COURT OF APPEALS
DECISION
DATED AND FILED

March 6, 2018

Sheila T. Reiff
Clerk of Court of Appeals

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* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2017AP385-CR **Cir. Ct. No. 2014CF1334**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CAYETANO VILLANUEVA, JR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DANIEL L. KONKOL and M. JOSEPH DONALD, Judges. *Affirmed*.

Before Brennan, P.J., Brash and Dugan, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. Cayetano Villanueva, Jr., appeals a judgment of conviction and a postconviction order. He contends that his trial counsel was ineffective for failing to object when the sentencing court made remarks that he says show it penalized him for going to trial. Because we conclude that the remarks properly related to the circuit court's consideration of the gravity of the offense and its effect on the victim, we reject his claims and affirm.

Background

¶2 The State charged Villanueva with one count of sexual exploitation of a child and one count of possessing a firearm while a felon. He pled guilty to the latter count and proceeded to a jury trial on the former. At trial, the State presented evidence that Villanueva met M.M., an autistic sixteen-year-old boy, in an on-line gaming environment. Soon after they met, Villanueva demanded videos of M.M. masturbating and pictures of M.M. naked. M.M. complied with the demands, fearing that Villanueva would otherwise carry out a threat to hack into and crash M.M.'s PlayStation account. The jury found Villanueva guilty as charged of sexually exploiting a child.

¶3 The matter proceeded to sentencing on both convictions. The circuit court imposed a twenty-two year term of imprisonment for sexually exploiting a child and a concurrent two-year term of imprisonment for possessing a firearm as a felon.[1]

[1] The Honorable Daniel L. Konkol presided over Villanueva's plea and trial and imposed sentence in this matter.

¶4 Villanueva filed a postconviction motion seeking resentencing. As grounds, he claimed that his trial counsel was ineffective for failing to object when the circuit court allegedly considered an improper sentencing factor, namely the effect on M.M. of testifying at trial. The sentencing error arose, Villanueva argued, when the circuit court said: "[b]ut certainly it was embarrassing for [M.M.]. You can tell as he was testifying this was very embarrassing. This was a very embarrassing situation." The circuit court denied relief in a written order entered without a hearing, and Villanueva appeals.[2]

Discussion

¶5 As is well settled, a circuit court exercises its discretion at sentencing. *See* ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. In fashioning a sentence, the circuit court must consider the primary sentencing factors of "the gravity of the offense, the character of the defendant, and the need to protect the public." ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. The circuit court may also consider a wide range of other factors concerning the defendant, the offense, and the community. *See* ***id.*** A circuit court erroneously exercises its discretion, however, if the circuit court bases a sentence on improper factors. *See* ***State v. Loomis***, 2016 WI 68, ¶31, 371 Wis. 2d 235, 881 N.W.2d 749.

¶6 Villanueva believes that the circuit court wrongly sentenced him in reliance on its view "that the victim had been embarrassed by having to testify at defendant's jury trial." Such a consideration was improper, Villanueva says,

[2] The Honorable M. Joseph Donald presided over the postconviction proceedings and entered the order denying resentencing.

because it impermissibly resulted in a sentence based on the defendant's exercise of the right to a jury trial. *See* ***Kubart v. State***, 70 Wis. 2d 94, 97, 233 N.W.2d 404 (1975) ("A defendant cannot receive a harsher sentence solely because he has availed himself of the important constitutional right of trial by jury."). He contends his trial counsel erred by failing to object to the circuit court's sentencing remarks acknowledging the victim's embarrassment.

