COURT OF APPEALS
DECISION
DATED AND FILED

May 8, 2012

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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

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

Appeal No. 2011AP916-CR **Cir. Ct. No. 2008CF2470**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DWAIN M. STATEN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: REBECCA F. DALLET, Judge. *Affirmed*.

Before Curley, P.J., Fine and Brennan, JJ.

¶1 FINE, J. Dwain Staten appeals the judgment entered on jury verdicts convicting him of burglary, *see* WIS. STAT. § 943.10(2)(a), first-degree

sexual assault, *see* WIS. STAT. § 940.225(1)(b), and armed robbery use of force, *see* WIS. STAT. § 943.32(2). He also appeals the order denying his motion for postconviction relief seeking DNA testing. Staten argues that: (1) the State should pay for more DNA testing because it may show another man had sex with the victim; and (2) the trial court imposed a harsh and excessive sentence.[1] We affirm.

I.

¶2 In January of 2003, S.P. called police to her home to report that a masked man broke down her doors, sexually assaulted her, and stole her jewelry, cell phone, and wallet. Police drove S.P. to a sexual assault treatment center at a Milwaukee hospital where a nurse took vaginal and cervical swabs from S.P. The police also collected S.P.'s pajamas, underwear, and bedsheet.

¶3 A few days later, S.P. told police she thought the masked man was Staten, who had knocked on her door an hour earlier the day of the assault, looking for his "Uncle Ace."

¶4 The police sent the collected evidence to the State Crime Laboratory for DNA testing. The crime laboratory identified semen on one of the vaginal swabs and entered the DNA profile into their databank. In 2006, the DNA profile was identified as Staten's. Police took buccal swabs from Staten to confirm the match. In May of 2008, the State charged Staten with the crimes. He was tried in February of 2010.

[1] Although Staten did not raise the sentencing issue in his postconviction motion, we elect to address the merits nevertheless.

¶5 At trial, S.P. testified that:

- About an hour before the break-in and assault by the masked man, Staten knocked on her door looking for Ace. When S.P. said Ace was not there, Staten said: "I wish I could see what was under your robe"; and S.P. testified "he smiled as he walked away."

- The masked man broke down two doors to get into her home, "charged at me [and] started like rummaging through my … stuff … demanding money" and "forced me into my room" acting "as if he had a gun." "[H]e pulled my pants down" "and he tried to have sex with me but" "I had a tampon inside of me; and he said, well, take it out; and I took it out; and I laid it on the bed; and he went again to have sex."

- "[H]e took my wallet, a cell phone" and some jewelry, including rings from her hand.

- As soon as he left, she took her two children (ages 3 and 10 months), who were also in the apartment when this happened, to her neighbor's and called 911; the police "told me to go back to the house." The police came to her house and she "gave a statement to the police about this happening" but did not tell the police initially that she suspected Staten because "I wanted something to be done to him; so I told my family, my brothers, my kids' father; and they went the same night that it happened … to his house, [but] no one answered."

- The police drove her to the hospital where the nurse examined her "looking for … anything that would … identify my attacker."

- A few days later, she told police she thought her attacker was Staten "because my peoples couldn't get him or find him."

¶6 The State played two audio recordings for the jury. One was S.P.'s 911 call. The other was a recording made apparently accidentally on S.P.'s cell phone during the crimes. S.P. explained to the jury: "I heard whoever attacked me asking me for my rings. I heard me crying. I heard running." S.P.'s daughter's voice was also on the recording.

¶7 The crime lab analyst testified:

- "The laboratory has a policy of best evidence. In cases of sexual assault it's usually going to be a body swab … because [it's] the most intimate. It's the closest to the individual."

- "I was able to identify a small amount of semen on the vaginal and cervical swabs, so I stopped examining evidence. … since I already had semen on the cervical and vaginal swabs, and those are the most intimate swabs, I did not proceed with any of the clothing, or … bedding."

- She found one male "semen donor."

¶8 Staten testified:

- He and Ace went to S.P.'s house on the day of the assault to "smoke marijuana" after they met S.P. on the street.

- After the three finished the marijuana, he went "to the store [to] get another blunt." When he got back, he saw "Ace and Ms. S[.P.] was coming out of the room" "fixing his clothes" as if the two had just had sex.

- He and S.P. then went into her bedroom and had consensual sex.

- He denied breaking in or stealing anything; he claimed that his aunt and girlfriend broke down S.P.'s doors when they came looking for him.

