

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 26, 2002

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. 01-2013-CR
STATE OF WISCONSIN**

Cir. Ct. No. 00 CF 1681

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

LEVI BOOTH,

DEFENDANT-APPELLANT.

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

Before Fine, Schudson and Curley, JJ.

¶1 PER CURIAM. Levi Booth appeals from a judgment of conviction entered after a jury found him guilty of one count of first-degree reckless homicide and two counts of first-degree recklessly endangering safety, all as party to the crimes. He also appeals from the order denying his motion for postconviction relief. He argues: (1) that the trial court erred in failing to conduct a colloquy

regarding the testimony of a co-defendant's witness, in a dual trial; (2) that trial counsel was ineffective for failing to object to that witness's testimony being presented in his trial; and (3) that the court erroneously exercised sentencing discretion. We affirm.

I. BACKGROUND

¶2 Booth, age fifty-three, and Rosie Townsend, the woman with whom he lived, were visiting with friends and relatives when some of them started talking about retaliating against those who had allegedly shot at Booth's nephew, Jonathan Booth, a/k/a, J.D., the night before. Sylvester Townsend asked Booth to return to Booth's house to retrieve a bag of bullets which Townsend had given to him the year before. Booth, together with his son, Alfonso Taylor, went home, retrieved the bag of bullets, and returned to the relative's home where Sylvester then distributed the bullets to several men who had guns. Sylvester Townsend then asked Booth to drive two of the armed men to the area where the retaliation was to take place. Booth agreed. On the way there, however, he told the two men he was transporting that they would be fools to participate; he then turned around and dropped them off back at Sylvester Townsend's house.

¶3 Unfortunately, several of the other men did carry out the retaliatory attack—shooting one man in the foot, injuring a woman with broken glass from her windshield, and killing eleven-year-old Rita Martinez, who was struck by a bullet that pierced the wall of her residence.

¶4 Booth and his son, Alfonso Taylor, were charged in one criminal complaint but the cases were severed for trial. In a dual jury trial procedure, however, they were tried at the same time before two separate juries. At trial, Taylor called his mother, Rosie Townsend, as a witness. During her testimony,

Townsend denied having made certain statements to police regarding her knowledge of the retaliatory shooting plot and of Booth's and Taylor's involvement in retrieving ammunition. Both men were subsequently convicted.

II. DISCUSSION

¶5 Booth first claims that the court failed to conduct a colloquy to determine whether Rosie Townsend's testimony should have been heard by his jury. Relying on *State v. Avery*, 215 Wis. 2d 45, 571 N.W.2d 907 (Ct. App. 1997), Booth argues that the trial court erred in failing to conduct a colloquy with counsel before allowing her to testify before his jury. We are not persuaded.

¶6 First, Booth misconstrues *Avery*. In *Avery*, this court determined that a trial court may conduct simultaneous trials of two defendants before two juries in order to ““conserve state funds, diminish inconvenience to witnesses and public authorities, and avoid delays in bringing those accused of crime to trial,”” *id.* at 51, provided that the court take precautions to exclude the jury of one defendant from the court during the presentation of evidence inadmissible as to that defendant, *id.* at 52. *Avery*, however, did not require a colloquy or any other specific procedure to accomplish that. *See id.*

¶7 Second, in the instant case, the court would have had no reason to question counsel about whether both juries should hear Rosie Townsend's testimony because she was listed as a potential witness on both defendants' witness lists. Logically, therefore, the court would have assumed that Booth's counsel was well aware of Townsend's potential testimony.

¶8 Third, Booth fails to establish that Rosie Townsend's testimony had any significant impact on the outcome of his case. Her testimony presented

information closely corresponding to information presented by other witnesses who, without objection, also were heard by Booth's jury. Thus, any error was harmless. See *State v. Dyess*, 124 Wis. 2d 525, 370 N.W.2d 222 (1985) (A reasonable possibility of a different outcome is a possibility sufficient to "undermine confidence in the outcome.").

¶9 Booth next claims that trial counsel was ineffective for not objecting to Rosie Townsend's testimony. He contends that the postconviction court erred in not granting his motion for an evidentiary hearing on his ineffective assistance of counsel claim. We disagree.

¶10 To prevail on a claim of ineffective assistance of counsel, a defendant bears the burden of establishing that counsel's performance was deficient and that the deficient performance produced prejudice. *State v. Sanchez*, 201 Wis. 2d 219, 232-36, 548 N.W.2d 69 (1996). To show prejudice, the defendant must demonstrate "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 694 (1984). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

¶11 Ineffective assistance of counsel claims present mixed questions of law and fact. *State v. Pitsch*, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985). A trial court's factual findings must be upheld unless they are clearly erroneous. *State v. Harvey*, 139 Wis. 2d 353, 376, 407 N.W.2d 235 (1987). Whether counsel's performance was deficient and, if so, whether the deficient performance prejudiced the defendant present questions of law, which we review *de novo*. *Pitsch*, 124 Wis. 2d at 634. The defendant has the burden of persuasion on both

prongs of the test, and a reviewing court need not address both prongs if the defendant fails to make a sufficient showing on one. *Strickland*, 466 U.S. at 687, 697.

¶12 A defendant is not automatically entitled to a hearing on a postconviction motion. *State v. Bentley*, 201 Wis. 2d 303, 313, 548 N.W.2d 50 (1996). If a defendant presents only conclusory allegations, which fail to raise a question of fact, or if the record conclusively demonstrates that the defendant is not entitled to relief, then the court may deny the motion on its face. *Id.* Whether a motion alleges facts warranting relief and thus entitling a defendant to a hearing is a question of law, which we review *de novo*. *Id.* at 310. If the motion and affidavits fail to allege sufficient facts, the trial court has the discretion to deny the postconviction motion without a hearing, *id.* at 310-11, and this court reviews that denial solely to determine whether the court erroneously exercised discretion, *id.* at 311.

