COURT OF APPEALS
DECISION
DATED AND FILED

December 27, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP3154-CR **Cir. Ct. No. 2004CF5418**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CLIFFORD L. PRATHER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: ELSA C. LAMELAS and DENNIS P. MORONEY, Judges.[1] *Affirmed.*

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

[1] The Honorable Elsa C. Lamelas presided over Clifford L. Prather's trial and entered the judgment of conviction. The Honorable Dennis P. Moroney issued the order denying Prather's postconviction motion.

¶1 FINE, J. Clifford L. Prather appeals a judgment entered after a jury found him guilty of first-degree reckless injury while armed, *see* WIS. STAT. §§ 940.23(1)(a), 939.63; conspiracy to commit robbery with the threat of force while armed, *see* WIS. STAT. §§ 943.32(1)(b), 939.31, 939.63; conspiracy to commit burglary with intent to steal while armed, *see* WIS. STAT. §§ 943.10(2)(a), 939.31; and attempted armed robbery with the threat of force, as a party to the crime, *see* WIS. STAT. §§ 943.32(2), 939.32, 939.05. He also appeals an order denying his postconviction motion. Prather claims that: (1) the conspiracy to commit robbery and the conspiracy to commit burglary charges were multiplicitous; and (2) the trial court erroneously exercised its sentencing discretion. We affirm.

I.

¶2 Prather was charged with first-degree reckless injury, conspiracy to commit robbery, and conspiracy to commit burglary for trying to rob Elsie Wessel. At Prather's trial, Wessel testified that a man rang her doorbell, came into her house, and asked if he could use her telephone. According to Wessel, after she said no, she hit his arm because she saw him "reach behind." The man then shot her in the mouth. Wessel told the jury that after the man shot her, he "stepped back out the front door," and she called 9-1-1.

¶3 A Milwaukee police detective testified that when he interviewed Prather, Prather told him that he and three others planned to rob Wessel because "she was old and she probably had lots of money in her house." Prather also told the detective that:

> Their plan was to go to the lady's house[. Prather] was the one that was going to knock on the door and the others were going to be lookouts. Once he forced his way inside

> the victim's residence, he was suppose [*sic*] to make the victim lie down on her stomach while he guarded her with the handgun and the others were to look for guns, cash, credit cards and identification.

According to Prather, he and the others went to Wessel's house to carry out their plan. Prather told the detective that instead of lying down, Wessel hit him and his gun went off.

¶4 Prather was charged with attempted armed robbery for trying to rob Ghia Immekus. Immekus testified that she was leaving work when a man walked up and pointed a gun at her. Immekus told the jury that the man said something she could not remember. She then put her backpack on the ground and her hands in the air. According to Immekus, "[s]omebody down the block shouted" and the man ran away.

¶5 Prather admitted to police that he and five others tried to rob Immekus. According to Prather, he pointed a gun at Immekus and told her to put her hands in the air. Prather said that one of the others then told Prather that he saw what looked like a detective's car, and Prather and the others ran away.

¶6 As we have seen, the jury found Prather guilty. The trial court sentenced Prather to a total of thirty-five years in prison, with an initial confinement of twenty-five years and ten years of extended supervision.

II.

A. *Multiplicity.*

¶7 Prather claims that the conspiracy to commit robbery and the conspiracy to commit burglary charges are multiplicitous. *See* ***State v. Davison***, 2003 WI 89, ¶32, 263 Wis. 2d 145, 164, 666 N.W.2d 1, 10 ("the imposition of

cumulative punishments from different statutes in a single prosecution for 'the same offense' violates double jeopardy when the cumulative punishments are not intended by the legislature"). To determine whether charges are multiplicitous, we apply a two-part test: (1) whether the charges are identical in law and fact; and (2) whether the legislative intent indicates that each count is an allowable unit of prosecution under the statute. ***State v. Rabe***, 96 Wis. 2d 48, 63, 291 N.W.2d 809, 816 (1980). Whether charges are multiplicitous is a question of law that we review *de novo*. ***State v. Lechner***, 217 Wis. 2d 392, 401, 576 N.W.2d 912, 917 (1988).

