COURT OF APPEALS
DECISION
DATED AND FILED

July 8, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-2918-CR **Cir. Ct. No. 01 CF 3933**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DEMETRIUS R. POWELL,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JOHN J. DiMOTTO and M. JOSEPH DONALD, Judges.[1] *Affirmed.*

Before Fine, Schudson and Curley, JJ.

---

[1] The Honorable John J. DiMotto presided over the trial and entered the judgment of conviction. The Honorable M. Joseph Donald issued the order denying the postconviction motion.

¶1 PER CURIAM. Demetrius R. Powell appeals from a judgment entered on a jury verdict finding him guilty of first-degree intentional homicide, with the use of a dangerous weapon, as a party to a crime. *See* WIS. STAT. §§ 940.01(1)(a), 939.63, and 939.05 (2001–2002).[2] He also appeals from an order denying his postconviction motion for sentence modification. Powell claims that: (1) his confession was involuntary; (2) the verdict was not supported by sufficient evidence; (3) the trial court should have declared a mistrial; (4) the trial court erred when it failed to submit a self-defense instruction to the jury; and (5) his sentence was unduly harsh. We affirm.

I.

¶2 Demetrius R. Powell was tried for shooting and killing James Christopher. At trial, Powell's co-actor Jeremy Harris testified that "B" offered to pay them $20,000 to kill Christopher. Powell and Harris agreed and went to a house where Christopher was working on a car in the driveway. Harris asked Christopher if he was "J-Rock." Christopher said no and went into the house. Powell and Harris began to walk away, but changed their minds and went back to the house.

¶3 When Powell and Harris got back to the house, Christopher was standing on the front porch. According to Harris, Christopher asked them several times: "[H]ow do you all know my name?" Harris testified that Christopher then put his hand behind his back and Powell shot him from the sidewalk. Christopher tried to turn around and run into the house. According to Harris, Powell

[2] All references to the Wisconsin Statutes are to the 2001–2002 version unless otherwise noted.

"continued to shoot" Christopher after Christopher had fallen to the porch. Harris testified that they were paid to kill Christopher because Christopher was "supposed to be a witness at court."

¶4 The police arrested Powell and Harris at approximately 5:00 p.m. on July 18, 2001, while investigating a separate homicide in Mequon. Powell was interviewed three times. During the first two interviews, Powell was questioned about unrelated crimes. After Powell's second interview, Harris told the police that he and Powell had killed Christopher. Thus, during the third interview, the police questioned Powell about the Christopher homicide and Powell confessed to killing Christopher for money.

¶5 Powell filed a motion to suppress his confession, claiming that it was involuntary. Captain Mark Zupnik conducted the first interview with Powell.[3] At a hearing on the motion, Zupnik testified that the interview started between 9:00 p.m. and 10:00 p.m., on July 18, 2001. Zupnik claimed that he did not make any threats or promises to Powell and that he asked Powell if he wanted anything. According to Zupnik, Powell requested a beverage and a cigarette. Zupnik also testified that he asked Powell if he had consumed drugs or alcohol. Powell told him that he had smoked marijuana earlier in the evening. According to Zupnik, Powell appeared to be "very coherent, very talkative, [and] very knowledgeable." The interview ended at approximately 3:00 a.m. on July 19, 2001, after Powell indicated that he was tired.

[3] The trial court held a ***Miranda-Goodchild*** hearing. *See* ***Miranda v. Arizona***, 384 U.S. 436 (1966); ***State ex rel. Goodchild v. Burke***, 27 Wis. 2d 244, 133 N.W.2d 753 (1965). Powell does not challenge, on this appeal, the trial court's conclusion that he received his ***Miranda*** rights.

¶6 Detective Gregory Schuler conducted the second interview with Powell. Schuler testified that the interview began at 2:25 p.m. and ended at 3:22 p.m. on July 19, 2001. Schuler testified that he did not threaten or promise anything to Powell. According to Schuler, Powell requested a soda and four cigarettes. Schuler testified that Powell seemed well rested and that his answers to questions were "clear, concise, and appeared to be accurate."

¶7 Detective Alfonso Morales conducted the third interview with Powell. The interview began at 9:00 p.m. on July 19, 2001, and ended at 12:03 a.m. on July 20, 2001. Morales testified that he did not threaten or promise anything to Powell and provided Powell with two McDonald's cheeseburgers, a Pepsi soda, "a number of cigarettes," and a twenty-minute break. After Powell confessed to shooting Christopher, Morales wrote Powell's statement down and asked Powell to sign it. Powell told Morales that he wanted to get some sleep and review the statement in the morning. Powell initialed the statement at 11:14 a.m.

¶8 Powell also testified at the hearing. He claimed that he had smoked "numerous marijuana blunts" and had taken two ecstasy pills about fifteen to twenty minutes before the police arrested him. Powell further testified that he brought ecstasy into the jail and took it while he was in custody. He claimed that he could not sleep, even though he had the opportunity to do so, because the ecstasy kept him awake.

¶9 The trial court concluded that Powell's confession was voluntary. It found that the police did not threaten or promise anything to Powell: "No promises were made. No force or coercion was used." It also found that Powell was not intoxicated during the interviews:

> Mr. Powell indicated that in addition to using marijuana, he took two Ectasy [sic] pills before he was taken into custody, was able to sneak into the jail at least three [additional pills] and took those. And the defendant testified that he was really high and wasn't sure what he was saying, wasn't sure what he was doing.
>
> I don't find that to be the facts in this case, because that is completely refuted by the testimony of all the officers regarding the coherence and the alertness of the defendant. Quite frankly, if the defendant took Ectasy [sic] it did not impair his ability to think, or to speak, or to give details.

¶10 As noted, a jury found Powell guilty. The trial court sentenced Powell to life in prison without the possibility of extended supervision. Powell filed a postconviction motion for sentence modification, alleging that his sentence was unduly harsh. The trial court denied the motion, concluding that it had considered the appropriate factors.

II.

A. Voluntariness of Confession

¶11 First, Powell alleges that the trial court erred when it denied the motion to suppress his confession because, he claims, it was involuntary. "In determining whether a confession was voluntarily made, the essential inquiry is whether the confession was procured [through] coercive means or whether it was the product of improper pressures exercised by the police." ***State v. Clappes***, 136 Wis. 2d 222, 235–236, 401 N.W.2d 759, 765 (1987). Whether a confession is voluntary under the totality of the circumstances requires a balancing of the personal characteristics of the defendant against the coercive or improper police pressure. ***State v. Pheil***, 152 Wis. 2d 523, 535, 449 N.W.2d 858, 863 (Ct. App. 1989). "However, we do not reach this balancing unless there is some improper or coercive conduct by the police." ***Id.***

¶12 We will uphold the trial court's findings of evidentiary or historical fact unless those findings are against the great weight and clear preponderance of the evidence. ***Clappes***, 136 Wis. 2d at 235, 401 N.W.2d at 765. We independently review the trial court's conclusion by applying constitutional principles to facts found by the trial court. ***Id.***

¶13 The trial court concluded that Powell's confession was voluntary because, among other things, the police officers did not threaten Powell. Indeed, Powell admits that "no one individual act of the police officers amounted to an improper exercise of coercion." Powell claims that the trial court erred, however, because several circumstances "when taken as a whole" show improper police conduct: (1) he was interviewed three times; (2) he did not sleep; (3) he was unable to call any family members; and (4) he was intoxicated because he had smoked several "marijuana blunts" and taken ecstasy pills. We disagree.

¶14 These circumstances do not show any evidence of police misconduct. The officers testified that Powell was given food and an opportunity to rest. Moreover, the officers testified that Powell was coherent and alert. The trial court was entitled to accept this testimony as true. *See* ***Dejmal v. Merta***, 95 Wis. 2d 141, 151–152, 289 N.W.2d 813, 818 (1980). The only evidence that Powell presents to the contrary is his alleged intoxication and, as phrased in his brief, "coupled with the facts listed above." This alone is not enough to show coercive police conduct. *See* ***Clappes***, 136 Wis. 2d at 241–242, 401 N.W.2d at 768 (intoxication does not affect the admissibility of a confession where there is no proof that the defendant was irrational, unable to understand questions or responses, otherwise incapable of giving a voluntary response, or reluctant to answer questions). Without any evidence of police coercion, our involuntariness analysis ends. ***Pheil***, 152 Wis. 2d at 535, 449 N.W.2d at 863.

B. Sufficiency of the Evidence

¶15 Next, Powell alleges that the evidence is insufficient to support a conclusion that he was guilty of intentional homicide. Powell concedes, however, "that if this Court concludes that the Trial Court's failure to grant [the motion to suppress the confession] should be affirmed then evidence would have been sufficient to support conviction." As we have seen, Powell's confession is admissible. Thus, there is sufficient evidence to support the jury's verdict.

C. Mistrial

¶16 Powell also argues that a mistrial was required because Detective Morales referred to the Mequon homicide during his trial testimony:

> [STATE]: Detective Morales, you've testified before here. What I'm going to ask you to do is remember back to the date of July 18th in the year 2001 at approximately five p.m. Do you remember being sent to an address at 4122 West Lisbon Avenue?
>
> [MORALES]: Yes, I do.
>
> [STATE]: And when you arrived there, why were you sent?
>
> [MORALES]: I was sent there to assist the outside jurisdiction who [sic] was looking for a subject wanted in a homicide.

