COURT OF APPEALS
DECISION
DATED AND FILED

October 29, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP722-CR **Cir. Ct. No. 2011CF5715**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

EARNEST LEE NICHOLSON,

DEFENDANT-APPELLANT.

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

¶1 KESSLER, J.[1] Earnest Lee Nicholson appeals the judgment of conviction, following a jury trial, of resisting or obstructing an officer. Nicholson also appeals the order denying his postconviction motion for relief. We affirm.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

BACKGROUND

¶2 On November 29, 2011, Nicholson was charged with one count of felony aggravated battery as a repeat offender and one count of resisting/obstructing an officer. The charges stemmed from an alleged domestic violence incident that occurred on November 24, 2011. On that day, Milwaukee police responded to a 911 call from an apartment located at 4651 North 36th Street, Milwaukee. When the officers arrived, Marnice Franklin told them that her boyfriend, Nicholson, punched her multiple times. Franklin was visibly bleeding and had a visible injury to her right eye when the officers arrived. The officers also spoke with Franklin's son, who told police that he witnessed Nicholson punch his mother multiple times. The officers did not see Nicholson at the apartment at that time.

¶3 Shortly thereafter, however, Officers Jacob Spano and James Floriani returned to the apartment in response to a phone call from Franklin's son, informing them that Nicholson had returned to the apartment. While inside the apartment, Officer Spano told Nicholson to turn around and put his hands behind his back, and advised Nicholson that he was under arrest. Nicholson responded, "I ain't gonna do shit, you're gonna have to turn me around," and clenched his fist. Officer Floriani then pepper sprayed Nicholson. Nicholson wiped off the spray and stated, "oh, that's how it's going to be," and a struggled between Nicholson and the officers ensued. The officers then attempted multiple arrest techniques, including a head decentralization technique to secure Nicholson; however, Nicholson was able to break free. The officers also attempted a "bear hug" technique, which Nicholson attempted to resist by swinging his elbows against Officer Floriani. Eventually, the officers were able to take Nicholson into custody.

¶4 Nicholson was bound over for trial on the felony charge following a preliminary hearing. On the day of Nicholson's trial, but prior to commencement of the trial, the State moved to dismiss the felony aggravated battery charge because the alleged victim failed to appear to testify, despite a warrant. The trial court granted the motion. Nicholson's trial continued on the resisting/obstructing an officer charge.

¶5 Both Officers Spano and Floriani testified as to their multiple attempts at arresting Nicholson and his aggressive attempts to resist. The jury found Nicholson guilty.

¶6 The trial court sentenced Nicholson to one year of initial confinement and one year of extended supervision. At the sentencing hearing, the trial court discussed the officers' multiple attempts at arresting Nicholson and then stated:

> So this, I believe, is a very serious and aggressive situation that you created. More people could have been harmed. We already had one harmed person there, and you showed a clear and consistent intent to resist law enforcement [by] all means necessary, by all - - in any way you could.
>
> And you put them at risk, you put the child at risk, you put this woman at risk for further harm.
>
> ….
>
> This is a repeater, and it should be a repeater, given the aggravation and seriousness and the dangerousness that you … created in that situation that day.
>
> It's amazing that nobody [got] hurt worse.
>
> So that's the situation I have to look at, in terms of the seriousness of the offense.
>
> And … You know, I understand that this woman is crazy enough to want you back.

> I mean, you have harmed her tremendously, and you have charmed her tremendously in phone calls.
>
> You have made her believe that she is going to have a wonderful life now, that you're gonna marry her, that everything will be great.
>
> …. [Y]ou charmed her out of coming to court.
>
> ….
>
> But I don't believe that it's in the community's interest to let the two of you continue in a relationship which is clearly dysfunctional, dangerous, for that child and your neighbors and everybody else.
>
> ….
>
> If you two want to do that, that's unfortunate, but the community cannot afford to have more incidents like this.

