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**DISTRICT II**

June 22, 2022

*To*:

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You are hereby notified that the Court has entered the following opinion and order:

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2021AP694-CR State of Wisconsin v. Alvin E. Linton, III (L.C. #2019CF528)

Before Neubauer, Grogan and Kornblum, JJ.

**Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).**

Alvin E. Linton, III appeals from a judgment of conviction and an order denying postconviction relief. Linton argues that the circuit court demonstrated objective bias in sentencing, as evidenced by the court's characterization before sentencing of Linton's plea agreement as a "bribe," and that the circuit court erroneously exercised its discretion in failing to consider Linton's acceptance of responsibility and expression of remorse in mitigation at sentencing. Based upon our review of the briefs and record, we conclude at conference that this

case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2019-20).[1] We disagree with Linton and affirm.

## BACKGROUND

In May 2019, City of Kenosha police officers responded to a report of a very distraught woman at the train station. There they found MFT[2] crying to the point of gagging. MFT reported that a man, later identified as Alvin Linton, had just raped her. He was identified by people at the scene, by security video, and by DNA testing. MFT reported that as she was walking through the station, Linton "approached her and asked her to use her phone to make a phone call. MFT said she decided to be nice and she let him use her phone." After the phone call, he asked for help "up the stairs because he felt dizzy," which she gave him. While going up the stairs, Linton took off his shirt and wrapped it around her neck. "He then pulled the shirt tight against her neck constricting her breathing" and preventing her from yelling for help. He pushed her down on the stairs and pulled down her pants, then inserted his finger in and out of her vagina. MFT was able to "wiggle her way out of being choked." The man then "put his hand around her mouth and said 'be quiet.'"

The District Attorney's office charged Linton with one count of second-degree sexual assault as a repeater, lifetime sex offender supervision, and one count of strangulation and suffocation. Linton subsequently entered into a plea agreement in which he pled guilty to second-degree sexual assault, the state struck the repeater and lifetime sex offender

[1] All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

[2] We refer to the victim by initials, MFT, or simply as the victim, to protect her identity, pursuant to the policy stated in WIS. STAT. RULE 809.86(1).

enhancements, and the strangulation and suffocation charge was dismissed and read in at sentencing. The State agreed not to make a specific sentence recommendation other than that Linton serve prison time of a duration left to the court.

At the plea hearing, the circuit court explained to Linton what a "read-in" meant, that the court could take that charge into consideration at sentencing, and it could have an "aggravating effect" on the sentence Linton would receive on the second-degree sexual assault charge.

MFT spoke at the sentencing hearing. She told the circuit court that she was fortunate to be alive. As a result of this offense, she said she "can't stop drinking." She could not "look the same at [her]self" and could not "look the same as [her] pride." MFT explained that when "a guy looks at [her] now, [she] automatically fight[s] him." MFT also told the court that she wanted to make sure that Linton did not hurt anyone else.

The State asked for a prison sentence in line with the defendant's prior record, the severity of this crime, and "the fact that this was a random predatory act." Within a span of about two minutes, as caught on video, Linton went from borrowing MFT's phone to sexually assaulting and strangling her. The State pointed out that Linton minimized his culpability throughout the proceedings, blaming his drug use. Linton further minimized the offense by characterizing it as "disrespect[ing] the girl" because he "wasn't in [his] right state of mind." The State argued, "[t]here's absolutely nothing respectful about what happened. It's absolutely despicable. It's predatory, and it should be punished appropriately."

Linton's attorney asked for a stayed prison sentence with probation and argued on Linton's behalf that Linton should be given credit because Linton didn't really know why he assaulted the victim, he just intended to steal her phone. The attorney stated that Linton was

"totally out of control" on drugs on the day of the offense. In addition, he noted that Linton was a victim of child abuse. Linton's attorney characterized Linton as remorseful, stating that he

> accepted responsibility after reviewing the video of what the video establishes, and that is that the victim here was very upset immediately after their encounter, which he understood as meaning that she wasn't upset about him trying to steal her phone.
>
> He accepted responsibility for what he did. He understands how wrong it is, and to the extent that he could, he would like to make amends.

Linton spoke on his own behalf prior to sentencing, stating that he was

> deeply sorry for what I have done. I mean, I never done this in my life before, and I'm hurting. I mean, it hurts me every night to know that I put my hands on a woman without her consent, and I'm just wishing she could forgive me after we move on from this situation, that I'm deeply sorry about touching her. I'm sorry. I'm sorry.

The circuit court then sentenced Linton. The court started with Linton's expression of remorse, compared with the impact of the crime on the victim, and in the context of Linton's prior criminal history. Although the court stated it had "no reason" to disbelieve Linton's expression of remorse, the court viewed Linton's criminal history and the violent nature of the offense as overwhelming:

> [T]he problem is that the crime was committed, and you committed it with an extensive—I think it is an extensive record of criminal behavior, violent behavior in Chicago and the frightening nature of this kind of a crime.
>
> I mean, this woman may suffer for the rest of her life. I'm sure she will. The degree of her impairment is I suppose yet to be determined, but this is a ghastly crime which will take a toll on her. I doubt a day of her life won't pass without her remembering it, and that may be true for you, too, but she is the one who suffered at the time of the event, and the fact that you drugged yourself up doesn't cut it for any kind of an excuse.

