COURT OF APPEALS
DECISION
DATED AND FILED

October 23, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP1593-CR **Cir. Ct. No. 2002CF6223**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GIVANTE A. MCGEE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: RICHARD J. SANKOVITZ and DENNIS P. MORONEY, Judges. *Affirmed*.

Before Curley, P.J., Wedemeyer and Kessler, JJ.

¶1 KESSLER, J. Givante A. McGee pled guilty to one count each of kidnapping, robbery–use of force, and arson, and to five counts of first-degree sexual assault as a party to a crime. McGee appeals the trial court's order denying

his motion to suppress and its order denying his postconviction motion. Because we determine that the trial court did not err in denying McGee's motion to suppress, and further determine that the trial court did not erroneously exercise its discretion in sentencing McGee, we affirm.

BACKGROUND

¶2 On October 31, 2002, at approximately 12:30 a.m., Milwaukee police responded to a report of a woman being sexually assaulted in an alley in the City of Milwaukee. When police arrived, they discovered five men gathered around a nearly naked woman, where two of them were actively sexually assaulting her, and she was yelling for them to stop. At the appearance of the police officers, the five men ran from the scene. One of the responding police officers, Officer Rodney Young, radioed that one of the assailants was wearing a blue and white jacket and had fled "between Loyd [sic] and North Avenue."

¶3 At approximately 1:00 a.m., another police officer dispatched to the area, Officer Aaron Berken, observed a black male wearing a top matching Young's broadcasted description walking in a northwesterly direction in the grass near an alley approximately six or seven blocks from the assault scene. Berken testified that the individual was walking when Berken first observed him, but when the individual saw the squad car, he began running, first in one direction, and then doubling back, jumping over two fences and ignoring Berken's orders to "stop" and "get down," before Berken apprehended and arrested him. Although he first gave Berken a false name when asked to identify himself, this individual was McGee. Upon a search of McGee's person incident to the arrest, Berken found a jackknife with a "three inches long" blade and a "silver necklace with the snake." It was later determined that McGee had held a knife to the woman's

throat and that a silver necklace with a snake had been stolen from the woman during the assault. After participating in the apprehension of a second suspect, Berken returned McGee to the scene of the assault, and presented McGee to the victim. The victim was not able to identify McGee.

¶4 McGee was held at the scene of the assault, in the back seat of a squad car, until approximately 5:00 or 5:30 a.m., when he was transported to the Sexual Assault Treatment Center (SATC), where he arrived at approximately 6:00 or 6:30 a.m. Upon arrival at the SATC, Detective Ellieanna Chavez requested, and obtained, consent from McGee to collect bucal and penile swabs from his person. McGee testified that prior to signing the consent form, police (1) did not read him his ***Miranda***[1] rights, (2) did not inform him that he could refuse consent, and (3) informed him that even if he refused to consent, they could take the swabs.

¶5 McGee was thereafter transported to the police station and taken through the booking process. At approximately 3:00 p.m. that same day, Chavez began taking McGee's statement. The interview took place in a windowless police interview room "approximately eight by eight feet with a small table and two chairs." The interview lasted approximately an hour and a half. During the interview, McGee was not in restraints, was provided with a Pepsi and offered a bathroom break, and was not physically abused by Chavez or anyone else. Chavez testified that McGee appeared to understand all of her questions and never asked for an attorney or indicated that he did not want to answer her questions. McGee apparently informed Chavez of his infant son during the background information gathering portion of the interview. Approximately thirty to forty

[1] ***Miranda v. Arizona***, 384 U.S. 436 (1966).

minutes into the interview, Chavez began asking questions about the sexual assault. Chavez testified that she prepared a written statement of the information McGee provided to her during the interview, gave McGee an opportunity to read and make corrections to the statement (he made no corrections), and then had McGee sign the statement, which he did. McGee testified, however, that Chavez had threatened him with never seeing his son again if he did not make a statement, and that upon McGee's request for his mother or an attorney, Chavez responded "[you] don't need [your] mother in this case and 'You can't afford a lawyer.'" McGee also testified that Chavez told him that "[he] might as well sign because … they already had [his] brothers talking, and they already have everybody else talking, so we might as well sign and get this over quick as we can" and that if he did not give a statement, Chavez would tell the judge that he did not cooperate and the judge would sentence him to "60 years mandatory." McGee further testified that he was tired at the time of the interview, having not slept since the previous morning, and that he had smoked marijuana the day before and was still under its influence when he was interviewed.

