COURT OF APPEALS
DECISION
DATED AND FILED

October 8, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-3337-CR **Cir. Ct. No. 99 CF 5171**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ALEX NIEVES,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: BONNIE L. GORDON and ROBERT CRAWFORD, Judges. *Affirmed*.

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

¶1 PER CURIAM. Alex Nieves appeals from a judgment entered on a jury verdict convicting him of two counts of armed robbery, as a party to a crime,

contrary to WIS. STAT. §§ 943.32(2) and 939.05 (1999-2000).[1] He also appeals from an order denying his postconviction motion for sentence modification. Nieves claims that: (1) there was insufficient evidence to support the jury verdict; (2) the failure to suppress an allegedly unduly suggestive photographic array was plain error; and (3) the trial court erroneously exercised its discretion when it imposed what he claims is an unduly harsh sentence. We affirm.

I. BACKGROUND

¶2 Alex Nieves was tried for armed robbery after he and an unidentified partner robbed Joseph Courture and Rose Wesolek at gunpoint on September 29, 1999. At trial, Courture testified that he and Wesolek were walking to his apartment around midnight when a man, whom he later identified as Nieves, walked up to him and pulled a handgun out of a "bright orange" jacket. According to Courture, Nieves put the gun "[n]o more than six inches" from his face and said "Give me your shit, nigger." Courture testified that Nieves "grab[bed]" two backpacks from off of his arm and that Nieves's partner took Wesolek's purse from her.

¶3 After Nieves and his partner ran away, Wesolek called 911 from Courture's apartment. Courture testified that he described Nieves to the first officer who showed up as either "white or very light skinned African-American." Courture further testified that the second robber was "black," but that he couldn't "make out his face at all. I was fixed upon Mr. Nieves."

[1] All references to the Wisconsin Statutes are to the 1999–2000 version unless otherwise noted.

¶4 On the morning of September 29, Wesolek called American Express to report that her credit card was stolen. American Express told her that someone had tried to use her card at a Pizza Hut on Wisconsin Avenue.[2] Wesolek informed the police. Two officers went to the Pizza Hut at 622 West Wisconsin Avenue where they spoke to the manager, Jessica Phillips. Phillips testified that she told the police that she had received a telephone call for a pizza order that morning from a caller who identified himself as "Nievess." According to Phillips, the caller used a credit card and wanted the pizza delivered to 3117 West St. Paul Avenue and gave the phone number 414-933-4015. Phillips entered this information into Pizza Hut's computer system and the system issued a receipt. Phillips testified she called the phone number on the receipt when she learned that the credit card had been cancelled.[3] A woman answered the telephone and told Phillips to cancel the order. Phillips gave the receipt to the police officers.

¶5 The police officers then went to the address on the receipt, 3117 West St. Paul Avenue. When they arrived, they saw an African-American man sitting on the porch wearing an orange jacket. The officers confiscated the jacket and took photographs of it. The officers also spoke to Taramia Burgess. Burgess told the police that Nieves lived at that address and that someone had called that morning to inquire about a pizza. Burgess testified that she told the caller to cancel the order.

[2] Wesolek testified that the Pizza Hut was "on Seventh and Wisconsin or Eighth and Wisconsin. I don't know the exact address."

[3] Wesolek testified that there may have been problems with the card because of a late payment.

¶6 That evening, the police showed two four-man photographic arrays and a picture of the jacket to Courture and Wesolek. Courture picked Nieves out of one of the arrays, but could not identify the second robber. Courture also recognized the jacket in the photograph as the jacket that Nieves was wearing. Wesolek identified the jacket, but could not identify Nieves and only tentatively identified the second robber.

¶7 The jury found Nieves guilty on both counts of armed robbery. The trial court sentenced Nieves to thirty-two years on the first count and thirty-two years on the second count to run concurrent to count one. Nieves filed a postconviction motion challenging the length of his sentence. The trial court summarily denied the motion.

II. ANALYSIS

A. Sufficiency of the Evidence

¶8 First, Nieves claims that there was insufficient evidence to support the verdict because some of the witness' testimony was "inherently incredible." Specifically, he contends that the testimony was incredible because: (1) Courture initially described Nieves as a "white man," admitted that he gave different descriptions of Nieves to different police officers, and could not identify the second robber; (2) Wesolek could not identify Nieves and was only able to tentatively identify the second robber; and (3) Phillips could not remember whether a man or a woman had called to order a pizza. We disagree.

¶9 When reviewing the sufficiency of the evidence, we will reverse a conviction only if "the evidence, 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." ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752, 755 (1990). The jury, not a reviewing court determines the credibility of witnesses and the weight of their testimony. ***Whitaker v. State***, 83 Wis. 2d 368, 377, 265 N.W.2d 575, 580 (1978). If a jury could have drawn more than one reasonable inference from the evidence, a reviewing court must accept the choice the jury made. ***State v. Alles***, 106 Wis. 2d 368, 377, 316 N.W.2d 378, 382 (1982).