The court further discussed the violent nature of the crime, including the read-in offense, and what impact this had on his sentencing decision:

> I have to tell you that this is a rape case. I mean, this is a forcible rape case, an ambush rape case, and I think that that kind of a sentence is way—it's detached from any realistic response by the community to this kind of an attack on this defenseless—well, I won't say defenseless because she did defend herself, thank God—and it's coupled with the fact that you have agreed to have read in the fact that you strangled her. You strangled her. You raped her, and you have—although it was stricken, you have this history for aggravated battery involving a school employee, aggravated and unlawful use of a weapon, a vehicle, and robbery from Chicago, and then on the robbery in Chicago you got a four-year sentence. I don't know how much of it you actually served, but apparently a chunk of it, and then yet this kind of a recommendation on this kind of a case I think—well, I don't think it is in the least bit not even close to being appropriate.
>
> Frankly, in terms of any concern, any kind of mitigation with respect to the sentence, I think that all came in the deal that you made. Your lawyer says—and he made a nice presentation—actually, quite an excellent presentation, but he fell into the trap that I frequently see play out in court, and he says that you accepted responsibility for what you did. To me, the person who accepts responsibility is the one who, when he is confronted by the officer out on the street, says to the officer, "I can't believe what I was doing. Yeah, I did this, and I committed this grave crime." That is accepting responsibility.
>
> Even people who come into the system and put themselves in the old trite expression—put themselves at the mercy of the Court, but you didn't do that, and I'm not penalizing you because you didn't. You have a right to have your day in court, to resist legally all the way through trial, so you are not getting penalized in any way for asserting your rights and obtaining a plea from the district attorney—a plea bargain. But that's when you coughed up your plea. It was after you had seen the video, after they had DNA evidence to prove what you had done and after the district attorney had bribed you for your—and I'm not being critical—rather than put this woman through a trial, bribed you for your plea by striking off, looks like, 16 years of your potential exposure, so that to me is a substantial reduction, and I don't see where there is much room for any more from what would be a case in my estimation that is worthy of the maximum sentence**.**

The circuit court then sentenced Linton to the maximum of forty years on the sexual assault charge, with twenty-five years of initial confinement followed by fifteen years of extended supervision.

Linton filed a Motion for Postconviction Relief based on the sentencing court's reference to his plea bargain as a "bribe." He also argued that the court erred in not giving Linton sentence mitigation for accepting responsibility. The court denied the motion in a written order, in which it reiterated the factors that it considered most important, added that the plea bargain fit the "elements of Wisconsin's extortion statute" and rejected Linton's expressions of remorse: "[o]nly if I were a Judge Bobblehead would I supinely accept the claim that the defendant 'accepted responsibility' for his criminal behavior."

Linton now appeals.

## DISCUSSION

*Standard of Review*

Whether the circuit court exhibited "objective bias" is a matter of law that we review independently. *See* ***State v. Goodson***, 2009 WI App 107, ¶7, 320 Wis. 2d 166, 771 N.W.2d 385.

The standard of review for whether the circuit court erred by failing to give mitigation credit to Linton based on his expression of remorse is whether "the sentencing court erroneously exercised its sentencing discretion." *See* ***State v. Stenzel***, 2004 WI App 181, ¶7, 276 Wis. 2d 224, 688 N.W.2d 20. "When discretion is exercised on the basis of clearly irrelevant or improper factors, there is an erroneous exercise of discretion." ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197.

*Objective Bias*

Linton argues that the circuit court's sentencing remarks, both at the time of sentencing and in the order denying Linton's postconviction motion, constitute objective bias. He argues that the term "bribe" shows objective bias, and appears to argue that the court's antipathy in general for plea bargaining in criminal cases, exhibited in the postconviction order, can only lead to the conclusion that the circuit court was biased against him.

"The right to an impartial judge is fundamental to our notion of due process." ***Goodson***, 320 Wis. 2d 166, ¶8. On appeal, we presume that "a judge has acted fairly, impartially, and without bias; however, this presumption is rebuttable." ***Id.*** When evaluating whether the defendant has rebutted that presumption, we apply two tests: a subjective one and an objective one. ***Id.*** In this case, we only review objective bias, based on Linton's argument.

Objective bias can "exist in two situations." ***Id.***, ¶9. The first is "appearance of bias," which "offends constitutional due process principles whenever a reasonable person—taking into consideration human psychological tendencies and weaknesses—concludes that the average judge could not be trusted to 'hold the balance nice, clear and true' under all the circumstances." ***Id.*** (citations omitted). We have described the "appearance of bias" as constituting "objective bias" when "a reasonable person could question the court's impartiality based on the court's statements." ***Id.***

The second category of objective bias occurs where "there are objective facts demonstrating ... the trial judge in fact treated [the defendant] unfairly." ***Id.*** (alteration in original; citation omitted).

We agree that the circuit court's hyperbolic statements can give one pause, but we disagree that they fall within either category of objective bias. At the outset, we note that Linton is asking us to merge two sets of statements to prove the court's bias. The first statement, calling the plea agreement a "bribe," was made during the sentencing hearing prior to pronouncing sentence. The second, equating the plea agreement to "extortion," and making general comments about plea bargaining, occurred in response to Linton's postconviction motion a few weeks after the sentence was already pronounced. The record does not support a conclusion that the court's general remarks about plea bargaining, expressed in the postconviction order, show objective bias toward Linton or affected this particular sentence, as we note below.

As the State notes, during the sentencing hearing, the circuit court emphasized that Linton had received a favorable plea bargain. The sentencing transcript reflects that the court focused on the aggravated nature of the crime, the impact on the victim and community, and Linton's prior record. As the State notes, "[t]he record shows that the judge's hyperbolic comments were simply meant to express the point that Linton was not entitled to additional leniency beyond that which the State granted in its plea deal."

At sentencing, the circuit court assured Linton that he was not getting "penalized in any way for asserting [his] rights and obtaining a plea from the district attorney—a plea bargain." The court used the term "bribe" to describe the plea bargain only after both parties had made their sentencing arguments, and in direct response to Linton's request for leniency. The court expressed its concern with the violence of the crime, which seriously affected the victim. The court described the crime as an "ambush" rape by a stranger in a public location. After the victim generously lent Linton her phone, Linton raped her and strangled her. In the court's view, Linton's failure to take responsibility until after he was confronted with video and DNA

evidence implicating him, and only after the State offered a significant incentive to plead guilty instead of going to trial, led to the "bribe" comment.

The record does not show that the circuit court was imposing additional punishment for accepting this plea agreement. The law is clear that a court may accept a plea bargain but is not required to endorse it. ***State v. Frey***, 2012 WI 99, ¶50, 343 Wis. 2d 358, 817 N.W.2d 436. The record instead shows that the court accepted the plea bargain and sentenced Linton according to the crime to which he pled guilty as well as the facts from the read-in offense, which is permissible. *See* ***id.***, ¶47. The court had informed Linton that it could take into account those facts, and that those facts might have an "aggravating effect" on the sentence.

We cannot say as a matter of law that the circuit court in this case showed objective bias. Taken in context, the court's remarks are insufficient to overcome the presumption that the court treated the defendant fairly.

*Exercise of Discretion in Sentencing*

Linton argues that the circuit court erroneously exercised its discretion by denying Linton sentence mitigation after Linton expressed remorse. We start with the presumption that the sentencing court acted reasonably. The decisions of the sentencing 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." ***Frey***, 343 Wis. 2d 358, ¶38 (citation omitted). A sentencing court "must consider the nature of the crime, the character of the defendant, and the rights of the public." ***Id.***, ¶46.

Linton presents no law that requires a court to reduce a defendant's sentence just because the defendant professes remorse. The circuit court clearly articulated its reasons on the record for imposing the maximum sentence. The court explained that it was not giving Linton further leniency beyond the plea deal, which reduced Linton's total exposure by sixteen years, based on the nature of the offense.[3] This record does not reveal an erroneous exercise of discretion in sentencing.

The record is clear that the circuit court considered the appropriate factors in sentencing: the nature of the offense, the impact on the victim, the lack of remorse of the defendant, and impact on the community. ***Gallion***, 270 Wis. 2d 535, ¶23. The court (1) correctly characterized the crime, reflected in the criminal complaint and the state's and victim's statements at sentencing, as an aggravated, violent crime, an ambush rape with strangulation; (2) noted the severe impact on the victim and on the community; and (3) considered Linton's prior record of violent criminal offenses. The court considered not only the charged offense, but also the count that was read-in. ***Frey***, 343 Wis. 2d. 358, ¶47.

The circuit court considered Linton's request for leniency and expression of remorse within the context of the entire sentencing. Linton's expressions of remorse were insufficient to overcome the other sentencing factors. A sentencing court may consider a defendant's lack of remorse, ***State v. Geske***, 2012 WI App 15, ¶35, 339 Wis. 2d 170, 810 N.W.2d 226, and may take

[3] Linton argues that imposing the maximum sentence on Count I only makes sense if the circuit court also intended to give a long sentence on Count II. This is his opinion, with no basis in the law.

the defendant's credibility into account when pronouncing sentence. ***State v. Martin***, No. 2011AP2168, unpublished slip op., ¶18 (WI App May 8, 2012).

IT IS ORDERED that the judgment and order of the circuit court are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

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*Sheila T. Reiff*
*Clerk of Court of Appeals*