¶6 McGee moved to suppress all evidence procured after his arrest on the ground that there was no probable cause for police to arrest him. McGee also moved to suppress the statement that he gave to Chavez.

¶7 After a two-day hearing on the first motion to suppress, the trial court denied McGee's motion, finding that police had probable cause to arrest McGee, and that McGee had consented to the taking of the bucal and penile swabs. After a ***Miranda-Goodchild***[2] hearing on the second motion to suppress,

[2] ***State ex rel. Goodchild v. Burke***, 27 Wis. 2d 244, 133 N.W.2d 753 (1965).

the trial court found that McGee's statement to Chavez was voluntary and that he did not request an attorney prior to giving the statement. Thereafter, McGee pled guilty to one count each of kidnapping, robbery–use of force, and arson, and to five counts of first-degree sexual assault as a party to a crime. After conducting a plea colloquy, the trial court accepted McGee's plea on all eight counts and ordered a pre-sentence investigation report.

¶8 McGee was sentenced with the two other adult defendants.[3] The trial court noted that the lack of empathy the defendants displayed "from the moment this victim was first thrown to the ground," in their shouting at the victim, holding her down with a foot on her neck, as well as threatening her with a knife, and in taking off her clothes and burning them, demonstrated that they could only have done this by dehumanizing the victim and "blotting [the victim's humanity] out of [their] mind[s]." The trial court considered these actions as demonstrating a "toxic selfishness" on the part of the defendants.

¶9 The trial court then addressed McGee's actions specifically. The trial court first noted that in addition to his actions that paralleled those of the other defendants, McGee failed to acknowledge the wrongfulness of his actions in the assault, and that McGee's statement to the PSI writer that the only reason he "pled guilty to sexual assault is because [he] thought it was illegal to have sex outside and that's what's involved in sexual assault," gave the trial court "concern[] about whether [McGee] can recognize the truth and the law for what it is and follow it." The trial court also found "deplorable" that McGee involved his

[3] Two of the assailants were McGee's sixteen-year-old and fourteen-year-old brothers. The younger McGees were subsequently waived into adult court and their cases were assigned to the Hon. John A. Franke.

sixteen-year-old and fourteen-year-old brothers, "introduc[ing] them to sex this way."

¶10 The trial court acknowledged McGee's positive personal characteristics: his lack of prior criminal record; his intelligence; and his guilty plea and its concomitant acceptance of responsibility. The trial court also recognized McGee's concern for raising his son as a positive, but further noted that if McGee was as concerned about being a good father as he claimed, he "would be home at 11 o'clock" [but i]nstead [he] is out doing drugs, running the streets with [his] buddies, and looking for a prostitute, and then engaging in this kind of crime." The trial court concluded that McGee's

> involvement in the crime deserves more punishment because you wielded a knife against this victim as you, yourself, confessed because you took this chaotic situation and introduced sadism into it the way that you burned her jacket and the way that you stole [her necklace] from her, and because you lead [sic] your impressionable 16 and 14 year old brothers into this.

The trial court sentenced McGee to concurrent sentences of twenty-five years of initial confinement and ten years of extended supervision on each of his sexual assault convictions, to a concurrent sentence of ten years of initial confinement and five years of extended supervision on the robbery conviction, and to a concurrent sentence of two years of initial confinement and three years of extended supervision for the arson conviction.[4]

[4] Of the other two adult defendants, Deandre Brown received a total combined sentence of twenty-eight years' imprisonment, and Gary Harris received a total combined sentence of twenty-five years' imprisonment. The trial court found that both Brown and Harris had some mental impairments (Harris could not read above the first grade level and was characterized by the PSI writer and his attorney as "slow," while Brown had a third-grade reading level.).

(continued)

¶11 McGee filed a postconviction motion for modification of sentence/motion for sentence reduction. The trial court[5] denied McGee's motion for modification or reduction of his sentence. McGee appealed. Additional facts are provided below as needed.

