

RECEIVED

STATE OF WISCONSIN

12-19-2017

COURT OF APPEALS

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

DISTRICT I

Case No. 2017AP1600-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MARQUIS D. WALLS,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT AND ORDER OF
THE CIRCUIT COURT FOR MILWAUKEE COUNTY,
THE HONORABLE DENNIS R. CIMPL, PRESIDING

PLAINTIFF-RESPONDENT'S BRIEF

BRAD D. SCHIMEL
Wisconsin Attorney General

GREGORY M. WEBER
Assistant Attorney General
State Bar #1018533

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-3935
(608) 266-9594 (Fax)
webergm@doj.state.wi.us

TABLE OF CONTENTS

	Page
ISSUES PRESENTED FOR REVIEW	1
STATEMENT ON ORAL ARGUMENT AND PUBLICATION	1
INTRODUCTION	1
STATEMENT OF THE CASE	2
STANDARD OF REVIEW	7
ARGUMENT	7
I. Walls forfeited his right to direct appellate review of his Fifth Amendment claim by not making contemporaneous objections at sentencing.....	7
II. Alternatively, the circuit court sentenced Walls in conformity with his Fifth Amendment right to freedom from compelled self-incrimination.	10
A. Controlling principles of law.	10
B. The circuit court did not ask Walls to admit his guilt, nor did the court’s questions violate Walls’s Fifth Amendment rights.....	12
C. Even if this Court construes the circuit court’s questions as an attempt to compel an admission, the court properly considered multiple factors in sentencing Walls.	14
D. Walls’s appellate analysis fails to persuade.	16
CONCLUSION.....	19

TABLE OF AUTHORITIES

Cases

<i>Anderson v. State</i> , 76 Wis. 2d 361, 251 N.W.2d 768 (1977)	11, 12
<i>Bastian v. State</i> , 54 Wis. 2d 240, 194 N.W.2d 687 (1972)	15
<i>Brown v. United States</i> , 356 U.S. 148 (1958)	8
<i>Chapman v. California</i> , 386 U.S. 18 (1967)	8
<i>Cheney v. State</i> , 44 Wis. 2d 454, 171 N.W.2d 339 (1969)	15
<i>Dudrey v. State</i> , 74 Wis. 2d 480, 247 N.W.2d 105 (1976)	9
<i>Finger v. State</i> , 40 Wis. 2d 103, 161 N.W.2d 272 (1968)	16
<i>Gregory v. State</i> , 63 Wis. 2d 754, 218 N.W.2d 319 (1974)	16
<i>Ketchum v. State</i> , 655 S.W.2d 325 (Tex. Ct. App. 1983).....	9
<i>Puckett v. United States</i> , 556 U.S. 129 (2009)	8, 9
<i>Roberts v. United States</i> , 445 U.S. 552 (1980)	7, 9
<i>Scales v. State</i> , 64 Wis. 2d 485, 219 N.W.2d 286 (1974)	10, 16
<i>State v. Adams</i> , 221 Wis. 2d 1, 584 N.W.2d 695 (Ct. App. 1998).....	7, 12
<i>State v. Baldwin</i> , 101 Wis. 2d 441, 304 N.W.2d 742 (1981)	11, 14

	Page
<i>State v. Boshcka</i> , 178 Wis. 2d 628, 496 N.W.2d 627 (Ct. App. 1992).....	8
<i>State v. Carrizales</i> , 191 Wis. 2d 85, 528 N.W.2d 29 (Ct. App. 1995)....	11, 14, 18
<i>State v. Curbello-Rodriguez</i> , 119 Wis. 2d 414, 351 N.W.2d 758 (Ct. App. 1984).....	7, 16
<i>State v. Davis</i> , 2005 WI App 98, 281 Wis. 2d 118, 698 N.W.2d 823.....	10
<i>State v. Erickson</i> , 227 Wis. 2d 758, 596 N.W.2d 749 (1999)	9
<i>State v. Fisher</i> , 211 Wis. 2d 665, 565 N.W.2d 565 (Ct. App. 1997).....	11, 13
<i>State v. Fuerst</i> , 181 Wis. 2d 903, 512 N.W.2d 243 (Ct. App. 1994).....	11, 14
<i>State v. Gallion</i> , 2004 WI 42, 270 Wis. 2d 535, 678 N.W.2d 197.....	10
<i>State v. Groth</i> , 2002 WI App 299, 258 Wis. 2d 889, 655 N.W.2d 163.....	9
<i>State v. Johnson</i> , 158 Wis. 2d 458, 463 N.W.2d 352 (Ct. App. 1990).....	9
<i>State v. Kimbrough</i> , 2001 WI App 138, 246 Wis. 2d 648, 630 N.W.2d 752	11, 14
<i>State v. Merryfield</i> , 229 Wis. 2d 52, 598 N.W.2d 251 (Ct. App. 1999).....	9
<i>State v. Pinno</i> , 2014 WI 74, 356 Wis. 2d 106, 850 N.W.2d 207.....	8
<i>State v. Speer</i> , 176 Wis. 2d 1101, 501 N.W.2d 429 (1993)	11, 14
<i>State v. Stenzel</i> , 2004 WI App 181, 276 Wis. 2d 224, 688 N.W.2d 20.....	10

