COURT OF APPEALS
DECISION
DATED AND FILED

September 9, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP1058-CR **Cir. Ct. No. 2012CF1178**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAVID DALAWRENCE BYRD,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DAVID L. BOROWSKI, Judge. *Affirmed.*

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 PER CURIAM. David Dalawrence Byrd appeals a judgment entered after a jury found him guilty of first-degree intentional homicide as a party to a crime and possessing a firearm as a felon. He also appeals the postconviction order denying his motion for resentencing or, alternatively, sentence modification.

He claims that the circuit court: (1) improperly allowed testimony from a witness who violated a sequestration order; (2) sentenced him under an unconstitutional statute; (3) failed to give him required information at the time of sentencing; and (4) erroneously exercised sentencing discretion. We reject his arguments and affirm.

BACKGROUND

¶2 The State alleged in a criminal complaint that, on October 27, 2011, Byrd approached Shawn Jenkins at gunpoint outside a junkyard in Milwaukee, Wisconsin. When Jenkins tried to escape, Byrd killed Jenkins by shooting him in the back of the head. Byrd took Jenkins's credit cards and then fled with two accomplices, Jimmy Williams and Derrick Byrd.[1] Based on these allegations, the State charged Byrd with first-degree intentional homicide as a party to a crime and with possessing a firearm as a felon. The State also charged Byrd with several crimes allegedly committed on October 7, 2011.

¶3 The matters proceeded to trial. We need not summarize the entirety of the trial proceedings here. As relevant to the issues Byrd pursues on appeal, the circuit court entered a sequestration order at the outset of the trial expressly barring any witness from entering the courtroom without the circuit court's authorization. Derrick took the stand for the State on the second day of trial. He acknowledged that he had been charged with felony murder in the death of Jenkins. Derrick also acknowledged that, pursuant to a plea bargain, he had pled

[1] Because our opinion in this matter requires us to discuss several men whose last name is "Byrd," we refer to the appellant as "Byrd," and we refer to other men in the Byrd family by their first names.

guilty to second-degree reckless homicide, and that the State had agreed to recommend a sentence of eight-to-ten years of initial confinement and five years of extended supervision in exchange for his cooperation in the prosecutions of Byrd and Williams.

¶4 Derrick went on to testify about the events of October 27, 2011. He said that he, Byrd, and Williams rode together in a blue Acura and discussed robbing someone. Williams drove the car to a junkyard, and Byrd and Derrick got out and approached a man leaving the premises. Byrd produced a semi-automatic pistol with a beam on it and chased after the man, and then Derrick heard three or four gunshots and saw a flash. When Byrd and Derrick returned to the car, they drove with Williams to the home of Navidia Bolden, where Derrick gave Bolden the victim's stolen credit cards.

¶5 Derrick completed his testimony on the morning of the third day of trial. After he left the stand, Byrd moved to exclude any testimony from Davonta Byrd because he was in court during Derrick's testimony that morning. After a hearing outside the jury's presence, the circuit court denied the motion.

¶6 Davonta testified that, at some point in October 2011, he was visiting his girlfriend, Bolden, when Derrick and Byrd drove up to her home in a blue Acura. Derrick entered the home and gave Bolden credit cards belonging to someone else while Byrd waited in the car. Davonta next testified that on another occasion, he saw Byrd with a semi-automatic nine millimeter gun with a beam on the bottom. Finally, Davonta testified about matters relating to the crimes that allegedly occurred on October 7, 2011.

¶7 The jury found Byrd guilty of the two crimes allegedly committed outside the junkyard on October 27, 2011. The jury acquitted him of the remaining charges.

¶8 At sentencing, the State asked the circuit court to sentence Byrd to life in prison without the possibility of supervised release, while Byrd emphasized that he was only nineteen years old at the time of the crime and argued that he should be eligible for supervised release at some point in the future. The circuit court imposed a life sentence for the homicide and decided that Byrd would be eligible for extended supervision after serving forty years in prison. The circuit court imposed a concurrent, evenly bifurcated, ten-year term of imprisonment for possessing a firearm while a felon.

