

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 13, 2003

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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**Appeal No. 02-1519-CR
02-1520-CR
STATE OF WISCONSIN**

**Cir. Ct. Nos. 01-CF-37
01-CF-80**

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JASON R. DIXON,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Taylor County: GARY L. CARLSON, Judge. *Affirmed.*

Before Vergeront, P.J., Dykman and Lundsten, JJ.

¶1 DYKMAN, J. Jason Dixon appeals from two judgments of conviction and from an order denying his motion for postconviction relief. The trial court sentenced Dixon to a total of ten years' imprisonment followed by eighteen years of extended supervision for one count each of bail jumping,

violating a domestic abuse order, substantial battery and burglary with battery. We reject Dixon's claims that the trial court violated his rights to due process by basing its sentence upon inaccurate information. Nor did Dixon present new factors in his postconviction motion justifying modification of his sentences. Finally, we conclude that Dixon's sentences were not unduly harsh and excessive. Accordingly, we affirm.

BACKGROUND

¶2 The charges against Dixon arise from a series of incidents between Dixon and his girlfriend, Dawn Heintz. In late February of 2001, a domestic abuse order barred Dixon from contacting Heintz as a result of an altercation where he hit her and choked her. As a condition of his bond, he was prohibited from having contact with Heintz, or being at or near her home. On March 4, 2001, a sheriff's deputy found Dixon and Heinz at Heintz's apartment. Dixon was arrested for violating the temporary restraining order issued on February 28, 2001, and the conditions of his bond. That same day, according to the jail telephone records, Dixon placed a total of thirteen calls to Heintz's apartment. Three days later, he was released on a cash bail, which again required that he not contact Dawn Heintz

¶3 On May 26, 2001, Dixon went to Heintz's apartment and they argued over Heintz's plans to go out that night with her friend Jenny Cowan. Later, as Heintz was preparing to go out, she and Dixon got into another argument, after which Dixon left the apartment. Jenny subsequently arrived, and she and Heintz went to a bar called "The Zone," leaving the apartment door unlocked. While there, the bartender brought Heintz the telephone and told her that someone had been calling for her at least twenty times. When Heintz picked up the

telephone, Dixon was on the line, wanting to know where she had been. After she told him, Dixon responded “fuck you stupid whore” and hung up.

¶4 When Heintz and Jenny returned to Heintz’s apartment, they found Dixon there, drinking vodka and orange juice. Heintz and Dixon got into another argument, which culminated in Dixon throwing his drink at her. The glass hit Heintz, and she asked Dixon to leave. He left, and Heintz and Jenny then locked all the windows and the door. They then went back to The Zone, where they were told that Dixon had kept calling for Heintz. When Jenny saw Dixon in the bar, Heintz hid in the bathroom and waited until Dixon left.

¶5 When Dixon continued to call the bar, the bartender reported that the call was coming from Heintz’s residence. After the bar closed, Heintz and Jenny returned to the apartment and found the front door open. They noticed that the door had been broken, but did not see any sign of Dixon. Dixon then rushed into the apartment and hit Heintz, causing her to feel a blunt sharp pain on the left side of her head. She fell to the floor and “everything went black.” Jenny called 911 and Dixon left.

¶6 The doctor at the hospital emergency room observed that the area behind Heintz’s left ear was slightly red, swollen and painful to the touch. There was no evidence of fracture and she was given a prescription of vicodin for the pain. In her Victim Impact Statement, Heintz stated that “I was hurt on the side of my head w/ swelling and bruising for about 1 wk.”

¶7 Dixon was arrested and charged with one count each of felony bail jumping, substantial battery, burglary with intent to commit battery on a person, resisting an officer and disorderly conduct. In exchange for the State’s agreement to make no sentencing recommendation, Dixon pleaded no contest to the

substantial battery and burglary charges and guilty to one charge of bail jumping and one charge of violating a restraining order. The last two charges are not part of this appeal.

