COURT OF APPEALS
DECISION
DATED AND FILED

March 1, 2018

Sheila T. Reiff
Clerk of Court of Appeals

Appeal No. 2017AP777-CR **Cir. Ct. No. 2015CF3534**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LUIS ROBERT VALDEZ,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: ELLEN R. BROSTROM and JEFFREY A. WAGNER, Judges. *Affirmed*.

Before Lundsten, P.J., Blanchard and Fitzpatrick, JJ.

¶1 PER CURIAM. Luis Robert Valdez appeals a judgment convicting him of first-degree sexual assault of a child and exposing genitals to a child, and an order denying his postconviction motion requesting sentencing relief.[1] Valdez argues that the sentencing court erroneously exercised its discretion and that his sentence was unduly harsh. We disagree and affirm.

¶2 This case involves the sexual assault of a four-year-old girl, the victim, by Valdez, her step-grandfather. The victim stayed at the home of her grandmother and Valdez almost every weekend. The assaults came to light when the victim told her mother that Valdez had pulled down her pants and kissed her "butt," by which she meant her vagina. The victim also reported that Valdez pulled down his pants and showed her his "butt," meaning his penis. Valdez threatened that, if she told anyone, she would no longer be able to go to her grandparents' house.

¶3 The State charged Valdez with one count of first-degree sexual assault of a child by means of sexual intercourse, and one count of exposing genitals to a child. First-degree sexual assault of a child is a Class B felony with a maximum sentence of sixty years. WIS. STAT. §§ 948.02(1); 939.50(3)(b) (2015-16).[2] Because the first-degree sexual assault charge alleged an act of sexual intercourse, it carried a twenty-five-year mandatory minimum term of initial confinement. WIS. STAT. §§ 948.02(1)(b); 939.616(1r). The definition of sexual

[1] The Honorable Ellen R. Brostrom presided at Valdez's jury trial and sentencing hearing and entered the judgment of conviction. The Honorable Jeffrey A. Wagner entered the order denying Valdez's postconviction motion.

[2] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

intercourse includes "vulvar penetration as well as cunnilingus, fellatio or anal intercourse … or any other intrusion, however slight … into the genital or anal opening…." WIS. STAT. § 948.01(7)(a).

¶4 After the State presented its case to the jury, Valdez moved for a directed verdict on the ground that the State had not introduced any evidence of sexual intercourse. The State informed the court that the medical definition of vulva was "female external genitalia," arguing that the term was sufficiently general "to include the entire genitalia area, including [the] pubic mound." The circuit court found there was specific evidence that Valdez had oral contact with the victim's "vaginal area" or "pubic mound" but expressed concern that, absent a statutory definition of "vulva" or "clitoris," the victim's testimony was not specific enough to support an instruction for sexual intercourse. After a lengthy and considered discussion between the court and parties, the court granted the defense's motion with respect to the sexual intercourse charge "out of an abundance of caution," and allowed the State to amend the charge to allege sexual contact.[3] An act of first-degree sexual assault alleging sexual contact rather than intercourse is also a Class B felony, but does not carry the twenty-five-year mandatory minimum. WIS. STAT. § 948.02(1)(e). The jury found Valdez guilty of the first-degree sexual assault charge as amended, and of exposing genitals to a minor.

¶5 At sentencing, the State recommended a twenty-five-year term of initial confinement, stating that, while it understood the circuit court's ruling on

[3] In pertinent part, WIS. STAT. § 948.01(5)(a)1. defines sexual contact as "[i]ntentional touching by the defendant or, upon the defendant's instruction, by another person, by the use of any body part or object, of the complainant's intimate parts."

the sexual intercourse charge, "what this case comes down to is that this Defendant put his mouth on her vagina, and I think the legislature intended that to be a 25 mandatory minimum, and that's why I'm asking for that sentence." The court found the offense to be "very, very grave," and said it agreed with the State "that the legislative policy that is expressed in the original charge of a 25-year mandatory period of initial confinement matches the recognition of how serious an offense this is." The court stated that the amendment of the charge did not "really change the basic behavior" which involved a young child "who you put your mouth on her vagina and exposed your penis to her. A child who was in a position of trust with you…." The court imposed a forty-year bifurcated sentence on the first-degree sexual assault, with twenty-five years' initial confinement followed by fifteen years' extended supervision. For exposing his penis, Valdez received a three-year concurrent sentence.

¶6 Valdez filed a postconviction motion alleging that he was entitled to resentencing on the ground that the circuit court erroneously exercised its discretion or, in the alternative, a sentence modification because the sentence imposed was unduly harsh. The postconviction court denied the motion in a written decision and order. Valdez appeals.

The Circuit Court Properly Exercised Its Discretion in Sentencing Valdez.

¶7 Valdez claims that the sentencing court erroneously exercised its discretion by, in effect, imposing the mandatory minimum applicable to a sexual assault involving intercourse, and by failing to adequately justify its sentence on the record.

