COURT OF APPEALS
DECISION
DATED AND FILED

February 13, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-1267-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

CHARLES A. EGGENBERGER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Outagamie County: JAMES T. BAYORGEON, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 HOOVER, P.J. Charles Eggenberger appeals his conviction for three counts of first-degree sexual assault of a child in violation of WIS. STAT.

§ 948.02(1).[1] He also appeals an order denying him postconviction relief. He argues that statements accepted into evidence violated his ***Miranda***[2] rights; that videotaped evidence was improperly introduced; and that individuals were improperly allowed to testify at the sentencing hearing. We reject Eggenberger's arguments in substantial part and conclude that any error was harmless. We affirm the judgment and order.

DISCUSSION

¶2 Eggenberger was charged with sexually assaulting his ten-year-old step-granddaughter, Amanda. Additional relevant facts are noted below.

A. POST-*MIRANDA* STATEMENTS

¶3 Eggenberger argues that the circuit court erred when it admitted into evidence statements taken after he exercised his right to an attorney, violating his ***Miranda*** rights. He challenges the following testimony by sergeant Thomas Poss, describing a conversation that occurred after Eggenberger invoked his right to counsel while in police custody:

> Q Now, on the 6th of May, did you have some contact with the defendant?
>
> A Yes, I did.
>
> Q Did he make an inquiry of you and Investigator Woodkey when you had contact with him?
>
> A Yes, he did.
>
> Q What did he inquire?
>
> A He asked what kind of evidence we had.

[1] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise indicated.

[2] *See* ***Miranda v. Arizona***, 384 U.S. 436 (1966).

> Q Did you or Investigator Woodkey say something to him?
>
> A Investigator Woodkey said we had a taped cassette of the conversation that Amanda made to [Eggenberger].
>
> Q Telephone conversation?
>
> A Correct.
>
> Q Did he make any comment in response?
>
> A He said: Yeah, I figured so.

¶4 This testimony was based upon the following exchange that occurred after Eggenberger invoked his right to counsel:

> Woodkey: We wouldn't be here, just so you know, if we didn't have a solid case, okay? And why I was hoping you would have talked to us was because sometimes there's reasons for things going on in a person's life and now I'm not going to get the opportunity to find this out which would have been relayed to the district attorney's office and so [Eggenberger responded] Okay, well no, we're not going to talk to you ….
>
> Eggenberger: Please, let me finish. You guys are the pros, you do this everyday. … I should be represented by an attorney …. I got nothing to hide.
>
> Woodkey: I respect that. You do have that right and um, um, and you have invoked your rights and I respect that and basically from here, um, the process will start because you're going to be in jail and, ah-
>
> Eggenberger: I don't believe this. I don't believe this.
>
> Woodkey: And so, we do have the evidence here, and--
>
> Eggenberger: Evidence, what evidence?
>
> Woodkey: Well, the evidence is we taped Amanda's telephone conversation before we even picked you up.
>
> Eggenberger: Yeah, I figured you did that.

¶5 Eggenberger complains that the police tactics constituted the "functional equivalent" of unlawful interrogation, relying on ***Rhode Island v. Innis***, 446 U.S. 291, 300-01 (1980). Eggenberger contends that the statement

"sometimes there's reasons for things going on in a person's life" was the functional equivalent of "What was going on in your life that caused you to sexually assault Amanda?" Additionally, he argues that the police officer's expressed disappointment that he would not be able to relay the mitigating information to the district attorney was the functional equivalent of "Don't you want to tell me why you assaulted Amanda so I can help you out here with the district attorney?" Eggenberger then discusses another subsequent conversation to demonstrate the police intent to coerce him into admissions.

¶6 Recognizing that ***Innis*** did not analyze the police officer's subjective intent, Eggenberger argues that the case condemns a practice that the police should know is reasonably likely to elicit an incriminating response. He contends that the police should have known that continued conversation would coerce Eggenberger because he invoked his right to counsel twice and was visibly nervous, as demonstrated by his inability to sign his name on the ***Miranda*** form. Further, he argues that the police officers also took advantage of Eggenberger's post-traumatic stress disorder for which he was receiving treatment and coerced him by withholding his medication for that condition.

