COURT OF APPEALS
DECISION
DATED AND FILED

December 16, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP887-CR **Cir. Ct. No. 2006CF3740**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MISTIE L. MORGAN-OWENS,

DEFENDANT-APPELLANT.

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

Before Fine, Kessler and Brennan, JJ.

¶1 FINE, J. Mistie L. Morgan-Owens appeals a judgment entered on her guilty plea to armed robbery with the threat of force, as a party to the crime. *See* WIS. STAT. §§ 943.32(2), 939.05. She also appeals the order denying her postconviction motion for sentence modification. Morgan-Owens claims that:

(1) the circuit court erroneously exercised its sentencing discretion; (2) she was sentenced on inaccurate information; and (3) a new factor warrants sentence modification. We affirm.

I.

¶2 Morgan-Owens was arrested for helping to rob a credit union in Milwaukee. According to the complaint, Morgan-Owens drove her co-actor, Ryan Garrison, to the credit union. Garrison, disguised as a construction worker, then went into the credit union with a gun and told the tellers to empty their cash drawers. The tellers gave Garrison their money, he ran back to the car, and Morgan-Owens drove away.

¶3 After her arrest, Morgan-Owens confessed to her involvement in the robbery. According to the complaint, Morgan-Owens told the police that on the morning of the robbery she:

> drove by the credit union three times. She knows the credit union opens at 9:00 a.m. because she used to work there. She also knows it has cameras on the inside…. She turned into the alley and turned the car around. She left the car running and parked southbound. [Garrison] got out of the car…. The plan was that [Garrison] would go inside the credit union, display the gun, get the money, and get []out.

¶4 Morgan-Owens pled guilty on September 13, 2006. She subsequently submitted a sentencing memorandum recommending that the circuit court impose and stay "a period of initial confinement of 3 years[,] followed by extended supervision," and place her on "substantial probation supervision." Morgan-Owens's sentencing hearing was adjourned several times so that she could testify at Garrsion's trial.

¶5 Garrison's trial began on September 10, 2007. Morgan-Owens was sentenced on September 12, 2007. Pursuant to a plea bargain, the prosecutor agreed not to make a specific recommendation, but was able to discuss "the defendant's facts and any prior record at the time of sentencing."[1] The prosecutor told the circuit court, among other things, that Morgan-Owens was "cooperative with the police when she was arrested, she did give a full statement and also, as indicated, she was willing to testify truthfully against Mr. Garrison if the State had requested that testimony."

¶6 Consistent with her sentencing memorandum, Morgan-Owens's lawyer asked the circuit court for probation. She told the circuit court, among other things, that Morgan-Owens had cooperated with the police and was "here yesterday, today and on previous dates that were set for trial [in Garrison's case] when this was put over because she was in fact willing to testify." The trial court sentenced Morgan-Owens to six years of imprisonment, with an initial confinement of three years, and three years of extended supervision.

¶7 On the same day Morgan-Owens was sentenced, Garrison's trial ended in a mistrial. On March 19, 2008, Morgan-Owens filed a postconviction motion to modify her sentence, claiming, as material, that her willingness to testify at Garrison's retrial was a new factor. In support, Morgan-Owens attached a letter from an assistant district attorney asserting that in exchange for Morgan-Owens's

[1] Of course, a prosecutor may not agree to keep pertinent facts from a sentencing court. ***State v. McQuay***, 148 Wis. 2d 823, 826, 436 N.W.2d 905, 906 (Ct. App. 1989) ("Agreements by prosecutors not to reveal relevant information to the sentencing judge are against public policy and cannot be respected by the courts."), *rev'd on other grounds*, 154 Wis. 2d 116, 119, 452 N.W.2d 377, 378 (1990) ("The prosecutor did not agree to withhold information concerning the defendant from the sentencing court and did not agree to limit information in the presentence report.").

testimony, the State would "stipulate to a request for a re-sentencing" and recommend an imposed and stayed sentence of six years of imprisonment, and five years on probation. The circuit court denied Morgan-Owens's motion.

¶8 Morgan-Owens testified against Garrison on June 3, 2008. On appeal, the State adheres to its position that Morgan-Owens should be resentenced to five years on probation.

II.

A. *Sentencing Discretion.*

¶9 Morgan-Owens challenges her sentence on several grounds. First, she contends that the circuit court erroneously exercised its sentencing discretion because it did not: (1) explain how the length of her sentence promoted the objectives of sentencing; or (2) adequately consider what Morgan-Owens alleges are mitigating factors, including that she: was a co-actor in the robbery; cooperated with the police; had "health challenges," including tracheal stenosis; had "money problems with mounting medical bills and child rearing costs"; was pregnant at the time of sentencing; had no prior criminal record; was remorseful and accepted responsibility; graduated from high school and had a work history; and had the support of her family. We disagree.

