COURT OF APPEALS
DECISION
DATED AND FILED

February 9, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP3202-CR **Cir. Ct. No. 2007CF3008**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAVID S. HEHN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEFFREY A. CONEN and JEFFREY A. WAGNER, Judges. *Affirmed.*

Before Fine, Kessler and Brennan, JJ.

¶1 FINE, J. David S. Hehn appeals the judgment entered after a jury found him guilty of first-degree reckless injury, *see* WIS. STAT. § 940.23(1)(a), and false imprisonment, *see* WIS. STAT. § 940.30. He also appeals the order denying

his postconviction motion seeking resentencing. Hehn claims that the trial court: (1) erroneously instructed the jury on "great bodily harm"; (2) was not impartial; and (3) erroneously exercised its discretion when it imposed sentence. We affirm.

I.

¶2 In June of 2007, Hehn was charged with aggravated battery (great bodily harm with intent to cause great bodily harm) and false imprisonment. His victim was his then-roommate, Lori Jordan, who, according to the criminal complaint, accused Hehn of hitting her "multiple times in her face, in her arms, in the back and in her buttocks…. us[ing] his fists, open hands, his feet, and his head as a weapon." The complaint also alleged that Jordan "suffered severe bruising and swelling to her entire face and to her arms and back…. [and] suffered lacerations and bleeding to her brain." Jordan said she tried to phone for help and leave the residence, but Hehn stopped her.

¶3 The trial court told the jury, as pertinent here:

> Now, before you … may find the defendant guilty of reckless injury the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present:
>
> First, the defendant caused great, bodily harm to Lori Jordan. Caused means that the defendant's act was a substantial factor in producing great, bodily harm. Great, bodily harm means serious, bodily injury. You, the jury, alone are [to] determine if the bodily injury is serious.

¶4 As noted, the jury found Hehn guilty on both counts. The trial court sentenced him to twenty-three years on the reckless injury count, consisting of thirteen years of initial confinement, followed by ten years of extended supervision. It then imposed a consecutive two-year sentence on the false

imprisonment count, consisting of one year each of confinement and supervision. We address Hehn's claims in sequence.

II.

A. *Jury Instruction—Great Bodily Harm.*

¶5 Hehn argues that the trial court erroneously exercised its discretion when it instructed the jury on great bodily harm because the instruction did not include "the entire language of the applicable statutory definition," *see* WIS. STAT. § 939.22(14) ("'Great bodily harm' means bodily injury which creates a substantial risk of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily injury."). Hehn makes this argument despite his acknowledgment that we expressly approved in ***State v. Ellington***, 2005 WI App 243, ¶¶6–10, 288 Wis. 2d 264, 271–277, 707 N.W.2d 907, 910–913, an instruction the same as that given here, by claiming that ***Ellington*** was wrongly decided. We are, however, bound by our prior published decisions. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 189–190, 560 N.W.2d 246, 255–256 (1997). The instruction was not error.

B. *Impartial Tribunal.*

¶6 Hehn's second contention is that the trial court's various rulings indicate that the trial court was biased against him, and that this deprived him of a fair and impartial trial. Whether a judge was not impartial is a question of law that we review independently. ***Murray v. Murray***, 128 Wis. 2d 458, 463, 383 N.W.2d 904, 907 (Ct. App. 1986).

