COURT OF APPEALS DECISION DATED AND FILED

September 23, 2009

David R. Schanker
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. 2008AP1936-CR

Cir. Ct. No. 2005CF614

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DALE W. CONLEY,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Walworth County: ROBERT J. KENNEDY, Judge. *Affirmed.*

Before Brown, C.J., Anderson and Snyder, JJ.

¶1 ANDERSON, J. Dale W. Conley appeals from a judgment of conviction (as amended) and order denying his motion for postconviction relief.

The State charged Conley with two counts of first-degree sexual assault of a child in violation of WIS. STAT. § 948.02(1) (2007-08)[1] and two counts of incest with a child in violation of § 948.06(1).[2] Following a three-day trial, a jury found Conley guilty of all counts. On June 29, 2006, the trial court sentenced Conley to consecutive prison terms on the counts of incest with a child for a total sentence of fifty years (twenty years' incarceration, thirty years' extended supervision) and placed Conley on thirty years' probation on the counts of first-degree sexual assault of a child, concurrent to the prison sentences. Conley filed a motion for postconviction relief seeking a new trial or, alternatively, a new sentencing based on the trial court's failure to consider the sentencing guidelines. After two postconviction hearings, the trial court denied all of Conley's claims of error with the exception of a claim for sentence credit due. Upon review and after oral argument, we affirm the judgment and order of the trial court.

¶2 This appeal arises from Conley's four felony convictions relating to two sexual touchings of his then twelve-year-old daughter, M.A.C. According to the complaint, M.A.C. alleged that on two occasions in 2005, Conley entered her bedroom and touched her vagina under her pajamas. Conley was arraigned on two counts of first-degree sexual assault of a child and two counts of incest with a child.

---

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

[2] Conley was also charged with disorderly conduct for a May 2005 domestic dispute involving his wife and two counts of misdemeanor bail jumping. These charges were severed from the sexual assault and incest counts. Ultimately, Conley pled no contest to these misdemeanor counts after the trial on the other offenses. Conley is not raising any claim of error arising from these counts on appeal.

¶3 Prior to trial, the State sought and obtained a pretrial ruling preventing the defense from eliciting testimony from Conley's wife, Lori Conley, as to whether she believed her daughter's allegations. In discovery, it had been revealed that Lori did not initially believe her daughter's allegations. The State argued that this evidence was inadmissible under ***State v. Haseltine***, 120 Wis. 2d 92, 352 N.W.2d 673 (Ct. App. 1984). The trial court indicated that the evidence was inadmissible, but would allow an offer of proof. Prior to trial, the trial court revisited the issue of this testimony, stating that it would not allow Lori to testify "that she believes the allegations are true or untrue."

¶4 The three-day jury trial began on March 20, 2006. On the first day, the court informed the jury that it would allow jury questioning of witnesses. After the questioning of a witness by the attorneys, the court allowed jurors to submit written questions, which could be read by the court to the witness, after review by counsel.

¶5 At trial, M.A.C. testified that in late September 2005, her father entered her room after she went to bed. He got into bed with her and rubbed her vagina. M.A.C. told him that she would tell her mother; Conley then slapped her in the mouth. M.A.C. testified that the second assault occurred some time later, again in her room, after she had gone to bed. She stated that Conley told her that he was touching her because it was his way of expressing that he loves her and because he "needed it." She said that before he left her room that time, he told her he would do it again but did not say when.

¶6 M.A.C. testified that the day after the second incident, she told a friend at school what Conley had done and told her friend not to tell anyone. She said she told her mother, Lori, that same day after school. M.A.C. testified that

after she told her mother what had happened, her father put a lock on the inside of her bedroom door which prevented anyone from entering her room when it was locked. A photo of the lock was shown to the jury and entered as an exhibit.

¶7 M.A.C. further testified that her mother took her to see Dr. David Taylor for an examination and that her mother told her to lie and tell the doctor that "a guy" touched her while sleeping at a friend's house.