¶7 To show ineffective assistance of counsel, a defendant must prove both that trial counsel's performance was deficient and that the deficiency was prejudicial. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Whether counsel's performance was deficient and whether the deficiency was prejudicial are questions of law that we review *de novo*. ***State v. Johnson***, 153 Wis. 2d 121, 128, 449 N.W.2d 845 (1990). When a convicted person bases a claim of trial counsel's ineffectiveness on a failure to challenge a circuit court's action, the person must demonstrate that the circuit court erred. *See* ***State v. Ziebart***, 2003 WI App 258, ¶15, 268 Wis. 2d 468, 673 N.W.2d 369. A claim based on failure to challenge a correct circuit court action cannot show either deficient performance or prejudice. *See* ***id.***

¶8 As a preliminary matter, we reject Villanueva's premise that a sentencing court errs by considering the effect of testifying on a victim. A sentencing court may properly consider how a crime has affected the victim, *see* ***State v. Payette***, 2008 WI App 106, ¶40, 313 Wis. 2d 39, 756 N.W.2d 423, and "[t]he court process is a predictable consequence of conduct which results in a criminal charge. Hence, if a victim is affected specifically because the victim becomes a witness, a court can reasonably consider that effect on the victim as part of the overall sentencing calculus." ***Id.***, ¶41. In light of ***Payette***, Villanueva

is simply wrong in contending that a circuit court errs by considering the effect on a victim of testifying at trial.

¶9 Moreover, were we to conclude that ***Payette*** does not dispose of the issue presented, we would nonetheless reject Villanueva's claim for sentencing relief. Villanueva contends that the circuit court's sentencing remarks focused on the effect that the trial had on the victim, but Villanueva has misconstrued the remarks by taking them out of context. The excerpts that Villanueva quotes in his brief are plucked from the circuit court's broader discussion about the gravity of the offense and were an integral part of the circuit court's assessment of that factor.

¶10 In context, the circuit court explained:

> With regard to [the conviction for sexual exploitation of a child], that's a very serious offense [] because a child is involved. It's even more serious here because the defendant was preying on a naïve victim and there's a saying in the law that you take the victims as you get them. Here, this victim was autistic. One of his ways of dealing with that was to sort of escape into on-line gaming. Now he finds it difficult to be able to do that. You deprived that person of something very important that was in his life. He's been traumatized. He finds it difficult to trust people. He already has an issue with autism. Now he has this issue.
>
> But certainly it was very embarrassing for him. You can tell as he was testifying that this was very embarrassing. This was a very embarrassing situation. And as was indicated, there is concern that he felt naïve to be manipulated. I think he had a real concern that the photos or videos, embarrassing photos or videos, could go over the whole internet. Everyone knows once that happens they don't come back, they're out there forever.
>
> And this young man -- not quite a man, he's only 17 -- would have to grow up knowing that those are out there. It could come back to haunt him at any time. That's terrible, and this wasn't something that the defendant just

> did one time. He contacted him, he got some pictures, contacted him again.

¶11 Contrary to Villanueva's contention, the opening three sentences of the middle paragraph quoted above—the only portion of the circuit court's sentencing remarks cited and discussed in Villanueva's briefs—do not show that the sentencing court drew a negative inference because Villanueva chose to go to trial and "the victim had to testify." The remarks simply continue the discussion about the gravity of the offense that the sentencing court began in the preceding paragraph. In context, the remarks in their totality unambiguously reflect the sentencing court's conclusion that the sexual exploitation at issue here was particularly serious in part because Villanueva embarrassed M.M. by tricking him, manipulating him, and making him feel vulnerable in a way that could haunt him for the rest of his life. This consideration was entirely proper. As courts of this state have long recognized, the effect of a crime upon the victim is relevant to the gravity of the offense. *See* ***Gallion***, 270 Wis. 2d 535, ¶65 (citing ***State v. Voss***, 205 Wis. 2d 586, 595-96, 556 N.W.2d 433 (Ct. App. 1996)).

¶12 Because the sentencing court did not err when it considered the effect that Villanueva's crime had on the victim, trial counsel had no duty to object when the sentencing court did so. *See* ***State v. Wheat***, 2002 WI App 153, ¶14, 256 Wis. 2d 270, 647 N.W.2d 441 (failure to raise an issue is not deficient performance if the issue lacks merit). Accordingly, we affirm.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2015-16).