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STATE OF WISCONSIN

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

DISTRICT II

Case No. 2020AP62-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CHRISTOPHER W. LEBLANC,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING POSTCONVICTION RELIEF, BOTH ENTERED IN KENOSHA COUNTY CIRCUIT COURT, THE HONORABLE JASON A. ROSSEL, PRESIDING

RESPONSE BRIEF OF PLAINTIFF-RESPONDENT

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INTRODUCTION

Defendant-Appellant Christopher W. LeBlanc pled guilty to using a computer to facilitate a child sex crime. He had used his cell phone to arrange a sexual encounter with a 15-year-old girl who went to high school with his daughter. On appeal, he argues that he is entitled to resentencing because the circuit court (1) originally imposed a term of extended supervision that exceeded the statutory maximum, and (2) improperly relied on his religious belief that extramarital sex is permissible.

This Court should affirm because LeBlanc is not entitled to resentencing on either ground. First, resentencing is not an automatic remedy when a component of a sentence exceeds the legal maximum. A circuit court can instead commute the excessive portion to the maximum, which is what happened here. Second, the sentencing court did not improperly rely on LeBlanc's religious beliefs. It instead relied on his pattern of having adulterous sexual encounters with random people whom he met on "hook up" cell phone applications while travelling for work. It was proper to rely on that pattern of undesirable behavior because the court was sentencing LeBlanc for similar behavior: using one of those same cell phone applications to try to arrange a sexual encounter with a 15-year-old girl.

ISSUES PRESENTED

1. Did the circuit court properly commute the excessive portion of LeBlanc's sentence instead of resentencing him?

The circuit court answered "yes."

This Court should answer "yes."

2. Did the circuit court properly exercise its sentencing discretion when it relied on LeBlanc's adulterous sexual encounters with random people he met on the Internet?

The circuit court answered "yes."

This Court should answer "yes."

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument or publication because this appeal can be decided based on the briefs and well-established legal principles.

STATEMENT OF THE CASE

In the summer of 2018, LeBlanc exchanged cell phone messages with a 15-year-old girl, ALB, who went to high school with his daughter. (R. 1:3.) They messaged each other through the "Grindr" and "Text me" phone applications. (R. 1:3.) LeBlanc told ALB that he was 30 years old, but he was really 41. (R. 1:3.) Most of their messages were sexual in nature. (R. 1:4.) Some of the messages discussed sexual things that LeBlanc and ALB would do together if they met in person. (R. 1:3.) LeBlanc and ALB also had a two-hour phone call, which included one hour of "phone sex." (R. 1:3.) ALB sent 22 nude pictures of herself to LeBlanc, and he sent three nude pictures of himself to her. (R. 1:4.)

LeBlanc's daughter found some of the sexual messages on his phone, and she recognized ALB as the girl in a picture on LeBlanc's phone. (R. 1:3.) LeBlanc's daughter told her mother about the messages, and the mother contacted law enforcement. (R. 1:3.) A detective searched ALB's phone with her consent. (R. 1:4.)

Posing as ALB, a detective sent messages to LeBlanc and agreed to meet him in person at a beach. (R. 1:4–5.) Police arrested LeBlanc when he arrived at the beach and searched his car. (R. 1:5.) Police found three unopened condoms and a bottle of lubrication. (R. 1:5.)

The State charged LeBlanc with use of a computer to facilitate a child sex crime, exposing a child to harmful material, sexual exploitation of a child, possession of child pornography, solicitation of sexual assault of a child under age 16, and misdemeanor bail jumping. (R. 1:1–2.) The State later dropped the solicitation charge. (R. 11.)

LeBlanc pled guilty to the charge of using a computer to facilitate a child sex crime. (R. 52:9.) The State agreed to dismiss the remaining charges pursuant to a plea agreement. (R. 18:2; 52:10.)

The circuit court ordered a presentencing investigation (PSI) report. (R. 15.) The subsequent PSI report noted that LeBlanc had admitted that, when he was married for 17 years, "he would engage in infidelity. He stated that while working as a CDL truck driver he would have lay overs where he would spend the night at a hotel in another city or state." (R. 17:13.) LeBlanc "reported that he would use hook-up applications such as 'Grindr', 'Tinder', and 'Plenty of Fish' to seek out random sexual encounters, with men or women, near him." (R. 17:13.) The PSI report's author "believe[d] that this occupation and lifestyle subjects the public to an extreme amount of unnecessary risk in multiple state jurisdictions." (R. 17:21.) The PSI report further noted, "The defendant was asked to explain his attitude toward sex. He stated, 'I don't think it's sinful. I don't believe that you have to be married to have sex." (R. 17:14.)

