COURT OF APPEALS
DECISION
DATED AND RELEASED

August 29, 1995

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

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No. 94-3170-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

SYLVESTER J. SASNETT, JR.,

Defendant-Appellant.

APPEAL from a judgment and orders of the circuit court for Milwaukee County: VICTOR MANIAN, Judge. *Affirmed.*

Before Sullivan, Fine and Schudson, JJ.

PER CURIAM. Sylvester J. Sasnett, Jr., *pro se*, appeals from a judgment convicting him of two counts of first degree sexual assault as a party to a crime, one count of burglary as a party to a crime, and one count of robbery as a party to a crime, and from orders denying him post-conviction relief. Sasnett asserts the following claims of trial-court error: (1) that expert testimony by the victim's therapist invaded the province of the jury; (2) that he was denied his right to effective assistance of counsel; (3) that his right to an impartial jury

was compromised because of an improper comment made during *voir dire* by a juror who was excused from the jury panel; and (4) that the sentence imposed after his conviction was unduly harsh and unconscionable. We affirm.

Sasnett's criminal acts occurred on January 25, 1989, in connection with a 19-year-old developmentally-disabled, mildly retarded woman. Lisa, the victim of the assaults, testified at trial that on the date the crimes took place, she was at home alone watching television in her bedroom when she heard a door open. Sasnett, an acquaintance of Lisa's family, came into her bedroom and "punched her in the eye." Sasnett then picked her up and carried her into the living-room, placing her on the floor. When they entered the living-room, Lisa saw another male standing there who was told by Sasnett to collect the stereo, jewelry and "other stuff." Sasnett then raped Lisa. After Sasnett completed his assault, the other man raped Lisa as well. After the men carried a number of items out of the house, Lisa called the police and her mother's fiance, Gary Sapiro.

Sasnett testified that he and two other men decided to burglarize Lisa's home because Sapiro had "short-changed" them on money due for work they had previously done for him. He testified that they entered the home and encountered Lisa, not expecting to find anybody home. Sasnett stated that he kept Lisa still while the others searched the home for property to steal. Sasnett further testified that he left the house during the course of the crime for ten to twelve minutes to load the stolen property in a car. When he returned, he found Lisa naked and curled up in a corner. According to Sasnett, one of his accomplices told him "that he had raped her and that he took care of her." Sasnett denied that anybody hit Lisa. He also denied raping Lisa.

I.

Sasnett challenges the trial court's decision allowing the State to introduce expert testimony concerning the developmental disabilities of Lisa. Sasnett argues that the expert's testimony regarding Lisa's ability to recall events impermissibly bolstered Lisa's credibility. "Whether or not expert opinion should be admitted into evidence is largely a matter of the trial court's discretion." ***State v. Friedrich***, 135 Wis.2d 1, 15, 398 N.W.2d 763, 769 (1987). In reviewing this decision, "[t]he question on appeal is not whether this court ...

would have permitted it to come in, but whether the trial court exercised its discretion in accordance with accepted legal standards and in accordance with the facts of record." ***State v. Wollman***, 86 Wis.2d 459, 464, 273 N.W.2d 225, 228 (1979).

"Expert testimony is admissible only if it is relevant. `Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." ***State v. Pittman***, 174 Wis.2d 255, 267, 496 N.W.2d 74, 79 (1993) (citation omitted). Further, expert testimony should assist the jury. *See* RULE 907.02, STATS. The expert, however, must not be allowed to convey to the jury his or her own belief as to the veracity of the complainant. ***State v. Jensen***, 147 Wis.2d 240, 256-257, 432 N.W.2d 913, 920 (1988); ***State v. Haseltine***, 120 Wis.2d 92, 96, 352 N.W.2d 673, 676 (Ct. App. 1984).

The trial court ruled that it would permit Lisa's therapist to testify concerning Lisa's mental capacity, her ability to distinguish between right and wrong, and her ability to recount historical facts. The trial court based its decision on the fact that because the jury saw Lisa testify with obvious limitations, they were entitled to have the testimony of a therapist who had been working with her. The therapist testified that she began working with Lisa in the early 1980's and worked with her until 1990. At that time, she moved into a supervisory role with Lisa's new therapist. As part of Lisa's therapy, the therapist worked to develop her ability to distinguish between right and wrong, which according to the therapist, Lisa had mastered quite well. The therapist also testified that her therapy focussed on Lisa's ability to recall events. She testified that developmentally disabled people depend upon memory as their only way to learn. The therapist stated that Lisa has an incredible memory and that her ability to recall is almost picture perfect.