¶8 Defense counsel asked no questions of M.A.C. In a colloquy with the court, counsel stated that the decision not to cross-examine the witness had been a tactical decision made after discussion with Conley. A juror was then allowed to ask M.A.C. a question about the lock on her door. In response, M.A.C. testified that she had not attempted to lock her bedroom door before her father put the lock on the door.

¶9 M.A.C.'s thirteen-year-old friend testified to the following. One day while she and M.A.C. were at school recess, M.A.C. was not acting like herself and was not happy. She kept asking M.A.C. what was wrong and M.A.C. finally said, "All right, I'll tell you." M.A.C. then told her what her dad had done. At that time, M.A.C. was nervous and sad and "just didn't want to talk about it." M.A.C. asked her friend not to tell anyone. She promised not to, but after about three days, the friend told her grandma and her uncle. M.A.C. was then upset with her and called her to say, "You reported my dad."

¶10 Nurse Saskia Lodder, a sexual assault examiner, testified as an expert for the State. Lodder testified that it is common to see no injury in sexual assault cases.

¶11 Walworth County Human Services Social Worker Deborah Cratsenberg testified that she interviewed M.A.C. in the school conference room on November 7, 2005, after receiving a report of the allegations. Cratsenberg said that it was her opinion, after talking to M.A.C., that something had been happening between M.A.C. and her father. M.A.C. responded "yes" when asked if someone made her feel unsafe and also told Cratsenberg that her mother had told her not to tell anyone about what her dad had done because if she did, her dad would go to jail. Cratsenberg said that when she called M.A.C.'s mom Lori to discuss the allegations, she felt that Lori was extremely shocked and angry that she was calling.

¶12 Two witnesses, M.A.C.'s maternal grandfather, Daryll Zimmerman, and school counselor, Sheri Thoreson, both testified that M.A.C. had a character for truthfulness. Finally, a social worker, Theresa Hanson, testified as to common behaviors seen in victims of child sexual assault, including delay in disclosure and an inability to recall peripheral details about the assault. Hanson stated that there would be no physical evidence in a case of hand-to-pubic mound fondling.

¶13 Conley's defense called four witnesses to testify. M.A.C.'s paternal grandmother, Beverly Conley, testified that, in her opinion, M.A.C. was not truthful all the time.

¶14 Lori testified that her husband was the primary disciplinarian in the home and that Conley had grounded M.A.C. shortly before the allegations of assault were made. Lori further testified that she believed M.A.C. to be truthful. At which point defense counsel proceeded to confront Lori with prior inconsistent statements regarding M.A.C.'s truthfulness. Lori denied that she had told police that her daughter is known to lie.

¶15 The defense's adverse direct examination was limited by the trial court's pretrial rulings. Prior to Lori's testimony, Conley's defense counsel proffered that her statements of her belief at the time the allegations were made were relevant to explain why Lori had told M.A.C. to lie to the doctor and as prior inconsistent statements. The trial court affirmed its initial ruling that any testimony regarding whether Lori had believed her daughter's accusations is inadmissible.

¶16 A juror was then allowed to ask Lori whether M.A.C. liked to be the center of attention; Lori responded that M.A.C. did not. Another juror again asked about the lock on the door. Lori testified that she asked for a lock on M.A.C.'s bedroom door the day before Conley was arrested.

¶17 The defense called Detective Shannan Illingworth, who testified that Lori told her in an interview that "her daughter is known to be a liar and that she lies all the time about stupid stuff." Illingworth also testified that Lori told her that M.A.C. "could keep a story going for a period of time without coming clean."

¶18 Conley testified on his own behalf. He testified that he never touched M.A.C. in the way she alleged. He testified that M.A.C. had increasing disciplinary problems and that he had disciplined her shortly before the allegations came to light. He also noted that the family had financial problems for which he believed the family blamed him. Conley said he learned about M.A.C.'s allegations on November 1 from his wife who called him on his cell phone to tell him. He testified that the weekend of November 5-6, he put a lock on M.A.C.'s bedroom door after Lori asked him to "so that she could have peace of mind."

