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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case Nos. 2020AP000029-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

WESTLEY D. WHITAKER,

Defendant-Appellant

On Appeal from Judgment of Conviction
Entered in the Vernon County Circuit Court,
The Honorable Darcy J. Rood, Presiding

REPLY BRIEF OF DEFENDANT-APPELLANT

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CONSTITUTIONAL PROVISIONS AND STATUTES CITED

I. MR. WHITAKER OBJECTS TO RELYING ON FACTS OUTSIDE OF THE SENTENCING RECORD

When he pleaded no contest Mr. Whitaker limited the stipulated facts to those necessary to accept a plea to count one. (55:9-10). The State attempts to aggravate Mr. Whitaker's acts by referencing facts that the trial court did not find on the record or otherwise consider.[1] Particularly, that Mr. Whitaker threatened to kill S.E.W., or that he otherwise intimidated her, and that he caused S.E.W. and C.R.W. to suffer "significant emotional harm." (Resp. Br. 25-26). To the contrary, the pre-sentence investigation stated that C.R.W. denied ongoing harm and noted that S.E.W. was not interviewed about the allegations. (19:5). The trial court did not refer to or otherwise make a finding of fact on these allegations during sentencing. Mr. Whitaker objects to this court considering facts which were excluded from the factual basis that supported the plea, and were not relied on by the sentencing court.

II. THE SENTENCING COURT CONSIDERED MR. WHITAKER'S BELIEFS AND ASSOCIATION WITH THE AMISH COMMUNITY DURING SENTENCING

It is improper to consider a defendant's religious beliefs and association with communities of faith at sentencing unless there is a relevant relationship between the protected conduct and criminal activity. *State v. Fuerst*, 181 Wis. 2d 903, 913, 512 N.W.2d 243 (Ct. App. 1994). Mr. Whitaker bears the burden of showing by clear and convincing evidence that the sentencing court improperly relied on his religious beliefs or association with a religious community. *State v. Alexander*, 2015 WI 6, ¶¶ 2, 17, 360 Wis. 2d 292, 858 N.W.2d 662. On that question, the sentencing transcript speaks for itself. Judge Rood explicitly limited the deterrent goal of Mr. Whitaker's sentence to protecting wives and daughters in the Amish community, expressing her hopes that the Amish elders would attention to the consequences in his case. (54:29-32; App. 133-136). The sentencing court's remarks focused on deterring

[1] Mr. Whitaker acknowledges that read-in offenses can be considered, but disputes that all facts surrounding a dismissed allegation may be considered as true when they were not stipulated to at the time of the plea or relied upon by the trial court at sentencing.

misconduct and encouraging reporting solely within the Amish community. This goal necessarily required consideration Mr. Whitaker's Amish beliefs, and his association with the corresponding religious community.

The sentencing court also made clear at the post-conviction motion hearing that it had explicitly considered Mr. Whitaker's membership in the Amish community as its basis for deterrence, stating that the sentence was intended to combat the tendency of the Amish community to deal with allegations of sexual assault internally, and encourage reporting of childhood sexual offenses by adults in the Amish community. (61:9-10; App. 154-155). These remarks independently establish that the sentencing court explicitly considered Mr. Whitaker's association with the Amish community when it identified the deterrent component of his sentence. Even the State acknowledged that the sentencing court relied on Mr. Whitaker's association with the Amish community, arguing that this association makes him a proper subject to deter behavior within the Amish. (Resp. Br. 14). As such, Mr. Whitaker has met his burden to prove that the sentencing court relied, in part, on his religious faith, and membership in the Amish community as a factor in sentencing.

III. CRIMINAL DETERRENCE CANNOT BE USED TO DISCOURAGE OTHERWISE LAWFUL SOCIAL BEHAVIOR AND THE STATE HAS NOT ESTABLISHED THE NEXUS BETWEEN RELIGIOUS AFFILIATION AND CRIMINAL ACTIVITY THAT IS REQUIRED BY *FUERST*

Arguing that elders of the Amish community would be more likely to report sexual assaults by its male members if Mr. Whitaker is sentenced to prison, the State argues the inverse of an old proverb: that sons should not suffer the sins of their fathers. Instead, the State asks this court to punish Amish sons because their fathers did not report earlier childhood sexual assaults to civil authorities. Citing no authority for its position, the State seeks to expand the definition of deterrence beyond preventing crime to encouraging the reporting of crime. The State's position that criminal deterrence applies to socially undesirable, but otherwise lawful behavior must fail for several reasons.

