No. 95-0744-CR

STATE OF WISCONSIN IN COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

Plaintiff-Respondent,

v. **ERRATA SHEET**

NORBERT J. MADAY,

Defendant-Appellant.

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PLEASE TAKE NOTICE that the attached opinion is to be substituted for the above-captioned opinion which was released on March 13, 1996.

Dated this 18th day of December, 2006.

COURT OF APPEALS
DECISION
DATED AND RELEASED

March 13, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

NORBERT J. MADAY,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Winnebago County: WILLIAM E. CRANE, Judge. *Affirmed*.

Before Anderson, P.J., Nettesheim and Snyder, JJ.

PER CURIAM. Norbert J. Maday appeals from a judgment of conviction of three counts of second-degree sexual assault and one count of intimidation of a victim, and from an order denying his motion for postconviction relief. He contends that the evidence was insufficient to support the intimidation of a victim conviction, that evidence was improperly excluded which would have impeached testimony by one of the victims regarding a prior act of sexual misconduct, and that the sentence was the result of an erroneous exercise of discretion. We conclude that the evidence was sufficient, that the

evidentiary ruling was proper and that sentencing discretion was properly exercised. We affirm the judgment and the order.

The convictions arose out of sexual contact with two young boys in the care of Maday, a Roman Catholic priest, at a recreational retreat facility in Oshkosh in June or July 1986. The assaults were not reported until 1992.

The intimidation conviction is based on the testimony of one victim that after the assault Maday told the boy that if he told anyone, Maday would kill the boy's older brother. Maday argues that the victim's testimony alone is "the scantiest evidence that one could possibly find."

Our review of the sufficiency of the evidence is to determine whether the evidence, viewed most favorably to the State and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. ***State v. Ray***, 166 Wis.2d 855, 861, 481 N.W.2d 288, 291 (Ct. App. 1992). We will not substitute our evaluation of the evidence for that of the jury. ***State v. Barksdale***, 160 Wis.2d 284, 290, 466 N.W.2d 198, 201 (Ct. App. 1991).

With regard to the intimidation of a victim, the State was obligated to prove beyond a reasonable doubt that there was a victim of a crime, the defendant attempted to prevent or dissuade the victim from reporting the crime, the defendant acted knowingly and the defendant's acts were accompanied by threats of force or violence against another. Section 940.45, STATS., 1985-86. Maday does not challenge the sufficiency of the evidence regarding the sexual assault. Thus, the evidence established that Maday's threat was made to a crime victim with the intent to deter the victim from reporting the crime.

Maday challenges nothing more than the victim's credibility that the threat was made. The jury, not a reviewing court, determines the credibility of witnesses and the weight of their testimony. *See* ***State v. Wachsmuth,*** 166 Wis.2d 1014, 1023, 480 N.W.2d 842, 846 (Ct. App. 1992). We will not disturb the jury's credibility determinations on appeal unless we determine that the

testimony was incredible as a matter of law. ***Id.*** Evidence is incredible only when it is in conflict with the uniform course of nature or with fully established or conceded facts. ***Haskins v. State***, 97 Wis.2d 408, 425, 294 N.W.2d 25, 36 (1980). We reject Maday's implication that the evidence was patently incredible because it is "laughable" to believe that he would be of a mindset to kill another person or because the victim's story was "far fetched." Such a threat, even coming from a Catholic priest, is not improbable, particularly in light of the assaults that occurred. We need not speculate as to whether the threat was real enough so as to buy the victim's silence for all the ensuing years. The victim's testimony by itself was sufficient to establish guilt beyond a reasonable doubt on the intimidation charge. *See* ***Wachsmuth,*** 166 Wis.2d at 1024, 480 N.W.2d at 846-47.

