

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

NOTICE

June 10, 1997

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-3334-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

TIGERWOLF ANGELO PREY-PEREZ,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Brown County:
PETER J. NAZE, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

MYSE, J. Tigerwolf Angelo Prey-Perez appeals a sentence imposed following a judgment of conviction for various offenses charged as a result of incidents on January 16, 1996, and December 20, 1995. Prey-Perez contends that the trial court erroneously considered an impermissible factor when imposing sentence based on its conclusion that he was guilty of the offense of

sexual assault even though the charge of sexual assault had been dismissed as a result of a plea bargain between Prey-Perez and the State. Prey-Perez contends that the dismissal of the charge precludes the trial court's consideration of the conduct underlying that charge while imposing sentences on the offenses remaining before the court. Because we conclude that a trial court is privileged to assess the seriousness of the conduct without regard to whether the conduct is charged, the trial court did not consider an improper factor in sentencing. Accordingly, we affirm the judgment of conviction and sentence.

Prey-Perez was charged with criminal trespass to a dwelling, false imprisonment and one count of battery, each enhanced as a result of prior convictions relating to a domestic incident that occurred on January 16, 1996. Prey-Perez was also charged with criminal trespass with a repeater enhancer, second-degree sexual assault with a repeater enhancer, false imprisonment with a repeater enhancer, false imprisonment with a weapon enhancer and battery with a weapon enhancer as a result of a domestic incident arising on December 20, 1995.

The facts underlying the January 1996 charges involved a dispute between Prey-Perez and his wife, Lisa. Their argument culminated in a physical assault when Prey-Perez threw Lisa on the bed and pinned her down. Although Lisa expressed a desire to leave with her children, Prey-Perez advised her that she could not leave, followed her into one of the children's bedrooms and threw her on the bed causing her to hit her head on the wall. Prey-Perez pinned Lisa to the bed, grabbed and choked her, but Lisa eventually was able to escape and Prey-Perez agreed to leave the residence. The facts underlying the charges of December 1995 involved Lisa awakening to find Prey-Perez in her bedroom, even though he no longer resided there. She asked him to leave, but he refused, insisting that he wanted to work things out. He grabbed a knife, pushed Lisa down on the bed and

held the knife to her throat. Prey-Perez ordered Lisa to remove her pants and underwear and began to touch her between her legs claiming he wanted to find out if she had been with another man. He also struck her head against the wall and choked her for a period of time. He struck Lisa in the face with his hand and also struck her with a stick.

The two cases were consolidated and Prey-Perez reached an agreement with the State that involved his pleading guilty or no contest to criminal trespass to a dwelling as a repeater, false imprisonment as a repeater with a weapons enhancer and battery as a repeater. The sexual assault charge was to be dismissed. In the January 1996 incident, he agreed to plead guilty to one count of false imprisonment as a repeater and disorderly conduct as a repeater. The State recommended an effective sentence of ten years with each of the counts running concurrent and also concurrent with the prison time remaining on his anticipated parole revocation. For the offenses arising out of the December 1995 incident, the court imposed concurrent sentences of three years on count 1, ten years on count 2 and three years on count 3, each to run concurrent with the other. For the offenses arising from the January 1996 incident, the court imposed eight years on count 1 and three years of count 2 to run concurrent with one another but consecutive to the previously imposed sentence for the December 1995. The total term of imprisonment ordered was eighteen years.

Among the various reasons given by the court for the sentence imposed was that the court concluded that Prey-Perez had a long-standing record of antisocial and criminal behavior and had received a significant ten-year sentence for four counts of cocaine delivery in 1988. The court also noted that while the charges were pending in this case, Prey-Perez had approached a woman on the street and attempted to intimidate her into a sexual relationship. He was

also involved in two incidents of contacting people for the purpose of soliciting their assistance to intimidate and physically threaten Lisa Perez to discourage her from testifying with respect to the charges in this case. The court concluded that Prey-Perez was a significant danger to the community as well as family members. The court also noted that the facts underlying the offense of December 20, 1995, involved facts sufficient to warrant a conviction of first-degree sexual assault. The court acknowledged the charge had been dismissed as part of the plea agreement, but concluded that the severity of the offense was consistent with conduct amounting to a first-degree sexual assault with the use of a weapon.

