**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**November 17, 2010**

**A. John Voelker**
**Acting Clerk of Court of Appeals**



**Appeal No. 2010AP126-CR** **Cir. Ct. No. 2008CF250**

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

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**MICHAEL D. DEVERA,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Waukesha County: LINDA M. VAN DE WATER, Judge. *Reversed and cause remanded.*

Before Brown, C.J., Anderson and Reilly, JJ.

¶1 PER CURIAM. Michael D. DeVera appeals from a judgment convicting him of causing mental harm to a child and from an order denying his

motion for postconviction relief. Because we agree with DeVera that his sentence is not supported by a sufficient basis in the record or a reasoned explanation of how it was fashioned, we are obliged to reverse. We remand so that he may be resentenced.

¶2 Twenty-one-year-old DeVera and fifteen-year-old Kelsey S. had noncoercive sexual intercourse numerous times in their dating relationship. A number of the encounters involved mutual use of alcohol or marijuana. DeVera was diagnosed as a child with several developmental disorders, including pervasive developmental disorder, an autism-spectrum disorder which manifests, in part, as a child-like presentation and social immaturity. He is slightly built and appears and acts younger than his age. When Kelsey's mother discovered that he was not sixteen as Kelsey had told her, she insisted they break up and eventually called the police.

¶3 DeVera was charged with repeated sexual assault of the same child. He said he loved Kelsey and considered her his girlfriend. Although instructed at his initial appearance to have no contact with Kelsey or her family, he wrote and called her, even from jail, and sent her an "engagement" ring made of aluminum foil. Kelsey's mother had the jail block his calls and wrote a letter to the court stating that Kelsey was afraid of DeVera and wanted no further contact with him.[1]

¶4 The State reduced the charge to causing mental harm to a child. DeVera pled no contest. At sentencing, the defense and the State jointly recommended three years' probation. An independent sentencing report ("the

[1] Kelsey's mother did not permit the PSI writer to interview Kelsey. Neither Kelsey nor her mother appeared at sentencing.

Hargan report") recommended AODA treatment, psychotherapy, medication management and family counseling. Defense counsel also referenced a report submitted to the court by a psychologist who does WIS. STAT. ch. 980 evaluations for the State. He wrote that DeVera "appears and presents physically and emotionally much younger than his stated age" and found that he does not pose a risk for sexual re-offending.

¶5 The Department of Corrections presentence investigation (PSI) recommended six to eight years' imprisonment. It also stated, incorrectly, that DeVera's offense required him to comply with the sex offender registry program and precluded him from participating in the Challenge Incarceration Program and Earned Release.[2] The court sentenced him to nine years: four years' initial confinement and five years' extended supervision.

¶6 DeVera filed a postconviction motion seeking resentencing. He argued that the sentence was not properly explained, was excessive and was based on inaccurate information, specifically, that he was twenty-two and that his contact with Kelsey violated probation and conditions of release on bail. In fact, DeVera was twenty-one at the time of the offense, never had been on probation and, unable to make his $25,000 bail, was in jail the whole time. Alternatively he argued that defense counsel was ineffective for failing to correct the court's reliance on inaccurate information and improper factors.

¶7 The sentencing judge also presided over the postconviction motion hearing. Conceding that it had relied on inaccurate information as to DeVera's

[2] We consider the possibility that the PSI writer had in mind the initial charge of repeated sexual assault of a child.

age and legal status, the court held that any error was harmless. The court said it had focused on the victim's age, not his, and the incorrect reference to his status was fleeting and only to emphasize the unwanted contact with Kelsey and her family. The court also concluded that it had properly identified and considered the necessary sentencing objectives and denied the motion on all grounds raised.

¶8 DeVera appeals, raising the same issues as he did in his postconviction motion. More facts will be supplied as necessary.

¶9 DeVera first contends that he is entitled to a new sentencing hearing because he was sentenced on inaccurate information. A defendant has a due process right to be sentenced upon accurate information. ***State v. Tiepelman***, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1. To establish a denial of this right, the defendant must show both that the disputed information was inaccurate and that the circuit court actually relied on it. *See* ***id.***, ¶26. Once the defendant establishes the court's reliance on inaccurate information, the burden then shifts to the State to establish that the error was harmless. ***Id.***, ¶3. We review de novo whether a defendant has been denied the right to be sentenced based on accurate information. ***Id.***, ¶9.

¶10 DeVera again points to the sentencing court's misstating his age as twenty-two at the time of the offense, rather than twenty-one, and its misconception that his continued contact with Kelsey violated both conditions of probation and conditions of his release on bail. DeVera contends that the record does not support the court's assertion at the postconviction motion hearing that its admitted reliance on these inaccuracies was harmless. We are compelled to agree.

¶11 The defense, the State and the Hargan report all recommended probation. Defense counsel specifically urged that DeVera "certainly deserves a

chance" for probation because he had "no criminal record …. He has never been on probation, never been on any kind of supervision." Defense counsel also advised the court that DeVera had been in custody the entire eight months because he had been unable to post bail.

¶12 After those remarks, the court nonetheless repeatedly observed that DeVera already had proved his unsuitability for probation by flouting conditions of probation and bail:

> If he's locked up and under a *condition of probation* that he not have contact and he violates it, it certainly shows he is not a good candidate for community supervision.…
>
> His continued contact and thought process shows volumes about his character and either inability or unwillingness to conform to *rules of supervision within the community* … I have grave concerns about placing him on probation and putting him in the community.…
>
> Looking at the seriousness of the offense and [the] need to protect the victim and the public as well as his character is demonstrated by numerous things in the [PSI] as well as his behavior *while out on bail*. (Emphasis added.)

