

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 7, 2019

Sheila T. Reiff
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal Nos. 2017AP2254-CR
2017AP2255-CR**

**Cir. Ct. Nos. 2015CF5091
2016CF2072**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LUE XIONG,

DEFENDANT-APPELLANT.

APPEALS from judgments and an order of the circuit court for Milwaukee County: JANET C. PROTASIEWICZ, Judge. *Affirmed.*

Before Kloppenburg, Brash and Dugan, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. Lue Xiong appeals his judgments of conviction and the trial court's denial of his postconviction motion seeking to modify his sentence. Xiong pled guilty to second-degree recklessly endangering safety with a domestic abuse assessment, and arson of a building with a domestic abuse assessment; numerous other charges were dismissed and read in for purposes of sentencing.

¶2 In his postconviction motion, Xiong argued that his sentence was based on inaccurate information, and that the trial court had erroneously exercised its discretion with regard to the factors it considered in imposing the sentence. The trial court denied the motion without a hearing.

¶3 On appeal, Xiong requests that his sentence be vacated and the matter be remanded for resentencing because he was denied the effective assistance of counsel due to a lack of adequate interpreter services at the plea and sentencing hearings. He also renews his argument that the trial court erroneously exercised its discretion at sentencing regarding the factors it considered.

¶4 We conclude that Xiong's ineffective assistance of counsel claim is barred because he did not raise it in his postconviction motion. Furthermore, even if the claim was not barred, it would fail on the merits. We also conclude that the trial court did not erroneously exercise its discretion in imposing sentence. We therefore affirm.

BACKGROUND

¶5 The charges against Xiong resulted after the culmination of escalating domestic violence incidents against J.S., Xiong's former girlfriend and the mother of his three children.

¶6 On September 5, 2015, J.S. had stopped to speak to a friend, T.H., at a hair salon in Slinger. T.H. was standing at the driver’s window of J.S.’s vehicle speaking with her when another vehicle pulled into the parking lot. The driver of that vehicle—Xiong—sped up and struck T.H., pinning him between Xiong’s car and J.S.’s vehicle. T.H. immediately realized that his leg was broken. Xiong then exited his vehicle and attacked T.H., punching and kicking him. A witness called police; Xiong was arrested and charged with second-degree recklessly endangering safety. T.H. required surgery for his broken leg.

¶7 On November 22, 2015, police were called to J.S.’s residence on North 95th Street in Milwaukee after Xiong came to the residence at approximately 4:00 a.m. Xiong attempted to get into bed with J.S.; she told him to sleep in the guest bedroom. J.S. told police that Xiong thought she had a new boyfriend and was jealous. Xiong became increasingly upset and kicked a hole in the wall of the bedroom. He then went to the kitchen and retrieved a knife.

¶8 Xiong threatened to kill J.S., her “boyfriend,” and himself. J.S. picked up two laundry baskets to protect herself; Xiong stabbed the baskets, with the knife penetrating all the way through. Xiong then turned the knife on himself, at which time J.S. was able to escape and call 911.

¶9 Xiong was arrested and charged with first-degree recklessly endangering safety with the use of a dangerous weapon, with a domestic abuse assessment. He was also charged with felony bail jumping after police discovered that he was out on bail after the incident in Slinger.¹

¹ The charges from the Slinger incident are not included in this appeal.

¶10 On May 7, 2016, police were again called to J.S.'s residence on North 95th Street. Earlier that evening, J.S. had been out with her friend, R.L., and they had returned to J.S.'s residence. They were in the kitchen when the doorbell rang; J.S. "did not have a good feeling" and grabbed a baseball bat for protection. J.S. then heard footsteps on her back deck and set off her silent alarm to contact police. Shortly thereafter, she heard objects hitting her window; the window broke and someone entered the residence. That person started talking once inside the residence, and she recognized the voice as Xiong's.

¶11 J.S. hit Xiong with the baseball bat. Xiong kned J.S. in the eye and knocked her to the ground. Xiong then went to the kitchen and grabbed a knife. J.S. and R.L. were able to flee the residence, and they ran to a nearby police station. J.S. had to be transported to a hospital for treatment.

¶12 Meanwhile, emergency medical technicians responding to a 911 call placed by R.L. arrived at the residence and saw that it was on fire. Xiong was observed trying to run into the burning house and was rescued by firefighters. He was then combative with police after they helped him into an ambulance: he kicked, screamed, and flailed his arms, kicking one officer in the face and spitting in the face of another officer after trying to bite him. Police also observed that the tires on R.L.'s vehicle had been slashed.

¶13 The fire was deemed to be arson. There were four different points of origin for the fire, and J.S.'s clothes had been burned. Damage was estimated to be over \$35,000.00.

¶14 Xiong was arrested and charged with a number of crimes, including arson with a domestic abuse assessment, battery with a domestic abuse assessment, criminal damage to property, resisting an officer, discharging bodily

fluids at an officer, and several counts of felony bail jumping. Additionally, J.S. had obtained a domestic abuse injunction against Xiong after the November 2015 incident with the knife. The court commissioner had granted a ten-year injunction on December 4, 2015, finding that there was “a substantial risk [Xiong] may commit first-degree intentional homicide or second-degree intentional homicide.”

