COURT OF APPEALS
DECISION
DATED AND FILED

March 8, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP2470-CR **Cir. Ct. No. 2011CM49**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JASON ALAN ADAMS,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Grant County: CRAIG R. DAY, Judge. *Affirmed*.

¶1 LUNDSTEN, P.J.[1] Jason Adams seeks resentencing. He argues that the circuit court misused its sentencing discretion. I disagree, and affirm the circuit court.

¶2 According to the criminal complaint, on February 18, 2011, Adams went to the residence of his ex-girlfriend and entered in the middle of the night, unannounced and uninvited. The ex-girlfriend approached Adams and Adams asked her where "he" was, an apparent reference to the man the ex-girlfriend had been sleeping with. Adams then approached the ex-girlfriend's bedroom. There was an altercation. The other man told police that Adams struck him in the face with a closed fist five to six times and that Adams also "kneed" him in the face. The ex-girlfriend called the police, and Adams fled.

¶3 Adams was charged with multiple counts, but eventually entered no contest pleas to just two counts—misdemeanor battery and misdemeanor bail jumping. Adams was sentenced to five months in jail for the battery and three months in jail for the bail jumping, consecutive to each other.

¶4 Adams challenges his sentence. He asserts that the circuit court misused its discretion, but his primary argument seems to be that the court relied on inaccurate information. Adams contends that the court's use of inapt analogies shows that the court misunderstood the nature of Adams' behavior. I disagree.

¶5 Sentencing courts are "presumed to have acted reasonably, and the defendant can only rebut the presumption by showing an unreasonable or

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2009-10). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

unjustifiable basis for the sentence in the record." ***State v. Wickstrom***, 118 Wis. 2d 339, 354, 348 N.W.2d 183 (Ct. App. 1984) (citation omitted). A sentencing court "misuses its discretion when it fails to state the relevant and material factors that influenced its decision, relies on immaterial factors, or gives too much weight to one factor in the face of other contravening factors." ***State v. Steele***, 2001 WI App 160, ¶10, 246 Wis. 2d 744, 632 N.W.2d 112. In addition, a circuit court exceeds its discretion as to the length of the sentence only when 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.'" ***Id.*** (citation omitted). Further, the defendant has a right to be sentenced based upon accurate information. ***State v. Tiepelman***, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1.

¶6 I need not address the circuit court's full sentencing rationale because Adams' arguments are focused on the proposition that the court misunderstood the nature of the altercation and this misunderstanding is demonstrated by the court's use of inaccurate characterizations and inapt comparisons. Moreover, according to Adams, the court's explanations at the subsequent postconviction hearing do not explain away these errors.

¶7 I disagree, and begin by quoting the relevant portion of the sentencing transcript:

> And there are [a] few things that make this more than a bloody nose.
>
> First of all you're out on bond. You get into trouble, you get charged, you sign a bond that says you're not going to violate the law, and the[n] you do.

> *Second of all, it's not a boo-boo type of offense. By that I mean you know it would be a different circumstance if you and [the other man] were out at the bars and you both had a shine on this one particular gal. And your machismo took over and the two of you decided to duke it out for the seeming honor of a lady. That's one circumstance.*
>
> *But going to a place and dragging a guy out of bed and thumping him, whether he participated in reciprocal thumping or not is a different thing.*
>
> Your record is an aggravating circumstance. Had this been your first offense we could say well you know Mr. Adams certainly did exercise poor judgment, certainly did make a poor decision. But you have now a ten year cycle of bad decisions that lead to bad things for you.
>
> It's not going to do your son any good for you to go to jail. It doesn't do your son any good to probably be woken up in the middle of the night while his dad thumps another guy in his home. It probably doesn't do him any good for you and his mother to be in this gerbil wheel that is your relationship. And it certainly, certainly does him absolutely no good at all if you don't snap to attention very, very, very, very soon.

(Emphasis added.)

¶8 Adams' appeal focuses on the two italicized paragraphs above. Because Adams' arguments are not easily summarized, I quote them and explain why I reject each.

> "While Mr. Adams' offense may have been 'more in the nature of an unprovoked attack,' the court does not assert that it was an entirely unprovoked attack. The facts clearly indicate that Mr. Adams had injuries himself, showing that the fight was at least partially mutual."

The circuit court plainly acknowledged at the initial sentencing and at the postconviction hearing that the victim may have struck some blows. More to the point, the court explained at the postconviction hearing that Adams' assertion that he was invited to the residence by his ex-girlfriend was not credible. That is, it

was not credible that Adams' ex-girlfriend, with whom he had a child and a tempestuous relationship, would invite Adams over when the ex-girlfriend had another man in bed with her. The court properly inferred that Adams was the primary aggressor.

> "Further, a hypothetical fight over the 'seeming' honor of a lady could also involve an unprovoked attack. It is an inaccurate colloquialism."

This assertion by Adams is true, but it is a non-starter because it does not address what the circuit court said at sentencing. In context, the court compared Adams' act of going to the house and starting a fight with a hypothetical fight over a woman when the combatants mutually decide to resolve their dispute by "duking it out." Such a fight would be "provoked" by both men, unlike the situation here.

> "[The circuit court] asserted at the sentencing that this fight over the honor of a lady would be due to machismo. That [it] found Mr. Adams' offense more serious implies that machismo excuses batteries to some degree."

The circuit court did not imply that "machismo" is an excuse. Indeed, the court might well agree that "machismo" (i.e., an exaggerated sense of masculinity) is a problem that Adams has. Rather, the court suggested only that mutual combat is not as serious as non-mutual combat.

> "[The circuit court] gives no explanation for why fighting over a lady, in a bar, makes a fight less serious, or why machismo might be an excuse."

Again, this statement misperceives the circuit court's analogy. The court in no way suggests that all bar fights over a woman or fights involving machismo are less serious than the incident here.

> "[The circuit court] characterized the battery as 'not a boo boo type of offense.' [The court] said Mr. Adams 'thump[ed]' [the other man]. These descriptions are again

> neither legal in nature nor precise. The connotation of a 'thumping' brings to mind a one-sided fight in which the victim receives multiple severe injuries. As explained above, this was not the case here."

My review of the transcript provides no reason to suppose that the circuit court misunderstood the underlying allegations or the seriousness of the other man's injury. Rather, the court properly viewed the situation as Adams going uninvited to his ex-girlfriend's residence, being aggressive, and brutally striking the man that he found with her. It is meritless to suggest that the court's use of the imprecise term "thumping" warrants reversal.

> "Similarly, [the circuit court's use of the term] 'boo-boo' implies an injury not requiring medical attention. [The other man] did not seek medical attention for his bloody nose. Perhaps it implies an injury one could receive accidentally. Again, a bloody nose would fit this definition. The comparison to a 'boo-boo offense', and elevation above it, is simply not rational."

This argument is frivolous. The circuit court had before it evidence that Adams bloodied the nose of the other man and that he struck him hard enough, or otherwise struck or pushed him, so that there was blood on the sheets and the walls. The other man also sustained swollen eyes. The court's use of the term "boo boo" was simply meant to convey the idea that Adams' actions were serious, that is, more serious than if Adams had inflicted other non-specific less serious injury.

¶9 In sum, I reject all of Adams' arguments because they are all based on a misunderstanding or a mischaracterization of the circuit court's comments.

By the Court.—Order affirmed.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)4.