The circuit court held a sentencing hearing. When discussing the gravity of the offense, the court said that LeBlanc would have been charged with first-degree sexual

assault of a child had a detective not posed as the victim. (R. 54:12–13.) The court gave LeBlanc consideration for accepting responsibility by pleading guilty. (R. 54:13.) The court quoted LeBlanc's statement in the PSI report describing his views on extramarital sex. (R. 54:13.) The court prefaced that remark by saying that it did not want to comment on religion. (R. 54:13.) The court noted the PSI report's discussion of LeBlanc's "behaviors" while he was married. (R. 54:13.) The court agreed with the PSI report's conclusion that LeBlanc's lifestyle and occupation put him at high risk to the public. (R. 54:14.) The court said that its sentence would have a punishment component, but the sentence was "primarily to protect the public." (R. 54:15.) The court then sentenced LeBlanc to 15 years of initial confinement followed by 20 years of extended supervision. (R. 54:15.)

The Department of Corrections subsequently wrote a letter to the circuit court, stating that LeBlanc's legal maximum term of extended supervision was 15 years. (R. 32:1.) At a hearing on the letter, the court said that it would amend the judgment of conviction to reflect that LeBlanc was ordered to serve 15 years of extended supervision. (R. 55:2.) Neither party objected. (R. 55:3.) The circuit court later filed an amended judgment of conviction reflecting 15 years of extended supervision. (R. 20:1.)

LeBlanc subsequently filed a motion for resentencing. (R. 57.) He argued that the circuit court should have ordered resentencing, instead of modifying his term of extended supervision, when it realized that this aspect of his sentence exceeded the maximum. (R. 57:4.) He further argued that he was entitled to resentencing because the circuit court

improperly relied on his "attitude towards extramarital sex." (R. 57:4.)[1]

The circuit court held a hearing on LeBlanc's motion for resentencing and denied the motion. The court rejected LeBlanc's argument that resentencing was mandatory to remedy the excessive term of extended supervision. (R. 56:2–8.) The court further concluded that it had not relied on religion when sentencing LeBlanc. (R. 56:9–14.)

LeBlanc appeals his judgment of conviction and the order denying his postconviction motion. (R. 46.)

STANDARD OF REVIEW

This Court reviews a circuit court's sentencing decision for an erroneous exercise of discretion. *State v. Loomis*, 2016 WI 68, ¶ 30, 371 Wis. 2d 235, 881 N.W.2d 749. This Court independently interprets and applies statutes and case law. *Welin v. Am. Family Mut. Ins. Co.*, 2006 WI 81, ¶ 16, 292 Wis. 2d 73, 717 N.W.2d 690.

ARGUMENT

I. This Court should affirm because the circuit court properly exercised its discretion by commuting the excessive sentence rather than resentencing LeBlanc.

The circuit court has already commuted LeBlanc's 20-year term of extended supervision to the statutory maximum of 15 years. (R. 20:1.) LeBlanc does not argue that this 15-year term of extended supervision is excessive. Instead, he argues that the circuit court should have granted him a new sentencing hearing instead of commuting his term of

[1] LeBlanc also argued that the circuit court should modify his length of mandatory sex-offender registration. (R. 57:11–12.) The circuit court granted that request. (R. 56:2.)

extended supervision. The circuit court properly exercised its discretion in choosing commutation instead of resentencing.

A. Commuting an excessive sentence is required by statute and resentencing is optional.

When "a portion" of a sentence exceeds the statutory maximum, Wis. Stat. § 973.13 "command[s]" a circuit court to commute the "sentence to the maximum permitted for the underlying offense." *State v. Holloway*, 202 Wis. 2d 694, 698, 551 N.W.2d 841 (Ct. App. 1996). The supreme court has held that resentencing is optional: "Resentencing is unnecessary, and certainly not required, where . . . the invalidation of one count on double jeopardy grounds has no affect at all on the overall sentence structure." *State v. Church*, 2003 WI 74, ¶ 26, 262 Wis. 2d 678, 665 N.W.2d 141.