¶8 It is a well-settled principle of law that sentencing is committed to the circuit court's discretion. ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535,

678 N.W.2d 197. A sentencing court properly exercises its discretion when it engages in a reasoning process that "depend[s] on facts that are of record or that are reasonably derived by inference from the record" and imposes a sentence "based on a logical rationale founded upon proper legal standards." ***McCleary v. State***, 49 Wis. 2d 263, 277, 182 N.W.2d 512 (1971). The sentencing court considers the primary factors of the gravity of the offense, the character of the offender, and the protection of the public. ***State v. Harris***, 2010 WI 79, ¶28, 326 Wis. 2d 685, 786 N.W.2d 409. The weight to be given each factor is committed to the circuit court's discretion. ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76.

¶9 Review of a sentencing decision is limited to determining whether there was an erroneous exercise of discretion and "the defendant bears the heavy burden of showing that the circuit court erroneously exercised its discretion." ***Harris***, 326 Wis. 2d 685, ¶30. We afford the sentencing court a strong presumption of reasonability, and if discretion was properly exercised, we follow "a consistent and strong policy against interference" with the court's sentencing determination. ***Gallion***, 270 Wis. 2d 535, ¶18 (quoting ***McCleary***, 49 Wis. 2d. at 278.)

¶10 Valdez's primary complaint is that the circuit court deemed Valdez's conduct "to consist of Sexual Assault with sexual intercourse" and "merely adopt[ed] the mandatory sentencing guideline" for a conviction involving sexual intercourse. To the extent Valdez argues that the sentencing court impermissibly considered the mandatory minimum for the original charge, we are not persuaded.

¶11 The sentencing court stated the primary sentencing factors and found the offense to be "very, very grave," based on the facts of record, including

Valdez's specific conduct, the age of the child, and Valdez's position of trust. In determining offense severity, the sentencing court referred to the legislature's statutory pronouncement mandating a twenty-five-year minimum sentence for very similar conduct. The court stated:

> And I think that wrapped up in the legislature's sentencing guidelines on the original charge is this basic dynamic, how vulnerable children are. They don't understand. They are compliant. They follow directions. They're completely innocent and really are defenseless against this kind of activity.
>
> And then, once it happens, it can be very, very difficult for the truth to be ferreted out and addressed. In this case, I believe that it was.

¶12 The legislature's penalty scheme is relevant to the gravity of a given offense and the circuit court's comments reflect an appropriate consideration of the policies underlying that legislative pronouncement.[4] The circuit court was well aware that the crime of conviction did not carry a mandatory minimum but determined that, in light of the overlapping dynamics and policy considerations, a similar punishment was warranted on the facts of this case. We see no impropriety.

¶13 We also reject Valdez's contention that the sentencing court erroneously exercised its discretion because it "failed to specify on the record adequate factors that called for such a harsh sentence." The circuit court's sentence permissibly focused on the aggravated offense severity. *See* ***Ziegler***, 289

[4] We observe that the legislature classified both the original charge and the crime of conviction as Class B felonies carrying a sixty-year maximum sentence. For convictions based on either intercourse or contact, the circuit court may, in its discretion, impose up to forty years of initial confinement.

Wis. 2d 594, ¶23. The victim was four years old. The contact did not involve an over-the-clothes touching. Valdez pulled down the victim's pants and kissed her vagina. In addition, this was not an isolated sexually inappropriate incident. Along with Valdez's repeated requests of the victim to let him kiss her "butt," he showed her his penis. Not only did Valdez abuse the victim's love and trust, he added to her distress by threatening that, if she told anyone, the victim's visits to her grandmother's house would stop. Additionally, the circuit court was not impressed with Valdez's character, stating that he was not "anywhere near accepting the reality of what has gone on here," and that he had exhibited cognitive distortions on the Bumby assessment.[5]

The Circuit Court's Sentence Was Not Unduly Harsh.

¶14 Valdez maintains that he is entitled to a sentence modification because his forty-year sentence is unduly harsh. A sentence is unduly harsh only if the length of the sentence imposed by a circuit court 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." ***State v. Davis***, 2005 WI App 98, ¶15, 281 Wis. 2d 118, 698 N.W.2d 823 (quoting ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975)). In determining whether a sentence is unduly harsh or excessive, we review the circuit court's sentence for an erroneous exercise of discretion, and we are to presume that the sentencing court acted reasonably. ***State v. Scaccio***, 2000 WI App 265, ¶17, 240 Wis. 2d 95, 622 N.W.2d 449. "A

[5] The Bumby Cognitive Distortion Scale is a self-reported measure of an offender's beliefs related to sexual offending or rape, asking the offender if he or she agrees or disagrees with a list of statements.

sentence well within the limits of the maximum sentence is unlikely to be unduly harsh or unconscionable." ***Id.***, ¶18.

¶15 In this case, the circuit court imposed a forty-year sentence which is well within the sixty-three-year maximum penalty. The sentencing court relied on the facts of record and the correct law and reached a reasonable decision. *See* ***McCleary***, 49 Wis. 2d at 277. Valdez has not shown any "unreasonable or unjustified basis" for his sentence that would cause us to question its propriety. *See* ***State v. Taylor***, 2006 WI 22, ¶18, 289 Wis. 2d 34, 710 N.W.2d 466 (quoting ***State v. Borrell***, 167 Wis. 2d 749, 782, 482 N.W.2d 833 (1992)).

By the Court.—Judgment and order affirmed.

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