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03-31-2021

CLERK OF WISCONSIN
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STATE OF WISCONSIN
IN SUPREME COURT

Case No. 2018AP1476-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

OCTAVIA W. DODSON,

Defendant-Appellant-Petitioner.

APPEAL FROM A JUDGMENT OF CONVICTION AND AN
ORDER DENYING POSTCONVICTION RELIEF,
ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT,
THE HONORABLE M. JOSEPH DONALD (JUDGMENT),
AND THE HONORABLE CAROLINA STARK (ORDER),
PRESIDING

PLAINTIFF-RESPONDENT'S BRIEF

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ISSUES PRESENTED

Octavia W. Dodson shot and killed DeShun T. Freeman. Dodson pleaded guilty to second-degree intentional homicide, acknowledging that he took Freeman's life through unnecessary defensive force. At the sentencing hearing, the circuit court observed, based on its experience as a judge, how a person's decision to possess a firearm changes how they react and respond to other people. With respect to Dodson, the circuit court expressed its belief that Dodson's crime was set in motion the day he obtained a concealed carry permit and purchased a firearm. The circuit court also stated that Dodson had a "misguided" and "distorted" belief that Freeman posed a threat that required Dodson to use deadly force. Based primarily on the seriousness of Dodson's crime, his character, and his acceptance of responsibility, the circuit court sentenced Dodson to a 20-year term of imprisonment.

In a postconviction motion, Dodson asked the circuit court to resentence him, claiming that the sentencing court's comments infringed on his Second Amendment rights and, therefore, constituted an improper sentencing factor.

1. Did the circuit court's comment about Dodson's status as a concealed-carry licensee and its observations about how people who possess firearms interact with others constitute an improper sentencing factor?

The postconviction court answered: No.

The court of appeals answered: No.

This Court should answer: No.

2. If the circuit court's comments reflected an improper factor, did Dodson prove by clear and convincing evidence that the circuit court actually relied on that factor when it sentenced Dodson?

The postconviction court answered: No.

The court of appeals answered: No.

This Court should answer: No.

3. If Dodson met his burden, did the State prove that the error was harmless?

The circuit court did not answer.

The court of appeals did not answer.

This Court should answer: Yes, if it reaches this issue.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

This case merits oral argument and publication.

INTRODUCTION

This Court should affirm Dodson's sentence. First, the circuit court's comments about Dodson's "misguided" and "distorted" beliefs related to Dodson's unreasonable belief the victim posed a threat that required Dodson to respond with deadly force. Neither the circuit court's experiential observations about how people who possess guns interact with others nor its comment about Dodson's decision to obtain a concealed-carry license constituted an improper factor because the court's comments did not infringe on Dodson's Second Amendment rights.

Second, even if the circuit court's comments constituted an improper factor, Dodson did not prove by clear and convincing evidence that the circuit court actually relied on this factor when it sentenced him.

Third, even if the circuit court actually relied on an improper factor, the error was harmless based on the circuit court's focus on other legitimate factors, including the seriousness of Dodson's crime and his positive character traits.

STATEMENT OF THE CASE

The charge. The State charged Dodson with second-degree intentional homicide while using a dangerous weapon, alleging that Dodson caused Freeman's death with intent to kill, under circumstances that "mitigated the offense of first degree intentional homicide, to wit: unnecessary defensive force under [Wis. Stat. § 940.01(2)(b)]," contrary to Wis. Stat. §§ 940.05(1) and 939.63(1)(b). (R. 1:1.)

According to the complaint, on March 25, 2016, several people called 911, reporting that they heard gun shots and saw the victim lying near the intersection of 10th Street and Concordia. (R. 1:1.) The Milwaukee Police Department's ShotSpotter detected six gunshots near the intersection of 10th and Concordia at approximately 10:48 p.m. (R. 1:2.)

Officers responded and found Freeman lying facedown in the middle of the street. (R. 1:2.) Officers did not recover a firearm, ammunition, or holster from Freeman's person. (R. 1:2.) Officers located several spent shell casings grouped near the street curb. (R. 1:2.) Officers noted that Freeman's Buick did not have tinted windows and that a registration plate was affixed to the front bumper. (R. 1:2.)

A forensic pathologist determined that Freeman died from the three gunshot wounds he sustained, including one to his right temple. (R. 1:2.)

Dodson called 911, identified himself, and said that the other man "pulled a gun" on him. (R. 1:1.) Dodson said that he would turn himself in to the police. (R. 1:1.) Officers met Dodson at his father's house, where they recovered a Glock 9mm semi-automatic handgun, an extended magazine with a 17-round capacity loaded with eleven unspent cartridges, and a holster. (R. 1:2.)

Dodson told detectives that a blue Buick without a front license plate and with bluish-purplish window tint rear-ended

him at Teutonia Avenue and Center Street. (R. 1:3.) Dodson exited his car to see if it had sustained damage. (R. 1:3.) As the Buick backed away and sped off, Dodson unholstered his gun, holding it in his left hand. (R. 1:3.)¹ Dodson attempted to follow the Buick but lost sight of it. (R. 1:3.) As he drove around, Dodson replaced a 10-round magazine in the gun with an extended 17-round magazine. (R. 1:3.)

Dodson told detectives that he later saw the Buick that previously struck him come up from behind at a high rate of speed and stop. (R. 1:3.) Dodson stopped his car as well. (R. 1:3.) Dodson stated that a man exited the car and ran toward him with his hands in his pockets or underneath his shirt. (R. 1:3.) Dodson believed that the man was pulling something out, and he responded by shooting his gun three times. (R. 1:3.) Initially, Dodson said that he never exited his car, but he later said that he shot the victim while standing outside his car. (R. 1:3.) Dodson drove to his girlfriend's house and then called 911 as he drove to his father's house. (R. 1:4.)

