COURT OF APPEALS
DECISION
DATED AND FILED

January 21, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP810-CR **Cir. Ct. No. 2007CF99**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LANDRAY M. HARRIS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JOSEPH R. WALL and KEVIN E. MARTENS, Judges. *Reversed and cause remanded.*

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

¶1 KESSLER, J. Landray M. Harris appeals from a judgment of conviction for possession of cocaine with intent to deliver, as a party to a crime, contrary to WIS. STAT. §§ 961.41(1m)(cm)2. and 939.05 (2005-06),[1] and from an order denying his motion for resentencing or sentence modification.[2] Harris seeks resentencing on grounds that the trial court erroneously exercised its discretion when it made several comments at sentencing that suggest the court improperly relied on race and gender stereotypes. We conclude that Harris is entitled to resentencing because although the trial court properly considered all appropriate relevant factors, it nonetheless erroneously exercised its discretion when it made comments at sentencing that suggested to a reasonable person in the position of the defendant or a reasonable observer that it was improperly considering the defendant's race in imposing sentence. Therefore, we reverse and remand for resentencing.

BACKGROUND

¶2 Harris, an African-American male,[3] pled guilty to possession of cocaine with intent to deliver, as a party to a crime. He was sentenced several months after his twenty-first birthday. A five-year sentence was imposed, consisting of two years of initial confinement and three years of extended supervision. The trial court also ordered that Harris, who had no previous charges,

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

[2] The Honorable Joseph R. Wall accepted Harris's guilty plea and imposed the sentence. The Honorable Kevin E. Martens denied Harris's motion for resentencing.

[3] Generally this court does not specifically identify the race or gender of defendants. We do so here because these facts relate directly to Harris's claims that the trial court's comments at sentencing were related to Harris's race and gender.

convictions or juvenile adjudications, was eligible for the Challenge Incarceration Program and the Earned Release Program.

¶3 During Harris's allocution at sentencing, he mentioned that he had a daughter who was almost two years old. Shortly thereafter, the trial court asked Harris about his employment, which led to the following exchange that forms the basis for Harris's appeal:

> THE COURT: Where are you working now?
>
> THE DEFENDANT: I'm unemployed right now.
>
> THE COURT: You're unemployed still?
>
> THE DEFENDANT: Yes.
>
> THE COURT: Have you gotten a job since January?
>
> THE DEFENDANT: No, sir.
>
> THE COURT: You're kidding.
>
> THE DEFENDANT: No.
>
> THE COURT: What do you do all day?
>
> THE DEFENDANT: I just stay at home with my daughter and that's it.
>
> THE COURT: Where is her mother?
>
> THE DEFENDANT: At work.
>
> THE COURT: So the mother works and you sit at home, right?
>
> THE DEFENDANT: Yeah.
>
> THE COURT: And watch the child?
>
> THE DEFENDANT: I got all types of things goin'. My personal family.
>
> THE COURT: Where does the baby's mama work?
>
> THE DEFENDANT: Metro Market.

> THE COURT: Did she finish school?
>
> THE DEFENDANT: Yes.
>
> THE COURT: Is she going to college, too?
>
> THE DEFENDANT: Yes.
>
> THE COURT: Where do you guys find these women, really, seriously. I'd say about every fourth man who comes in here unemployed, no education, is with a woman who is working full-time, going to school. Where do you find these women? Is there a club?
>
> THE DEFENDANT: No.
>
> THE COURT: You're sure?
>
> THE DEFENDANT: I ain't find her at—she not the club [type].
>
> THE COURT: Oh, she's not the club type.

Later in the sentencing, the trial court stated: "Mr. Harris sits at home, gets high while his baby mama works and goes to school. I swear there's a club where these women get together and congregate."

¶4 Harris filed a postconviction motion for resentencing or sentence modification. He argued he was entitled to resentencing because the trial court at sentencing made "sarcastic comments about [his] relationship with the mother of his daughter [that] were inappropriate and based on unfair stereotypical conceptions about the roles to be assigned to men and women."