¶10 Sentencing is within the discretion of the circuit court, and our review is limited to determining whether the circuit court erroneously exercised that discretion. ***McCleary v. State***, 49 Wis. 2d 263, 277–278, 182 N.W.2d 512, 519–520 (1971); *see also* ***State v. Gallion***, 2004 WI 42, ¶68, 270 Wis. 2d 535, 569, 678 N.W.2d 197, 212 ("circuit court possesses wide discretion in determining what factors are relevant to its sentencing decision"). The three primary factors a

sentencing court must consider are the gravity of the offense, the character of the defendant, and the need to protect the public. ***State v. Harris***, 119 Wis. 2d 612, 623, 350 N.W.2d 633, 639 (1984). The court may also consider the following factors:

> "(1) Past record of criminal offenses; (2) history of undesirable behavior pattern; (3) the defendant's personality, character and social traits; (4) result of presentence investigation; (5) vicious or aggravated nature of the crime; (6) degree of the defendant's culpability; (7) defendant's demeanor at trial; (8) defendant's age, educational background and employment record; (9) defendant's remorse, repentance and cooperativeness; (10) defendant's need for close rehabilitative control; (11) the rights of the public; and (12) the length of pretrial detention."

Id., 119 Wis. 2d at 623–624, 350 N.W.2d at 639 (quoted source omitted); *see also* ***Gallion***, 2004 WI 42, ¶¶59–62, 270 Wis. 2d at 565–566, 678 N.W.2d at 211 (applying the main ***McCleary*** factors—the seriousness of the crime, the defendant's character, and the need to protect the public—to Gallion's sentencing). The weight given to each of these factors is within the circuit court's discretion. ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457, 461 (1975).

¶11 The circuit court considered the appropriate factors when it sentenced Morgan-Owens. It considered the gravity of the crime, noting that Morgan-Owens was "heavily involved" in the robbery of the credit union:

> You knew the information about the place, you knew the locale of the place, you knew the proximity of where you wanted to have the get-away situation for the place. I mean, you were up to your eyeballs in this case, and so the idea that you're not as equally culpable as the fellow who pointed the gun, that could be argued but under the party to a crime concept, you buy into what he did, he buys [i]nto what you did.

The circuit court also found that the robbery was "aggravated," but acknowledged that "it may be lesser" because of Morgan-Owens's "lack of continued activity in that regard."

¶12 The circuit court also considered Morgan-Owens's character. It considered her health and limited financial means. It was "concerned" that Morgan-Owens became pregnant while the case was pending, noting that her pregnancy gave "insight[]" into her "thought process":

> I know it's a primary right, but I think that's a consideration you should have given under the circumstances of your, shall we say, tentative legal standing as far as having your freedom. I don't think it was a very responsible thing, to be quite candid with you; I think it was a very selfish thing.
>
> I have to consider that, though, because it gives insightful thought process into who you are and why you do things and in fact [are] somewhat manipulative, to be candid with you. I'm concerned about that.

In its written decision and order denying Morgan-Owens's postconviction motion, the circuit court observed that at sentencing it considered Morgan-Owens's "cooperation with law enforcement" and "willingness to lend assistance in the prosecution of her co-defendant."

¶13 Finally, the circuit court considered the need to protect society, noting that it was "not so sure there's not risk in the future[]; I think you'd do just about anything." It concluded that confinement was warranted because the robbery was "so severe and it was so calculated and it was so planned it could hardly be a spur of the moment silly stupid act." The circuit court fully explained Morgan-Owens's sentence and the reasons for it. *See* ***State v. Taylor***, 2006 WI 22, ¶30, 289 Wis. 2d 34, 52, 710 N.W.2d 466, 476 (circuit court not required "to

provide an explanation for the precise number of years chosen"). It did not erroneously exercise its sentencing discretion.

¶14 Morgan-Owens also contends that the circuit court's consideration of her pregnancy violated a bushel basket of constitutional rights, all the way from equal protection to the right to be free from cruel and unusual punishment. *See* ***McCleary***, 49 Wis. 2d at 278, 182 N.W.2d at 520 (sentencing court erroneously exercises its discretion when it relies on "clearly irrelevant or improper factors"). We disagree. The circuit court specifically noted both at the sentencing hearing and in its decision and order denying Morgan-Owens's postconviction motion that it was not punishing Morgan-Owens for being pregnant. Rather, as we have seen, the circuit court viewed Morgan-Owens's pregnancy as an attempt to manipulate the system. *See* ***State v. Glass***, No. 83950, 2004 WL 1903251, at *1 (Ohio Ct. App. 2004) (pregnancy asserted by defendant as a mitigating sentencing factor; rejected by the court). This was well within the circuit court's discretion to assess Morgan-Owens's character, which it termed as "manipulative."[2] A sentencing court need not turn a blind eye to a fact in a case merely because what the