¶7 The State responds that Woodkey's remarks were not the functional equivalent of interrogation and, therefore, Eggenberger's Fifth Amendment right to remain silent was not violated. The State contends that, in the testimony objected to, Eggenberger does not admit any of the statements made in the telephone call nor does he admit any of the charges against him. Even if admission of the statements was error, the State argues that it was harmless because the statements were de minimis compared to the other evidence against Eggenberger. We agree that Eggenberger's Fifth Amendment right was violated, but that the error was harmless.

¶8 The Fifth Amendment protects an accused's right to be free from compelled self-incrimination, and this protection extends to the states via the Fourteenth Amendment. *See* ***State v. Cunningham***, 144 Wis. 2d 272, 276, 423 N.W.2d 862 (1988). The State may not use statements obtained during custodial interrogation unless they adhere to the requirements set forth in ***Miranda***. ***Cunningham***, 144 Wis. 2d at 276. Interrogation under ***Miranda*** includes not only express questioning of a suspect in custody, but also the "functional equivalent" of interrogation. ***Id.*** at 277. Police conduct or words that "the police should know are reasonably likely to elicit an incriminating response from the suspect" is the functional equivalent of interrogation and thus inadmissible. ***Id.*** at 277 (quoting ***Innis***, 446 U.S. at 300-01). This definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police. ***Id.***

¶9 In ***Cunningham***, the court viewed the ***Innis*** "functional equivalent" test as an objective foreseeability standard, taking into consideration the police officer's specific knowledge of the accused. ***Id.*** at 278.

> [I]f an objective observer (with the same knowledge of the suspect as the police officer) could, on the sole basis of hearing the officer's remarks or observing the officer's conduct, conclude that the officer's conduct or words would be likely to elicit an incriminating response, that is, could reasonably have had the force of a question on the suspect, then the conduct or words would constitute interrogation.

Id. at 278-79. Further, the words "incriminating response" mean "any response—'whether inculpatory or exculpatory—that the *prosecution* may seek to introduce at trial.'" ***Id.*** at 279 (quoting ***Innis***, 446 U.S. at 301 n.5).

¶10 Although ***Innis*** did not conclusively list the factors that should be considered in determining whether a police practice is "functional interrogation,"

Cunningham did identify two factors from ***Innis***: (1) the length of conversation between the officer and the suspect (to show if the officer should have known that words would elicit an incriminating response) and (2) the person's emotional state (to show if he or she is susceptible to persuasion). *See* ***Cunningham***, 144 Wis. 2d at 281.

¶11 We first review whether the police conduct or statements constituted the "functional equivalent" of interrogation. We conclude that Eggenberger unequivocally exercised his right to remain silent. Although Eggenberger does not challenge the administrative statements and questions that occurred after invoking his rights, we conclude that the officers continued making non-administrative statements to Eggenberger about the case after he invoked his right to remain silent.

¶12 On the one hand, the length of the conversation was short, lasting only a few minutes. The environment was not particularly oppressive. The police gave Eggenberger the option whether he wanted the door open or shut, whether he wanted anything to drink, or whether he needed to see a doctor. Eggenberger let them decide whether to close the door and declined the other offers.

¶13 The foregoing notwithstanding, we conclude that the officer's statements were reasonably likely to elicit a response. The evidence demonstrates that Eggenberger was visibly nervous, the officers were aware of Eggenberger's post traumatic stress disorder, and they withheld his medication during questioning.[3] Although Woodkey did not expressly ask Eggenberger a question,

[3] Although the State contends that the officers had Eggenberger's medication if he needed it, the videotape shows that one officer explained that they would not give him his medication because they were unsure if the medication would impair his ability to waive or exert his ***Miranda*** rights.

we agree that his statements were calculated to invite explanations for the suggested purpose of mitigating the seriousness of Eggenberger's alleged conduct. Eggenberger did respond and his statements were introduced at trial.

¶14 The trial court found that the statements were made after Eggenberger had invoked his ***Miranda*** rights. However, it also found that Eggenberger made the statements voluntarily, not in response to any interrogation, and were therefore not prohibited by ***Miranda***. We conclude that the error was harmless for reasons explained following the discussion of the other challenged evidence.

