COURT OF APPEALS
DECISION
DATED AND FILED

November 19, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP642-CR **Cir. Ct. No. 2011CF3779**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MALIK MERCHANT,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DAVID L. BOROWSKI, Judge. *Affirmed.*

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

¶1 PER CURIAM. Malik Merchant appeals a judgment of conviction entered upon his guilty pleas to first-degree reckless homicide and armed robbery, both as a party to a crime. He also appeals a postconviction order denying his motion for sentence modification. Merchant contends that the circuit court

erroneously exercised its sentencing discretion and imposed unduly harsh sentences for crimes that he committed when he was fifteen years old. We conclude that the circuit court's sentencing remarks reflect a proper exercise of discretion and demonstrate why the twenty-five-year aggregate term of imprisonment imposed is neither unduly harsh nor excessive. We affirm.

BACKGROUND

¶2 Merchant, along with two companions, shot and killed a pregnant woman, Sharon Staples, in front of her thirteen-year-old son in order to steal her purse. The State filed a criminal complaint charging Merchant with armed robbery and two counts of first-degree reckless homicide, as a party to each crime. The State also charged Merchant with the attempted armed robbery of Anthony L. Jagers, alleging that Merchant and his co-actors tried to rob Jagers at gunpoint shortly before confronting and killing Staples. According to the complaint and Jagers's testimony at the preliminary examination, Merchant was the gunman during the attempted armed robbery.

¶3 Pursuant to a plea bargain, Merchant pled guilty to armed robbery and to the first-degree reckless homicide of Staples as a party to both crimes. At the plea hearing and at the later sentencing proceeding, the State acknowledged that Merchant played the roles of follower and lookout in the offenses against Staples and that he cooperated in the investigation of the crimes. In exchange for Merchant's guilty pleas to the two offenses, and in recognition of his role in those offenses and his cooperation afterwards, the State agreed to recommend eighteen years of initial confinement. The State also moved to dismiss and read in the charge of first-degree reckless homicide of Staples's unborn child and the charge of attempted armed robbery.

¶4 At sentencing, the State recommended a total of eighteen years of initial confinement. Merchant recommended a period of nine-to-twelve years of initial confinement followed by an unspecified period of extended supervision. The circuit court imposed a twenty-five year term of imprisonment for the first-degree reckless homicide, bifurcated as seventeen years of initial confinement and eight years of extended supervision. The circuit court imposed a concurrent four-year sentence for the armed robbery, evenly bifurcated between initial confinement and extended supervision.

¶5 Merchant moved for sentence modification, asserting that his role in robbing and killing Staples warrants a twelve-year term of initial confinement. The circuit court denied the motion, and this appeal followed.

DISCUSSION

¶6 When a criminal defendant challenges the sentence imposed by the circuit court, the defendant has the burden to show some unreasonable or unjustifiable basis in the record for the sentence at issue. When reviewing a sentence imposed by the circuit court, we start with the presumption that the circuit court acted reasonably. We will not interfere with the circuit court's sentencing decision unless the circuit court erroneously exercised its discretion.

State v. Lechner, 217 Wis. 2d 392, 418-19, 576 N.W.2d 912 (1998) (citations and footnote omitted).

¶7 A sentencing court must consider the primary sentencing factors of "the gravity of the offense, the character of the defendant, and the need to protect the public." ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. The circuit court may also consider a wide range of other factors concerning the defendant, the offense, and the community. *See* ***id.*** These factors include, but

are not limited to, the defendant's criminal history, role in the offense, background, age, remorse, and cooperation. *See* ***id.*** The sentencing court exercises its discretion by discussing on the record the relevant factors and objectives considered when fashioning the defendant's sentence. *See* ***State v. Stenzel***, 2004 WI App 181, ¶8, 276 Wis. 2d 224, 688 N.W.2d 20. The circuit court has an additional opportunity to explain its sentence when challenged by postconviction motion. *See* ***State v. Fuerst***, 181 Wis. 2d 903, 915, 512 N.W.2d 243 (Ct. App. 1994).

¶8 The circuit court appropriately considered the primary sentencing factors here. It discussed the gravity of the offenses, finding that Merchant's crimes were "unconscionable, reprehensible, violent, despicable," and that, "on a scale of one to 10, 10 being the worst, this is about a 9.9." The circuit court discussed Merchant's character, recognizing that Merchant showed remorse but expressing grave concern that he was "trying to fit in with ... gangbangers and thugs, criminals, bad actors, people who are ruining this community." The circuit court discussed the protection of the public, finding that Merchant "needs to be confined to protect the community. He is at this point a danger."

¶9 Merchant contends that the circuit court nonetheless erroneously exercised its discretion. He argues that he played a minimal role in the crimes against Staples, that he had no prior criminal or juvenile record, and that he had a supportive family. He also points to his cooperation in resolving the crimes by giving statements to law enforcement and by entering guilty pleas, and he particularly emphasizes his youth.

