COURT OF APPEALS
DECISION
DATED AND FILED

June 13, 2006

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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

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

Appeal No. 2005AP1510-CR **Cir. Ct. No. 2002CF2265**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL R. GAULTNEY,

DEFENDANT-APPELLANT.

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

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

¶1 CURLEY, J. Michael R. Gaultney appeals from the judgment of conviction entered after a jury convicted him of armed robbery with threat of force, party to a crime, contrary to WIS. STAT. §§ 943.32(2) and 939.05

(2003-04).[1] He also appeals the denial of his postconviction motion. Gaultney contends that the evidence used to convict him was insufficient and that the trial court erroneously exercised its discretion in sentencing him. Because we conclude that there was sufficient evidence to convict Gaultney, and that the trial court properly exercised its sentencing discretion, we affirm.

I. BACKGROUND.

¶2 This case arises out of an incident that took place on April 17, 2002, on the porch of the residence located at 2709 North 47th Street in the City of Milwaukee. Although there are conflicting accounts of what actually happened, the following is known about the incident. Joseph Copeland, Shavoni Williams and Jonathan Brown were sitting on the porch, when they were approached by Gaultney and Marvin Woods. Pointing a gun at Copeland, Woods demanded money, in response to which the three men emptied their pockets. Copeland attempted to reach for Woods's gun and a struggle ensued. The gun went off and Copeland was hit. Copeland then apparently fell to the ground, gained possession of Woods's gun, and fired it at Woods as Woods was running away. What happened next is in dispute, but according to some accounts, Gaultney fired a different gun at Copeland, hitting Copeland in the back. It is undisputed that Copeland was shot ten times and was not expected to live. Copeland survived but was left with permanent disabilities.

¶3 Gaultney was arrested and charged with attempted first-degree intentional homicide and armed robbery, party to a crime. He was interviewed by

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

the police four times, and during one of the interviews, conducted by Detectives Michael Wesolowski and Carl Buschmann, he gave a statement admitting that he fired a .9-mm pistol.[2] Gaultney's attorney brought a motion to suppress the statement.

¶4 A ***Miranda-Goodchild***[3] hearing was held in response to the motion. Detectives Wesolowski and Buschmann testified that after Gaultney was read his ***Miranda*** rights, he agreed to speak with them about the incident, and gave a statement that was reduced to writing and signed by Gaultney. They indicated that Gaultney was never threatened, and that he wished to add to the end of the statement that he was sorry. Gaultney claimed that he was never read his ***Miranda*** rights, but admitted signing multiple forms acknowledging that he was. He also testified that he only told the detectives "what [they] wanted to hear," and that they told him that unless he gave a statement, he would never see his family again, and they promised him that he could go home if he did. The court denied the motion and concluded that Gaultney was given his ***Miranda*** warnings and that the statement was voluntary.[4]

[2] A copy of Gaultney's statement is not in the record; however, the statement was read to the jury by Detective Buschmann at the trial and is thus part of the record.

[3] *See* ***Miranda v. Arizona***, 384 U.S. 436 (1966); ***State ex rel. Goodchild v. Burke***, 27 Wis. 2d 244, 133 N.W.2d 753 (1965).

[4] The following day, the testimony on the suppression motion was reopened as a result of new information obtained by the State related to Gaultney having been subjected to a polygraph test. Detective Buschmann testified that the results are not admissible in state courts in Wisconsin and are used only as an "investigative tool." The detective who administered the test told the court that he provided the result of Gaultney's polygraph test to the other detectives involved, but that the results are never revealed to the defendant. Gaultney testified that he had been told that he failed the polygraph test. The court ultimately did not change its decision, but felt it necessary to supplement the record with the new information.

¶5 After a number of delays, a jury trial began on May 11, 2004. Several witnesses testified. Detective Wesolowski, who, along with Detective Buschmann, investigated the scene, testified that they recovered numerous .9-mm caliber bullets, unfired cartridges and casings. Detective Steven Caballero testified that two days after the incident he recovered a loaded .9-mm Jericho handgun from Woods's girlfriend's residence. Reginald Templin, from the State Crime Laboratory, who examined the bullets, unfired cartridges and casings, testified that four of the casings were fired from the same Jericho .9-mm semiautomatic pistol and that eleven were fired from the same Mack 11 semiautomatic pistol. He testified that the fired bullets were too damaged to conclusively tell whether they were from the Jericho .9-mm, but stated that they were not from a Mack 11.

¶6 Williams testified that he, Copeland and Brown were sitting on the porch when Woods and another man, whom he later identified as Gaultney, appeared from around the house. He stated that Woods was holding a Mack 10 gun and was pointing it at Copeland, but that he did not see Gaultney with a gun. He indicated that Woods then made a statement implying that he wanted to rob them, that the three of them complied, and that the entire time Gaultney only stood there and did nothing to assist Woods. According to Williams, Copeland then reached out and grabbed Woods, and that Woods swung the gun at Copeland. Williams stated that at this point he ran off, and that as he was running he heard gunshots, but did not know who fired them or whether anyone was hit.

¶7 Copeland also testified. He first indicated that Woods had previously tried to steal his car, which had led to problems between them. He told

the jury that on April 17, 2002, he, Williams and Brown[5] were sitting on the porch when Gaultney, whom he did not know, and Woods approached them and robbed them. He testified that Woods was holding a gun, and that at the time he did not see Gaultney with a gun. He stated that Gaultney did not say anything and simply stood by the porch. According to Copeland, Woods then threatened to shoot him and his friends, which made him fear for his life, so he reached for the gun. He testified that the gun went off and that he blacked out, but thought a struggle must have taken place because when he regained consciousness, he had the gun in his possession. He found himself on the ground in great pain. He said he then saw Woods running away, and while still holding Woods's gun, he fired in Woods's direction. He testified that he then noticed Gaultney standing approximately seven or eight feet away with a gun, and that Gaultney "[r]aised the gun and emptied the clip into [his] body."

¶8 Detective Buschmann then testified about the statement Gaultney gave during his and Detective Wesolowski's interview.

> Q. What did Mr. Gaultney tell you that he and [Woods] did on April 17 of 2002?
>
> A. "He stated [Woods] picked him up at Mr. Gaultney's house … that the two of them started riding around in the car.… He said an unknown dude came up to the car and talked to [Woods] and told [Woods] that [Copeland] was up on the porch and then nodded in the direction where [Copeland] was. Mr. Gaultney indicated that he didn't know who [Copeland] was but had heard on the street that [Copeland] had shot at [Woods] in the past.

[5] After the shooting, Brown apparently moved to Atlanta, Georgia, and was not available to testify.

He stated that [Woods] then pulled off and drove into an alley … somewhere in the immediate area, that Mr. Gaultney stayed in the car, that [Woods] left the car and returned approximately five minutes later carrying two guns and he described one of the guns as being an Uzi-type weapon and he couldn't explain it at first so I had him draw it out on a piece of paper and he drew a picture of what the gun looked like."

….

Q. And did Mr. Gaultney describe to you the other type of gun that [Woods] came back with?

A. Yes. He stated it was a large black pistol.

Q. And what did he tell you about the second gun?

A. Oh, I'm sorry. That's what he said it was. He stated the second gun was a .9 mm black pistol.

Q. What did he tell you happened after [Woods] came back with these two guns he described?

A. "[Woods] … parked the car one block north of [the porch] and he asked Gaultney if he was going to watch his back and Gaultney indicated to us that he didn't know what [Woods] planned on doing. He knows he was 'fin [sic] to do something but he didn't know what it was. And Mr. Gaultney took possession of the .9 mm pistol and [Woods] had the Uzi. They exited the car -- "

Q. Let me back you up. Did Mr. Gaultney tell you what he did with the .9 mm pistol when [Woods] gave it to him?

A. He placed it in his front pant's pocket.

Q. Then where did he tell you he and [Woods] went?

A. "They walked down the alley … [a]nd when they came out in front of the house [Copeland] was standing on the porch with two other dudes and he stated that [Woods] had the Uzi out and that he stated to [Copeland] something to the effect of 'strip.'

