COURT OF APPEALS
DECISION
DATED AND FILED

June 2, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal Nos. 2014AP2222-CR
2014AP2223-CR

Cir. Ct. Nos. 2013CF2989
2013CM1706

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MONTRAEL LAMAR CLARK,

DEFENDANT-APPELLANT.

APPEALS from judgments and an order of the circuit court for Milwaukee County: LINDSEY CANONIE GRADY, Judge. *Affirmed*.

Before Curley, P.J., Kessler, J., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. In these consolidated appeals, Montrael Lamar Clark appeals from two judgments of conviction and from an order denying his postconviction motion. Clark seeks resentencing on grounds that the trial court

erroneously exercised its sentencing discretion "when it failed to articulate a reason for consecutive sentences, refused to consider information about similarly situated defendants, and gave insufficient weight to [Clark's] remorse, repentance and cooperativeness." Clark also argues that the trial court relied on inaccurate information at sentencing. We reject Clark's arguments and affirm the judgments and order.

BACKGROUND

¶2 In April 2013, while released on bail on an unrelated misdemeanor case, Clark twice battered a woman with whom he had a romantic relationship. According to the criminal complaint, he hit the woman multiple times at a hotel in Milwaukee and then, at a private residence, he hit her in the face with such force that it damaged her dental work. Clark was charged with two counts of misdemeanor battery, domestic abuse, as a repeater. Clark was also charged with two counts of misdemeanor bail jumping as a repeater because he was alleged to have battered the woman while on bail for the prior case.

¶3 While Clark was awaiting trial on those four misdemeanors, he called the victim from jail between fifty and one hundred times over the course of several months; those calls were recorded by the jail. In June 2013, the State provided trial counsel and the trial court with information about a series of calls that had occurred on April 27, 2013. The State said that it would be issuing new charges based on those calls. The trial court admonished Clark not to contact the victim again. Nonetheless, later that same day, Clark again called the victim from jail and told her that she should say she could not recall what she told the police about being battered by Clark.

¶4 Based on calls Clark placed to the victim from April 27, 2013, through June 27, 2013, the State charged Clark with eight felonies, including felony intimidation of a victim, felony intimidation of a witness, and solicitation of perjury, all as acts of domestic abuse and with the repeater enhancer. The criminal complaint quoted extensively from the recorded phone calls. For instance, it said that during the calls, Clark berated the victim for calling the police, told her that he would kill her son, and said that he did not "care if I beat yo ass a thousand time[s]." Clark told the victim: "[Y]ou gotta lie on the stand" and "There ain't going to be no next time, once I kill you and your son."

¶5 Clark entered a plea agreement with the State pursuant to which he pled guilty to four charges in the two cases: two counts of misdemeanor battery, domestic abuse, as a repeater; one count of felony intimidation of a witness, domestic abuse, without the repeater enhancer; and one count of solicitation of perjury, domestic abuse, without the repeater enhancer. *See* WIS. STAT. §§ 940.19(1), 968.075(1)(a), 939.62(1)(a), 940.43(3) & 946.31(1)(a) (2013-14).[1] The remaining charges were dismissed and read in for sentencing purposes, and the State also agreed not to file two additional charges for calls placed to the victim from the jail on August 13, 2013. Both sides were free to argue for an appropriate sentence.

¶6 When the parties appeared for sentencing, the State recommended a global sentence of twenty years, which was the maximum sentence that could be imposed. The sentencing hearing was continued due to court congestion, and

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

before the continued sentencing hearing, both Clark and the State filed detailed written sentencing recommendations. The State continued to recommend a global sentence of twenty years, composed of ten years of initial confinement and ten years of extended supervision.

¶7 Clark's written memorandum recommended a global sentence of eighteen months of initial confinement and three years of extended supervision. It asserted that Clark had recently come to terms with his anger issues and that if Clark was to receive counseling for his issues and discontinue his use of drugs and alcohol, the community would be adequately protected. The memorandum also included a chart listing the sentences imposed in twenty-five other cases where the crime was intimidation of a witness or victim.[2] The memorandum asserted that based on the sentences imposed in those other cases, "the prosecution's recommendation of ten years of initial confinement is substantially more than courts have given in similar circumstances."

¶8 At the continued sentencing hearing, the trial court heard extensive argument from the parties. During that argument, trial counsel specifically contested the State's allegation that Clark may have been involved in human trafficking. Trial counsel also argued that in other witness and victim intimidation cases, the defendants who accepted responsibility generally received concurrent time, which trial counsel said would be appropriate in this case.

