COURT OF APPEALS
DECISION
DATED AND FILED

October 21, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP1601-CR **Cir. Ct. No. 2006CF322**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LEIGH J. BARBER,

DEFENDANT-APPELLANT.

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

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

¶1 PER CURIAM. Leigh J. Barber appeals from a judgment of conviction for three counts of misappropriating personal identifying information ("identity theft"), and from a postconviction order summarily denying her motion for resentencing. The issues are whether the trial court: (1) actually relied on

inaccurate information in sentencing Barber and if so, whether Barber's trial counsel was ineffective for failing to object to or attempt to correct the inaccuracies in the prosecutor's sentencing presentation; (2) erroneously exercised its discretion by failing to explain the reasons for the sentence; or (3) should consider correction of the false information a new factor warranting sentence modification. We conclude that: (1) insofar as the trial court was presented with any inaccuracies in the sentencing presentation, there was no actual reliance because it did not affect the sentence it imposed, consequently, there was no prejudice to maintain an ineffective assistance claim against trial counsel; (2) the trial court properly exercised its sentencing discretion; and (3) correction of any inaccuracies does not constitute a new factor warranting sentence modification because the facts that require correction were not highly relevant to sentencing, nor did they frustrate the purpose of the original sentence. Therefore, we affirm.

¶2 Barber pled guilty to three counts of identity theft, in violation of WIS. STAT. § 943.201(2) (2005-06).[1] The trial court imposed three consecutive five-year sentences, each comprised of two- and three-year respective periods of initial confinement and extended supervision, resulting in a fifteen-year aggregate sentence, comprised of six- and nine-year respective aggregate periods of initial confinement and extended supervision, to run consecutive to any other sentence Barber was serving. Barber moved for resentencing, which the trial court summarily denied. Barber renews her resentencing challenges on appeal.

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

¶3 The principal reason that Barber seeks resentencing is her claim that the prosecutor's sentencing presentation contained numerous inaccuracies that collectively tainted the trial court's already less-than-favorable opinion of Barber, resulting in a harsher sentence than she would have received had she not been portrayed inaccurately. Preliminarily, Barber pled guilty to engaging in identity theft for: (1) opening a checking account at the Marshall & Ilsley Bank under the name Leigh Barber (a different woman named Leigh Barber) with that woman's birthdate and social security number; (2) opening several checking accounts and obtaining a loan of $8401.99 from U.S. Bank using the name Leigh Barber with the same birthdate and social security number she used when opening the checking account at the M & I Bank; and (3) obtaining a $14,999.99 loan from Citi Financial, Inc., using the name Leigh R. Barber with the same false birthdate and social security number she used when obtaining the U.S. Bank loan. Barber pled guilty to these three offenses.

¶4 At sentencing, Barber claims that the prosecutor inaccurately portrayed her criminal history in five respects: (1) a 2002 conviction in Illinois; (2) claiming that the 2002 Illinois conviction was the "exact same offense" that she was now being sentenced for; (3) exaggerating the number of aliases Barber has used; (4) contending that Barber acted using her "clear faculties"; and (5) allegedly describing Barber as having an "absolutely unabated record of financial frauds," and as being "a sociopathic serial identity thief."[2]

> ¶5 "A defendant who requests resentencing due to the [trial] court's use of inaccurate information at the sentencing hearing 'must show both that the information was

[2] This quotation is from Barber's appellate brief-in-chief. There is no record cite attributing this characterization.

> inaccurate and that the court actually relied on the inaccurate information in the sentencing.'" Once actual reliance on inaccurate information is shown, the burden then shifts to the state to prove the error was harmless.

State v. Tiepelman, 2006 WI 66, ¶26, 291 Wis. 2d 179, 717 N.W.2d 1 (citations omitted). The trial court has an additional opportunity to explain its sentence when challenged by postconviction motion. *See* ***State v. Fuerst***, 181 Wis. 2d 903, 915, 512 N.W.2d 243 (Ct. App. 1994). We consider the five inaccuracies Barber claims.

¶6 Barber's strongest claimed inaccuracy is the description of her 2002 Illinois conviction for financial identity theft. According to the presentence investigation report, Barber, using the name Lee Jacqlyn McCloskey, was placed on probation for four years for obtaining a credit card listing Rochelle Nason as the primary cardholder, and herself (McCloskey) as the secondary card holder. McCloskey was charged with and convicted of obtaining several unauthorized credit card accounts that McCloskey opened in Nason's name, amounting to charges of over $20,000. The address on the account was McCloskey's business address, the Classy Touch Boutique, owned by McCloskey.