In *Holloway*, the circuit court imposed two concurrent three-year prison terms, which was the maximum sentence if a repeater sentence enhancer applied. *Holloway*, 202 Wis. 2d at 696. The defendant filed a postconviction motion, arguing that the State had not proven its repeater allegations. *Id.* The circuit court agreed with the defendant, so it commuted her sentences to nine months of imprisonment, the maximum penalty without the repeater enhancer. *Id.* at 696–97. The court ordered the new sentences to be consecutive, rather than concurrent. *Id.* On appeal, the defendant argued that a circuit court may not amend other aspects of a sentence, such as whether they are imposed concurrently or consecutively, when the court commutes a sentence under Wis. Stat. § 973.13. *Id.* at 697. This Court rejected that argument. It noted that, "[w]hen the sentencing court determined that a portion of each sentence was void, the court did exactly what the statute commanded: it commuted each sentence to the maximum permitted for the underlying offense." *Id.* at 698. It then held that, "when a sentence is commuted pursuant to

§ 973.13, Stats., the sentencing court may, in its discretion, resentence the defendant if the premise and goals of the prior sentence have been frustrated." *Id.* at 700.

B. The circuit court properly commuted the excessive portion of LeBlanc's sentence instead of resentencing him.

Here, under *Holloway* and *Church*, the circuit court was not required to resentence LeBlanc when it commuted his term of extended supervision. Because *Church* does not require resentencing on remaining counts when an entire conviction and sentence are vacated, it follows that resentencing is not required when a court vacates only the excessive portion of a single sentence. *Holloway* confirms this principle. Again, *Holloway* holds that section 973.13 requires a circuit court to commute the excessive "portion" of a sentence, and this statute allows but does not require a circuit court to resentence a defendant after granting commutation. 202 Wis. 2d at 698, 700.

It would be unreasonable to require resentencing in some cases, like this one, where a circuit court commutes an excessive portion of a sentence. If a circuit court chooses to resentence a defendant after commuting an excessive sentence, the new sentence might result in the defendant serving more (or less) confinement time than originally required. *See Holloway*, 202 Wis. 2d at 701. So, some defendants might prefer only commutation instead of risking an adverse outcome at a resentencing hearing.

Here, LeBlanc gave the circuit court the opportunity to determine whether commutation frustrated his prior sentence. The circuit court implicitly answered that question in the negative when it denied LeBlanc's postconviction motion without resentencing him. The circuit court has nothing to "revisit." *See State v. Volk*, 2002 WI App 274, ¶ 48, 258 Wis. 2d 584, 654 N.W.2d 24. It already determined that

LeBlanc does not need to be resentenced even though it commuted the excessive portion of his sentence. (R. 56:7–8.)

The circuit court properly commuted the excessive statute as required by statute and exercised its discretion to forgo resentencing. The circuit court originally imposed a 20-year term of extended supervision, although a 15-year term was the statutory maximum. (R. 32:1.) Section 973.13 requires a circuit court to commute the void "portion" of a sentence that exceeds the statutory maximum. *Holloway*, 202 Wis. 2d at 698. This statute thus required the circuit court to commute the portion of LeBlanc's original term of extended supervision beyond 15 years. The court complied with the statute and reasonably forwent a discretionary resentencing.

C. LeBlanc's arguments are not persuasive because they conflict with the statute and case law.

LeBlanc argues that Wis. Stat. § 973.13 does not apply, and that resentencing is the only remedy, if a portion of a sentence exceeds the maximum but the overall sentence length is legal. (LeBlanc's Br. 7–11.) He is wrong both under the plain language of the statute and under case law.

1. LeBlanc's argument conflicts with the statute's plain language.

LeBlanc's view of Wis. Stat. § 973.13 does not comport with its plain language. This statute provides, "In any case where the court imposes a maximum penalty in excess of that authorized by law, such excess shall be void and the sentence shall be valid only to the extent of the maximum *term* authorized by statute and shall stand commuted without further proceedings." Wis. Stat. § 973.13 (emphasis added). Nothing in this language distinguishes between excessive entire sentences and excessive portions of sentences. The statute's use of the word "term" indicates that commutation

is required whenever a term of extended supervision or term of initial confinement is excessive, even if the overall sentence length is legal.

