COURT OF APPEALS
DECISION
DATED AND FILED

April 10, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-1112-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

LUIS A. TRUJILLO,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: LAURENCE C. GRAM, JR., and MEL FLANAGAN, Judges. *Affirmed*.

Before Fine, Schudson and Curley, JJ.

¶1 PER CURIAM. Luis A. Trujillo appeals from a judgment of conviction, following his guilty pleas to eighteen charges, and from an order denying his motion for postconviction relief. He argues that the trial court

erroneously exercised discretion in sentencing him, and that the postconviction court erred in denying his motion to withdraw his pleas regarding six of the counts on which he was convicted. We affirm.

I. BACKGROUND

¶2 The State charged Trujillo with ten counts of first-degree sexual assault, two counts of attempted first-degree sexual assault, three counts of kidnapping, one count of attempted kidnapping, one count of operating a vehicle without the owner's consent, and three counts of armed robbery, all as a party to a crime.[1] Pursuant to a plea agreement, the State moved to have the attempted kidnapping count and one of the armed robbery counts dismissed and read into the record for sentencing purposes; Trujillo pled guilty to the remaining eighteen

[1] The twenty counts, each charged as a party to a crime were: Count 1—kidnapping, by threat of imminent force, on July 13, 1997; Count 2—first-degree sexual assault, by threat of use of a dangerous weapon, on July 13, 1997; Count 3—first-degree sexual assault, by threat of use of a dangerous weapon, on July 13, 1997; Count 4—operating a vehicle without the owner's consent, while possessing a dangerous weapon and by threat of use of force or the weapon against another, on August 9, 1997; Count 5—kidnapping, by force or threat of imminent force, on August 9, 1997; Count 6—armed robbery, by threatening imminent use of force, on August 9, 1997; Count 7—first-degree sexual assault, by use of a dangerous weapon, on August 9, 1997; Count 8—first-degree sexual assault, by use of a dangerous weapon, on August 9, 1997; Count 9—first-degree sexual assault, by use of a dangerous weapon, on August 9, 1997; Count 10—attempted first-degree sexual assault, by use of a dangerous weapon, on August 9, 1997; Count 11—first-degree sexual assault, by use of a dangerous weapon, on August 9, 1997; Count 12—first-degree sexual assault, by use of a dangerous weapon, on August 9, 1997; Count 13—first-degree sexual assault, by use of a dangerous weapon, on August 9, 1997; Count 14—armed robbery, by threatening imminent use of force, on August 23, 1997; Count 15—attempted kidnapping, by threat of imminent force, on August 23, 1997; Count 16—kidnapping, by threat of imminent force, on August 23, 1997; Count 17—first-degree sexual assault, by use of a dangerous weapon, on August 23, 1997; Count 18—attempted first-degree sexual assault, by use of a dangerous weapon, on August 23, 1997; Count 19—first-degree sexual assault, by use of a dangerous weapon, on August 23, 1997; and Count 20—armed robbery, by threatening imminent use of force, on August 23, 1997.

counts.[2] The parties stipulated to the criminal complaint as the factual basis for the pleas. The court accepted the pleas, stating that it would "make findings of guilty as to all counts except 14 and 15 which are dismissed but … [the] factual basis for those counts has been established and they will be considered for purposes of sentencing."

¶3 Trujillo faced a potential total prison sentence of 680 years; the court imposed an aggregate sentence of 340 years. Trujillo filed a postconviction motion seeking: (1) withdrawal of his pleas regarding Counts 8-13; and (2) resentencing. The court denied the motion without a hearing.

II. DISCUSSION

A. Plea Withdrawal

¶4 Trujillo challenges the court's denial of his postconviction motion to withdraw his pleas to Counts 8-13, each involving either attempted or completed first-degree sexual assault of the same victim on the same day. He contends that the court "failed to establish a factual basis for the pleas." Trujillo explains that his challenge is to the application of WIS. STAT. § 940.225(1)(b) (1997-98),[3] and

---

[2] On Counts 10-12, Trujillo pled guilty pursuant to ***North Carolina v. Alford***, 400 U.S. 25 (1970). An ***Alford*** plea is a guilty plea. ***State ex rel. Warren v. Schwarz***, 219 Wis. 2d 615, 631, 579 N.W.2d 698 (1998) ("An ***Alford*** plea is a guilty plea in the same way that a plea of *nolo contendere* or no contest is a guilty plea.").

