COURT OF APPEALS
DECISION
DATED AND FILED

December 13, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP3009-CR **Cir. Ct. No. 2003CF76**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TAMAR T. BROWN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JOHN SIEFERT, Judge. *Affirmed.*

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

¶1 WEDEMEYER, P.J. Tamar T. Brown appeals from a judgment entered after a jury found him guilty of three offenses: delivering cocaine in an amount less than five grams; possessing cocaine with intent to deliver in an amount more than five but less than fifteen grams; and possession of marijuana

(second offense), contrary to WIS. STAT. §§ 961.41(1)(cm)1., 961.41(1m)(cm)2. and 961.41(3g)(e) (1999-2000).[1] He also appeals from an order denying his postconviction motion.

¶2 Brown raises five challenges in this appeal: (1) the evidence was insufficient to support the jury's verdict; (2) the prosecutor committed reversible error by informing the jury of the State's sentencing recommendation for a witness who had pled guilty to a charge different than any of those that Brown faced; (3) the trial court erred in denying Brown's motion for a mistrial when a witness testified about other bad acts over the defense's objection; (4) the trial court erred in allowing the State to amend the information to conform to the evidence; and (5) the trial court erroneously exercised its discretion in sentencing Brown. Because each issue is resolved in favor of upholding the judgment and order, we affirm.

BACKGROUND

¶3 On January 4, 2003, in the late afternoon, Milwaukee Police Officers Michael Lopez and Marnie Ohmund were on routine patrol. The officers observed Brown standing in an alley behind 1415-1417 South 23rd Street. The officers then noticed a maroon van pull into the alley and stop next to Brown. The van was driven by Pamela Beauchamp. Brown got into the van on the passenger side and the van began to travel westbound toward 24th Street. The officers knew this residence to be a drug house and decided to follow the van. The officers observed the van commit several traffic violations and decided to conduct a traffic stop.

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

¶4 As Officer Lopez approached the van, he observed Brown reach back with his left hand and body as if he was reaching for, or attempting to hide, something behind the driver's seat. Lopez then observed, in plain view, a clear plastic baggie containing an off-white powdery substance and a brownish-green plant-like substance sitting on the top of the passenger seat behind the driver. Lopez believed the substances to be cocaine and marijuana.

¶5 Beauchamp was asked to step out of the van to talk to the officers. She told them that she just purchased two "8 balls" from Brown. The term "8 ball" refers to an eighth of an ounce of cocaine base. She removed them from her pocket and handed them to one of the officers. She was then arrested. The officers recovered the bags of cocaine and marijuana from the passenger seat.

¶6 Officer Lopez asked Brown what was going on and he stated he had no idea. Brown was arrested and subsequently charged with: delivery of a controlled substance (cocaine), more than five but less than fifteen grams, second offense; possession with intent to deliver a controlled substance (cocaine), more than five but less than fifteen grams, second offense; and possession of a controlled substance (marijuana), second offense. He pled not guilty and the case was presented to a jury.

¶7 During the trial, the State called Beauchamp as a witness. She testified consistent with her statements to police that she had purchased the cocaine from Brown. Before submitting the case to the jury, the State moved to amend the information to conform to the evidence, specifically charging a lesser amount of cocaine sold. *See* ¶¶ 25, 26. The trial court permitted the amendment. The jury found Brown guilty. He was sentenced to fifteen years, broken down as five years' confinement, ten years' extended supervision on the first count; twenty

years on the second count, broken down into ten years' confinement and ten years' supervision, concurrent; and forty-six days on the third count, offset by the forty-six-day credit for pretrial incarceration. Judgment was entered. Brown now appeals.

