COURT OF APPEALS
DECISION
DATED AND FILED

July 26, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal Nos. 2010AP2007-CR
2010AP2008-CR

Cir. Ct. Nos. 2007CF3951
2007CF5315

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

REGINALD O. KYLES,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Milwaukee County: CLARE L. FIORENZA and MARY M. KUHNMUENCH, Judges. *Affirmed*.

Before Curley, P.J., Fine and Kessler, JJ.

¶1 PER CURIAM. In these consolidated appeals, Reginald O. Kyles appeals from judgments of conviction, entered after a jury trial, for two counts of

second-degree recklessly endangering safety, one count of substantial battery, and one count of disorderly conduct, all as an habitual criminal, contrary to WIS. STAT. §§ 941.30(2), 940.19(2), 947.01, and 939.62 (2007–08).[1] Kyles also appeals from an order denying his motion for postconviction relief.[2] He argues: (1) there was insufficient evidence to convict him of two counts of second-degree recklessly endangering safety; and (2) the trial court erroneously exercised its sentencing discretion. We reject Kyles's arguments and affirm.

BACKGROUND

¶2 A jury found Kyles guilty of the aforementioned crimes, which arose out of two separate incidents when Kyles and his girlfriend, Jessica Parker, were driving on the expressway.[3] The first incident took place in July, 2007, in the late afternoon. According to Parker's trial testimony, she was driving her car, a purple Blazer, and Kyles was in the passenger seat. They got into an argument. Kyles, who had been drinking, told Parker to pull over. Parker testified that Kyles hit her in the head and face more than once as she was driving. Later in her testimony, Parker said she remembered Kyles hitting her while she was parked on the side of

[1] Two of the crimes were charged in Milwaukee County Circuit Court Case No. 2007CF3951 and two were charged in Milwaukee County Circuit Court Case No. 2007CF5315. The cases were tried together and the trial court sentenced Kyles for all four crimes. We ordered the appeals consolidated on November 9, 2010.

All references to the Wisconsin Statutes are to the 2009–10 version unless otherwise noted.

[2] The Honorable Clare L. Fiorenza tried the cases and entered the judgments of conviction. The Honorable Mary M. Kuhnmuench denied the postconviction motion, which related to both judgments, in a single order.

[3] The jury found Kyles not guilty of a third count of second-degree recklessly endangering safety.

the road, rather than as they were driving. She said that after the altercation, Parker drove Kyles to his mother's house. Parker said she suffered a cut lip that was treated with stitches at the hospital.

¶3 A witness, Tina Torres-Cruz, testified that she was driving on the expressway behind Parker's car and had to swerve to the left lane to avoid hitting Parker's car, which had "c[o]me to a complete stop" in the center lane. Torres-Cruz said that as she drove past, she saw Kyles choking Parker. Torres-Cruz said that Kyles "had his hands wrapped around the female driver's neck" and was "choking" her. Torres-Cruz called 911 and reported what she had seen.

¶4 Kyles was charged with two counts of second-degree recklessly endangering safety, for endangering Parker and Torres-Cruz, and with substantial battery for hitting Parker, all as an habitual criminal. An arrest warrant was issued in August, 2007. Before Kyles could be arrested, the second incident occurred, in October, 2007.

¶5 In the October incident, it was late in the evening and Parker was driving Kyles, who was intoxicated, to Parker's house. Kyles became angry and told Parker to pull the car over so he could drive. Parker pulled the car over to the right distress lane of the expressway. She and Kyles argued and then she got out of the car. Kyles got into the driver's seat and started driving. Parker said that Kyles pulled away from the side of the expressway and into the lanes of traffic, driving against the flow of traffic. Parker, who was still standing on the side of the road, saw another car hit her car. Next, Kyles maneuvered the car so that he was driving the correct way. He collided with another car. Kyles then drove off. An officer later found him parked on the side of the road.

¶6 The driver of the first car that struck Kyles's car, Andrew Becker, testified that as he and his four passengers were driving on the expressway, he saw a purple Blazer "off to the side of the road," in the distress lane on the right. Becker said that "all of a sudden, [the Blazer] just pulled out right in front of me." Becker said the Blazer was "horizontal on the freeway" in between the middle and third lanes. Becker "had to brake real quick, swerve off to the right, try avoiding him." Becker's car struck the rear end of the Blazer, which caused extensive damage to Becker's car and injured Becker's back.