B. HEARSAY STATEMENTS

¶15 Eggenberger next argues that Poss was inappropriately allowed to testify about one of Amanda's prior consistent statements and the jury inappropriately was allowed to view a forty-five-minute videotape of Amanda's testimony.[4] He contends that the videotape evidence was not a prior consistent statement and was therefore inadmissible under ***State v. Mainiero***, 189 Wis. 2d 80, 102-03, 525 N.W.2d 304 (Ct. App. 1994). Alternatively, Eggenberger asserts that the videotaped statements lacked probative value and needlessly presented cumulative evidence inadmissible under WIS. STAT. § 904.03.

¶16 Eggenberger submits that the greatest problem with the videotape evidence is that it violated his right to cross-examine witnesses as protected by the Sixth Amendment. He asserts that the statements were not made under oath and counsel lacked a meaningful opportunity to cross-examine the victim because her

[4] Eggenberger refers to the videotaped statement as occurring on May 4, 1999. However, it occurred on May 7, 1999.

statement was videotaped. Eggenberger claims, without specifically identifying any objectionable statements, that "[a] review of the tape will reveal that during these forty-five minutes, there were numerous questions and answers which [Eggenberger's trial attorney] would have successfully kept from the jury on the grounds of hearsay, relevance, foundation and because the witness was being led."

¶17 The State responds that the videotape evidence was introduced to rebut Eggenberger's claim that Amanda was motivated to fabricate the story to get attention after her cousin's birth, or that she was improperly influenced by police scripted cue cards during an audiotaped telephone conversation between Amanda and Eggenberger. It asserts that the video contained largely the same information that Amanda testified to at trial and was presented in the audiotaped telephone conversation. The State argues that Eggenberger fails to identify any new information in the videotape that was not already introduced by other testimony.

¶18 Further, the State contends that Eggenberger's right to confrontation was not violated because the declarant, Amanda, was present in court and could have been recalled to the stand for cross-examination. Finally, the State submits that there is no reasonable possibility that the error contributed to the conviction. *See* ***State v. Jackson***, 216 Wis. 2d 646, 668, 575 N.W.2d 475 (Ct. App. 1998) (harmless error analysis also applies to whether the cumulative effect substantially outweighs the probative value); ***State v. Lomprey***, 173 Wis. 2d 209, 220-21, 496 N.W.2d 172 (Ct. App. 1992) (confrontation clause violations subject to harmless error analysis). We agree with the State's last two contentions.

¶19 We first address Eggenberger's confrontation complaint. "Where the purported declarant of the statement admitted into evidence is present in court and is subject to full and effective cross-examination concerning it, there is no

violation of the right to confrontation." ***Vogel v. State***, 96 Wis. 2d 372, 389-90, 291 N.W.2d 838 (1980). Eggenberger's counsel concedes that he declined to re-call Amanda to the stand after the videotape was shown as a matter of trial strategy, not because the court prevented him. Tough strategic choices do not implicate the confrontation clause. *See* ***id.*** at 391-92; ***State v. McDonald***, 50 Wis. 2d 534, 538, 184 N.W.2d 886 (1971) (a litigant's deliberate choice of strategy is binding and claim of error based on litigant's own choice will not be considered on appeal). Eggenberger's speculations about the potential results on cross-examination are not persuasive. We conclude that the videotaped statements and Poss's statements about the videotaped statements did not violate Eggenberger's right to confrontation.

¶20 Next, we address whether the statements were otherwise admissible. *See* ***State v. Hereford***, 195 Wis. 2d 1054, 1065-66, 537 N.W.2d 62 (Ct. App. 1995) (we will uphold the court's decision if a proper legal analysis supports the trial court's conclusion, even if the trial court applied a mistaken view of the law). WISCONSIN STAT. § 908.01(4)(a)2 provides that a prior consistent statement of a witness is not hearsay if: (1) the declarant testifies at trial and is subject to cross-examination; (2) the statement is consistent with the declarant's testimony; and (3) the statement is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive. *See also* ***Ansani v. Cascade Mtn., Inc.***, 223 Wis. 2d 39, 52, 588 N.W.2d 321 (Ct. App. 1998).

¶21 Both Poss and Amanda testified at trial and were subject to cross-examination. Eggenberger does not dispute that the statements were consistent with each declarant's testimony. However, the State all but openly concedes that

the statement fails to satisfy the third requirement of WIS. STAT. § 908.01(4)(a)2.[5] The State does not distinguish ***Mainiero*** or otherwise show that the videotaped statements were made prior to the alleged fabrication or improper influence. Rather, it contends that even if the videotape fails to satisfy the hearsay rules, the error is harmless. *See* ***id.*** at 104. For the reasons that follow, we agree.

