STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT IV

Case No. 2020AP0029-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

WESTLEY D. WHITAKER,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING RESENTENCING, ENTERED IN VERNON COUNTY CIRCUIT COURT, THE HONORABLE DARCY J. ROOD, PRESIDING

BRIEF AND SUPPLEMENTAL APPENDIX OF PLAINTIFF-RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

ISSUES PRESENTED

1. Has Defendant-Appellant Westley D. Whitaker proven that the sentencing court relied on an improper factor, his religious beliefs or association with the Amish community, when imposing sentence?

The trial court held on postconviction review that it did not sentence Whitaker for his religious beliefs or his past association with the Amish community.

This Court should affirm because the trial court did not sentence Whitaker for his religious beliefs or past association with the Amish community. The court properly used his prison sentence to deter the practice of the local Amish community elders to cover up sexual assaults committed by one member against another.

2. Did Whitaker prove that his sentence was imposed in violation of the Eighth Amendment's proscription against cruel and unusual punishment?

The trial court held on postconviction review that the sentence it imposed was not cruel and unusual.

This Court should affirm because the sentence imposed for first-degree sexual assault, two years of initial confinement and two years of extended supervision where the maximum bifurcated sentence was sixty years in prison, was not cruel and unusual.

3. Did the trial court erroneously exercise its sentencing discretion?

The trial court held on postconviction review that the four-year bifurcated prison sentence it imposed was based on proper sentencing factors.

This Court should affirm because the trial court relied on relevant and appropriate factors for the sentence it imposed.

POSITION ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument. The briefs should adequately address the issues presented.

Publication may be of benefit depending on how this Court resolves the First and Eighth Amendment issues presented.

STATEMENT OF THE CASE

The charges and the plea

The State charged Whitaker with six counts of first-degree sexual assault of his two siblings, R.A.W. and S.E.W., committed over a period of nearly three years when Whitaker was between ages 12 and 15. The State charged three counts for each victim. His total penalty exposure if convicted of all six counts was 360 years, 60 years maximum for each count. (R. 1; 10.)

Police interviewed R.A.W. on June 22, 2017. As alleged in the complaint, R.A.W. stated that Whitaker sexually assaulted her and her two siblings repeatedly when she was between ages 10 and 13, and he was between ages 12 and 15, from 2005 through 2007. (R. 1:2.) It was "almost [on] a daily basis, and it was a lot more severe for [R.A.W.] because she was the oldest." (*Id.*) It "involved almost daily sexual intercourse, penis to vagina penetration, from Westley." R.A.W. said that Whitaker's assaults caused her two siblings to "move[ ] to Michigan to get away from this type of behavior and out of the household." (*Id.*)

Whitaker turned himself in two-and-one-half months later on September 7, 2017, when he called police and admitted his guilt in a telephone interview from his home in New York State. (R. 1:3.) Whitaker was aware that R.A.W. had given a statement to police, that "it was [her] idea that he call and give a statement," and he hoped it would "bring

closure." (*Id.*) Whitaker said he and R.A.W. discussed this in person at a "family wedding" a week earlier, and he also discussed this with S.E.W. over the phone. After discussing this with R.A.W. "and a counselor from the church," Whitaker agreed to turn himself in but only after asking: "Just to be clear, they are not pressing charges, right?" (*Id.*) Whitaker said, "since they were not pressing charges, he wanted to bring it all out and get it dealt with." (*Id.*)

Whitaker admitted in the telephone interview that the sexual activity "started in May 2005, and [he] believed June 2007 was the last time anything happened." (*Id.*) Whitaker admitted to having penis to vagina intercourse with R.A.W. "several times per week." (*Id.*) He would ejaculate inside her vagina without protection. (R. 1:4.) Whitaker also admitted sexually assaulting S.E.W. and C.R.W. Although Whitaker denied penis to vagina intercourse with those two, he admitted to ejaculating on them. (*Id.*) Whitaker added the detail that his victims "always had their eyes closed while the assaults were occurring." (*Id.*) Whitaker said he began assaulting S.E.W. and C.R.W. in late 2006 and stopped in June 2007, when "I realized the wrongness." (*Id.*)

S.E.W. told police in an October 2017 interview that the assaults on her began in 2005 when she was seven years old and ended when she was ten years old. She said Whitaker would rub his penis on her but there was no penetration, and "it occurred approximately every other day and occurred over the course of the summer." (R. 1:5.) S.E.W. explained that Whitaker "tried to penetrate her vagina with his penis, but could not because it was too painful for her." (*Id.*) One time, Whitaker penetrated her vagina with his fingers, "it was really painful for her, and there was blood from injuries caused by" Whitaker's inserting his fingers into her vagina. (*Id.*) According to S.E.W., Whitaker "ejaculated every time she was assaulted," and "it would normally go in her vagina area." (*Id.)* Whitaker threatened to "kill" S.E.W. if she told

anyone, and he threatened to "make her life hard if she did not cooperate with him." S.E.W. said she went along with it because "she didn't know what else to do." (*Id.*) S.E.W. said that Whitaker and another brother jointly assaulted her on one occasion and they "took turns." (*Id.*)

Police then interviewed C.R.W. She reported that Whitaker sexually assaulted her one time "when she was either six or seven years old" and Whitaker was fourteen years old. (R. 1:6.) Like S.E.W., C.R.W. said that Whitaker "tried to penetrate her vagina with his penis, but he could not penetrate her." (*Id.*)

After plea negotiations with the State, Whitaker pled no contest on January 25, 2019, to one count of first-degree sexual assault of a child. (R. 55.) The other five sexual assault charges "would be dismissed but read in" for consideration at sentencing. (R. 55:4.) The allegations in the criminal complaint served as the factual basis for the plea. Whitaker stated on the Plea Questionnaire and Waiver form that his plea would be "based upon the facts in the criminal complaint and/or the preliminary examination." (R. 15:2.) Whitaker had earlier waived a preliminary hearing. (R. 11..) At the plea hearing, Whitaker's attorney stipulated only to the facts supporting the one count to which Whitaker pled guilty. (R. 55:9–10.) He did not, however, dispute the facts supporting the other five counts that were dismissed but read into the record. At sentencing, defense counsel acknowledged that fifteen years earlier, Whitaker "began a series of terrible crimes against his sisters. We're not here today because Mr. Whitaker has denied or minimized those offenses." (R. 54:13.)