Powell claims that this testimony was prejudicial because it suggested to the jury that Powell was involved in another homicide, *i.e.*, the Mequon homicide. We disagree.

¶17 "The decision whether to grant a motion for a mistrial lies within the sound discretion of the trial court." ***State v. Pankow***, 144 Wis. 2d 23, 47, 422 N.W.2d 913, 921 (Ct. App. 1988). "The trial court must determine, in light of

the whole proceeding, whether the claimed error was sufficiently prejudicial to warrant a new trial." ***Id.*** "The denial of a motion for mistrial will be reversed only on a clear showing of an abuse of discretion by the trial court." ***Id.*** The level of deference that we give to a "trial court's mistrial ruling depends on the reason for the request." ***State v. Bunch***, 191 Wis. 2d 501, 507, 529 N.W.2d 923, 925 (Ct. App. 1995).

> When the basis for a defendant's mistrial request is the State's overreaching or laxness, we give the trial court's ruling strict scrutiny out of concern for the defendant's double jeopardy rights…. However, where the defendant seeks a mistrial on grounds not related to the State's alleged laxness or overreaching, we give the trial court's ruling "great deference."

Id. (citations and quoted source omitted).

¶18 Powell contends that we should analyze the trial court's ruling under the strict-scrutiny standard. We disagree. To prove prosecutorial overreaching, the defendant must show:

> (1) The prosecutor's action [was] intentional in the sense of a culpable state of mind in the nature of an awareness that his activity would be prejudicial to the defendant; *and* (2) the prosecutor's action was designed either to create another chance to convict, that is, to provoke a mistrial in order to get another "kick at the cat" because the first trial is going badly, or to prejudice the defendant's rights to successfully complete the criminal confrontation at the first trial, *i.e.*, to harass him by successive prosecutions.

State v. Copening, 100 Wis. 2d 700, 714–715, 303 N.W.2d 821, 829 (1981) (emphasis in ***Copening***). Powell admits that "the State in no way intentionally caused the ill-advised comments of [D]etective Morales." Thus, we give the trial court's decision great deference.

¶19 During an in-chambers conference with counsel, the trial court indicated that Morales's testimony was not sufficiently prejudicial to warrant a mistrial:

> If you were to move for a mistrial right now, I would deny it for the reasons I've articulated. It was one reference. It was fleeting. They already know that Mequon was investigating a crime. They've heard Mr. Harris testify that he pled guilty to not one, not two but three murders. They were looking for Mr. Harris.

We agree. Morales did not directly implicate Powell in the Mequon homicide. He did not refer to Powell by name or give any details about the Mequon homicide. Moreover, Powell fails to show how Morales's comment affected the jury. Indeed, when the trial court offered to instruct the jury that Harris was a suspect in the Mequon homicide, Powell's attorney declined, noting: "I did not see any jurors react." Thus, in light of the entire proceeding, Powell was not prejudiced by Morales's isolated and ambiguous reference to the Mequon homicide.

D. Self -Defense Jury Instruction

¶20 Next, Powell claims that the trial court erroneously exercised its discretion when it refused to give an instruction on perfect self-defense and unnecessary defensive force (imperfect self-defense). A defendant has presented sufficient evidence to justify a self-defense instruction if "'a reasonable construction of the evidence will support the defendant's theory "viewed in the most favorable light it will reasonably admit from the standpoint of the accused."'" ***State v. Coleman***, 206 Wis. 2d 199, 213, 556 N.W.2d 701, 707 (1996) (quoted sources omitted).

> [A] defendant seeking a jury instruction on perfect self-defense to a charge of first-degree intentional homicide must satisfy an objective threshold showing that she *reasonably* believed that she was preventing or terminating

> an unlawful interference with her person and *reasonably* believed that the force she used was necessary to prevent imminent death or great bodily harm…. [A] defendant seeking a jury instruction on unnecessary defensive force (imperfect self-defense) to a charge of first-degree intentional homicide is *not* required to satisfy an objective threshold showing.… [R]ather, the defendant must show some evidence that she *actually* believed that she was in imminent danger of death or great bodily harm and *actually* believed that the force she used was necessary to defend herself.

State v. Head, 2002 WI 99, ¶¶4–5, 255 Wis. 2d 194, 648 N.W.2d 413 (emphases in ***Head***; footnote omitted). "Whether there are sufficient facts to allow the giving of an instruction is a question of law … we review de novo." ***Id.***, 255 Wis. 2d 194, ¶44.