Dodson's plea hearing. Under a plea agreement's terms, the State moved to dismiss the "while armed" penalty enhancer, and Dodson agreed to plead guilty to second-degree intentional homicide. (R. 70:2.) The State agreed to recommend that Dodson receive a "substantial prison term" without specifying the amount of confinement time or extended supervision time. (R. 13:2; 70:3.) The circuit court accepted Dodson's plea, granted the State's motion to strike

¹ Surveillance video from a nearby gas station confirmed Dodson's account of the accident that occurred at approximately 10:43 p.m. on March 25, 2016. (R. CD-Defendant's Postconviction Motion Exhibit F, 10:43:00 p.m.) The surveillance video is on a CD that Dodson filed in circuit court with his postconviction motion and subsequently transmitted to this Court. (R. 63:1.)

the while armed enhancer, and ordered a presentence investigation. (R. 70:10–13.)

The presentence recommendation. Dodson faced a maximum term of imprisonment of not more than 60 years for second-degree intentional homicide. (R. 70:4); Wis. Stat. § 939.50(3)(b). The presentence writer recommended that Dodson serve a five-to-nine-year term of initial confinement followed by a five-to-six-year term of extended supervision. (R. 17:20.)

The court identified relevant sentencing factors, including the serious nature of the offense, Dodson’s character, and the need to protect the public. (R. 73:30.) It characterized Dodson’s crime as a “serious offense.” (R. 73:32.) The court explained, “I am completely baffled as to why this happened. And I don’t think that there is any rational way of trying to explain it.” (R. 73:30.) The court observed,

[I]n my experience as a judge, I have seen over time how individuals when they are possessing a firearm, how that in some way changes them. It changes how they view the world. It changes how they react and respond to people. I know that this is only speculation on my part, but I do strongly feel that the day that you applied for that concealed carry permit and went out and purchased that firearm, and that extended magazine, whether your rational beliefs [sic] for possessing it, whether you felt the need to somehow arm yourself and protect yourself from essentially the crime that is going on in this community I think on that day set in motion this circumstance.

(R. 73:30–31.)

Focusing on the crime itself, the court told Dodson, “[I]t is a distorted, misguided belief of the world that somehow Mr. Freeman was a threat that required you, in essence, to terminate his life.” (R. 73:31.) The court characterized Freeman’s death as a “totally unnecessary and tragic loss of

life.” (R. 73:31.) It told Dodson, “[Y]ou were operating under some misguided belief, some distorted view of the world that somehow Deshon [sic] Freeman was a threat to you when in reality it was nothing further from the truth.” (R. 73:32.) Based on its own review of the record as well as the prosecutor’s argument, the court observed that Dodson made several statements that were not factually supported in the record. (R. 73:32.)

The court noted Dodson’s positive character traits, including the absence of a prior record, his work history, and efforts to provide for his family. (R. 73:32.) It also characterized Dodson’s acceptance of responsibility as a mitigating factor. (R. 73:32.)

Dodson’s sentence. The circuit court imposed a 20-year term of imprisonment, consisting of a 14-year term of initial confinement followed by a 6-year term of extended supervision. (R. 73:34.)²

Dodson’s postconviction motion. Dodson moved for postconviction relief. (R. 38.) Relevant to this appeal, Dodson claimed that the sentencing court considered an improper factor, i.e., his possession of a handgun and status as a concealed-carry licensee. (R. 38:12–17.)

Based on its review of the sentencing transcript, the postconviction court determined that the sentencing court’s comments about gun owners did not constitute an improper sentencing factor. (R. 72:25–26.) The postconviction court determined that when it looked at the sentencing court’s

² Dodson also moved to withdraw his plea because he claimed that his counsel was ineffective for misadvising him about the unanimity requirement at a jury trial. (R. 38:6–12.) The court denied this claim following an evidentiary hearing. (R. 71; 72:17–22.) Dodson does not challenge the postconviction court’s denial of his plea withdrawal motion on appeal.

statements “in the context” and as “a whole,” its statements did “not rise to the level of improper sentencing factors.” (R. 72:27.) The postconviction court denied Dodson’s postconviction motion. (R. 72:27.)

The court of appeals’ decision. In a per curiam opinion, the court of appeals affirmed the circuit court’s denial of Dodson’s postconviction motion. *State v. Dodson*, No. 2018AP1476-CR, 2020 WL 4999697 (Wis. Ct. App. Aug. 25, 2020) (unpublished). Viewing the circuit court’s sentencing comments in context, the court of appeals determined that the circuit court’s “comments about Dodson’s unlawful use of his firearm were not improper,” and that the circuit court did not base its sentence on Dodson’s decision, as a concealed-carry licensee, to exercise his right to carry a firearm. *Id.* ¶ 18. Therefore, the court of appeals concluded that Dodson did not prove by clear and convincing evidence that the circuit court actually relied on an improper factor. *Id.*

ARGUMENT

I. The circuit court’s comments about people who possess weapons and Dodson’s status as a concealed-carry licensee did not constitute an improper sentencing factor.

A. Dodson bears the burden of proving that the circuit court relied on an improper factor when it sentenced him.

1. Standard of review

“Sentencing decisions are afforded a presumption of reasonability consistent with [this Court’s] strong public policy against interference with the circuit court’s discretion.” *State v. (Landray) Harris*, 2010 WI 79, ¶ 30, 326 Wis. 2d 685, 786 N.W.2d 409. Therefore, sentencing is committed to the circuit court’s discretion, and this Court limits its review of a

circuit court's sentence to determining whether the circuit court erroneously exercised its discretion. *State v. Gallion*, 2004 WI 42, ¶ 17, 270 Wis. 2d 535, 678 N.W.2d 197. As such, the defendant bears a “heavy burden” of proving an erroneous exercise of discretion by clear and convincing evidence. (*Landray*) *Harris*, 326 Wis. 2d 685, ¶¶ 31, 34.

