

**State of Wisconsin
Court of Appeals
District I**
Appeal No. 2008AP000033

State of Wisconsin,

Plaintiff-Respondent,

v.

Donte Moss,

Defendant-Appellant.

**Appeal from a judgment of conviction entered in the
Milwaukee County Circuit Court, the Honorable
William Sonsay, presiding**

Defendant-Appellant's Brief

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Statement on Oral Argument and Publication

The issues presented by this appeal are controlled by well-settled law and, therefore, the appellant does not recommend oral argument nor publication.

Statement of the Issues

I. Whether the trial court abused its discretion in denying Moss' motion for a mistrial because evidence was presented that Moss "torched" the victim's mother car prior to the incident.

Answered by the trial court: No.

II. Whether the trial court abused its sentencing discretion by failing to place on the record of the sentencing hearing a proper nexus between the factors considered and the sentence imposed by the court.

Answered by the trial court: No.

Summary of the Argument

I. Abuse of discretion in denying mistrial

The State's case depended almost entirely upon the credibility of the victim, Edmon Green ("Green") Green testified at trial that it was Moss and Blades (a co-defendant) who assaulted him. As such, the State requested the "motive" instruction and then elicited testimony from Green that he had a beef going with Moss because Moss had "disrespected" Green's mother. Then, in testimony that was apparently a surprise to all, Green told the jury that the "disrespect" involved Moss torching Green's mother's car. Moss moved for a mistrial but the motion was denied. Instead, the

testimony was stricken and the judge gave the jury a curative instruction. But, later in the trial, another witness told the jury that Moss had recently been released from jail (corroborating the jury's inevitable belief that Moss had committed arson against his own aunt).

As will be set forth in more detail below, whether to grant a mistrial is within the trial court's discretion. On appeal an order denying a motion for mistrial will not be reserved absent a showing of the erroneous exercise of discretion. Additionally, the law provides that a curative instruction raises a presumption that the stricken testimony is not unfairly prejudicial.

In this case, though, Moss can overcome the presumption that any prejudice was eliminated by the curative instruction. Although the court struck the testimony that Moss had "torched" his aunt's car the evidence that Moss had "disrespected" Green's mother stayed in the record. Moreover, the court instructed the jury to specifically consider this circumstantial evidence of motive in deciding whether Blades and Green committed the crimes alleged. As such, the curative instruction could not and did not eliminate the unfair prejudice.

II. Abuse of sentencing discretion

The trial court sentenced Moss to eight years of initial confinement. Although the court considered relevant factors the judge failed to explain on the record *why* those sentencing factors required the sentence that was imposed. In other words, no nexus between the sentencing factors and the length of sentence was set forth on the record. As such, appellate review for the exercise of sentencing discretion is practically impossible. Under these circumstances the appellate court must find that the trial judge

abused his sentencing discretion.

Statement of the Case

I. Procedural Background

The defendant-appellant, Donte Moss ("Moss") was charged in a criminal complaint with first degree reckless injury contrary to Sec. 940.23(1)(a), Stats.¹ (R:2) The charges arose out of an incident that occurred on October 1, 2005. The complaint alleged that, following a brief argument with Edmond Green, Moss instructed Sidney Blades to shoot Green. Allegedly Blades shot at Green and hit him in the arm. Moss entered a plea of not guilty to the charge.

On August 28, 2006 the case was called for trial but the prosecutor informed the court that there may be new charges against Moss because the night before a person, believed to be Moss, fired shots at Green (the State's primary witness) while Green was sitting on the porch. (R:37-3) Based on this assertion the court adjourned the trial.

