COURT OF APPEALS
DECISION
DATED AND FILED

June 24, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-3250-CR **Cir. Ct. No. 01-CF-26**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JEFFREY DANIEL BURR,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Pepin County: DANE F. MOREY, Judge. *Affirmed.*

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

¶1 CANE, C.J. Jeffrey Daniel Burr appeals a judgment entered on a jury's verdict convicting him of first-degree intentional homicide, aggravated battery, and false imprisonment, all as a party to a crime. He also appeals an order denying his motion for postconviction relief. Burr argues he was denied a fair trial because of judicial bias and prosecutorial misconduct. He also contends several of

the trial court's evidentiary rulings were erroneous and further claims the trial court erred when it refused to give the "spectator" portion of the party to a crime jury instruction. Finally, he argues the trial court erroneously exercised its sentencing discretion. We reject these claims and affirm the judgment and order.

BACKGROUND

¶2 On March 9, 2000, loggers found the dead, nearly naked body of Ronald Ross along a road in Pepin County. The investigation into Ross's death revealed that Ross had been at the Treasure Island Casino near Red Wing, Minnesota, on March 7 and 8. A surveillance videotape showed Ross talking to and eventually leaving the casino with a group of nine persons. Two of these people were identified as cousins Paul and David Jackson, who had registered at the casino hotel.

¶3 Police eventually contacted David at the casino, where he was an employee. He did not provide any information about Ross's death. David and Paul then contacted an attorney and subsequently told investigators that Ross had been murdered and offered to provide details in exchange for immunity. The police agreed, and the information they provided eventually led to fifteen-year-old-Burr's arrest, along with Noah and Arlo White.

¶4 At trial, Paul[1] testified that he went to a party at Noah's house in Red Wing early in the morning of March 9. Burr, the Whites, David and Ross were all at the party. Paul testified that he argued with Ross in the basement approximately

[1] Paul was the only witness at trial directly connecting Burr to Ross's death. As a result, the subsequent facts are taken from his testimony.

two hours after he arrived at the party. Paul said he punched Ross in the chin and knocked him to the floor. According to Paul, the party quickly began to break up and he went upstairs to "cool down."

¶5 Approximately forty-five minutes later, Burr and Noah asked Paul to go to the garage. Paul did, and in the garage he saw an unconscious Ross lying on the ground covered by a blanket. Paul testified that Burr then kicked Ross in the back and that they placed Ross in the back of Arlo's sport utility vehicle. Burr and Paul sat in the back seat, Noah in the front passenger seat, while Arlo drove to Wisconsin. On the ride, Burr said they should kill Ross and suggested slicing his throat. After entering Wisconsin, Ross regained consciousness. Paul said that Burr grabbed a sheathed machete and hit Ross with it for five minutes.

¶6 The men stopped the vehicle on a Pepin County logging road. Burr, Paul and Noah unloaded Ross from the vehicle, dropping him on the ground. Paul went back to the vehicle while Burr and Noah kicked Ross for several minutes and left him on the road. Back in the vehicle, Burr said, "We killed him." The men drove back to Minnesota. At trial, the Ramsey County, Minnesota, medical examiner who performed Ross's autopsy testified that the cause of death was multiple blunt force trauma and that hypothermia was a contributing factor.

¶7 The jury convicted Burr of first-degree intentional homicide, aggravated battery and false imprisonment, all as party to a crime. The court imposed the mandatory life sentence for the homicide and made Burr eligible for extended supervision in sixty years. The court also gave concurrent fifteen- and five-year sentences for the battery and false imprisonment respectively. Additional facts will be added to the discussion where relevant.

Discussion

A. Judicial Bias

¶8 We first address Burr's claim of judicial bias. The right to a fair trial includes the right to be tried by an impartial and unbiased judge. ***State v. Walberg***, 109 Wis. 2d 96, 105, 325 N.W.2d 687 (1982). Whether a judge was a "neutral and detached magistrate" is a question of constitutional fact we review de novo and without deference to the trial court. ***State v. McBride***, 187 Wis. 2d 409, 414, 523 N.W.2d 106 (Ct. App. 1994). There is a presumption that a judge is free of bias and prejudice. ***Id.*** In order to overcome this presumption, the party asserting judicial bias must show by a preponderance of the evidence that the judge is biased or prejudiced. ***Id.*** at 415.

