COURT OF APPEALS
DECISION
DATED AND FILED

November 11, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-0480-CR **Cir. Ct. No. 01 CF 005008**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KIEUTA Z. PERRY,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEFFREY A. CONEN, Judge. *Affirmed*.

Before Fine, Schudson and Curley, JJ.

¶1 PER CURIAM. Kieuta Z. Perry appeals from a judgment of conviction after a jury convicted him of first-degree recklessly endangering safety by use of a dangerous weapon. He also appeals from the order denying his motion for postconviction relief. Perry argues that: (1) the trial evidence was insufficient;

(2) the trial court erred in denying his motion for mistrial; (3) counsel was ineffective; and (4) his sentence is unduly harsh and excessive. We affirm.

I. BACKGROUND

¶2 At approximately 4:30 p.m., on July 27, 2001, Samuel Roberts and his brother, Tyrone Roberts, had an altercation with some men near the 3200 block of North 29th Street. Samuel Roberts testified that shortly after the fight began, a man, whom he later identified as "Kikki," a/k/a Kieuta Perry, displayed a semi-automatic handgun and began firing at him, grazing him in the back of the head, and causing him to fall. Roberts testified that after he fell to the ground, Perry approached him, stood right over him, and shot him several times, gravely injuring him. Roberts suffered six gunshot wounds—three to his right leg, one to his left leg, one to his left forearm, and a graze wound to the back of his head. As a result of his injuries, Roberts underwent surgery to repair several broken bones, and, at the time of trial, Roberts anticipated having to undergo additional reconstructive surgery to his arm.

¶3 Detective Dennis Kuchenreuther testified that he interviewed Roberts shortly after Roberts' arrival at Froedtert Hospital. Detective Kuchenreuther explained that during this initial interview, Roberts failed to identify Perry from a photo array. Trial testimony established, however, that in a subsequent interview, Roberts identified Perry as his assailant. Detective Charles Childs testified that on September 18, 2001, he spoke with Roberts, who was then recovering from his injuries in Michigan. At that time, Roberts told Detective Childs that he had previously not named Perry because Perry was a notorious gang member and he was afraid of him.

¶4 Detective Childs also testified that when he first interviewed Roberts on July 27 at Froedtert, just shortly before his surgery, Roberts had trouble answering questions, appeared to be in a lot of pain, and directed him to talk to his brother, Tyrone, for assistance in identifying the gunman. Detective Childs stated that it was not unusual for head-wound victims to fail to give details of their attacks until after they have received medical treatment and, further, that their recollections can be clear after they have received medical treatment.

¶5 Defense witnesses Marcus Leavy and Patrick Morgan testified that they were with Perry on the day of the shooting. Leavy testified that at the time of the shooting, he saw an armed man ride by on a bike and begin shooting. Leavy claimed that when the first shot was fired, he (Leavy) "ducked down," and although he could not see anything, "[he] believe[d] [he] heard two pistols . . . going off." He also testified that he did not see Perry "doing any shooting." Morgan testified that he had also seen someone on a bike, but acknowledged that he could not discern whether the bike rider was firing a gun.

¶6 At the conclusion of the four-day trial, the jury convicted Perry of first-degree recklessly endangering safety by use of a dangerous weapon. The court imposed a fifteen-year sentence, comprised of eight years of initial confinement and seven years of extended supervision. Perry filed a motion for postconviction relief and for sentence modification, which the trial court denied.

II. ANALYSIS

A. Sufficiency of the Evidence

¶7 Perry argues that the evidence was insufficient to support the jury's conviction. We disagree. We will reverse a conviction if "the evidence, viewed

most favorably to the [S]tate and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). The jury, not a reviewing court, determines the credibility of witnesses and the weight of their testimony, ***Whitaker v. State***, 83 Wis. 2d 368, 377, 265 N.W.2d 575 (1978), and resolves any conflicts in the evidence, ***State v. Daniels***, 117 Wis. 2d 9, 18, 343 N.W.2d 411 (Ct. App. 1983). If a jury could reasonably have drawn more than one inference from the evidence, a reviewing court must accept the jury's choice. ***State v. Alles***, 106 Wis. 2d 368, 377, 316 N.W.2d 378 (1982). Thus, a defendant "attacking a jury verdict has a heavy burden, for the rules governing our review strongly favor the verdict." ***State v. Allbaugh***, 148 Wis. 2d 807, 808-09, 436 N.W.2d 898 (Ct. App. 1989).