STANDARD OF REVIEW

¶12 In reviewing a denial of a motion to suppress evidence based on a challenge to the probable cause for an arrest, we will "uphold the trial court's findings of fact unless they are clearly erroneous." ***State v. Kutz***, 2003 WI App 205, ¶13, 267 Wis. 2d 531, 671 N.W.2d 660. Whether the facts constitute probable cause, however, is a question of law which we review *de novo*. ***Id.*** In reviewing a denial of a motion to suppress based upon the question of whether consent to search or to provide a statement to police was voluntarily given, we must independently apply the trial court's factual findings, unless clearly erroneous, to the constitutional principles at issue. ***State v. Turner***, 136 Wis. 2d 333, 344, 401 N.W.2d 827 (1987).

¶13 Sentencing is within the trial court's discretion. ***State v. Ramuta***, 2003 WI App 80, ¶23, 261 Wis. 2d 784, 661 N.W.2d 483. We have a strong policy against interference with that discretion. ***State v. Cooper***, 117 Wis. 2d 30, 39-40, 344 N.W.2d 194 (Ct. App. 1983) ("If the record contains evidence that

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Both younger McGee brothers also received lesser sentences from Judge Franke. None of the other four defendants were charged with the robbery or arson counts that McGee was charged with.

[5] The Hon. Richard J. Sankovitz presided over the case through sentencing. Due to the delay in McGee pursuing his appeal, and as a result of judicial rotation, the Hon. Dennis P. Moroney decided the postconviction motion.

discretion was properly exercised when imposing sentence, we must affirm.") When a defendant challenges his or her sentence, "the defendant has the burden to show some unreasonable or unjustifiable basis in the record for the sentence at issue." ***State v. Lechner***, 217 Wis. 2d 392, 418, 576 N.W.2d 912 (1998). The standards we employ in reviewing an imposed sentence are well-settled:

> A circuit court exercises its discretion at sentencing, and appellate review is limited to determining if the court's discretion was erroneously exercised. This court stated in *McCleary* [*v. State*], 49 Wis. 2d [263,] 281, [182 N.W.2d 512 (1971)], that "[a]ppellate judges should not substitute their preference for a sentence merely because, had they been in the trial judge's position, they would have meted out a different sentence."

State v. Brown, 2006 WI 131, ¶19, 298 Wis. 2d 37, 725 N.W.2d 262 (citation omitted). "On appeal, we will 'search the record to determine whether in the exercise of proper discretion the sentence imposed can be sustained.'" ***Lechner***, 217 Wis. 2d at 419 (citation omitted).

DISCUSSION

I. Probable cause to arrest

¶14 McGee challenges the trial court's determination that the police officers had probable cause to arrest him on October 31, 2002. The State argues that given the totality of the circumstances, "it is clear that police had probable cause to arrest [McGee]."

¶15 Police must have probable cause to lawfully arrest a suspect. ***Kutz***, 267 Wis. 2d 531, ¶11. Whether probable cause exists is a question of constitutional fact. *See* ***State v. Secrist***, 224 Wis. 2d 201, 208, 589 N.W.2d 387 (1999).

> Probable cause for arrest exists when the totality of the circumstances within the arresting officer's knowledge would lead a reasonable police officer to believe that the defendant probably committed a crime. While the information must be sufficient to lead a reasonable officer to believe that the defendant's involvement in a crime is "more than a possibility," it "need not reach the level of proof beyond a reasonable doubt or even that guilt is more likely than not." Probable cause is a flexible, commonsense measure of the plausibility of particular conclusions about human behavior.

Kutz, 267 Wis. 2d 531, ¶11 (citations omitted). A court applies an objective standard in determining whether probable cause exists, "and is not bound by the officer's subjective assessment or motivation. ***Id.***, ¶12 (citation omitted).

> The court is to consider the information available to the officer from the standpoint of one versed in law enforcement, taking the officer's training and experience into account. The officer's belief may be predicated in part upon hearsay information, and the officer may rely on the collective knowledge of the officer's entire department.

Id. (citation omitted).