¶9 The Honorable Dane Morey presided at the trial. In determining whether Judge Morey was actually biased, we must evaluate the existence of bias in both a subjective and an objective light. *See* ***id.*** The subjective component is based on the judge's own determination of whether he will be able to act impartially. ***Id.*** If Judge Morey subjectively believed he would not be able to act impartially, he would have been required to disqualify himself from the proceedings. Under the objective test, we must determine whether there are objective facts demonstrating that Judge Morey was actually biased. *See* ***id.*** at 416. Under this test, Burr must show that the "trial judge in fact treated him unfairly." ***Id.*** Merely showing that there was an appearance of partiality or that the circumstances might lead one to speculate that the judge was partial is not sufficient. ***Id.***

¶10 In his motion for postconviction relief, Burr requested that Judge Morey recuse himself. Judge Morey denied the request, stating he had no bias at

any time during the trial. He further noted that, as the judge who presided over the trial, he was the only judge who could hear the postconviction motions. Finally, Judge Morey said that in the event he granted a new trial, he would recuse himself. Burr argues that Judge Morey erred by denying the recusal motion on the basis that he was the only one who could hear the postconviction motion. He also contends that Judge Morey's statement that he would recuse himself in the event of a new trial implicitly admits his bias. We disagree.

¶11 Judge Morey refused to recuse himself primarily because he did not believe he was biased. Under the subjective portion of our analysis, we must then conclude that Judge Morey was not biased. *See* ***State v. Santana***, 220 Wis. 2d 674, 684-85, 584 N.W.2d 151 (Ct. App. 1998). We understand Judge Morey's comment regarding the requirement that he hear the postconviction motion to address the timing of the recusal motion. Because Burr made his request as part of the postconviction motions, Judge Morey was being asked not to hear these motions. Under normal circumstances, the trial judge hears a defendant's postconviction motions. *See* WIS. STAT. § 809.30.[2] Further, we do not discern an implicit admission of bias in Judge Morey's statement that he would recuse himself if he granted the motion for a new trial. Instead, Judge Morey's comment appears to mean exactly what it says: that he would voluntarily recuse himself in

[2] We note that the State argues that Burr waived his right to bring a recusal claim because the alleged improprieties happened at the trial and, as a result, the motion should have been brought then. However, the State also points out that a conviction must nonetheless be vacated if the trial judge should have recused himself regardless of any motion by the defendant. ***State v. Marhal***, 172 Wis. 2d 491, 505, 493 N.W.2d 758 (Ct. App. 1992). We therefore summarily reject the State's waiver argument.

All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

the event he granted a new trial. The subjective portion of our judicial bias analysis focuses entirely on the trial court's own belief it acted impartially. We are bound by Judge Morey's conclusion.

¶12 We next turn to the objective portion of our review. Burr's approach to demonstrating Judge Morey's actual bias is to list several pages of trial transcript excerpts in the fact section of his brief, mostly involving objections and the court's decision and comments regarding them. In the argument section of his brief, he urges that these incidents, examined together, amount to a showing of bias. He does this without analyzing any of the specific incidents, and does not mention them in the argument section, other than to call them the "numerous incidents referred to on pages 4 to 12," or to refer to them by a phrase taken from a few of the examples or a brief description of the incident. Burr's claim of bias is somewhat an unattended conclusion, which we normally do not consider. *See* ***M.C.I., Inc. v. Elbin***, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988). Further, we consider "for-reasons-stated-elsewhere" arguments to be inadequate and generally decline to address them. ***Calaway v. Brown County***, 202 Wis. 2d 736, 750-51, 553 N.W.2d 809 (Ct. App. 1996).

