COURT OF APPEALS
DECISION
DATED AND FILED

December 21, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP171-CR **Cir. Ct. No. 2007CF5664**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHRISTOPHER JOHN JOHNSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed.*

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

¶1 PER CURIAM. Christopher John Johnson pled guilty to one count of repeated sexual assault of the same child. *See* WIS. STAT. § 948.025(1)(b)

(2005-06).[1] He appeals on the grounds that his sentence is based on inaccurate information, and the circuit court erroneously exercised its sentencing discretion. We affirm.

BACKGROUND

¶2 In November 2007, Johnson's thirteen-year-old stepdaughter disclosed that Johnson sexually assaulted her on multiple occasions beginning when she was ten years old. The child reported that, during the period from December 2006 through mid-November 2007, Johnson engaged in at least 100 acts of mouth-to-vagina sexual intercourse with her. The State charged Johnson with one count of repeated sexual assault of the same child. Johnson pled guilty.

¶3 At the sentencing hearing, the circuit court considered a presentence investigation report prepared by an employee of the Department of Corrections. The circuit court also heard statements from the parties, the victim, and the victim's father. The circuit court imposed a twelve-year term of imprisonment, bifurcated as eight years of initial confinement and four years of extended supervision.

¶4 Johnson moved for sentence modification, asking the circuit court "to eliminate or alternatively reduce the initial confinement." The circuit court denied the motion without a hearing, and Johnson appeals.

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

DISCUSSION

¶5 We begin with Johnson's three challenges to the accuracy of the information considered at sentencing. A defendant has a due process right to be sentenced upon the basis of accurate information. ***State v. Johnson***, 158 Wis. 2d 458, 468, 463 N.W.2d 352 (Ct. App. 1990). A defendant who seeks resentencing based on a claimed violation of this right "must establish two things: that some of the information presented was inaccurate, and that the sentencing court actually relied on that misinformation." ***State v. Tiepelman***, 2006 WI 66, ¶¶26, 28, 291 Wis. 2d 179, 717 N.W.2d 1.

¶6 Johnson first attacks the circuit court's discussion of his probation for a prior offense. The court stated: "you would think at th[e] time [of the earlier probation] you would have gotten some of the help that you needed, but apparently it didn't work out that way because you went out and committed this offense." According to Johnson, the circuit court "misunderstood the nature and extent of [his] past treatment" because the presentence investigation report reflects that he successfully completed anger management counseling and parenting classes while on probation.

¶7 The circuit court may base a sentence on inferences reasonably derived from the record. ***McCleary v. State***, 49 Wis. 2d 263, 277, 182 N.W.2d 512 (1971). The circuit court's conclusion that Johnson needed more treatment than he received is a reasonable—indeed, an inescapable—inference here. Accordingly, we will not disturb it. *See* ***State v. Friday***, 147 Wis. 2d 359, 370-71, 434 N.W.2d 85 (1989).

¶8 Next, Johnson complains because the author of the presentence investigation report remarked that Johnson shed "tears of self pity." In Johnson's

view, this is a false statement because he "explained to the court ... that he does not pity himself." The agent's impression regarding the cause of Johnson's tearfulness is not an objective fact but rather is a subjective opinion that cannot be described as "accurate" or "inaccurate." *Cf.* ***State v. Sanders***, 196 Wis. 2d 45, 51, 538 N.W.2d 546 (Ct. App. 1995) (distinguishing facts from opinions in the context of ineffective assistance of counsel claims). Moreover, Johnson fails to demonstrate that the circuit court relied on the agent's opinion about his tears. Thus, he satisfies neither ***Tiepelman*** prong on this issue.

¶9 Johnson also faults the circuit court for relying on information in the presentence investigation report that he fought for custody of his children. He shows no error because he acknowledged at sentencing that he pursued child custody. At the outset of the sentencing proceeding, his trial counsel stated:

> [t]he next correction [to the presentence investigation report] involves page six the fourth paragraph, talking about the custody battle with his ex-wife. There's language in there that a custody study was in his favor. It wasn't. He wasn't awarded custody by the court.... The study found in his favor but the judge overruled that.