¶8 At sentencing, the trial court commented at length regarding the results of Dixon’s psychological evaluation. The report contained the following diagnosis:

Axis I: Post-Traumatic Stress Disorder
Axis II: Borderline Personality Disorder
Antisocial Personality Disorder

¶9 The trial court discussed its interpretation of this diagnosis. Its comments included the following:

I have read and reread the presentence examination and the report of the psychological evaluation. What disturbs me most about Jason is the comment by the examiner that when asked about the signs and symptoms of Borderline Personality Disorder, the offender acknowledged a clear presence of all nine symptoms and signs.

Could Jason profit from psychotherapy? Certainly, unquestionably. But what I have to worry about is what the examiner refers to in his report is the, quote, “deep suppressed rage,” unquote. Not anger, not fear, but rage.

....

One the problems I’ve had—or noted—with Borderline Personality Disorder, for all practical purposes, these people have no conscience. They know what to say.

You’re a highly intelligent person, there’s no question about that. They know what to say. They’re great con artists. But when push comes to shove, what they say and what they do are two different things, and that’s not very appropriate for me.

....

You have in your favor your demeanor. You have been a pleasant fellow in court. As I said from my experience with people who are personal—pardon me—have Borderline Personality Disorder, that is common. I would expect nothing less than that. They're con artists.

....

Dawn, from day one, you said he lied to you. That's what con artists do. They lie and they lie and they lie to get what they want. They can put on a good face. They can hit you in one instant and then in the next they can be loving and caring and sorry.

....

It's not your fault that he is psychotic. Some of the "best" serial killers this country has known—maybe best should be in quotation marks—have been extremely likeable, affable people, highly intelligent con artists.

¶10 Dawn Heintz addressed the court and said that she was afraid of Dixon. She was quite certain that he would have killed her if Jenny had not been at her apartment that night. The trial court agreed with her assessment, and stated that "I think I have to save Dawn's life, because one, you've already shown a court order doesn't mean diddly to you. I doubt if probation would mean diddly to you." The trial court then went on to stress the need to protect the public:

Are you in need of close rehabilitative control that's available only in a secure setting? Oh, you bet you are. The only way I can protect other women, Dawn or otherwise, from you is to put you in a position where you have no access to them, period. I'm sorry, but it's the truth.

....

... [B]ut I'm really concerned and what really has an effect on me is the actions in Germany with Julie [Dixon's ex-wife] which tell me there's a pattern, that this incident with Dawn is just a continuation of your personal attitude towards women, your attitude about controlling other people and your ability to understand that there are other controls on you from society, other than just the normal moral restraints we all should have that we don't go around beating other people up.

¶11 The trial court sentenced Dixon to one year of imprisonment for felony bail jumping, three years for substantial battery, and six years for the burglary with battery, all to run consecutively, for a cumulative length of confinement of ten years. In addition, the trial court imposed a total of eighteen years of extended supervision for these convictions.

¶12 Dixon filed a postconviction motion requesting that his sentences be reduced. As grounds, Dixon argued that the trial court misunderstood the psychological report and that new information, unknown at the time of sentencing, supported a reduction in sentence. Dixon contended that his actual diagnosis was much more benign than what the trial court had apparently assumed from its “con artist” and “psychotic” comments. Rather, “the two diagnoses both stress that Mr. Dixon was, in fact, in his own previous life much more a victim than a perpetrator going into the events that put him in front of the Court” Dixon also presented character references from an investigator with the City of Medford Police Department as well as the sheriff and former fire chief of his home town in Arkansas.

¶13 The trial court did not overtly acknowledge that its statements, based on the Borderline Personality Disorder, describing Dixon as a “con artist” and “psychotic,” attributed psychological characteristics to Dixon that were not part of that diagnosis. Instead, the trial court noted that it had been struck by the psychologist’s description of Dixon as having “deep suppressed rage.” As a result, “I thought that the need for public protection was extremely high in part because of this deep suppressed rage. I felt that he was really going to be a risk to the public in the future.” It then concluded that Dixon’s motion for sentence modification did not present a new factor, that all the relevant factors and considerations were addressed at sentencing, and that it had not over-relied on the

psychological evaluation. Accordingly, the trial court denied Dixon's postconviction motion. Dixon appeals both the original sentencing and the denial of his motion for sentence reduction.

