COURT OF APPEALS
DECISION
DATED AND FILED

October 11, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal Nos. 2004AP2571-CR
2004AP2572-CR
2004AP2573-CR

Cir. Ct. Nos. 1999CF0658
1999CF5263
2000CF4921

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

WILLIE D. ENGRAM,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Milwaukee County: ROBERT CRAWFORD and DAVID A. HANSHER, Judges.[1] *Affirmed*.

[1] The Hon. Robert Crawford presided over the initial trials and issued the judgments of conviction. The Hon. David A. Hansher presided over the postconviction motion hearing and issued the order denying same.

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

¶1 CURLEY, J. Willie D. Engram appeals the judgments convicting him, following two separate jury trials, of two counts of battery to a law enforcement officer, contrary to WIS. STAT. § 940.20(2) (1999-2000);[2] one count of first-degree reckless injury while using a dangerous weapon, contrary to WIS. STAT. §§ 940.23(1) and 939.63(1)(a)2. (1999-2000); one count of second-degree recklessly endangering safety while using a dangerous weapon, contrary to WIS. STAT. §§ 941.30(2) and 939.63; and one count of disorderly conduct while using a dangerous weapon, contrary to WIS. STAT. §§ 947.01 and 939.63 (1999-2000). He also appeals from the order denying his postconviction motion.[3] On appeal, Engram argues that: (1) during voir dire, the trial court improperly enhanced the credibility of the police witnesses, thereby biasing the jury pool; (2) his attorney was ineffective for failing to object to the trial court's questions to the prospective jurors which enhanced the credibility of police witnesses, and for failing to move to strike an allegedly objectively-biased juror, Wendy S., for cause; and (3) the trial court erroneously exercised its discretion in imposing sentences by utilizing inaccurate information. Because the trial court properly exercised its discretion in questioning prospective jurors and therefore did not bias the jurors, and because the juror in question was not objectively biased, Engram's attorney was not ineffective for failing to object to either the trial court's questions or for failing to request that Wendy S. be stricken for cause. Further, while the trial court was

[2] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

[3] This court granted Engram's motion seeking to consolidate the matters on appeal.

mistaken about what a police officer saw at one of the scenes, the sentencing was properly conducted. Consequently, we affirm.

I. BACKGROUND.

¶2 Engram was charged in three separate cases. Two of the cases were consolidated for trial. The case charging Engram with first-degree reckless injury while armed was consolidated with the second-degree recklessly endangering safety and disorderly conduct while armed charges. Engram objected to the consolidation. Two separate jury trials were held, with the first jury hearing the evidence concerning the two counts of battery to law enforcement officer charges, and the second jury hearing the evidence on the first-degree reckless injury while armed, second-degree recklessly endangering safety while armed and disorderly conduct while armed charges. During the voir dire at both trials, the trial court inquired, in a series of questions, whether the panel believed that police officers were more believable than other witnesses. The trial court also explored with the jury panel whether they thought police officers were capable of being wrong in their observations of events. No objection was made to the trial court's questions. Additionally, one of the jurors revealed she was personally acquainted with one of the police officers who testified. However, she advised the court that she believed she could be fair and impartial. No motion was made asking the court to strike the juror for cause. The two juries found Engram guilty of all counts, and the trial court sentenced Engram on all of the counts at the same hearing.

¶3 The initial charges of two counts of battery to a police officer followed an incident that occurred on February 5, 1999. According to the complaint and the testimony at trial, two plain-clothed Milwaukee police officers were driving an unmarked squad car when they saw Engram urinating against a

building. The officers stopped and asked Engram for identification. When Engram could not provide satisfactory identification, the officers accompanied him to his apartment so that he could show them proper identification. At his apartment, Engram began rummaging through a nightstand drawer. After one of the officers asked him to stop, Engram became angry and a fight ensued. Engram struck both officers, and bit one of the officers in the thumb, requiring a tetanus shot.

