COURT OF APPEALS
DECISION
DATED AND FILED

May 4, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP815-CR **Cir. Ct. No. 2007CF5894**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARK W. STERLING,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEFFREY A. KREMERS and KEVIN E. MARTENS, Judges. *Affirmed*.

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

¶1 BRENNAN, J. Mark W. Sterling appeals a judgment entered after a jury found him guilty of attempted first-degree intentional homicide and false

imprisonment, and an order denying his postconviction motions.[1] Sterling argues that: (1) he was deprived of effective assistance of trial counsel because his trial counsel failed to object to the trial court's alleged improper interference with the prosecutor's charging decision; (2) he was deprived of an impartial tribunal when the trial court allegedly improperly interfered with the prosecutor's charging decision; (3) he was deprived of his Sixth Amendment right to confront the witness against him when the trial court prohibited him from questioning Demetrius Gaines (the victim) about his motives for testifying; and (4) he is entitled to a new sentencing hearing because the trial court erred when it failed to consider on the record whether to order a presentence investigation report ("PSI"). We affirm.

BACKGROUND

¶2 On November 25, 2007, Gaines was exiting his vehicle after parking it on the street in front of his home on West Custer Avenue in Milwaukee. Upon exiting the vehicle, he observed a dark colored SUV approaching him. Gaines testified that he recognized the SUV as belonging to Shekita Bell. Bell testified that on November 25, 2007, she loaned her SUV to her cousin, Earl Stewart.

¶3 Gaines testified that the SUV stopped approximately five to seven feet in front of him and that when the rear driver's side door of the SUV opened he observed Charles Lamar sitting behind the driver's seat, pointing a gun at him. Gaines also recognized Sterling, who was driving the SUV, and a man Gaines knew only as "Fat Dre" sitting in the back seat of the SUV next to Lamar. Gaines

[1] The Honorable Jeffrey A. Kremers presided over trial and ordered that judgment be entered. The Honorable Kevin E. Martens presided over Sterling's postconviction motions.

did not recognize a fourth man sitting in the front passenger's seat. Gaines testified that Lamar instructed him to "[g]et in" the SUV and that he got into the back seat of the SUV behind the driver because: "I didn't know if they was going to do anything to me right there or whatever. So, … I'm thinking to get in the car or get shot and killed right here. So, I chose to get in the car."

¶4 Gaines testified that after the SUV pulled away from the curb, Lamar threatened him with a gun and began asking him, "[W]here is it at? Where is it at?" Detective Mitchell Ward testified that when he interviewed Gaines later, Gaines told him the men were referring to a "chopper"—a street term for an assault rifle.[2] Although Gaines told the men that he was unaware of what they were asking about, the men continued to ask him, "Where it's at?" Gaines testified that the men were also hitting him in the face and saying, "M.F[.], you going to die." Gaines testified that at one point Lamar put a gun to Gaines' head and then to his "genital area . . . and said, '[m]other fucker, I'll blow your balls off. You think we're playing with you?'" Then the front seat passenger said, "I'm tired of playing, let's take him to the hood and let's finish this."

¶5 Gaines testified that, fearing for his life, he "rampaged the door" and jumped from the SUV as it was moving. Gaines testified that he "fell in the street, … rolled about twice ... got to [his] feet and started running towards traffic." Gaines saw the SUV make a U-turn to follow him. As Gaines began running towards traffic, he heard gunshots, and was hit by two cars. He then felt pain in his leg and fell. The SUV then pulled up next to him. While on the

[2] At trial, Gaines denied knowing that the men were asking him about the location of an assault rifle, and instead, testified that he believed the men were robbing him.

ground, Gaines noticed that the windows on the passenger's side of the SUV were open. Gaines then heard between four and six shots ring out. Gaines was ultimately shot four times—twice in the left leg, once in the right leg, and once in the lower back. Gaines testified that when he felt a burning sensation in his back, he put his "head down like [he] was dead and that is when [he] heard them peel off."

¶6 Detective Ward testified that he met Gaines at the hospital the night Gaines was shot. Detective Ward stated that Gaines was very cooperative during questioning and had no trouble responding to any of his questions. Although at trial Gaines denied remembering anything that he told the police, Detective Ward testified that Gaines was able to identify Sterling and Lamar as passengers in the SUV and that Gaines was able to identify the SUV as belonging to Bell.

