COURT OF APPEALS
DECISION
DATED AND RELEASED

APRIL 24, 1996

No. 95-2258-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

NORGIE VIERAS,

Defendant-Appellant.

APPEAL from judgments and an order of the circuit court for Kenosha County: BRUCE E. SCHROEDER, Judge. *Reversed and cause remanded*.

Before Anderson, P.J., Nettesheim and Snyder, JJ.

ANDERSON, P.J. Norgie Vieras appeals from judgments of conviction for one count of second-degree reckless endangerment with a weapon, as a repeater contrary to §§ 941.30(2), 939.63 and 939.62(1)(b), STATS., and two counts of battery, as a repeater contrary to §§ 940.19(1) and 939.62(1)(b), STATS. He also appeals from an order denying his motion for

postconviction relief. We conclude that the trial court's inferences about the possibility of emotional harm to Vieras' children who witnessed the crimes were unsupported by any evidence in the record and were therefore unreasonable. Accordingly, we reverse the trial court and remand for resentencing.

According to the criminal complaint, Vieras' girlfriend and mother of his two children, Selena Davison, was at her home with Vieras. They were arguing, and Vieras grabbed a kitchen knife and began chasing her. He pushed her up against a door, put the knife to her neck and said, "Do you want to die." Vieras threw the knife down and punched Davison in the arm. The children were in the home at the time of this incident. The next day, Vieras, Davison and the two children were in the car when Vieras started to shout at Davison and hit her on the left side of her face. That evening, after more argument, Vieras threw a spray bottle at Davison, striking her on the right leg. Later, Vieras allegedly wrote Davison a note threatening to kill her father.

Vieras pled guilty to two counts of battery and one count of second-degree reckless endangerment with a weapon, all as a repeater. The trial court entered judgments of conviction on these three counts. At sentencing, the trial court stated:

> That's part of the reason we have so much crime is that people can fantasize like that and not know that they are going to have to answer for their conduct. Answer for torturing these children. Sentencing these children to a life of the awful memories that they will have because of your behavior.
>
> ....

> The children should not have to grow up in fear. I heard a tape on TV the other night they played back one of these 911 tapes of one of these crying children about how father is beating mother up. And I think this kid is going to be miserable from this incident for the rest of his life. When he is 80 years old, he'll still be suffering from the fact that his father was for whatever reason beating his mother up.

The trial court went on to state: "So I reject entirely the suggestion that probation has any part to play in the immediate future of this man."

Vieras filed a motion for postconviction relief, alleging that the sentence constituted an erroneous exercise of discretion because it was not supported by an adequate statement of reasons for the penalty imposed or by accurate information. The trial court denied the motion. Vieras appeals.

Vieras argues that he should be resentenced because "there is no support in the record for the sentencing judge's assumption that [his] conduct had emotionally damaged his children." Sentencing is within the discretion of the trial court. ***State v. Roubik***, 137 Wis.2d 301, 310, 404 N.W.2d 105, 108 (Ct. App. 1987). The sentencing court, in imposing sentence, is presumed to have acted reasonably, and the burden is on the defendant to show an unreasonable or unjustifiable basis in the record for the sentence. ***Id.***

This case requires that we review the trial court's inferences at sentencing. In exercising its discretion, the trial court must use a process of reasoning that depends on facts that are of record *or that are reasonably derived by inference from the record* and a conclusion based on a logical rationale founded upon proper legal standards. ***Christensen v. Economy Fire & Casualty Co.***, 77

Wis.2d 50, 55-56, 252 N.W.2d 81, 84 (1977) (emphasis added). Just as jurors may take into account matters of their common knowledge and their observations and experiences in the affairs of life, so too may the trial court in reaching a decision.

See WIS J I—CRIMINAL § 195.

We keep in mind that it is not within the province of this court or any appellate court to choose not to accept an inference drawn by a fact finder when the inference drawn is a reasonable one. ***State v. Friday***, 147 Wis.2d 359, 370-71, 434 N.W.2d 85, 89 (1989). In reviewing the trial court's inferences, we look to a reasonableness standard: the defendant has the burden of showing that no reasonable judge could have reached the inferential finding made and that the judge then relied upon the inferential finding when imposing sentence. Here, the issue is whether the trial court could make and use the inferential finding at sentencing that Vieras' children would suffer long-term emotional harm as a result of his abuse of their mother.

The trial court made repeated references at sentencing to the psychological harm caused to the children who witnessed the abuse. It is evident that the court relied upon the effect of Vieras' crimes had on his children. At sentencing, the court questioned Davison as follows:

THE COURT: … Now, were there any children present when this happened by the way, August 30, 1994?

MS. DAVISON: Yes.

....

THE COURT: Where were they?

MS. DAVISON: We were in the kitchen and they were in a separate room.

THE COURT: … August 31, 1994. Driving on Roosevelt Road. Anybody else in the car? ….

MS. DAVISON: Me and Norgie and the children.

The factual record before the court did not support the court's assertions that the children were "tortured" or that they were sentenced "to a life of … awful memories." It is not a reasonable inference from the evidence that this incident would psychologically damage the children for life. The inferences drawn by the trial court were unreasonable in light of the children's ages, two and one-half years old and one year old, and the lack of evidence in the record. In addition, there was no evidence that the children had exhibited any trauma since the incidents.

Our conclusion in the present case does not prevent a trial court from reaching reasonable inferences in similar cases. While the trial court may reasonably draw inferences of the long-term consequences affecting victims of a crime, the same inferences cannot be made concerning the children who witnessed the abuse without support in the record. Pursuant to statute, the presentence investigator shall attempt to contact the victim of a crime to determine the psychological effect of the crime on the victim. *See* § 972.15(2m), STATS.; *see also* ***State v. Horn***, 126 Wis.2d 447, 461, 377 N.W.2d 176, 182 (Ct. App. 1985), *aff'd*, 139 Wis.2d 473, 407 N.W.2d 854 (1987). Similarly, the person preparing the PSI report could properly interview a child whose parent was

abused pursuant to the statute's language: "The person preparing the report may ask any appropriate person for information." Section 972.15(2m). In the present case, there was no information in the PSI report concerning what the children saw and the trial court could only speculate as to the impact the incident had on them. We therefore remand the case for resentencing.[1]

Because of our decision here, we need not reach Vieras' alternative assertion that an evidentiary hearing should be ordered to allow him to prove the factual allegations in his postconviction motion.

By the Court.—Judgments and order reversed and cause remanded.

Recommended for publication in the official reports.

[1] We are confident that Vieras' prior criminal record alone could well have justified the sentence imposed.

NETTESHEIM, J. (*concurring*). I concur with the majority opinion that the trial court erred in the exercise of its sentencing discretion in this case. I write separately to clarify and stress that the commission of a criminal act in the presence of young children can be a relevant and aggravating factor which a trial court may, in the proper exercise of discretion, consider when imposing sentence.

It may be that this was what the trial court was attempting to convey in this case. However, as the majority opinion correctly holds, the court's words went too far by concluding, without supporting information or data, that the young children were "tortured" and scarred for life as a result of Vieras' criminal acts.