¶4 The second case, charging Engram with first-degree reckless injury while armed, was generated by an incident that occurred on October 11, 1999. According to the criminal complaint, Mark Pugh, a man with both physical and mental disabilities, told police that he was at a bus stop when he encountered Engram, another man and a woman. The man accompanying Engram asked Pugh for money, and when Pugh claimed not to have any, Engram threatened to harm him. Pugh stated he became angry and struck Engram. All three people then attacked Pugh. Pugh told the police that during the fight, Engram cut him across the right side of his neck with a razor. Engram also cut Pugh several more times with the razor, as well as punched and kicked him. When the police arrived, Engram was observed kicking Pugh, who was lying on the ground. Pugh's injuries put him in critical condition.

¶5 The second-degree recklessly endangering safety while armed and disorderly conduct while armed charges were the result of an incident that occurred on September 22, 2000. A juvenile claimed that Engram confronted him at a gas station and displayed a knife. When the juvenile ran home, he told his brothers and his mother what had occurred. The brothers confronted Engram, asking him why he was chasing their brother with a knife. Engram turned and ran away, but the brothers and mother followed him to a fast food restaurant where

Engram swung the knife several times at one of the brothers, striking him in the face and arm. One of the cuts from the knife required ten stitches to close.

¶6 As noted, a jury convicted Engram of the two counts of battery to a police officer in October 2000, and a different jury convicted Engram of the remaining charges in January 2001. The sentencings were consolidated and held on two separate days. Engram was sentenced to 90 days in the House of Correction for count one of the battery to a police officer charge, and to thirty days for the second count of battery to a police officer. Each sentence was to be served consecutive to his other sentences and to each other. On the first-degree reckless injury charge, Engram received a fifteen-year term. Apparently, because the remaining crimes occurred after the passage of the truth-in-sentencing law, Engram was subject to a two-part sentence on the second-degree recklessly endangering safety while using a dangerous weapon charge. The judge sentenced Engram to a term of six years of initial confinement and three years of extended supervision for the second-degree recklessly endangering safety charge, and nine months consecutive to his other sentences on the disorderly conduct while armed charge. The sentences for these charges were ordered to be served consecutive to the other sentences. Engram filed a postconviction motion which was denied without a hearing.

II. ANALYSIS.

A. Engram has waived his right to challenge the trial court's questioning of prospective jurors.

¶7 Engram argues that the trial court "enhanced the credibility of police witnesses against Mr. Engram," and that the trial court's actions resulted in "objectively biasing the jury pool." Engram contends that the trial court, at both

trials, "engaged in extensive voir dire of prospective jurors who were related to, had formed friendships with or were acquainted in some way with police or law enforcement officers as to whether those officers had ever been wrong[.]" He claims the trial court's questioning biased the jurors in favor of the police. He asserts that: "The voir dire at issue here reinforced rather than assuaged any biases the jurors may have had by drawing their attention to the issue of police officers witness credibility and making it more prominent in their minds[,]" and,

> the effect of the voir dire in these cases was to drive home to the jury the opinion that police officers do not, in fact, make mistakes, as testified to by those who knew them best: their family and friends. The lesson that the jury took, by either accident or design, from the court's voir dire was that because police officers are not mistaken, the testimony that they give can be trusted.

The State responds that Engram has waived his right to review this issue by not objecting. We agree with the State.

¶8 Failure to object to an error at trial generally precludes a defendant from raising the issue on appeal. ***State v. Marshall***, 113 Wis. 2d 643, 653, 335 N.W.2d 612 (1983). Engram claims the trial court's actions resulted in a due process violation. However, the waiver doctrine applies even to a claim of a constitutional right. ***Id.*** Thus, we conclude that this issue was waived.

¶9 Moreover, in addressing Engram's claim of ineffective assistance of counsel, we have reviewed the record and we are satisfied that Engram's attorney was not ineffective for failing to object to the trial court's actions because the trial court properly exercised its discretion in its questioning of the prospective jurors.