¶5 Because of judicial rotation, a different trial court decided the motion. In a written order denying the motion, the court stated that it had "reviewed the sentencing transcript and finds no erroneous exercise of discretion." The court explained:

> The [sentencing] court gave adequate consideration to all aspects of the defendant's character as part of the overall

> factors it must consider at the time of sentencing. The comments concerning the defendant's unemployment status and the willingness of his child's mother to go out and work and go to school while the defendant sat home were meant to express incredulity over a 21 year old able-bodied male allowing the child's mother to go out and work instead of going out and finding a job on behalf of his family and furthering his financial prospects. The court finds this to be an appropriate consideration of the defendant's character for sentencing purposes and declines to modify the sentence or resentence the defendant on any basis set forth in the defendant's motion.

(Citation omitted.) This appeal follows.

DISCUSSION

¶6 At issue is the denial of Harris's motion for resentencing, which was based on Harris's challenge to the original sentencing. We conclude that Harris is entitled to resentencing because although the trial court properly considered all appropriate relevant factors, it nonetheless erroneously exercised its discretion when it made comments at sentencing that suggested to a reasonable person in the position of the defendant or a reasonable observer that it was improperly considering the defendant's race in imposing sentence.

I. Legal standards.

¶7 "It is a well-settled principle of law that a [trial] court exercises discretion at sentencing." ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. On appeal, our "review is limited to determining if discretion was erroneously exercised." ***Id.*** "When discretion is exercised on the basis of clearly irrelevant or improper factors, there is an erroneous exercise of discretion." ***Id.*** For example, "[A] sentence may not be based on constitutionally invalid grounds, such as activity or beliefs protected by the First Amendment." ***State v. Schreiber***, 2002 WI App 75, ¶9, 251 Wis. 2d 690, 642 N.W.2d 621.

¶8 The primary sentencing factors that should be considered by the sentencing court are the gravity of the offense, the character of the offender and the public's need for protection. ***State v. Larsen***, 141 Wis. 2d 412, 427, 415 N.W.2d 535 (Ct. App. 1987). A sentencing court, within its discretion, may also consider:

> "(1) Past record of criminal offenses; (2) history of undesirable behavioral pattern; (3) the defendant's personality, character and social traits; (4) result of presentence investigation; (5) vicious or aggravated nature of the crime; (6) degree of the defendant's culpability; (7) defendant's demeanor at trial; (8) defendant's age, educational background and employment record; (9) defendant's remorse, repentance and cooperativeness; (10) defendant's need for close rehabilitative control; (11) the rights of the public; and (12) the length of pretrial detention."

State v. Taylor, 2006 WI 22, ¶20 n.10, 289 Wis. 2d 34, 710 N.W.2d 466 (citations omitted).

¶9 It seems beyond challenge that a defendant's race is not a relevant consideration at sentencing. *See* ***Rose v. Mitchell***, 443 U.S. 545, 555 (1979) ("Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice."); ***State v. Shillcutt***, 119 Wis. 2d 788, 829, 350 N.W.2d 686 (1984) (Abrahamson, J., dissenting) ("Racial stereotypes have no place in judicial proceedings."); ***United States v. Leung***, 40 F.3d 577, 586 (2d Cir. 1994) ("A defendant's race or nationality may play no adverse role in the administration of justice, including at sentencing.").

II. Analysis.

¶10 Harris argues that the trial court's comments at sentencing suggest it improperly relied on race and gender[4] stereotypes when it imposed Harris's sentence. We conclude that although the trial court thoughtfully considered and weighed numerous appropriate factors, still several of the court's comments had racial overtones that suggested the trial court was improperly considering the defendant's race at sentencing. In doing so, the trial court erroneously exercised its discretion. Resentencing is required because of the racial overtones in these comments.

¶11 Recognizing that Harris's race was not a relevant sentencing factor, we consider two questions: Did the trial court's comments suggest to a reasonable observer or a reasonable person in the position of the defendant that the court *was* improperly considering Harris's race? If so, is Harris entitled to resentencing? We answer both questions in the affirmative.

