COURT OF APPEALS
DECISION
DATED AND FILED

March 3, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2009AP2867-CR **Cir. Ct. No. 2007CF3084**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANTHONY M. SMITH,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: WILLIAM SOSNAY and DENNIS R. CIMPL, Judges. *Affirmed.*

Before Higginbotham, Sherman and Blanchard, JJ.

¶1 BLANCHARD, J. Anthony Smith appeals from the judgment entered on a jury verdict finding him guilty of armed robbery with threat of force

as a party to the crime, contrary to WIS. STAT. §§ 943.32(2) (2009-10)[1] and 939.05, and the order denying his motion for postconviction relief.

¶2 Smith first asserts that the trial court erred in granting the State's motion to limit cross-examination of a witness called by the State, DBrittan Jackson, regarding Jackson's mental health. We conclude that the trial court did not erroneously exercise its discretion or violate Smith's confrontation right in limiting cross-examination of Jackson on relevance grounds. We also reject Smith's related claim that his attorney at trial was ineffective in failing to file a pretrial motion related to Jackson's mental health.

¶3 Smith also asserts that two categories of evidence—one involving tattoos worn by Smith, and the other involving "robbery activities"—were erroneously admitted because, considered together, they constituted improper character evidence. We decline to address this contention because Smith's argument fails to include relevant record citations, fails to develop a legal argument, and was forfeited by his failure to object at trial. For these same reasons, we decline to address a related argument based on alleged ineffective assistance of counsel.

¶4 Smith also contends that his trial counsel was ineffective in failing to object to testimony from witnesses called by the State regarding the nature of their convictions and pending robbery charges, which, he asserts, violated WIS. STAT. § 906.09. We conclude that failure to make this objection could not have been

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

prejudicial to Smith because such an objection would have been overruled as a matter of law.

¶5 Smith asks us to employ our discretionary power of reversal in the interest of justice based on the alleged errors referenced above, which we decline to do.

¶6 Finally, Smith argues that the evidence presented at trial was not sufficient to sustain his conviction, and that he should be resentenced because his sentence was unduly harsh. We reject each of these contentions, and therefore affirm the judgment and the order of the circuit court.

BACKGROUND

Overview

¶7 On an afternoon in August 2006, two people wearing masks held up Wong's Wok restaurant in Milwaukee at gunpoint and made a successful getaway. A witness testified to seeing the two people with their masks off immediately after the robbery and described them as young males. The only contested issue at trial was whether Smith was one of the two robbers.

¶8 The first of the two robbers to enter the restaurant, alleged by the State to be Smith, wore a ghoul mask and brandished a long gun. The second robber in the door, agreed by the parties at trial to be DBrittan Jackson, immediately followed Smith, wearing a bandana over the lower half of his face, with the hood of a hooded sweatshirt pulled up over the top of his head. The second robber pulled out a handgun after entering the restaurant. The two ran out the back door of the restaurant after forcing employees to give them access to money from cash drawers.

¶9 A police detective who happened to be across the street at the time suspected that a robbery of Wong's Wok was underway and went to investigate. The detective came face-to-face with the two robbers as they ran from the restaurant, and got a look at the long gun held by one of them. Nine days after the robbery, police confiscated a shotgun from Smith, which was admitted as an exhibit at Smith's trial. The detective testified that this shotgun was consistent in appearance with the long gun that he saw one of the robbers holding.

¶10 The State's position at trial was that a third man, Dannie Stallworth, was the getaway driver. The defense pointed to a lack of physical evidence tying Smith to the crime. Smith also attacked the credibility of witnesses called by the State who claimed to have knowledge of Smith's involvement in the robbery primarily on the grounds that the witnesses falsely incriminated Smith in order to win shorter sentences for themselves in their own pending criminal cases. The defense suggested to the jury that Jackson and Stallworth had committed the robbery, and that Jackson's brother, Bradshannon Wash, "cased" the restaurant before the robbery, then acted as the getaway driver.

Jackson Testimony

¶11 Because it is relevant to several issues on appeal, we briefly summarize the substance of Jackson's testimony as follows. Two friends of Jackson's, Scenario Richardson and Douglas Fritz, suggested that it would be easy to rob Wong's Wok. Jackson, Smith, Stallworth, and Jackson's brother, Bradshannon Wash, drove to Wong's Wok to commit the robbery. Richardson and Kevin Reynolds were in a second car in the same area at the same time and were on the telephone with the first group, talking about finding a store to rob.

¶12 Jackson pulled Stallworth's car into the alley behind Wong's Wok. Smith and Jackson retrieved a shotgun belonging to Smith and a .22-caliber handgun from the trunk of the car. Wash stayed in the car during the robbery. Jackson put a bandana on his face and Smith donned the ghoul mask.

