

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 18, 2003

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 03-0510-CR

Cir. Ct. No. 02CF001381

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

TIMOTHY M. COLLIER,

DEFENDANT-APPELLANT.

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

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

¶1 PER CURIAM. Timothy M. Collier appeals from a judgment convicting him of one count of second-degree sexual assault of a child, contrary to WIS. STAT. § 948.02(2) (1997-98),¹ and one count of kidnapping, contrary to WIS.

¹ All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

STAT. § 940.31(1)(b), and from an order denying his motion for postconviction relief. He argues that the trial court: (1) failed to ensure that Collier was sentenced on the basis of accurate information; (2) either erroneously considered Collier's asserted failure to express sufficient remorse to the presentence author or gave it too much weight, and accordingly, failed to adequately explain the sentence; and (3) violated Collier's Fifth Amendment rights by punishing him for failing to incriminate himself in the presentence interview. Because the trial court sentenced Collier on the basis of accurate information, considered the appropriate factors in sentencing Collier, sufficiently explained the basis for the sentence, and did not violate his Fifth Amendment rights, we affirm.

I. BACKGROUND.

¶2 On the evening of April 17, 1998, the victim, L.S.H., was walking on North 12th Street, toward a local store. On the way, she passed Collier, who asked her whether she smoked marijuana or crack. She told him that she did not. Collier then came up behind her, said “[h]ey, hon, come on, I’m not going to hurt you[,]” and pressed a hard object against the back of her head. She began to cry and he told her that he would not hurt her if she was quiet. Collier then grabbed her and forced her to walk to a nearby shed. Once near the shed, he instructed her to take her jacket off, lie down, pull her pants down, and pull her shirt up. Collier then pulled down his pants and she again asked him not to hurt her, and told him that she was a virgin. He proceeded to attempt to have sexual intercourse with L.S.H. in two different manners, and finally forced her to perform oral sex on him. Collier then placed his mouth on her breasts, after which time he stood up, dressed, and instructed her not to leave until he was gone.

¶3 L.S.H. immediately reported the incident. Authorities obtained samples of seminal fluid from different parts of her body, and in 2002, Collier was identified as a result of a DNA match. L.S.H. identified Collier in a lineup shortly thereafter, and he was charged on March 11, 2002. Collier waived his preliminary hearing and eventually pled guilty to one count of second-degree sexual assault of a child and one count of kidnapping. During the plea colloquy, Collier affirmatively answered the trial court's questions regarding whether he had committed all of the elements of both offenses, whether he understood that he was giving up certain rights, and whether the facts in the complaint were substantially true.

¶4 A presentence investigation was undertaken, and the individual who wrote the report indicated that Collier "was cooperative, but states the criminal complaint was not accurate[, and that he] admits to having sexual contact with the victim, but stated it was consensual." The report also indicates that Collier "stated he only pled guilty to the offense because he felt he would be found guilty at a trial." Further, the report noted that "Collier does not admit to the offense, and certainly shows no remorse for something he claims was consensual."²

¶5 It appears that Collier filed a *pro se* "affidavit" with the trial court after the presentence investigation interview, but before the sentencing hearing. In it, Collier refers to pleading "no contest" to the charges, accepting responsibility for his actions, and having a "serious mental and nature [sic] problem." There is no reference to the affidavit elsewhere in the record.

² On May 21, 2003, this court entered an order allowing the State to have access to the presentence investigation report, and both parties to view, argue from, and cite to the report.

¶6 At the sentencing hearing, the trial court inquired as to whether any changes, deletions, or additions needed to be made to the presentence investigation report (PSI). After indicating that a few changes needed to be made to the portion of the report reflecting Collier's employment history, Collier's attorney indicated that, contrary to what appears in the report regarding the PSI author's interview with Collier, "he's not denying what happened." Collier's attorney further insisted that "the only way in which he's not admitting everything that happened is only because he doesn't recall everything."

¶7 The trial court expressed its concern that Collier claimed that the sexual encounter was consensual and that there was no mention of the kidnapping in the PSI: "But even if it were quote, unquote, "consensual" then where did we get the kidnapping situation? None of this had been addressed in the presentence." The court went on to state that "if you are telling me that he is forgetting all of that but just conveniently remembers the consensual sex part doesn't make a whole lot of sense."