[2] Morgan-Owens's postconviction lawyer submitted an affidavit in support of her postconviction motion that averred: "Ms. Morgan-Owens has advised me that … after the birth of her first child Jasmine, she did not believe she could conceive again due to medical reasons. When she became pregnant during the pendancy of this case, she was surprised. The pregnancy was not planned." The affidavit, of course, is not competent evidence. ***Hopper v. City of Madison***, 79 Wis. 2d 120, 131, 256 N.W.2d 139, 144 (1977) (A lawyer's affidavit consisting of a "summary of evidence and his conclusions thereon" may not be used on summary judgment because it encompassed "matters outside his personal knowledge."); ***Fuller v. General Accident Fire & Life Assurance Corp.***, 224 Wis. 603, 610, 272 N.W. 839, 842 (1937) (A lawyer's affidavit must do more than attest to the merits of the client's cause.). Further, if, in fact, the pregnancy was "not planned," Morgan-Owens obviously knew that at the sentencing hearing, and her silence in the face of the circuit court's assertion is waiver. *See* ***State v. Mosley***, 201 Wis. 2d 36, 46, 547 N.W.2d 806, 810 (Ct. App. 1996) (when facts in a presentence investigation report are "not challenged or disputed by the defendant at the time of sentencing, the sentencing judge may appropriately consider them").

defendant has done is a protected right. Certainly, if a sentencing court can restrict the exercise of protected rights, ***State v. Oakley***, 2001 WI 103, ¶19, 245 Wis. 2d 447, 469, 629 N.W.2d 200, 210 ("'[C]onditions of probation may impinge upon constitutional rights as long as they are not overly broad and are reasonably related to the person's rehabilitation.'") (quoted source omitted), *modified on other grounds*, 2001 WI 123, 248 Wis. 2d 654, 635 N.W.2d 760; ***Krebs v. Schwarz***, 212 Wis. 2d 127, 131–132, 568 N.W.2d 26, 28–29 (Ct. App. 1997) (upholding probation condition that defendant convicted of sexually assaulting his daughter get permission from his probation agent before having a sexual relationship), it may consider the exercise of a protected right insofar as that action reflects on the defendant's character and likelihood for rehabilitation, as long as the sentencing court is not being punitive by "punishing" the defendant for doing something that does not reflect on the defendant's attitude in connection with proper sentencing criteria because even the exercise of a protected right may be ill-advised under the circumstances. If Morgan-Owens became pregnant to elicit sympathy at sentencing, as the sentencing court found, that is a significant reflection on her character and sense of proportionality that is so essential to successful rehabilitation. The circuit court did not violate Morgan-Owens's constitutional rights.

¶15 Second, Morgan-Owens claims that the circuit court erroneously exercised its discretion because it did not explain why it rejected the parties' sentencing recommendations. A sentencing court, however, is not bound by sentencing recommendations. *See* ***State v. Johnson***, 158 Wis. 2d 458, 469, 463 N.W.2d 352, 357 (Ct. App. 1990) (court need not explain why its sentence differs from any particular recommendation as long as discretion exercised).

¶16 Third, Morgan-Owens contends that the circuit court erroneously exercised its discretion because it did not consider the sentencing guidelines for armed robbery. As we have seen, Morgan-Owens was sentenced on September 12, 2007. For sentencing hearings occurring after September 1, 2007, a circuit court satisfies its obligation under WIS. STAT. § 973.017(2)(a) to consider the sentencing guidelines "when the record of the sentencing hearing demonstrates that the court actually considered the sentencing guidelines and so stated on the record."[3] ***State v. Grady***, 2007 WI 125, ¶2, 305 Wis. 2d 65, 66–67, 739 N.W.2d 488, 488 (per curiam). The circuit court did not say on the Record at Morgan-Owens's sentencing hearing that it actually considered the sentencing guidelines for armed robbery.[4] This does not, however, end our analysis.

¶17 A failure to consider the sentencing guidelines can be harmless error. Thus, for example, even violations of a defendant's constitutional rights can

[3] WISCONSIN STAT. § 973.017(2)(a) provides:

> **(2)** GENERAL REQUIREMENT. When a court makes a sentencing decision concerning a person convicted of a criminal offense committed on or after February 1, 2003, the court shall consider all of the following:
>
> (a) If the offense is a felony, the sentencing guidelines adopted by the sentencing commission created under 2001 Wisconsin Act 109, or, if the sentencing commission has not adopted a guideline for the offense, any applicable temporary sentencing guideline adopted by the criminal penalties study committee created under 1997 Wisconsin Act 283.