Sasnett argues that the therapist's expert testimony communicated to the jury that she believed Lisa was telling the truth when she accused him of sexually assaulting her. We reject Sasnett's argument and disagree that the trial court erroneously exercised its discretion in permitting this testimony. In response to questioning whether or not working on Lisa's ability to recall was part of Lisa's therapy, the therapist replied:

Lisa is incredible with her memory and always has been. Her ability to recall is almost picture perfect. And, again, I think that relates to her developmental disability, because people with a developmental disability have only one way to learn, and that's by memory. They cannot think through a process, they cannot make decisions, they cannot learn by thinking through, they can only learn by memory.

So, their memory serves them in order to get through life. So, she could recall almost every detail of every instance. She also does not have the capability of elaborating on her memory, she can't elaborate the way you and I might in looking back. She only will recall the way it was.

As the testimony indicates, the therapist did not offer an opinion or comment regarding whether Lisa was sexually abused or if any of her allegations were truthful. Further, she was not asked about Lisa's character for truthfulness. The therapist's testimony was properly admitted at trial.

II.

Strickland v. Washington, 466 U.S. 668 (1984), sets forth the two-pronged test for ineffective assistance of counsel under the Sixth Amendment to the United States Constitution. First, counsel's performance must be deficient. ***Id.***, 466 U.S. at 687. Second, the deficient performance must prejudice the defendant. ***Id.*** A court, however, need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffective-assistance-of-counsel claim on the grounds of lack of sufficient prejudice, that course should be followed. ***Id.***, 466 U.S. at 697. To show actual prejudice, the defendant must establish "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id.***, 466 U.S. at 694.

Initially, we point out that Sasnett filed a *pro se* motion for post-conviction relief, claiming that he was denied effective assistance of counsel. Sasnett requested an evidentiary hearing pursuant to ***State v. Machner***, 92 Wis.2d 797, 285 N.W.2d 905 (Ct. App. 1979). The trial court denied relief without an evidentiary hearing. In a motion for post-conviction relief, the defendant is entitled to an evidentiary hearing if he alleges facts which, if true, would establish a basis for relief. ***State v. Carter***, 131 Wis.2d 69, 78, 389 N.W.2d 1, 4 (1986). If the defendant fails to allege sufficient facts in his motion to raise a question of fact, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the trial court may in the exercise of its legal discretion deny the motion without a hearing. ***Id.***, 131 Wis.2d at 78, 389 N.W.2d at 4. Upon appeal, we review the defendant's motion to determine whether it alleges facts sufficient to raise a question of fact necessitating a ***Machner*** hearing. This review is *de novo*. ***State v. Toliver***, 187 Wis.2d 346, 360, 523 N.W.2d 113, 118 (Ct. App. 1994).

Sasnett failed to allege sufficient facts to raise a genuine issue of fact regarding most of his arguments. Further, his allegations were mainly conclusory and in some cases, the record showed conclusively that Sasnett was not entitled to relief. Therefore, the trial court properly denied Sasnett's motions for post-conviction relief without conducting an evidentiary hearing. We discuss the myriad issues Sasnett raises.

A.

Sasnett argues that trial counsel's advice to waive the preliminary hearing was deficient, prejudicing his case. He has not, however, alleged facts that show how he was prejudiced beyond general, conclusory assertions. Although Sasnett contends that the waiver prevented him from obtaining potentially useful testimony for impeachment at trial, he fails to specify what that testimony would have been. Moreover, a preliminary hearing is not a discovery device. ***Bailey v. State***, 65 Wis.2d 331, 344, 222 N.W.2d 871, 878 (1974).

B.