¶7 The prosecutor described this offense as Barber obtaining the social security number of a Lee Merrick, ultimately resulting in a bankruptcy proceeding filed against Merrick who then had nine civil judgments and twenty-six accounts in collection status connected to that social security number. The prosecutor summarized that incident as being Barber's "pattern throughout."

¶8 Defense counsel told the trial court that although Barber had done some things illegally, she was upset that the prosecutor told the trial court that she had illegally obtained and used social security numbers that were not her own

when that was not true. Barber then explained herself to the trial court. She explained that she had been married to a Raymond McCloskey and changed her name from Merrick to McCloskey, and legally changed her name from Beverly Ann Slowik (her actual name) to Lee Jacqlyn Merrick-Barber. She had told the presentence investigator that she opened the account for her business, Classy Touch. Both she and Rachel Nason used credit cards because Nason was her travel agent and used the credit card directly for expenses incurred on behalf of Merrick and Classy Touch. When Nason was telephoned by the credit card company, her husband told the company that Nason did not have this card, and Nason left the $65,000 worth of charges to Barber to "save face with her husband."

¶9 While the State concedes that the prosecutor's version of Barber's 2002 Illinois conviction was inconsistent with the presentence investigator's version, Barber has not shown that the trial court actually relied on any inaccuracies. Without emphasizing the obvious problems with Barber's own version of this conviction, we note that the trial court had its own questions regarding this incident. The trial court asked Barber to "explain why each of those names, social security numbers have a different date of birth"; Barber responded to the trial court, "[t]hat I cannot explain to you." In her postconviction motion, Barber explained that she "never stole the identity of any 'real person' named Lee Merrick." The 2002 Illinois conviction, explained Barber, "involved the allegedly unauthorized use of the identity of Rochelle Nason, a business associate, in opening business credit card accounts on which [Barber] was also listed as a cardholder. There is no evidence of any complaint from, or existence of, any Lee Merrick other than the defendant." In addition to the basic inaccuracies in the

prosecutor's account, Barber emphasized that this conviction was essentially a victimless crime, rather than a crime adversely affecting Nason.

¶10 Barber was convicted of a crime in 2002 in Illinois involving the use of an unauthorized credit card. Barber has not shown that the trial court actually relied on the inaccurate details of this conviction when it imposed sentence. Regardless of Barber's level of credibility with the trial court, she was asked to and did explain her 2002 Illinois conviction. The trial court was unimpressed insofar as the actual specific details were not favorable; she was convicted in 2002 of a type of financial identity crime. Regardless of whether this was a victimless crime, Barber has not shown that the trial court actually relied on these inaccurate details of her criminal history in imposing sentence.

¶11 Barber's second challenged statement was when the prosecutor referred to the offenses for which she was being sentenced, as "the exact same offense" as the one for which she was convicted in 2002 in Illinois. This alleged inaccuracy relates to the first alleged inaccuracy. This is not an inaccuracy. Although the facts and circumstances of the Illinois financial identity conviction, which Barber herself referred to in her postconviction motion as involving "the allegedly unauthorized use of the identity of Rochelle Nason" are somewhat different, the essential crime of using personal identifying information of another person improperly to obtain credit, money, or something of value, is the same. *Compare* 720 ILL. COMP. STAT. 5/16G-15(a) (2002) *with* WIS. STAT. § 943.201(2). Barber has not shown that the trial court's statement that this was the "exact same offense" as she was convicted of in Illinois in 2002 was inaccurate.

¶12 Barber's next challenge is to the accuracy of the number of aliases the prosecutor claimed she used. The prosecutor mentioned that Barber

"maintained 43 aliases and utilized them interchangeably." The trial court probed Barber on this point among others and asked if she thought it was "normal" to "have 43 identities." Barber explicitly denied having forty-three aliases, explaining that she would sometimes sign her name using her middle initial, other times using her middle name. Although one may quibble over how many different names Barber had actually used and for what purpose, she has not shown that she did not use many different aliases, as mentioned in the presentence investigation report and by the prosecutor. Defense counsel corrected the presentence investigator's list of aliases telling the trial court that Barber has had six legal names and only two of the forty mentioned were used under false pretenses. Barber explained her perception of using different initials and names; the trial court drew reasonable inferences from the information presented, including information that Barber presented. Although Barber would have preferred that the trial court considered this information differently, she has not shown that this information was inaccurate, or that the trial court actually relied on Barber having used forty-three (as opposed to a lesser number) of aliases.