A circuit court erroneously exercises its sentencing discretion when it does not explain its reasoning for its sentencing determination, when it bases its sentence on facts not in the record, or when it misapplies the law by relying on “clearly irrelevant or improper factors.” *State v. Loomis*, 2016 WI 68, ¶ 31, 371 Wis. 2d 235, 881 N.W.2d 749. Whether a factor is improper because it may implicate a defendant's constitutional rights presents a legal question that this Court independently reviews. *Id.* ¶ 29 (right to due process). This Court “may search the record for reasons to sustain the circuit court's exercise of [sentencing] discretion.” *State v. Salas Gayton*, 2016 WI 58, ¶ 20, 370 Wis. 2d 264, 882 N.W.2d 459 (citation omitted).

2. The exercise of sentencing discretion

In exercising its sentencing discretion, the circuit court must identify the sentence's objectives. *Gallion*, 270 Wis. 2d 535, ¶ 40. A circuit court considers three primary factors when it assesses a sentence's objectives, including: “(1) the gravity of the offense; (2) the character of the defendant; and (3) the need to protect the public.” *State v. Williams*, 2018 WI 59, ¶ 46, 381 Wis. 2d 661, 912 N.W.2d 373; Wis. Stat. § 973.017(2)(ad)–(ak). A circuit court also assesses the crime's impact on the victim. *Gallion*, 270 Wis. 2d 535, ¶¶ 64–65 (citing Wis. Const. Art. I, § 9m and Wis. Stat. § 950.04(1v)(pm)). A circuit court may also consider several other sentencing factors related to the offense's seriousness, the defendant's character, and the public's interest. (*Robert*)

Harris v. State, 75 Wis. 2d 513, 519–20, 250 N.W.2d 7 (1977) (listing 12 additional factors).

As part of its exercise of sentencing discretion, the circuit court should identify the facts relevant to the sentence’s objectives and explain how a sentence’s component parts advance its objectives. *Gallion*, 270 Wis. 2d 535, ¶ 42. It should identify the relevant factors that it considers in determining its sentence, explaining “how those factors fit the objectives and influence the decision.” *Id.* ¶ 43.

3. A sentence based on inaccurate information or an improper factor

A circuit court erroneously exercises its sentencing discretion when it relies on inaccurate information or an improper factor. *State v. Alexander*, 2015 WI 6, ¶ 17, 360 Wis. 2d 292, 858 N.W.2d 662.

Improper factors. “An improper sentencing factor is a factor that is ‘totally irrelevant or immaterial to the type of decision to be made.’” *State v. Gallion*, 2002 WI App 265, ¶ 16, 258 Wis. 2d 473, 654 N.W.2d 446, *affirmed* 2004 WI 42, 270 Wis. 2d 535, 678 N.W.2d 197 (quoting *Elias v. State*, 93 Wis. 2d 278, 282, 286 N.W.2d 559 (1980)). A circuit court’s consideration of certain factors, including “race or national origin, gender, alleged extra-jurisdictional offenses, and the defendant’s or victim’s religion,” would violate due process. *Alexander*, 360 Wis. 2d 292, ¶ 23 (citations omitted); *cf. Salas Gayton*, 370 Wis. 2d 264, ¶¶ 31–33 (circuit court’s consideration of immigration status as a minor factor did not violate due process when it was relevant to one of the defendant’s convictions).

Apart from improper factors based on certain classifications, a circuit court “may not vindictively punish a defendant *solely* for exercising a constitutional right.” *Williams*, 381 Wis. 2d 661, ¶ 51 (emphasis added). For

example, an increased sentence imposed on a defendant following a successful appeal may violate due process and constitute an improper factor, to the extent the court is punishing the defendant for exercising his right to appeal. *State v. Church*, 2003 WI 74, ¶ 1, 262 Wis. 2d 678, 665 N.W.2d 141. Likewise, a circuit court's consideration of a defendant's compelled statements obtained in violation of the Fifth Amendment privilege against self-incrimination would constitute an improper factor. *Alexander*, 360 Wis. 2d 292, ¶ 24. Finally, a circuit court may not "vindictively increase a defendant's sentence based *solely* on his decision" to exercise a statutory right. *Williams*, 381 Wis. 2d 661, ¶¶ 49–51 (emphasis added) (consideration of objection to paying restitution proper when it was "inextricably intertwined with a defendant's character and lack of remorse").

A challenge to a sentence based on inaccurate information or an improper factor. When a defendant alleges that the circuit court relied on inaccurate information, the defendant must prove by clear and convincing evidence that the "(1) information was inaccurate, and (2) the court actually relied on the inaccurate information in the sentencing." *Alexander*, 360 Wis. 2d 292, ¶¶ 17–18. "If the defendant proves inaccuracy and actual reliance, the burden shifts to the State to prove the error was harmless." *Id.*

Recognizing the difficulties of proving that a circuit court actually relied on an improper factor, this Court modified the analysis that applies to challenges based on inaccurate information when it assesses a defendant's claim that a circuit court relied on an improper factor. *Alexander*, 360 Wis. 2d 292, ¶ 20. When a defendant alleges that the circuit court relied on an improper factor, "only the second part of the test, actual reliance, is relevant." (*Landray Harris*, 326 Wis. 2d 685, ¶ 33 n.10. And the defendant must "prove by clear and convincing evidence that the circuit court

actually relied on an improper factor.” *Alexander*, 360 Wis. 2d 292, ¶ 30.

