

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 27, 2026

Samuel A. Christensen
Clerk of Court of Appeals

NOTICE

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**Appeal No. 2025AP92-CR
STATE OF WISCONSIN**

Cir. Ct. No. 2021CF724

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BRENT M. FUNMAKER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for La Crosse County:
RAMONA A. GONZALEZ, Judge. *Affirmed.*

Before Blanchard, Kloppenburg, and Nashold, 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. Brent Funmaker appeals a judgment of conviction entered after a jury found him guilty of second-degree sexual assault. He argues

that there was insufficient evidence to support the jury's verdict. He also challenges the jury instructions and argues that the circuit court erroneously exercised its discretion at sentencing. We reject Funmaker's arguments and affirm.

BACKGROUND

¶2 Funmaker was charged with second-degree sexual assault. At trial, the State presented evidence showing the following.

¶3 In August 2021, A.B.¹ was invited by her friend Raquel Greendeer to accompany Greendeer and Greendeer's boyfriend, Aaron Flick, on an overnight weekend trip to La Crosse. A.B., Greendeer, and Flick, who all lived in Madison, stayed in La Crosse with Greendeer's friend, Michaela Ortiz, and they arrived at Ortiz's house ("the house") Saturday night sometime between 8:30 and 10:00 p.m. When they arrived, they were introduced to Funmaker, who lived in the house with Ortiz.

¶4 After A.B., Greendeer, and Flick arrived, everyone, including Funmaker, played drinking games at the house before A.B., Greendeer, Flick, Ortiz, and Ortiz's boyfriend went out together to several bars in downtown La Crosse. They went to three or four bars, A.B. drank alcohol at each of the bars, and by the time the group left the last bar to return to the house, A.B. was very intoxicated. Funmaker went out separately but was present at the first bar at the same time as the group that A.B. was with.

¹ Pursuant to the policy underlying WIS. STAT. RULE 809.86 (2023-24), we refer to the victim using initials that do not conform to her actual name. All references to the Wisconsin Statutes are to the 2023-24 version.

¶5 After A.B. and the group that she was with returned to the house, Funmaker joined them in staying up longer and drinking alcohol. A.B. stayed up for approximately half an hour after returning to the house before changing into her pajamas and either falling asleep or passing out on the couch in the living room at around 3:00 a.m., while others, including Funmaker, continued to drink and converse around the dining room table.² Someone set a bucket or trash can next to A.B. in case she had to vomit.

¶6 Several hours later, still on Sunday morning, A.B. woke up in Funmaker's bed. She initially woke up momentarily at 6:51 a.m. and realized that she was no longer on the couch but then quickly fell back to sleep. She then woke up again to her name being called by Greendeer, who, along with Ortiz and Flick, was searching the house for A.B. after seeing that she was no longer on the couch. A.B. was in bed next to Funmaker, was not wearing anything below the waist, and felt pain in her "lower area." A.B. could not remember any events that occurred from the time her group left the second bar to the time she first woke up briefly in Funmaker's bed at 6:51 a.m.³

¶7 On Sunday, A.B., Greendeer, Flick, Ortiz, and Ortiz's boyfriend engaged in various activities in La Crosse before A.B., Greendeer, and Flick returned home to Madison, arriving late Sunday night.

² Funmaker and the State dispute whether the evidence shows that A.B. "passed out" on the couch or instead went to sleep on it. This distinction does not matter for purposes of our analysis.

³ One possible exception to this is that A.B. testified that she remembered taking photos with Ortiz in the bathroom at one of the bars, but A.B.'s testimony was unclear as to whether that took place at the second bar or at a later one. Because it does not matter for purposes of our analysis, for readability, we do not mention this possible exception again.

¶8 On Monday, A.B. reported a sexual assault to a law enforcement agency and went to a hospital for a sexual assault exam. A forensic nurse examiner observed a contusion and a laceration on A.B.'s labia, four lacerations on A.B.'s perineum, blood on A.B.'s cervix, a "tissue disruption" to A.B.'s anus, and bruising on A.B., including on her thighs and her lower back/buttocks. As part of the examination, the forensic nurse examiner collected DNA with a cervical swab. DNA from that swab was tested and determined to be consistent with Funmaker's DNA.