Sentencing

Whitaker was sentenced on April 18, 2019. (R. 54.) The trial court considered a presentence investigation report that included a victim impact statement. (R. 54:4.) The parties agreed, and the court held, that Whitaker would not have to

register as a sex offender because he no longer posed a risk to the public for the crimes he committed as a juvenile. (R. 54:6.) The victims recommended that Whitaker serve two to five years of initial confinement in prison. (R. 54:11.) The prosecutor recommended that he serve three years of initial confinement followed by three years of extended supervision because, despite his admission of guilt, Whitaker should be punished and must know that there are consequences for his actions. (R. 54:11–12.)

Defense counsel pointed to several mitigating factors: Whitaker had no criminal record, he has led a productive life as an adult, he turned himself in and pled no contest rather than go to trial, and he had sole custody of a young son. Although the presentence report recommended only a 30-day jail sentence, counsel argued that Whitaker should not have to serve any time at all or even be placed on probation. Whitaker has led a productive life since his juvenile offenses and was no longer a risk to reoffend. When Whitaker committed these crimes, he was an immature adolescent who, because of his sheltered upbringing, knew almost nothing about sex or the impact of his conduct on the victims. Whitaker stopped once he realized the wrongfulness of his conduct. The stigma of this felony conviction will follow him for life and alone is sufficient punishment, counsel argued. (R. 54:19–27.)

In exercising his right of allocution, Whitaker expressed remorse for his conduct, apologized to the victims, and hoped that this will be "a step forward in the healing process." (R. 54:28.)

In exercising its sentencing discretion, the trial court agreed with both attorneys that it faced a "[v]ery difficult decision" given that Whitaker committed these offenses when he was young and is no longer a risk. "But it's not one time, one act. It was a thousand. It was years of abuse." (R. 54:29.) The court saw the need to punish Whitaker for these crimes.

It also saw the need to use his sentence to deter others in the Amish community of which Whitaker and the victims were members when these assaults occurred. (*Id.*) The Court explained:

> I happen to live in the midst of an Amish community. I purchased an Amish house. They're my neighbors.
>
> And sexual assault of sisters is not something that is accepted. I understand it often happens and that it is dealt with in the community. And that's not sufficient. That's not sufficient when it is not a one-time thing and not when the women, the daughters, the wives in the Amish community are not empowered to come forward. They do not have the ability because of their upbringing. They are discouraged from bringing these issues forward.

(R. 54:29.)

The court sought to deter the local Amish community "from permitting their sons, their husbands to engage in this" behavior. (R. 54:29–30.) The court recognized that there is "zero" risk of Whitaker reoffending. That is why it did not require him to register as a sex offender. (R. 54:30.) The court also was pleased that Whitaker came forward and did not force the victims to go through a trial. (*Id.*) Nonetheless, the court emphasized the serious impact Whitaker's actions had on the victims, especially R.A.W.:

> So not only was [R.A.W.] destroyed by these acts night after night after night, but she was destroyed by the threats of her beloved older brother. But also she couldn't raise it in her family, or she would be blamed. She couldn't raise it in her family because she had no power in which to do so. She was not permitted to have those independent thoughts, I believe.

(R. 54:30.)

The court believed that Whitaker's "remorse is sincere." (R. 54:30–31.) The court also pointed out, however, that most Amish men raised the same way as Whitaker do not "sexually

assault their sisters night after night after night." (R. 54:31.) Explaining the need for confinement, the court stated:

> And the actual facts of this case are abhorrent, that she was victimized. She's in bed. She can't go to sleep comfortably in her own house. Mr. Whitaker can. Her parents can. But [R.A.W.] couldn't. In the one place where she is supposed to feel safety, with her parents' support, she didn't have it. And she didn't have the support of her beloved older brother.
>
> I think that no confinement would depreciate the seriousness of this offense.

(R. 54:31–32.) That is what made punishment a "critical" factor in the court's eyes. (R. 54:34.)

The court concluded:

> [A] prison sentence is the only way to send the message to Mr. Whitaker and to the community that this is totally unacceptable behavior. And perhaps it now can help the family heal. And I hope that the elders in the community pay attention to this.

(R. 54:32.)

Noting that the maximum prison sentence it could impose was 60 years (R. 54:30), the trial court rejected the State's recommended six-year bifurcated sentence as too long. It imposed a four-year bifurcated sentence instead (R. 54:32). The court stayed execution of the sentence and released Whitaker on bond pending appeal. (R. 54:36, 39–40.) The judgment of conviction was entered on April 22, 2019. (R. 29.)

Postconviction proceedings

Whitaker filed a postconviction motion for resentencing on August 16, 2019. (R. 35.) He argued that the trial court improperly considered his affiliation with the Amish community and its religious practices as a primary sentencing factor in violation of his First Amendment right to the free exercise of religion. Whitaker also argued that his sentence violated the Eighth Amendment's proscription against cruel

and unusual punishment. Finally, Whitaker argued that the trial court erroneously exercised its sentencing discretion. The trial court denied Whitaker's motion at a hearing held on December 30, 2019. (R. 61.)