¶16 The trial court discussed the circumstances under which police arrested McGee, and noted that fleeing a police officer raises a reasonable suspicion to make a stop. *See* ***State v. Anderson***, 155 Wis. 2d 77, 82, 454 N.W.2d 763 (1990). Berken testified that when McGee saw Berken's squad car, McGee began running first in one direction, then another and that when Berken caught up with McGee, McGee refused to "get down," requiring the officer to "put him down on the ground" in order to "stop" him. Berken also testified that McGee originally gave him a false name when asked to identify himself. The printout from the dispatch report shows that officers were aware that McGee fit the description of one of the assailants (as personally identified by one of the responding officers) and that after searching McGee incident to his arrest, Berken

recovered both a knife (an illegally concealed weapon) and a necklace which was later identified as belonging to the victim.

¶17 McGee argues that even if the police had probable cause to arrest him, the probable cause evaporated once the victim was unable to positively identify him as one of the assailants in a show-up identification held near the original scene of the assault. McGee argues that the police simply set on him as one of the assailants and stopped investigating. This too is inaccurate. McGee was arrested only after he attempted to flee from police. Upon a search after his arrest, McGee was found to have an illegally concealed weapon on his person, a weapon similar to the description given by the victim, and also a necklace which matched the dispatcher's description of a necklace taken from the victim by one of the assailants. Further, based on this probable cause, the police held McGee in such a manner as to preserve evidence until such time as bucal and penile swabs could be obtained from McGee. Based upon our review of the record and the trial court's findings of fact, we affirm the trial court's determination that there was probable cause to arrest McGee.

II. Voluntariness of McGee's consent to give bucal and penile swabs

¶18 McGee first argues that he could not give consent to the swabs because he did so while he was illegally seized. As noted above, we affirm the trial court's determination that the police had probable cause to arrest McGee for the assault. McGee further argues that even if it is determined that he was legally in custody, his consent was "not free, intelligent, unequivocal and specific consent without any duress or coercion, actual or implied." The State argues that the trial court heard the testimony of McGee, Chavez and Police Officer Daniel Reilly, who was present both when Chavez obtained McGee's signatures on the consent

form and when the SATC nurse took the swabs, and based on that testimony, found the testimony of the officers to be more credible than McGee's version of events, and determined that McGee had voluntarily consented to the taking of the swabs.

¶19 Whether an individual consented to a search is a question of fact which we review under the clearly erroneous standard. ***State v. Wallace***, 2002 WI App 61, ¶16, 251 Wis. 2d 625, 642 N.W.2d 549. "Whether the consent was voluntary, however, is a question of 'constitutional fact,' which we review independently of the [trial] court, applying constitutional principles to the facts as found by the trial court." ***Id.*** As a well-established exception to the Fourth Amendment's warrant requirement, consent must be a "free, intelligent, unequivocal and specific consent without any duress or coercion, actual or implied." ***Id.***, ¶17 (citation and internal quotation marks omitted). It is the State's burden to prove that the consent was voluntary by clear and convincing evidence. ***Id.***

¶20 We examine the totality of the circumstances in determining whether consent was voluntarily given, "considering both the events surrounding the consent and the characteristics of the individual whose consent is sought." ***Id.*** (citation omitted). Factors we consider include, but are not limited to:

> [W]hether any misrepresentation, deception or trickery was used to entice the defendant to give consent; whether the defendant was threatened or physically intimidated; the conditions at the time the request to search was made; the defendant's response to the agents' request; the defendant's general characteristics, including age, intelligence, education, physical and emotional condition, and prior experience with the police; and whether the agents informed the individual that consent to search could be withheld.

Id. (citation omitted; brackets in ***Wallace***).

¶21 The facts in ***Wallace*** are somewhat similar as those present in the instant case. In ***Wallace***, the defendant was in custody at a police station and had been so for thirty minutes before the request for a strip search was made of him. ***Id.***, ¶18. Wallace argued that under these circumstances, his consent "was a 'mere submission to authority, and not true voluntary consent.'" ***Id.*** The ***Wallace*** court, echoing the Supreme Court in ***United States v. Watson***, 423 U.S. 411, 424 (1976), held that "although custody is one factor to be considered in determining voluntariness, it is not in itself dispositive." ***Wallace***, 251 Wis. 2d 625, ¶18. Accordingly, we must continue our inquiry. *See* ***id.***

¶22 McGee argues that:

> Mr. McGee, but 18 years old, was handcuffed in the back of a squad where he had been for approximately 5 hours when Detective Chavez had Mr. McGee sign a written Consent Form…. [P]rior to signing the Consent Form, the police didn't read to him his ***Miranda*** warnings. The police did not tell him that he was free to refuse consent. In fact, Mr. McGee testified that the police told him that, if he refused consent, the swabs would be forcibly taken.

