COURT OF APPEALS
DECISION
DATED AND FILED

February 3, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-1318-CR **Cir. Ct. No. 02CF000435**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LARRY B. HOOKER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: PATRICIA D. McMAHON, Judge. *Affirmed*.

Before Wedemeyer, P.J., Fine and Schudson, JJ.

¶1 PER CURIAM. Larry B. Hooker appeals from a judgment entered after a jury found him guilty of one count of arson and two counts of first-degree recklessly endangering safety, contrary to WIS. STAT. §§ 943.02(1)(a) and

941.30(1) (2001-02).[1] He also appeals from an order denying his postconviction motion. Hooker claims: (1) the evidence relied upon at the preliminary hearing was inadmissible and insufficient to support a finding of probable cause; (2) the evidence was insufficient to support the conviction; and (3) the trial court erroneously exercised its sentencing discretion. Because the first claim is legally barred, because the evidence is sufficient to sustain the conviction, and because the trial court did not erroneously exercise its sentencing discretion, we affirm.

I. BACKGROUND

¶2 At approximately 4:30 a.m. on January 10, 2002, fires were deliberately set in the Milwaukee apartment of Trina Flowers-Hooker and her fifteen-year-old daughter, Dominique Gosia. Flowers-Hooker was not in the apartment at the time, but Dominique was sleeping in her room. She awoke when she heard the phone ringing and was able to exit the apartment safely. Both Dominique and Flowers-Hooker gave statements to the police implicating Flowers-Hooker's estranged husband, Larry B. Hooker, as the suspected arsonist.

¶3 Hooker was charged with one count of arson and one count of first-degree recklessly endangering safety (of Dominique), and a second count of first-degree recklessly endangering safety was added later. The additional charge related to a sixty-two-year-old neighbor who lived across the hall from Flowers-Hooker. The neighbor required oxygen to breathe and had an "oxygen in use" sign on her door.

[1] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

¶4 Hooker's preliminary hearing took place on March 6, 12, and 15, 2002. The statements Dominique gave police were admitted over Hooker's hearsay objection under the excited utterance exception. Hooker was bound over for trial. On May 3, 2002, Hooker filed a motion to dismiss, alleging the preliminary hearing was defective because of the reliance on the hearsay statements. Hooker argued that the court commissioner erred in ruling that these statements qualified as excited utterances. The trial court denied the motion.

¶5 Hooker's case was tried before a jury on August 19-22, 2002. The jury found him guilty on all three counts. He was sentenced to fifty years in prison on the arson count, with thirty years of initial confinement, followed by twenty years of extended supervision. The trial court sentenced him to five years' confinement, followed by five years' extended supervision on the first recklessly endangering safety count, consecutive to the arson. Hooker was sentenced to five years' confinement, followed by five years' extended supervision on the second recklessly endangering safety count, to be served concurrently.

¶6 In May 2002, Hooker filed a postconviction motion seeking sentencing modification. The trial court denied the motion. Hooker now appeals.

II. DISCUSSION

A. Preliminary Hearing.

¶7 Hooker claims that there was no probable cause to bind him over at the preliminary hearing because Dominique's statement to police was inadmissible. Without that statement, Hooker contends there was insufficient evidence to make a finding of probable cause. Therefore, he requests that we

reverse his conviction and remand the matter to the trial court. We cannot grant his request.

¶8 As the State correctly points out, a defendant may not challenge preliminary hearing errors after he has been convicted at a fair and error-free trial. ***State v. Webb***, 160 Wis. 2d 622, 628, 467 N.W.2d 108 (1991). Defects at the preliminary hearing are non-jurisdictional and issues relating to the probable cause phase are not reviewable after the jury has found guilt beyond a reasonable doubt. ***Id.*** Accordingly, the issue he raises regarding the preliminary hearing defect is moot and will not be addressed by this court. ***Id.*** In addition, Hooker failed to reply to the State's response brief, and therefore concedes the point. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

B. Sufficiency of the Evidence.

¶9 Hooker next contends that the evidence introduced at trial was insufficient to sustain his convictions. He rests this contention on the fact that no one actually saw him start the fires, that Dominique's trial testimony was inconclusive, that Flowers-Hooker suggested her boyfriend may have started the fires, and the other evidence was all circumstantial. Based on our standard of review, we reject Hooker's insufficiency claim.

¶10 In reviewing these types of claims, our review is limited. We will not reverse the conviction unless the evidence, when viewed in a light most favorable to the verdict, "is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990).

¶11 Although Hooker points to the evidence which would support his claim of innocence, he ignores the remainder of the evidence, upon which a reasonable jury could find him guilty beyond a reasonable doubt. This evidence included the following facts. At 2:45 a.m., on January 10, 2002, Hooker came over to the apartment. Flowers-Hooker and Hooker argued and Flowers-Hooker left the apartment. Flowers-Hooker then used her cell phone to call the apartment and Hooker answered the telephone. Flowers-Hooker told Hooker to leave the apartment.