¶13 Jackson, Smith, and Stallworth agreed that after the robbery, Stallworth would meet Jackson and Smith with the car nearby to make a getaway. Smith entered the store with the shotgun, followed by Jackson with the handgun. The two men jumped the counter, demanded money, and then grabbed cash from three cash registers after a worker unlocked them. After Jackson and Smith ran out the back door of Wong's Wok, a police detective "came out of nowhere" with a gun and ordered Smith and Jackson to freeze, but Smith and Jackson turned and ran through backyards and ended up meeting with Wash and Stallworth, who drove them away.[2]

DISCUSSION

I. Order Precluding Defense from Cross-examining Jackson Regarding His Prior Competency Proceeding and Non-Use of Medication, and Related Ineffective Assistance Claim.

¶14 Smith contends that the trial court[3] erred in conditionally granting the State's motion in limine precluding Smith's attorney from cross-examining Jackson on two topics: (1) a hearing held nine months before Smith's trial in the

[2] During Jackson's testimony, the State also relied on images captured by restaurant surveillance cameras. Jackson identified himself and Smith as the masked robbers in these images.

[3] Presiding at trial was the Honorable William Sosnay. The postconviction motion was considered by the Honorable Dennis Cimpl.

pending case against Jackson regarding Jackson's competency to stand trial as a criminal defendant for his role in the Wong's Wok armed robbery, and (2) Jackson's history of failing to take medications previously prescribed for mental illness, which was an issue that arose in the earlier competency hearing.

A. Court's Ruling on Mental Health Motion In Limine

¶15 Before Jackson's testimony, the State moved for an order prohibiting defense counsel from cross-examining Jackson "on the issue of his competence or alleged lack of competency or his various medications." The State's motion focused on the earlier proceeding in Jackson's own criminal case, held pursuant to WIS. STAT. § 971.14, addressing Jackson's competency to stand trial as Smith's co-defendant. The same trial judge presiding over Smith's trial presided over the earlier competency proceeding, at which the court had found Jackson competent to stand trial based in part on a report and recommendation from a psychiatrist.

¶16 The psychiatrist reported that Jackson was competent to stand trial, and made the following observations: "[Jackson's] [t]hought processes were goal-directed. Thought content revealed no evidence of current delusions, hallucinations .... Cognition was grossly intact. Intelligence is below average." Regarding medication, the psychiatrist reported that Jackson had told the psychiatrist that Jackson had been treated with medications for Attention Deficit Disorder and Bipolar Disorder, but that Jackson had not taken any medications since his incarceration three weeks earlier. The psychiatrist reported that, although Jackson "has been unmedicated for the last three weeks, he demonstrated no symptoms of mania or substantial depression and did not demonstrate difficulties with hyperactivity, impulsivity or substantial attentional difficulties

during this evaluation that rose to a level of severity that interfered with a productive evaluation."

¶17 Jackson's mother testified at the competency hearing that, with her help, Jackson had been current with his medications prior to his arrest, but after his arrest he stopped taking medications. She testified that police had told her following Jackson's arrest that Jackson had to be taken to a hospital because Jackson was "flipping out on them and he needed his medication." During that period, she testified, Jackson was acting "zoned out" and told her that he was hearing voices.

¶18 At Smith's trial, nine months later, defense counsel objected to the State's motion in limine on the grounds that, if Jackson had been prescribed medications that he was no longer taking at the time of trial, that could affect Jackson's ability "to remember things, [and to] count [sic-recount?] things." For purposes of our analysis, we will assume that the attorney's objection was shorthand for an argument that the order proposed by the State jeopardized Smith's ability to test through cross-examination Jackson's capacities to (1) recall events from the time of the armed robbery, and (2) relate facts to the jury.

¶19 The court questioned Jackson in advance of his trial testimony outside the presence of the jury. Jackson told the court that he was not taking any medication at the time of the trial, but had been ten months earlier. The court found that Jackson appeared alert and responsive. The trial judge also noted that he could recall the substance of the prior competency proceeding, providing background for the court's consideration of the State's motion in limine at Smith's trial.

¶20 Based on this record, the court conditionally granted the State's motion, precluding the defense from asking questions about Jackson's "prior mental condition" or his use of medication, at least until "such time as it becomes relevant through some of the answers he may give or his demeanor, but right now I don't see it as an issue." During the balance of the trial, defense counsel did not ask the court to revisit its conditional evidentiary ruling based on Jackson's responses to questions or his demeanor.

B. Legal Standards Regarding Motion In Limine Ruling

¶21 As a general rule, "[t]he admission of evidence rests within the discretion of the trial court," and this court reviews only whether "the trial court exercised its discretion in accordance with accepted legal standards and in accordance with the facts of the record." ***State v. Roberson***, 157 Wis. 2d 447, 452, 459 N.W.2d 611 (Ct. App. 1990).

¶22 Smith contends that the court's evidentiary ruling violated his constitutional right to confront witnesses called against him, as guaranteed by the federal and state constitutions. *See* U.S. CONST. amend. VI; WIS. CONST. art. I, § 7. We review de novo whether a trial court's decision to admit or exclude evidence violates a defendant's constitutional right to confront witnesses called by the State. ***State v. Yang***, 2006 WI App 48, ¶10, 290 Wis. 2d 235, 712 N.W.2d 400.