¶7 On December 11, 2007, Sterling was charged with first-degree reckless injury and false imprisonment. At a hearing on January 30, 2008, Sterling informed the court that he turned down an initial offer from the State and that he had decided to take the case to trial. The trial court had the following exchange with the prosecutor:

> THE COURT: Are these the charges [first-degree reckless injury and false imprisonment] the State is going forward on if he's going to trial?
>
> [PROSECUTOR]: Yes.
>
> THE COURT: Why not attempted murder?
>
> [PROSECUTOR]: Well, I thought under the circumstances this was the best way to proceed. I can reconsider. At this point this is --
>
> THE COURT: I mean if the State believes this happened the way that Mr. Gaines -- Gaines, is that his name?

> [PROSECUTOR]: Yes.
>
> THE COURT: Gain[e]s said [it] did, that the people in the car did a U-turn, came back at him and were shooting at him and he got hit four times, why isn't that attempted murder with maybe a lesser included or an additional charge of first degree recklessly -- reckless injury[?] I don't understand that myself, but --
>
> [PROSECUTOR]: Well, Judge, there's time between now and trial. I'm certain those things will be considered yet again.
>
> THE COURT: Well, there's not much time between now and trial.
>
> [PROSECUTOR]: I understand.
>
> THE COURT: Because there's not going to be a final pretrial.

¶8 Approximately two and one-half months later, on February 26, 2008, the prosecutor filed an amended information charging Sterling with attempted first-degree intentional homicide and false imprisonment.

¶9 The case proceeded to trial, and on March 26, 2008, a jury found Sterling guilty of attempted first-degree intentional homicide and false imprisonment. Sterling was sentenced to thirty-six years' for count one (attempted first-degree intentional homicide), consisting of twenty-two years of initial confinement and fourteen years of extended supervision. Sterling was sentenced to six years' for count two (false imprisonment), consisting of three years of initial confinement and three years of extended supervision, to be served concurrent to count one.

¶10 On May 1, 2008, Sterling filed a Notice of Intent to Pursue Postconviction Relief. Sterling then filed two postconviction motions. The first argued that: (1) "the [trial] judge improperly involved himself in suggesting that

the charge against Mr. Sterling be increased"; and (2) trial counsel was ineffective for failing to object to the trial court's interference. The second motion argued for resentencing because the trial court failed to state on the record why it did not order a PSI. Without holding a hearing, the postconviction court denied both motions. Sterling appeals.

DISCUSSION

¶11 As previously noted, Sterling argues that: (1) he was deprived of effective assistance of trial counsel because his trial counsel failed to object to the trial court's alleged improper interference with the State's charging decision; (2) he was deprived of an impartial tribunal when the trial court allegedly improperly interfered with the State's charging decision; (3) he was deprived of his Sixth Amendment right to confront the witness against him when the trial court prohibited him from questioning Gaines about his motives for testifying; and (4) he is entitled to a new sentencing hearing because the trial court erred when it failed to consider on the record whether to order a PSI. We will address each claim in turn.

A. Ineffective Assistance of Trial Counsel

¶12 Sterling first asserts that his trial counsel was ineffective for failing to object to the trial court's alleged improper interference with the State's charging decision when the trial court asked the prosecutor why she was not charging Sterling with attempted murder. Specifically, Sterling asserts that his trial counsel was deficient because he "did nothing when the judge goaded the prosecutor into increasing the charges" and that, as a result of his trial counsel's deficiency, he was prejudiced because the trial court's "pressure[] … escalated the charges" and "increased [his] liability[,] result[ing] in a higher sentence." Sterling argues that if

his trial counsel had "object[ed] to the trial court's appearance of bias" the prosecutor would not likely have amended the information (to avoid a possible appellate issue). We disagree.

¶13 A defendant claiming ineffective assistance of counsel must establish that: (1) the lawyer was deficient; and (2) the defendant suffered prejudice as a result of the deficiency. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Because a defendant must show both deficient performance and prejudice, reviewing courts need not consider one prong if the defendant has failed to establish the other. ***Id.*** at 697.