¶9 Byrd filed a postconviction motion for resentencing or sentence modification. The circuit court denied the motion without a hearing. Byrd appeals, challenging both the order denying his postconviction motion and the mid-trial order denying his motion to exclude Davonta's testimony. We discuss additional facts as necessary to our resolution of the issues Byrd presents.

DISCUSSION

¶10 We first consider the claim that the circuit court erroneously permitted Davonta to testify after he violated a sequestration order. Sequestration serves the purpose of "prevent[ing] a witness from 'shaping his [or her] testimony' based on the testimony of other witnesses." ***State v. Evans***, 2000 WI App 178, ¶6, 238 Wis. 2d 411, 617 N.W.2d 220 (citations omitted, brackets in ***Evans***). Whether a witness who violates a sequestration order may nonetheless testify rests in the circuit court's discretion. ***State v. Bembenek***, 111 Wis. 2d 617, 637, 331 N.W.2d 616 (Ct. App. 1983). The issue is resolved with a two-prong analysis.

"[A] witness who has violated a sequestration order should not be allowed to testify where the defendant has been prejudiced by th[e] violation and the party calling the witness was a guilty participant in the violation." ***Id.***

¶11 Byrd's trial counsel moved to exclude any testimony from Davonta because he was in court while Derrick was on the stand during the morning of the third day of trial. To resolve the motion, the circuit court received statements and heard testimony from numerous witnesses. The lead prosecutor explained that he did not know what Davonta looked like and had not realized he was in the courtroom during another witness's testimony. The State's victim-witness coordinator said she did not see Davonta enter the courtroom but she described confronting him as he emerged from the courtroom and demanding to know why he was inside. Several citizens observing the trial testified, each recalling that Davonta was in the courtroom for five-to-ten minutes while Derrick was on the stand. Davonta also testified, stating that he was in the courtroom only briefly to speak to his grandmother during a recess in the proceedings.

¶12 The circuit court found that the State was not a "guilty party" in the sequestration violation. The circuit court explained that it "did not think ... for even a second that [the prosecutors] told [Davonta] to be in court."

¶13 We defer to a circuit court's factual findings unless they are clearly erroneous. *See* ***Royster–Clark, Inc. v. Olsen's Mill, Inc.***, 2006 WI 46, ¶11, 290 Wis. 2d 264, 714 N.W.2d 530. We also defer to the credibility assessments of a circuit court "because of its superior opportunity to observe the demeanor of witnesses and to gauge the persuasiveness of their testimony." ***State v. Carnemolla***, 229 Wis. 2d 648, 661, 600 N.W.2d 236 (Ct. App. 1999). Here, Byrd does not offer any basis for rejecting the circuit court's findings. Accordingly, we

accept the circuit court's determination that the State was not a "guilty participant" in Davonta's violation of the sequestration order.

¶14 The rule is long settled that a witness who violates a sequestration order should be permitted to testify unless the party calling the witness is a "guilty participant" in the violation. *See* ***Loose v. State***, 120 Wis. 115, 121, 97 N.W. 526 (1903). This rule governs even when the opposing party is prejudiced by the violation of the order. ***Id.*** As our supreme court explained: "That is just. An innocent party should not be deprived of the testimony of one of his witnesses because of the latter's transgression of which such party is innocent.... [T]he direct punishment for the offense should be visited upon the offender himself, as for a contempt of court." ***Id.*** at 121-22. Byrd therefore fails to demonstrate that the circuit court wrongly permitted Davonta to testify here. *See* ***Bembenek***, 111 Wis. 2d at 637.

¶15 Moreover, the circuit court explained it "was not convinced that the defense is going to be prejudiced by" admitting Davonta's testimony. The circuit court found that Davonta was not "the most credible witness." The circuit court also found that Derrick's testimony consumed one-and-a-half-to-two hours, that Davonta was in the courtroom for five-to-ten minutes while Derrick was on the stand, and that Davonte heard two-to-five minutes of Derrick's testimony. The circuit court found that, in light of the nominal amount of Derrick's testimony that Davonta could have heard, and in light of Davonta's weaknesses as a witness, Byrd failed to show he would be prejudiced if Davonta testified.