DISCUSSION

Inaccurate Information

¶14 A defendant has a constitutional due process right to receive a sentence that is based upon accurate information. *State v. Lechner*, 217 Wis. 2d 392, 419, 576 N.W.2d 912 (1998). Whether this right has been denied presents a question of law which we review de novo. *State v. Groth*, 2002 WI App 299, ¶21, ___ Wis. 2d ___, 655 N.W.2d 163. A defendant alleging that a sentencing decision was based on inaccurate information must show that: (1) the information was inaccurate; and (2) that the trial court actually relied on the inaccurate information at sentencing. *State v. Harris*, 174 Wis. 2d 367, 378, 497 N.W.2d 742 (Ct. App. 1993). The burden is on the defendant to prove by clear and convincing evidence the inaccuracy of the information and that the information was prejudicial. *State v. Littrup*, 164 Wis. 2d 120, 132, 473 N.W.2d 164 (Ct. App. 1991).

¶15 Dixon argues that, as illustrated by the trial court's use of the terms "psychotic," "con artist" and "person with no conscience," his sentence was premised on a basic misunderstanding of his psychological diagnoses of Post-Traumatic Stress Disorder (PTSD) and Borderline Personality Disorder. Dixon contends that because the trial court misunderstood the symptoms and ramifications of a diagnosis of borderline personality disorder, the sentence handed down is based on inaccurate information. Although the record demonstrates that the trial court made unwarranted assumptions regarding

Borderline Personality Disorder, we are not persuaded that Dixon has established a due process violation.

¶16 Dixon's psychological examination concluded that he suffered from both PTSD and Borderline Personality Disorder. After stating that it was disturbed by the conclusion in the psychological report that Dixon met all nine factors associated with Borderline Personality Disorder, the trial court made repeated remarks that Dixon was a con artist and a person with no conscience. The trial court also referred to Dixon as "psychotic." Concluding that there was a great need to protect other women, who might not survive Dixon's extreme jealousy and violent behavior, the trial court imposed sentences totaling ten years of imprisonment.

¶17 Dixon has the burden to show that the trial court relied upon inaccurate information at sentencing. With his motion for sentencing modification, Dixon attached a copy of the diagnostic criteria for both PTSD and Borderline Personality Disorder, as set forth in the Diagnosis and Statistical Manual, 4th Ed. Text Revision (DSM IV-TR) at 706-10. Borderline Personality Disorder is described as follows:

A pervasive pattern of instability of interpersonal relationships, self-image, and affects, and marked impulsivity beginning by early adulthood and present in a variety of contexts, as indicated by five (or more) of the following:

(1) frantic efforts to avoid real or imagined abandonment....

(2) a pattern of unstable and intense interpersonal relationships characterized by alternating between extremes of idealization and devaluation.

(3) identity disturbance: markedly and persistently unstable self-image or sense of self.

(4) impulsivity in at least two areas that are potentially self-damaging (e.g., spending, sex, substance abuse, reckless driving, binge eating)....

(5) recurrent suicidal behavior, gestures, or threats, or self-mutilating behavior.

(6) affective instability due to a marked reactivity of mood (e.g., intense episodic dysphoria, irritability, or anxiety usually lasting a few hours and only rarely more than a few days).

(7) chronic feelings of emptiness.

(8) inappropriate, intense anger or difficulty controlling anger (e.g., frequent displays of temper, constant anger, recurrent physical fights).

(9) transient, stress-related paranoid ideation or severe dissociative symptoms.

¶18 Dixon is correct that none of these characteristics refer to “con artists” or describe individuals with Borderline Personality Disorder as lacking a conscience or being psychotic. We agree that the trial court’s statements to that effect at sentencing demonstrate a flawed understanding of Dixon’s psychological diagnosis.

¶19 However, while being a con artist and/or lacking a conscience are not part of the Borderline Personality Disorder symptomology, there is support in the psychologist’s report for the trial court’s statements. According to the report, Dixon’s suicidal threats appeared to have been made “in order to manipulate others or escape from accountability for his behavior.” He has a history of irresponsible behavior including “lying, misrepresentation, and minimization of his own culpability across a number of settings ranging from his military service to a variety of legal difficulties as a civilian.” In addition, Dixon had an erratic employment history, and thus “has tended to live a parasitic lifestyle with his ex-wife.”