¶9 The State introduced the information recounted above through the testimony of police officers, the forensic nurse examiner who examined A.B., a DNA analyst from the Wisconsin State Crime Lab, Ortiz, Flick, Greendeer, and A.B. At the close of the State's case, Funmaker moved to dismiss the charge, arguing that the State had not presented sufficient evidence regarding two elements of the crime of second-degree sexual assault: that Funmaker had actual knowledge that A.B. was incapable of giving consent and that Funmaker had the purpose of having sexual intercourse with A.B. while A.B. was unable to consent. The circuit court denied Funmaker's motion. Funmaker did not present any evidence.

¶10 The jury found Funmaker guilty. The circuit court sentenced Funmaker to seven years of initial confinement and six years of extended supervision.

¶11 Funmaker appeals.

DISCUSSION

¶12 Funmaker raises three arguments on appeal. First, he argues that there was insufficient evidence to support the jury’s verdict regarding two closely related elements of second-degree sexual assault. Specifically, he contends that there was insufficient evidence for the jury to find that he had actual knowledge that A.B. was incapable of giving consent to have sexual intercourse and that, for the same reason, there was insufficient evidence for the jury to find that Funmaker had the purpose to have sexual intercourse while A.B. was incapable of giving consent. Second, he challenges the jury instructions on the basis that they did not define the phrase “actual knowledge” for purposes of the element requiring proof that he actually knew that A.B. was incapable of giving consent for sexual intercourse. Third, he argues that the circuit court erroneously exercised its discretion in various respects at sentencing. We address, and reject, each of these arguments for the reasons that follow.

I. Sufficiency of the Evidence

¶13 To find Funmaker guilty of second-degree sexual assault, the jury was required to find beyond a reasonable doubt that: (1) Funmaker had sexual intercourse with A.B.; (2) A.B. was under the influence of an intoxicant at the time of the sexual intercourse; (3) A.B. was under the influence of an intoxicant to a degree which rendered her incapable of giving consent; (4) Funmaker had actual knowledge that A.B. was incapable of giving consent; and (5) Funmaker had the purpose to have sexual intercourse with A.B. while A.B. was incapable of giving consent. WIS. STAT. § 940.225(2)(cm); WIS JI—CRIMINAL 1212. Funmaker argues that there was insufficient evidence for the jury to find both the fourth and fifth elements. As stated, Funmaker contends that there was insufficient evidence

to support the jury’s finding that he had actual knowledge that A.B. was incapable of giving consent at the time of the sexual intercourse, and that as a result, there was necessarily insufficient evidence that he had the purpose of having sexual intercourse with A.B. while she was incapable of giving consent.

¶14 When reviewing a challenge to the sufficiency of the evidence, we accord great deference to the factfinder, here the jury. See **State v. Poellinger**, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990). “It is the function of the trier of fact, and not of an appellate court, to fairly resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.” **Id.** at 506. We “may not substitute [our] judgment for that of the trier of fact unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt.” **Id.** at 507. “If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn a verdict even if it believes that the trier of fact should not have found guilt based on the evidence before it.” **Id.** This means that “a defendant challenging the sufficiency of the evidence bears a heavy burden to show the evidence could not reasonably have supported a finding of guilt.” **State v. Beamon**, 2013 WI 47, ¶21, 347 Wis. 2d 559, 830 N.W.2d 681. We independently review whether the evidence is sufficient to sustain a jury verdict. **State v. Hanson**, 2012 WI 4, ¶15, 338 Wis. 2d 243, 808 N.W.2d 390. “[T]he standard for reviewing the sufficiency of the evidence to support a conviction is the same in either a direct or circumstantial evidence case.” **Poellinger**, 153 Wis. 2d at 501.

¶15 We conclude that there was sufficient evidence from which the jury could find that Funmaker had actual knowledge that A.B. was incapable of giving consent when Funmaker had sexual intercourse with A.B.