DISCUSSION

A. Sufficiency of the Evidence.

¶8 Brown's first claim is that the evidence was insufficient to support the verdict. We reject this claim. Our review of a sufficiency of the evidence claim is limited. An appellate court may: "not reverse a conviction unless the evidence, viewed most favorably to the state and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). Here, a review of the evidence demonstrates that it was sufficient to support the verdict. The officers testified as to what happened. They observed Brown standing in an alley, behind a home known to be a drug house. A van pulled into the alley and stopped next to Brown, who then got into the front passenger seat. The officers followed the van as it drove around the block and then stopped at the point where Brown first got in. The officers had observed the van roll through a stop sign and fail to use its directional signal a number of times. The officers proceeded to conduct a traffic stop.

¶9 As they approached the van, one of the officers observed Brown's movements inside the car, raising suspicion that he was placing something behind the driver's seat. During the stop, the officer discovered cocaine and marijuana placed behind the driver's seat. The officers asked Beauchamp, who was the

driver, to step out of the van. She then told the officers that she had just purchased cocaine from Brown and turned the drugs over to the officers. Beauchamp and Brown were arrested. The police searched Brown and found $2705 in cash in his pocket.

¶10 Beauchamp testified at trial. She told the jury she had called Brown and asked to purchase two "8 balls." They agreed to meet in the specific alley. She drove her van to the alley, spotted Brown, and he got into the front passenger seat. She drove around the block, during which time the purchase occurred. When the officer approached the van, Brown tried to get her to take the bag with the other drugs in it. She declined. She could not say where Brown then put the drug bag because she was watching through the rearview mirror to see the officer approaching the van.

¶11 Based on these facts, it was reasonable for the jury to conclude that Brown had delivered the two "8 balls" of cocaine to Beauchamp and that the bag of drugs found on the rear seat of the van belonged to Brown. Brown argues that this evidence is insufficient because of discrepancies between the officers' version of events and Beauchamp's version.

¶12 He points out that Beauchamp testified that she complied with all traffic rules and used her turn signal before making a turn, whereas the officers testified that she did not use her turn signal. The discrepancies that Brown proffers, however, all relate to the possible impeachment of police testimony. To the extent that conflicts arose in the trial testimony, it was the jury's job to resolve them. ***Id.*** at 506. It is the jury's role to assess credibility of the witnesses and assess what is the truth. ***State v. Allbaugh***, 148 Wis. 2d 807, 809-11, 436 N.W.2d 898 (Ct. App. 1989).

¶13 Accordingly, in applying the limited standard for reviewing sufficiency challenges, we cannot conclude that the evidence was insufficient to support the jury's verdict.

B. Prosecutor's Closing Argument.

¶14 Brown next claims that the prosecutor committed reversible error when it read a letter during closing argument that the prosecutor had sent to Beauchamp's attorney. Brown argues that the letter contained a recommendation with respect to the sentence Beauchamp would receive, and this may have led the jury to conclude that Brown would receive a similar sentence. Brown goes on to argue that it is improper to discuss range of punishment during the guilt/innocence stage of the trial because the jury may convict on the basis of the potential punishment instead of the facts of the case. We reject Brown's contention.

¶15 The letter, which was introduced into evidence, was read to demonstrate that the State was not making any promises to Beauchamp in exchange for her testimony against Brown. The letter, its contents and its admissibility had been addressed in a hearing earlier in the proceedings. The trial court ruled that a redacted portion of the letter could be read to the jury. The only portion that Brown objected to refers to the sentence recommendation for Beauchamp:

> [T]he State will still recommend that the Court sentence Ms. Beauchamp as follows: Forty-two months Wisconsin State Prison, eighteen months of which will be initial confinement and twenty-four months are extended supervision, consecutive, a $500 fine plus costs, six-month suspension of driver's license, and a DNA sample and surcharge.

¶16 The trial court specifically addressed Brown's concerns about the jury hearing the recommendation:

> [T]here is a general rule that the penalty is in the hands of the judge and the jury is not to know the penalty. The letter states that Ms. Beauchamp is charged with possession with intent to deliver, cocaine, five grams or less. The jury here will see five to fifteen grams and the charge against Mr. Brown, so they will see they are different, so I don't believe they are being told improperly what the penalty is for the charge against Mr. Brown.

