COURT OF APPEALS
DECISION
DATED AND FILED

May 8, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-0426-CR

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

HERBERT ASCHER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DANIEL L. KONKOL, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Schudson, JJ.

¶1 WEDEMEYER, P.J. Herbert Ascher appeals from a judgment entered after he entered a no contest plea to a charge of false imprisonment,

contrary to WIS. STAT. § 940.30 (1999-2000).[1] He also appeals from an order denying his postconviction motion seeking sentencing modification. Ascher contends that the circuit court erroneously exercised its discretion when it unfairly discounted an incomplete presentence investigation report and thereby imposed an unduly harsh sentence. Because the trial court did not erroneously exercise its discretion, we affirm the judgment of conviction and the postconviction order.

I. BACKGROUND

¶2 For purposes of this appeal, the facts are undisputed. As a basis for the false imprisonment charge, the criminal complaint alleged that when Ascher's then-wife Monica "shrugged off his sexual advances," Ascher forcibly took off her clothes, tied her up, had sexual intercourse with her, then untied her and threw her naked into the locked garage of their home. She spent the night in a car in the garage. Ascher was also originally charged with mayhem for allegedly carving his initials onto Monica's right breast with a razor blade. At a subsequent plea hearing, the prosecutor indicated that Ascher's wife did not wish to testify, and that Ascher had agreed to plead no contest to the false imprisonment charge. The State specified the difficulties it foresaw in taking the case to trial and indicated that, in return for Ascher's plea, it would drop the mayhem charge and would not make a sentencing recommendation. Ascher pled no contest, acknowledging that

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

by entering such a plea, he was "not contest[ing] the State's ability to prove the facts necessary to constitute the crime."[2]

¶3 At sentencing, the circuit court was presented with a presentence investigation report that was described by the prosecutor as "absolutely the worst presentence I've ever seen from a victim's standpoint." The prosecutor noted that the report writer, who was recommending that Ascher receive probation, did not speak to the victim, made little effort to contact her, did not contact the prosecutor's office, and did not read the police reports. The prosecutor then argued that the report writer, rather than analyzing the facts to which Ascher pled, made "factual judgments about whether these incidents occurred or not, based solely on [the writer's] interview of the defendant." The prosecutor then told the court the victim's account of the crime. In his remarks to the court, Ascher maintained his innocence and stated that he hoped his wife could "live with herself" for the accusations against him.

¶4 In imposing sentence, the circuit court indicated that it would give little weight to the presentence investigation report due to the writer's failure to interview the victim and apparent "oblivious[ness] to issues that regard matters of domestic violence and responses to domestic violence." The court noted that it was troubling that the presentence report writer would "disregard the fact of conviction, and continue to go on with the report questioning [the] credibility of the victim" without talking to her. It further noted that Ascher had "not expressed any remorse for [his] conduct," and that Ascher's comments at sentencing

[2] The allegations in the complaint are horrific and, given the victim's apparent willingness to cooperate with the presentence writer and the prosecution, as reflected by her appearance at sentencing, we question the appropriateness of reducing a rape and mayhem case to a mere false imprisonment charge.

indicated that he was continuing "to backpedal from any responsibility for [his] conduct." The circuit court then imposed a two-year sentence, based on the seriousness of the crime, which included "violent and debasing conduct"; Ascher's decision to cast himself as the victim; and Ascher's apparent failure to take the "first step toward rehabilitation." The court stated that imposition of probation would unduly depreciate the seriousness of the offense. On the other hand, the circuit court noted that although it considered a prison term to be necessary to protect the public, Ascher's "positive aspects" undercut the need for the maximum five-year sentence.

¶5 In his postconviction motion, Ascher contended that the circuit court: (1) improperly exercised its sentencing discretion by using an incomplete presentence investigation report against him; (2) incorrectly concluded that Ascher was "backpedaling from responsibility"; and (3) failed to properly weigh all relevant sentencing factors. The circuit court rejected each of Ascher's arguments, and Ascher renews only the first claim on appeal.