¶9 In its sentencing remarks, the trial court acknowledged that trial counsel had included a chart listing the sentences imposed in other cases involving

[2] The chart listed each defendant's name, case number, criminal charges, plea, presiding trial court judge, and sentence imposed.

witness or victim intimidation, but it said that it did not find the information to be "relevant to this Court from the standpoint of each case must be judged and must be determined by its own factors and by the facts and circumstances surrounding the particular crime."

¶10 The trial court imposed four consecutive sentences. It sentenced Clark to twelve months for both of the misdemeanors, which reflected the enhanced repeater penalty applicable to those crimes. For the felony intimidation charge, the trial court imposed three years of initial confinement and five years of extended supervision. For the solicitation of perjury charge, the trial court imposed two years of initial confinement and three years of extended supervision. Thus, in total, Clark was sentenced to seven years of initial confinement and eight years of extended supervision. As it imposed Clark's sentences, the trial court noted that "the record should clearly reflect that the Court did look at the read-in charges when [it] analyzed the gravity and nature of the offense."

¶11 Represented by postconviction counsel, Clark filed a postconviction motion seeking sentence modification.[3] Clark argued that the trial court had erroneously exercised its sentencing discretion and had relied on inaccurate information at sentencing. The trial court denied the motion in a written order. This appeal follows.

[3] Although the postconviction motion sought sentence modification, Clark now seeks resentencing.

DISCUSSION

¶12 Clark seeks resentencing on grounds that the trial court erroneously exercised its sentencing discretion when it "failed to articulate a reason for consecutive sentences, refused to consider information about similarly situated defendants, and gave insufficient weight to his remorse, repentance and cooperativeness." Clark also argues that the trial court relied on inaccurate information at sentencing. We consider each argument in turn.

I. Exercise of sentencing discretion.

¶13 At sentencing, the trial court must consider the principal objectives of sentencing, including the protection of the community, the punishment and rehabilitation of the defendant, and deterrence to others, ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76, and it must determine which objective or objectives are of greatest importance, ***State v. Gallion***, 2004 WI 42, ¶41, 270 Wis. 2d 535, 678 N.W.2d 197. In seeking to fulfill the sentencing objectives, the trial court should consider a variety of factors, including the gravity of the offense, the character of the offender, and the protection of the public, and it may consider several subfactors. ***State v. Odom***, 2006 WI App 145, ¶7, 294 Wis. 2d 844, 720 N.W.2d 695. The weight to be given to each factor is committed to the trial court's discretion. *See* ***Gallion***, 270 Wis. 2d 535, ¶41.

¶14 Clark does not assert that the trial court generally failed to follow the dictates of ***Gallion***. Instead, he argues that the trial court erred in three specific ways. First, he argues that the trial court "erroneously exercised its discretion when it failed to articulate a reason for consecutive sentences." (Bolding omitted.) He explains:

> [C]oncurrent sentences for the criminal behavior [Clark] plead[ed] guilty to are consistent with the sentencing factors outlined in ***Gallion*** and addressed by the Court. The sentencing court's failure to indicate precisely why consecutive terms totaling seven years [of] initial confinement and eight years [of] extended supervision were necessary to protect the public, address the gravity of the offense, and ensure Mr. Clark gets the services related to his rehabilitative needs was an erroneous exercise of discretion, particularly in light of Mr. Clark's other claims.

(Bolding added).

¶15 We are not convinced that the trial court erroneously exercised its discretion. In ***State v. Hall***, 2002 WI App 108, 255 Wis. 2d 662, 648 N.W.2d 41—the case Clark cites in his brief—we recognized that "[i]n sentencing a defendant to consecutive sentences, the trial court must provide sufficient justification for such sentences and apply the same factors concerning the length of a sentence to its determination of whether sentences should be served concurrently or consecutively" and that "'[t]he sentence imposed should represent the minimum amount of custody consistent with those factors.'" *See* ***id.***, ¶8 (citation omitted; second set of bracketing in original). In a subsequent case, we discussed ***Halls***'s holding:

> ***Hall*** did not … establish a new procedural requirement at sentencing that the trial court state separately why it chose a consecutive rather than a concurrent sentence. Rather, ***Hall*** emphasized the well-settled right of defendants to have the relevant and material factors influencing their sentences explained on the record.
>
> A trial court properly exercises its discretion in imposing consecutive or concurrent sentences by considering the same factors as it applies in determining sentence length.

See ***State v. Berggren***, 2009 WI App 82, ¶¶45-46, 320 Wis. 2d 209, 769 N.W.2d 110.