¶17 We agree with the trial court. The contents of the letter did not advise or inform the jury of the potential punishment for Brown. The cases Brown relies on in support of this argument all refer to situations disclosing the potential punishment of the defendant, not a State's witness who faces a different charge. *See, e.g.*, ***Bruton v. State***, 921 S.W.2d 531, 535 (Tex. Crim. App. 1996).

¶18 Finally, this argument rests on pure speculation and cannot form the basis of reversible error. There is no reasonable possibility that the contents of the letter read during closing argument contributed to the conviction because it did not disclose Brown's potential punishment. Any error, therefore, was harmless. ***State v. Dyess***, 124 Wis. 2d 525, 543-44, 370 N.W.2d 222 (1985).

¶19 Brown's alternative argument that his counsel provided ineffective assistance of counsel for not objecting is without merit. In order to prove ineffective assistance, Brown must allege both deficient performance and prejudice. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). We have already concluded that Brown was not prejudiced by the introduction of the letter. Accordingly, any ineffective assistance claim fails.

C. Other Acts/Mistrial.

¶20 Brown argues that the trial court erred in allowing Beauchamp to introduce other acts evidence during her testimony. Specifically, he objected to Beauchamp's answer to the question: "Was there an agreement already as to how much you would be purchasing, or how much the price was going to be from [Brown] to purchase cocaine?" Beauchamp answered: "It was a standard thing, but I owed him some money so I had to pay that too."

¶21 Brown then requested a sidebar, wherein counsel moved for a mistrial based on the reference to other acts evidence—that is, the reference that the price was standard and she owed him money. The trial court denied the motion, reasoning:

> [T]he answer I owed him some money is not in and of itself evidence of any bad acts. She may owe him money for rent. She may have owed him some money for pizza, any number of reasons totally innocent. It does not necessarily imply any bad acts, so I will deny the request for a mistrial on that point.

¶22 Brown argues the trial court should have granted the motion for a mistrial. In reviewing a trial court's decision on a mistrial motion, we afford great discretion to the trial court. The trial court must determine, in light of the entire proceeding, whether the basis for the mistrial request is sufficiently prejudicial to warrant a new trial. We will reverse the trial court's ruling only if there is a clear erroneous exercise of discretion. ***State v. Bunch***, 191 Wis. 2d 501, 506-07, 529 N.W.2d 923 (Ct. App. 1995).

¶23 Here, the trial court's determination did not constitute an erroneous exercise of discretion. The trial court reasoned that Beauchamp's answer did not necessarily mean that she owed Brown money from past drug purchases.

Moreover, the statement does not by itself connote a reference to Brown's "other acts." The jury could have taken Beauchamp's statement to mean that she knew what the standard price of drugs was in the drug community, not that Beauchamp was referring to Brown's standard prices.

¶24 Further, we agree that even if this statement should not have been admitted, it did not rise to the level of sufficient prejudice to warrant a mistrial. The comment was not emphasized by the State or referred to in the State's case. Accordingly, its admission was harmless error. *See* ***State v. Petrovic***, 224 Wis. 2d 477, 494-95, 592 N.W.2d 238 (Ct. App. 1999).

D. Amending the Information.

¶25 Next, Brown argues that the trial court erred in granting the State's motion to amend the information to conform to the evidence. This argument relates solely to the first count of the information, which originally charged Brown with delivery of cocaine in an amount *more than five grams*, but not more than fifteen grams. This count related to the two "8 balls" of cocaine that Brown sold to Beauchamp.

¶26 After the close of the evidence, Brown moved for a directed verdict on count one because, based on a stipulation between the parties, the two "8 balls" weighed 4.558 grams. This amount, obviously, is less than the "five grams," with which Brown was charged.