[4] The circuit court wrote in its decision and order denying Morgan-Owens's postconviction motion that it had considered the sentencing guidelines. This, however, does not pass muster under ***State v. Grady***, 2007 WI 125, ¶2, 305 Wis. 2d 65, 67, 739 N.W.2d 488, 488 (per curiam) ("when a circuit court's consideration of sentencing guidelines is reviewed, the reviewing court may not supplement the sentencing record with evidence outside the sentencing hearing for any sentence occurring after September 1, 2007").

be "harmless." ***Neder v. United States***, 527 U.S. 1, 8 (1999); ***State v. Dyess***, 124 Wis. 2d 525, 543, 370 N.W.2d 222, 231 (1985) (standard for evaluating harmless error is the same whether error is constitutional, statutory, or otherwise). Of course, Morgan-Owens does not contend that the sentencing court's failure to assert on the sentencing Record that it considered the sentencing guidelines is the violation of a constitutional right, and the failure to consider sentencing guidelines can similarly be harmless error. *See* ***State v. Sherman***, 2008 WI App 57, ¶¶8–9, 310 Wis. 2d 248, ___, 750 N.W.2d 500, 504. An error is harmless if it does not affect the defendant's substantial rights. WIS. STAT. § 805.18 (made applicable to criminal proceedings by WIS. STAT. § 972.11(1)). To determine whether the failure to consider the sentencing guidelines was harmless, we compare the sentencing transcript and armed robbery sentencing guidelines worksheet. *See* ***Sherman***, 2008 WI App 57, ¶9, 310 Wis. 2d at ___, 750 N.W.2d at 504 (noting that "the sentences for the two guidelines counts were less than the controlling sentence of fifteen years' initial confinement and fifteen years' extended supervision rendered for repeated sexual assault of a child").

¶18 The guidelines worksheet for armed robbery, *available at* http://wsc.wi.gov/docview.asp?docid=3303, plots the severity of the offense against future risk using the following categories: the characteristics of the offense; the degree of preparation; the type of harm caused; the defendant's role; the victim's vulnerability; and the offender's education, employment history, health, criminal and social background, acceptance of responsibility, and show of remorse, *see* ***ibid.*** As we have seen, the circuit court considered many of these factors in sentencing Morgan-Owens. It found that the armed robbery was planned and that Morgan-Owens was "heavily involved." The circuit court also considered Morgan-Owens's cooperation, health, financial circumstances,

manipulative behavior, and the risk that Morgan-Owens would "do just about anything" in the future. After weighing these factors, it imposed a sentence well within the forty-year maximum sentence. *See* WIS. STAT. §§ 943.32(2), 939.50(3)(c). Morgan-Owens's substantial rights were not affected. The error was harmless beyond a reasonable doubt. *See* ***State v. Harris***, 2008 WI 15, ¶42, 307 Wis. 2d 555, 578, 745 N.W.2d 397, 408 (adopting a "beyond a reasonable doubt" test for harmless error).

B. *Inaccurate Information.*

¶19 A defendant claiming that a sentencing court relied on inaccurate information must show that: (1) the information was inaccurate; and (2) the sentencing court actually relied on the inaccurate information. ***State v. Tiepelman***, 2006 WI 66, ¶26, 291 Wis. 2d 179, 192–193, 717 N.W.2d 1, 7. We review *de novo* whether a defendant has been denied the right to be sentenced on accurate information. ***Id.***, 2006 WI 66, ¶9, 291 Wis. 2d at 185, 717 N.W.2d at 3.

¶20 Morgan-Owens appears to claim that the circuit court sentenced her based on inaccurate information when it commented at sentencing about her daughter's sexual-assault by Morgan-Owens's former husband:

> I look at the fact that you were willing to potentially put your child at risk during the course of that sexual molestation by not protecting the child or putting her in a safe position but standing by your man, as it were. That's not good thinking. It's not right thinking. Your duty as a mother and parent is to protect that child regardless of what it does to your personal relationships.

Morgan-Owens contends that there is no factual basis in the Record for this statement. She points out that, according to her sentencing memorandum, she did not know that the person whom the Record reflects was her then-husband was

assaulting her daughter, and was "devastated" and "blamed herself for not knowing" when she found out. Neither Morgan-Owens nor her lawyer objected, however, when the circuit court made the comment they now contend was inaccurate. Accordingly, we review this claim in an ineffective-assistance-of-counsel context. *See* ***Kimmelman v. Morrison***, 477 U.S. 365, 375 (1986) (unobjected-to error must be analyzed under ineffective-assistance-of-counsel standards, even when error is of constitutional dimension); ***State v. Groth***, 2002 WI App 299, ¶26, 258 Wis. 2d 889, 909, 655 N.W.2d 163, 172 (failure to object at sentencing to inaccurate information may be reviewed within ineffective-assistance-of-counsel context), *overruled on other grounds by* ***Tiepelman***, 2006 WI 66, ¶2, 291 Wis. 2d at 181–182, 717 N.W.2d at 2.