¶23 The constitutional standard recognizes that the right to confront witnesses is "central to the truthfinding function of the criminal trial." ***State v. McCall***, 202 Wis. 2d 29, 43, 549 N.W.2d 418 (1996) (citations omitted). Nevertheless, the confrontation right "may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process." ***Id.*** Trial

courts "'retain wide latitude ... to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant.'" ***Id***. at 44 (quoting ***Delaware v. Fensterer***, 474 U.S. 15, 20 (1985)). "[W]hile the right to confront one's accusers is protected by the constitution, this right is not violated when the court precludes a defendant from presenting evidence which is irrelevant or immaterial." ***McCall***, 202 Wis. 2d at 44.

¶24 Relevant evidence is evidence that has a tendency to make a fact of consequence to a case more or less probable. WIS. STAT. § 904.01. In determining whether proposed cross-examination is relevant, the issue is whether it would "be useful to the trier of fact in appraising the credibility of the witness and evaluating the probative value of the direct testimony." ***Rogers v. State***, 93 Wis. 2d 682, 689, 287 N.W.2d 774 (1980).

¶25 More specific to the question of how the mental health of a witness might affect the credibility of the witness, our supreme court has determined that "[i]nquiry into the existence of and treatment for mental affliction is proper where it appears that a connection exists between the affliction and the reliability of the witness's testimony." ***Johnson v. State***, 75 Wis. 2d 344, 360-61, 249 N.W.2d 593 (1977). After citing the above passage with approval in ***Chapin v. State***, 78 Wis. 2d 346, 355-56, 254 N.W.2d 286 (1977), the court added the following observation:

> Evidence of mental disorder or impairment may be relevant as affecting the credibility of a witness when it shows that his mental disorganization in some way impaired his capacity to observe the event at the time of its occurrence, to communicate his observation accurately and truthfully at

> trial, or to maintain a clear recollection of it in the meantime.

C. Analysis of Motion In Limine Ruling

¶26 We understand Smith to have objected at trial that he should have been permitted to cast doubt on Jackson's ability to recall and relate events at trial because Jackson reported no longer taking prescribed medications. However, on appeal Smith attempts to broaden that argument, contending also that Smith's ability to raise questions about Jackson's "capacity to observe the event at the time of its occurrence" was improperly cut off by the court's ruling.

¶27 We conclude that even if Smith did not forfeit his new, broader argument, it has no merit. The focus of the State's motion at trial, and the basis for Smith's objection to it, was that Jackson had stopped taking previously prescribed medications following his arrest in June 2007, and allegedly remained off medications until the time of trial in April 2008, not that Jackson was not taking medications at the time of the Wong's Wok robbery. So far as the record reveals, Jackson was taking his medication at the time of the robbery. Therefore, the new capacity-to-observe claim lacks a factual foundation.

¶28 Turning to objections Smith made at trial, the capacity-to-recall and capacity-to-relate claims also fail for lack of sufficient foundations. Smith failed at trial, and now again on appeal, to identify a specific mental disorder of Jackson's existing at the time of trial likely to have interfered with Jackson's ability to recall or relate events.[4] The standard is not, as Smith seems to suggest,

[4] The record does not reflect analysis on this issue by the trial court. It reflects only that the trial court granted the State's motion in limine on the grounds that the excluded topics were not relevant. However, this court will uphold a discretionary determination if we conclude that the facts of record, when subjected to the proper legal standards, support the trial court's decision. (continued)

that any mental disorder of a witness is presumed to affect the credibility of the witness. Instead, a finding of relevance requires proof that a disorder has impaired or is capable of impairing the reliability of the witness. Such proof is lacking here.

¶29 Applying the scrutiny called for under the confrontation clause, we note that the challenged order was narrow, still allowing Smith to focus the jury's attention on inconsistencies in Jackson's testimony, to argue vigorously to the jury that any inconsistency undermined its reliability, and to raise questions in the minds of jurors about Jackson's ability to perceive, recall, and accurately report past events.

¶30 Smith argues that Jackson testified inconsistently, purportedly due to untreated mental illness. Yet Smith does not identify inconsistencies that support this position. Witnesses may forget details, become confused or nervous, or decide to lie—all or some combination of which may produce inconsistencies. The issue here, however, is whether Smith had a reasonable basis to suggest that a mental disorder affected Jackson's credibility at trial in relating events surrounding the armed robbery, bearing in mind that "[m]ere mental impairment, without more, is not sufficient to affect credibility." *See* ***Chapin***, 78 Wis. 2d at 353. Smith does not point to any fact undermining the trial court's determination that there appeared to be no reasonable basis at the time of trial to suspect impairment of Jackson's orientation, thought process, memory, concentration, or comprehension in testifying.

See ***Andrew J.N. v. Wendy L.D.***, 174 Wis. 2d 745, 767, 498 N.W.2d 235 (1993). As discussed in the text, we conclude that the record supports the trial court's decision under applicable legal standards.

