COURT OF APPEALS
DECISION
DATED AND FILED

October 28, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP33-CR **Cir. Ct. No. 2005CF5752**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DONTE L. MOSS,

DEFENDANT-APPELLANT.

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

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

¶1 CURLEY, P.J. Donte L. Moss appeals from the judgment, entered after a jury trial, convicting him of first-degree reckless injury, as a party to a crime, while using a dangerous weapon, contrary to WIS. STAT. §§ 940.23(1)(a),

939.05 and 939.63 (2005-06).[1] He also appeals from the order denying his postconviction motion. Moss claims that the trial court erroneously exercised its discretion when it: (1) refused to grant a mistrial after the victim, Edmond Green, gave surprising testimony that Moss had "torche[d]" and "bust[ed] out the windows" of Green's mother's car; and (2) failed to "set forth on the record a nexus between the factors considered by the court and the sentence imposed." Because the trial court properly exercised its discretion, both when it denied the mistrial motion and when it sentenced Moss, we affirm.

I. BACKGROUND.

¶2 According to the testimony given at trial by Green, on October 1, 2005, Green flew to Milwaukee from his home in Las Vegas, Nevada.[2] At some point, either before he left Nevada or upon arriving in Milwaukee, he was made aware of an altercation between his mother and Moss, who is his first cousin. Green testified that he accompanied another cousin to 44th Street and Hadley Street, where he saw Moss. He related that he walked up to Moss and asked him why he was "disrespecting" his mother. He explained to the jury that shortly thereafter, a fistfight broke out between Moss and himself and, after several blows were struck, Moss ran across the street to where Moss's brother, Sidney Blades, was standing, and told Blades to shoot Green. Blades then pulled out a gun from his pocket and, from a distance of about twenty to twenty-five feet, shot at Green

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

[2] A joint trial was held with Sidney Blades, the actual shooter, who was also convicted of first-degree reckless injury, as a party to a crime, while using a dangerous weapon.

numerous times, hitting him in the right rear elbow. Green ran away and later collapsed. As a result of the shooting, Green's arm had to be amputated.

¶3 Early in his testimony, Green was asked about Moss "disrespecting" his mother, and he replied: "Well, my mother have [sic] previously purchased a Lincoln, a Lincoln and it didn't work. She was in the process of getting it fixed or whatever. It was sitting in front of the house. He goes and torches it and busts out the windows. This is all--" At this time, defense counsel objected and an off-the-record discussion was held. Although this conversation was not recorded, it appears from a later conversation between the court and counsel that Moss's attorney made a mistrial motion at this time, which the court took under advisement and later denied. Immediately following the sidebar conversation, the trial court instructed the jury to disregard the testimony regarding the car.

¶4 Following the trial, the jury returned a verdict of guilty. At a joint sentencing hearing, the trial court sentenced both Moss and Blades to an identical sentence of eight years of incarceration, to be followed by ten years of extended supervision. Moss's postconviction motion seeking a modification of sentence was denied. This appeal follows.

II. ANALYSIS.

A. The trial court properly exercised its discretion when it denied the mistrial motion.

¶5 Moss first argues that the trial court erroneously exercised its discretion when it denied his request for a mistrial after Green blurted out that

Moss had "torche[d]" and "buste[d] out the windows" of Green's mother's car.[3] He submits that this information, coupled with another witness's testimony stating that Moss had recently been released from jail, "corroborat[ed] the jury's inevitable belief that Moss had committed arson against his own aunt." He also submits that since the jury was instructed on "motive," and the evidence alleging that Moss "disrespected" his aunt remained in the record, the stricken testimony "made it likely that the jury became unfairly prejudiced against Moss." We disagree.[4]

¶6 The decision whether to grant a mistrial lies within the sound discretion of the trial court. ***State v. Ross***, 2003 WI App 27, ¶47, 260 Wis. 2d 291, 659 N.W.2d 122. "The trial court must determine, in light of the whole proceeding, whether the claimed error was sufficiently prejudicial to warrant a new trial. The denial of a motion for mistrial will be reversed only on a clear showing of an erroneous use of discretion by the trial court." ***Id.*** (citations omitted). "Where the trial court gives the jury a curative instruction, … [this] court may conclude that such instruction erased any possible prejudice, unless the record supports the conclusion that the jury disregarded the trial court's admonition." ***Genova v. State***, 91 Wis. 2d 595, 622, 283 N.W.2d 483 (Ct. App. 1979). "[N]ot all errors warrant a mistrial and the law prefers less drastic

[3] It appears, as Moss notes in his brief, that this testimony "was apparently a surprise to all."

