STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

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STATE OF WISCONSIN,

Plaintiff-Respondent,

v. Appeal No. 2019 AP 836 CR

EDWARD L. BODY, SR.,

Defendant-Appellant.

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ON APPEAL FROM
KENOSHA COUNTY CIRCUIT COURT,
CASE NO. 17 CM 1162
THE HONORABLE BRUCE E. SCHROEDER,
PRESIDING

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# BRIEF OF PLAINTIFF-RESPONDENT

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## STATEMENT OF ISSUES

**I. DID THE TRIAL COURT RELY ON PROPER SENTENCING FACTORS, AND THUS PROPERLY DENY BODY'S MOTION FOR RESENTENCING?**

The Trial Court answered: "No."

Appellant argued: "Yes."

Respondent argues: "No."

**II. WAS THE SENTENCE IMPOSED UNDULY HARSH?**

The Trial Court answered: "No."

Appellant argued: "Yes."

Respondent argues: "No."

## STATEMENT ON ORAL ARGUMENT OR PUBLICATION

The State does not request oral argument. Oral argument is not necessary because "the briefs fully present and meet the issues on appeal and fully develop the theories and legal authorities on each side so that oral argument would be of such marginal value that it does not justify the additional expenditure of court time or cost." Wis. Stat. § 809.22(2)(b). Publication is not necessary.

## STATEMENT OF THE FACTS

**Incident Leading to Underlying Charge:**

On August 1, 2017, just after midnight, Kenosha Police Officers Singh and Barbian responded to the 1800 block of 62nd Street, in the City and County of Kenosha, State of Wisconsin, concerning a report of people being loud and arguing in the street. (R. 2-2.) Upon arrival, officers observed a male, later identified as Defendant-Appellant Edward Body, Sr. (hereinafter "Body"), yelling and pacing in the roadway of the 2000 block of 62nd Street. (*Id*.) Many residents in the area were watching the disturbance, both outside and through windows. (*Id*.) Officers heard residents yell to Body to stop yelling. (*Id*.) Specifically, one resident yelled to Body "[h]ey man, the police are here, stop." Body replied "I don't care. [Expletive] the police." (*Id*.)

Near Body was Emily Mays, who explained to officers that she and Body had been arguing about issues they had with their children. (*Id*.) Officers also spoke with a neighbor who said when Body began yelling in the street, the neighbor

told Body to "take the drama elsewhere" because it was creating a disturbance. (*Id*.)

Body was taken into custody for disorderly conduct. (*Id*.) While being taken into custody Body advised to officers he had marijuana in his pocket. (*Id*.) Body was ultimately charged with Disorderly Conduct as a Repeater, and Possession of Tetrahydrocannabinols as a Repeater. (*Id*. at 1.)

**Procedural Posture:**

On January 11, 2018, Body appeared before the Kenosha County Circuit Court, the Honorable Bruce E. Schroeder presiding, for a plea and sentencing hearing. (R. 51-1.) In exchange for a guilty plea to the Disorderly Conduct, Repeater charge, the State agreed to dismiss the Possession of Tetrahydrocannabinols charge and make no specific recommendation at sentencing. (*Id*. at 2.) Sentencing was withheld and Body was placed on one year probation. (*Id*. at 13.) Rules of supervision included not committing further crimes, not consuming alcohol, and reporting to

Body's probation agent's office when required. (*Id*. at 13; R. 41-2.)

On June 23, 2018, Body visited Mays' residence to see their son. (R. 41-2.) On that day, both Mays and Body were drinking alcohol, and soon began arguing. (*Id*.) Body spit in Mays' face, and Mays told Body to leave. (*Id*.) Body punched Mays multiple times in Mays' head and body. (*Id*.) One of Mays' sons, Gregory, who is only six years old, witnessed the Body hitting May and tried to call 911. (*Id*.) Body smashed Gregory's phone to stop him from calling for help. (*Id*.) Mays tried to call 911 from her own phone, which Body then threw across the room. (*Id*.) Mays was able to retrieve her phone, which still worked, and called 911. (*Id*.) Mays went to the hospital, concerned she may have a broken jaw. (*Id*.) Mays also reported being bruised over the left side of her face and her arm from the beating. (*Id*.)

