COURT OF APPEALS
DECISION
DATED AND RELEASED

July 10, 1996

No. 95-3508-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DONALD P. SULLIVAN,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Walworth County: MICHAEL S. GIBBS, Judge. *Affirmed*.

BROWN, J. Donald P. Sullivan claims that the sentencing court misused its discretion by considering a companion charge of which he had been acquitted. He further argues that the sentencing court improperly relied upon hearsay evidence. He also asserts that his sentence was unduly harsh. We hold that the sentencing court acted within the bounds of its discretion and affirm.

The facts supporting the verdicts are as follows. In the early morning hours of October 1, 1994, Sullivan's car ran off the road. An officer from the town of Bloomfield police came to the scene and a witness told him that Sullivan had exited his car and had run into the nearby woods.

When the officer eventually found Sullivan, the officer saw that Sullivan's face was covered with blood and that he appeared to be severely injured. The officer also noticed the smell of intoxicants. The officer warned Sullivan to stay still and avoid aggravating his injuries.

Sullivan nonetheless ignored the officer and tried to get up. The officer then tried to grab Sullivan and hold him still. Sullivan responded by trying to strike the officer. The officer then tried subduing Sullivan with a pepper spray. But it did not work and the two men struggled for a brief period before another officer arrived and they successfully restrained Sullivan. The first officer claimed that Sullivan punched him several times during this struggle.

In addition to resisting arrest and disorderly conduct charges, the State filed one count of felony battery of a police officer. *See* §§ 946.41(1), 947.01 and 940.20(2), STATS. The jury acquitted Sullivan of the felony battery charge. The State separately sought a sanction against Sullivan for operating a vehicle while intoxicated.

Before we turn to Sullivan's three specific challenges to the sentencing decision, we must first resolve the parties' apparent dispute over the

appropriate standard of review. Sullivan maintains that ***Harris v. State***, 75 Wis.2d 513, 521, 250 N.W.2d 7, 11 (1977), requires us to review his claims that the sentencing court considered improper factors under a de novo standard. He seems to further suggest that if we conclude that the sentencing court considered an improper factor, then we must automatically reverse and order that he be resentenced. The State responds that our review of sentencing decisions is deferential and that we may not reverse unless we can conclude from the overall record that the court misused its discretion.

We agree with the State. Our ability to interfere with the sentencing court's decisions is limited to instances "where there has been a clear abuse of discretion." *See* ***id.*** at 519, 250 N.W.2d at 10 (quoted source omitted). While the court's reliance on an improper factor may suggest that it misused its discretion, the court's reliance on an improper factor, standing alone, does not automatically warrant a reversal of the sentencing decision. *See* ***id.*** at 518, 250 N.W.2d at 10. When we review a sentencing decision, we search the whole record to see if it contains facts to support the court's ultimate decision and if the court applied those facts in a reasonable manner. *See* ***id.*** at 519, 250 N.W.2d at 10.

We now turn to each of Sullivan's specific charges. He starts with the argument that the sentencing court impermissibly considered facts which had been rejected by the jury. Sullivan notes that the court relied on evidence that he struck the officer in the face to reach its conclusion about the severity of his offenses. Sullivan claims, however, that the jury seemingly rejected the

theory that he struck the officer when it acquitted him of the battery of a police officer charge. Thus, Sullivan contends that the sentencing court relied on an improper factor when it reached its ultimate decision.

Under ***State v. Bobbit***, 178 Wis.2d 11, 17, 503 N.W.2d 11, 14 (Ct. App. 1993), the sentencing court may look to the circumstances surrounding the offenses to reach its conclusion. This evidence, however, need not be accepted by the jury because the information which a court uses to make a sentencing decision, unlike the proof used to secure a conviction, need not be established beyond a reasonable doubt. *See* ***id.*** Here, the sentencing court had before it the officer's testimony regarding how Sullivan had struck him and the severity of the resulting injuries. This information provided a sufficient basis on which the sentencing court could ground a reasonable decision that Sullivan's actions were severe enough to warrant punishment.

