COURT OF APPEALS
DECISION
DATED AND FILED

February 28, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP1329-CR **Cir. Ct. No. 2002CF6046**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

NATHANIEL JORDAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed*.

Before Wedemeyer, P.J., Curley and Kessler, JJ.

¶1 PER CURIAM. Nathaniel Jordan pled guilty to first-degree recklessly endangering safety, while armed, and to possession of a firearm by a felon. The court sentenced Jordan to twelve years of imprisonment for the reckless endangerment charge, comprised of seven years of initial confinement

and five years of extended supervision, concurrent with another sentence, and to five years of imprisonment for the possession of a firearm charge, comprised of two years of initial confinement and three years of extended supervision, consecutive to the reckless endangerment sentence.

¶2 In a postconviction motion, Jordan argued that the court relied on inaccurate information at sentencing and therefore, he was entitled to resentencing. Alternatively, Jordan argued that the consideration by the court of the inaccurate information constituted a "new factor" that justified sentence modification. The court denied Jordan's motion. On appeal, Jordan renews his arguments. We affirm.

BACKGROUND

¶3 On October 16, 2002, Jordan and his girlfriend, Cynthia Arnett, were at Arnett's house when they began arguing. The criminal complaint alleged that Arnett told police that she and Jordan "went into the bedroom … [Jordan] shut the bedroom door … [and] brandished a firearm at her during the argument." The two struggled over the firearm and the gun went off during the struggle, wounding Arnett in the left shoulder. Several of Arnett's children were in the house, and they told police that Jordan and Arnett were arguing and "went into the bedroom … shut the door and continued arguing." After hearing a single gunshot, one of the children went into the bedroom and saw Jordan holding a gun while standing over her mother.

¶4 At sentencing when describing the incident, the assistant district attorney said that Jordan "pulled [Arnett] into a room … shut the door, [and] the door locked." The assistant district attorney also said that the children had told

police that "they saw [Jordan] take [Arnett] into a room and shut the door behind." Jordan did not object to the State's comments.

DISCUSSION

¶5 Jordan contends that the State violated his right to due process during its sentencing argument because there was no evidence that he forced Arnett into the bedroom. Jordan also contends that the sentencing court relied on that inaccurate information when imposing sentence.

¶6 A defendant has a constitutional due process right to receive a sentence that is based upon accurate information. ***State v. Lechner***, 217 Wis. 2d 392, 419, 576 N.W.2d 912 (1998). Whether a defendant has been denied the due process right to be sentenced based on accurate information is a constitutional issue presenting a question of law that we review *de novo*. ***State v. Coolidge***, 173 Wis. 2d 783, 789, 496 N.W.2d 701 (Ct. App. 1993). A defendant alleging that a sentencing decision is based on inaccurate information must prove by clear and convincing evidence both that the information was inaccurate and that the trial court relied on it. ***State v. Groth***, 2002 WI App 299, ¶22, 258 Wis. 2d 889, 655 N.W.2d 163. If a defendant establishes this, the burden shifts to the State to prove the error was harmless.[1] ***Id.***

¶7 Despite the "considerable latitude" afforded counsel during argument, ***State v. Draize***, 88 Wis. 2d 445, 454, 276 N.W.2d 784 (1979) (citation omitted), for purposes of this opinion, we will assume that Jordan has met his burden to show

[1] Although Jordan did not object during sentencing on the grounds of inaccurate information, we consider his argument in the interests of preserving the integrity of the sentencing process. *See* ***State v. Groth***, 2002 WI App 299, ¶23, 258 Wis. 2d 889, 655 N.W.2d 163.

that the information was inaccurate. Therefore, we move directly to examine whether Jordan has proven by clear and convincing evidence that the court relied on the information when imposing sentence.

¶8 At sentencing, the court first considered the nature of the offense. The court stated that Jordan "may not have had the intent to do what [he] did upon coming to the scene but [he] certainly did recklessly endanger the safety" of Arnett. The court further noted that Jordan "could have caused serious injury or death to anybody in the house" because the bullet traveled through walls and was found on the porch. The court stated that Jordan's conduct "certainly showed an utter disregard for human life" and that he could have been charged with reckless homicide if Arnett had been killed. The court discussed Jordan's use of a gun, despite his prior felony convictions and noted that the gun was not recovered by police.