Although the procedural posture of Body's brief names one violation for which probation was revoked, Body's Revocation Summary details four violations providing for

revocation: Body's probation agent determined Body violated his conditions of probation for (1) "punch[ing] Emily Mays in the head repeatedly", (2) "caus[ing] damage to Gregory [ ] and Emily Mays['] cell phones", and (3) consuming alcohol. (Body's Br. 5; R. 41-2.) Body committed a fourth violation of probation when he failed to report to his agent's office on June 27, 2018. (R. 41-2.) In the Revocation Summary, Body's agent noted that "[a]lthough [Body] denies any assaultive behavior in this incident with [Mays], it is difficult to believe this based on his prior record as well as the photos/report of what occurred that evening." (R. 41-3.) Body was "assessed to be a high (10) risk for violent recidivism." (*Id.*)

Body received and reviewed the contents of the Revocation Summary, waived his revocation hearing, and thus waived his opportunity to challenge the contents of the Revocation Summary. (R. 52-2-4; 53-5.)

On August 21, 2018, Body appeared before Judge Schroeder for a sentencing after revocation hearing. (R. 52-1.)

At that hearing, the court inquired as to Body's criminal history. The State indicated Body's prior convictions included "priors for carrying [a] concealed weapon … multiple disorderly conducts, threat to injure, intimidation of a victim, dissuade reporting, batteries that include domestic violence, obstructing, criminal damage to property, [and] substantial battery." (*Id*. at 6.) The court "interrupted the district attorney because [the court] had already heard as much as [it] needed to," and adjourned the hearing so the court could "take a look in-depth at what [Body's] history is" in terms of domestic violence. (*Id*. at 7.)

On August 30, 2018, Body again appeared before Judge Schroeder for the adjourned sentencing hearing after revocation. (R. 53-1.) The court reported that Body "seems to have interpersonal relationship problems with women and police officers." (*Id.* at 7.) The court then listed a number of incidents in Body's record, including "grabbing [Mays'] shirt, push[ing] her against the wall in front of the children, t[aking] her phone away, refus[ing] to give it back," "damag[ing] her

car," "slap[ing] [Mays] in the face . . . push[ing] her into a door, push[ing] her into the wall, follow[ing] her, punch[ing] her in the mouth two more times," "grabb[ing] her by the arms and thr[owing] her to the ground in the kitchen [and] spit[ting] on her face," and being "difficult with police officers," often times challenging them and swearing at them. (*Id*. at 6-9.)

The court questioned Body as to "what … other men think of someone who slaps women around," where Body's children live, what those children's home lives are like, and whether Body "think[s] it's a father's responsibility to set a good example for his children." (*Id*. at 10-12.) The court questioned "how long that memory going to last in your six-year-old's life?" referring to six-year-old Gregory's witnessing Body hitting Mays, Gregory's attempting to call 911 to help his mother, and Body smashing Gregory's phone. (*Id*. at 13-14.)

The court ultimately sentenced Body to one year in jail. (*Id*. at 15.) Body erupted "[t]his is [expletive]" and "I

didn’t do anything.” (*Id*. at 18.) Body moved for resentencing, which was denied. (R. 43; 45-2.)

## ARGUMENT

Dismissed motions for sentencing modification are reviewed on appeal by determining whether "the sentencing court erroneously exercised its discretion." *State v. Noll*, 2002 WI App. 273, ¶ 4, 258 Wis.2d 573, 653 N.W.2d 895. Cases concerning the application of Wis. Stat. § 973.19 present a question of law reviewed without deference to the trial court. *Id*.

### I. THE SENTENCING COURT PROPERLY RELIED UPON THOSE FACTORS IT MUST CONSIDER WHEN SENTENCING BODY.

The sentencing court did not consider gender when imposing Body's sentence, and properly sentenced Body according to the appropriate sentencing criteria and relevant hearsay evidence, as permitted by statute and case law.

In exercising discretion, sentencing courts "must individualize the sentence to the defendant based on the facts of the case by identifying the most relevant factors and explaining how the sentence imposed furthers the sentencing objectives." *State v. Harris*, 2010 WI 79, ¶ 29, 326 Wis.2d

685, 786 N.W.2d 409 (citing *State v. Gallion*, 2004 WI 42, ¶ 39-48, 270 Wis.2d 535, 678 N.W.2d 197). Whenever making a sentencing determination, such factors a sentencing court "must consider [are] the protection of the public, the gravity of the offense, and the rehabilitative needs of the defendant, *as well as any appropriate mitigating or aggravating factors*," Wis. Stat. § 973.17(2) (emphasis added). Case law has identified "various additional factors that a circuit court might consider within its [sentencing] discretion," including the defendant's "past record of criminal offenses; history of undesirable behavior pattern; ... personality, character and social traits; ... [and] remorse, repentance and cooperativeness." *State v. Gayton*, 2016 WI 58, ¶ 22, 370 Wis.2d 264, 882 N.W.2d 459, *cert. denied*, 137 S. Ct. 1331 (U.S. Mar. 20, 2017) (No. 16-6926).