¶27 In response to the motion for a directed verdict, the State asked the court to amend the information on count one to conform to the evidence. The trial court allowed the amendment and denied Brown's motion. The jury was then given an instruction explaining the change.

¶28 Whether to allow an amendment to the information is a discretionary decision for the trial court. ***State v. Flakes***, 140 Wis. 2d 411, 416, 410 N.W.2d 614 (Ct. App. 1987). We will affirm a discretionary decision unless the trial court erroneously exercised its discretion. ***Id.*** If the trial court considered the pertinent facts, applied the correct law and reached a reasonable determination, we will affirm the decision. ***Id.*** at 417.

¶29 WISCONSIN STAT. § 971.29(2) provides that a court "may allow amendment of the … information to conform to the proof where such amendment is not prejudicial to the defendant." The purpose of the information is to provide notice to the defendant as to the acts he is alleged to have committed so that he may prepare to defend against the charges. ***State v. Waste Mgmt. of WI, Inc.***, 81 Wis. 2d 555, 566, 261 N.W.2d 147 (1978). Thus, the important fact in addressing this issue is whether the defendant had sufficient notice of the amended count. ***State v. Wickstrom***, 118 Wis. 2d 339, 347-48, 348 N.W.2d 183 (Ct. App. 1984).

¶30 The record reflects that Brown had adequate notice of the amended count. The amendment related solely to correcting the charge with respect to the weight of the cocaine that he was accused of delivering. The parties stipulated to the weight. Thus, the amendment did not prejudice Brown and the trial court did not erroneously exercise its discretion in allowing the amendment to conform to the evidence.

E. Sentencing.

¶31 Brown's final argument is that the trial court erroneously exercised its discretion when it imposed sentence. Brown believes the trial court imposed a harsher sentence based on his misstatement during the sentencing hearing that he "never done no wrong in my life." Brown argues that he did not mean to say that,

but rather he meant to say he is not saying that he's never done anything wrong in his life.

¶32 In reviewing sentencing issues, our review is limited to determining whether the trial court erroneously exercised its discretion. ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. A strong public policy exists against interfering with the trial court's discretion in determining sentences and the trial court is presumed to have acted reasonably. ***Wickstrom***, 118 Wis. 2d at 354. A defendant claiming that his or her sentence was unwarranted must "show some unreasonable or unjustified basis in the record for the sentence imposed." ***State v. Borrell***, 167 Wis. 2d 749, 782, 482 N.W.2d 883 (1992). To properly exercise its discretion, a sentencing court must provide a rational and explainable basis for the sentence. ***McCleary v. State***, 49 Wis. 2d 263, 276, 182 N.W.2d 512 (1971). It must specify the objectives of the sentence on the record which include, but are not limited to, the protection of the community, punishment of the defendant, rehabilitation of the defendant, and deterrence of others. *See* WIS JI—CRIMINAL SM-34 (1999). It must identify the general objectives of greatest importance, which may vary from case to case. ***McCleary***, 49 Wis. 2d at 276.

¶33 In addition to the three primary sentencing factors, other relevant factors that the circuit court may consider include: (1) the defendant's past record of criminal offenses; (2) any history of undesirable behavior patterns; (3) the defendant's personality, character and social traits; (4) the presentence investigation; (5) the nature of the crime; (6) the degree of the defendant's culpability; (7) the defendant's demeanor at trial; (8) the defendant's age, educational background and employment record; (9) the defendant's remorse and cooperativeness; (10) the defendant's need for close rehabilitative control; (11) the rights of the public; and (12) the length of pretrial detention. ***Harris v. State***, 75

Wis. 2d 513, 519-20, 250 N.W.2d 7 (1977). The trial court need discuss only the relevant factors in each case. ***State v. Echols***, 175 Wis. 2d 653, 683, 499 N.W.2d 631 (1993). The weight given to each of the relevant factors is within the court's discretion. ***State v. J.E.B.***, 161 Wis. 2d 655, 662, 469 N.W.2d 192 (Ct. App. 1991).