¶21 A defendant claiming ineffective assistance of counsel must establish that: (1) the lawyer was deficient; and (2) the defendant suffered prejudice as a result. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To satisfy the prejudice aspect of ***Strickland***, the defendant must demonstrate that the lawyer's errors were sufficiently serious to deprive him or her of a fair trial and a reliable outcome, ***ibid.***, and "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome," ***id.***, 466 U.S. at 694. We need not address both aspects if the defendant fails to make a sufficient showing on either one. ***Id.***, 466 U.S. at 697.

¶22 Assuming, without deciding, that the circuit court's sexual-assault comment was inaccurate, Morgan-Owens has not shown that she was prejudiced by her lawyer's failure to object. When the circuit court's sentencing remarks are viewed as a whole, it is clear that the sexual-assault was not highly relevant to the

imposed sentence. As we have seen, the circuit court relied heavily on Morgan-Owens's significant involvement in the robbery and her manipulative behavior. In this context, the circuit court's *de minimis* reference to the sexual-assault did not negate the overall accuracy of the circuit court's sentencing analysis. *See* ***State v. Way***, 113 Wis. 2d 82, 91, 334 N.W.2d 918, 922 (Ct. App. 1983) (circuit court did not erroneously exercise sentencing discretion in relying on erroneous presentence investigation report when sufficient other facts in the record justified sentence imposed).

C. *New Factor.*

¶23 Morgan-Owens contends that her apparent agreement to testify against Garrison at his second trial is a new factor that warrants sentence modification. *See* ***State v. Doe***, 2005 WI App 68, ¶10, 280 Wis. 2d 731, 740–741, 697 N.W.2d 101, 106 (post-sentencing substantial assistance to law enforcement may be new factor). We disagree.

> Whether facts constitute a new factor is a question of law we review de novo. A new factor is a fact or set of facts highly relevant to the imposition of sentence, but not known to the trial court at the time of original sentencing, either because it was not then in existence or because it was unknowingly overlooked by the parties. The new factor not only must be previously unknown, but it must also strike at the very purpose of the original sentence.

State v. Slagoski, 2001 WI App 112, ¶10, 244 Wis. 2d 49, 59, 629 N.W.2d 50, 54 (citations omitted).

¶24 Although it is technically accurate that Morgan-Owens had not yet testified against Garrison at his second trial when she was sentenced on September 12, 2007, that testimony was not highly relevant to the imposition of that sentence because her testimony at Garrison's trial on June 3, 2008, was essentially the same

cooperation and willingness to testify about which the circuit court knew and considered at sentencing. As we have seen, the circuit court in its decision and order denying Morgan-Owens's postconviction motion indicated that "the parties duly apprised the court of the defendant's cooperation with law enforcement authorities and of the defendant's willingness to lend assistance in the prosecution of her co-defendant…. The court … considered … the defendant's degree of cooperation with law enforcement authorities in fashioning its sentence." Indeed, as noted: Morgan-Owens's sentencing hearing was adjourned several times so that she could testify at Garrsion's trial; the prosecutor told the sentencing court that Morgan-Owens "was willing to testify truthfully against Mr. Garrison if the State had requested that testimony"; and Morgan-Owens's lawyer told the circuit court at sentencing that Morgan-Owens was "here yesterday, today and on previous dates that were set for trial [in Garrison's case] when this was put over because she was in fact willing to testify." The State's "stipulation" in the postconviction affidavit and on appeal that resentencing is warranted because Morgan-Owens testified against Garrison does not trump the circuit court's duty to independently exercise its sentencing discretion. *See* ***Johnson***, 158 Wis. 2d at 469, 463 N.W.2d at 357 (court need not explain why its sentence differs from any particular recommendation as long as discretion exercised). The circuit court properly exercised its discretion in denying Morgan-Owens's sentence-modification motion.

By the Court.—Judgment and order affirmed.

Publication in the official reports is not recommended.

¶25 KESSLER, J. (*dissenting*). I respectfully dissent because I believe that Morgan-Owens is entitled to resentencing based on the trial court's consideration of Morgan-Owens's pregnancy as a negative factor at sentencing. *See* majority op., ¶¶12, 14. Further, I conclude that Morgan-Owens is entitled to resentencing based on the trial court's reliance on its finding—which was unsupported by the record—that Morgan-Owens permitted her husband to sexually abuse her daughter. *See* majority op., ¶¶20-22. Consequently, I would remand for resentencing.

I. Punishing Morgan-Owens based on her pregnancy.

¶26 In sentencing Morgan-Owens for armed robbery,[5] the trial court referred to Morgan-Owens's pregnancy as evidence that she was "manipulative" and stated that the pregnancy was "a very selfish thing." *See* majority op., ¶12. The majority approves the trial court's consideration of the pregnancy, holding—without citation to any authority—that "[a] sentencing court need not turn a blind eye to a fact in a case merely because what the defendant has done is a protected right." *See* majority op., ¶14. In my view the majority misstates the law in Wisconsin.