First, what the State suggests is not criminal deterrence, because it is not imposed to deter others from committing crimes. While not explicitly defined in Wisconsin common law, criminal deterrence is commonly understood to reduce the incentive for would-be offenders to commit similar criminal acts by making an example of an individual defendant. This was the clear purpose in *State v. Gallion*, where the Court explained that an individual sentence in an impaired driving offense may deter others from driving under the influence. 2004 WI 42, ¶ 61, 270 Wis. 2d 535, 678 N.W.2d 197. General deterrence has long been defined in federal authority as imposing a sentence on an individual defendant to deter others from similar acts. *U.S. v. Barker*, 771 U.S. 1362, 1367-8 (9th Cit. 1985) (discussing general deterrence, and applying the concept to drug trafficking offenses). In contrast, the sentencing goal advocated by the State is not criminal deterrence, it is social engineering. The State argues that the purported deterrent interest in this matter is not to prevent future crime. Instead, the State argues that deterrence in Mr. Whitaker's case is intended to encourage early reporting of sexual offenses, and encourage victims in the Amish community to come forward. However, criminal deterrence is intended to deter crime, not modify attitudes in a community about reporting crime. *See Gallion*, 2004 WI 42, ¶ 61.

Indeed, the legislature has already identified those who are required to report suspected child sexual assault, and the circumstances when they must do so. *See* Wis. Stat. 48.981(6) (mandatory reporting requirement for certain occupations, and criminal penalty for failure to comply). While certain members of the clergy are mandatory reporters, this requirement does not extend to social elders in a religious community. Wis. Stat. § 48.981(2)(bm). Even if Amish elders were required by section 48.981(6) to report suspected sexual abuse, any inaction on their part would be addressed by the statutory criminal sanction, not roundabout social deterrence achieved by sentencing a former Amish child to prison. Moreover, as the State points out, the manner of achieving institutional social change is civil litigation. Beyond statutory reporting requirements with a criminal sanction, civil action is the only remedy that the legislature permits to address institutional failures of a civil or religious organization to protect children.

The State cites no authority for its proposition that criminal deterrence can be employed solely to encourage reporting of crime by members of the community, rather than preventing others from engaging in similar criminal conduct.

What the State suggests is exactly the type of civil and religious entanglement that is prohibited by *Lemon v. Kurtzman*. 403 U.S. 602, 612-13 (1971). If the State is permitted to employ criminal deterrence to encourage certain social behavior, the degree of government entanglement with the Amish community would be substantial. The State seeks not to deter criminal behavior, or to enforce any existing law, but to force the Amish to interact more regularly with secular authorities. *See Id*. at 615. In effect, they seek to regulate not the law, but the social and moral standards of the Amish community, which is one of the chief evils that the establishment clause guards against. *Id*. at 612.

For the same reasons the State cannot show the nexus between the Amish community and Mr. Whitaker's criminal conduct that is required by *Fuerst*. 181 Wis. 2d at 913. *Fuerst* permits consideration of a defendant's religious beliefs and associations "only if a reliable nexus exists between the defendant's criminal conduct and the defendant's religious beliefs and practices." *Id.* The State does not suggest that sexual assault of children is practiced as a tenet of the Amish faith, or that Mr. Whitaker committed a crime because of his religious beliefs. Nor does the State suggest that elders in the Amish community encouraged Mr. Whitaker's sexual offenses. The State argues that there is a reliable nexus between Mr. Whitaker's offense, and the tendency of the Amish community to avoid local law enforcement, but this argument misses the point. (Resp. Br. 19). *Fuerst* requires a link between the defendant's religious association and his crime. Like *U.S. v. Lemon*, 723 F.2d 922, 936 (D.C. Cir. 1983), which was adopted by *Fuerst*, the mere fact that multiple members of a constitutionally protected group engaged in criminal behavior does not establish a link between religion and criminality. *Id. See also State v. J.E.B.*, 161 Wis. 2d 655, 673, 469 N.W.2d 192 (Ct. App. 1991) (adopted by *Fuerst*). The same is true in this case. Reluctance by the Amish community to engage the criminal justice system does not

drive criminal activity by its membership, and as such cannot constitute the nexus required by *Fuerst*.

