

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 30, 2018

Sheila T. Reiff
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2017AP135-CR

Cir. Ct. No. 2014CF3988

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

HOWARD GRADY,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: REBECCA F. DALLET and JANET C. PROTASIEWICZ, Judges. *Affirmed.*

Before Brennan, P.J., Kessler and Brash, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. Howard Grady appeals from a judgment convicting him of aggravated battery with use of a dangerous weapon, as a repeater and as an act of domestic violence. He also appeals the circuit court’s order denying his motion for postconviction relief. Grady argues: (1) the jury improperly convicted him of both substantial battery and aggravated battery, the former of which is a lesser included offense of the latter; (2) the circuit court erred by failing to place a question from the jury during deliberations into the record; and (3) the circuit court’s sentence is unduly harsh. We affirm.

¶2 Grady first argues that he is entitled to a new trial because the jury improperly found him guilty of both substantial battery and aggravated battery, the former being a lesser included offense of the latter. Grady contends that the guilty verdicts violated WIS. STAT. § 939.66(2m) (2015-16),¹ which provides, “Upon prosecution for a crime, the actor may be convicted of either the crime charged or an included crime, but not both. An included crime [includes] ... [a] crime which is a less serious or equally serious type of battery than the one charged.”

¶3 Before sentencing, the State recognized the error and moved to dismiss the substantial battery conviction. The circuit court vacated it and sentenced Grady only on the aggravated battery conviction. Nevertheless, Grady contends that this remedy was inadequate because the circuit court vacated the lesser charge, rather than the greater charge. He argues that he should be given a new trial as a remedy.

¹ All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

¶4 In *State v. Cox*, 2007 WI App 38, 300 Wis. 2d 236, 730 N.W.2d 452, we rejected the defendant’s motion for a new trial where he was convicted of two crimes, one of which was a lesser included offense of the other, and the circuit court vacated the lesser charge as a remedy. *Id.*, ¶¶9-15. We explained in *Cox* that “[v]acating the lesser conviction is a reasonable remedy because a jury following the correct procedure would end its deliberations after finding guilt on the greater offense and never reach the lesser.” *Id.*, ¶15; *see also State v. Hughes*, 2001 WI App 239, ¶9, 248 Wis. 2d 133, 635 N.W.2d 661 (jury found the defendant guilty of both a crime and a lesser included offense; harmless error because the circuit court entered judgment on only the greater offense). We reject Grady’s argument that he is entitled to a new trial.

¶5 Grady next argues that he is entitled to a new trial because the jury asked the circuit court a question during deliberations that was not placed in the record and the circuit court’s response to the question was not recorded. While the matter was not contemporaneously placed in the record as required by WIS. STAT. § 805.13(1), the circuit court addressed the issue at the beginning of the sentencing hearing. The parties agreed that the jury’s note stated: “proof of burden explanation?” The parties also agreed that the circuit court responded by referring the jury to the jury instructions. Because the circuit court addressed the error and remedied it, and the error was unknown to the jury and therefore did not contribute to the verdict, the error was harmless. *See* WIS. STAT. § 805.18.

¶6 Finally, Grady contends that his sentence of twelve years of initial confinement and three years of extended supervision was unduly harsh and unconscionable. When imposing a sentence, the circuit court must consider three primary factors, “the gravity of the offense, the character of the defendant, and the need to protect the public.” *State v. Harris*, 2010 WI 79, ¶28, 326 Wis. 2d 685,

786 N.W.2d 409. The circuit court may also consider a host of related factors such as the defendant’s criminal record, the aggravated nature of the crime, the degree of the defendant’s culpability and the defendant’s remorse. *Id.* The circuit court should “specify the objectives of the sentence on the record.” *State v. Gallion*, 2004 WI 42, ¶40, 270 Wis. 2d 535, 678 N.W.2d 197. Our review of the circuit court’s sentence is limited to determining whether the circuit court properly exercised its discretion. *See id.*, ¶17.

¶7 In framing Grady’s sentence, the circuit court flatly told Grady that it did not believe his version of events. The circuit court said that Grady’s battery conviction was more aggravated than most and that he could have killed K.C. when he repeatedly hit her in the face and on the head with a hammer. Noting Grady’s thirty-year criminal record, ranging from property crimes to a homicide, the court found that Grady was “a danger to everybody in our community” because he continued to break the law and violate people’s rights. The circuit court’s lengthy sentencing decision applied the appropriate law to the facts and specified the objectives the circuit court considered paramount. Twelve years of initial confinement is a reasonable result given the circumstances. Therefore, we reject the argument that the sentence is unduly harsh.

By the Court.—Judgment and order affirmed.

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