¶9 The court then made the following comments that form the basis for Jordan's argument. Referring to the allegations of the criminal complaint, the court stated that Jordan "took [Arnett] into the bedroom, shut the door, brandished a firearm, and during an argument or in a struggle over that weapon she was subsequently shot." The court also stated that "the nature of the offense … [was] obviously very serious," noting that "not only was [Arnett] forced into the bedroom and then was shot but [there were also] a number of kids in the household."

¶10 The court next considered Jordan's character, stating that it "always tailors a sentence to fit the particular circumstances of the case and the individual characteristics" of the defendant. The court stated that Jordan had been arrested over fifty times and had "committed a number of property crimes, drug-related

offenses and armed robberies" that were plea-bargained down to thefts from a person. The court noted that Jordan used an "instrument of death" in this incident and that a child saw Jordan "standing over [Arnett] with the gun in your hand." The court stated that Jordan had previously been on probation and parole and he had been revoked and spent time in prison. The court stated that Jordan has "had a number of chances" to lead a crime-free life and will have another opportunity when he is released from prison after serving this sentence. The court considered Jordan's education, employment history, and his "chemical usages." The court noted that Jordan had been "less than truthful" when speaking to the preparer of the presentence investigation report but that was "cleared up" earlier in the hearing.[2] The court stated that Jordan had engaged in "assaultive behaviors" previously and, therefore, probation was not appropriate. Then, after complying with the mandates of WIS. STAT. § 973.01(8) (2003-04),[3] the court again referred to "the gravity of the offense," Jordan's "entire record" and his "previous convictions of various felony charges" and imposed sentence.

¶11 In its postconviction decision, the court stated that it "did not base its sentence on the method in which the defendant and the victim came to be in the bedroom," but rather "primarily on the defendant's prior criminal history and his inability to conform his conduct as evidenced by [his] multiple … convict[ions], plus the fact that many of the offenses were committed while he was on probation or parole, and the many revocations of his probation or parole." The court further stated that "[t]he how or why the defendant and the victim reached the bedroom …

[2] Initially, Jordan denied any involvement in the incident.

[3] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

was completely insignificant in the total picture painted of the defendant, his character, and his background…. Whether the defendant pulled her, took her, followed her or was 'just there' … had no virtual impact" on the sentence.

¶12 We recognize that "[a] postconviction court's assertion of non-reliance on allegedly inaccurate sentencing information is not dispositive [and] [w]e may independently review the record to determine the existence of any such reliance." ***Groth***, 258 Wis. 2d 889, ¶28 (citation omitted). In this case, we conclude that the postconviction court's disavowal of reliance is supported by the record, and therefore, Jordan has not met his obligation to prove reliance by clear and convincing evidence. In both of the comments that Jordan finds objectionable, the court's ultimate observation was that Arnett was shot. That observation is entirely consistent with the court's statement in its postconviction decision that the "method" or the "how or why" that Jordan and Arnett got to the bedroom was immaterial. Rather, when imposing sentence, the court focused on Jordan's character, his prior criminal record, and the danger that his conduct created both for Arnett and the children in the house. Those considerations are relevant factors when imposing sentence. We conclude that the court did not rely on the prosecutor's comments that suggested that Jordan forced Arnett into the bedroom and, therefore, did not violate Jordan's due process right to be sentenced upon accurate information. *See* ***Lechner***, 217 Wis. 2d at 419.

¶13 We next consider Jordan's argument that he is entitled to resentencing based upon a new factor. A defendant seeking sentence modification based on a new factor must first show that a new factor exists. ***State v. Champion***, 2002 WI App 267, ¶4, 258 Wis. 2d 781, 654 N.W.2d 242. A "new factor" is

> a fact or set of facts highly relevant to the imposition of sentence, but not known to the trial judge at the time of

> original sentencing, either because it was not then in existence or because, even though it was then in existence, it was unknowingly overlooked by all of the parties.

Rosado v. State, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975). A new factor must be a development that frustrates the purpose of the original sentence, and must be proved by clear and convincing evidence. ***Champion***, 258 Wis. 2d 781, ¶4. Whether something constitutes a new factor is a question of law we review independently. ***State v. Michels***, 150 Wis. 2d 94, 97, 441 N.W.2d 278 (Ct. App. 1989).

¶14 As decided above, the court did not rely on the allegedly inaccurate information when imposing sentence. Therefore, it cannot be a "fact or set of facts highly relevant to the imposition of sentence," ***Rosado***, 70 Wis. 2d at 288, and Jordan's "new factor" argument also fails.

By the Court.—Judgment and order affirmed.

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