¶10 The circuit court properly recognized and discussed all of the factors that Merchant highlights now. The circuit court considered Merchant's lack of

criminal history, observing that he "does not have a prior juvenile record, does not have a prior criminal record. That's a positive...." Regarding Merchant's role in Staples's homicide, the circuit court found that Merchant "was being the lookout" and that he was "a follower in this case for the most part." The circuit court praised Merchant for assisting law enforcement, explaining that "he came forward, has been cooperative.... He was willing to testify against his co-actors. Those are all positives." The circuit court additionally took into account that Merchant was not a member of a gang and that he has "a father who seems like a decent, intelligent, upstanding individual who[']s[] been involved in [Merchant's] life."

¶11 The circuit court also dwelt at length on Merchant's youth, but circuit courts are not required "to give overriding mitigating significance to the young age of a defendant who has committed a serious crime." *See* ***State v. Davis***, 2005 WI App 98, ¶19, 281 Wis. 2d 118, 698 N.W.2d 823. Here, the circuit court explained that it was "[c]ertainly ... also considering the defendant's age," but the circuit court noted a host of related concerns. The circuit court found that Merchant "lacked boundaries," that he "def[ied] the rules of his home," that he "was using marijuana," and that he "associated with a primarily delinquent peer group." Further, the circuit court found that Merchant "is young enough that he could be talked into [similar criminal acts] again," rendering him "a danger to the public." The circuit court therefore concluded that Merchant required "control in a confined setting" for a period long enough to ensure the safety of the community until he developed a "sense of responsibility."

¶12 The mitigating weight, if any, to assign to a defendant's youth rests with the circuit court. *See* ***id.***, ¶18. Here, the circuit court reasonably exercised its discretion when assessing the significance of Merchant's youth to the sentencing decision in light of the particular circumstances of this case.

¶13 Merchant next complains that the circuit court did not explain why it selected seventeen years of initial confinement instead of the twelve years that he believes his conduct warrants. The exercise of discretion, however, does not lend itself to mathematical precision. ***State v. Gallion***, 2004 WI 42, ¶49, 270 Wis. 2d 535, 678 N.W.2d 197. We do not require the circuit court to state exactly how the factors it considered translate into a specific number of years of imprisonment. ***State v. Fisher***, 2005 WI App 175, ¶¶21-22, 285 Wis. 2d 433, 702 N.W.2d 56. We also do not require the circuit court to recite "'magic words'" to justify a sentence. *See* ***Gallion***, 270 Wis. 2d 535, ¶49. Rather, we require an explanation for the general range of the sentence imposed. ***Id.*** Here, the findings that Merchant was dangerous and vulnerable to manipulation by a delinquent peer group justified the range of sentence selected and explained why the circuit court ordered Merchant confined in a controlled setting until he attained a greater measure of maturity. As the circuit court observed, "no one understands at 15 or 16 or 17 years of age the same things they understand when they are 30 or 35."

¶14 Merchant maintains that the twelve years of confinement he proposed is "sufficient to punish Merchant, deter others, protect the public and ... rehabilitate" Merchant. The essence of this argument is that the circuit court should have weighed the relevant factors differently and imposed a more lenient sentence. Merchant, however, does not show that the circuit court fashioned its sentences on the basis of some improper or unreasonable factor. He shows only that the circuit court exercised its discretion differently than he had hoped. That is not an erroneous exercise of discretion. *See* ***State v. Prineas***, 2009 WI App 28, ¶34, 316 Wis. 2d 414, 766 N.W.2d 206 ("our inquiry is whether discretion was exercised, not whether it could have been exercised differently").

¶15 Merchant also asserts that the term of initial confinement imposed is unduly harsh. 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.'" ***State v. Grindemann***, 2002 WI App 106, ¶31, 255 Wis. 2d 632, 648 N.W.2d 507 (citation omitted). When a defendant alleges that a sentence is unduly harsh and excessive, we review the sentence for an erroneous exercise of discretion. *See* ***Prineas***, 316 Wis. 2d 414, ¶29.

¶16 Merchant faced a hundred years of imprisonment upon pleading guilty in this case. *See* WIS. STAT. §§ 940.02(1), 943.32(2), 939.50(3)(b)-(c) (2011-12).[1] The circuit court had statutory authority to require him to spend sixty-five of those years in initial confinement. *See* WIS. STAT. § 973.01(2)(b)1.-3. The seventeen years of initial confinement imposed is well within the maximum available. "A sentence well within the limits of the maximum sentence is not so disproportionate to the offense committed as to shock the public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." ***State v. Daniels***, 117 Wis. 2d 9, 22, 343 N.W.2d 411 (Ct. App. 1983). Indeed, the circuit court observed here that "the average person in this community says, 'Mr. Merchant participated in killing a pregnant woman, I don't know, fifty, sixty years sounds like a good start.'" (Some punctuation added.) We cannot say that the seventeen years of initial confinement imposed for the violent loss of life in this case shocks community sensibilities.

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

¶17 Last, we note Merchant's brief argument that the circuit court "did not cure its [sentencing] error when presented with Merchant's motion to modify sentence." Because we conclude that the circuit court appropriately exercised its discretion at sentencing and committed no error, we reject this contention. We affirm.

By the Court.—Judgment and order affirmed.

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