	Page
<i>State v. Thompson</i> , 172 Wis. 2d 257, 493 N.W.2d 729 (Ct. App. 1992).....	11
<i>State v. Travis</i> , 2013 WI 38, 347 Wis. 2d 142, 832 N.W.2d 491.....	15
<i>State v. Wickstrom</i> , 118 Wis. 2d 339, 348 N.W.2d 183 (Ct. App. 1984).....	11, 14
<i>United States v. Olano</i> , 507 U.S. 725 (1993)	8
<i>United States v. Pool</i> , 660 F.2d 547 (5th Cir. 1981).....	9
<i>United States v. Verdugo-Urquidez</i> , 494 U.S. 259 (1990)	8
 Statutes	
Wis. Stat. § 346.04(3).....	2
Wis. Stat. § (Rule) 809.30	9
Wis. Stat. § 973.19	9

ISSUES PRESENTED FOR REVIEW

Marquis D. Walls stands convicted by jury of attempting to flee or elude a traffic officer—felony fleeing. He claims the circuit court violated his Fifth Amendment right against compelled self-incrimination at sentencing by imposing the statutory maximum sentence to punish him for refusing to admit his guilt.

This appeal presents two issues for review:

1. Did Walls forfeit his right to direct appellate review of his claim by not objecting during sentencing?

Not answered by the circuit court.

This Court should answer “yes.”

2. Did the circuit court violate Walls’s right against compelled self-incrimination at sentencing?

The circuit court answered “no.”

This Court should answer “no.”

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State of Wisconsin does not request oral argument or publication. The opening briefs fully address the issues on appeal. Well-established principles of law compel rejection of Walls’s claim of error.

INTRODUCTION

The Fifth Amendment right against compelled self-incrimination is not self-executing; a defendant must invoke it in a timely manner. That did not happen here. Walls forfeited his right to direct appellate review of his claim by failing to make specific, contemporaneous objections at sentencing.

Alternatively, his claim lacks merit. The circuit court did not ask Walls to admit anything. The court did not impose its sentence based on Walls's refusal to admit his guilt of the charged crime. The court sentenced Walls in a manner fully comporting with the Fifth Amendment.

STATEMENT OF THE CASE

Relevant Background

The charges. The State charged Walls in 2015 with one count of armed robbery, party to the crime, and one count of felony fleeing. (R. 1; 4.) A jury acquitted Walls of the armed robbery, but convicted him of felony fleeing under Wis. Stat. § 346.04(3). (R. 16:1–2.)

The felony fleeing charge stemmed from an act of self-help taken by the alleged victim of the armed robbery. The victim recognized one of the two men who robbed him. After learning the man's street name—and that he dealt drugs—the victim and a family member arranged a drug buy from the man in an attempt to identify him. (R. 48:24–32.)¹

The victim got the man's license plate number and gave it to police. (*Id.* at 32, 34–35.) Department of Transportation records listed Walls as one of the owners of the car. (*Id.* at 60.) And the victim identified Walls from a photo array as one of the robbers. (*Id.* at 60–65.)

Lead detective Nathan Butz located Walls and his car. (*Id.* at 66–68.) Butz stopped the car, and radioed uniformed officers in marked squad cars for backup assistance. (*Id.* at 68–70.) A uniformed officer—Daniel Urban—approached Walls's car to confirm his identity and arrest him for the armed robbery. (*Id.* at 69–71, 86–91.)

¹ This potentially dangerous, ill-advised act of self-help occurred without prior police knowledge or involvement. (R. 48:59.)

