COURT OF APPEALS
DECISION
DATED AND FILED

August 16, 2001

Cornelia G. Clark
Clerk of Court of Appeals

No. 00-2499-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BILLY J. RACHAL,

DEFENDANT-APPELLANT.

APPEAL from judgment and order of the circuit court for Milwaukee County: MEL FLANAGAN, Judge. *Affirmed*.

Before Dykman, Roggensack and Deininger, JJ.

¶1 PER CURIAM. Billy Rachal appeals from a judgment convicting him of second-degree reckless injury, and from an order denying postconviction relief. The issues are whether the jury heard sufficient evidence to find him guilty, whether the trial erroneously excluded certain testimony, and whether the court imposed an excessive sentence. We affirm on all three issues.

¶2 Billy was hosting a small outdoor party when his brother, Johnny Rachal, showed up uninvited. Matters degenerated until a brawl occurred with Billy and Curtis Brown fighting on one side, and Johnny and his friend, Stoney, on the other. In the course of the struggle, Johnny's hand came into contact with Billy's mouth and Billy bit the tip off one of Johnny's fingers. Johnny was a great deal bigger than Billy, and had a reputation as a violent bully. Billy testified to his great fear of Johnny during the fight.

¶3 The case went to trial on charges of mayhem and witness intimidation. To support his theory of self-defense, Billy offered testimony from his sister about her discussion with Johnny after the fight, in which Johnny said that he had intended to punch Billy in the face and stomp on him. Billy also offered testimony from another witness that when Stoney had started to leave the party, Johnny ordered him to stay, and said something to the effect that he was not paying Stoney to leave. In both cases the trial court excluded the offered testimony as irrelevant.

¶4 At the close of testimony Billy requested and received an instruction on second-degree reckless injury, as a lesser-included crime of mayhem. The jury subsequently found him guilty of the lesser-included offense, and acquitted him of the mayhem and intimidation charges.

¶5 At sentencing Billy argued in mitigation that he reasonably believed he was in a very dangerous situation and bit Johnny out of desperation and fear. It was pointed out that the Rachal family supported Billy in this matter. However, the trial court chose to disregard these mitigating factors. The court instead focused on Billy's record of several criminal convictions and probation revocations, and the nature and seriousness of his offense. The court referred to

Billy's act as brutal and vicious and stressed the victim's permanent injury.[1] The court also noted Billy's lack of any demonstrated remorse, and the fact that he had no obvious means of support. Based on these factors, the court sentenced Billy to the maximum five-year prison term for the offense.

¶6 We do not decide whether the evidence was sufficient to convict Rachal. His request for an instruction on the lesser-included offense of second-degree reckless injury is deemed a concession that sufficient evidence exists to convict on that charge. *See* ***State v. Michels***, 141 Wis. 2d 81, 97-98, 414 N.W.2d 311 (Ct. App. 1987). Rachal is therefore judicially estopped from raising this issue on appeal. *See* ***id.*** at 98.

¶7 The trial court properly excluded the testimony concerning Johnny's statements. Evidence is relevant if it aids in proving or disproving a fact of consequence. WIS. STAT. § 904.01 (1999-2000).[2] We review the court's decision whether to exclude evidence for an erroneous exercise of discretion. ***Ansani v. Cascade Mtn., Inc.***, 223 Wis. 2d 39, 45, 588 N.W.2d 321 (Ct. App. 1998). Johnny's post-fight description of his intentions during the fight prove nothing concerning Billy's act or his intent, because Billy could not have known about them during the fight. Also irrelevant was the offered testimony concerning Johnny's statement to Stoney. The fact that Johnny did not want Stoney to leave

[1] In denying Billy's motion for sentence modification, the court characterized the act as outrageous, extremely violent, and "appalling." The court stated that "the act itself was more brutal and vicious than had Rachal pulled the trigger of a gun."

[2] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

the party, or that Johnny possibly employed Stoney in some manner, makes it neither less nor more probable that Billy's act was a reasonable act of self-defense.

¶8 The trial court properly exercised its sentencing discretion. When exercising sentencing discretion, the court must primarily consider the gravity and nature of the offense, its effect on the victim, the character and needs of the offender, and the need to protect the public. ***State v. Spears***, 227 Wis. 2d 495, 507, 596 N.W.2d 375 (1999). Additional factors the court may consider include the defendant's criminal record, history of undesirable behavior, personality and social traits, degree of culpability, and degree of remorse or repentance. ***Harris v. State***, 75 Wis. 2d 513, 519-20, 250 N.W.2d 7 (1977). The weight to be given any of these factors is left to the trial court's discretion. ***Spears***, 227 Wis. 2d at 511. The resulting sentence is deemed excessive only if it is so unusual and so disproportionate to the offense as to shock public sentiment and violate the judgment of reasonable people. ***Ocanis v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). Here, all of the factors the trial court considered were proper and, as noted, the trial court was free to accord more weight to the aggravating factors involved in this case. The court also fully explained its rationale on the record. Given the emphasis the trial court placed on the aggravated nature of the incident, and the defendant's prior record, poor educational and employment record, and lack of remorse, a maximum sentence is not so shocking or disproportionate that we must vacate it.

By the Court.—Judgment and order affirmed.

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