¶16 To start, there was evidence regarding how intoxicated A.B. was that night. Flick testified that A.B. drank alcohol at each of the bars that they went to and got more intoxicated as the night went on; that at the first bar she was already starting to sway a little; and that by the end of the night, A.B. needed help walking. Greendeer testified that at one of the bars, A.B. dropped her drink; that at another, A.B. could not find her ID; that at the last bar, A.B. was still drinking and “getting really drunk”; and that also at the last bar, Ortiz told Greendeer that A.B. had accidentally gone into the men’s restroom instead of the women’s. Greendeer also testified that when they went to the car on their way home after leaving the last bar, A.B. was having a hard time walking and keeping her balance and that Greendeer “had to carry [A.B.] into the car.”

¶17 A.B. testified as follows. She could not remember many events from that night. She recalled that she had a couple of drinks at the house before going out and had “quite a few” drinks at both the first and second bars, and that by the time they were at the second bar, she was feeling drunk and “was probably beyond [her] limit.” A.B. could not remember any events that occurred from the time her group left the second bar until the time she woke up briefly in Funmaker’s bed at 6:51 a.m. A.B. did not remember having sexual intercourse with Funmaker, even though the sexual assault exam showed that she sustained multiple injuries to her genitals and she felt pain in that area and saw new bruises on her body the next day. When A.B. did wake up briefly at 6:51 a.m., she “felt like [she] got hit by a truck” and “didn’t even realize where [she] was in that moment.”

¶18 Although Funmaker was present at the first bar with A.B.’s group, there was no evidence that Funmaker was at any of the other bars that A.B. visited that night. However, Flick and Greendeer testified that when A.B. and the group she was with returned to the house, Funmaker was there, and that everyone, including Funmaker, stayed up drinking around the dining room table after returning to the house. Greendeer and Flick also testified that: A.B. stayed up for approximately a half hour after returning to the house; A.B. changed into her pajamas and “plopped down” and fell asleep on the couch (which was visible from the dining room table), with the lights on and with everyone else conversing close by, in the next room over; and someone set a bucket or a trash can next to the couch in case A.B. needed to vomit.

¶19 From the evidence presented, the jury could reasonably infer that A.B. was exhibiting outward signs of extreme intoxication, that Funmaker observed as much, and that as a result Funmaker knew that A.B. was incapable of giving consent at the time he had sexual intercourse with her. *See id.* at 507 (stating that an appellate court must not overturn a verdict “[i]f any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt”). We reject Funmaker’s arguments to the contrary.

¶20 In arguing that there was insufficient evidence as to his actual knowledge regarding A.B.’s capacity to consent, Funmaker relies on the definition of “actual knowledge” from a U.S. Supreme Court case, ***Intel Corp. Investment Policy Committee v. Sulyma***, 589 U.S. 178 (2020). In ***Intel***, for purposes of defining “actual knowledge,” as that phrase is used in the Employee Retirement Income Security Act of 1974 (ERISA), the Supreme Court agreed with the Court of Appeals for the Ninth Circuit that “actual knowledge” means “what it says:

knowledge that is actual, not merely a possible inference from ambiguous circumstances.” *Id.* at 183 (quoting *Sulyma v. Intel Corp. Inv. Policy Comm.*, 909 F.3d 1069, 1076 (9th Cir. 2018)). The *Intel* court stated that “actual knowledge” “must be more than ‘potential, possible, virtual, conceivable, theoretical, hypothetical, or nominal.’” *Id.* at 185 (quoting BLACK’S LAW DICTIONARY 53 (4th ed. 1951)). Funmaker argues that under the definition of “actual knowledge” from *Intel*, the State did not present sufficient evidence to show that Funmaker had actual knowledge that A.B. was not capable of giving consent.

