

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**August 2, 2006**

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. 2005AP2001-CR**

**Cir. Ct. No. 2003CF1158**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**KEVIN D. RUSSO,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Waukesha County: MICHAEL O. BOHREN and PAUL F. REILLY, Judges.  
*Affirmed.*

Before Snyder, P.J., Brown and Nettesheim, JJ.

¶1 PER CURIAM. Kevin Russo appeals from a judgment convicting him as a habitual offender of battery to a law officer and the misdemeanor crimes of disorderly conduct, possession of drug paraphernalia, and possession of

marijuana. He also appeals from an order denying his postconviction motion for sentence modification. He challenges the sufficiency of the evidence to support the jury's verdict on the battery charge and argues that his sentence of five years' initial confinement and six years' extended supervision and probation is unduly harsh and was influenced by the prosecutor's improper comments. We affirm the judgment and order.

¶2 We may not reverse a conviction on the basis of insufficient evidence “unless the evidence, viewed most favorably to the state and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt.” *State v. Poellinger*, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). We must accept the reasonable inferences drawn from the evidence by the jury. *Id.* at 506-07. It is the function of the jury to decide issues of credibility, to weigh the evidence and resolve conflicts in the testimony. *Id.* at 506.

¶3 The crime of battery to a law officer has six elements. *See* WIS JI—CRIMINAL 1230. Russo challenges only the sufficiency of the evidence on the last element of the crime—whether Russo acted intentionally. The jury was instructed that intent means that Russo had the mental purpose to cause bodily harm or was aware that his conduct was practically certain to cause bodily harm to the law officer. *See* WIS JI—CRIMINAL 923B.

¶4 Russo was taken into custody by two police officers inside a hotel room. Detective Imler testified that Russo became physically resistive after being escorted out of the room, down the stairs, and to the hotel parking lot. Imler's assisting officer, Sergeant Bertram, attempted a “pull-in push-down” compliance

move on Russo which is designed to cause the resistive party to lose balance and go down to the ground. During the move Russo's left leg struck Sergeant Bertram in the left leg. Russo landed on top of Sergeant Bertram. Sergeant Bertram's testimony confirmed that during the take-down move Russo's left leg struck him.

¶5 Russo contends that because the move was designed to put him off balance and make him unable to control himself, there was no evidence that he intended to strike the officer with his left leg. He characterizes the evidence as showing nothing more than an accidental kick. However, Detective Imler's testimony was sufficient evidence that Russo intentionally kicked Sergeant Bertram. Detective Imler explained that Russo's physical combativeness came on quickly once they had him in the hotel parking lot. Russo was kicking and spitting at both officers. Russo was still attempting to kick the officers when the take-down move was tried. Detective Imler indicated that Russo's kick was done with force and that Russo planted his right foot on the ground and pivoted "driving force weight of his body" into Sergeant Bertram's leg. The motion appeared intentional to Detective Imler. This was sufficient evidence from which the jury could conclude that Russo's kick to Sergeant Bertram was not just an accident but an intentional battery. The jury could reasonably infer that Russo's kick was a successful continuation of his attempts to intentionally kick the officers.

¶6 Sentencing is left to the discretion of the trial court and appellate review is limited to determining whether there was an erroneous exercise of discretion. *State v. Gallion*, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. An erroneous exercise of discretion occurs when a sentence is based on irrelevant or improper factors. *Id.*, ¶17. "When the trial court has properly exercised its discretion, we follow a consistent and strong policy against interference with the discretion of the trial court, and we afford a strong presumption of reasonability to

the court's sentencing determination because the court is best suited to consider the relevant factors and demeanor of the convicted defendant." *State v. Ziegler*, 2006 WI App 49, ¶22, \_\_\_ Wis. 2d \_\_\_, 712 N.W.2d 76, *review denied*, 2006 WI 39, \_\_\_ Wis. 2d \_\_\_, \_\_\_N.W.2d \_\_\_.