¶13 Barber also challenges the accuracy of the trial court's characterization of her having her "clear faculties" when she "decided to abuse people in the way that [she] ha[s]." The context of these remarks was that Barber was not suffering from an alcohol or drug dependency that may have affected her judgment and contributed to her engaging in this type of unlawful conduct. Barber contends that this was inaccurate in that a psychologist's report shows that she has mental problems that render the "clear faculties" characterization wrong. That psychological report was not presented to the trial court until Barber attached it to her postconviction reply brief. We cannot criticize the trial court for failing to

interpret a report as Barber does, particularly when, at the time in question, that report had never been presented to the trial court.

¶14 Barber's last alleged inaccuracy is the unattributed comment that the trial court was under the erroneous impression that she "had an absolutely unabated record of financial frauds and would inevitably recidivate."[3] First, only the "absolutely unabated record of financial frauds" is a proper challenge, as the remainder of the phrase is the trial court's concerns about Barber's future conduct, which are predictive concerns that a trial court may legitimately and properly espouse at sentencing as reasons for its sentence and the need to consider the character of the offender and the need to protect the community, both primary sentencing factors. *See* ***State v. Larsen***, 141 Wis. 2d 412, 427, 415 N.W.2d 535 (Ct. App. 1987). Barber had been convicted of identity theft in the past. An investigation connected her to seven identity thefts, although she had only been charged with three. Her repeated problems with using different identities to obtain cash, credit or services when considered in the context of the presentence investigation report's recitation of her history, including fraud, perjury, theft, issuing worthless checks, false representations, deceptive practices, and financial identity theft from 1975 through 2002 destroy her claim of inaccurate information.

¶15 Barber's next claim is that the trial court erroneously exercised its discretion by failing to explain its reasons for imposing the sentence it did. The primary sentencing factors are the gravity of the offense, the character of the offender, and the need for public protection. *See* ***id.*** The weight the trial court accords each factor is a discretionary determination. ***Ocanas v. State***, 70 Wis. 2d

[3] *See* ¶4 n.2 *supra*.

179, 185, 233 N.W.2d 457 (1975). The trial court's obligation is to consider the primary sentencing factors and to exercise its discretion in imposing a reasoned and reasonable sentence. *See* ***Larsen***, 141 Wis. 2d at 426-28.

¶16 The trial court considered the nature and frequency of these offenses, referring to other incidents that were investigated, not all of which were charged. It explained precisely why this offense has serious consequences for the victims. The trial court recited Barber's criminal history, beginning in 1975 with her convictions for fraud and perjury. As the trial court recited and commented on her history, Barber shook her head, prompting the trial court to inquire if it was "wrong about something [it is] reading here [because if so, the court] would like to correct it. If there is no error, if [the trial court is] correct," to which Barber responded that she is "just shaking [her] head as [the court was] reading." The trial court continued commenting on Barber's character by chastising her for saying "I didn't think I was hurting anybody, is so disingenuous, so insincere to be absurd, to be laughable." The trial court then commented on the need for community protection, by stating that "[t]here is nothing more offensive than the fact that you were totally unmanageable in a community when you have a chance to get out in a community and defraud somebody." The trial court properly exercised its sentencing discretion. It additionally afforded Barber repeated opportunities to correct any misinformation.

¶17 Barber raises essentially the same challenge as her inaccurate information challenge, by claiming that her attempting to correct these claimed inaccuracies constitutes a new factor warranting sentence modification. A new factor is

> "a fact or set of facts highly relevant to the imposition of sentence, but not known to the trial judge at the time of

> original sentencing, either because it was not then in existence or because, even though it was then in existence, it was unknowingly overlooked by all of the parties."

State v. Franklin, 148 Wis. 2d 1, 8, 434 N.W.2d 609 (1989) (quoting ***Rosado v. State***, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975)). Once the defendant has established the existence of a new factor, the trial court must determine whether that "'new factor' … frustrates the purpose of the original sentence." ***State v. Michels***, 150 Wis. 2d 94, 99, 441 N.W.2d 278 (Ct. App. 1989).

¶18 The only information that was inaccurate was the prosecutor's portrayal of Barber's Illinois conviction from 2002. She was unable to show, however, that the trial court actually relied on the inaccuracies when it imposed sentence. Consequently, the set of facts that Barber seeks to correct, are not "highly relevant to the imposition of sentence," nor do they "frustrate[] the purpose of the original sentence." *See* ***Franklin***, 148 Wis. 2d at 8; ***Michels***, 150 Wis. 2d at 99. The other information Barber claims warrants correction also are not "highly relevant to," nor do they "frustrate[] the purpose of the original sentence." *See* ***Franklin***, 148 Wis. 2d at 8; ***Michels***, 150 Wis. 2d at 99.