¶7 Kyles was charged with one count of second-degree recklessly endangering safety for endangering Becker, as well as one count of disorderly conduct.[4] The charges from the July and October, 2011 incidents were tried together. The jury found Kyles guilty of all charges except one: it acquitted Kyles of endangering Torres-Cruz.

¶8 The trial court sentenced Kyles to four consecutive sentences, including: (1) seven years of initial confinement and five years of extended supervision for endangering Parker; (2) eighteen months of initial confinement and two years of extended supervision for the substantial battery of Parker; (3) seven years of initial confinement and five years of extended supervision for endangering Becker; and (4) one year of initial confinement and one year of extended supervision for disorderly conduct. Kyles filed a postconviction motion

[4] Kyles was also ticketed for operating while intoxicated, operating with a prohibited alcohol concentration and driving the wrong way on a divided highway. Those traffic charges were handled separately from the cases at issue in this appeal and will not be addressed.

challenging the sufficiency of the evidence and the trial court's exercise of sentencing discretion. The trial court denied the motion.

DISCUSSION

¶9 Kyles challenges his convictions for second-degree recklessly endangering safety on grounds that there was insufficient evidence to convict him of endangering Parker or Becker. In the alternative, he seeks resentencing on grounds that the trial court erroneously exercised its sentencing discretion when it "failed to adequately explain the sentence and placed undue weight on one factor." We consider each issue in turn.

I. Sufficiency of the evidence.

¶10 Kyles argues that there was insufficient evidence to convict him of second-degree recklessly endangering safety. ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752, 757–758 (1990), recounts the standard we must apply:

> [I]n reviewing the sufficiency of the evidence to support a conviction, an appellate court may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn a verdict even if it believes that the trier of fact should not have found guilt based on the evidence before it.

(Internal citation omitted.)

¶11 In order to convict Kyles under WIS. STAT. § 941.30(2), the State was required to prove that: (1) Kyles endangered the safety of another human

being; and (2) he did so by criminally reckless conduct. *See* WIS JI—CRIMINAL 1347. This requires that Kyles's conduct created an unreasonable and substantial risk of death or great bodily harm to another and that Kyles was aware that his conduct created such a risk. *See* ***ibid.*** (defining criminally reckless conduct).

A. Endangering Parker.

¶12 Kyles argues there was insufficient evidence that he endangered Parker because "there is no evidence that his action in hitting or choking her" constituted criminally reckless conduct. He notes that Parker testified that her driving was not affected and that she was stopped in the distress lane when Kyles hit her. He also asserts that because the jury found Kyles not guilty of endangering Torres-Cruz, it should not have found that Kyles endangered Parker. Kyles's arguments are not convincing.

¶13 There is evidence in the Record that supports the jury's verdict. *See* ***Poellinger***, 153 Wis. 2d at 507, 451 N.W.2d at 757–758. Specifically, there was testimony that Kyles yelled, hit, and choked Parker while she was driving, causing her to stop suddenly in the center lane of traffic. The jury could have found that these actions constituted second-degree reckless endangering safety. Parker's inconsistent testimony concerning when Kyles hit her does not change our analysis. It was the jury's role to resolve inconsistencies in the testimony. *See* ***State v. Perkins***, 2004 WI App 213, ¶15, 277 Wis. 2d 243, 253, 689 N.W.2d 684, 688. The jury was entitled to believe Parker's initial testimony that Kyles hit her as she was driving. Moreover, the jury could have found that Kyles choked Parker while she was driving and hit her when she was pulled over on the side of the road. Under either theory, there was sufficient evidence to find Kyles guilty of reckless endangering Parker's safety.

