COURT OF APPEALS
DECISION
DATED AND FILED

June 7, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP2204-CR **Cir. Ct. No. 2002CF6201**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARLON O. EVANS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: VICTOR MANIAN, Reserve Judge, and JEAN W. DiMOTTO, Judge. *Affirmed*.

Before Wedemeyer, P.J., Fine and Curley, JJ.

¶1 WEDEMEYER, P.J. Marlon O. Evans appeals from a judgment of conviction for six counts of armed robbery, party to a crime, in violation of WIS.

STAT. §§ 943.32(2) and 939.05 (2003-04).[1] He also appeals from an order denying his postconviction motion. He raises four claims of error: (1) he contends his trial counsel provided ineffective assistance, requiring a new trial; (2) that the evidence adduced was insufficient to support any conviction; (3) that the trial court erroneously decided the ***Miranda-Goodchild*** issues;[2] and (4) finally, that the trial court erroneously exercised its sentencing discretion.

¶2 Because Evans's trial counsel was not deficient in his performance, the evidence was sufficient to support the convictions, the trial court's findings of fact and conclusions of law in the ***Miranda-Goodchild*** hearing were clearly not erroneously determined and were reasonably based, and because the trial court did not erroneously exercise its sentencing discretion, we affirm.

I. BACKGROUND

¶3 Evans was found guilty by a jury of six counts of armed robbery, party to a crime. Prior to trial, the court conducted a ***Miranda-Goodchild*** hearing in which it concluded that statements given by Evans to investigating police officers were freely and voluntarily made. The trial court imposed a sentence of thirty years of incarceration followed by fifteen years of extended supervision on each count, all to be served concurrently. Evans's postconviction motion seeking relief from his judgment of conviction and term of incarceration was denied. He now appeals.

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[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

[2] *See* ***Miranda v. Arizona***, 384 U.S. 436 (1966); ***State ex rel. Goodchild v. Burke***, 27 Wis. 2d 244, 133 N.W.2d 753 (1965).

II. ANALYSIS

A. Ineffective Assistance of Counsel Claim.

¶4 Evans first claims his trial counsel was ineffective for failing to present evidence at trial. More specifically, Evans asserts that his trial counsel had in his possession letters from all four of his co-defendants stating that he did not participate in the robberies for which he was convicted. Evans claims his counsel had these letters at the time of trial but never offered them as evidence, nor were any of these individuals called as witnesses. He further claims that his counsel did not explain to him why he did not present this evidence or explain his trial strategy.

STANDARD OF REVIEW AND APPLICABLE LAW

¶5 In order for this court to review a defendant's claim of ineffective assistance of counsel, the trial court must have conducted a hearing to preserve trial counsel's testimony regarding the alleged deficient performance. ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). "The hearing is important not only to give trial counsel a chance to explain his or her actions, but also to allow the trial court, which is in the best position to judge counsel's performance, to rule on the motion." ***State v. Curtis***, 218 Wis. 2d 550, 554, 582 N.W.2d 409 (Ct. App. 1998).

¶6 A trial court, however, is not required to hold a ***Machner*** hearing unless the defendant presents the court with a motion that alleges sufficient material facts that, if true, would entitle him to the relief sought. ***State v. Allen***, 2004 WI 106, ¶36, 274 Wis. 2d 568, 682 N.W.2d 433; ***State v. Bentley***, 201 Wis. 2d 303, 309-10, 548 N.W.2d 50 (1996). If the motion raises such facts, the trial

court must hold an evidentiary hearing. ***Bentley***, 201 Wis. 2d at 310; ***Nelson v. State***, 54 Wis. 2d 489, 497, 195 N.W.2d 629 (1972). If, however, the motion does not raise facts sufficient to entitle the movant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the trial court has the discretion to grant or deny a hearing. ***Bentley***, 201 Wis. 2d at 309-10. This court reviews independently whether a motion alleges sufficient facts which, if true, would entitle the defendant to relief. ***Id.*** at 310.