Actual reliance occurs only when the circuit court pays “explicit attention” to an improper factor, and when the improper factor forms “part of the basis for the sentence.” *Alexander*, 360 Wis. 2d 292, ¶ 25 (quoting *State v. Tiepelman*, 2006 WI 66, ¶ 14, 291 Wis. 2d 179, 717 N.W.2d 1). In determining whether a circuit court actually relied on an improper sentencing factor, an appellate court reviews the sentencing transcript as a whole and considers the allegedly improper comments in context. (*Landray*) *Harris*, 326 Wis. 2d 685, ¶ 45. Notably, actual reliance does not occur when improper factors “bear a reasonable nexus to proper sentencing factors.” *Id.* ¶ 4.

Harmless error. Dodson assumes that harmless error analysis applies if he proves the circuit court actually relied on an improper factor. (Dodson’s Br. 11–12.) Harmless error analysis applies when a defendant proves that the circuit court actually relied on *inaccurate* information. *State v. Travis*, 2013 WI 38, ¶¶ 55–66, 347 Wis. 2d 142, 832 N.W.2d 491. But this Court has not decided whether a circuit court’s actual reliance on an improper factor constitutes structural error or is subject to harmless error analysis. (*Landray*) *Harris*, 326 Wis. 2d 685, ¶ 33; *Salas Gayton*, 370 Wis. 2d 264, ¶¶ 18, 38. Should this Court determine error occurred, then it should apply harmless error analysis to resolve Dodson’s case based on Dodson’s concession and because harmless error ordinarily applies to the type of error that Dodson claims occurred here. *See infra* Section III.A.

The remedy. A defendant is entitled to resentencing if the defendant demonstrates that the circuit court actually relied on inaccurate information or an improper factor and the State does not demonstrate the error was harmless. *Tiepelman*, 291 Wis. 2d 179, ¶ 4 (inaccurate information).

4. Second-degree intentional homicide—unnecessary defensive force

First-degree intentional homicide occurs when the defendant causes another person's death with intent to kill that person or another human being. Wis. Stat. § 940.01(1)(a). Unnecessary defensive force is an affirmative defense that mitigates the crime of first-degree intentional homicide to second-degree intentional homicide. Wis. Stat. §§ 940.01(2)(b) and 940.05(1). Unnecessary defensive force occurs when the “[d]eath was caused because the actor believed he or she or another was in imminent danger of death or great bodily harm and that the force used was necessary to defend the endangered person, if either belief was unreasonable.” Wis. Stat. § 940.01(2)(b). Thus, a defendant will prevail on an imperfect self-defense, but not perfect self-defense, “[i]f a defendant had an *actual* but unreasonable belief that she was in imminent danger of death or great bodily harm and an *actual* but unreasonable belief that the force she used was necessary to defend herself.” *State v. Head*, 2002 WI 99, ¶ 90, 255 Wis. 2d 194, 648 N.W.2d 413; Wis. JI—Criminal 1014 (2003) and 1052 (2006).

5. A person's right to keep and bear arms

The Second Amendment of the U.S. Constitution confers an individual with the right to keep and bear arms for self-defense. *District of Columbia v. Heller*, 554 U.S. 570, 635–36 (2008) (holding Second Amendment does not permit “the absolute prohibition of handguns held and used for self-defense in the home”). The Second Amendment is applicable to the States under the Fourteenth Amendment. *McDonald v. City of Chicago*, 561 U.S. 742, 749 (2010).

Article I, section 25 of the Wisconsin Constitution provides: “The people have the right to keep and bear arms for security, defense, hunting, recreation or any other lawful

purpose.” This Court has declared that “the state constitutional right to bear arms is fundamental.” *State v. Cole*, 2003 WI 112, ¶ 20, 264 Wis. 2d 520, 665 N.W.2d 328. It has characterized the right conferred under the state constitution as “a straightforward declaration of an individual right to keep and bear arms *for any lawful purpose*.” *Wisconsin Carry, Inc. v. City of Madison*, 2017 WI 19, ¶ 10, 373 Wis. 2d 543, 892 N.W.2d 233 (emphasis added).³

Wisconsin Stat. § 175.60 confers a statutory right to bear arms. A person who meets certain qualifications and satisfies specific requirements may obtain a license to carry a concealed weapon anywhere in Wisconsin subject to certain exceptions. Wis. Stat. § 175.60(2g), (3), (4), and (7).

B. Dodson did not prove that the sentencing court’s observations about people who arm themselves with weapons or Dodson’s status as a concealed-carry licensee constituted an improper factor.

Neither the circuit court’s comments about gun possession nor its comments about Dodson’s decision to obtain a concealed-carry license constituted an improper sentencing factor.

Dodson claims that “the sentencing court actually relied on an improper and erroneous conclusion: that people who obtain a concealed carry (CCW) permit and choose to go

³ Dodson frames his issue in terms of the Second Amendment and cites Art. I, § 25 only once in his argument. (Dodson’s Br. 1, 10, 16.) He does not suggest that the textural differences between the Second Amendment and Art. I, § 25 of the Wisconsin Constitution might dictate a different result in his case under one constitutional provision but not the other. Because this Court does not address undeveloped arguments, the State does not address this issue further. *See State v. Grandberry*, 2018 WI 29, ¶ 30 n.19, 380 Wis. 2d 541, 910 N.W.2d 214.

armed are driven by their own paranoid fantasies.” (Dodson’s Br. 12.) But Dodson misinterprets the court’s statements. The court made no judgment about whether obtaining a permit or lawfully possessing a firearm is “wrong.” Rather, it simply drew on its “experience as a judge” when it made its observations about gun possession and Dodson’s decision to obtain a concealed carry permit. (R. 73:30.)