¶8 Collier's attorney responded that he did not think that Collier "meant to tell, or express, or convey to the presentence author that it was strictly consensual sex[.]" and that Collier "knows what he pled guilty to," but that "he doesn't recall most of the details." The trial court expressed its disbelief that the PSI author "could get it so wrong," and that Collier's statements were misinterpreted:

We have had situations where the presentence writer has had a misimpression based on one statement and the statement would come out, and it was misinterpreted or whatever the case might be.

But if you take a look at the Offender Interview, which is the portion of the presentence which is only one paragraph throughout the entire thing, he denies ever forcing anyone

to do anything, everything was consensual, and he denies knowing the victim was underage, you know.

So if you take a look at that, he basically denied everything with the exception of the fact of the offense status of second-degree sexual assault which there can't be consent based on the age of the victim legally. So that's the problem.

I've got nothing in this presentence dealing with the kidnapping issue which, in my mind, I mean, from his statement and from what he sets forth in this presentence, indicates a total denial of the kidnapping issue, you know.

Collier's attorney then requested additional time to speak to the PSI author. The trial court denied that request, indicating that Collier had already had enough time to "come clean," and that giving him more time now "to conform his statement to what the Court is looking for is not fair."

¶9 After the court took statements from the victim, the victim's mother, Collier's mother, two of Collier's siblings, and Collier himself, the court addressed a number of factors including the seriousness and nature of the crime, the PSI, Collier's character, the influence and effects of drugs and alcohol on his life, his criminal record, the fact that he pled guilty, the statements made on the record, Collier's remorse, and the need for punishment and protection of the public. The trial court then sentenced him to eighteen years of imprisonment on the first count, and twenty-five years of imprisonment on the second count, to be served consecutively.

¶10 Several months later, Collier filed a motion for postconviction relief, pursuant to WIS. STAT. RULE 809.30 (2001-02), requesting resentencing before a different judge or, alternatively, to vacate the guilty pleas. He argued that resentencing was required because the sentencing proceeding "effectively sought to coerce a confession, and the sentencing court impermissibly punished [him] for

failing to incriminate himself.” He also argued that the trial court placed “excessive weight” on the PSI interview, and “if the court did not impermissibly consider [his] failure to incriminate himself in the PSI interview, the court plainly gave the factor undue weight.” Finally, Collier contended that the trial court found that he “basically denied everything,” and that if that was true, the trial court should not have accepted his guilty pleas. As such, Collier insisted that it was inconsistent for the trial court to find that he knowingly, voluntarily, and intelligently entered his guilty plea, and also to find “a complete denial of responsibility.”

¶11 The trial court denied the motion, rejecting the contentions that it sought to coerce a confession from him and placed excessive weight on the PSI. The trial court noted:

The court finds no erroneous exercise of discretion in placing significant weight on the defendant’s comments to the presentence writer and no erroneous exercise of discretion in attempting to discover why the defendant had backpedalled [sic] from his initial admission at the guilty plea hearing. The court did *not* “impermissibly punish” the defendant for failing to incriminate himself; it merely considered the fact that the defendant’s inconsistency in his position was not favorable to his character and that his altered view of the offenses could detrimentally affect the community in the future.

The court discussed the case law relevant to the propriety of considering a defendant’s lack of remorse in sentencing. It also denied Collier’s contention that his guilty pleas should be vacated.

¶12 It is from the judgment of conviction and the order denying his motion for postconviction relief that Collier now appeals.

II. ANALYSIS.

A. *The trial court sentenced Collier on the basis of accurate information, considered proper factors, and adequately explained the basis for the sentence.*

¶13 Collier contends that he has a due process right to be sentenced on the basis of true and correct information, and to have that sentence adequately explained. Accordingly, he insists that: (1) the trial court “erroneously exercised its discretion when it refused a continuance to obtain better information on the issue of accepting responsibility”; (2) the PSI “did not accurately or fully reflect [his] remorsefulness and acceptance of responsibility”; and (3) the “[s]entencing proceeding was fundamentally unfair and incompatible with sound public policy and the purposes of presentence investigation reports.” Further, Collier argues that he “should be allowed to present accurate information about his acceptance of responsibility[,]” that “his sentence is based too heavily” on the trial court’s concern with the PSI interview, and that the trial court failed to explain and justify its reliance on the PSI interview. Collier’s arguments appear to boil down to three central contentions: (1) that he was sentenced on the basis of inaccurate information; (2) that the trial court failed to adequately explain the basis for the sentence; and (3) that the trial court did not consider the proper factors. We disagree for the reasons that follow.