Prey-Perez attacks the sentence imposed based upon a claim that the court improperly considered evidence of a sexual assault that had previously been dismissed pursuant to a plea agreement. Sentencing is a matter left to the trial court's discretion. *State v. Jones*, 151 Wis.2d 488, 495, 444 N.W.2d 760, 763 (Ct. App. 1989). Appellate review is tempered by a strong public policy against interfering with the trial court's exercise of discretion. *State v. Larsen*, 141 Wis.2d 412, 426, 415 N.W.2d 535, 541 (Ct. App. 1987). Reviewing courts presume that the sentencing court acted reasonably and the defendant bears the burden of demonstrating unreasonableness from the record. *State v. Echols*, 175 Wis.2d 653, 681-82, 499 N.W.2d 631, 640 (1993).

Prey-Perez argues that the trial court considered an improper factor. This claim raises a question as to what evidence the court may consider in determining the punishment to be imposed, which is a question of law. *See State v. Mosley*, 201 Wis.2d 36, 43-44, 547 N.W.2d 806, 809 (Ct. App. 1996). We therefore review deferentially the quantum of punishment imposed, but review without deference whether the trial court considered an improper factor in determining the quantum of punishment to be imposed. Prey-Perez's contention is

that while a court may consider offenses for which a defendant has not been convicted, it may do so only if the defendant has acknowledged his guilt for such offenses. *See State v. Szarkowitz*, 157 Wis.2d 740, 753, 460 N.W.2d 819, 824 (Ct. App. 1990).

Prey-Perez contends that because he has denied the sexual assault in this case, the trial court erred by concluding that the conduct in which he engaged was a first-degree sexual assault. This argument confuses the consideration of alleged criminal conduct denied by Prey-Perez involving a course of conduct totally unrelated to the offense for which he is now charged and evaluating his dangerousness based upon the course of conduct for which he stands convicted. We agree that a trial court may not increase punishment based upon uncharged criminal offenses unrelated to the course of conduct for which Prey-Perez is now charged when his responsibility for such criminal conduct has not in some way been determined. *See Szarkowitz*, 157 Wis.2d at 754, 460 N.W.2d at 824-25. In this case, however, the trial court did not consider uncharged conduct unrelated to the offenses. The trial court analyzed the conduct giving rise to the offenses for which Prey-Perez was convicted. His sexually touching Lisa while holding a knife at her throat is the very conduct that gave rise to the charged offenses and may, therefore, be considered in assessing the seriousness of the defendant's conduct.

The trial court's consideration of this factor was not only proper, but required. The court was obligated to assess Prey-Perez's dangerousness to the community in determining the appropriate sentence. The three primary factors to be considered in the imposition of sentence are the gravity of the offense, the offender's character and the need to protect the public. *State v. Anderson*, 76 Wis.2d 361, 364, 251 N.W.2d 768, 771 (1977). Assessing the nature of the

defendant's conduct addresses each of the primary factors used to determine the appropriate punishment to be imposed. The fact that Prey-Perez held a knife to his wife's throat and had sexual contact with her is an aggravating factor. The serious nature of the conduct reflects upon his character and indicates a need to protect Lisa from further acts of criminal conduct. We therefore conclude that the trial court properly assessed the nature of the conduct in which Prey-Perez engaged in determining the severity of the sentence to be imposed. We further agree with the trial court that the conduct was of a grave and aggravated nature because it was equivalent to the conduct necessary to sustain a conviction for first-degree sexual assault. This is a proper factor to be considered in the imposition of sentence.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