¶14 To prove deficient performance, the defendant must point to specific acts or omissions of the lawyer that are "outside the wide range of professionally competent assistance." ***Id.*** at 690. There is "a strong presumption that counsel acted reasonably within professional norms." ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). "'Effective representation is not to be equated, as some accused believe, with a not-guilty verdict. But the representation must be equal to that which the ordinarily prudent lawyer, skilled and versed in criminal law, would give to clients who had privately retained his [or her] services.'" ***State v. Felton***, 110 Wis. 2d 485, 500-01, 329 N.W.2d 161 (1983) (citation omitted).

¶15 To satisfy the prejudice aspect of ***Strickland***, the defendant must demonstrate that the lawyer's errors were sufficiently serious so as to deprive him or her of a fair trial and a reliable outcome, ***id.***, 466 U.S. at 687, and "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," ***id.*** at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.***

¶16 We review the denial of an ineffective assistance of counsel claim as a mixed question of fact and law. ***Johnson***, 153 Wis. 2d at 127. We will not reverse the trial court's factual findings unless they are clearly erroneous. ***Id.*** However, we review the two-pronged determination of trial counsel's performance independently as a question of law. ***Id.*** at 128.

¶17 Sterling claims the trial court interfered with the prosecutor's charging discretion. "'In our system, so long as a prosecutor has probable cause to believe that the accused has committed an offense defined by statute, the decision whether … to prosecute, and what charge to file … generally rests entirely in his [or her] discretion.'" ***State ex rel. Kalal v. Circuit Court for Dane County***, 2004 WI 58, ¶29, 271 Wis. 2d 633, 681 N.W.2d 110 (citation omitted); *see also* WIS. STAT. § 968.02(1) (2007-08).[3] "In general, 'the prosecuting attorney is answerable to the people of the state and not to the courts or the legislature as to the way in which he [or she] exercises power to prosecute complaints.'" ***Kalal***, 271 Wis. 2d 633, ¶30 (citation omitted). A trial court judge does not have the authority to direct a prosecutor to file a different charge or an additional charge. ***State ex rel. Unnamed Petitioner v. Circuit Court for Walworth County***, 157 Wis. 2d 157, 159-60, 458 N.W.2d 575 (Ct. App. 1990). In other words, "there is no statute allowing a judge to second-guess [the prosecutor's] discretionary choice." ***Id.*** at 160.

¶18 Here, the postconviction court found that the trial court did not interfere with the prosecutor's charging discretion when asking about the attempted murder charge and that the trial court's comments were merely meant to

[3] All references to the Wisconsin Statutes are to the 2007-08 version.

"ensure[] that justice would be administered fairly and efficiently." The postconviction court determined that the trial court's comments were an attempt to inform the prosecutor that if she intended to amend the charging documents that she do so in a timely manner to allow the trial to proceed as scheduled. These findings are not clearly erroneous.

¶19 First, as noted by the postconviction court, the record is clear that the trial court did not explicitly order the prosecutor to amend the charges against Sterling. Rather, the trial court first asked the prosecutor: "Are these the charges [first-degree reckless injury and false imprisonment] the State is going forward on if [Sterling's] going to trial?" Then the trial court asked the prosecutor if she believed "that the people in the car did a U-turn, came back at [Gaines] and were shooting at him and he got hit four times, why isn't that attempted murder with maybe a lesser included or an additional charge of first-degree recklessly -- reckless injury[?] I don't understand that myself, but --." Neither question ordered the prosecutor to charge Sterling with anything other than what was in the original information—first-degree reckless injury and false imprisonment. The court asked a question and made an observation supported by the facts in the criminal complaint.