McGee concludes that "[g]iven all the facts and circumstances of this case, the State did not meet its burden to prove by clear and convincing evidence that Mr. McGee's consent was voluntary."

¶23 During the hearing on the motion to suppress, the trial court was presented with conflicting versions of the process used in obtaining McGee's consent. The trial court weighed the credibility of the witnesses and concluded that Chavez's account was more credible; that her testimony was clear and cogent, and that she did not have "anything to lose by explaining [the consent sought and the form] because as the evidence ha[d] already made clear if this didn't work for

her she had an automatic plan B [taking the swabs forcibly, with notification by a different form]." The trial court specifically found that Chavez had read the document to McGee, that the consent form was written such that it would not "take very much intelligence at all for a person to [be] put on guard by the [form's] language" and that while McGee was in custody, he was not threatened or promised anything for his consent, and that the conversation that occurred in which McGee signed the consent form was "a very calm, reasonable" one. The trial court also noted that McGee had above average intelligence, and that "[i]n this day and age people don't lightly put their names on documents." Based upon our review of the record, we conclude that the trial court's findings are not clearly erroneous.

¶24 In reviewing these findings in light of the factors set forth in ***Wallace***, we conclude that: (1) Chavez did not misrepresent or attempt to obtain McGee's consent by deception or trickery; (2) that McGee was not threatened or physically intimidated into giving consent; (3) that although McGee had been handcuffed in the back of a squad car for approximately four to five hours prior to seeking his consent, the police had not deliberately lengthened his custody to coerce consent, but rather it was a natural result of their investigation (apprehension of the five assailants, show up identifications at the scene for each, etc.); and (4) McGee was intelligent, had some high school education and read above the high school level, and there was no testimony that he was overwrought nor did he appear to officers to be under the influence of any intoxicant such that he could not understand what Chavez was asking. *See* ***Wallace***, 251 Wis. 2d 625, ¶17. Additionally, there was testimony that Chavez returned to McGee to obtain his consent to bucal swabs (the initial consent only being to penile swabs), and that McGee signed and initialed that handwritten addition separately. Based upon

the totality of the circumstances, we affirm the trial court's determination that McGee's consent to the penile and bucal swabs was voluntary.

III. Voluntariness of McGee's statement

¶25 McGee asserts that the statement he gave to the police at approximately 3:00 p.m. on the day the sexual assault occurred was involuntary. The State argues that McGee gave his statement voluntarily, noting that there is no evidence that police used any coercive tactics to procure the statement, that the trial court found that McGee "read above the high school level, appeared to be intelligent and to understand Detective Chavez's questions to him, gave appropriate responses to Detective Chavez's questions and was calm."

¶26 If involuntary, the admission of McGee's statement would be a violation of his due process rights under both the Fourteenth Amendment to the United States Constitution and Article I, Section 8 of the Wisconsin Constitution. *See* ***State v. Hoppe***, 2003 WI 43, ¶36, 261 Wis. 2d 294, 661 N.W.2d 407. "We apply a totality of the circumstances standard to determine whether a defendant's statements are voluntary." ***Id.***, ¶38. One consideration is whether the statements at issue were "coerced or the product of improper pressures exercised by the person or persons conducting the interrogation." ***Id.***, ¶37. Police conduct that is coercive or improper "is a necessary prerequisite for a finding of involuntariness." ***Id.***

¶27 In analyzing whether a statement is voluntary, we must balance police tactics, such as:

> the length of the questioning, any delay in arraignment, the general conditions under which the statements took place, any excessive physical or psychological pressure brought to bear on the defendant, any inducements, threats, methods

> or strategies used by the police to compel a response, and whether the defendant was informed of the right to counsel and right against self-incrimination,

id., ¶39, with "[t]he relevant personal characteristics of the defendant," including "the defendant's age, education and intelligence, physical and emotional condition, and prior experience with law enforcement," ***id.*** It is the State's burden to prove by a preponderance of the evidence that the statement was voluntarily given. ***State v. Agnello***, 226 Wis. 2d 164, 181-82, 593 N.W.2d 427 (1999).