[4] Moss argues in his brief that his "theory of defense in this case was alibi." This, as the State points out, is incorrect. The co-defendant, Blades, argued that he was elsewhere at the time of the shooting, but both Blades and a witness called by him placed Moss at the scene. Moss did not testify.

alternatives, if available and practical." ***State v. Adams***, 221 Wis. 2d 1, 17, 584 N.W.2d 695 (Ct. App. 1998) (citation and internal quotation marks omitted).

¶7 Immediately following the sidebar, which occurred after Moss's defense counsel objected to Green's testimony, the trial court gave the following instruction to the jury:

> THE COURT: All right. The court is going to instruct the jury, and this is an instruction. It's an order to you. You are to disregard the testimony that was just elicited regarding an alleged incident that was responded to by the witness regarding a car. I instruct you to disregard it. You are not to consider it as evidence, and the testimony at this point is ordered stricken. So it is not evidence in this case and you are not to consider it. All right. Proceed.

¶8 We would characterize this as a strong curative instruction. Thus, pursuant to ***Genova***, we conclude that the instruction erased any possible prejudice. Further, we must presume juries follow the court's instructions. ***State v. Smith***, 170 Wis. 2d 701, 719, 490 N.W.2d 40 (Ct. App. 1992) .

¶9 Knowing that Green believed Moss "disrespected" his mother does not transform the stricken testimony into evidence that is unfairly prejudicial. Here, the jury was aware that this was an internecine squabble. Certainly the jury would have concluded that each family had complaints about the other. Thus, hearing a complaint concerning Moss's alleged earlier behavior would not be highly prejudicial. The main focus of the trial was the conflict between reports of what occurred. The jury had to determine which witnesses were truthful. What caused the bad blood between the families was not pivotal to the jury's assessment of the credibility of the various witnesses.

¶10 As to Moss's claim that the testimony from a defense witness that Moss had been released from jail, coupled with the testimony about Green's

mother's car, led the jury to believe Moss "committed arson against his own aunt." We will not discuss it, as this testimony was never objected to. In order to appeal an evidentiary ruling, a party must first object to the admission or exclusion at the trial court level. *See* ***State v. Edwards***, 2002 WI App 66, ¶9, 251 Wis. 2d 651, 642 N.W.2d 537. If a party fails to object at the trial court level, a party waives any objections to the admissibility of the evidence. ***Id.*** The contemporaneous objection rule gives parties and the trial judge notice of the issue and a fair opportunity to address the objection, thus eliminating the need for appeal. ***State v. Huebner***, 2000 WI 59, ¶12, 235 Wis. 2d 486, 611 N.W.2d 727. Moss cannot claim this evidence unduly prejudiced him when no objection to its admission was raised at trial. Moreover, the jury knew from Green's testimony that he had been convicted of a crime three times previously, so incidental information about Moss being released from jail would not have been particularly harmful to his credibility. Consequently, we conclude that the trial court properly exercised its discretion when it denied the mistrial motion, and instead, gave the jury a curative instruction.

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

¶11 Moss next argues that the trial court erroneously exercised its discretion at sentencing because it failed to provide a nexus between the factors considered by the court and the sentence that the court imposed. We are not persuaded.