¶31 Moreover, the fact that the defense did not take up the court's invitation to renew its motion during Jackson's trial testimony suggests that Jackson's manner and affect on the witness stand did not suggest a mental disorder impairing his capacity to provide reliable testimony. Our independent review of the transcript supports the finding of the trial court, in its decision denying Smith's postconviction motion, that Jackson testified at trial "cogently and intelligently and was thoroughly cross-examined about the armed robbery," with "no showing that Jackson's mental infirmity had worsened from his lack of medication" between the time of Jackson's arrest and Smith's trial nine months later.

¶32 In a related argument, Smith asserts that his attorney was ineffective in failing to file a motion in limine "detailing Jackson's history of mental health issues," on the grounds that this would have made it easier for defense counsel to convince the court to allow unrestricted cross-examination.

¶33 A defendant seeking reversal based on alleged ineffective assistance of counsel must prove both that trial counsel performed deficiently and that the deficient performance prejudiced the defense case. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). The second prong requires the defendant to "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id***. at 694. If this court may resolve a claim of ineffective assistance on the basis that insufficient prejudice has been shown then that is the preferred route, without addressing performance of counsel, because our purpose "'is not to grade counsel's performance.'" ***State v. Carprue***, 2004 WI 111, ¶49, 274 Wis. 2d 656, 683 N.W.2d 31 (quoting ***Strickland***, 466 U.S. at 697).

¶34 For the reasons stated above, there is no reasonable probability that, but for the failure to brief the trial court on this topic in advance of Jackson's testimony, the result of the trial would have been different. Smith does not identify a potential line of cross-examination barred by the court's order that could have been significant in raising doubt about Jackson's credibility based on Jackson's mental health. Moreover, the trial judge made clear that he recalled relevant details of the competency proceeding supporting the court's decision to conditionally grant the State's motion in limine, and therefore it is difficult to see what difference pretrial briefing would have made to the court.

¶35 Accordingly, we affirm the court's order denying Smith's postconviction motion regarding the court's decision to grant the State's motion in limine as a discretionary ruling that was in accord with accepted legal standards and the facts of record, and also a decision that fell within the court's "wide latitude" in this area, and therefore not in violation of Smith's confrontation rights. Additionally, we affirm the court's order denying Smith's postconviction claim that trial counsel was ineffective for failing to pursue his own motion in limine regarding Smith's mental health.

II. Alleged Improper "Character Evidence"

¶36 In a highly truncated manner, Smith asserts that the trial court erred in permitting the State to present two categories of evidence, and permitted the State to use that evidence to impermissibly present Smith to the jury "as part of a pack of robbers."[5] The two categories of evidence Smith alludes to are:

[5] In addition, in passing and without citation to applicable legal standards, Smith asserts that it was deficient performance for his trial counsel to have failed to "strenuously object" to testimony regarding his tattoo and "robbery activities" as inadmissible under "WIS. STAT. (continued)

(1) testimony regarding a tattoo allegedly worn by Smith, and (2) testimony "about robbery related activities" of witnesses called by the State at trial. Smith asserts that evidence regarding Smith's tattoo and the "robbery related activities," considered in combination, amounted to improper character or propensity evidence barred under WIS. STAT. § 904.04.[6]

¶37 We do not address this claim of error for three reasons. First, in making this argument Smith fails to cite evidence from the record supporting his contention, and it is not the role of this court to try to determine what facts Smith might be referring to. *See* ***State v. West***, 179 Wis. 2d 182, 195-96, 507 N.W.2d 343 (Ct. App. 1993) (this court is not required to search the record to supply facts that may support appellant's argument). The *only* record citation Smith provides

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§ 940.04(1)," by which we take him to mean WIS. STAT. § 904.04(1). This is a vague and undeveloped argument, and therefore we do not address it. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (this court may decline to consider undeveloped arguments).

[6] WISCONSIN STAT. § 904.04 provides in relevant part:

> **Character evidence not admissible to prove conduct; exceptions; other crimes.** **(1)** CHARACTER EVIDENCE GENERALLY. Evidence of a person's character or a trait of the person's character is not admissible for the purpose of proving that the person acted in conformity therewith on a particular occasion ....
>
> ….
>
> **(2)** OTHER CRIMES, WRONGS, OR ACTS. (a) Except as provided in par. (b), evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. This subsection does not exclude the evidence when offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

in making this argument is to one page of the trial transcript that he contends describes the "robbery activities" at issue, yet this transcript page does not contain any such reference. It appears, from other sections of his brief, that Smith is alluding to testimony of witnesses called by the State regarding their plea agreements in pending cases, as discussed in another context below, but what Smith means to argue in the context of a violation of WIS. STAT. § 904.04 is not clear.

¶38 Second, moving from the factual arena to the legal one, Smith's complete failure to make meaningful citation to the record in making this argument is compounded by the fact that Smith fails to develop an argument that, under applicable legal standards, there was a violation of WIS. STAT. § 904.04. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992). Smith characterizes this evidence as "other acts" evidence that should have been prohibited at trial under § 904.04, but he does not even attempt to apply the relevant legal standards to this contention, and therefore we need not consider it under ***Pettit***.