II. DISCUSSION

¶6 A circuit court has great discretion in imposing sentence. *See*, *e.g.*, ***State v. Wickstrom***, 118 Wis. 2d 339, 354-55, 348 N.W.2d 183 (Ct. App. 1984). This court will affirm a sentence imposed by the circuit court if the facts of record indicate that the circuit court "engaged in a process of reasoning based on legally relevant factors." ***Id.*** at 355. This court will sustain a circuit court's exercise of discretion if the conclusion reached by the circuit court was one a reasonable judge could reach, even if this court or another judge might have reached a different conclusion. ***Hartung v. Hartung***, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981). This court is extremely reluctant to interfere with the circuit court's

sentencing discretion given the circuit court's advantage in considering the relevant sentencing factors and the demeanor of the defendant in each case. *See* ***State v. Echols***, 175 Wis. 2d 653, 681-82, 499 N.W.2d 631 (1993).

¶7 Ascher contends that the circuit court improperly used the presentence investigation report against him. Noting that the circuit court discounted the presentence report because the victim's account of the crime was not presented, Ascher contends that the circuit court should have halted the sentencing and ordered the report supplemented with the victim's account. Ascher suggests that because the victim's account was not in the presentence report, the circuit court did not have the benefit of a complete record for its sentencing decision.

¶8 While the circuit court could have, within the ambit of its discretion, followed the course suggested by Ascher, it was not required to do so. First, the circuit court was presented with the victim's account through the prosecutor's sentencing remarks, so Ascher's claim that the circuit court did not have a complete view of the case is overstated.[3] More importantly, however, Ascher did not seek supplementation of the report at sentencing even after the prosecutor's criticisms, but instead chose to support the incomplete report, which was extremely favorable to him. Although the State challenged the quality of the report, Ascher did not; he defended the report and asked the court to follow the report writer's probation recommendation. We agree with the State that because Ascher did not object to the circuit court's use of an allegedly incomplete

[3] We should note that the victim was present at sentencing and did not take issue with the State's representations of her viewpoint in any way when she was given an opportunity to address the court.

presentence report, but in fact supported the report, he waived his right to challenge the circuit court's use of that report. *See* ***State v. Robles***, 157 Wis. 2d 55, 60, 458 N.W.2d 818 (Ct. App. 1990).

¶9 Ascher suggests, however, that because the circuit court chose to discount the report, he did not receive the benefit of the favorable information discussed in the report. The record demonstrates, however, that Ascher took the opportunity to discuss the aspects of the report favorable to him, and that the circuit court had before it a variety of favorable information from Ascher's friends, family and clergy. The circuit court stated that the many favorable aspects of Ascher's character indicated that a less-than-maximum sentence was appropriate, and it therefore imposed the two-year sentence. The circuit court had before it ample information to render sentence and the record indicates that it considered all the information in imposing a reasonable sentence. Although another court might have chosen to weigh the sentencing factors differently, we cannot say on the record before us that the circuit court erroneously exercised its sentencing discretion.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.

¶10 FINE, J. *(concurring).* This is a horrible case, a horrible plea bargain, and, in my view, an incredible miscarriage of justice. Our criminal justice has two main goals: seeing to it "that guilt shall not escape or innocence suffer." ***Berger v. United States***, 295 U.S. 78, 88 (1935). Sadly, guilt here may have largely escaped, and innocence—a blameless victim whom the system and those in it presumably are supposed to protect—has suffered, immeasurably.

¶11 According to a criminal complaint filed against Ascher by the Milwaukee County District Attorney, the victim was married to Ascher, and wanted to leave him but was afraid that he would beat her if she tried. Indeed, according to the criminal complaint, Ascher had beaten his wife brutally and often. He had also used a razor blade to carve his initials on one of her breasts, because, according to what he told her, he owned her and could kill her anytime he wanted.

¶12 The criminal complaint recites that one day in March, 1998, as she was making dinner, Ascher came up behind her and indicated that he wanted to have sex with her. When she demurred, he returned with a rope, tied her to a chair, yelled at her that he owned her, took her into their bedroom, tied her hands behind her back, and raped her. Afterwards, according to the criminal complaint, he "untied her and threw her naked into the garage and locked the door." She spent the night in the car.

¶13 Some two weeks later, again according to the criminal complaint, Ascher, angry at his wife for studying, "took a 3-pound hand weight and hit her in the lower back area which caused her legs to go numb and caused her to fall to her

knees, at which point [Ascher] took the weight and hit her left ribs and hip." Several weeks later, he cut his initials into her breast while she was showering. Still later, over the Easter weekend, he hit her, kicked her, and threw her against a dresser because he was angry that she was studying.