¶20 Second, the postconviction court reasonably concluded that the trial court's comments, when put into context, demonstrated that the trial court's purpose in asking about the attempted murder charge was not to pressure the prosecutor into bringing that charge, but to ensure that if an additional charge was brought it was brought in a timely manner. The context of the trial court's comments was that the case had been set that day for a projected guilty plea. Sterling's attorney advised the trial court that Sterling had decided not to plead guilty and asked that the case be set for jury trial. When the prosecutor noted that

"there's time between now and trial" to consider bringing additional charges and that she was "certain those things will be considered yet again," the trial court reminded the prosecutor that "there's not much time between now and trial" "[b]ecause there's not going to be a final pretrial." The context of the comment reveals that the trial court was concerned that an untimely amendment to the information would delay the jury trial. That purpose became apparent in the next exchange between the prosecutor and the trial court when the prosecutor told the judge that she wanted to try Sterling with his co-actor whose trial was already set for March 24, less than two months away. In that context, it is a reasonable interpretation of the trial court's impromptu remarks that they were meant merely to ensure that the case progressed and that the trial court's calendar remained intact.[4]

¶21 Not only did the postconviction court reasonably conclude that the trial court did not explicitly or implicitly order the prosecutor to charge Sterling with attempted murder, Sterling has presented no evidence that the trial court's impromptu remarks actually affected the prosecutor's decision to amend the information. The prosecution had ample evidence supporting the attempted murder charge—so much so, that Sterling was in fact convicted by a jury. Further, the prosecutor's statement that she was "certain those things will be considered yet again" provides evidence that the prosecutor knew the decision remained hers to make. Sterling's suggestion that an objection would have prevented the prosecutor from amending the information is entirely speculative.

[4] Sterling argues that if the trial court was truly concerned about scheduling it could have expressed its concern in a manner that did not "interfer[e]" with the prosecutor's charging decision. The question on review is not whether the trial court could have expressed itself better, but whether the trial court's comments were improper under the law.

¶22 Without demonstrating that the trial court's remarks were improper or otherwise improperly influenced the prosecutor's charging decision, Sterling has failed to demonstrate that his trial counsel was deficient for failing to object to the trial court's comments. Because Sterling has failed to establish that his trial counsel's failure to object was "outside the wide range of professionally competent assistance," we need not consider whether Gaines was prejudiced by his trial counsel. *See* ***Strickland***, 466 U.S. at 690, 697.

B. Impartial Tribunal

¶23 Next, Sterling asserts that the trial court was biased and thereby denied Sterling his due process right to an impartial tribunal. More specifically, Sterling contends that the trial court's bias was revealed when the court "argued that the case should be tried as attempted murder" and when it sentenced Sterling to thirty-six-years' on the attempted first-degree intentional homicide charge. We disagree.

¶24 "The right to an impartial judge is fundamental to our notion of due process." ***State v. Goodson***, 2009 WI App 107, ¶8, 320 Wis. 2d 166, 771 N.W.2d 385. "When analyzing a judicial bias claim, we always presume that the judge was fair, impartial, and capable of ignoring any biasing influences." ***State v. Gudgeon***, 2006 WI App 143, ¶20, 295 Wis. 2d 189, 720 N.W.2d 114. The presumption of impartiality is, however, rebuttable. ***Id.*** To determine "whether a defendant has rebutted the presumption in favor of the court's impartiality, we generally apply two tests, one subjective and one objective." ***Goodson***, 320 Wis. 2d 166, ¶8. "Either sort of bias can violate a defendant's due process right to an impartial judge." ***Gudgeon***, 295 Wis. 2d 189, ¶20. Here, Sterling only argues

that the trial court displayed objective bias, and therefore, we need not address subjective bias.[5]

¶25 "[T]he objective [bias] test[] asks whether a reasonable person could question the judge's impartiality." ***Id.***, ¶21. Objective bias can take two forms: actual bias or the appearance of bias. *See* ***Goodson***, 320 Wis. 2d 166, ¶9. Actual bias occurs when "there are objective facts demonstrating that ... the 'trial judge in fact treated [the defendant] unfairly.'" ***State v. McBride***, 187 Wis. 2d 409, 416, 523 N.W.2d 106 (Ct. App. 1994) (citation omitted). "[T]he appearance of bias offends constitutional due process principles whenever a reasonable person—taking into consideration human psychological tendencies and weaknesses—concludes that the average judge could not be trusted to 'hold the balance nice, clear and true' under all the circumstances." ***Gudgeon***, 295 Wis. 2d 189, ¶24. Whether the partiality of a trial court can be questioned is a matter of law that we review *de novo*. *See* ***Goodson***, 320 Wis. 2d 166, ¶7.