¶13 However, we believe it would be improper to summarily dismiss Burr's claim given the numerous instances Burr offers to show bias. Based on our review of these claims, we are satisfied that, as a whole, they do not amount to a showing of judicial bias. Because Burr briefly refers to a few of the incidents in his argument, we will limit our discussion to these claims to demonstrate our conclusion that the record does not establish judicial bias.

¶14 Two incidents that Burr suggests show the court had prejudged the case's merits are the court (1) saying the prosecutor's improper conduct "doesn't

matter," and (2) implying that the prosecutor's objectionable actions did not matter because the information was already before the jury. A review of these instances in context, however, does not reveal any prejudice.

¶15 In the first scenario, Burr's counsel objected to a question, but the witness answered before the court made its ruling. The court then said, "Sustained. It doesn't matter." Burr's counsel then moved to strike the answer and the court granted this request. The court's response that it "doesn't matter" appears to be a comment on the fact that the witness's answer was non-responsive and that she answered before the court was able to rule on the objection. In any event, the court struck her answer, and we cannot perceive how this ruling would contribute to any prejudice Burr suffered.

¶16 Nor can we discern any suggestion of bias in the second instance. There, Burr's counsel objected to nonresponsive testimony of a police officer on direct examination by the State. The court then ruled, "All right. It's already before the jury. I'll instruct the jury to ignore that." Again, the court sustained defense counsel's objection, and its comment merely notes that the improper information was already before the jury. The court then instructed the jury to disregard the answer. Jurors are presumed to follow the court's instructions. ***State v. Adams***, 221 Wis. 2d 1, 12, 584 N.W.2d 695 (Ct. App. 1998). We fail to see how these rulings could possibly demonstrate any prejudice against Burr.

¶17 Burr next argues the court ordered his counsel to stop objecting and limited his cross-examinations, both of which required him to choose between aggressively defending the charge and obtaining a fair trial. The only instance where we discern that the court told Burr's counsel to "stop objecting" was during the State's closing arguments, where Burr's counsel was repeatedly making

objections that the argument was outside the evidence introduced at trial. The court told Burr's counsel, "Now, counsel, reasonably, he can argue and make reasonable inferences from the evidence in this case. And I'll ask you not to stand up and object every time a little something varies, because I will give reasonable latitude to you, as well as to him, in your closing argument." Examined in context, the court's ruling did not contribute to any prejudice against Burr. Instead, the court asked Burr's counsel to allow the State to conduct its closing argument, and informed him that he would receive the same privilege during his. Burr does not contend his counsel did not receive similar latitude or that the court otherwise erred by making this ruling.

¶18 Similarly, we are not persuaded that the trial court's limitation of Burr's counsel's cross-examination of Paul contributed to any prejudice. Burr points to numerous instances where the court sustained the State's objections during cross-examination and also to one instance where the court, on its own, told Burr's counsel to stop yelling at Paul. Again, Burr does not argue the court's rulings were erroneous, nor does he offer any reason why the court on its own may not tell an attorney to stop yelling at a witness. These incidents do not reveal any trial court bias. Instead, the record reveals a highly charged murder trial, with a good deal of frustration between the court and counsel. A judge's bias against counsel must be sufficiently severe in order to translate into partiality against the defendant; antagonism or a strained relationship between counsel and the judge is insufficient. ***Walberg***, 109 Wis. 2d at 107. Even had Burr further examined and analyzed the other alleged incidents of bias, we are satisfied the record reveals that the trial court exhibited no partiality against Burr.

B. Prosecutorial Misconduct

¶19 Next, we examine Burr's claim that he is entitled to a new trial because of prosecutorial misconduct. Much like his judicial bias argument, he points to numerous instances of alleged misconduct throughout the trial. Specifically, he contends the prosecutor engaged in misconduct by (1) improperly arguing during his opening statement; (2) making improper comments in response to witness testimony, such as "good," "thank you," and "that's right"; (3) eliciting testimony from Paul that he went along with the crime because he was scared, allowing the jury to draw the false inference that coercion is a defense to first-degree intentional homicide; and (4) improperly arguing in his closing. We determine that all but the last of these objections have been waived.