¶19 On cross-examination and without objection by the defense, the State elicited that Conley and his wife had not had sex since February 2005 and had had marital problems since that time.

¶20 The defense called Dr. David Taylor, M.A.C.'s family doctor. He testified that M.A.C. told him that a neighbor boy had touched her through her pajamas where her thigh meets the pelvis. Taylor said when he asked, M.A.C. denied that anyone had touched her vagina. He said he examined M.A.C., and it was a "normal prepubertal examination" and he found "no evidence of trauma." On cross-examination, the State established that Taylor did not conduct the exam as directed by the sexual assault examination guidelines.

¶21 During its closing, the State argued that the lock on M.A.C.'s bedroom door was evidence of "consciousness of guilt." The State argued that its expert testimony from Lodder and Hanson corroborated the lack of physical evidence and M.A.C.'s testimony because her delay in reporting and demeanor when talking to authorities were consistent with behaviors of sexual assault victims. The State also argued that Conley's marital problems, including the fact that he had not had sex with his wife since February 2005, were his motive to commit the assault.

¶22 The defense argued that the case came down to the credibility of M.A.C. compared to the credibility of Conley. The defense focused on the opinion evidence regarding M.A.C.'s credibility. When the defense attempted to explain that Lori did not report the matter to police because she did not believe M.A.C., the State objected to "improper argument" and the court sustained the objection. The defense argued that the lock was installed merely to satisfy Lori.

¶23 The jury ultimately convicted Conley of all counts. At sentencing, the State asked for a lengthy prison sentence; the defense argued for probation.

¶24 On June 29, 2006, the trial court sentenced Conley to consecutive prison terms on the counts of incest with a child for a total sentence of fifty years (twenty years' incarceration, thirty years' extended supervision) and placed Conley on thirty years' probation on the counts of first-degree sexual assault of a child, concurrent to the prison sentences.

¶25 Raising six issues, Conley filed a motion for postconviction relief seeking a new trial or, alternatively, a new sentencing. Conley argued that trial counsel provided ineffective assistance of counsel by not objecting to evidence of the lock placed on the bedroom door on the grounds of relevance, unfair prejudice, and because it was evidence of a subsequent remedial measure inadmissible under WIS. STAT. § 904.07. Conley further argued that trial counsel should have objected to any mention of Conley's sexual relationship with his wife on the grounds of relevance.[3] Conley also argued that the trial court erred when it ruled that ***Haseltine*** prevented his adverse examination of Lori on the issue of whether she initially believed the allegations brought by her daughter. Conley additionally raised a claim that it was structural error to allow jurors to question witnesses. With respect to sentencing, Conley argued that the trial court erroneously exercised its sentencing discretion and imposed an unduly harsh sentence. He further argued that a new sentencing was necessary due to the trial court's failure

[3] Conley also raised a claim of ineffective assistance of counsel for the failure to object to a reference to the victim's chastity in the questioning of Taylor. Conley does not renew that argument on appeal. Nor does he renew claims related to several passing incidents of hearsay that went without objection or a limiting instruction at trial.

to consider the applicable state sentencing guidelines for first-degree sexual assault of a child.[4]

¶26 A ***Machner***[5] hearing was held on April 17 and July 9, 2008. Before evidence was taken, the trial court ruled that there could be no error in trial counsel's failure to object to evidence of the lock on M.A.C.'s door because the rule against evidence of subsequent remedial measures "cannot apply in a criminal case." On the issue of allowing jurors to question witnesses, the court acknowledged, as Conley had, that the practice had been approved by the court of appeals and that the issue was raised merely to preserve it for further appellate review.

¶27 Trial counsel testified at the postconviction motion hearing. On his decision not to object to the evidence of Conley's lack of intimacy with Lori, he testified that he had considered an objection, but chose instead to argue that the State's suggestion that this provided a motive to assault M.A.C. was so "ludicrous" and "silly" that it gave the defense "a bolstering argument." He stated that he did not explore whether the State's theory was supported by scientific evidence and had not hired any experts because Conley lacked the financial resources.