The First Amendment Issue

After conceding that the court could use Whitaker's sentence to deter others from committing sexual assaults, defense counsel argued that it could not use his sentence to deter the elders in the Amish community from covering up sexual assaults just because he was raised Amish and was a member of that community when the assaults occurred. (R. 61:5–7.) In response, the court explained that the Amish do not condone sexual assaults but they must be deterred from covering up sexual assaults that occur within their community. (R. 61:7.) It did not consider religion as a factor. (R. 61:8.) The court's objective was both to address the failure of the Amish community to properly deal with sexual assaults within the community and to encourage victims to come forward. (R. 61:9–10.)

Defense counsel argued that it was improper for the trial court to use Whitaker's sentence to regulate the conduct of the Amish community just because of his past association with it. (R. 61:10.) In response, the court rhetorically asked what other purpose deterrence would serve if not to deter others in the community. (R. 61:11.) The prosecutor argued that the trial court was not using Whitaker's sentence to deter a religious practice (R. 61:12), and there was a "reliable nexus" between Whitaker's conduct and the Amish community (R. 61:13). The trial court denied this aspect of Whitaker's motion alleging that it improperly considered his religious beliefs and association as factors. (R. 61:14.)

The Eighth Amendment Issue

Defense counsel noted that the maximum sentence for Whitaker's admitted crime, discovered and charged as it was

long after he became an adult, was 24 times the maximum for the same crime had he been charged as a juvenile. (R. 61:15–17). In response, the court pointed out that Whitaker did not come forward when he was a juvenile at a time when he could have benefitted from juvenile jurisdiction and its lesser penalties. Whitaker did not come forward until years later after the victims finally confronted him. (R. 61:17.) These were serious offenses that occurred almost every day for over two years. (R. 61:20.)

The prosecutor argued that there is proper adult jurisdiction over these offenses because they did not come to light until after Whitaker became an adult. This is no different than any other case where the crime first comes to light when a victim comes forward 15 or 20 years later. (R. 61:21–22.)

The trial court agreed that had Whitaker come forward or had his crimes been discovered when he was a juvenile, he would have been subject to the lesser juvenile penalties, as opposed to the 60-year maximum adult penalty, and he could have taken advantage of the rehabilitative aspects of juvenile jurisdiction. But he did not come forward for many years, there were two other victims, and this delay exacerbated R.A.W.'s recovery because she could not effectively deal with the trauma until then. (R. 61:23.) The court again emphasized the seriousness of the offenses: It was "every night" and "really an extreme situation." (R. 61:23–24.)

Defense counsel argued that Whitaker could not come forward until after he had left the Amish community because sexual assault was deemed a "fatal sin." (R. 61:24–25.) The trial court responded: "But he didn't [come forward], he is charged as an adult . . . he is sentenced as an adult and the sentence is well within the legislature's parameters." (R. 61:25.) The court denied this aspect of the motion. (*Id.*)

Sentencing Discretion

Defense counsel acknowledged that the court articulated proper sentencing factors and that its sentence was well within the statutory range for first-degree sexual assault committed by an adult. Counsel argued nonetheless that the court erroneously exercised its discretion by failing to give proper weight to the factors that Whitaker committed his crimes as an adolescent, was no longer a danger to the community, and no longer needed to be rehabilitated. (R. 61:26–27.) The court explained that the sentence it imposed was what it believed to be the minimum necessary to achieve its sentencing objectives even though Whitaker no longer posed a danger to the public and no longer needed rehabilitation. (R. 61:27–28.) The court acknowledged, however, that it did not separately explain why, in addition to two years of initial confinement, two years of extended supervision was also appropriate. (R. 61:27.). But the court explained, "there are no criteria that say okay, this amount is the absolute right amount to sentence to," and noted that it had rejected as "excessive" the State's request for three years of initial confinement followed by three years of extended supervision in light of the mitigating factors favoring Whitaker. (R. 61:27.)

The court explained that the need for punishment was the primary factor for the sentence it chose and that anything lower would unduly depreciate the seriousness of Whitaker's offenses. (R. 61:27–28.) This was "[m]ore than just a teenager experimenting with sex, it was a brutal assault, because she was so young, on his sister." (R. 61:28.) The trial court denied this aspect of the motion. (*Id.*)

The court denied Whitaker's motion in its entirety at the close of the hearing (R. 61:31), and in a written order issued the same day (R. 44). Whitaker appeals from the judgment and order. (R. 42.)

STANDARD FOR REVIEW

Review of a sentence is deferential, limited to whether the trial court erroneously exercised its discretion. *State v. Harris*, 2010 WI 79, ¶ 3, 326 Wis. 2d 685, 786 N.W.2d 409. "Sentencing decisions are afforded a presumption of reasonability consistent with Wisconsin's strong public policy against interference with a circuit court's discretion." *Id*. This Court's duty is to affirm if, from the facts of record, the sentence is sustainable as a proper discretionary act. *State v. Berggren*, 2009 WI App 82, ¶ 44, 320 Wis. 2d 209, 769 N.W.2d 110.

ARGUMENT

I. The trial court did not base its sentence on Whitaker's religious beliefs or affiliation, or on the religious practices of the Amish, in violation of the First Amendment.

Whitaker argues that the trial court violated the First Amendment when it used his sentence to deter Amish religious practices because he and the victims were members of the Amish community when the crimes occurred. Whitaker's challenge lacks merit because the trial court was merely using his sentence for a secular purpose: to deter what everyone at sentencing agreed was the practice of elders in the Amish community to cover up sexual assaults committed by its members, such as Whitaker, against other members, such as his victims.

A. Whitaker must overcome the strong presumption that the sentencing court acted reasonably.

The sentencing court is presumed to have acted reasonably, and Whitaker bears the burden of proving an unreasonable or unjustifiable basis in the record for the sentence imposed. *State v. Davis*, 2005 WI App 98, ¶ 12, 281 Wis. 2d 118, 698 N.W.2d 823. The sentencing court

erroneously exercises its discretion when it "actually relies on clearly irrelevant or improper factors." *Harris*, 326 Wis. 2d 685, ¶ 66.