¶12 Dominique, who had been sleeping in her room, heard the telephone ring and heard Hooker talking on the phone. She then heard him walking back and forth between the living room and her mother's bedroom, and then heard a "whooshing" sound. She opened her bedroom door a crack and saw Hooker walking toward the door. She then heard someone leave the apartment. When Dominique walked into the living room, she discovered the love seat was on fire. She then saw that there was a fire in her mother's bedroom as well.

¶13 Dominique immediately telephoned her mother and told her that Hooker had set the apartment on fire. Flowers-Hooker called 911 at 4:52 a.m. to report the fire and said the person who set the fire just left the house. Flowers-Hooker drove to the apartment and noticed Hooker's car pulling out of the driveway of her apartment building. At about 5:12 a.m., Hooker called Flowers-Hooker and said, "you took something precious away from me, and so now I'm taking something precious away from you."

¶14 Based on these facts, a jury could reasonably conclude that Hooker was the arsonist. Although Dominique and Flowers-Hooker's trial testimony varied from their earlier statements, the jury was free to determine which

statements were a credible accounting. Prior inconsistent statements, such as those made by Flowers-Hooker and Dominique, are properly admissible as substantive evidence. ***State v. Moffett***, 147 Wis. 2d 343, 355, 433 N.W.2d 572 (1989). Accordingly, we conclude the evidence was sufficient to sustain the jury's verdict.

C. Sentencing.

¶15 Hooker also claims that the trial court erroneously exercised its sentencing discretion. He argues that the trial court failed to account for the "mitigating circumstances," namely that he maintained his innocence and both Dominique and Flowers-Hooker stated their belief that Hooker was innocent. He also complains that the trial court did not consider his "cooperativeness" and wrongly assumed he failed to appreciate the severity of this crime. We conclude that the trial court did not erroneously exercise its sentencing discretion.

¶16 Our standard for reviewing sentencing decision is limited as the trial court is afforded wide discretion in determining the appropriate sentence for the crime committed. ***State v. Jackson***, 110 Wis. 2d 548, 552, 329 N.W.2d 182 (1983). This court will presume that the sentences the trial court imposes are reasonable. ***State v. Lechner***, 217 Wis. 2d 392, 418, 576 N.W.2d 912 (1998). To overcome this presumption, a defendant must demonstrate that the court erroneously exercised its discretion. ***Ocanas v. State***, 70 Wis. 2d 179, 183, 233 N.W.2d 457 (1975). Generally, a trial court must consider three primary factors before imposing sentence: the gravity of the offense, the character and rehabilitative needs of the offender, and the need to protect the public. ***Elias v. State***, 93 Wis. 2d 278, 284, 286 N.W.2d 559 (1980). The trial court may also consider a host of secondary factors: the defendant's criminal record, history of

undesirable behavior patterns, personality and social traits, results of a presentence investigation, the aggravated nature of the crime, degree of culpability, demeanor at trial, remorse, repentance and cooperativeness, educational and employment history, the need for close rehabilitative control, and the rights of the public. ***State v. Lewandowski***, 122 Wis. 2d 759, 763, 364 N.W.2d 550 (Ct. App. 1985).

¶17 A defendant satisfies his burden by showing that: (1) the sentence was imposed without the underpinnings of explained judicial reasoning; (2) the sentencing court relied upon factors that were totally irrelevant or immaterial to the type of decision to be made; (3) it placed too much weight upon one factor in the face of other contravening considerations; or (4) the sentence was so disproportionate to the crime as to shock public sentiment. ***State v. Johnson***, 74 Wis. 2d 26, 44, 245 N.W.2d 687 (1976); ***State v. Wickstrom***, 118 Wis. 2d 339, 354, 348 N.W.2d 183 (Ct. App. 1984).

¶18 Hooker's sentencing challenge does not fall squarely into any of these four categories. Rather, he contends that his claim of innocence should have mitigated the sentence. The trial court is not obligated to mitigate a sentence based on the defendant's conclusory statement that he did not commit the crime.

¶19 He also argues that his cooperativeness should have factored into the sentencing decision. Again, this is not a factor that the trial court is obligated to consider during the sentencing process. Hooker fails to cite any legal authority to support this contention.

¶20 Finally, Hooker argues that the trial court wrongly assumed that he did not appreciate the severity of this crime. The State points out that nothing Hooker said during his brief allocution at the sentencing hearing would suggest to the court that he had any remorse or appreciation for the danger posed to

Dominique or the other residents when the fires were deliberately set in the apartment at 4:30 a.m. on January 10, 2002. Hooker did not file any reply to refute the State's contention. Accordingly, he concedes the point. *See* ***Charolais Breeding Ranches, Ltd.***, 90 Wis. 2d at 109.

By the Court.—Judgment and order affirmed.

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