COURT OF APPEALS
DECISION
DATED AND FILED

July 20, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2009AP74-CR **Cir. Ct. No. 2006CF1082**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CARL MORGAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Brown County: JOHN D. MC KAY, Judge. *Affirmed*.

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 HOOVER, P.J. Carl Morgan appeals a judgment of conviction for second-degree intentional homicide, attempted first-degree intentional homicide, and reckless endangerment. Morgan argues: (1) the court erroneously denied his motion for a directed verdict of acquittal following presentation of the State's case

because there was no in-court identification made; (2) the court erroneously exercised its discretion when it denied Morgan's request for reverse waiver into juvenile court; (3) there was insufficient evidence to support the attempt charge; and (4) the sentence was too harsh. We reject Morgan's arguments and affirm.

BACKGROUND

¶2 A confrontation arose between two groups in a Green Bay nightclub parking lot. Morgan, fifteen years old, exited the vehicle he was in, retrieved his .22 caliber handgun from the trunk, and shot Greg Smith several times, killing him. At trial, Adam Boss testified Morgan then pointed the gun at him and, as Boss turned away and ran, fired two shots. Several other witnesses to the parking lot events also testified at trial. Morgan testified too, admitting he brought the gun and shot Smith. However, he stated he did not recall shooting at anyone else, and asserted he acted in self-defense.

¶3 The jury acquitted Morgan of first-degree intentional homicide for shooting Smith, convicting him instead of second-degree intentional homicide based on a conclusion Smith acted in imperfect self-defense. The jury also convicted Morgan of attempted first-degree intentional homicide for shooting at Boss, and of first-degree reckless endangerment.

DISCUSSION

¶4 Morgan first argues the circuit court erroneously denied his motion for a directed verdict of acquittal following presentation of the State's case. Morgan contends the State failed to prove he was the shooter because no witness identified him in court. We conclude Morgan has waived this argument.

¶5 Our supreme court has explained:

> [W]here a defendant moves for a dismissal or a directed verdict at the close of the prosecution's case and when the motion is denied, "… the introduction of evidence by the defendant, if the *entire* evidence is sufficient to sustain a conviction, waives the motion to direct." In the present case, after the defendant's motion to dismiss was denied, he proceeded to put in his defense. Therefore, on review, the appellate court must examine all the evidence in determining whether it is sufficient to sustain the conviction.

State v. Kelley, 107 Wis. 2d 540, 544, 319 N.W.2d 869 (1982) (citations omitted). Here, Morgan testified in his defense and admitted he was the shooter. Therefore, he cannot now argue the State failed to prove he was the shooter. *See* ***id.*** Further, Morgan concedes this issue by his failure to reply to the State's argument relying on ***Kelley***. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

¶6 Morgan next argues the circuit court erroneously exercised its discretion when it denied his request for reverse waiver into juvenile court. Because Morgan was charged with attempt and commission of first-degree intentional homicide, the circuit court had original jurisdiction over his case. *See* WIS. STAT. § 938.183(1)(am).[1] Thus, after finding probable cause at the preliminary hearing, the court was required to conduct a reverse waiver analysis under WIS. STAT. § 970.032(2), which provides in part:

> The court shall retain jurisdiction unless the juvenile proves by a preponderance of the evidence all of the following:

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

> (a) That, if convicted, the juvenile could not receive adequate treatment in the criminal justice system.
>
> (b) That transferring jurisdiction to the court assigned to exercise jurisdiction under chs. 48 and 938 would not depreciate the seriousness of the offense.
>
> (c) That retaining jurisdiction is not necessary to deter the juvenile or other juveniles from committing the violation of which the juvenile is accused ....

As to the first factor, whether the juvenile can obtain adequate treatment in the adult criminal justice system, the "statute permits the trial court to balance the treatment available in the juvenile system with the treatment available in the adult system and requires it to decide under the specific facts and circumstances of the case which treatment will better benefit the juvenile." ***State v. Dominic E.W.***, 218 Wis. 2d 52, 56, 579 N.W.2d 282 (Ct. App. 1998).

¶7 The circuit court's reverse waiver determination involves an exercise of discretion. ***State v. Verhagen***, 198 Wis. 2d 177, 191, 542 N.W.2d 189 (Ct. App. 1995).

> A discretionary determination must be the product of a rational mental process by which the facts of record and law relied upon are stated and considered together for the purpose of achieving a reasoned and reasonable determination. We will not reverse a trial court's discretionary act if the record reflects that discretion was in fact exercised and there was a reasonable basis for the court's determination. When reviewing a trial court's exercise of discretion, we will look for reasons to sustain the decision.

Id. (citations omitted).

¶8 Morgan contends the circuit court erroneously exercised its discretion because Morgan provided "sufficient evidence" of the three criteria and the court's determination was conclusory. The question here, however, is not

whether Morgan provided sufficient evidence on which the circuit court could have relied to grant a reverse waiver. Rather, the issue is whether the court's determination not to grant a waiver is reasonably supported by the facts and law.

