COURT OF APPEALS
DECISION
DATED AND FILED

March 8, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-3199-CR **Cir. Ct. No. 02CF003318**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RAYMOND A. ROSA,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JOHN A. FRANKE, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

¶1 CURLEY, J. Raymond Rosa appeals from the judgment, following a jury trial, convicting him of one count of second-degree sexual assault of a child, contrary to WIS. STAT. § 948.02(2) (2003-04).[1] He also appeals from the order

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

denying his postconviction motion. He argues that there was insufficient evidence presented at trial to convict him and that the trial court erroneously exercised its discretion in sentencing him to a twelve-year sentence, consisting of seven years of initial confinement and five years of extended supervision. Because sufficient evidence was presented to support the jury's verdict, and because the trial court's sentence was the result of a proper exercise of discretion, we affirm.

I. BACKGROUND.

¶2 At trial, J.G. testified that on June 1, 2002, she made plans with her friend Antoinette (Tony), to go swimming at a hotel pool. After her mother dropped her off, Tony's father, Rosa, drove them to pick up Tony's boyfriend, Justin. The four then drove in Rosa's truck to several hotels that had swimming pools, but decided that those hotels were either too expensive or too crowded. Ultimately, they ended up at the Red Roof Inn, which does not have a swimming pool, where Rosa rented a room.

¶3 J.G. testified that after they arrived, she and Tony stayed at the motel while Rosa and Justin went shopping. When they returned, Rosa and Justin mixed vodka with lemonade and the four began to play a drinking game. J.G. testified that she drank approximately three glasses of the beverage. The game ended when the four consumed the entire bottle of vodka. After the game ended, Rosa allegedly told Tony and Justin to go out to the truck to listen to music. J.G. recalled that Rosa then turned off the lights, undressed himself, and then took off all of her clothes. She testified that Rosa then engaged in several sexual acts with her. First, he placed his penis into her vagina. He then committed three additional sex acts: he put his fingers into her vagina, he placed his mouth on her vagina, and he ordered J.G. to put her mouth on his penis. These sexual acts were

interrupted when Tony and Justin began knocking on the door. Rosa instructed J.G. to get dressed, and Rosa, after dressing himself, let Tony and Justin in the room.

¶4 J.G. reported that she fell asleep, and when she woke up in the morning, Rosa was sleeping in the same bed with her. She also discovered that she was not wearing her shorts and underwear. J.G. said nothing about the events that took place the evening before, and Rosa drove her home.

¶5 J.G. testified that, several weeks later, her mother confronted her with a rumor she had heard that J.G. had gone to a hotel with Tony, Justin and Rosa, and that she had gotten drunk and engaged in sex with Rosa. J.G. admitted it was true. Her mother then called the police. Rosa was initially charged with one count of second-degree sexual assault of a child. After the preliminary hearing, the State amended the information and added three additional counts of second-degree sexual assault of a child. The matter was tried to a jury. The jury found Rosa guilty of the first count, sexual intercourse, penis-to-vagina, but found him not guilty of the remaining three counts.

¶6 The trial court sentenced him to seven years of confinement and five years of extended supervision. Rosa brought a postconviction motion, contending that the trial court erroneously exercised its discretion at sentencing by placing too much emphasis on what the court perceived as his lack of remorse. The motion was denied.

II. ANALYSIS.

A. Sufficient evidence was submitted to the jury.

¶7 Rosa first contends that there was insufficient evidence presented to convict him on the first count of sexual assault. He points to the not guilty verdicts in the three other counts as evidence that J.G. was not credible. He claims that her testimony was riddled with inconsistencies and was not deserving of belief. He also argues that the lack of physical evidence, coupled with the testimony of a witness who said that J.G. denied that the assault occurred, support his belief that there was insufficient evidence to convict him. We disagree.

¶8 There are two elements to the crime of second-degree sexual assault of a child. The State must prove, beyond a reasonable doubt, that: (1) the defendant had sexual intercourse with the victim; and (2) the victim was under the age of sixteen at the time of the alleged sexual intercourse. *See* WIS JI—CRIMINAL 2104. Furthermore, direct physical evidence is not required to secure a sexual assault conviction. *See* ***State v. Holt***, 128 Wis. 2d 110, 119-20, 382 N.W.2d 679 (Ct. App. 1985).