¶7 In rejecting Evans's motion without the benefit of a hearing, the trial court stated:

> the defendant has not provided the court with the co-actors' letters nor, has he provided any affidavits to show what their testimony would have been or that they were available and willing to testify on the defendant's behalf. In short the defendant's ineffective assistance claim is so lacking in evidentiary support that it conclusively demonstrates that the defendant is not entitled to a Machner hearing.

The record supports the trial court's decision. Evans failed to provide any evidentiary documents to support his claim. Because the trial court's decision to forego a ***Machner*** hearing was reasonably based, we are precluded from reviewing Evans's claim on the merits. ***Curtis***, 218 Wis. 2d at 555.

B. Insufficiency of the Evidence.

¶8 Next, Evans claims that the evidence was insufficient to convict him on any of the six counts of armed robbery, party to a crime. In support of this claim, Evans asserts that "none of the victims were ever able to place [him] at the scene of any of the alleged robberies" and "the only evidence that placed [him] at the scene of any of the crime scenes was a statement given by [him] …."

Essentially, Evans's claim is that there is insufficient corroboration to serve as a basis for the convictions. He argues that the only other person to place him at the scene of the crimes was Lamarcus, a co-defendant.

STANDARD OF REVIEW AND APPLICABLE LAW

¶9 Our review of an insufficiency of evidence claim is of a restricted nature. We

> may not substitute [our] judgment for that of the trier of fact unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn a verdict even if it believes that the trier of fact should not have found guilt based on the evidence before it.

State v. Poellinger, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990) (citations omitted).

¶10 In ***State v. Hauk***, 2002 WI App 226, 257 Wis. 2d 579, 652 N.W.2d 393, we set forth the dimensions of the corroboration requirement:

> In Wisconsin … there is a common law rule that "conviction of a crime may not be grounded on the admission or confessions of the accused alone." Rather, there must be corroboration of a "significant fact" in order to sustain a conviction. "Such corroboration is required in order to produce confidence in the truth of the confession."

Id., ¶20 (citations omitted). In ***Triplett v. State***, 65 Wis. 2d 365, 222 N.W.2d 689 (1974), our supreme court further amplified the corroboration rule:

> [A]s to the need for corroborating evidence, all the elements of the crime do not have to be proved independently of an accused's confession—it is enough that there be some corroboration of the confession in order

> to sustain the conviction. As this court has put it, … The corroboration, however, can be far less than is necessary to establish the crime independent of the confession. If there is corroboration of any significant fact, that is sufficient under the Wisconsin test.

Id. at 372 (footnotes and internal quotation marks omitted). Evans's statements, besides describing his actions, also implicated four other co-actors: Demetrius McGee, also known as Domino; Lamarcus C.; Dewight C.; and Derrick D. Not all of them, however, were involved in every incident. We shall now examine the record to ascertain if any significant facts exist from which it can be reasonably inferred that Evans participated in any of the six armed robberies.

¶11 Time wise, the first incident giving rise to a conviction was the armed robbery of Susan Rogan, which occurred on October 15, 2002, in a cul-de-sac garage area behind her home. When questioned about this incident, Evans stated that he was driving by himself in a Mercury Marquis from his home on Martin Luther King Drive to Dewight C.'s home at 6600 West Sheridan Avenue. Evans stated that Demetrius, Derrick and Lamarcus were driving some distance behind him in a stolen red Mazda. He admitted that he was looking for someone to rob and if he found a subject, he would have brought it to the attention of Demetrius, Derrick and Lamarcus. He drove into this same garage area but, finding no prey, he left. At about the same time, he observed his three friends enter the same area.

¶12 Rogan testified that there were three men involved in the robbery of her car. Two accosted her, while the third remained in a red Mazda. Two of the black males drove off in her car while the third, driving the Mazda, followed. Doubtless, Rogan corroborated the color and make of the car and the number of individuals described in Evans's statement to police. This is sufficient

corroboration to render Evans's confession reliable. It would not have been unreasonable for the jury to conclude that Evans was in league with Demetrius, Derrick and Lamarcus scouting for people to rob, and conspiring to find victims. He thus could reasonably be found guilty as a party to the crime.