¶21 We first observe that how the *Intel* court defined the phrase “actual knowledge” from ERISA is not controlling here for purposes of our interpretation of “actual knowledge” in WIS. STAT. § 940.225(2)(cm). See *Alberte v. Anew Health Care Servs., Inc.*, 2000 WI 7, ¶7, 232 Wis. 2d 587, 605 N.W.2d 515 (noting that Wisconsin courts are bound by statements of the United States Supreme Court only when the Court interprets federal law). In any event, even using that definition, we conclude that the evidence discussed above is sufficient to support the jury’s finding that Funmaker had actual knowledge as this phrase is used in § 940.225(2)(cm).

¶22 Funmaker might mean to argue that the evidence, recounted above, is insufficient because it is circumstantial. However, this argument is undermined by *Intel* itself: as the State points out, the Court in *Intel* specifically stated that “actual knowledge can be proved through ‘inference from circumstantial evidence.’” *Intel*, 589 U.S. at 189 (quoting *Farmer v. Brennan*, 511 U.S. 825, 842 (1994)). This is consistent with what the Wisconsin pattern jury instructions, used here, state regarding actual knowledge: “You cannot look into a person’s mind to find purpose and actual knowledge. Purpose and actual knowledge must

be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon purpose and actual knowledge." WIS JI—CRIMINAL 1212. Here, the jury could find that Funmaker had actual knowledge that A.B. was incapable of giving consent based on the relevant facts and circumstances.

¶23 Funmaker also notes that there was no evidence that A.B. needed help walking or changing clothes after she had returned to the house that night, that Flick testified that A.B. did not need help getting to the couch, and that A.B. had the "presence of mind" to go to another room to change. However, the jury was not obligated to place great weight on this isolated evidence or absence of evidence. And based on the testimony recounted above, the jury had ample evidence to reasonably infer that A.B. was exhibiting signs of extreme intoxication that Funmaker noticed, sufficient to give him actual knowledge that A.B. was incapable of giving consent when he had sexual intercourse with her.

¶24 Funmaker also points out that there was no evidence that Funmaker and A.B. directly interacted in the half hour or so while she was awake, after she returned to the house, and Funmaker generally makes much of the limited evidence that he directly interacted with A.B. that night before she went to sleep or passed out. We are not persuaded that the limited nature of their prior interactions renders the evidence as a whole insufficient. For the reasons we have previously explained, the jury could still reasonably infer that Funmaker would have observed how intoxicated A.B. was and that she was incapable of giving consent when he had sexual intercourse with her.

¶25 In sum, we conclude that Funmaker has failed to establish that there was insufficient evidence to support the jury's verdict.

II. Jury Instructions

¶26 Funmaker argues that the circuit court’s failure to define the phrase “actual knowledge” in the jury instructions relieved the State of its burden of proof and deprived Funmaker of due process. Funmaker acknowledges that he forfeited this argument by failing to raise it in the circuit court. *See* WIS. STAT. § 805.13(3) (stating that a failure to object to jury instructions at the jury instruction conference “constitutes a waiver of any error in the proposed instructions”); ***State v. Cockrell***, 2007 WI App 217, ¶36, 306 Wis. 2d 52, 741 N.W.2d 267 (stating that this court does not have the power to review a waiver under § 805.13(3)). Funmaker nonetheless argues that we should address the issue pursuant to WIS. STAT. § 752.35, which allows this court, in its discretion, to reverse when “it is probable that justice has for any reason miscarried.” “The power to grant a new trial in the interest of justice is to be exercised ‘infrequently and judiciously,’” and only in “exceptional” cases. ***State v. Avery***, 2013 WI 13, ¶¶38, 58, 345 Wis. 2d 407, 826 N.W.2d 60 (quoted source omitted). To grant a discretionary reversal because of a probable miscarriage of justice, there must be a “substantial probability that a different result would be likely on retrial.” ***State v. Schumacher***, 144 Wis. 2d 388, 401, 424 N.W.2d 672 (1988). We conclude that Funmaker fails to show that this is an “exceptional case” that warrants discretionary reversal. *See Avery*, 345 Wis. 2d 407, ¶58.