¶27 "It is well settled that a sentence imposed may not be based on constitutionally invalid grounds, for example, because the defendant has exercised

[5] Morgan-Owens was convicted of armed robbery with threat of force, as a party to a crime, in violation of WIS. STAT. §§ 943.32(2) and 939.05 (2005-06).

his right to a trial by jury." ***Hanneman v. State***, 50 Wis. 2d 689, 691, 184 N.W.2d 896 (1971). Conduct that is constitutionally protected may be considered at sentencing only when the protected acts are directly related to the crime for which the defendant was convicted. *See* ***State v J.E.B.***, 161 Wis. 2d 655, 665, 469 N.W.2d 192 (Ct. App. 1991). In ***J.E.B.***, we considered whether the trial court properly considered the defendant's reading of sexually explicit books—an activity protected by the first amendment—when it sentenced the defendant for having sexual contact with his six-year-old daughter.[6] ***Id.*** at 659-61, 663-73. The trial court considered J.E.B.'s choice of the reading material to be evidence of his questionable character, and a "relevant factor" (though "not the major factor") in J.E.B.'s sentence. ***Id.*** at 660-61. On appeal, we observed that federal case law holds that "a sentence based on activity or beliefs protected by the first amendment is constitutionally invalid. However, if the first amendment activity carries some identifiable link to the criminal conduct, the activity is no longer protected." ***Id.*** at 665 (citation omitted). We adopted the test outlined in ***United States v. Lemon***, 723 F.2d 922, 937 (D.C. Cir. 1983), that determines whether constitutionally protected conduct can be considered at sentencing by considering: "whether there is a reliable showing of a sufficient relationship between the [protected conduct and the criminal act]. Where … the criminal conduct so parallels the constitutional activity, we conclude that such a showing has been made." ***J.E.B.***, 161 Wis. 2d at 673. We concluded that the trial court's consideration of J.E.B.'s act of reading sexually explicit material, in the context of

[6] In ***State v J.E.B.***, 161 Wis. 2d 655, 469 N.W.2d 192 (Ct. App. 1991), the State did not contend that the books were pornographic or that they depicted children. The supreme court specifically described the books (which were not part of the record) as "sexually explicit" books that were protected by the First Amendment to the United States Constitution. *See* ***id.*** at 663-64.

his conviction for having sexual contact with his six-year-old daughter, was not a misuse of sentencing discretion. ***Id.*** at 659. In effect, we concluded that there was a reliable showing of a sufficient relationship between the protected constitutional conduct and the criminal conduct to permit impinging on protected conduct. *See* ***id.*** at 673.

¶28 The same reliable showing of a sufficient relationship between the criminal activity and the protected conduct must be shown to justify probation conditions which restrict constitutionally protected activity. In ***State v. Oakley***, 2001 WI 103, 245 Wis. 2d 447, 629 N.W.2d 200, the defendant had been convicted of intentionally refusing to support his nine children although he was employed and had a demonstrated ability to support the children. *See* ***id.***, ¶6. Our supreme court sustained a condition of probation which prohibited Oakley from conceiving more children unless he could demonstrate that he could support both his already existing children and the new child. ***Id.***, ¶1. The Court concluded that the condition was permissible because the constitutionally protected conduct (conceiving children) that was impinged by the conditional prohibition during probation was factually related to the crime for which the defendant was convicted (refusing to support his children in spite of his ability to do so), and reasonably related to Oakley's rehabilitation (complying with the law requiring him to support his children). ***Id.***, ¶¶20, 21. Thus, the Court concluded, the impingement was an appropriate condition of probation. ***Id.***

¶29 Unlike in ***J.E.B.*** and ***Oakley***, in this case there was not a "reliable showing of a sufficient relationship" between Morgan-Owens's criminal conduct (helping to plan, and participating in, an armed robbery) and her constitutionally protected conduct (conceiving a child), that would justify consideration of the pregnancy at sentencing. ***J.E.B.***, 161 Wis. 2d at 673. The pertinent facts in the

record here are as follows. Morgan-Owens planned and participated in an armed robbery on July 18, 2006. *See* majority op., ¶¶2-4. She entered her guilty plea not quite two months later, on September 13, 2006. *See* majority op., ¶4. She was sentenced a year later, on September 12, 2007. *See* majority op., ¶5. At that time, she was due to deliver a baby in early October, 2007.

¶30 The sentencing memorandum did not mention the pregnancy. It did, however, discuss Morgan-Owens's unique health considerations in the context of suggesting that electronic monitoring may be appropriate for Morgan-Owens. Specifically, it explained that Morgan-Owens suffers from gastroesophageal reflux disease and has had numerous surgeries as a result, including a tracheotomy. She cannot speak normally and must use a electrolarynx or vibrator to communicate. She must also regularly maintain the tube in her throat. In addition, she requires AODA treatment and psychiatric care.