After Walls turned over his driver's license, Urban asked him to step out of his car. Walls asked why. Urban told him they had "something to talk about." (*Id.*) Walls replied "no, we don't," put his car into gear, and fled. (*Id.* at 71–72, 91–99, 103–13.)

Walls then led police on a high-speed chase for three and one-half miles on Milwaukee city streets and freeways, driving at least part of the time with his lights off, and ignoring traffic signals. (R. 1:3; 48:90–114.) Walls eventually pulled over and was arrested. (R. 48:113–14.)

The trial. Walls stood trial on both the armed robbery and felony fleeing charges. (R. 46–49.) Through his trial counsel, Walls implicitly admitted his guilt of the felony fleeing charge on two different occasions.

In his opening statement, trial counsel told the jury Walls was "not guilty on the armed robbery, but there will be evidence shown with regarding to the fleeing that will lead you to the conclusion that may not be favorable to Mr. Walls, and Mr. Walls will accept that." (R. 47:97.)

And in his closing argument, trial counsel asked the jury to conclude that Walls fled police not because he committed the armed robbery, but because he had been present at the drug deal set up by the victim of the armed robbery: "[O]ne reason he may have fled is that drug transactions are illegal, because it is an illegal activity. If that is the case, that is the reason he might have fled. Because he might have said, hey, you know, that was a drug deal, I helped him out, I might get in trouble for that one. He panicked and took off." (R. 49:32.) Counsel then told the jury that "I don't want to take up your time and think you are fools in terms of the fleeing in the decision you come to. I understand that one. But the armed robbery, that identification is so weak, not even close." (*Id.*)

Trial counsel correctly predicted the outcome. The jury acquitted Walls of the armed robbery, but found him guilty of the felony fleeing. (R. 16.)

The sentencing. At sentencing, the prosecutor asked the circuit court to impose the maximum sentence of three and one-half years, with one and one-half years of initial confinement and two years of extended supervision, imposed consecutive to a previous nine-year sentence after revocation. (R. 50:2–3.) Walls’s trial counsel asked for a concurrent sentence. (*Id.* at 5.)

Through counsel, Walls explicitly admitted his guilt: “[Walls] wants me to tell you the reason he went to trial is because—it was his position that he was not guilty on the armed robbery. The jury did find him not guilty on that. As far as the fleeing, pretty much early on we knew what that situation was going to be. It was on tape. *My client explained to me he knows he was guilty for the fleeing.* That was not much of a surprise when the jury did find him guilty.” (*Id.* at 6 (emphasis added).)

Walls chose to allocute. (*Id.* at 8.) During allocution, the circuit court asked Walls several times why he fled police. (*Id.* at 8, 9, 16.) Walls chose to answer. He offered no consistent explanation for his conduct: “I was scared . . . I was on supervision . . . I am not supposed to have police contact . . . I have no reason . . . I have no excuse.” (*Id.* at 8, 9, 16.)

The circuit court also asked Walls why he went to the drug deal set up by the armed robbery victim. (*Id.* at 9.) Walls said, “I didn’t know it was a drug deal.” (*Id.*)

The circuit court did not believe Walls.

As for the reasons Walls gave for fleeing, the circuit court said it had “no idea why he is running. I don’t buy his excuse at all that he was running because he was afraid of what his PO might do.” (*Id.* at 14.) The court “chose to

believe that the reason you did it is because you were afraid of something that you had done either on extended supervision, in violation of your extended supervision, or you had violated the law. The jury said it wasn't because of an armed robbery." (*Id.* at 16.) The court was blunt: "I don't believe you for a minute anyway. Because I think you are lying to me and you won't tell me why you ran from the cops." (*Id.* at 17.)

As for whether Walls knew he was present at a drug deal, the circuit court said, "I know he took place in a drug deal set-up by the victim of the armed robbery. He said he didn't know it was a drug deal. I guess I don't believe him I know you were involved in at least one drug deal. You say you didn't know it was a drug deal. I chose not to believe you. Until you can give me a logical explanation as to why you fled from the cops, I don't know." (*Id.* at 14, 16.)

In sentencing Walls, the circuit court discussed the need for both specific and general deterrence—the need to send "a message to Mr. Walls, and everybody else in the community, that you cannot engage in the conduct that he did . . . without consequences." (*Id.* at 13.)

