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DISTRICT IV

May 22, 2017

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

2016AP1452-CR State of Wisconsin v. Corey O. Collier (L.C. # 2015CF159)

Before Lundsten, Sherman and Blanchard, JJ.

Corey Collier appeals a judgment convicting him of armed robbery of a financial institution following a jury trial. Collier contends that the circuit court erroneously exercised its discretion by: (1) permitting the State, during trial, to have Collier put on a jacket and hat identified as items worn by the perpetrator during the robbery; and (2) relying on the State's sentencing comments that Collier had been involved in uncharged robberies in Illinois, without requiring more information. 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 (2015-16).[1] We summarily affirm.

Collier was arrested shortly after an armed bank robbery and was charged with that offense. At trial, the State presented the bank's surveillance videotape footage, showing the robbery. Over the defense's objection, the State was allowed to have Collier put on a jacket and hat recovered near the crime scene, which were identified by witnesses as the items worn by the perpetrator as shown in the video. The jury returned a guilty verdict.

At sentencing, the State asserted that Collier had committed nine prior bank robberies in Chicago, but that Collier denied any involvement in those robberies. The circuit court asked the State whether Collier had been indicted in federal court, and the State responded: "I just heard from the U.S. Attorney's Office today, your Honor, that they're issuing indictments in March for this defendant." Defense counsel argued that Collier had only one prior criminal conviction, and that the court should consider the lack of an extensive criminal history as a positive character factor. Defense counsel also argued that the reference to any uncharged conduct relating to the Chicago robberies was speculative, and that, since Collier had not been indicted in those cases, there was not evidence of his involvement to the level of probable cause. The court stated its belief that, by the time an Assistant United States Attorney decides to seek an indictment, the matter has been "pretty thoroughly reviewed in the federal system." The court stated that it understood that Collier had not been charged or found guilty in those cases, but that the court thought that it was "not nothing, that's for certain, that the [Assistant United States Attorney] has

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

decided they have probable cause to go forward to seek an indictment. So at a minimum, there's a real possibility that Mr. Collier was involved with other similar actions in Illinois." The court sentenced Collier to five years of initial confinement and five years of extended supervision.

Collier contends, first, that the circuit court erroneously exercised its discretion by permitting the State, at trial, to have Collier put on the jacket and hat identified as items worn by the perpetrator during the robbery. *See* ***State v. Franklin***, 2004 WI 38, ¶6, 270 Wis. 2d 271, 677 N.W.2d 276 (explaining that "whether evidence is admissible is a discretionary decision of the circuit court," which we review "under the erroneous exercise of discretion standard"). Collier contends that the probative value of the evidence was outweighed by the danger of unfair prejudice.[2] *See* WIS. STAT. § 904.03 (relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice). He asserts that the probative value of the evidence was minimal because, while the State asserted its intent to demonstrate that the jacket fit Collier, the State's witness testified that he had not noticed whether the jacket fit Collier, and the State conceded that the hat would have fit anyone. Collier argues that the circuit court erroneously exercised its discretion by failing to weigh the minimal probative value of the evidence against the danger of unfair prejudice. We are not persuaded.

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[2] Collier concedes that the procedure was not testimonial, and thus not a violation of Collier's constitutional right not to incriminate himself. *See* ***United States v. Hubbell***, 530 U.S. 27, 34-35 (2000) (explaining that the constitutional protection against self-incrimination is limited to "compelled incriminating communications … that are 'testimonial' in character" and that "there is a significant difference between the use of compulsion to extort communications from a defendant and compelling a person to engage in conduct that may be incriminating. Thus, even though the act may provide incriminating evidence, a criminal suspect may be compelled to put on a shirt, to provide a blood sample or handwriting exemplar, or to make a recording of his voice" (footnotes omitted); ultimately, "[t]he act of exhibiting such physical characteristics is not the same as a sworn communication by a witness that relates either express or implied assertions of fact or belief").

At trial, the State indicated its intent to have Collier put on the jacket and hat recovered near the scene of the robbery to demonstrate to the jury that the jacket fit Collier and to allow the jury to compare Collier wearing the items to the appearance of the robber as captured by the bank surveillance system. After defense counsel objected to that procedure, the court asked the State to clarify the purpose of having Collier wear the jacket and hat in front of the jury. The State reiterated that there were two purposes: to demonstrate that the jacket fit Collier, and to allow the jury to compare Collier's appearance while wearing the clothing to the image of the robber captured by the bank.