The record reflects that the court made the two challenged comments as it attempted to understand why this homicide occurred. “I am completely baffled as to why this happened.” (R. 73:30.) After stating that there was no “rational way of trying to explain it,” the court made the two challenged observations. First, it noted from its “experience as a judge” how people change when they possess a weapon: “It changes how they view the world. It changes how they react and respond to people.” (R. 73:30.) Second, with respect to Dodson, the court expressed its belief that Dodson’s decision to apply for a concealed carry license and purchase a firearm and extended magazine “set in motion this circumstance” that resulted in Freeman’s death. (R. 73:30–31.)

The court’s observation from its experience—a person’s possession of a firearm changes how they react and respond to others—was not improper. Sentencing courts are not prohibited from “entertaining general predispositions, based upon [their] criminal sentencing experience,” when they exercise sentencing discretion. *See State v. Ogden*, 199 Wis. 2d 566, 573, 544 N.W.2d 574 (1996). What a sentencing court may not do is allow its predispositions to override “the particular circumstances of the individual offender.” *Id.*

In *Ogden*, this Court determined that the circuit court’s policy of refusing to grant Huber release for childcare was disfavored because this type of “mechanistic” approach to sentencing undermines the circuit court’s duty to exercise its

discretion based on the individual circumstances of the case, including the offense's gravity, the offender's character, and public protection. *Ogden*, 199 Wis. 2d at 571–72. While *Ogden* concerned the circuit court's rigid application of a uniform policy that prohibited a certain disposition, the principle underlying *Ogden*, i.e., the requirement for individualized sentencing determinations, prohibits sentencing determinations based on rigid, inflexible judgments that reflect a "made-up mind." *Id.* at 571 (citation omitted). Indeed, as this Court has repeatedly emphasized, "Individualized sentencing . . . has long been cornerstone to Wisconsin's criminal justice jurisprudence." *Gallion*, 270 Wis. 2d 535, ¶ 48.

Unlike the circuit court in *Ogden*, the court here did not articulate a rigid rule for fashioning a sentence that applies in all cases involving firearms or concealed-carry licensees. While it expressed its observations about how people with guns interact with others and commented on Dodson's concealed-carry licensee status, the court did not suggest, as Dodson argues, that "gun owners are categorically suspect." (Dodson's Br. 14.) Nor did the circuit court express a predisposition to sentence Dodson a certain way based on its experience or Dodson's status as a licensee. Instead, as the record demonstrates, the court fashioned an individualized sentence, focused primarily on the seriousness of Dodson's offense, including its devastating impact on Freeman's family, and Dodson's character. (R. 73:31–33.)

Dodson attempts to connect the court's comments about Dodson's gun possession to two other statements in the record. First, the court stated, "[I]t appears that it is a distorted, misguided belief of the world that somehow Mr. Freeman was a threat that required you . . . to terminate his life." (Dodson's Br. 9; R. 73:31.) Second, the court stated, "[Y]ou were operating under some misguided belief, some

distorted view of the world that somehow Deshon [sic] Freeman was a threat to you when in reality it was nothing further from the truth.” (Dodson’s Br. 9; R. 73:32.)

The court’s comments about Dodson’s “distorted, misguided belief” and “distorted view” focused on Dodson’s perception that Freeman posed a threat to him. Neither statement had anything to do with the court’s observations as a judge about people who possess firearms or Dodson’s status as a concealed-carry licensee. Indeed, the court’s comments went to the very nature of the second-degree intentional homicide charge: Dodson acted with unnecessary defensive force when he intentionally killed Freeman. That is, Dodson believed Freeman posed an imminent danger of death or great bodily harm to him and that deadly force was necessary to defend himself, but his beliefs were not objectively reasonable. Wis. Stat. § 940.01(2)(b); *see also Head*, 255 Wis. 2d 194, ¶ 69.

Dodson also contends that the court’s remarks demonstrate that the court was punishing him “for choosing to become a lawful gun owner in the first instance,” thereby violating his Second Amendment rights. (Dodson’s Br. 15.) Dodson is wrong for two reasons. First, the court neither expressly stated nor implicitly suggested that it sentenced Dodson based on his exercise of his right to possess a firearm or to carry a concealed weapon. It did not state that Dodson had a “distorted view” of the world *because* he purchased or carried a firearm.

Second, and more importantly, neither the Second Amendment nor Art. I, § 25 authorize anyone, including a concealed-carry licensee, to use a firearm for an *unlawful* purpose as Dodson did. *Heller* recognized an individual’s Second Amendment right to “keep and bear arms . . . for self-defense in the home.” *Heller*, 554 U.S. at 635–36. And Art. I, § 25 of the Wisconsin Constitution confers a right to “keep and

bear arms for *any lawful purpose*[,]” which includes the right to carry concealed as authorized under section 175.60. *Wisconsin Carry, Inc.*, 373 Wis. 2d 543, ¶¶ 8–11 (emphasis added).

Neither the Second Amendment nor Article I, § 25 of the Wisconsin Constitution shield Dodson from liability for using a firearm to unlawfully take Freeman’s life. While Dodson may have acted lawfully when he carried a concealed weapon, he acted unlawfully when he shot and killed Freeman with unnecessary defensive force. *See* Wis. Stat. §§ 940.01(2)(b) and 940.05(1). When read in context, the court’s sentencing comments that Dodson challenges focused on Dodson’s unlawful use of a firearm in a manner that caused Freeman’s death rather than Dodson’s right to own or carry a firearm generally.