The circuit court characterized the offense of conviction as an "egregious fleeing a long chase" through residential neighborhoods, at high speeds, with no attention paid to traffic signals or the possibility of injury to both citizens and the pursuing officers. (*Id.* at 13–15.) The court noted Walls's alleged gang membership and prior conviction for first-degree reckless injury, a negotiated disposition that resulted in dismissal of two counts of attempted first-degree intentional homicide (read in for sentencing purposes). (*Id.* at 15, 17.) The court believed the public needed protection from Walls. (*Id.* at 17.) When the court looked at "all of that"—including Walls's multiple explanations for why he fled—the court concluded that it

had “no choice” but to impose the maximum sentence available on the offense of conviction. (*Id.*)

The forfeiture. The defense did not object during sentencing to any of the circuit court’s questions or remarks.

The postconviction proceedings. Walls sought resentencing, claiming “[t]he circuit court violated [his] Fifth Amendment right against self-incrimination by attempting to coerce him into admitting guilt during sentencing, and then relying on his failure to do so to impose the maximum prison sentence available.” (R. 32:4.)

The circuit court refused to resentence Walls. (R. 33.) The court explained why it imposed the maximum sentence: “[T]he court considered the egregious nature of the offense (speeding between 60 and 80 miles an hour through residential neighborhoods, disregarding stop signs and traffic lights), the defendant’s prior record, including very serious charges of first-degree intentional homicide, two counts of attempted first-degree intentional homicide and keeping a drug house - all of which were reduced to a single charge of first-degree reckless injury under the terms of a plea agreement), the defendant’s gang affiliation (which he denied), his character for lying and the need to protect the public.” (*Id.* at 2.)

The circuit court also rejected Walls’s asserted Fifth Amendment violation. (*Id.* at 2–3.) The court explained that it questioned Walls about why he fled “in the exercise of its duty to acquire full knowledge of his character and behavior.” (*Id.* at 2.) The court felt it “was entitled to consider the facts adduced at trial, including the facts relating to the drug deal, even though the defendant was not charged with drug dealing and he denied that he was involved in that kind of activity.” (*Id.* at 2–3.)

The circuit court stated that Walls’s responses did not have a material effect on the sentence imposed: “There were

other more compelling factors the court considered in imposing a maximum prison sentence, most particularly the egregious nature of the fleeing, which put the lives of innocent people and the pursuing officers at risk. The court did not give undue weight to the defendant's responses in considering his character and did not punish the defendant more severely because of them. The court considered a variety of factors within the exercise of its discretion and imposed the sentence it deemed to be necessary to achieve the goals of punishment, deterrence and community protection." (*Id.* at 3.)

Walls now appeals.

STANDARD OF REVIEW

Whether a sentencing court has violated a convicted defendant's Fifth Amendment right against compelled self-incrimination presents a question subject to independent review. *State v. Adams*, 221 Wis. 2d 1, 6, 584 N.W.2d 695 (Ct. App. 1998). Nevertheless, "[t]here is a presumption that a trial court acts reasonably in sentencing." *State v. Curbello-Rodriguez*, 119 Wis. 2d 414, 435, 351 N.W.2d 758 (Ct. App. 1984).

ARGUMENT

I. Walls forfeited his right to direct appellate review of his Fifth Amendment claim by not making contemporaneous objections at sentencing.

The Fifth Amendment right against compelled self-incrimination is not self-executing. *Roberts v. United States*, 445 U.S. 552, 559 (1980). A defendant must invoke it in a timely fashion. *Id.*

That did not happen here. Walls made no contemporaneous Fifth Amendment objections to any of the

circuit court's questions and remarks. He first challenged them after conviction. He has therefore forfeited his right to review of his Fifth Amendment claim in this appeal.

“No procedural principle is more familiar to this Court than that a constitutional right . . . may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.” *United States v. Olano*, 507 U.S. 725, 731 (1993) (citation omitted). *See also State v. Pinno*, 2014 WI 74, ¶ 56, 356 Wis. 2d 106, 850 N.W.2d 207. To be sure, courts have viewed the privilege against compelled self-incrimination as *fundamental*. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 264 (1990). But only *structural* errors that undermine the entire criminal adjudicatory process require automatic reversal. *Chapman v. California*, 386 U.S. 18, 21–22 (1967). Even if proven, a Fifth Amendment self-incrimination violation does not constitute structural error. *Id.* at 24. And the rights subject to forfeiture include the privilege against compelled self-incrimination. *See Brown v. United States*, 356 U.S. 148, 155–56 (1958).