¶14 “A defendant has three due process rights at sentencing: (1) to be present at the hearing and to be afforded the right to allocution, (2) to be represented by counsel, and (3) to be sentenced on the basis of true and correct information.” *State v. Borrell*, 167 Wis. 2d 749, 772, 482 N.W.2d 883 (1992). Not only does the defendant have the right to be sentenced on the basis of true and correct information, but the judge is also required to “articulate the basis for the sentence imposed on the facts of the record.” *Id.* Yet, while “[d]efendants have a

due process right to be sentenced on the basis of accurate information[,] a defendant who requests resentencing based on inaccurate information must show both that the information was inaccurate, and that the court actually relied on the inaccurate information in the sentencing.” *State v. Johnson*, 158 Wis. 2d 458, 468, 463 N.W.2d 352 (Ct. App. 1990) (citation omitted). Further, “[c]riminal defendants should not be able to question the validity of the results of the sentencing process except for clear and convincing reasons.” *State v. Littrup*, 164 Wis. 2d 120, 131-32, 473 N.W.2d 164 (Ct. App. 1991). Thus, Collier “has the burden of proving by clear and convincing evidence both the inaccuracy prong and the prejudice prong of the due process test.” *Id.* at 132.

¶15 In regard to passing sentence, “[i]t is a well-settled principle of law in Wisconsin that sentencing is left to the discretion of a trial court, and that appellate review is limited to determining if an [erroneous exercise] of discretion has occurred.” *State v. Jones*, 151 Wis. 2d 488, 495, 444 N.W.2d 760 (Ct. App. 1989). Further, “[i]t is well established that in sentencing a defendant the court should consider the gravity of the offense, the need for protection of the public and the character of the offender.” *Johnson*, 158 Wis. 2d at 464. The sentencing court may also consider:

the vicious or aggravated nature of the crime; the past record of criminal offenses; any history of undesirable behavior patterns; the defendant’s personality, character and social traits; the results of a presentence investigation; the degree of the defendant’s culpability; the defendant’s demeanor at trial; the defendant’s age, educational background and employment record; the defendant’s remorse, repentance and cooperativeness; the defendant’s need for rehabilitative control; the right of the public; and the length of pretrial detention.

Borrell, 167 Wis. 2d at 773-74. The weight to be attributed to each factor “is a determination which appears to be particularly within the wide discretion of the

sentencing judge.” *Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). “[T]here is a strong public policy against interfering with the sentencing discretion of a court. In addition, there is an equally strong presumption that the sentencing court acted reasonably.” *State v. Mosley*, 201 Wis. 2d 36, 43, 547 N.W.2d 806 (Ct. App. 1996) (citation omitted). Thus, “[i]f the facts are fairly inferable from the record, and the reasons indicate the consideration of legally relevant factors, the sentence should ordinarily be affirmed.” *McCleary v. State*, 49 Wis. 2d 263, 281, 182 N.W.2d 512 (1971).

¶16 Collier contends that the PSI was inaccurate, and that the trial court erroneously exercised its discretion when it denied his request for a continuance. He also insists that he was not given a meaningful opportunity to correct the errors in the PSI. Collier further argues that the trial court failed to explain why it relied on the PSI when it allegedly acknowledged conflicts with other facts of record, noted that no mention was made of the kidnapping charge, and failed to determine whether the alleged inaccuracies were attributable to Collier or to the PSI author.

¶17 However, as noted above, Collier has the burden of proving both the inaccuracy and prejudice prongs by clear and convincing evidence. He has failed to do so. Collier makes much of his contention that the PSI was inaccurate in its portrayal of his remorse and acceptance of responsibility. Yet, this court can find nothing in the record demonstrating that, at the sentencing hearing, Collier denied saying anything that the PSI author indicated that he said during the interview.³

³ It appears that Collier argued, in his postconviction brief, that he would testify that “he does not recall saying that he disagreed with the complaint, or that he ‘denied’ guilt.” However, whether he later insists that he cannot “recall” making certain statements to the PSI author does not make the report inaccurate. He never attempted or requested the opportunity to correct the portion of the PSI that indicated that he said those things. As such, an after the fact argument that he did not remember saying something does not render the PSI inaccurate and unreliable.

His concern is with what the PSI author perceived. At the sentencing hearing, Collier's counsel was persistent in his contention that the PSI "does not reflect the type of person that he is[,]” that Collier was not claiming to be not guilty, and that Collier simply did not remember all of the details of the event.