¶10 Here, the evidence amply supports the jury's verdict. Both Courture and Wesolek testified that they were robbed at gunpoint. Courture also picked Nieves out of a four-man photographic array and identified Nieves as the robber at trial.[4] Moreover, both Courture and Wesolek identified the jacket that police officers took from another individual at Nieves's house as the jacket that Nieves was wearing when he robbed them. Finally, Phillips's and Burgess's testimony linked Nieves to Wesolek's stolen American Express card. Accordingly, there is more than sufficient evidence to support the jury's verdict. The jury was free to believe or reject the witnesses' testimony and we cannot conclude that, on the basis of this evidence, the jury could not have found guilt beyond a reasonable doubt.

B. Photographic Array

¶11 Next, Nieves alleges that the photographic array was impermisibly suggestive because Courture initially identified one of the robbers as a "white

[4] We address below Nieves's contention that admission of the photographic array was plain error.

male," while the photographic array contained what he claims are photographs of four Hispanic males. Nieves thus contends that the "photo array should have contained Caucasian males to coincide with Mr. Courture's initial identification." We disagree.

¶12 Nieves failed to preserve this issue for appellate review for the following reasons. First, in his brief, Nieves concedes that he did not raise this issue in a pretrial motion to suppress. Second, Nieves did not object to the admission of the array at trial or raise this issue in his postconviction motion. Finally, Nieves does not argue that his trial counsel's failure to object constituted ineffective assistance of counsel. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984) (a defendant alleging ineffective assistance of counsel has the burden to show: (1) that his counsel's performance was deficient; and (2) that he was prejudiced as a result). Accordingly, this issue is waived. *See* ***Wirth v. Ehly***, 93 Wis. 2d 433, 443–444, 287 N.W.2d 140, 145 (1980) (generally, an appellate court will not review an issue raised for the first time on appeal).

¶13 Nieves argues that despite waiver we must address the allegedly suggestive array because its admission was plain error. A court may take "notice of plain errors affecting substantial rights although they were not brought to the attention of the judge." WIS. STAT. RULE 901.03(4); *see also* ***State v. Kruzycki***, 192 Wis. 2d 509, 527, 531 N.W.2d 429, 436 (Ct. App. 1995) ("A defendant's failure to object to a plain error affecting substantial rights does not preclude us

from taking notice of the error.").[5] An error is plain when it is "'both obvious and substantial'" or "'grave'" and it is "'reserved for cases where there is the likelihood that the [error] … has denied a defendant a basic constitutional right.'" ***State v. Vinson***, 183 Wis. 2d 297, 303, 515 N.W.2d 314, 317 (Ct. App. 1994) (quoted source omitted). "[W]hen constitutional errors are involved and plain error is alleged, the state has the burden to show that the error was harmless beyond a reasonable doubt." ***State v. King***, 205 Wis. 2d 81, 93, 555 N.W.2d 189, 194 (Ct. App. 1996).

¶14 The defendant has the initial burden to prove that the photo identification was impermissibly suggestive. ***State v. Mosley***, 102 Wis. 2d 636, 652, 307 N.W.2d 200, 210 (1981). "Suggestiveness in photographic arrays may arise in several ways—the manner in which the photos are presented or displayed, the words or actions of the law enforcement official overseeing the viewing, or some aspect of the photographs themselves." ***Id.*** Nieves's claim lacks merit—other than his conclusory allegation that "Caucasian males" should have been used

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[5] WISCONSIN STAT. RULE 901.03 provides, as relevant:

> **Rulings on evidence. (1)** EFFECT OF ERRONEOUS RULING. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected; and
>
> (a) *Objection.* In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or
>
> ….
>
> **(4)** PLAIN ERROR. Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the judge.

in the array, Nieves does not allege what characteristics made the array unduly suggestive. Indeed, in his closing argument, Nieves's attorney described Nieves as "Hispanic." Furthermore, the officer who showed the array to Courture and Wesolek testified that when he chooses photographs for an array, he picks photographs of individuals who are similar in appearance to the suspect. Nieves does not contest this testimony or allege why Caucasian males should have been used in the array when he is Hispanic.[6]

¶15 Moreover, an examination of the four photographs in the array reveals that the other participants reasonably resembled Nieves. All of the individuals, including Nieves, have light-to-medium skin tones. Thus, there was no error, much less plain error, in the admission of the photographic array, *see* ***Powell v. State***, 86 Wis. 2d 51, 67, 271 N.W.2d 610, 618 (1978) (where examination of the photographs reveals that all of the photographs are similar in relevant aspects, the array is not impermissibly suggestive), and the State's burden to show that any error was harmless beyond a reasonable doubt has not been triggered.[7]

[6] Indeed, in his brief, Nieves alleges that "[t]he photo array should have contained Caucasian males to coincide with Mr. Courture's initial identification," while in his reply brief Nieves alleges that "the failure to include other Hispanic males in a photographic array was plain error."