¶14 The criminal complaint charged Ascher with false imprisonment, a Class E felony punishable by a maximum of two years imprisonment, *see* WIS. STAT. §§ 940.30 & 939.50(3)(e) (1997-98), and mayhem, a Class B felony punishable by a maximum of forty years imprisonment, *see* WIS. STAT. §§ 940.21 & 939.50(3)(b) (1997-98). The complaint did not charge any degree of sexual assault or battery.

¶15 On May 4, 1998, Ascher's wife testified at a preliminary examination. An information was filed on May 7, 1998, and again charged Ascher with false imprisonment and mayhem. On March 3, 1999, the case was plea bargained.

¶16 In reciting the terms of the plea bargain, the prosecutor said that Ascher would plead "no contest" to the two-year felony of false imprisonment, and that the prosecutor would ask the trial court to dismiss the mayhem charge, the forty-year felony. He told the trial court that the victim, who was no longer married to Ascher, had "no objection" to the deal. The prosecutor explained that "this whole process had made [the victim] – she's very fearful of the process," explaining that circumventing the need for her to testify would "sav[e] her a lot of pain, both emotional pain and pain in having to relive what happened here." The prosecutor represented to the trial court that plea-bargaining the case was in the victim's "best interest."

¶17 The prosecutor also explained that in his view "the charge on count one is adequate to protect the interest of the community in that it is a felony," noting that despite all of the things Ascher did to his former wife, the prosecutor did not believe that Ascher was "a danger to anyone else in the community." He also explained that a defense-retained polygraph examiner had concluded that Ascher was telling the truth when he denied cutting his wife, although he conceded that polygraph evidence was not admissible in Wisconsin courts.

¶18 The trial court accepted the plea bargain, took Ascher's no-contest plea to the false imprisonment count, dismissed the mayhem charge, and ordered a presentence report, which the parties had jointly recommended. The presentence report is in the appellate record. It indicates that the person who wrote the presentence report "tried to contact [the victim], but calls were not returned." The report notes, however, that in one of her earlier statements the victim said that "she is fearful for her life, and afraid he will hurt her again," but that "she did not want anything bad to happen to her husband, she just wanted him to get some help."

¶19 The presentence writer reflected that she did not "get the impression that [Ascher] participated in the physical abuse" of his former wife, noting that the case seemed atypical of domestic abuse cases because "he did not appear to have any issues with power and control within the marriage" and because there were not the "numerous calls to police before charges are actually filed." Additionally, the writer noted that Ascher had, in the writer's word, "passed" the lie detector test, calling the lie-detector results "[o]ne of the most convincing facts" in support of her view that Ascher was not guilty.

¶20 The victim appeared at Ascher's sentencing. The prosecutor contradicted the implication in the presentence writer's report that the victim had failed to return her "calls":

> I talked to [the victim] about that, and she said that sometime earlier this week, she received a voice message on her machine, at 9:45 a.m. from the presentence writer who said she needed to talk to [the victim] regarding this incident. But she needed to talk to her by two p.m. that day and that was the deadline.
>
> Well, [the victim] works and goes to school and didn't get home until that evening, hours after apparently the deadline had passed. That's the only efforts the presentence writer made to contact her.

The prosecutor also explained to the trial court that the presentence writer never attempted to contact him, nor did she speak with any of the victim's friends or relatives who knew of the long history of abuse and had seen the bruises and scars. After reciting briefly what the victim had endured, the prosecutor opined that: "This is a case of an abused woman who fits the whole profile of an abused woman, especially a woman who is of a professional stature and is trying to keep up face in her profession, and at school and at work." The prosecutor also told the trial court that he believed that Ascher raped his wife and threw her naked into the garage, and that he had "no doubt that these incidents, as horrible as they were, actually did occur." He noted: "People don't treat animals that badly."

¶21 Although the prosecutor had told the trial court at the plea hearing that he had plea bargained the case in part because Ascher had done well on the defense-arranged lie detector test, he now told the trial court that he believed that Ascher "has certain psychological aspects to his make up" that would enable him to "beat" a lie detector test.