¶10 The standards for ineffective assistance of counsel are well known. In order to prevail on a claim of ineffective assistance of counsel, a defendant

must show that the attorney's performance was deficient and that the defendant was prejudiced as a result of the attorney's deficient conduct. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); *see also* ***State v. Pitsch***, 124 Wis. 2d 628, 633, 369 N.W.2d 711 (1985). A defendant who claims ineffective assistance of counsel must prove both that his or her lawyer's representation was deficient, and, as a result, the defendant suffered prejudice. *See* ***Strickland***, 466 U.S. at 690. To prove deficient performance, the defendant must show specific acts or omissions of his attorney that fall "outside the wide range of professionally competent assistance." ***Id.*** To show prejudice, the defendant must demonstrate that the result of the proceeding was unreliable. ***Id.*** at 687. If the defendant fails on either prong—deficient performance or prejudice—his ineffective assistance of counsel claim fails. ***Id.*** at 697. We "strongly presume[]" counsel has rendered adequate assistance. ***Id.*** at 690.

¶11 Engram complains that his attorney should have objected to the trial court's questions that explored with potential jurors a possible bias they may have had concerning law enforcement personnel credibility. Engram submits that the trial court "went beyond testing for bias when [it] elicited from the potential jurors responses indicating that … law enforcement personnel with whom they were acquainted had never made a mistake in even the most trivial matters." He also argues that he was prejudiced by the court's comments.

¶12 The trial court's questioning of a potential juror is proper. Indeed, the trial court is mandated by WIS. STAT. § 805.08(1) to examine each juror and ascertain certain information, including whether the juror is aware of any bias or prejudice that may affect the trial. Section 805.08(1) reads:

> **805.08 Jurors. (1)** QUALIFICATIONS, EXAMINATION. The court shall examine on oath each person who is called as a juror to discover whether the juror is related by blood, marriage or adoption to any party or to any attorney appearing in the case, or has any financial interest in the case, or has expressed or formed any opinion, or is aware of any bias or prejudice in the case. If a juror is not indifferent in the case, the juror shall be excused. Any party objecting for cause to a juror may introduce evidence in support of the objection. This section shall not be construed as abridging in any manner the right of either party to supplement the court's examination of any person as to qualifications, but such examination shall not be repetitious or based upon hypothetical questions.

A trial court has broad discretion regarding questioning on voir dire, and exercise of that discretion will not be disturbed unless the court abuses its discretion or violates some rule of law. *See* ***State v. Migliorino***, 150 Wis. 2d 513, 537, 442 N.W.2d 36 (1989).

¶13 We first observe that Engram's claim that the trial court elicited juror responses that suggested that law enforcement officers make no mistakes is incorrect. On the contrary, some jurors readily admitted that their law enforcement friends and family were capable of mistakes. From our review, we are satisfied that nothing in the court's questions, intentionally or otherwise, enhanced the credibility of police witnesses. Nor can we conclude that objective juror bias was created by the particular questions posed by the court. A prospective juror is objectively biased if "a reasonable person in the prospective juror's position objectively could not judge the case in a fair and impartial manner." ***State v. Erickson***, 227 Wis. 2d 758, 775, 596 N.W.2d 749 (1999). A reasonable person would not have become objectively biased by the trial court's questions. Moreover, our review of the record persuades us that the trial court was correctly concerned about the possibility that jurors might harbor a belief that police officers' observations were more deserving of belief than those of other

witnesses, and the trial court attempted to dispel the jury of any such belief. Inasmuch as the trial court properly exercised its discretion in conducting the voir dire, the failure of trial counsel to object does not amount to ineffectiveness of counsel. Counsel is not ineffective for failing to make meritless arguments. *See* ***State v. Toliver***, 187 Wis. 2d 346, 360, 523 N.W.2d 113 (Ct. App. 1994).