¶16 Here, there is no question that the trial court considered the gravity of the offenses, Clark's character, and the protection of the public. *See* ***Odom***, 294 Wis. 2d 844, ¶7. The trial court offered extensive analysis, and even considered potential lethality factors in fashioning an appropriate sentence for Clark. The trial court expressed special concern that Clark was willing to continue to threaten the victim even after he was told that his calls from the jail were being recorded. The trial court found that "[j]ail time is absolutely necessary to protect the community [and] to ensure that you get the right programs." The trial court also indicated that it had considered the read-in charges when fashioning an appropriate sentence. The trial court adequately explained the sentences it imposed; it did not need to "state separately why it chose a consecutive rather than a concurrent sentence." *See* ***Berggren***, 320 Wis. 2d 209, ¶45.

¶17 Next, Clark argues that the trial court erroneously exercised its discretion because it "refused to consider pertinent information provided by the defense about similarly situated defendants." At the outset, we disagree with Clark's characterization of the trial court's treatment of the defense's chart listing sentences imposed in other intimidation cases. The trial court reviewed the chart and also heard trial counsel's arguments concerning sentences imposed in other cases. What the trial court ultimately did was conclude that it would not be guided by the sentences imposed in those other cases because it determined that "each case must be judged and must be determined by its own factors and by the facts and circumstances surrounding the particular crime."

¶18 The trial court's decision to focus on the individual facts of this case was not erroneous. As the State points, out, this court addressed a similar claim from a defendant in ***State v. Sherman***, 2008 WI App 57, 310 Wis. 2d 248, 750 N.W.2d 500, where the defendant argued that the trial court erred by not

considering a defense memorandum listing sentences imposed in other similar cases. *See* ***id.***, ¶16. We explained:

> In ***Gallion***, our supreme court suggested many facts that courts may consider during sentencing, including information about sentences in other cases. Here … the [trial] court clearly considered Sherman's sentencing memorandum. The court noted that other sexual assault cases "rise and fall on their own facts, and I know none of those facts so I'm not dealing with any of those cases here today." The court also noted that it was familiar with a case not included in Sherman's memorandum, which resulted in a sentence providing twenty years' initial confinement. The court based its sentence on the facts of Sherman's case: "[Y]our sentence, Mr. Sherman, rises and falls on the facts here and your character and your behavior. No one else's."
>
> Individualized sentencing "has long been a cornerstone to Wisconsin's criminal justice jurisprudence." No two convicted felons stand before the sentencing court on identical footing ... and no two cases will present identical factors." Here, the court considered all the information before it, including Sherman's sentencing memorandum. We reject any implication that the court was required to give his memorandum more weight.

See ***Sherman***, 310 Wis. 2d 248, ¶¶17-18 (citations omitted; second ellipsis in original). The reasoning of ***Sherman*** applies in Clark's case as well. The trial court was not required to rely on the sentences imposed in other cases when determining an appropriate sentence for Clark. The trial court did not erroneously exercise its discretion by deciding to focus on the individual facts of Clark's case, and to not give weight to the length of sentences imposed in other cases. *See* ***id.*** Further, the fact that the trial court considered lethality factors that are frequently considered in domestic violence cases does not alter our decision.

¶19 Clark's final argument with respect to the trial court's exercise of sentencing discretion is that the trial court failed to give "sufficient weight to [Clark's] remorse, repentance and cooperativeness," which are factors that can be

considered at sentencing.[4] *See* ***State v. Prineas***, 2009 WI App 28, ¶30, 316 Wis. 2d 414, 766 N.W.2d 206 ("[P]roper sentencing considerations" include, among other factors, "the defendant's remorse, repentance and cooperativeness."). Clark notes that his trial counsel told the trial court about Clark's "genuine insights about the effect of childhood trauma on his mental health and subsequent relationships, insights that were initiated by feelings of remorse and repentance." He asserts:

> [T]he record supports the inference that he fully cooperated with his attorney, overcoming obstacles like pride and an ingrained reluctance to talk about himself, to explore unresolved issues from his past. This level of cooperation signals, in turn, a greater cooperation with the criminal justice system and the community as a whole. The sentencing court did not properly weigh this fundamental change in assessing the danger he presents to the public or his amenability to rehabilitation.