Sasnett next claims that trial counsel's failure to file a motion for an independent expert evaluation of Lisa was ineffective assistance of counsel. Sasnett relies on ***State v. Maday***, 179 Wis.2d 346, 507 N.W.2d 365 (Ct. App. 1993). In ***Maday***, the State sought to introduce the opinions of five expert witnesses to testify that the behaviors of two sexual assault victims were consistent with the behaviors of sexual abuse victims with whom the experts had dealt in the past. ***Id.***, 179 Wis.2d at 350, 507 N.W.2d at 368. This court determined that the use of "comparison evidence" put the behavior of the two victims into issue and therefore the defense had a compelling need for an independent psychological examination to counter the State's evidence. ***Id.***, 179 Wis.2d at 357, 507 N.W.2d at 371. Here, there was no such comparison evidence. Lisa's therapist merely described her abilities, limitations, and disabilities. Accordingly, ***Maday*** is inapplicable and the trial court was within its discretion in denying Sasnett's motion to appoint an independent examination of Lisa.

C.

Sasnett next claims that trial counsel's failure to file a motion regarding his own competency to stand trial constituted ineffective assistance of counsel. Sasnett alleges that trial counsel should have doubted his competency based upon the fact that he was undergoing chemotherapy for non-Hodgkin's lymphoma at the time of his arrest, during pre-trial proceedings, and throughout the trial. Further, Sasnett alleges that he was diagnosed as suffering from post-traumatic stress disorder prior to trial. Therefore, Sasnett argues that under ***State v. Guck***, 176 Wis.2d 845, 851, 500 N.W.2d 910, 912 (1993), trial counsel was required to seek a competency evaluation. In denying post-conviction relief, the trial court concluded that "the transcript overwhelmingly establishes the defendant's competence and coherence at trial. He presented himself as a well-spoken, articulate and intelligent individual. His reference to timeframes and events in his life were [*sic*] clearly outlined as to dates and locations." We agree with the trial court that Sasnett presented no evidence in support of his position.

D.

Sasnett next argues that trial counsel was ineffective for failing to seek severance of the charges of party to the crime of two counts of first-degree sexual assault from the crimes of burglary and robbery. He bases his argument upon "verifiable information that complications from a vasectomy received in 1987 affected his ability to have sexual intercourse." Sasnett's conclusory allegations, however, do not explain how the vasectomy affected his ability to rape Lisa. Further, although severance is a remedy directed at curing the risk of prejudice when a defendant is tried on the basis of an information containing multiple counts, it has been consistently recognized that when evidence of both counts would be admissible in separate trials, the risk of prejudice arising due to a joinder of offenses is generally not significant. ***State v. Bettinger***, 100 Wis.2d 691, 697, 303 N.W.2d 585, 588 (1981). Therefore, "[w]e must focus upon whether or not in this case evidence of the commission of one of the charges would be admissible to prove the commission of the second charge." ***Id.***, 100 Wis.2d at 697, 303 N.W.2d at 588.

It is clear that evidence of the commission of one charge would be admissible to prove the other charges. "`Other crimes' evidence is admissible to complete the story of the crime on trial by proving its immediate context of happenings near in time and place." ***Id.*** Here, the crimes charged occurred simultaneously and by Sasnett's own admission, he was at Lisa's residence at the time in question and held Lisa down while the burglary and robbery were committed. This admission would be allowed as other acts evidence to show opportunity, knowledge, and identity. *See* RULE 904.04(2), STATS. The record clearly indicates that the burglary and robbery counts are connected with the rape. The denial of the motion to sever was not error.

E.

Sasnett next argues that trial counsel was ineffective for failing to file a motion to suppress his statement to the F.B.I. agents made when he was arrested while an out-patient at the Veterans Administration Hospital in New Orleans. According to the record, Sasnett was advised of his ***Miranda*** rights, signed a waiver form, and agreed to be extradited. The trial court ruled that there was "no apparent basis for counsel to challenge the statement the defendant made to the F.B.I." Although Sasnett now argues that he was under the influence of chemotherapy and thus was unable to freely consent, this information is not part of the appellate record. Therefore, we cannot consider it.