¶20 In order to preserve a claim of prosecutorial misconduct based on the remarks made at trial, defense counsel must object and make an immediate motion for a mistrial. *See* ***Sanders v. State***, 69 Wis. 2d 242, 262-63, 230 N.W.2d 845 (1975). Although Burr objected to most, but not all, of the alleged instances of misconduct, he only moved for a mistrial after the jury had retired. Thus, we conclude that the only claim preserved for our review is that the prosecutor improperly argued in his closing.

¶21 Counsel enjoys wide latitude in closing arguments, subject to discretionary limitation by the trial court. ***State v. Draize***, 88 Wis. 2d 445, 454, 276 N.W.2d 784 (1979). "The prosecutor may 'comment on the evidence, detail the evidence, argue from it to a conclusion and state that the evidence convinces him and should convince the jurors.'" ***Id.*** (citation omitted). When a claim of prosecutorial misconduct is raised, the test is whether the allegedly improper remarks "'so infected the trial with unfairness as to make the resulting conviction

a denial of due process.'" ***State v. Wolff***, 171 Wis. 2d 161, 167, 491 N.W.2d 498 (Ct. App. 1992) (citation omitted).

¶22 Burr's claim of prosecutorial misconduct suffers from the same shortcoming as his judicial bias claim; that is, while the brief's fact section contains numerous examples of alleged misconduct, the argument section does not incorporate these examples, except for a few tangential references. Thus, in our analysis, we will use a similar approach to the one taken in resolving Burr's judicial bias claim. Burr argues that during the State's rebuttal, "the prosecutor endeavored to lend credence to the State's case by commenting on what attorneys, like Mr. Jackson's attorney, know and do. It was error for the prosecutor to basically testify as to the conduct of attorneys and as to the way plastic cards fly in the wind." This statement refers to two specific instances in the State's rebuttal.

¶23 In the first, it appears that the prosecutor was referring to a suggestion in Burr's closing and cross-examination of Paul that Paul's attorney helped him concoct his testimony in order to obtain immunity. The prosecutor said, "That's illegal. Attorneys don't do that," and later added, "What you don't have in this case is evidence of the lying lawyer. Like I said, it's illegal. His license and reputation goes. His freedom goes. He knows about immunity agreements." First, we note that Burr did not object to this testimony, although he argues it was because the court had admonished his attorney not to interrupt. Even if this incident was not waived, we conclude that the comment did not amount to misconduct. Although in isolation, "Attorneys don't do that" is arguably an improper argument because it resembles testimony, in context, the prosecutor is merely asking the jury to reject Burr's claim based on inferences from experiences within their common knowledge. We reject Burr's argument that this comment so infected the trial with unfairness to make his conviction a due process violation.

¶24 The second statement involves the prosecutor's comments regarding testimony that several of Ross's credit cards were found along the side of the road. Where they had been found suggested they had been thrown from a particular side of the vehicle on the way to the site where Ross's body was left, and this was inconsistent with Paul's testimony. During rebuttal the prosecutor said, "Where the cards ended up – If you can draw inferences that you think you can depend upon about which side of a car they got thrown out of, then you know a lot more about physics and wind dynamics, and whatever else, than I do. Because every time I've seen any little piece of plastic or –." At this point, Burr objected, saying the prosecutor was testifying. The court sustained the objection, and said, "He has been instructed not to express his observations of anything." Burr successfully objected to this improper statement. The prosecutor was prevented from improperly testifying and we thus reject Burr's claim this constitutes prosecutorial misconduct.

