COURT OF APPEALS
DECISION
DATED AND FILED

September 10, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-0002-CR **Cir. Ct. No. 99-CF-401**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

NICHOLAS LEAIR,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Marathon County: PATRICK M. BRADY, Judge. *Affirmed*.

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 CANE, C.J. Nicholas Leair appeals a judgment entered on a jury verdict convicting him of burglary while armed with a dangerous weapon, contrary to WIS. STAT. § 943.10(2)(a) (1997-98);[1] armed robbery, contrary to WIS.

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

STAT. § 943.32(2); two counts of kidnapping, contrary to WIS. STAT. § 940.31(1)(b); two counts of false imprisonment, contrary to WIS. STAT. § 940.30; and attempted taking and driving a vehicle without the owner's consent, contrary to WIS. STAT. § 943.23(2). He also appeals an order denying his motion for postconviction relief. Leair argues (1) the trial court improperly limited his cross-examination of one of his co-defendants, (2) the trial court should have granted a new trial in light of new evidence from another co-defendant, and (3) the trial court erroneously exercised its discretion when it sentenced him and later refused to reduce the sentence in light of the sentences his co-defendants received. We determine the court properly limited Leair's cross-examination during the trial. We also conclude the court properly denied Leair's motion for a new trial and did not erroneously exercise its discretion in sentencing. Therefore, we affirm the judgment and order.

BACKGROUND

¶2 On August 4, 1998, Leair, Rodney Lai, and Patrick McElroy robbed the Tony Roma's restaurant in Mosinee. Around 11 p.m., Lai and Leair approached the restaurant's back entrance while McElroy waited in his truck. An employee, waiting for his mother to give him a ride home, was sitting on a table outside the entrance. Lai and Leair held a knife to the employee's throat and forced the assistant manager, who was inside, to open the door. Once inside, Lai and Leair bound the employee and assistant manager with duct tape. Lai and Leair then opened the safe after getting the combination from the assistant manager. The two left with approximately $3,100.

¶3 As Lai and Leair left the building, they found the employee's mother waiting in her car. The two attempted to force the woman out of her car, but she

drove off and called the police. McElroy then picked up Lai and Leair and the three fled.

¶4 Leair, Lai and McElroy were eventually arrested and charged with one count each of burglary while armed with a dangerous weapon, armed robbery, and attempted taking and driving a vehicle without the owner's consent. They were also charged with two counts of false imprisonment and two counts of kidnapping. Both McElroy and Lai pled guilty. Lai entered into a plea agreement with the prosecution, while McElroy did not. McElroy received one year in jail and probation for one count each of armed robbery, false imprisonment and kidnapping. The court read in and dismissed the other charges. Lai was sentenced to ten years in prison on the armed robbery charge and twenty-five years' consecutive probation on one false imprisonment count and twelve years' consecutive probation on one kidnapping count.

¶5 After a five-day trial, a jury convicted Leair of all seven charges. The State's evidence against Leair consisted primarily of his confessions to several friends and McElroy's testimony. During direct examination, McElroy said he had not received anything in return for his testimony. On cross-examination, Leair's counsel attempted to elicit McElroy's sentence and the State objected. The court sustained the objection, determining McElroy's sentence was irrelevant because there was no plea agreement. Neither party called Lai. The court sentenced Leair to thirty years on the robbery, burglary and kidnapping charges, five years on the false imprisonment charges, and three years on the attempted taking of a vehicle charge, all served concurrently.

¶6 Leair filed a motion for postconviction relief, seeking a new trial and a reduction of his sentence. In support of the new trial, he submitted an affidavit

from Lai saying Leair had no role in the robbery. The State subsequently charged Lai with false swearing, and Lai refused to testify at a hearing on Leair's motion. Leair also presented the testimony of defense investigator Robert Moon, to whom Lai had first exculpated Leair. The trial court denied Leair's motion for a new trial after determining the new evidence would not lead to a different result. The court said Lai's refusal to testify made it likely he would not testify at a new trial. The court also noted if the testimony then came in through Moon, other statements in which Lai implicated Leair would discredit the testimony. In addition, the court said Lai's testimony was "suspect" because Lai, already having been convicted, had nothing to lose by exculpating Leair.

¶7 The court also denied Leair's sentence reduction motion. In its decision, the court said it had reviewed the sentencing and was satisfied it had properly considered the sentencing factors. The court also noted both McElroy and Lai had pled guilty, apologized to the victims, and cooperated more than Leair, justifying the disparity in the sentences. Leair appeals.

