IN THE NEBRASKA COURT OF APPEALS

MEMORANDUM OPINION AND JUDGMENT ON APPEAL
(Memorandum Web Opinion)

STATE V. TAYLOR

STATE OF NEBRASKA, APPELLEE,

V.

DELBERT R. TAYLOR, APPELLANT.

Filed April 2, 2024. No. A-23-522.

Appeal from the District Court for Lancaster County: SUSAN I. STRONG, Judge. Affirmed.

Kristi Egger, Lancaster County Public Defender, and Todd C. Molvar for appellant.

Michael T. Hilgers, Attorney General, and Jacob M. Waggoner, for appellee.

PIRTLE, Chief Judge, and MOORE and BISHOP, Judges.

BISHOP, Judge.

INTRODUCTION

Delbert R. Taylor pled no contest to one count of attempted first degree sexual assault of a child, and one count of third degree sexual assault of a child. The Lancaster County District Court sentenced him to consecutive sentences of 40 to 45 years' imprisonment and 2 to 3 years' imprisonment, respectively. Taylor claims his sentence is excessive and that the district court included victim impact statements by individuals who were not within the statutory definition of a victim. We affirm.

BACKGROUND

On July 27, 2022, the State filed an information charging Taylor with three counts: count I, first degree sexual assault of a child (A.R.), a Class IB felony, pursuant to Neb. Rev. Stat. § 28-319.01 (Reissue 2016); count II, first degree sexual assault of a child (B.P.), a Class IB felony,

pursuant to § 28-319.01; and count III, third degree sexual assault of a child (M.K.), a Class IIIA felony, pursuant to Neb. Rev. Stat. § 28-320.01 (Reissue 2016).

At a hearing on May 1, 2023, the State was granted leave to file an amended information and Taylor waived his right to a 24-hour waiting period before entering his plea. Taylor was informed that the amended information (later filed on May 3) charged him with two counts: count I, attempted first degree sexual assault of a child (B.P.), a Class II felony, pursuant to § 28-319.01 and Neb. Rev. Stat. § 28-201 (Reissue 2016); and count II, third degree sexual assault of a child (M.K.), a Class IIIA felony, pursuant to § 28-320.01. Pursuant to a plea agreement, Taylor pled no contest to the counts in the amended information. In exchange, the State, in addition to filing the amended information, also agreed "not to add charges in this case for two victims who are currently identified as 414 victims, [B.K.] for conduct that happened between 2001 and 2002, and [A.B.] for conduct that occurred between 2005 and 2010."

The State provided the following factual basis to support Taylor's pleas:

> State's evidence would show that on September 14th of 2021, the child abuse and neglect hotline got a call from Bryan West Hospital regarding a 16-year-old female who's referred to in the Information as B.P. . . ., she had been sexually abused by . . . Taylor, as a child.
>
> On November 2nd of 2021, [B.P.], whose date of birth is October . . . of 2004, was forensically interviewed at the Child Advocacy Center. Defendant, Delbert Taylor, whose date of birth is July . . . of 1958, was identified as the person who perpetrated the abuse. He's -- She said he was a neighbor at the time and a family friend. [B.P.] said that he began sexually abusing her when she was approximately six years old. Sexual abuse included the fact that he digitally penetrated her vagina on multiple occasions. He made her touch and masturbate his bare, erect penis on multiple occasions. [B.P.] stated that he would buy her food and snacks before and after the instances of sexual abuse, as well as offer her alcohol, cigarettes and marijuana; that this abuse continued until she was approximately 12 years old.
>
> Defendant's prior address here in Lincoln, Lancaster County, is . . . North 28th Street. This is where the abuse occurred. [B.P.] also said the abuse occurred at nearby parks and bicycle trails in the area.
>
> [B.P.] also stated defendant sexually abused her now 20-year-old sister, [A.R.] between the ages of 9 and 14.
>
> On February 23 of 2022, 15-year-old female who's identified in the Information as M.K. . . . disclosed that she was sexually assaulted by . . . Taylor, who was also a family friend and neighbor to her.
>
> On March 8th of 2022, [M.K.] was forensically interviewed at the Child Advocacy Center. She disclosed that between seven and eight years old, the defendant sexually assaulted her at her parents' residence here in Lincoln, Lancaster County. She said that she was in one of her relative's rooms to get batteries and the defendant entered. When she asked for assistance, he said he would provide it as long as she provided a kiss. She kissed him. At that point she said he grabbed her buttocks with his hands, picked her up, kissed her again and laid her on the bed. When he laid her on the bed, he continued kissing her,

as well as touched her sides. There were other times the defendant would come into her residence and would want to sit next to her, touch her buttocks or grope her.

