COURT OF APPEALS
DECISION
DATED AND RELEASED

May 29, 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. 95-1333-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JOHNNY BOHANNON,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: ELSA C. LAMELAS and KITTY K. BRENNAN, Judges. *Affirmed*.

FINE, J. Johnny E. Bohannon appeals from a judgment convicting him of resisting an officer, *see* § 946.41, STATS., and from the trial court's order denying post-conviction relief.

This case has its origins in a report received by Milwaukee police officers that a man whom they later identified to be Bohannon had gotten into a dispute with another person, pulled out a gun, and fired it two times in the air.

The officers went to Bohannon's house to investigate. A woman who identified herself as Mrs. Bohannon answered the door and told the officers that Bohannon was not home. At that point, one of the responding officers saw, as found by the trial court, "a man ducking as if trying to hide or flee." The officers entered the house, arrested and handcuffed Bohannon. They did not have a warrant. No gun was found. Bohannon was charged with resisting an officer when he kicked one of the officers whom Bohannon claimed was threatening his wife.

Bohannon raises five issues on this appeal. First, he asserts that the trial court erred in not suppressing what he claims to be an unlawful warrantless arrest. Second, he argues that the trial court should have instructed the jury on the defense of provocation. Third, he contends that the trial court should have instructed the jury on the defense-of-others privilege. Fourth, he claims that the trial court misused its discretion in imposing a nine-month stayed sentence of incarceration and a two-year period of probation, with a sixty-day period of work-release confinement as a condition of probation. Fifth, he argues that his trial counsel was ineffective. We affirm.

1. *Warrantless Arrest.*

The State and Bohannon agreed that Bohannon's motion to suppress the arrest could be decided by the trial court based on the police reports, and that live testimony was not required. Unfortunately, copies of those police reports are not in the record on appeal. Thus, we are limited to the findings made by the trial court, and must assume that they are not "clearly erroneous." *See* RULE 805.17(2), STATS. (findings by trial court must be upheld on appeal unless "clearly erroneous"), made applicable to criminal proceedings by § 972.11(1), STATS.; ***Wurtz v. Fleischman***, 97 Wis.2d 100, 107 n.3, 293 N.W.2d 155, 159 n.3 (1980) (appellate court may not consider matters not contained in record); ***Duhame v. Duhame***, 154 Wis.2d 258, 269, 453 N.W.2d 149, 153 (Ct. App. 1989) (when appellate record is incomplete in connection with issue raised by

appellant, appellate court must assume that missing material supports trial court's ruling).[1]

Absent exigent circumstances, the Fourth Amendment prohibits warrantless arrests in the home. ***Welsh v. Wisconsin***, 466 U.S. 740, 749–750 (1984). Here, as the trial court pointed out in its oral decision, the officers were justified in going to Bohannon's home to investigate the report that he had fired a gun in the air:

> The officers in this case were investigating an incident, which while it might be described as somewhat a routine incident, at the same time it is the kind of incident that brings with it the potential for danger to citizens and police officers. The incident was one of shots fired in the air. At the time that the police went to the home, I believe they were acting responsibly. They had, however, no probable cause and, indeed, no basis upon which to obtain a warrant until they were at the door when the defendant was identified, that is, when the wife denied his presence. That's when probable cause arose and also circumstances which revealed risk of officer safety.

Although our review of the trial court's conclusion that the officers complied with the Fourth Amendment is *de novo*, *see* ***State v. Angiolo***, 186 Wis.2d 488, 494–495, 520 N.W.2d 923, 927 (Ct. App. 1994), we agree. Given Mrs. Bohannon's denial of what they knew to be true—namely, that there was a man in the house, and that he appeared to be hiding—the officers reasonably believed that

[1] It is appellant's burden to insure that the record is sufficient to address the issues raised on appeal. ***State Bank of Hartland v. Arndt***, 129 Wis.2d 411, 423, 385 N.W.2d 219, 225 (Ct. App. 1986); *see* RULE 809.15(1)(a)(9), STATS. (The record on appeal shall include "[e]xhibits material to the appeal whether or not received in evidence."); RULE 809.15(2), STATS. (The parties receive ten-day notice of the provisional contents of the record prior to its transmittal to the appellate court.).

