COURT OF APPEALS
DECISION
DATED AND FILED

September 10, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP863-CR **Cir. Ct. No. 2009CF2077**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

OMAR J. SMITH,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DENNIS R. CIMPL, Judge. *Affirmed*.

Before Fine, Kessler and Brennan, JJ.

¶1 FINE, J. Omar J. Smith appeals the judgment entered on jury verdicts convicting him of first-degree reckless homicide while armed as party to a crime, *see* WIS. STAT. §§ 940.02(1), 939.63(1)(b) & 939.05; two counts of first-degree recklessly endangering safety while armed as party to a crime, *see* WIS.

STAT. §§ 941.30(1), 939.63(1)(b) & 939.05, unlawfully possessing a firearm as a convicted felon, *see* WIS. STAT. § 941.29(2); and felony bail-jumping, *see* WIS. STAT. § 946.49(1)(b). Smith also appeals the order denying his motion for postconviction relief. He claims: (1) the trial court erred in not suppressing his confession; (2) the State violated his right to confrontation, and his trial lawyer gave him ineffective legal representation by not objecting to the alleged confrontation violation; and (3) the trial court imposed an unduly harsh and cruel sentence. We affirm.

¶2 On April 17, 2009, at about 8:30 p.m. several friends gathered outside a home at 2465 West McKinley in Milwaukee. They saw three men in black hoodies across the street start shooting at them. Bullets from the guns hit three women in the group: Brittany Alvarez, Jennifer Langoehr, and Jordan Alvarez. Alvarez died from the nine millimeter bullet that hit her heart.

¶3 A few days later, police detectives Paul Lough and Keith Kopcha questioned Smith about the shooting. The police stopped the interview when Smith asked for a lawyer, packed up, and left the room. When a detective came back to give Smith the cigarette he requested, Smith reinitiated the interview saying, "he wanted to tell [the detectives] what happened but he didn't want to tell or rat on anyone else involved." When detective Lough said they "couldn't talk to him since he had asked for an attorney[,]" Smith responded: "I'll tell you what I did without a lawyer present." The detectives re-read Smith his ***Miranda*** warnings, and Smith said he understood his rights.[1] The recorded transcript of this interview provides as material:

[1] *See* ***Miranda v. Arizona***, 384 U.S. 436 (1966).

Detective: Okay. Like I said, you can say what you want. If you don't want to, say, about this is what other people did – that's up to you. You know what I mean? I'm not gonna –

Smith: But that don't make it look worse on me than I don't say nothing about somebody else?

Detective: I would rather have you cooper- but you know what? It depends on the situation. You know what? Some people could say they could understand. You know what I mean? If, you know, there might be a certain type of individuals that you're very close with not wanting to say what, you know, so – you know what? It depends on the situation. But what my thing is – it's – it – it's up to you. It's up to you.

Smith: You know cuz I really want – I wanna talk to you all man but –

Detective: Well, like I said – you can –

Smith: Know what I'm sayin'?

Detective: You can, listen, you can – you can tell us what you wanna tell us and what you don't wanna tell us, you don't have to right now. You know that I mean? And if you don't want to, that's up to you. If you don't wanna tell us who else, you know, what other peoples' parts were, that's your decision. You know what I mean? Do you wanna tell us what your part in this was, Omar?

Smith: I want to, but I kinda wanna lawyer present, but I don't want it to look like if I wait for my lawyer.

Detective: It's your decision.

Smith: I don't want it to look worse for me if I wait for my lawyer.

Detective: Omar. Omar. This is your decision. We can't help you with that. Okay? I can't tell ya to do one or the other. It's your decision.

> Like I said, remember in the rights, it said you can answer some questions and you can pick and – it's also you can pick and choose what questions you want. So it's your decision whether you want – not answer any or answer some, or it's your decision.
>
> Smith: Hmm. Fire away with your own questions – I don't –
>
> Detective: Sure you want (inaudible) you wanna – you wanna – tell us what happened?
>
> Smith: Umm, fire away with your questions.
>
> Detective: Does that mean yes?
>
> Smith: Go right ahead.

¶4 During this interview, Smith told the detectives that:

- On April 14, 2009, Smith's "momma's" "house got shot up." Smith learned that what he said was "the Deuce Squad guys" from "22nd and 26th" "off McKinley" did the shooting.

- On April 17, 2009, Smith planned to find the Deuce Squad and "scare they ass." Smith wore a "black hoodie and some shorts."