[3] WISCONSIN STAT. § 940.225 (1997-98) provides, in relevant part:

> **Sexual assault. (1)** FIRST DEGREE SEXUAL ASSAULT. Whoever does any of the following is guilty of a Class B felony:
>
> ….
>
> (b) Has sexual contact or sexual intercourse with another person without consent of that person by use or threat of use of a dangerous weapon ….

on "the legal determination of whether 'use' of a dangerous weapon includes the implied 'threat of use' [of] a dangerous weapon." He argues:

> In counts 8-13, … the state only alleged that [I] committed the assaults "by use of a dangerous weapon." Factually, counts 8-13 are similar to counts 2 and 3 where the state alleged that the assaults occurred "by threat of use of a dangerous weapon." As in counts 2 and 3, a weapon was used to abduct the victim and bring her to the place where the assaults occurred. By the time the assaults commenced, the weapon was put away. And, even though there arguably remained a threat of use of the weapon, no weapon was directly used in the assaults in counts 8-13.

¶5 "Withdrawal of a plea following sentencing is not allowed unless it is necessary to correct a manifest injustice." ***State v. Smith***, 202 Wis. 2d 21, 25, 549 N.W.2d 232 (1996). A trial court's failure "to establish a sufficient factual basis that the defendant committed the offense to which he or she [pled]" is an example of a manifest injustice. ***Id.*** A sufficient factual basis must exist regarding each element of the offense. ***Id.*** at 28. With respect to an ***Alford*** plea, "the factual basis requirement is only satisfied if there is *strong proof of guilt* as to each element of the crime." ***Id.*** (emphasis added). "The determination of the existence of a sufficient factual basis lies within the discretion of the trial court and will not be overturned unless it is clearly erroneous." ***Id.*** at 25. A defendant seeking to withdraw a guilty plea after sentencing must establish clear and convincing evidence of a manifest injustice. ***State ex rel. Warren v. Schwarz***, 219 Wis. 2d 615, 635, 579 N.W.2d 698 (1998).

¶6 The complaint, used as the factual basis for Trujillo's pleas to Counts 8-13, includes the victim's account of events that occurred without her consent: (1) Trujillo's accomplice put a gun to the head of the victim's companion and instructed him to get out of the car; (2) Trujillo pushed the victim into her companion's car, "got into the back seat and put a knife to her throat," "pulled her

head back with one hand[,] and kept the knife to her throat with the other"; (3) while Trujillo's accomplice was driving them to a parking lot, Trujillo "began slipping his hand down [the victim's] sweater and into her bra[,] grabbing her breasts," and "undid [the victim's] pants and slipped his hand inside her pants[,] rubbing her vagina and inserting his finger into her"; (4) Trujillo "forced [the victim] out of the car and walked her over between two semi-trailers"; (5) when the victim tried to prevent Trujillo from pulling her pants down, he "told her 'don't mess with me,'" at which time Trujillo's accomplice "walked up and [the victim] could see the gun sticking out of his waistband"; (6) Trujillo proceeded to pull the victim's pants down, rub her vagina with his hand, lick her vagina, and rub and kiss her breasts; (7) Trujillo subsequently "undid his pants" and "grabbed [the victim] by the hair and forced her on to his penis and was moving her head up and down by her hair"; (8) Trujillo again touched the victim's vagina, kissed her breasts, and performed oral sex (mouth to vagina) on her; (9) Trujillo then, without a condom, "placed his penis into [the victim's] vagina and stroked a couple of times before pulling out of her"; and (10) Trujillo also had anal intercourse with the victim, ejaculating inside her.

¶7 The factual basis for Trujillo's pleas to Counts 8-13 also includes his account: (1) he held the victim in place, preventing her from leaving the car, and then got into the back seat, behind her, and held a switchblade to her side; (2) after his accomplice drove them to a parking lot at the rear of a factory, Trujillo "walked the [victim] to some trailers, … motioned for her to remove her clothes," and then "motioned for her to stop" after "[s]he removed her shoes and started removing her blue jeans and underwear, then pulling up her top"; and (3) with the switchblade in his pocket, he had anal intercourse with the victim, ejaculating inside her.

¶8 By pleading guilty and stipulating to the criminal complaint as the factual basis for his pleas, Trujillo admitted all the material facts alleged in the complaint. *See* ***State v. Rachwal***, 159 Wis. 2d 494, 509, 465 N.W.2d 490 (1991). In fact, during the plea hearing, when the trial court asked Trujillo if he was "satisfied the witness would testify to those things that are set forth in that complaint," he replied, "Yes." As the postconviction court explained in its order denying Trujillo's motion for postconviction relief, Trujillo "not only had used the knife to force the victim's compliance, but continued to use the knife, pocketed or otherwise, to get what he wanted from [the victim]." We agree. Whether in his hand or in his pocket, the use and threat of use of the knife were inextricably connected to Trujillo's actions. Accordingly, Trujillo has failed to establish that withdrawal of his pleas to Counts 8-13 is necessary to correct a manifest injustice.[4]

B. Sentencing

¶9 Trujillo contends that the trial court erroneously exercised discretion in sentencing him. He claims that "[a] Wisconsin circuit court's jurisdiction ends at the Wisconsin border," and that the court, in referring to the danger he would present to people in El Salvador, his native country, should he be released and deported, erred by considering "the need to protect the community outside of the United States." Trujillo also argues that the court erred when it "expressly refused to consider [his] positive character traits." We disagree.