¶8 We begin with whether the crimes underlying the conspiracy charges—robbery by threat of force and burglary with intent to steal—are identical in law and fact. *See* WIS. STAT. § 939.31 (crime of conspiracy incorporates elements of underlying crime). *See* ***Lechner***, 217 Wis. 2d at 404, 576 N.W.2d at 919. Two crimes are different in law if each requires proof of an element that the other does not. ***Blockburger v. United States***, 284 U.S. 299, 304 (1932); *see also* WIS. STAT. § 939.66.[2]

¶9 Under WIS. STAT. § 943.32(1)(b), a person commits robbery by threat of force when he or she "with intent to steal, … threaten[s] the imminent use

[2] The "elements only" test from ***Blockburger v. United States***, 284 U.S. 299 (1932), was codified under WIS. STAT. § 939.66, which provides, as material:

> **Conviction of included crime permitted.** Upon prosecution for a crime, the actor may be convicted of either the crime charged or an included crime, but not both. An included crime may be any of the following:
>
> **(1)** A crime which does not require proof of any fact in addition to those which must be proved for the crime charged.

of force against the person of the owner or of another who is present with intent thereby to compel the owner to acquiesce in the taking or carrying away of the property."

¶10 Under WIS. STAT. § 943.10(1m)(a) & (2)(a), a person commits burglary with intent to steal when he or she "with intent to steal or commit a felony" "intentionally enters … [a]ny building or dwelling."

¶11 These crimes do not have an element in common other than the requisite "intent to steal." Prather acknowledges this, but contends that the charges are multiplicitous because they "rely on the exact same facts." This argument lacks merit. "'It is well settled that a single transaction can give rise to distinct offenses under separate statutes without violating the Double Jeopardy Clause.'" ***State v. Jackson***, 2004 WI App 190, ¶9, 276 Wis. 2d 697, 703, 688 N.W.2d 688, 691 (quoted source omitted). Accordingly, Prather's charges pass ***Blockburger*** muster. We thus turn to whether the legislative intent indicates that each count is an allowable unit of prosecution under the conspiracy statute.

¶12 Legislative intent is determined by examining the statutory language, legislative history and context, nature of the proscribed conduct, and appropriateness of multiple punishment. ***Lechner***, 217 Wis. 2d at 407, 576 N.W.2d at 920. The relevant statute here, WIS. STAT. § 939.31 provides, as material:

> [W]hoever, with intent that a crime be committed, agrees or combines with another for the purpose of committing that crime may, if one or more of the parties to the conspiracy does an act to effect its object, be fined or imprisoned or both not to exceed the maximum provided for the completed crime; except that for a conspiracy to commit a crime for which the penalty is life imprisonment, the actor is guilty of a Class B felony.

Thus, there are three elements: (1) the defendant intended that a crime be committed; (2) the defendant was a member of a conspiracy to commit that crime; and (3) one or more of the conspirators did something to facilitate that crime. As we stated in ***Jackson***, where we analyzed whether § 939.31 permits the charging of multiple crimes of conspiracy:

> The[] elements [of criminal conspiracy] incorporate each criminal offense that is the criminal object of the conspiracy. This means that when a conspiracy has as its object the commission of multiple crimes, separate charges and convictions for each intended crime are permissible. Thus, § 939.31 expresses the Wisconsin Legislature's intent to permit multiple punishments.

Jackson, 2004 WI App 190, ¶8, 276 Wis. 2d at 703, 688 N.W.2d at 691.

¶13 Prather argues that ***Jackson*** is distinguishable, however, because the defendant in ***Jackson*** was charged with the "substantially different" crimes of conspiracy to commit arson and conspiracy to commit murder, while he was charged with crimes that are "near[ly] identical."[3] *See* ***id.***, 2004 WI App 190, ¶9, 276 Wis. 2d at 703, 688 N.W.2d at 691. We disagree. As we have seen, Prather's crimes involving Wessel required proof of different elements, even though they both included the element of intent to take money or property from her. They are thus separate crimes under ***Blockburger***. *See* ***State v. Derango***, 2000 WI 89, ¶36, 236 Wis. 2d 721, 744, 613 N.W.2d 833, 844 ("[T]he legislature is entitled to attack a discrete social problem by writing multiple statutes with subtle elemental differences in order to capture and criminalize the widest possible variety of