C. Evidentiary Rulings

¶25 Next, we address Burr's claim that the trial court erred in several evidentiary rulings. Specifically, Burr argues the court erroneously (1) prevented his counsel from cross-examining Paul about the length of the sentence he avoided through his immunity agreement; (2) allowed the county coroner to testify that Ross's injuries were inflicted by more than one person; and (3) excluded David's out-of-court statements. A trial court's decision to admit or exclude evidence is discretionary and we will not overturn absent an erroneous exercise of discretion. ***State v. Jenkins***, 168 Wis. 2d 175, 186, 483 N.W.2d 262 (Ct. App. 1992). A court properly exercises its discretion when it employs "a process of reasoning which depends on facts that are in the record or are reasonably derived by inference from the record, and yields a conclusion based on logic and founded on proper legal

standards." ***State v. Hines***, 173 Wis. 2d 850, 858, 496 N.W.2d 720 (Ct. App. 1993).

¶26 The trial court sustained the State's objection to Burr's question to Paul whether he was aware that first-degree intentional homicide carried a life sentence as an attempt at jury nullification. Arguing jury nullification, or that the jury should acquit a defendant based on the fairness of the conviction rather than the law, is not permitted in Wisconsin. *See* ***State v. Bjerkaas***, 163 Wis. 2d 949, 962, 472 N.W.2d 615 (Ct. App. 1991). The State argued, and the court agreed, that Burr was attempting to introduce evidence of his potential sentence by asking Paul about the first-degree intentional homicide charge he avoided in exchange for his testimony.

¶27 Burr argues, however, that by excluding this questioning, he was prevented from fully exploring Paul's motives for testimony and denied his Sixth Amendment right to confrontation. When the State grants concessions in exchange for testimony by accomplices or co-conspirators implicating a defendant, the defendant's right to a fair trial is safeguarded by (1) full disclosure of the terms of the agreements struck with the witnesses; (2) the opportunity for full cross-examination of those witnesses concerning the agreements and the effect of those agreements on the testimony of the witnesses; and (3) instructions cautioning the jury to carefully evaluate the weight and credibility of the testimony of such witnesses who have been induced by agreements with the state to testify against the defendant. ***State v. Nerison***, 136 Wis. 2d 37, 46, 401 N.W.2d 1 (1987).

¶28 Burr relies on ***State v. Vogleson***, 571 S.E.2d 752 (Ga. 2002). There, the Georgia Supreme Court determined a defendant's confrontation rights were violated when a trial court prevented him from questioning his accomplice about

the benefit of his agreement to testify. ***Id.*** at 753-55. The accomplice agreed to testify in exchange for a ten-year sentence recommendation on a reduced charge, where he and the defendant were both initially charged with a drug offense that carried a twenty-five-year mandatory minimum sentence. ***Id.*** The Georgia court determined the defendant's right to inquire about the benefit of his accomplice's plea agreement included questioning about the sentence avoided, even if it was the same as that faced by the defendant. ***Id.***

¶29 We reject Burr's contention, however, because if the court erred by sustaining the objection, the error was harmless. An evidentiary error is harmless if there is no reasonable possibility it contributed to the defendant's conviction. ***State v. Dyess***, 124 Wis. 2d 525, 543, 370 N.W.2d 222 (1985). The State argues that as common knowledge, the jurors would know that first-degree intentional homicide carries a lengthy sentence and perhaps would even be aware it has a mandatory life sentence. We agree. In fact, Burr's counsel admitted as much when asking Paul about his sentence when he said, "You are aware, however, that–I mean this is common knowledge. First-degree murder is a life-sentence. Are you not?" The jurors would know, at a minimum, that Paul was avoiding a lengthy prison sentence. This, along with the rest of Burr's cross-examination of Paul and the court's instructions to carefully consider testimony from immunized accomplices, satisfies us that there was no reasonable probability that Burr's inability to specifically question Paul about his potential avoided sentence contributed to Burr's conviction.