A variety of factors must be considered by the sentencing court because that court "has a responsibility to acquire full knowledge of the character and behavior pattern of the convicted defendant before imposing sentence." *Id*. at

¶ 23, (citing *Elias v. State*, 93 Wis.2d 278, 285, 286 N.W.2d 559 (1980)). When the same circuit court judge presides at both the original sentencing and the sentencing after revocation of probation, "the appellate court considers the original sentencing reasons to be implicitly adopted." *State v. Haynes*, 2016 WI App. 75, ¶ 12, 371 Wis.2d 760, 886 N.W. 2d 593.

"Any and all information that reasonably might bear on the proper sentence for the particular defendant" is permitted to be considered by the sentencing court. *Gayton*, 2016 WI at ¶ 23 (citing *State v. Guzman*, 166 Wis.2d 577, 591, 480 N.W.2d 446 (1992)). This includes "uncharged and unproven offenses," as directly held in *Grant v. State*. 73 Wis.2d 441, 243 N.W.2d 186 (1976); *see Gayton*, 2016 WI at ¶ 23. The Wisconsin Supreme Court explained uncharged and unproven offenses may be considered at sentencing because these offenses are "evidence of a pattern of behavior which, in turn, is an index of the defendant's character, a critical factor in sentencing." *Elias*, 93 Wis.2d at 284.

Body argues the sentencing court relied on improper factors when exercising its sentencing discretion. Specifically, Body argues one improper factor was considered, that being Body's gender, and makes further argument that information considered by the sentencing court from the revocation report should not have been considered because it "did not fit into any of the sentencing criteria", and contained "inadmissible hearsay evidence." (Body's Br. 9-10.)

### A. The sentencing court did not rely upon Body's gender as a factor at sentencing.

It is indisputable that gender is an improper factor to consider in imposing sentence, and imposing a sentence on the basis of gender is therefore an erroneous exercise of discretion. *See Harris*, 2010 WI at ¶ 66. A defendant must show by clear and convincing evidence that a sentencing court relied upon a defendant's gender to be successful on such a claim. *Id.* at ¶ 34.

Body alleges the trial court improperly relied on the factor of gender, citing two of many questions the court posed

to Body at the sentencing after revocation hearing on August 30, 2018. (Body Br. 10.) It is true the trial court questioned Body as to "[w]hat [Body] think[s] other men think of *someone* who slaps women around?" (emphasis added). The trial court followed that question up with "What do you (Body) think I (the court) think right now?" The trial court never stated the question as what men think of other men who abuse women. Instead, the court's question focused on the gender of the victim, rather than the gender of the abuser.

This case is analogous in this respect to *State v. Harris*. In *Harris*, the sentencing court used phrases like "you guys", "these women", and "baby mama" when it articulated it "frequen[tly] ... sees unemployed and uneducated fathers come into court with mothers working full-time and going to school." *Id*. at ¶ 53. Harris argued on appeal these phrases evidenced an improper reliance on Harris's race at sentencing. *Id*. at ¶ 46. The appellate court found that these phrases taken in context did not implicate race, instead, that the sentencing court was "observing a

common scenario, a reality the [sentencing] court found maddening, and not without reason" and that those "observations bear a reasonable nexus to the relevant factors, including Harris's character, education, employment, and need for close rehabilitative control." *Id*. at ¶ 53, 59.

The sentencing court in this case did not consider Body's gender as a factor in sentencing. Similar to *Harris*, the sentencing court in this case articulated disfavor for, what it considered, the frequency in which children observe or are even victims themselves of domestic abuse. Like in *Harris*, this exchange was part of a larger colloquy, where the court explored the history of abuse between Body and his partners, the number of children Body has, his involvement with those children, and that abuse affecting or even being witnessed by Body's young children. These facts fit squarely within the permissible sentencing factors of the defendant's past record of criminal offenses, his history of undesirable behavior pattern, and his personality, character and social traits. Mere

reference to gender while relying on proper factors is not reliance on an improper factor.

### B. The reasons for revocation, along with other facts of record, were properly considered at sentencing as they fall under numerous sentencing criteria the court must consider.

Body alleges the violations leading to revocation do not fit into any of the sentencing criteria: Body argues the "uncharged allegations" were improperly considered under gravity of the offense because there is "no charged offense to consider", improperly considered under character of the defendant because the allegations were the trial court's "main focus', and improperly considered under need to protect the public because the trial court "focus[ed] almost exclusively" on the allegations in the revocation report, and that those allegations "do not equate and cannot be relied on as factual background for sentencing purposes." (Body Br. 11-12.)