> Gaultney states that he went and stood on the public sidewalk and just watched and that he saw [Woods] or he saw the guys on the porch emptying their pockets. He states that [Copeland] grabbed for the gun and that [Copeland] and [Woods] wrestled over the gun and the gun was going off.
>
> While [Copeland] was on the ground he was yelling '[Woods] is shooting me' and that [Copeland] was able to get the gun away from [Woods]. [Copeland] sat up with the Uzi and pointed it at Gaultney. Gaultney states that he almost shit in his pants as he thought [Copeland] was going to shoot him. He states that [Woods] ran across [the] [s]treet and that he (Gaultney) just stared at [Copeland]. Gaultney thought that Joe was going to start shooting so he (Gaultney) pulled out his .9 mm pistol and started to run. And as he was about 12 feet from [Copeland], he started to fire the gun over his shoulder in [Copeland]'s direction. Gaultney states he wasn't aiming and has no idea where his shots went.
>
> Gaultney states that he thinks he fired about five or six shots. Gaultney states that as he was running away … he saw [Copeland] fire numerous shots in his (Gaultney's) direction, that he met up with [Woods] at [Woods]'s car at which time he (Gaultney) stated to [Woods] 'man, this is fucked up. Take me home.' He gave [Woods] back the .9 mm pistol and [Woods] drove him home."

¶9 Ramon Bridges testified for the defense. He stated that he was driving to a nearby convenience store when he recognized Copeland and Brown on the porch, and that when he got out of his car at the store, about forty-five to fifty feet away from the porch, he heard gunshots, turned around, and saw Copeland struggling with a man he did not recognize. He also testified that a man with braids, who was wearing a red t-shirt, was standing behind Copeland, and then began shooting at Copeland with a silver gun. Bridges indicated that he was not wearing his glasses at the time, and was unable to later identify any of the individuals he did not recognize.

¶10 Tina McClain testified that she lives close to where the shooting took place, and that when she heard gunshots, she ran downstairs and saw a man who had braids and was wearing a red t-shirt, holding a silver gun. She testified that the man in the red t-shirt was the only person she saw and that she did not see anyone who was injured. The defense then called Detective Caballero back to the stand. He testified that during the investigation he spoke with McClain and that she was shown photographs in an attempt to identify the individual she had seen. McClain picked a photograph depicting Shavoni Williams "as somewhat fitting the description" of the man in the red t-shirt.

¶11 Finally, Gaultney took the stand in his own defense. He testified that he and Woods were driving around, and when they stopped, a man told Woods that Copeland was in the vicinity. Gaultney testified that he did not know Copeland and that Woods told him to go with him and that Copeland owed him, Woods, money. He testified that Woods then parked the car and told him to follow, and that he followed Woods to a porch where he heard people talking. He stated that he did not recognize any of the people on the porch and just stood on the sidewalk. He then told the jury that two or three minutes later he heard gunshots, at which point he ducked and ran back to the car. He stated that Woods appeared at the car a few minutes later and that he asked Woods to take him home. Gaultney denied having a gun. He also testified that he never told police the truth because he was scared and only told them "what they wanted to hear," and was now telling the truth.

¶12 On cross-examination Gaultney admitted telling police that Woods had asked him to watch his back, but denied shooting Copeland because he had promised Woods he "had his back." He also claimed that even though his earlier statement correctly identified the types of guns that were fired and he drew a

picture of one of them, he lied when he admitted firing a gun. He also claimed not to have seen anything because he was facing the street with his back to the porch. He admitted adding to his statement that he was sorry and telling police that he did not want to go to prison for something Woods did, but denied this was the truth. He also admitted telling police that he fired the gun over his shoulder as he was running, but denied this was the truth and claimed doing so would have shot his ear off.

¶13 The jury found Gaultney not guilty of attempted first-degree intentional homicide and guilty of armed robbery, party to a crime.

¶14 Gaultney was sentenced on June 24, 2004. The State recommended a sentence of twenty years of confinement and eight to ten years of extended supervision, and asked the court to consider the facts of the acquitted count, stating that it was an appropriate consideration in terms of Gaultney's character, need for rehabilitation, and need for incarceration. The prosecutor specifically noted that she felt Gaultney had a character of being less than truthful, and that the jury had heard only part of the story because there was an indication that Gaultney had told a number of people that he saved Woods's life by shooting Copeland, but that these people had been unwilling to cooperate with the investigation or be found to be subpoenaed for trial.