¶12 Sentencing is left to the discretion of the trial court and appellate review is limited to determining whether there was an erroneous exercise of discretion. ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. When the proper exercise of discretion has been demonstrated at sentencing, this

court follows a strong and consistent policy of refraining from interference with the trial court's decision. ***State v. Ziegler***, 2006 WI App 49, ¶22, 289 Wis. 2d 594, 712 N.W.2d 76. We afford a strong presumption of reasonability to the trial court's sentencing determination because that court is best suited to consider the relevant factors and demeanor of the convicted defendant. ***Id.***

¶13 To properly exercise its discretion, a trial court "must provide a rational and explainable basis for the sentence." ***State v. Stenzel***, 2004 WI App 181, ¶8, 276 Wis. 2d 224, 688 N.W.2d 20. "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." ***Id.*** "The primary sentencing factors which a court must consider are the gravity of the offense, the character of the defendant, and the need to protect the public." ***Ziegler***, 289 Wis. 2d 594, ¶23. However, the weight to be given each sentencing factor remains within the wide discretion of the trial court. ***Stenzel***, 276 Wis. 2d 224, ¶9.

¶14 The "sentence imposed in each case should call for the minimum amount of custody or confinement which is consistent with the protection of the public, the gravity of the offense and the rehabilitative needs of the defendant." ***Gallion***, 270 Wis. 2d 535, ¶23 (citation and internal quotation marks omitted). However, in imposing the minimum amount of custody consistent with the appropriate sentencing factors, "minimum" does not mean "exiguously minimal," or insufficient to accomplish the goals of the criminal justice system. ***State v. Ramuta***, 2003 WI App 80, ¶25, 261 Wis. 2d 784, 661 N.W.2d 483. Moreover, while the trial court must provide its sentencing rationale on the record, a defendant is not entitled to a mathematical breakdown of how each sentencing factor translates into a specific term of confinement. ***State v. Fisher***, 2005 WI

App 175, ¶¶21-22, 285 Wis. 2d 433, 702 N.W.2d 56. ***Gallion*** requires an explanation but not mathematical precision. *See* ***Ziegler***, 289 Wis. 2d 594, ¶25.

¶15 Applying those principles to the case here, we are satisfied that the trial court properly exercised its discretion. The trial court discussed the nature and severity of the offense, finding it to be "a very—extremely serious offense." The court was troubled that the offense involved a gun which was shot in a residential area. The court noted that it was fortunate that no one else was hurt, given that there were at least eight or nine shots fired. The trial court also addressed Moss's character and background, observing that Moss was twenty-four years old, had a high school equivalency diploma, and while he had no past record of violence, he did have a criminal record. The court stated that Moss was employed and was the father of two children. The court remarked that, in considering the protection of the public, Moss should have "put a lid on [the family squabble]," but did not. Also, the trial court explained that this was not a probation case, because it would depreciate the seriousness of the offense and such conduct cannot be condoned. The trial court opined that this was a senseless and reckless act. For the reasons stated, the trial court found that Moss was in need of supervision and imposed the sentence that it did.

¶16 Later, the trial court, in its decision rejecting the motion to modify the sentence, further elaborated on its sentencing decision by stating:

> The State recommended the maximum penalty in this case, which was 25 years plus a penalty enhancer of five years, based on the seriousness of the offense. The court agreed that the offense was serious – the victim lost an arm; moreover, the defendant has a prior record. The court also noted that the community was sick of this type of violence and that such behavior cannot be condoned. The court sufficiently considered the ***McCleary*** [***v. State***, 49 Wis. 2d 263, 182 N.W.2d 512 (1971)] factors and ***State v. Gallion***, 270 Wis. 2d 535 (2004). The sentencing

> objectives under ***Gallion*** were clear: removal of the defendant and his co-defendant from the community for a substantial period of time due to their violent response (shooting) where such a response was not called for, and punishing the defendant for his role in causing the victim to lose his arm. The court perceives no erroneous exercise of discretion and no reason to modify the sentence imposed.

(Footnote omitted.) We agree. The trial court touched on all the primary sentencing factors, and also gave reasons for the sentence it imposed. Thus, there was no erroneous exercise of discretion here.

¶17 For the reasons stated, the judgment and order of the court are affirmed.

By the Court.—Judgment and order affirmed.

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