The forfeiture rule exists, in part, to encourage diligence and vigilance by defendants. “The forfeiture rule facilitates fair and orderly administration of justice and encourages parties to be vigilant lest they lose a right by failing to object to its denial.” *Pinno*, 356 Wis. 2d 106, ¶ 56. Enforcement of the forfeiture rule encourages defendants to make timely objections, which gives the circuit court the opportunity to consider and resolve them so they cannot affect the outcome of the proceeding. *Puckett v. United States*, 556 U.S. 129, 134 (2009).

Application of the forfeiture rule at sentencing also discourages sandbagging by defendants who might otherwise wait to see the actual sentence imposed before objecting. *Cf. State v. Boshcka*, 178 Wis. 2d 628, 643, 496

N.W.2d 627 (Ct. App. 1992); *Dudrey v. State*, 74 Wis. 2d 480, 485, 247 N.W.2d 105 (1976); *Puckett*, 556 U.S. at 134.

A defendant's unexcused failure to make a contemporaneous objection to a circuit court's alleged Fifth Amendment violation at sentencing is no different than failure to object to other alleged sentencing errors for which forfeiture applies. *See, e.g., State v. Johnson*, 158 Wis. 2d 458, 470, 463 N.W.2d 352 (Ct. App. 1990) (failure to object to alleged errors in a presentence report); *State v. Groth*, 2002 WI App 299, ¶¶ 25–26, 258 Wis. 2d 889, 655 N.W.2d 163 (failure to object to other alleged inaccuracies); *State v. Merryfield*, 229 Wis. 2d 52, 64–66, 598 N.W.2d 251 (Ct. App. 1999) (failure to object to a prosecutor's alleged breach of a plea agreement).

Forfeited claims need not evade appellate review. A defendant can seek review of a forfeited claim in the context of ineffective assistance of counsel. *State v. Erickson*, 227 Wis. 2d 758, 766, 596 N.W.2d 749 (1999). But Walls has not claimed that his trial counsel performed deficiently by failing to make Fifth Amendment objections at sentencing.

Walls may respond that defendants routinely challenge a circuit court's exercise of sentencing discretion in postconviction motions under Wis. Stat. § (Rule) 809.30, or Wis. Stat. § 973.19. That is fine for challenges to most discretionary sentencing decisions, such as length of sentence.

But it is not fine for Fifth Amendment claims involving allegations of compelled self-incrimination at sentencing. That is because a circuit court may quickly and easily cure such a claim at the sentencing hearing. The court need only clarify that it is not punishing the defendant for exercising the Fifth Amendment right against compelled self-incrimination. *See, e.g., Roberts*, 445 U.S. at 559; *United States v. Pool*, 660 F.2d 547, 556 (5th Cir. 1981); *cf. Ketchum*

v. State, 655 S.W.2d 325, 327 (Tex. Ct. App. 1983) (failure to raise Fifth Amendment objection to sentencing court's use of defendant's statements contained in presentence report constitutes waiver).

Specific, contemporaneous objections by Walls at sentencing would have given the circuit court the ability to quickly clarify or correct its reasons for asking the questions Walls complains about on appeal. His failure to object led to additional judicial proceedings that could have been avoided. His failure resulted in the squandering of judicial and litigation resources.

Those failures should come with a price. This Court should deem his Fifth Amendment claim forfeited, and end its work here.

II. Alternatively, the circuit court sentenced Walls in conformity with his Fifth Amendment right to freedom from compelled self-incrimination.

A. Controlling principles of law.

Sentencing is a discretionary act, *State v. Gallion*, 2004 WI 42, ¶ 17, 270 Wis. 2d 535, 678 N.W.2d 197, subject to a consistent, strong policy of appellate noninterference. *State v. Stenzel*, 2004 WI App 181, ¶ 7, 276 Wis. 2d 224, 688 N.W.2d 20. This Court presumes reasonableness in sentencing, and Walls bears the burden of showing the circuit court imposed an unreasonable or unjustifiable sentence. *State v. Davis*, 2005 WI App 98, ¶ 12, 281 Wis. 2d 118, 698 N.W.2d 823.

Generally, the Fifth Amendment prevents a circuit court from imposing a harsher sentence because a defendant refuses to admit guilt after a finding of guilt. *Scales v. State*, 64 Wis. 2d 485, 495, 219 N.W.2d 286 (1974). Wisconsin courts have narrowed the construction of this broad principle in three ways.