¶15 Gaultney's attorney tried to deemphasize the homicide count of which Gaultney was acquitted, and claimed the State was trying to sentence him as

the shooter, even though the jury did not find him guilty on that count.[6] He then recommended either a five-year sentence, comprised of two years of confinement followed by three years of extended supervision, amounting to only extended supervision because Gaultney had already served two years while awaiting trial, or alternatively, a lengthy term of probation.

¶16 Gaultney's mother made a brief statement, stating that her son is not a violent person. When the court asked her[7] about her son's father, she stated that he is in prison and was never a father figure to her son. She was unable to explain what her son had been doing for the past four to five years, but was able to tell the court that he had not been gainfully employed, and was living with his

---

[6] Gaultney's attorney also compared Gaultney to Woods, whose case did not go to trial, and who pled guilty to armed robbery and reckless injury, and despite two felony convictions, was sentenced to concurrent sentences of three and thirteen years of confinement on the reckless injury and robbery counts, respectively. He therefore strongly argued that Gaultney should not receive a longer sentence than Woods.

"A mere disparity between the sentences of codefendants is not improper if the individual sentences are based upon individual culpability and the need for rehabilitation," ***State v. Toliver***, 187 Wis. 2d 346, 362, 523 N.W.2d 113 (Ct. App. 1994), and is improper only if "the trial court based its determination upon factors not proper in or irrelevant to sentencing, or was influenced by motives inconsistent with impartiality," ***Jung v. State***, 32 Wis. 2d 541, 548, 145 N.W.2d 684 (1966).

Here, however, addressing the defense attorney's reference to Woods, the court stated that it "rarely tr[ies] to give much weight to the sentence of a codefendant," but nonetheless determined that "in this particular case … this defendant, particularly if Mr. Woods had two prior adult felony convictions, should not receive more of a sentence than Mr. Woods received." Because Gaultney's sentence was in fact not more than Woods's, and because Gaultney does not raise this issue on appeal, we do not address the issue further.

[7] The court explained that it wished to ask Gaultney's mother questions about her son, particularly because a presentence investigation report was not prepared. At the conclusion of the trial, Gaultney's attorney requested a presentence investigation report. Earlier during the week of the sentencing, the defense was informed that the report had inadvertently not been ordered and was offered an adjournment. Gaultney and his attorney decided to waive the request for a presentence investigation report and to proceed with the sentencing without a report.

grandmother, her mother, at the time of the incident. She also told the court that her son never finished high school because he "just dropped out." Gaultney himself addressed the court and asked for a second chance.

¶17 The court first noted that it was not going to try to resolve whether Gaultney contributed to any of Copeland's many gunshot wounds, but stated that "Gaultney understood that he was participating in a threatening and potentially extremely violent encounter" and "went along with it." The court emphasized the need to protect the public by explaining that "[t]his is the kind of violent street encounter with guns that destroys communities, ruins neighborhoods, creates fear on the part of anyone near the location where this crime might occur …" and concluded that "[w]hether Mr. Gaultney directly contributed to the specific injuries of Mr. Copeland or not, he bears a heavy share of the burden for those injuries."

¶18 The court observed that Gaultney is young, and although he does not have a significant criminal record as an adult, he has a juvenile record that is serious enough that he served time as a juvenile. The court considered the fact that Gaultney lacked a father figure and that he himself now has a son, but concluded that because of his lack of education and employment, his son is "a child he's presently unable to be any more of a father to than his father was to him."

¶19 Finally, the court also noted that Gaultney had not accepted responsibility, but acknowledging that this was related to the many uncertainties about what in fact happened, stated: "I don't consider that his decision to go to trial reflects any unwillingness to accept responsibility." The court then sentenced

Gaultney to thirteen years of initial confinement and twelve years of extended supervision, for a total of twenty-five years.

¶20 Gaultney filed a postconviction motion seeking sentence modification, arguing that the trial court had erroneously exercised its discretion in sentencing him. The trial court issued a written decision and order denying Gaultney's motion. Gaultney now appeals.

II. ANALYSIS.

¶21 On appeal, Gaultney makes two arguments: (1) that the evidence used to convict him of armed robbery was insufficient; and (2) that the trial court erroneously exercised its discretion when it sentenced him to twelve years of initial confinement and thirteen years of extended supervision.

