Allen would have no opportunity to be released. Finally, the court concluded the sentences were not excessively harsh because they were based on the serious nature of the offenses.

DISCUSSION

¶6 The sentencing court was not required to explain why it rejected the STATIC-99R assessment of Allen's low risk of reoffending. A sentencing court need not explain why it rejected information relevant to sentencing. ***State v. Johnson***, 158 Wis. 2d 458, 469, 463 N.W.2d 352 (Ct. App. 1990), *abrogated on other grounds by* ***State v. Harbor***, 2011 WI 28, ¶¶47-48 & n.11, 333 Wis. 2d 53, 797 N.W.2d 828. As in ***Bastian v. State***, 54 Wis. 2d 240, 246-47, 194 N.W.2d 687 (1972), the sentencing court could reasonably focus on the seriousness of the crimes rather than an expert's assessment of reoffense risk, and it could reasonably impose the maximum sentence based on its determination that such a sentence was necessary to protect society. Imposing a lengthy term of confinement to protect society constitutes a proper exercise of discretion. ***Id.*** Because the sentencing court imposed a sentence within the permissible range set by statute and gave reasons for its decision, it did not need to explain why the sentence it imposed differed from any particular recommendation. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). Although the DOC's recommendation may be helpful and should be considered by the court, the recommendation is not entitled to any deference. *See* ***State v. Brown***, 2006 WI 131, ¶24, 298 Wis. 2d 37, 725 N.W.2d 262.

¶7 Citing ***State v. Hall***, 2002 WI App 108, ¶10, 255 Wis. 2d 662, 648 N.W.2d 41, Allen contends the sentencing court "exercised discretion but without an explained judicial reasoning process." We disagree. Unlike ***Hall***, the sentencing court here extensively explained its objective, namely, to ensure public safety by making sure Allen remains confined for the rest of his life. It imposed a sentence sufficient to meet that objective.

¶8 Allen argues that the STATIC-99R is admissible to establish an offender's risk. The sentencing court did not rule the test inadmissible. It found the assessment unpersuasive. Contrary to Allen's argument, the court's own assessment of risk, based on the facts of the case, cannot be written off as mere intuition simply because it differs from an actuarial tool.

¶9 Allen contends the court improperly exercised its discretion by imposing the maximum consecutive sentences instead of the least amount of confinement necessary. He argues the guarantee that Allen would never be released from prison, and the signal the court wanted to send to the victims that Allen's crimes were being punished separately, could have been achieved without the court imposing the maximum consecutive sentences. While it is true that a shorter sentence might also guarantee that Allen would never be released from prison, a shorter sentence would not benefit Allen unless he outlived the term of initial confinement, in which case the sentencing court's legitimate objective would be defeated. The court agreed with the PSI author's description of Allen as a "classic sexual predator." It noted the lasting harm to the victims, the need to guarantee there would be no additional victims, and the need for society to appreciate that this conduct is "reprehensible, atrocious, of incredible harm." Imposing, in effect, a life sentence is permitted if the court identifies a permissible goal and the sentence will accomplish that goal. *See* ***State v. Ramuta***, 2003 WI App 80, ¶¶24-25, 261 Wis. 2d 784, 661 N.W.2d 483. Because the sentencing court exercised its discretion by considering the facts and circumstances of this case in light of the applicable legal principles, this court follows the consistent and strong public policy against interfering with its discretion. *See* ***State v. Gallion***, 2004 WI 42, ¶18, 270 Wis. 2d 535, 678 N.W.2d 197.

¶10 Finally, Allen contends the sentence is unduly harsh and thus unconstitutional. A sentence is unduly harsh only when it is so excessive and unusual and 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. ***State v. Davis***, 2005 WI App 98, ¶21, 281 Wis. 2d 118, 698 N.W.2d 823. The question is not whether this court would have imposed the same sentence as appellate courts do not substitute their preference for a particular sentence. ***Cunningham v. State***, 76 Wis. 2d 277, 280-81, 251 N.W.2d 65 (1977). Given the range of sentences the court could impose, the legislature intended the maximum sentences to be reserved for the more aggravated breaches of the statutes. *See* ***McCleary v. State***, 49 Wis. 2d 263, 275, 182 N.W.2d 512 (1971). However, it is the sentencing court's obligation to consider the seriousness of the offenses and the danger Allen poses to the public. When the maximum consecutive sentences are supported by the record and the sentencing court's reasoning, the resulting sentence is not unduly harsh. *See* ***State v. Peters***, 192 Wis. 2d 674, 698, 534 N.W.2d 867 (Ct. App. 1995).

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2013-14).