¶31 At the sentencing hearing, trial counsel updated the health information, telling the court that Morgan-Owens was expecting a child that was due on October 2, 2007. Neither the State nor counsel during argument, nor Morgan-Owens in her allocution, made any additional reference to the pregnancy.

¶32 After hearing from the State, trial counsel and Morgan-Owens, the trial court commented on Morgan-Owens's culpability, and soon began to discuss her pregnancy (at times also referring to her health problems), stating:

> I'm concerned that *you got yourself pregnant* during this course of time….
>
> ….
>
> … [T]hese limitations that you have[,] you should have brought into your own thought process at the time, not after the fact. And *then to exacerbate it by becoming pregnant*, to be honest with you, I know it's a primary

> right, but I think that's a consideration you should have given under the circumstances of your, shall we say, tentative legal standing as far as having your freedom. *I don't think it was a very responsible thing, to be quite candid with you; I think it was a very selfish thing*.
>
> I have to consider that, though, because it gives insightful thought process [sic] into who you are and *why you do things and in fact somewhat* [sic] *manipulative*…. I'm concerned about that.
>
> ….
>
> To go do this [crime] and then think I'm going to give you a walk because of your health, it's not the way it is. These are things you should have considered, not thinking it was going to be a great excuse for what you did and how you're going to get out of this thing. *And then you exacerbate that by then adding the pregnancy to it*.… [I]t shows me a person that has *planning and manipulation as part of her life*.

(Emphasis added.)

¶33 Although the trial court indicated that the pregnancy would "not enter into this Court's decision-making in this case," I am not convinced that the pregnancy did not negatively impact the sentence. These were not passing references to the pregnancy. On the contrary, the remarks indicate that the court was highly focused on the fact that Morgan-Owens became pregnant and on its determination that she was not going to be given any positive consideration because of the pregnancy. The totality of the trial court's comments show the court believed that Morgan-Owens intentionally became pregnant in order to positively influence the court at sentencing, and that it considered the pregnancy in a negative context at sentencing.

¶34 The majority accepts the trial court's view of Morgan-Owens's pregnancy as proper evidence of manipulative character and affirms the sentence. *See* majority op., ¶14. However, there was no evidence to support the trial court's

findings concerning Morgan-Owens's motivations, and even if there were, Wisconsin law does not allow sentencing consideration of one's exercise of a constitutionally protected right unless there is a reliable showing of a sufficient relationship between the defendant's crime and the constitutionally protected conduct. *See* ***J.E.B.***, 161 Wis. 2d at 673. As we have seen, no such relationship has been established here.

¶35 The trial court did not reference the basis for its conclusion that Morgan-Owens's pregnancy signified that she was "manipulative" and that her pregnancy was "a very selfish thing." There was no explanation as to the reasons for and circumstances of the pregnancy. If simply appearing at sentencing while pregnant, without any evidence in the record of the reasons and circumstances surrounding the pregnancy, is relevant evidence of manipulative character, lack of responsibility or selfishness, then *all* women who happen to be pregnant at the time of sentencing are selfish, manipulative and irresponsible.[7] I cannot accept such a logically flawed and factually baseless analysis of why women become pregnant. The reasons for, and timing of, any woman's pregnancy are as complex and varied as the circumstances of a woman's involvement with a romantic partner. In the absence of facts surrounding the pregnancy or the romance, one cannot fairly or accurately determine the motivation of any party involved.

¶36 Moreover, as ***J.E.B.*** instructs, unless there is a reliable showing of a sufficient relationship between the defendant's crime and the constitutionally protected right, consideration of the exercise of that right is prohibited at

[7] Such an illogical syllogism would also justify the belief that women "manipulate" men into the conduct necessary to produce a pregnancy, and that women routinely do so for irresponsible and selfish motives.

sentencing. *See* ***J.E.B.***, 161 Wis. 2d at 673. The majority offers no compelling explanation for how the exercise of the right of procreation is related to the crime of armed robbery. Therefore, consideration of the factor was not permitted under Wisconsin law. I would reverse and remand for resentencing based on this error.

II. Blaming Morgan-Owens for her daughter's victimization.

¶37 I further dissent from those portions of the majority opinion sanctioning the trial court's unsupported reference to Morgan-Owens's responsibility for a sexual assault of her daughter committed by Morgan-Owens's then-husband. *See* majority op., ¶¶20, 22. The trial court commented negatively on Morgan-Owens's actions with respect to the sexual assault, asserting that she had been willing to "put [her] child at risk during the course of that sexual molestation by not protecting the child … but standing by [her] man." *See* majority op., ¶20. However, the majority opinion points to no facts—and the record reveals none—that suggest Morgan-Owens knowingly permitted the abuse of her daughter to continue after she learned of it. The trial court's implicit finding, as evidenced by its statement, is unsupported by any evidence we have found in the record. In effect, the trial court concluded that because the abusive conduct continued for some time, Morgan-Owens *must* have known about it, and *must* have self-indulgently decided to do nothing. That conclusion has no factual basis in the record.