¶13 The second instance of armed robbery occurred on October 21, 2002, at 2190 North 55th Street. The victim was Machelle Reed and the incident involved the robbery of her red Mitsubishi Montero automobile. On this occasion, according to Evans, Demetrius was driving his Mercury. He was seated in the front passenger seat and Derrick was in the back seat. Derrick observed a red Montero and Demetrius began to follow it. Soon the driver (Reed) pulled into a driveway. Demetrius stopped the Mercury and all three got out. Evans stated that he then reentered the Mercury at the driver's side while Demetrius and Derrick walked towards the driveway where the Montero was parked. Evans stated he knew his friends would rob the person in the Montero. He, however, drove home where Demetrius and Derrick later joined him. Derrick drove the Montero to Evans's home. Later, with Derrick driving, the three went joy riding in the red Montero, looking for someone else to rob. Evans did not like the way Derrick was operating the vehicle, so he took over the task of driving.

¶14 Reed testified that the two men who robbed her got out of a car. She stated that her license plate reads "Mackees." Contrary to Evans's version of events, Reed observed that the Mercury auto did not immediately leave the scene, but said she saw it drive away ahead of her Montero that had been stolen by the two men. Regardless of the truth of the matter, Reed's account supports the fact that Evans, by supplying the car, facilitated the conveying of Demetrius and Derrick to the scene of the robbery. He abetted the commission of this crime and thus, quite reasonably, a jury could find him guilty as a party to the crime.

¶15 The next incident involved Evans's role in taking several pizzas from Alison Stalsberg. This occurred later in the day of October 21st at 3115 North Newhall Street. While Demetrius, Derrick and Evans were joy riding as referred to above, they entered an alley and saw Stalsberg carrying some pizzas. Evans was driving. Demetrius declared he was hungry and wanted the pizzas he saw Stalsberg carrying. Evans stopped the Montero and Demetrius and Derrick got out. He stated that Derrick had a BB gun and forced Stalsberg to give up the pizzas and a dollar bill that she had. He stated he never left the vehicle and served only as "the getaway driver." Evans then drove off.

¶16 Stalsberg testified that she was walking down an alley on her way home from buying some pizzas when two males got out of an "SUV-type" vehicle and forced her at gun point to surrender the pizzas and a dollar that she had with her. She was unable to see whether there was another individual in the vehicle. Stalsberg's version of what transpired in the alley essentially corroborates Evans's portrayal of the crime. Thus, a jury could reasonably convict him of this armed robbery as a party to it.

¶17 The next incident occurred in the alley located at 3234 North Cambridge Avenue in the early evening hours of October 21, 2002. The victim was Kelly Fusie. She was returning home from a laundromat. As she was retrieving her laundry from the back of her car, a red Montero stopped behind her. She noticed that the license plate read "Mackees." She testified that two men bearing pistols approached her and, since she heard laughter coming from the vehicle, she surmised there was a third person seated inside. She only had $1.75 and a half a pack of cigarettes in her possession, which her assailants took.

¶18 Evans stated to police that he was in the Montero when Demetrius and Derrick committed this robbery. This robbery occurred on the same day that Reed's red Montero was stolen. He further stated that after Derrick had driven the Montero back to his home, he, Demetrius and Derrick went for a joy ride to find other opportunities to commit robberies. Moreover, we note the fact that the red Montero, bearing the same license plate, was involved in the Reed robbery as well as this robbery. From this convergence of facts, a jury could readily conclude that Evans, Demetrius and Derrick, as part of their joy ride to find other victims, found Fusie, thus making Evans a party to this crime.