¶39 Third, regardless of precisely which evidence Smith may be challenging in making this argument, he concedes on appeal that he did not contemporaneously object to the admission of the evidence at issue, and therefore he forfeited the argument. *See* ***State v. Agnello***, 226 Wis. 2d 164, 172-73, 593 N.W.2d 427 (1999) (adequate objection necessary to preserve issue for appeal by

giving parties and courts notice of disputed issues and "fair opportunity to prepare and address them in a way that most efficiently uses judicial resources").[7]

¶40 In a section heading only, without matching argument in the short text that follows, Smith contends that trial counsel was ineffective for failing to move for a mistrial "when the State improperly introduced testimony about Smith's alleged tattoo as well as the implications about other robbery activities of the State's witnesses." Again, we are left without record citations or legal authority sufficient to merit consideration of this assertion, and therefore will not attempt to construct an argument for Smith on appeal.

III. Alleged Ineffective Assistance of Counsel for Failing to Object to References to the Substance of Witnesses' Prior Convictions as a Violation of "Counting Rule" (§ 906.09)

¶41 Smith contends that his trial counsel was ineffective in failing to object to testimony from witnesses called by the State about the nature of their convictions and pending robbery charges. Smith argues that this testimony violated WIS. STAT. § 906.09,[8] as interpreted under Wisconsin's "counting rule."

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[7] Smith's primary brief includes a "catch-all" assertion that any and all alleged errors that this court may deem to have been insufficiently preserved should be reviewed under the plain error doctrine. The plain-error rule allows appellate courts to review errors otherwise forfeited by a party's failure to preserve the error for review. ***State v. Mayo***, 2007 WI 78, ¶29, 301 Wis. 2d 642, 734 N.W.2d 115; *see also* WIS. STAT. § 901.03(4). However, a "catch-all" assertion is not a developed argument that allows opposing appellate counsel and this court to identify and analyze under the applicable standard, and therefore is of no value.

[8] WISCONSIN STAT. § 906.09 provides, in relevant part:

> **Impeachment by evidence of conviction of crime or adjudication of delinquency. (1)** GENERAL RULE. For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime or adjudicated delinquent is admissible. The party cross-examining the witness is not concluded by the witness's answer.

(continued)

In order to address this claim, it is necessary to briefly summarize the testimony at issue, which involved plea agreements of the witnesses that were pending at the time of Smith's trial.

A. Robbery Convictions of Witnesses

¶42 Witnesses called by the State included Jackson, Scenario Richardson, Douglas Fritz, and Eric Gray.

DBrittan Jackson

¶43 In addition to the testimony summarized above, Jackson testified that he had entered a plea of guilty to participating in the Wong's Wok armed robbery, and anticipated being sentenced to four years in prison, followed by three years' extended supervision.

Scenario Richardson

¶44 Richardson testified that he had five criminal convictions, which included a State court armed robbery case for which Richardson was awaiting

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> **(2)** EXCLUSION. Evidence of a conviction of a crime or an adjudication of delinquency may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.
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> **(3)** ADMISSIBILITY OF CONVICTION OR ADJUDICATION. No question inquiring with respect to a conviction of a crime or an adjudication of delinquency, nor introduction of evidence with respect thereto, shall be permitted until the judge determines pursuant to s. 901.04 whether the evidence should be excluded.

Section 901.04, referenced in subsection (3), addresses preliminary questions of evidence that are to be determined by the trial court.

sentencing. Richardson had also pleaded guilty in a federal bank robbery case and had an understanding with prosecutors that they would encourage the sentencing court to run his state court sentence concurrent to any federal sentence.

Douglas Fritz

¶45 Fritz testified to having one criminal conviction for armed robbery and was awaiting sentencing in that case. There was also unobjected-to testimony of a Milwaukee police detective called by the State that Fritz was charged with an armed robbery, not the armed robbery of Wong's Wok, and that Fritz was interviewed in advance of Smith's trial by authorities "regarding various armed robberies," but that Fritz did not face federal charges. Fritz's understanding was that the State would seek a sentence of seven years' initial confinement in prison and three years of extended supervision, but with the opportunity for a recommendation of one or two fewer years based on truthful testimony in Smith's case.

Eric Gray

¶46 Gray testified that he had pled guilty to two counts of "armed robbery, bank robbery in [a] federal case," and anticipated receiving a federal sentence of ten to twelve years of incarceration, followed by up to five years of supervised release, with the possibility that he could earn a recommendation from the government for a downward departure. Gray testified that he had no specific understanding that the State would try to influence the government recommendation in the federal criminal case, but he hoped that his attorney would alert the federal prosecutor to the fact that he testified at Smith's trial.

¶47 With that background, Smith contends that he was denied a fair trial because his attorney did not rely on WIS. STAT. § 906.09 to object to the admission of evidence regarding the nature of the convictions of some witnesses called by the State, namely their armed robbery convictions in cases that were pending at the time of Smith's trial. In addressing these claims in Smith's postconviction motion, the trial court concluded that Smith could not show that he was prejudiced by this testimony because "the evidence was not elicited to show that the defendant was probably an armed robber as well, but what type of consideration the individual witnesses were receiving in their own cases for testifying against the defendant." We agree.