the man presented a danger that required immediate entry.[2] We affirm the trial court's denial of Bohannon's motion to suppress his warrantless arrest.[3]

2 & 3. *Jury Instructions.*

Bohannon argues that the trial court should have instructed the jury on the defense of provocation—citing here as he did before the trial court the statement in ***Lane v. Collins***, 29 Wis.2d 66, 72, 138 N.W.2d 264, 267 (1965), that "a police officer cannot provoke a person into breach of the peace, such as directing abusive language to the police officer, and then arrest him without a warrant." ***Lane***, a civil case, affirmed awards against a police officer for false imprisonment. In refusing to give Bohannon's requested instruction, which, unfortunately, is not in the appellate record, the trial court noted that

---

[2] One of the arresting officers testified at the trial that he had the following conversation with Mrs. Bohannon at the door to the Bohannon house:

A"Is Johnny Bohannon home?" She stated, "No." I stated, "Well, who is the man in the house with you?" She told me that there was no man in the house with her, [that] it was her son.

QWhat did you do?

AAgain I asked her who was the man in the house with her. She again was telling me there was no man in the house. I saw the defendant peek his head out from the interior opening to look out to see what was going on.

....

QAfter you saw Mr. Bohannon inside the house, what did you do?

AAfter he looked, I believe he saw me, that I recognized him, and he pulled back into the house.[*] I immediately went into the house after him.

[*] The officer later explained that he "recognized" Bohannon as "being a man, not a boy," and that he had not seen Bohannon before.

[3] After the jury returned its verdict, Bohannon renewed his motion to suppress the warrantless arrest. No new arguments were presented, however.

apparently the instruction was not given in ***Lane***, and that it had, apparently, never been given in a criminal case.[4]

Although a trial court has broad discretion in determining what jury instructions need be given, ***State v. Herriges***, 155 Wis.2d 297, 300, 455 N.W.2d 635, 637 (Ct. App. 1990), a defendant is entitled to an instruction that bears on his or her theory of defense, ***State v. Gaudesi***, 112 Wis.2d 213, 223, 332 N.W.2d 302, 306 (1983). Other than citing generalized principles of law, however, Bohannon does not explain how the evidence in this case warranted an instruction on provocation. Accordingly, we do not address this issue. *See* ***Barakat v. DHSS***, 191 Wis.2d 769, 786, 530 N.W.2d 392, 398 (Ct. App. 1995) (appellate court need not consider "amorphous and insufficiently developed" arguments); ***Murphy v. Droessler***, 188 Wis.2d 420, 432, 525 N.W.2d 117, 122 (Ct. App. 1994) (arguments in appellate briefs must be supported by authority and references to the record, RULE 809.19(1)(e) & (3)(a), STATS., and appellate courts need not consider arguments that do not comply).

Bohannon also requested that the trial court give to the jury WIS JI—CRIMINAL 825, which concerns the privilege to act in the defense of others. Here again, however, Bohannon has not explained how the evidence in this case warranted the instruction. Accordingly, we do not address his claim of error. *See* ***Barakat***, 191 Wis.2d at 786, 530 N.W.2d at 398; ***Murphy***, 188 Wis.2d at 432, 525 N.W.2d at 122.

4. *Sentence*.

Bohannon claims that the trial court erroneously exercised its sentencing discretion because it assumed that Bohannon had, at one point at least, possessed the gun and fired it as described in the police report, and because it assumed, based on evidence elicited during the course of a hearing on whether Bohannon was justified in refusing to have his blood-alcohol content measured, that he had driven while under the influence of an intoxicant.

[4] We again remind Bohannon's counsel that it was his responsibility to ensure that the appellate record contains the material necessary to analyze the issue he raises.

Sentencing is within the trial court's discretion and will only be overturned if there is an abuse of discretion or if discretion is not exercised. ***Ocanas v. State***, 70 Wis.2d 179, 183-184, 233 N.W.2d 457, 460 (1975).