¶9 As noted, the jury convicted Staten. The trial court sentenced Staten to thirty-five years' imprisonment on each count (twenty-five years' initial confinement followed by ten years' extended supervision), concurrent to each but consecutive to any other sentence. In May of 2010, the trial court modified the burglary sentence to fifteen years' initial confinement and five years' extended supervision. In February of 2011, Staten filed a postconviction motion asking for DNA testing of the clothing and other items to show that someone else had sex with the victim. The trial court denied the motion, ruling:

> There is not a reasonable probability, given the issues presented to the jury concerning the credibility of the parties,[] that the outcome of the trial would have been different. As indicated by the State, the defendant is free to pursue his own DNA testing at a private lab at his own cost, but it will not be ordered by the court at public expense.

The trial court also noted that it "observed the [trial] witnesses and did not find either the defendant or the defendant's witnesses credible."

II.

A. *DNA testing.*

¶10 Staten argues that if the other items showed semen from another man, this information could exonerate him. We disagree.

¶11 A defendant may ask for postconviction DNA testing under WIS. STAT. § 974.07(2) if: "(a) The evidence is relevant to the investigation or prosecution that resulted in the conviction"; "(b) The evidence is in the actual or constructive possession of a government agency"; and "(c) The evidence has not previously been subjected to forensic [DNA] testing[.]" The trial court must grant the motion if, as material, the following requirements under § 974.07(7)(a) have been met:

> 1. The movant claims that he … is innocent of the offense at issue in the motion….
>
> 2. It is reasonably probable that the movant would not have been prosecuted [or] convicted … for the offense at issue in the motion … if exculpatory [DNA] testing results had been available before the prosecution [or] conviction….
>
> 3. The evidence to be tested meets the conditions under sub. (2)(a) to (c).

¶12 The State concedes that all the conditions of WIS. STAT. § 974.07(2) have been met. It further concedes that subdivisions 1. and 3. under § 974.07(7)(a) are satisfied. The only issue is whether the DNA testing Staten asks for here would make it "reasonably probable" that he "would not have been prosecuted [or] convicted." We conclude that Staten did not show that the testing he asked for would satisfy that standard.

¶13 As noted, the vaginal and cervical swabs showed the presence of one man's semen. The DNA from that semen matched Staten's DNA. Staten, in fact, admitted that he had sex with S.P. on the day of the crime. Contrary to the theme underlying Staten's argument, the issue here is not mistaken identity but, rather, consent. Staten admits that he had consensual sex with S.P., and S.P. testified that she did not consent. Whether S.P. had sex with Ace or someone else is not material to whether she consented to have sex with Staten. *See* WIS. STAT. § 972.11(2)(b) ("If the defendant is accused of a crime under s. 940.225 … any evidence concerning the complaining witness's prior sexual conduct … shall not be admitted into evidence during the course of the … trial, nor shall any reference to such conduct be made in the presence of the jury," with exceptions not material here.).

B. *Sentencing.*

¶14 Staten also claims that his sentence is harsh and excessive. It is too harsh, he contends, because: (1) he is already serving another thirty-five year sentence for robbery and sexual assault, and (2) he says he is innocent. We disagree.

¶15 Sentencing is within the discretion of the trial court, and our review is limited to determining whether the trial court erroneously exercised that discretion. ***McCleary v. State***, 49 Wis. 2d 263, 277–278, 182 N.W.2d 512, 519–520 (1971). The trial court must consider the three primary sentencing factors: the gravity of the offense, the character of the defendant, and the need to protect the public. ***Id.***, 49 Wis. 2d at 274–275, 182 N.W.2d at 518. 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).

¶16 The trial court considered the appropriate factors. The trial court recognized that "this is an extremely aggravated offense." Staten knew S.P., he "broke down her door[,]" "[w]as masked[,]" acted like "he had a gun," sexually assaulted her, "forced [her] to remove a tampon[,]" did not "use of a condom[,]" and "there were children in this house."

¶17 The trial court also considered Staten's character: "it's also quite disturbing that Mr. Staten has a prior offense that is extremely serious and extremely similar to this offense … a robbery and sexual assault." The fact that Staten did this twice within a short period of time "shows [his] character[.]" The trial court found, "It shows a willingness to perpetrate these types of crimes, to go out and seek them."

¶18 The trial court also looked at the need to protect the public, noting that he was "a huge risk to the community. I don't see how the community can be safe with Mr. Staten on the street, given that he's done this two times; one was a stranger, and one was Ms. P[.], who was an acquaintance." The trial court said Staten was "a danger to any woman at this point in time" and "extremely dangerous."

¶19 The trial court considered all the appropriate factors and acted well within its discretion.

By the Court.—Judgment and order affirmed.

Publication in the official reports is not recommended.