Body's arguments are flawed and selective. First, as mentioned previously, uncharged and unproven offenses may be considered by a sentencing court. *State v. Leitner*, 253

Wis.2d 449, 474, 646 N.W.2d 341 (2002) (citing *Elias*, 93 Wis.2d at 284). Uncharged and unproven offenses are considered so often at sentencing, and upheld on appeal, that this argument needs little response. That the battery allegations contained in the revocation report did not manifest into independent charges is of absolutely no importance, as acknowledged by the sentencing court. A history of case law speaks for itself.[1]

Second, the material in the revocation report fit within a number of factors a sentencing court *must* consider when imposing a sentencing. The allegations Mays made against Body directly relate to the character of the defendant and his

[1] *See State v. Mosley*, 201 Wis.2d 36, 547 N.W.2d 806 (1996) (uncharged and unproven allegations considered by a sentencing court as to whether crime charged was "an isolated act or a pattern of conduct"); *State v. McQuay*, 154 Wis.2d 116, 126, 452 N.W.2d 377, 381 (1990) (sentencing court may evaluate a defendant's character in light of evidence of unproven offenses); *Elias*, 93 Wis.2d at 284 (1980) (explicitly holding that a sentencing court may consider uncharged and unproven offenses, "since those other offenses are evidence of a pattern of behavior which is an index of the defendant's character, a critical factor in sentencing,"); *see Grant v. State*, 73 Wis.2d 441, 243 N.W.2d 186 (1976) (directly holding the trial court was proper in considering uncharged and unproven offenses at sentencing).

history of exhibiting an undesirable behavior pattern, as well as his personality, character and social traits.

As stated on the record, the Body has not just a lengthy history of aggressive behavior, but aggressive behavior towards his partners, including Mays. (R. 39-6-7, where the court counts four instances of aggressive or violent behavior towards Mays alone, some of which witnessed by Body's children.) The revocation report was just one of many facts of record the sentencing court considered when sentencing Body. The court considered Body's prior record and criminal complaints, acknowledging that while the defendant had some complaints alleging behavior that is "disruptive ... [and] threatening, and that has to be distinguished from actual violence," that other complaints alleged damage to property, physical violence against his partners, including Mays, and being uncooperative with law enforcement. All of this is relevant to the underlying charge of disorderly conduct, where again Mays was the target of Body's aggression.

The sentencing court was well within its discretion when it considered the uncharged offenses that led to revocation, as held by numerous cases. This information gave the sentencing court "a full knowledge of the character and behavior pattern of the convicted defendant before imposing sentence," as required by *Gayton*.

### C. Hearsay evidence is permissible at a sentencing hearing.

Body concedes hearsay evidence is permissible in revocation hearings, but argues the evidence "should not be considered for the sentencing of a disorderly conduct charge" because it is not specifically listed as an exception to the hearsay rule under Wis. Stat. § 908.03. (Body Br. 12.) Body further argues that because the revocation packet contains hearsay, it should not have been filed with the sentencing court. (*Id*.)

First, contrary to Body's claim, the revocation packet itself *does* fall under one of the hearsay exceptions in Wis. Stat. § 908.03. Revocation reports are admissible under §

908.03(8), the public records and reports exception to the hearsay rule. *See State v. Downs*, 2000 WI App. 161, ¶ 11, fn.10, 238 Wis.2d 93, 617 N.W.2d 676.

Second, that the revocation report contains hearsay is immaterial. *See State v. Winant*, 2015 WI App. 68, ¶ 16, 364 Wis.2d 759, 869 N.W.2d 170 (noting that a revocation summary is admissible under § 908.03(8) as a public record, and hearsay within that document is admissible seeing as these documents "necessarily include 'statements' from 'sources' and therefore contain layers of hearsay"). Hearsay evidence is permissible at sentencing hearings: It is the same statute section that permits hearsay at sentencing hearings that permits hearsay at revocation hearings. Wis. Stat. § 911.01(4)(c); *see State v. Scherreiks*, 153 Wis.2d 510, 522-523, 451 N.W.2d 759 (Ct. App. 1989). As with the consideration of uncharged and unproven offenses, there are numerous cases in which hearsay evidence was permissible when found to be relevant to the sentencing factors considered. *See Mosley*, 201 Wis.2d at 45; *see also State v.*

*Marhal*, 172 Wis.2d 491, 502-03, 493 N.W.2d 758 (Ct. App. 1992) (noting that the "rules of evidence do not apply at sentencing", that "[e]vidence of unproven offenses involving the defendant may be considered by the [sentencing] court.") Because hearsay is permissible at sentencing hearings, the sentencing court did not err by considering hearsay evidence when sentencing the defendant.

