COURT OF APPEALS
DECISION
DATED AND RELEASED

January 16, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 94-2346-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

SOL COLEMAN, JR.,

Defendant-Appellant,

RICHARD COLEMAN,

Defendant.

APPEAL from a judgment of the circuit court for Milwaukee County: JANINE P. GESKE, Judge.[1] *Affirmed.*

[1] Coleman also attempts to appeal from an order dated September 1, 1994, by the Hon. Maxine A. White denying his motion seeking postconviction relief on the grounds that he received ineffective assistance of trial counsel. The order he relies on, however, is invalid because it was entered beyond the time limit within which the trial court was authorized to act on the motion. Section 809.30(2)(i), STATS.; ***State v. Scherreiks***, 153 Wis.2d 510, 516, 451 N.W.2d 759, 761 (Ct.

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

PER CURIAM. Sol Coleman Jr. appeals *pro se* from a judgment entered after a jury convicted him of first-degree sexual assault, contrary to § 940.225(1)(c), STATS. Coleman alleges: (1) that the trial court erred in excluding certain evidence; (2) that the trial court lost subject matter jurisdiction in this case when the State failed to comply with the requirements of § 971.05(3), STATS.; and (3) that his sentence was excessive. Because we resolve each contention in favor of upholding the judgment, we affirm.

I. BACKGROUND

On January 7, 1993, the victim, Lou C., was walking in the area of North Eighth Street and West North Avenue in the City of Milwaukee. Coleman, who was driving his truck in the same area, stopped near Lou C. Coleman's brother, who was riding with Coleman, got out of the truck and asked Lou C. if she wanted a ride. Lou C., who was on her way to the hospital, accepted the ride because she was cold.

Lou C. testified at trial that Coleman told her to remove her pants and when she refused, Coleman told her she had two choices: remove her pants or he would beat her. She removed her pants. Lou C. testified that Coleman sexually assaulted her while his brother held down her arms.

Coleman's defense was that Lou C. consented to having sexual intercourse with him in exchange for drugs. The jury convicted and Coleman was sentenced to thirteen years in prison. He now appeals.

II. DISCUSSION

(..continued)

App. 1989). Accordingly, we are without jurisdiction to review his claim that he received ineffective assistance, as that claim can only be heard where the trial court has entered an order denying a postconviction motion alleging ineffective assistance. *See* ***State v. Machner***, 92 Wis.2d 797, 801-04, 285 N.W.2d 905, 907-09 (Ct. App. 1979); ***State v. Malone***, 136 Wis.2d 250, 401 N.W.2d 563 (1987).

A. Evidentiary Rulings.

Coleman claims the trial court erroneously excluded three pieces of evidence: (1) evidence that Lou C. had previously been convicted of prostitution; (2) evidence that a man named "Jack," who was at a party at a drug house that both Coleman and Lou C. attended, told Coleman that Lou C. was "pretty good in giving head jobs"; and (3) Coleman's statement to his probation officer that his brother was not in the car when the assault occurred.

A trial court's evidentiary rulings will not be reversed if the trial court exercised its discretion in accordance with accepted legal standards and in accord with the facts of record. ***State v. Pharr***, 115 Wis.2d 334, 342, 340 N.W.2d 498, 501 (1983).

1. Prostitution Evidence.

Coleman first claims the trial court should not have excluded evidence that Lou C. had previously been arrested and charged with prostitution. Coleman asserts that he wanted to introduce this evidence in an attempt to corroborate his defense that Lou C. resorted to exchanging sex for money to support her drug use. The trial court ruled that the defense could ask Lou C. "whether or not she was helping support her drug habit by engaging in sexual relations for the drugs or for money for the drugs," but that the defense could not ask "questions concerning any prior arrests." The trial court based its decision on the fact that the prostitution charge was too remote in time and not sufficiently similar to the circumstances of the charged offense, and as a result any marginal probative value of this evidence was outweighed by the potential for unfair prejudice, pursuant to § 904.03, STATS.

Our review of the record demonstrates that this decision was not an erroneous exercise of discretion. The trial court examined the relevant facts: although Lou C. was charged with prostitution, the charge was later dismissed; Lou C. testified that the incident had nothing to do with drugs; and it did not occur in the recent past. The trial court applied the § 904.03, STATS., balancing test to these facts and reasonably concluded that this evidence should be excluded.

2. "Jack's" Statement.

Next, Coleman claims that the trial court erred in excluding evidence that a person known only as "Jack" told Coleman, at a drug house party that Jack, Coleman and Lou C. all attended, that Lou C. was "pretty good in giving head jobs." Coleman indicated that he had seen Jack and Lou C. enter a room together, but that he had no personal knowledge of what happened in the room. Coleman's theory is that Lou C. exchanged sex with Jack for drugs.

The trial court decided that Coleman could testify only to those facts of which he had personal knowledge and could not repeat Jack's statement because it was inadmissible hearsay, under § 908.01(3), STATS. Again, our review of the record reveals that this decision was a proper exercise of discretion. It was reasonable for the trial court to conclude that a statement made by a person known only as "Jack," at a "drug" party, constituted inadmissible hearsay. The trial court's decision was reasonable and based on a proper application of the law to the relevant facts.

In his appeal to this court, Coleman argues, for the first time, that he wanted to introduce Jack's statement only to explain why he later approached Lou C. on the street—not for the truth of the matter. Because Coleman raises this issue for the first time on appeal, we decline to address it. *See* ***Wirth v. Ehly***, 93 Wis.2d 433, 443-44, 287 N.W.2d 140, 145-46 (1980).