State v. Kuhn, 178 Wis.2d 428, 439-440, 504 N.W.2d 405, 411 (Ct. App. 1993). Further, Sasnett must be able to show the presence of some coercive tactics by the F.B.I. in order to sustain a challenge to the voluntariness of the confession. "In determining whether a confession was voluntarily made, the essential inquiry is whether the confession was procured via coercive means or whether it was the product of improper pressures exercised by the police." ***State v. Clappes***, 136 Wis.2d 222, 235–236, 401 N.W.2d 759, 765 (1987). "This determination is made ... by examining the totality of the facts and circumstances surrounding the confession." ***Id.***, 136 Wis.2d at 236, 401 N.W.2d at 765. The totality-of-the-circumstances analysis requires a balancing of the personal characteristics of the defendant against the coercive or improper pressure brought to bear upon the defendant or him or her during questioning. ***Id.***, 136 Wis.2d at 239, 401 N.W.2d at 767. Sasnett has not identified any coercive or improper tactic used by the F.B.I. agents.

F.

Sasnett next argues that trial counsel was ineffective for failing to file a motion to suppress the out-of-court identification made by Lisa. A criminal defendant has the initial burden of showing that an out-of-court photographic identification was impermissibly suggestive. If this burden is not met, the State is under no obligation to establish the reliability of the identification under the totality of the circumstances test. ***State v. Mosley***, 102 Wis.2d 636, 652, 307 N.W.2d 200, 210 (1981). Sasnett argues that various discovery materials provided to the victim including a photo array consisting of five photographs of different white males, indicate that the victim was improperly coached. The discovery materials, however, are not part of the appellate record and, therefore, will not be considered by this court. ***Kuhn***, 178 Wis.2d at 439-440, 504 N.W.2d at 411. Further, his argument is meritless because he and Lisa knew each other prior to the home invasion, and he admitted being at Lisa's home and participating in the burglary and robbery.

G.

Citing authorities such as ***Barker v. Wingo***, 407 U.S. 514 (1972), Sasnett argues that trial counsel was deficient by failing to protect his fundamental constitutional right to a speedy trial. In ***Barker***, the supreme court

stated "the right to speedy trial is a more vague concept than other procedural rights. It is, for example, impossible to determine with precision when the right has been denied. We cannot definitely say how long is too long in a system where justice is supposed to be swift but deliberate." ***Id.***, 407 U.S. at 521. The Court then rejected suggestions that it set a specified time period during which a trial must be held. The Court stated that "such a result would require this court to engage in legislative or rule making activity rather than in the adjudication process to which we should confine our efforts." ***Id.***, 407 U.S. at 523. In determining if a particular defendant has been denied his right to a speedy trial, the court in ***Barker*** created a balancing test which requires that courts consider the length of delay, the reason for the delay, the defendant's assertion of his right and any prejudice to the defendant. ***Id.***, 407 U.S. at 530.

Sasnett's initial appearance was on October 29, 1990. At Sasnett's arraignment on November 6, 1990, the parties agreed to a trial date of February 27, 1991. A status conference was held on February 27, 1991. At that time, the trial did not proceed and defense counsel orally advised the court: "I would enter a speedy trial demand as of today's date." The jury trial commenced approximately two months later, on May 6, 1991. Sasnett has not demonstrated how an earlier trial would have changed its outcome. He has not shown prejudice.

H.

Next, Sasnett argues that trial counsel failed to protect his interests at the arraignment. Specifically, Sasnett complains that trial counsel waived any objection to the personal jurisdiction of the trial court by entering a plea on the information. He does not, however, assert that the arrest warrant or subsequent extradition proceeding were defective. In the absence of such claims, he has not shown prejudice.

I.

Sasnett also claims that trial counsel should have entered a plea of not guilty by reason of mental defect, stating that he was suffering from post-traumatic stress disorder as a result of his experiences as a soldier in Vietnam.

However, Sasnett has not presented any evidence that this disorder was operative at the time the crimes were committed. A defendant does not have a constitutional right to present an affirmative defense of not guilty by reason of mental disease or defect if the defense does not have sufficient evidence to raise a jury issue. ***State v. Leach***, 124 Wis.2d 648, 662, 370 N.W.2d 240, 248 (1985).

J.