B. No objectively biased juror remained on the jury.

¶14 Engram next complains that juror Wendy S. was objectively biased and should not have been allowed to remain on the jury. Because his attorney did not object and ask that she be stricken from the jury for cause, Engram claims his attorney was ineffective for his failure to do so. As noted, objective bias is judged on the basis of reasonableness—whether a reasonable person in the juror's position would be biased. As an example, when there is evidence from voir dire that a prospective juror has formed an opinion or has prior knowledge, a court must ask if a reasonable person in the juror's position could set aside the opinion or prior knowledge. ***State v. Mendoza***, 227 Wis. 2d 838, 850, 596 N.W.2d 736 (1999). A court's determination of whether a prospective juror is objectively biased is a mixed question of fact and law. ***State v. Faucher***, 227 Wis. 2d 700, 720, 596 N.W.2d 770 (1999). An appellate court should give weight to the circuit court's determination that a prospective juror is or is not objectively biased. ***Id.*** at 721. An appellate court will not reverse a circuit court's conclusion unless as a matter of law a reasonable judge could not have reached such a conclusion. ***Id.***

¶15 Wendy S. revealed during questioning that she knew the detective who testified in the case. She testified that she went to high school with him and had other contacts with him. The following exchange occurred between the trial court and Wendy S.:

[THE COURT:] Ms. Wendy [S.], which names do you recognize?

JUROR: Detective Kuchenreuther.

THE COURT: How do you know Detective Kuchenreuther?

JUROR: I'm friends with his ex-wife.

THE COURT: You're friends with his ex-wife?

JUROR: With him and his ex-wife, yes.

THE COURT: Have you maintained your friendship with both Detective Kuchenreuther and his ex-wife?

JUROR: Yes.

THE COURT: How long have you known Detective Kuchenreuther?

JUROR: Eight years. I knew him in high school too. He lives next door to my husband's parents.

THE COURT: Eventually this is going to come out. Which year did you graduate from high school?

JUROR: '75.

THE COURT: Did you have much interaction with Detective Kuchenreuther in high school?

JUROR: No, I didn't.

THE COURT: How much interaction have you had with him over the last twenty-five years since graduating from high school?

JUROR: In the last eight years I got to know his wife through him.

THE COURT: Since the couple divorced, how often have you seen Detective Kuchenreuther?

JUROR: Maybe once or twice a month.

THE COURT: Do you participate in any particular social activities with him?

JUROR: No.

> THE COURT: Would you describe the circumstances when you meet him as just bumping into each other in the neighborhood or the like?
>
> JUROR: Right.
>
> THE COURT: Would you be able to listen fairly and impartially to testimony that he might present?
>
> JUROR: Yes, I could.
>
> THE COURT: In your interactions with him through high school and over the last twenty-five years, have you ever known him to be mistaken about anything?
>
> JUROR: Not that I know of, no.
>
> THE COURT: Do you ever remember an incident in high school when the two of you looked at the same thing and maybe had a disagreement about what it was that you saw?
>
> JUROR: No.
>
> THE COURT: Did you two ever attend a sporting event in high school when there was a close call about which side of the line a football player had his foot on?
>
> JUROR: No.
>
> THE COURT: Thank you.

Implicit in the trial court's actions of concluding the questioning of Wendy S., and moving on to another juror, was the trial court's belief that Wendy S. was not objectively biased. As is evident from the exchange, Wendy S.'s responses did not reveal any objective bias on her part. She knew the witness, although not well, and she believed she could be fair and impartial. Nothing in the record would have supported the trial court's removal of Wendy S., had such a request been made. As noted, to find counsel's performance to be ineffective requires a showing of both that the performance was deficient and that the deficiency was prejudicial. We find no error in counsel's decision not to request that she be stricken. As a result, the trial attorney was not ineffective in this regard.

C. The trial court properly exercised its discretion at sentencing.

¶16 Finally, Engram argues that the trial court erroneously exercised its discretion at sentencing when the trial court recollected that a police officer "saw your hand movement back and forth across [the victim's] throat." Engram contends that this is incorrect, and as a result of the trial court's mistake, the trial court's remarks at sentencing were deficient under the standard promulgated in ***McCleary v. State***, 49 Wis. 2d 263, 182 N.W.2d 512 (1971). We disagree.

