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### State v. Kirchner Respondent's Brief Dckt. 48142

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	NO. 48142-2020
Plaintiff-Respondent,	)	
	)	Bonneville County Case No.
v.	)	CR10-19-7264
	)	
KEVIN CARL KIRCHNER,	)	
	)	RESPONDENT’S BRIEF
Defendant-Appellant.	)	
_____	)	

ISSUE

Has Kirchner failed to establish that the district court abused its discretion by imposing a unified sentence of 10 years, with two years fixed, upon his guilty plea to attempted strangulation?

ARGUMENT

Kirchner Has Failed To Establish That The District Court Abused Its Sentencing Discretion

A. Introduction

On July 26, 2019, Kirchner repeatedly asked his girlfriend of three years, Heather, “to come to his house,” where she had been “stay[ing] the night with [Kirchner] a few times a

week.” (R., p. 13.) Heather arrived at Kirchner’s residence at approximately 5:30 A.M. (Id.) They “were hanging out,” then “slept for a little bit,” after which Heather “got up and put her sweatshirt back on and [Kirchner] got angry because he thought she was trying to leave.” (Id.) He “threw her on the ground” and began “hitting her in the face.” (Id.) Kirchner “put his hands around her neck [while] he was on top of her” and strangled her to the point that she “could not breathe.” (R., pp. 13-14.) He told her he was going to use his “Taser gun” on her and “slapped her in the face ... with both hands.” (R., p. 14.) Heather “was fighting trying to get away but [Kirchner] was to[o] strong,” so she “just tried to get him to stop hurting her”; she estimated that “he was hurting her for about a half hour.” (Id.)

Heather was eventually able to get away from Kirchner and fled from his residence. (R., p. 13.) She “waved down” a woman who was driving by, who subsequently contacted law enforcement and reported that Heather “got beat up by her boyfriend” and that Heather “was hiding because she kept seeing her boyfriend drive by and was very scared of him.” (Id.) The woman also advised that Heather was “crying and very distraught,” had “a big goose egg about her left eye and ... red marks on her neck,” and “was wearing shorts and a sweatshirt but no shoes.” (Id.) An officer “arrived in the area shortly” thereafter – at approximately 7:53 A.M. – but “was not able to find [Heather].” (Id.)

Approximately one hour later, “a different male reporting party” contacted law enforcement and “gave the same description as the prior reporting party.” (Id.) Officers responded to the area and located Heather. (Id.) Heather “was crying and very hesitant to talk with [the officers],” but she eventually told them that Kirchner “beat her up and would not let her leave,” that he “did this kind of thing to her before,” and “she is scared of him and he threatens her.” (Id.) The officers observed “very noticeable petechial marks on both sides of her neck”

and “asked Heather what happened to her neck.” (R., pp. 13-14.) “[A]fter not wanting to tell [the officers] for a while, she finally ... said [Kirchner] put his hands around her neck” and “she was scared because she could not breathe.” (Id.)

The state charged Kirchner with attempted strangulation and battery. (R., pp. 43-45.) Pursuant to a plea agreement, Kirchner entered an Alford<sup>1</sup> plea to attempted strangulation and the state agreed to dismiss the battery charge, as well as a separate case in which Kirchner was charged with felony witness intimidation, and to not file “felony stalking charges.” (R., pp. 75-78, 81-82; PSI, p. 10.<sup>2</sup>) On January 7, 2020, the district court released Kirchner to Pre-Trial Services pending sentencing. (R., pp. 69-70.) Pre-Trial Services subsequently requested that Kirchner’s release be revoked, advising that Kirchner “admitted to using methamphetamines on 1/16/20,” he “failed to appear to drug testing on 1/24, 1/27, 1/29, 1/31/20, and the whole month of February,” and “[m]ultiple attempts to contact him [were] unsuccessful.” (R., p. 87.) The district court continued Kirchner on Pre-Trial Services release. (R., p. 86.) Two days later, Pre-Trial Services again requested that Kirchner’s release be revoked, as he had acquired new charges for violating a no contact order and possession of drug paraphernalia. (R., p. 88.) The district court issued a bench warrant and later revoked Kirchner’s release. (R., pp. 6, 99.)

The state filed a notice of intent “to not be bound by the sentencing recommendations made in the Plea Agreement due to the fact that [Kirchner] has violated the terms of his plea agreement.” (R., pp. 97-98.) At sentencing, the district court imposed a unified sentence of 10 years, with two years fixed, and retained jurisdiction. (R., pp. 111-15.) Kirchner filed a notice

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<sup>1</sup> North Carolina v. Alford, 400 U.S. 25 (1970).