¶15 Xiong and the State reached a plea agreement in August 2016, whereby Xiong pled guilty to second-degree recklessly endangering safety with a domestic abuse assessment, and arson of a building with a domestic abuse assessment. As part of the plea agreement, the other charges were dismissed and read in at sentencing. At the plea hearing, an interpreter was provided for Xiong, who is Hmong. The trial court asked Xiong whether he understood what was being said; Xiong answered in English that he understood, but chose to proceed using the interpreter for the hearing.

¶16 Xiong was sentenced in December 2016, again using an interpreter. J.S. spoke at the sentencing hearing and said that she was being treated for post-traumatic stress disorder as a result of Xiong’s conduct. She stated, “He has destroyed almost everything I have. He has taken so much from me. I have never felt so broken, scared, sad, or angry in my life.”

¶17 Xiong’s sister also spoke at the sentencing hearing. She stated that this conduct was completely out of character for Xiong—that he was a hard worker and “truly a good person.” She said the fact that he was charged with these crimes was like “a nightmare that I can’t make sense of.” Xiong also spoke at the hearing—in English—apologizing to J.S. and R.L. as well as his family, taking responsibility for his actions and agreeing to pay restitution.

¶18 The trial court noted that the information it had received and considered regarding Xiong’s character—including many “glowing” letters submitted by people who knew him—was in “utter conflict” with the nature of the crimes with which he was charged. The court then discussed the incident in Slinger where Xiong rammed his car into T.H. along with the two incidents that occurred at J.S.’s residence. The court observed that “[t]he very next day” after the November 2015 incident, J.S. had filed a petition for a temporary restraining order. The court further noted that it “very, very rarely” sees the type of findings the court commissioner made in granting the ten-year injunction: that there was a “substantial risk” that Xiong may commit first or second-degree intentional homicide.

¶19 The trial court observed that J.S. was looking to the court to protect her and her children, “as she should.” Thus, the court stated that while Xiong’s character “in so many instances is so very, very good, the seriousness of the offense[s] is completely at the high end” and the need to protect J.S. “is also very much at the high end.” Therefore, the court sentenced Xiong to fifteen years of initial confinement and ten years of extended supervision for the arson charge, with a consecutive sentence of three years of initial confinement and five years of extended supervision for the recklessly endangering safety charge.

¶20 Xiong filed a postconviction motion seeking to modify his sentence. He argued that the trial court had erroneously exercised its discretion in imposing the sentence because it had placed “[i]nordinate weight” on the seriousness of the offense and the need to protect the public and did not sufficiently consider his good character traits and his lack of a criminal record. Xiong also asserted that the court relied on inaccurate information regarding the arson charge set forth in the presentence investigation report (PSI) prepared for Xiong’s sentencing for the

Slinger incident. Specifically, Xiong contends that critical facts were left out of the PSI that the trial court should have considered, such as the fact that J.S. had hit Xiong with a baseball bat after he broke into her house, and that Xiong was alone in the house when he set the fire.

¶21 The trial court denied the motion. The court noted that it had reviewed not just the PSI from the Slinger case, but also the criminal complaints, a report on Xiong from Badger State Investigative Services, and “at least two dozen” character letters submitted on behalf of Xiong. The court also pointed out that at the sentencing hearing the State had noted that J.S. was not at home when the fire started; the court then specifically asked whether the children were home at that time, to which the State answered that they were not. Moreover, the court stated in its comments at sentencing that J.S. had hit Xiong with a baseball bat after he broke into the house. Therefore, the court determined that it had not relied on inaccurate information.

¶22 Furthermore, the trial court found that it had not erroneously exercised its discretion in the sentence it imposed, “[g]iven the circumstances of these cases, the escalation of [Xiong]’s criminal behavior, his lack of self-control, [and] the dangerousness associated with his criminal acts[.]” This appeal follows.

DISCUSSION

Ineffective Assistance of Counsel Claim

¶23 On appeal, Xiong raises for the first time a claim of ineffective assistance of his trial counsel, citing a failure to provide adequate interpreter services at both the plea and sentencing hearings. Specifically, Xiong argues that

the interpreter provided for him merely interpreted what was being said during the proceedings, but did not inquire whether Xiong understood.

¶24 “Claims of ineffective trial counsel or whether grounds exist to withdraw a guilty plea cannot be reviewed on appeal absent a postconviction motion in the trial court.” *State ex rel. Rothering v. McCaughtry*, 205 Wis. 2d 675, 677-78, 556 N.W.2d 136 (Ct. App. 1996). This is “especially true” in cases where ineffective assistance of trial counsel is alleged, because “‘it is a prerequisite to a claim of ineffective representation on appeal to preserve the testimony of trial counsel’ at a postconviction hearing.” *State v. Giebel*, 198 Wis. 2d 207, 218, 541 N.W.2d 815 (Ct. App. 1995) (quoting *State v. Machner*, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979)). We therefore will not address this claim. *See Rothering*, 205 Wis. 2d at 678.