A. Sufficiency of Evidence

¶22 Our review of the sufficiency of the evidence is governed by the well-established principle reiterated in ***State v. Poellinger***, 153 Wis. 2d 493, 451 N.W.2d 752 (1990). This court will reverse a conviction for insufficient evidence only if the evidence presented at trial "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." ***Id.*** at 501.

> The test is not whether this court or any of the members thereof are convinced [of the defendant's guilt] beyond reasonable doubt, but whether this court can conclude the trier of facts could, acting reasonably, be so convinced by evidence it had a right to believe and accept as true .... The credibility of the witnesses and the weight of the evidence is for the trier of fact. In reviewing the evidence to challenge a finding of fact, we view the evidence in the light most favorable to the finding. Reasonable inferences

> drawn from the evidence can support a finding of fact and, if more than one reasonable inference can be drawn from the evidence, the inference which supports the finding is the one that must be adopted.

Id. at 503-04 (citations omitted; alterations and omissions by ***Poellinger***). We give deference to a trial court's findings because of "the superior opportunity of the trial court to observe the demeanor of witnesses and to gauge the persuasiveness of their testimony." ***Kleinstick v. Daleiden***, 71 Wis. 2d 432, 442, 238 N.W.2d 714 (1976). "The function of the jury is to decide which evidence is credible and which is not, and how conflicts in the evidence are to be resolved." ***State v. Pankow***, 144 Wis. 2d 23, 30-31, 422 N.W.2d 913 (Ct. App. 1988). Moreover, "[o]nly when the evidence is inherently or patently incredible will [this court] substitute [its] judgment for that of the factfinder." ***State v. Saunders***, 196 Wis. 2d 45, 54, 538 N.W.2d 546 (Ct. App. 1995) (citation omitted).

¶23 Gaultney argues that the evidence used to convict him of armed robbery was insufficient. He points to the conflicting reports about what transpired, specifically his own denial that he had a weapon, Williams's testimony that the person with Woods did not have a weapon and did nothing to assist Woods, and the fact that Williams was able to identify him only after being shown photographs. He also refers to Copeland's testimony that Gaultney shot him but did nothing during the robbery, and claims that the evidence that placed him at the scene of the crime with a weapon was a statement that he himself gave, "for which the voluntariness is already called into question." We disagree.

¶24 The armed robbery count was submitted to the jury only under the party to the crime, aiding and abetting theory. The jury was given the following instruction with respect to party to a crime, WIS. STAT. § 939.05:

> [T]he law provides that whoever is concerned in the commission of a crime is a party to that crime and may be convicted of that crime although that person did not directly commit it. As to Count 2, the state contends that the defendant was concerned in the commission of the crime of armed robbery by intentionally aiding and abetting the person who directly committed it. If a person intentionally aids and abets the commission of a crime, then that person is guilty of the crime as well as the person who directly committed it.
>
> Again, a person intentionally aids and abets the commission of a crime when acting with knowledge or belief that another person is committing or intends to commit a crime, he knowingly either assists the person who commits the crime or is ready and willing to assist and the person who commits the crime knows of the willingness to assist.
>
> To intentionally aid and abet an armed robbery, the defendant must know that another person is committing or intends to commit the crime of armed robbery and have the purpose to assist the commission of that crime.

¶25 The court then explained to the jury that to convict Gaultney they must be satisfied beyond a reasonable doubt that the elements of armed robbery were present, which in this case were:

> First, that Joseph Copeland had possession of property. Second, that Marvin Woods took property from the person or from the presence of Joseph Copeland. Third, that Marvin Woods took the property with the intent to steal. Fourth, that Marvin Woods acted forcibly. Fifth, that at the time of taking Marvin Woods used or threatened to use a dangerous weapon.

There was ample evidence presented at trial indicating that the five elements of armed robbery were satisfied and that Gaultney aided and abetted Woods in the commission of the crime.

