COURT OF APPEALS
DECISION
DATED AND FILED

February 1, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 04-0076-CR **Cir. Ct. No. 02CF007154**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAVID SANCHEZ,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: JOHN A. FRANKE, Judge. *Affirmed.*

Before Fine, Curley and Kessler, JJ.

¶1 CURLEY, J. David Sanchez appeals the judgment, entered following his guilty plea, convicting him of first-degree reckless homicide as a party to the crime, contrary to WIS. STAT. §§ 940.02(1) and 939.05 (2003-04).[1]

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

Sanchez argues that the trial court erroneously exercised its discretion when, before sentencing him, it determined that he was the actual shooter, as the State argued, rather than an aider and abettor, as Sanchez argued. Sanchez claimed his cousin, Norberto Sanchez, was the shooter and that he only supplied the gun and hat used by Norberto, and drove him to the victim's house and back.[2] Sanchez submits that the trial court should have either proceeded to sentence Sanchez, acknowledging that there was a factual dispute without resolving it, or conducted a hearing at which witnesses would testify and be subjected to cross-examination. Next, Sanchez argues that even if it was proper for the trial court to decide this factual dispute, it erroneously exercised its discretion in reaching its conclusion because no clear and convincing evidence existed to prove that Sanchez was the shooter. We are satisfied that under the holding of ***State v. Spears***, 227 Wis. 2d 495, 596 N.W.2d 375 (1999), the trial court could properly determine whether Sanchez was the shooter without conducting a full-blown evidentiary hearing. Further, our review of the record supports the trial court's assessment that clear and convincing evidence established Sanchez as the shooter.[3] Consequently, we affirm.

[2] Sanchez confessed to supplying the gun and hat, and to driving Norberto to the victim, Eloy Ramirez-Vela's house. Later, Sanchez denied supplying the hat or driving the car. However, he continued to claim to have accompanied Norberto and supplied the gun.

[3] The State maintains, relying on ***State v. Hubert***, 181 Wis. 2d 333, 510 N.W.2d 799 (Ct. App. 1993), that the trial court need not have found clear and convincing evidence in order to determine Sanchez was the shooter, as current law only requires the sentencing court to properly exercise its discretion in making factual findings which impact on sentencing. *See* ***id.*** at 345. However, because the trial court elected to apply a "clear and convincing evidence" standard, we have opted to review the evidence using that burden of proof in analyzing whether the trial court erroneously exercised its discretion.

I. BACKGROUND.

¶2 According to the criminal complaint, on December 22, 2002, around midnight, Eleazar Vela heard a knock at the front door of his house, located on West Grant Street in the City of Milwaukee. He looked out the window and saw a young Hispanic man. The victim, Eloy Ramirez-Vela, Eleazar's son, then came down the stairs and went to the door. Eleazar related that after Ramirez-Vela looked through the crack of the door, he attempted to close the door, and Eleazar heard multiple gunshots. Ramirez-Vela was struck by several bullets and later died.

¶3 Also present in the home that evening was Sirene Segura, Ramirez-Vela's girlfriend. She recalled that she and Ramirez-Vela were upstairs when she heard some knocks on the door. She stated that Ramirez-Vela left the bedroom and walked downstairs to the front door. She heard gunshots, and when she looked outside the bedroom, she saw Ramirez-Vela crawling up the stairs. She asked who shot him and he answered: "It was David Sanchez." Ramirez-Vela's mother also heard her son say that David Sanchez was the shooter, as did a police officer who arrived at the scene. Vela was unable to identify the man who was at the door that evening, but he did pick Sanchez out of a lineup as the man most resembling the person at the door.

¶4 After Sanchez was arrested, he gave several statements to the police. In one, he claimed that he was at the home of his cousin, Martin Hernandez, with a few others, including another cousin, Norberto Sanchez. He claimed that they were discussing the death of Sanchez's brother, who had been shot by Ramirez-Vela's brother, and had recently been convicted of a crime as a result. Sanchez stated that his family was unhappy with the result of the criminal proceedings

because Ramirez-Vela's brother pled guilty to a reduced charge. Sanchez said they began talking about revenge, and Norberto said that if Sanchez would not shoot Ramirez-Vela, he would. Sanchez said that he gave Norberto his gun and drove to Ramirez-Vela's house, where Norberto got out, after putting on a hat found in the car, and walked towards the Ramirez-Vela home. Sanchez recalled that several minutes later, he heard gunshots and saw Norberto run back to the car and get in. Sanchez told police that they then returned to Hernandez's house.