[3] Prather also claims that ***State v. Jackson***, 2004 WI App 190, 276 Wis. 2d 697, 688 N.W.2d 688, was wrongly decided. We are bound by ***Jackson***. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 190, 560 N.W.2d 246, 256 (1997) ("the court of appeals may not overrule, modify or withdraw language from a previously published decision of the court of appeals").

conduct."). Further, the legislative intent to permit multiple punishments when conspirators agree to commit multiple crimes is clear. Accordingly, the charges against Prather involving Wessel are not multiplicitous.

B. *Sentencing.*

¶14 Prather claims that his sentences are harsh and excessive. He contends that the trial court did not explain the rationale for its sentences or give sufficient consideration to the primary sentencing factors. *See* ***McCleary v. State***, 49 Wis. 2d 263, 274–275, 182 N.W.2d 512, 518 (1971) (three primary sentencing factors are the gravity of the offense, the character of the defendant, and the need to protect the public). We disagree.

¶15 Sentencing is within the discretion of the trial court, and our review is limited to determining whether the trial court erroneously exercised that discretion. ***Id.***, 49 Wis. 2d at 277–278, 182 N.W.2d at 519–520. We will find an erroneous exercise of discretion "only where the sentence is so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457, 461 (1975).

¶16 In addition to the three primary sentencing factors, the trial court may also consider the following factors:

> "(1) Past record of criminal offenses; (2) history of undesirable behavior pattern; (3) the defendant's personality, character and social traits; (4) result of presentence investigation; (5) vicious or aggravated nature of the crime; (6) degree of the defendant's culpability; (7) defendant's demeanor at trial; (8) defendant's age, educational background and employment record; (9) defendant's remorse, repentance and cooperativeness;

> (10) defendant's need for close rehabilitative control; (11) the rights of the public; and (12) the length of pretrial detention."

State v. Harris, 119 Wis. 2d 612, 623–624, 350 N.W.2d 633, 639 (1984) (quoted source omitted); *see also* ***State v. Gallion***, 2004 WI 42, ¶¶59–62, 270 Wis. 2d 535, 565–566, 678 N.W.2d 197, 211 (applying the main ***McCleary*** factors—the seriousness of the crime, the defendant's character, and the need to protect the public—to Gallion's sentencing). The weight given to each of these factors is also within the trial court's discretion. ***Ocanas***, 70 Wis. 2d at 185, 233 N.W.2d at 461.

¶17 The trial court considered the appropriate factors. It considered Prather's failed plan to steal from Wessel, describing the crimes as "horrible." It noted that Prather "targeted" Wessel because she was "vulnerable," and stated that "the most difficult part of this case" was that Prather "went into this lady's home and shot her in the face ... [a]nd quite remarkably she lived through it." The trial court also considered the attempt to rob Immekus, finding that Prather was "lucky" because the crime was interrupted when "the police drove by."

¶18 The trial court also considered Prather's character, noting that Prather did not have a criminal record and reading a positive letter from one of Prather's teachers. It considered and rejected probation because it determined that Prather needed to go to prison for both punishment and rehabilitation. It also opined that it hoped Prather's sentences would deter others because the community needed to be protected:

> [W]e have people committing … crimes, many of them young people like Mr. Prather who are committing crimes of unspeakably grave dimensions. We have people who are vulnerable being targeted.
>
> And so I hope that part of what is understood from a sentence like this by everyone who meets Mr. Prather or hears of what happened to him, is that the repercussions,

> the penalty to be paid for senseless crimes like this where human life is either taken or dealt with, with utter disregard, I mean, that was [the] charge in Count 1, reckless injury, first degree, while armed, acting recklessly and showing utter disregard for human life, the repercussions will be very, very severe.

The trial court fully explained Prather's sentences and the reasons for them. It acted well within its discretion.

By the Court.—Judgment and order affirmed.

Publication in the official reports is not recommended.