¶28 McGee refers to his being handcuffed in a squad car for over four hours as being coercive to his giving a statement involuntarily. McGee also testified that he had asked for a lawyer and that Chavez had told him that he "can't afford a lawyer" and did not stop the interrogation. McGee also testified that Chavez told him that his son would be taken away from him if he didn't give a statement and that she would personally go to the judge so that he got the "60 years mandatory." The trial court specifically asked McGee during his testimony whether the quotations he was attributing to Chavez were her actual words or whether they were just his interpretation of what she meant. McGee testified that they were Chavez's exact words. The trial court, in determining the credibility of Chavez and McGee, and hence their testimony regarding what occurred at the time McGee gave his statement, found that McGee's testimony was not credible as to the quotes that he was claiming Chavez made to him as she was a veteran police detective, in the sexual crimes division, and what McGee claimed she said was not the law, and therefore, Chavez would not likely have said it. Additionally, the trial court noted that Chavez carried a copy of the ***Miranda*** warning with her police identification badge, read the warning to McGee directly from the written form, and had McGee respond that he understood his rights and that he was waiving

those rights to talk with Chavez both verbally and in writing by initialing on the pedigree form that he had been read these rights.

¶29 McGee also claimed that he was still under the influence of the marijuana that he had smoked the previous day. The trial court found this to be incredible, and went into a lengthy discussion on the record of the different stages of drug intoxication and their possible effects. The trial court found that Chavez had noted McGee's demeanor on her report, that McGee was coherent and gave question-appropriate answers to Chavez's questions. Based on its consideration of the evidence before it, the trial court found that McGee's testimony was not credible, and that Chavez's was credible. *See* ***State v. Missouri***, 2006 WI App 74, ¶17, 291 Wis. 2d 466, 714 N.W.2d 595 ("Resolution of credibility issues and questions of fact must be determined by the factfinder."). Based upon our review of the record, we conclude that the trial court's findings of fact are not clearly erroneous and, therefore, we must now analyze these facts to determine whether McGee's statement was constitutionally involuntary.

¶30 In analyzing these facts under a totality of the circumstances standard, balancing police tactics with McGee's individual characteristics, we conclude that none of the police tactics were improperly coercive. McGee was not handcuffed nor physically threatened or intimidated during Chavez's questioning. Chavez was the only officer questioning McGee and the interview only lasted an hour and a half. McGee is an intelligent eighteen-year-old adult, with a reading level higher than high school level. McGee acknowledged that Chavez had read him his ***Miranda*** rights and that he had verbally and in writing acknowledged that he understood and waived them. McGee received offers of drink and a bathroom break. While McGee had not gotten a good night's sleep since the morning before, and had admitted use of marijuana during some part of the day before,

Chavez noted that during the interview McGee was calm in his demeanor and that his responses to her questions were coherent and responsive to the questions asked. Based upon our analysis, we determine that McGee's statement was voluntary.

IV. Sentencing

¶31 When a defendant challenges his or her sentence, "the defendant has the burden to show some unreasonable or unjustifiable basis in the record for the sentence at issue." ***Lechner***, 217 Wis. 2d at 418; *see also* ***Ramuta***, 261 Wis. 2d 784, ¶23 (defendants have the burden of establishing that the trial court erroneously exercised its discretion in sentencing them). This burden is a heavy one, as "the trial court's sentence is presumptively reasonable," ***Ramuta***, 261 Wis. 2d 784, ¶23, and there is a "consistent and strong [public] policy against interference with the discretion of the trial court in passing sentence." ***State v. Stenzel***, 2004 WI App 181, ¶7, 276 Wis. 2d 224, 688 N.W.2d 20.

¶32 Our review is limited to whether the trial court erroneously exercised its discretion and we will not substitute our "preference for a sentence merely because, had [we] been in the trial judge's position, [we] would have meted out a different sentence." ***Brown***, 298 Wis. 2d 37, ¶19. "On appeal, we will 'search the record to determine whether in the exercise of proper discretion the sentence imposed can be sustained.'" ***Lechner***, 217 Wis. 2d at 419 (citation omitted).