State's evidence would also include two victims who are, to [M.K.] and [B.P.] at least, 414 victims. That would be [B.K.], who was abused between 2001 and 2002 when she was four to six years old. She was sexually assaulted on two occasions, including the fact the defendant digitally manipulated her vagina. It also includes [A.B.], she was sexually assaulted between the ages of 8 and 12 years old, from 2005 to 2010. That sexual assault included digitally penetrating her vagina.

And all those events occurred in Lancaster County[.]

The district court accepted Taylor's pleas of no contest to the charges in the amended information and found him guilty of the same. The case was set for sentencing.

At the sentencing hearing on June 14, 2023, the district court sentenced Taylor to consecutive terms of 40 to 45 years' imprisonment for count I (attempted first degree sexual assault of a child) and 2 to 3 years' imprisonment for count II (third degree sexual assault of a child). Taylor was given credit for 378 days' time served. The court ordered that Taylor was subject to the Nebraska Sex Offender Registration Act. And after finding that "this was an aggravated offense because it does involve the penetration of a child under the age of 12 years," the court ordered that Taylor was subject to lifetime community supervision by the Office of Parole Administration.

Taylor appeals.

ASSIGNMENTS OF ERROR

Taylor assigns, reordered, that (1) the district court's inclusion of victim impact statements by individuals who are not within the statutory definition of a victim constitutes an abuse of discretion, and (2) the sentence imposed by the district court was excessive.

STANDARD OF REVIEW

An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court. *State v. Lierman*, 305 Neb. 289, 940 N.W.2d 529 (2020). Abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence. *Id.*

ANALYSIS

VICTIM IMPACT STATEMENTS

Taylor claims the district court's inclusion of victim impact statements by individuals who are not within the statutory definition of a victim constitutes an abuse of discretion.

Neb. Rev. Stat. § 29-2261 (Supp. 2023) governs the creation and contents of a presentence investigation report (PSR). Pursuant to § 29-2261(3), any written statements by "a victim" to the county attorney or the probation office are to be included in the PSR. For purposes of § 29-2261(3), "the term victim shall be as defined in section 29-119." As relevant here, Neb. Rev. Stat. § 29-119 (Cum. Supp. 2022) states:

(2)(a) Victim means a person who has had a personal confrontation with an offender as a result of . . . a first degree sexual assault under section 28-319, a sexual assault of a

child in the first degree under section 28-319.01, a second or third degree sexual assault under section 28-320, a sexual assault of a child in the second or third degree under section 28-320.01 . . . .

. . . .

(d) In the case of a sexual assault of a child, . . . victim means the child victim and the parents, guardians, or duly appointed legal representative of the child victim but does not include the alleged perpetrator of the crime.

. . . .

(f) Victim also includes a sexual assault victim as defined in section 29-4309.

Neb. Rev. Stat. § 29-4309 (Cum. Supp. 2022) states in relevant part,

(5)(a) Sexual assault victim or victim means any person who is a victim of sexual assault who reports such sexual assault:

(i) To a health care provider, law enforcement, or an advocate, including anonymous reporting as provided in section 28-902; and

(ii) In the case of a victim who is under eighteen years of age, to the Department of Health and Human Services.

(b) Sexual assault victim or victim also includes, if the victim described in subdivision (5)(a) of this section is incompetent, deceased, or a minor who is unable to consent to counseling services, such victim's parent, guardian, or spouse, unless such person is the reported assailant.

At the sentencing hearing, the district court stated that it had reviewed the PSR. The court said, "We've also had a number of additions to the [PSR]," "we have now three victim impact statements and two deposition transcripts, and . . . I have reviewed those, as well."