¶12 We are troubled by the trial court's references to "baby mama"[5] (a phrase that neither trial counsel nor Harris used at sentencing), coupled with the

[4] We decline to consider whether the trial court's comments that Harris asserts concern the traditional roles of men and women would also justify resentencing. *See* ***State v. Blalock***, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989) ("[C]ases should be decided on the narrowest possible ground[s].").

[5] The phrase "baby mama" is said to have originated in Jamaican creole as a reference to an unmarried mother and is now common in American hip hop. *See* Wikipedia, http://en.wikipedia.org/wiki/Baby_mama (last visited December 17, 2008). Urbandictionary.com offers several definitions for a "baby mama," including: "The mother of your child(ren), whom you did not marry and with whom you are not currently involved. [As in,] 'Oh her? She ain't nothing to me now, girl, she just my baby mama. So, can I get your number?'" *See* http://www.urbandictionary.com/define.php?term=baby%20mama (last visited December 17, 2008).

trial court's sarcastic comments stereotyping Harris and the mother of Harris's child. Specifically, the court stated: "Where do *you guys* find *these women*, really, seriously. I'd say about every fourth man who comes in here unemployed, no education, is with a woman who is working full-time, going to school. Where do you find *these women*? Is there a club?" (Emphasis supplied.) The court subsequently added: "Mr. Harris sits at home, gets high while his *baby mama* works and goes to school. I swear there's a club where *these women* get together and congregate." (Emphasis supplied.) While the term "baby mama" might well have non-racial meaning used in some situations in isolation, the totality of the comments are of concern because, in combination with references to "these women" and "you guys"—a short step from the phrase "you people" which is commonly understood to be insulting to the group addressed—these terms could reasonably be understood by an African-American or other observer, or a defendant in Harris's position, to be expressions of racial bias, even though we assume they were not intended to be racially offensive.

¶13 Harris argues that:

> Although the use of the term "baby mama" is common in African-American popular culture, a white judge's use of the term in this case when sentencing a black defendant was racially offensive, especially when used in conjunction with contemptuous remarks directed at a "club" of African-American women.
>
> ….
>
> In the context of this case, the court's references to "you guys" and ["]these women[,"] just half a step from the code word "you people" also indicate the court's descent into race and gender stereotyping.

We do not conclude that the trial court intended these comments to be offensive, or that it intentionally engaged in racial stereotyping. We do not conclude that the

term "baby mama" necessarily, in every instance, refers to African-American women. What concerns us is the reasonable perception of an African-American defendant, or an observer, that the sentence was being imposed at least in part because of race. No Wisconsin cases have specifically addressed the issue of similar comments at sentencing which could reasonably be understood to be racially motivated. We consider how other courts have dealt with this issue.

¶14 In ***Jackson v. State***, 772 A.2d 273 (Md. 2001), the judge stated during sentencing:

> "Now, unfortunately, a number of communities in the lovely city of Columbia have attracted a large number of rotten apples. Unfortunately, most of them came from the city. And they live and act like they're living in a ghetto somewhere. And [t]hey weren't invited out here to [behave] like animals.… [R]oaming around the streets at 3:30 in the morning … going out of the way to go to somebody else's house and confront people with sawed-off shotguns is what they do in the city. That's why people moved out here. To get away from people like Mr. Jackson. Not to associate with them and have them follow them out here and act like this was a jungle of some kind."

Id. at 275-76 (footnotes and italics omitted; first two sets of brackets in original). On appeal, the court held that resentencing was required for two reasons: (1) the sentencing judge "gave the impression that he based his sentence, at least in part, on something beyond the facts and circumstances of the crime and the background of petitioner—specifically, that the sentencing judge based his sentence, at least in part, on a belief that petitioner was from Baltimore City," which was improper because "it is not permissible to base the severity of sentencing on where people live, have lived, or where they were raised"; and (2) the sentencing judge, "who is Caucasian, uses words such as 'ghetto,' 'jungle,' 'animals,' and 'people like Mr. Jackson' who come 'from the city' in describing an African-American defendant, has called into question, whether his comments might also have

constituted racial bias, or the appearance of racial bias." ***Id.*** at 278. The court continued:

> While we cannot determine on the basis of this record whether the sentencing judge's comments were actually based on race, and thus whether petitioner was also improperly sentenced by the sentencing judge in part because of his being an African-American, we recognize that the language used by the sentencing judge when sentencing petitioner could lead a reasonable person to draw such an inference. The constitutional guarantee of due process of law forbids a court from imposing a sentence based in any part on inappropriate considerations, including improper considerations relating to race. As we discussed, *supra*, although we cannot determine whether the sentencing judge's comments were actually based on race, the sentencing judge clearly was not alert to avoid comments that may be so perceived.