¶19 The next incident occurred on October 24, 2002, at 7801 West Townsend Street. The victim was Maureen Keyes. Evans stated that in the early evening hours he, Demetrius, Derrick, Dwight C. and Lamarcus C. met at his girlfriend's, Kimberly C.'s, home. While there, they discussed committing a robbery to get some money. They reached an agreement and left the home, with the exception of Kimberly. Evans drove his Mercury Marquis. He was accompanied by Derrick and Lamarcus. Demetrius and Dwight drove a stolen light blue Toyota. Evans parked his car at a friend's home at North 70th Street and Hampton Avenue. He, Derrick and Lamarcus then became passengers in the Toyota. They drove around looking for someone to rob. Lamarcus spotted Keyes standing next to a green Oldsmobile at the Townsend Street address. Derrick, wearing a ski mask and garnishing a BB gun, got out of the Toyota and approached Keyes. She began screaming and ran toward a house. Derrick entered the green Oldsmobile and drove off. Demetrius, driving the Toyota that contained the rest of the participants, followed.

¶20 In this instance, the focal point is on the testimony of Lamarcus. Under oath he stated that Evans directed Demetrius to "turn the car around" after

he saw Keyes. He stated that Evans gave a ski mask to Derrick. He further testified that Evans got out of the Toyota and, at gunpoint, demanded Keyes's purse. Keyes testified that she had given one of her assailants her car keys and that another demanded her purse before she started running.

¶21 Evans denied having a role in this crime, but he was aware that Keyes was going to be robbed. He also knew that he and his companions planned to look for opportunities for robbery. Through Lamarcus, there was direct eyewitness testimony that he participated in this robbery. Although Evans challenged the motive of Lamarcus's testimony against him, it was for the jury to determine the weight and credibility to be assigned to this damaging evidence. Sufficient evidence existed for a jury to reasonably convict Evans as a party to this crime on this count.

¶22 The last incident occurred at 5715 North 55th Street on the same day about fifteen minutes after the previous robbery. The victims were Amber and Dorothy Hackett. Evans recounted that, by this time, the Toyota had been abandoned and everyone was in the green Oldsmobile. They were cruising in the area of North 55th Street and West Silver Spring Drive. Lamarcus spotted a woman walking toward a small white car parked in a driveway. There was a passenger in the car. Demetrius, who was driving, said he needed some money and turned the Oldsmobile into the driveway behind the white car. Both Derrick and Demetrius jumped out of the car and, while armed, robbed the two women of their purses. They returned to the Oldsmobile and drove off. After the robbery, the Hacketts began to follow the Oldsmobile in which the men were riding. Derrick fired a shot in the air to dissuade the Hacketts from continuing their pursuit.

¶23 Lamarcus's version of this crime is different than that of Evans. He testified that Evans and Demetrius were the ones who spotted the two Hackett women and that Evans gave Derrick the gun to fire. This evidence was more than sufficient for a jury to reasonably conclude that Evans was involved in the commission of this armed robbery as a party to a crime. From this brief review, we conclude that with respect to each of the six counts for which Evans was convicted, there was sufficient evidence from which a jury could reasonably reach a determination of conviction as a party to a crime.

*C. **Miranda-Goodchild** Hearing.*

¶24 Evans's third claim of error is that the trial court improperly admitted his custodial statement. It is constitutionally fundamental, when the State seeks to admit an accused's custodial statement at trial, that it must show by a preponderance of the evidence that: (1) the accused was informed of his or her ***Miranda*** rights, understood them, and knowingly and intelligently waived them; and (2) the accused's statement was voluntary. ***State v. Santiago***, 206 Wis. 2d 3, 18-19, 28-29, 556 N.W.2d 687 (1996).

STANDARD OF REVIEW AND APPLICABLE LAW

¶25 Whether upon review, this court is asked to apply the rubrics of ***Miranda*** or ***Goodchild***, in either instance, we are confronted with questions of constitutional fact. When reviewing a question of constitutional fact, we employ a two-step standard of review. First, the trial court's findings of historical fact are reviewed under a deferential standard, reversed only if they are clearly erroneous. Second, the ultimate question of whether the facts found by the trial court meet the constitutional standard is a question of law, which we review independently. ***State v. Martwick***, 2000 WI 5, ¶¶18-19, 231 Wis. 2d 801, 604 N.W. 2d 552.

