COURT OF APPEALS
DECISION
DATED AND RELEASED

June 6, 1995

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 94-1992-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RUBEN F. HERRERA,

Defendant-Appellant.

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

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

PER CURIAM. Ruben Herrera appeals from a judgment of conviction for first-degree intentional homicide while armed with a dangerous weapon, party to the crime, following a jury trial. He also appeals from the denial of his postconviction motion to modify his sentence. Herrera argues that the trial court erred by admitting hearsay testimony. He also argues that the trial court erred by failing to articulate the basis for its determination of his date of parole eligibility. We affirm.

The essential facts are undisputed. Herrera killed Mandy Clark when he fired four shots from the car in which he was riding at a parked car in which Clark was sitting. Three of the shots struck the car and one of them pierced the car and struck Clark. Herrera admitted that he fired the shots but denied that he intended to kill anyone. He claimed that he only intended to scare the occupants. At Herrera's request, the trial court instructed the jury on the lesser-included offense of first-degree reckless homicide, but the jury found Herrera guilty of first-degree intentional homicide.

At the trial, the State called Anthony Juarez to testify about a conversation between Herrera and Thomas Redmond at Juarez's home that Juarez previously had told police he had overheard four days after the shooting. Juarez testified that he remembered overhearing their conversation about the shooting from the next room, that he recognized their respective voices and heard Redmond ask Herrera whether he was scared, that he remembered giving a statement to the police about what Herrera had said, and that he remembered speaking with the prosecutor and Milwaukee Police Detective James Cesar just before testifying. He claimed, however, that he could not recall Herrera's statement, or even his own conversation with the prosecutor and Cesar. He also claimed that the police had told him about the Redmond/Herrera conversation and that he (Juarez) had been "just filling in the blanks."

The State then called Milwaukee Police Detectives James Cesar and Michael Lewandowski. First, Cesar testified that shortly before Juarez took the stand, Juarez acknowledged hearing Herrera's statement but that "[h]e couldn't say those things in front of the defendant." Next, Lewandowski testified that Juarez previously had told police that, from a separate room in his house, he heard Redmond ask Herrera whether he was scared and Herrera responded, "fuck the bitch, she shouldn't have been in the car anyway," and that "Juice should have got it and that BoDog was close and he should have got it too," and that "the bullet was meant" for one of two men in the car.

Herrera first argues that Juarez's account of his (Herrera's) alleged statement was inadmissible hearsay because Juarez overheard Herrera's statement from another room and that the statement was not to him (Juarez) but to Redmond. We disagree.

A trial court's decision to admit or exclude hearsay evidence is discretionary and will be upheld absent an erroneous exercise of discretion. ***State v. Patino***, 177 Wis.2d 348, 362, 502 N.W.2d 601, 606 (Ct. App. 1993). Herrera's claim that the trial court's ruling deprived him of his right of confrontation, however, is subject to our independent review. *See* ***State v. Turner***, 136 Wis.2d 333, 344, 401 N.W.2d 827, 832-833 (1987) (appellate courts independently apply constitutional principles).

Herrera contends that, under ***Patino***, for a hearsay statement to be admissible it must be one uttered in the "presence" of the witness. Herrera is wrong. Although ***Patino*** refers to an admissible hearsay statement made in the "presence and overheard by" a witness, ***id.*** at 363, 502 N.W.2d at 607, it says nothing to suggest that a hearsay statement would be inadmissible simply because the witness overheard the statement from another room or location. Herrera has offered no authority for such a proposition and nothing logically supports such a principle.

In this case the trial court admitted the hearsay statement as an "adoptive admission" under § 908.01(4)(b)2, STATS. The trial court was wrong. An "adoptive admission" refers to a defendant's apparent acceptance of or agreement with the statement made by some other person. ***State v. Marshall***, 113 Wis.2d 643, 651-652, 335 N.W.2d 612, 616 (1983). In the instant case, however, we are dealing with the defendant's own statement. Nevertheless, this statement clearly was admissible under § 908.01(4)(b)1, STATS., providing that a statement by a party opponent is not hearsay. "If the trial court's decision is supportable by the record, we will not reverse even though the [trial] court may have given the wrong reason or no reason at all." ***Patino***, 177 Wis.2d at 362, 502 N.W.2d at 606.

Herrera also argues that admission of the evidence "violated his due process right to a fair trial because the jury was not given a proper foundation to judge the veracity of Mr. Juarez's testimony as offered in Detective Lewandowski's testimony." Herrera contends, therefore, "that Due Process requires a trial court to perform an analysis similar to one done in Confrontation Clause cases" so that "the trial court could have had some measure as it related to the reliability of the evidence." We conclude, however, that "[b]ecause the statement is properly viewed as [Herrera's] own, there can be no confrontation clause issue since [Herrera] cannot claim that he was denied

the opportunity to confront himself." *See* ***Patino***, 177 Wis.2d at 373, 502 N.W.2d at 611.

As an alternative to a new trial, Herrera seeks resentencing. He argues that the trial court failed to articulate the basis for setting his parole eligibility date of January 1, 2045. He maintains that the trial court "failed to give proper consideration to all of the sentencing factors" and, instead, "focused exclusively on the gravity of the offense" and did not consider his character, his rehabilitative needs, and the public's protection. We disagree.

In reviewing a challenge to a sentence, it is "presume[d] that the trial court acted reasonably, and the defendant has the burden to show some unreasonable or unjustifiable basis in the record for the sentence." ***Patino***, 177 Wis.2d at 384, 502 N.W.2d at 616. A sentencing court must consider "the gravity of the offense, the character of the offender, and the need to protect the public." ***Id.*** at 385, 502 N.W.2d at 616. The weight given to each sentencing factor is within the trial court's discretion. ***Id.*** Further, a trial court "must articulate the basis for the sentence imposed on the facts of the record" to permit meaningful appellate review. ***State v. Echols***, 175 Wis.2d 653, 682, 499 N.W.2d 631, 640, *cert. denied*, 114 S. Ct. 246 (1993). These same principles apply in reviewing a trial court's determination of a parole eligibility date for a defendant convicted of first-degree intentional homicide. ***State v. Borrell***, 167 Wis.2d 749, 774, 482 N.W.2d 883, 892 (1992).

Although the trial court's comments were somewhat vague and attenuated in some respects, the trial court did address the required criteria and did articulate the basis for its decision. First, as Herrera concedes, the trial court emphasized the gravity of the offense. In doing so, the trial court had the benefit not only of learning the details of the crime during the trial, but listening to the eloquent and compelling comments of the victim's grandmother, Ms. Mamie Clark, at the sentencing hearing.

Next, contrary to Herrera's assertion, the trial court considered his character. The prosecutor and defense attorney commented at length on Herrera's background. The trial court noted positive aspects about Herrera and his family, based on information in Herrera's sentencing memorandum, presentence report, and citizen letters on his behalf, as well as negative aspects

including Herrera's association with gangs and guns, and his unwillingness to take advantage of constructive programs and services. Finally, contrary to Herrera's claim, the trial court considered the public's protection and emphasized that "there is a message to be sent" to those who would become involved with guns and gangs:

> And the reason for the punishment is to make sure that other individuals who perhaps may think of doing something like this may stop for a moment and not pull the trigger because that will save that person's life and another victim's life. And that's very important not only as a specific deterrent to [Herrera] but a general deterrent to others.

Accordingly, we conclude that the trial court considered the required sentencing/parole eligibility criteria and sufficiently articulated the basis for its decision.

By the Court. – Judgment and order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.