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

October 19,1999

**Marilyn L. Graves**
**Clerk, Court of Appeals**
**of Wisconsin**



**No. 99-1412-CR**

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

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**RODNEY A. KING,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Forest County: JAMES P. JANSEN, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Rodney A. King appeals a judgment convicting him of nine counts of criminal activity and an order denying postconviction relief. King claims the circuit court committed two errors on appeal: (1) the trial court erroneously exercised its discretion when it admitted two photographs; and (2) the

court's characterizations of him during his sentencing constituted reliance on inaccurate information. We conclude that the trial court neither erroneously exercised its discretion in admitting the photographs nor relied on inaccurate information in sentencing King. Therefore, the judgment and order are affirmed.

## FACTS

¶2 King's convictions are based mainly on two criminal episodes: one involving a stranger, Ruth LaBrosse, that took place on November 14, 1997; and the other involving a woman with whom he resided, Shelley Vladik, on December 13, 1997. The criminal activity included the murder of LaBrosse; substantial battery to Vladik; and first-degree sexual assault while using a dangerous weapon, kidnapping and armed robbery of both victims. King was also convicted of operating a motor vehicle without the owner's consent, a crime that also occurred on December 13.

¶3 On November 14, King was residing at Vladik's residence in Wabeno. King would later admit that on that evening, he left the residence with a knife intending to rob someone. Later that evening, King observed LaBrosse walking out of a bar. He followed her and attacked her from behind putting the knife to her throat and demanding money. LaBrosse refused, and King responded by hitting her five or six times. He then put the knife back to her throat and made her walk to the woods where he removed her clothing and raped her. King then repeatedly hit her with his fists and a stick, and strangled her until she stopped breathing. King then took money from LaBrosse's pants pocket and covered her body with pine needles and snow. He hid the knife after leaving the scene and returned home.

¶4 On December 13, King was still residing at Vladik's residence. Earlier that day, Vladik's boyfriend, Erik Peterson, had given King some money to purchase cigarettes. King later told Vladik that he was beaten up and had the money stolen from him. Vladik told King that his story was hard to believe because he did not look beaten up.

¶5 King decided to "get even" with Vladik and rob her when she returned home later that evening. When she drove into her driveway, King ran up to her and, at gun point, ordered her back in the car. King followed her into the car and, now putting a knife to her throat, ordered her to remove her jacket, shirt and bra. Valdik managed to escape out of the passenger's door, but King gave chase and caught her. He grabbed her by the ankles and dragged her down the road on her back. He eventually got Vladik standing and, again putting the knife to her throat, forced her to walk to a secluded area. There he raped her and threatened to kill her; however, he let her run away after she promised not to tell anyone about the incident. King then got rid of the knife, found a vehicle with keys in it and drove to Green Bay where the authorities apprehended him several days later.

¶6 King admitted committing all charged offenses, but pled not guilty by reason of mental disease or defect pursuant to §§ 971.06(1)(d) and 971.15(1), STATS. At a jury trial held only on the sanity issue, the trial court admitted two photographs of LaBrosse. One photograph depicted her when she was alive and the other depicted her body after police discovered her body. King objected to both photographs on the grounds that they were not relevant and were overly prejudicial. After the two-day trial, the jury found that King was not suffering from mental disease or defect at the time of the offenses.

¶7 At sentencing, the prosecutor argued, among other things, that King was a serial killer. While pronouncing sentence, the court referred to King as a "sexual predator" and a "sexual pedophile." King claimed at his postconviction motion, as he does here, that there is no evidence to support any of these characterizations and therefore the trial court relied on inaccurate information. The trial court denied King's postconviction motion, and this appeal followed.

ANALYSIS

¶8 King first argues that the trial court erred by admitting the two photographs at trial. We disagree. The decision to admit photographs rests within the trial court's sound discretion. *See* ***Sage v. State***, 87 Wis.2d 783, 788, 275 N.W.2d 705, 708 (1979). The trial court's decision must stand "unless it is wholly unreasonable or the only purpose of the photographs is to inflame and prejudice the jury." ***State v. Lindvig***, 205 Wis.2d 100, 108, 555 N.W.2d 197, 200 (Ct. App. 1996) (quoted source omitted).

¶9 Photographs should be excluded if they are not substantially necessary to show relevant facts and tend to create sympathy or indignation or direct the jury's attention to improper considerations. *See* ***Sage***, 87 Wis.2d at 788, 275 N.W.2d at 708. Further, § 904.03, STATS., permits the exclusion of relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice.