Moreover, the presentence investigator noted as one source of information: "autobiography of Christopher Johnson requesting custody of children." Johnson did not dispute the existence of that autobiography, nor did he claim that the presentence investigator inaccurately quoted his current wife's remarks that "his ex-wife had said everything imaginable about him during their custody battle which spanned over 2.5 years." The circuit court may rely on facts in a presentence report that are not disputed by the defendant. ***State v. Spears***, 227 Wis. 2d 495, 508-09, 596 N.W.2d 375 (1999).

¶10 We turn to whether the circuit court erroneously exercised its sentencing discretion. Our standard of review requires us to "start with the presumption that the circuit court acted reasonably." ***State v. Lechner***, 217 Wis. 2d 392, 418, 576 N.W.2d 912 (1998). We have a duty to uphold a sentence on appeal if "'from the facts of record [the sentence] is sustainable as a proper discretionary act.'" ***State v. Berggren***, 2009 WI App 82, ¶44, 320 Wis. 2d 209, 769 N.W.2d 110 (citation omitted).

¶11 The circuit court must consider the primary sentencing factors of "the gravity of the offense, the character of the defendant, and the need to protect the public." ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. The court may also consider a wide range of other factors concerning the defendant, the offense, and the community. *See* ***id.*** The sentencing court must identify the sentencing objectives on the record and explain how the sentence imposed advances those objectives. ***State v. Gallion***, 2004 WI 42, ¶¶40, 42, 270 Wis. 2d 535, 678 N.W.2d 197. We recognize, however, that the amount of explanation required for a sentencing decision varies from case to case. ***Id.***, ¶39.

¶12 The circuit court fully complied with its obligations here. The circuit court began by discussing the seriousness of the offense, reminding Johnson that he "caused a significant amount of pain that will last for a lifetime." The circuit court also discussed Johnson's dangerousness, pointing out that he was able to lead "a secret life" for a long time.

¶13 Johnson asserts, however, that the circuit court "did not evaluate or consider" the third primary sentencing factor, the character of the offender. We disagree. The circuit court viewed Johnson's many secret sexual assaults upon his stepdaughter as illustrative of his character. The circuit court stated that Johnson

occupied a position of trust in relation to his stepdaughter and that he "violated that trust." The circuit court described Johnson as "nurturing" his relationship with the child to enable "intrusive conduct." Additionally, the circuit court considered his prior criminal convictions, noting that his record "go[es] back a little while." *See* ***State v. Fisher***, 2005 WI App 175, ¶26, 285 Wis. 2d 433, 702 N.W.2d 56 (prior criminal record is evidence of character). We are satisfied that the circuit court sufficiently addressed the three primary sentencing factors here.

¶14 Johnson complains that the circuit court did not give weight to factors that he views as mitigating, including his cooperation and acceptance of responsibility. Numerous factors are potentially relevant at sentencing. *See* ***Gallion***, 270 Wis. 2d 535, ¶43 & n.11. The circuit court is not required to discuss every potential factor, however, but "need discuss only the relevant factors in each case." ***Id.***, ¶43 n.11. The circuit court has discretion to determine both the factors that it deems relevant and the weight to assign to each relevant factor. ***State v. Stenzel***, 2004 WI App 181, ¶16, 276 Wis. 2d 224, 688 N.W.2d 20.

¶15 Here, the circuit court noted Johnson's education, his military service, and his employment. The court viewed these factors as aggravating, however, because they suggested that Johnson "should have ... known better" than to molest a child. The court has discretion to determine that particular factors are mitigating or aggravating in light of the individual defendant and the facts of the case. ***State v. Thompson***, 172 Wis. 2d 257, 265, 493 N.W.2d 729 (Ct. App. 1992).

¶16 Johnson's next contention is that the circuit court "penalized him for his mental health issues." In support of this claim, Johnson points to the court's concern that he "need[s] a significant amount of treatment." In Johnson's view,

this remark warrants sentence modification because "[i]t is a violation of constitutional rights to punish one for being ill."