¶26 Evans first contends he was not properly informed of two of his ***Miranda*** rights, i.e., the right to have counsel appointed for him if he was unable to afford his own and that his statement could be used against him in court.

¶27 At the ***Miranda-Goodchild*** hearing only three witnesses testified: Evans and City of Milwaukee Detectives Charles Mueller and Timothy Zens. Contrary to Evans's contention, Mueller and Zens both testified that they informed him of all of his ***Miranda*** rights. The trial court found that the detectives were more credible than Evans, thereby according more probative weight to their version of events. ***State v. Kienitz***, 227 Wis. 2d 423, 440, 597 N.W.2d 712 (1999). Thus, there was no impropriety on the trial court's part in the application of the ***Miranda*** requirements.

¶28 Evans next asserts that his statement to police was not voluntary for four reasons: (1) his questioning did not begin until seven hours after his arrest; (2) he was given only a Pepsi to drink and nothing to eat; (3) between interviews he was allowed to sleep in the Police Administration Building, but given only a blanket and, as a result, the sleep he had was of "a poor quality"; and (4) the police promised he would probably receive probation, yet threatened he would not see his children again. For reasons to be stated, we reject these assertions.

¶29 When examining a challenge to the voluntary nature of self-incriminatory statements, we apply a totality of the circumstances test. ***State v. Clappes***, 136 Wis. 2d 222, 236-37, 401 N.W.2d 759 (1987). This methodology takes into consideration the characteristics of the accused, vis-à-vis, the circumstances of the interrogation. ***Id.***

¶30 Evans first contends that the time between his arrest at 10:00 a.m., and the start of the interrogation at 5:30 p.m., rendered his statement involuntary.

He buttresses this contention with the argument that "he may have allegedly waived his right to an attorney because he would be released earlier." We are not persuaded by the logic or substance of this argument. First, Evans had been arrested for his alleged roles in the armed robberies. The likelihood of his release simply because he denied his involvement was remote. Second, his argument that the lengthy time of detention before questioning invalidates his statement is essentially undeveloped. Accordingly, we are not obligated to consider it and eschew doing so. *See* ***State v. Pettit***, 171 Wis. 2d 627, 647, 492 N.W.2d 633 (Ct. App. 1992).

¶31 Next, Evans complains he was only given a Pepsi to drink and was not provided any food. It is uncontroverted, however, that Evans never requested any food. Detective Mueller testified that Evans never asked for food and Detective Zens testified that Evans indicated he was not hungry. Moreover, Evans never asked for additional beverages. The record evidences no deprivation of sustenance. Thus, there was no element of coercion that would lead to involuntariness.

¶32 Next, Evans claims he was denied adequate sleep, which contributed to his involuntary statement. In his brief, he claims his sleep was "poor in quality." The record belies this claim. Contrary to the claim in his brief, Evans never testified at the motion hearing that his sleep was "poor in quality." Evans was sent to bed between 12:30 and 1:00 a.m. His second interrogation began the next morning at approximately 10:45 a.m. He had been provided a blanket for sleeping. Admittedly, the accommodations were not on par with the Ritz-Carlton, nevertheless, after nine hours of sleep, he was hardly in a position to persuasively argue that his sleep was "poor in quality." There is no support for such a claim.

¶33 Lastly, Evans contends his statement to police was involuntary because of promises and threats made by the officers questioning him. At the hearing on his motions, Evans testified: "they told me if I told them everything I would probably get probation and they would put a good word into the DA for me." He also claimed the police: "threatened that he would not see his children again." The interrogating officers denied making any promises or threats as claimed.

¶34 In respect to the alleged promise, Evans had previous experience in the criminal justice system and admitted his awareness that it is a judge, not police officers, who imposes any sentence that he would receive. This acknowledgment trumps any merit that might have existed in his claim of improper promises. Interrogating police officers are not restricted from using techniques of persuasion to convince an accused to tell the truth of what happened in any incident, giving rise to a criminal prosecution. Here, the record reflects that the officers, during one of the breaks in the questioning, even allowed Evans to speak with his mother. Officers can voice opinions, but are prohibited from making promises that induce an accused to incriminate oneself. *See* ***State v. Deets***, 187 Wis. 2d 630, 636, 523 N.W.2d 180 (Ct. App. 1994).

¶35 The trial court, in rendering its oral decision, emphasized that its findings were based upon a credibility determination. We can ascertain from our reading of the record no reason why this assessment was clearly erroneous. From a constitutional standpoint, the trial court's admission of Evans's statement was not improperly made.

D. Sentencing.

¶36 Evans's final claim is that the trial court erroneously exercised its discretion when it sentenced him to thirty years of confinement and fifteen years of extended supervision. His claim is based on the contention that the trial court failed to consider mitigating factors.

STANDARD OF REVIEW AND APPLICABLE LAW

¶37 Sentencing lies within the discretion of the trial court. We, as an appellate court, are limited in our review to determining whether that discretion was erroneously exercised. ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. There is a strong public policy against interference with the sentencing discretion of the trial court, and the appellate court presumes that the trial court acted reasonably. ***Id.***, ¶18. Because of this policy, the defendant has the burden to show some unreasonable or unjustified basis in the record for the sentence at issue. ***State v. Lechner***, 217 Wis. 2d 392, 418, 576 N.W.2d 912 (1998). Sentencing decisions are "'generally afforded a strong presumption of reasonability because the [trial] court is best suited to consider the relevant factors and demeanor of the convicted defendant.'" ***Gallion***, 270 Wis. 2d 535, ¶18 (citation omitted).

¶38 The three primary factors that a court must address in exercising its sentencing discretion are: (1) the gravity of the offense; (2) the character and rehabilitative needs of the offender; and (3) the need for protection of the public. ***State v. Sarabia***, 118 Wis. 2d 655, 673, 348 N.W.2d 527 (1984). The weight to be given each sentencing factor is particularly within the sentencing court's discretion. ***State v. Ocanas***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

¶39 The trial court has discretion to determine the length of the sentence within the permissible statutory range. ***Hanson v. State***, 48 Wis. 2d 203, 207, 179 N.W.2d 909 (1970). As long as the sentencing court considered the proper factors and the sentence was within the statutory limits, the sentence will not be reversed unless it is so excessive as to shock the public conscience. ***State v. Owen***, 202 Wis. 2d 620, 645, 551 N.W.2d 50 (Ct. App. 1996).

¶40 Evans's claim of discretionary sentencing error is not directed to the three primary sentencing factors, but to three instances of the trial court's failure to consider mitigating factors. Evans first contends error occurred by not taking into account his insistence of innocence. Search as we have, we have been unable to find any authority that requires a court to grant a defendant a lower sentence because he maintains his innocence. For this reason, we reject this contention.

¶41 Second, Evans contends the trial court failed to consider the fact that he had children, a girlfriend, and the girlfriend's grandmother to support. The record refutes this contention. The trial court did weigh Evans's family circumstances versus the need for the public to be protected, and decided from a societal standpoint, that the latter warranted more attention than the former. Inherent in this approach was the obvious conclusion that if Evans was so concerned about his children, his girlfriend, and her grandmother, he ought to have thought twice about his own conduct. The trial court's analysis was reasonably based and not an erroneous exercise of sentencing discretion.

¶42 Finally, Evans claims the trial court erred by failing to consider the remorse he showed to the victims. To find even a smidgeon of remorse in this record is difficult—for the obvious reason that Evans maintained his innocence to the very end. Doubtless, Evans had a right to maintain his innocence and he

cannot be punished for that stance. *See* ***Scales v. State***, 64 Wis. 2d 485, 496, 219 N.W.2d 286 (1974). Nevertheless, an eleventh hour attempt to claim remorse to a victim—Maureen Keyes—for the trouble she was put through and, yet, still deny culpability is not the type of remorse that equates to a mitigating factor.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.