¶18 Thus, the alleged inaccuracy appears to be based upon a credibility determination. Those types of determinations are left to the discretion of the trial court. The court chose to believe the PSI author's assessment of Collier's responses and statements and, accordingly, of Collier's remorse. That was reasonable. Regardless of the brevity of the interview and Collier's alleged inability to remember the details of the crime, he did appear to indicate to the PSI author, for example, that the criminal complaint was not accurate and that the sexual encounter was consensual. Although Collier insists that the PSI author's perception of Collier's remorse was inaccurate, these statements support the notion that Collier was not taking complete responsibility for the crime. Collier has not shown by clear and convincing evidence that the PSI author's assessment of his remorse and failure to take responsibility for the crime was inaccurate.

¶19 Although Collier insists that he should have been granted more time to demonstrate that he was accepting responsibility, to speak with the PSI author regarding his apparent remorse, to determine why the PSI did not address the kidnapping issue, to evaluate whether the alleged inaccuracies in the PSI were more attributable to the PSI author or to Collier, and to uncover the *pro se* affidavit filed with the court after the PSI interview and before the sentencing hearing, he fails to establish that the trial court erroneously exercised its discretion in denying his request for a continuance. Again, Collier makes much of the alleged brevity of the PSI interview, the trial court's alleged tendency to hold Collier "responsible" for the failure to mention the kidnapping in the PSI

interview, and the trial court's alleged failure to consider the weight of the fact that Collier pled guilty and thus accepted responsibility.

¶20 Yet, most of these alleged deficiencies could, and perhaps should, have been addressed by Collier at or before the sentencing hearing. Both Collier and counsel had time to read and to evaluate the PSI before the sentencing hearing. The trial court's denial of Collier's request for a continuance, explaining that Collier had already had enough time to "come clean," and that giving him more time now "to conform his statement to what the Court is looking for is not fair[.]" was reasonable. Further, while counsel was apparently unaware of the *pro se* affidavit, Collier was not—he filed it. Although the record is unclear regarding the circumstances of the *pro se* affidavit, Collier has failed to show by clear and convincing evidence that he was sentenced on the basis of inaccurate information as a result.

¶21 Collier's contentions that the trial court improperly failed to explain why it believed the PSI author's perceptions of Collier's remorse, to explain why it allegedly held Collier responsible, so to speak, for the lack of any mention of the kidnapping charge in the PSI, and to determine whether the alleged inaccuracies were attributable to Collier or to the PSI author fail to establish by clear and convincing evidence that he was sentenced on the basis of inaccurate information. As noted above, the perceptions of remorse were essentially credibility assessments, and Collier has not pointed to any clear and convincing evidence to upset those determinations. The "inaccuracies" in the PSI appear to be allegations, many of which are based on perceptions of remorse or a lack thereof, unsupported by clear and convincing evidence of their inaccuracy.

¶22 We also cannot conclude that the sentencing proceeding was fundamentally unfair and incompatible with sound public policy. Collier insists that the trial court denied him “a meaningful opportunity to refute or conduct an investigation concerning the section of the PSI the court later found to be very important.” He argues that any explanation for why the PSI might be incomplete or inaccurate was “rejected out of hand.” Collier further insists that “[i]f the PSI had falsely stated that [he] had prior violent felonies, it is inconceivable that he would denied [sic] an opportunity to correct the record[, and thus] [h]e should have been afforded the same opportunity to challenge the PSI writer’s assessment of his version of the crimes.” He argues that the trial court’s actions would not encourage defendants to speak candidly to PSI authors, contrary to *State v. Comstock*, 168 Wis. 2d 915, 485 N.W.2d 354 (1992).⁴ He insists that he “is merely asking for recognition that [guilty pleas] are the most meaningful acceptance of responsibility any defendant can offer[, and] that the courts not simultaneously rely on the pleas and reap their benefits, while pretending [he] has given them nothing.”

⁴ Although it is certainly essential for defendants not to “be reluctant to speak truthfully in the presentence investigation for fear that a disclosure may cause the circuit court to vacate the plea[.]” *State v. Comstock*, 168 Wis. 2d 915, 922, 485 N.W.2d 354 (1992), the central holding of *Comstock* involved whether Comstock’s double jeopardy rights were violated when a trial court judge vacated *sua sponte* the defendant’s already accepted “no contest” pleas to an amended complaint and reinstated the charges of the original information. *Id.* at 920-21. The supreme court determined that his rights were violated and directed

each [trial] court to refrain from *sua sponte* vacating a guilty or no contest plea after the [trial] court has validly accepted the plea by assuring itself of the voluntariness of the plea and the factual basis for the charges unless the [trial] court finds that there was fraud in procuring the plea or that a party intentionally withheld from the [trial] court material information which would have induced the [trial] court not to accept the plea.