¶5 Norberto was interviewed regarding this matter and claimed to have had no involvement in Ramirez-Vela's death. He stated that although he left at the same time as Sanchez, and people may have thought he left with Sanchez, he was actually in the bathroom and happened to exit the bathroom at the very time that Sanchez came back. Later, in an interview with Sanchez's attorney, Hernandez disputed Norberto's account of his whereabouts and said that he could not have been in the bathroom. At one point during the investigation, the police, at Norberto's request, brought Norberto into the interrogation room to confront Sanchez regarding his claim that Norberto was the shooter. Sanchez refused to talk to Norberto in Spanish—the only language Norberto understands. As a result, the police remained unconvinced that Sanchez was telling the truth.

¶6 After Sanchez's arrest, the police found a hat similar to the one worn by the shooter in Sanchez's house, and a number of bullets, of the same type and make as the casings found at the scene, in Sanchez's garbage.

¶7 Sanchez was charged with first-degree reckless homicide, as a party to the crime. He pled guilty and the State agreed to recommend a sentence of twenty years of initial confinement, with the length of extended supervision left to the discretion of the court. The plea agreement allowed the State to argue

whatever facts it deemed appropriate at sentencing, while Sanchez was free to argue his aiding and abetting theory. The trial court concluded that under either scenario, there was a sufficient factual basis, and accepted Sanchez's plea.

¶8 At sentencing, the trial court discussed the existence of the factual dispute and, rather than proceeding to sentence Sanchez with the disputed fact remaining undecided, undertook an analysis of the existing evidence, concluding that Sanchez was the actual shooter. The trial court announced that there was sufficient clear and convincing evidence to support its view. The trial court then sentenced Sanchez to a term of twenty-six years of initial confinement and fourteen years of extended supervision. In sentencing Sanchez, the trial court indicated that because its determination that Sanchez was the shooter was based on clear and convincing evidence, rather than evidence beyond a reasonable doubt, it decided against giving Sanchez the maximum sentence.

II. ANALYSIS.

¶9 This court will uphold a sentence unless the trial court erroneously exercised its discretion. ***State v. J.E.B.***, 161 Wis. 2d 655, 661, 469 N.W.2d 192 (Ct. App. 1991). Public policy strongly disfavors appellate court interference with the sentencing discretion of the trial court. ***State v. Teynor***, 141 Wis. 2d 187, 219, 414 N.W.2d 76 (Ct. App. 1987). In imposing sentence, a trial court should consider the gravity of the offense, the defendant's character, and the need to protect the public. ***State v. Borrell***, 167 Wis. 2d 749, 773, 482 N.W.2d 883 (1992). The weight given to each of the sentencing factors is within the court's discretion. ***J.E.B.***, 161 Wis. 2d at 662. We presume the trial court acted reasonably, and the defendant must show that the court relied upon an unreasonable or unjustifiable basis for its sentence. ***Id.*** at 661. It is the

responsibility of the sentencing court "to acquire *full* knowledge of the character and behavior pattern of the convicted defendant before imposing sentence." ***Elias v. State***, 93 Wis. 2d 278, 285, 286 N.W.2d 559 (1980) (emphasis added).

¶10 Sanchez argues that the trial court erroneously exercised its discretion when it concluded that Sanchez was the shooter. Sanchez submits that in order for this court to sustain a discretionary determination, the determination "must demonstrably be made and based upon the *facts* appearing in the record," citing and quoting ***State v. Canedy***, 161 Wis. 2d 565, 579, 469 N.W.2d 163 (1991) (citation omitted) (emphasis in brief). He contends that while ***Canedy*** dealt with disputed facts at a motion to withdraw a guilty plea, the same standard applies here. Thus, he asserts the ***Canedy*** definition of a discretionary determination as "the product of a rational mental process by which the *facts of record* and law relied upon are stated and are considered together for the purpose of achieving a reasoned and reasonable determination"—applies. *See* ***id.*** at 580 (citation omitted) (emphasis added). Further, while acknowledging that case law permits the sentencing court to consider unproven offenses, as well as pending charges, he argues that "the dispute before the court in this case involved a fact that was a critical element of the offense, as opposed to a fact regarding the defendant's character, the impact on the victims, or other like matter," and, therefore, the court "had a duty not to just accept one counsel's sentencing hearing presentation over the other's[,]" or "should not have proceeded at all to make a finding, and gone to the sentencing mindful of the dispute." We are not persuaded by Sanchez's arguments.