> The exercise of discretion contemplates a process or reasoning based on facts that are of record or that are reasonably derived by inference from the record, and a conclusion based on a logical rationale founded upon proper legal standards.

Id., 70 Wis.2d at 185, 233 N.W.2d at 461. Thus, a court may impose a sentence within the limits set by statute, ***ibid.***, if it considers appropriate factors.

> The primary factors to be considered in imposing sentence are the gravity of the offense, the character of the offender, and the need for protection of the public.

Elias v. State, 93 Wis.2d 278, 284, 286 N.W.2d 559, 561 (1980). If the trial court exercises its discretion based on the appropriate factors, a particular sentence will not be reversed unless it "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***, 70 Wis.2d at 185, 233 N.W.2d at 461. "The weight to be given each factor is within the discretion of the trial court." ***State v. Wickstrom***, 118 Wis.2d 339, 355, 348 N.W.2d 183, 192 (Ct. App. 1984). A sentencing court may appropriately consider uncharged or unproven offenses, ***Elias***, 93 Wis.2d at 284, 286 N.W.2d at 562, as well as crimes for which the defendant has been acquitted, ***Tucker v. State***, 56 Wis.2d 728, 740, 202 N.W.2d 897, 902 (1973).

In sentencing Bohannon, the trial court analyzed the appropriate factors, considered Bohannon's prior record (a 1989 conviction for criminal damage to property, and a 1991 conviction for disorderly conduct), noted that

Bohannon was the type of person "who is quite willing to take offense when other people do anything," and considered the circumstances surrounding the incident that resulted in his conviction. The trial court's sentence was well within the ambit of its discretion.[5]

5. *Effective Assistance of Counsel.*

Every criminal defendant has a Sixth Amendment right to the effective assistance of counsel. ***Strickland v. Washington***, 466 U.S. 668, 686 (1984). In order to establish violation of this fundamental right, a defendant must prove two things: (1) that his or her lawyer's performance was deficient, and, if so, (2) that "the deficient performance prejudiced the defense." ***Id.***, 466 U.S. at 687. A lawyer's performance is not deficient unless he or she "made errors so serious that counsel was not functioning as the `counsel' guaranteed the defendant by the Sixth Amendment." ***Ibid.*** Similarly, a defendant alleging prejudice must demonstrate that the trial lawyer's errors "were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." ***Ibid***. As recently restated, the "prejudice" component of ***Strickland*** "focusses on the question whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair." ***Lockhart v. Fretwell***, 113 S. Ct. 838, 844, 122 L.Ed.2d 180, 191 (1993).

On appeal, the standard of review is a question of both fact and law. ***Strickland***, 466 U.S. at 698. The trial court's findings of fact will not be reversed unless clearly erroneous. ***State v. Pitsch***, 124 Wis.2d 628, 634, 369 N.W.2d 711, 714 (1985). However, questions of whether counsel's actions were deficient, and, if so, whether they prejudiced the defense, are questions of law to be determined independently by the reviewing court. ***Id.***, 124 Wis.2d at 634, 369 N.W.2d at 715. We need not analyze counsel's performance if it is clear that any alleged deficiencies did not prejudice the defendant. ***Strickland***, 466 U.S. at 687; ***State v. Johnson***, 153 Wis.2d 121, 128, 449 N.W.2d 845, 848 (1990).

[5] Significantly, the trial court imposed as a condition of Bohannon's probation that he not only undergo "alcohol and drug assessment" and treatment, but that he also "complete a course in anger management."

Following the post-conviction hearing mandated by ***State v. Machner***, 92 Wis.2d 797, 804, 285 N.W.2d 905, 908 (Ct. App. 1979), the trial court concluded that Bohannon's trial counsel was not ineffective, and that his decision to agree to the use of the police reports was reasonable trial strategy. In an undeveloped argument, Bohannon disagrees but does not explain—beyond a conclusory couple of sentences—how the trial court's decision on his suppression motion was rendered either "unreliable" or "fundamentally unfair." *See* ***Lockhart***, 113 S. Ct. at 844, 122 L.Ed.2d at 191. As already noted, we will not consider arguments that are not sufficiently developed.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.