¶20 Given this description of Dixon as someone with an extensive history of lying and manipulating others in order to avoid the negative consequences of his own behavior, we conclude that there is a basis for the trial court's references to Dixon as a "con artist." Moreover, when the court's comments at sentencing are considered as a whole, the "con artist" and "without a conscience" statements clearly relate to Dixon's history as a domestic abuser who apologized contritely after each incident only to abuse again when his jealousy and anger were aroused. Thus, while the trial court's statements are not consistent with the Borderline Personality Disorder criteria, they are not wholly inconsistent with the other conclusions in the report.

¶21 The more troubling statements are those in which the trial court calls Dixon "psychotic" and remarks that "some of the 'best' serial killers this country has known ... have been extremely likeable, affable people, highly intelligent con artists." However, having reviewed the entirety of the court's remarks at sentencing, we conclude that the gratuitous reference to serial killers was not a statement related to Dixon's diagnosis. Rather, it appears to be an effort by the trial court to make the point that appropriate demeanor in court is not a reliable indicator of a defendant's character.

¶22 Even if it is assumed, *arguendo*, that the trial court relied upon its own inaccurate interpretation of a Borderline Personality Diagnosis when sentencing Dixon, we must still determine whether the trial court's error was harmless. In view of other factors considered and weighed by the court, would it have imposed the same sentence even with the corrected information? *See Littrup*, 164 Wis. 2d at 132-34.

¶23 Although some of the trial court's comments reveal a substantial misconception of a Borderline Personality Disorder diagnosis, we find it telling that the court's next statements directly quote the psychological evaluation:

Could Jason profit from psychotherapy? Certainly, unquestionably. But what I have to worry about is what the examiner refers to in his report is the, quote, "deep suppressed rage," unquote. Not anger, not fear, but rage.

[The report] goes on to say, "He appears to have a great deal of submerged anger that he tries to hide from the world, and upon which he must expend a great deal of psychic energy to keep it under control. Under conditions of [what he perceives as] high stress ... or (what he perceives as) high provocation, these controls are likely to fail, and the rage is likely to manifest in some type of aggressive action."

¶24 The trial court then related the psychologist's conclusions to the charges against Dixon:

We have already seen the results of this rage when he perceives provocation. The crimes that he has pled to are incredibly serious crimes. Oh, perhaps disorderly conduct and telephone harassment isn't, in the range of what he's done, considered particularly serious, but what we have seen in these cases is a progression over a period of just three months of increasingly serious and increasingly violent activity.

¶25 Despite the inaccuracy of some of the trial court's statements regarding Borderline Personality Disorder, we are not persuaded that the incorrect information resulted in a greater sentence. The trial court's comments at sentencing establish that it was primarily guided by the psychologist's statement that Dixon was an individual with "deep suppressed rage," the severity of Dixon's conduct and the specific incidents of domestic abuse in Dixon's past. We are confident that, in view of these factors and the substantial weight the trial court accorded them, Dixon would have received the same sentence even with the

corrected information regarding Borderline Personality Disorder. Accordingly, the court's misconceptions were harmless.

Existence of New Factors

¶26 Dixon next argues that the trial court improperly denied his motion for sentence modification based on new factors. Whether new factors have been established is a question of law that this court reviews without deference to the trial court. *State v. Franklin*, 148 Wis. 2d 1, 8, 434 N.W.2d 609 (1989). A new factor is a fact or set of facts highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in existence or because it was unknowingly overlooked by all of the parties. *Rosado v. State*, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975). A new factor is an event or development that frustrates the purpose of the original sentencing. *State v. Johnson*, 158 Wis. 2d 458, 466, 463 N.W.2d 352 (Ct. App. 1990). The burden is on the defendant to show, by clear and convincing evidence, that a new factor exists. *Franklin*, 148 Wis. 2d at 8-9.

¶27 The new factors claimed by Dixon are the corrected information regarding his psychological diagnosis and his character references, especially the letter from Investigator Gary Krueger of the City of Medford Police Department describing Dixon's work as a confidential informant. While we accept Dixon's assertion that this information was unknowingly overlooked by the parties at the original sentencing, we conclude that none of these facts frustrates the purpose of the original sentence.