<sup>2</sup> PSI page numbers correspond with the page numbers of the electronic file “Confidential Exhibit Record.pdf.”

of appeal timely from the judgment of conviction. (R., pp. 117-20.) He also filed a Rule 35 motion for reduction of sentence, which the district court denied. (Supp. R., pp. 10-11, 17-18.)

Kirchner asserts his sentence is excessive in light of “the substantial mitigating factors that exist in this case.” (Appellant’s brief, p. 1.) The record supports the sentence imposed.

B. Standard Of Review

Appellate review of a sentence is based on an abuse of discretion standard. State v. Dobbs, 166 Idaho 202, \_\_\_, 457 P.3d 854, 855 (2020) (citation omitted). “Where a sentence is not illegal, the appellant has the burden to show that it is unreasonable and, thus, a clear abuse of discretion.” State v. Schiermeier, 165 Idaho 447, 454, 447 P.3d 895, 902 (2019) (citation omitted). “A sentence fixed within the limits prescribed by the statute will ordinarily not be considered an abuse of discretion by the trial court.” Id. “A sentence of confinement is reasonable if it appears at the time of sentencing that confinement is necessary ‘to accomplish the primary objective of protecting society and to achieve any or all of the related goals of deterrence, rehabilitation, or retribution applicable to the given case.’” Id. (quoting State v. Toohill, 103 Idaho 565, 568, 650 P.2d 707, 710 (Ct. App. 1982)). The district court has the discretion to weigh those objectives and to give them the weight deemed appropriate. Dobbs, 166 Idaho at \_\_\_, 457 P.3d at 856. “In deference to the trial judge, this Court will not substitute its view of a reasonable sentence where reasonable minds might differ.” State v. Bodenbach, 165 Idaho 577, 591, 448 P.3d 1005, 1019 (2019) (citation omitted).

C. Kirchner Has Shown No Abuse Of The District Court’s Discretion

Application of these legal standards to the facts of this case shows no abuse of discretion. At sentencing, the district court articulated the correct legal standards applicable to its decision.

(Tr., p. 17, L. 22 – p. 18, L. 4.) It noted that Kirchner’s crime in this case “was certainly a serious offense” (Tr., p. 18, Ls. 5-6) and that “many of the charges” contained in his criminal record are “serious” (Tr., p. 20, Ls. 15-16). It also noted that Kirchner has a history of refusing to participate in treatment as ordered, failing to abide by the terms of community supervision, and absconding, and that he performed abysmally while on pre-trial release in this case. (Tr., p. 19, L. 23 – p. 21, L. 23.) The court stated, “I have to consider whether you are going to obey the Court’s orders, which you have not done. You have failed to do nearly every single thing this Court has ordered you to do,” and, “I have you basically showing me that you are not going to – you don’t care what this Court orders; that you are going to do what you want to do, no matter what, even though the Court has ordered certain things to happen.” (Tr., p. 19, L. 24 – p. 20, L. 8.) The court concluded that Kirchner was not a viable candidate for probation or community-based treatment, advising, “I think the risk to the community is too high. I think, based on your failure to comply with this Court’s orders in the past, I’d just be setting you back up to disobey the Court’s orders” (Tr., p. 26, Ls. 1-6), and, “I just, frankly, don’t believe you will do what I ask you to do, based upon where you are” (Tr., p. 24, Ls. 3-4). The district court reasonably chose to impose a unified sentence of 10 years, with two years fixed, and retained jurisdiction so it would “know for sure [Kirchner] will get treatment.” (Tr., p. 23, Ls. 16-22; p. 24, Ls. 6-8.)

The district court’s analysis is supported by the record. Kirchner battered and attempted to strangle his girlfriend, Heather, after she went to his residence as he requested, leaving “a big goose egg above her left eye” and “red marks” and bruising on her neck. (R., pp. 13-14.) Heather told officers that she no longer lived with Kirchner because he “did this kind of thing to her before” (R., p. 13), and Kirchner later admitted to having a “history of violence toward the victim” (PSI, p. 2).