LeBlanc's view violates the cardinal rule that courts must interpret statutory language "reasonably, to avoid absurd or unreasonable results." *State ex rel. Kalal v. Cir. Ct. for Dane Cty.*, 2004 WI 58, ¶ 46, 271 Wis. 2d 633, 681 N.W.2d 110. Under his logic, he would *not* be entitled to resentencing had the circuit court initially imposed an *additional* six years of extended supervision. LeBlanc's Class C felony had maximum penalties of 25 years of initial confinement and 15 years of extended supervision. Wis. Stat. § 973.01(2)(b)3., (2)(d)2. The circuit court initially imposed 15 years of initial confinement and 20 years of extended supervision. (R. 54:15.) LeBlanc argues that "Wis. Stat. § 973.13 does not apply" here, and instead resentencing is required, because his 35-year overall sentence "was five years less than the maximum." (LeBlanc's Br. 7.) Under that logic, he *would* be entitled to commutation but *not* resentencing had the circuit court originally imposed 15 years of initial confinement and 26 years (or more) of extended supervision. Because that hypothetical sentence would exceed the overall 40-year maximum, LeBlanc's view of Wis. Stat. § 973.13 would have permitted the circuit court to commute the 26-year term of extended supervision without resentencing him.

So, the only reason why LeBlanc is entitled to resentencing, under his logic, is because the excessive term of extended supervision was *not excessive enough* to cause his overall sentence length to be illegal. The law does not require this absurd result.

2. LeBlanc is wrong under the relevant case law.

Relying on *State v. Finley*, 2016 WI 63, 370 Wis. 2d 402, 882 N.W.2d 761, *Volk*, 258 Wis. 2d 584, and *State v. Kleven*, 2005 WI App 66, 280 Wis. 2d 468, 696 N.W.2d 226, LeBlanc argues that resentencing is required when a portion of a sentence exceeds the maximum if the overall sentence is within the statutory maximum. (LeBlanc's Br. 7–11.) Those cases do not mandate resentencing here.

LeBlanc's reliance on *Finley* is misplaced. There, the supreme court held that section 973.13 did "not provide a remedy" in that case because "the sentence initially imposed (although at the plea colloquy the circuit court advised otherwise) did not exceed the maximum statutory penalty." *Finley*, 370 Wis. 2d 402, ¶ 74; *see also id.* ¶ 51 n.31. Here, by contrast, the extended-supervision portion of LeBlanc's original sentence did exceed the statutory maximum.

Volk also does not control here. In *Volk*, this Court held that "a penalty enhancer cannot be applied to the term of extended supervision." *Volk*, 258 Wis. 2d 584, ¶ 35. There, "[t]he trial court sentenced Volk to a total of twelve years' imprisonment, consisting of a six-year term of confinement followed by a six-year term of extended supervision." *Id.* ¶ 15. But the maximum term of extended supervision was five years (rather than six) because the circuit court erroneously applied a repeater enhancer to the term of extended supervision. *Id.* ¶ 30. The remedy issue on appeal was not whether the circuit court had discretion to commute an excessive term of extended supervision without resentencing the defendant. The issue on appeal was whether this Court could commute the defendant's sentence in the first instance. *See id.* ¶¶ 46–49.

On the issue of remedy, this Court noted that if Wis. Stat. § 973.13 applied to Volk's case, "*we* would simply confirm the six-year term of confinement, and commute the six-year term of extended supervision to five years, thereby putting the matter to rest without further proceedings." *Id.* ¶ 46 (emphasis added). This Court concluded, however, that this statute did "not apply in this case." *Id.* ¶ 47. It noted that Wisconsin's truth-in-sentencing law mandated bifurcated sentences that consist of initial confinement and extended supervision. *Id.* ¶ 48. It further reasoned that, "[w]hen a crucial component of such a sentence is *overturned*, it is proper and necessary for the *sentencing court to revisit the entire question*." *Id.* (emphases added). This Court continued, "If *we* held otherwise and simply confirmed the term of confinement and commuted the extended supervision to five years pursuant to Wis. Stat. § 973.13, *we* would produce a sentence based on mathematics, rather than an individualized sentence . . . ." *Id.* (emphases added). This Court concluded that it could not do so, instead holding that the "sentencing court" must "revisit" the defendant's sentence after the excessive "component" is "overturned." *Id.* ¶ 48.

Unlike in *Volk*, the circuit court here commuted the excessive portion of LeBlanc's term of extended supervision. (R. 20:1.) So, unlike the defendant in *Volk*, LeBlanc is not asking this Court to "overturn[]" an excessive "component" of his sentence. *See Volk*, 258 Wis. 2d 584, ¶ 48.