¶16 Byrd nonetheless asserts on appeal that Davonta's testimony was "used to corroborate the testimony of the co-actor, Derrick ... [and] constituted serious prejudice to the defendant." This bald assertion is unaccompanied by any

analysis tying the alleged prejudice to the violation of the sequestration order. Byrd does not show, for example, that Davonta's testimony included details Davonta did not previously disclose and that can be traced to Derrick's testimony on the third day of trial. We conclude that the claim of prejudice is conclusory and inadequately briefed.[2] *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (arguments supported only by general statements are insufficient).

¶17 In sum, Davonta violated a sequestration order but he was present in the courtroom for a vanishingly small percentage of the time that Derrick was testifying. Byrd failed to show that the State was a "guilty participant" in Davonta's violation, and Byrd failed to support his claim that he was prejudiced by Davonta's opportunity to hear a few minutes of Derrick's testimony. Accordingly, Byrd does not demonstrate any error in the circuit court's decision allowing Davonta to testify. *See* ***Bembenek***, 111 Wis. 2d at 637.

¶18 We turn to Byrd's challenges to his sentence. When a defendant is convicted of first-degree intentional homicide, the circuit court is required to impose a sentence of life imprisonment. *See* WIS. STAT. §§ 940.01(1), 939.50(3)(a) (2013-14).[3] Pursuant to WIS. STAT. § 973.014(1g)(a), the court must also decide whether the offender shall be eligible for extended supervision in

[2] For the sake of completeness, we observe that the admission of testimony from a witness who should have been but was not sequestered is harmless error when, as alleged here, the testimony was merely cumulative of another witness's testimony. *See* ***Bagnowski v. Preway, Inc.***, 138 Wis. 2d 241, 250-51, 405 N.W.2d 746 (Ct. App. 1987).

[3] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted. The 2011-12 version of the statutes governed Byrd's sentencing, but the language of the relevant statutory provisions is the same in the current version.

twenty years, or eligible on a date after twenty years, or never eligible. *See* ***id.*** Byrd argues that § 973.014(1g)(a) is unconstitutional on its face.

¶19 A defendant who claims that a statute is unconstitutional must establish "'that the statute is unconstitutional beyond a reasonable doubt.'" ***Wisconsin Med. Soc'y, Inc. v. Morgan***, 2010 WI 94, ¶37, 328 Wis. 2d 469, 787 N.W.2d 22 (citation omitted). Moreover, "a facial challenge to the constitutionality of a statute cannot prevail unless that statute cannot be enforced 'under any circumstances.'" ***State v. Padley***, 2014 WI App 65, ¶16, 354 Wis. 2d 545, 849 N.W.2d 867 (citation and one set of quotation marks omitted). Byrd fails to make the required showings.

¶20 According to Byrd, WIS. STAT. § 973.014(1g)(a) is unconstitutional "on its face" because the statute permits a juvenile offender to receive a life sentence without the possibility of parole. Byrd asserts that such a possibility runs afoul of the United States Supreme Court's decision in ***Miller v. Alabama***, 132 S. Ct. 2455 (2012). There, the Court held that "mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.'" ***Id.*** at 2460.

¶21 Byrd fails to demonstrate that ***Miller*** is relevant here. WISCONSIN STAT. § 973.014(1g)(a) does not mandate life without the possibility of community supervision for any offender. Under the statute, eligibility for extended supervision and the date on which an eligible offender may be considered for extended supervision both rest in the circuit court's discretion. *See* ***State v. Young***, 2009 WI App 22, ¶¶23-25 & n.9, 316 Wis. 2d 114, 762 N.W.2d 736. Indeed, the circuit court here exercised its discretion to impose a sentence that included a date when Byrd is eligible for release.