¶48 WISCONSIN STAT. § 906.09 is applied through a method commonly referred to as "the counting rule." The general counting rule provides that when a party attacks the credibility of a witness for truthfulness by use of prior criminal convictions of the witness, the jury learns only two facts: (1) that the witness has been convicted of a crime, and (2) the number of prior convictions. ***State v. Smith***, 203 Wis. 2d 288, 297, 553 N.W.2d 824 (Ct. App. 1996). The trial court uses a balancing test, the details of which are not relevant to this appeal, to determine whether to allow impeachment under the counting rule. ***Id.*** at 296. Ordinarily, the jury will not learn the nature of the prior convictions at issue, absent circumstances also not relevant to this appeal. *See* ***Nicholas v. State***, 49 Wis. 2d 683, 689, 183 N.W.2d 11 (1971) (witness denies fact of prior conviction).

¶49 In this case, the prior offenses were not offered by a party seeking to impeach the witnesses. Instead, the witnesses were asked about their pending plea agreements, which necessarily included reference to the charges at issue in those agreements, for the purpose of "fronting" to the jury the potential for bias of these witnesses in favor of the party calling the witnesses, namely the State. The

counting rule "applies only where the theory of impeachment is that the witness is less credible because of her criminal record; WIS. STAT. § 906.09 does not apply when the prior conviction is otherwise relevant, as where ... *the earlier offense demonstrates bias* or is admissible as other act of evidence." 7 Daniel D. Blinka, WISCONSIN PRACTICE SERIES: WISCONSIN EVIDENCE § 609.1 (3d ed. 2008) (emphasis added); *see also* ***State v. Scott***, 2000 WI App 51, ¶28, 234 Wis. 2d 129, 608 N.W.2d 753 (life sentence gave witness motive to falsely confess "without risk," creating bias issue falling outside scope of § 906.09).

¶50 The record supports the State's argument that the State's primary purpose in eliciting this testimony was to take the "sting" out of anticipated impeachment by Smith regarding an obvious point of bias of these witnesses that the defense sought to highlight from the outset of the trial.[9] The bias at issue was the witnesses' belief that lighter sentences might result from testimony favorable to the State and unfavorable to Smith. When a witness has an agreement with the prosecution to testify as part of a plea agreement, the witness's understanding of any potential benefits that the witness may gain from the agreement is unquestionably grounds for impeachment by the defense. ***State v. Lenarchick***, 74 Wis. 2d 425, 446-47, 247 N.W.2d 80 (1976). An agreement can create bias and motivation to lie or mislead, and is therefore subject to exploration on cross-

[9] The record also reflects additional, related purposes of the State in eliciting testimony from law enforcement agents relating to the federal-state investigation that produced the pending charges against witnesses at Smith's trial. The State relied on this testimony to establish the timing of the witnesses' cooperation with authorities, which could be seen as relevant to an assessment of their bias and motivations, and also as general context, to give the jury some understanding of how the investigation unfolded. Our analysis focuses on anticipated impeachment, however, because that appeared to be the State's primary purpose. We do not see anything improper in the additional purposes, at least insofar as the State pursued them in this particular case.

examination. ***Id.*** Defense inquiry may extend beyond specific promises to the witness; the defense may delve into the motives of a witness. ***Id.*** at 446. "'The main objective is to show that the witness may have expected leniency or immunity from prosecution if he gave testimony in favor of the state, and it is necessary to show the commission of wrongful acts in order to establish the basis for such an expectation.'" ***Id.*** at 447 (emphasis added) (quoting ***Whitton v. State***, 479 P.2d 302, 317 (Alaska 1970)).

¶51 The State cannot attempt to hide this form of bias from the defense or the jury. *See* ***State v. Nerison***, 136 Wis. 2d 37, 45-47, 401 N.W.2d 1 (1987). "It is generally recognized that evidence of pending charges against a witness, even absent promises of leniency, may reveal 'a prototypical form of bias.'" ***State v. Barreau***, 2002 WI App 198, ¶55, 257 Wis. 2d 203, 651 N.W.2d 12 (citation omitted). In this case, the State decided, as the State frequently does in calling as witnesses persons who have pending criminal cases, to be first to introduce the jury to the substance of this "prototypical form of bias."

¶52 The purpose of exposing this type of bias is not to attack the credibility of the witness. Instead, the purpose is to support the witness's credibility using evidence of bias that the prosecution must disclose to the defense and that the defense can, and frequently will, seek to exploit at trial. *See* ***Nerison***, 136 Wis. 2d at 45-46 (due process not necessarily violated when prosecution delves into plea agreement details of witnesses called by prosecution). Thus, for example, this court has held that it is not necessarily impermissible bolstering of a witness for the prosecution to elicit the understanding of an alleged accomplice regarding two topics: (1) plea agreement details and (2) steps that the prosecution predicts it will take if the prosecution deems the accomplice to have

lied in testifying. ***State v. Kaster***, 148 Wis. 2d 789, 799-800, 436 N.W.2d 891 (Ct. App. 1989) (citing ***Nerison***, 137 Wis. 2d at 46).