¶26 Sterling has not demonstrated that the trial court was actually biased against him. As we previously stated, the trial court did not direct or order the prosecutor to amend the charges to include the attempted murder charge. The decision remained within the prosecutor's discretion. Further, the trial court couched its question with the word "if," asking why the prosecutor was not charging attempted murder "*if* the State believes this happened the way that Mr. Gaines … said [it] did." (Emphasis added.) The trial court's use of the word

[5] Subjective bias is based on a judge's own determination that he or she cannot act impartially in a matter. *See* ***State v. McBride***, 187 Wis. 2d 409, 414-15, 523 N.W.2d 106 (Ct. App. 1994).

"if" demonstrates that the trial court had no actual opinion on Sterling's guilt but was merely trying to ensure that justice was fairly and efficiently administered.

¶27 Nor has Sterling demonstrated that a reasonable person could determine that the trial court projected an appearance of impartiality. In other words, a reasonable person could not "conclude[] that the average judge could not be trusted to 'hold the balance nice, clear and true' under all the circumstances." *See* ***Gudgeon***, 295 Wis. 2d 189, ¶24. Sterling first argues that a reasonable person would have interpreted the trial court's remarks as "assistance" to the prosecutor and would have determined that the trial court had a predetermined interest in a particular outcome. As we previously noted, however, the trial court's use of the word "if" demonstrated that it had not yet rendered an opinion on Sterling's guilt or innocence. Further, we conclude that a reasonable person could determine that the trial court's comments were merely meant to ensure that justice proceeded fairly and efficiently.

¶28 Sterling also attempts to persuade us that the trial court projected an appearance of bias when it imposed a thirty-six-year sentence for attempted first-degree intentional homicide, because the maximum sentence for the original charge (first-degree reckless injury) was twenty-five years. *See* WIS. STAT. §§ 940.23(1)(a), 939.50(3)(d). Sterling asserts that "[a] reasonable person would conclude that the judge had made up his mind that if Mr. Sterling lost at trial, the judge felt the maximum twenty-five years … was too lenient."

¶29 To assert that a reasonable person would view the sentence as revealing bias is entirely speculative and unsupported by the record.[6] First of all, it is not reasonable to infer from the sentence the trial court imposed on April 11, 2008, what the trial court's intentions were on January 30, 2008. Secondly, there is an intervening significant fact that makes it impossible to logically link the court's sentence to the court's earlier comments, namely a jury verdict finding Sterling guilty of attempted first-degree intentional homicide and false imprisonment, both by use of a dangerous weapon. The trial court was duty-bound to sentence Sterling based on the jury's findings.

¶30 And finally, the premise of Sterling's bias argument, that the court appeared to be looking for more sentencing exposure, is not supported by the court's ultimate sentence. Of the possible seventy-six-year sentence that Sterling faced at sentencing,[7] the trial court sentenced him to only thirty-six years—less than half, and only five years more, than could have been imposed pursuant to the original charges.[8] No reasonable person would assume on these facts that the trial

[6] In his reply brief, Sterling asserts for the first time that the trial court's remarks in this case are similar to those found to demonstrate bias in ***In re United States of America***, 572 F.3d 301 (7th Cir. 2009). We decline to address the argument because it was not raised in Sterling's original brief and the State has not been provided an opportunity to rebut the issue. *See* ***Bilda v. County of Milwaukee***, 2006 WI App 57, ¶20 n.7, 292 Wis. 2d 212, 713 N.W.2d 661.

[7] *See* WIS. STAT. §§ 940.01(1)(a), 939.32(1)(a), 939.50(3)(a) and (b), 939.63(1)(b) (setting sixty-five years of imprisonment as the maximum penalty for attempted first-degree intentional homicide with use of a dangerous weapon) and §§ 940.30, 939.50(3)(h), 939.63(1)(b) (setting eleven years of imprisonment as the maximum penalty for false imprisonment with use of a dangerous weapon).

[8] *See* WIS. STAT. §§ 940.23(1)(a), 939.50(3)(d) (setting twenty-five years of imprisonment as the maximum penalty for first-degree reckless injury) and §§ 940.30, 939.50(3)(h) (setting six years of imprisonment as the maximum penalty for false imprisonment).

court was attempting to pressure the prosecutor's charging decision for the opportunity to sentence a defendant to an additional five-year sentence.