[4] Additionally, we note that when we apply the manifest injustice test in our review of the postconviction court's denial of Trujillo's motion for plea withdrawal, we may consider "[f]acts adduced at the preliminary hearing." ***White v. State***, 85 Wis. 2d 485, 491, 271 N.W.2d 97 (1978). At the preliminary hearing, the victim testified that while Trujillo was sexually assaulting her, she could see his accomplice, and that most of the time "he was no more than three to five feet away" and he "was watching and had the gun," which he was holding toward her. Since Trujillo was charged as a party to a crime for each count, he may be held accountable for his accomplice's use of the gun during the sexual assaults. *See* WIS. STAT. § 939.05 (1997-98).

¶10 Just prior to imposing sentence, the court stated:

> The offenses here are horrendous. And you know this is a significant pattern of conduct, not a single, isolated incident. It appears it occurred over a period of several dates.
>
> Reference is made … to the defendant's previous good character, the concern the family has for him. But you know, that's not what brings defendants before this court. What brings defendants before th[is] court is their wrongful behavior, and to the extent that the court has to fashion punishment, it's for the wrongful behavior that the court has to fashion punishment, not what good things they may have done in their life. [sic]
>
> ….
>
> I've read the presentence. The presentence very simply says Judge, impose the maximum that the law allows. It is the defendant who has committed these crimes….
>
> The defense has suggested frankly substantial period of time in imprisonment and then with a vehicle apparently to send him back to El Salvador.…
>
> One of the factors I mentioned was the need to protect the community. That community isn't always this county. Or even this state. Sometimes it even … reaches beyond the borders of this country. Because as the people that walk the streets of Milwaukee are entitled to protection from this defendant, so are the people of El Salvador.

¶11 We read nothing improper in the court's sentencing evaluation of this case. As the supreme court has explained:

> Sentencing is left to the discretion of the trial court, and appellate review is limited to determining whether there was an erroneous exercise of discretion. We recognize a "strong public policy against interference with the sentencing discretion of the trial court and sentences are afforded the presumption that the trial court acted reasonably." … The defendant must show some unreasonable or unjustifiable basis in the record for the sentence imposed.
>
> The trial court must articulate the basis for the sentence imposed on the facts of the record. There should be evidence in the record that discretion was in fact exercised.

> The primary factors the trial court must consider in imposing sentence are: (1) the gravity of the offense, (2) the character and rehabilitative needs of the offender, and (3) the need for protection of the public. As part of these primary factors the trial court may consider: the vicious and aggravated nature of the crime; the past record of criminal offenses; any history of undesirable behavior patterns; the defendant's personality, character and social traits; the results of a presentence investigation; the degree of the defendant's culpability; the defendant's demeanor at trial; the defendant's age, educational background and employment record; the defendant's remorse, repentance, and cooperativeness; the defendant's need for rehabilitative control; the right of the public; and the length of pretrial detention.

State v. Echols, 175 Wis. 2d 653, 681-82, 499 N.W.2d 631 (1993) (citations omitted). Additionally, the supreme court has stated: "[I]mposition of a particular sentence can be based on any one or more of the three primary factors. While an element of weighing or balancing is involved, this is for the trial court to perform." ***Anderson v. State***, 76 Wis. 2d 361, 367, 251 N.W.2d 768 (1977).

¶12 As the State argues, Trujillo "cites no case which holds that a Wisconsin court can only consider protection of the Wisconsin public in imposing sentence." Arguments in appellants' briefs must be supported by "citations to the authorities, statutes and parts of the record relied on," WIS. STAT. RULE 809.19(1)(e) (1999-2000), and this court need not address unsupported assertions, ***Murphy v. Droessler***, 188 Wis. 2d 420, 432, 525 N.W.2d 117 (Ct. App. 1994). Additionally, we observe, it is perfectly appropriate for a sentencing court to consider the dangers a defendant presents to all potential victims, whether they live in this community or elsewhere.

¶13 The court's sentencing comments reflect its consideration of the appropriate criteria and "a process of reasoning based on legally relevant factors." *See* ***State v. Wickstrom***, 118 Wis. 2d 339, 355, 348 N.W.2d 183 (Ct. App. 1984)

(appellate court has duty to affirm sentencing decision if trial court "engaged in a process of reasoning based on legally relevant factors").

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (1999-2000).