Kirchner also has a history of domestic violence against his ex-wife, Ashley, whom he battered “in their home with the children present.” (PSI, pp. 11, 14.) He was convicted of domestic battery against Ashley following an incident in 2015 that was disturbingly similar to the instant offense; Ashley reported that Kirchner “started smacking” her in the head, then “got on top of her and put his hands around [her] neck and started strangling her.” (PSI, pp. 9, 56.) She also advised that “there had been 7 to 8 physical incidents” in the 10 months preceding that battery. (PSI, p. 56.) Kirchner was placed on probation following his conviction for the domestic battery; however, he “never signed up for supervision and a probation violation was filed a month later.” (PSI, p. 11.) He “received a jail sanction on this violation prior to being released back to probation in December 2016. In March 2017, another probation violation was filed for non-payment and failure to appear,” after which Kirchner absconded supervision for approximately two years. (Id.) He was arrested in March 2019 and was thereafter ordered to participate in Domestic Violence Court, but he failed to engage in treatment. (Id.) Consequently, Kirchner’s probation was revoked and he “finished the remainder of his sentence in jail.” (Id.)

After Kirchner committed the instant offense, he persisted in his criminal behavior, incurring new charges for violation of a no contact order and intimidating a witness. (PSI, pp. 10-11.) He admitted that he “had 99 NCO violations” with Heather while he was in jail for the instant offense. (Confidential Document Record, p. 9.) Kirchner also violated the terms of his pretrial release in this case by testing positive for methamphetamine, failing to report for drug testing for more than a month, and avoiding supervision. (PSI, p. 11; R., p. 87.) Additionally, Kirchner “no-showed” for his scheduled appointments with the presentence investigator on two separate dates. (PSI, p. 20.)

The domestic violence evaluator determined that Kirchner presented a high risk to reoffend and that Kirchner was “[a]mbivalent” with respect to his need for treatment. (PSI, pp. 41, 43.) The psychological evaluator likewise reported that, while Kirchner had “some insight regarding the need for change,” he “simply is not motivated due to apathy.” (PSI, p. 2.) The evaluator advised that Kirchner “will not be able to access or maintain appropriate treatment without external support” and that, if placed in a problem-solving court, he would require “significant supervision and support to ensure compliance.” (PSI, p. 3.) Although Kirchner applied for problem-solving court, he was denied entry into Domestic Violence Court for being “[t]oo difficult to supervise,” and he was also denied entry into Veterans Court because he “is a high risk for domestic violence and [the] program will not be able to mitigate this risk to the community.” (Confidential Document Record, p. 8.)

The record supports the district court’s conclusions that Kirchner’s instant offense and other criminal offenses were serious, that Kirchner has demonstrated an unwillingness to abide by the terms of supervision in the community, and that he is not a viable candidate for probation due to the risk he presents to the public and his lack of motivation for, and failure to comply with, community-based treatment. Kirchner has failed to establish that the district court abused its discretion by imposing a unified sentence of 10 years, with two years fixed, and retaining jurisdiction.

On appeal, Kirchner argues that his sentence is excessive because he was diagnosed with PTSD in 2015, he claims his conduct was unintentional, and the psychological evaluator felt that Kirchner presents “only” a moderate risk to reoffend and recommended Veteran’s Court. (Appellant’s brief, pp. 4-5.) Although Kirchner largely attributes his actions in the instant offense to his PTSD, the record indicates that he previously received treatment for his PTSD

through the United States Navy in 2012, and that his VA benefits would cover additional treatment, yet he chose not to engage in any further treatment – even after his parental rights were terminated in 2015 “due to his PTSD” or after he was convicted of domestic battery in 2016. (PSI, pp. 9, 14, 16, 43.) Furthermore, as addressed above, Kirchner failed to engage in treatment when he was previously ordered to participate in Domestic Violence Court, and, after he committed the instant offense, he was deemed ineligible for both Veterans Court and Domestic Violence Court due to his “high risk for domestic violence” and the programs’ inability to safely supervise him in the community. (Confidential Document Record, p. 8.) Kirchner’s arguments do not establish an abuse of sentencing discretion.

Kirchner’s sentence is appropriate in light of the seriousness of the offense, the harm done to the victim, Kirchner’s high risk to reoffend, his refusal to abide by court orders, and his demonstrated unwillingness to comply with the terms of supervision in the community. Kirchner has not demonstrated that the district court abused its discretion when it determined that a unified sentence of 10 years, with two years fixed, was necessary to meet the goals of sentencing.

#### CONCLUSION

The state respectfully requests this Court to affirm Kirchner’s conviction and sentence.

DATED this 30th day of March, 2021.

/s/ Kenneth K. Jorgensen  
KENNETH K. JORGENSEN  
Deputy Attorney General

VICTORIA RUTLEDGE  
Paralegal

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 30th day of March, 2021, served a true and correct copy of the attached RESPONDENT'S BRIEF to the attorney listed below by means of iCourt File and Serve:

ANDREA W. REYNOLDS  
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/s/ Kenneth K. Jorgensen  
KENNETH K. JORGENSEN  
Deputy Attorney General