¶28 With regard to the issue considered by the court to be a ***Haseltine*** issue, trial counsel[6] testified that he intended to confront Lori with her statements

---

[4] Conley also brought a claim seeking sentence credit of his pretrial incarceration. This aspect of his postconviction motion was granted by the trial court.

[5] ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

[6] "Trial counsel" here refers to a partner of Conley's lead counsel who second-chaired the trial; elsewhere it refers to Conley's lead counsel.

to police indicating that she did not initially believe her daughter's accusations. However, he was unable to because the trial court made a ruling relying on ***Haseltine*** that this evidence could not come in. Trial counsel stated that when he made his offer of proof before the judge, he explained that he wanted the evidence in so that he could impeach Lori with her inconsistent statement regarding M.A.C.'s character for truthfulness.

¶29 Conley also called Dr. Allen Hauer, Ph.D., to testify on whether there was a link between a lack of marital intimacy and the likelihood that a man will commit an act of incest against a child. Although the circuit court deemed the testimony irrelevant, it allowed Conley to make his record. Hauer opined that it was highly improbable that there would be a connection between a lack of adult intimacy and subsequent sexual contact with a minor child. He further testified that there is a low probability that other stressors, such as financial stressors, would motivate a child sexual assault.

¶30 The trial court denied all of Conley's claims of error with the exception of a claim for sentence credit due. In denying the remainder of Conley's postconviction motion, the trial court found that trial counsel did not perform ineffectively by not objecting to the evidence of Conley's lack of marital intimacy; it reasoned that the evidence was relevant in light of statements allegedly made by the defendant to M.A.C. that he was assaulting her because he "needed it." The trial court further found that trial counsel had a "very good tactical reason" for not wanting to object and instead wanting to let this evidence in and then argue that it is "ludicrous." The trial court rested on its ruling and the record made at trial regarding the evidence it considered ***Haseltine*** evidence. Also, the trial court stood on the record made at sentencing in rejecting Conley's argument that the sentence imposed was excessive. Finally, the trial court

acknowledged that it had not considered the sentencing guidelines, but deemed the error harmless because it had sentenced Conley only to probation on the charges of first-degree sexual assault of a child and, on the offense for which the court sentenced Conley to prison (i.e., incest), there was no controlling sentencing guideline.

¶31 Conley renews the same six arguments on appeal: two ineffective assistance of counsel claims, two claims of trial court error during trial, and two claims of trial court error in sentencing.

¶32 *Ineffective Assistance of Counsel*. To establish ineffective assistance of counsel under the state and federal constitutions, a criminal defendant "must show (1) that his or her counsel's representation was deficient and (2) that such deficient performance resulted in prejudice to the defense." ***State v. Franklin***, 2001 WI 104, ¶11, 245 Wis. 2d 582, 629 N.W.2d 289; ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). In order to show prejudice, the defendant must show "a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Strickland***, 466 U.S. at 694. Because the performance and prejudice requirements are conjunctive, we need not address the performance prong if the defendant has failed to show prejudice and vice versa. ***Id.*** at 697.

¶33 Conley's first ineffective assistance of counsel argument is based on his claim that his trial counsel should have objected to evidence of the lock Conley placed on M.A.C.'s door at his wife's request after the alleged assaults.

¶34 Evidence is admissible when "relevant" to show "the existence of any fact that is of consequence to the determination of the action," WIS. STAT.

§ 904.01, and if not otherwise subject to exclusion under the state and federal constitutions or rules of evidence, *see* WIS. STAT. § 904.02.