¶31 For the foregoing reasons, we conclude that a reasonable person would not believe that the trial court was biased against Sterling either based upon its comments to the prosecutor or the sentence it imposed.

C. Cross-Examination on Gaines' Motive for Testifying

¶32 Sterling also claims that the trial court erred when it prohibited Sterling from cross-examining Gaines regarding whether he expected consideration from the prosecutor or the trial court testifying against Sterling. At the time of Sterling's trial, Gaines was also facing criminal charges, pending before the same court presiding over Sterling's case, for being a felon in possession of a firearm. Sterling argues that his Sixth Amendment right to confront the witness against him permitted him to ask Gaines on cross-examination whether Gaines believed that he would "curry favor with the [S]tate [or] …impress the judge" by testifying against Sterling. The trial court prohibited Sterling from asking Gaines about his motive for testifying on the grounds that the information was irrelevant.

¶33 Following the shooting, when Gaines was interviewed by Detective Ward at the hospital, Gaines agreed to allow police to search his home for the missing assault rifle. Police did not recover the missing assault rifle, but instead recovered a different gun, drugs, and a scale. Charges were subsequently brought against Gaines for being a felon in possession of a firearm. At the time of his testimony in Sterling's trial, the trial court had just completed a motion hearing in Gaines' case and a plea hearing was set for later in the week. It is undisputed that

Gaines was not receiving any consideration from the State for his testimony against Sterling.

¶34 "A Wisconsin criminal defendant's right to confront witnesses is guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and article I, section 7 of the Wisconsin Constitution."[9] ***State v. Barreau***, 2002 WI App 198, ¶47, 257 Wis. 2d 203, 651 N.W.2d 12 (footnote omitted). "The right of confrontation includes the right to cross-examine adverse witnesses to expose potential bias." ***Id.*** "Although the [trial] court may limit cross-examination when it seeks only irrelevant evidence, the Supreme Court has held that the 'partiality of a witness … is always relevant as discrediting the witness and affecting the weight of his testimony.'" ***Id.*** (citations and emphasis omitted; alteration in ***Barreau***).

¶35 "Generally[,] the decision to admit or exclude evidence is within the [trial] court's discretion." ***Id.***, ¶48. This discretion, however, "may not be exercised until the court has accommodated the defendant's right of confrontation." ***Id.*** And "[w]hether the limitation of cross-examination violates the defendant's right of confrontation is a question of law that we review de novo." ***Id.***

¶36 In ***Barreau***, we noted that "[i]t is generally recognized that evidence of pending charges against a witness, even absent promises of leniency, may reveal 'a prototypical form of bias.'" ***Id.***, ¶55 (citations omitted). However, this

[9] We interpret a defendant's confrontation rights under the Wisconsin Constitution consistent with the confrontation rights granted under the United States Constitution. ***State v. Barreau***, 2002 WI App 198, ¶47, 257 Wis. 2d 203, 651 N.W.2d 12.

case is factually distinguishable from ***Barreau***. Those factual differences lead us to conclude that bias could not reasonably be inferred from the facts of this case, and therefore, the trial court did not err by prohibiting the cross-examination on relevancy grounds.

¶37 First, unlike the witness in ***Barreau***, Gaines was not merely a witness with information of the crime charged, but the victim. *See* ***id.***, ¶45. The actions of Sterling and his co-actors instilled such fear in Gaines that he leapt from a moving SUV and ran into oncoming traffic. As a result, he was hit by not one, but two cars, before ultimately being chased down and shot four times by Sterling and his co-actors. Unlike a witness with information about a crime, Gaines had a vested interest in ensuring that the men who shot him were properly prosecuted for their actions and no longer on the streets to do him harm. Given that vested interest, it makes little sense that he would testify falsely to prosecute Sterling in the mere *hope* of receiving a more lenient sentence on his own pending charge.

¶38 Second, Gaines' testimony at trial almost identically tracked the statement he gave to Detective Ward immediately following the shooting—*before* police searched Gaines' apartment and recovered the illegal firearm and drug paraphernalia.[10] At the time Gaines gave his initial statement, Gaines had no reason to "curry favor" with either the State or the trial judge. That his trial testimony closely replicated that statement, further undercuts Sterling's argument that the jury could have determined that Gaines' testimony was false.