Taylor's counsel said he did not object to the victim impact statement by B.P.'s mother. However, counsel did object to the victim impact statement by A.R. because the charge related to her was dismissed; "so I don't believe that she would qualify under the Nebraska statutes to submit a victim impact statement in this case, and that's pursuant to 29-2261, 29-119 and 29-4309." Counsel also objected to the victim impact statement by A.B. because she "isn't a person that was in the Amended Information" and was "someone that would potentially have been a 414 witness and someone that potentially would have been added to the Information if this case had gone to trial, which it did not." The State responded that A.B. "was a 414 victim, who at the time of . . . Taylor's plea the State was seeking leave to amend to make her a victim in fact named in the Information," "[s]o, I think that she's entitled to write a victim impact statement or simply a letter to the Court, if we're getting caught up on what the document's called." As for A.R., the State also believed that she was "entitled to write a letter, given the fact that there [are] numerous police reports in the [PSR] that detail . . . Taylor's conduct with her." The district court noted that the PSR contained recorded interview statements from both A.B. and A.R., and it overruled Taylor's objections and received "those victim impact statements for consideration."

Taylor claims that the district court's inclusion of the victim impact statements of "individuals who were not themselves victims or related to victims of the offenses for which [he] was convicted" was in violation of § 29-2261. Brief for appellant at 12-13. We note that the victim

impact statements do not appear in our appellate record, nor are they in the PSR that was provided to this court.

Regardless of whether A.B. and A.R. fit within the statutory definition of "victim," the Nebraska Supreme Court has "consistently said that the definition of victim in § 29-119 established only a baseline right to provide victim impact statements under Nebraska law, and it does not limit a sentencing court's broad discretion to consider relevant evidence from a variety of sources when determining a criminal sentence." *State v. Lara*, 315 Neb. 856, 866, 2 N.W.3d 1, 11 (2024). See, also, *State v. Thieszen*, 300 Neb. 112, 912 N.W.2d 696 (2018) (murder victim's sister allowed to read letter to court even though she was not nearest surviving relative and therefore not "victim" under § 29-119). Pursuant to § 29-2261(3), a PSR is to include "any other matters that the probation officer deems relevant or the court directs to be included." Further, a sentencing court has broad discretion as to the source and type of evidence and information which may be used in determining the kind and extent of the punishment to be imposed, and evidence may be presented as to any matter that the court deems relevant to the sentence. *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015).

Taylor claims that the inclusion of the allegations made by A.B. and A.R. "created a way for the State to circumvent the usual process for securing convictions" and "undermine[d] the plea negotiation and agreement itself." Brief for appellant at 20. He further claims that the weight placed on the allegations "make it undeniable that they had a strong influence on the outcome of [his] case despite not being charged as crimes or proven in a court of law." *Id.* But, a sentencing court in noncapital cases may consider a defendant's unadjudicated misconduct in determining an appropriate sentence. *State v. Alford*, 6 Neb. App. 969, 578 N.W.2d 885 (1998).

We find no abuse of discretion in the district court's consideration of any victim impact statements by A.B. or A.R.

EXCESSIVE SENTENCE

Taylor also claims that the sentences imposed by the district court were excessive and constitute an abuse of discretion, and he argues that he should have been placed on probation. Taylor was convicted of one count of attempted first degree sexual assault of a child (count I), a Class II felony, punishable by 1 to 50 years' imprisonment. See Neb. Rev. Stat. § 28-105 (Cum. Supp. 2022). He was also convicted of one count of third degree sexual assault of a child (count II), a Class IIIA felony, punishable by up to 3 years' imprisonment, a $10,000 fine, or both. See *id.* Taylor was sentenced to consecutive terms of 40 to 45 years' imprisonment on count I and 2 to 3 years' imprisonment on count II. He was not subject to post-release supervision in this case. See § 28-105(6). Taylor's sentences were within the statutory range. As such, we review the court's sentencing determination only for an abuse of discretion.