Id. at 922.

¶23 Defendants do have a right to review the PSI for potential errors or inconsistencies. *State v. Skaff*, 152 Wis. 2d 48, 58, 447 N.W.2d 84 (Ct. App. 1989). The record indicates that Collier and his counsel were given the opportunity to and did review the PSI. Collier was also given the opportunity to bring any inaccuracies to the attention of the trial court, and the trial court considered Collier’s counsel’s explanations for the alleged inaccuracies regarding Collier’s expression of remorse. Further, Collier had the opportunity to challenge the PSI author’s assessment when he addressed the court during the sentencing hearing, and he presumably did so when he then expressed his remorse. If Collier is impliedly suggesting that a continuance should be granted, or perhaps an evidentiary hearing should be held, every time a defendant disagrees with the PSI author’s assessment of his or her remorse or character so that he or she can “meaningfully” challenge or address the alleged inaccuracy, he cites no authority for that proposition, as there is none.

¶24 Pleading guilty does demonstrate an acceptance of responsibility. Yet, the defendant’s attitude toward the crime is relevant to a number of other sentencing considerations, including rehabilitation concerns and the protection of the public, as well. *See State v. Baldwin*, 101 Wis. 2d 441, 459, 304 N.W.2d 742 (1981). The trial court was admittedly concerned about Collier’s apparent lack of remorse, but it also did not ignore the fact that he pled guilty to the crime. We cannot conclude that the sentencing proceeding was fundamentally unfair and incompatible with sound public policy.

¶25 Further, the record indicates that the trial court considered the seriousness and nature of the crime, the PSI, Collier’s character, the influence and effects of drugs and alcohol on his life and the crime, his criminal record, the fact that he pled guilty, the statements made on the record, Collier’s remorse, and the

need for punishment and protection of the public. These were all proper factors for the trial court to consider.

¶26 The trial court acknowledged that Collier was expressing remorse and taking responsibility during the sentencing hearing, but was also concerned with the apparent lack thereof in the PSI interview. It also noted that the crime appeared to be out of character for Collier. The trial court discussed the seriousness of the crime, the effect on the victim, and the need to protect the public. Accordingly, the trial court adequately explained the sentence and the factors upon which it was relying.

B. The trial court did not violate Collier's Fifth Amendment rights by punishing him for failing to incriminate himself in the presentence interview.

¶27 Collier contends that the trial court impermissibly punished him for failing to incriminate himself. He notes that the PSI author indicated that he was “cooperative,” but insists that pursuant to his Fifth Amendment privilege against self-incrimination while awaiting sentence, he “had every right not to be cooperative at all, and the sentencing court violated [his] Fifth Amendment rights when it punished him for failing to provide a clear statement that ‘I still did it[.]’” He argues that a defendant can be rewarded for showing remorse, but he cannot be punished for refusing to admit guilt, and while “it might be a challenge for sentencing courts to honor this distinction[,] ... this case is not even close.” He contends that he was punished on the basis of the trial court’s conclusion that he failed to admit guilt in the presentence interview. Collier explains that

[o]n this appeal, [he] is not pursuing his objection to the Fifth Amendment violation at the sentencing hearing. The violation did not produce an allocution that he would repudiate in any way. He pursues the Fifth Amendment claim as to the Offender Interview because, even though it failed to describe in detail what he said, the sentencing

court relied on it to presume there was a failure to self-incriminate. The court then impermissibly punished [him] because of what it presumed he had said.

¶28 In *Scales v. State*, 64 Wis. 2d 485, 496, 219 N.W.2d 286 (1974), the supreme court explained:

The Bill of Rights confers no rights upon the state, but limits the power of the state. The exercise of the right against self-incrimination is a one-way street. If the defendant exercises that right, he may not be penalized for it, even after a jury's determination of guilt. On the other hand, in the expectation of leniency, he may waive that right and acknowledge his guilt and express his contrition and remorse.