¶7 The basic objectives of the sentence include the protection of the community, punishment of the defendant, rehabilitation of the defendant, and deterrence to others. *Gallion*, 270 Wis. 2d 535, ¶40. The court is to identify the general objective of most import. *Id.*, ¶41. The trial court found that with Russo's history of offenses and inability to control his violent temper, the safety of the community demanded Russo's incarceration.

¶8 Arguing that the sentence is unduly harsh, Russo contends that the trial court did not give enough consideration to mitigating circumstances presented by Russo's mental health and alcohol/drug dependency issues. The trial court acknowledged Russo's personal problems as well as the positives of employment achievements and strong family support. The factors that will be considered and the weight given to each factor are left to the sentencing court's broad discretion. *State v. Thompson*, 172 Wis. 2d 257, 264, 493 N.W.2d 729 (Ct. App. 1992). The trial court balanced the good and bad presented by Russo's background and criminal record. We are not persuaded that the trial court gave too much weight to the need to protect the public while ignoring mitigating circumstances.

¶9 Russo also argues that the sentence is harsh because it is exponentially longer than defense counsel's recommendation of probation and jail time. The trial court is not obligated to follow or approximate defense counsel's sentencing recommendation as long as it properly explains its sentence. *See State v. Jones*, 2005 WI App 111, ¶12, 283 Wis. 2d 509, 698 N.W.2d 133, *review*

*denied*, 2005 WI 136, 285 Wis.2d 629, 703 N.W.2d 379. Here the trial court properly exercised its discretion and gave an explanation for the sentence.

¶10 As long as the trial court considered the proper factors and the sentence was within the statutory limitations, the sentence will not be reversed unless it is so excessive as to shock the public conscience. *State v. Owen*, 202 Wis. 2d 620, 645, 551 N.W.2d 50 (Ct. App. 1996). However, “[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); *see also State v. Scaccio*, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449 (“A sentence well within the limits of the maximum sentence is unlikely to be unduly harsh or unconscionable.”). Russo faced a maximum sentence of eleven years’ and six months’ of initial confinement and a total of sixteen years’ imprisonment. The sentence of five years’ initial confinement and six years’ extended supervision and probation was within the maximum and is not harsh.

¶11 Finally, Russo argues that at sentencing the prosecutor made inflammatory remarks that following a 1993 conviction, Russo wrote a letter threatening to rape the sentencing judge and, with a racial slur, to kill the prosecutor. Russo contends the statement is hearsay and violated his right to be sentenced based upon true and correct information. There was no objection to the prosecutor’s statements at sentencing.

¶12 A defendant who requests resentencing based on inaccurate information “must show both that the information was inaccurate, and that the court actually relied on the inaccurate information in the sentencing.” *State v.*

*Tiepelman*, 2006 WI 66, ¶26, No. 2004AP914-CR (citation omitted). Russo merely asserted that the prosecutor’s statement that threats were made in 1993 was untrue. Russo did not meet his burden at the postconviction motion hearing of showing that the information was inaccurate. Indeed, the record demonstrates that as a judge assigned to hear Russo’s postconviction motion, the 1993 prosecutor recused himself because of threats received while in the district attorney’s office. The judicial substitution request also indicated that the 1993 judge should not be appointed “due to threats received.”

¶13 Russo did not meet his burden of showing that the trial court relied on the allegedly inaccurate information about the 1993 threats. The trial court did not mention the written threats. Although the threats were related to Russo’s abusive and angry character, there was ample other evidence of that character trait. Notably, there was evidence that while awaiting trial and disposition of this case, Russo received twenty-four disciplinary reports in jail. The trial court looked at Russo’s disruptive jail behavior as the most current demonstration of Russo’s inability to conduct himself as a reasonably safe and civil person. There is no reason to disturb Russo’s sentence.

*By the Court.*—Judgment and order affirmed.

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

