

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 25, 2011

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

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Appeal No. 2010AP2676-CR

Cir. Ct. No. 2009CF4258

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TORONEE L. KIMBROUGH,

DEFENDANT-APPELLANT.

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

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

¶1 BRENNAN, J. Toronee L. Kimbrough appeals from a judgment entered after Kimbrough pled guilty to one count of felony murder and from the circuit court's order denying his postconviction motion. Kimbrough generally alleges that the circuit court's sentencing remarks reflect a series of beliefs and

conclusions grounded in inaccurate information that violate his right to due process and asks that we remand this case for resentencing. Because we discern no error requiring resentencing in the circuit court's remarks, we affirm.

BACKGROUND

¶2 In May 2009, Kimbrough and Voneric Steward went to Cosea Copeland's home with loaded guns to steal marijuana. After arriving at the house, Kimbrough ordered another person at the house, Jeremy Richardson, to give him his necklace, and then forced Richardson into another room. Copeland saw Kimbrough force Richardson into the room and then, from outside the room, Copeland heard sounds of a struggle and seconds later he heard two gunshots. Kimbrough and Steward then fled the scene. When the police arrived, they found Richardson unconscious with two gunshot wounds; he died a few hours later.

¶3 In September 2009, Kimbrough and Steward were arrested and charged with felony murder for Richardson's death. Kimbrough admitted to police that he participated in the robbery and shot Richardson. He told police that it was his idea to steal the marijuana from Copeland and that he knew that there was marijuana at Copeland's house because he had at least one "prior dealing" with Copeland. Kimbrough stated that, at the time he and Steward entered Copeland's house, he was carrying a black pistol with a long clip containing fifteen rounds of ammunition, and he shot Richardson when Richardson grabbed for his gun during a scuffle. Kimbrough disposed of the gun immediately after the shooting, throwing it in a body of water.

¶4 Kimbrough pled guilty to felony murder with the underlying crime of armed robbery, and faced a maximum penalty of fifty-five years imprisonment.

The court ordered a presentence investigation report (“PSI”) and set the matter for sentencing.

¶5 When interviewed by the PSI writer, Kimbrough acknowledged the facts contained in the criminal complaint, including his statement to police: that when he entered Copeland’s home he intended to rob Copeland and that he shot Richardson during a scuffle. He also told the PSI writer that he brought the loaded gun with him to the robbery because “I don’t think they would have handed me the weed if I hadn’t of had a gun.” When describing the events leading up to the shooting, Kimbrough stated, “[Richardson] grabbed for the gun and it went off. I didn’t fire myself. It went off like two or three times, I think.” Kimbrough admitted to the PSI writer that he “knew there was a possibility somebody could get hurt [during the robbery] but didn’t think anyone would die.”

¶6 At the sentencing hearing, the State recommended Kimbrough be sentenced to thirty years of imprisonment, composed of twenty years of initial confinement followed by ten years of extended supervision. The defense argued for fifteen years of initial confinement followed by extended supervision as the circuit court deemed necessary.

¶7 The circuit court began its sentencing remarks by generally commenting on both of the defendants’ statements of their culpability as reported in each defendant’s PSI. The court stated:

It’s interesting because when I read through these presentence investigations and the stories that each of the defendants tell, I’m not sure if it was Mr. Kimbrough or Mr. Steward who said that it wasn’t even their intention to rob anyone. It was their intention to go over there and to buy the weed.

Well, if that’s the case, then why bust in the door, pointing guns at people, taking Mr. Richardson into another

room, throwing him on the ground, stealing his necklace, taking him into the other room, and wave a gun around at him? I don't understand it.

Is that a feeble attempt at minimization? And then somehow Mr. Richardson is to blame for his own death because he struggled with somebody who was pointing a gun at him?

There is also some indication in these presentences, I'm not sure which one, and they do interchange because there's a portion of the presentences that are the same, there is also some indication that supposedly Mr. Richardson was armed and that Mr. Kimbrough shot him because he was trying to shoot Mr. Kimbrough. It is my understanding from everything that I read that there was no gun recovered and no one at the scene ever saw a gun in Mr. Richardson's hand. So, again, another feeble attempt at minimization.

¶8 The parties agree that it was Steward, and not Kimbrough, who told the PSI writer that the defendants only went to Copeland's home with the intent to purchase marijuana and that Richardson was armed.¹ To the contrary, Kimbrough admitted to both police and the PSI writer that he and Steward intended to rob Copeland and that he shot Richardson while they struggled over Kimbrough's gun.