Moss was then charged with first degree recklessly endangering safety, bail jumping, and intimidation of a witness. (Milwaukee County Case No. 2006CF004562) Again, Moss entered pleas of not guilty to the charges. The State moved to consolidate the charges for trial and, without objection from Moss, the cases were consolidated. (R:39-4)

The cases proceeded to jury trial beginning on January 22, 2007. During Green's direct examination he was asked to explain the nature of the disagreement he had with Moss. Green told the

¹ 940.23(1)(a), Stats., provides, "(a) Whoever recklessly causes great bodily harm to another human being under circumstances which show utter disregard for human life is guilty of a Class D felony.

jury that it was because Moss had "disrespected" his (Green's) mother. Then Green explained:

Well, my mother have [sic] previously purchased a Lincoln, a Lincoln and it didn't work. She was in the process of getting it fixed or whatever. It was sitting in front of the house. He goes and torches it and busts out the windows. This is all--

(R:43-84) Moss objected and a sidebar conference was held (R:43-84). Moss moved for a mistrial. (R:43-157) The court denied the motion for a mistrial. (R:43-158)

Instead, the court instructed the jury:

All right. The court is going to instruct the jury, and this is an instruction. It's an order to you. You are to disregard the testimony that was just elicited regarding an alleged incident that was responded to by the witness regarding the car. I instruct you to disregard it. You are not to consider it as evidence, and the testimony at this point is ordered stricken. So it is not evidence in this case and you are not to consider it.

(R:43-84, 85)

Later, during the state's cross-examination of Terrence Brown, a witness called by the co-defendant, Blades, the following testimony was elicited:

Q And when is it that you discovered that Mr. Blades had a brother?

A Donte Moss recently was released from jail and that's when I found out he had a brother.

(R:45-77).

At the State's request the court instructed the jury as to motive. (Wis. JI-Criminal 175)² (R:46-12; R:46-37)

The jury returned verdicts finding Moss guilty of first degree reckless injury in the "first" case; however, the jury found Moss not

2 "Motive" refers to a person's reason for doing something. While motive may be shown as a circumstance to aid in establishing the guilt of a defendant, the State is not required to prove motive on the part of a defendant in order to convict. Evidence of motive does not by itself establish guilt. You should give it the weight you believe it deserves under all of the circumstances.

guilty of all three counts in the "second" case. (R:14)

The court sentenced Moss to eight years initial confinement and ten years of extended supervision. At the sentencing hearing the court touched on Moss' prior record and the seriousness of the offense and then sentenced Moss as follows:

As to Mr. Moss, the court is going to sentence the defendant . . . to a period of eight years of initial confinement. The court notes that the defendant is not the one that fired the gun, but the court does believe that he was equally responsible by his actions. Again, this was a classic case of party to the crime under the circumstances, and given the relationship that Mr. Moss had with Mr. Blades, the court feels strongly that he was responsible here, as well. The court also believes that he is in need of this supervision, and that is why the court is imposing the ten years of extended supervision, as well.

(R:48-36, 37).

Moss timely filed a notice of intent to pursue postconviction relief.

Moss then filed a postconviction motion for resentencing on the grounds that the trial court failed to place on the record at the sentencing hearing a proper "nexus" between the factors considered by the court and the sentence imposed. (R:25) The trial court denied the motion (R:26) and then Moss timely filed a notice of appeal.

II. Factual Background³

This case that involves a family feud not unlike the Hatfields and the McCoys. Moss and the co-defendant, Blades, are brothers. Green is their cousin. (R:42-108) This incident was prompted by a beef that supposedly existed between Moss and Green. (R:43-7) According to some witnesses, the beef had to do with Moss "disrespecting" Green's mother.⁴ (R:43-81) Green had been living in

3 There was much testimony presented at the trial concerning the August, 2006, incident where someone shot at Green while he was sitting on the porch. Those facts, however, are not relevant to this appeal because the jury acquitted Moss on all of those allegations.

4 Whether this was the true nature of the beef, alas, must be left to the reader's imagination. This was what Green said was the nature of the beef and Moss did not

Las Vegas, Nevada; however, he decided to return to Milwaukee to pick up his daughter and to "confront" Moss about the conflict. (R: 43-80)

It turns out that on the evening of October 1, 2005, when Green saw Moss standing outside of a residence talking to other persons, Green "approached" Moss. (R:43-87) What happened next is predictable. Green asked Moss if he "had a problem" and then a fist-fight ensued. (R:43-87) According to Green he was getting the best of Moss and so Moss went into the street and told his (Moss') brother, Blades (R:44-21), to shoot Green. (R:43-88) Blades obliged and ended up hitting Green in the right elbow. (R: 43-88) Green estimated that the shot was fired from twenty to twenty-five feet away. (R:43-90) Green told the jury that he does not remember much after that point because, according to Green, he was "legally dead" for about thirty minutes. (R:43-92)

At about 10:43 p.m. Milwaukee Police were dispatched to the 2700 block of North 44th Street upon a complaint that shots were fired. (R:42-28, 29). When the police arrived they found a path of blood drops from 44th and Hadley Street leading into an alley. (R: 42-76). The police and the paramedics found Green near 2802 N. 44th Street. (R:42-76). Green was bleeding profusely from a gunshot wound to his arm. He was rushed to the hospital; however, he fell into a coma and, ultimately, doctors were forced to remove Green's right arm in order to save his life. (R:42-116).

When the police investigated the scene they found a bullet casing in front of 2802 N. 44th Street. (R:42-84).

Blades told the jury that he was not even at the scene, though, when Green was shot. (R:44-27). Blades' friend, Terrence Brown,

testify at that trial.

backed him up on that testifying that on the night Green was shot he (Brown) and Blades were together the whole night and they never went to 44th and Hadley (the place where Green was shot). (R: 44-71)

Argument

I. The trial court abused its discretion in denying Moss' motion for a mistrial.

The State's case depended almost entirely upon the credibility of Green's testimony that it was Blades and Moss who assaulted him. Understandably, the State requested the "motive" instruction and then elicited testimony from Green that he had a beef going with Moss because Moss had "disrespected" Green's mother. Then, in testimony that was apparently a surprise to all, Green told the jury that the "disrespect" involved Moss torching Green's mother's car. Moss moved for a mistrial but the motion was denied. Instead, the testimony was stricken and the judge gave the jury a curative instruction. But, later in the trial, another witness told the jury that Moss had recently been released from jail (corroborating the jury's inevitable belief that Moss had committed arson against his own aunt).

As will be set forth in more detail below, whether to grant a mistrial is within the trial court's discretion. On appeal an order denying a motion for mistrial will not be reserved absent a showing of the erroneous exercise of discretion. Additionally, the law provides that a curative instruction raises a presumption that the stricken testimony is not unfairly prejudicial.

In this case, though, Moss can overcome the presumption that

any prejudice was eliminated by the curative instruction. Although the court struck the testimony that Moss had "torched" his aunt's car the evidence that Moss had "disrespected" Green's mother stayed in the record. Moreover, the court instructed the jury to specifically consider this circumstantial evidence of motive in deciding whether Blades and Green committed the crimes alleged. As such, the curative instruction could not and did not eliminate the unfair prejudice.

A. Standard of Appellate Review

The decision whether to grant a motion for mistrial lies within the discretion of the circuit court. *State v. Pankow*, 144 Wis. 2d 23, 47, 422 N.W.2d 913 (Ct. App. 1988). "The trial court must determine, in light of the whole proceeding, whether the claimed error was sufficiently prejudicial to warrant a new trial." *Id.* On appeal, the court will not reverse the denial of a motion for mistrial absent a clear showing of an erroneous exercise of discretion by the circuit court. *Id.* "A trial court properly exercises its discretion when it has examined the relevant facts, applied the proper standard of law, and engaged in a rational decision-making process." *State v. Bunch*, 191 Wis. 2d 501, 506-07, 529 N.W.2d 923 (Ct. App. 1995).

In this case the judge immediately gave a curative instruction. The giving of a curative instruction presumptively eliminates the potential prejudice. *See State v. Collier*, 220 Wis. 2d. 825, 837, 584 N.W.2d 689 (Ct. App. 1998). ("Potential prejudice is presumptively erased when admonitory instructions are properly given by a trial court.")

Here, then, Moss must persuade the Court of Appeals that, despite the curative instruction, the testimony heard by the jury but

stricken by the court denied him a fair trial when considered in the context of the entire trial.

B. The stricken testimony concerning the "torching" of the car made it likely that the jury became unfairly prejudiced against Moss.

Moss' theory of defense in this case was alibi.⁵ Blades testified that he was not at the scene and he called a number of alibi witnesses who corroborated Blades' testimony. Thus, the key material question that the jury had to resolve was whether the evidence demonstrated that Moss and Blades were present at the scene. Certainly, if Moss had a *motive* for being at the scene then it is much more likely that he was, in fact, at the scene as was claimed by Green. As the defense attorneys vociferously argued in their closing arguments, despite the fact that there were supposedly numerous persons present in the street at the time of the incident it was only Green who testified that Blades and Moss were present. The State's entire case, then, rested on Green's credibility.

Initially, there was scant testimony concerning any motive on the part of Moss and Blades to fight with Green. According to Green, it was some nebulous "beef" that he had with Moss because Moss had "disrespected" his (Green's) mother. (R:43-81) If the testimony had been limited to Green's vague description of the disagreement the jury might have rightfully concluded that Green was lying about this detail of the incident.

5 Moss did not testify at the trial nor did he offer any witnesses. Technically speaking, then, Moss' theory of defense was the burden of proof. However, the codefendant, Sidney Blades, offered alibi as his defense. Blades testified and he call alibi witnesses. As a practical matter, then, Moss' theory of defense was also alibi because if Blades were not present at the scene then Green's version of the offense is untrue.

But Green did not leave it at that. Without warning he told the jury that it was Moss who had "torched" Green's mother's car.⁶

This testimony is severely prejudicial to Moss' case for three important reasons: (1) If true it suggests that Moss is a violent and criminally-minded person; (2) It fleshes out Green's nebulous claim that Moss disrespected Green's mother (i.e. it provides a motive); and (3) It suggests without any proof that Moss had committed the felony of arson against his own aunt.⁷ This being the case, how hard would it be to believe that Moss would order that his cousin be shot?

The key question, of course, is whether these three elements of prejudice are sufficient to overcome the presumption that the court's curative instruction eliminated the prejudice.

There is a solid and unavoidable reason why the court's curative instruction failed to eliminate the prejudice: Green's "motive" testimony that Moss had "disrespected" Green's mother *remained in the record*. Moreover, at the conclusion of the case the court instructed the jury that, "motive may be shown as a circumstance to aid in establishing the guilt of a defendant". Thus, the court specifically directed the jury to consider Green's testimony that Moss had "disrespected" Green's mother as a circumstance to aid in determining whether Moss was present at the scene.

It is nothing short of foolhardy to believe that the jury could

6 It appears from the context of the testimony that this was the first time that Green had told anyone in the world about this incident. An element of Moss' objection was that this was a discovery violation. Moss' attorney told the judge that this testimony was "completely undisclosed" prior to trial (apparently indicating that the claim was not contained in any police report of Green's statements (R:43-157) If this were the case then the prosecutor would have been equally surprised.

7 The prejudice in this regard was compounded when Blades' witness, Terrence Brown, told the jury that Moss had "recently got out of jail" suggesting that Moss had been convicted of some crime (perhaps of arson?) (R:45-93)

specifically consider the evidence that Moss had "disrespected" Green's mother but, at the same time, put out of their minds the remark that Moss had "torched" the car- especially when there was no other explanation in the record as to the nature of this disagreement. Thus, the jury was told to consider the evidence that Moss had disrespected Green's mother but to ignore the remark that this disrespect involved the torching of a car. No person, no matter what intellectual effort is expended, could successfully engage in such awkward mental gymnastics. Even if one were inclined to disregard the stricken testimony how does one reconcile Terrence Brown's testimony that Moss had recently got out of jail? At that point even the most intellectually resilient juror would have to confess a nagging impression that Moss had been convicted of arson for torching his own aunt's car.

When one considers the totality of the record, then, there can be little doubt that the trial judge's curative instruction did little or nothing to eliminate the unfair prejudice that Green's stricken testimony created. As such, the Court of Appeals must order a new trial.

II. The trial court abused its sentencing discretion by failing to set forth on the record a nexus between the factors considered by the court and the sentence imposed.

The trial court sentenced Moss to eight years of initial confinement. Although the court considered relevant factors the judge failed to explain on the record *why* those sentencing factors required the sentence that was imposed. In other words, no nexus between the sentencing factors and the length of sentence was set

forth on the record. As such, appellate review for the exercise of sentencing discretion is practically impossible. Under these circumstances the appellate court must find that the trial judge abused his sentencing discretion.

A. Standard of Appellate Review

The standard of appellate review for a criminal sentence is well-known. Sentencing is left to the discretion of the trial court and, on appeal, the appellate court will reverse only if there has been an abuse of sentencing discretion. *State v. Gallion*, 2004 WI 42, P51 (Wis. 2004). However, in light of the Truth-in-Sentencing law the courts have recognized that the rule of law suffers where there is unfettered sentencing discretion. Thus, the Wisconsin Supreme Court has explained that:

We are mindful that the exercise of discretion does not lend itself to mathematical precision. The exercise of discretion, by its very nature, is not amenable to such a task. As a result, we do not expect circuit courts to explain, for instance, the difference between sentences of 15 and 17 years. We do expect, however, an explanation for the general range of the sentence imposed. This explanation is not intended to be a semantic trap for circuit courts. It is also not intended to be a call for more "magic words." Rather, the requirement of an on-the-record explanation will serve to fulfill the McCleary mandate that discretion of a sentencing judge be exercised on a "rational and explainable basis." 49 Wis. at 727. This will assist appellate courts in determining whether the circuit court properly exercised its discretion. n14

Gallion, 2004 WI 42, P51

B. The trial court failed to give any explanation as to why the factors considered by the court required the sentence that was imposed.

There is no doubt that, in passing sentence on Moss, the court considered relevant factors. The court looked at the nature of the offense and characterized Moss' behavior as serious. The court

considered Moss' prior criminal convictions. What the court left unexplained, though, is why those sentencing factors required the length of confinement that was imposed. Put another way, the record contains no nexus between the factors considered and the sentence imposed.

Recently, in, *State v. Taylor*, 2006 WI 22 ¶18 (Wis. 2006) the Wisconsin Supreme Court reaffirmed the traditional sentencing factors but, in the light of "Truth in Sentencing", emphasized the need for trial courts to do more than simply recite the facts, invoke the sentencing factors, and to then decide the sentence. Rather, the trial court must *explain* what factors are being considered and *why* those factors require the sentence being imposed (i.e. to provide the "linkage" between the sentencing factors and the sentence imposed). The court wrote:

The standards governing appellate review of an imposed sentence are well settled. A circuit court exercises its discretion at sentencing, and appellate review is limited to determining if the court's discretion was erroneously exercised. *State v. Gallion*, 2004 WI 42, P17, 270 Wis. 2d 535, 678 N.W.2d 197; see also *McCleary v. State*, 49 Wis. 2d 263, 277, 182 N.W.2d 512 (1971) ("It is thus clear that sentencing is a discretionary judicial act and is reviewable by this court in the same manner that all discretionary acts are to be reviewed."). "Discretion is not synonymous with decision-making. Rather, the term contemplates a process of reasoning. This process must depend on facts that are of record or that are reasonably derived by inference from the record and a conclusion based on a logical rationale founded upon proper legal standards." *Id.* at 277.