- A friend "on his way to the liquor store" dropped Smith and two friends off at 22nd and Vliet Streets.

- The three "walked around the neighborhood" "on McKinley" when they saw "a crowd of 'em" that they thought "might be them d[e]uce squad niggers right here."

- Smith and his friends stopped across the street from the crowd and "shot till there wasn't no more bullets."

- Smith had a "nine millimeter" handgun that he aimed "above the crowd" "[n]ot really at nobody."

- After emptying his gun, he "took off" and "ran to my mama house."

- He gave the nine millimeter gun "to somebody and told them to get rid of it."

¶5 The State charged Smith with the crimes. He argued that his confession should be suppressed because he claimed that he invoked his right to a lawyer at the start of the second interview when he said: "I kinda wanna lawyer present, but I don't want it to look like if I wait for my lawyer." The trial court found the statement "ambiguous and equivocal" and further found that when the detectives clarified whether Smith wanted to talk, Smith said: "Yes, go right ahead."[2] The trial court denied the suppression motion.

¶6 Smith's trial began November 1, 2010. On the morning of November 3, 2010, the State called Smith's co-actor, Alfonzo Treadwell, to testify. Treadwell testified that:

- He pled "guilty to a charge of homicide" for "the shooting that occurred on April 17th of 2009" and was sentenced to prison.

[2] Smith's motion to suppress in the trial court also asserted that "Smith did nothing to voluntarily reinitiate contact with police that would legally waive his request for counsel." The trial court found that Smith voluntarily reinitiated the interview. On appeal, Smith concedes that he voluntarily reinitiated the interview, and therefore, we need not discuss it. *See* ***Reiman Associates, Inc. v. R/A Advertising, Inc.***, 102 Wis. 2d 305, 306 n.1, 306 N.W.2d 292, 294 n.1 (Ct. App. 1981) (issues not argued on appeal are deemed abandoned).

- He has been friends with Smith "[f]or a long time," and identified him in the courtroom.

- He talked to police about "what happened on April 17th, 2009" and "told them what I did."

¶7 When asked if he and Smith were involved in the shooting on April 17, 2009, Treadwell responded: "Man, I keep telling you all, man. … I keep telling you all, man, people keep trying to make me, you know what I'm saying, do something I don't want to do. This the second time they brought me down here and I told them. … If you all get him, you get him on your own." (Formatting altered.) When pressed to answer "Yes or no?", he answered "No." When asked to tell the jury what happened on April 17, 2009, Treadwell just kept saying "I told you all. I told you all already, man."

¶8 The trial court sent the jury out of the courtroom and the trial court told Treadwell that it could find him in contempt, "in effect add time on to your sentence. Now if I bring the jury out here, are you going to answer the questions?" Treadwell said: "Nope." The trial court decided to pass Treadwell as a witness until after lunch. The trial court told the prosecutor: "One of the things that you could certainly do is you can ask me to declare him unavailable because of his refusal to testify and then you can have his statement admitted into evidence under 908.045(4), a statement against interest," and suggested the prosecutor "use the noon hour to find out if he's [Treadwell] going to cooperate." Smith's lawyer then said: "Your Honor, just so the Court -- I'm sure the Court is aware of this, but we would strongly object to [declaring Treadwell unavailable]. My client does have a right to face his accusers."

¶9 After lunch, the State recalled Treadwell. Treadwell sat in the witness stand mute, not saying a word. The prosecutor attempted to put Treadwell's prior statements to police into evidence by asking the following questions, as material:

- "Did you tell Detective Billy Ball on tape that a few days prior to this homicide of Jordan Alvarez that you were at Omar Smith's house, that he was your friend and the house that Omar Smith was at, at 1629 North 14th Street, was shot up?"

- "Do you recall telling Detective Billy Ball that a few days prior to this homicide that Omar Smith's house was shot up and that Omar had been very upset and his family was also upset over the shooting?"

- "Do you recall telling Detective Billy Ball that on the day of the homicide that you were at Omar Smith's house at 1629 North 14th Street; and that at one point while you were over there, Omar Smith walked up to him and said, quote, come on with the heat, unquote?"

- "Do you recall telling Billy Ball that at this point that you got into a white two-door car that belonged to Omar's friend named Juggy, that you got in the backseat behind the passenger and Omar was in the backseat behind the driver? It further stated that there was a black male that was dark complected in the front seat of the two-door car and that he was a friend of Juggy."