¶9 The circuit court held a two-day reverse waiver hearing at which both Morgan and the State called witnesses. The court later denied Morgan's waiver request in an oral ruling. The court began by noting it "had an opportunity to listen to the testimony that was presented in this case," and particularly appreciated the testimony of Dr. Beyer, who the court described as a highly knowledgeable children's rights advocate. The court then explained its decision to deny the reverse waiver motion:

> This Court is confronted with the consideration of three statutory factors that need to be dealt with, and dealt with specifically. And on the basis of the testimony that was presented, this Court sincerely believes that Carl Morgan can and will receive adequate treatment and services in the criminal justice system.
>
> Transferring this matter to juvenile court would from this Court's perspective greatly depreciate the seriousness of the crime for which Carl Morgan is accused. And retaining jurisdiction is necessary from this Court's perspective to deter Carl Morgan and others like Carl Morgan from committing offenses similar to the one for which Carl Morgan is charged.
>
> I came across a quote which I want to share with counsel. And I don't do this for anything but the point that I've tried to make. It happens to be a quote from the ancient Roman philosopher Cicero.
>
> "The greatest incitement to crime is the hope of escaping punishment."
>
> That plays into the consideration of the factors that this Court has dealt with, particularly the deterrence that's needed when the crime charged is a first degree intentional homicide.
>
> There will be no reverse waiver.

¶10 While, as the State concedes, a sentencing decision with this level of detail might be considered inadequate under ***State v. Gallion***, 2004 WI 42, 270 Wis. 2d 535, 678 N.W.2d 197, this is not a sentencing case subject to ***Gallion***. Morgan cites no authority requiring a more detailed explanation from the court than that provided here. The court stated it relied on the testimony it heard at the two-day reverse waiver hearing in reaching its conclusion. The court also demonstrated it was fully engaged in the proceeding by directly questioning witnesses and otherwise participating actively in the hearing. Thus, we are satisfied the court fully considered the legal question and factual evidence before it. The court applied the proper legal standard and came to a conclusion a reasonable judge could reach. *See* ***State v. Keith***, 216 Wis. 2d 61, 69, 573 N.W.2d 888 (Ct. App. 1997).

¶11 Moreover, even if we deemed the circuit court's explanation inadequate, we must search the record for reasons to uphold the circuit court's exercise of discretion denying Morgan's reverse waiver request. *See* ***Verhagen***, 198 Wis. 2d at 191. In contrast to Morgan's minimally developed argument, the State's brief discusses the hearing testimony at great length. That testimony adequately supports the court's discretionary determination.

¶12 We next reject Morgan's argument that there was insufficient evidence presented to convict him on the attempted homicide charge because "there was virtually no testimony from which inferences could be drawn that ... Morgan attempted to shoot Adam Boss." The jury is the sole arbiter of the credibility of witnesses and alone is charged with the duty of weighing the evidence. ***State v. Poellinger***, 153 Wis. 2d 493, 506, 451 N.W.2d 752 (1990). "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 ...." ***Id.*** at 507.

¶13 Adam Boss testified Morgan pointed the gun at him and, immediately after he turned away and retreated, fired two shots at him. Valentina Cervantes testified she saw the man who shot Smith "shooting at a different individual" after he shot Smith. Rachel Ferry testified that after Smith was shot she observed the shooter point the gun at the other gentleman and continue shooting. Finally, John Nikolaides testified, "After the shooter shot the victim, he pointed the weapon over to … the victim's friend, shot at him, and then I heard the clicking." Nikolaides later acknowledged he was unsure whether the shooter ran out of ammunition before or after he pointed the gun at the friend, but knew the shooter was pulling the trigger. The foregoing testimony demonstrates there was not merely sufficient, but substantial, evidence supporting the jury's verdict on the attempt charge.

¶14 Finally, Morgan argues he was sentenced too harshly, emphasizing the mitigating sentencing factors and his potential for rehabilitation. This argument ignores the appellate standard of review.

¶15 "When the legislature granted courts the authority to impose sentences within a certain range, it gave the courts discretion to determine where in that range a sentence should fall." ***State v. Harris***, 119 Wis. 2d 612, 624, 350 N.W.2d 633 (1984). Therefore, sentencing decisions are reviewed on appeal for the erroneous exercise of discretion. ***McCleary v. State***, 49 Wis. 2d 263, 278, 182 N.W.2d 512 (1971). They "are generally afforded a strong presumption of reasonability because the circuit court is best suited to consider the relevant factors and demeanor of the convicted defendant." ***Gallion***, 270 Wis. 2d 535, ¶18.

¶16 The primary factors to be considered at sentencing are the gravity of the offense, the character of the offender, and the need to protect the public. ***Id.***, ¶40. "A defendant's age is … a secondary factor, which may be considered by the trial court in fashioning an appropriate sentence." ***State v. Davis***, 2005 WI App 98, ¶14, 281 Wis. 2d 118, 698 N.W.2d 823. However, even if age is considered, the circuit court determines what weight to assign it. ***Id.***, ¶18. Where a sentencing court properly considers the primary factors and imposes a sentence within the statutory range, an erroneous exercise of discretion will be found "only where the sentence is so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

¶17 Here, the court explicitly addressed the severity of the offense, Morgan's character, and the need to protect the public, as well as Morgan's young age and rehabilitative needs. It weighed those factors and determined that rehabilitation "quite candidly ... takes a backseat here to protection of the public and to the gravity of the offense. And it takes a backseat along with your age." Ultimately, the court sentenced Morgan to a total of fifty-five years' initial confinement and thirty years' extended supervision. The maximum sentence Morgan could have received on the three charges was eighty-seven and one-half years' initial confinement and forty-five years' extended supervision. Because the court considered the primary sentencing factors and imposed a sentence well within the statutory maximums, it did not erroneously exercise its discretion and the sentence is not so excessive as to shock the public sentiment. *See* ***State v. Grindemann***, 2002 WI App 106, ¶31, 255 Wis. 2d 632, 648 N.W.2d 507.

By the Court.—Judgment affirmed.

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