C. TRIAL EVIDENCE HARMLESS ERROR ANALYSIS

¶22 Errors that affect constitutional rights do not require reversal if the State "prove[s] beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." ***Chapman v. California***, 386 U.S. 18, 24 (1967) (adopted in Wisconsin by ***State v. Harris***, 199 Wis. 2d 227, 252-53, 544 N.W.2d 545 (1996)). "[T]he court must be able to declare a belief that [the constitutional error] was harmless beyond a reasonable doubt." ***Id.*** The standard applies equally to nonconstitutional and constitutional errors. *See* ***State v. Dyess***, 124 Wis. 2d 525, 542-43 370 N.W.2d 222 (1988).

¶23 We review the evidence to determine whether admission of the statements was harmless beyond a reasonable doubt. *See* ***Harris***, 199 Wis. 2d at 254. In the present case, the following unchallenged evidence was presented to the jury.

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[5] WISCONSIN STAT. § 908.01(4)(a) provides in relevant part:

> A statement is not hearsay if:
> (a) The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is:
> ….
> 2. Consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive ….

¶24 Amanda testified about an incident when she was at Eggenberger's house alone with him. Eggenberger's wife, Amanda's maternal grandmother, had not yet come home from work. She told the jury that Eggenberger made her take off her clothes and then he touched her in the crotch with his tongue, moving his tongue in circles. She stated that they heard the grandmother drive into the driveway and he stopped and Amanda put her clothes back on.

¶25 Amanda testified that about two weeks later on May 1, 1999, she and her mother were at Eggenberger's house. Amanda stated that it was her mother's birthday and her mother left at some point in the afternoon to shower at home and get ready to go out to dinner. Amanda said that she stayed at her grandparents' house. Her grandmother went upstairs to shower while Amanda was in the basement with Eggenberger. Amanda testified that Eggenberger removed her shorts and underwear, sat her on the couch, kneeled before her and then touched her crotch with his tongue and moved his tongue in circles on her crotch. She said the contact stopped when the phone rang and she pulled on her clothes and ran upstairs.

¶26 Amanda also testified about other incidents when Eggenberger put his mouth on her bare breasts. On those occasions, she stated that he read "gross" jokes to her from a book. The book was recovered by police from Eggenberger's residence and was introduced into evidence. Additionally, she told the court about three incidents where he unzipped his pants and made her put her hand on his penis. She further testified that on another occasion, Eggenberger took his own and her clothes off and then told her to dance with him naked.

¶27 She explained that Eggenberger told her not to tell anyone or else something bad would happen. However, Amanda testified that one day on the

way home from school she told her school friend, Tracy. Amanda told the court that Tracy insisted that Amanda tell her mom or else Tracy would tell hers. Amanda said that she and Tracy went to Amanda's home and told Amanda's mom.

¶28 Amanda's mother testified to Amanda's demeanor and statements made when Amanda reported the incidents to her. Amanda's mother stated that Amanda came into the house with glassy eyes and Amanda's mother, who was speaking with her husband on the telephone, explained to him that something must have happened that day perhaps at school, and that she had to get off the phone.

¶29 Also admitted into evidence, and most damning, was a recorded telephone conversation between Amanda and Eggenberger wherein he specifically admitted to licking Amanda's crotch and breasts. The jury heard the tape-recording and had a transcript of it for review during deliberations. In the tape-recording, Eggenberger explained that he thought she liked the sexual contact and he apologized when she said that she did not. He promised that the sexual contact would not happen again and he begged Amanda not to tell her parents. "If you talk to your mother, she's gonna be extremely angry and your dad's gonna want to kill me … and your grandma will not have anything to do with me … and I'll probably wind up goin' to jail."

¶30 Eggenberger presented no evidence to provide an innocent explanation for his audiotaped statements.[6] The only defense he presented was that Amanda had fabricated the story because she wanted attention after the birth

[6] Further, Eggenberger does not challenge any aspect of the audiotape-recorded telephone conversation on appeal.

of her new cousin, Leah. He also contended that once Amanda told her friend Tracy about the incidents, she was pressured or even manipulated into repeating the same story to her parents, the social worker, the police and the jury. Eggenberger presented no witnesses or other evidence to support these theories.