Due to this presumption of reasonableness, the burden of proving an erroneous exercise of sentencing discretion is a "heavy" one. *Harris*, 326 Wis. 2d 685, ¶ 30. Whitaker must present clear and convincing evidence that the court actually relied on improper or inaccurate factors. *Id.* ¶¶ 34–35, 60; *see State v. Loomis*, 2016 WI 68, ¶ 31, 371 Wis. 2d 235, 881 N.W.2d 749; *State v. Alexander*, 2015 WI 6, ¶¶ 2, 17, 360 Wis. 2d 292, 858 N.W.2d 662 (same).

The court actually relies on an improper factor when it pays "explicit attention" to that factor and it forms the "basis for the sentence." *Alexander*, 360 Wis. 2d 292, ¶ 25. When determining whether the sentencing court relied on an improper factor, the reviewing court "review[s] the sentencing transcript as a whole and consider[s] the allegedly improper comments in context." *State v. Williams*, 2018 WI 59, ¶ 52, 381 Wis. 2d 661, 912 N.W.2d 373.

B. The trial court properly used Whitaker's sentence as a vehicle to deter the actions of the elders in the local Amish community that it believed contributed to Whitaker's criminal conduct and discouraged his victims from coming forward.

Deterrence of others is one of the primary factors a court may consider when imposing sentence. *State v. Gallion*, 2004 WI 42, ¶ 40, 270 Wis. 2d 535, 678 N.W.2d 197; *see id.* ¶ 61 ("The court also observed that society has an interest in punishing Gallion so that his sentence might serve as a general deterrence against drunk driving."). General deterrence is widely recognized as a proper sentencing factor. *United States v. Barker*, 771 F.2d 1362, 1368 (9th Cir. 1985).

But deterrence should not be "the *sole* aim in imposing sentence." *Id*. at 1368.

1. The court did not sentence Whitaker for his abstract religious beliefs or religious association in violation of the First Amendment.

The trial court may not base its sentence on either the defendant's or the victim's religion, the defendant's religious beliefs, or those of the victim's family. *State v. Ninham*, 2011 WI 33, ¶¶ 90, 94, 333 Wis. 2d 335, 797 N.W.2d 451. Whitaker must prove by clear and convincing evidence that the court actually relied on his religious beliefs or association for the sentence it imposed. *Id*. ¶ 100. Whitaker acknowledges that he bears this daunting burden of proof. (Whitaker's Br. 11.)

The Constitution does not absolutely prohibit consideration of a defendant's religious beliefs or association at sentencing even though they are protected by the First Amendment. *Dawson v. Delaware*, 503 U.S. 159, 165 (1992). The court may not sentence a defendant merely for his abstract beliefs protected by the First Amendment. *Id*. at 167. The Supreme Court, however, "in *Dawson* suggested that evidence of a defendant's protected associations or beliefs *would* be relevant at sentencing *if* the Government tied that evidence to the offense of conviction or introduced it to rebut mitigating evidence." *United States v. Schmidt*, 930 F.3d 858, 863 (7th Cir. 2019). The defendant's protected beliefs and associations may be considered when they are relevant to proper sentencing factors. *Id.* at 864–66 (and cases discussed therein); *see id*. at 867–69 (defendant's white supremacist beliefs, coupled with his criminal record, were properly considered as evidence of his future dangerousness and lack of respect for the law); *see also Ninham*, 333 Wis. 2d 335, ¶ 96 (the court may consider the "unique and particularized impact" of the defendant's conduct on the victim's family).

There must be a "reliable nexus" between the crime and the defendant's religious beliefs or practices. *See State v. Fuerst*, 181 Wis. 2d 903, 912–13, 512 N.W.2d 243 (Ct. App. 1994) (so holding as a matter of due process). This nexus can be established even absent a "cause and effect" relationship between the crime and the defendant's religious beliefs or practices. *State v. J.E.B.,* 161 Wis. 2d 665, 673, 469 N.W.2d 192 (Ct. App. 1991).

A parent's right to the free exercise of religion may be restricted by the State, "if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens." *Wisconsin v. Yoder*, 406 U.S. 205, 233–34 (1972). In *United States v. Lee*, 455 U.S. 252, 258–61 (1982), the Court rejected an Amish employer's First Amendment challenge to the mandatory collection and payment of social security taxes on the ground that the Amish faith prohibits participation in a governmental support program. *C.f. State v. Yoder*, 49 Wis. 2d 430, 437–443, 182 N.W.2d 539 (1971) (upholding a First Amendment challenge to Wisconsin's law requiring two years of compulsory high school education as applied to Amish children because the State's interest was not compelling).

Whitaker's association with the Amish community was relevant to his crimes and to the societal interest in deterring future coverups of sexual assaults in the Amish community. Whitaker acknowledges that "the intended deterrence was directed solely towards preventing sexual assault and encouraging reporting of offenses within a religious community." (Whitaker's Br. 13.)

It is especially important to note here that Whitaker does not dispute what amounts to the trial court's finding of fact that it was then a common practice of the Amish community, at least in Vernon County, to not report sexual assaults by its members against other members, opting instead to address the problem internally. (R. 54:29–30.) In

his sentencing remarks, Whitaker's attorney acknowledged that "adults . . . were aware of this" while it was going on. (R. 54:16.) Whitaker "does not argue that sexual assault is an acceptable practice." (Whitaker's Br. 14 n.17.) He presumably also would agree that covering up sexual assault is not an acceptable religious practice; it is misconduct in any community that in this case happened to occur within a religious community.