¶34 Brown does not dispute that the trial court addressed the three primary factors. Rather, his argument lies with the fact that the trial court referred to Brown's alleged misstatement in noting: "I wish that you didn't think in the way that you think; that I wish you understood that your statement that you never done no wrong in my life just really shows a criminal way of thinking that your drug dealing is not wrong." The sentencing transcript, however, when read as a whole, reflects that the trial court did not impose its sentence based on this single sentence. Rather, the transcript reflects a proper exercise of discretion.

> THE COURT: … [I]n my sentencing, I should note for the record why I feel a much different sentence is appropriate for you than for the person that was charged with you as a co-defendant in the original criminal complaint. By that, of course, is Pamela Beauchamp.
>
> There [are] clearly very strong reasons why these sentences between you and her should be vastly differen[t], because while she took responsibility for her actions and testified truthfully about what went down, your statement here in court shows the difference. Your statement that you just made shows the difference.
>
> I will quote from what you just told me. "She was the one running away from the case. For what reason, I don't know." Well, Mr. Brown, testifying truthfully in front of a jury is not running away from a case, particularly when the State did not give her any consideration, did not offer her anything in exchange for her testimony.
>
> When she comes to court to testify without any offer made … by the State to her in exchange for her testimony, that's not running away from the case. I think your way of thinking is demonstrated by the statement that you just

made here in court [that] "I have never done no wrong in my life."

….

Well, Mr. Brown, selling drugs is doing wrong. Now, your lawyer's absolutely correct. I don't punish people for going to trial, and, particularly, when they don't take the witness stand and testify untruthfully, and you didn't take the witness stand in this case, and you didn't testify untruthfully, but there is some other potential downsides to going to trial from a defendant that you need to understand.

One of them is that I hear the evidence. Even if you are not testifying, I hear the evidence from the other people and learn more about the offense and more about the character of the actors than I would otherwise know, because I heard the actual trial testimony, and as the trial testimony came in from Pamela Beauchamp … was that as the police squad was approaching and the policemen were walking towards you in the car, you tried to push the drugs off on to her to make it seem like they're all her drugs.

That's just -- that just amazes me that you would not realize that I would think doing that is a sign of bad character.

….

Now, I also need to consider the seriousness of the offense and the need to protect the public, and, quite frankly, we need to protect the public from drug dealers like you.… I wish that you didn't think in the way that you think; that I wish you understood that your statement that you never done no wrong in my life just really shows a criminal way of thinking that your drug dealing is not wrong.

[BROWN]: Your Honor, I never said that I didn't do anything wrong in my life.

THE COURT: I am just quoting exactly what you said, Mr. Brown.

….

[BROWN]: I must have told you wrong. I said that I -- I said that I am not the best person in life, but I am not the worst. I didn't mean that I have never done any wrong in

> life, Your Honor. I'm not saying that. I never -- I didn't mean to say that.
>
> THE COURT: You may not have meant to say it. I think it does reflect your statements during the sentencing, and your elocution does in fact reflect your way of thinking, and your way of thinking is a criminal way of thinking, so I do believe that a lengthy prison sentence is necessary on the two of these three cases, and I am going to impose what for me is a relatively lengthy prison sentence. It will not be as long as recommended by the State.

¶35 This excerpt demonstrates that although the court did refer to Brown's alleged misstatement, it did not base its sentence on it. Rather, the court based its sentence on the pertinent sentencing factors and his overall failure to take responsibility for his actions during the trial by arguing that all the drugs belonged to Beauchamp.

¶36 Moreover, the sentence imposed was less than the twenty-to-thirty years' initial confinement recommended by the State, and less than the maximum potential sentence. Accordingly, we cannot conclude that the sentence imposed was excessive or shocking to public sentiment. Thus, we reject Brown's contention that the trial court erroneously exercised its discretion in imposing sentence.

By the Court.—Judgment and order affirmed.

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