DISCUSSION

1. Restriction on cross-examination

¶8 We first address Leair's claim the trial court improperly restricted his cross-examination of McElroy. Leair attempted to elicit McElroy's sentence for the purpose of impeaching his credibility. The extent and scope of cross-examination allowed for impeachment purposes is within the sound discretion of the trial court. ***State v. McCall***, 202 Wis. 2d 29, 35, 549 N.W.2d 418 (1996). We must defer to the trial court's determination unless it represents a prejudicial erroneous exercise of discretion. ***Id.*** We will not find an erroneous exercise of discretion if a reasonable basis exists for the trial court's ruling. ***Id.*** at 36.

¶9 The trial court determined evidence of McElroy's sentence would be irrelevant because he had not made a plea agreement or received any sentencing concessions in exchange for his testimony. While Leair acknowledges the court's discretion, he argues the trial court acted improperly because courts generally allow inquiry into witnesses' sentencing expectations as a result of their testimony and the leniency expected is the "prototypical form of bias." *See* ***Delaware v. Van Arsdall***, 475 U.S. 673, 680 (1986). Leair argues McElroy's sentence resulted in his testimony being biased in favor of the State and it was error to not allow him to explore it on cross-examination.

¶10 This case is similar to our supreme court's decision in ***McCall***. There, a defendant attempted to question a witness regarding the state's decision to dismiss charges against the witness. ***McCall***, 202 Wis. 2d at 36. Although the defendant alleged the state agreed to dismiss the charges in exchange for his testimony, the defendant offered no proof of any agreement. ***Id.*** at 40. The supreme court determined the defendant's theory was too speculative of any rational relationship to the witness's character to constitute prejudicial error by the trial court. ***Id.***

¶11 Similarly, the trial court in this case determined in the absence of any sentencing-for-testimony agreement, it would be irrelevant to question McElroy about his sentence. While it is true a co-defendant's sentencing expectations or actual sentence in exchange for testimony generally suggests bias, this is not the case with McElroy. Apparently, McElroy's lenient sentence was a result of the remorse he expressed to the court and the victims, not any exchange with the State for his testimony, and Leair could offer no proof otherwise. This is a reasonable basis to exclude the evidence, and we cannot say this was an erroneous exercise of the trial court's discretion.

¶12 Leair further argues ***Lindh v. Murphy***, 124 F.3d 899 (7th Cir. 1997), requires us to conclude the trial court erroneously restricted his cross-examination of McElroy. In ***Lindh***, the seventh circuit determined it was error for a Wisconsin trial court[2] to restrict the impeachment of a psychiatrist during the "mental condition" phase of a defendant's homicide trial. ***Id.*** at 901. The psychiatrist had been accused of sexual impropriety with several patients. ***Id.*** As a result, the State was considering filing charges against him, although the investigation had been assigned to another county because the county regularly used the psychiatrist as an expert witness. ***Id.*** The trial court precluded the defendant from asking anything regarding the alleged impropriety and the potential charges, including any suggestion the psychiatrist might have changed his testimony for more lenient treatment from the State. ***Id.*** The seventh circuit determined this complete preclusion violated the defendant's confrontation rights under the Sixth Amendment to the United States Constitution. ***Id.***

¶13 ***Lindh*** is distinguishable. The seventh circuit's primary concern was the total preclusion of mentioning the impropriety or the charges. ***Id.*** In essence, the trial court's ruling made the psychiatrist unimpeachable. ***Id.*** at 902. The trial court's ruling here does not have this effect. It merely precluded Leair from asking about McElroy's sentence. It did not prevent Leair from inquiring about what crimes McElroy was charged with, what he was convicted of, or the existence of any agreement with the prosecution. The trial court only determined

[2] In ***Lindh***, the defendant was seeking federal habeas relief from his murder conviction. Our supreme court had reinstated his conviction after we determined the trial court improperly restricted the defendant's ability to impeach the psychiatrist. *See* ***State v. Lindh***, 161 Wis. 2d 324, 468 N.W.2d 168 (1991) (reversing 156 Wis. 2d 768, 457 N.W.2d 564 (Ct. App. 1990)).

that in the absence of any demonstrable agreement, McElroy's sentence was irrelevant, and we conclude it did not err in doing so.