Id. at 278-79.

¶15 In ***Leung***, involving an Asian defendant who was not a United States citizen, the sentencing judge said:

> "Indeed frequently … when I sentence non-American citizens I make the observation which may to seem [sic] cynical but it is not intended to be cynical, it is intended to be factual: We have enough home-grown criminals in the United States without importing them.
>
> ….
>
> The purpose of my sentence here is to punish the defendant and to generally deter others, particularly others in the Asiatic community because this case received a certain amount of publicity in the Asiatic community, and I want the word to go out from this courtroom that we don't permit dealing in heroin and it is against president [sic] law, it is against the customs of the United States, and if people want to come to the United States they had better abide by our laws. That's the reason for the sentence, punishment and general deterrence."

Id., 40 F.3d at 585 (bracketing in original). On appeal, the court examined the trial court's comments and concluded resentencing was required. ***Id.*** at 586-87. It explained:

> [W]e are confident that the able and experienced trial judge in fact harbored no bias against Leung because of her ethnic origin, her alien status, or any other categorical factor. Nevertheless, since "'justice must satisfy the appearance of justice,'" even the appearance that the sentence reflects a defendant's race or nationality will ordinarily require a remand for resentencing. We think there is a sufficient risk that a reasonable observer, hearing or reading the quoted remarks, might infer, however incorrectly, that Leung's ethnicity and alien status played a role in determining her sentence. The remarks differ from mere passing references to the defendant's nationality or immigrant status at sentencing, which by themselves are not sufficient grounds for vacating a defendant's sentence.

Id. (citations omitted).

¶16 Having examined the entire sentencing transcript, we are satisfied that the trial court did not harbor bias against Harris because of his race. However, at sentencing the trial court used the term "baby mama" in a reference to the mother of Harris's child that can only be understood to be derogatory, and followed with sarcastic comments including: "Where do you guys find these women?" and "Is there a club?" The combination of these comments could easily have been interpreted by an observer or the defendant to be a comment on race. We conclude that both justice and the appearance of justice require resentencing.

¶17 We find guidance in a Wisconsin case that involved comments on the defendant's religious practices. In ***State v. Fuerst***, 181 Wis. 2d 903, 512 N.W.2d 243 (Ct. App. 1994), we examined a sentencing court's comments concerning the fact that the defendant did not regularly go to church or believe in religion. *See* ***id.*** at 909. We concluded "that a sentencing court may consider a

defendant's religious beliefs and practices only if a reliable nexus exists between the defendant's criminal conduct and the defendant's religious beliefs and practices."[6] ***Id.*** at 913. We concluded the sentencing court's comments were improper because they "reiterated the court's willingness to consider a defendant's religious practices both as a mitigating or aggravating factor at sentencing, without limiting that consideration to circumstances where the defendant's religious practices are related to the defendant's criminal conduct." ***Id.*** at 914. Further, we concluded that because the trial court at the postconviction hearing "did not state on the record that it was not considering Fuerst's lack of religious convictions," the case should be remanded for resentencing "without the consideration of Fuerst's religious beliefs or practices." ***Id.*** at 915.