3. Probation Statement.

Coleman's final assertion is that the trial court should have allowed him to introduce a statement that he made to his probation officer on January 22, 1993. In the January 22 statement, Coleman indicated that his brother was not in the car with him when the incident took place. Coleman testified at trial, consistent with the January 22 statement, that his brother was not in the truck at the time of the assault. In response to this testimony, the prosecutor introduced Coleman's statement to police on January 8, 1993, that his brother *was* present in the truck during the assault. The trial court excluded the January 22 prior consistent statement on the basis that it did not *precede* the

inconsistent statement and, therefore, did not refute the prior inconsistent statement.

Again, we conclude that the trial court did not erroneously exercise its discretion in reaching this conclusion. In this state, "prior consistent statements must predate the alleged recent fabrication" before they are relevant. *See* ***State v. Peters***, 166 Wis.2d 168, 177, 479 N.W.2d 198, 201 (Ct. App. 1991). It is undisputed that the probation statement was made subsequent to the police statement. Accordingly, the trial court's decision to exclude its admission on the basis of relevance was proper.

We also reject Coleman's claim that this statement should have been admitted under the "completeness" rule professed in ***State v. Sharp***, 180 Wis.2d 640, 511 N.W.2d 316 (Ct. App. 1993). In ***Sharp***, this court recognized that a prior consistent statement may be probative, even if it does not predate the alleged recent fabrication if it is needed to "correct 'the misleading impression created by taking matters out of context.'" ***Id.*** at 654, 511 N.W.2d at 323 (citation omitted). The ***Sharp*** analysis is inapplicable to the facts in Coleman's case because the police statement was not misleading, nor was it taken out of context.

B. Subject Matter Jurisdiction.

Coleman also claims that the trial court lost subject matter jurisdiction over the case because he never received a copy of the information, which violates § 971.05(3), STATS. We reject Coleman's claim because the purpose of § 971.05(3) was satisfied when Coleman's attorney accepted a copy of the information on behalf of his client, and because Coleman did not object to this procedure.

The record demonstrates that the following exchange occurred at Coleman's initial appearance:

[Prosecutor]: I have given ... Mr. Backes for Sol Coleman ... a copy of the information, along with 18 pages of police

> reports, which are all the reports the State currently has regarding this case.
>
> ....
>
> [Coleman's counsel]: I would acknowledge receipt of the information, waive its reading.

The transcript indicates that Coleman was present for this proceeding. It is clear that Coleman's attorney accepted the information on Coleman's behalf. Moreover, Coleman was present to hear that his attorney accepted the information on his behalf and did not object to this procedure. We conclude, therefore, that the purpose of § 971.05(3), STATS., was satisfied and that Coleman waived his right to complain on these grounds.

As a result, we reject his claim that the trial court lost subject matter jurisdiction over his case.

C. Sentencing.

Coleman's final complaint is that he received an excessive sentence. He was sentenced to thirteen years in prison out of a possible maximum sentence of twenty years.

Our standard of review, when reviewing a criminal sentencing, is whether or not the trial court erroneously exercised its discretion. ***State v. Plymesser***, 172 Wis.2d 583, 585 n.1, 493 N.W.2d 367, 368 n.1 (1992). Indeed, there is a strong policy against an appellate court interfering with a trial court's sentencing determination and, indeed, an appellate court must presume that the trial court acted reasonably. ***State v. Thompson***, 146 Wis.2d 554, 564-65, 431 N.W.2d 716, 720 (Ct. App. 1988). When a defendant argues that his or her sentence is unduly harsh or excessive, we will find an erroneous exercise of discretion "only where 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, 461 (1975).

From our review of the record, we conclude that the sentencing court did not erroneously exercise its discretion in imposing sentence, and that the sentence imposed was not unduly harsh or excessive.

The record demonstrates that the sentencing court considered the three primary factors in sentencing Coleman: (1) the gravity of the offense; (2) the character of the offender; and (3) the need to protect the public. ***State v. Harris***, 119 Wis.2d 612, 623-24, 350 N.W.2d 633, 639 (1984). The sentencing court indicated that the sexual assault was of an aggravated nature perpetrated on a very vulnerable victim, whose life has not been the same since the incident. The sentencing court looked at Coleman's character, his criminal record and background, as well as the threat he poses to the community. It is clear from the record that the trial court did not erroneously exercise its discretion in imposing sentence.

We turn now to whether or not the thirteen-year sentence imposed was unduly harsh or excessive. As noted above, Coleman faced a potential maximum sentence of twenty years. He complains mostly about the impact the State's reference to past charges had on the length of the sentence. We are not persuaded by his argument for two reasons: the State is free to present evidence of past criminal activity at the sentencing, *see* ***State v. McQuay***, 154 Wis.2d 116, 124, 452 N.W.2d 377, 380 (1990); and, the sentencing court indicated a limited reliance upon this information, stating that "[i]n terms of these prior incidences and contacts, I'm not going to consider that each and every one is true, but there certainly is a pattern." Further, the sentence imposed was well within the statutory maximum. *See* ***State v. Daniels***, 117 Wis.2d 9, 22, 343 N.W.2d 411, 417-18 (Ct. App. 1983) ("A sentence well within the limits of the maximum sentence is not so disproportionate to the offense committed as to shock the public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances."). Accordingly, we cannot conclude that the sentence imposed was excessive or unduly harsh.

By the Court. – Judgment affirmed.

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