¶27 As noted, the State had to prove that Funmaker had actual knowledge that A.B. was incapable of giving consent. WIS. STAT. § 940.225(2)(cm). Although the jury instructions stated as much, the instructions did not define the phrase “actual knowledge,” beyond stating that the jury must find actual knowledge “from all the facts and circumstances in this case bearing upon purpose and actual knowledge.” WIS JI—CRIMINAL 1212. Funmaker

specifically argues that the jury instructions should have gone further and defined “actual knowledge” consistent with how the phrase is defined in *Intel*, and that the failure to do so would have allowed the jury to find Funmaker guilty based on a finding that he could or should have known that A.B. was too intoxicated to give consent, rather than based on a finding that he actually knew as much. However, as stated, when the Supreme Court defined “actual knowledge” in *Intel* as set forth above, the Court concluded that “actual knowledge” means what it says. *Intel*, 589 U.S. at 183; see also *id.* at 184 (stating that the meaning of “actual knowledge” is plain and that “[d]ictionaries are hardly necessary to confirm the point”). And “[i]t is presumed that juries look to the plain meaning of the jury instructions and once instructed follow these instructions.” *State v. Deer*, 125 Wis. 2d 357, 364, 372 N.W.2d 176 (Ct. App. 1985). Accordingly, we conclude that there is no substantial probability of a different result on retrial if the jury were to receive an instruction defining “actual knowledge” consistent with how it is defined in *Intel*. In other words, we reject Funmaker’s argument that, in the absence of such a definition, the jury could have found Funmaker guilty based on a finding that he could or should have known that A.B. was too intoxicated to give consent rather than based on a finding that he actually knew this.

III. Sentencing

¶28 Funmaker argues that the circuit court erroneously exercised its discretion in sentencing him to seven years of initial confinement and six years of extended supervision. We reject Funmaker’s arguments for the following reasons.

¶29 “A circuit court exercises its discretion at sentencing, and appellate review is limited to determining if the court’s discretion was erroneously exercised.” *State v. Taylor*, 2006 WI 22, ¶17, 289 Wis. 2d 34, 710 N.W.2d 466.

A court's exercise of discretion “contemplates a process of reasoning” that “must depend on facts that are of record or that are reasonably derived by inference from the record and a conclusion based on a logical rationale founded upon proper legal standards.” *Id.* (quoting *McCleary v. State*, 49 Wis. 2d 263, 277, 182 N.W.2d 512 (1971)). The sentencing court's decisions are afforded a strong presumption of reasonability. *Id.*, ¶18.

¶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. A sentencing court should indicate the general objectives of greatest importance and explain how ... the sentence selected advances those objectives.” *State v. Ziegler*, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76 (citation omitted). Additionally, the court must “identify the factors that the court considered in arriving at the sentence and must indicate how those factors fit the objectives and influenced the sentencing decision.” *Id.* “The three primary factors which a sentencing judge must consider are the gravity of the offense, the character and rehabilitative needs of the defendant, and the need to protect the public.” *State v. Paske*, 163 Wis. 2d 52, 62, 471 N.W.2d 55, 59 (1991). “The weight to be given to each factor is within the discretion of the sentencing court.” *Ziegler*, 289 Wis. 2d 594, ¶23.

¶31 “The sentence imposed in each case should call for the minimum amount of custody or confinement which is consistent with the protection of the public, the gravity of the offense[,] and the rehabilitative needs of the defendant.” *McCleary*, 49 Wis. 2d at 276 (quoted source omitted). Relatedly, “probation should be considered as the first alternative,” and probation should be the disposition unless the court finds: (1) that confinement is necessary to protect the public from further criminal activity by the defendant, (2) the defendant is in need

of correctional treatment which can most effectively be provided if the defendant is confined, or (3) it would unduly depreciate the seriousness of the offense if a sentence of probation were imposed. *State v. Gallion*, 2004 WI 42, ¶¶25, 44, 270 Wis. 2d 535, 678 N.W.2d 197.

¶32 Funmaker argues that the circuit court erroneously exercised its discretion at sentencing because it failed to adequately consider the gravity of the offense, his rehabilitative needs, and the need for public protection. The record does not support Funmaker’s contention.