¶18 Guided by the analyses in ***Fuerst***, ***Jackson*** and ***Lueng***, we conclude that Harris is entitled to resentencing. Our conclusion is consistent with ***Jackson*** and ***Leung***, which both recognized that the appearance of justice is important, and that even where it could not be determined that the trial court actually improperly relied on race as a sentencing factor, resentencing was required to satisfy "the appearance of justice." *See* ***Leung***, 40 F.3d at 586; *see also* ***Jackson***, 772 A.2d at 278-79. As in ***Leung***, "[w]e think there is a sufficient risk that a reasonable observer, hearing or reading the quoted remarks, might infer, however incorrectly," that Harris's race played a role in determining his sentence. *See* ***id.***, 40 F.3d at 586-87. Although we do not hold that the trial court intended the

[6] The sentencing court stated: "'[Mr. Fuerst, you] have very little religious conviction[]. I say that because you don't go to church.… I guess I make the distinction between somebody who goes to church every Sunday and somebody who either doesn't go to church or believe in religion, and certainly those are mitigating factors.'" ***State v. Fuerst***, 181 Wis. 2d 903, 909, 512 N.W.2d 243 (Ct. App. 1994) (ellipses in original).

comments to be racially offensive, and we conclude that the trial court properly considered numerous appropriate sentencing factors, we nonetheless must conclude that the trial court's racial comments suggest to a reasonable observer, or a reasonable person in the position of the defendant, that the trial court was improperly considering Harris's race when it imposed sentence. For these reasons, we are "compelled to reverse the order, vacate the sentence and remand the matter for resentencing without the consideration" of Harris's race. *See* ***Fuerst***, 181 Wis. 2d at 915.

By the Court.—Judgment and order reversed and cause remanded.

Recommended for publication in the official reports.

¶19 CURLEY, P.J. (*concurring*). I write separately to point out that the trial court's remarks run contrary to the aspirational goals found in the Code of Judicial Conduct, SCR 60.04(1)(d) and (e). These provisions direct that:

> (d) A judge shall be patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity and shall require similar conduct of lawyers, staff, court officials and others subject to the judge's direction and control….
>
> (e) A judge shall perform judicial duties without bias or prejudice. A judge may not, in the performance of judicial duties, by words or conduct, manifest bias or prejudice, including bias or prejudice based upon race, gender, religion, national origin, disability, age, sexual orientation or socioeconomic status, and may not knowingly permit staff, court officials and others subject to the judge's direction and control to do so.

¶20 The trial court's intemperate sentencing remarks, set forth in the Majority opinion, *see* Majority, ¶3, were sarcastic and demeaning, the antithesis of "patient, dignified and courteous." As is evident by the many sentencing transcripts that cross my desk, it is possible for a sentencing judge to mete out stiff (and often well-deserved) sentences without belittling the offender.

¶21 BRENNAN, J. (*dissenting*). I would affirm the trial court in this case. With all due respect to my colleagues in the majority, I do not believe the trial court's comments here could reasonably be viewed as comments on the defendant's race. Whether the comments were advisable is not the question and determining whether they violate the aspirational goals of the judicial code is not this court's function. The question is whether the trial court's comments show an unreasonable basis for the sentence imposed. They do not.

¶22 There is a strong public policy against interfering with the sentencing discretion of the trial court and there is an equally strong presumption that the trial court acted reasonably. ***State v. Gallion***, 2004 WI 42, ¶18, 270 Wis. 2d 535, 678 N.W.2d 197; ***State v. Echols***, 175 Wis. 2d 653, 681-82, 499 N.W.2d 631 (1993). "'Appellate judges should not substitute their preference for a sentence merely because, had they been in the trial judge's position, they would have meted out a different sentence.'" ***Gallion***, 270 Wis. 2d 535, ¶18 (citing ***McCleary v. State***, 49 Wis. 2d 263, 281, 182 N.W.2d 512 (1971)). Similarly, appellate courts should not substitute their preference for the trial court's choice of language unless the record clearly demonstrates that the trial court relied on a constitutionally impermissible basis for the sentence.

¶23 Proper sentencing discretion is demonstrated if the record shows that the court considered three factors: the gravity of the offense, the character of the defendant and the need to protect the public. ***Echols***, 175 Wis. 2d at 682. The record must show that the court "examined the facts and stated its reasons for the

sentence imposed, 'using a demonstrated rational process.'" ***State v. Spears***, 147 Wis. 2d 429, 447, 433 N.W.2d 595 (Ct. App. 1988) (citation omitted). The majority opinion admits that the trial court here considered all of the appropriate sentencing factors, and did not intend to be racially offensive. Because the court here considered the required factors and gave a lengthy, rational explanation for the sentence imposed, I conclude it properly exercised its discretion.

