

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 16, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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 § 808.10 and RULE 809.62, STATS.

No. 98-0411-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MANDELL ASHFORD,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DOMINIC S. AMATO and DENNIS P. MORONEY, Judges. *Affirmed.*

FINE, J. Mandell Ashford appeals from a judgment convicting him on his guilty plea to battery as an habitual criminal, *see* §§ 940.19(1) & 939.62, STATS., and from the trial court's order denying his motion for postconviction relief. The only issue on this appeal is whether the trial court erroneously

exercised its discretion in sentencing Ashford to imprisonment for an indeterminate period not to exceed three years. We affirm.

I.

Ashford was originally charged with battery and false imprisonment while armed, as an habitual criminal. *See* §§ 940.30 & 939.63, STATS. (false imprisonment while armed). The case was plea-bargained, and, in return for Ashford's guilty plea to misdemeanor battery as an habitual criminal, the State agreed to seek dismissal of the felony charge of false imprisonment while armed, and recommend probation with a no-contact order, subject to a stayed three-year sentence of incarceration. The trial court accepted the first part of the deal, but not the second.

The trial court, with the agreement of both the State and Ashford, accepted the allegations in the criminal complaint as a factual basis for Ashford's guilty plea to the battery count. The criminal complaint alleged that Ashford hit the woman with whom he was living when she refused to give him money:

At the time the argument started, [the victim] was combing her childrens' [*sic*] hair. [Ashford] struck her one time in the left side of the head in front of the children, causing pain and swelling without her consent, then ordered the children upstairs. [The victim] states that she left the residence (which did not have a working phone) and began walking to the nearest pay phone, but [Ashford] caught her before she reached the pay phone. [Ashford] threw a leather jacket over her head, and dragged her back to the apartment against her will. Once [Ashford] got back to the apartment, he repeatedly threatened to kill her, her children, and then himself. [Ashford] was holding a large butcher knife, and swallowed approximately 50 Ibuprofen pills in front of [the victim], saying that now he was going to die, he could kill her too.

Ultimately, Ashford gagged himself, disgorged the pills, made the victim remove her clothes, and prevented her from leaving the apartment. He kept her in the apartment until the next afternoon when he drove her on the way to his mother's home. The route took them past a police station, and the victim jumped out of the car and ran to the station, where she sought help. The complaint further alleged that when she ran into the police station, the victim “had a small bruise and swelling to the left temple area of her head.”

At the sentencing hearing, the State told the trial court that Ashford had “seven juvenile adjudications,” and that Ashford was on parole following his conviction for firing shots from a sawed-off shotgun “even after police officers, uniform [*sic*] police officers arrived at the scene” of the shooting. According to the State, Ashford was allowed to plea-bargain those crimes as well: “Ultimately he pled guilty to a reduced charge of attempted -- excuse me -- first degree recklessly endangering safety while armed, endangering safety by use of a dangerous weapon, and possession of a short-barreled shotgun.” Although sentenced to a six-year term in prison, he was paroled after but two years.

The State also told the trial court that the victim had recanted and absconded, leaving “a good job as a phlebotomist at St. Joseph's Hospital rather than be there for us to serve her” with a subpoena. She was arrested on a warrant to compel her testimony at the preliminary examination, where she changed her story to minimize the seriousness of what Ashford did to her.

Ashford's lawyer asked the court to accept the plea-bargained sentencing recommendation of a stayed sentence (although expressing doubt that three years was “necessary”), pointing out that Ashford received his GED from a community outreach program, and was enrolled in a carpentry apprenticeship.

The lawyer also told the trial court that Ashford was “a father figure” to the victim's children, and that the victim wanted to continue her relationship with him.

During his allocution, Ashford said that he was “sorry for how this incident had taken place,” that he “made amends with the victim,” and that he had “rectified lot [*sic*] of my thoughts and feelings concerning the victim and how this situation was displayed.” The victim also addressed the trial court. She recounted how she had “been with Mr. Ashford for five years,” and that “[t]his is the first time we had a situation like this.” She told the trial court that although Ashford “did slap me,” “[i]t didn't hurt and leave a bruise or anything.” She claimed that she had earlier “exaggerated the truth.” She also indicated that she was undergoing counseling, and that she and Ashford hoped to get married. She asked the trial court not to impose a no-contact order.

The trial court explained to the victim that he understood that she loved Ashford, and that there “are a lot of people who are in love with people who abuse them, either physically, mentally, or emotionally, and it's very natural to forgive someone that you love.” The trial court pointed out that the crux of the sentencing hearing was whether Ashford would either hurt her again, or hurt her children or someone else. The trial court then noted that Ashford had “a long juvenile record,” and, pointing out that Ashford reacted violently when he did not get his way, the trial court saw Ashford as a “risk to the community” and the victim. Viewing the “probability” of Ashford's recidivism as “high,” the trial court expressed the need to not only deter Ashford from future criminality but, also, to send a message to the community that would deter others. Considering but rejecting the plea-bargained recommendation of probation as a “waste” because Ashford “had plenty of opportunity to do that,” the trial court imposed the maximum possible sentence (given the plea-bargained dismissal of the felony

charge) of three years in prison, “consecutive to anything else.” Any other sentence, the trial court opined, “would unduly depreciate the seriousness” of what Ashford did.

II.

Sentencing is vested in the trial court's discretion, and a defendant who challenges a sentence has the burden to show that it was unreasonable; it is presumed that the trial court acted reasonably. *State v. Lechner*, ___ Wis.2d ___, ___, 576 N.W.2d 912, 925 (1998). The primary factors considered in imposing sentence are the gravity of the offense, the character of the offender, and the need for the public's protection. *Elias v. State*, 93 Wis.2d 278, 284, 286 N.W.2d 559, 561 (1980). If the trial court exercises its discretion based on the appropriate factors, its sentence will not be reversed unless it is “so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances.” *Ocanas v. State*, 70 Wis.2d 179, 185, 233 N.W.2d 457, 461 (1975). Although Ashford argues that the trial court gave too much weight to the seriousness of both this crime and his record of violence, “[t]he weight to be given each factor is within the discretion of the trial court.” *State v. Wickstrom*, 118 Wis.2d 339, 355, 348 N.W.2d 183, 192 (Ct. App. 1984).

The trial court weighed all of the appropriate factors, heard and considered what Ashford and the recanting victim had to say, and assessed their credibility. Undoubtedly, Ashford would have been happy if the trial court had swallowed whole the plea bargain he struck with the State. He has not, however, pointed to anything in the record that remotely suggests that the trial court

erroneously exercised its discretion in sentencing him to prison for the indeterminate three-year period.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.