IV. DETERRENCE CAN NOT BE PREMISED ON THE DEFENDANT'S FAITH OR ASSOCIATION WITH A RELIGIOUS COMMUNITY

The more basic problem presented by this appeal is that it is impossible to deter crime within a religious community without also considering the defendant's religious beliefs and associations. Relying in large part on its hypothetical example of a predatory Catholic priest, the State argues that "no one could seriously dispute that using an abusive priest's sentence to deter others in this fashion would be both constitutional and an eminently reasonable secular purpose," and as such, it is appropriate to consider a defendant's membership in a religious community if done to deter crime within a particular congregation or faith. (Resp. Br. 16). Whether a defendant is Catholic, Amish, or of any other faith or creed, the problem with the State's argument is that it goes well beyond the acceptable purpose of deterring crime in a community, and calls for criminal sentences that are justified, in part, on the defendant's religious association. Deterring the Amish community necessarily requires considering Mr. Whitaker's beliefs and association with a community of faith before the sentencing court could conclude that Mr. Whitaker is an appropriate subject to deter the Amish elders. These factors are precisely what a trial court is prohibited from considering under ordinary circumstances. *Lemon v. Kurtzman*, 403 U.S. at 612-13; *Fuerst*, 181 Wis. 2d at 913.

It takes little imagination to apply the State's rationale in a manner that would be transparently unconstitutional. One need only substitute the State's hypothetical Catholic priest with another protected class to reach a result that plainly violates the First and Fourteenth Amendments to the U.S. Constitution. While the State suggests that it would be acceptable to enhance an abusive priest's sentence to deter others in the Catholic faith, surely the State would not suggest doing the same to an African American defendant to deter perceived crime in the black community. Nor does the State suggest that it would be proper to single out a gay or transgender person, an indigent defendant, a union member, or

a political radical to deter perceived crime in their respective populations. The State's rationale is an invitation to discriminate against defendants belonging to a protected class under the guise of addressing perceived crime in a community otherwise entitled to the protections of the First and Fourteenth Amendments. This is precisely why Mr. Whitaker cited *State v. David* in his brief in chief, because the prosecutor in *David* extended the position the State takes in this case on religious affiliation to the defendant's race, arguing that the defendant's ethnicity alone could help deter similar offenses in the Micronesian community. 333 P.3d 1090, 1092, 1102-1104 (2014), 134 Hawaii 289. The *David* Court correctly held that general deterrence could not be premised on race or ethnicity, and the analysis should not differ when deterrence is premised on another constitutionally protected characteristic of the defendant. *Id*. A defendant's faith and religious association receive the same protection from consideration by a sentencing judge as race. *See Zant v. Stephens*, 462 U.S. 862, 885 (1983). As such, the result in this case should not differ from that in *David*, as Mr. Whitaker was identified as a subject for deterrence solely because of his constitutionally protected association with the Amish community.

It was indisputably Mr. Whitaker's faith and association with the Amish community, both protected by the First and Fourteenth Amendments, that justified the deterrent goal in this case. The entire point of Mr. Whitaker's First and Fourteenth Amendment argument is that he received a prison sentence, in part, because he was once Amish. In other words, he was singled out for criminal deterrence, and imprisonment, because of this constitutionally-protected trait. An equally-situated defendant who belonged to any other faith or creed would not have been appropriate to deter the Amish community, and without such deterrent interest, would be less likely to receive a prison sentence. Imposing a prison sentence designed to deter only the defendant's religious community violates the *Lemon* test by inhibiting members of the Amish faith in criminal proceedings, and advancing the interests of similar defendants of different faiths and religious associations. *Lemon v. Kurtzman*, 403 U.S. at 612-13; *Fuerst*, 181 Wis. 2d at 911.

V. A FOUR-YEAR TERM OF IMPRISONMENT AS AN ADULT FOR OFFENSES COMMITTED AS A YOUNG ADOLESCENT IS CRUEL AND UNUSUAL

The State focused on the impact Mr. Whitaker's offenses had on his sister, arguing that he deserves "little credit for finally owning up to his crimes," concluding that his young age at the time of the offenses is outweighed by the degree of harm he caused. (Resp. Br. 25). However, beyond briefly mentioning that Mr. Whitaker was a child at the time of the offenses, the State entirely ignored the point of his claim: that child offenders are not as culpable as their adult counterparts. *Roper v. Simmons*, 543 U.S. 551, 570 (2005). Describing the claim as "blithe," the State rejects Mr. Whitaker's argument that he felt genuine remorse and did not delay a confession to cause his sisters to suffer. (Resp. Br. 25). In taking this position the State ignores the facts in the record. Neither the State nor the sentencing court objected to Mr. Whitaker's explanation that he confessed with the belief that it would aid his sister's recovery. (54:13; App. 119). The State does not challenge the sentencing court's finding of fact that Mr. Whitaker took responsibility for his actions, and was remorseful for his childhood acts. (54:30-31; App. 134-135).