[10] The only substantial difference between Gaines' original statement to Detective Ward and his trial testimony was that he told Detective Ward that Sterling and his co-actors were asking for a "chopper" whereas Gaines testified that he did not know what Sterling and his co-actors were asking for when they kidnapped him.

¶39 Third, while it is certainly true that "evidence of pending charges against a witness, even absent promises of leniency, *may* reveal 'a prototypical form of bias,'" ***id.***, ¶55 (citations omitted; emphasis added), it is still notable that Gaines did not have an agreement of leniency with the prosecutor. Sterling's theory that the mere *hope* for leniency could make Gaines a bias or partial witness when weighed against the violence perpetrated against him by Sterling and his co-actors is simply not reasonable.

¶40 We conclude, however, that even if Sterling's right to confrontation had been violated, the error would have been harmless. *See* ***State v. Stuart***, 2005 WI 47, ¶39, 279 Wis. 2d 659, 695 N.W.2d 259 (stating that a "[v]iolation of the Confrontation Clause 'does not result in automatic reversal, but rather is subject to harmless error analysis'") (citation omitted). "An error is harmless if the beneficiary of the error proves 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" ***Id.***, ¶40 (citation omitted).

¶41 Here, if a Confrontation Clause violation occurred, the violation was harmless because at most the jury would have heard that Gaines was receiving no leniency for his testimony and that Gaines possessed a firearm unrelated to the shooting. These additional facts would not have cast any doubt on Gaines' testimony, which was almost entirely consistent with what he told police at the hospital before they knew anything about the firearm.

D. Pre-sentence Investigation Report

¶42 Finally, Sterling contends that even though the trial court is not required to order a PSI and even though Sterling did not request a PSI, the trial court's failure to explain on the record why it did not order a PSI entitles Sterling

to a new sentencing hearing. Sterling's argument is entirely frivolous and without merit.

¶43 Appellate review of a sentencing decision is limited to determining whether the trial court erroneously exercised its discretion in imposing sentence. ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. To properly exercise its sentencing discretion, a trial court must provide a rational and explainable basis for the sentence. ***State v. Stenzel***, 2004 WI App 181, ¶8, 276 Wis. 2d 224, 688 N.W.2d 20. It must specify the objectives of the sentence on the record, which include, but are not limited to, protection of the community, punishment of the defendant, rehabilitation of the defendant, and deterrence of others. ***Id.***

¶44 The primary sentencing factors that a trial court must consider are 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, 712 N.W.2d 76. Other factors which *may be relevant* include, but are not limited to, the defendant's past record or history of undesirable behavior patterns; the defendant's personality, character, and social traits; the PSI; the vicious or aggravated nature of the crime; the degree of the defendant's culpability; the defendant's demeanor before the court; the defendant's age, educational background, and employment history; the defendant's remorse, repentance, and cooperation; the defendant's need for close rehabilitative control; and the right of the public. ***Id.*** The trial court need not discuss all of these secondary factors, but rather only those relevant to the particular case. ***Id.*** The weight to be given to each sentencing factor remains within the trial court's wide discretion. ***Stenzel***, 276 Wis. 2d 224, ¶9.

¶45 Sterling does not argue that the trial court erroneously exercised its discretion when issuing his sentence. Rather, his entire argument is that he is entitled to a new sentencing hearing because the trial court failed to explain on the record why it did not order a PSI. Sterling cites no law to support his assertion because there is none.

¶46 "Wisconsin Stat. § 972.15 provides that, after a felony conviction, the court 'may' order a [PSI] prepared by the department of corrections." ***State v. Greve***, 2004 WI 69, ¶10, 272 Wis. 2d 444, 681 N.W.2d 479. The statute does not require a trial court to order a PSI nor does it require the trial court to explain why it is or is not ordering a PSI in a given case. *See* § 972.15. Sterling's assertion that the trial court must explain its reasoning for not ordering a PSI is contrary to the law. So long as the trial court properly considers the factors set forth above—and Sterling does not contend the trial court did not—we will not disturb the sentence imposed by the trial court.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.