¶53 The State's use of prior convictions here was permissible because the use was, as required, "limited to a proper evidentiary purpose, such as the impeachment of trial testimony or to reflect on the witness' credibility." ***Virgil v. State***, 84 Wis. 2d 166, 183, 267 N.W.2d 852 (1978) (citing ***United States v. King***, 505 F.2d 602, 607 (5th Cir. 1974)). The State did not equate the witness's guilty pleas or convictions to substantive evidence of the guilt of the accused, which would be impermissible. *See* ***King***, 505 F. 2d at 607.[10]

¶54 Therefore, the failure of Smith's attorney to object to the challenged evidence on the grounds of a violation of WIS. STAT. § 906.09 could not have unduly prejudiced his case because such an objection should have been overruled as a matter of law.[11]

[10] ***Virgil v. State***, 84 Wis. 2d 166, 183, 267 N.W.2d 852 (1978), cites ***United States v. King***, 505 F.2d 602 (5th Cir. 1974), for a relevant proposition, and we follow it, while cautioning that citation to federal precedent in this area requires special care, because Federal Rule of Evidence 609, governing impeachment based on prior crimes, differs in multiple respects from Wisconsin's "counting rule."

[11] This appeal addresses, in one context, the extent to which the substance of a witness's prior convictions may be elicited by the party calling the witness. We note briefly that this also occurs in a different but somewhat analogous context in connection with the counting rule, namely when a party waives the "fact and number" limitation for tactical reasons on direct or re-direct examination of a witness. *See* ***State v. Gary M.B.***, 2004 WI 33, ¶18, 270 Wis. 2d 62, 676 N.W.2d 475. *See also* 7 Daniel D. Blinka, WISCONSIN PRACTICE SERIES: WISCONSIN EVIDENCE § 609.1 (3d ed. 2008). This variation on the counting rule allows the jury to assess "'to what extent [the witness's] credibility is impaired, for manifestly offenses vary within vast ranges as to their impeaching powers.'" *See* ***State v. Bailey***, 54 Wis. 2d 679, 690, 196 N.W.2d 664 (1972) (quoting ***Remington v. Judd***, 186 Wis. 338, 341, 342, 202 N.W. 679 (1925)).

IV. Request for New Trial in Interests of Justice

¶55 Smith asks that we exercise our discretionary power under WIS. STAT. § 752.35 to reverse his conviction in the interests of justice on the grounds that the real controversy was not fully tried. Specifically, Smith argues that the conditional order limiting Jackson's cross-examination, the testimony regarding armed robbery convictions admitted by witnesses, and the evidence regarding Smith's tattoo together substantially impaired his right to a fair trial.[12] The real controversy is not fully tried when "the jury was precluded from considering 'important testimony that bore on an important issue' or ... certain evidence which was improperly received 'clouded a crucial issue' in the case." ***State v. Darcy N.K.***, 218 Wis. 2d 640, 667, 581 N.W.2d 567 (Ct. App. 1998) (citation omitted).

¶56 Smith's request for discretionary reversal depends in part on evidence that was admitted but not objected to, and therefore the question is whether "the jury had before it evidence not properly admitted which so clouded a crucial issue that it may be fairly said that the real controversy was not fully tried." ***State v. Hicks***, 202 Wis. 2d 150, 160, 549 N.W.2d 435 (1996).

¶57 This assertion requires us to briefly address the nature of the tattoo evidence.

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[12] WISCONSIN STAT. § 752.35 provides in relevant part:

> **Discretionary reversal.** In an appeal to the court of appeals, if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried, the court may reverse the judgment or order appealed from, regardless of whether the proper motion or objection appears in the record and may direct the entry of the proper judgment or remit the case to the trial court for entry of the proper judgment or for a new trial ....

¶58 Scenario Richardson testified that Smith has a tattoo that reads, "NGM," which stands for "Niggas Getting Money." Richardson testified that "NGM" meant, "Just getting money." When asked how people get money, Richardson responded, "It doesn't mean how. Working, doing anything. It's not a specific thing on how you get money." Richardson testified that Kevin Reynolds also has the "NGM" tattoo.

¶59 Eric Gray testified that Gray, Reynolds, Stallworth, and Smith were among a group of friends during the summer of 2006 who often socialized together. Smith, Stallworth, and Reynolds shared the "NGM" tattoo. Gray testified that "NGM" meant, "People that get money." When asked how people get money, Gray responded, "Got to survive. Got to struggle through their struggle."

¶60 We do not believe that this testimony, either alone or together with the other evidence that Smith challenges, creates a record that the real controversy regarding the identity of the second armed robber was not fully tried. It is not probable that justice has miscarried; individually and collectively the issues identified by Smith as a basis for a new trial are not substantial. In making this argument for a new trial, Smith emphasizes alleged error in granting the State's motion in limine regarding Jackson's mental health, which we have addressed and rejected above. Accordingly, Smith has failed to provide sufficient reason for this court to employ its discretionary power of reversal.