First, a circuit court may consider a defendant's refusal to admit guilt "as one of a number of factors at sentencing, so long as the court does not give [it] undue weight." *State v. Carrizales*, 191 Wis. 2d 85, 96, 528 N.W.2d 29 (Ct. App. 1995); *see also State v. Speer*, 176 Wis. 2d 1101, 1130, 501 N.W.2d 429 (1993); *State v. Fuerst*, 181 Wis. 2d 903, 915, 512 N.W.2d 243 (Ct. App. 1994).

Second, a circuit court may consider a defendant's refusal to admit guilt—especially in the face of overwhelming evidence—as reflecting the need for rehabilitation and the risk to the public. *See Fuerst*, 181 Wis. 2d at 915–16; *Speer*, 176 Wis. 2d at 1131; *State v. Wickstrom*, 118 Wis. 2d 339, 355–56, 348 N.W.2d 183 (Ct. App. 1984); *State v. Baldwin*, 101 Wis. 2d 441, 459, 304 N.W.2d 742 (1981).

Third, a circuit court may consider a defendant's refusal to admit guilt in light of the defendant's inconsistent accounts of the charged crimes as indicative of lying, a relevant character consideration. *See Baldwin*, 101 Wis. 2d at 459; *cf. State v. Kimbrough*, 2001 WI App 138, ¶ 18, 246 Wis. 2d 648, 630 N.W.2d 752. A circuit court should "acquire the full knowledge of the character and behavior of the defendant before imposing sentence." *State v. Fisher*, 211 Wis. 2d 665, 678, 565 N.W.2d 565 (Ct. App. 1997). This includes an assessment of the defendant's credibility. *Anderson v. State*, 76 Wis. 2d 361, 369, 251 N.W.2d 768 (1977). Credibility—or lack of it—is indicative of character, remorse, repentance, and cooperativeness, all proper sentencing considerations. *State v. Thompson*, 172 Wis. 2d 257, 264–65, 493 N.W.2d 729 (Ct. App. 1992).

B. The circuit court did not ask Walls to admit his guilt, nor did the court's questions violate Walls's Fifth Amendment rights.

Scales holds that a sentencing court may not impose a harsher sentence for a defendant's failure to admit guilt after a finding of guilt. That did not happen here. The circuit court did not ask Walls to admit his guilt.

"Every case has its frame of reference." *Anderson*, 76 Wis. 2d at 363. Here, the frame of reference includes trial counsel's opening statement and closing argument, in which counsel shared Walls's implicit admissions of guilt on the felony fleeing charge with both the jury and the circuit court. (R. 47:97; 49:32.) It also includes trial counsel's sentencing argument, in which counsel told the court that Walls "explained to me he knows he was guilty for the fleeing." (R. 50:6.)

This is not a situation where a circuit court—frustrated by a defendant's decision not to testify at trial—used the sentencing hearing as an opportunity to press him for an admission to the offense of conviction. No reason existed for the court to demand an admission from Walls. The court already had three.

Here, the frame of reference also includes Walls's decision to allocute. (*Id.* at 8.) He chose to speak. It was no violation of Walls's Fifth Amendment right to freedom from compelled self-incrimination for the circuit court to ask Walls questions about the circumstances surrounding the offense of conviction. And it was no violation for the court to consider what Walls said in response when it imposed sentence.

The Fifth Amendment allows room for circuit courts to ask defendants questions at sentencing that address and serve legitimate, relevant sentencing considerations. That happened here. Walls chose to allocute. And the circuit court

chose to ask Walls questions that would help the court understand an aspect of the charged crime—why he fled from police—and why he found himself present at the drug deal arranged by the armed robbery victim.

The circuit court had a legitimate reason for wanting to know Walls’s motivation for fleeing. That information would help the court better understand Walls. It would provide insight into his criminal conduct, and in turn help the court fashion an appropriate sentence. That is why the court asked its questions: “The court’s questions were put to the defendant in the exercise of its duty to acquire full knowledge of his character and behavior.” (R. 33:2.) *See Fisher*, 211 Wis. 2d at 678. Knowing why Walls found himself present at the drug deal would also provide the circuit court with information relevant to its sentencing decision. Walls’s mere presence at a drug deal—and/or his mere association with another person at such a deal—did not make Walls guilty of any crime. But his presence arguably provided additional insight into Walls’s character.

