



OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS

110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688

Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT I

December 4, 2019

To:

Hon. Ellen R. Brostrom
Circuit Court Judge, Br. 6
821 W. State St.
Milwaukee, WI 53233

Karen A. Loebel
Deputy District Attorney
821 W. State St.
Milwaukee, WI 53233

Hon. Jeffrey A. Wagner
Circuit Court Judge
Milwaukee County Courthouse
901 N. 9th St.
Milwaukee, WI 53233

Kara L. Mele
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

John Barrett
Clerk of Circuit Court
821 W. State Street, Room 114
Milwaukee, WI 53233

Urszula Tempska
Law Office of Urszula Tempska
P.O. Box 11213
Shorewood, WI 53211-0213

You are hereby notified that the Court has entered the following opinion and order:

2018AP165-CR

State of Wisconsin v. Eliu Rivera (L.C. # 2015CF3509)

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

Summary disposition orders 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).

Eliu Rivera appeals a judgment entered after a jury found him guilty of two counts of first-degree sexual assault of a child younger than thirteen years of age. He also appeals postconviction orders denying his claims for sentencing relief or, alternatively, a new trial. Upon

our review of the briefs and record, we conclude at conference that this matter is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2017-18).¹ We summarily affirm.

The State alleged in a criminal complaint that between the dates of October 3, 2003, and June 27, 2005, Rivera had sexual contact with one of his granddaughters, S.I.C., born in 1998. The State further alleged that between the dates of June 1, 2015, and June 27, 2015, Rivera had sexual contact with another of his granddaughters, K.C., born in 2005. The matters proceeded to a jury trial.

At trial, S.I.C. testified that when she was between the ages of five years old and seven years old, she sometimes spent the night at her grandparents' home. She said that on one of those nights, Rivera touched her breast area both over and under her clothing while he was intoxicated. K.C. testified that in June 2015, just before her tenth birthday, she was watching television with Rivera when he touched her chest over her clothing. S.C., who is Rivera's daughter and the mother of both S.I.C. and K.C., testified and described how the girls disclosed the sexual assaults. S.C. also testified that Rivera sexually assaulted her when she was a child. Rivera testified on his own behalf and denied committing sexual assaults. The jury found him guilty as charged.

At the sentencing hearing, the circuit court first acknowledged receipt of written victim impact statements from S.C., who said that her daughters' allegations had fractured the family and that some family members were pressuring S.I.C. to recant. S.I.C. then made a statement to the court. She said she was angry that she had been required to testify at trial because "Rivera

¹ All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

would never hurt [her]” or her sister. S.I.C. went on to say that she was forced by S.C. to testify against Rivera and “to go through something ... in front of all these people which wasn’t really true.”

The parties also spoke. The State argued that the circuit court should impose six to nine years of initial confinement and seven years of extended supervision based on the nature of Rivera’s criminal conduct, its effect on the victims and their family, and Rivera’s need for treatment. Rivera did not offer a sentencing recommendation but instead emphasized his position that he was not guilty and that S.C. had concocted the allegations based on her long history of hostility towards him.

The circuit court began its remarks by stating that it understood Rivera’s version of events but that the circuit court accepted the jury’s verdicts and would sentence Rivera for the crimes that the jury found he committed. The circuit court went on to note that those crimes were “obviously very serious” and that each conviction carried a maximum term of sixty years of imprisonment. After explaining the sentencing objectives and discussing numerous aggravating and mitigating factors, the circuit court imposed two concurrent twelve-year terms of imprisonment, each bifurcated as five years of initial confinement and seven years of extended supervision.

Rivera filed a postconviction motion seeking sentence modification on the ground that the circuit court erroneously exercised its sentencing discretion by “[not] considering or giving any weight” to S.I.C.’s sentencing remarks. Rivera alternatively moved for a new trial on the ground that the jury was misled by WIS JI—CRIMINAL 140, the pattern jury instruction concerning the burden of proof and the presumption of innocence at a criminal trial. The circuit

court denied Rivera's claims without a hearing and then denied his motion to reconsider. He appeals.²

We begin with Rivera's claim that the circuit court erroneously exercised its sentencing discretion. A defendant must meet a heavy burden to prevail on such a claim. See *State v. Harris*, 2010 WI 79, ¶30, 326 Wis. 2d 685, 786 N.W.2d 409. We will affirm an exercise of sentencing discretion so long as "the facts of record indicate that the [circuit] court engaged in a process of reasoning based on legally relevant factors." *State v. Odom*, 2006 WI App 145, ¶7, 294 Wis. 2d 844, 720 N.W.2d 695 (citation omitted). We defer to the circuit court's "great advantage in considering the relevant factors and the demeanor of the defendant." *State v. Echols*, 175 Wis. 2d 653, 682, 499 N.W.2d 631 (1993).

The principles guiding the circuit court's exercise of sentencing discretion are well-settled. The circuit court is required to identify the sentencing objectives, which may "include, but are not limited to, the protection of the community, punishment of the defendant, rehabilitation of the defendant, and deterrence to others." *State v. Gallion*, 2004 WI 42, ¶40, 270 Wis. 2d 535, 678 N.W.2d 197. In seeking to fulfill the sentencing objectives, 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 sentencing court may also consider a wide range of other

² Rivera raised a variety of claims in his postconviction motion that he does not pursue on appeal. Specifically, he alleged that S.I.C.'s remarks at sentencing constituted both a new factor and newly discovered evidence and also reflected that he was sentenced on the basis of inaccurate information. He additionally alleged that his trial counsel was ineffective for failing to present S.I.C.'s recantation at trial. Because Rivera does not renew these claims in this court, we do not address them further.

factors concerning the defendant, the offense, and the community. *See id.* The circuit court has discretion to determine both the factors that are relevant in imposing sentence and the weight to assign to each relevant factor. *See State v. Stenzel*, 2004 WI App 181, ¶16, 276 Wis. 2d 224, 688 N.W.2d 20.

