

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**June 19, 2012**

Diane M. Fremgen  
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. 2011AP1323-CR**

**Cir. Ct. No. 2009CF1917**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT I**

---

**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**v.**

**DANIEL NEWMAN,**

**DEFENDANT-APPELLANT.**

---

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

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

¶1 PER CURIAM. Daniel Newman appeals a judgment convicting him of armed robbery and burglary. He also appeals an order denying his motion for postconviction relief. He argues: (1) that he should be allowed to withdraw his plea because his attorney ineffectively represented him; (2) that his sentence

was based on inaccurate information, violating his due process rights; and (3) that he should be resentenced because his sentence is unduly harsh and excessive. We affirm.

¶2 Newman first argues that he received ineffective assistance of counsel because his attorney promised him that he would receive three to five years of initial confinement. To establish ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that he was prejudiced by the deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

¶3 The circuit court heard testimony from Newman and from Newman's trial attorney. Newman testified that his attorney promised him that he would receive a sentence of three to five years of imprisonment. However, Newman acknowledged that when he entered his plea, he knew that the circuit court was free to impose whatever sentence it saw fit. He also admitted that he knew from prior convictions that the trial judge was not bound by the plea agreement and had the authority to decide the length of the sentence. Newman's trial attorney testified that he did not have an independent recollection of his conversation with Newman, but he would never promise a client a specific result. He testified that it was his practice to give his clients his professional opinion about the sentence they were likely to receive, but that he would not tell a client that the client was guaranteed a particular sentence because he had no control over what the trial judge would decide to do.

¶4 After considering the testimony, the circuit court concluded that the dispute came down to which witness was more credible, Newman or his trial attorney. The circuit court decided that Newman's testimony was not credible.

We defer to the circuit court's determination regarding the credibility of the witnesses. See *State v. Lalor*, 2003 WI App 68, ¶11, 261 Wis. 2d 614, 661 N.W.2d 898. Because the circuit court concluded that Newman's testimony that he had been promised a sentence of three to five years was not credible, Newman has not shown deficient performance by his attorney. We reject Newman's argument that he received ineffective assistance of counsel.

¶5 Newman next argues that his due process rights were violated because he was sentenced based on inaccurate information. He contends that the circuit court incorrectly believed he ripped a necklace off the victim's neck during the robbery and stated in its sentencing remarks that Newman's crime was aggravated based on this behavior. A defendant has a due process right to be sentenced based on accurate information. *State v. Tiepelman*, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1. "[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." *Id.*, ¶17 (citation omitted).

¶6 Newman did not object at sentencing to the statements by the prosecutor and the circuit court that he ripped the victim's necklace from her neck. Although we generally will not consider issues when no objection has been raised in the circuit court, we will briefly address the issue because it is unsettled "[w]hether, given the paramount importance of the 'integrity of the sentencing process,' waiver may be invoked to preclude a defendant's challenge to a sentencing based on inaccurate information." *State v. Groth*, 2002 WI App 299, ¶25, 258 Wis. 2d 889, 665 N.W.2d 163 (citation omitted), *overruled on other grounds by Tiepelman*, 291 Wis. 2d 179, ¶2. At the hearing on this postconviction claim, the prosecutor said that the reason he said during sentencing that Newman

ripped the necklace from the victim's neck is because the victim, who was present at the sentencing hearing, told him that at the hearing. Newman did not present any evidence to contradict the prosecutor's claim; he did nothing more than point to the fact that the information about the necklace was not in the police report and was not otherwise documented prior to the sentencing hearing. *See id.*, ¶17. Newman's challenge is unavailing because he has not met his burden of showing that the information was inaccurate.

¶7 Finally, Newman argues that he should be resentenced because his sentence is unduly harsh and excessive. The circuit court imposed twelve years of imprisonment for burglary, with seven years of initial confinement and five years of extended supervision, and thirty years of imprisonment for armed robbery, with eighteen years of initial confinement and twelve years of extended supervision. The sentences run concurrently to each other and to any prior sentence.

¶8 “A sentence is unduly harsh ... when it is ‘so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances.’” *State v. Berggren*, 2009 WI App 82, ¶47, 320 Wis. 2d 209, 769 N.W.2d 110 (citation omitted). Where, as here, a sentence is well within the maximum sentence allowed, it is unlikely to be unduly harsh or unconscionable. *See id.* Newman's conduct during the crimes was aggravated; he demanded that the victim take off her pants and, when she refused because her children were in the room, he struck her in the face. Newman has an extensive prior criminal record. Under these circumstances, the sentence, which was well within the maximum, was not unduly harsh and excessive.

*By the Court.*—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5. (2009-10).