The court determined that, in its discretion, it would allow the State to have Collier put on the jacket and hat. It explained that it found the procedure was prejudicial, but not unfairly prejudicial. It reasoned that "there's nothing horrific about it. It's not a bad … photograph of a gruesome murder scene or that sort of thing. It's simply the jacket that was recovered, the hat that was recovered." Thus, the court properly exercised its discretion by determining that the probative value of the evidence was not outweighed by the danger of unfair prejudice.[3] *See*

[3] Collier also contends, on appeal, that the circuit court erroneously exercised its discretion by failing to consider that the demonstration of Collier wearing the jacket and hat was a needless presentation of cumulative evidence. *See* WIS. STAT. § 904.03 (relevant evidence may be excluded if probative value is outweighed by consideration of needless presentation of cumulative evidence). He asserts that the evidence was cumulative to the testimony by two bank employees who were present during the robbery and the surveillance images showing the robber's resemblance to Collier. However, Collier did not argue in the circuit court that the evidence was unnecessary and cumulative, and the argument is thus not preserved for appeal. *See* ***State v. Peters***, 166 Wis. 2d 168, 174, 479 N.W.2d 198 (Ct. App. 1991) ("In order to preserve [the] right to appeal on a question of admissibility of evidence, a defendant must apprise the trial court of the specific grounds upon which the objection is based. General objections which do not indicate the grounds for inadmissibility will not suffice to preserve the objector's right to appeal." (citations omitted)). In any event, were we to reach the merits, we would disagree with Collier's argument that the evidence was cumulative. Having Collier put on the jacket and hat to allow the jury to see that the jacket fit and to allow the jury to compare Collier's appearance to the images captured of the robber was different in kind from the other evidence presented at trial.

Lievrouw v. Roth, 157 Wis. 2d 332, 348, 459 N.W.2d 850 (Ct. App. 1990) (court properly exercises its discretion to admit evidence if its decision has a reasonable basis and relies on a proper legal standard and the facts in the record).

Next, Collier contends that the circuit court erroneously exercised its discretion at sentencing by considering the State's assertion that Collier had been involved in prior robberies in Chicago, without requiring more information.[4] *See* ***State v. Gallion***, 2004 WI 42, ¶¶20-37, 270 Wis. 2d 535, 678 N.W.2d 197 (providing that circuit courts must properly exercise discretion when imposing sentences, and, at ¶36, commenting that: "Experience has taught us to be cautious when reaching high consequence conclusions about human nature that seem to be intuitively correct at the moment. Better instead is a conclusion that is based on more complete and accurate information and reached by an organized framework for the exercise of discretion."). The State responds that Collier failed to preserve his sentencing argument for appeal because he failed to file a postconviction motion in the circuit court. *See* ***State v. Walker***, 2006 WI 82, ¶31, 292 Wis. 2d 326, 716 N.W.2d 498 ("A postconviction motion in the circuit court is a prerequisite to appellate review when a defendant challenges a sentence as an erroneous exercise of discretion, unless compelling circumstances justify overriding this requirement."). In reply, Collier argues that "compelling circumstances" are presented here in that, had Collier filed a postconviction motion challenging his sentence, the State would have been motivated to encourage the United States Attorney's Office to seek indictments to support

[4] Collier states, in passing, that the lack of any federal indictments of Collier since his sentencing in this case "may constitute inaccurate sentencing information considered by the court." *See* ***State v. Tiepelman***, 2006 WI 66, 291 Wis. 2d 179, 717 N.W.2d 1. Collier does not argue that he is entitled to resentencing on that basis.

the sentence imposed in this case. Thus, Collier asserts, he could not have pursued a postconviction motion in the circuit court on grounds that the court erred by considering the uncharged robberies in Chicago without risking indictments for those robberies. He also contends that the issue raised on appeal does not concern any disputes of law or fact. *See* ***id.***, ¶33 ("[T]he court of appeals has concluded that compelling circumstances exist where a defendant's appeal raised a question of law that raised 'significant questions' about the circuit court's authority, and that did not depend upon disputed facts or a review of the circuit court's exercise of discretion."). As to the facts, Collier contends that there is no dispute that he has not been indicted for the Chicago robberies, and that the circuit court relied on the allegations of imminent indictments in imposing sentence. As to the legal issue, Collier contends that the question is whether there were compelling circumstances that justified him not making a sentence modification motion before the circuit court.

As an initial matter, Collier's "compelling circumstances" argument is improperly raised for the first time in the reply brief. *See* ***Bilda v. County of Milwaukee***, 2006 WI App 57, ¶20 n.7, 292 Wis. 2d 212, 713 N.W.2d 661 ("It is a well-established rule that we do not consider arguments raised for the first time in a reply brief."). In any event, that argument is not persuasive. Collier does not persuasively explain how a postconviction motion challenging his sentence in this case would have put him at risk for federal indictments. Ultimately, Collier's assertion that a Wisconsin prosecutor would have influence over a federal prosecutor's decision or ability to seek those indictments is speculative. Federal prosecutors have their own standards and resources to consider. The notion that a federal prosecutor would make the effort to bring an indictment because of the mere possibility that it might affect a decision to modify Collier's state sentence is highly speculative. We conclude that this case does not present compelling

circumstances sufficient to overcome the requirement for a postconviction motion before raising a sentencing argument on appeal.

Therefore,

IT IS ORDERED that the judgment is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published and may not be cited except as provided under WIS. STAT. RULE 809.23(3).

Diane M. Fremgen
Clerk of Court of Appeals