Dodson contends that Wis. Stat. § 175.60(17) statutorily protects his constitutional right to bear arms. (Dodson’s Br. 16–17.) Section 175.60(17) is inapposite. It imposes criminal liability on an “officer who uses excessive force based *solely* on an individual’s status as a licensee.” *Id.* Putting aside the relevance of this subsection to his case, the court did not sentence Dodson “based solely on [Dodson]’s status as a licensee.” *Id.* It did not “vindictively increase [Dodson]’s sentence based solely on his decision” to exercise his constitutional or statutory rights. *Williams*, 381 Wis. 2d 661, ¶ 49. Rather, it sentenced Dodson primarily because he unnecessarily and tragically took Freeman’s life.

Dodson repeatedly uses “paranoid” and “paranoia” to describe the circuit court’s view of gun owners generally and him specifically. Dodson asserts that the circuit court claimed that he had a “distorted, misguided, and paranoid view of the world,” that he was the “type of person (gun-owner) that is prone to violence (paranoid),” that the court viewed “gun owners as paranoid people,” that concealed-carry licensees

“are driven by their own paranoid fantasies,” that “gun-induced paranoia” is the only reason that Dodson shot Freeman, and that he had a “paranoid fear inspired by the firearm in [his] hand.” (Dodson’s Br. 1, 12, 14, 18.)

The court used neither “paranoid” nor “paranoia” when it sentenced Dodson. (R. 73:1–35.) Furthermore, neither “paranoid” nor “paranoia” honestly or accurately describe the circuit court’s sentencing observations about people who possess guns more generally or Dodson specifically.⁴ Dodson may have had a misguided and distorted view of the danger that Freeman posed, but the court’s comments can hardly be characterized as a suggestion that Dodson suffered from this mental disorder or that his behaviors were consistent with those of people who suffered from this disorder.

Dodson also criticizes the prosecutor’s argument that the public had a right “to be protected from people who think ‘that this is some sort of a game.’” (Dodson’s Br. 12, citing R. 73:18.) Contrary to Dodson’s argument, the prosecutor’s comments did not demonstrate “contempt for [Dodson]’s decision to go armed.” (Dodson’s Br. 7.) In fact, the prosecutor emphasized the right of law-abiding citizens to keep and bear arms, including concealed weapons. (R. 73:18.) The prosecutor also stressed the lethality of firearms and the purposes of an

⁴ “Paranoid” is defined as “characterized by or resembling paranoia or paranoid schizophrenia,” “characterized by suspiciousness, persecutory trends, or megalomania,” or “extremely fearful.” Paranoid, Merriam-Webster Online Dictionary, <https://www.merriam-webster.com/dictionary/paranoid> (last visited March 19, 2021). “Paranoia” is defined as “mental illness characterized by systematized delusions of persecution or grandeur usually without hallucinations,” or “a tendency on the part of an individual or group toward excessive or irrational suspiciousness and distrustfulness of others.” Paranoia, Merriam-Webster Online Dictionary, <https://www.merriam-webster.com/dictionary/paranoia> (last visited March 19, 2021).

extended magazine, i.e., “killing as quickly and efficiently as one possibly can,” like the one Dodson loaded into his gun just before he killed Freeman. (R. 73:9, 18–19.) As the prosecutor reasonably argued, “[Dodson] was spoiling for a fight. He went looking for it. He found it. He overreacted. He took a person’s life. He deserves punishment for that.” (R. 73:19.) The prosecutor’s comments do not reflect contempt for law-abiding people who arm themselves, but for individuals like Dodson who exercised that right irresponsibly. The prosecutor’s argument was not improper. But even if it was, the circuit court did not adopt it.

Neither the court’s observation about gun possession from its experience as a judge nor its comments about Dodson’s decision to carry a concealed weapon constituted improper sentencing factors.

II. Even if the court’s observations about gun possession and Dodson’s decision to carry concealed were improper, Dodson has not proved that the court actually relied on these factors when it sentenced him.

Neither the court’s comments about gun possession generally nor Dodson’s concealed-carry license status constitute improper factors. But even if they do, Dodson cannot prove actual reliance because he has not demonstrated that those comments formed “part of the basis for [his] sentence.” *Alexander*, 360 Wis. 2d 292, ¶ 25.

The court’s observations about gun possession generally or Dodson’s concealed-carry license status occurred at a single moment during the sentencing proceeding. (R. 73:30–31.) Nothing within the court’s sentencing comments suggest that people who commit crimes with guns that they otherwise had lawfully possessed should receive longer sentences generally.

Nor did the court state that Dodson should receive a longer sentence simply because he chose to possess a firearm.

Contrary to Dodson's assertion, the court's statements about Dodson's "distorted, misguided belief" and "distorted view" had nothing to do with its observations about people who possess guns or Dodson's concealed-carry status. (R. 73:31–32; Dodson's Br. 18.) The court's comments had everything to do with its assessment that Dodson's perception that Freeman posed a threat to him was "distorted." *See supra* Section I.B. And here, where liability attached because Dodson's subjective belief was not objectively reasonable, the court's consideration of the unreasonableness of his beliefs related directly to the seriousness of his crime and did not constitute actual reliance on an improper factor.

The court's comment that some of Dodson's statements did not "make any sense" also did not demonstrate that the court actually relied on its observations about gun possession generally or Dodson's concealed-carry license status when it sentenced him. (Dodson's Br. 18.) Viewed in its entire context, the court stated: "I, too, like the State, look at certain factors that are surrounding the night that this occurred, certain statements that are attributed to you that in my opinion really don't make any sense, because factually it's not supported." (R. 73:32.)