Accordingly, “[a] court is prohibited from imposing a harsher sentence *solely* because the defendant refused to admit his guilt.” *State v. Fuerst*, 181 Wis. 2d 903, 915, 512 N.W.2d 243 (Ct. App. 1994) (emphasis added). Yet, a sentencing court is permitted to note a defendant's lack of remorse, though it may not punish a defendant for maintaining his innocence or compel an admission of guilt. *See State v. Wickstrom*, 118 Wis. 2d 339, 355, 348 N.W.2d 183 (Ct. App. 1984); *Fuerst*, 181 Wis. 2d at 915.

¶29 In *Scales*, the supreme court concluded that the trial court failed to exercise proper discretion when the trial court, relying almost solely on the defendant's demonstration of remorse, stated:

“It is my judgment that until you demonstrate some remorse, until you acknowledge your responsibility for the crime that you have committed, probation is not in order and efforts at rehabilitation will come to naught.

“It is for that reason that it is my judgment ... that I can do nothing but order your incarceration....”

64 Wis. 2d at 495. The supreme court concluded:

A trial judge may, but he need not, take into consideration such expressions as indicative of the likelihood that the rehabilitative process hoped for in the criminal law has commenced; but where, as here, the defendant refuses to admit his guilt, that fact alone cannot be used to justify incarceration rather than probation.

Id. at 496-97. Later, in *Williams v. State*, 79 Wis. 2d 235, 239-40, 255 N.W.2d 504 (1977), the supreme court concluded that acknowledging the defendant's refusal to admit guilt by merely stating the fact of the defendant's remorse, repentance, and cooperation, without evidence that the trial court materially relied upon the defendant's refusal to admit guilt, was not an erroneous exercise of discretion.

¶30 Then, in *Baldwin*, 101 Wis. 2d 441, the supreme court was faced with a case that did not fit neatly under either *Scales* or *Williams*. In *Baldwin*, the supreme court indicated that the trial court's mention of the defendant's lack of remorse was not a "mere acknowledgment" of the fact, as in *Williams*, but instead that "[i]t clearly was a factor, among ... several ..., which contributed in part to the judge's sentencing decision." *Baldwin*, 101 Wis. 2d at 458. It went on to distinguish Baldwin's case from that in *Scales*, and the Fifth Circuit case upon which it relied, by indicating that in *Scales*, "the trial court's consideration of the defendant's lack of remorse was not one among many other factors" and "Scales [was] given the maximum sentence possible for the offenses of which [Scales] had been convicted." *Baldwin*, 101 Wis. 2d at 458. The supreme court ultimately concluded:

There is a distinction ... between the evil which *Scales* seeks to avoid and the trial court's obligation to consider factors such as the defendant's demeanor, his need for rehabilitation, and the extent to which the public might be endangered by his being at large. A defendant's attitude toward the crime may well be relevant in considering these things. In this case we believe the trial court considered a

variety of factors, giving no undue or overwhelming weight to any one in particular. The sentence imposed was well within the maximum for which the defendant might have been sentenced, and while it is evident that the defendant's failure to admit his guilt and his lack of remorse were factors in the sentencing decision, we do not believe it was improper or an abuse of discretion.

Id. at 459 (citation omitted).

¶31 As in *Baldwin*, the trial court considered a number of factors and did not rely solely on Collier's alleged lack of remorse during the presentence interview. There was no ultimatum given, either at the interview or sentencing stage, requiring the defendant to incriminate himself or bear the burden of a harsher punishment. While the trial court admits, in its denial of Collier's postconviction motion, that it "was extremely concerned with [Collier's] inability to take responsibility for his actions after he had expressly taken responsibility during the plea hearing[,]" it stated that "[Collier's] denial that he ever forced the victim to have sex with him because she had consented flies in the face of the guilty plea[,]" and the trial court admits that it gave that factor "significant weight, although it also considered [Collier's] assertions of responsibility and remorse during his allocution." It went on to explain that the statement to the PSI author "not only provided insight of [Collier's] true character, which the court can and must consider when fashioning an appropriate sentence, but it also gave the court insight into how readily the defendant might be rehabilitated and what kind of future threat he may pose to the community." The defendant's character, the PSI, the threat to the community, and rehabilitation concerns are all proper factors to consider.

¶32 Further, Collier's sentence was well within the maximum. Thus, although Collier insists that "even though [the PSI] failed to describe in detail

what he said, the sentencing court relied on it to presume there was a failure to self-incriminate[.]” and in so doing impermissibly punished him, we cannot conclude that the trial court’s assessment of Collier’s attitude toward the crimes was an erroneous exercise of discretion.

¶33 Based upon the foregoing, this court affirms.

By the Court.—Judgment and order affirmed.

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