¶9 Next, the circuit court focused on Kimbrough specifically, stating:

Mr. Kimbrough, you, in your presentence ... said that you knew that it was a possibility somebody was going to get hurt, but you weren't expecting anybody to die. That's quite telling out of the entire packet of information that I have....

So what Mr. Kimbrough is telling us is that he went into this situation with a loaded gun expecting to hurt somebody, just not kill them.

¹ Steward's PSI is not included in the record.

¶10 The circuit court continued addressing Kimbrough's actions by taking into account the type of gun involved in the incident and confirming with the prosecutor that it contained a long clip, which ordinarily holds double the ammunition of a regular clip, which would contain sixteen rounds. The court then assumed, inaccurately, that the long clip was fully loaded and thus concluded that the clip contained thirty to thirty-two rounds. Neither party informed the court of its error. The court stated:

Unless you were planning for somebody to either get hurt or to die, why would you go into a situation with a gun with 32 rounds of ammunition? I don't think that there's a good explanation for that other than the fact that somebody was intended to get hurt. By Mr. Kimbrough's own admission, there was a possibility somebody was going to get hurt.

He doesn't come in here and say we took a couple of plastic guns just to scare people or to make us look tough so that we would get what we want. This isn't a situation where they walked in and said we took in a couple of guns that weren't loaded because we wanted to scare people. It happens all the time; those are your run-of-the-mill armed robbery cases that obviously no one dies because guns weren't loaded or they were plastic or they were toys, but he puts himself in this situation with 32 rounds of ammunition.

Moreover, when looking at Kimbrough's case the circuit court noted, "it is one of the most aggravated."

¶11 The circuit court gave Kimbrough credit for taking responsibility and entering a plea, but thought Kimbrough was remorseful only because he was facing substantial imprisonment. The circuit court stated, "[t]here is some feeling of sadness that he took somebody's life, but not overwhelming. I think he is more upset and sad that he is going to prison for a good portion of his life."

¶12 The circuit court noted that a “significant amount of punishment” was necessary “in this case to ensure that this does not happen again” and to protect the public and its interests. It concluded by stating that “somebody who brings a 32-round clip to a robbery is at least at this point in his life a significant risk to offend and offend violently in the future.” Ultimately, the circuit court imposed a forty year sentence composed of thirty years of initial confinement and ten years of extended supervision.

¶13 Kimbrough filed a motion for postconviction relief seeking resentencing. Kimbrough argued that during sentencing the circuit court had

- (1) inaccurately attribut[ed] to Toronee Kimbrough the statements of Voneric Steward that he did not go to the house with intent to rob, but rather only to buy marijuana;
- (2) an inaccurate belief that Kimbrough had claimed that Jeremy Richardson was armed;
- (3) an unsupported inference that Kimbrough intended to hurt someone because the gun had a “long clip;”
- (4) [an] unsupported speculation that a more serious homicide charge was warranted and that the State’s failure to charge Kimbrough with a more serious homicide was due to “proof issues;”
- and (5) an unsupported inference that Kimbrough’s statements of remorse were insufficient and self-serving.

¶14 The circuit court denied Kimbrough’s motion, concluding that there was no error in its exercise of discretion and that it did not rely on inaccurate information while sentencing Kimbrough. Kimbrough now appeals.

DISCUSSION

¶15 Kimbrough argues that the circuit court improperly relied on three pieces of inaccurate information when sentencing, in violation of Kimbrough’s due process rights: (1) that Kimbrough made a “feeble attempt at minimization”; (2) that the long clip contained thirty-two rounds of ammunition; and (3) that

Kimbrough was not actually remorseful. We separately address each alleged instance of inaccurate information.

¶16 “[S]entencing decisions of the circuit court are generally afforded a strong presumption of reasonability because the circuit court is best suited to consider the relevant factors and demeanor of the convicted defendant.” *State v. Gallion*, 2004 WI 42, ¶18, 270 Wis. 2d 535, 678 N.W.2d 197 (citation omitted; brackets in *Gallion*). The sentencing record must show the basis for the circuit court’s exercise of discretion. See *McCleary v. State*, 49 Wis. 2d 263, 277, 182 N.W.2d 512 (1971). If the record shows a process of reasoning based upon legally relevant factors, the sentence will be upheld. See *Anderson v. State*, 76 Wis. 2d 361, 364, 251 N.W.2d 768 (1977). The primary factors to consider are the gravity of the offense, the offender’s character, and the public’s need for protection. See *State v. Mosley*, 201 Wis. 2d 36, 43-44, 547 N.W.2d 806 (Ct. App. 1996).