When imposing a sentence, a sentencing judge should consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense, and (8) the amount of violence involved in the commission of the crime. *State v. Lierman*, 305 Neb. 289, 940 N.W.2d 529 (2020). The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the

defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life. *Id.*

Taylor was 64 years old at the time of sentencing. According to the PSR, he was single and had no children. Taylor was battling cancer and undergoing chemotherapy. Three of his four siblings passed away from cancer within the previous 5 years. His parents are also deceased. Taylor has a history of alcohol and marijuana use.

Taylor is a high school graduate and reported completing trade school and obtaining his carpentry and millwork certificates in 1978. He served in the United States Navy from 1981 to 1983 and reported receiving his machinist license during that time. Taylor has been unemployed since June 2022 due to his incarceration in this case, but previously worked part-time at the same business for 10 years and reported that he could return to work there upon his release from incarceration.

Taylor's criminal history includes: a fine for possession of marijuana in 1976; 12 months' probation and a fine for burglary in 1978 (unsuccessfully discharged from probation); a fine for consuming alcohol in public in 1993; a fine for disturbing the peace in 1995; a fine and restitution for disturbing the peace in 1998; a fine for occupying a business parking lot after hours in 1999; a fine for "No Proof of Financial Responsibility" in 2004; a fine, 10 days' house arrest, and 6 months' license impoundment for "DUI/.08, 1st Offense" in 2011; fines for possession of marijuana in 2011 and 2015; and a fine for "Parks: Possess or Consume Alcohol" in 2016. Taylor also had fines for various traffic violations in 1997, 2004, and 2005. The details of his current offenses have been set forth previously.

The probation officer conducted a "Level of Service/Case Management Inventory." Taylor was assessed as a high risk to reoffend. He scored as a high risk in the criminogenic risk factor domains for leisure/recreation, alcohol/drug problems, and procriminal attitude. He scored as a medium risk in the domains for criminal history, education/employment, family/marital, companions, and antisocial pattern. On the "Vermont Assessment of Sex Offender Risk-2," Taylor scored in the low-risk range for sexual and/or violent recidivism.

According to the PSR, Taylor denied ever being sexually abused or assaulted as a child. However, when he was 14 years old, he had sex with his 18-year-old stepsister. As related to the charges in the current case:

> When asked what thoughts come to mind when he thinks about the victims in this case, the defendant said, "That a lot of it I didn't do. If I'm guilty of anything its inappropriate touching." When asked why he thinks he got in trouble for what he did, the defendant said, "They just started talking to parents and exaggerated what happened." He said he is the one to blame for what happened in the present offense. When asked how he thinks his victim feels about what happened, the defendant said, "They didn't push me away."

The probation officer noted that Taylor appeared to be "taking little to no responsibility for the present offense" and "engaging in minimization or denial related to his involvement in the present offense."

At the sentencing hearing, Taylor's counsel stated that it was true that Taylor was denying many of the facts in the reports contained in the PSR, but he "doesn't dispute everything and he does take some responsibility" "as it pertains to the charges that he has been convicted of" in that

he "does admit to inappropriate touching." Counsel asked the district court to consider the fact that Taylor entered a plea, saving the time and expense of trial, as well as saving any of the witnesses from having to testify in court. Counsel also asked the court to consider Taylor's: "criminal history, which is not extensive"; age, current health, and life expectancy; score on the sex offender specific evaluation tools that he was as an overall low risk to reoffend; and his willingness to participate in any evaluations, counseling, or treatment the court deemed appropriate. Counsel said Taylor wanted to be "consider[ed] for probation on whatever terms the Court may deem appropriate."

The district court asked Taylor if there was anything that he would like to add to what his attorney said. Taylor responded, "[Counsel] said it okay."

The State argued that Taylor was not a suitable candidate for probation. It asked the district court to consider "three things, the serious nature of this offense, the danger [Taylor] presents to the community and the impact on the victims and their families." As to the nature of the offense, the State asked the court to consider

> the sheer number of victims in this case. [Taylor] pled to molesting two young girls. In reality, there are five victims in this case that spanned over two decades. One of the three victims originally charged dropped out because of the trauma and stress associated with this case. Two others are 414 victims the State was asking to amend to make victims in fact at the time of Mr. Taylor's plea.