¶8 Perry first argues that "the victim's testimony at trial was inconsistent and not trustworthy." Specifically, he cites Roberts' failure to identify him when first interviewed at the hospital and Roberts' later claim of not even remembering being questioned at the hospital as examples of these inconsistencies. He also contends that "trial testimony regarding the unidentified bike rider proves that there was someone, other than [him], at the scene doing the shooting." His argument fails.

¶9 Roberts, who suffered wounds to his forearm, head, and legs, had reason not to clearly describe the shooter, or to remember the hospital interview. He was on morphine and, as he explained, fighting to survive. Roberts testified that after his release from the hospital and move to Michigan, he spoke to Detective Childs by phone, and told him that he did not identify Perry during his hospital stay because Perry was a member of a gang and he feared retribution.

¶10 Trial evidence also established that Roberts had seen his shooter. Roberts testified that after Perry shot him the first time, Perry came back to where he was lying, stood over him, and shot him five more times. Roberts' testimony was also corroborated by his brother's testimony.

¶11 Perry nevertheless argues that Roberts' testimony should not have been believed because, at the preliminary hearing, he testified that he was knocked unconscious from the first shot and, at trial, he said he could not recall whether he had been unconscious. We disagree.

¶12 At the preliminary hearing, Roberts testified that he was knocked unconscious by the first shot. He noted, however, that he was not unconscious for very long because he immediately realized that someone was standing over him, shooting him. At trial, Roberts stated that he could not recall whether he had been knocked unconscious. When confronted with his preliminary hearing testimony on cross-examination, however, he testified that he was not lying at the preliminary hearing, and acknowledged that he "might [have] blacked out or whatever, but saw what he saw." Any inconsistency between Roberts' preliminary hearing testimony and his trial testimony was minor. The jury clearly believed Roberts' account, which, of course, was within its province. *See* ***Daniels***, 117 Wis. 2d at 18 (jury resolves conflict in the evidence).

¶13 Perry also claims that testimony about an armed bicyclist at the scene undermines Roberts' and his brother's testimony. Specifically, he asserts that the "trial testimony regarding an unidentified bike rider proves that there was someone, other than Perry, at the crime scene doing the shooting." We cannot agree. Neither Roberts nor his brother denied that a bicyclist was at the scene, but no evidence supports defense-witness Leavy's claim that this person shot anyone.

Indeed, Leavy's testimony—implying that the unidentified bicyclist was firing two pistols, apparently while riding his bicycle—could easily have been rejected by the jury. Moreover, Leavy admitted that even under his version of the facts, Perry could have done the shooting. Consequently, the jury was entitled to believe Roberts' testimony, which was corroborated by his brother and by the physical evidence.

B. Motion for Mistrial

¶14 Perry next argues that the court erred in denying his motion for a mistrial after Detective Childs testified that the reason why Roberts initially failed to identify Perry as the shooter was because he (Roberts) knew Perry was a gang member. We disagree.

¶15 The decision to declare a mistrial is within the sound discretion of the trial court. ***State v. Copening***, 100 Wis. 2d 700, 710, 303 N.W.2d 821 (1981). Our review is limited to whether the trial court erroneously exercised discretion in refusing to declare a mistrial. ***State v. Pankow***, 144 Wis. 2d 23, 47, 422 N.W.2d 913 (Ct. App. 1988). A trial court properly exercises discretion when it examines the relevant facts, applies the proper standard of law, and engages in a rational decision-making process. ***Schultz v. Darlington Mut. Ins. Co.***, 181 Wis. 2d 646, 656, 511 N.W.2d 879 (1994).