¶22 ***Miller*** is also inapplicable because it discusses the constitutionality of statutes mandating life imprisonment without parole for an offender younger than eighteen years of age at the time of his or her crime. *See* ***id.***, 132 S. Ct. at 2460. Byrd was older than eighteen when he killed Jenkins. Accordingly, even if the statute mandated life in prison without the possibility of community supervision—and it does not—Byrd fails to explain why ***Miller*** would prevent the State from applying the statute to Byrd. *See* ***Padley***, 354 Wis. 2d 545, ¶16 (facial challenge cannot prevail absent showing that statute is unenforceable in every circumstance).

¶23 The State further points out that our supreme court previously rejected a challenge to the constitutionality of WIS. STAT. § 973.014, holding that it does not violate the constitutional prohibition against cruel and unusual punishment. *See* ***State v. Borrell***, 167 Wis. 2d 749, 759, 774-77, 482 N.W.2d 883 (1992) (discussing the 1987-88 version of the statute). This court has no authority to overrule or modify a decision of the supreme court. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997). Byrd did not file a reply brief and offered nothing to rebut the State's argument that ***Borrell*** forecloses his challenge to the constitutionality of § 973.014(1g)(a). We conclude that he concedes the point. *See* ***State v. Baldwin***, 2010 WI App 162, ¶42, 330 Wis. 2d 500, 794 N.W.2d 769 (unrefuted arguments deemed conceded). For all of these reasons, we reject Byrd's claim for relief based on his contention that § 973.014(1g)(a) is unconstitutional.

¶24 Next, Byrd asserts that he is entitled to resentencing because the sentencing court did not comply with WIS. STAT. § 973.014(1g)(b). Under that statute, a court sentencing a person to life imprisonment for a crime committed on or after December 31, 1999, "shall inform the person of the provisions of [WIS.

STAT. §]302.114(3)." *See* § 973.014(1g)(b). Byrd concedes that the sentencing court gave him a copy of a form titled "Written Explanation of Determinate Life Sentence."[4] The form includes an explanation of the ramifications of determinate sentencing addressed in § 302.114(3). Byrd nonetheless asserts that the court did not "inform" him about the provisions of the statute, apparently because the court did not advise him orally about the statutory provisions. Nothing in the text of § 973.014(1g)(b), however, mandates that the sentencing court give a convicted person an oral explanation of the information in § 302.114(3), and Byrd offers no citation for such a proposition. For that reason alone, we may reject his contention. *See* ***Pettit***, 171 Wis. 2d at 646 (we require citations for legal propositions).

¶25 Additionally, the supreme court has previously considered the propriety of using a written document to give a convicted offender required information about postconviction matters and concluded that the offender "may be informed about appellate rights through the use of written materials." *See* ***State ex rel. Flores v. State***, 183 Wis. 2d 587, 614, 516 N.W.2d 362 (1994). The ***Flores*** court explained: "all that is required is that the proper information be conveyed." ***Id.*** Because the sentencing court informed Byrd in writing about the provisions of WIS. STAT. § 302.114(3), and in light of Byrd's failure to offer any authority showing that a written document conveying the information is insufficient, we must reject his claim that use of a written document to provide the information earns him any relief.

[4] Wisconsin circuit court form CR-235, titled Written Explanation of Determinate Life Sentence, is available at http://www.wicourts.gov/formdisplay/CR-235.pdf?formNumber=CR-235&formType=Form&formatId=2&language=en (last visited August 6, 2015).

¶26 Byrd next asserts that the sentencing court erroneously exercised its discretion when it established his parole eligibility date. A sentencing court considering parole eligibility for a person serving a mandatory life sentence must consider the primary sentencing factors of "'the gravity of the offense, the character of the offender, and the need for protection of the public.'" *See* ***Young***, 316 Wis. 2d 114, ¶24 (citation omitted). The sentencing court may also consider a wide range of other factors concerning the defendant, the offense, and the community. *See* ***id.*** Byrd does not suggest that the sentencing court failed to consider the mandatory sentencing factors in his case, and the record would not support such a suggestion. Further, Byrd acknowledges that the sentencing court discussed numerous additional factors when considering his parole eligibility. For example, the sentencing court considered Byrd's criminal record, his juvenile record, his behavior in the courtroom, his history of substance abuse, and his loss of a father figure early in life. The sentencing court also took into account Byrd's accomplishments, including his receipt of a GED and his participation in alcohol counseling, and the sentencing court acknowledged that he was "certainly young." Thus, the court considered a wide range of appropriate factors when deciding Byrd's parole eligibility.