¶26 Detective Buschmann's testimony of Gaultney's signed statement of what transpired on the date in question was powerful evidence that Gaultney aided

and abetted Woods in the commission of the armed robbery, irrespective of the fact that Gaultney himself contradicted crucial portions of the statement at trial. According to Gaultney's statement, after he and Woods were informed that Copeland was nearby, the two drove to an alley where Woods retrieved two guns. He told police that Woods handed him one of the guns and asked him to watch his back, and that he placed the gun in his pant's pocket. He described the robbery to police by explaining that when they returned to the porch, Woods pointed a gun at Copeland, made a statement implying that he wanted Copeland and the other men to hand over their money, in response to which the men emptied their pockets. According to Gaultney's statement, he did not personally participate in the robbery and was merely standing on the sidewalk. His statement to police further described what transpired next, and he explained that after Copeland reached for Woods's gun, that the two struggled over the gun and that the gun went off and Copeland was hit. He told police that during the struggle, Copeland gained control of Woods's gun, at which point Woods took off running. Gaultney then stated that he saw Copeland pointing the gun at him and thought Copeland was about to shoot him, so he retrieved the gun from his pocket and started to run, and as he was running, he fired the gun over his shoulder in Copeland's direction.

¶27 The testimony the jury heard from Copeland is even more powerful evidence that Gaultney aided and abetted Woods. With the exception of a few significant discrepancies, Copeland's testimony was for the most part consistent with Gaultney's statement to police. Similar to Gaultney's statement, Copeland testified that when Woods and Gaultney appeared and Woods robbed him and his friends, Gaultney did not participate in the robbery. He also stated that Gaultney did not appear to be carrying a gun. Also consistent with Gaultney's statement is Copeland's testimony that he, Copeland, reached for the gun Woods was holding.

Copeland also testified that he tried to grab the gun because Woods threatened to shoot him, that the gun went off and he found himself in great pain, and that although he blacked out, a struggle must have taken place because when he regained consciousness, he was on the ground holding Woods's gun. Copeland stated that he saw Woods running away and that he fired in Woods's direction, but unlike Gaultney's version that he too was running away, Copeland stated that he then observed Gaultney standing as close as seven or eight feet away. In stark contrast to Gaultney's version, Copeland testified that at that point Gaultney "[r]aised the gun and emptied the clip into my body."

Out of all the conflicting testimony, the jury evidently chose to believe mostly Copeland's testimony and Gaultney's statement to police over Gaultney's assertion on the stand that his previous statements were untrue and that he was facing the street and never witnessed the shooting, over the testimonies of Bridges and McClain. The jury appears to have resolved the numerous inconsistencies by concluding that the State had not put forth enough evidence to convince it beyond a reasonable doubt that Gaultney was guilty of attempted first-degree intentional homicide, but that the State had put forth enough evidence to convince it beyond a reasonable doubt that Gaultney was guilty of armed robbery, as party to the crime. *See* ***Pankow***, 144 Wis. 2d at 30-31. Resolving inconsistencies in the evidence presented is, as explained, the province of the jury, and the conclusion it reached here is an entirely reasonable one. ***Poellinger***, 153 Wis. 2d at 503-04. Indeed, the fact that the jury returned a verdict of guilty on one count and not guilty on the other appears to indicate that it seriously contemplated what, if anything, the State

had proven beyond a reasonable doubt, which it concluded was armed robbery, party to a crime. There is no reason for us to interfere with the jury's finding.[8]

B. Sentencing

¶28 It is well-settled that sentencing decisions generally lie within the sound discretion of the trial court, and our review of that decision 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 (citing ***McCleary v. State***, 49 Wis. 2d 263, 277, 182 N.W.2d 512 (1971)). An erroneous exercise of discretion will be found only "[w]hen discretion is exercised on the basis of clearly irrelevant or improper factors." ***Id.*** We follow "a consistent and strong policy against appellate interference with the discretion of the trial court in passing sentence." ***Id.***, ¶18 (citation omitted). "[S]entencing 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." ***Id.*** (citation omitted). "Appellate judges should not substitute their preference for a sentence merely because, had they been in the trial judge's