¶33 The primary sentencing factors are the gravity of the offense, the character of the offender, and the need for public protection. ***McCleary***, 49 Wis. 2d at 276. The trial court's obligation is to consider the primary sentencing factors and to exercise its discretion in imposing a reasoned and reasonable sentence. *See* ***State v. Larsen***, 141 Wis. 2d 412, 426-28, 415 N.W.2d 535 (Ct.

App. 1987). It is within the trial court's exercise of its discretion to determine those factors it believes are relevant and to determine what weight to give each relevant factor. ***Stenzel***, 276 Wis. 2d 224, ¶16.

¶34 A sentence is unduly harsh and thus an erroneous exercise of discretion when it is "so excessive and unusual and so disproportionate to the offense committed as to 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); *see also* ***State v. Giebel***, 198 Wis. 2d 207, 220, 541 N.W.2d 815 (Ct. App. 1995) (We review an allegedly harsh and excessive sentence for an erroneous exercise of discretion.). "A mere disparity between the sentences of codefendants is not improper if the individual sentences are based upon individual culpability and the need for rehabilitation." ***State v. Toliver***, 187 Wis. 2d 346, 362, 523 N.W.2d 113 (Ct. App. 1994).

¶35 McGee argues that the trial court erroneously exercised its discretion when it sentenced him to "7 to 15 years of greater initial confinement time" than the other four defendants. McGee argues that the trial court failed to give him the appropriate credit for accepting responsibility, for his prior lack of criminal record or for his concerns toward his son. Finally, McGee argues that the trial court based its sentence on "[u]nreasonable and unjustifiable basis [sic]" and therefore, we should grant McGee's request for sentence modification, and "remand for proper sentencing." The State argues that the record shows that the trial court, in considering the three primary sentencing factors in light of the facts, properly exercised its discretion.

¶36 McGee was sentenced at the same time as the two other adult defendants in the case. In sentencing McGee, the trial court first discussed the seriousness of the crime. The court noted that the defendants acted with "toxic selfishness," and that the lack of empathy the defendants displayed "from the moment this victim was first thrown to the ground," in their shouting at the victim, holding her down with a foot on her neck, as well as in threatening her with a knife, and in taking off her clothes and burning them demonstrated that they could only have done this by dehumanizing the victim and "blotting [the victim's humanity] out of [their] mind[s]."

¶37 The trial court then considered the protection of the community and McGee's personal characteristics. The trial court first noted that in addition to his actions that paralleled those of the other defendants, McGee failed to acknowledge the wrongfulness of his actions in the assault, and that McGee's statement to the PSI writer that the only reason he "pled guilty to sexual assault is because [he] thought it was illegal to have sex outside and that's what's involved in sexual assault," gave the trial court "concern[] about whether [McGee] can recognize the truth and the law for what it is and follow it." The trial court also found "deplorable" the fact that McGee had involved his sixteen-year-old and fourteen-year-old brothers, "introduc[ing] them to sex this way." The trial court acknowledged McGee's positive personal characteristics: his lack of prior criminal record; his intelligence; and his guilty plea and its concomitant acceptance of responsibility. The trial court also recognized McGee's concern for raising his son as a positive, but further noted that if McGee was as concerned about being a good father as he claimed, he "would be home at 11 o'clock" [but i]nstead [he] is out doing drugs, running the streets with [his] buddies, and looking

for a prostitute, and then engaging in this kind of crime." The trial court concluded that McGee's

> involvement in the crime deserves more punishment because you wielded a knife against this victim as you, yourself, confessed because you took this chaotic situation and introduced sadism into it the way that you burned her jacket and the way that you stole [her necklace] from her, and because you lead [sic] your impressionable 16 and 14 year old brothers into this.

¶38 The trial court considered the three primary sentencing factors, and set forth its reasoning on the record for giving McGee a longer sentence that his co-defendants. McGee faced a maximum sentence of sixty years on each of sexual assault counts alone. From our review of the record, we determine that the trial court did not erroneously exercise its discretion in sentencing McGee to a total of twenty-five years' imprisonment for his actions in this case.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.