¶24 The real question here is whether the trial court's comments demonstrate that the sentence imposed was based on Harris's race. Harris has the burden of showing that the "'sentence was based on clearly irrelevant or improper factors.'" ***Gallion***, 270 Wis. 2d 535, ¶72 (citation omitted). In seeking to overturn a sentence the defendant bears the burden of showing "some unreasonable or unjustified basis for the sentence imposed." ***State v. Mata***, 2001 WI App 184, ¶13, 247 Wis. 2d 1, 632 N.W.2d 872. A sentence may not be based on a constitutionally invalid ground. ***State v. Schreiber***, 2002 WI App 75, ¶¶8-9, 251 Wis. 2d 690, 642 N.W.2d 621. The majority correctly writes that race would be a constitutionally invalid ground. I agree with the majority's general statement but conclude that the trial court's comments here do not refer to Harris's race. An analysis of the comments themselves and their context shows the court was not basing the sentence on Harris's race. Neither the comments nor the context in which they were used, nor any of the cases cited by the majority show that these comments are impermissible as based on Harris's race.

¶25 "Baby mama" does not refer to any particular race. It is currently a trendy pop-culture term for a single mother,[1] as evidenced by the recent Hollywood movie (released on DVD in 2008) titled "Baby Mama," involving *Saturday Night Live* actress, Tina Fey, playing the role of a white single mother. At worst, the "baby mama" comment here is an awkward attempt by the trial court to sound hip to a defendant when explaining how his idleness and lack of ambition are negative character traits especially in contrast to the mother of his child.

¶26 In addition to the fact that the term does not refer to any particular race, the context in which it was used here demonstrates that no racial subtext could reasonably be read into it. The court never used the expression to refer to Harris. The court made two references to "baby mama." In the first instance, the court contrasts Harris with men his age who are enlisting in the armed forces putting their lives at stake while he "sits at home, gets high while his baby mama works and goes to school." In this first instance the court is simply referring to the lazy, unmotivated, unproductive character of Harris in contrast to the hardworking, ambitious mother of his child and the men in the armed forces. In the second instance, the court first refers to the mother of Harris's child as "your wife," then realizes its mistake, hesitates and says "not your wife, your baby mama." The only thing missing for conventional grammar is the apostrophe "s"

[1] Wikipedia's definition (citing the OXFORD ENGLISH DICTIONARY) confirms that the meaning of "baby mama" is a single mother. *See* Wikipedia, http://en.wikipedia.org/wiki/Baby_mama (last visited December 16, 2008) ("[B]aby mama … is a mother who is not married to her child's father. The OXFORD ENGLISH DICTIONARY defines baby mama as 'the mother of a man's child, who is not his wife or (in most cases) his current or exclusive partner.'"). Because Wikipedia is a communally-created resource tool, its definition of "baby mama" provides some guidance as to the popular (objective) meaning of the phrase.

after baby. Neither the words themselves, nor the context, have anything to do with Harris's race.

¶27 The "you guys/club" comment was made when the trial court observed, apparently somewhat frustrated, that one in four drug dealers who came before the court displayed the same lack of a job and ambition as Harris while the mothers of their children worked. Strongly worded feelings expressed by a trial court should not be isolated but should be viewed in context. *See* ***Deja v. State***, 43 Wis. 2d 488, 495, 168 N.W.2d 856 (1969), *overruled on other grounds by* ***Stockwell v. State***, 59 Wis. 2d 21, 207 N.W.2d 883 (1973). In ***Deja*** where the court's comments in isolation could be viewed as abrasive, the Wisconsin Supreme Court found them permissibly related to the court's concern with a required sentencing factor, namely the protection of the community. ***Id.*** at 495. Here the trial court's frustrated comment about the number of men it sees going into drug dealing as they sit at home, unemployed and while the mothers of their children work, is permissibly related to Harris's character. The "guys" were not of a particular race. They shared the commonality of all being charged with selling drugs and had the same negative character for not working, not going to school, sitting idle, while the women in their lives worked. The court gave a full explanation of what it meant by the comments and the court's explanation had nothing to do with race or stereotype. The court was merely considering another negative aspect of Harris's character.