¶35 Wisconsin courts have found admissible as "consciousness of guilt" such evidence as the following: evidence of the defendant's attempted bribery of the sexual assault complainant, *see* ***State v. Bettinger***, 100 Wis. 2d 691, 698, 303 N.W.2d 585 (1981), *amended by* 100 Wis. 2d 691, 305 N.W.2d 57 (1981); evidence of the defendant's verbal threat to the complainant, *see* ***State v. Neuser***, 191 Wis. 2d 131, 144-45, 528 N.W.2d 49 (Ct. App. 1995); and evidence of the defendant's verbal threat to a potential witness, *see* ***Price v. State***, 37 Wis. 2d 117, 130-32, 154 N.W.2d 222 (1967).

¶36 We recognize that even innocent persons, fearing wrongful conviction, may flee or lie or engage in other postcrime conduct suggestive of consciousness of guilt to extricate themselves from situations that look damning. *See* ***People v. Bennett***, 593 N.E.2d 279, 283 (N.Y. Ct. App. 1992). Nonetheless, that prospect does not preclude the admission of such evidence. Rather, "[e]ven equivocal consciousness-of-guilt evidence may be admissible so long as it is relevant, meaning that it has a tendency to establish the fact sought to be proved—that defendant was aware of guilt." ***Id.***

¶37 We agree with the trial court that trial counsel did not fail in his performance by not objecting to the lock evidence and/or for not citing to WIS. STAT. § 904.07 as grounds for barring the lock evidence.

¶38 WISCONSIN STAT. § 904.07 provides:

> **904.07. Subsequent remedial measures.** When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence

> or culpable conduct in connection with the event. This section does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment or proving a violation of [WIS. STAT. §] 101.11.

First, we find guidance in the fact that this rule of evidence is patterned after Federal Rule of Evidence 407, which was drafted to limit the use of subsequent remedial measures to prove negligence in *civil* litigation.[7] In addition, the scope of Rule 407 is "quite narrow." *See* 23 CHARLES ALAN WRIGHT AND KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5285 (Supp. 2009). We have found no published decision in which § 904.07 or FED. R. EVID. 407 is applied in a criminal case. Moreover, in ***D.L. by Friederichs v. Huebner***, 110 Wis. 2d 581, 605, 329 N.W.2d 890 (1983), our supreme court revealed its lack of faith altogether in the exclusionary rule and pointed out that many commentators view it to be "unsound" even in civil law. Assisted by this history and the supreme court's assessment of the exclusionary rule, we conclude that § 904.07 is not applicable in this case.

¶39 That determined, we conclude that the evidence that Conley installed a lock at the insistence of his wife is relevant and contextual and was therefore

[7] The Advisory Committee Notes to FED. R. EVID. 407, 28 U.S.C.A. (Advisory Committee Notes, 1972 Proposed Rules), state that

> [Rule 407] incorporates conventional doctrine which excludes evidence of subsequent remedial measures as proof of an admission of fault. The rule rests on two grounds. (1) The conduct is not in fact an admission, since the conduct is equally consistent with injury by mere accident or through contributory negligence…. (2) The other, and more impressive, ground for exclusion rests on a social policy of encouraging people to take, or at least not discouraging them from taking, steps in furtherance of added safety.

properly admitted. We agree with the State that one reasonable inference that jurors could draw from Conley's acquiescence to his wife's insistence that he install the lock is a conscious attempt to avoid potential prosecution and incarceration by appeasing his wife and daughter so that they would not report his alleged prior sexual assaults. Though the lock evidence may be susceptible to other competing inferences about Conley's state of mind, this does not render it inadmissible or unfairly prejudicial. Resolving such competing inferences is typical fodder for the jury, guided by the closing arguments of counsel. *See, e.g.*, ***Price***, 37 Wis. 2d at 132.

¶40 Conley's second ineffective assistance of counsel argument is based on his claim that his trial counsel should have objected to evidence of sexual inactivity between Conley and his wife in the months prior to the alleged assaults. During its cross-examination of Conley, the State asked Conley whether it was true that he had not had sex with his wife since February 2005—eight or nine months before his alleged assaults of M.A.C. In conjunction, Conley faults his trial counsel for not proffering expert testimony to suggest that such sexual activity would not likely motivate Conley to pursue sexual gratification from his twelve-year-old daughter.