¶33 At the sentencing hearing, the circuit court began by explicitly saying that it would “consider the gravity of the offense, the rehabilitation and character of this young man, and the protection of the public.” Regarding the gravity of the offense, the court observed that a crime like the one in this case has both direct and indirect victims, said that Funmaker had “brutally assault[ed]” A.B. and that the physical evidence was clear, and concluded that “the gravity of the offense requires prison.”

¶34 As to Funmaker’s rehabilitative needs, the circuit court acknowledged Funmaker’s rehabilitative needs as described by defense counsel, but the court determined that these needs are outweighed by the gravity of the offense and the need to protect the public. Regarding Funmaker’s character, the court said that Funmaker is dangerous because he did not appreciate the severity of the crime. In support of this, the court relied on the fact that Funmaker had stopped attending therapy because he did not believe that he was getting anything out of it. Additionally, the court appeared to rely on the allegations in a criminal complaint against Funmaker’s brother and on police body camera footage, which, according to the State, showed that Funmaker was in downtown La Crosse

“engaging in heavy drinking and involved in physical altercations just a few days after the jury’s verdict” in this case. The court explained that, because Funmaker did not appreciate the severity of the offense, the sentence “ha[d] a priority of punishment.” The court also explained that it considered Funmaker’s youth and the support he had from his family to be mitigating factors. Based on these mitigating factors, the court adopted the State’s recommended sentence rather than the sentence recommended by the Department of Corrections in Funmaker’s presentence investigation report, which recommended two to three more years of initial confinement.

¶35 Concerning the protection of the public, the circuit court characterized Funmaker as “dangerous.” Further, the court said that it was “satisfied that without incarceration and without treatment in a confined setting this behavior will not change.” The court also explained to A.B., in response to A.B.’s statement at sentencing, that the court was not giving Funmaker the sentence as fashioned by the court with the purpose of generally deterring others from committing sexual assault, because the court did not believe that a harsher sentence would have any general deterrent effect.

¶36 The foregoing shows that the circuit court reasonably considered the gravity of the offense, Funmaker’s rehabilitative needs and character, and the need for public protection.

¶37 Funmaker appears to argue that the circuit court was required to provide a more detailed explanation than it did. For example, Funmaker contends that the circuit court “did not explain its sentence and how the factors that it relied upon fit the objectives of sentencing nor did it explain why the duration of incarceration advanced the objectives it specified.” However, he provides no legal

authority to support his assertion that more explanation was required, and we have previously rejected similar arguments. See **State v. Fisher**, 2005 WI App 175, ¶21, 285 Wis. 2d 433, 702 N.W.2d 56 (rejecting an argument that the sentencing court “should have explained with specificity the comparative weight it ascribed to each factor and exactly how these factors translated into a specific number of years”); see also **State v. Pettit**, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (explaining that this court need not consider arguments that are undeveloped). In addition, Funmaker argues that the court never addressed his rehabilitative needs, but that assertion is contradicted by the record. As stated, the court acknowledged Funmaker’s rehabilitative needs as described by defense counsel, but the court did not weigh these needs as heavily as the gravity of the offense and the need to protect the public. Again, the weight to be given each sentencing factor is within the sentencing court’s discretion. **Ziegler**, 289 Wis. 2d 594, ¶23.

¶38 Funmaker also argues that the circuit court erroneously exercised its discretion at sentencing because it failed to consider probation as a first alternative and never addressed probation as a disposition or explained why probation with conditional jail time was not an appropriate sentence. However, as stated, the court explained that the gravity of the offense required prison and that the court did not believe that Funmaker’s behavior would change unless he was incarcerated. In determining that incarceration was necessary, the court necessarily also determined that probation would be insufficient. To the extent that Funmaker means to argue that the court was required use the word “probation” or some other particular language, we reject that argument. Requiring sentencing courts to adequately explain their decisions “is not intended to be a semantic trap” or “a call for more ‘magic words.’” **Gallion**, 270 Wis. 2d 535, ¶49.

