COURT OF APPEALS
DECISION
DATED AND FILED

July 9, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-2942-CR **Cir. Ct. No. 00CF5812**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ARTHUR L. ROBINSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JOHN F. FOLEY, Reserve Judge, and WILLIAM SOSNAY, Judge. *Affirmed and cause remanded with directions*.

Before Fine, Schudson and Curley, JJ.

¶1 PER CURIAM. Arthur L. Robinson appeals the judgment convicting him of aggravated battery while armed, and first-degree recklessly endangering safety while armed, contrary to WIS. STAT. §§ 940.19(5), 941.30(1),

and 939.63 (1997-98).[1] Robinson argues that the trial court erred in denying, at a pretrial motion, his request for a self-defense instruction, finding that the underlying facts did not support such an instruction.[2] He also claims that the trial court erroneously exercised its discretion in imposing sentence.[3] Because Robinson, by pleading guilty, waived his right to contest the trial court's ruling that his offer of proof failed to provide a factual basis for a self-defense instruction, and because the trial court properly exercised its discretion at sentencing, we affirm.

I. BACKGROUND.

¶2 Robinson was charged with one count of aggravated battery while armed, and one count of first-degree recklessly endangering safety while armed, following an altercation over $50 that Charles Knox claimed Robinson owed him. Knox came to Robinson's home on several occasions seeking the money. Robinson's house and car were also shot at during this time, which Robinson attributed to Knox. On November 19, 2000, Knox, accompanied by Allen Colvin, again accosted Robinson outside of his home, and asked for his money. An argument ensued and Colvin struck Robinson in the face. Although disputed,

[1] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

[2] The transcript reflects that Judge John F. Foley was sitting for Judge Patricia D. McMahon on the date of the guilty plea and on the date of the sentencing. On remand, the trial court is directed to amend the judgment to reflect the proper presiding judge.

[3] In his brief, Robinson states four arguments. Besides the two listed above, he also argues that the trial court denied him his constitutional right of confrontation and that the trial court failed to exercise appropriate discretion when it denied his postconviction motion. Inasmuch as Robinson pled guilty and had no trial, he was not denied his right to confrontation. Further, his postconviction motion is based on the identical arguments raised here, and those issues will be addressed directly.

Robinson claimed that Knox then pulled out a gun. Nevertheless, Robinson pulled out his gun and began shooting at them. Colvin fled and Robinson chased after him, shooting Colvin as he attempted to enter a grocery store. Colvin was struck three times and suffered serious injuries.

¶3 After being charged, Robinson waived his right to a preliminary hearing and the matter was set for a jury trial. On the day of the jury trial, because the State felt there was insufficient evidence to submit a self-defense instruction to the jury, the State requested that Robinson make an offer of proof as to his witnesses' testimony. The trial court agreed, and Robinson's attorney, as well as Robinson, engaged in a discussion concerning whether the facts, as they would be presented to the jury, would permit a self-defense instruction.

¶4 After listening to arguments, the trial court determined that no self-defense instruction would be given. The trial court remarked that Robinson's running after Colvin for a block as Colvin fled and shooting him three times were facts inconsistent with self-defense. After the trial court gave its preliminary ruling, the assistant district attorney asked for a recess. Following the recess, Robinson pled guilty to the two charges. At the sentencing hearing, the trial court sentenced Robinson to five years' imprisonment, to be followed by five years' extended supervision on each count, to be served concurrently. Robinson brought a postconviction motion arguing that his constitutional rights were violated because he should have been permitted to present his self-defense theory and he sought a modification of the sentences. The motion was denied.

II. ANALYSIS.

¶5 Robinson submits that the trial court erred in its decision that he had not demonstrated sufficient facts to permit a self-defense instruction be given to

the jury. The State argues that Robinson has waived his right to raise this issue by pleading guilty. We agree with the State.

¶6 The general rule is that a properly entered guilty plea constitutes a waiver of various defects and defenses arising from events preceding the plea. *See* ***State v. Kazee***, 192 Wis. 2d 213, 219, 531 N.W.2d 332 (Ct. App. 1995). The two exceptions to this rule can be found in § 971.31(10), which has been described as creating a narrow exemption to the general rule of waiver. *See* ***State v. Nelson***, 108 Wis. 2d 698, 702, 324 N.W.2d 292 (Ct. App. 1982).[4] Robinson acknowledges that WIS. STAT. § 971.31(10) only permits an appeal of an order denying a motion to suppress or a motion challenging the admissibility of a statement of a defendant after a plea of guilty is entered; however, he argues that because § 971.31(2) makes no mention of a ruling on self-defense, his legal arguments regarding the trial court's ruling survive his pleas of guilty.[5] He is incorrect.

