

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 25, 2005

Cornelia G. Clark
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. 2004AP807-CR

Cir. Ct. No. 2002CF397

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JAY L. WEISS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Washington County: DAVID C. RESHESKE, Judge. *Affirmed.*

Before Brown, Nettesheim and Snyder, JJ.

¶1 PER CURIAM. Jay L. Weiss appeals from the judgment of conviction entered against him and the order denying his motion for postconviction relief. He argues that the trial court erred by allowing the State to

show photographs of the victim at trial, and that the trial court erroneously exercised its discretion when it sentenced him. Because we conclude that the photographs were properly admitted and that the court properly exercised its sentencing discretion, we affirm.

¶2 Weiss was convicted after a jury trial of one count of first-degree reckless homicide as a party to a crime. The underlying incident involved an evening long dispute between a number of people that ended in a fight between Weiss, his codefendant, Eric Tolonen, and the victim, Jose Guerrero.¹ Weiss argues that the trial court erred when it allowed photographs taken of the deceased victim to be admitted at trial during the testimony of the doctor who performed the autopsy. Some of the photographs were of the victim when he arrived at the hospital, and some were taken during the autopsy.

¶3 The admission of photographs is a matter for the trial court's discretion. *State v. Sarinske*, 91 Wis. 2d 14, 41, 280 N.W.2d 725 (1979). "Photographs should be admitted if they will help the jury gain a better understanding of material facts; they should be excluded if they are not 'substantially necessary' to show material facts and will tend to create sympathy or indignation or direct the jury's attention to improper considerations." *State v. Sage*, 87 Wis. 2d 783, 788, 275 N.W.2d 705 (1979). We uphold the trial court's exercise of discretion unless it is wholly unreasonable or the only purpose of the photographs is to inflame and prejudice the jury. *State v. Lindvig*, 205 Wis. 2d 100, 108, 555 N.W.2d 197 (Ct. App. 1996).

¹ Tolonen's conviction was also affirmed on appeal. *State v. Tolonen*, No. 2004AP658-CR, unpublished slip op. (WI App Feb. 9, 2005).

¶4 We conclude that the trial court properly admitted the photographs of the victim. The court first considered that this was not a case in which the defendant disputed that he engaged in the conduct that caused the victim's death. Rather, the question for the jury was whether his conduct was criminally reckless conduct under the statute. The court concluded that the nature and extent of the injuries would be relevant to the jury in determining whether reckless conduct was involved. The photographs depicting those injuries, therefore, would help the jury decide that question.

¶5 Further, both Weiss and his codefendant suggested that the victim's injuries resulted from a fall to the pavement. Specifically, defense counsel questioned the autopsy physician about "coup and contrecoup" injuries. The autopsy physician explained that head injuries from a fall result in coup and contrecoup injuries. These are injuries that occur to the brain when the head strikes a fixed object.² The physician then used the photographs to show why the injuries the victim suffered were not coup or contrecoup injuries.

¶6 Moreover, the trial court placed some restrictions on the number of photographs and the type of images it would allow the State to use. The court allowed the photographs to be used only to illustrate the pathologist's testimony. Based on this record, we conclude that the photographs were used to help the jury gain a better understanding of material facts and were not used to inflame the jury's prejudices. The trial court properly exercised its discretion when it admitted the photographs.

² Specifically, when the head hits a fixed object the brain hits the skull on that side (a coup injury) and then reverberates inside the skull and hits the other side (contrecoup injury).

¶7 Weiss next argues that the trial court erred when it sentenced him to twenty years of initial confinement and thirty years of extended supervision. Sentencing lies within the sound discretion of the trial court, and a strong policy exists against appellate interference with the discretion. *State v. Mosley*, 201 Wis. 2d 36, 43, 547 N.W.2d 806 (Ct. App. 1996). The trial court is presumed to have acted reasonably and the defendant has the burden to show unreasonableness from the record. *Id.* The primary factors to be considered by the trial court in sentencing are the gravity of the offense, the character of the offender and the need for the protection of the public. *State v. Harris*, 119 Wis. 2d 612, 623, 350 N.W.2d 633 (1984). The discretion of the sentencing judge must be exercised on a “rational and explainable basis.” *State v. Gallion*, 2004 WI 42, ¶76, 270 Wis. 2d 535, 678 N.W.2d 197 (citation omitted). The weight to be given the various factors is within the trial court’s discretion. *Cunningham v. State*, 76 Wis. 2d 277, 282, 251 N.W.2d 65 (1977).

¶8 Weiss argues that the trial court gave too much weight to the offense, and too little weight to mitigating factors, including the role that the consumption of alcohol played in the underlying incident. We disagree. The trial court considered all of the appropriate factors, including the mitigating factors. The court determined, however, that the brutal and aggravated nature of the attack outweighed the positives. Further, the court imposed a sentence that was well within the maximum allowed by law, and that was substantially less than that recommended by the presentence investigation report or the State. We conclude that the sentencing court properly exercised its discretion when it sentenced Weiss. For the reasons stated, we affirm the judgment and order of the circuit court.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2003-04).