¶39 Funmaker further argues that the circuit court “interjected its own opinions about the pervasive misogyny in the community, labeling the defendant as a misogynist,” which Funmaker argues was not an appropriate sentencing factor. In making this argument, Funmaker challenges two statements that the court made. The first was a comment that the court made in explaining Funmaker’s rehabilitative needs. The court stated:

It is never joyful to send a young person into custody, and you’re right, [defense counsel]; he has a lot of [rehabilitative] needs. And what 21 year old doesn’t, and what 21 year old swimming in the soup that is misogyny that is this community and the alcohol fueling it -- they all have [rehabilitative] needs, but they do not all take advantage of a young woman when she cannot say yes. They do not all inflict sexual injury and then not take responsibility.

The court made the second statement when explaining to A.B. why the court’s sentence was not intended to serve as a deterrent to others. The court stated:

I want to specifically say to the victim [that] I cannot ... make an example of him because, unfortunately, and I need you to understand this -- people always talk about deterrence, that we need higher -- higher punishments for these [because] this deters others from doing the same thing. I just wish that would work, but it doesn’t. Because as he was about to rape you, he didn’t think, oh, boy, this is a 40-year felony; I could go to prison on this. They don’t think that way.... It really doesn’t deter ... the gentlemen who wish to take sex whenever they want it no matter what. We live in a society where we’re swimming in that misogynistic soup.... All I can do is dispense justice at this point and give him the punishment that he deserves, but I cannot deter others. That power I do not have.

Contrary to what Funmaker argues, the court did not label him a misogynist at any point. The court characterized society as being pervaded by misogynistic attitudes in order to explain the court’s view of Funmaker’s rehabilitative needs, and in order to explain to A.B. why the court had concluded that a harsh penalty would

not have general deterrent effect. Funmaker fails to show that this was an erroneous exercise of discretion.⁴

¶40 Funmaker also takes issue with how the circuit court characterized the crime at sentencing. Specifically, Funmaker challenges the court’s statement that A.B. was “unconscious” and that Funmaker “took his penis or whatever else and put it inside a human being and inflicted pain and injury.” Funmaker argues that there was no evidence about the exact nature of the assault. But the court’s statement relied on facts that are fairly inferable from the record, which is not an erroneous exercise of discretion. *See McCleary*, 49 Wis. 2d at 281.

¶41 Funmaker separately challenges the circuit court’s apparent reliance on the fact that Funmaker, while released on bond pending sentencing, did not take his crime seriously. Specifically, Funmaker argues that the court, in doing so, “presumably” was relying on the evidence that, a few days after the verdict in this case, he was drinking heavily in downtown La Crosse with his brother, who got into a fight and was criminally charged. Funmaker argues that his conduct did not violate any of his bond conditions.

¶42 On this issue, we first observe that the circuit court, in making the finding that Funmaker did not appreciate the seriousness of the offense, was also relying on the fact that Funmaker had chosen to stop participating in therapy that could help him to rehabilitate. And beyond that, Funmaker fails to develop an

⁴ Funmaker also appears to assert that the circuit court, based on its comments about misogyny, sentenced Funmaker based on inaccurate information. However, Funmaker fails to develop this argument, and we reject it for that reason. *See State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (explaining that this court need not consider arguments that are undeveloped).

argument as to why it was an erroneous exercise of discretion for the court to rely on the evidence regarding the incident from a few days after the verdict as evidence that Funmaker did not appreciate the gravity of the offense. *See Pettit*, 171 Wis. 2d at 646.

¶43 In sum, we conclude that Funmaker has failed to show that the circuit court erroneously exercised its discretion at sentencing.⁵

CONCLUSION

¶44 For the reasons stated, we affirm.

By the Court.—Judgment affirmed.

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

⁵ The State argues that we should apply the forfeiture rule to Funmaker's arguments regarding sentencing because he failed to raise them in a postconviction motion. We need not address this issue because we reject Funmaker's arguments on the merits. *See Barrows v. American Fam. Ins. Co.*, 2014 WI App 11, ¶9, 352 Wis. 2d 436, 842 N.W.2d 508 (2013) (we need not address every issue when one is dispositive).