¶28 We have already determined that the trial court's misinformation regarding the precise nature of the characteristics of Borderline Personality Disorder was not prejudicial because we are convinced by our review of the record

that the trial court would have imposed the same sentence even with the benefit of the actual DSM IV-TR criteria. Therefore, this additional information does not constitute a new factor. We reach a similar result regarding Dixon's new character references.

¶29 The trial court unequivocally expressed its concerns about Dixon in its comments at sentencing:

Jason is not a good person. He may have some good aspects and attributes about him, I don't deny that. He may sometimes have the ability to deal with these situations in a less destructive way, but I'm quite honestly not willing to take the chance on Dawn's life or the life of some other person who decides she can trust him and bring him into her life and then have him turn on her.

There has been talk, appropriately, about the primary factors the court's to consider: gravity of the offense, character, need to protect the public. Every single one of these factors falls on the side against Jason. There isn't a single one of those factors that I believe I can consider to be in his favor. These crimes are serious. They were life-threatening.

His character, well, I wonder about his character. Certainly his military experience doesn't say anything particularly good about him. He's arrested in 1997 by the military police for physically assaulting his wife, Julie Soderverg....

His attitude towards women seems to be a rather fixed one, and it is one of physical assault....

The need for public protection I think is extremely high. Jason has his own warped idea of what it means for someone to provoke him or to threaten him, and he loses all control, and I would not want to be around when that happens....

¶30 At the motion hearing, the trial court further explained the basis for its sentencing decision:

I recall at the time of the sentencing that I was going through the factors that I thought that the need for public protection was extremely high in part because of this deep suppressed rage. I felt that he was really going to be a risk to the public in the future.

....

The Court at that time was essentially especially concerned about what it believed to be Jason's destructive tendencies; the fact that when he is provoked, he sort of goes off the deep end.

....

At the time the Court's I think primary consideration was one basically of incapacitation, which is a big and fancy long word for as long as he's locked up, he's not going to be hurting women.

....

I was very concerned about his attitude. I was very concerned about the likelihood that if the Court imposed a sentence on Jason that did not basically incapacitate him for a significant period of time, there was going to be more victims.

¶31 Clearly the two central concerns underlying the trial court's sentencing decision were the seriousness of the offense and the need to protect the public. Although the reference letters from Dixon's home town and his brief volunteer work as a confidential informant for the City of Medford Police Department are relevant to an evaluation of his overall character, and character is one of the primary factors that a court is to consider at sentencing, *see Rosado*, 70 Wis. 2d at 288, this new character information does not frustrate the purpose of the original sentence. That Dixon did not exhibit behavioral problems in high school and performed well in a Junior ROTC program neither addresses nor mitigates his history of abusive relationships with women. Thus his character references do not undercut the rationale expressed by the trial court and frustrate the purpose of the

original sentence. Accordingly, we conclude that Dixon has failed to establish by clear and convincing evidence that a new factor exists in this case.

Unduly Harsh and Excessive Sentence

¶32 Finally, we turn to Dixon’s argument that the sentence he received is unduly harsh and excessive. There is a strong policy against interfering with the discretion of the trial court in passing sentence. *McCleary v. State*, 49 Wis. 2d 263, 276, 182 N.W.2d 512 (1971). Thus, the length of the sentence imposed by a trial court will be disturbed on appeal only where the sentence 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).

¶33 Dixon submits that the sentence he received, a total of ten years’ incarceration followed by eighteen years of supervised release, meets this standard. He stresses that he was only twenty-two at the time of the offense, he had no prior criminal record, and no one was gravely hurt by his conduct. Under these circumstances, he contends that it was an erroneous exercise of discretion for the trial court to impose such a lengthy prison term “without ever having tried any lesser punishments or methods of controlling his behavior.” This argument is unavailing.

¶34 First, although the injury to Heintz did not result in permanent physical injury, the record establishes that Heintz did suffer a loss of consciousness when Dixon hit her with an unknown blunt object. There is no

question that Dixon’s conduct qualifies as substantial bodily harm under WIS. STAT. § 939.22(38) (2001-02).¹ Further, the trial court believed that greater harm might well have been done to Heintz had not Jenny been there to call for help immediately. Thus there is a reasonable basis for the trial court’s determination that both the gravity of the offense and the need to protect the public required a significant period of incarceration.