¶31 Amanda testified that her relationship with her cousin was good, that she had no problems with her and was not jealous of her. Further, Amanda's mother testified that she observed Amanda with Leah and did not notice anything unusual. She stated that Amanda never demonstrated negative behaviors or opinions toward Leah and that Amanda "like[d] to hold her and mother her" and feed her from a bottle.

¶32 We conclude that the statements made after Eggenberger invoked his right to silence and attorney representation were erroneously admitted into evidence. However, the statements were only briefly referenced at trial. They were not discussed in either opening or closing arguments. With regard to the videotape evidence and the officer's statements about the videotape, we can discern no new information presented in the video that was not otherwise entered into evidence. After reviewing the overwhelming evidence against Eggenberger, we are convinced that there is no reasonable possibility that the evidence entered in error contributed to the conviction.

D. SENTENCING DUE PROCESS

¶33 Eggenberger argues that his federal and state constitutional due process rights were violated during sentencing when the court allowed family members who did not fit the definition of "victim" under WIS. STAT. § 950.02 to testify. He contends that victim rights legislation dictates who may speak at a sentencing hearing. *See* WIS. STAT. §§ 950.02 and 950.04. He particularly takes

issue with those family members who recommended castration and life imprisonment, complaining that these requests were legally impermissible and "could serve no purpose other than to inflame and deprive the sentencing hearing of the solemnity to which Eggenberger was entitled." He cites ***South Carolina v. Gathers***, 490 U.S. 805 (1989), and ***Booth v. Maryland***, 482 U.S. 496 (1987) (*both overruled in part by* ***Payne v. Tennessee***, 501 U.S. 808, 829-30 (1991)),[7] for the proposition that allowing the trial court to hear the victim and the victim's family's opinion of the crime and the defendant during sentencing created a constitutionally unacceptable risk.

¶34 First, Eggenberger contends that the victim rights legislation found at WIS. STAT. §§ 950.02 and 950.04 limits who may testify at the sentencing hearing. He states that these statutes only allow the victim and her parents to make statements to the court.

¶35 WISCONSIN STAT. § 950.02(4)(a) defines "victim" as "1. a person against whom a crime has been committed" or "[i]f the person specified in subd. 1. is a child, a parent, guardian or legal custodian of the child." WISCONSIN STAT. § 950.04(1v)(m) provides: "Victims of crimes have the following rights: … [t]o

[7] In ***Payne v. Tennessee***, 501 U.S. 808, 830 n.2 (1991), the United States Supreme Court concluded:

> Our holding today is limited to the holdings of ***Booth* v. *Maryland*,** 482 U.S. 496 … (1987), and ***South Carolina* v. *Gathers*,** 490 U.S. 805 … (1989), that evidence and argument relating to the victim and the impact of the victim's death on the victim's family are inadmissible at a capital sentencing hearing. ***Booth*** also held that the admission of a victim's family members' characterizations and opinions about the crime, the defendant, and the appropriate sentence violates the Eighth Amendment. No evidence of the latter sort was presented at the trial in this case.

provide statements concerning sentencing … as provided under … s. … 972.14(3)(a)."

¶36 Eggenberger ignores the other provisions of WIS. STAT. § 972.14(3)(a) that permit the testimony of additional family members in a sentencing hearing:

> Before pronouncing sentence, the court shall determine whether a victim of a crime considered at sentencing wants to make a statement to the court. If a victim wants to make a statement, the court shall allow the victim to make a statement in court or to submit a written statement to be read in court. *The court may allow any other person to make or submit a statement under this paragraph.* Any statement under this paragraph must be relevant to the sentence. (Emphasis added.)

Eggenberger has not argued that the statements were not relevant. We conclude that the victim rights legislation does not bar the family's testimony regarding the crime's impact.

¶37 Next, Eggenberger claims that his due process rights, guaranteed by the Fourteenth Amendment to the United States Constitution and the Wisconsin Constitution, art. V, § 8, were violated by the nature of the family's testimony at the sentencing hearing. He asserts that he has a right to a trial free of "prejudice, passion and excitement," citing ***Sheppard v. Maxwell***, 384 U.S. 333 (1966). He characterizes the hearing as infected with a "mob mentality." He contends that "[t]he hatred which the trial court acknowledged was in the courtroom completely overshadowed the information presented by Eggenberger as to the drug Prozac

and its effects."[8] He insists that the court did not reference Prozac, "the linchpin" of Eggenberger's argument, in its explanation of the sentence and therefore illustrates a constitutionally unfair hearing.