¶16 Here, the State informed the court that Perry himself had admitted that he was a member of the Gangster Disciples, and argued that it was eliciting this information about Perry's gang affiliation to explain Roberts' reluctance to identify him. Based on this showing, the court found Detective Child's statement to be relevant to Roberts' credibility, and, further, found that the statement was true. Consequently, the trial court then instructed the jury that the evidence was

relevant "as it relates to [Roberts'] state of mind as an explanation for the delay in providing police with the name of [the defendant] as the person who shot him," and for no other reason. The limiting instruction was given to the jury on the same day the evidence was heard; hence, the timing of the instruction minimized any potential adverse effect on Perry's defense. *See* ***State v. Truax***, 151 Wis. 2d 354, 362, 444 N.W.2d 432 (Ct. App. 1989) (jury presumed to follow instructions). Accordingly, we conclude that the trial court did not err in denying the motion for mistrial.

C. Ineffective Assistance of Counsel

¶17 Perry next claims that counsel was ineffective for failing to: (1) object to the adjournment of the trial; (2) ask for a continuance when the State produced Roberts' brother as what he terms a "surprise" witness; and (3) object and move to strike Tyrone Roberts' comment that he couldn't "see how [defense counsel] can defend a person who's shot a person this many times."

¶18 To prevail on a claim of ineffective assistance of counsel, a defendant bears the burden of establishing that counsel's performance was deficient and that the deficient performance produced prejudice. ***State v. Sanchez***, 201 Wis. 2d 219, 232-36, 548 N.W.2d 69 (1996). To show prejudice, the defendant must demonstrate "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Strickland v. Washington***, 466 U.S. 668, 694 (1984). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.***

¶19 Ineffective-assistance-of-counsel claims present mixed questions of law and fact. ***State v. Pitsch***, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985).

A trial court's factual findings must be upheld unless they are clearly erroneous. ***State v. Harvey***, 139 Wis. 2d 353, 376, 407 N.W.2d 235 (1987). Whether counsel's performance was deficient and, if so, whether the deficient performance prejudiced the defendant present questions of law, which we review *de novo*. ***Pitsch***, 124 Wis. 2d at 634. The defendant has the burden of persuasion on both prongs of the test, and a reviewing court need not address both prongs if the defendant fails to make a sufficient showing on one. ***Strickland***, 466 U.S. at 687.

¶20 A defendant is not automatically entitled to a hearing on a postconviction motion. ***State v. Bentley***, 201 Wis. 2d 303, 313, 548 N.W.2d 50 (1996). If a defendant presents only conclusory allegations that fail to raise a question of fact, or if the record conclusively demonstrates that the defendant is not entitled to relief, the court may deny the motion on its face. ***Id.*** at 309-10. Whether a motion alleges facts warranting relief, thus entitling a defendant to a hearing, is a legal issue we review *de novo*. ***Id.*** at 310. If the motion and affidavits fail to allege sufficient facts, the trial court has discretion to deny the postconviction motion without a hearing, ***id.*** at 310-11, and this court reviews that denial solely to determine whether the court erroneously exercised discretion, ***id.*** at 311.

¶21 Perry contends counsel was ineffective for failing to object to the trial court's adjournment of the trial from Wednesday, March 27, 2002, until May 6, 2002. His contention is baseless. The trial court decided not to begin the trial on March 27 because it was the holy week of Easter and Passover—March 27 was Passover, and March 29 was Good Friday. After questioning counsel about the expected duration of the trial, the court concluded that the trial could not possibly be finished by Friday at noon. Consequently, due to concerns about finding jurors

who would be willing and able to serve, the court adjourned the trial until May 6, 2002.

¶22 Perry argues, however, that counsel's failure to object to the adjournment and move to dismiss prejudiced him because, in the interim, Tyrone Roberts, Samuel Roberts' brother, became available to testify for the State. Perry implies that if the trial had taken place before May 6, Tyrone Roberts would not have been available to testify, and, he contends, "[Samuel Roberts'] shaky testimony would have been uncollaborated [sic] and the jury would not have then brought in a guilty verdict." He also maintains that this failure prejudiced him because, he contends, if the trial had taken place over the holy week and had not finished prior to noon on Good Friday, the trial would have been interrupted and "the jurors may well [have] forget[ten] some of the State's evidence." Perry's arguments are both speculative and absurd. As the State aptly observes, defendants do not have "a right to a tactical advantage, much less a right to have the jurors forget some of the evidence." A criminal trial is not a game; it is a search for the truth. *See* ***Morris v. Slappy***, 461 U.S. 1, 15 (1983) (A criminal trial is not a "game."); s*ee also* ***State v. Reid***, 166 Wis. 2d 139, 146, 479 N.W.2d 572 (Ct. App. 1991) (search for truth is highest priority at trial).