¶11 Several cases support the sentencing court's decision to decide the factual dispute. In ***Elias***, a case involving facts different than those presented here, our supreme court reminded us that at sentencing, the trial court can consider

other uncharged and unproven offenses, as well as pending charges for which there has been no conviction, because these offenses reflect on the defendant's character. 93 Wis. 2d at 284.

> This court has stated that the trial court in imposing sentence for one crime can consider other unproven offenses, since those other offenses are evidence of a pattern of behavior which is an index of the defendant's character, a critical factor in sentencing. … This court held in *Grant v. State*, 73 Wis.2d 441, 243 N.W.2d 186 (1976) that the trial court could consider offenses which were uncharged and unproven. The trial court can also consider pending charges for which there has been no conviction.

Id. (citations omitted).

¶12 In ***State v. Hubert***, 181 Wis. 2d 333, 510 N.W.2d 799 (Ct. App. 1993), a case involving various acts of arson by Hubert, the State provided the trial court with a list of thirty fires in which it believed Hubert was involved. This court approved the sentencing court's "sifting and winnowing process which eliminated many of the [S]tate's other acts offenses" and reduced the list of proposed other acts of arson to eleven offenses that the court believed were supported by an adequate factual basis. *See* ***id.*** at 345. This court stated that the trial court did not erroneously exercise its discretion in considering the underlying offenses at sentencing. Additionally, we declined Hubert's

> request that we adopt a formal burden of proof requirement for factual findings which impact on a sentencing. Hubert urges us to follow the approach of certain federal jurisdictions. *See, e.g., United States v. Angulo*, 927 F.2d 202, 205 (5th Cir. 1991) (approving the preponderance of the evidence burden); *United States v. Kikumura*, 918 F.2d 1084, 1102 (3d Cir. 1990) (adopting the clear and convincing burden as to a sentencing factor which works an extreme effect on the sentence).

Id. Instead, we explained:

> We decline Hubert's invitation to fix a specific burden of proof as to "other acts" which bear upon a sentencing. We are satisfied that the present law which places all sentences under the standard of judicial discretion remains the more practical and workable rule for both the trial court when imposing a sentence and the appellate court when reviewing a sentence.

Id. Thus, under existing law, it is clear the trial court was free to exercise its discretion when faced with factual disputes.

¶13 Finally, we find the holding in ***Spears***, 227 Wis. 2d 495, particularly instructive. There, the sentencing court refused to consider the homicide victim's rather extensive criminal record in sentencing Spears, who had argued that she had been physically assaulted and robbed of her purse by the homicide victim before she got into a car and ran him down, killing him. In reversing the trial court's decision, the supreme court reasoned that when the victim's criminal record "supports a defendant's version of a crime, the gravity of which is a sentencing factor, it should be admitted as evidence at the defendant's sentencing hearing." ***Id.*** at 511. That logic, although working against Sanchez, nevertheless applies here. If Sanchez actually went to the door, shot at the victim five times without provocation, and killed him, his crime was far worse than if he merely supplied the murderer with a gun, a hat, and a ride, as he claimed. Thus, the trial court was entitled to evaluate the evidence to consider whether Sanchez actually committed the murder and assess the gravity of the crime, as this issue is clearly a sentencing factor. Sanchez's argument that this dispute concerns a "critical element of the offense," as opposed to a fact regarding the "defendant's character, the impact on the victims or other like matters," may be technically correct, but the analysis does not end there. ***Spears*** seemingly teaches that the sentencing court can decide disputes concerning "critical elements" of the offense. As noted in ***Spears***, in

order to pronounce a fair sentence on a guilty party, the trial court should determine the gravity of the offense.

