COURT OF APPEALS
DECISION
DATED AND RELEASED

October 1, 1996

NOTICE

No. 96-0974-CR-NM

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

State of Wisconsin,

Plaintiff-Respondent,

v.

Keith L. Allen,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed*.

Before Wedemeyer, P.J., Fine and Schudson, JJ.

PER CURIAM. After a jury trial, Keith L. Allen was convicted of armed robbery, in violation of § 943.32(1)(b) and (2), STATS. The trial court sentenced Allen to forty years in prison. Pursuant to § 973.0135(2)(b), STATS., the court set parole eligibility at two-thirds of the sentence imposed and ordered Allen to pay restitution up to twenty-five percent of his prison earnings account. Allen was granted 242 days of credit for presentence incarceration.

The state public defender appointed Donna L. Hintze to represent Allen on appeal. Attorney Hintze has filed a no merit report pursuant to RULE 809.32, STATS., and ***Anders v. California***, 386 U.S. 738 (1967). Allen received a copy of the no merit report and was advised of his right to file a response. He has filed a response.

According to the testimony, Allen robbed Arno Tellier when Tellier and his wife returned home from grocery shopping. Allen demanded Tellier's wallet and attempted to remove it from Tellier's pocket. At first unsuccessful, Allen apparently cut or tore Tellier's pocket to obtain the wallet. As Tellier got out of the car, he lost his balance and fell against Allen. Before Allen ran from the garage, Tellier removed one of Allen's shoes and threw it out of reach. Kathie Rolando, the daughter of Tellier's neighbor, saw Allen run from the garage to a waiting car. While fleeing, Allen backed the car into a tree. Rolando provided the car's license number to investigators who traced it to Bryon Dixon. Dixon loaned the car to Allen on the morning of the robbery. After the robber left the garage, Tellier's wife told Tellier that Allen had had a knife and that he had threatened her with it.

The no merit report addresses whether the evidence was sufficient to prove guilt beyond a reasonable doubt, whether the trial court erroneously exercised its discretion when it denied Allen's requests for new counsel on the day of trial and for a mistrial or continuance when Rolando identified Allen in court, and whether Tellier's testimony concerning his wife's statements after the robbery violated Allen's confrontation rights. The no merit report also addresses whether the trial court erroneously exercised its discretion when it imposed the maximum sentence and set parole eligibility at two-thirds of the sentence. Allen also raises these issues in his response. Hintze concludes that these possible issues have no arguable merit. Based upon our independent review of the record, we conclude that her analysis of each of the issues is correct; however, we address Allen's specific concerns.

Allen does not contend that a robbery did not occur; rather, he challenges the conclusion that he was the robber. He complains about numerous discrepancies in the evidence or testimony. For example, he complains that Dixon was not asked to try on the robber's shoe or to provide alibi witnesses. Also, Allen's fingerprints were not found in Dixon's car, but no

one testified that the robber wore gloves. Apparently, there was also a discrepancy regarding facial hair.

Allen ignores our standard of review when reviewing evidence to sustain a conviction. An appellate court does not require that all of the pieces of the case fit together perfectly. Rather, a reviewing court considers the evidence in the light most favorable to the jury's verdict to determine if a jury, acting reasonably, could be convinced, beyond a reasonable doubt, by evidence the jurors had a right to believe and accept as true. ***State v. Barksdale***, 160 Wis.2d 284, 289-90, 466 N.W.2d 198, 200 (Ct. App. 1991). Under this standard, there was sufficient evidence to support the jury's finding.

Allen alleges that his request for new counsel should have been granted because a conflict of interest existed between himself and trial counsel. As evidence of the conflict, Allen cites counsel's plea negotiations, his failure to advise Allen concerning adjournments, his belief that Allen was guilty, and his refusal to file motions to suppress evidence and to dismiss. A suppression motion would have been frivolous because the evidence at trial did not result from statements Allen made or from a search of his person or property. A motion to dismiss was inappropriate because the trial was held within the time limits of the speedy trial demand. Additionally, trial counsel represented that he was prepared for trial and that the differences between himself and Allen were not irreconcilable. The record reflects that trial counsel vigorously defended Allen and was sensitive to Allen's desire to have input into trial decisions. Nothing suggests that the conflict was so great that, during trial, it likely resulted in a total lack of communication, prevented an adequate defense, or frustrated a fair presentation of the case. *See* ***State v. Lomax***, 146 Wis.2d 356, 359, 432 N.W.2d 89, 90 (1988).

Allen moved for a mistrial or a continuance when Rolando identified him as the man she saw flee. On the day she testified, Rolando advised the prosecutor that she could identify Allen. The discovery materials did not indicate that she could make an identification, and she had not done so at a parole revocation hearing. The trial court rejected the motion for a mistrial after determining that no information known to the prosecution before trial had been withheld during discovery.

The trial court also rejected Allen's request for a continuance to obtain a transcript of the parole hearing. Allen argued Rolando had testified then that she could not identify Allen, and Rolando claimed that she had not been asked to do so. To support his claim that the trial court should have granted the continuance, Allen included a copy of the transcript from the hearing. Ordinarily, we do not consider items not in the appellate record. *See* ***Jenkins v. Sabourin***, 104 Wis.2d 309, 313, 311 N.W.2d 600, 603 (1981). We note, however, that the transcript shows that Rolando testified truthfully when she testified that she was not asked at the hearing if she could identify the robber. The transcript shows the following exchange:

Agent Prock:"Did you see the attacker?"

