COURT OF APPEALS
DECISION
DATED AND FILED

July 23, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP1669-CR **Cir. Ct. No. 2010CF3688**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TRAVIS WESLEY STEVENS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DAVID L. BOROWSKI, Judge. *Affirmed.*

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

¶1 PER CURIAM. Travis Wesley Stevens appeals a judgment convicting him of possession of a firearm by a felon and an order denying his motion for postconviction relief. He argues that the circuit court erred in instructing the jury and that his sentence should be modified. We affirm.

¶2 Stevens was charged with one count of possession of cocaine, one count of possession of marijuana, and one count of possession of a firearm, all as a party to a crime. After a trial, the jury found Stevens guilty of possession of a firearm by a felon, but acquitted him on the two possession charges. Stevens moved for postconviction relief, challenging a jury instruction and arguing that his sentence should be modified because his co-defendant, Tamika Toombs, received a sentence that was more lenient than his sentence. The circuit court denied the motion.

¶3 Stevens first contends that the circuit court coerced the jury into reaching a verdict, after the jury informed the circuit court that it was deadlocked, by instructing the jury using a modified version of WIS JI—CRIMINAL 520. The circuit court added the words in italics to the standard instruction.

> I've read the most recent note from the foreperson indicating that you've not been making a lot of progress. Here's the situation.
>
> *I'm going to read you [an] additional, supplemental instruction, but you need to continue to deliberate. You need to reach verdicts.*
>
> You, the jurors, are as competent to decide the disputed issues of fact of this case as the next jury that may or might be called to determine such issues. You are not going to be made to agree nor are you going to be kept out until you do agree. However, it is your duty to make an honest and sincere attempt to arrive at verdicts.
>
> Jurors should not be [obstinate]. They should be open minded. They should listen to the arguments of others and talk matters overly freely and fairly, and make an honest effort to come to conclusions on all the issues presented to you as the jury.
>
> *Again, you need to continue to deliberate.* I would ask that you, please, retire to the jury room *and continue deliberating.*

A little over an hour after receiving this instruction, the jury returned verdicts of not guilty to possession of cocaine and possession of marijuana, but guilty to the charge of possession of a firearm by a felon. The circuit court polled the jurors individually to confirm that this was their verdict.

¶4 The circuit court has broad discretion in instructing the jury. ***State v. Hemphill***, 2006 WI App 185, ¶8, 296 Wis. 2d 198, 722 N.W.2d 393. The circuit court must not, however, instruct the jury in a manner that tends to coerce or threaten them into agreement. ***State v. Echols***, 175 Wis. 2d 653, 666, 499 N.W.2d 631 (1993). When reviewing an argument that the jury was improperly coerced by an instruction, "we consider the supplemental charge [that was] given by the [circuit] court 'in its context and under all circumstances.'" ***Id.*** (quotation marks and citation omitted).

¶5 The supreme court has held that jury instructions coerce a verdict in situations where "the jurors faced bodily discomfort and unhealthy conditions if they failed to reach a verdict quickly." ***Id.*** at 667. As examples of this type of situation, the ***Echols*** court pointed to ***Brown v. State***, 127 Wis. 193, 106 N.W. 536 (1906), where two jurors "were made seriously ill by cigar smoke of fellow jurors and were informed that they would be locked in the jury room for the night unless they reached a verdict quickly," and ***Mead v. City of Richland Center***, 237 Wis. 537, 297 N.W. 419 (1941), where the circuit court informed the jury "that the majority of jurors were probably correct and that they would be kept in a cold room all night unless they all agreed to a verdict." *See* ***Echols***, 175 Wis. 2d at 667. The ***Echols*** court suggested that polling the jurors individually after the verdict is announced would help to ensure that the verdict was not coerced because it would allow the jurors an opportunity to express any reservations with

the verdict and "to change their minds about a verdict to which they ha[d] agreed in the jury room." ***Id.*** at 668-69.

¶6 Acknowledging that prior supreme court decisions have held that WIS JI—CRIMINAL 520 is not coercive, *see* ***Quarles v. State***, 70 Wis. 2d 87, 89, 233 N.W.2d 401 (1975), Stevens contends that the language added to the instruction by the circuit court, when considered in context, coerced the jury into reaching an agreement. We disagree. The additional language added by the circuit court told the jury that it needed to continue to deliberate and that it needed to reach a verdict, but the jury was then informed that it was not going "to be made to agree or kept out until you do agree." Read as a whole, the instruction did not *force* the jury to agree; it told the jury to keep working to see if agreement was possible. The circuit court did not impose a time limit for the jury to reach its verdict and did not threaten the jury with adverse consequences should it fail to reach a verdict. Based on the language of the instruction considered in context, no reasonable jury would have understood that they had no choice but to reach a verdict. Moreover, the circuit court polled the jury after the verdict, giving the jurors an opportunity to express any reservations that they might have with the verdict or to change their minds. We therefore conclude that the circuit court's instruction to the jury did not improperly coerce the jury into a verdict.

¶7 Stevens next argues that his sentence should be modified based on a "new factor," the disparity between his sentence and the sentence later imposed on Toombs. Toombs was convicted of two charges, felon in possession of a firearm and keeping a drug house. The circuit court sentenced her to four years of imprisonment on each count, with two years of initial confinement and two years of extended supervision, to be served concurrently to each other and to her revocation sentence, while Stevens was sentenced to five years of imprisonment

for one conviction, felon in possession of a firearm, with three years of initial confinement and two years of extended supervision, to be served consecutively, with eligibility for the Earned Release Program after two years.

¶8 A new factor is '"a fact or set of facts highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in existence or because ... it was unknowingly overlooked by all of the parties.'" ***State v. Harbor***, 2011 WI 28, ¶40, 333 Wis. 2d 53, 797 N.W.2d 828 (citation omitted). The defendant has the burden of proving by clear and convincing evidence that a new factor exists. ***Id.***, ¶36. Whether a fact or set of facts constitutes a new factor is a question of law that this court decides independently. ***Id.***, ¶33.

¶9 Stevens contends that the disparity in sentences is a new factor because it was not known at the time of sentencing—Toombs was sentenced after him—and was highly relevant to the imposition of his sentence. This argument fails because Stevens has not shown that the fact that Toombs's sentence was less severe is highly relevant to *his* sentence. To the extent Stevens is attempting to argue that he should be resentenced based on the principle that similarly situated defendants should receive similar sentences, Stevens has not shown that he and Toombs are similarly situated. Stevens contends that Toombs was more culpable because the gun was found in her house, but that is not enough by itself to establish that Toombs was more culpable. Stevens also argues that Toombs had a more aggravated record than his, but provides absolutely no details regarding her prior record to substantiate this assertion. We therefore reject the argument that Stevens is entitled to sentence modification based on the disparity in sentences between Stevens and Toombs.

By the Court.—Judgment and order affirmed.

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