Sasnett next argues that trial counsel failed to present a meaningful defense. Sasnett's defense was that he was guilty of the burglary and robbery counts but that he had no knowledge of and was not involved in the two counts of first-degree sexual assault. Sasnett takes issue with this defense because it placed him at the scene of the crime, and, because he was charged as a party to the crime on all four counts, his guilt on all four counts was "virtually guaranteed." In order for the State to prove that Sasnett was a party to the crime of sexual assault, however, it would have to prove that Sasnett directly committed the sexual assault, aided and abetted in the commission, or was a party to a conspiracy to commit the crimes. ***State v. Hecht***, 116 Wis.2d 605, 617–618, 342 N.W.2d 721, 728 (1984). The State's burden thus required that it prove more than mere presence or complicity in the robbery and burglary. Further, Sasnett's assertion that trial counsel was ineffective because she did not challenge Lisa's recollection of the sequence of events to show that it was possible that the sexual assaults took place at a different time is not only speculative, but it contradicts Sasnett's own statement to the police and his testimony at trial.

K.

Sasnett also claims that trial counsel failed to challenge the sexual assault charges by presenting evidence that he was physically incapable of committing sexual assault because of the complications of a previous vasectomy and cocaine use on the day of the crime. As was noted by the trial court, this allegation is "wholly conclusory and is unsupported by any factual foundation as to both his medical condition and his use of cocaine." Sasnett also complains that trial counsel failed to effectively impeach Lisa by showing inconsistencies in her testimony. The record, however, is to the contrary. Further, Sasnett claims that trial counsel did not adequately cross-examine Lisa. Sasnett has not indicated anything substantive that would have been revealed by a different type of cross-examination. Sasnett also claims that trial counsel was ineffective because she did not draw the jury's attention to Lisa's alleged eye condition, arguing that this would have affected Lisa's ability to identify her assailant. This argument is also conclusory and unsupported by any facts in the record.

L.

Sasnett last argues that trial counsel was ineffective for failing to poll the jury. The decision to assert or waive the right to poll the jury is delegated to trial counsel. *See* ***State v. Jackson***, 188 Wis.2d 537, 541, 525 N.W.2d 165, 167 (Ct. App. 1994). Sasnett has not shown any prejudice resulting from the trial counsel's waiver and none is evident from the record.

III.

Sasnett argues that the jury pool was tainted against him during *voir dire*, requiring a new trial. According to Sasnett, during *voir dire* a panelist testified within the hearing of the other jury panelists that he knew Sasnett and that he knew Sasnett had committed a serious crime in Brookfield. Upon hearing this, the prosecutor told a police officer to run a check for a possible warrant on Sasnett in Brookfield well within the hearing of the jury. The trial court denied post-conviction relief stating that "comments made during *voir dire* in no way tainted the jury panel or denied petitioner a fair trial."

Voir dire is conducted under the supervision of the trial court and broad discretion if given to the court in the exercise of the process. ***State v. Migliorino***, 150 Wis.2d 513, 537, 442 N.W.2d 36, 46 (1989). The trial court determined that the jury was not prejudiced and instructed the jury to decide the case solely on the evidence. It is presumed that the jury follows the instructions given to it. ***State v. Truax***, 151 Wis.2d 354, 362, 444 N.W.2d 432, 436 (Ct. App. 1989). In the absence of any evidence to the contrary, it is clear that the trial court acted within its discretion.

IV.

Sasnett argues that the sentence he received is unduly harsh and unconscionable. He argues that the fifty-year sentence imposed by the trial court is excessive because he is suffering from post-traumatic stress disorder and non-Hodgkin's lymphoma. Therefore, in his opinion, the sentence imposed may well be a life sentence.

When reviewing a claim that a sentence is too harsh, an appellate court first determines if the court properly exercised discretion and then whether the sentence was excessive and unduly harsh. ***State v. Glotz***, 122 Wis.2d 519, 524, 362 N.W.2d 179, 182 (Ct. App. 1984). Review is tempered by a strong policy against interfering with the sentencing discretion of the trial court. ***State v. Larsen***, 141 Wis.2d 412, 426, 415 N.W.2d 535, 541 (Ct. App. 1987). "It is presumed that the trial court acted reasonably and the defendant must show some unreasonable or unjustifiable basis in the record for the sentence." ***Harris v. State***, 75 Wis.2d 513, 518, 250 N.W.2d 7, 10 (1977). A misuse of sentencing discretion "will be found 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). The sentence is not so excessive and unusual or disproportionate to the offenses committed so as to shock public sentiment and violate the judgment of reasonable people. The record reflects that the trial court was aware of Sasnett's physical condition and properly exercised its discretion arriving at the sentence.

By the Court.—Judgment and orders affirmed.

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