¶41 This admission of "sexual inactivity" evidence without objection or offer of expert testimony by the defense caused this court considerable consternation. However, because we conclude that Conley has failed to show prejudice, we need not address whether counsel's performance failed. Thus, as in his first ineffective assistance claim, Conley does not prevail. *See* ***Strickland***, 466 U.S. at 697. Like the "lock" evidence, the "sexual inactivity" evidence was susceptible to competing inferences about Conley's state of mind at the time of the alleged sexual assault of M.A.C. Reasonable jurors could have both adopted

defense counsel's argument that the "sexual inactivity" evidence was inconsequential and yet still believed M.A.C.'s allegations.

¶42 Moreover, the State offered compelling evidence favoring M.A.C.'s credibility. Before the second alleged touching, M.A.C. had told no one of the first incident, explaining that she was both "scared" of Conley and "scared [she] would never see him again." Also, consistent with expert testimony on the subject, M.A.C. first revealed the sexual incidents to a close girlfriend, whom she then swore to secrecy and with whom she became very upset after the allegations became public. Furthermore, in accordance with her mother's directions, M.A.C. falsely told the family doctor that a neighborhood boy, not her father, had sexually touched her, and when M.A.C. revealed the incidents to a social worker, she expressed fear that her mother would be mad at her.

¶43 In short, the jurors were able to view both M.A.C. and Conley on the witness stand, and there is no reasonable probability that jurors would have resolved the credibility battle between them any differently had they not heard the "sexual inactivity" evidence. Thus, even assuming an error in performance, Conley did not show "a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different." *See* ***id.*** at 694. As such, any error, and we do not determine that this was error, would have been harmless, negating the prejudice necessary for an ineffective assistance claim.

¶44 *Trial Court Error.* Conley's third and fourth arguments are related to trial court error during trial. His fifth and sixth arguments claim trial court error during sentencing. We begin by noting that even if this court finds that the trial court has erred, we will not set aside a jury verdict based on claimed error if the

error is harmless. *See* WIS. STAT. § 805.18. An error is harmless if the reviewing court can say beyond a reasonable doubt that the error did not contribute to the verdict. ***State v. Mayo***, 2007 WI 78, ¶47, 301 Wis. 2d 642, 734 N.W.2d 115.

¶45 First, Conley argues that the trial court erroneously limited the examination of Lori on whether she believed her daughter's accusations when they were first made. Whether to admit or exclude evidence is within the trial court's discretion. ***Grube v. Daun***, 213 Wis. 2d 533, 541-42, 570 N.W.2d 851 (1997). Upon review of evidentiary issues, "[t]he question on appeal is not whether this court, ruling initially on the admissibility of the evidence, would have permitted it to come in, but whether the trial court exercised its discretion in accordance with accepted legal standards and in accordance with the facts of record." ***State v. Wollman***, 86 Wis. 2d 459, 464, 273 N.W.2d 225 (1979). "Thus, the test is not whether this court agrees with the ruling of the trial court, but whether appropriate discretion was in fact exercised." ***State v. Pharr***, 115 Wis. 2d 334, 342, 340 N.W.2d 498 (1983). This court will not find an erroneous exercise of discretion if there is a reasonable basis for the trial court's determination. ***Id.***

¶46 The trial court's ultimate decision to bar the defense from asking Lori if she initially disbelieved M.A.C.'s allegations was based on the reasonable exercise of discretion. The trial court heard both parties' positions on admission, allowed Conley an offer of proof and, thus, allowed the record to be preserved. The court relied on ***Haseltine*** in determining that defense counsel could not adversely question Lori on the issue of whether she initially believed the allegations brought by her daughter. We do not quite see this line of questioning as a ***Haseltine*** issue, but that is not determinative to our review because, as already noted, the question is not whether this court, ruling initially on the admissibility of the evidence, would have permitted it to come in. *See* ***Wollman***, 86 Wis. 2d at

464. Despite what this court in the trial court's place would have done, it was not error for the trial court, after exercising discretion in accordance with accepted legal standards and in accordance with the facts of record, to have limited the admission of the evidence in this regard. Moreover, even if it was error to rely on ***Haseltine*** to limit this evidence, that error would be harmless. The record supports that the jurors had more than sufficient evidence to adjudge M.A.C.'s credibility and to adjudge Lori's credibility without this line of questioning.