V. Sufficiency of the Evidence

¶61 Smith argues that the evidence was insufficient to support the jury's unanimous conclusion that the State proved beyond a reasonable doubt that he,

and not someone else as his attorney contended at trial, was the person who robbed Wong's Wok at gunpoint with Jackson.

¶62 In considering a claim that a criminal conviction was based on insufficient evidence, "it is not necessary that [the appellate] court be convinced of the defendant's guilt but only that the court is satisfied the jury acting reasonably could be so convinced." ***State v. Koller***, 87 Wis. 2d 253, 266, 274 N.W.2d 651 (1979). This court will sustain a jury verdict in a criminal or civil case if "any credible evidence" supports it. ***Morden v. Continental AG***, 2000 WI 51, ¶38, 235 Wis. 2d 325, 611 N.W.2d 659. Thus, we will "resolve sufficiency of the evidence questions by looking at the proof in the light most favorable to the verdict." ***State v. Caldwell***, 154 Wis. 2d 683, 691, 454 N.W.2d 13 (Ct. App. 1990).

¶63 While not specifically addressing a sufficiency claim in its order denying the postconviction motion, the trial court expressed a view that trial "testimony of the defendant's involvement in the robbery at Wong's Wok was overwhelming." Our own review of the record supports a conclusion that the evidence was strong. In addition to the heavy impact of Jackson's detailed testimony describing Smith's involvement in the armed robbery, the jury was entitled to credit the testimony regarding postrobbery admissions Jackson made to witnesses who testified at trial, and the reasonable inferences that could be drawn from the seizure of a long gun resembling a firearm used in the robbery from Jackson. Viewed in the light most favorable to the verdict, the jury need only have believed Jackson's testimony to be credible in order to find Smith guilty of the single offense charged. In addition, Richardson, Fritz, Gray, and other witnesses corroborated this testimony, leaving no question that the evidence was sufficient for the jury to find Smith guilty of violating each element of WIS. STAT.

§ 943.32(1)(b) and (2) beyond a reasonable doubt. Therefore, there is an insufficient basis to set aside the verdict of the jury.

VI. Claim of Unduly Harsh Sentence

¶64 Finally, Smith asserts that his sentence was unduly harsh. A sentence is unduly harsh when it 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 (1975). When this occurs, "the sentencing court has erroneously exercised its discretion, and the sentence may be reduced." ***State v. Scaccio***, 2000 WI App 265, ¶17, 240 Wis. 2d 95, 622 N.W.2d 449. To establish erroneous exercise of discretion, "[t]he defendant must show an 'unreasonable or unjustifiable basis in the record for the sentence complained of.'" ***Id.*** (citations omitted).

¶65 The trial court sentenced Smith to seven years and six months of initial confinement in prison, followed by five years of extended supervision. Smith asserted as grounds for his motion that there is "no rational basis that can explain" Smith's sentence as compared with the probationary disposition received by Dannie Stallworth following Stallworth's misdemeanor conviction (receiving stolen property) for Stallworth's role in the Wong's Wok armed robbery as the getaway driver.

¶66 In its order denying relief on this issue, the circuit court stated that it had reviewed the transcript of the sentencing by the trial court and "perceive[d] no erroneous exercise of discretion in imposing a sentence that is slightly more than one-quarter of the maximum penalty provided by statute." We conclude that the

sentence Smith received was reasonable based on the aggravating and mitigating factors cited by the circuit court.

¶67 In this appeal, Smith does not compare and contrast factors relevant to his sentence with those relevant to Stallworth's sentence. Such comparison is necessary to demonstrate any degree of inequity, much less a shocking disparity. Yet even when considered on its incomplete terms, Smith's argument fails. Smith's conduct was more dangerous, and therefore required a more severe sentence, assuming all other factors to be the same between Smith and Stallworth. Stallworth was the getaway driver. In contrast, Smith entered a restaurant while masked, carrying a shotgun and demanding money, and then fled a police detective while armed with the shotgun. In addition, Smith was on probation at the time he committed this armed robbery.

¶68 Furthermore, the record reflects assiduous effort by the trial court to calibrate Smith's sentence to Smith's individual culpability and rehabilitative needs. *See* ***State v. Toliver***, 187 Wis. 2d 346, 362, 523 N.W.2d 113 (Ct. App. 1994) (disparity in sentencing not improper if court individualizes sentences based on relevant factors such as the severity of offense, need to protect the community, and rehabilitative needs of offender). This involved an extended sentencing hearing at which many mitigating and aggravating circumstances were aired, identifying Smith's case as a "tragedy" in part because Smith was just twenty-one years old at the time of sentencing (indeed, only eighteen at the time of the offense).

¶69 The court did not erroneously exercise its discretion in concluding that, based on all relevant factors, Smith's planned, life-threatening criminal conduct required confinement of seven years, six months as punishment and to

protect the community. Accordingly, we affirm the decision of the circuit court to deny the postconviction motion for modification of Smith's sentence.

CONCLUSION

¶70 For these reasons, we affirm the judgment of conviction and the order denying Smith's motion for postconviction relief.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.