¶17 A trial court's sentence is reviewed for an erroneous exercise of discretion. *See* ***State v. Paske***, 163 Wis. 2d 52, 70, 471 N.W.2d 55 (1991). There is a consistent and strong policy against interference with the discretion of the trial court in passing sentence. ***Id.*** at 61-62. This policy is based on the great advantage the trial court has in considering the relevant factors and the demeanor of the defendant. ***State v. Harris***, 119 Wis. 2d 612, 622, 350 N.W.2d 633 (1984). Furthermore, "the trial court is presumed to have acted reasonably, and the burden is on the appellant to 'show some unreasonable or unjustifiable basis in the record for the sentence complained of.'" ***State v. Thompson***, 172 Wis. 2d 257, 263, 493 N.W.2d 729 (Ct. App. 1992) (citation omitted). It is well established that trial courts must consider three primary factors in passing sentence. Those factors are "the gravity of the offense, the character and rehabilitative needs of the defendant, and the need to protect the public." ***Paske***, 163 Wis. 2d at 62 (citing ***State v. Sarabia***, 118 Wis. 2d 655, 673, 348 N.W.2d 527 (1984)). The weight to be given to each of the factors is a determination particularly within the discretion of the trial court. ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). After consideration of all relevant factors, the sentence may be based on any one of the three primary factors. ***State v. Krueger***, 119 Wis. 2d 327, 338, 351 N.W.2d 738 (Ct. App. 1984).

¶18 The exercise of a sentencing court's discretion requires a demonstrated process of reasoning based on the facts of the record and a conclusion based on a logical rationale. ***McCleary***, 49 Wis. 2d at 277. The trial court must engage in an explained judicial reasoning process and provide the reasons for its actions. ***Id.*** at 281-82. However, even if the trial court fails to adequately set forth its reasons for imposing a particular sentence, the reviewing court will not set aside the sentence for that reason. ***Id.*** at 282. The reviewing court is "obliged to search the record to determine whether in the exercise of proper discretion the sentence imposed can be sustained." ***Id.***

¶19 "A defendant has a due process right to be sentenced based on accurate information." ***State v. Groth***, 2002 WI App 299, ¶21, 258 Wis. 2d 889, 655 N.W.2d 163. The defendant has the burden of proving by clear and convincing evidence the inaccuracy of the information and that the information was prejudicial. ***Id.***, ¶22. Whether the sentence was based on inaccurate information that was prejudicial to the defendant is a constitutional issue that presents a question of law, which we review *de novo*. ***Id.***, ¶21.

¶20 Here, we first observe that the trial court's recollection concerning the police officer's eyewitness observation was inaccurate. The testifying officer who responded to the incident where Engram attacked the victim with a razor did not actually see Engram strike the victim with the razor, but the police officer did see Engram kicking the victim. Perhaps because the sentencing in this matter was held approximately three months after the jury trial, the trial court failed to accurately recall all of the events, or perhaps because the police responded very quickly to the incident, the trial court believed the officer was an eyewitness to the razor slashing. In any event, the fact that the trial court mistakenly believed that a police officer was an eyewitness to the slashing is, in this instance, irrelevant. The

victim testified that Engram slashed at him with a razor numerous times. Indeed, the victim testified he needed 113 stitches as a result of Engram's actions. Inasmuch as Engram denied harming the victim at all and claimed that he only intervened, at which time the actual attackers escaped, the jury clearly accepted the victim's testimony over Engram's account. Thus, the issue in this case was not who saw the victim get injured, but what injuries Engram inflicted on the victim. Whether the trial court believed the officer was an eyewitness was of no consequence because it was not prejudicial to Engram.

¶21 Finally, we turn to Engram's allegation that, as a result of the trial court's mistake, the rationale used by the trial court in sentencing Engram was deficient under ***McCleary***. As noted, the trial court's mistake was not prejudicial to Engram. Additionally, we have read the sentencing transcripts which took place at two separate hearings and encompassed at least four hours of discussion. We note that the trial court in all other respects accurately stated the facts of the numerous charges and carefully explained its reasons for the sentences, including touching upon the severity of the crimes, the treatment needs of Engram and the need to protect the public from Engram's conduct. As a result, the trial court properly exercised its discretion at sentencing. Accordingly, we affirm.

By the Court.—Judgments and order affirmed.

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