¶7 Hehn claims that the trial court's bias was cumulative. He points to: (1) the exchange between the trial court and his lawyer on the first day of trial when the trial court discussed the need for a hearing on whether a book that Hehn owned entitled THE ANCIENT ART OF STRANGULATION would be admissible, and his lawyer objected to the book's use at trial; (2) the trial court's limiting the defense's opening statement to ten minutes even though his lawyer asked for fifteen minutes; (3) the exchange following the trial court's ruling sustaining the State's objection to questions his lawyer asked the victim during the hearing on the book's admissibility; (4) the trial court's *sua sponte* direction to his lawyer during cross-examination of the victim: "Enough of the commentary. Move along"; (5) the trial court's direction to his lawyer after a sidebar: "The objection is sustained, [l]et's move along"; (6) the trial court's decision to give a curative instruction in response to alleged other-acts evidence referenced during Hehn's direct testimony, and because the trial court also told the jury that "Mr. Hehn and his attorney have violated court procedure, and [the] Court will not allow it"; (7) the trial court's response of "Great. Thank you," when Hehn described the lamp he claimed that the victim used to hit him; and (8) the trial court's decision to instruct the jury during his lawyer's closing argument that the lawyer "has made an improper inference that Ms. Jordan previously [has] been convicted of perjury. This is absolutely not true. You must disregard [defense counsel]'s last statement." We discuss these matters in turn.

1. *The Book.*

¶8 At the final pre-trial conference, the State said that it intended to introduce a book found in Hehn's room called THE ANCIENT ART OF STRANGULATION. The trial court ruled that the State would have to "on the day of

trial" show that the book was relevant. On that day, the following was said outside the jury's presence:

> THE COURT: My understanding is that [the State] is not going to use the book … [but] will be entering it into evidence later on in [the] opening which is fine, and then we'll be able to get the record custodian on and off the stand quickly before the end of the day hopefully. Then we can get to the issue of the admissibility of the book. I'm assuming there is no problem with that right now, [defense counsel]?
>
> [DEFENSE COUNSEL]: We continue to object, but I don't need—
>
> THE COURT: Object to my proposed way of handling things?
>
> [DEFENSE COUNSEL]: No. I'm sorry. I thought you were talking about the book.
>
> THE COURT: I'm not even talking about the book at this point. You can object and have a hearing.
>
> [DEFENSE COUNSEL]: You're talking so fast. There is no objection to the proposed proceedings. No.
>
> THE COURT: Anyways that's probably what we should do. Then hopefully we can keep everyone moving here.

¶9 Hehn argues this exchange showed impatience and bias against him. We disagree.

> *Not* establishing bias or partiality, however, are expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women, even after having been confirmed as federal judges, sometimes display. A judge's ordinary efforts at courtroom administration—even a stern and short-tempered judge's ordinary efforts at courtroom administration—remain immune.

Liteky v. United States, 510 U.S. 540, 555–556 (1994) (emphasis by ***Liteky***).

2. *Opening Statement.*

¶10 That the trial court gave Hehn's lawyer ten minutes for his opening statement when he asked for fifteen minutes, and the State asked for only two minutes, is not evidence of bias. The trial court has the discretion to "limit the time for argument." WIS. STAT. RULE 805.10. *See also* WIS. STAT. RULE 906.11(1) (trial courts may control the trial).

3. *Hearing on Admissibility of Strangulation Book.*

¶11 Jordan testified that she found the book in Hehn's room, and that the underlined and highlighted passages in the book described exactly what Hehn had done to her during his attack. Hehn's lawyer cross-examined Jordan, asking how she knew the book belonged to Hehn and how she knew Hehn had done the highlighting in the book. Then Hehn's lawyer asked: "When he was allegedly blocking your arteries and veins, how did you manage to counteract this strangulation?" The State objected that the question went "out of the scope here." The trial court agreed with the State that the question did not "go to the relevance of this book." There was then the following exchange between Hehn's lawyer and the trial court:

> [DEFENSE COUNSEL]: Relevance is if he had been following those techniques [in the book], she would not be walking around.
>
> THE COURT: The question may be that he's not as good as the book would like him to be. Then you want to start making statements like that. That doesn't make a lot of sense right now.
>
> [DEFENSE COUNSEL]: Maybe. Maybe not. I'm asking did she use some defense or did he just stop.
>
> THE COURT: It's not the issue. Self-defense isn't an issue. The question is whether this is relevant to be brought to the jury's attention.

