COURT OF APPEALS
DECISION
DATED AND FILED

May 23, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 99-3115-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

PATRICK GARY,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Milwaukee County: JEAN W. DiMOTTO, Judge. *Affirmed.*

¶1 FINE, J. Patrick Gary appeals from judgments entered on guilty pleas convicting him of two counts of battery as a habitual criminal, *see* WIS. STAT. §§ 940.19(1) & 939.62, and disorderly conduct while armed with a dangerous weapon as a habitual criminal, *see* WIS. STAT. §§ 947.01, 939.63(1) & 939.62, and from the trial court's denial of his motion for postconviction relief. Gary contends that the trial court's imposition of three consecutive sentences of

two years and eleven months each was an erroneous exercise of its sentencing discretion. We disagree and affirm.

I.

¶2 All of the charges to which Gary pled guilty involved violent disputes, on two separate days, with a woman with whom he was having a relationship. The dangerous weapon involved in the disorderly-conduct incident was a kitchen knife. Gary's habitual-criminality penalty enhancer was based on his convictions for the crimes of: unlawful entry into a locked building, criminal damage to property, and battery. The maximum sentence to which Gary was exposed as a result of his guilty pleas was three years for each of the three crimes.

¶3 During the course of the plea hearing the trial court appropriately asked Gary what he did that resulted in the battery and disorderly-conduct charge on one of the days. After some resistance, Gary ultimately admitted that he threatened the woman with the knife, pulled her hair, and choked her in a rage when she resisted giving him money and the keys to her car. Gary also admitted that on the other day he pulled the woman's hair, choked her, and hit her on the head with an iron frying pan. In the course of fleshing out the events for the trial court, the prosecutor asserted that Gary and the woman had dated for approximately one and one-half years, that they had a child together, and that Gary had been physically abusive for eight months of the relationship, essentially because of what the prosecutor called Gary's "terrible drug habit." The prosecutor also told the trial court that in addition to the convictions that supported Gary's status as a habitual criminal, Gary also had, among other crimes, two convictions for operating an automobile without the owner's consent, a conviction for being a felon in possession of a firearm, a conviction for escape, and a conviction for

burglary. Further, the prosecutor told the trial court that other charges against Gary had been dismissed, and additional matters had been referred to the district attorney's office but were not "processed." All in all, and without getting into any great detail, the string of incidents revealed Gary to be a violent person who was unable to conform his conduct to the rudimentary needs of a civilized society. The trial court, however, indicated that it would not consider in deciding on an appropriate sentence the referrals to the district attorney that were not processed.

¶4 Gary's lawyer told the trial court that he believed that in light of Gary's history, the prosecutor's recommendation of between four and one-half to six years in prison was "an appropriate one," but he also argued that the trial court should look at the incidents involving the victim as two rather than three, and sentence Gary to a total of between thirty-six and forty-eight months. Although Gary's lawyer repeated several times in his statement to the trial court that Gary was remorseful, Gary declined to address the trial court except to note that he did not disagree with anything his lawyer had said and that "I'd like to apologize to the victim, [naming her], and also to my son."

¶5 In imposing sentence, the trial court described Gary's behavior during the proceedings as betraying "an attitude that is almost indescribable," noting that he had been "smirking" and, addressing him directly, told him: "Your actions and your facial expressions have shown that you discount the importance of this process, these matters, this Court and even the attorneys." The trial court also opined that Gary was "a violent and dangerous man as characterized by your record," and that his crimes were "abominable." The trial court noted that Gary had "been given many breaks in the past on sentencing and opportunities on probation for rehabilitation," and, nevertheless, he was "as dangerous a man as I have ever seen in my court."

II.

¶6 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. *See* ***State v. Lechner***, 217 Wis. 2d 392, 418, 576 N.W.2d 912, 925 (1998). The primary factors to be considered in imposing sentence are the gravity of the offense, the character of the offender, and the need for the public's protection. *See* ***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). Additionally, WIS. STAT. § 973.15(2) permits a sentencing court to "impose as many sentences as there are convictions and may provide that any such sentence be concurrent with or consecutive to any other sentence imposed at the same time or previously."

¶7 Gary's assertions on appeal essentially boil down to his claim that the trial court improperly considered his demeanor during the proceedings, and that he was not a threat to the "public at large."[1] A trial court may, however, consider a defendant's demeanor, *see* ***State v. Echols***, 175 Wis. 2d 653, 682, 499 N.W.2d 631, 640 (1993), and, as the trial court noted in its written decision

[1] Underlying the contention that Gary was not a threat to the "public at large" is the apparent tacit assertion that domestic abuse is a less-serious crime than violence directed at strangers. Such an argument, if in fact it was being made by Gary's appellate lawyer in her brief on this appeal, is not only without merit but is also unworthy of a member of the bar and an officer of the court.

denying Gary's motion for postconviction relief, Gary's "demeanor negated any representation that he was truly remorseful for his conduct." The trial court here considered the appropriate factors, and appropriately exercised its discretion within the limits set by the legislature.

By the Court.—Judgments and order affirmed.

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