¶9 The standard for reviewing a challenge to the sufficiency of the evidence is stated in ***State v. Blaisdell***, 85 Wis. 2d 172, 180-81, 270 N.W.2d 69 (1978):

> When the defendant challenges the sufficiency of the evidence, the test is whether the evidence adduced, believed, and rationally considered by the jury was sufficient to prove the defendant's guilt beyond a reasonable doubt. Conversely stated, the test is whether when considered most favorably to the State and the conviction, the evidence is so insufficient in probative value and force that it can be said as a matter of law that no trier of facts acting reasonably could be convinced to that degree of certitude which the law defines as "beyond a

> reasonable doubt." Furthermore, it is not necessary that this court be convinced of the defendant's guilt but only that the court is satisfied the jury acting reasonably could be so convinced.

Id. (citations omitted). Moreover, as stated in ***State v. Toy***, 125 Wis. 2d 216, 222, 371 N.W.2d 386 (Ct. App. 1985):

> It is the jury's task … not [the reviewing] court's, to sift and winnow the credibility of the witnesses. We review sufficiency of evidence claims most favorably to the jury's findings. It is certainly allowable for the jury to believe some of the testimony of one witness and some of the testimony of another witness even though their testimony, read as a whole, may be inconsistent.

Id. (citations omitted).

¶10 At trial, inconsistencies among J.G.'s earlier written and oral statements to the police and her trial testimony were brought out during cross-examination and thoroughly discussed. For example, J.G. could not recall the sequence of events after the first act of penis-to-vagina sexual intercourse, and she did not remember reporting to the police that Rosa tried to kiss her. J.G. freely admitted that she forgot much of what had occurred. This is understandable since she was, by her own admission, drunk at the time of the assault. It was for the jury to decide whether they believed all of her testimony, or only parts of it. Here, apparently, the jury was satisfied that the first act of sexual intercourse had been proven beyond a reasonable doubt, but it could not conclude that the remaining three counts had been sufficiently established.

¶11 Additionally, despite the lack of any physical evidence corroborating the sexual assault, other circumstantial evidence supported J.G.'s account. Justin, the then-boyfriend of Tony, verified that the four had gone to a motel and a drinking game ensued. Justin corroborated J.G.'s account that he and Tony had

been asked to leave the motel room and that the door was locked when the two returned. Further, he testified that Rosa and J.G. slept in the same bed in the motel, and that J.G. was not fully dressed in the morning. Justin also recounted how he had a conversation with J.G. approximately one week after they were at the motel, and J.G. told him that she had had sex with Rosa. Justin also told the jury that he had assumed from the circumstances present that evening, even before J.G. admitted to engaging in sex with Rosa, that J.G. had had sex with Rosa.

¶12 Thus, ample testimony supported the jury's verdict of guilt on count one. Consequently, we decline to overturn the conviction because "evidence adduced, believed, and rationally considered by the jury was sufficient to prove the defendant's guilt beyond a reasonable doubt." *See* ***Blaisdell***, 85 Wis. 2d at 180.

B. The trial court properly exercised its discretion.

¶13 Next, Rosa submits that the trial court erroneously exercised its sentencing discretion because he was "harshly punished" for failing to show remorse. He submits that since he believes he is innocent of the charges, it was unreasonable for the trial court to take his lack of remorse into consideration at sentencing. He contends that, as a consequence, the trial court's sentence was unduly harsh.

¶14 A strong public policy exists against interfering with the trial court's discretion in determining sentences, and the trial court is presumed to have acted reasonably. ***State v. Wickstrom***, 118 Wis. 2d 339, 354, 348 N.W.2d 183 (Ct. App. 1984). As such, an appellate court will not reverse a sentence absent an erroneous exercise of discretion. *See* ***State v. Thompson***, 172 Wis. 2d 257, 263, 493 N.W.2d 729 (Ct. App. 1992). Under the erroneous exercise of discretion standard of

review, this court "presume[s] that the trial court acted reasonably unless the defendant shows some unreasonable or unjustifiable basis in the record for the sentence." ***State v. Fuerst***, 181 Wis. 2d 903, 909-10, 512 N.W.2d 243 (Ct. App. 1994). Further, in reviewing whether a trial court erroneously exercised sentencing discretion, an appellate court will not substitute its preference for a particular sentence "'merely because, had [it] been in the trial judge's position, [it] would have meted out a different sentence.'" ***Cunningham v. State***, 76 Wis. 2d 277, 281, 251 N.W.2d 65 (1977) (citation and footnote omitted).