At trial the second victim testified about an incident that occurred in the spring of 1986, before his visit with Maday to the retreat facility. The incident occurred in the rectory of the Chicago, Illinois church where Maday resided. The victim indicated that Maday sexually assaulted him while the two watched a movie called "Trick or Treat." The victim explained that the movie had been rented from a video store. Maday sought to introduce testimony that the official records of Warner Home Video indicated that the movie "Trick or Treat" was not released to video retailers until October 1987. The trial court excluded this testimony as violating the prohibition in § 906.08(2), STATS., against the use of extrinsic evidence to impeach witness credibility. ***McClelland v. State***, 84 Wis.2d 145, 158-59, 267 N.W.2d 843, 849-50 (1978).

Maday does not challenge the admission of the other acts evidence. Nor does he develop a constitutional challenge to the trial court's exclusion of the evidence regarding the video release date. No objection was made at trial on constitutional grounds.

Section 906.08(2), STATS., provides that "[s]pecific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's credibility ... may not be proved by extrinsic evidence." ***McClelland*** holds that impeachment of a witness on the basis of collateral facts introduced by extrinsic testimony is forbidden. ***Id.*** at 159, 267 N.W.2d at 849-50.

Maday attempts to distinguish ***McClelland*** on the grounds that the extrinsic evidence there was offered to impeach the defendant and here it is offered to show that the victim was completely wrong about the prior incident and therefore the liar the defense claimed he was. However, Maday ignores that the evidence about the video release date was collateral. "A matter is collateral if the fact to which error is predicated could not be shown in evidence for any purpose independently of the contradiction." ***State v. Olson***, 179 Wis.2d 715, 724, 508 N.W.2d 616, 619 (Ct. App. 1993). The evidence about the movie's video release date was only admissible to contradict the victim's recounting of a prior occurrence, a collateral matter itself. The evidence was only admissible for the limited purpose of testing the victim's credibility. Thus, like the evidence examined in ***McClelland***, it was of a collateral nature and barred by § 906.08(2), STATS. ***McClelland***, 84 Wis.2d at 160, 267 N.W.2d at 850. We are bound by ***McClelland*** and uphold the trial court's exclusion of the evidence.

Maday was sentenced to serve two consecutive and one concurrent ten-year prison terms for the sexual assaults. He was sentenced to a five-year consecutive term on the intimidation of a witness conviction, but that sentence was stayed and a five-year term of probation imposed consecutive to parole. While Maday concedes that the sentencing court adequately analyzed the appropriate factors required in sentencing, he contends that the sentence is excessive and harsh as "commensurate to a death penalty" because he will probably be seventy years old when released from prison. He also contends that the sentence is harsh because although he maintains his innocence, the conduct for which he was convicted amounted to "attempted masturbation at worse" and did not escalate into more intrusive forms of behavior. He suggests that the ends of justice will be accomplished by a sentence reduced to a term of seven to ten years.

Sentencing is a discretionary act and this court presumes that the sentencing court acted reasonably. ***State v. Scherreiks***, 153 Wis.2d 510, 517, 451 N.W.2d 759, 762 (Ct. App. 1989). This court will honor the strong policy against interfering with the discretion of a sentencing court unless no reasonable basis exists for its determination. *See* ***id.*** A sentence may be excessive when it shocks public sentiment and violates the judgment of reasonable people concerning what is right and proper under the circumstances. ***State v. Spears***, 147 Wis.2d 429, 446, 433 N.W.2d 595, 603 (Ct. App. 1988). However, we may not substitute our preference for a sentence "merely because, had we been in the sentencing court's position, we would have meted out a different sentence." ***Id.***

Maday was fifty-six years old at the time of sentencing. The court acknowledged this. The court also considered Maday's character, his need for close rehabilitative control and the need to protect the public. Although the court was most influenced by the serious nature of the offenses because Maday violated a position of trust with the young boys, we reject Maday's contention that the court was assessing blame to Maday for all the problems his victims suffered. The sentence was based on the facts of record and proper considerations. It is less than the maximum and not so great under the circumstances that it would shock the public conscience. The mere fact that Maday may be quite elderly when released from prison does not mean that the sentence is unduly harsh.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.