B. Endangering Becker.

¶14 Noting that there was inconsistent testimony concerning whether Kyles drove against the flow of traffic or simply pulled out into traffic, Kyles argues that "a reasonable jury should have only concluded, that, at most, Mr. Kyles pulled out into traffic without looking rather than traveling against traffic." He further explains:

> In the present case the question becomes whether causing someone to stop in traffic or hitting someone while driving or pulling out into traffic constitutes the crime of second degree recklessly endangering safety. Mr. Kyles asserts that it does not under the circumstances of his case. No evidence was presented [t]hat Mr. Kyles was aware of the risk he was creating by his actions. There is no evidence that he knew that Parker stopped in traffic and that Becker was behind him when he pulled out of the distress lane. While Mr. Kyles['s] conduct may have been negligent, he asserts that [it] did not rise to the level of criminally reckless conduct. Coupled with the inconsistent testimony concerning what actually happened, Mr. Kyles asserts that no reasonable trier of fact should have convicted him of second degree recklessly endangering safety.

¶15 We disagree. Viewing the evidence in a light most favorable to the State and the conviction, we cannot agree that "no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." *See* ***Poellinger***, 153 Wis. 2d at 507, 451 N.W.2d at 758. The jury could have inferred that when Kyles abruptly drove his car onto the expressway, traveling either perpendicular to the direction of the oncoming cars or heading straight for them, he knew that he had "created an unreasonable and substantial risk of death or great bodily harm to" drivers in the oncoming cars, including Becker. *See* WIS JI—CRIMINAL 1347. The fact that Kyles fled the scene after colliding with two cars also supports such a finding. *See* ***State v. Bettinger***, 100 Wis. 2d 691, 698, 303 N.W.2d 585, 589 (1981) ("It is

generally acknowledged that evidence of criminal acts of an accused which are intended to obstruct justice or avoid punishment are admissible to prove a consciousness of guilt of the principal criminal charge.").

II. Exercise of sentencing discretion.

¶16 Kyles challenges the trial court's exercise of sentencing discretion. He argues that the trial court erroneously placed undue weight on one factor (the potential harm that could have occurred on the expressway in both incidents) and failed to adequately explain the basis for imposing the maximum sentence for both counts of second-degree recklessly endangering safety. He also suggests that the sentence was "excessive" and "simply does not fit the crime."

¶17 At sentencing, a court must consider the principal objectives of sentencing, including the protection of the community, the punishment and rehabilitation of the defendant and deterrence to others, ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 606, 712 N.W.2d 76, 82, and it must determine which objective or objectives are of greatest importance, ***State v. Gallion***, 2004 WI 42, ¶41, 270 Wis. 2d 535, 557–558, 678 N.W.2d 197, 207. In seeking to fulfill the sentencing objectives, the court should consider a variety of factors, including the gravity of the offense, the character of the offender, and the protection of the public, and it may consider several subfactors. ***State v. Odom***, 2006 WI App 145, ¶7, 294 Wis. 2d 844, 851, 720 N.W.2d 695, 699. The weight to be given to each factor is committed to the court's discretion. *See* ***Gallion***, 2004 WI 42, ¶41, 270 Wis. 2d at 557–558, 678 N.W.2d at 207. The sentencing court is "'generally afforded a strong presumption of reasonability,'" and if our review reveals that discretion was properly exercised, we follow "'a consistent and strong policy

against interference'" with the trial court's sentencing determination. ***Id.***, 2004 WI 42, ¶18, 270 Wis. 2d at 549, 678 N.W.2d at 203 (citations omitted).

¶18 We begin with Kyles's assertion that the trial court placed "undue weight" on the potential harm that could have occurred on the expressway in both incidents. He points to the trial court's statement that "a lot of people were put at risk because of the defendant's actions in these cases" as evidence that the trial court was placing undue emphasis on what might have happened if there had been additional collisions or more serious collisions on the expressway. Kyles explicitly acknowledges that the trial court was entitled to consider "the potential harm that the defendant's actions might have caused," but argues that "in the present case the court relies too heavily on that factor and fails to balance contravening factors."