In his sentencing remarks, the prosecutor discussed why it took so long for these assaults to come to light:

> Is it the parents' failure to address these situations? We've dealt with these situations, Your Honor, in the past in the Amish community, where we have had sisters, daughters that have been sexually assaulted, and then they end up actually leaving the Amish community, and then it gets reported years later.
>
> So I understand the culture surrounding the Amish, that they want to handle these situations internally. And a lot of times what they end up doing is they end up sending the people off to Ohio, is one of the treatment places that a lot of these individuals in the past have gone to.
>
> So there's a lot of -- there's a lot of things that are going on as to why this wasn't reported, why it wasn't addressed 12 or 14 years ago.

(R. 54:8.)

In his sentencing remarks, Whitaker's attorney stated the following:

> I think it's also important to note that there were adults who were aware of this conduct when it was happening. *They went to their religious elders at the time, and it was recommended that the allegations remain within the community*. So even when the adults had the opportunity to intervene, they chose not to and treated it -- and I've handled several sexual assault cases from the Amish community. *This is not unusual.* I'm sure the Court and Mr. Gaskell [the

> prosecutor] are well aware of that. But they treated it as is traditionally treated in the Amish, and as a result there was never any meaningful intervention *even though people were aware that this happened*.

(R. 54:16 (emphasis added).)

It was undisputed, therefore, that sexual assaults generally have been covered up within the Amish community in Vernon County, and Whitaker's sexual assaults in particular were covered up, having adverse impacts on Amish victims while not discouraging offenders. It was reasonable and within the scope of the trial court's sentencing discretion to use Whitaker's sentence to deter more coverups in hopes that future Amish victims will be empowered to report sexual abuse while future offenders like Whitaker will be dealt with in the juvenile justice system sooner. (R. 54:29–30.)

The court did not punish Whitaker for his religious beliefs or affiliation. Whitaker concedes that the Amish strongly forbid sexual assault. (Whitaker's Br. 15 ("[T]he record illustrates that all expressions of adolescent sexuality were heavily shunned and viewed by the elders as sins.").) Obviously, sexual abuse is not a tenet of the Amish religion. Covering up sexual assaults also is not a tenet of the Amish religion just as covering up sexual abuse by priests is not a tenet of the Catholic religion.

Obstructing the investigation of sexual assault by civil authorities is both outside the scope of religious doctrine and illegal. The imposition of a lengthy sentence on a Catholic priest convicted of sexual assault to deter other potentially abusive priests, to deter local archdioceses from covering up such conduct in the future, and to encourage other priest-abuse victims to come forward, is proper. No one could seriously dispute that using an abusive priest's sentence to deter others in this fashion would be both a constitutional and an eminently reasonable secular purpose.

"Religious conduct intended to or certain to cause harm need not be tolerated under the First Amendment." *Gibson v. Brewer*, 952 S.W.2d 239, 248 (Mo. 1997). Liability for the tort of intentional failure to supervise clergy does not violate the First Amendment. *Id.* Religious beliefs are absolutely protected, but "[c]onduct remains subject to regulation for the protection of society." *Cantwell v. Connecticut*, 310 U.S. 296, 303–04 (1940). "The government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, 'cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development.'" *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 885 (1990) (citation omitted). The government may "enforce generally applicable prohibitions of socially harmful conduct." *Id.* "To make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs . . . contradicts both constitutional tradition and common sense." *Id.* There is no "constitutional right to ignore neutral laws of general applicability." *City of Boerne v. Flores*, 521 U.S. 507, 513 (1997). "When the exercise of religion has been burdened in an incidental way by a law of general application, it does not follow that the persons affected have been burdened any more than other citizens, let alone burdened because of their religious beliefs." *Id.* at 535. Whitaker failed to prove that the trial court relied on an improper factor at sentencing: his abstract religious beliefs or association untethered to his admitted criminal conduct. It sought to deter illegal conduct that happened to occur within a religious community.

2. The use of Whitaker's sentence to deter future coverups of sexual assaults in the Amish community did not deny him due process.

Whitaker's challenge fits more neatly under the Fourteenth Amendment's Due Process Clause than under the

First Amendment's Establishment or Free Exercise Clause. It is unfair, a denial of due process, to consider the defendant's race, religious beliefs or religious affiliation as sentencing factors. *Zant v. Stephens*, 462 U.S. 862, 885 (1983). The pertinent issue is whether the sentencing was fair; not whether it violated the Establishment Clause. *Bates v. Sec'y, Fla. Dep't of Corrs.*, 768 F.3d 1278, 1290 (11th Cir. 2014) (and cases cited therein).

Likewise, in Wisconsin it is a denial of due process for a sentencing court to consider the defendant's religion, religious beliefs or his failure to attend church. *Alexander*, 360 Wis. 2d 292, ¶ 23; *Fuerst*, 181 Wis. 2d at 911–12; *see State v. Travis*, 2012 WI App 46, ¶ 13, 340 Wis. 2d 639, 813 N.W.2d 702 (defendants have a "constitutionally protected due process right to be sentenced upon accurate information and a fair sentencing process").

The sentencing court may consider the defendant's religious associations only if there is "some identifiable link between those associations and the crime for which the defendant was convicted." *Fuerst*, 181 Wis. 2d at 912. There must be a "reliable nexus" between the defendant's religious beliefs or practices and his criminal conduct. *Id.* at 913; *see United States v. Lemon*, 723 F.2d 922, 936 (D.C. Cir. 1983) (due process requires that there be an "identifiable link" between the defendant's association and the crime committed). "For example, it would be permissible for a court sentencing a defendant convicted of drug offenses to consider the defendant's religious practices as a factor at sentencing if those religious practices involve the use of illegal drugs." *Fuerst*, 181 Wis. 2d at 913; *see id.* (the presentence investigation report properly contained information about a defendant's religious history, along with his personal and social history, when it evaluated his character); *State v. J.E.B.*, 161 Wis. 2d at 673 (proper to consider the fact that the defendant read books containing child pornography because

the crime, sexual contact with a child, paralleled the arguably protected activity); *see also State v. Betters*, 2013 WI App 85, ¶ 11, 349 Wis. 2d 428, 935 N.W.2d 249 ("[T]he mere mention of a religious element during sentencing is generally insufficient to establish a due process violation.").