The circuit court simply asked Walls why he did what he had already admitted doing—fleeing police—and why he found himself at the drug deal arranged by the armed robbery victim. Honest, thoughtful answers—as opposed to lies, or indifference—could have worked in Walls’s favor. Answers that demonstrated insight into his criminal activity—answers that suggested he now saw the error of his ways and was prepared to forego future antisocial behavior—could have opened the door to a more lenient sentence. Such answers could have given the court greater confidence in Walls’s chances for reform and rehabilitation. Such answers could have offset—at least to some degree—the court’s weighing of the extreme risk Walls’s flight had posed to public safety.

But the Fifth Amendment also allows room for a defendant like Walls to face hard questions and make bad

responses. The circuit court asked Walls pointed questions. Walls gave multiple answers that the court did not believe, and considered indicative of lying. (R. 50:14–17.) Those answers did not help Walls’s cause at sentencing. But that is not the circuit court’s fault, and it is not a violation of the Fifth Amendment. Walls’s multiple, inconsistent answers led the court to believe Walls was lying, a relevant character consideration. *Baldwin*, 101 Wis. 2d at 459; *Kimbrough*, 246 Wis. 2d 648, ¶ 18. Lying to the court at sentencing also does not bode well for a defendant’s rehabilitation, and reinforces the conclusion that the defendant poses a risk to public safety. These, too, constitute proper sentencing considerations. *Fuerst*, 181 Wis. 2d at 915–16; *Speer*, 176 Wis. 2d at 1131; *Wickstrom*, 118 Wis. 2d at 355–56; *Baldwin*, 101 Wis. 2d at 459.

The circuit court did not demand Walls admit to felony fleeing. The court asked Walls to explain why he did what he did. Walls’s responses led the court to question Walls’s credibility, and to consider that lack of credibility in imposing sentence. That did not violate Walls’s Fifth Amendment rights.

C. Even if this Court construes the circuit court’s questions as an attempt to compel an admission, the court properly considered multiple factors in sentencing Walls.

“A trial court does not erroneously exercise its discretion when it considers a defendant’s refusal to admit guilt as one of a number of factors at sentencing, so long as the court does not give one factor undue weight.” *Carrizales*, 191 Wis. 2d at 96.

The State does not believe the circuit court tried to compel Walls to admit his guilt of felony fleeing. The State does not believe the court punished Walls with a harsher

sentence because he did not admit guilt. But if this Court disagrees, it should also conclude the court considered a number of permissible sentencing factors. The court did not rely solely on Walls’s alleged refusal to admit guilt, and did not give it undue weight.

The circuit court focused on the need for both specific and general deterrence—“sending a message to Mr. Walls, and everybody else in the community, that you cannot engage in the conduct that he did . . . without consequences.” (R. 50:13.) The court characterized the offense of conviction as an “egregious fleeing a long chase” through residential neighborhoods, at high speeds, with no attention paid to traffic signals or the possibility of injury to both citizens and the pursuing officers. (*Id.* at 13–15.) *See, e.g., Bastian v. State*, 54 Wis. 2d 240, 246, 194 N.W.2d 687 (1972) (“[I]n the exercise of discretion, a substantial sentence may be imposed to emphasize the seriousness of the crime.”); *Cheney v. State*, 44 Wis. 2d 454, 468–69, 171 N.W.2d 339 (1969) (seriousness of offense may justify maximum sentence).

The circuit court also noted Walls’s alleged gang membership and prior conviction for first-degree reckless injury, a negotiated disposition in a case that resulted in dismissal of two counts of attempted first-degree intentional homicide (read in for sentencing purposes). (*Id.* at 15, 17.) The court believed the public needed protection from Walls. (*Id.* at 17.) When the court looked at “all of that”—including Walls’s multiple explanations for why he fled—it concluded that it had “no choice” but to impose the maximum sentence available on the offense of conviction. (*Id.*)

The circuit court explained that it considered the factors unrelated to Walls’s reason for fleeing “more compelling factors” in its sentencing determination. (R. 33:3.) This Court is not bound by the circuit court’s explanation of sentence, *see State v. Travis*, 2013 WI 38,

¶¶ 48, 77, 347 Wis. 2d 142, 832 N.W.2d 491, but it does not have to ignore it, either. The sentence imposed was a measured response to a serious crime. It finds full record support, and enjoys a presumption of reasonableness that Walls has not overcome. *Curbello-Rodriguez*, 119 Wis. 2d at 435. This Court should not disturb it on appeal.