¶13 The court's written postconviction motion decision belies the assertion that its reliance was harmless. The court returned to the very comments that it already had conceded were inaccurate to buttress its finding that it had employed the requisite reasoning process in crafting the sentence. Specifically, the court stated that it had addressed the need to protect the public and victim by noting that "if he's locked up and under a condition of probation that he not have contact and he violates it, it certainly shows he is not a good candidate for community supervision." We agree with DeVera that the court's reliance at sentencing on an inaccurate fact cannot be harmless and simultaneously be intrinsic to its reasoning.

¶14 The State may bear some measure of responsibility for the impression that DeVera was on bail. While discussing errors in the PSI, defense counsel expressed concern regarding the PSI's "extensive amount of discussion" and the "tremendous amount of emphasis" it placed on allegations that DeVera "solicited Waukesha Jail inmates" to hire a hit man to murder Kelsey's mother and the investigating detective. Defense counsel explained to the court that a sole federal inmate made that claim and the claim could not be corroborated, despite jail officials putting an undercover decoy hit man in the jail pods. She also advised the court of the parties' active agreement to issue no charges and requested that all references to the unsubstantiated accusation be stricken.

¶15 The prosecutor then stated he had not examined whether the matter could be considered at sentencing:

> [C]ertainly someone's conduct while out on bail or conduct in the jail if they're incarcerated while awaiting sentencing is something the court can take into consideration….
>
> I don't know the answer to the question in terms of the law, Judge, as far as where the line is drawn, as far as what the court can consider at sentencing regarding conduct of someone while out on bail.

¶16 It was after these comments, however, that defense counsel clarified as noted above that DeVera never was out on bail. In addition, the court itself calculated at sentencing that DeVera was owed 249 days of sentence credit because he was in custody "[f]ourteen days in March, then all of April, May, June, July, August, September, October, and twenty-one days in November." The court should have understood he was not out on bail. We cannot overlook the persistent references to his failures on supervision.

¶17 We have concerns, too, about the weight the court gave the "hit man" allegation. At least six references appear in the PSI, which presented the matter as fact, implied that DeVera approached multiple inmates and included no reference to the police department's futile efforts to verify the claim. While a trial court may consider uncharged and unproven offenses at sentencing, a defendant still has a due process right to be sentenced on the basis of accurate information. ***State v. Anderson***, 222 Wis. 2d 403, 410, 588 N.W.2d 75 (Ct. App. 1998). Defense counsel again alerted the court that the allegations came from a single federal inmate and proved impossible to corroborate. Still, the court referred to the claim again, stating that it evinced a "thought process that is … disturbing."

¶18 As to the age inaccuracy, we agree with the State that whether the court said DeVera was twenty-one or twenty-two typically would be de minimis. In this case, however, the error further points up the pervasive disregard for detail. It also shows the court's apparent discounting of DeVera's undisputed emotional, developmental and social immaturity. The court heard repeatedly that he is "childlike." The victim's own mother believed he was sixteen. The court showed it deemed his chronological age significant when it found that "although he does have limitations and [various disorders], [h]e is twenty-two years old."

¶19 The trial court's sentencing remarks make clear that it believed that DeVera made poor adult choices, that he already had failed on community supervision and that the PSI allegations influenced its assessment of his character such that a relatively lengthy sentence was necessary. On the record before us, we simply lack confidence that there is no reasonable possibility that the factual errors on which the court admittedly relied contributed to the sentence imposed. *See* ***State v. Dyess***, 124 Wis. 2d 525, 543, 370 N.W.2d 222 (1985).

¶20 DeVera also challenges his sentence as an erroneous exercise of discretion because the court did not sufficiently explain its reasoning and the sentence is disproportionately harsh. The State asserts that DeVera simply is angry that the court departed from the joint probation recommendation.

¶21 This court takes very seriously the admonitions that we must begin by presuming that the trial court acted reasonably, ***State v. Lechner***, 217 Wis. 2d 392, 418, 576 N.W.2d 912 (1998), and that we are not to substitute our preference for a sentence merely because we would have meted out a different one, *see* ***McCleary v. State***, 49 Wis. 2d 263, 281, 182 N.W.2d 512 (1971). We ordinarily affirm a sentence if the facts are fairly inferable from the record, and the supporting reasons show the consideration of legally relevant factors. ***Id.***

¶22 That DeVera already had failed on probation or while out on bail, as the court stated, is not fairly inferable from the record. The court may have meant to say it was not persuaded that he would be successful *if* placed on probation, but we cannot put words in the court's mouth.

¶23 Similarly, the supporting reasons for the sentence do not show full consideration of legally relevant factors. A sentencing court is to consider probation first. *See* ***State v. Gallion***, 2004 WI 42, ¶44, 270 Wis. 2d 535, 678 N.W.2d 197. Apart from the erroneous references to DeVera's prior failures, there was no discussion of why probation was not a viable option as a disposition, despite—except for the flawed PSI—the unanimous recommendations for it. If there was some other rationale beyond the mistaken belief about past failures, we are left to speculate as to what it might be.

¶24 Perhaps the sentence would have been the same had the court not considered inaccurate information. Perhaps the court meant one thing and said

another. Perhaps it inwardly considered probation. We are not confident, however, that the court's reliance on the inaccuracies was harmless and we cannot speculate about unspoken words or thoughts. We therefore are constrained to reverse and remand for resentencing.

*By the Court*.—Judgment and order reversed and cause remanded.

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