---

[8] We also note that on appeal Gaultney misrepresents Williams's testimony in claiming that Williams testified that Gaultney did not have a gun. Williams was asked: "Did the other person that was with [Woods] have a gun *that you saw*?" (Emphasis added.) Williams responded, "No." In other words, Williams did not say that Gaultney did not have a gun, but merely that he did not see him with one. Williams's statement is perfectly consistent with Gaultney's previous statements to the police that he put the gun in his pocket and did not retrieve it until Copeland was on the ground holding Woods's gun and Woods was running away, and he, Gaultney, began to shoot in Copeland's direction (over his shoulder and while he was running, if one is convinced by the remainder of Gaultney's statement). This testimony by Williams is also perfectly consistent with his testimony that he ran away as soon as Woods and Copeland began to struggle over the gun and merely heard gunshots but did not see who fired them or if anyone was hit.

position, they would have meted out a different sentence." ***McCleary***, 49 Wis. 2d at 281.

¶29 The primary factors to be considered by the trial court in sentencing are the gravity of the offense, the character of the offender and the need for the protection of the public. ***State v. Harris***, 119 Wis. 2d 612, 623, 350 N.W.2d 633 (1984). The court may also consider the following factors: a past record of criminal offenses; a history of undesirable behavior patterns; the defendant's personality, character and social traits; the result of a presentence investigation; the vicious or aggravated nature of the crime; the degree of the defendant's culpability; the defendant's demeanor at trial; the defendant's age, educational background and employment record; the defendant's remorse, repentance and cooperativeness; the defendant's need for close rehabilitative control; the rights of the public; and the length of pretrial detention. ***Id.*** at 623-24.

¶30 The discretion of the sentencing judge must be exercised on a "rational and explainable basis," and an explanation for the sentence must be provided on the record. ***Gallion***, 270 Wis. 2d 535, ¶39 (citation omitted). The weight to be given the various factors is within the trial court's discretion. ***Id.***, ¶¶41-43; ***Cunningham v. State***, 76 Wis. 2d 277, 282, 251 N.W.2d 65 (1977). After consideration of all relevant factors, the court may base the sentence on any one of the three primary factors. ***State v. Krueger***, 119 Wis. 2d 327, 338, 351 N.W.2d 738 (Ct. App. 1984). To obtain relief on appeal, the defendant has the burden to "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).

¶31 Gaultney presents four reasons that he argues indicate an erroneous exercise of sentencing discretion by the trial court. We address each in turn.

¶32 First, Gaultney maintains that the trial court failed to consider mitigating factors, specifically that he maintained his innocence and that the testimonies of McClain and Bridges supported that contention. We disagree.

¶33 The trial court started out by acknowledging the uncertainty as to what in fact happened, and stated that it would impose sentence by focusing on only what was clear. "As is often the case, there is a lot of uncertainty about what happened … rather than struggle with what's not clear, I need to focus on what is clear." The court was therefore mindful of the conflicting accounts, including the fact that Gaultney had maintained his innocence, but proceeded to sentence Gaultney by focusing on the crime for which the jury had found him guilty. This was a proper exercise of discretion by the trial court. *See* ***Gallion***, 270 Wis. 2d 535, ¶17.

¶34 Second, Gaultney claims the trial court "appeared to hold it against [him] that he took this matter to trial" by stating that there was no clear acceptance of responsibility. He submits instead that because he maintained his innocence and continued to assert that he did not have a weapon, "it was not possible for him to recognize the severity [of the crime,]" and reiterates that he gave a contrary statement to police only "because he was scared and [he] thought that that is what they wanted to hear." We again disagree.

¶35 As already mentioned, among factors the court may consider are the defendant's remorse, repentance and cooperativeness. ***Harris***, 119 Wis. 2d at 623-24. Here, however, immediately before sentencing Gaultney, the trial court made the following statement:

> There hasn't been any clear acceptance of responsibility. Part of that has to do with the uncertainties about just what happened. *But I don't consider that his decision to go to trial reflects any unwillingness to accept responsibility*. There were, clearly, important issues to be tried which a jury was asked to address and which the jury did address.

(Emphasis added.)

¶36 Contrary to Gaultney's assertion, the trial court thus appears to have been very understanding of his decision to take the matter to trial, particularly in light of the many uncertainties.

¶37 Third, Gaultney argues that the trial court "attempted to 'retry' him for the count that he was acquitted of" by stating that it believed Gaultney was armed and may have been one of the shooters and therefore bears a heavy responsibility for what happened. Once again we disagree.

¶38 A sentencing court may consider a charge for which a defendant was acquitted in assessing the defendant's character and the need for incarceration and rehabilitation. ***State v. McQuay***, 154 Wis. 2d 116, 126, 452 N.W.2d 377 (1990); ***State v. Arrendondo***, 2004 WI App 7, ¶¶53-55, 269 Wis. 2d 369, 674 N.W.2d 647. The logic behind this rule is that "an acquittal does not mean that the event did not happen. Nor would it mean that the defendant is necessarily innocent. Rather, it means that the jury did not find proof of the event *beyond a reasonable doubt*." ***State v. Bobbitt***, 178 Wis. 2d 11, 17, 503 N.W.2d 11 (Ct. App. 1993) (emphasis in ***Bobbitt***).

¶39 The trial court was thus well within its discretion when it addressed the uncertainties about the shots that were fired and noted that it believed Gaultney had a gun, and that it was "far more likely than not that he fired bullets which

contributed to at least one of the holes in Mr. Copeland." The trial court also explicitly cautioned that "rather than struggle with what's not clear, [it] need[ed] to focus on what [wa]s clear," and emphasized that "Gaultney's willingness to go along with this kind of encounter is a serious crime no matter what happens." The court stated:

> Mr. Gaultney understood that he was participating in a threatening and potentially extremely violent encounter. He went along with it. He made a decision to do it, and he was old enough and had been around enough to have some reasonably clear idea of what the potential consequences could be; that is, somebody could get shot, somebody could get killed, maybe many people could get shot, particularly when he had reason to think Mr. Copeland or someone on the porch might also have a weapon.
>
> ….
>
> Whatever responsibility others may bear for this, Mr. Gaultney bears a heavy responsibility for the armed robbery and for the gunfire that resulted and for the injuries that resulted. It's not hard to imagine that more than one person could have been maimed for life or more than one person could have been killed in this encounter, including either Mr. Gaultney or Mr. Woods. So I have an extremely serious crime, one that harmed an individual in an extraordinary way, threatened the safety of other people, and threatened the security and well-being of the community …

¶40 In other words, the reason the court concluded that Gaultney bears a heavy responsibility for Copeland's injuries was Gaultney's own decisions, not a desire by the court to punish Gaultney for the count for which he has been acquitted. The trial court exercised proper discretion and did not "retry" Gaultney on the homicide charge.

¶41 Finally, Gaultney also asserts that the court did not fully consider his character, namely that "[h]e is the father of one son," "was involved with the

mother of that child," and "had family support and was going back to school to get his high school diploma." Again, we are not convinced.

¶42 The court considered many aspects of Gaultney's character. The court noted that Gaultney is only twenty-two years old, has no major adult record, but does have a juvenile record that was "serious enough to get him locked up as a juvenile." The court addressed Gaultney's family and noted "there apparently hasn't been much of a father around for Mr. Gaultney for a significant period of time," and that it appeared as though his "mother was unable to keep him out of trouble as a juvenile," so he served time and went to live with his grandmother.

¶43 And although Gaultney claims that he was going to go back to school to get his high school diploma, the court did consider his education, the reality of which was that for the past four or five years he has not done anything productive with his life:

> There's no indication that he's been doing anything productive for the last several years of his life, no reason to think that he's on some education or employment track that's going to give him the sort of stake at life and the stake in community that might cause him to make a different choice when somebody says let's arm ourselves and go confront a bunch of people on a porch.

¶44 The court also specifically recognized the fact that Gaultney has a son, but was not convinced that the mere fact that he is a father makes him more likely to make better decisions in the future.

> There's a child, a child that he's presently unable to be any more of a father to than his father was to him. Is that going to change things? Does that make him less of a risk to a community? Is that some sort of stake or interest that will cause him to make different decisions? I'd like to think so. I'm sure he believes so. I'm sure he hopes so, but I've seen too many cases where people with children who they say

> they care about do precisely this sort of thing or things less awful or more awful.

¶45 Overall, the court more than adequately considered Gaultney's character. *See* ***Harris***, 119 Wis. 2d at 623. Consequently, the trial court did not erroneously exercise its discretion when it sentenced Gaultney.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.