¶23 Slightly altering this argument, Perry next claims that counsel was ineffective for not asking for a continuance when Tyrone Roberts appeared for trial. As the State explains, however, Tyrone Roberts was a surprise witness to both parties; the court allowed both parties to interview him before he testified and, as a result, the defense withdrew any objection. Nevertheless, Perry faults counsel for not at least asking for a continuance. Although he does not suggest what benefit he would have received, or how he was prejudiced, he implies that if requested and granted, Tyrone Roberts might not have been available to testify.

As we have already noted, however, a criminal trial is not a game. Perry's argument is without merit.

¶24 Perry also contends that counsel was ineffective for failing to object and move to strike Tyrone Roberts' remark, "I don't see how you can defend a person who's shot a person this many times." We disagree.

¶25 The court promptly admonished the witness, instructing him to limit his answer to the question. Tyrone apologized and then asked counsel to repeat his question. Perry claims that the "jury's attention should have been focused towards disregarding the remark." We disagree; apparently, counsel decided not to highlight Tyrone's opinion by moving to strike and requesting an instruction. Moreover, even if counsel's failure to object were deemed deficient, Perry has not established how the failure prejudiced him. Consequently, the trial court did not err in denying his request for a ***Machner*** hearing.[1]

D. Request for Sentence Modification

¶26 Perry contends that the "fifteen[-]year maximum sentence is harsh and excessive." Essentially, he contends that the sentence is excessive given that the trial evidence, in his opinion, was insufficient to support his conviction. His contention is without merit.

¶27 The principles governing appellate review of a court's sentencing decision are well established. *See* ***State v. Larsen***, 141 Wis. 2d 412, 426, 415 N.W.2d 535 (Ct. App. 1987). Appellate review is tempered by a strong policy

[1] ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

against interfering with the trial court's sentencing discretion. ***Id.*** We will not remand for resentencing absent an erroneous exercise of discretion. ***State v. Thompson***, 172 Wis. 2d 257, 263, 493 N.W.2d 729 (Ct. App. 1992). In reviewing whether a court erroneously exercised sentencing discretion, we consider: (1) whether the court considered the appropriate sentencing factors; and (2) whether the court imposed an excessive sentence. ***State v. Glotz***, 122 Wis. 2d 519, 524, 362 N.W.2d 179 (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 (1992).

¶28 At sentencing, the prosecutor asked the court to impose the maximum sentence, ten years of initial confinement, and five years of extended supervision. Defense counsel requested that the court impose an initial confinement period of five to seven years, followed by a period of six to eight years of extended supervision. Perry addressed the court and denied having committed the crime.

¶29 The trial court then commented on Perry's character, the gravity of the offense, and the need to protect the public. The court noted that Perry had a poor work history, little education, and a troubled background, which included having been involved in a shooting in Indiana. The court observed that Roberts was rendered disabled by the shooting and that he and his family remained fearful of retribution. Finally, the court addressed the need to protect the public from men who choose to solve disputes with violence, particularly gun violence.

¶30 The record reflects the sentencing court's proper consideration of the appropriate sentencing factors and its adequate explanation of the bases for the sentence. The court's sentencing comments reflect "a process of reasoning based

on legally relevant factors." ***State v. Wickstrom***, 118 Wis. 2d 339, 355, 348 N.W.2d 183 (Ct. App. 1984) (appellate court had duty to affirm sentencing decision if trial court "engaged in a process of reasoning based on legally relevant factors.").

¶31 Further, we do not conclude that "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 (1975). Considering Perry's character and rehabilitative needs, and considering the emotional, physical and economic trauma suffered by Roberts, the sentence is not unduly harsh or excessive.

By the Court.—Judgment and order affirmed.

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