2. Motion for new trial

¶14 Next, Leair argues the trial court improperly denied his motion for a new trial based on new evidence of Lai's affidavit stating Leair was not involved with the robbery. A trial court will grant a new trial on grounds of newly discovered evidence if the defendant establishes by clear and convincing evidence that: (1) the evidence was discovered after conviction; (2) the defendant was not negligent in seeking the evidence; (3) the evidence is material to an issue in the case; and (4) the evidence is not merely cumulative. If the defendant proves these four criteria by clear and convincing evidence, the circuit court must determine whether a reasonable probability exists that a different result would be reached in a trial. ***State v. McCallum***, 208 Wis. 2d 463, 473, 561 N.W.2d 707 (1997). We review the court's denial of a motion for a new trial on a deferential standard. *See* ***State v. Jenkins***, 168 Wis. 2d 175, 186, 483 N.W.2d 262 (Ct. App. 1992).

¶15 Here, the trial court determined the new evidence was not likely to result in a different outcome at a new trial because Lai would not testify at one and there was evidence from Lai directly contradicting his proffered new testimony. We agree this was a reasonable basis for the court to deny Leair's motion, and we do not read Leair's arguments to contest this determination.

¶16 Instead, Leair argues the trial court improperly based its decision on ***State v. Jackson***, 188 Wis. 2d 187, 525 N.W.2d 739 (Ct. App. 1994). In ***Jackson***, we determined a co-defendant's testimony was not new evidence for the purposes of granting a new trial when the defendant was aware of the testimony, but was unable to present it at trial because the co-defendant invoked his privilege against

self-incrimination. ***Id.*** at 198-99. Leair argues he never called Lai at trial because he did not know Lai would exculpate him and, therefore, ***Jackson*** does not apply.

¶17 First, we note, as the trial court did, that Leair did not attempt to call Lai at trial. Second, Leair reads ***Jackson*** too narrowly. Our decision there was based in part on the general unreliability of the post-trial testimony of a co-defendant. ***Id.*** at 200. In particular, we noted that once a co-defendant is sentenced, "there is very little to deter the pleading co-defendant from untruthfully swearing out an affidavit in which he purports to shoulder the entire blame." ***Id.*** at 200 n.5 (citing ***United States v. La Duca***, 447 F. Supp. 779, 783 (D. N.J.), *aff'd*, 587 F.2d 144 (3d Cir. 1978)). The trial court here, when discussing ***Jackson***, noted it was not emphasizing Leair's refusal to call Lai at trial, but rather the unreliable nature of Lai's new testimony. To the extent the trial court relied on ***Jackson*** in denying Leair a new trial, we conclude it was proper.

3. Sentencing

¶18 Finally, Leair contends the trial court erred when it imposed his sentence and later refused to reduce it. We will not reverse a trial court's sentencing decision unless the court erroneously exercised its discretion. ***State v. Thompson***, 172 Wis. 2d 257, 263, 493 N.W.2d 729 (Ct. App. 1992). As part of our review, we consider whether the trial court properly considered the primary factors a court is required to consider when sentencing a defendant: the gravity of the offense, the character of the offender and the need to protect the public. ***State v. Larsen***, 141 Wis. 2d 412, 427, 415 N.W.2d 535 (Ct. App. 1987).

¶19 Leair, however, does not suggest the court improperly applied these factors. Instead, he claims the court's sentence and its subsequent refusal to lower it were error because his co-defendants received lesser sentences. We cannot

conclude the court erred in its sentencing decisions. As our supreme court has said:

> There is no requirement that defendants convicted of committing similar crimes must receive equal or similar sentences. On the contrary, individualized sentencing is a cornerstone to Wisconsin's system of indeterminate sentencing. "[N]o two convicted felons stand before the sentencing court on identical footing. The sentencing court must assess the crime, the criminal, and the community, and no two cases will present identical factors." Imposing such a requirement would ignore the particular mitigating and aggravating factors in each case.

State v. Lechner, 217 Wis. 2d 392, 427, 576 N.W.2d 912 (1998).

¶20 Here, in refusing to reduce Leair's sentence, the trial court accepted the State's arguments differentiating between the three defendants. The State noted Lai and McElroy both pled guilty and apologized to the victims. Further, at Leair's sentencing, the State said McElroy had shown empathy for the victims, taken full responsibility for his actions, and generally been very cooperative. In addition, the State noted their case against Lai was weaker than that against Leair, leading to a plea agreement. The State also said Lai had taken more responsibility for his actions than Leair. Leair, in contrast, never admitted his role in the robbery, nor did he show any empathy for the victims. The court properly determined there were sufficient differences in the circumstances of the defendants to justify their disparate sentences.

By the Court.—Judgment and order affirmed.

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