"The sentencing decisions of the circuit court are generally afforded a strong presumption of reasonability because the circuit court is best suited to consider the relevant factors and demeanor of the convicted defendant." *State v. Borrell*, 167 Wis. 2d 749, 781-82, 482 N.W.2d 883 (1992) (citing *State v. Harris*, 119 Wis. 2d 612, 622, 350 N.W.2d 633 (1984)). "Therefore, the convicted defendant must show some unreasonable or unjustified basis in the record for the sentence imposed." *Borrell*, 167 Wis. 2d at 782 (citing *Harris*, 119 Wis. 2d at 622-23). "Appellate judges should not

substitute their preference for a sentence merely because, had they been in the trial judge's position, they would have meted out a different sentence." *McCleary*, 49 Wis. 2d at 281.

Furthermore, "[a] trial judge clearly has discretion in determining the length of a sentence within the permissible range set by statute." *Hanson v. State*, 48 Wis. 2d 203, 207, 179 N.W.2d 909 (1970). "An abuse of this discretion will be found only where the sentence is so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." (internal citations omitted)

In sentencing Moss the court took care to outline all of the factors that the court considered, however, having invoked the sentencing factors, the court never explained *why* the sentence imposed was necessary. Rather, the court merely said, "As to Mr. Moss, the court is going to sentence the defendant . . . to a period of eight years of initial confinement."

In a concurring opinion in *Taylor*, Justice Bradley wrote, "Merely uttering the facts involved, invoking sentencing factors, and pronouncing a sentence is not a sufficient demonstration of the proper exercise of discretion." *Taylor*, 2006 WI 22, ¶54 (Wis. 2006). Rather, as the court explained in *Gallion*, "[W]e require that the court, by reference to the relevant facts and factors, explain how the sentence's component parts promote the sentencing objectives. By stating this linkage on the record, courts will produce sentences that can be more easily reviewed for a proper exercise of discretion." *Gallion*, 2004 WI 42, ¶46 (Wis. 2004)

Here, this record contains no explanation from the judge as to why the factors that were considered required that Moss be incarcerated for eight years, Thus, the record does not demonstrate that proper sentencing discretion was exercised.

It is difficult to imagine why the sentencing factors that the

court considered would require eight years in prison. As the court noted, Moss was the not shooter. Moreover, though Moss did not have the privilege of adequate provocation or self-defense, there is no doubt that Green was the aggressor and, prior to being shot, had battered Moss for no apparent reason. Besides Moss' prior criminal conviction, his life seemed to be on the right track. He was obtaining an education and he was working.

Under these circumstances the factors considered by the court do not seem to warrant eight years in prison. The record is not helpful in understanding because the sentencing judge did not offer an explanation.

Conclusion

It is respectfully requested that the court reverse Moss' conviction for the reason that the trial court erroneously exercised its discretion in denying Moss' motion for a mistrial. In the alternative, it is requested that the court order resentencing with instructions that the court place on the record a nexus between the factors considered and the sentence actually imposed.

Dated at Milwaukee, Wisconsin this ____ day of _____, 2008.

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Certification

I hereby certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of the brief is 4092 words.

This brief was prepared using *Open Office* word processing software. The length of the brief was obtained by use of the Word Count function of the software

Dated this _____ day of _____,
2008:

Jeffrey W. Jensen

**State of Wisconsin
Court of Appeals
District I**
Appeal No. 2008AP000033

State of Wisconsin,

Plaintiff-Respondent,

v.

Donte Moss,

Defendant-Appellant.

Appendix Certification

A. Record on Appeal

B. Excerpt of trial court's ruling motion for mistrial

C. Excerpt of trial court's sentencing remarks

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19 (2) (a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to

be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to

Dated at Milwaukee, Wisconsin, this _____ day of _____, 2008

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