D. Walls’s appellate analysis fails to persuade.

Having admitted the offense of conviction through counsel, having chosen to allocute—and having answered the circuit court’s resulting questions in a way that led the court to reject his credibility—Walls now tries to portray the court as an inquisitor acting in violation of the Fifth Amendment. (Walls’s Br. 10–15.) Walls refers to the court’s “attempts to pressure Mr. Walls to explain his offense and admit guilt,” and its “demands for Mr. Walls to explain his actions and admit guilt.” (*Id.* at 10, 14.)

Walls fails to recognize that, for Fifth Amendment purposes here, the circuit court asking him to explain aspects of the offense of conviction is not the same as the court demanding that he admit his guilt, and punishing him for his failure to do so. The court did not ask, compel, or cajole Walls into admitting his guilt.

This is not a case like *Finger v. State*, 40 Wis. 2d 103, 112, 113 n.1, 161 N.W.2d 272 (1968), where the circuit court flat-out asked the defendant to admit his guilt. And this is certainly not a case like *Scales*, 64 Wis. 2d at 497, where this Court could “only conclude, from the words of the judge, that the decision to imprison was based upon the refusal to confess guilt and to express remorse and that, had [the defendant] done so, he would have been placed on probation.”

Instead, this case is more in keeping with *Gregory v. State*, 63 Wis. 2d 754, 759, 218 N.W.2d 319 (1974), where

“[t]he record fails to disclose any request by the trial judge that the defendant in fact admit his guilt,” and where the circuit court’s comments and remarks “could be characterized as a statement of its belief as to the incredulity of the defendant.”

As argued *supra*, the circuit court asked its questions to better understand an aspect of the charged crime and better understand Walls as he stood before the court for sentencing. The Fifth Amendment does not bar such questions. Nor does it prevent the court from gauging Walls’s responses, from concluding that Walls was lying to the court, and from taking that into account in the sentencing calculus. Walls’s contention that the court was not entitled to answers to the questions it asked (Walls’s Br. 11) rests uneasily alongside the facts that Walls himself chose to allocute, to face questions his allocution might raise, and to face the consequences of answering in a way the court deemed deceitful.

Walls also asserts that the circuit court’s questions and remarks “influenced the circuit court’s sentencing discretion” and “dominated its sentencing discussion.” (*Id.* at 12, 13.)

Certainly the circuit court’s conclusion that Walls was not being truthful factored into the court’s sentencing determination. A defendant’s lack of candor with the circuit court at sentencing does not bode well for his prospects at rehabilitation. The court’s questions reflected proper inquiry, generated responses that the court could properly take into account in imposing sentence, and contributed to—but did not dominate—the sentencing and the sentence imposed. Even if this Court construes the court’s conduct as an effort to pressure Walls into admitting guilt, Walls’s responses were—at most—only one of multiple factors the court considered. They did not receive undue weight. They

did not lead to an erroneous exercise of sentencing discretion. *Carrizales*, 191 Wis. 2d at 96.

Finally, Walls points to the circuit court's statement that it had "no choice" but to impose the maximum sentence available. (Walls's Br. 5, 10, 14.) Walls's believes this reflects the court's dissatisfaction with Walls's answers to the court's questions. (*Id.* at 14.) This may be partially correct, but the State has already shown that the court could properly judge Walls's credibility and character by considering the answers to those questions.

And in context, the circuit court's comment reflects the court's conclusion that, in light of all the factors it considered on the record, Walls plainly deserved the maximum available sentence: "So when I look at the serious nature of the crime, the need to protect the community, and your lack of character, because you are telling me you were never involved in a -- never involved in a gang, well, I don't believe you. Because I don't believe you for a minute anyway. Because I think you are lying to me and you won't tell me why you ran from the cops. So when I look at all of that, you go to prison — back to prison for three and a half years, year and a half initial confinement, two years extended supervision, consecutive to 08-CF-833 out of Racine County. I have no choice." (R. 50:16–17.)

CONCLUSION

This Court should affirm Walls's judgment of conviction and the order denying resentencing.

Dated at Madison, Wisconsin, this 19th day of December, 2017.

BRAD D. SCHIMEL
Wisconsin Attorney General

GREGORY M. WEBER
Assistant Attorney General
State Bar #1018533

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-3935
(608) 266-9594 (Fax)
webergm@doj.state.wi.us

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 5153 words.

GREGORY M. WEBER
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 19th day of December, 2017.

GREGORY M. WEBER
Assistant Attorney General