> [DEFENSE COUNSEL]: The purpose of blocking arteries and veins I assume is to get someone unconscious. It didn't happen.
>
> THE COURT: Maybe he didn't read it well enough. The question is whether it's relevant or not.
>
> [DEFENSE COUNSEL]: Well, [it's] also prejudicial. It's talking about killing people, but there is no killing or serious attempts at killing.
>
> THE COURT: All right. Anything more?
>
> [DEFENSE COUNSEL]: I don't have anything more.

¶12 The trial court ruled that the strangulation book was admissible and explained:

> All right. The Court's going to rule that this is relevant under the circumstance. It's not unduly prejudicial. It's extremely relevant to what the victim states happened to her. It appears that this is a book he had taken a look at. There is a number of notes that have been all through this book underlined, and based on the testimony that I've heard from the victim it appears that this is a how to book, and that the defendant allegedly followed the instructions in this book. Maybe not to its ultimate finish, but it clearly is relevant, and it's not unduly prejudicial.

Hehn suggests this exchange and ruling again showed the court's impatience with his lawyer and its desire to move things along quickly that, he claims, biased his defense. We disagree. We see nothing here that shows bias.

4 & 5. *Trial Court's Direction to Hehn's Lawyer to "Move Along" During His Cross-Examination of Jordan.*

¶13 The trial court's direction to Hehn's lawyer was during his cross-examination of Jordan following questions suggesting that Jordan and Hehn were merely fighting:

> Q Well, I guess we can argue who attacked who [*sic*] and who grabbed whose neck first, but the two of you were fighting, correct?
>
> A He grabbed me from behind first. I would-- I would-- I would never grab and try to choke Dave. First of all, he's a huge man, and I wouldn't do that. I couldn't even believe he did it to me. Who would do that to somebody?
>
> Q People do it to each other all the time, and I'm sorry.

At this point, the trial court said: "Enough of the commentary. Move along." Hehn's lawyer then asked: "Are you saying that he had the intent to kill you?" to which the State objected: "She has no idea what his intent was." The trial court sustained the objection. When Hehn's lawyer asked a similar question, the State requested a sidebar, after which the objection was again sustained and the trial court said: "Let's move along." Hehn argues the ruling and comments evinced the court's bias against him. We disagree. The court's first comment was entirely proper because the lawyer's assertion was not a question. The trial court's further direction that Hehn's lawyer "Move along" was also well within its discretion. *See* WIS. STAT. RULE 906.11(1).

6. *Alleged Other-Acts Evidence and Instruction to Jury that Hehn's Lawyer "Violated Court Procedure."*

¶14 When Hehn's lawyer asked Hehn on direct-examination to "give us the background of your relationship with Ms. Jordan," Hehn explained:

> I met Lori through a mutual friend. Today I'm [a] recovering alcoholic who goes through terms of binge drinking, and I use a drinking friend. He's a crack addict along with Lori. Basically he told me that if I wanted to have sex for money, I could pay Lori, and she would be willing to do that because she was in his terms a crack whore.

The State asked for a sidebar and the trial court excused the jury. The State objected to the reference as "other bad acts," and contended: "This was never brought up and we never had any motions about this." Hehn's lawyer said that the "crack whore" reference was relevant because Hehn would testify that Jordan "was using crack cocaine that evening." The trial court disagreed, finding the reference was "inappropriate character witness testimony," and if Hehn intended to use such evidence, he should have brought an "other acts" motion. The trial court discussed the following curative instruction: "You, jury, are hereby instructed to disregard Mr. Hehn's statement about Ms. Jordan's alleged drug use. Mr. Hehn and his attorney have violated court procedure, and [the] Court will not allow it." Before the jury was brought back into the courtroom, the trial court confirmed that Hehn and his lawyer agreed to the curative instruction. Hehn's lawyer said: "Yes, sir." Hehn waived any objection to the instruction. *See* ***Estate of Hegarty v. Beauchaine***, 2006 WI App 248, ¶218, 297 Wis. 2d 70, 189, 727 N.W.2d 857, 915.