¶19 We have carefully reviewed the sentencing transcript, including the twenty-four pages of transcript where the trial court discussed relevant sentencing factors and imposed the sentence. The trial court properly "consider[ed] a variety of factors, including the gravity of the offense, the character of the offender, and the protection of the public." *See* ***Odom***, 2006 WI App 145, ¶7, 294 Wis. 2d at 851, 720 N.W.2d at 699. It discussed the facts of the crimes, Kyles's past criminal history (which included juvenile adjudications, misdemeanors, and felonies), his potential for rehabilitation, and the danger to the community presented by Kyles's "aggravated" actions. It recognized Kyles's history of violence to women, as well as his "poor track record with respect to concern for anybody else but himself." It also looked at positive characteristics, such as Kyles's attainment of a GED. In sum, the trial court considered appropriate factors. To the extent the trial court may have placed greater emphasis on the gravity of the crimes and what might

have occurred, that emphasis was well within the trial court's sentencing discretion. *See* ***Gallion***, 2004 WI 42, ¶41, 270 Wis. 2d at 557–558, 678 N.W.2d at 207 (weight given to each sentencing factor is within court's discretion).

¶20 Next, Kyles argues that the trial court failed to "adequately explain" its sentence. He asserts that the trial court was required to explain why it did not follow the presentence investigator's sentencing recommendation and why it imposed consecutive sentences.

¶21 Contrary to Kyles's argument, the trial court was not required to explain why it was not adopting the presentence investigator's recommendation.[5] *See* ***id.***, 2004 WI 42, ¶47, 270 Wis. 2d at 561, 678 N.W.2d at 209 (encouraging, but not requiring, "courts to refer to information provided by others" and to use "counsels' recommendations for the nature and duration of the sentence and the recommendations of the presentence report as touchstones in their reasoning"). The trial court was also not required to provide a specific explanation as to why it imposed consecutive, rather than concurrent, sentences. *See* ***State v. Berggren***, 2009 WI App 82, ¶¶45–46, 320 Wis. 2d 209, 239, 769 N.W.2d 110, 124 (rejecting proposition that trial court must "state separately why it chose a consecutive rather than a concurrent sentence" and noting that a "trial court properly exercises its discretion in imposing consecutive or concurrent sentences by considering the same factors as it applies in determining sentence length").

[5] It is clear that the trial court considered the presentence investigator's report, which it referenced several times in its explanation of sentence. Indeed, the trial court explicitly adopted one of the recommendations suggested in the report: requiring victim awareness counseling.

¶22 What the trial court was required to do was "provide a 'rational and explainable basis' for the sentence." *See* ***Gallion***, 2004 WI 42, ¶39, 270 Wis. 2d at 556, 678 N.W.2d at 207 (citation omitted). The trial court did so here. For instance, it recognized that Kyles presented "a substantial risk for our community" and commented on the "very aggravated" nature of the crimes. It concluded that Kyles seemed to have no concern for others and that the sentences imposed were "appropriate." The trial court's sentence was adequately explained.

¶23 Kyles also takes issue with the fact that the trial court did not resolve the inconsistency in Parker's testimony concerning whether she was hit while she was driving or while she was pulled over. Kyles suggests that the trial court's decision to "ignore[]" the inconsistencies "supports [his] contention that the court sentenced him solely based on what might have happened rather than [on] what actually happened." We are not persuaded. The trial court recognized that Parker had given inconsistent testimony concerning when she was hit, but it resolved the issue by relying on the testimony of Torres-Cruz, "an independent witness" who the trial court found to be "very credible." The trial court accepted Torres-Cruz's testimony that she observed Kyles battering Parker while Parker's car was stopped in the center lane of traffic. This action, the trial court concluded, endangered Parker and other motorists.

¶24 Finally, Kyles asserts that the sentence was excessive because he "received a sentence commensurate with much more serious felonies and behaviors." Kyles's argument ignores the fact that "[s]entences are to be individualized to meet the facts of the particular case and the characteristics of the individual defendant." *See* ***State v. Coles***, 208 Wis. 2d 328, 334–335, 559 N.W.2d 599, 601 (Ct. App. 1997). The fact that Kyles was given the maximum sentence

for the two reckless endangerment crimes does not mean that his sentence must be excessive. As explained above, the trial court followed the dictates of ***Gallion***. In light of the facts of these cases, including the fact that Kyles endangered people on the expressway on two separate occasions, as well as his criminal history and poor response to previous incarceration, we do not believe that the sentence was unduly harsh or excessive. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457, 461 (1975) (A sentence is unduly harsh when it 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.").

By the Court.—Judgments and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.