There was a "reliable nexus" between Whitaker's criminal conduct and the coverup of sexual assaults in the Amish community. Whitaker all but concedes the point. (Whitaker's Br. 14–15.) "After all, if Mr. Whitaker had not been Amish, he would not have been an appropriate subject to deter sexual assault within this community, or influence the behavior of its elders." (Whitaker's Br. 14.) Correct. Whitaker was, however, a member of this particular Amish community when he committed sexual assaults against his Amish siblings and, so, he was "an appropriate subject to deter sexual assault within this community, or influence the behavior of its elders." That is what provided the nexus. That was not unfair.

Whitaker helpfully explains when there would be no nexus: "In comparison, similarly-situated offenders raised outside of the Amish community would not be subject to the same deterrence interest, and a trial court would not have as compelling of a rationale to impose a prison sentence on a secular offender." (Whitaker's Br. 15.) Precisely. The rationale for deterrence was compelling here because it involved sexual assaults committed by a member of the Amish community against other members of the Amish community, and Amish elders were aware of the activity but covered it up. That is why the trial court acted both reasonably and constitutionally when it decided to use Whitaker's sentence to deter future coverups to the detriment of future victims within this particular Amish community.

Whitaker's sentence may or may not deter future juvenile offenders like him but it could prevent future assaultive conduct from going on for so long. Whitaker's

sentence might deter future sexual assault coverups by encouraging elders in the Amish community to involve civil authorities from the beginning so that young Amish offenders can receive appropriate treatment in the juvenile justice system with its lesser penalties, and by empowering victims in the community to come forward and stop the abuse sooner. Whitaker's sentence also might deter future adult offenders in the Amish community and encourage the victims of adult offenders to come forward. There was, then, a "reliable nexus" between Whitaker's conduct and his association with the Amish community when he committed these offenses for such a long time; and there was a "reliable nexus" between his crimes and the practice of the Amish community to not report sexual assaults and instead deal with them internally. *See Deyton v. Keller*, 682 F.3d 340, 346 (11th Cir. 2012) (sentencing must accurately reflect the community's attitude towards the crime to reinforce the community's values, and it should take into consideration the impact the criminal conduct has had on the community).

Whitaker relies heavily on the Hawaii Court of Appeals' decision in *State v. David*, 339 P.3d 1090 (Haw. Ct. App. 2014), *vacated on other grounds*, 409 P.3d 719 (Haw. 2017). That decision has no persuasive force here. It is obviously not controlling in Wisconsin. More important, the improper factor at sentencing in *David* was the prosecutor's appeal to racial prejudice towards Micronesians (the defendant was Micronesian). *Id*. at 1103–04; *see id*. at 1092 ("The prosecutor then stated that 'we're talking Micronesians who get inebriated on alcohol, then become violent with their own family members, their own friends and they involve knives.'"). Whitaker asserts at p. 16 of his brief that the *David* court ruled the "mere appearance of basing a sentence on a protected factor" violates the Constitution. The opinion does not so state. If it did, that holding would be contrary to Wisconsin precedent holding that the defendant's beliefs and

associations protected by the Constitution may be considered if there is a reliable nexus between those beliefs and associations and the crimes for which the defendant is facing sentence. *Fuerst*, 181 Wis. 2d at 912–13. What the court in *David* did was to remand for resentencing before a different judge because, although the judge said in his remarks that he was not relying on the prosecutor's appeal to racial prejudice to send a message to Micronesians, "the appearance of justice would be better served" if the defendant were resentenced before a different judge. *David*, 339 P.3d at 1104–05.

Adults in the Amish community covered up Whitaker's criminal conduct for over two years to the severe physical and emotional detriment of his young victims who were also members of the Amish community. The trial court did not appeal to religious prejudice. The trial court properly exercised its discretion in a manner consistent with due process when it used Whitaker's sentence as a tool to deter elders in the Amish community from covering up future assaultive conduct to the detriment of future Amish victims. "[T]he court's actual sentence was informed by proper secular factors regarding the seriousness of the offense, and the nature and extent of injury to the victim[s]," *Betters*, 349 Wis. 2d 428, ¶ 17, placing Whitaker's "conduct in a secular context." *Id.* ¶ 18. Whitaker failed to prove a due process violation.

II. *Whitaker* failed to prove that the trial court imposed a sentence that was cruel and unusual in violation of the Eighth Amendment.

Whitaker argues that his sentence was cruel and unusual in violation of the Eighth Amendment. The trial court could have imposed a maximum 60-year bifurcated prison sentence for first-degree sexual assault. It imposed a four-year bifurcated sentence for what it termed "extreme"

offenses. (R. 61:23–24.) There was nothing "cruel and unusual" about Whitaker's sentence.

A. A sentence imposed within the statutory limits is normally not cruel and unusual in violation of the Eighth Amendment.

The Eighth Amendment "guarantees individuals protection against excessive sanctions." *Ninham*, 333 Wis. 2d 335, ¶ 45. It is based on the precept that the punishment should be proportionate to the crime. *Id.* ¶ 46. The punishment must be consistent with "evolving standards of decency that mark the progress of a maturing society." *Id.* (citations omitted).

The United States Supreme Court has cautioned against appellate courts second-guessing the appropriateness of a particular sentence under the Eighth Amendment. *Solem v. Helm*, 463 U.S. 277, 290 n.16 (1983).