¶19 Barber raises two ineffective assistance claims: (1) trial counsel should have objected to the prosecutor's inaccurate portrayal of her 2002 Illinois conviction; and (2) trial counsel should have filed the psychological evaluation by Suzanne J. Lisowski, Ph.D., which addresses Barber's mental condition, and was previously discussed as demonstrating that she was not operating with "clear faculties." Trial counsel attached Dr. Lisowksi's report to the postconviction reply brief, which was the first time it was presented to the trial court.

¶20 To maintain an ineffective assistance claim, the defendant must show that trial counsel's performance was deficient, and that this deficient

performance prejudiced the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To establish deficient performance, the defendant must show that counsel's representation was below objective standards of reasonableness. *See* ***State v. McMahon***, 186 Wis. 2d 68, 80, 519 N.W.2d 621 (Ct. App. 1994). To establish prejudice, the defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Strickland***, 466 U.S. at 694. Prejudice must be "*affirmatively* prove[n]." ***State v. Wirts***, 176 Wis. 2d 174, 187, 500 N.W.2d 317 (Ct. App. 1993) (citation omitted; emphasis in ***Wirts***). The necessity to prove both deficient performance and prejudice obviates the need to review proof of one, if there is insufficient proof of the other. ***State v. Moats***, 156 Wis. 2d 74, 101, 457 N.W.2d 299 (1990). Matters of reasonably sound strategy, without the benefit of hindsight, are "virtually unchallengeable," and do not constitute ineffective assistance. ***Strickland***, 466 U.S. at 690-91.

¶21 Barber contends that her trial counsel was ineffective for failing to correct the prosecutor's inaccurate description of her 2002 Illinois conviction. Preliminarily, Barber herself was asked directly by the trial court about that conviction, and did not appear to require counsel's assistance in attempting to explain her version of that incident. More significantly, Barber cannot "*affirmatively* prove" that her trial counsel's failure to object to and correct the inaccuracies in the prosecutor's version of the conviction was prejudicial. We previously held that Barber had not proven that the trial court actually relied on these inaccuracies; therefore, she cannot prove prejudice, an essential element of an ineffective assistance claim.

¶22 Barber's second ineffective assistance claim is trial counsel's failure to file Dr. Lisowski's psychological report before sentencing, to show that she had

significant mental and emotional problems that explain her criminal history and current conduct, and suggest the efficacy of treatment. She claims that instead defense counsel presented some of these claims at sentencing without the authority that would have attended to those claims if they had been proffered by a psychologist.

¶23 First, the trial court, in its postconviction order, rejected that claim, ruling that the written psychological evaluation would not have affected the sentencing decision. Second, at its essence, the evaluation merely offered that treatment "could" be helpful to Barber; this does not meet the test of "*affirmative*[] pro[of]" of prejudice necessary to an ineffective assistance claim. *See* ***Wirts***, 176 Wis. 2d at 187.

¶24 Barber contends that the cumulative effect of the trial court hearing all of these inaccurate character portrayals without the support of Dr. Lisowski's professional opinion presented her in a less favorable light at sentencing than the facts and circumstances of the offenses for which she was being sentenced. The trial court rejected these claims in its postconviction order; we reject them too. First, she has only shown one factual inaccuracy among several less than favorable characterizations and opinions. Barber has not been able to show that the trial court actually relied on that inaccuracy in a description of a previous crime for which she had been convicted. *See* ***Tiepelman***, 291 Wis. 2d 179, ¶26. Second, correcting that specific inaccuracy was not "highly relevant to" sentencing, nor would correction of that inaccuracy "strike[] at the very purpose for the sentence selected by the trial court," both necessary before sentence modification is warranted. ***Franklin***, 148 Wis. 2d at 8; ***Michels***, 150 Wis. 2d at 99. Third, without demonstrating "actual[] reli[ance]" or "high[] relevan[ce]" to the sentence, Barber cannot "*affirmatively* prove" the prejudice component of an ineffective

assistance of counsel claim. ***Tiepelman***, 291 Wis. 2d 179, ¶26; ***Franklin***, 148 Wis. 2d at 8; ***Wirts***, 176 Wis. 2d at 187. The trial court questioned Barber about her history and certain unfavorable statements, encouraging her to correct any inaccuracies or misimpressions. Barber's responses and clarifications were unimpressive. Barber's real complaint is that the trial court exercised its discretion differently than Barber had hoped it would; that, however, does not constitute an erroneous exercise of sentencing discretion. *See* ***Hartung v. Hartung***, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981) (our inquiry is whether discretion was exercised, not whether it could have been exercised differently).

By the Court.—Judgment and order affirmed.

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