

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

NOTICE

July 23, 1997

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-1766-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

GREGORY JORDAN,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Kenosha County: BRUCE E. SCHROEDER, Judge. *Affirmed.*

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

PER CURIAM. Gregory Jordan appeals from judgments convicting him of armed robbery and two counts of taking and driving a vehicle without consent, all as party to the crime, and from an order denying his postconviction motion for a new trial. On appeal, Jordan challenges the trial court's evidentiary

rulings and sentence. Discerning no misuse of the trial court's discretion in these areas, we affirm.

After pleading guilty to two counts of taking and driving a vehicle without the owner's consent and having four other charges dismissed, Jordan went to trial on the remaining charge of armed robbery of a hotel as party to the crime. The hotel clerk testified that she saw two boys¹ enter the hotel and stand there for some time before they partially covered their faces and approached the lobby desk. The clerk saw Jordan's face for twenty to thirty seconds before he covered it. Jordan approached her, pointed a gun at her and demanded money. She complied. Jordan jumped on the counter and pulled the cash register drawer open. At that time, Jordan's face was approximately twelve to eighteen inches from the clerk's. The clerk testified that the proximity of Jordan's eyes assisted her in later identifying him in a photo array as the robber. She estimated that the robbers were in the lobby approximately four and a half minutes. She was unable to identify Jordan's accomplice.

The clerk described the robbers to the police. After a friend of Jordan's told police that Jordan had admitted the robbery to him, the police presented two photo arrays to the clerk. The first array did not contain Jordan's picture; she did not identify any suspects from that array. Jordan's picture was in the second array and the clerk identified him as one of the robbers. She later identified Jordan at trial.

¹ Jordan was sixteen years old at the time of the robbery. He was waived into adult court.

On appeal, Jordan argues that the trial court erroneously permitted the jury to learn that he had been in custody on a prior occasion. The first incident involved the photograph from which the clerk identified Jordan as the robber. The photograph was identified by a detective at trial as the photograph from which the clerk identified Jordan. The detective twice displayed the photograph to the jury during his testimony. The photograph depicted Jordan in a jail uniform. Jordan argues that he was prejudiced by the photograph which revealed his prior custodial status. In denying Jordan's motion for a mistrial, the trial court found that it was unlikely that the jury was able to discern that it was an in-custody photograph given the distance at which it was displayed and the brevity of the display. The court discerned no prejudice to Jordan from the detective's display of the photograph during his testimony.

Whether to grant a mistrial is within the trial court's discretion. *See State v. Bunch*, 191 Wis.2d 501, 506, 529 N.W.2d 923, 925 (Ct. App. 1995). The trial court must assess, in light of the whole proceeding, whether the basis for the mistrial request is sufficiently prejudicial to warrant a new trial. *See id.* We will uphold the trial court's discretionary decision if it examined the relevant facts, applied a proper legal standard and employed a rational decision-making process. *See id.* at 506-07, 529 N.W.2d at 925. The trial court has an advantage over this court in assessing the impact of the detective's display of the in-custody photograph during his testimony. *See State v. Hagen*, 181 Wis.2d 934, 949, 512 N.W.2d 180, 185 (Ct. App. 1994). We defer to the trial court's observations on the ability of the jury to discern that the photograph showed Jordan in custody.

We turn to Jordan's complaint about the submission of the in-custody photograph to the jury as part of the photo array exhibit. At the close of the State's case, the State moved the court to permit the jury to examine the photographs.

Defense counsel asked the court to alter the photograph to obscure or remove that portion which identified it as a “mugshot.” Once the photograph was altered, defense counsel withdrew his objection to publishing the photograph to the jury.

We agree with the State that Jordan waived his right to appeal the display of the photograph when he withdrew his objection after the trial court acceded to his request to mask the fact that the photograph was a mugshot. *See State v. Hoffman*, 106 Wis.2d 185, 214-15, 316 N.W.2d 143, 159 (Ct. App. 1979) (by withdrawing evidentiary objection, defendant waived claim of error). Finally, we note that it was appropriate to publish the photographs comprising the array to the jury because identification was a central issue in the case and they were the photographs reviewed by the clerk and from which she identified Jordan as one of the robbers.

The second incident which Jordan contends highlighted his prior custodial status occurred during the testimony of Shamont Howell. Howell stated he knew Jordan “[s]ince Lincoln Hills” in response to the prosecutor’s inquiry regarding the beginning of Howell’s association with Jordan. Defense counsel moved for a mistrial on the ground that this reference to a juvenile correctional facility prejudiced Jordan. The State argued that the bare reference to “Lincoln Hills” did not necessarily reveal that Lincoln Hills was a juvenile correctional facility. The trial court offered to give a curative instruction on the reference to Lincoln Hills; Jordan declined because it would unduly highlight his connection to Lincoln Hills. The trial court denied the mistrial motion because the remark did not prejudice Jordan. We conclude that the trial court properly exercised its discretion in denying a mistrial. *See Bunch*, 191 Wis.2d at 506, 529 N.W.2d at 925.