Body's grievances primarily revolve around the violations in the revocation report: that the violations were considered at the sentencing after revocation hearing, the alleged weight given to the violations at the sentencing after revocation hearing, and that the Body views Mays as an unreliable and incredible source. The latter is evident not just by the content of Body's brief, but by Body's unnecessary inclusion of Mays' prior criminal complaints in his brief's appendix.

It was not Mays' character that the sentencing court was to consider. It was Body's. That these allegations leading to revocation did not manifest into charges

themselves do not mean the events leading to revocation did not happen or that they may not be considered at sentencing after revocation. That Mays was consuming alcohol that evening does not mean the events leading to revocation did not happen. Body had every opportunity, had he not waived his revocation hearing, to challenge the contents of the revocation report. Body could have called the responding officers, hospital personnel, even Mays herself, and challenged whether Mays' injuries were consistent with her claims. Body waived that opportunity. It was well within the sentencing court's discretion to consider these violations, seeing as they fit into proper sentencing factors that the court must consider.

## II. THE SENTENCE IMPOSED WAS NOT UNDULY HARSH.

A sentence within the statutory range will only be considered unduly harsh if the sentence is "so excessive and unusual and so disproportionate to the offense committed as

to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." *State v. Grindemann*, 2002 WI App. 106, ¶ 31, 255 Wis.2d 632, 648 N.W.2d 507. Courts review whether a sentence is unduly harsh by the abuse of discretion standard, and begin with "a strong presumption" the sentence is reasonable. *State v. Macemon*, 113 Wis.2d 662, 670, 335 N.W.2d 402, 407 (1983). This presumption is due to the sentencing court being "best suited to consider the relevant factors and demeanor" of the defendant. *State v. Borrell*, 167 Wis.2d 749, 781, 482 N.W.2d 883 (1992) (citing *State v. Harris*, 119 Wis.2d 612, 622, 350 N.W.2d 633 (1984)).

On appeal, a court is to inquire "whether discretion was exercised, not whether it could have been exercised differently." *State v. Prineas*, 2009 WI App. 28, ¶ 34, 316 Wis.2d 414, 766 N.W. 2d 206. A defendant can only succeed on a claim a sentence is unduly harsh if the defendant shows "some unreasonable or unjustifiable basis in the record" for the sentence imposed. *Id*. at 668.

Body alleges the trial court imposed an unduly harsh sentence when it sentenced Body to half the maximum penalty, one year. (Body Br. 15.) Body argues the imposed sentence is unduly harsh because the sentencing court expressed a "disfavor" for persons facing domestic abuse allegations. (Body Br. 16.) However, it is clear from the record the sentence is within range and reasonable. There is no dispute the sentence handed down was within range: Although disorderly conduct usually mandates a maximum of 90 days imprisonment, because of Body's repeater status, his maximum penalty increases to not more than two years imprisonment. (R. 2-1.) The court originally sentenced Body to one year probation, and upon revocation, sentenced Body to one year in jail. (R. 51-13; 53-15). This is half of the maximum penalty Body was exposed to.

Such a sentence is entirely reasonable. The court articulated Body's long history of "aggressive" behavior, both towards Body's partners and towards law enforcement, and thus his risk of recidivism, as acknowledged in the revocation

summary. The court extensively discussed Body's prior record and contents of the revocation report, as well as the facts of the underlying disorderly conduct/repeater conviction, and what it all collectively demonstrated about Body's character and undesirable behavior pattern. That the sentence imposed constituted a greater length of imprisonment than what was recommended by the State makes no difference: A sentencing court is not bound by any sentencing recommendation. *State v. Hampton*, 2004 WI 107, ¶ 42, 274 Wis.2d 379, 683 N.W.2d 14.

## CONCLUSION

For the foregoing reasons, the State requests this court to affirm the judgment from which this appeal has been taken.

Dated this 18th of September, 2019

Respectfully submitted,

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## CERTIFICATION

I hereby verify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief produced with a proportional serif font.

The length of this brief is 35 pages, 4,380 words.

Signed:

_____

Emily K. Gaertner [1117661]
Attorney for Plaintiff-Respondent

## CERTIFICATION OF ELECTRONIC FILING OF BRIEF

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. Sec. 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 18th of September, 2019.

_____

Emily K. Gaertner [1117661]
Attorney for Plaintiff-Respondent

## CERTIFICATION OF MAILING

I certify that this brief was deposited in the U.S. mail for delivery to the Clerk of the Court of Appeals by first-class mail, or other class of mail that is at least as expeditious, on September 18, 2019. I further certify that the brief was correctly addressed and postage was pre-paid.

_____

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