Rolando: "He was a black male, tall, thin, wearing dark clothes and a white sock."

Agent Prock:"And *did* you identify him?" (emphasis added).

Rolando:"As a black male. Tall black male."

The question asked whether, in the past, Rolando identified the robber. The questioner did not ask if she could identify him at the time of the hearing. A transcript would not have allowed Allen to impeach Rolando's identification.

Allen's confrontation claim is premised on Tellier's testimony that, immediately after the robbery, his wife said that the robber had had a knife and had threatened her with it. The trial court ruled that Mrs. Tellier's statements were excited utterances, which are admissible even if she were available to testify. *See* § 908.03(2), STATS. Prior to trial, Mrs. Tellier broke her ankle and her hip, and she did not testify. Allen contends that because Mrs. Tellier traveled to doctor's appointments, she was sufficiently ambulatory to appear and testify; and thus, she was available. When testimony is within a well-recognized exception to the ban on hearsay statements, however, the Confrontation Clause does not require that the State show the declarant is unavailable. ***White v. Illinois***, 502 U.S. 346, 354-56 (1992). Consequently, even if Mrs. Tellier was an available witness, Allen's confrontation claim lacks merit.

Allen objects to statements made by the prosecutor during the sentencing hearing. The prosecutor regretted that he did not file two counts of armed robbery. He also stated that Allen stalked the victims and suggested that Allen may have been responsible for a series of similar crimes. While due process requires that a defendant be sentenced on the basis of true and correct information, ***State ex rel. LeFebre v. Israel***, 109 Wis.2d 337, 345, 325 N.W.2d 899, 903 (1982), a defendant has the burden of proving by clear and convincing evidence that the challenged statements were inaccurate and that he was prejudiced by the error. ***State v. Littrup***, 164 Wis.2d 120, 132, 473 N.W.2d 164, 168 (Ct. App. 1991). Allen has not shown prejudice. Whether or not a second armed robbery count would have been appropriate, Mrs. Tellier was the victim of some crime when Allen intimidated her with a knife, and the trial court could properly consider this fact. Regarding the series of robberies, the trial court's comments during sentencing do not indicate that it considered this allegation when imposing sentence.

The trial court set Allen's parole eligibility date pursuant to § 973.0135(2)(b), STATS. Allen argues that the validity of the statute should be challenged; however, a challenge has been foreclosed by ***State v. Borrell***, 167 Wis.2d 749, 482 N.W.2d 883 (1992). In ***Borrell***, the court upheld a statute allowing courts to set a parole eligibility date for a life sentence, holding that the date was an integral part of the sentencing decision. ***Id.***, at 778, 781, 482 N.W.2d at 894, 895. ***Borrell***'s rational applies equally to § 973.0135.

In addition to the issues raised by Hintze, Allen objects to statements made by the prosecutor during closing arguments. The closing arguments were not reported, and assertions of fact not a part of the record cannot be considered. ***Jenkins***, 104 Wis.2d at 313, 311 N.W.2d at 603.

Allen also claims ineffective assistance of counsel. The allegedly deficient performance included counsel's plea negotiations and the trial court's awareness of them, his agreement that voir dire, opening statements, and closing arguments would not be reported, his failure to have the transcript of the parole hearing available at trial, his lack of preparation for trial, and his failure to object to unreliable and irrelevant statements during sentencing.

To establish a claim of ineffective assistance of counsel, a defendant must show that trial counsel's performance was deficient and prejudicial. ***State v. Brooks***, 124 Wis.2d 349, 352, 369 N.W.2d 183, 184 (Ct. App. 1985). Prejudice exists if "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Strickland v. Washington***, 466 U.S. 668, 694 (1984).

Allen cannot show prejudice. He admits that a robbery occurred. The evidence showed the robber had a weapon. Allen's identity as the robber was established both by eyewitness testimony and by circumstantial evidence. The record does not provide any basis for arguing that the trial court was not fair or that counsel was not prepared. Allen's allegation that trial counsel was not prepared resulted from Rolando's surprise identification; however, a transcript from the parole revocation hearing would have bolstered, not impeached, Rolando's credibility. Because of the evidence against Allen, the prosecutor's alleged comments during closing arguments, if objectionable, were harmless. ***State v. Dyess***, 124 Wis.2d 525, 543, 370 N.W.2d 222, 231-32 (1985) (error is harmless if no reasonable possibility error contributed to result). Finally, the comments at sentencing were relevant because Allen's background and character are relevant factors, and Allen has not shown that the comments were unreliable.

Our independent review of the record did not disclose any additional potential issues for appeal. Therefore, any further proceedings on Allen's behalf would be frivolous and without arguable merit within the meaning of ***Anders*** and RULE 809.32(1), STATS. Accordingly, the judgment of conviction is affirmed, and Hintze is relieved of any further representation of Allen on this appeal.

By the Court. – Judgment affirmed.