7. *The Trial Court's Remark: "Great. Thank You."*

¶15 The trial court's "Great. Thank you" comment after Hehn's testimony about the lamp with which he claimed Jordan hit him was a mere expression of irritation or impatience and is insufficient to establish bias. *See* ***Liteky***, 510 U.S. at 555–556.

8. *Trial Court's Instruction to Jury During Hehn's Lawyer's Closing Argument.*

¶16 Finally, Hehn challenges the trial court's instruction to the jury following his lawyer's argument in closing that Jordan:

> got up there and took the stand, she took an oath to tell the truth. She swore to tell the truth. If she lies on that oath, she's facing possible criminal penalties and possible jail time. She has demonstrated by her two criminal convictions she's not afraid of that. She's willing at times to take that chance of going to jail.

The State objected because in its view Hehn's statement sounded like Jordan had been convicted of perjury, which was not true. The trial court agreed with the State's interpretation and instructed the jury that Hehn's lawyer: "has made an improper inference that Ms. Jordan previously [has] been convicted of perjury. This is absolutely not true. You must disregard [defense counsel]'s last statement." Hehn argues that this instruction effectively told the jury that his lawyer could not be trusted, especially because it was the second instruction telling the jury that Hehn's lawyer had done something improper. We disagree. The trial court was trying to assure a fair and impartial trial; correction of a comment by Hehn's lawyer that could be misconstrued was well within its discretion.

¶17 As we have seen, all of Hehn's contentions involve either judicial rulings or comments. None of this, however, equates with bias. *See* ***Liteky***, 510 U.S. at 555–556. Further, "judicial rulings alone almost never constitute a valid basis for a [claim of] bias or partiality." ***Id.***, 510 U.S. at 555. Hehn's contention that what he calls "the cumulative effect" of the trial court's rulings and comments equals bias is similarly without merit because nothing the trial court did was improper. "Zero plus zero equals zero," no matter how many zeroes there are. *See* ***Mentek v. State***, 71 Wis. 2d 799, 809, 238 N.W.2d 752, 758 (1976).

¶18 Hehn also asserts that the trial court committed "plain error" and seeks our discretionary reversal. *See* WIS. STAT. § 752.35. There was no error, however.

C. *Sentencing.*

¶19 Hehn's final argument is that the trial court erroneously exercised its sentencing discretion. We disagree.

¶20 Sentencing is within the trial court's discretion, and our review is limited to considering whether discretion was erroneously exercised. ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 549, 678 N.W.2d 197, 203. "When the exercise of discretion has been demonstrated, we follow a consistent and strong policy against interference with the discretion of the trial court in passing sentence." ***State v. Stenzel***, 2004 WI App 181, ¶7, 276 Wis. 2d 224, 231, 688 N.W.2d 20, 23. We defer to the trial court's "great advantage in considering the relevant factors and the demeanor of the defendant." *See* ***State v. Echols***, 175 Wis. 2d 653, 682, 499 N.W.2d 631, 640 (1993). The trial court must consider the primary sentencing factors of "the gravity of the offense, the character of the defendant, and the need to protect the public." ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 606, 712 N.W.2d 76, 82. The court may also consider a wide range of other factors concerning the defendant, the offense, and the community, and the weight assigned to each factor is left to the trial court's discretion. *See* ***ibid.***

¶21 Hehn concedes that the trial court considered the proper factors, but argues that it put too much weight on the public-protection factor. The sentencing transcript confirms that the trial court considered all the proper factors, but felt that "in this particular instance the protection of the public … is paramount." The trial court explained its reasons for weighting this factor more than the others—namely, Hehn's inability to comprehend the wrongfulness of what he did together with his "obsession with Martial Arts, with killing, with Martial Arts weapons, with the

books." The trial court considered the proper factors and has the discretion to place more weight on any factor it deems appropriate. *See* ***State v. Curbello-Rodriguez***, 119 Wis. 2d 414, 434, 351 N.W.2d 758, 768 (Ct. App. 1984). There was no error.

By the Court.—Judgment and order affirmed.

Publication in the official reports is not recommended.