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DISTRICT II

September 25, 2013

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You are hereby notified that the Court has entered the following opinion and order:

2013AP132-CR State of Wisconsin v. Thomas J. Abitz, Jr. (L.C. #2011CF85)

Before Brown, C.J., Reilly and Gundrum, JJ.

A jury found Thomas J. Abitz, Jr., guilty of felony bail jumping and child abuse—recklessly causing injury. The trial court imposed consecutive maximum sentences. Abitz appeals from the judgment of conviction and from the order denying his postconviction motion seeking sentence modification. We reject Abitz's argument that the sentence is excessive because it was based on incorrect inferences from the record. We affirm. Based on our review of the briefs and the record, we conclude that summary disposition is appropriate. *See* WIS. STAT. RULE 809.21 (2011-12).

Abitz claimed that McKena N., the two-year-old daughter of his girlfriend, Kayla B.L., suddenly became unresponsive as they played. Doctors found bilateral retinal hemorrhages, a skull fracture, a subdural hematoma, and numerous bruises, some in the shape of an adult-sized hand. Abitz variously asserted that McKena tripped while playing with the cats, spontaneously fainted and bumped her chin on his shoulder, got bruises on her back when he "helped" her when she choked on some food, and, finally, that she struck her head on the wall as he played "airplane" with her. Now four, McKena cannot walk or talk, has a permanent feeding tube, is incontinent of urine and stool, and may be blind.

The trial court sentenced Abitz to maximum consecutive terms for the child abuse and the bail-jumping counts. Postconviction, Abitz challenged the sentence as too harsh. He contended that the court based the sentence on improper inferences—*i.e.*, that his delay in admitting that he might have been rougher with McKena than he meant to aggravated her condition and warranted a stiffer sentence. Abitz objected to comments such as these:

> …. This is obviously a very—a very trying situation on all fronts; quite frankly, something that probably never should have happened. And certainly it should have been addressed differently when it did, and it wasn't. That's what really makes this thing so—this whole tragic accident—tragic, call it a tragic accident, tragic event, so egregious. It's that we have a situation that we have no eyewitnesses and we have the tragic result that McKena sustained. Unforgivable. Then the actions taken by the defendant, you know, when that happened are inexcusable.
>
> Any time something happens you have to be up front, you got to be forthright, you got to be proactive, you got to exercise every initiative necessary. You can't hesitate, you can't do anything, it's life and death, it's residual problems. It's like the people that may have a stroke that you have to get that attention to them immediately and if you don't there is the likelihood of some very serious collateral problems. This situation with McKena, quite frankly, may not have been as severe as [sic] it was handled differently by Mr. Abitz at the time.

> And what really makes this case even that much more serious is that … when something happens to somebody, I don't care what the situation is, you have to exercise every positive initiative to mitigate and minimize any possible issues or concerns.
>
> And what was so telling in this case is the jury trial, three days of listening to testimony, three days of listening to variations of stories, three days of listening to how long it took for Dr. Knox to finally tap the common sense vein of this defendant to … determine that there was in fact something that actually happened and something that he evidently may have been involved in that resulted in this tragic result to McKena. By that time, who knows, only God knows the net result that that had on that poor child.

The trial court disagreed that it had determined that Abitz's delay worsened McKena's condition and prognosis and thus justified a harsher sentence. Rather, the court explained, so as to properly analyze the seriousness of the offense, it had to consider the totality of the circumstances, including Abitz's "decisions and his behavior and his actions because obviously some offenses could be more serious or less serious," depending on his chosen course of action. The court denied the motion. Abitz appeals.

This court reviews sentencing decisions under the erroneous exercise of discretion standard. ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. We start with the presumption that the trial court acted reasonably. ***Elias v. State***, 93 Wis. 2d 278, 282, 286 N.W.2d 559 (1980). Courts must identify the sentencing factors and objectives of the sentence and identify which are of greatest importance. ***Gallion***, 270 Wis. 2d 535, ¶¶40-41, 43. Among the objectives are the protection of the community, punishment and rehabilitation of the defendant, and deterrence to others. ***Id.***, ¶40. Relevant factors are many, but include the defendant's criminal history, personality, character, degree of culpability, trial demeanor, remorse, repentance and cooperativeness, and the vicious or aggravated nature of the crime. *See* ***Harris v. State***, 75 Wis. 2d 513, 519–20, 250 N.W.2d 7 (1977). A court erroneously exercises its discretion when it imposes a sentence "based on or in actual reliance upon clearly irrelevant

or improper factors." ***State v. Harris***, 2010 WI 79, ¶30, 326 Wis. 2d 685, 786 N.W.2d 409 (emphasis omitted).

We conclude that the few remarks to which Abitz objects are taken out of context. The transcript of the trial court's sentencing remarks spans twenty pages. We agree with the State that, read in their entirety, it is plain that the court did not impose the maximum sentence because Abitz's delayed admission caused McKena's condition to worsen. Indeed, the court stated that it remained unknown. Rather, the court exhaustively examined the "standard" sentencing factors and took great care in explaining the underpinnings of the sentence it imposed. It considered Abitz's strong support system, his steady employment, his fairly minor criminal history, and the tragedy of this case to everyone involved. It emphasized, however, the gravity of the offense, and his failure to take responsibility and lack of remorse for McKena's nearly fatal injuries. His seeming indifference to the damage he caused, the court said, illustrated the danger Abitz poses to the public. Its comments at the postconviction motion hearing confirm our conclusion that the sentence reflects a proper exercise of discretion. *See* ***State v. Fuerst***, 181 Wis. 2d 903, 915, 512 N.W.2d 243 (Ct. App. 1994) (the trial court has an additional opportunity postconviction to explain its sentence to confirm its proper exercise of discretion).

Upon the foregoing reasons,

IT IS ORDERED that the judgment and order of the circuit court are summarily affirmed, pursuant to WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals