COURT OF APPEALS
DECISION
DATED AND FILED

May 9, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 99-3100-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TARLON HERRON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: MAXINE A. WHITE, Judge. *Affirmed.*

¶1 WEDEMEYER, P.J.[1] Tarlon Herron appeals from a judgment of conviction entered after a jury found him guilty of one count of battery, contrary to WIS. STAT. § 940.19(1) (1997-98).[2] He also appeals from an order denying his

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2).

[2] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

postconviction motion. Herron claims: (1) the trial court erroneously exercised its discretion when it excluded his testimony that he believed the battery victim had a gun; (2) the trial court erroneously exercised its discretion when it precluded defense counsel from mentioning, during opening statement, the temporary restraining order Herron had secured against the victim; (3) the trial court erroneously exercised its discretion when it refused to give the "defense of others" jury instruction; (4) the State's challenge to Herron's statement that he had obtained a permanent injunction against the victim constituted prosecutorial misconduct and deprived him of a fair trial; (5) the real controversy was not tried, requiring a new trial in the interest of justice; (6) the trial court erroneously exercised its discretion when it denied Herron's request for an adjournment during sentencing; and (7) the trial court relied on inaccurate information when it imposed sentence. Because this court resolves each issue in favor of affirming the judgment and order, this court affirms.

I. BACKGROUND

¶2 On July 6, 1999, Herron was returning to his home with his two children in his car. His estranged wife, Linda Momon-Herron, was sitting in her parked car in front of his home. Herron pulled up behind Linda's car and rear-ended her car. Linda then circled around and began driving her car towards Herron, who was now on foot. Subsequently, Herron ran to the house to call the police. At this point, Linda attempted to take the children and leave. Herron came running back and punched her three times in the face while she was holding one of the children. Linda fell to the ground. Herron then kicked her and attempted to choke her.

¶3 Herron was charged with one count of battery as a result of the incident. He pled not guilty and claimed that he acted in self-defense and in defense of his children when he struck Linda. The jury convicted. The trial court denied his postconviction motions. He now appeals.

II. DISCUSSION

A. Exclusion of Herron's Testimony re: Gun.

¶4 Herron first asserts that the trial court erroneously excluded his testimony that he believed Linda had a gun. In reviewing evidentiary matters, this court's role is limited to determining whether the trial court erroneously exercised its discretion. *See* ***State v. Oberlander***, 149 Wis. 2d 132, 140, 438 N.W.2d 580 (1989). This court will affirm if the trial court applied the proper law to the pertinent facts and reached a reasonable conclusion. *See* ***id.*** at 141. Further, this court will uphold a trial court's evidentiary ruling if the record contains facts which support the decision the trial court made even if the trial court failed to fully state its reasons. *See* ***Hammen v. State***, 87 Wis. 2d 791, 800, 275 N.W.2d 709 (1979). This court affirms the trial court's decision.

¶5 Before trial, the State filed a motion *in limine* seeking to exclude the fact that Herron had obtained a temporary restraining order against his wife, which was served on her the morning of the battery. Herron obtained the order on the representation that his wife threatened to kill him and appeared to have a gun. The State argued that the restraining order was irrelevant to the battery. The defense argued that the restraining order provided motivation for Linda to attack Herron, and therefore supported his self-defense theory. The trial court summarized Herron's offer of proof to be "that the examination [of Linda] would relate to your questions of her about where she was and the fact that she was restricted from

where she was, and you would question her about your belief that she attacked him and he was defending himself?" Defense counsel responded, "Yes." The trial court ruled that this subject could be examined during the defense case, after the theory of self-defense had been admitted.

¶6 During Herron's testimony, the following exchange occurred:

> Q Why did you feel that you would be hurt or that your kids would be hurt?
>
> A She had threatened me. The reason I went and got a restraining order --
>
> [Prosecutor:] Objection. This is irrelevant.
>
> THE COURT: The objection is sustained.
>
> Q Were you acting in defense of your children?
>
> A Yes and myself.
>
> Q Okay. Was there any other reason why you felt that you needed to defend yourself or you were in danger?
>
> A Yes. She owned a gun, and she --
>
> [Prosecutor:] Objection, your Honor. This is completely irrelevant.
>
> THE COURT: The objection is sustained.
>
> [Defense counsel:] Okay. I have no further questions.

¶7 In his postconviction motion, and again on appeal, Herron argued that if he had been allowed to, he would have testified about a specific instance of Linda's violent character, i.e., that a few days earlier, she had a gun and had threatened "to blow his head off." The trial court rejected this claim in its postconviction order ruling:

> The only indication of the defendant's pursuit of such a basis for his defense is his attempt … to elicit other acts evidence. The record only reflects a wide open[] ended query of the defendant about the reasons for his apprehension in front of the jury on the trial record.

> Clearly, the defendant's pursuit was improper without notice to the court and the state, and clearly improper without any preliminary offer of proof, law and argument on relevance and prejudice. The argument was not made before the trial court in the manner it is presented on appeal. The defendant's failure to follow the rules … operates as a waiver of this claim.

¶8 This court agrees with the trial court's conclusions in this regard. Herron indicated solely that he intended to introduce evidence that a restraining order was in effect and that Linda was violating it when she came to his home. He claimed that because the order was served the morning of the battery, this supplied a basis for his self-defense theory. Nowhere during the pre-trial motions, or more importantly, during the challenged testimony itself, does Herron indicate any intent to introduce character evidence, nor does he set forth the required offer of proof—at the proper time—to preserve review of any alleged error. *See* WIS. STAT. § 901.03(1)(b); ***McMorris v. State***, 58 Wis. 2d 144, 205 N.W.2d 559 (1973). There was no attempt by Herron's counsel to make an offer of proof relative to Linda's violent character when the court sustained the State's objections. There was no indication during the challenged testimony that Herron's counsel alerted the court that the questions were intended to elicit specific instances of Linda's violent character.[3] Accordingly, the trial court's decision does not constitute an erroneous exercise of discretion. Herron waived his right to present this argument for failing to timely raise or preserve it.

[3] In addition, Herron testified that Linda had a gun and that he had secured a restraining order against her. The jury heard this information before an objection was made. Although the subsequent objections were sustained, the aforementioned testimony was not struck.

B. Mentioning Restraining Order During Opening Statement.

¶9 Herron next contends that the trial court erroneously precluded him from mentioning the restraining order during the opening statement. This court disagrees. Trial courts have always had the authority and discretion to limit the content of attorneys' opening statements. *See* ***Baker v. State***, 69 Wis. 32, 33 N.W. 52 (1887); ***Beavers v. State***, 63 Wis. 2d 597, 604-06, 217 N.W.2d 307 (1974).

¶10 Here, during the motion *in limine* hearing, the trial court ruled that the restraining order is only relevant to Herron's self-defense theory. Therefore, it reasoned that the evidence would not come in unless Herron actually presented a self-defense theory. Accordingly, it prohibited Herron from mentioning the restraining order during opening statement. During opening statement, the trial court did not prohibit Herron from disclosing to the jury his theory that the battery was committed in defense of himself.

¶11 This court cannot say that this decision constituted an erroneous exercise of discretion. Comments during opening statements must be confined to statements based on facts that can be proved. *See* ***State v. Albright***, 98 Wis. 2d 663, 675, 298 N.W.2d 196 (Ct. App. 1980). The trial court determined that the restriction was necessary here.

C. Defense of Others Jury Instruction.

¶12 Next, Herron contends that the trial court erroneously refused to charge the jury with the "defense of others" jury instruction, *see* WIS JI—CRIMINAL 825, despite the evidence supporting the instruction. A trial court has wide discretion as to instructions. *See* ***State v. Lenarchick***, 74 Wis. 2d 425, 455, 247 N.W.2d 80 (1976). In Wisconsin, our supreme court has stated that the

requested instruction must be supported by the evidence, viewing it in the light most favorable to the defendant. *See* ***State v. Gaudesi***, 112 Wis. 2d 213, 223, 332 N.W.2d 302 (1983). If the evidence reasonably requires the instruction, it must be given. *See* ***Johnson v. State***, 85 Wis. 2d 22, 28, 270 N.W.2d 153 (1978). When there is an instructional error, however, this court will not order a new trial unless the error is prejudicial, that there is a probability, not just a possibility, that the jury was misled thereby. *See* ***State v. Peterson***, 220 Wis. 2d 474, 485, 584 N.W.2d 144 (Ct. App. 1998).

¶13 Here, Herron contends that the evidence reasonably supports a "defense of others" instruction. This court does not agree. To warrant a "defense of others" instruction, the defendant must reasonably believe that the third person would be privileged to act in self-defense, and that the defendant's intervention is necessary for the protection of the third person. *See* WIS. STAT. § 939.48(4). The facts elicited at trial do not lead to that conclusion. Although Herron did testify that he hit his wife out of fear for his own safety and that of his children, there is no evidence to support a reasonable belief that the children would be privileged to act in self-defense. Herron testified that his wife was driving like a "mad woman" and trying to run him over. There was also testimony from an independent witness that Herron was beckoning his wife to hit him with the car, but that she never did. Herron testified that he left his children in the car and ran a distance to get into his home to call the police. Further, Herron admitted that when he hit his wife, she was not causing any immediate danger to the children. Accordingly, there was no basis for the trial court to grant Herron's request to give a "defense of others" instruction and, even if there was a basis to so instruct, such omission was harmless. There is no probability that the jury was misled by the absence of the requested instruction. The jury heard Herron's testimony that he acted in defense

of himself and his children. The jury did not believe him. An instruction on defense of others would not have altered the outcome of the trial.

D. Prosecutorial Misconduct.

¶14 Herron also contends that the prosecutor committed misconduct when it cross-examined him, questioning the existence of a permanent restraining order against Linda. The challenged colloquy provided:

> Q … You got a temporary restraining order against your wife, correct?
>
> A Correct.
>
> Q And that temporary restraining order is, as far as you know, good for one week until you can have a hearing in front of a Judge to determine whether a permanent injunction which bars her from being around you should be in place or granted, right?
>
> A Correct.
>
> Q And the Commissioner of that hearing denied your request for a[n] injunction --
>
> ….
>
> A No, he did not.
>
> ….
>
> Q Sir, isn't it true that the Commissioner denied the request for an injunction?
>
> A No.
>
> Q You know you're under oath right now, right, sir?
>
> A I believe that I was successful in getting a permanent restraining order against her for two years. That's in force right now.

¶15 Herron argues that the State had no good basis for asking these questions because it knew, or should have known, that the permanent injunction had been granted. Herron further contends that the prosecutor's reference to this testimony during closing argument further aggravated the matter.

¶16 In addressing a claim of prosecutorial misconduct, this court must determine whether the alleged misconduct was in fact improper behavior and, if so, whether it requires reversal or whether it was harmless beyond a reasonable doubt. *See* ***State v. Ruiz***, 118 Wis. 2d 177, 187-95, 347 N.W.2d 352 (1984). The trial court rejected the claim of prosecutorial misconduct raised in the postconviction motion ruling:

> The defendant's prosecutorial misconduct claim has been reviewed and the Court concludes that it has no merit. The defendant's reliance on the 3 questions and answers to suggest that the prosecutor misle[]d the jury and created an atmosphere which poisoned the entire trial is extremely misleading. The state was correct in directing the jury to consider the actual charge in this case and the elements of the crime of battery. To suggest that the state could not cross exam [sic] him on information that he had suggested in his factual responses to direct questions is preposterous. Additionally, the defense could have offered redirect on the subject or offered the Court record itself.

¶17 This court agrees with the trial court's reasoning. However, this court concludes that if the State did know about the permanent injunction, the questions were improper. Nevertheless, even if improper, the misconduct here does not require reversal because it was harmless. Herron testified that the injunction was in place. He did not waiver when his position was challenged. The jury heard his testimony. With respect to the argument made by the prosecutor during closing about this testimony, such does not constitute grounds to reverse. The jury was instructed that arguments by counsel do not constitute evidence. The jury is presumed to follow the instructions given. *See* ***State v. Truax***, 151 Wis. 2d 354, 362, 444 N.W.2d 432 (Ct. App. 1989). Herron was not deprived of a fair trial. He was allowed to testify to the existence of the permanent injunction and

the jury was instructed to base its decision on the evidence and not argument by the attorneys.

E. Interest of Justice.

¶18 Herron next requests this court to reverse the judgment and order and grant a new trial in the interest of justice. He contends that the real controversy was not tried because of the "combination" of the alleged errors of the trial court and the prosecutor discussed above. Because this court has rejected each of Herron's foregoing contentions, no errors remain. Accordingly, there is no "combination of errors" requiring this court to exercise its discretionary reversal authority under WIS. STAT. § 752.35.

F. Denial of Adjournment at Sentencing.

¶19 Herron next contends that the trial court erred when it refused to grant his request for an adjournment during sentencing to investigate Linda's representation to the court that he was in violation of a family court order requiring him to undergo drug testing. The trial court denied the request for adjournment on this basis, instructing Herron that he would be afforded an opportunity to tell the court his version of the facts relative to Linda's contentions. This court rejects Herron's claim.

¶20 Whether to grant an adjournment is left to the discretion of the trial court and, in making that decision, the trial court must balance the defendant's right to adequate representation and the public interest in the prompt administration of justice. *See* ***State v. Wollman***, 86 Wis. 2d 459, 468, 273 N.W.2d 225 (1979). Here, the trial court declined the request for an adjournment and indicated its willingness to hear Herron's version of events. Herron responded to

Linda's accusations providing the court with his understanding about the family court's drug testing order and visitation.

¶21 Under these circumstances, this court cannot conclude that the trial court's refusal to adjourn constituted an erroneous exercise of discretion. The trial court stated its practice to proceed immediately to sentencing, afforded Herron an opportunity to refute Linda's contention, and concluded that there was insufficient cause to adjourn on that basis. This was a reasonable determination.

G. Inaccurate Sentencing Information.

¶22 Last, Herron contends that the trial court sentenced him using inaccurate information; that is, the contention of Linda that he was required to undergo drug testing by the family court in order to see his children. Herron points out that the family court order did not require that. Rather, it required supervised visitation and a one-time drug screening. Herron claims that Linda's representations at sentencing left the trial court with the erroneous impression that he had a major drug problem. This court rejects Herron's claim.

¶23 There is a consistent and strong policy against interference with the discretion of the trial court in passing sentence. *See* ***State v. Paske***, 163 Wis. 2d 52, 61-62, 471 N.W.2d 55 (1991). This policy is based on the great advantage the trial court has in considering the relevant factors and the demeanor of the defendant. *See* ***State v. Harris***, 119 Wis. 2d 612, 622, 350 N.W.2d 633 (1984). Furthermore, the trial court is presumed to have acted reasonably, and the burden is on the defendant to show some unreasonable or unjustifiable basis in the record for the sentence complained of. *See* ***State v. Thompson***, 172 Wis. 2d 257, 493 N.W.2d 729 (Ct. App. 1992). A trial court's sentence is reviewed for an erroneous exercise of discretion. *See* ***Paske***, 163 Wis. 2d at 70.

¶24 It is similarly well established, and undisputed by the parties in this case, that trial courts must consider three primary factors in passing sentence. Those factors are the gravity of the offense, the character and rehabilitative needs of the defendant, and the need to protect the public. *See* ***id.*** at 62. The weight to be given to each of the factors, however, is a determination particularly within the discretion of the trial court. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). After consideration of all relevant factors, the sentence may be based on any one of the three primary factors. *See* ***State v. Krueger***, 119 Wis. 2d 327, 338, 351 N.W.2d 738 (Ct. App. 1984).

¶25 Because the trial court is in the best position to determine the relevant factors in each case, we shall allow the trial court to articulate a basis for the sentence on the record and then require the defendant to attack that basis by showing it to be unreasonable or unjustifiable. *See* ***State v. Echols***, 175 Wis. 2d 653, 682, 499 N.W.2d 631 (1993).

¶26 Here, Herron complains only that the trial court relied on inaccurate information when it imposed sentence and, therefore, the sentence was improper. This court disagrees. The trial court addressed this issue in its postconviction order ruling: "the information offered by each side as to the status of the family court matters was only one factor and not determinative of the outcome of the matter of the sentencing in this case. At page 145 of the transcript the court emphasizes the many issues considered at sentencing." This court has reviewed the sentencing transcript. It is clear that the trial court based its sentence primarily on the severity of the offense. The trial court noted the "serious injury" that Herron caused to Linda's face, that there was a large bump under her eye, and black bruising and swelling along her cheek area. The trial court was also concerned that the battery occurred in front of the couple's two young children

and that it was more than a simple punch. Herron punched Linda multiple times, hard enough to cause her to fall to the ground. After that, he proceeded to kick her and attempted to choke her. It is true that the trial court did mention the family court matters, however, as indicated by the trial court in its postconviction motion, this information did not determine the sentence. This court's review of the sentencing transcript confirms the trial court's conclusion. It is apparent from the transcript itself, that the severity of the crime and the context in which it occurred was determinative of the sentence imposed.

¶27 Further, in pursuing this argument, Herron suggests that Linda's misrepresentations of the family court's drug testing order improperly affected his character. Therefore, he claims that the trial court was unable to fairly assess his character which, in turn, deprived him of due process. This court disagrees. The trial court imposed sentence after presiding over the entire trial. The trial court had the opportunity to observe Herron during the trial in general and, more specifically, when he testified in his own defense. The trial court also had the opportunity to hear Herron's version of the family court events during post-trial proceedings. Most importantly, the trial court acknowledged that the family court proceedings were not determinative of the sentence imposed. Accordingly, this court concludes that the inaccurate information presented by Linda did not interfere with Herron's due process rights.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.