¶27 Byrd nonetheless claims that the sentencing court erred because, he says, it did not consider the "general characteristics about juvenile offenders" discussed in ***Miller***. We reject this argument. Byrd was not a juvenile offender when he committed first-degree intentional homicide. He was a nineteen-year-old adult. *See* ***id.***, 132 S. Ct. at 2460 (drawing line between juvenile and adult at eighteen years of age for purposes of permitting life sentence without possibility of parole); ***Roper v. Simmons***, 543 U.S. 551, 574 (2005) (drawing line between juvenile and adult at eighteen years of age for purposes of permitting eligibility for

capital punishment); *see also* WIS. STAT. § 938.02(10m) (drawing line between juvenile and adult at seventeen years of age for purposes of prosecuting a person who is alleged to have a committed a state or federal crime). Byrd offers no authority requiring the sentencing court to consider characteristics of juveniles when sentencing a person for an offense that he or she committed as an adult. His argument therefore must fail. *See* ***Pettit***, 171 Wis. 2d at 646.

¶28 Moreover, the sentencing court acknowledged more than once during the course of the sentencing proceedings that Byrd was young. The court had no obligation, however, to give Byrd's "age the overriding and mitigating significance that he would have preferred." *See* ***State v. Stenzel***, 2004 WI App 181, ¶16, 276 Wis. 2d 224, 688 N.W.2d 20. Rather, the court had discretion to determine the importance, if any, of Byrd's age to the sentencing decision. *See* ***id.***

¶29 Byrd complains next because the sentencing court considered an offense for which he was acquitted. Had the court done so, it would not have erred. *See* ***State v. Leitner***, 2002 WI 77, ¶45, 253 Wis. 2d 449, 646 N.W.2d 341. Byrd, however, is unable to point to anything in the record showing that the sentencing court in fact considered an offense for which the jury acquitted him. This claim lacks merit.

¶30 Finally, Byrd complains because the court sentenced him more harshly than it sentenced Derrick, who received an eleven-year term of imprisonment for his role in Jenkins's homicide. The equal protection clauses of the state and federal constitutions require that persons similarly situated be accorded similar treatment. *See* ***Treiber v. Knoll***, 135 Wis. 2d 58, 68, 398 N.W.2d 756 (1987). Byrd asserts that he was "very similarly situated" to Derrick. We cannot agree.

¶31 Derrick pled guilty to second-degree reckless homicide, a less serious form of homicide than Byrd's crime of first-degree intentional homicide. *See* ***State v. Chapman***, 175 Wis. 2d 231, 241, 499 N.W.2d 222 (Ct. App. 1993) ("[E]very degree of homicide is a lesser included offense of first-degree intentional homicide."). Additionally, Derrick assisted law enforcement, an entirely appropriate consideration at sentencing. *See* ***Young***, 316 Wis. 2d 114, ¶24 (sentencing court may consider, *inter alia*, a defendant's cooperativeness); *see also* ***State v. Kaczynski***, 2002 WI App 276, ¶9, 258 Wis. 2d 653, 654 N.W.2d 300 (observing that it has long been the law that a sentencing court may consider a defendant's cooperation with the prosecution of accomplices). Byrd did not cooperate with the prosecution. Byrd was thus not similarly situated to Derrick for sentencing purposes.[5] Accordingly, the circuit court did not err by giving Byrd a harsher sentence for first-degree intentional homicide than Derrick received for committing a less serious crime.

By the Court.—Judgment and order affirmed.

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

[5] Byrd also offers the puzzling contention that he and Williams were similarly situated. As Byrd acknowledges, a jury acquitted Williams of Jenkins' death. Byrd thus was not similarly situated to Williams.