The State also draws no distinction between a child's culpability and adult punitive consequences, and in the process, ignores the Eighth Amendment proportionality analysis. *State v. Ninham*, 2011 WI 33, ¶ 50, 333 Wis. 2d 335, 797 N.W.2d 451. Just as a five-year-old child playing doctor is less culpable than a teenager who sexually touches a peer, the State would presumably acknowledge that an early adolescent is less culpable than an adult who sexually offends against children. The same concept applies for those who, for lack of a better phrase, know better. Mr. Whitaker was left to discover his sexuality entirely on his own. He had no parent, teacher, healthcare provider, trusted adult, or even peer he could talk to about his emerging sexuality, and in the process, offended against his sister. Ignoring these facts, the State focuses entirely on Mr. Whitaker's delayed confession, arguing that child sexual assault results in substantial harm to victims. However, focusing on the consequences of the offense misdirects from the Eighth Amendment proportionality analysis that this court must apply. Once more,

Mr. Whitaker does not argue that his offenses were harmless, but that as a young adolescent in an Amish community he was objectively less culpable than the adult offender that the trial court sentenced him as.

Additionally, the State failed entirely to address Mr. Whitaker's argument that at the time of his offenses he was subject to a statutory maximum penalty of thirty days punitive confinement, and as such, the sentence exceeded the legislatively-established standard for what was proportionate for a juvenile offender. Wis. Stat. § 938.34(3)(f)1 (2005-2006). Since the State does not contest Mr. Whitaker's position that section 938.34(3)(f)1 legislatively established a reasonable threshold for punitive confinement, they have conceded this claim. *State ex rel. Sahagian v. Young*, 141 Wis. 2d 495, 500, 415 N.W.2d 568 (Ct. App. 1987).

VI. THE SENTENCE DOES NOT COMPLY WITH *STATE V. GALLION*

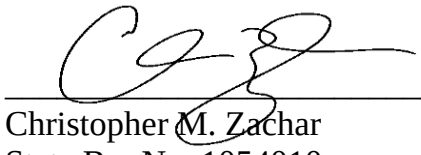
Finally, the State argues that the bifurcated term of imprisonment, including a term of two years extended supervision was consistent with *State v. Gallion*. (Resp. Br. 28-29). The State justifies the term of extended supervision by arguing it "will help ensure that nothing like this ever happens again." (Resp. Br. 29). Once more, the State ignores the facts in the record. The sentencing court found that Mr. Whitaker presented "zero" risk of reoffending. (54:30; App. 134). It explicitly held that Mr. Whitaker was not a threat to the public, did not need rehabilitative programming, and exempted him from sex offender reporting requirements. (31; 54:31; App. 134). In effect, the sentencing court already determined that nothing like Mr. Whitaker's childhood offenses would happen again. Since there is not a rational explanation in the record for imposing two years of extended supervision in light of the sentencing court's findings, the sentence does not comply with *Gallion* and must be reversed. 2004 WI 42, ¶ 45.

VII. CONCLUSION

For the reasons stated, Mr. Whitaker respectfully requests that this court vacate the judgment of conviction and sentence imposed, and remand for a new sentencing hearing.

Dated this 18th day of September, 2020.

BY COUNSEL FOR MR. WHITAKER:



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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional Times New Roman font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum of 2 points, maximum of 60 characters per full line of body text. The length of the brief is 2,898 words.

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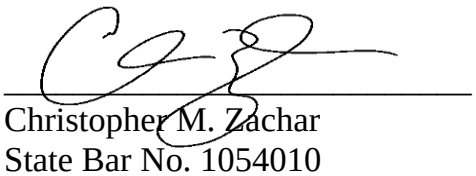

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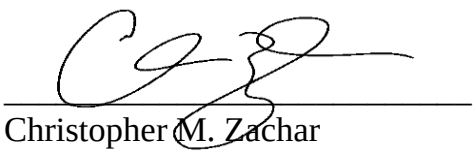

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