¶47 Conley next argues that the trial court's decision to allow jurors to question witnesses in a criminal trial constitutes structural error. Conley acknowledges that the trial court followed the procedure sanctioned in ***State v. Darcy N.K.***, 218 Wis. 2d 640, 581 N.W.2d 567 (Ct. App. 1998), and that this court is not empowered to overrule its prior decisions, ***Cook v. Cook***, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997). Conley is correct and cannot prevail here. However, Conley "raises this argument solely to preserve it for further appellate review." His argument is as follows. After acknowledging that the majority of states allow the practice of juror questioning, he directs us to a number of cases[8] in which he contends states "have banned it outright." He purports that

> [t]he courts of these states have correctly concluded that the practice of juror questioning raises significant concerns, including encouraging juries to form prior tentative opinions about the evidence and alleviating the burden on the state of marshalling evidence to prove a defendant guilty beyond a reasonable doubt. *See* [***State v.***] ***Costello***, 646 N.W.2d [204,] 210-11 [Minn. 2002]. These courts have concluded that in order to protect the neutrality and

[8] ***State v. Costello***, 646 N.W.2d 204 (Minn. 2002); ***Wharton v. State***, 734 So. 2d 985 (Miss. 1998); ***Johnson v. State***, 507 S.E.2d 737 (Ga. 1998); ***Morrison v. State***, 845 S.W.2d 882 (Tex. Crim. App. 1992); ***State v. Zima***, 468 N.W.2d 377 (Neb. 1991).

> impartiality of jurors it is not permissible to permit jurors to question witnesses in a criminal trial. ***Id.*** at 213.

Conley urges his belief that "the Wisconsin Supreme Court should adopt this reasoning and ban the practice of allowing jurors to question witnesses in criminal trials."

¶48 Conley's third trial-court-error argument is based on his contention that his sentence was unduly harsh. We disagree. Sentencing is left to the sound discretion of the trial court and we are limited on review to determining whether the trial court erroneously exercised discretion. ***State v. Harris***, 119 Wis. 2d 612, 622, 350 N.W.2d 633 (1984). We presume that the trial court acted reasonably in imposing sentence and the defendant has the burden to show some unreasonable or unjustified basis in the record for the sentence of which the defendant complains. ***Id.*** at 622-23. The primary factors to be considered in imposing sentence are the gravity of the offense, the character and rehabilitative needs of the defendant, and the protection of the public. ***State v. Sarabia***, 118 Wis. 2d 655, 673, 348 N.W.2d 527 (1984); ***State v. Curbello-Rodriguez***, 119 Wis. 2d 414, 433, 351 N.W.2d 758 (Ct. App. 1984). "Imposition of a sentence may be based on one or more of the three primary factors after all relevant factors have been considered." ***State v. Spears***, 227 Wis. 2d 495, 507-08, 596 N.W.2d 375 (1999). The trial court may also consider the defendant's criminal record; history of undesirable behavior patterns; personality and social traits; degree of culpability; demeanor at trial; remorse, repentance and cooperativeness; age, educational background and employment record; the results of a presentence investigation; the nature of the crime; the need for close rehabilitative control; and the rights of the public. *See* ***Curbello-Rodriguez***, 119 Wis. 2d at 433. A trial court exceeds its discretion when it imposes a sentence so excessive as to shock the public sentiment and violate the

judgment of reasonable people concerning what is right and proper under the circumstances. ***State v. Thompson***, 172 Wis. 2d 257, 264, 493 N.W.2d 729 (Ct. App. 1992).