¶17 A defendant has a due process right to be sentenced on the basis of accurate information. *State v. Tiepelman*, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1. “A defendant is entitled to resentencing when a sentence is affected by a [circuit] court’s reliance on an improper factor.” *State v. Leitner*, 2001 WI App 172, ¶39, 247 Wis. 2d 195, 633 N.W.2d 207. A defendant claiming a circuit court relied on inaccurate information must show not only that the information was inaccurate, but also that the circuit court actually relied on the inaccurate information. *Tiepelman*, 291 Wis. 2d 179, ¶31. A circuit court’s comments at a postconviction hearing may establish that the circuit court was aware of, and did not consider, the improper factors. See *State v. Lechner*, 217 Wis. 2d 392, 419-23, 576 N.W.2d 912 (1998). Once a defendant establishes a circuit court’s reliance on inaccurate information, the burden then shifts to the State to establish that the error was harmless. *Tiepelman*, 291 Wis. 2d 179, ¶3.

I. Feeble Attempt at Minimization

¶18 Kimbrough first alleges that the circuit court erroneously exercised its discretion when it relied on Steward’s “feeble attempts at minimization” to infer that Kimbrough failed to accept responsibility for Richardson’s death. In particular, Kimbrough faults the circuit court for allegedly attributing the following statements to Kimbrough, when they were actually made by Steward: (1) that they went to the house to buy marijuana and did not intend to rob anyone; and (2) that Richardson was armed. We conclude that the circuit court did not rely on inaccurate information, and if it did, any such reliance was harmless. *See id.*, ¶¶2-3.

¶19 To begin, the circuit court did not actually attribute either statement to Kimbrough. In each instance, the circuit court explicitly stated that it did not remember whether the statement was made by Kimbrough or Steward, stating: “I’m not sure if it was Mr. Kimbrough or Mr. Steward who said that it wasn’t even their intention to rob anyone. It was their intention to go over there and to buy the weed” and “[t]here is also some indication in these presentences, I’m not sure which one, and they do interchange because there’s a portion of the presentences that are the same, there is also some indication that supposedly Mr. Richardson was armed.”

¶20 In its order denying Kimbrough’s postconviction motion, the circuit court explained that it was “not attributing Steward’s remarks to Kimbrough,” but instead, “was merely looking at the overall picture of what had occurred.” The circuit court explained that its comments were “not individualized at that juncture, and it did not single out ... Kimbrough for minimizing the event.” The circuit court’s explanation is supported by the record. *See Lechner*, 217 Wis. 2d at 419-

23 (A circuit court’s comments at a postconviction hearing may establish that it did not rely on the inaccurate information.).

¶21 Furthermore, even if Kimbrough had met his burden and established that the circuit court erroneously attributed Steward’s comments to him, any such error was harmless. Kimbrough also made statements to the PSI writer attempting to minimize the seriousness of his actions. For instance, Kimbrough told the PSI writer that he only meant to rob Copeland and that he did not intend to kill anyone, even though he carried a loaded gun into the residence and expected that he could hurt someone. Furthermore, Kimbrough attempted to blame Richardson for his own death, stating that he “didn’t fire [the gun himself]” but that the gun only went off because Richardson struggled with him. These statements, both of which were noted by the circuit court during sentencing, support the circuit court’s statement that Kimbrough attempted to minimize the seriousness of his actions. As such, the alleged error was harmless. See *Tiepelman*, 291 Wis. 2d 179, ¶3.

II. Ammunition in the Long Clip

¶22 Next, Kimbrough argues the circuit court inaccurately assumed that the long clip in Kimbrough’s gun was fully loaded with thirty-two rounds of ammunition, twice the number held in a regular sized clip, even though the only evidence in the record demonstrated that the long clip contained fifteen rounds. Kimbrough submits that the circuit court relied on that inaccurate assumption during sentencing, concluding that because there were thirty-two rounds in the clip Kimbrough’s actions were more aggravated and made it more likely that Kimbrough would reoffend in the future. We conclude that while the circuit court’s assumption that the long clip held thirty-two rounds was unsupported by the record, the court accurately assumed and relied on the fact that the gun held a

significant number of rounds, inconsistent with Kimbrough's assertion that he did not think anyone would die.