¶14 Further, Sanchez offered no support for his argument that the sentencing court "had a duty not to just accept one counsel's sentencing hearing presentation over the other's." Here, both sides were well aware of the disputed facts and they agreed at the guilty plea proceeding to argue their versions of the events at sentencing. Sanchez cannot then claim surprise or that he was prevented from disputing the State's contention. He even filed a sentencing memorandum with the court explaining his position. Thus, we conclude the trial court properly exercised its discretion in evaluating the factual dispute.

¶15 We next turn to Sanchez's complaint that the trial court erroneously exercised its discretion when it concluded that he was the shooter because no clear and convincing evidence supports the trial court's conclusion. Sanchez argues that "[t]he record was wholly insufficient for the circuit court to have undertaken a determination [of] whether David Sanchez was involved in the commission of the crime as the one having directly committed it, or as the one who aided and abetted."

¶16 Our review of the record reveals that the trial court relied on many significant factors in its determination that Sanchez was the shooter. First, and most important to the trial court's decision, were the victim's dying declarations—Ramirez-Vela's last statements telling three people that David Sanchez shot him. Dying declarations are considered worthy of belief because "the evidence is thought to be sufficiently reliable to dispense with live testimony by the unavailable declarant. The theory here, of course, is that a person would not knowingly go to his or her death with a lie on the lips." RALPH ADAM FINE,

WISCONSIN EVIDENCE 321 (1996). Although the sentencing court explored the unlikely possibility that the victim may have assumed it was Sanchez, given the family history of animosity, it concluded that the evidence pointed squarely to the fact that Ramirez-Vela, well-acquainted with Sanchez because of their prior friendship, had an excellent opportunity to see the person at the door. The trial court characterized this as "strong evidence."

¶17 The trial court also took Sanchez's strong motive for committing the act into consideration. The trial court noted that the shooting occurred about twenty days after the charges against Ramirez-Vela's brother concerning Sanchez's brother's death were reduced. Besides the Sanchez family's unhappiness with the reduced charges, the trial court also knew that Sanchez thought that Ramirez-Vela was following his girlfriend and causing problems for the Sanchez family. The trial court commented that Norberto's motive to harm Ramirez-Vela was not as compelling as Sanchez's, and it did not think that Norberto would have committed this act by himself.

¶18 The trial court also considered Sanchez's subsequent actions when Norberto asked to be questioned in the same room and claimed that he did not participate in the shooting. The trial court believed that Sanchez's refusal to talk to Norberto was another strong indicator that Sanchez was the shooter. As noted, Sanchez refused to communicate with Norberto in Spanish, and spoke only in English, a language Norberto does not understand; after the encounter, Sanchez told the police something to the effect of: "You guys are the detectives, you figure out what happened." The trial court believed this peculiar behavior by Sanchez bolstered the State's contention of what happened.

¶19 Finally, although the trial court made no specific reference in its comments to the evidence of the crime that was found in Sanchez's house, the trial court was mindful of that fact. Evidence from a crime, found in the home of the accused, is usually a strong indicator that the person was deeply involved in the crime.

¶20 Yet, the trial court also weighed the evidence supporting Sanchez's contention that he was not the shooter. This evidence consisted of his admitting to being involved in the shooting, but denying being the shooter, while Norberto totally denied any part in the shooting. However, the trial court commented that it put little stock in the denials because both Sanchez and Norberto had a "tremendous motive to lie." The trial court went on to state that the only other piece of evidence that supported Sanchez's claim that Norberto was the shooter was Eleazar Vela's initial physical description of the man on the porch given to the police. While that description came closer to describing Norberto than Sanchez, as the trial court noted, several days later Vela picked out Sanchez as the man most closely resembling the shooter, which minimized the importance of his earlier description.

¶21 Thus, in reviewing the facts, we are satisfied that the evidence identified by the court in concluding that Sanchez was the shooter constituted "clear and convincing evidence." The underlying evidence was not subject to dispute—no one disputed that the victim's father's description of the shooter changed; that three people heard the victim, after being shot three times and believing he was going to die, say that Sanchez was his killer; that Sanchez had a strong motive for killing Ramirez-Vela; that Sanchez refused to talk to Norberto; and, finally, that incriminating evidence was found in Sanchez's house. Rather, the dispute lies with the facts that can be reasonably inferred from that evidence.

We are satisfied that the trial court properly exercised its discretion in taking all of these matters into account and determining that Sanchez was the shooter. Accordingly, we affirm.

By the Court.—Judgment affirmed.

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