- "Do you recall telling Detective Billy Ball that while you were driving and riding in that car that you sat in the backseat and loaded

eight bullets into your .45 caliber pistol, which you have - - you then cocked so it would be ready to fire when they got out?"

- "Do you recall stating to Billy Ball that Juggy drove them to the area of 23rd and McKinley? When Juggy stopped the car, he overheard Omar telling Juggy to wait for them."

- "Do you recall that upon the car being stopped that you immediately got out and ran towards the house on 24th Street where all the people were out at? Do you recall stating that you saw a guy named Ricky standing out and that you fired two or three shots at Ricky?"

- "Do you recall stating that you fired four or five shots at a black car … and that the gun that you were using was a black .45 caliber pistol, which was yours?"

- "Do you recall stating that after you had fired all of your bullets, you began to hear more gunshots and did not know if it was coming from Omar and the other black male or whether people were shooting back at them, so you began to run from the scene?"

- "Do you recall telling Billy Ball that when this incident occurred that you were wearing a pair of blue jeans, white dukies and a black hoody?"

- "Do you recall telling Billy Ball upon looking at a photo of a Harold Conner, this person, Harold Conner, in the photo that you looked at was the person that you know as Juggy and that Juggy was the driver of the two-door white automobile?"

- "Do you recall also during this statement that you identified photographs shown to you of Omar Smith, who is the defendant in court here today, and you stated that that is Omar the person who asked you to come with him to do the shooting?"

- "Do you recall at that time telling the detectives … that Omar wanted to go over to the area of 24th and McKinley to retaliate because Omar Smith believed that the, quote, Deuce Squad, unquote, shot at his mother's house?"

- "Do you recall telling the Police Detectives … that [the third shooter] shot two to three times with the .22 and that his gun jammed and that you shot approximately four to five times and that Omar shot everything and then his gun locked back?"

¶10 As noted, Treadwell did not respond to these or any other questions asked during the State's direct examination. Further, Treadwell did not respond to most of the questions Smith's lawyer asked on cross-examination. Smith did not object during Treadwell's afternoon non-responsiveness.

¶11 The following afternoon, Smith's lawyer asked the trial court for a mistrial on the grounds that Treadwell's refusal to answer questions denied Smith his right to confrontation. His lawyer told the trial court he did not object the day before because: "there were certain things that [he] wanted to get out from Mr. Treadwell. Especially if he was going to be declared unavailable" but "he just stopped talking. He did almost all of this in front of the jury."

¶12 The prosecutor opposed the request for a mistrial in favor of striking all of Treadwell's testimony—both morning testimony, where he did answer

questions, and afternoon testimony, where he sat mute. Smith's lawyer asked the trial court to keep Treadwell's morning testimony, but strike all the questions asked in the afternoon. The trial court reasoned:

> Had [the State] been told ahead of time that Treadwell was going to act the way he did, [it] would never have called him to the witness stand and we wouldn't have this problem. It was only after he got on here that we had the problem. In retrospect, we probably should have ended the testimony at the time of the morning session when I had him -- when I threatened him with contempt and then we came -- we would come back in the afternoon and I would have asked him if he was going to respond to questions, and if he would have remained mute, that would have probably been it. We didn't do that.
>
> The question is, is anybody going to be hurt, and I know how difficult it is for a jury to be told to disregard something, and the fact is arguably the statements work both ways. Arguably the defense is helped as well as harmed and the State is helped as well as harmed by the various statements that Treadwell gave. As to who's harmed more or who's helped more, I don't know. That would be trying to predict what a jury is going to do. So neither side is prejudiced that much that there should be a mistrial.
>
> ….
>
> So I think the only way to proceed -- the only way to proceed here is to actually strike the questions 'cause there were no answers from the afternoon session and to tell the jury that the reason they are being stricken is that none of that stuff is in evidence, that they have no idea whether in fact those statements were in effect made, and tell them to disregard it, and then neither of you will comment on those statements in your closing arguments.
>
> With regard to what he actually did testify to, I would be inclined to strike that -- that first portion -- that morning portion. Except for the fact that it's not the State that's asking me to put that in, it's the defense asking me to put it in, and arguably [the defense lawyer] had no ability to cross examine [Treadwell] on those limited questions and answers, but by arguing to me that I should allow that in, in effect the defense is giving up his right to cross examine as to those limited questions, and therefore when I look at it

> that way, that portion he was -- he answered the questions that were put to him, he was responsive. … I think that portion ought to stand. So what I'm going to do is deny the motion for mistrial.

¶13 The trial court then asked both the State and the defense if the curative instruction was something each "can live with?" Smith's lawyer said: "Yes, Your Honor." The trial court read a curative instruction to the jury after its ruling, and again during jury instructions:[3]

> the Court has ordered struck all testimony of Alfonzo Treadwell from the afternoon of Wednesday, November [3rd]. The jury is ordered to disregard what occurred during the afternoon of November [3rd] regarding the testimony of Treadwell. In particular, all questions and comments by the attorneys and the Court and any responses given by Treadwell because there is no evidence on this record that any of those questions, comments, and responses were based in fact. His testimony from the morning of November [3rd] is not affected by this order and it is in evidence.
>
> Remarks of the attorneys are not evidence. If the remarks suggested certain facts not in evidence, disregard that suggestion.

[3] The trial court read a slightly different instruction to the jurors at the end of the case:

> The Court has struck all of the testimony of Alfonzo Treadwell from the afternoon of Wednesday, November 3rd. The jury is ordered to disregard and not consider in any manner whatsoever during your deliberations what occurred during the afternoon of November 3rd regarding the testimony of Treadwell, in particular all questions and comments by the attorneys and the Court and any response given by Treadwell, because there is no evidence on this record that any of those questions, comments and responses were based in fact. His testimony from the morning of November 3rd is not affected by this order, and it is in evidence. Remarks of the attorneys are not evidence. If the remarks suggested certain facts not in evidence, disregard the suggestion.

¶14 When detective Keith Kopcha testified, the State played the audio recording of Smith's interview with police. The prosecutor gave each juror a written transcript of the recorded interview to help them follow along.

¶15 The jury found Smith guilty, and the trial court sentenced Smith to: forty years of initial confinement followed by twenty years of extended supervision on the homicide conviction; seven years of initial confinement followed by five years of extended supervision on each of the reckless endangerment convictions; five years of initial confinement followed by five years of extended supervision on the unlawful possession of a firearm conviction; and three years of initial confinement followed by three years of extended supervision on the bail-jumping conviction, all to be served consecutively.

A. *Miranda rights*.

¶16 Smith claims he "unambiguously invoked his right" to a lawyer and, therefore the trial court erred when it denied his suppression motion. Whether Smith effectively invoked his Fifth Amendment ***Miranda*** right to a lawyer is a question of constitutional fact we decide under a two-part standard of review. *See* ***State v. Hambly***, 2008 WI 10, ¶16, 307 Wis. 2d 98, 109, 745 N.W.2d 48, 53. First, we uphold any "findings of evidentiary or historical fact unless they are clearly erroneous." ***Id.***, 2008 WI 10, ¶49, 307 Wis. 2d at 126, 745 N.W.2d at 62. We defer to the trial court's credibility determinations based on those findings "unless the testimony relied upon is incredible as a matter of law." ***State v. Jacobs***, 2012 WI App 104, ¶17, 344 Wis. 2d 142, 155, 822 N.W.2d 885, 891. Second, we "decide *de novo* the legal issue of whether those findings require suppression." ***State v. Douglas***, 2013 WI App 52, ¶13, 347 Wis. 2d 407, 419, 830 N.W.2d 126, 131.

¶17 A suspect who clearly "expressed his desire to deal with the police only through counsel, is not subject to further interrogation." ***Edwards v. Arizona***, 451 U.S. 477, 484 (1981). Ambiguous or equivocal statements about a lawyer, however, where a reasonable officer believes a "suspect *might* be invoking the right to counsel … do not require the cessation of questioning." ***Davis v. United States***, 512 U.S. 452, 459 (1994) (emphasis in ***Davis***). Further, police do not need to stop asking a suspect questions to clarify ambiguous requests for a lawyer. ***State v. Jennings***, 2002 WI 44, ¶¶5, 36, 252 Wis. 2d 228, 233, 246, 647 N.W.2d 142, 144, 151.

¶18 The trial court found that Smith's statement did not unambiguously invoke his right to a lawyer. The Record supports the trial court's finding. Smith reinitiated the interview and told the detectives he wanted to tell them his part in the shooting. When Smith hedged with "I kinda wanna lawyer present, but I don't want it to look like if I wait for my lawyer," the detective told Smith it was his decision. The detective, although not required to do so, then clarified whether Smith wanted to continue the interview or stop. Smith responded, "fire away with your questions" and "[g]o right ahead," indicating he wanted to answer questions without a lawyer. Clearly, Smith's statement did not unequivocally or unambiguously assert his right to a lawyer. *See* ***Davis***, 512 U.S. at 455 (Davis's statement "'[m]aybe I should talk to a lawyer'" insufficient to invoke right to a lawyer.); ***Jennings***, 2002 WI 44, ¶24, 252 Wis. 2d at 241, 647 N.W.2d at 148 (Jennings's statement "'I think maybe I need to talk to a lawyer'" insufficient to invoke right to a lawyer.).

B. *Confrontation; Ineffective Assistance*.

¶19 Smith argues that the questions the prosecutor asked Treadwell the afternoon of November 3 prejudiced him and violated his right to confrontation. Smith also argues that his lawyer acted ineffectively by not objecting until the day after Treadwell testified.

¶20 The confrontation clause in the Sixth Amendment gives a defendant the right to confront witnesses who testify against him or her. *See* ***Crawford v. Washington***, 541 U.S. 36 (2004). Where, as here, a defendant claims his constitutional rights were violated but his trial lawyer did not preserve timely an objection to the alleged violation, we review the claim in the context of an ineffective-assistance-of-counsel claim. *See* ***Kimmelman v. Morrison***, 477 U.S. 365, 374–375 (1986). Every defendant has the right to constitutionally effective representation. ***Strickland v. Washington***, 466 U.S. 668 (1984). To prove deficient representation, a defendant must point to specific acts or omissions by the lawyer that are "outside the wide range of professionally competent assistance." ***Id.***, 466 U.S. at 690. In order to succeed on the prejudice aspect of the ***Strickland*** analysis, "[t]he defendant must show that there is a reasonable probability that, but for the counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.***, 466 U.S. at 694. This is not, however, "an outcome-determinative test. In decisions following ***Strickland***, the Supreme Court has reaffirmed that the touchstone of the prejudice component is 'whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair.'" ***State v. Smith***, 207 Wis. 2d 258, 276, 558 N.W.2d 379, 386 (1997) (citations and quoted source omitted). On

review, we need not address both aspects of the ***Strickland*** test if the defendant does not make a sufficient showing on one. *See* ***Strickland***, 466 U.S. at 697.

¶21 There was no prejudice here. As we have seen, Smith confessed to the police a few days after the shooting. The jury heard the audio recording of Smith's confession. Other witnesses corroborated the confession's details. Howard Conner testified that on April 17, 2009, at around 8:30 p.m., he drove Smith, Treadwell, and a third man to the area of 21st and Vliet, let them out of the car, and then went to the liquor store. The surviving victims testified that they saw three men with black hoodies start shooting at them from across the street. And, of course, the Record shows that the bullet that killed Jordan Alvarez came from a nine millimeter gun, which Smith admitted is the same type of gun he shot that night.

¶22 Further, as we have also seen, Smith's lawyer asked to keep in Treadwell's morning testimony even though he did not cross examine Treadwell. Both the State and Smith agreed to the trial court's proposed solution to strike Treadwell's afternoon testimony and give a curative instruction. The trial court read the curative instruction to the jury not once, but twice. We presume the jury followed those instructions. *See* ***State v. Searcy***, 2006 WI App 8, ¶59, 288 Wis. 2d 804, 841, 709 N.W.2d 497, 514. The trial court ordered the jury to ignore everything asked of Treadwell and his non-responsiveness. The trial court told the jury that none of this was evidence and should not be considered. Thus, Smith was not prejudiced and his ineffective-assistance-of-counsel claim fails.[4]

[4] Smith asks us to remand for a ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905, 908 (Ct. App. 1979) hearing "to determine whether trial counsel can flesh out his strategic reason for his deficient performance" for not objecting when the prosecutor questioned Treadwell (continued)

¶23 Smith, citing ***Bruton v. United States***, 391 U.S. 123 (1968) and ***Cruz v. New York***, 481 U.S. 186 (1987), argues that limiting instructions do not "cure" prejudice where a nontestifying codefendant's confession is admitted. He argues that the prosecutor's questions of Treadwell, in essence, admitted Treadwell's confession, causing him (Smith) prejudice. We disagree. Neither ***Bruton*** nor ***Cruz*** are on point. First, both cases involved trials where co-defendants were tried together, *see* ***Bruton***, 391 U.S. at 137 ("in the context of a joint trial we cannot accept limiting instructions as an adequate substitute for petitioner's constitutional right of cross-examination"); ***Cruz***, 481 U.S. at 193 (limiting instruction insufficient in joint trial). That is not the case here. Treadwell pled guilty and had already been convicted. This was not a joint trial. Second, in both ***Bruton*** and ***Cruz***, the testimony was admitted, subject to the limiting instructions, telling the jury to not consider the codefendant's confession against the other defendant. *See* ***Bruton***, 391 U.S. at 125; ***Cruz***, 481 U.S. at 193. Here, the trial court struck all of Treadwell's afternoon non-responsive testimony and ordered the jury to "not consider [it] in any manner whatsoever during its deliberations." Neither ***Bruton*** nor ***Cruz*** apply here.

C. *Sentencing*.

¶24 Smith argues that the trial court imposed an unduly harsh and cruel sentence because he will be 82-years-old when he completes his term of initial confinement. We disagree.

---

the afternoon of November 3. The Record, however, conclusively shows no prejudice. We also note that Smith's lawyer already offered his strategic reason for not objecting—"there were certain things that [he] wanted to get out from Mr. Treadwell" on cross-examination.

¶25 Sentencing is vested in the trial court's discretion. *See* ***State v. Steele***, 2001 WI App 160, ¶10, 246 Wis. 2d 744, 750, 632 N.W.2d 112, 116. The trial court must consider three primary factors: (1) the seriousness of the crime; (2) the defendant's character; and (3) the need to protect the public. *See* ***McCleary v. State***, 49 Wis. 2d 263, 274, 182 N.W.2d 512, 518 (1971); *see also* ***State v. Gallion***, 2004 WI 42, ¶¶59–62, 270 Wis. 2d 535, 565–566, 678 N.W.2d 197, 211. "[W]hether to impose consecutive, as opposed to concurrent, sentences is, like all other sentencing decisions, committed to the trial court's discretion." ***State v. Johnson***, 178 Wis. 2d 42, 52, 503 N.W.2d 575, 578 (Ct. App. 1993).

¶26 A sentence passes the Eighth Amendment's "cruel and unusual" bar if it is not "so greatly disproportionate to the offense committed as to be completely arbitrary and shocking to the sense of justice." ***State v. Paske***, 163 Wis. 2d 52, 69, 471 N.W.2d 55, 62 (1991) (quoted source and internal quotation marks omitted). A sentence is unduly harsh only if its length "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." ***State v. Davis***, 2005 WI App 98, ¶15, 281 Wis. 2d 118, 128, 698 N.W.2d 823, 828 (quoted source and internal quotation marks omitted).

¶27 The trial court considered each of the primary sentencing factors. It addressed the serious nature of the crime, that "gunplay has got to stop," that Smith did these crimes while on probation for another crime, and in retaliation for someone shooting at his house. Smith took his nine millimeter gun and emptied it into a group of people, killing a young woman and wounding two others. As for Smith's character, the trial court observed that Smith "smirked" through the sentencing, and that he did not take responsibility or show remorse. The trial court

discussed his past history of violence, use and sale of drugs, that he dropped out of school, (but did get an equivalency degree) had been drinking since he was twelve or thirteen and "never had any stable employment." Next, the trial court addressed the need to protect the public, to get guns off the streets, and that imposing probation "would unduly depreciate the seriousness of the offense."

¶28 Although the trial court did not specifically explain the need for consecutive sentences, we discern from the Record that it did so because of the serious nature of the crime and to punish Smith for each of the crimes. *See* ***McCleary***, 49 Wis. 2d at 282, 182 N.W.2d at 522 (reviewing court must "search the record to determine whether in the exercise of proper discretion the sentence imposed can be sustained"). The facts of Record show that Smith planned to retaliate against a gang he believed had fired at his mother's house. He got his friends and their guns and looked for the rival gang. When they saw a group of people, Smith claimed that he raised his arm to try to shoot just over the crowd's heads to "scare" them. He shot until he emptied his gun, however, and then ran. Three innocent young women were shot, one fatally. Smith did this while on probation for another crime and while he was ordered not to have any guns. The trial court imposed less than the maximum potential sentence. The combined sentences are not disproportionate, arbitrary, or shocking. Smith's appellate complaint that the trial court erroneously exercised its discretion is without merit.[5]

[5] Smith argues the sentence imposed is contrary to the ***Graham v. Florida***, 560 U.S. 48, 130 S. Ct. 2011 (2010) holding that the "Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide." 560 U.S. at ___, 130 S. Ct. at 2034. We disagree. Smith did commit homicide and he is an adult. ***Graham*** does not apply.

By the Court.—Judgment and order affirmed.

Publication in the official reports is not recommended.