¶49 Here, the trial court's sentencing rationale fully accounted for all three primary sentencing factors, including Conley's positive character attributes, and properly emphasizing the seriousness of Conley's criminal conduct. With regard to the gravity of the offenses, the trial court properly assessed both the nature of the criminal conduct and the resultant harm. We agree with the trial court's observation that, though incestuous conduct "is not as vicious and aggravated as many" sexual assaults, such conduct "causes tremendous emotional and psychological harm to a child." The trial court clearly considered Conley's positive character attributes: it credited him for having no criminal record, save for a minor theft, and no prior history of "undesirable behavior patterns." It commended him for a good educational record and for being a "hard worker" who, unfortunately, suffered an illness that led to bankruptcy. The court also observed that over the course of a sixteen-year marriage, until the sexual assaults, Conley, had been "a loving father" who, by his wife's account, "interrelate[d] with his children; play[ed] with his children appropriately." The court did not ignore, however, that Conley stands convicted of an incident of disorderly conduct for an event that happened some months before the assaults on M.A.C. in which Conley became embroiled with his wife in a domestic disturbance that "involved threats to kill and a gun." In addition, the court found that during trial, "it became absolutely evident that [Conley was] lying" and that "[i]n effect, [Conley] falsely accused his daughter of being a liar." It considered this "a very, very serious thing. That[] [constituted] false testimony during trial[.]"

¶50 Finally, in considering the protection of the public, the trial court expressed its concern for "the safety of … young women," concluding that because Conley "do[es] not tell the truth in the essentials" with respect to his sexual crimes, Conley exhibits "an extremely high need for close, rehabilitative control." The court was concerned with Conley's unwillingness to "accept responsibility" for his criminal conduct, thereby creating a concern that unless Conley is confined and treated, he poses a substantial risk to "children [who] come in contact with him."

¶51 With regard to the length of Conley's sentence, it was well within the limits of the maximum sentence he faced. Each ten-year term of initial confinement for incest is less than half the maximum of twenty-five years' initial confinement. *See* WIS. STAT. § 973.01(2)(b). In fact, the trial court imposed only two prison sentences—for the two incest convictions—while opting for probation for the two sexual assault convictions, which are Class B felonies that exposed Conley to a maximum of forty years' confinement for each. *See* § 973.01(2)(b)1. Conley's sentence is not so disproportionate to the offense committed as to shock the public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances. *See* ***Thompson***, 172 Wis. 2d at 264; *see also* ***State v. Grindemann***, 2002 WI App 106, ¶31, 255 Wis. 2d 632, 648 N.W.2d 507.

¶52 Conley's final argument on appeal is that a new sentencing is warranted due to the trial court's failure to consider the applicable sentencing guidelines under WIS. STAT. § 973.017(2).[9] Here, it is undisputed that the trial

---

[9] WISCONSIN STAT. § 973.017(2) provides:

(continued)

court did not consider the applicable sentencing guidelines. At the postconviction hearing, the court stated that it "was disturbed" that it "overlooked the [sentencing] guidelines," but determined that this was "harmless error, at best," because it gave Conley probation sentences for the two crimes for which the sentencing guidelines apply and gave him imprisonment for the two crimes for which the sentencing guidelines do not apply. The court reasoned: "What more could [Conley] have asked for in a case like this where he sexually assaulted a twelve-year-old child twice?" We agree with the trial court's assessment. If this was error, it was "harmless, at best."[10]

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.

> When a court makes a sentencing decision concerning a person convicted of a criminal offense committed on or after February 1, 2003, the court shall consider all of the following:
>
> (a) If the offense is a felony, the sentencing guidelines adopted by the sentencing commission created under 2001 Wisconsin Act 109 ….

[10] We also note that the sentencing guideline language in WIS. STAT. §§ 973.017(2)(a) and 973.017(10) has been repealed in the budget bill. *See* 2009 Wis. Act 29, §§ 3386m, 3387m.