A sentence within statutory limits is normally not deemed unconstitutionally harsh. *Hutto v. Davis*, 454 U.S. 370, 372–74 (1982). If the sentence is within statutory limits, it is not cruel and unusual unless it is so excessive and disproportionate to the crime, "as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." *Ninham*, 333 Wis. 2d 335, ¶ 85.

In *Rummel v. Estelle*, 445 U.S. 263, 266–76, 285 (1980), the Court refused to overturn a sentence of life imprisonment for recidivism based upon the defendant's conviction of three relatively minor felonies.

In *Harmelin v. Michigan*, 501 U.S. 957, 961, 994–95 (1991), the Court rejected a proportionality challenge to a sentence of life in prison without the possibility of parole for possessing more than 650 grams of cocaine.

In *Hutto*, 454 U.S. at 374–75, the Court upheld an Eighth Amendment proportionality challenge to a 40-year prison sentence for possession with intent to distribute nine ounces of marijuana.

In *Ninham*, the Wisconsin Supreme Court rejected an Eighth Amendment proportionality challenge to the sentence of a 14-year-old to life in prison without the possibility of parole for first-degree intentional homicide. 333 Wis. 2d 335, ¶¶ 51–86.

In *State v. Barbeau*, 2016 WI App 51, ¶¶ 26–33, 36–43, 370 Wis. 2d 736, 883 N.W.2d 520, this Court held that a juvenile convicted of first-degree intentional homicide may be sentenced, consistent with the Eighth Amendment, to life in prison without extended supervision if the circumstances warrant and only after the effects of youth are taken into account. *Id.* ¶¶ 26–33. This Court also rejected an Eighth Amendment challenge to Wisconsin's 20-year mandatory minimum eligibility for release on extended supervision as applied to a juvenile sentenced to life in prison for first-degree intentional homicide. *Id.* ¶¶ 35–43; *see also State v. Jackson*, No. 2017AP712, 2018 WL 4179078, ¶¶ 24–42 (Wis. Ct. App. Aug. 28, 2018 (unpublished) (upholding against an Eighth Amendment challenge a sentence of life in prison without the possibility of parole imposed on a juvenile for several offenses including first-degree intentional homicide where the sentencing court "took into consideration all of these factors relating to Jackson's age," *id.* ¶ 40).

B. Whitaker failed to prove that his four-year bifurcated sentence was disproportionate to his crimes or shocking to the public conscience.

Whitaker committed his crimes as a juvenile, but they did not come to light until he self-reported as an adult over a decade later. The State properly charged Whitaker as an

adult, thereby exposing him to adult penalties, because the date of charging, not the date of commission, controls and the State did not delay charging him to avoid juvenile jurisdiction. *State v. Annala*, 168 Wis. 2d 453, 460–63, 465, 471, 484 N.W.2d 138 (1992); *State v. Becker*, 74 Wis. 2d 675, 676, 678, 247 N.W.2d 495 (1976); *see State v. Sanders*, 2018 WI 51, ¶¶ 31–42, 381 Wis. 2d 522, 912 N.W.2d 16.

Whitaker pled guilty to one count of first-degree sexual assault of a child under age 13, in violation of Wis. Stat. § 948.02(1)(e). The maximum penalty for that offense is 60 years in prison. Wis. Stat. § 939.50(3)(b). Five other first-degree sexual assault charges, each with its own 60-year maximum penalty, were dismissed but read into the record for sentencing purposes in exchange for his plea.

Whitaker maintains that his sentence was cruel and unusual because, "had these offenses been reported within three years of when they were committed," he would have been subject to juvenile jurisdiction. (Whitaker's Br. 17.) They had not, however, "been reported" because: (1) Whitaker waited over a decade to report them; (2) he self-reported only because R.A.W. confronted him at a family gathering after she had already gone to the police; and (3) his victims who were mere children at the time were too frightened to tell anyone sooner because he threatened them, they did not have the support of their parents, and two of them moved away.

The trial court correctly decided not to give Whitaker any benefit for waiting so long to report his crimes. *See Davis*, 281 Wis. 2d 118, ¶ 23 ("Further, it would be unjust for this court to conclude that a juvenile who avoids apprehension until he is an adult should be given the benefit of his illegal actions.").

The fact that Whitaker waited so long to self-report, and only at the urging of R.A.W. who had already reported the assaults to police, is why his penalty exposure was so much

greater than it would have been had he admitted his guilt or been reported while still a juvenile. Whitaker's claim that "his conscience compelled him to confess" rings hollow. (Whitaker's Br. 21.) The *victims* compelled him to confess. Had R.A.W. not reported him two-and-one-half months earlier, and had she and her sisters not thereafter pressured him to report, these crimes likely never would have come to light.

Whitaker blithely insists that he never "intended for his sister to suffer in the absence of his confession." (Whitaker's Br. 22.) What did he expect? Whitaker had to know that R.A.W. was still suffering from all of the abuse he inflicted on her almost daily for over two years. Perhaps it was not Whitaker's intent that his sister would continue to suffer years after the abuse ended, but he had to know it was practically certain that she would still suffer. R.A.W. made that clear to Whitaker when she confronted him at a family gathering and urged him to come forward to finally bring closure for her and her sisters. At that, Whitaker turned himself in believing that he would not be charged. (R. 1:3.) In short, Whitaker deserves little credit for finally owning up to his crimes under pressure nearly eleven years after the abuse ended.

The overall tone of Whitaker's argument is that his offenses just were not that serious because he was an adolescent when he committed them and did not know better. The sentencing court, on the other hand, was moved by the gravity of his conduct despite his age and believed that anything short of a prison sentence would unduly depreciate the seriousness of his offenses. Again, Whitaker committed at a minimum several hundred sexual assaults against not only R.A.W. but two other sisters for over two years. His actions included regular penis-vagina intercourse and ejaculation. His actions inflicted significant emotional harm on his victims, causing two of his sisters to move out of state to get

away from him. (R. 1:2.) Moreover, the fact that Whitaker threatened to kill S.E.W. and make things hard for her if she told anyone (R. 1:5), belies his claim that he did not understand the wrongfulness of his conduct in time to come forward as a juvenile.