¶15 To obtain relief on appeal, the defendant has the burden to "show some unreasonable or unjustified basis in the record for the sentence imposed." ***State v. Borrell***, 167 Wis. 2d 749, 782, 482 N.W.2d 883 (1992). A sentence will be deemed harsh and excessive only when the sentence is so excessive, unusual, and disproportionate to the offense committed as to shock public sentiment. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

¶16 The three primary factors the trial court must consider at sentencing are: (1) the gravity of the offense; (2) the character of the defendant; and (3) the need to protect the public. ***Thompson***, 172 Wis. 2d at 264. The trial court need discuss only the relevant factors in each case. *See* ***State v. Echols***, 175 Wis. 2d 653, 683, 499 N.W.2d 631 (1993). The weight given to each of the relevant factors is within the trial court's discretion, ***State v. J.E.B.***, 161 Wis. 2d 655, 662, 469 N.W.2d 192 (Ct. App. 1991), and, after consideration of all the relevant factors, the sentence may be based on any one of the three primary factors, ***State v. Krueger***, 119 Wis. 2d 327, 338, 351 N.W.2d 738 (Ct. App. 1984).

¶17 Here, at sentencing, the trial court first explained to Rosa that it agreed with the jury's verdict. The trial court went on to state:

> [Y]our conduct on this particular evening was so incredibly reprehensible, even aside from the sexual assault, that it's difficult to wonder why we don't have some sort of crime to punish what you did even before you sexually assaulted this child.

The trial court also indicated that Rosa's attempts to cover up the crime aggravated the situation:

> The efforts to cover this up, the conversation you had with [your younger daughter], the suggestions and efforts regarding getting people to back off their testimony or change their testimony is just one more aggravating circumstance in what is an extremely aggravated, aggravated crime.

With respect to Rosa's remorse, the trial court said:

> There is no remorse. There's no admission of guilt on your part. There's no acceptance of responsibility. There isn't even anything other than the minimum in terms of accepting responsibility for the incredibly reprehensible behavior that preceded the sexual assault.

The trial court concluded: "Given your lack of judgment[,] this crime alone requires that there be a prison sentence."

¶18 Later, in its written decision denying the postconviction motion, the trial court explained its position concerning Rosa's remorse, recognizing that Rosa maintained his innocence:

> Lack of remorse is a legitimate sentencing consideration. In this case it speaks to the defendant's character, the risks of reoffense, and the impact of the crime on the victim. While we can feel sorry about what others do, we can have remorse only for our own actions. Defendant is therefore correct that his continued denial of guilt precludes an expression of remorse, but is not correct to suggest that remorse as a sentencing factor is limited to those who admit guilt. *See* ***State v. Baldwin***, 101 Wis. 2d 441, 456-59 (1981). This is unfair only if the defendant is truly not guilty, in which case a far greater injustice has occurred than my attention to his lack of remorse.

> Additionally, the defendant implausibly contends that the court did not fully consider Mr. Rosa's good character, noting that he was employed at the time of the offense and was "attempting to be a good father." Any vague claim of an attempt at good parenting was vastly outweighed by the reprehensible character aspects of the offense, in which the defendant hosted a hotel drinking party with his 15-year-old daughter and friends, sexually assaulted her friend, and condoned and enabled the sexual assault of his own daughter in the next bed.

(Footnote omitted.)

¶19 We agree with the trial court. Rosa does not appear to understand that, on the night in question, he had a responsibility to both his daughter and her friends to conduct himself in a responsible and adult manner. He failed to do so. He permitted—indeed, promoted—the drinking of excessive amounts of alcohol by three teenagers, and proceeded to sexually assault a drunken fifteen-year-old girl—a friend of his daughter's—while placing his daughter in a situation where she was also likely to engage in sexual intercourse. Later, he exacerbated the situation by trying to pay off the teenaged witnesses to his crime. The trial court reasonably determined that Rosa had no remorse for his actions, his attitude towards the crime spoke to his character, risk of reoffense, and the impact on the victim, and he mistakenly believed he was "a good father." Moreover, the trial court did not base its sentence, which was well within the maximum, solely on Rosa's lack of remorse. Thus, the sentence pronounced by the trial court was a proper exercise of discretion. The trial court discussed the three primary sentencing factors and gave reasons for its sentence. Accordingly, we affirm.

By the Court.—Judgment and order affirmed.

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