Sullivan points to language in ***Bobbit*** where this court observed that a sentencing court could conceivably misuse its discretion by relying on evidence which was "undoubtedly rejected" by the jury. *See* ***id***. at 18, 503 N.W.2d at 15. Sullivan argues that when the jury acquitted him of battery to a police officer, the sentencing court and this court were duty bound to presume that the jury rejected the assertion of Sullivan striking the officer. The State responds that the acquittal resulted from the evidence that it was dark and that the officer was not readily identifiable as such; therefore, Sullivan may not have known, beyond a reasonable doubt, that he was striking at an officer. But Sullivan dismisses this argument by claiming that the State cannot presume that

this was the reason why the jury acquitted. Sullivan insists that we must look at the jury's acquittal as though it "undoubtedly rejected" the charge.

We disagree with Sullivan. The jury convicted him of resisting arrest. The facts surrounding the resisting arrest charge included the officer's testimony that Sullivan struck him. Physical contact between a defendant and a police officer can be an element of resisting arrest. *See* WIS J I—CRIMINAL 1765 ("To resist an officer means to oppose the officer by force or threat of force.") We conclude that Sullivan's reliance upon ***Bobbit*** is misplaced because upon considering the resisting arrest conviction, we cannot say, and Sullivan cannot say, that the facts relied on by the sentencing court were undoubtedly rejected by the jury. A reasoned view of the testimony suggests that the jury could have indeed viewed the blows that Sullivan delivered as evidence that Sullivan resisted arrest. Thus, the sentencing court had every right to rely upon this information.

Sullivan next argues that the sentencing court erroneously relied on hearsay evidence. Specifically, Sullivan points to the prosecutor's oral statements during the sentencing hearing that she "heard" Sullivan was a "violent" and "dangerous" person. Moreover, Sullivan is concerned that the trial court relied on the prosecutor's other statements about how her office had investigated allegations that Sullivan had threatened the State's witnesses prior to his trial.

Sullivan acknowledges that the State is permitted to use hearsay evidence of the defendant's other criminal acts during sentencing arguments.

See generally ***State v. Marhal***, 172 Wis.2d 491, 502-03, 493 N.W.2d 758, 763-64 (Ct. App. 1992). Nonetheless, he raises a general claim that the prosecutor's information was "so vague as to be useless, 'except to poison the well.'"

However, we need not decide if the sentencing court could use the hearsay evidence. This is because our review of the sentencing court's decision does not indicate that it relied on the hearsay information offered by the State. The court explained that it considered Sullivan's criminal history when it formulated his sentence, but it specifically referred to evidence of his three prior convictions. The prosecutor may have attempted to secure a greater sentence through the use of hearsay evidence, but there is no indication that it won favor with the court or that Sullivan was otherwise affected by it. We find no misuse of discretion on this point.

Lastly, Sullivan claims that the sentence was unduly harsh. He writes that the State had only minimal evidence which suggested that he had a violent history or that this was a violent crime. Furthermore, Sullivan asserts that he has only a "minimal criminal record." He therefore argues that the sentencing court had no rational basis to order that he serve six months confinement in the county jail.

Alternatively, and accepting that Sullivan did strike the officer, he contends that his sentence is still overly harsh. Sullivan argues that he only struck the officer in response to being subdued with pepper spray. "To punish [him] harshly for doing so would be akin to punishing Rodney King, had King managed to land a punch on the policemen clubbing him."

We again conclude that the sentencing court had a reasonable basis for imposing confinement and thus did not misuse its discretion. The court found sufficient evidence that Sullivan had struck a police officer and that Sullivan was intoxicated at the time. Moreover, the court seemed particularly concerned that the police officer in this case had come to Sullivan's aid after the crash only "to get punched out and fought and injured …." The court concluded that its decision to order confinement "boil[ed] down to [the] gravity of the offense."

The gravity of the offense is a legitimate concern to address at sentencing. *See* ***State v. Wickstrom***, 118 Wis.2d 339, 355, 348 N.W.2d 183, 192 (Ct. App. 1984). The sentencing court, moreover, is free to assign this factor with whatever weight that the court believes this factor deserves. *See* ***id***. Accordingly, we conclude that a reasonable construction of the record shows that Sullivan became intoxicated and struck a police officer who was trying to render aid. Indeed, far from being the victim of police brutality, as Sullivan portrays himself, the sentencing court undoubtedly determined that the reverse was true—Sullivan victimized a police officer who was only trying to help him. The record supports this conclusion. On the basis of this record, the sentencing court did not misuse its discretion when it concluded that Sullivan had committed a serious offense and that the gravity of his offense alone warranted imposing a sentence that included confinement.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.