¶13 In the instant case, the postconviction court properly rejected Booth's request for an evidentiary hearing based on its conclusion that Booth's motion failed to show that he was entitled to relief. The court concluded that because the jury heard Booth's own incriminating statement to police, which was confirmed by other witnesses, no reasonable probability existed that the trial outcome would have been different if Booth's jury had not heard Rosie Townsend's testimony. The court was correct.

¶14 Ample evidence supported the jury's verdict. Detective Kent Corbett testified that he had taken a statement from Booth shortly after his arrest. In that statement, Booth acknowledged that on the evening of March 24, 2000, he was at home with Rosie, his two sons, Alfonso Taylor and Kenneth Townsend,

and some of their friends when his nephew, J.D., arrived and told them that he had been shot at outside a bar. Booth stated that the following evening he and Rosie went to visit relatives at 2408 N. 33rd Street, where he found a number of young people, including Selika Hamilton and Jacquell Smith, a/k/a, Tyrisa Carpenter. There, Sylvester Townsend started talking to the other men about retaliating against the men who had shot at J.D. the night before. Sylvester asked Booth to return to his house and retrieve some ammunition. Booth complied. On his return, Sylvester asked Booth to drive him to the area of 30th and Brown Street. Again, Booth complied with Sylvester's request. Booth returned to his vehicle with Rosie, Alfonso, and several others. Booth then "drove around for a while" before telling the men that they would be fools to go to the site of the shooting and returning to the 2408 N. 33rd Street address, where he dropped them off. Booth stated that he then returned home with Rosie and Alfonso.

¶15 In addition to Booth's statement, the jury also heard the testimony of Selika Hamilton and Jacquell Smith, both of whom confirmed that Booth had been present at the house on 33rd Street, that he had been asked to retrieve the ammunition, that he did so, and that he was seen transporting the men.

¶16 In light of this evidence, Rosie Townsend's testimony had an insignificant impact on Booth's case. Her testimony was generally exculpatory with respect to Booth and Taylor. She testified that neither Booth nor she knew that the boys riding in their car had guns when they got in and that, when she and Booth discovered that they did, Booth drove them back to the house on 33rd Street. During cross-examination, the State successfully impeached Townsend with her prior statement to police. Although her impeachment may have hurt Booth's case, it did not alter the outcome, given the evidence of Booth's guilt.

Consequently, the court did not err in denying Booth's motion for a hearing on his ineffective assistance of counsel claim.

¶17 Finally, Booth argues that, in sentencing, the court failed "to consider the relevant factors of defendant's degree of culpability; the defendant's age; and the results of the presentence investigation." He contends that the court "illogically concluded that [he] could have prevented the shooting from transpiring," and failed to appreciate that "the retrieval of a bag of ammunition is the sum total of his involvement in the offenses." He claims that these alleged errors warrant his resentencing. We disagree.

¶18 The principles governing appellate review of a court's sentencing decision are well established. See *State v. Larsen*, 141 Wis. 2d 412, 426, 415 N.W.2d 535 (Ct. App. 1987). Appellate review is tempered by a strong policy against interfering with the trial court's sentencing discretion. *Id.* We will not remand for resentencing absent an erroneous exercise of discretion. *State v. Thompson*, 172 Wis. 2d 257, 263, 493 N.W.2d 729 (Ct. App. 1992). In reviewing whether a court erroneously exercised sentencing discretion, we consider: (1) whether the court considered the appropriate sentencing factors; and (2) whether the court imposed an excessive sentence. *State v. Glotz*, 122 Wis. 2d 519, 524, 362 N.W.2d 179 (Ct. App. 1984). The primary factors a sentencing court must consider are the gravity of the offense, the character of the offender, and the protection of the public. *Larsen*, 141 Wis. 2d at 427. The weight to be given each factor, however, is within the sentencing court's discretion. *Cunningham v. State*, 76 Wis. 2d 277, 282, 251 N.W.2d 65 (1977).

¶19 Here, the court properly evaluated the relevant sentencing criteria. In addressing Booth's character, the court appropriately faulted Booth for failing

to make any attempt to dissuade the others from engaging in a retaliatory shooting. At the same time, the court acknowledged that any attempt to do so might have been in vain.

¶20 In addition, the court considered Booth's work history and his parenting. The court noted that Booth's life had been a "hodgepodge" of success and failure, observing that Booth had been able to hold down jobs, but not able to guide his children in the right direction. The court also observed that drugs had had an obvious influence on Booth and his children. The court attributed many of Booth's failures to his trouble with addiction, and concluded that Booth had significant rehabilitative needs. Finally, the court evaluated Booth's role in the offense and the tragic results, weighing Booth's role in gathering the ammunition and the senselessness of Rita Martinez's death.

¶21 The court also considered the sentencing recommendations. The presentence-investigation report recommended five to seven years in prison; the prosecutor recommended twenty-five years; Rita's family recommended the maximum. After weighing these recommendations, the court ordered an aggregate sentence of thirty-seven years, composed of twenty-one years of initial confinement and sixteen years of extended supervision.

¶22 Although the court presented somewhat contradictory statements about whether Booth could have prevented the crimes, and although it certainly could have ordered a lesser sentence, the court's evaluation of the required criteria was not improper. Accordingly, no basis for resentencing exists.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE
809.23(1)(b)5.