The record supports the court's observations. After providing a detailed summary of Dodson's crime (R. 73:9–14), the prosecutor identified several false statements that Dodson made:

- "That the defendant, or that the victim rather, pulled a gun. That wasn't true." (R. 73:16);
- "That he shot from inside the safety of his car. False." (R. 73:16);
- "He shot [at] him six times—not three." (R. 73:16);

- According to the presentence report, Dodson told his father that he was the victim of a bump-and-rob scheme. (R. 73:16.) “That’s totally false. The video of the car accident shows that that’s not even close to anything that had happened there. And there is not a shred of evidence to indicate that Mr. Freeman was up to anything of the sort.” (R. 73:16.)

The prosecutor argued one reasonable explanation for Dodson’s lies was that “he was aware and he knew in his heart that what he did was completely out of bounds and totally over the top.” (R. 73:17.) Nothing about this comment suggests that the court relied on an improper factor when it sentenced Dodson.

In arguing that the court actually relied on improper information, Dodson asserts that he “had a legitimate subjective fear.” (Dodson’s Br. 19.) There is nothing “legitimate” about a subjective fear that is not otherwise objectively reasonable. Wis. Stat. §§ 940.01(2)(b) and 940.05(1)(a). By pleading guilty to second-degree intentional homicide, Dodson acknowledged that his fears were not legitimate. In fact, his counsel agreed with the prosecutor’s assessment that Dodson had a “gross overreaction.” (R. 73:25.)

Dodson asserts that evidence at the scene corroborated important portions of his story. (Dodson’s Br. 19–20.) But nothing in the record supported Dodson’s initial claim that Freeman pulled a gun on him or his subsequent statement that Freeman ran toward him with his hands in his pockets or underneath his shirt when Dodson shot him. (R. 1:1, 3.) Indeed, the court noted that Dodson’s statements about Freeman were not factually supported. (R. 73:32.) Responding officers found Freeman lying facedown in the middle of the street with his hands and arms in a position well away from his waistband and his pockets. (R. 1:2; 73:11.) Officers found

no other evidence at the scene that suggested that Freeman was armed with a weapon. (R. 1:2; 73:11.)

Noting that he contacted the police “as instructed by the DOJ Training Guide” and turned himself and his weapon over to the police, Dodson argues that he conducted himself “responsibly *after* the incident.” (Dodson’s Br. 20 (emphasis added).)⁵ Contrary to his assertion, Dodson did not behave responsibly after he shot Freeman. Dodson left the scene and went to his girlfriend’s house, only calling the police as he drove to his father’s house. (R. 1:4.) Dodson’s actions before, during, and immediately after his confrontation with Freeman were neither reasonable nor responsible. And the court could reasonably consider his irresponsible and unreasonable behavior when it sentenced him. What Dodson did “after the incident” was simply too late to save Freeman from Dodson’s unnecessary defensive force.

Dodson’s act of unlawfully using a firearm formed the basis for the court’s comments—not the fact that Dodson chose to exercise his right to carry a firearm. The fact that Dodson owned a firearm and was a concealed-carry licensee simply was not “part of the basis for [his] sentence.” *Alexander*, 360 Wis. 2d 292, ¶ 25. Rather, the court’s sentence was based on Dodson’s unlawful use of his firearm, as described above.

⁵ Wisconsin Department of Justice, *Firearm Safety Course: A Training Guide for Concealed Carry Licenses*, January 2017, <https://www.doj.state.wi.us/sites/default/files/dles/ccw/student-manual.pdf> (last viewed March 19, 2021). Dodson failed to follow the DOJ Training Guide’s recommendation to avoid and de-escalate a confrontation in the first place. *Id.* at 27–28. Rather than call the police after the accident, Dodson unholstered his gun, replaced its magazine with an extended magazine, and looked for the Buick before he shot Freeman. (R. 1:2–3.)

The record demonstrates that the court properly exercised its sentencing discretion when it sentenced Dodson. After identifying the information that it considered, the court appropriately assessed the seriousness of Dodson's offense, Dodson's character, and the need to protect the public when it fashioned his sentence. (R. 73:29–34.) Therefore, Dodson did not prove by clear and convincing evidence that the court actually relied on an improper factor and made inaccurate assumptions about firearm possession or his concealed-carry status when it sentenced him.

III. Any error in considering Dodson's status as a licensee was harmless.

Even if this Court concludes that Dodson proved by clear and convincing evidence that the circuit court actually relied on an improper factor, the error was harmless.

A. Harmless error, not structural error, applies in Dodson's case.

This Court has not decided whether a circuit court's reliance on an improper factor is subject to harmless error or structural error. (*Landray Harris*, 326 Wis. 2d 685, ¶ 33; *Salas Gayton*, 370 Wis. 2d 264, ¶¶ 18, 38. It should accept Dodson's concession that harmless error applies because the error about which he complains is more appropriately assessed under the rubric of harmless error rather than structural error. (Dodson's Br. 12.)

Subject to a few errors that are deemed structural, most constitutional errors are subject to harmless-error analysis. *Neder v. United States*, 527 U.S. 1, 8 (1999) (recognizing a "strong presumption" that constitutional errors are subject to harmless-error analysis). Wisconsin's harmless error rule is

codified in Wis. Stat. § 805.18(2)⁶ and applies to criminal proceedings under Wis. Stat. § 972.11(1). *State v. Nelson*, 2014 WI 70, ¶ 29, 355 Wis. 2d 722, 849 N.W.2d 317. In the sentencing context, “[t]he State can meet its burden to prove harmless error by demonstrating that the sentencing court would have imposed the same sentence absent the error.” *Travis*, 347 Wis. 2d 142, ¶ 73.