The *Volk* court's reliance on *Holloway* supports the State's view here. This Court in *Volk* relied heavily on *Holloway* when deciding the remedy issue. *Volk*, 258 Wis. 2d 584, ¶¶ 47–48. It noted that, under *Holloway*, a circuit court has discretion to resentence a defendant if "the premise and goals of the prior sentence have been frustrated" after the circuit court commutes a sentence. *Id.* ¶ 47 (quoting *Holloway*, 202 Wis. 2d at 700). In other words, such discretion exists "when the underlying premise for an original sentence

no longer exists" after the circuit court commutes the "excess portion" of a sentence. *Id.* (quoting *Holloway*, 202 Wis. 2d at 699–700). Here, the circuit court exercised its discretion not to resentence LeBlanc. (R. 56:7–8.)

For the same reasons, *Kleven* does not require resentencing here. This Court in *Kleven* concluded that resentencing was required under *Volk*. *Kleven*, 280 Wis. 2d 468, ¶ 31. It did not discuss commutation under Wis. Stat. § 973.13. Indeed, it noted that the defendant's sentence did *not* exceed the statutory limits for the term of initial confinement, term of extended supervision, or overall sentence length. *Id.* ¶ 28. *Kleven* thus does not shed light on whether a circuit court may commute an excessive portion of a sentence, without resentencing the defendant, when the overall sentence length is legal.

* * * * *

In sum, the circuit court properly commuted LeBlanc's excessive term of extended supervision without resentencing him. LeBlanc's view would unreasonably force circuit courts to always resentence a defendant when only one portion of a sentence, but not the overall sentence, exceeds the statutory maximum. LeBlanc might be willing to risk getting a higher sentence on resentencing, but not all defendants are. Nothing in Wis. Stat. § 973.13, *Finley*, *Volk*, or *Kleven* requires every defendant in LeBlanc's situation to take that risk. *Holloway* required the circuit court to commute the excessive portion of LeBlanc's sentence and gave the circuit court discretion to decide whether to resentence him. The court properly chose not to resentence him.

II. The sentencing court properly considered LeBlanc's adulterous sexual encounters with people he met on the Internet.

A. A defendant bears a heavy burden for proving that a sentencing court relied on an improper factor.

"As a general proposition, a sentencing judge 'may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come.'" *Nichols v. United States*, 511 U.S. 738, 747 (1994) (citation omitted); *accord Handel v. State*, 74 Wis. 2d 699, 702–03, 247 N.W.2d 711 (1976). But "[a] circuit court erroneously exercises its sentencing discretion when it 'actually relies on clearly irrelevant or improper factors.'" *State v. Alexander*, 2015 WI 6, ¶ 17, 360 Wis. 2d 292, 858 N.W.2d 662 (citation omitted). "A defendant must prove both that the factor was improper and that the circuit court actually relied on it." *State v. Williams*, 2018 WI 59, ¶ 45, 381 Wis. 2d 661, 912 N.W.2d 373.

"A defendant bears the burden of proving, by clear and convincing evidence, that the sentencing court actually relied on irrelevant or improper factors." *Alexander*, 360 Wis. 2d 292, ¶ 17. "In the context of the whole sentencing transcript, [an appellate court] examine[s] first whether the [circuit] court gave explicit attention to the allegedly improper factor and second, whether the improper factor 'formed part of the basis for the sentence,' which could show actual reliance." *Id.* ¶ 29 (citations omitted). When a defendant challenges his sentence, this Court's "analysis includes consideration of postconviction orders because a circuit court has an additional opportunity to explain its sentence when challenged by a postconviction motion." *State v. Helmbrecht*, 2017 WI App 5, ¶ 13, 373 Wis. 2d 203, 891 N.W.2d 412.

B. The circuit court did not rely on an improper factor when sentencing LeBlanc.

LeBlanc's second ground for resentencing fails for three reasons. First, he has not proven by clear and convincing evidence that the sentencing court relied on his religious views. Second, even if it did, LeBlanc's religious views on the appropriateness of extramarital sex were a proper sentencing factor because they related to the crime for which he was being sentenced. Third, if the circuit court improperly relied on LeBlanc's religious views, this Court should affirm under the independent-review doctrine because LeBlanc's pattern of undesirable behavior justified whatever sentencing weight the circuit court arguably gave to LeBlanc's religious views.