¶25 We further note that a postconviction motion on this issue likely would have been rejected by the trial court. As previously noted, before a postconviction motion claiming ineffective assistance of counsel can proceed, an evidentiary hearing—referred to as a *Machner* hearing—must be granted and held before the trial court on that issue. *State v. Barbeau*, 2016 WI App 51, ¶22, 370 Wis. 2d 736, 883 N.W.2d 520. The trial court, however, in its discretion, may deny a postconviction motion without granting a *Machner* hearing “if the motion fails to allege sufficient facts to raise a question of fact, presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief.” *State v. Roberson*, 2006 WI 80, ¶43, 292 Wis. 2d 280, 717 N.W.2d 111 (citation and emphasis omitted).

¶26 In his argument on appeal, Xiong has not established that he is entitled to a *Machner* hearing. He has not alleged sufficient facts to show that he

did not comprehend the plea and sentencing hearings; indeed, he does not even make that allegation, instead merely stating that the record is “unclear” as to whether he understood the proceedings. Without sufficient facts to support a claim of ineffective assistance of counsel, a *Machner* hearing need not be granted by the trial court. See *Roberson*, 292 Wis. 2d 280, ¶43. We conclude that a hearing would have properly been denied. Therefore, Xiong’s claim fails.

Erroneous Exercise of Discretion at Sentencing

¶27 Xiong also renews his postconviction claim that the trial court erroneously exercised its discretion at sentencing. Xiong complains that the trial court “honed in” on factors such as the protection of J.S. and the gravity of the offenses instead of his positive character traits. Xiong asserts that the trial court found his conduct to be extremely aggravating even though he did not physically harm J.S. and R.L.,² and ignored the fact that he does not pose a threat to the public at large.

¶28 “It is a well-settled principle of law that a [trial] court exercises discretion at sentencing.” *State v. Gallion*, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197.

¶29 Our review on appeal is “limited to determining if discretion was erroneously exercised,” such as in cases where that discretion was exercised “on

² We note that Xiong’s assertions do not comport with the record, which clearly indicates that J.S. required transportation to the hospital after she fled her home during the incident in May 2016, after Xiong kned her in the eye and threw her to the ground. This demonstrates that J.S. did indeed sustain physical harm during that incident. We further note that Xiong had also previously caused physical harm to T.H.—he suffered a broken leg that required surgery—after Xiong saw him talking to J.S., a fact that was considered at sentencing.

the basis of clearly irrelevant or improper factors[.]” *See id.* This court follows “a consistent and strong policy against interference with the discretion of the trial court in passing sentence.” *See McCleary v. State*, 49 Wis. 2d 263, 281, 182 N.W.2d 512 (1971).

¶30 “The principal objectives of a sentence include, but are not limited to, the protection of the community, the punishment of the defendant, 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. In addition to discussing those objectives, the trial court must also identify the factors it considered in imposing the sentence. *Id.* The primary factors to be considered are “the gravity of the offense, the character of the defendant, and the need to protect the public.” *Id.* “The weight to be given to each factor is within the discretion of the sentencing court.” *Id.*

¶31 The record in this case clearly indicates that the trial court considered proper factors and sufficiently explained those factors in fashioning Xiong’s sentence. The court thoroughly discussed Xiong’s character, even noting that his conduct in committing these offenses was “apparently completely out of character.” The court also reviewed the gravity of the offenses: that there were four points of origin for the fire, that Xiong had burned J.S.’s clothes, and that Xiong had kneed J.S. in the eye and knocked her to the ground before she was able to flee—injuries that required her to be transported to the hospital. Additionally, the court discussed the incidents prior to the fire—ramming the car into T.H. in Slinger in September 2015, and attempting to stab J.S. in November 2015, which the court described as a “horrific” situation.

¶32 In discussing the need for protection of J.S., the trial court explained that Xiong had “walk[ed] right through” the ten-year injunction that was granted in December 2015 when he broke in to J.S.’s house, attacked her, and then set the fire. The court noted that J.S. had lost her house and had to move in with family members, that she is “riddled with fear and anxiety” and suffering from post-traumatic stress disorder; in short, Xiong had “destroyed everything she ha[d].” The court also expressed the need to protect the public given Xiong’s attack on and injuries to T.H., and his break-in to J.S.’s residence while R.L. was there, indicating his propensity for violence against “any male [J.S.]’s associated with.”

¶33 In fashioning the sentence, the trial court stated that “[t]his is not a probation case. Everybody knows that. Probation would seriously depreciate this.” The court noted that Xiong was getting treatment and counseling for drugs, alcohol, and mental health issues when he was out of custody for the earlier offenses, but “even that couldn’t prevent the incidents which occurred in May.”

¶34 This discussion by the trial court demonstrates that it considered proper and relevant factors in imposing sentence on Xiong. *See Gallion*, 270 Wis. 2d 535, ¶17. We therefore conclude that court did not erroneously exercise its discretion in this case. *See id.*

¶35 Accordingly, we affirm Xiong’s judgments of conviction as well as the trial court’s denial of his postconviction motion.

By the Court.—Judgments and order affirmed.

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