¶22 The victim spoke to the trial court. I reprint her brief remarks in full:

> Um, Your Honor, I'm not quite sure how to even go about starting there. Because I thought about talking about what had happened to me over the past year and a half and throughout my years of marriage and, um, you know, I look at it in the sense that if I say all the details and I say how it affected my life and I say how it affected my family, um, there's a self satisfaction that he gets.
>
> And if I say I'm doing a great job working on a Ph.d. I'm teaching and I'm surviving, and it doesn't affect me, then it looks like, you know, whatever he did has no impact on my life and I just go on and walk away.
>
> I lost a lot. I lost a man that I loved. A six year marriage. I've lost a second family. I've lost both people I considered dear friends to me because of him.
>
> Um, I've lost self esteem, I've lost integrity. I have to explain scars to strangers, you know, renting an apartment, oh my gosh, what happened to your arms? Um, I have to, I mean I wanted children by the time I was thirty. I wanted a family. That was all something that I had hoped for.
>
> Right now, one of my friends even said to me, how do you know after everything you've been through you can even have children? I don't know. Um, I didn't want to come forward. I didn't want anybody to know. It's embarrassing, it's obscene. It's a reflection on me, um, it's a reflection on his family. That's not fair to them.
>
> Um, I don't think anything that happens today will make me feel better. I don't think there's anything I can recommend. I've been in counseling. It's going to take a lot for me to get my wits back about me. But all I can say is I don't want to see this happen to anybody else.
>
> I don't want to see his family have to go through it again. And maybe some day he can make a better life for himself. That's all I have to say. Thank you.

¶23 Ascher, too, addressed the trial court, and denied the accusations and charges, noting that the experience had been "a nightmare for me." He then told the trial court:

> Part of me has forgiven [the victim] for what she has done. And I know I must forgive give [*sic*] her completely. It is the Christian thing to do.
>
> But I only hope that she can live with herself and she does not continue to harm herself or others. I truly

> hope she seeks help, and I know now, [the victim] will never be a truly, happy, established person.
>
> Her goals and expectations in life were high. She is punishing me for her inability to reach these goals. I was the convenient person to blame.

¶24 The trial court agreed with the prosecutor that the presentence report was less-than-helpful because of its limited scope and because the presentence writer had apparently ignored the fact that Ascher had accepted conviction. The trial court also noted that Ascher had admitted that there was enough evidence to convict him on the false imprisonment count, commented that Ascher was not accepting responsibility, and said that probation would unduly depreciate the seriousness of what Ascher had done. The trial court imposed a sentence of two years incarceration, but less than the maximum fine ($2,000 rather than $10,000) because Ascher "does have some positive aspects" in his life. Ascher appeals, complaining that the sentence is "unduly harsh."

¶25 I set out in some length what happened here because it is all too typical of a plea-bargaining system that ignores the role of the criminal justice system to protect the innocent, to punish the guilty—in short to do "justice." No wonder the victim was "fearful" of the process; the "process" is mired in the mud of expediency, and permits someone accepting conviction to, from Spiro Agnew on down, proclaim innocence on the courthouse steps, and, as here, to blame the victim. What happened here reminds me of these thoughtful words written by our chief justice for a unanimous Wisconsin Supreme Court some two decades ago:

> [By not calling] the child as a witness, the district attorney may protect the child's emotional interest in not being forced to face the alleged abuser and accuse the abuser of criminal acts, but may inflict a greater harm on the child by allowing the alleged abuser to go free and by demonstrating to the child that the state of Wisconsin does not place a high enough value on the child's suffering to bring to justice the person alleged to have caused the suffering.

State v. Gilbert, 109 Wis. 2d 501, 507, 326 N.W.2d 744, 747 (1982). Sadly, things seem worse today.

¶26 Here, the prosecutor did not charge the rape, did not charge the beatings, and asked the trial court to dismiss the mayhem (which the trial court dutifully did). By "sparing" Ascher's wife the supposed trauma of testifying—even though she testified at the preliminary examination and came to court for the sentencing, the prosecutor has, in the words of ***Gilbert***, "demonstrat[ed] to [the victim] that the state of Wisconsin does not place a high enough value on [her] suffering to bring to justice the person alleged to have [and whom the prosecutor believes has] caused the suffering." Tragically, this scenario is repeated and repeated in our courts, both here and throughout the country, every minute of every day. I think it is time that the criminal justice systems in our country do some justice.