The State recounted the details of the other three girls' encounters with Taylor; although we will not set forth those details here, they are supported by the various police reports and interviews appearing in the PSR. The State remarked, "For all five girls, defendant abused a position of trust. In each and every instance he was a neighbor and a family friend, and in most of the instances was tasked with caring for the children."

The State also noted the age disparity between the victims and Taylor; the abuse began when the victims were between the ages of 4 and 10, "and [Taylor] was in his early 40s, and lasted until his late 50s." "[I]n addition to spanning almost half a dozen children, [Taylor's] abuse spanned multiple decades, in some instances went on for multiple years and involved multiple instances of penetration." "Each victim was deeply affected, able to recall vividly decades old interactions with [Taylor], and most report struggling greatly with this still today"; "[c]ollectively they report PTSD, anxiety, depression, and some report self harm as well as suicide attempts after [Taylor] abused them." Taylor "takes no responsibility" and instead "blames young girls, as young as six, and all under 13, who are separated by decades of time and miles in space, of somehow colluding and conspiring against him." The State had "serious concerns that if [Taylor] were released in the community he would regress, recidivate and re-offend." The Stated asked "for a substantial period of incarceration on each count, consecutively."

The district court stated that it had reviewed the PSR, as well as the three victim impact statements and two deposition transcripts that were added to the PSR. In addressing Taylor, the court said, "I find your behavior to be inexcusable and appalling," "[y]ou took advantage of your relationship with these victims' families as a neighbor." "Some of these victims described you as an uncle, somebody they used to think about as a male father figure in their lives." "You traded candy for sexual favors." "You threatened one victim . . . that if she didn't comply you'd turn to her younger sister, which you did anyway"; Taylor interjected to say "That is not true." The court

said, "You did take some responsibility in the presentence investigation interview, but at other times . . . you said the girls were exaggerating." "And I think the most shocking statement was when you were asked how you think the victims feel about what happened, and you said, 'They didn't push me away'"; Taylor again interjected and said, "I did not say that." The court noted that all of the girls told similar stories about the events that occurred, and the court said Taylor "caused these girls trauma which will affect them for the rest of their lives." The court agreed with the State that Taylor "deserve[d] a lengthy term of incarceration." It then sentenced Taylor as previously set forth.

In his brief on appeal, Taylor claims the district court abused its discretion by imposing a sentence of incarceration rather than placing him on probation. Taylor refers to Neb. Rev. Stat. § 29-2260(3) (Reissue 2016), which sets out various factors which "shall be accorded weight in favor of withholding [a] sentence of imprisonment" by a sentencing court. Taylor argues that the court failed to give adequate weight to "opportunities for rehabilitation, [Taylor's] willingness to accept responsibility, and [his] pleas of 'no contest' . . . thereby saving the time and expense of trial and relieving the victims of having to testify in court." Brief for appellant at 12. He notes that he has "consistently admitted the facts which pertain to the crimes that the State charged against him and has maintained only his innocence of other allegations which the State has raised but never charged or proven and were not included in the plea agreement that [he] chose to accept." *Id.* at 16-17. Taylor also argues that "an extensive prison sentence is uniquely punitive," and that given his "very serious illness with Stage 4 lung cancer, as well as other health conditions," "[t]here is a significant risk that a long term incarceration would condemn [him] to what is essentially a life sentence." *Id.* at 16.

Having considered the relevant factors in this case, we cannot say that the district court abused its discretion when it sentenced Taylor to prison rather than probation. See *State v. Lierman*, 305 Neb. 289, 940 N.W.2d 529 (2020) (sentence imposed within statutory limits will not be disturbed on appeal absent abuse of discretion by trial court). Nor do we find that the district court abused its discretion in the length of the prison sentences imposed. See *id.* See, also, *State v. Blaha*, 303 Neb. 415, 929 N.W.2d 494 (2019) (law invests trial judge with wide discretion as to sources and types of information used to assist him or her in determining sentence to be imposed within statutory limits); *State v. Alford*, 6 Neb. App. 969, 578 N.W.2d 885 (1998) (sentencing court in noncapital cases may consider defendant's unadjudicated misconduct in determining appropriate sentence).

CONCLUSION

For the reasons set forth above, we affirm Taylor's conviction and sentences.

AFFIRMED.