A structural error is a defect that affects the framework within which a trial proceeds, infecting the entire trial process in a manner that renders it fundamentally unfair. *Travis*, 347 Wis. 2d 142, ¶ 54. “The limited class of structural errors include: complete denial of the right to counsel, a biased judge, excluding members of the defendant’s race from a grand jury, denial of the right to self-representation, denial of the right to a public trial, and a defective reasonable doubt instruction.” *State v. Pinno*, 2014 WI 74, ¶ 50, 356 Wis. 2d 106, 850 N.W.2d 207 (citations omitted). Structural error that implicates one of these core rights may apply to a sentencing hearing. *Travis*, 347 Wis. 2d 142, ¶ 53.

But the alleged error about which Dodson complains, i.e., the circuit court’s consideration of an improper sentencing factor, does not fit within the limited class of cases where courts have found structural error. The error neither “permeate[d] the entire process,” *Nelson*, 355 Wis. 2d 722, ¶ 34, nor affected the proceeding “from beginning to end.”

⁶ It provides in relevant part:

No judgment shall be reversed or set aside . . . on the ground of . . . error as to any matter of pleading or procedure, unless . . . after an examination of the entire action or proceeding, it shall appear that the error complained of has affected the substantial rights of the party seeking to reverse or set aside the judgment. Wis. Stat. § 805.18(2).

Pinno, 356 Wis. 2d 106, ¶ 49 (citation omitted). Rather, the error is akin to a trial error that occurs during the presentation of a case such that the error's effect "may be quantitatively assessed in the context of other evidence presented in order to determine whether [it was] harmless beyond a reasonable doubt." *Nelson*, 355 Wis. 2d 722, ¶ 30 (citation omitted).

B. The error was harmless.

The circuit court identified relevant sentencing factors, including the seriousness of Dodson's offense, Dodson's character, and the need to protect the public. (R. 73:30.) See *Gallion*, 270 Wis. 2d 535, ¶¶ 41–42. It assessed these factors based on a wide variety of information in the record, not just its observations about people who possess weapons. It considered the attorney's arguments, the presentence investigation report, victim impact statements, and statements made on Dodson's behalf. (R. 73:29–30.)

The court placed considerable weight on the seriousness of Dodson's offense and appropriately determined that a sentence other than imprisonment would unduly depreciate the seriousness of the offense. (R. 73:33.) The record supports this assessment. Dodson intentionally killed Freeman, who was unarmed, under circumstances that constituted "unnecessary defensive force." (R. 70:8.) In this case, "unnecessary defensive force" meant that Dodson unreasonably believed that Freeman posed an imminent danger of death or great bodily harm and that the force was necessary to defend himself. Wis. Stat. § 940.01(2)(b). By pleading guilty, Dodson acknowledged that his subjective belief was not objectively reasonable under the circumstances. (R. 70:8–9.) Indeed, at the sentencing hearing, Dodson's counsel characterized Dodson's behavior as a "gross overreaction." (R. 73:25.)

The record does not support Dodson's initial assertion that Freeman pulled a gun on him or his subsequent assertion that Freeman ran toward him with his hands in his pockets or underneath his shirt when Dodson shot him. (R. 1:1, 3.) The court noted that Dodson's statements about Freeman were not factually supported. (R. 73:32.) Responding officers found Freeman lying facedown in the middle of the street with his hands and arms in a position well away from his waistband and his pockets. (R. 1:2; 73:11.) Officers found no other evidence that suggested that Freeman was armed with a weapon. (R. 1:2; 73:11.) The court reasonably concluded that Freeman did not pose a threat to Dodson and that his death was "a totally unnecessary and tragic loss of life." (R. 73:31–32.)

The court described Dodson as a "model citizen" and appropriately acknowledged several positive character traits, including his work history, responsibility toward family, absence of a criminal record, and acceptance of responsibility. (R. 73:32.) *But see State v. Thompson*, 172 Wis. 2d 257, 265, 493 N.W.2d 729 (Ct. App. 1992) (recognizing that a court may deem a defendant's commission of a serious offense that results in the death of another "especially egregious when viewed in light of his 'laudable background.'") Here, the court ultimately placed greater weight upon the seriousness of Dodson's offense, observing that any sentence other than a prison sentence would unduly depreciate the seriousness of his offense. (R. 73:33.)

Despite the seriousness of Dodson's offense, the court demonstrated restraint. Dodson faced a 60-year term of imprisonment for intentionally killing Freeman, but the court only sentenced him to a 20-year term, consisting of a 14-year term of initial confinement and 6-year term of extended supervision. (R. 73:34.)

In *Travis*, this Court found that a sentencing court's error, i.e., inaccurate penalty information, was not harmless because the court explicitly and repeatedly gave it attention such that it relied on the information when it passed sentence. *Travis*, 347 Wis. 2d 142, ¶¶ 31–32, 46, 75–76. Unlike in *Travis*, the court neither explicitly nor repetitively referred to its observations about people who possess guns or Dodson's concealed-carry license status when it discussed the seriousness of the offense and Dodson's character—the two primary factors that guided the circuit court's sentencing determination. Unlike in *Travis*, the court's observations about people who possess guns or Dodson's status did not permeate the sentencing proceedings. *Id.* ¶ 85. The error was harmless.

The court's observations about Dodson's concealed-carry license or gun possession based on its experience did not drive its exercise of sentencing discretion. Rather, the court fashioned an individualized sentence grounded in the seriousness of Dodson's offense, but tempered by Dodson's otherwise positive character traits and acceptance of responsibility. The court would have imposed the same sentence even if it had not commented on Dodson's possession of a handgun or his concealed-carry license status. The error was harmless. Dodson is not entitled to resentencing.

CONCLUSION

This Court should affirm Dodson's judgment of conviction and the circuit court's order denying postconviction relief.

Dated this 31st day of March 2021.

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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 7,360 words.

Dated this 31st day of March 2021.



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**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 31st day of March 2021.



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