¶21 Powell alleges that he is entitled a jury instruction on self-defense and unnecessary defensive force because there is evidence that Christopher put his hand behind his back before Powell shot him leading Powell to believe that Christopher had a weapon.[4] *See* WIS JI—CRIMINAL 1014 (first-degree intentional homicide; self-defense; second-degree intentional homicide); ***Head***, 255 Wis. 2d 194, ¶8 (requesting that the Wisconsin Criminal Jury Instructions Committee amend WIS JI—CRIMINAL 1014). We disagree.

[4] Powell's trial attorney also requested WIS JI—CRIMINAL 1012, second-degree intentional homicide, but limited the request to WIS JI—CRIMINAL 1014 when the trial judge questioned him about the lack of adequate provocation. *See* ***State v. Head***, 2002 WI 99, ¶62, 255 Wis. 2d 194, 648 N.W.2d 413 (the difference between first-degree intentional homicide and second-degree intentional homicide is the presence or absence of mitigating circumstances); WIS. STAT. § 940.01(2)(a) (adequate provocation is a mitigating circumstance). Moreover, while Powell raises the claim that the trial court should have instructed the jury on second-degree murder, he fails to develop it. Accordingly, we decline to address it. ***Barakat v. Department of Health and Soc. Servs.***, 191 Wis. 2d 769, 786, 530 N.W.2d 392, 398 (Ct. App. 1995) (we will not review arguments that are "amorphous and insufficiently developed").

¶22 The trial court denied Powell's request because, it found that the evidence did not provide a sufficient factual basis to support a self-defense theory:

> Viewing the evidence in the light most favorable to Mr. Powell, there is no basis to give self-defense or imperfect self-defense. [The fact that Christopher] put his hand behind his back, that in and of itself would not cause anyone to have any reasonable or actual belief that they needed to blow somebody away…. The evidence in this case from the testimony of Mr. Harris and from the statement of the defendant is people went over there with the specific intent to kill Mr. Christopher who was a witness against Mr. Jackson. And the circumstances of that interaction brought forth no evidence that anyone had any reasonable belief or actual belief that self-defense was even in the picture.

We agree.

¶23 The only evidence that Powell presents to show that he acted in self-defense is the fact that Christopher put his hand behind his back as if he "was going for some type of a weapon." This is insufficient to show that Powell had a reasonable or an actual belief that he was in imminent danger of death or great bodily harm. In his statement, Powell did not indicate that he saw Christopher with a gun or that he shot Christopher because he believed that his life was in danger. In his reply brief, Powell claims that this information was "omitted" from his statement because it was written by the police. Powell does not support this statement, however, beyond mere assertion. Indeed, the morning after the statement was written, Powell made corrections to it and initialed it, indicating that it was true and correct.

¶24 Moreover, as we have seen above, there is sufficient evidence that Powell intentionally killed Christopher for money, not in self-defense. As we have seen, Harris testified that Powell continued to shoot Christopher as he lay on

the front porch. Accordingly, the trial court properly declined to give a self-defense instruction to the jury.

E. Sentence

¶25 Finally, Powell alleges that his sentence of life without the possibility of extended supervision is "excessive and disproportionate." Again, we disagree. 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." ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457, 461 (1975). A strong public policy exists against interfering with the trial court's discretion in determining sentences and the 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).

¶26 The three primary factors a sentencing court must consider are the gravity of the offense, the character of the defendant, and the need to protect the public.[5] ***State v. Sarabia***, 118 Wis. 2d 655, 673, 348 N.W.2d 527, 537 (1984). An

[5] 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, 444 N.W.2d 760, 763 (Ct. App. 1989).

examination of the record shows that the trial court considered the appropriate factors. First, the trial court considered the gravity of Powell's offense. It noted that Christopher's murder "shocks the conscience of the community … on multiple levels." In making this determination, it considered: (1) "it was a homicide"; (2) "the number of shots"; (3) "the malice behind the act"; (4) "Mr. Christopher was a witness"; (5) "it was done for money"; and (6) "it was done in a residential neighborhood … on a porch where women and children live."

¶27 The trial court also considered Powell's character, including his: age, education, employment history, juvenile record, and adult convictions. Finally, the court considered the interests of the community, including Powell's rehabilitation, the protection of society, and the appropriate punishment. It noted that: "While you clearly have rehabilitative needs, they are so great that they pale in comparison to the need to protect society from you being able to harm people again." Given these factors, it can hardly be said that Powell's 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." ***Ocanas***, 70 Wis. 2d at 185, 233 N.W.2d at 461. As the postconviction court noted: "The gravity of this offense alone would have justified the court's sentence." We agree. *See* ***State v. Koenig***, 2003 WI App 12, ¶7, 259 Wis. 2d 833, 656 N.W.2d 499 ("While rehabilitation is the goal of probation, judges must also concern themselves with the imperative of protecting society and potential victims.").

By the Court.—Judgment and order affirmed.

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