COURT OF APPEALS
DECISION
DATED AND FILED

August 4, 2011

A. John Voelker
Acting 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. 2010AP1806-CR

Cir. Ct. No. 2004CF346

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHRISTOPHER R. STRUPP,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Wood County: GREGORY J. POTTER, Judge. *Affirmed*.

Before Lundsten, P.J., Sherman and Blanchard, JJ.

¶1 PER CURIAM. Christopher R. Strupp appeals from a judgment of conviction for mayhem, as a repeat offender, and the order denying his motion for postconviction relief. Strupp argues on appeal that the circuit court erred when it refused to instruct the jury on the lesser-included offense of aggravated battery

with intent to commit only bodily harm, and that the circuit court erred at sentencing when it considered defense counsel's strategy as an aggravating factor. We conclude that the circuit court did not err, and we affirm the judgment and order.

¶2 Strupp was charged with stalking and mayhem for an incident in which he bit off part of the ear and the lip of a man. At trial, and at the State's request, the court instructed the jury on mayhem, WIS. STAT. § 940.21, and on a lesser-included offense under § 940.19(5) (2009-10), aggravated battery with the intent to cause great bodily harm.[1] Strupp asked the court to also instruct the jury on WIS. STAT. § 940.19(4), a less-aggravated form of battery requiring intent to cause bodily harm. The court refused to give the jury the instruction for § 940.19(4). The jury found Strupp guilty of mayhem, and acquitted him of the stalking charge. The court sentenced Strupp to ten years of initial confinement and ten years of extended supervision. Strupp filed a postconviction motion that raised a number of issues, including the two issues he argues in this appeal. The circuit court denied the motion.

¶3 Strupp argues that the circuit court erred when it refused to instruct the jury on the less-aggravated battery charge. As we have explained, the court instructed the jury on aggravated battery with the intent to cause great bodily harm. There is one difference between these two statutes, and that is the degree of

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

intent.[2] Both are lesser-included offenses of mayhem. *See* WIS. STAT. § 939.66(2m).

¶4 The question of whether the evidence at trial permitted the giving of an instruction on a lesser-included offense is a question of law that we review *de novo*. *See* ***State v. Borrell***, 167 Wis. 2d 749, 779, 482 N.W.2d 883 (1992). The evidence at trial showed that the incident occurred when the victim and a friend were sitting in a car in a store parking lot. Strupp drove by and "moon[ed]" them. About fifteen minutes later, Strupp appeared at the car window. The victim turned towards his window, Strupp put his arm through the window, and began punching and hitting the victim. The window broke, and Strupp came partly into the car through the window. The victim did not know who was attacking him or why. The victim tried to move the car to get Strupp to stop the attack.

¶5 Strupp continued to attack the victim as the car moved, biting off part of the victim's ear and part of his lip. The victim described the injury to his ear: "a quarter inch in from the back of [my] ear straight up and down, [the]whole back line was removed, you know, bit and tore off," and the injury to his lip:

> The injury to the lip was pretty severe. Half to three-quarters of it was completely gone all the way down to my gum line and—it wasn't just a clean bite off and it's gone. It was bit and torn off so when he pulled it away my whole gum line along my lower jaw was also ripped away too.

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[2] WISCONSIN STAT. § 940.19(4) provides: "Whoever causes great bodily harm to another by an act done with intent to cause bodily harm to that person or another is guilty of a Class H felony." WISCONSIN STAT. § 940.19(5) provides: "Whoever causes great bodily harm to another by an act done with intent to cause great bodily harm to that person or another is guilty of a Class E felony."

¶6 We conclude that the circuit court did not err when it refused to give the instruction for the less-aggravated form of battery. Strupp was an unprovoked aggressor who did not know the victim. Further, Strupp's actions in biting first the ear and then the lip showed his intent to cause more than bodily harm.[3] We agree with the circuit court that there was no basis in the facts of record for the jury to have acquitted Strupp on mayhem and aggravated battery, and instead find him guilty of the less-aggravated form of battery.

¶7 Strupp next argues that the circuit court erred when it sentenced him by considering his counsel's theory of defense as an aggravating factor. At one point when explaining the sentence imposed, the court referred to Strupp's "testimony at trial." The prosecutor reminded the court that Strupp had not testified at trial. The judge immediately corrected the statement and said that he was referring to the testimony of others.

¶8 The court then described the facts of the crime and said that Strupp had become enraged, attacked the victim, and then claimed that he had acted to protect himself when the victim attempted to drive away. Defense counsel pointed out that the court was considering trial counsel's argument, and not Strupp's testimony. In other words, counsel had argued to the jury that Strupp was acting to protect himself. Strupp had not testified about his action. The court said that it understood. The court then said: "Throughout this matter it continues to appear to me that [Strupp] downplays his responsibility in all of these matters, that there are certain things that obviously came to light that are different from what the

[3] The exact biting sequence is not clear from the record. It is clear, however, that Strupp bit one part of the victim's body and then separately the other part.

sentencing judge … believed at the time he rendered the sentence." The court went on to point out inconsistencies in Strupp's statements over time.

¶9 Strupp argues that he did not testify at trial and that the court should not have attributed counsel's strategy to him. He also argues that the court's remark showed that it was penalizing Strupp for going to trial. Sentencing lies within the sound discretion of the circuit court, and a strong policy exists against appellate interference with exercises of that 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 circuit 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). A court may consider, among other things, a defendant's remorse and repentance when sentencing. ***State v. Gallion***, 2004 WI 42, ¶43 n.11, 270 Wis. 2d 535, 678 N.W.2d 197. A defendant has a due process right to be sentenced based on accurate information. ***State v. Tiepelman***, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1.

¶10 Our review of the record shows that the court considered Strupp's behavior over time, showing that he had a history of downplaying his responsibility for his own actions and concluding that the history demonstrated a lack of remorse. Strupp does not suggest that the court's statements about his record were factually incorrect.

¶11 Considering the court's remarks in context, we are not convinced that the court believed that Strupp had affirmatively denied his intent to harm the victim. There is no reason to believe that the court persisted in believing that

Strupp personally denied intent after the court was twice corrected by the prosecutor and defense attorney. Rather, we read the court's remarks in total as revealing its reliance, not on any specific assertion about intent by Strupp, but instead on Strupp's general failure to take responsibility.

¶12 Both Strupp and his counsel suggested during their sentencing comments that Strupp lacked responsibility for this crime. During the sentencing hearing, Strupp's counsel suggested that the incident escalated because Strupp was in the window of the car when the car began to move. And Strupp told the court at sentencing that he had already spent time incarcerated for this crime and told the court that he had "paid a little bit too much in time," that he had made "a mistake" and that he had already paid for that mistake. Further, what the court's remarks show is that the court believed that Strupp had shown in the past and continued to show a lack of remorse or sense of responsibility for his actions. The court considered appropriate sentencing factors and did not erroneously exercise its discretion when it sentenced Strupp.

¶13 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.