

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 30, 2011

A. John Voelker
Acting 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. 2010AP2801-CR

Cir. Ct. No. 2009CF14

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL L. FREY,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Florence County: LEON D. STENZ, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Michael Frey appeals a judgment convicting him of second-degree sexual assault and two counts of delivering marijuana. He also appeals an order denying his motion for resentencing. He argues that the sentencing court improperly exercised its discretion by focusing on a dismissed

charge, drew unreasonable inferences from the facts and sentenced Frey on an erroneous belief that force was used in the sexual assault. We reject these arguments and affirm the judgment and order.

¶2 Frey was charged with sexually assaulting two sixteen-year-old girls, Ariel and Melissa, two counts of child enticement, and two counts of delivering marijuana. At the preliminary hearing, Ariel testified that Frey had forcible intercourse with her. Melissa testified that Frey gave her pills that caused her to fall asleep. She awoke to discover Frey's hand coming out of her pants. Pursuant to a plea agreement, the State dismissed the sexual assault allegation regarding Ariel and the two counts of enticement, and Frey pled no contest to sexually assaulting Melissa and two counts of delivering marijuana.

¶3 At the sentencing hearing, the court considered the facts relating to the sexual assault of Ariel as well as those relating to Melissa in order to assess Frey's character and the pattern of his behavior. The court inferred that Frey drugged Melissa for the purpose of sexually abusing her. It rejected Frey's contention that the crime against Melissa consisted only of sexual contact, not intercourse, which Frey described as a mitigating circumstance. Based on Melissa's testimony at the preliminary hearing that Frey had inserted his finger in her vagina on previous occasions and a statement in the presentence investigation report regarding an incident of digital penetration in Michigan, the court inferred that digital penetration took place in this case as well. The court imposed consecutive sentences totaling twenty-four years' initial confinement and seven years' extended supervision.

¶4 The court properly considered Frey's sexual assault of Ariel as a measure of his character and the pattern of his behavior. *See Elias v. State*, 93

Wis. 2d 278, 284, 286 N.W.2d 559 (1980). The court can consider uncharged and unproven offenses, pending charges, and even charges for which the defendant has been acquitted, *State v. Bobbitt*, 178 Wis. 2d 11, 18, 503 N.W.2d 11 (Ct. App. 1993). Frey notes that the charge regarding Ariel's assault was dismissed outright and not read in for sentencing purposes. When a crime is read in for sentencing purposes, the defendant agrees to have the court consider that offense, relieving the State of its obligation to establish a factual basis for the offense. Here, the factual basis for the assault of Ariel was provided by Ariel's testimony at the preliminary hearing. The sentencing judge also conducted the preliminary hearing and noted that he found Ariel's testimony credible. Therefore, the court properly considered the assault of Ariel as a measure of Frey's character and the pattern of his behavior.

¶5 Sufficient evidence supports the sentencing court's inference that Frey drugged Melissa for the purpose of assaulting her. Frey contends he provided Melissa with drugs on other occasions when she was not molested, suggesting that he merely took advantage of her unconsciousness and not that he drugged her to facilitate the assault. It is the function of the trier of fact to draw reasonable inferences from the evidence. *State v. Poellinger*, 153 Wis. 2d 493, 504, 451 N.W.2d 752 (1990). When a defendant gives pills to a child that cause her to fall asleep and molests her while she is sleeping, it is reasonable to infer that he gave her the pills to render her unconscious to facilitate the sexual assault.

¶6 The court also reasonably inferred that the crime included intercourse consisting of digital penetration. That behavior would be consistent with Frey's previous digital penetration of Melissa. Digital penetration, no matter how slight, constitutes sexual intercourse as defined in WIS. STAT. § 940.225(5)(c) (2009-10).

¶7 Finally, Frey has not established that the court sentenced him erroneously believing that force was used against Melissa as well as Ariel. Frey focuses on the court's statement that Frey "used force in these cases." However, in the context of the entire proceeding, it is clear that the court was fully aware of Frey's use of force against Ariel and use of drugs against Melissa. After referring to "force in these cases," when again speaking of the use of force, the court clarified, "against Ariel in any event." The record does not suggest that the court believed it was necessary for Frey to use force against an unconscious victim. Rather, the fairest construction of the court's comment was that Frey used force and drugs to sexually assault the girls, but not that he used both methods in both instances.

By the Court.—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5. (2009-10).