¶17 Johnson is wrong in suggesting that a defendant with treatment needs may not be imprisoned after conviction of a crime. The constitution imposes no bar to imposing a prison sentence when the circuit court concludes that treatment would be desirable. *See* ***State v. Lynch***, 105 Wis. 2d 164, 170-71, 312 N.W.2d 871 (Ct. App. 1981).

¶18 Johnson next argues that the circuit court did not explain the reason for the length of the sentence or why the sentencing objectives required the term of confinement imposed. We are not persuaded.

¶19 The circuit court has no obligation to state exactly how the factors it considered justify the specific number of years of imprisonment. ***Fisher***, 285 Wis. 2d 433, ¶¶21-22. Rather, the circuit court must discuss the relevant factors and the sentencing objectives in a way that demonstrates "a rational basis for the 'general range' [of the sentence] ... imposed." ***State v. Klubertanz***, 2006 WI App 71, ¶21, 291 Wis. 2d 751, 713 N.W.2d 116 (citation omitted).

¶20 In this case, the circuit court identified punishment and protection of the public as the primary sentencing objectives. The circuit court considered whether probation was appropriate, but rejected that option after noting both the victim's need for protection and the failure of previous community-based rehabilitative efforts to prevent Johnson from committing new crimes. *See* ***Gallion***, 270 Wis. 2d 535, ¶44 (reflecting that probation should not be imposed when, *inter alia*, confinement is necessary to protect the public). The circuit court took into account "how long this [unlawful conduct] lasted [and] the age of the child when [the molestation] started," and reminded Johnson again of the pain that

he inflicted. The circuit court explained that "the child should be protected from [Johnson] and at least have the ability to go to sleep knowing that [he is] not going to be around."

¶21 The circuit court fully explained the basis for the sentence selected in this matter. Although Johnson contends that the circuit court "could have imposed shorter confinement," our inquiry is whether the circuit court exercised discretion, not whether discretion could have been exercised differently. *See* ***Hartung v. Hartung***, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981).

¶22 We also reject Johnson's contention that the sentence was unduly harsh. A sentence is unduly harsh 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.'" ***State v. Grindemann***, 2002 WI App 106, ¶31, 255 Wis. 2d 632, 648 N.W.2d 507 (citation omitted).

¶23 "In our society, sexual abuse of a child ranks among the most heinous crimes a person can commit." ***Johnson v. Rogers Mem'l Hosp. Inc.***, 2005 WI 114, ¶80, 283 Wis. 2d 384, 700 N.W.2d 27 (Prosser, J., concurring). Johnson had oral sex with his thirteen-year-old stepdaughter on numerous occasions. He faced a forty-year term of imprisonment upon conviction. *See* WIS. STAT. §§ 948.025(1)(b), 939.50(3)(c). The penalty imposed is within the permissible range set by statute and thus is neither shocking nor disproportionate to the offense. *See* ***Grindemann***, 255 Wis. 2d 632, ¶31.

¶24 Johnson last asserts that the circuit court improperly denied his postconviction motion because he "identified several misuses of the court's

discretion entitling him to relief." Because we conclude that the circuit court did not err when sentencing Johnson, we reject this contention.[2]

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2007-08).

[2] In his reply brief, Johnson faults the State for "editorialing" [sic] and for using "phrases and words ... that are argumentative and vituperative in tone." Johnson objects to the State's descriptions of his activity with his thirteen-year-old stepdaughter as "grooming the victim" and as "sexual slavery," and he is evidently offended by the State's reference to his "scathing criticism" of the presentence investigation report He also complains because the State describes his brief as "overly long" and as "distort[ing]" sentencing law. He asks us to "take note of counsel's numerous statements because clearly they are intentional." To the extent that Johnson suggests some impropriety in the State's arguments, the suggestion is rejected. Legal discourse is not disserved by descriptive language, and a prosecutor is entitled to "strike hard blows." *See* ***State v. Neuser***, 191 Wis. 2d 131, 139, 528 N.W.2d 49 (Ct. App. 1995) (citation omitted). The State has done no more than that here.