COURT OF APPEALS
DECISION
DATED AND FILED

July 30, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP2224-CR **Cir. Ct. No. 2009CF5795**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ALDO LUIGI VICTORIA-VAZQUEZ,

DEFENDANT-APPELLANT.

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

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

¶1 PER CURIAM. Aldo Luigi Victoria-Vazquez appeals a judgment of conviction and a postconviction order denying his motion for sentence

modification.[1] He claims that the maximum consecutive sentences he received are unduly harsh and that his ineligibility to participate in the earned release program while in prison is a new factor that warrants relief. We disagree and affirm.

BACKGROUND

¶2 The State charged Victoria-Vazquez with two counts of substantial battery, one count of false imprisonment, and one count of strangulation and suffocation. *See* WIS. STAT. §§ 940.19(2), 940.30, 940.235(1) (2009-10).[2] In the criminal complaint, the State alleged that during a two-day period in December 2009, Victoria-Vazquez repeatedly punched and kicked his girlfriend, Julie Liotta, "all over her body," fractured her ribs, ripped her hair from her head, held a knife to her throat, smothered her with a pillow, strangled her, held her head under water until she lost consciousness, and severely abraded her skin by dragging her naked through her apartment. The complaint further alleged that Victoria-Vazquez took the only working telephone from the apartment and abandoned Liotta there while she was unable to move or call for help.

¶3 Victoria-Vazquez demanded a trial. The parties picked a jury but, on the second day of trial proceedings, he pled guilty to all four charges against him. At sentencing in October 2010, Liotta told the trial court that Victoria-Vazquez came to the United States from Mexico exactly one year earlier and that

[1] The Honorable Mary M. Kuhnmuench presided over the sentencing proceedings and entered the judgment of conviction in this matter. We refer to Judge Kuhnmuench as the trial court. The Honorable Mel Flanagan presided over the sentence modification motion and entered the order denying the motion. We refer to Judge Flanagan as the circuit court.

[2] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

she was at first delighted to begin a life with him. Within days of his arrival, however, he hit her. During the first weeks of the couple's domestic partnership, Victoria-Vazquez blackened her eye and injured her ribs, and he continued to abuse her, she said, throughout the weeks that preceded the crimes in this case. Liotta then described in detail the violence underlying the criminal charges, and she told the trial court that the skin grafts she later required as a result were so painful that they "made all the broken ribs and orbital fractures seem like nothing." She remained hospitalized for more than a month.

¶4 The trial court sentenced Victoria-Vazquez to maximum consecutive terms of imprisonment, specifically, eighteen months of initial confinement and two years of extended supervision for each substantial battery conviction, and three years of initial confinement and three years of extended supervision for each of the other two crimes. After imposing the sentences, establishing conditions of extended supervision, and discussing with Victoria-Vazquez some of the collateral consequences of his convictions, the trial court declared that he was eligible to participate in the earned release program while in prison.

¶5 Victoria-Vazquez moved for postconviction relief, alleging that he received unduly harsh sentences. He complained that the trial court improperly penalized him for "waffling" over whether to proceed to trial and failed to consider his lack of a prior criminal record. He also alleged that a new factor, namely, his statutory ineligibility to participate in the earned release program, warrants sentence modification. The circuit court rejected his claims without a hearing, and he appeals.

DISCUSSION

¶6 Victoria-Vazquez alleges that his sentences are unduly harsh. A sentence is unduly harsh only if its length "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. Davis***, 2005 WI App 98, ¶15, 281 Wis. 2d 118, 698 N.W.2d 823 (citation omitted). In determining whether sentences are unduly harsh or excessive, we review them for an erroneous exercise of discretion, and we presume that the sentencing court acted reasonably. ***State v. Scaccio***, 2000 WI App 265, ¶17, 240 Wis. 2d 95, 622 N.W.2d 449. This court will sustain a trial court's exercise of sentencing discretion "if the conclusion reached by the trial court was one a reasonable judge could reach, even if this court or another judge might have reached a different conclusion." ***State v. Odom***, 2006 WI App 145, ¶8, 294 Wis. 2d 844, 720 N.W.2d 695.