¶30 Burr next argues the court erred by admitting county coroner Dr. David Castleberg's opinion that it was likely more than one person inflicted

Ross's injuries. Specifically, Burr contends Castleberg was not qualified to provide the opinion. We disagree. WISCONSIN STAT. § 907.02[3] governs expert witness testimony. If specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, the witness may testify. ***State v. St. George***, 2002 WI 50, ¶39, 252 Wis. 2d 499, 643 N.W.2d 777. This provision "continues the tradition of liberally admitting expert testimony" in Wisconsin. ***Id.*** Whether a witness "is qualified to give an opinion depends upon whether he or she has superior knowledge in the area in which the precise question lies." ***Id.***, ¶40 (citation omitted). Having a medical license does not automatically qualify a person to offer expert testimony on every issue in the field of medicine. ***Id.*** If the witness has no scientific, technical, or other specialized knowledge about the particular issues in the case, then the witness's opinion is not reliable enough to be probative. ***Id.***

¶31 Burr argues Castleberg was not qualified to answer the question because his medical training, general medical practice and work as a county coroner did not qualify him. He compares this situation to that in ***Lemberger v. Koehring Co.***, 63 Wis. 2d 210, 216 N.W.2d 542 (1974). There, our supreme court determined that a trial court erroneously allowed a neurologist to testify that a construction worker's injuries could have been prevented if he had been wearing a hard hat. ***Id.*** at 217-18. The court determined that the neurologist had no

[3] WISCONSIN STAT. § 907.02 provides:

> **Testimony by experts.** If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

specialized information about construction or the capacity of hard hats to prevent injury and, therefore, he should not have been permitted to testify that a hard hat would have prevented the worker's injuries. ***Id.*** Similarly, Burr contends nothing qualified Castleberg to testify that more than one person inflicted Ross's injuries, because, for instance, Castleberg did not have any specialized training in determining the number of persons inflicting injuries and did not testify he ever examined a body that had been injured by more than one person.

¶32 We are satisfied that the trial court did not err when it allowed Castleberg's testimony. He testified that he had been a doctor for twenty-eight years and the county coroner for twelve. In his capacity as coroner, he said he received specialized training in death investigation, and had examined about 100 bodies. Based on these qualifications, and his work in examining Ross's body, the trial court could properly conclude that Castleberg was qualified to answer whether, based on his experience, it was likely that more than one person inflicted Ross's injuries. While the record does not reveal that Castleberg had any specific training in determining whether more than one person caused the injuries leading to a person's death, we are satisfied that the trial court did not erroneously exercise its discretion by admitting Castleberg's opinion based on his qualifications as a coroner.

¶33 We further note that Castleberg's testimony was not especially detailed. He explained his answer summarily, saying he based it on the multiple types and angles of the injuries, as well as "just the whole pattern" of injury Ross sustained. In addition, during cross-examination, Castleberg admitted it was possible that one person could have inflicted the injuries. That Burr was able to call Castleberg's conclusion into question belies Burr's claim of prejudice based on the opinion's admission.

¶34 Next, Burr contends the court erred when it refused to admit David Jackson's out-of-court statements. Through defense witness Ashley Getty, Burr sought to introduce two telephone conversations between Getty and David. The defense claimed that David had called Getty from Ross's stolen cellular telephone on the night of the murder. In two subsequent conversations, David allegedly told Ashley to erase the telephone number from her cellular telephone. In the earlier conversation, David said the telephone was stolen and in the latter, he told her, "The guy whose number it was was killed." The trial court sustained the State's hearsay objection to these statements.

¶35 Burr argues the court erred because the statements were offered to show that David had knowledge that the telephone's owner had been killed, and therefore, were not hearsay. We agree, although we conclude the court's error was harmless. Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. WIS. STAT. § 908.01(3). Burr's theory of these statements' relevance is that because David and Paul were very close, David must have learned about Ross's killing from Paul and this knowledge, as well as David's attempt to hide evidence, corroborates the defense theory that Paul was responsible for killing Ross. As the State notes, however, Paul's role in the killing was not in dispute: it was established by his own testimony. We agree with the State's argument that, "Even if the jury were to draw all the inferences that Burr hoped they would draw from David Jackson's statement about the phone, that would be much weaker proof of Paul Jackson's involvement in the crime than what Paul Jackson's own testimony provided." The evidence Burr sought to introduce was established by other testimony. The court's exclusion of this evidence could not have contributed to Burr's conviction and was therefore harmless. *See* ***Dyess***, 124 Wis. 2d at 543.