On the first of those three points, LeBlanc has not shown that the sentencing court relied on his religious views. The court did not give "explicit attention" to religion. *Alexander*, 360 Wis. 2d 292, ¶ 29. The sentencing court said, "I don't want to make comment . . . about a religious belief . . . ." (R. 54:13.) It then said that, "when asked to explain his attitude towards sex," LeBlanc told the PSI writer, "I don't think it's sinful. I don't believe that you have to be married to have sex." (R. 54:13.) The first of those two sentences by LeBlanc might have religious connotations by mentioning sin, but his second sentence "immediately plac[ed]" his reference to sin "in a secular context." *State v. Betters*, 2013 WI App 85, ¶ 18, 349 Wis. 2d 428, 835 N.W.2d 249. LeBlanc's possibly religious reference to sin overlapped with his secular notion of morality, because "religious and social condemnation often, but not always, overlap." *Id.* ¶ 19. By mentioning LeBlanc's views on the propriety of extramarital sex, the court did not give explicit attention to religion.

And even if the circuit court gave "explicit attention" to religion, religion did not form "part of the basis for the sentence." *Alexander*, 360 Wis. 2d 292, ¶ 29. The sentencing

court noted that the PSI report discussed "some of the behaviors that [LeBlanc] engaged in . . . when you were married." (R. 54:13.) The court agreed with the PSI writer's opinion that LeBlanc's "occupation and lifestyle subjects the public to an extreme amount of unnecessary risk in multiple state jurisdictions." (R. 54:14.) The court noted that "lifestyle" referred to LeBlanc's "attitudes towards sex and prior situations." (R. 54:14.) The court said that its sentence would have a punishment component, but the sentence was "primarily to protect the public." (R. 54:15.)

So, the court relied on LeBlanc's "behaviors" and "prior situations," not his view about whether extramarital sex is appropriate. (R. 54:13–14.) Those behaviors and situations, of course, referred to LeBlanc's casual sex with strangers while he was travelling for work. Right before stating that LeBlanc's occupation and lifestyle created high risk, the PSI report noted that LeBlanc had said "that he would often use hook up applications such as 'Grind[r]', 'Tinder', and 'Plenty of Fish' to engage in sexual encounters with random individuals while staying in hotels due to his CDL truck driving route." (R. 17:21.)

In denying LeBlanc's postconviction motion, the circuit court confirmed that it did not rely on religion when sentencing LeBlanc. The postconviction court noted that, at sentencing, it "was not adopting a religious standard or morals although our laws do adopt morals." (R. 56:11.) The court noted that, at sentencing, "I said I do not want to make a comment about a religious belief and that's not what I was doing. What I was expressing is the fact that he was engaged in behaviors that pushed the norms of sexuality." (R. 56:13.) The court said that it "was in no way, shape, or form passing judgment on [LeBlanc] in a religious sense." (R. 56:13.) The court said that it had agreed with the PSI writer's reasoning for concluding that LeBlanc was a public safety risk based on his past conduct, "not because it's necessarily considered by

one or another religious belief system to be immoral." (R. 56:13.) The court noted that LeBlanc's "lifestyle choices" were "such that leads you into a situation where" he arranged to have sex with a child. (R. 56:13.)

In short, the sentencing transcript and postconviction-hearing transcript show that the circuit court did not rely on LeBlanc's religious views when determining his sentence. The court instead relied on the safety risk that LeBlanc's highly promiscuous lifestyle created by leading to the crime for which he was being sentenced. LeBlanc has not shown by clear and convincing evidence that the sentencing court relied on his religious views.

Second, even if the circuit court relied on LeBlanc's religious views, they were a proper sentencing factor. "[A] sentencing court may consider a defendant's religious beliefs and practices only if a reliable nexus exists between the defendant's criminal conduct and the defendant's religious beliefs and practices." *State v. Fuerst*, 181 Wis. 2d 903, 913, 512 N.W.2d 243 (Ct. App. 1994). This test can be satisfied even if there was no "cause and effect" relationship between the religious views and the crime. *State v. J.E.B.*, 161 Wis. 2d 655, 673, 469 N.W.2d 192 (Ct. App. 1991).

Here, a reliable nexus exists between LeBlanc's views on the appropriateness of extramarital sex and the crime for which he was sentenced—using a computer to facilitate a child sex crime. Those views were relevant to LeBlanc's pattern of sexual relations with random people he met on the Internet. And, as the circuit court noted, that lifestyle led to the crime for which LeBlanc was being sentenced. (R. 56:13.) The circuit court could reasonably think that LeBlanc's permissive views on extramarital sex made him more likely to engage in extramarital sex with a child. Even if LeBlanc's religious views did not "cause" him to use a computer to facilitate a child sex crime, there is still a reliable nexus between his views and his crime. LeBlanc has the burden of

showing by clear and convincing evidence that his religious views are an improper sentencing factor. *See Williams*, 381 Wis. 2d 661, ¶ 49. He has failed to meet that burden.