¶7 A trial court exercising sentencing discretion must consider the primary sentencing factors of "the gravity of the offense, the character of the defendant, and the need to protect the public." *See* ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. A wide range of information may assist the trial court in understanding these factors. Thus, because a trial court must fully assess a defendant's character, the trial court may consider "'uncharged and unproven offenses.'" ***State v. Frey***, 2012 WI 99, ¶47, 343 Wis. 2d 358, 817 N.W.2d 436 (citation omitted). To evaluate the risk that a defendant poses to the public, the trial court may take into account the defendant's attitude toward the crime and the extent of the defendant's remorse. *See* ***State v. Fuerst***, 181 Wis. 2d 903, 915-16, 512 N.W.2d 243 (Ct. App. 1994). The trial court may also consider numerous other factors concerning the defendant, the offense, and the community.

See ***Ziegler***, 289 Wis. 2d 594, ¶23. We are "reluctant to interfere with the trial court's sentencing discretion given the trial court's advantage in considering the relevant sentencing factors and the defendant's demeanor." ***Odom***, 294 Wis. 2d 844, ¶8. Moreover, when the trial court erroneously exercises sentencing discretion, we will nonetheless "'search the record to determine whether in the exercise of proper discretion the sentence imposed can be sustained.'" ***Id.*** (citation omitted).

¶8 At sentencing here, the trial court discussed the gravity of the offenses. The trial court noted the "multiple layers of injuries" that Victoria-Vazquez inflicted on Liotta and found that his actions "brutalized" and "terrorized" her. The trial court repeatedly reminded Victoria-Vazquez that he showed Liotta no mercy, and the trial court characterized him as afflicted with a "deep-rooted anger problem." The trial court took into account that the victim's two-day ordeal "wasn't an isolated incident" and found that Victoria-Vazquez tormented Liotta "almost from day one."

¶9 The trial court also found that Victoria-Vazquez failed to show remorse for his crimes. The trial court noted, for example, that he did not waive his preliminary examination until that proceeding was well under way, and the victim had arrived at the courthouse from the hospital while in great discomfort. Similarly, the trial court discussed his decision not to spare the victim the emotional trauma of preparing to testify at trial but instead pled guilty only after jury selection. Further, the trial court noted his decision to cast blame on the victim by suggesting that she misled him about her age and about a possible pregnancy. The trial court cautioned Victoria-Vazquez that he must not leave the courtroom believing that anything the victim did justified his actions.

¶10 Victoria-Vazquez now argues that the trial court erroneously exercised its sentencing discretion. We cannot agree.

¶11 Victoria-Vazquez complains that the trial court failed "to properly consider [his] character ... particularly, that he had no prior record." The trial court, not this court, determines the factors that are important at sentencing and the weight to assign those factors. ***State v. Stenzel***, 2004 WI App 181, ¶16, 276 Wis. 2d 224, 688 N.W.2d 20. Here, the trial court placed no emphasis on the fact that Victoria-Vazquez was not convicted of a crime during the weeks he spent in the United States before his arrest in this case, nor did the trial court focus on the State's inability to determine whether he had a criminal history in his native Mexico. The trial court nonetheless assessed his character, giving weight to considerations such as his mercilessness, his uncontrolled rage, and the uncharged incidents of domestic violence that preceded the crimes of conviction. A trial court commits no error by weighing the sentencing factors differently from the way that the defendant would have preferred. *See* ***State v. Prineas***, 2009 WI App 28, ¶34, 316 Wis. 2d 414, 766 N.W.2d 206.

¶12 Victoria-Vazquez next complains that the trial court improperly punished him for "waffling in making decisions on how to proceed." In support of his claim, he points to the trial court's discussion of his delay in waiving his preliminary examination and the trial court's similar discussion of his decision to plead guilty only after the trial was underway. He asserts that "waffling ... is not a crime." Victoria-Vazquez misconstrues the thrust of the trial court's discussion.