D. Bystander Jury Instruction

¶36 Next, Burr argues that the court erroneously refused to give the "bystander" or "spectator" portion of the party to a crime jury instruction, WIS JI—CRIMINAL 400, which states:

> [USE THE FOLLOWING IF SUPPORTED BY THE EVIDENCE]
>
> (However, a person does not aid and abet if he is only a bystander or spectator, innocent of any unlawful intent, and does nothing to assist the commission of a crime.)

¶37 At the instruction conference, the court determined there was no evidence that Burr had been a bystander or spectator, and said it would not give that portion of the instruction. Burr argues that the court's ruling denied him of a defense because he would have introduced evidence that he was a bystander had he known he needed to do so in order to have the jury so instructed. He claims the court's ruling unconstitutionally places the burden of showing an innocent presence at the crime scene on the defendant and relieved the State of its burden to prove the elements of a crime beyond a reasonable doubt.

¶38 A trial court has wide discretion in instructing the jury. ***State v. Coleman***, 206 Wis. 2d 199, 212, 556 N.W.2d 701 (1996). Whether there are sufficient facts to allow the issuing of an instruction is a question of law we review de novo. ***State v. Mayhall***, 195 Wis. 2d 53, 57, 535 N.W.2d 473 (Ct. App. 1995). A court errs when it refuses to give an instruction on an issue raised by the evidence. ***Id.***

¶39 We conclude the trial court correctly refused to give the bystander portion of the instruction. The court's decision was based on the fact that there

was no evidence to support the proposition that Burr was a bystander. The only evidence connecting Burr to Ross's death was through Paul, whose testimony described Burr's active role in the killing. Contrary to Burr's assertions, the State does not have the burden of proving that a person was not a bystander as an element of aiding and abetting. Instead, if there is evidence that the defendant was merely present at the crime and did nothing to assist or had any unlawful intent, the defendant is entitled to the instruction. There was no evidence of that here, and the trial court did not err when it refused to give the bystander instruction.

¶40 It seems Burr expected that the bystander instruction would automatically be given, and because he had no notice that it would not, he claims he was unable to prepare a defense based upon it. We note that although the information was amended to include party to a crime on the last day of trial, Burr admits he was aware of the State's intention to proceed under this theory four months before trial. Had Burr wished to argue that he was a bystander, he had ample time to prepare his defense. The trial court's ruling did not deny Burr the opportunity to introduce evidence at trial that he was a bystander; it was made after the close of evidence. Burr should have been aware he was not entitled to the bystander instruction unless there was evidence to support it.

E. Sentencing

¶41 Finally, Burr claims the trial court erroneously exercised its sentencing discretion because (1) the sentence was based on inaccurate information; (2) the court gave too much weight to his failure to testify and his lack of remorse; and (3) sentence was unduly harsh. We reject all of these arguments.

¶42 Burr argues the court relied on inaccurate information that he had been a bully during school in determining its sentence. Burr's presentence investigation report included a statement that he had bullied a fellow student, but this was later stricken after Burr's objection that it was false. At sentencing, however, the trial court noted that, "All through school and his contact with other kids, he's been a bully." It is well settled that a criminal defendant has a due process right to be sentenced only upon materially accurate information. ***State v. Lechner***, 217 Wis. 2d 392, 419, 576 N.W.2d 912 (1998). A defendant who requests resentencing due to the circuit court's use of inaccurate information at the sentencing hearing "must show both that the information was inaccurate and that the court actually relied on the inaccurate information in the sentencing." ***Id.***