¶23 Kimbrough correctly asserts that the circuit court inaccurately assumed that the long clip on Kimbrough's gun was fully loaded with thirty-two rounds of ammunition at the time of the robbery, when the only evidence of the number of rounds in the long clip demonstrated that the clip only held fifteen rounds. However, contrary to Kimbrough's assertions, the circuit court did not find that Kimbrough's actions were more aggravated or that he was more likely to reoffend because he carried a long clip containing thirty-two rounds of ammunition as opposed to a regular clip containing sixteen rounds. Rather, the circuit court's findings that Kimbrough's actions were more aggravated and that he was more likely to reoffend were based on the fact that Kimbrough brought a loaded, semi-automatic weapon with substantial ammunition to commit a robbery, stating:

Unless you were planning for somebody to either get hurt or to die, why would you go into a situation with a gun with 32 rounds of ammunition? I don't think that there's a good explanation for that other than the fact that somebody was intended to get hurt. By Mr. Kimbrough's own admission, there was a possibility somebody was going to get hurt.

He doesn't come in here and say we took a couple of plastic guns just to scare people or to make us look tough so that we would get what we want. This isn't a situation where they walked in and said we took in a couple of guns that weren't loaded because we wanted to scare people. It happens all the time; those are your run-of-the-mill armed robbery cases that obviously no one dies because guns weren't loaded or they were plastic or they were toys, but he puts himself in this situation with 32 rounds of ammunition.

¶24 Whether Kimbrough’s weapon contained fifteen or thirty-two rounds was inapposite to the circuit court’s sentencing decision. The crux of the circuit court’s sentence was that Kimbrough brought a gun with a long clip and a substantial number of rounds to commit the robbery, and Kimbrough admitted that he knew bringing the loaded weapon could result in harm (although, inexplicably, not death). It was Kimbrough’s decision to bring a gun with a long clip and a substantial number of rounds that caused the circuit court to conclude that Kimbrough’s actions were more aggravated than most and which led to a greater chance that he would reoffend. Because the circuit court did not rely on the precise number of rounds in the gun, but rather focused on the long clip and its ability to allow Kimbrough to bring substantial ammunition to the robbery, Kimbrough’s due process rights were not violated.² See *Tiepelman*, 291 Wis. 2d 179, ¶2.

III. Remorse

¶25 Finally, Kimbrough argues that the circuit court’s assertion that Kimbrough was not sincerely remorseful for killing Richardson is inaccurate because it is unsupported by the record. Kimbrough contends that because he “consistently expressed that he was sorry he caused Jeremy Richardson’s death and wished he could ‘take it back,’ and that he was aware of the impact his conduct had had on others, including the victim’s family,” that there was no

² The State argues that Kimbrough forfeited this argument by failing to raise it in his postconviction motion. In his postconviction motion, Kimbrough did not mention the circuit court’s reference to the number of rounds in the long clip but rather to the long clip itself. We need not address the merits of that claim because regardless, Kimbrough’s claim fails on its merits. See *State v. Castillo*, 213 Wis. 2d 488, 492, 570 N.W.2d 44 (1997) (“An appellate court should decide cases on the narrowest possible grounds.”).

evidence to support the circuit court's conclusion that he was insincere and that therefore the circuit court's sentence was based on inaccurate information. Kimbrough is mistaken.

¶26 The circuit court is charged with the responsibility of assessing the credibility of witnesses and the weight of their testimony. See *State v. Baudhuin*, 141 Wis. 2d 642, 647, 416 N.W.2d 60 (1987). We defer to the circuit court's assessment because of the circuit court's "superior opportunity ... to observe the demeanor of witnesses and to gauge the persuasiveness of their testimony." *Kleinstick v. Daleiden*, 71 Wis. 2d 432, 442, 238 N.W.2d 714 (1976). Here, the circuit court concluded that Kimbrough's statements to the court and the PSI writer that he was remorseful were not sincere, stating: "There is some feeling of sadness that he took somebody's life, but not overwhelming. I think he is more upset and sad that he is going to prison for a good portion of his life." The circuit court acted well within its discretion in making that conclusion. See *Baudhuin*, 141 Wis. 2d at 647. The circuit court's credibility determination is not "inaccurate information" simply because Kimbrough disagrees with the circuit court's finding. See *Tiepelman*, 291 Wis. 2d 179, ¶¶2-3.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.