¶20 We are not persuaded that the trial court erroneously exercised its discretion. The record reflects that the trial court heard the parties' arguments on those factors and that it specifically gave Clark credit for taking responsibility and not taking the case to trial. The trial court also expressed concern, however, that Clark could not be stopped from contacting the victim until his communication privileges were taken away. It discussed the fact that Clark would need batterer's intervention and other counseling to protect the community. It is within the trial court's discretion to determine how much weight to give to each sentencing factor, *see* ***Gallion***, 270 Wis. 2d 535, ¶41, and the fact that the trial court placed greater

[4] For purposes of this argument, we will assume that the trial court accepted as genuine Clark's expressions of regret and remorse. However, we note that the trial court said at the beginning of its sentencing remarks that while "there are parts of things that [Clark] said that I think are truthful and heartfelt … [t]here are parts of things that I guess I take some issue with."

emphasis on Clark's need for rehabilitation, deterrence, and punishment does not mean that the trial court erroneously exercised its discretion.

II. Alleged reliance on inaccurate information.

¶21 Clark asserts that the trial court sentenced him based on inaccurate information and that his right to due process was therefore violated. Specifically, Clark takes issue with two allegations in the State's written sentencing memorandum. First, the memorandum said that Clark's "record of convictions makes clear his chosen profession as a drug dealer over the years," thereby asserting that Clark was a drug dealer, rather than simply a drug user. Second, the memorandum alleged that Clark was engaged in human trafficking as it related to the victim and another woman in an unrelated case. In her sentencing argument, trial counsel contested the human trafficking allegations and referred to Clark as a drug user, rather than as a drug dealer.

¶22 We begin our analysis with the applicable legal standards. "A defendant has a constitutionally protected 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. "Whether a defendant has been denied this due process right is a constitutional issue that an appellate court reviews *de novo*." ***Id.*** (italics added). ***Tiepelman*** explained:

> "A defendant who requests resentencing due to the circuit court's use of inaccurate information at the sentencing hearing 'must show both that the information was inaccurate and that the court actually relied on the inaccurate information in the sentencing.'" Once actual reliance on inaccurate information is shown, the burden then shifts to the state to prove the error was harmless.

Id., ¶26 (citations omitted). "'An error is harmless if there is no reasonable probability that it contributed to the outcome.'" ***State v. Payette***, 2008 WI App 106, ¶46, 313 Wis. 2d 39, 756 N.W.2d 423 (citation omitted); *see also* ***State v. Dyess***, 124 Wis. 2d 525, 543, 370 N.W.2d 222 (1985).

¶23 Applying those standards here, we conclude that Clark has not shown he is entitled to relief. Specifically, as the State points out, even if we were to assume that the State's information concerning drug dealing and human trafficking was inaccurate, "Clark has not shown that the court actually relied upon it."[5] In his appellate brief, the only argument Clark presents concerning the trial court's actual reliance on the alleged misinformation is that after hearing arguments from the State and trial counsel—including trial counsel's concerns about the State's memorandum—the trial court nonetheless "stated that it was relying on all the submitted written materials." We have reviewed the record citation that Clark offers in support of his argument. The trial court's comments about documents it reviewed were offered as it invited Clark's grandmother to take the stand to offer her comments on sentencing. The trial court said: "As we move her in here, [the] record should reflect there were two letters from [the victim]…. I did review those letters in addition to the sentencing memorandum by [trial counsel] that's dated October 31st, [and] a sentencing memorandum from [the State]." The trial court did not make any findings with respect to Clark's

[5] Clark chose not to file a reply brief, so he did not respond to the State's arguments on this or other issues.

alleged drug dealing or human trafficking.[6] Indeed, the trial court did not even reference those terms when it pronounced sentence. Clark has not adequately asserted, much less shown, that the trial court relied on the allegedly inaccurate information when it sentenced Clark. *See* ***Tiepelman***, 291 Wis. 2d 179, ¶26.

By the Court.—Judgments and order affirmed.

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

[6] The trial court did say that Clark had "a long-standing record related to drug use," but it did not discuss whether it believed Clark had dealt drugs.

We also note that the trial court briefly addressed Clark's postconviction argument concerning drug dealing and human trafficking in its written order denying Clark's postconviction motion. In doing so, the trial court said that the State's memorandum correctly listed Clark's prior crimes involving drug use, rather than drug dealing, and that the trial court had "neither considered nor relied on the prosecutor's erroneous statement with regard to drug dealing in fashioning its sentence." With respect to human trafficking, the trial court said that it was entitled to consider allegations made in the criminal complaint in Clark's other misdemeanor case, although the trial court did not state whether it had actually relied on that information in fashioning Clark's sentence. On appeal, Clark does not discuss the trial court's postconviction order or present any arguments based on that order. We decline to develop arguments for him. *See* ***State v. Gulrud***, 140 Wis. 2d 721, 730, 412 N.W.2d 139 (Ct. App. 1987).