Third, this Court may affirm LeBlanc's sentence under the independent-review doctrine—even if the sentencing court improperly relied on LeBlanc's religious views. Under the independent-review doctrine, an appellate court "will 'search the record to determine whether in the exercise of proper discretion the sentence imposed can be sustained.'" *State v. Lechner*, 217 Wis. 2d 392, 419, 576 N.W.2d 912 (1998) (citation omitted). "[I]f the trial court's exercise of discretion demonstrates consideration of improper facts or a mistaken view of the law, the reviewing court need not reverse if it can conclude *ab initio* that facts of record applied to the proper legal standard support the trial court's conclusion." *State v. Pittman*, 174 Wis. 2d 255, 268–69, 496 N.W.2d 74 (1993). A sentencing court may consider a defendant's "history of undesirable behavior pattern." *Alexander*, 360 Wis. 2d 292, ¶ 22 (citation omitted).

LeBlanc had a pattern of undesirable behavior: he "often" had "sexual encounters with random individuals" he met on "hook up applications" including Grindr. (R. 17:21.) As the circuit court found, that pattern of behavior led to the crime for which LeBlanc was sentenced. (R. 56:13.) Indeed, LeBlanc used Grindr to commit the crime for which he was sentenced. (R. 1:3.) His undesirable behavior pattern would thus support whatever sentencing weight the circuit court allegedly gave to LeBlanc's religious views, which were related to that behavior.

C. LeBlanc's arguments are unavailing because they fail to prove actual reliance on religion or that his religious views were irrelevant at sentencing.

LeBlanc's arguments fail at the outset because he has not proven that the circuit court relied on his religious views when sentencing him. He asserts without citation that "the word 'sin' . . . has strong religious connotations." (LeBlanc's Br. 14.) As explained above, however, the circuit court did not give explicit attention to religion, or rely on religion as a sentencing factor, simply by mentioning LeBlanc's own statement that had used the word "sinful."

LeBlanc seems to argue that the circuit court relied on his religious views because "[a]part from LeBlanc's belief that extramarital sex is not sinful . . . the court did not identify any other factors that made LeBlanc dangerous." (LeBlanc's Br. 13.) He is wrong. As explained above, the sentencing court found LeBlanc a risk to public safety because of his occupation and lifestyle—a commercial truck driver who often had sex with random people in hotels while travelling for work. The court relied on LeBlanc's history of undesirable behavior, not his religious views. Indeed, as discussed below, many of LeBlanc's arguments acknowledge that the court relied on his pattern of behavior. And LeBlanc recognizes that the sentencing court relied on his past "consensual sex with men and women outside of his marriage." (LeBlanc's Br. 14.) It is disingenuous for him to argue that the court relied exclusively on his beliefs to support a finding of dangerousness.

LeBlanc next argues that Wisconsin's criminalization of adultery "does not make LeBlanc's permissive views on extramarital sex relevant to the sentencing objectives in general or his dangerousness in particular." (LeBlanc's Br. 14.) That argument is a red herring because, again, the sentencing court relied on LeBlanc's history of undesirable sexual behavior, not his beliefs. Besides, the illegality of

adultery is relevant to sentencing objectives here. By committing adultery with random people—a felony in Wisconsin, Wis. Stat. § 944.16—LeBlanc showed that he is willing to engage in sexual behavior even if it is illegal. *See State v. Richard G.B.*, 2003 WI App 13, ¶ 16, 259 Wis. 2d 730, 656 N.W.2d 469 ("It may be that adultery is no longer prosecuted as a crime, and that many people no longer view adultery as deserving of criminal punishment. But adultery is nevertheless defined as a crime . . . ."). The circuit court could reasonably think that LeBlanc's willingness to commit felony adultery made him more likely to be willing to have felony sex with a minor. *See In re Commitment of Burris*, 2004 WI 91, ¶¶ 73–74, 273 Wis. 2d 294, 682 N.W.2d 812 (including sex with a married woman among the major transgressions of a person on supervision). That belief is eminently reasonable because the circuit court was sentencing LeBlanc for trying to arrange a sexual encounter with a 15-year-old girl.