¶10 Nevertheless, photographs, like any other item of evidence, are admissible if they are relevant. *See* ***id***. at 788, 275 N.W.2d at 708. The trial judge is in a better position than this court to determine whether, in light of the evidence, the photographs will assist the jury. *See* ***Hayzes v. State***, 64 Wis.2d 189, 200, 218 N.W.2d 717, 723 (1974). As our supreme court has explained, "[w]hile

reasonable persons looking at the photographs as a part of a record may have differing opinions in regard to whether they were cumulative, inflammatory, or prejudicial, the judgment is essentially one to be exercised by the trial judge." ***Sage***, 87 Wis.2d at 788-89, 275 N.W.2d 708 (quoting ***Hayzes***, 64 Wis.2d at 200, 218 N.W. 2d at 723).

¶11 The sole purpose of King's jury trial was to determine whether he was criminally responsible for his conduct. He would not be criminally responsible "if at the time of [his] conduct as a result of mental disease or defect [he] lacked substantial capacity either to appreciate the wrongfulness of his … conduct or conform his … conduct to the requirements of law." Section 971.15(1), STATS. King conceded that he appreciated the wrongfulness of his conduct, but claimed that he did not have the ability to conform his conduct to the law. He had the burden of proving his claim to a "reasonable certainty by the greater weight of the credible evidence." Section 971.15(3), STATS.

¶12 The State sought to admit the two photographs to rebut King's claimed inability to conform his conduct to the law. The State argued that both photographs were relevant to show that King was calculated and in control of his actions. The State claimed that the first photograph was relevant because it supported its position that King acted in a calculated manner by carefully selecting his victim for her slight stature making it easier to successfully overpower her. The second photograph, according to the State, was relevant because it supported its theory that King carefully covered the victim's wounds, further evidence that he was in control of his actions.

¶13 King claims that both photographs were admitted merely to show a "juxtaposition" that "could have only outraged the jurors." He argues that the

photograph showing LaBrosse's slight stature was erroneously admitted for two reasons: first, there was no point of reference that would allow the jury to discover LaBrosse's size or stature and, second, the photograph was unnecessary because King admitted that he chose his victim based on her slight build.[1]

¶14 We are not persuaded by King's arguments. First, the photograph depicts LaBrosse from head to toe seated outdoors. It was taken at a relatively close distance and thus it clearly illustrates her size and stature. The photograph is therefore relevant because it tends to support the State's theory that King consciously chose a victim who would be easier to overpower.

¶15 Further, we reject King's argument that the photograph was unnecessary because he had already admitted that he chose his victim because of her size. The State is not required to accept an "admission of [its] adversary, but may insist on proving the fact.'" ***State v. McAllister***, 153 Wis.2d 523, 527, 451 N.W.2d 764, 766 (Ct. App. 1989) (quoting source omitted). "A syllogism is not a story, and a naked proposition in a courtroom may be no match for the robust evidence that would be used to prove it." ***Old Chief v. United States***, 117 S.Ct. 644, 654 (1997). King was attempting to prove that he could not control his conduct. The State was entitled to present evidence to show that King acted in a calculated manner in selecting his victim.

¶16 King also argues that the trial court erroneously admitted the second photograph of LaBrosse as she was discovered by police, partially-naked with clothes wrapped loosely around her body. King again asserts that the photograph

[1] Defense counsel objected to the first photograph at sidebar, although the discussion between counsel and the trial court was off the record. The trial court instructed the jury that the evidence was being admitted "solely to show, basically, her size."

was unnecessary and that the trial court failed to adequately explain its relevancy. The trial court determined that the photograph was relevant to "explain things" and that it did not consider the photograph overly prejudicial or inflammatory.

¶17 Even where the trial court fails to sufficiently set forth its reasoning in exercising its discretion to admit evidence, we will independently review the record to determine whether it provides a basis for the court's exercise of discretion. *See* ***McAllister***, 153 Wis.2d at 530, 451 N.W.2d at 767.

¶18 The State's reason for offering the photograph was, again, to rebut King's argument that he lacked the ability to conform his conduct to the requirements of law. The prosecutor offered the photograph during the direct examination of Captain Jerry Gibson of the Forest County Sheriff's Department. Gibson testified as to King's motive and scheme, which directly alluded to his mental condition at the time of the murder—the sole issue at trial. The appearance of LaBrosse's body, depicted in the photograph, directly formed the basis for Gibson's testimony. Therefore, the photograph was relevant to Gibson's testimony.

¶19 King also contends that the photograph was highly prejudicial and inflammatory. We disagree. The focus of the photograph is not on any graphic or grotesque wounds. It reveals, from the backside, LaBrosse lying in a semi-fetal position. We conclude that the trial court did not abuse its discretion and that the photograph's probative value was not substantially outweighed by the danger of unfair prejudice.