¶35 Second, the ten year sentence handed down is substantially below the maximum. Had the trial court imposed the maximum for each crime, Dixon would have been sentenced to a total period of incarceration of eighty-two years. “A sentence well within the limits of the maximum sentence is not so disproportionate to the offense committed as to shock the public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances.” *State v. Daniels*, 117 Wis. 2d 9, 22, 343 N.W.2d 411 (Ct. App. 1983). Moreover, the trial court did consider probation, but rejected that approach because Dixon had already demonstrated, by repeatedly violating the terms of his bond and the temporary restraining orders, that he would not obey legal restraints. On this record, we conclude that Dixon’s sentence is not unduly harsh or excessive.

By the Court.—Judgments and order affirmed.

Not recommended for publication in the official reports.

¹ Under WIS. STAT. § 939.22(38), “substantial bodily harm” is defined as “bodily injury that causes a laceration that requires stitches; any fracture of a bone; a burn; a temporary loss of consciousness, sight or hearing; a concussion; or a loss or fracture of a tooth.”

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¶36 VERGERONT, P.J. (*concurring*). I agree with the conclusion in Judge Dykman's opinion that the trial court did not violate Dixon's right to due process by sentencing him based on inaccurate information; however, I do not agree with the analysis used in arriving at that result. Accordingly, on that issue I respectfully concur in the result. On the two remaining issues, I agree with the analyses and conclusions of Judge Dykman's opinion.

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¶37 LUNDSTEN, J. (*concurring*). Judge Dykman concludes that the sentencing judge misunderstood some aspects of Dixon’s psychological profile, but that the judge’s misunderstanding did not affect the sentence imposed. Although I agree that the sentence imposed should be affirmed, I write separately to express my disagreement with Judge Dykman’s interpretation of some of the sentencing judge’s sentencing comments. In my view, a fair reading of the record does not disclose any misunderstanding on the part of the sentencing judge.

¶38 Judge Dykman addresses Dixon’s assertion that the sentencing judge evinced a misunderstanding of Dixon’s psychological diagnoses by describing Dixon as a “con artist,” a “person with no conscience,” and “psychotic.” The psychologist’s report concludes that Dixon suffers from: “Axis I: Post-Traumatic Stress Disorder” and “Axis II: Borderline Personality Disorder” and “Antisocial Personality Disorder.” Judge Dykman quotes the characteristics of Borderline Personality Disorder from the *Diagnosis and Statistical Manual, 4th Ed. Text Revision*, and accurately states that “none of these characteristics refer to ‘con artists’ or describe individuals with Borderline Personality Disorder as lacking a conscience or being psychotic.” Majority at ¶¶17-18. While Judge Dykman’s statement is true, it is also true that the sentencing judge never said or implied that Dixon’s “Borderline Personality Disorder” diagnosis meant Dixon was a con artist, a person with no conscience, or psychotic.

¶39 The sentencing judge does make the observation that, in his experience, people with Borderline Personality Disorder “for all practical purposes ... have no conscience.” The judge goes on to say, “They know what to say.... They’re great con artists. But when push comes to shove, what they say and what they do are two different things” Interpreting the judge’s remarks in a manner that supports his decision, as we should,² the sentencing judge is merely saying that a high percentage of the convicted people who have appeared before him who have been diagnosed with Borderline Personality Disorder act as though they have no conscience and lie to get what they want. The judge does not say or suggest that Dixon has these characteristics because he has Borderline Personality Disorder.

¶40 Further, Judge Dykman has not demonstrated that there is no high correlation between a diagnosis of Borderline Personality Disorder in criminals and the characteristics discussed above. Thus, Judge Dykman’s various pronouncements, such as “[w]e agree that the trial court’s statements ... at sentencing demonstrate a flawed understanding of Dixon’s psychological diagnosis,” Majority at ¶18, and “[t]he trial court did not overtly acknowledge [at the postconviction hearing] that its statements, based on the Borderline Personality Disorder, describing Dixon as a ‘con artist’ and ‘psychotic,’ attributed psychological characteristics to Dixon that were not part of that diagnosis,” Majority at ¶13, are unfair.