[7] Nieves also alleges that "pursuant to Section 805.18(2) Wis. Stats., this error was not harmless." This contention is conclusory and undeveloped. Thus, we decline to address it. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633, 642 (Ct. App. 1992) (appellate court can "decline to review issues inadequately briefed").

C. Sentencing

¶16 Finally, Nieves alleges that the trial court erred because his sentence was unduly harsh. We will not disturb a sentence imposed by a trial court unless the trial court erroneously exercised its discretion. ***Ocanas v. State***, 70 Wis. 2d 179, 183, 233 N.W.2d 457, 460 (1975). 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." ***Id.***, 70 Wis. 2d at 185, 233 N.W.2d at 461. A strong public policy exists against interfering with the trial court's discretion in determining sentences, *see* ***State v. Sarabia***, 118 Wis. 2d 655, 673, 348 N.W.2d 527, 537 (1984), and "[t]he trial court is presumed to have acted reasonably," ***State v. Wickstrom***, 118 Wis. 2d 339, 354, 348 N.W.2d 183, 191 (Ct. App. 1984). To obtain relief on appeal, a defendant "must 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, 895 (1992).

¶17 The three primary factors which a sentencing court must consider are the gravity of the offense, the character of the defendant, and the need to protect the public.[8] ***Sarabia***, 118 Wis. 2d at 673, 348 N.W.2d at 537. Here,

[8] The trial court may also consider: the defendant's past record of criminal offenses; the defendant's history of undesirable behavior patterns; the defendant's personality, character and social traits; the presentence investigation results; the viciousness or aggravated nature of the defendant's 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 or cooperativeness; the defendant's rehabilitative needs; the rehabilitative needs of the victim; the needs and rights of the public; and, the length of the defendant's pretrial detention. ***State v. Jones***, 151 Wis. 2d 488, 495–496, 444 N.W.2d 760, 763–764 (Ct. App. 1989).

Nieves claims that his thirty-two year sentence is unwarranted because he did not harm the victims and because he was allegedly "being punished for having a Jury Trial." Again, we disagree. Nieves has not presented any evidence that the trial court punished him for exercising his right to a jury trial and an examination of the record shows that the trial court considered the appropriate factors.

¶18 First, the trial court considered the gravity of the offense. It noted that "armed robbery is a very serious violation of law" and considered the fact that Nieves "stuck the gun … no more than six inches from his [Courture's] face." Second, the trial court considered Nieves's character, including Nieves's: age; education; work history; family history; and prior convictions of disorderly conduct, armed robbery, retail fraud, and escape. The trial court also considered the fact that Nieves was on probation when he committed the armed robbery and Nieves's "escalating pattern of criminal activity." Third, the trial court considered the need to protect the public: "this incident not only affects these two victims here but it affects the community at large. It sends a message to the people that reside in this area that this is an unsafe area to walk at night."

¶19 Finally, contrary to Nieves's contention, the trial court found that the victims *were* harmed by the robbery:

> to fully appreciate the seriousness of your actions that's all you need to do is read the victim impact statements of these individuals to fully understand what emotional distress you caused them…. One of the things that I was taking into consideration I did want to address with you, Mr. Nieves, is Mr. Courture's father's watch. He testified that his father died … in 1980. He carries around his father's watch in his backpack because he wants to feel like his father was with him, he's always with him and you took that watch. And that's something -- it's only worth $35 but to Mr. Courture it's probably worth a million dollars … [a]nd that's something that can never be replaced.

Thus, given the totality of these factors, Nieves's sentence was not excessive and the trial court did not erroneously exercise its discretion.[9]

By the Court.—Judgment and order affirmed.

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

[9] Nieves also alleges that the trial court erred when it denied his postconviction motion for sentence modification because the trial court did not state its reasons for denying the motion when it "merely wrote on the front page of Nieves's motion that the motion was in fact denied." For the reasons stated above, we conclude that the trial court correctly denied Nieves's postconviction motion. *See also* ***State v. Scherreiks***, 153 Wis. 2d 510, 513–514, 451 N.W.2d 759, 761–762 (Ct. App. 1989) (court of appeals can review an issue despite the defendant's contention that the trial court denied the postconviction motion "without giving reasons" where defendant appeals from the judgment and repeats contentions from the postconviction motion on appeal).