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[4] WISCONSIN STAT. § 971.31(10) provides:

> **(10)** An order denying a motion to suppress evidence or a motion challenging the admissibility of a statement of a defendant may be reviewed upon appeal from a judgment of conviction notwithstanding the fact that such judgment was entered upon a plea of guilty.

[5] WISCONSIN STAT. § 971.31(2) provides:

> **(2)** Except as provided in sub. (5), defenses and objections based on defects in the institution of the proceedings, insufficiency of the complaint, information or indictment, invalidity in whole or in part of the statute on which the prosecution is founded, or the use of illegal means to secure evidence shall be raised before trial by motion or be deemed waived. The court may, however, entertain such motion at the trial, in which case the defendant waives any jeopardy that may have attached. The motion to suppress evidence shall be so entertained with waiver of jeopardy when it appears that the defendant is surprised by the state's possession of such evidence.

¶7 WISCONSIN STAT. § 971.31(2) directs that certain motions must be brought before trial or at trial or be deemed waived. This statute has nothing to do with whether a court's preliminary decision concerning a jury instruction survives a plea of guilty. That question is answered by § 971.31(10), which allows only motions to suppress evidence or motions challenging the admission of a defendant's statement to be raised after pleading guilty.

¶8 Further, we can find no exception in the statutes permitting an appeal of a preliminary jury instruction determination. Robinson's contention, that the failure to mention self-defense in § 971.31(2) is evidence that an order denying a request for an instruction on self-defense falls outside the ambit of the statute, is also contrary to case law. In ***Nelson***, the defendant attempted to challenge the trial court's ruling on other acts evidence on appeal. This court concluded that the statute was unambiguous and that evidentiary rulings did not fall within the exceptions listed in § 971.31(10):

> From the unambiguous language of this statute, this court concludes that sec. 971.31(10), is applicable only in suppression situations. In addition, our supreme court made this clear when it stated: "Under the rule of statutory construction of *expressio unius est exclusio alterius*, this statute stops with the single exception it creates." Thus, by its express terms, this statute excepts only motions to suppress evidence and motions challenging the admissibility of a defendant's statement.

Nelson, 108 Wis. 2d at 702 (citations omitted).

¶9 Thus, we determine that Robinson has waived his right to challenge the trial court's ruling that insufficient facts were presented to permit a self-defense jury instruction.

¶10 Next, Robinson argues that the trial court erroneously exercised its discretion when sentencing him. He posits that the sentence was excessive and that the trial court's conclusions were flawed, resulting in an unfair sentence. We disagree.

¶11 An allegation that the trial court's sentence of a defendant was harsh is reviewed to see whether the trial court erroneously exercised its discretion. *See* ***State v. Harris***, 119 Wis. 2d 612, 622, 350 N.W.2d 633 (1984).

¶12 A sentence will be deemed harsh and excessive only when the sentence is so excessive, unusual, and disproportionate to the offense committed so as to shock public sentiment. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). At sentencing the trial court must consider three factors and may consider others. The three primary factors the trial court must consider at sentencing are: (1) the gravity of the offense; (2) the character of the defendant; and (3) the need to protect the public. *See* ***State v. Thompson***, 172 Wis. 2d 257, 264, 493 N.W.2d 729 (Ct. App. 1992). Besides the primary sentencing factors, the trial court may also consider, in connection with the three primary factors: the vicious and aggravated nature of the crime; the past record of criminal offenses; any history of undesirable behavior patterns; the defendant's personal character and social traits; the results of a presentence investigation; the degree of the defendant's culpability; the defendant's demeanor at trial; the defendant's educational background and employment record; defendant's remorse, repentance, and cooperativeness; defendant's need for rehabilitative control; the rights of the public; and the length of pretrial detention. *See* ***State v. Echols***, 175 Wis. 2d 653, 682, 499 N.W.2d 631 (1993).

¶13 Here, the trial court addressed the three primary factors, as well as other factors. The trial court stated its reasons for its sentences. The trial court observed that Robinson engaged in

> … kind of a Wild West type of behavior, vigilante type of behavior that cannot be tolerated in a civilized environment, especially in light of the fact there were three little children cowering in the doorway of the grocery that could have easily been shot here as a result of what transpired.
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> ….
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> This obviously is not a probation type of offense, and Counsel has made a passionate plea for probation and condition time; but when you look at the gravity of the offense and the fact of the bullet spray all over the area, this is not a probation offense.

¶14 Although Robinson had no prior record and many good qualities, the trial court was struck by the egregiousness of his "horrible lapse of judgement [sic]." We also note that while Robinson received a five-year term of imprisonment, he faced a maximum of thirty-five years in prison, and that the State had recommended a far more severe penalty. Thus, we are satisfied that the trial court properly exercised its discretion. Moreover, we are not shocked by Robinson's sentences. Therefore, we affirm. On remand, the trial court is directed to amend the judgment to reflect the proper presiding judge.

By the Court.—Judgment and order affirmed and cause remanded with directions.

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