¶38 The majority ignores the sentencing memorandum, which is the only disclosure in this record of the substance of the sexual abuse incident and Morgan-Owens's reaction to it. Neither the State nor defense counsel provided additional information on this subject in the sentencing hearing. The sentencing memorandum, which was prepared for Morgan-Owens's counsel, and not

factually disputed by the State, indicates the following with respect to the sexual abuse:

> According to Ms. Morgan[-]Owens and her family, she began suffering from depression back in 2004 after she learned that her husband, Kelvin Owens, had been molesting his stepdaughter, J[] (age 8 at the time) for over two years. According to CCAP, Mr. Owens pled guilty to Second Degree Sexual Assault of a Child, and was sentenced on 10-14-05 … to five years[’] probation, and seven months in the Milwaukee County House of Correction, with release privileges. *Ms. Morgan-Owens was devastated, and blamed herself for not knowing or being able to protect her child.*

(Emphasis added.) The sentencing memorandum also quotes Morgan-Owens's mother:

> "We were angry and we blamed Mistie for not protecting J[]. *Mistie didn't know about it.* I was suspicious about him. *Mistie felt she let her daughter down* and everyone down. She became so depressed.… I came home and we found her upstairs unconscious. She tried to overdose on her headache medicine. She was on life support for one week.… Then she was trying to pull out the tubes and tore her windpipe. They had to put in a trachea. She has been in and out of the hospital a lot and has had a lot of surgeries since."
>
> ….
>
> *… I think her whole life changed when her husband molested J[]*.

(Emphasis added.) Finally, the sentencing memorandum quoted Morgan-Owens herself:

> Our marriage lasted two years. It ended when I found out he molested my daughter. I got the divorce papers, but have no money to file for divorce.

¶39 The only information before the trial court on the subject of the earlier sexual abuse of Morgan-Owens's daughter was what was contained in the

sentencing memorandum set out above. Nonetheless, the trial court told Morgan-Owens at sentencing that:

> I look at the fact that *you were willing to potentially put your child at risk* during the course of that sexual molestation *by not protecting the child* or putting her in a safe position but *standing by your man.… That's not good thinking.… Your duty as a mother and parent is to protect that child regardless of what it does to your personal relationships*.

(Emphasis added.)

¶40 The trial court concluded that because the sexual abuse occurred, it was Morgan-Owens's fault, and considered this a negative factor in her sentencing. The conclusion is directly contrary to all of the facts and explanations provided to the court concerning the impact of the sexual assault on Morgan-Owens. The court's comments can only be understood to reflect a belief that Morgan-Owens's character should be considered negatively because of the court's belief that she had to have known of the abuse and failed to prevent it. None of those alternatives have any evidentiary support in the record.

¶41 In summary, the record lacks any support for the trial court's finding that Morgan-Owens knew about the abuse and failed to act. The majority "assume[es], without deciding, that the [trial] court's sexual-assault comment was inaccurate," but concludes that Morgan-Owens is not entitled to resentencing based on an ineffective assistance of counsel analysis. *See* majority op., ¶22. I disagree with the majority's conclusion. Assuming that trial counsel was required to object in order to preserve Morgan-Owens's objection to the trial court's erroneous finding, then counsel was deficient for failing to object to the trial court's finding that was obviously erroneous and contrary to the only evidence in the record on this subject, the sentencing memorandum.

¶42 Further, I conclude that Morgan-Owens was prejudiced by this deficiency. Contrary to the majority's conclusion that trial court's remarks were not "highly relevant to the imposed sentence," I conclude that the trial court's erroneous finding influenced its decision. Knowingly failing to protect one's daughter from sexual abuse by one's spouse is not only shocking, it is a crime.[8] In effect, the trial court found that Morgan-Owens had engaged in criminal conduct. Because a finding of criminal conduct, extraneous to the crime charged, if accurate, would be highly relevant to a defendant's character and would almost certainly increase the sentence, I cannot agree that such a finding did not influence the ultimate sentence here.

[8] WISCONSIN STAT. § 948.02(3) provides:

> FAILURE TO ACT. A person responsible for the welfare of a child who has not attained the age of 16 years is guilty of a Class F felony if that person has knowledge that another person intends to have, is having or has had sexual intercourse or sexual contact with the child, is physically and emotionally capable of taking action which will prevent the intercourse or contact from taking place or being repeated, fails to take that action and the failure to act exposes the child to an unreasonable risk that intercourse or contact may occur between the child and the other person or facilitates the intercourse or contact that does occur between the child and the other person.