¶43 The State argues other information in the PSI supports the court's statement that Burr was a bully. We disagree. Although the report makes extensive references to Burr's discipline problems at school, antisocial behavior, and substance abuse problems, the only reference to bullying is the redacted portion of the PSI. Therefore, we conclude the court erroneously relied on that portion of the PSI when it sentenced Burr. However, we conclude the error is harmless. Once a defendant demonstrates a due process violation by clear and convincing evidence that he or she was sentenced on the basis of inaccurate information and that this was prejudicial, the burden shifts to the State to demonstrate that the error was harmless. ***State v. Littrup***, 164 Wis. 2d 120, 132, 473 N.W.2d 164 (Ct. App. 1991); ***State v. Anderson***, 222 Wis. 2d 403, 410-11, 588 N.W.2d 75 (Ct. App. 1998). The court's comments at sentencing focus primarily on the crime's brutal nature and Burr's primary role, lack of remorse, antisocial tendencies, aggressive and violent nature, history of discipline problems, and substance abuse. The main issue at sentencing was determining when Burr

would be released on extended supervision; the court was required to give him a life sentence. Given the court's other statements at sentencing, we are satisfied that there is no reasonable probability that the court's comment that Burr had been a bully resulted in a longer period of incarceration.

¶44 Burr next contends the court placed too much weight on his invocation of his right against self-incrimination by noting that Burr expressed no remorse for his crime. On the advice of counsel, Burr did not discuss Ross's death with the PSI author. At sentencing, referring to the PSI, the court noted, "This writer is not allowed to make a critical analysis regarding the issue of remorse and victim empathy, due to not being allowed to address the offense section," and later, "A very disturbing thing is that I have not seen one ounce of remorse or repentance in this case."

¶45 A court is prohibited from imposing a harsher sentence solely because the defendant refused to admit his guilt. ***Scales v. State***, 64 Wis. 2d 485, 495, 219 N.W.2d 286 (1974). However, a sentencing court does not erroneously exercise its discretion by noting a defendant's lack of remorse as long as the court does not attempt to compel an admission of guilt or punish the defendant for maintaining his innocence. ***State v. Wickstrom***, 118 Wis. 2d 339, 355-56, 348 N.W.2d 183 (Ct. App. 1984). The weight to be given each factor is within the sentencing court's discretion. ***Id.*** at 355. A sentencing court misuses its discretion if it gives too much weight to one factor in the face of other contravening factors. ***State v. Steele***, 2001 WI App 160, ¶10, 246 Wis. 2d 744, 632 N.W.2d 112.

¶46 We conclude the court did not place too much weight on Burr's lack of remorse. As noted, this is an appropriate consideration for a sentencing court, as long as it does not punish the defendant for maintaining innocence or attempt to

compel an admission of guilt. Burr does not argue that either happened here. In addition, the court considered a wide variety of factors in making its determination, including the three primary factors: the gravity of the offense, the character and rehabilitative needs of the defendant, and the need to protect the public. ***Wickstrom***, 118 Wis. 2d at 355. The court did not give undue weight to Burr's lack of remorse.

¶47 Finally, Burr argues his sentence is unduly harsh because his co-defendants received shorter sentences and he was much younger than they were at sentencing. He also argues that there was a significant disparity between his sentence and one received by a fifteen-year-old convicted of homicide in another case. We reject all of these arguments. "There is no requirement that defendants convicted of committing similar crimes must receive equal or similar sentences." ***State v. Lechner***, 217 Wis. 2d 392, 427, 576 N.W.2d 912 (1998). The mere fact that someone else who was convicted of the same crime received a lesser sentence does not make a sentence unduly harsh. *See* ***id.***

¶48 Here, Arlo and Noah White both pled guilty to first-degree reckless homicide, a less serious crime than first-degree intentional homicide. The offense to which they pled carries a lesser penalty and this alone justifies shorter sentences. Further, the trial evidence revealed that Burr was more culpable than the other defendants. Finally, we reject Burr's conclusory claim that his sentence was unduly harsh because a fifteen-year-old Washburn County boy convicted of first-degree intentional homicide was eligible for release on extended supervision in twenty years, rather than the sixty given here. Burr's reliance on a newspaper article about the boy's sentencing does not persuade us that Burr's sentence was unduly harsh. We therefore reject his argument.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.