¶38 The cases Eggenberger advances to support his claim involved different claims and the death penalty, not at issue in the current case. In ***Payne***, the court specifically states that it granted certiorari "to reconsider our holdings in ***Booth*** and ***Gathers*** that the Eighth Amendment prohibits *a capital sentencing jury* from considering 'victim impact' evidence relating to the personal characteristics of the victim and the emotional impact of the crimes on the victim's family." ***Id.*** at 817 (emphasis added). ***Booth*** and ***Gathers*** analyzed the constitutional prohibition against cruel and unusual punishment, the Eighth Amendment, not due process, and are inapposite to our case.

¶39 In ***Sheppard***, also a capital murder case, the court considered the impact of extensive media coverage on the proceedings. ***Id.*** at 362-63. It concluded that the defendant's due process rights had been violated because the court failed to protect the defendant from prejudicial publicity that infected the proceedings. ***Id.*** at 363. Further, it concluded that the trial court failed to control disruptive influences in the courtroom including the media's presence at a table in the courtroom area usually reserved for counsel and clients, lack of witness and jury insulation from the media, and lack of court admonishment for accurate

[8] Eggenberger testified at the sentencing hearing that Prozac had a negative effect on him. "Among other things, impaired judgment and loss of sexual desire." Dr. Palermo noted that Prozac "at times causes mental confusion and excitement." Palermo opined that the sexual molestation "may be the outcome of the disinhibiting, confusion-producing action of Prozac in a person who was suffering, and is still suffering, from a masked depression and is impotent and fearful of rejection by adults." Susan Dansand, MRE, reported that Prozac carried the risk of a number of side effects and among the less common ones were "irrational ideas" and "paranoid reaction."

media reporting of trial proceedings when it became aware that the media was reporting misinformation. ***Id.*** at 358-63. Eggenberger makes no similar claims.

¶40 Additionally, the Wisconsin Supreme Court recognized that ***Booth*** was limited to capital murder trials. "The ***Booth*** court noted that facts about the victim and his or her family may be relevant in a noncapital criminal trial, and said it implied 'no opinion as to the use of these statements in noncapital cases.'" ***State v. Scherreiks***, 153 Wis. 2d 510, 521, 451 N.W.2d 759 (Ct. App. 1989) (citations omitted). ***Scherreiks*** refused to apply ***Booth*** to a noncapital case. ***Id.*** Eggenberger ignores discussion of ***Scherreiks***. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (arguments not refuted deemed admitted). To the extent that ***Booth*** survives ***Payne***, its holding is irrelevant to this, a noncapital case, and ***Scherreiks*** controls. *See* WIS. STAT. § 752.41(2) ("Officially published opinions of the court of appeals shall have statewide precedential effect.").

¶41 The trial court must reasonably exercise its discretion during sentencing and consider the gravity of the offense, the character of the offender and the need for public protection. ***State v. Larsen***, 141 Wis. 2d 412, 426, 415 N.W.2d 535 (Ct. App. 1984). Eggenberger does not provide authority that a court must reference all evidence in its sentencing explanation. Further, the record reflects that he did not object to the family's statements at the sentencing hearing or at any time before the postconviction motion hearing. Under ***State v. Smith***, 153 Wis. 2d 739, 741, 451 N.W.2d 794 (Ct. App. 1989), he has waived his right of review on that issue.

¶42 As a final note, the court acknowledged that the purpose of the family's testimony as well as Eggenberger's witnesses' testimony was primarily to

provide catharsis for them. The court stated that the statements did not bias the court: "Today I'm not enraged and I'm not inflamed. I'm saddened. I have, quite frankly, as I sit and listen to this, a very heavy heart." The sentence shows that the court was not swayed by the testimony about which Eggenberger complains. The court ordered neither castration nor lifetime imprisonment. Further, the court sentenced Eggenberger less severely than the prosecutor recommended. The prosecutor requested that the court sentence Eggenberger to the maximum sentence: forty years in prison for each of the three counts, served consecutively. The court sentenced Eggenberger to twenty years in prison with twenty years' probation served consecutively. The sentence reflects an appropriate exercise of discretion.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.