The need to hold Whitaker accountable for this serious criminal activity, to punish him for it, and as discussed above to deter others in the Amish community from covering up future such activity, properly motivated the court to impose a prison sentence that was 1/15th of the statutory maximum.

III. The trial court properly exercised its sentencing discretion after applying relevant factors including the gravity of Whitaker's conduct, its impact on the victims, the need to punish him, and the hope that it will deter others.

Whitaker's final argument, that the trial court erroneously exercised its sentencing discretion contrary to *Gallion*, need not detain this Court for long. The trial court considered relevant and appropriate factors before imposing a bifurcated prison sentence that was 1/15th of the maximum for first-degree sexual assault.

A. There are a variety of proper factors that a court may consider when imposing sentence.

It is strongly presumed that the trial court's exercise of sentencing discretion was reasonable because it is best suited to consider relevant factors as well as the demeanor of the defendant. *Harris*, 326 Wis. 2d 685, ¶ 39. Appellate courts follow a "consistent and strong policy" of not interfering with the sentencing court's decision. *Id. See generally McCleary v. State*, 49 Wis. 2d 263, 281, 182 N.W.2d 512 (1971). This Court's duty is to affirm if, from the facts of record, the sentence is sustainable as a proper discretionary act. *Berggren*, 320 Wis. 2d 209, ¶ 44.

The primary factors the court must consider when exercising sentencing discretion are: the gravity of the offense, the character of the offender, and the need to protect the public. *Harris*, 326 Wis. 2d 685, ¶ 28. The court may consider a variety of other factors as well including: the defendant's criminal history, his personality and social traits, results of a presentence investigation, the aggravated nature of the crime, the defendant's culpability, his age and education, his remorse or lack thereof, his cooperation, his need for close rehabilitative control, and the rights of the public. *Id.*; *Gallion*, 270 Wis. 2d 535, ¶¶ 43–44. Deterrence of others in the community is a proper factor. *Id.* ¶ 40.

"The trial court exhibits the essential discretion if it considers the nature of the particular crime (the degree of culpability) and the personality of the defendant and, in the process, weighs the interests of both society and the individual." *State v. Daniels*, 117 Wis. 2d 9, 21, 343 N.W.2d 411 (Ct. App. 1983). Statements by the victims as to how the crimes impacted their lives also are properly considered. *Ninham*, 333 Wis. 2d 355, ¶ 96.

The sentencing court is not required to address all relevant sentencing factors on the record. *State v. Echols*, 175 Wis. 2d 653, 682, 499 N.W.2d 631 (1993). The court must identify the most relevant factors and explain how the sentence it imposes will further its sentencing objectives. *Harris*, 326 Wis. 2d 685, ¶ 29.

The court has considerable discretion in deciding what weight to give each factor it considers. *Harris*, 326 Wis. 2d 685, ¶ 28. The trial court errs only if it "gives too much weight to one factor in the face of other contravening factors." *State v. Steele*, 2001 WI App 160, ¶ 10, 246 Wis. 2d 744, 632 N.W.2d 112.

The court also has considerable discretion in determining the length of the sentence within the permissible statutory

range. *Hanson v. State*, 48 Wis. 2d 203, 207, 179 N.W.2d 909 (1970). "The court must provide an explanation for the general range of the sentence imposed, not for the precise number of years chosen, and it need not explain why it did not impose a lesser sentence." *Davis*, 281 Wis. 2d 118, ¶ 26 (citing *Gallion*, 270 Wis. 2d 535, ¶¶ 49–50, 54–55); *see State v. Klubertanz*, 2006 WI App 71, ¶¶ 17, 22, 291 Wis. 2d 751, 713 N.W.2d 116 (same).

B. The trial court properly weighed the gravity of the offenses, their impact on the victims, and the need to deter others on balance with the mitigating factors in Whitaker's favor.

The court was disturbed by the nature and number of sexual assaults committed by Whitaker against his three siblings on almost a daily basis approaching three years when the victims were mere children. The court believed that anything short of a prison sentence would unduly depreciate the seriousness of Whitaker's conduct. The court was also moved by the impact of Whitaker's crimes on his victims. And, as discussed above, the court hoped that the prison sentence would deter the practice of the elders in the Amish community to cover up sexual assaults committed by one member against another. (R. 54:29–32.)

These were all relevant and appropriate factors. The court was free to assign more weight to some than to others. The court gave significant weight to the seriousness of the offenses, to their impact on the victims, to the need to punish Whitaker, and in the interest of deterring future coverups of sexual assaults in the Amish community to prevent future assaults and encourage future victims to come forward.

Whitaker complains that the court did not fully explain why it imposed two years of extended supervision. The court did not have to explain why it chose two years of extended supervision as opposed to something less or, for that matter,

greater. *Davis*, 281 Wis. 2d 118, ¶ 26; *Klubertanz*, 291 Wis. 2d 751, ¶¶ 17, 22. Two years of supervision after Whitaker's release will help ensure that nothing like this ever happens again.

Whitaker's four-year bifurcated sentence was 1/15th of the statutory maximum. His sentence did not "shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." *Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). It was reasonable. The trial court properly exercised its discretion.

CONCLUSION

This Court should affirm the judgment and order.

Dated this 30th day of July 2020.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 8,378 words.

Dated this 30th day of July 2020.

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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 30th day of July 2020.

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Supplemental Appendix
State of Wisconsin v. Westley D. Whitaker
Case No. 2020AP29-CR