² We should interpret the record and make reasonable inferences from it in a manner that supports the trial judge’s decision. *Cf. State v. Wilks*, 117 Wis. 2d 495, 503, 345 N.W.2d 498 (Ct. App.), *aff’d*, 121 Wis. 2d 93, 358 N.W.2d 273 (1984) (“[W]here a trial court does not expressly make a finding necessary to support its legal conclusion, an appellate court can assume that the trial court made the finding in the way that supports its decision.”).

¶41 Although finding them “gratuitous” and harmless, Judge Dykman is even more troubled by the sentencing judge’s use of the term “psychotic” and his remark that “[s]ome of the ‘best’ serial killers this country has known ... have been extremely likeable, affable people, highly intelligent con artists.” Read in context, I do not find the sentencing judge’s comments in this regard troubling.

¶42 The sentencing judge plainly was not using the term “psychotic” literally to say that Dixon suffers from psychosis. Rather, it is apparent that the judge used the term in a nontechnical way to express his belief that Dixon is an abusive, lying con-man who, if not quarantined, is highly likely to kill or gravely injure his current victim or his next female companion. The record contains ample evidence to support the judge’s expressed belief that if the victim’s friend had not been present during the most serious assault charged, Dixon would have either killed or seriously injured the victim. In addition to the psychologist’s conclusion that Dixon has “a deep, suppressed rage” and “a great deal of submerged anger that he tries to hide from the world,” the record shows that Dixon physically abused his former wife while in the military and stationed in Germany. After that woman fled Germany under a ruse to get away from Dixon, Dixon went AWOL and followed her to Texas, where he physically abused her again. In the current case, Dixon lied to the victim about his past, physically abused her, including choking, during a jealous rage, and then promptly violated a restraining order by calling the victim fourteen times from jail. Later, during an extended altercation at various locations, Dixon lashed out at the victim calling her, among other things, a “f---ing whore.” At one point, Dixon stormed into the victim’s house and struck her on the side of the head, causing everything to go “black.” This incident ended when the victim’s friend dialed 911. There are additional telling events and many

telling details supporting the trial judge's conclusion that Dixon is a highly dangerous, manipulative liar who, for all practical purposes, has no conscience.

¶43 In this context, the sentencing judge's single brief use of the term "psychotic" might have been technically imprecise, but there is no reason to think the judge misunderstood the psychological information before him or misunderstood Dixon. In the context of reassuring the victim that she was not to blame for the abuse she suffered, the judge said to the victim, who was present at sentencing:

To Dawn I say this: Don't beat yourself over the head over the fact that you trusted Jason. It's not your fault. You're the kind of a person who wants to believe in other people. You want to trust them. You want to expect that they're going to treat you properly and you want to think that this had to be just an isolated incident. It couldn't be this guy that I wanted to love, but he's a con artist.

Dawn, from day one, you said he lied to you. That's what con artists do. They lie and they lie and they lie to get what they want. They can put on a good face. They can hit you in one instant and then in the next they can be loving and caring and sorry.

But as soon as in their own mind it's built up again, the pressure cooker is built up, this, their frustration, is there, they'll do it again.

It's not your fault that he is psychotic. Some of the "best" serial killers this country has known – maybe best should be in quotation marks – have been extremely likeable, affable people, highly intelligent con artists.

They have never had trouble finding their victims because their victims get right in the car with them. They think this is a nice guy, and they're not.

¶44 While a different judge might have interpreted the lengthy presentence report and sentencing hearing testimony more favorably to Dixon and imposed a lighter sentence, and while Dixon's postconviction counsel reasonably

sought to determine whether the sentencing judge properly understood Dixon's diagnosis, there is nothing in the record justifying Judge Dykman's conclusion that the sentencing judge demonstrated "a flawed understanding of Dixon's psychological diagnosis." Majority at ¶18.

¶45 Accordingly, I do not join paragraphs 14 to 25 in Judge Dykman's opinion, but respectfully concur in the result. In all other respects, I join Judge Dykman's opinion.

