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September 28, 2016

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You are hereby notified that the Court has entered the following opinion and order:

2016AP136-CR

State of Wisconsin v. Richard J. Reyna (L.C. #2014CF467)

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

Richard J. Reyna appeals from a judgment of conviction for burglary of a dwelling, as party to a crime and as a repeater, and an order denying postconviction relief. Reyna appeals his sentence, arguing that the circuit court relied on inaccurate information related to his prior conviction for robbery with threat of force. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2013-14).¹ We affirm the judgment and order.

¹ All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

Reyna was charged with two counts of burglary, one count of attempted robbery with use of force, one count of false imprisonment, all as party to a crime, and one count of bail jumping in a criminal complaint filed September 3, 2014. The charges stem from a home invasion where the victim claimed that her assailants kicked down the door to her apartment. Two men then held her down on her bed while brandishing a knife. The victim was able to escape to a spare bedroom where she encountered Reyna, who purportedly attempted to push the victim into the spare bedroom, but she was able to free herself. Shortly thereafter, the police arrived on the scene.

Reyna entered a no contest plea to the charge of burglary of a dwelling. Under a plea agreement, the remaining charges were dismissed and read in for sentencing. At sentencing, the court arranged for a representative from the Department of Corrections, Todd Timm, to appear at the sentencing hearing to answer the court's questions regarding a prior robbery conviction. Timm explained that in the prior robbery, Reyna and three other men were sitting in a van in a parking lot of a business at night. The men were armed with a gun, and Reyna was one of two men who exited the van, approached the victim from behind, and robbed her. The court gave Reyna's counsel an opportunity to respond, and he explained, "I did speak with Mr. Reyna when you were questioning Mr. Timm and he offers to volunteer to the Court to answer your question that [Reyna] was the passenger in that vehicle with the other gentlemen and that it was a BB gun that they had." Timm confirmed that the gun was a BB gun and also supplied that the victim's and Reyna's DNA was the only DNA found on the BB gun.

During sentencing, the circuit court expressed concern with Reyna's truthfulness and his "minimization" of his involvement with both this offense and the prior robbery conviction. The court explained that Reyna's version of the events in this case has him as "a lookout," but does

not mention “anything about his involvement with regard to being in [the apartment] and pushing the victim [Reyna] [t]ries to make his involvement look not as serious.” The court referenced Reyna’s counsel’s statement regarding the prior offense, noting that “for [Reyna] to deny to his attorney that he was actually ... involved in brandishing the weapon and then it come[s] back from [Timm] that the Defendant’s DNA was the one on the gun” made it difficult to decipher if Reyna was being truthful.

The circuit court found Reyna guilty and sentenced him to thirteen years—eight years’ initial confinement and five years’ extended supervision. Reyna filed a motion for postconviction relief, arguing that the circuit court violated his due process right to be sentenced based on accurate information. Reyna argued that he never claimed that he did not get out of the van to approach the victim and never stated that he did not wield the gun. The court denied Reyna’s motion. This appeal follows.

“A defendant has a constitutionally protected due process right to be sentenced upon accurate information.” *State v. Tiepelman*, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1. We review the constitutional issue of whether a defendant has been denied this due process right de novo. *Id.* In order to demonstrate a due process violation at sentencing, the defendant “must show both that the information was inaccurate and that the court actually relied on the inaccurate information in the sentencing.” *Id.*, ¶26 (citation omitted). If the defendant is able to establish actual reliance, then the burden shifts to the State to demonstrate that the error was harmless. *Id.*

We conclude that the resolution of this case rests on the first consideration: the information that the circuit court had was not inaccurate. Reyna does not deny that his counsel told the court that he “was the passenger in that vehicle with the other gentlemen and that it was

a BB gun that they had.” Instead, Reyna claims that the circuit court misinterpreted his statement, arguing that the circuit court incorrectly took his explanation to suggest that he had little to no involvement in the robbery and was *only* a passenger in the vehicle. The information the circuit court had was accurate as Reyna did get out of the car in the prior robbery and he did have a BB gun. It is the court’s perception of Reyna’s own remarks that he challenges.

The interpretation and characterization of relevant facts is within the circuit court’s discretion. “It is not within the province of this court or any appellate court to choose not to accept an inference drawn by a factfinder when the inference drawn is a reasonable one.” *State v. Harris*, 174 Wis. 2d 367, 378, 497 N.W.2d 742 (Ct. App. 1993) (quoting *State v. Friday*, 147 Wis. 2d 359, 370-71, 434 N.W.2d 85 (1989)). As this court explained in *Harris*, where a circuit court is faced with conflicting evidence, the circuit court was free to find that Reyna did indeed portray himself as merely a passenger in the van, thereby minimizing his involvement in the crime. See *Harris*, 174 Wis. 2d at 378. Reyna’s statement to counsel, which was relayed to the court, was truthful, yet incomplete. Reyna may not utilize his incomplete statement and then wait to see how his ambiguity plays with the court. Based on the facts known to the court, it was not unreasonable for the circuit court to conclude that Reyna was attempting to minimize his involvement in the prior robbery. Reyna, therefore, has not met his burden to prove that the information before the circuit court was inaccurate.

While we do not decide this case on forfeiture, we note that the facts demonstrate a strong forfeiture argument. See *State v. Benson*, 2012 WI App 101, ¶17, 344 Wis. 2d 126, 822 N.W.2d 484. This court addressed forfeiture in the context of a sentencing challenge in *Benson* where counsel submitted an inaccurate pharmacology report and failed to correct or object to the information it contained prior to sentencing. *Id.*, ¶16. We explained that “Benson cannot now

claim his due process rights were violated by the court's consideration of that same information. He has forfeited the issue." *Id.*, ¶17. We determined that Benson's only option was to seek sentencing relief on ineffective assistance of counsel grounds. *Id.* Similarly, Reyna's counsel relayed the information to the circuit court that Reyna claims the court considered inaccurately. Reyna failed to correct the information at sentencing; thus, his arguments to this court would also fail based on a forfeiture argument. Reyna did not raise an ineffective assistance of counsel claim on appeal.

Upon the foregoing reasons,

IT IS ORDERED that the judgment and order of the circuit court are summarily affirmed, pursuant to WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals