COURT OF APPEALS
DECISION
DATED AND FILED

March 26, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP1530-CR **Cir. Ct. No. 2011CF743**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MYRON A. JONES,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Racine County: EUGENE GASIORKIEWICZ, Judge. *Affirmed.*

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

¶1 PER CURIAM. Myron A. Jones appeals a judgment convicting him of two counts of burglary and an order denying his motion for postconviction

relief. Jones contends that his trial and sentencing counsels were ineffective and that his punishment is unduly harsh, given those of his codefendants. We affirm.

¶2 Jones and five others were arrested for burglarizing a day care center and an adjacent dollar store. Except for Jones, all lived in a nearby apartment complex on Green Street. The State told Jones that if he pled guilty to one count of burglary, it would recommend an eighteen-month sentence, concurrent to an unrelated sentence. Jones refused. He went to trial on two counts of burglary.

¶3 Calling Jones "the ringleader," Tamara Carr testified that she, Jones, and the others entered the day care through an open back door, that she saw Jones "kicking the drywall" of the common wall between the two businesses, and that they all took merchandise. Ariella Rodriguez testified that on a second trip into the day care for more items, she saw a hole "big enough to crawl through" between the day care and the dollar store storage room, and that Jones was on the dollar store side "[p]utting stuff by the hole of the wall …. so that people [could] grab it from the day care" side. Jones did not testify. Police found stolen items in three Green Street apartments. A jury convicted Jones on both counts. The court sentenced him to consecutive terms totaling fourteen years.

¶4 Postconviction, Jones contended that his trial and sentencing attorneys each had denied him his right to effective representation and that his fourteen-year sentence is overly harsh, as it far exceeded those of his codefendants. The court denied his motion. Jones appeals.

¶5 To prove ineffective assistance, a defendant must show that counsel's performance was deficient and that the deficient performance resulted in actual prejudice. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient performance, a defendant must show that counsel's actions "fell below

an objective standard of reasonableness." ***Id.*** at 688. To prove prejudice, a defendant must "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id.*** at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** Failure to satisfy either prong is insufficient to establish ineffective assistance of counsel. *See* ***id.*** at 687. We review both prongs as mixed questions of law and fact. ***State v. Pitsch***, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985). The trial court's findings of fact will be upheld unless they are clearly erroneous. ***Id.*** at 634. Whether counsel's performance was deficient or prejudicial are questions of law we review de novo. ***Id.***

¶6 Jones asserts that trial counsel "promised" in her opening statement that he would testify, which, he contends, constitutes deficient performance under ***United States ex rel. Hampton v. Leibach***, 347 F.3d 219 (7th Cir. 2003). In ***Hampton***, counsel told the jury that the defendant "will testify and tell you that he was at the concert [and] … that he saw what happened but was not involved with it." ***Id.*** at 257. The court concluded that, as the jury was led to believe that it would hear and have the opportunity to choose between two versions of what occurred and so be able to evaluate the defendant's credibility, the accused's unexplained failure to testify was objectively unreasonable under ***Strickland***, as it well may have conveyed to the jury that the State's version was the correct one. ***Hampton***, 347 F.3d at 258, 260.

¶7 According to the transcript, Jones's counsel said in her opening statement: "The one person in this case who you're going to hear from that did not live on Green Street was Mr. Jones." That statement is a far cry from the

Hampton promise of a substantive alternate view of events. At the ***Machner***[1] hearing, counsel testified that she did not recall saying what she acknowledged the transcript reflected, that she intended to indicate only that all but Jones lived in the immediate neighborhood, and thus "may have misspoken" out of nervousness.

¶8 The trial court found that there was no promise and that even Jones did not react upon hearing counsel's comment, raising the issue only later upon seeing the transcript. We observe that, despite every effort at accuracy, a transcript may not always precisely reflect the self-corrections common in unscripted speech. Given counsel's testimony about her intended point, it is conceivable that she said, "The one person in this case who you're going to hear from—that did not live on Green Street was Mr. Jones." We conclude that at worst the phrasing was ambiguous and agree that there was no promise.

¶9 If the jury did interpret the statement as a promise that Jones would testify, however, he has not established prejudice. The jury was instructed that opening statements are not evidence. We presume the jury follows the instructions the trial court gives. *See* ***Schwigel v. Kohlmann***, 2002 WI App 121, ¶13, 254 Wis. 2d 830, 647 N.W.2d 362.

¶10 Jones similarly contends that trial counsel ineffectively made a "material misstatement" during her closing argument when she asserted that even when pressed neither Carr nor Rodriguez could say that they saw Jones kick a hole in the wall between the two businesses. The State objected on grounds that counsel's statement was inconsistent with the testimony. We disagree.

[1] *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

¶11 Carr testified that she observed Jones "kicking the wall." The prosecutor then asked, "So he was kicking a wall between the [dollar store] and the day care center?" Carr answered, "Right." This exchange followed on cross-examination:

> Q. Did you physically see Myron [Jones] kick the wall?
>
> A. Yes, yes …. He's kicking, and he kicked it, and once he kicked it again, it was like boom, boom, so that [had] to have been two, and once I get up there, he kicked it again …. The only thing I can say is I seen Myron [Jones] kick the wall. That was it.
>
> Q. You saw Myron [Jones] kick the wall once?
>
> A. Yeah, that's it, because when I got there, you heard the boom, boom, boom, you got there, he was the only one there. He kicked it. I left.

And while Rodriguez testified that she saw "a large hole" in the common wall, when asked if she saw Jones "put the hole in the wall of the day care slash Dollar Tree," she answered, "No, I did not." During deliberations, the jury was allowed to read portions of Carr's and Rodriguez's testimony, which, as shown, confirmed that counsel did not misstate it. Further, as with opening statements, the court instructed the jury that closing arguments are not evidence.

¶12 In any event, whether Jones kicked the hole in the wall was not, as he claims, the "chief evidence tying him to the Dollar Tree burglary." Rodriguez testified that she saw him in the Dollar Tree store room "[p]utting stuff by the hole … so that people could grab it." The State did not have to prove who made the hole in the wall to prove the elements of burglary—that Jones intentionally entered

a building without consent of the person in lawful possession and with the intent to steal. *See* WIS. STAT. § 943.10(1m) (2011-12).[2]

¶13 Jones next contends that his sentencing counsel ineffectively failed to argue the "great chasm" between his fourteen-year sentence and those meted out to his "similarly situated" codefendants: three received only probation and one was fined $530.

¶14 First, "similarly charged" may not be "similarly situated." Persons convicted of the same crime may receive different sentences, as their respective sentences are based upon individual culpability and rehabilitative needs. ***Drinkwater v. State***, 73 Wis. 2d 674, 679, 245 N.W.2d 664 (1976).

¶15 Second, as it reiterated at the postconviction motion hearing, the court thoroughly examined the sentencing factors and objectives as they specifically applied to Jones. *See* ***State v. Fuerst***, 181 Wis. 2d 903, 915, 512 N.W.2d 243 (Ct. App. 1994) (sentencing court has additional opportunity to explain its sentence when challenged by postconviction motion). It noted his lengthy criminal history, including felony convictions, his failures on supervision, and the threat he posed to the security of the community. There was testimony that Jones was the ringleader of the caper and that he alerted the others to the unsecured door. Jones thus has not established that he and his codefendants were similarly situated. Even if they were, their sentences do not control his. *See* ***State v. Giebel***, 198 Wis. 2d 207, 220-21, 541 N.W.2d 815 (Ct. App. 1995).

[2] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

¶16 In addition, the court said it had three of Jones's codefendants' sentences "in its memory bank," having sentenced them within the prior three months. Jones does not show that reiteration of his codefendants' sentences would have changed his sentence. *See* ***State v. Flynn***, 190 Wis. 2d 31, 49, 527 N.W.2d 343 (Ct. App. 1994) (one who alleges ineffectiveness must state with specificity how desired action would have affected outcome).

¶17 Jones also asserts that sentencing counsel ineffectively failed to point out the more lenient terms of the State's original offer, which "should" have had some effect on the court at sentencing. The test, however, is whether the desired action *would* have affected the outcome. *See* ***id.*** This argument is only speculative because the State's sentence recommendations are not binding on the court. *See* ***State v. Comstock***, 168 Wis. 2d 915, 927, 485 N.W.2d 354 (1992). A motion alleging ineffective assistance of counsel may not be based on speculation. *See* ***State v. Balliette***, 2011 WI 79, ¶18, 336 Wis. 2d 358, 805 N.W.2d 334.

¶18 In a related vein, Jones asserts trial court error. He claims that the comparative harshness of his sentence to his codefendants' and to the State's pretrial offer are grounds for sentence modification, based either on the length of the sentence or because the court's failure to acknowledge the lesser penalties constitutes a new factor. We disagree.

¶19 A court may modify a sentence determined to have been "unduly harsh" at sentencing or that falls under "new factor" jurisprudence. *See* ***State v. Klubertanz***, 2006 WI App 71, ¶40, 291 Wis. 2d 751, 713 N.W.2d 116. A sentence alleged to be unduly harsh is reviewed for an erroneous exercise of discretion. ***Giebel***, 198 Wis. 2d at 220. Whether a fact or set of facts constitutes a "new factor" is a question of law that we review de novo, but whether a new factor

justifies sentence modification is reviewed for an erroneous exercise of discretion. ***State v. Hegwood***, 113 Wis. 2d 544, 546-47, 335 N.W.2d 399 (1983).

¶20 Jones has not established that his sentence is unduly harsh because he has not shown that the disparity was arbitrary or based on inappropriate sentencing considerations. *See* ***State v. Perez***, 170 Wis. 2d 130, 144, 487 N.W.2d 630 (Ct. App. 1992). The two burglary charges exposed him to twenty-five years' imprisonment. His fourteen-year sentence thus "is not so disproportionate to the offense committed as to shock the public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." *See* ***State v. Daniels***, 117 Wis. 2d 9, 22, 343 N.W.2d 411 (Ct. App. 1983).

¶21 Jones's new-factors claim likewise fails. He neglects to argue, let alone demonstrate, that the trial court's refusal to modify his sentence was an erroneous exercise of discretion. *See* ***State v. Harbor***, 2011 WI 28, ¶38, 333 Wis. 2d 53, 797 N.W.2d 828. The court acknowledged that it did not refer to the sentences of Jones's codefendants at sentencing because that "is not … ever contained within [its] rubric or calculus to an individual defendant[,] as he [or she] stands … on his own feet or her own feet, not as compared to others." The court also emphasized that it considered all of the ***Gallion***[3] factors. The sentence represented a proper exercise of the court's discretion.

[3] *See* ***State v. Gallion***, 2004 WI 42, ¶¶40-43 & nn.9-12, 270 Wis. 2d 535, 678 N.W.2d 197.

By the Court.—Judgment and order affirmed.

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