¶13 A trial court may properly consider the defendant's refusal to admit guilt as an indication of a lack of remorse. ***Fuerst***, 181 Wis. 2d at 916. The trial court here pointed to the choices that Victoria-Vazquez made throughout the

criminal proceeding, observing that his reluctance to make concessions and accept guilt ensured pain and inconvenience for Liotta. The trial court concluded that the timing of his decisions was inconsistent with the regret and repentance he voiced at sentencing. We cannot and will not second-guess the trial court's assessment of Victoria-Vazquez's sincerity and credibility. *See* ***State v. Kaczynski***, 2002 WI App 276, ¶12, 258 Wis. 2d 653, 654 N.W.2d 300. Rather, we defer to the trial court's great advantage in determining the ways in which a defendant's actions and demeanor illuminate the relevant sentencing factors. *See* ***Odom***, 294 Wis. 2d 844, ¶8. The decision to give little weight to Victoria-Vazquez's expressions of remorse at sentencing in light of his choices earlier in the proceedings rested in the sound discretion of the trial court.

¶14 Ultimately, the trial court found that the brutality of the attacks underlying the charges in this case necessitated maximum consecutive terms of imprisonment. The court explained that "anything but the maximum sentences in this case would unduly diminish the seriousness of these offenses and unduly depreciate your responsibility for what you have done." Because the trial court considered proper sentencing factors and selected the sentences that it deemed warranted in light of the facts and circumstances here, we conclude that it appropriately exercised its sentencing discretion. *See* ***Prineas***, 316 Wis. 2d 414, ¶34 ("our inquiry is whether sentencing court exercised discretion, not whether sentencing court could have exercised discretion differently").

¶15 We turn to the claim that Victoria-Vazquez's statutory ineligibility to participate in the earned release program is a new factor warranting sentence modification. The earned release program is a prison treatment program that, upon successful completion, permits an inmate serving a bifurcated sentence to convert his or her remaining initial confinement time to extended supervision

time.[3] *See* WIS. STAT. § 302.05. The determination of whether a statutorily eligible inmate may participate in the earned release program rests in the sentencing court's discretion. *See* § 973.01(3g). The trial court here declared at the conclusion of the sentencing proceeding that Victoria-Vazquez could participate in the program but, in fact, he is statutorily disqualified by virtue of his convictions for offenses specified in WIS. STAT. ch. 940. *See* § 302.05(3)(a)1. He therefore moved for sentence modification, alleging that his ineligibility for the program is a new factor. The circuit court disagreed.

¶16 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. Harbor***, 2011 WI 28, ¶40, 333 Wis. 2d 53, 797 N.W.2d 828 (citation omitted). A circuit court has discretion to modify a sentence if a defendant shows the existence of a new factor. ***Id.***, ¶33. Whether a fact or set of facts constitutes a new factor, however, is a question of law that we review independently. ***Id.***

¶17 The circuit court rejected the claim that Victoria-Vazquez presented a new factor, explaining: "there is no indication that the [sentencing] court relied on its belief that the defendant was eligible for [the earned release program] when fashioning [the] sentences." The circuit court added that Victoria-Vazquez's statutory ineligibility for the earned release program does not "frustrate[] the purpose[s] of the sentence, which [are] punishment, deterrence and community

[3] Effective August 3, 2011, the legislature renamed the earned release program, and it is now known as the Wisconsin substance abuse program. *See* 2011 Wis. Act 38, §19; WIS. STAT. § 991.11 (2011-12). We use the name in effect at the time of sentencing.

protection." According to Victoria-Vazquez, the circuit court erred because he is not required to show that an alleged new factor frustrates the purpose of the original sentences in order to obtain relief. *See* ***Harbor***, ¶48 ("[F]rustration of the purpose of the original sentence is not an independent requirement when determining whether a fact or set of facts alleged by a defendant constitutes a new factor.").

¶18 We are not persuaded that Victoria-Vazquez identifies any error in the circuit court's order. While ***Harbor*** holds that a set of facts need not frustrate the purpose of a sentence to qualify as a new factor, the supreme court has made clear that a circuit court "determining whether to exercise its discretion to modify a sentence on the basis of a new factor ... may, but is not required to, consider whether the new factor frustrates the purpose of the original sentence." *See* ***State v. Ninham***, 2011 WI 33, ¶89, 333 Wis. 2d 335, 797 N.W.2d 451. Thus, contrary to Victoria-Vazquez's apparent belief, the circuit court did not err merely by considering whether his ineligibility for the earned release program frustrates the purpose of the sentences imposed.[4]

¶19 Regardless, we review *de novo* whether Victoria-Vazquez has demonstrated that a new factor exists. *See* ***Harbor***, 333 Wis. 2d 53, ¶33. Upon

[4] We remind Victoria-Vazquez that, in his postconviction motion, he argued that his ineligibility for the earned release program "constitutes a new factor justifying sentence modification for the following reasons.... The court's intention in sentencing is frustrated because it leaves no possibility for the defendant to shorten his initial incarceration from the maximum sentence." Unsurprisingly, the circuit court responded to this argument. Were we to conclude that the circuit court erred in formulating its response—and we do not reach such a conclusion—we would also conclude that any error was invited. Victoria-Vazquez cannot ask the circuit court to determine whether an alleged new factor frustrated the purpose of the sentences and then complain because the circuit court answered the question. *See* ***Shawn B.N. v. State***, 173 Wis. 2d 343, 372, 497 N.W.2d 141 (Ct. App. 1992) ("appellant cannot complain of error induced by appellant").

our independent review, we are satisfied that Victoria-Vazquez has not demonstrated the existence of a new factor, and the circuit court therefore properly refused to modify his sentences. *See* ***Harbor***, 333 Wis. 2d 53, ¶36 (requirement that defendant show new factor prevents sentence modification based solely on second thoughts).

¶20 At sentencing, the trial court identified the factors it considered in determining appropriate penalties for Victoria-Vazquez and it decided, without ever mentioning the earned release program, that maximum consecutive sentences were the "only fair, just and appropriate" dispositions. The court next discussed: the conditions of his extended supervision; the ramifications of his convictions, including the effect on his voting rights and on his right to possess a firearm; his risk to spend additional time in confinement if he violated prison rules; and his pretrial incarceration credit. The trial court went on to determine that he was ineligible to participate in the challenge incarceration program, *see* WIS. STAT. § 302.045, and that he would not serve a risk reduction sentence, *see* WIS. STAT. § 302.042. Finally, the court said "I don't – well, I will make you eligible for the earned release program, but ultimately it's a determination by the department of corrections as to whether or not they will find you suitable for that program."

¶21 The totality of the trial court's remarks demonstrates clearly that the decision to allow Victoria-Vazquez to participate in the earned release program was not "'highly relevant to the imposition of the sentence.'" *Cf.* ***Harbor***, 333 Wis. 2d 53, ¶40 (citation omitted). The trial court did not mention the earned release program when explaining the sentencing rationale, and nothing in the trial court's discussion suggests that eligibility for the program was a factor, let alone a highly relevant factor, in fashioning Victoria-Vazquez's sentences. Because the trial court's later determination of Victoria-Vazquez's eligibility for the earned

release program did not influence the length or structure of the sentences that the trial court had already pronounced, Victoria-Vazquez has not shown that his statutory ineligibility to participate in the program is a new factor.[5] We affirm.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2011-12).

[5] In his reply brief, Victoria-Vazquez seeks to further his claim that a new factor exists by contending that, if the sentencing court viewed eligibility for the earned release program as "an afterthought," then the trial court insufficiently considered its sentencing decision and thus erroneously exercised sentencing discretion. This argument does not support his position. The test to determine whether a new factor exists does not include an assessment of whether the trial court erroneously exercised its sentencing discretion. *See* ***State v. Harbor***, 2011 WI 28, ¶40, 333 Wis. 2d 53, 797 N.W.2d 828.