¶28 The comments complained of must be viewed in the context of the entire sentencing. Harris was being sentenced for a felony, possession with intent to deliver five to fifteen grams of cocaine. He was arrested with 7.21 grams of cocaine on his person, wearing pants that had a special secret pocket for hiding the drugs. Harris admitted that he sold cocaine for some months and had been a drug

user since he was sixteen. The court was shown three color photographs of Harris at a club in the month of his arrest with other convicted drug dealers "flashing gang signs." Harris admitted that his mother had supported him until he became a drug dealer. At the time of the offense he was living with his one-year-old child's mother, who was employed full time and going to school. Harris had never been employed even though he was twenty-one years of age and had a one-year-old child. He did not even offer evidence of any attempts to get employment during the seven months' pendency of the case while he was out of custody on bail. The trial court related all these facts to the sentence imposed.

¶29 The majority admits that there are no Wisconsin cases finding similar comments constitute reversible error. The majority relies on cases from other jurisdictions, ***Jackson v. State***, 772 A.2d 273 (Md. 2001) and ***United States v. Leung***, 40 F.3d 577, 586 (2d Cir. 1994). In ***Jackson***, a Maryland state court case, the court referred to the defendant being from the "ghetto" and bringing the "jungle" to the court's lovely city. ***Jackson***, 772 A.2d at 275-76. On appeal, the court found that the defendant's place of origin was not a permissible aggravating factor for the sentencing consideration and the language "jungle" sounded racially biased because it gave the impression the sentence was based on race rather than the defendant's actions and character. ***Id.*** at 278-79.

¶30 In ***Leung*** the trial court commented directly on the defendant's Asian heritage and remarked about the need for sending a message to the Asian community in the defendant's sentence. ***Leung***, 40 F.3d at 585. On appeal, the court there found that the reference to the Asian community was an impermissible factor for consideration in Leung's sentence because it was not just a passing reference to the defendant's nationality or immigration status. ***Id.*** at 586-87.

¶31 Here neither the "baby mama" nor the "you guys/club" comment was a reference to Harris. Each was made about other people in the context of the court explaining its reasoning regarding its negative character assessment of Harris. The comment "baby mama" was not a reference to Harris; it was not a racial reference at all and it was not related to the basis for his sentence. In context, it described the single mother who worked and went to school. It was descriptive of the contrast to Harris, who did neither. In context it was part of the court's character analysis. Similarly, the "you guys/club" comment was not a reference to Harris; it was not a racial reference at all and it was not related to the basis for his sentence. It described the one in four actual defendants (not stereotypes) that the trial court had before it, who live with the mothers of their children, while those women work and go to school and the men do nothing but sell drugs. In context, it was part of the court's elucidation of its consideration of the causes of the offense and the character of Harris.

¶32 The majority cites one Wisconsin case, ***State v. Fuerst***, 181 Wis. 2d 903, 512 N.W.2d 243 (Ct. App. 1994), admitting it is not directly on point, but finding that it provides guidance. ***Fuerst*** does not involve the trial court's use of language at all. ***Id.*** at 909. It is a challenge to the consideration of Fuerst's lack of religious convictions and practices as an aggravating factor in sentencing. ***Id.*** at 914. We held that Fuerst's religious convictions and practices could be an aggravating factor, but only if there was a nexus between them and the criminal activity. ***Id.*** at 913-14. ***Fuerst*** has little application to the case at hand. Here neither comment was about Harris. The comments were made about other people as part of the trial court's multi-step analysis of Harris's character. As such, they bore a rational nexus to his criminal drug dealing and are permissible.

¶33 Based on the foregoing analysis, the trial court properly exercised its discretion. It considered the required factors and articulated a rational basis for its sentencing decision. The majority opinion faults two comments in a twenty-eight page sentencing transcript. When viewed in context, from an objective viewpoint, neither comment demonstrates that the sentence imposed by the court was based on Harris's race. Harris has failed to overcome the strong presumption in favor of the trial court's proper exercise of discretion. Accordingly, I respectfully dissent.