Jordan also complains about the State's use of a photograph of President Clinton to demonstrate that the clerk would have been able to identify Jordan even though his face was partially obscured below the eyes. The clerk testified that she saw Jordan's eyes and these were an identifying feature. The State proposed to use a photograph of the President altered so that only his eyes were visible. Jordan objected on relevancy grounds. The trial court admitted the altered photograph because it was relevant to the clerk's ability to make an identification based upon her view of the robber's eyes. The clerk successfully identified the President after a fleeting view of the altered photograph.

The admission or exclusion of evidence is within the discretion of the trial court and its rulings in that regard will not be overturned on appeal absent a misuse of discretion. *See State v. Lindh*, 161 Wis.2d 324, 348, 468 N.W.2d 168, 176 (1991). We conclude that the trial court properly exercised its discretion in permitting the State to use the photograph in the manner it did. We also note that the significance of the clerk's identification of the President from an obscured photograph was placed in context by the prosecutor's acknowledgment that the clerk was more familiar with the President's appearance than Jordan's.

Jordan next contends that his trial was rendered unfair by the presence of individuals in the courtroom who allegedly flashed gang signs at witnesses during the proceedings and that such signs were visible to the jury. Jordan contends that these gang signs were a form of prohibited character evidence which prejudiced the jury and hindered its ability to consider the evidence. Jordan contends that a juror note alerted the court to the issue and that when the court became aware of the gang signs, it should have given a curative instruction to the jurors and removed spectators from the courtroom.

Jordan does not point us to that portion of the record which indicates that the trial court received and reviewed the juror's note discussing gang signs being flashed in the courtroom. We will not rummage through the record to locate support for a party's contentions. See *State v. Krieger*, 163 Wis.2d 241, 254, 471 N.W.2d 599, 603-04 (Ct. App. 1991). In the absence of record references to findings and rulings made by the trial court on this issue, we cannot conclude that the issue was brought before the trial court or that reversible error occurred.

Jordan also claims that a mistrial was necessary because the State failed to disclose exculpatory evidence. At trial, the State presented the testimony of Alfred Scott who denied telling police that Jordan was involved in the hotel robbery. At trial, Scott denied knowing Jordan, Milton Lott (Jordan's accomplice, whom the clerk could not identify) and Howell. When confronted with his signed statement to police, Scott admitted his signature appeared on the statement. At trial, Howell also denied telling police that Lott and Jordan told him they robbed the hotel.

Jordan contends that the State knew in advance of their trial testimony that Scott and Howell had repudiated their statements to police, that these repudiations were exculpatory with regard to Jordan, and that the State should have disclosed the repudiations to Jordan prior to trial. The court agreed that the repudiations should have been disclosed to Jordan in closer proximity to their discovery by the State. However, the court determined that the appropriate remedy was a continuance to permit Jordan's counsel to interview Scott and Howell.

As we stated earlier, whether to grant a mistrial is within the trial court's discretion. See *Bunch*, 191 Wis.2d at 506, 529 N.W.2d at 925. The trial court properly exercised its discretion in fashioning a remedy which addressed Jordan's

concerns about preparing for the witnesses who had repudiated earlier statements inculcating Jordan.²

Finally, Jordan challenges his sentence. The trial court sentenced Jordan to twenty years on the armed robbery count and a consecutive five-year term of probation for the count of intentionally taking a motor vehicle. Jordan claims that the sentence was excessive and that the trial court's sentencing rationale does not support the length of the sentence.

Public policy strongly disfavors appellate courts interfering with the sentencing discretion of the trial court. *See State v. Teynor*, 141 Wis.2d 187, 219, 414 N.W.2d 76, 88 (Ct. App. 1987). We review whether the trial court misused its sentencing discretion. *See State v. J.E.B.*, 161 Wis.2d 655, 661, 469 N.W.2d 192, 195 (Ct. App. 1991). We presume that the trial court acted reasonably, and the defendant must show that the trial court relied upon an unreasonable or unjustifiable basis for its sentence. *See id.*

The trial court examined Jordan's character (including his long history of criminal conduct, notwithstanding his youth), the gravity of the offenses and the need to protect the public, all appropriate factors in sentencing. *See State v. Paske*, 163 Wis.2d 52, 62, 471 N.W.2d 55, 59 (1991). The weight to be accorded these sentencing factors is for the sentencing court to determine in its discretion. *See State v. Spears*, 147 Wis.2d 429, 446, 433 N.W.2d 595, 603 (Ct. App. 1988). We conclude

² We are unpersuaded by Jordan's complaint that he would have taken a different approach in cross-examining the clerk had he known that Scott would not recall inculcating him to the police. The clerk's identification of Jordan was a key issue at trial and thorough cross-examination of the clerk was warranted under these circumstances.

that the trial court properly exercised its discretion in sentencing Jordan and that the sentence does not shock public sentiment.³

By the Court.—Judgments and order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

³ Because we affirm the trial court's exercise of sentencing discretion, we do not address Jordan's claim that the trial court erred in denying his sentence modification motion without a hearing. In that motion, Jordan alleged that the trial court failed to consider all of the factors relevant to fashioning a lesser sentence for Jordan. We have already held that the trial court considered the proper factors in sentencing Jordan.