¶20 Next, King points to the trial court's characterizations of him at sentencing and claims that these characterizations constituted reliance on inaccurate information in setting his parole eligibility date for 2080. We disagree.

¶21 We review parole eligibility determinations under the same standard as other sentencing decisions. *See* ***State v. Borrell***, 167 Wis.2d 749, 772, 482 N.W.2d 883, 891 (1992). A defendant has the due process right to be sentenced on the basis of true and correct information. *See* ***id***. King has the burden of proving by clear and convincing evidence that specific information was inaccurate and that the trial court actually relied on the inaccurate information at sentencing. *See* ***State v. Johnson***, 158 Wis.2d 458, 468, 463 N.W.2d 352, 357 (Ct. App. 1990).

¶22 The sentencing court protects the defendant's due process right to be sentenced on the basis of true and correct information when it appropriately exercises its discretion. *See* ***State v. Perez***, 170 Wis.2d 130, 142, 487 N.W.2d 630, 634 (Ct. App. 1992). There is a strong public policy against interfering with the court's sentencing discretion. *See* ***id***. In addition, there is an equally strong presumption that the sentencing court acted reasonably. *See* ***id***. Therefore, we will not overturn the circuit court's discretionary decision if it examined the relevant facts, applied a proper standard of law and reached a conclusion that a reasonable judge could reach. *See* ***id***.

¶23 A sentencing decision should be based primarily on the following factors: the gravity of the offense, the character of the offender and the need for protection of the public. *See* ***State v. Setagord***, 211 Wis.2d 397, 416, 565 N.W.2d 506, 514 (1997). The circuit court explained that each of the three main factors a court must consider in sentencing indicated that King should never be released from incarceration. The court found that King was and would continue to be a danger to society and that he must be punished for his abhorrent criminal acts. The court also considered King's character and concluded that he was unlikely to be rehabilitated. In its summation of these three sentencing factors, the court

stated that on a scale of one to ten, the need to sentence King to a long sentence reached ten. Because it applied the correct legal standards to King's criminal conduct, we conclude that the court properly exercised its discretion.

¶24 Further, we conclude that King has failed to demonstrate that the court relied on inaccurate information. King focuses on several of the court's characterizations made while pronouncing sentence. He claims that these characterizations indicate the court relied on erroneous information. The court referred to King as a "sexual predator" and stated its opinion that King would reoffend if released. King also argues that the court erred by characterizing him as an "incurable serial killer."

¶25 We reject these arguments. First, there is no evidence in the record that the court ever referred to King as a "serial killer," although the prosecutor did. Second, we reject King's arguments because the context of the court's comments demonstrates that its language was descriptive and not intended to constitute terms of art. The court based its opinions on King's admitted criminal acts—he had brutally raped both of his victims before killing one and threatening to kill the other. The prosecutor also referred the court to the presentence report that detailed other instances of sexual assault and abuse, which King did not dispute. King's conduct, character and the need to protect the public formed the basis of the court's sentence, not the terms the court chose to describe King's character or conduct.

¶26 King argues that the court's use of the term "sexual predator" was unreasonable because "Chapter 980, [STATS.], provides a whole host of due process procedural protections before one can be classified as a 'serious child sex offender' or 'sexually violent person.'" However, King was not being subjected to

a ch. 980 proceeding, and the court made no assertion that it intended its descriptions to constitute any such finding under that chapter.

¶27 King also seizes on an instance when the court referred to him as a "sexual pedophile." He claims that the court's reference to this term indicates reliance on inaccurate information. Both victims were adults, and there was no evidence or any information before the court that constituted a history of offenses against children. We are satisfied that the court simply misspoke.[2] The context of the statement supports our reading: the court stated, "[t]his is a sexual predator, and at least under the knowledge that we have, I know of no cure for sexual predators, for people who are sexual pedophiles." This was the sole reference to the term "sexual pedophile." No one had suggested that King was a pedophile, and no children were victims of his conduct. King has therefore failed to prove by clear and convincing evidence that the court's description of him indicated reliance on any inaccurate information.[3]

[2] King also suggests that the court reaffirmed its characterizations when it announced its postconviction order. We do not agree. The court simply stated that it stood by the sentence it pronounced based on the sentencing "factors" it considered.

[3] Even if any of the court's descriptions of King constituted reliance on inaccurate information, the record amply shows that that error was harmless beyond a reasonable doubt. *See* ***State v. Littrup***, 164 Wis.2d 120, 127, 473 N.W.2d 164, 166 (Ct. App. 1991).

*By the Court.*—Judgment and order affirmed.

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