LeBlanc seems to further argue that his pattern of adultery was not a relevant sentencing factor because he has a constitutional right to have consensual sex with adults, under *Lawrence v. Texas*, 539 U.S. 558, 578 (2003). (LeBlanc's Br. 16–17.) To the extent that LeBlanc seems to suggest that adultery bans are unconstitutional under *Lawrence*, he has not developed an argument to that effect. The Supreme Court in *Lawrence* declared unconstitutional a state law that prohibited sexual activity between two members of the same sex. The *Lawrence* Court did not address adultery bans. It thus did not "disturb the prohibitions which were not before" it, including bans on "adultery." *Lowe v. Swanson*, 639 F. Supp. 2d 857, 871 (N.D. Ohio 2009) (citing *Beecham v. Henderson County, Tenn.*, 422 F.3d 372 (6th Cir. 2005)), *aff'd*, 663 F.3d 258 (6th Cir. 2011). This Court should decline to consider LeBlanc's undeveloped argument relying on *Lawrence*. *State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d

633 (Ct. App. 1992) (undeveloped arguments generally not considered).

And, even if LeBlanc's pattern of adultery was constitutionally protected behavior under *Lawrence* (which it wasn't), the circuit court could still consider it. A sentencing court may consider a defendant's otherwise constitutionally protected behavior if it has "a sufficient nexus to the defendant's [criminal] conduct" and is "relevant to the issues involved" at sentencing. *State v. Schreiber*, 2002 WI App 75, ¶ 16, 251 Wis. 2d 690, 642 N.W.2d 621 (citing *Dawson v. Delaware*, 503 U.S. 159, 164 (1992)). LeBlanc's pattern of adultery had a sufficient nexus to his crime and was relevant to the issues involved at the sentencing hearing. This pattern of behavior shows that LeBlanc has often used Grindr and similar cell phone applications to meet random people for sexual encounters. (R. 17:13, 21.) This pattern gives context to the crime for which he was sentenced—using Grindr and a similar application to try to arrange a sexual encounter with a 15-year-old girl. (R. 1:3–5.) Although this case might be LeBlanc's first and only sex crime against a child, it was far from his first time using Grindr to arrange a sexual encounter. This pattern of behavior, which culminated in his present crime against a child, suggests that he is more likely to reoffend than if this crime were an isolated incident.

Yet LeBlanc contends that "[t]here is no reliable nexus between having consensual extramarital sex with adults and attempting to have sex with a child. . . . Most people who have extramarital sex or homosexual sex do not go on to have sex with a child." (LeBlanc's Br. 15.) That argument ignores the crucial fact that LeBlanc did end up trying to have sex with a child. And the PSI report describes highly unusual sexual

activity by LeBlanc (R. 17:14), which suggests that he is more deviant than the average adulterer.[2]

LeBlanc seems to further challenge this nexus by arguing that he did not express an opinion on the propriety of sex with children, he has no history of sexual assaults or crimes against children, and so on. (LeBlanc's Br. 13.) But, as just explained, LeBlanc often used cell phone applications to meet random people for sex at hotels, and then he used his cell phone to try to arrange a sexual encounter with a child. Because of this strong similarity between his pattern of adultery and his present crime, there is a reliable nexus between them. The sentencing court could thus properly rely on this pattern of behavior, even if it was protected under *Lawrence* and was related to LeBlanc's religious views.

As noted above, LeBlanc's arguments about his pattern of adultery seem to acknowledge that the sentencing court relied on this pattern of behavior, rather than his religious views. LeBlanc's arguments about the nexus between his past adultery and his present crime do not advance his claim that the circuit court relied on his religious views. Instead, those arguments undercut that claim by showing that the circuit court relied on his past adultery, not his beliefs.

In sum, LeBlanc's second ground for resentencing fails. He has not shown by clear and convincing evidence that the sentencing court relied on his religious views. And even if it did, he has not shown by clear and convincing evidence that

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[2] "Parties may reference information from the PSI that does not reveal confidential information and that is relevant to the appeal." *State v. Buchanan*, 2013 WI 31, ¶ 36, 346 Wis. 2d 735, 828 N.W.2d 847. But the supreme court has urged attorneys "to be abundantly cautious when deciding whether it is necessary to cite sensitive information and when choosing how to cite such content." *Id.* The State thus does not mention details of LeBlanc's unusual sexual activities.

his religious views were an improper sentencing factor. The circuit court properly relied on LeBlanc's history of committing adultery with random people whom he met on the Internet. This prior conduct was relevant to LeBlanc's use of a computer to facilitate a child sex crime.

CONCLUSION

This Court should affirm LeBlanc's judgment of conviction and the order denying his postconviction motion.

Dated this 6th day of July 2020.

Respectfully submitted,

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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 6139 words.

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

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This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

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Dated this 6th day of July 2020.

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