The record shows that the circuit court fully complied with its sentencing obligations. It identified treatment, punishment, and deterrence as the sentencing goals, and the circuit court discussed the primary sentencing factors and their relevance to those goals. The circuit court found that the crimes Rivera committed were serious but, recognizing that Rivera did not use force or penetration or repeatedly assault the same child, the circuit court determined that his crimes were “not as egregious as many that [the circuit court] see[s].” The circuit court discussed Rivera’s character at length and viewed it as largely mitigating, noting particularly his long-term marriage and his “excellent work history.” The circuit court also found that, although Rivera had a history of drug offenses, that history was “very dated” and, in the circuit court’s view, showed that he had “move[d] out of a drug-related lifestyle.” Turning to the need to protect the public, the circuit court found that while Rivera had victimized vulnerable members of his family, he posed a diminished risk of committing future offenses because he was sixty-six years old and suffered from a variety of health conditions.

The circuit court appropriately considered probation as the first sentencing alternative. *See Gallion*, 270 Wis. 2d 535, ¶25. The circuit court concluded, however, that probation would unduly depreciate the gravity of Rivera’s conduct. Instead, the circuit court determined that the goals of sentencing required that Rivera serve concurrent twelve-year terms of imprisonment.

Rivera's primary argument is that the circuit court did not "consider or weigh" the sentencing remarks offered by S.I.C. We first observe that this argument does not identify an error. The circuit court has discretion "to discuss only th[e] factors it believes are relevant," and to weigh those factors as the circuit court sees fit. *See Stenzel*, 276 Wis.2d 224, ¶16. Regardless, the circuit court in fact did consider S.I.C.'s remarks. It simply did not view them as significant to the sentencing decision. The circuit court reminded Rivera that it was "not the finder of fact here. The jury is." The circuit court went on to say that the jury believed the victims' trial testimony and that the circuit court "had no qualms about accepting" that testimony. The circuit court was not required to give any additional consideration to S.I.C.'s sentencing statements. *See id.*

Relatedly, Rivera argues that the circuit court failed to conduct an "individualized sentencing" because "S.I.C.'s sentencing[] statements were clearly individualized to [Rivera] and ... affected all the primary sentencing factors" but did not receive "proper mitigating weight." We reject this argument. Individualized sentencing refers to the circuit court's duty to tailor a sentence "based on the facts of the case by identifying the most relevant factors and explaining how the sentence imposed furthers the sentencing objectives." *See Harris*, 326 Wis.2d 685, ¶29. In short, the circuit court, not the witnesses, individualizes a sentence. The circuit court did so here. It focused on the nature and gravity of the offenses, acknowledging that Rivera's offenses were "limited" but recognizing that the victims "were young children ... who trusted [him]." The circuit court also considered Rivera's personal characteristics and the risks he posed, and it explained why the concurrent sentences selected furthered the primary goals of sentencing. The circuit court clearly fashioned sentences based on an assessment of Rivera and the particular circumstances of his case. Any contrary suggestion is unequivocally wrong.

We also reject Rivera's suggestion that the circuit court failed to consider mitigating information. The circuit court selected Rivera's age, health, employment, and stable marital relationship as the relevant mitigating factors here. It is true that the circuit court did not treat S.I.C.'s statements as mitigating, but the determination of whether a factor is mitigating rests in the circuit court's discretion. See *State v. Thompson*, 172 Wis. 2d 257, 267, 493 N.W.2d 729 (Ct. App. 1992).

Finally, we reject Rivera's contention that the circuit court somehow placed "unlawful reliance on the guilty verdicts." To the contrary, "a court may not sentence according to its desire to replace a jury's conclusion with its own." See *State v. Bobbitt*, 178 Wis. 2d 11, 18, 503 N.W.2d 11 (Ct. App. 1993). To do so "would offend the fundamental principles of fairness and due process." *Id.* Far from acting "unlawful[ly]," the circuit court here properly accepted the verdicts and imposed sentences in accordance with the jury's findings.

In sum, the circuit court sentenced Rivera for the crimes that the jury found he committed. The circuit court considered the primary sentencing factors, discussed additional aggravating and mitigating factors that it viewed as significant to the sentencing decision, and selected sentences that furthered the sentencing goals. We therefore conclude that the circuit court properly exercised its sentencing discretion, and we reject Rivera's arguments to the contrary.

Rivera also claims that he is entitled to a new trial because the circuit court instructed the jury in accordance with WIS JI—CRIMINAL 140. He contends that the instruction confuses jurors, misstates the law, and reduces the State's burden of proof to something less than the constitutionally required standard of "beyond a reasonable doubt." While this appeal was

pending, the supreme court rejected these arguments. *See State v. Trammell*, 2019 WI 59, ¶¶2, 37, 387 Wis. 2d 156, 928 N.W.2d 564. We are bound by the decision in *Trammell*. *See Cook v. Cook*, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997). We therefore reject Rivera’s claim for a new trial based on the circuit court’s use of WIS JI—CRIMINAL 140 to instruct the jury in this case.³ For all the foregoing reasons, we affirm.

IT IS ORDERED that the judgment and postconviction orders are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary opinion will not be published.

Sheila T. Reiff
Clerk of Court of Appeals

³ Rivera’s appellate counsel was also the appellant’s attorney in *State v. Trammell*, 2019 WI 59, 387 Wis. 2d 156, 928 N.W.2d 564. This court and the parties would have been well-served had appellate counsel notified this court of the decision and its likely effect on Rivera’s claim for a new trial.