¶7 Nicholson filed a postconviction motion, arguing that the trial court improperly considered allegations which were dismissed prior to trial, and were hearsay. The trial court denied the motion. This appeal follows.

DISCUSSION

¶8 On appeal, Nicholson argues that the trial court erroneously considered uncharged allegations during sentencing. He also argues that the evidence at trial was insufficient to support his conviction. We disagree.

Sentencing Considerations.

¶9 Nicholson argues that the trial court erroneously relied on the dismissed aggravated battery charge during sentencing because he did not admit to committing the offense and the criminal complaint initially charging aggravated battery contained multiple levels of hearsay. Specifically, Nicholson contends that the complaint contains a series of events relayed from Franklin to the police

officers; from the police officers to the district attorney; and from the district attorney to the sentencing court.

¶10 Sentencing is committed to the trial court's discretion. *See* ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. In its exercise of discretion, the trial court is to identify the objectives of its sentence, which include but are not limited to protecting the community, punishing the defendant, rehabilitating the defendant, and deterring others. ***Id.***, ¶40. "In Wisconsin, sentencing courts are obliged to acquire the 'full knowledge of the character and behavior pattern of the convicted defendant before imposing sentence.'" ***State v. Leitner***, 2002 WI 77, ¶45, 253 Wis. 2d 449, 646 N.W.2d 341 (citation omitted). Therefore, a sentencing court may consider uncharged and unproven offenses. ***Id.*** Even offenses for which the defendant has been acquitted may be considered. ***State v. Prineas***, 2009 WI App 28, ¶28, 316 Wis. 2d 414, 766 N.W.2d 206.

¶11 The trial court properly considered the allegations concerning the dismissed charge. The trial court's comments regarding Franklin's injuries and phone calls made to Franklin pertained to Nicholson's character and the trial court's concern for the community. The trial court properly drew from its knowledge of Nicholson's character. *See* ***Leitner***, 253 Wis. 2d 449, ¶45. Moreover, the trial court did not impermissibly rely on hearsay evidence. The rules of evidence do not apply at sentencing and a sentencing court may consider hearsay or even suppressed evidence. ***State v. Marhal***, 172 Wis. 2d 491, 502-03, 493 N.W.2d 758 (Ct. App. 1992).

Sufficiency of the Evidence.

¶12 In reviewing the sufficiency of the evidence, we may not reverse the trial court unless the evidence, viewed in the light most favorable to the outcome of the proceeding, is so deficient that, as a matter of law, no reasonable fact finder could have reached the same result. *See* ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990). When the record shows that the evidence presented could have supported more than one inference, the reviewing court must accept the conclusion drawn by the fact finder unless the evidence upon which it is based is incredible as a matter of law. *See* ***id.*** at 506-07. Finally, it is the trier of fact, not the appellate court, who has the opportunity to hear and observe testimony. Thus, the trier of fact is charged with resolving conflicts in testimony and weighing credibility. *See* ***id.*** at 506.

¶13 The jury was instructed that in order to find Nicholson guilty of resisting or obstructing an officer, it needed to be satisfied beyond a reasonable doubt that the following four elements were present:

> One, the defendant resisted an officer. A police officer is an officer under the statute. To resist an officer means to oppose the officer by force or threat of force. The resistance must be directed to the officer personally.
>
> Two, the officer was doing an act in an official capacity. Police officers act in an official capacity when they perform duties that they are employed to perform. The duties of a police officer include arresting a suspect.
>
> Three, the officer was acting with lawful authority. Police officers act with lawful authority if their acts are conducted in accordance with law. In this case, it is alleged that the officer was arresting the defendant.
>
> Four, the defendant knew that Officer Floriani was an officer acting in an official capacity and with lawful authority, and that the defendant knew his conduct would resist the officer.

(Some formatting altered.)

¶14 Nicholson contends that the State did not prove beyond a reasonable doubt that Nicholson resisted Officer Floriani or that Nicholson knew that his conduct would resist the officer.

¶15 The jury's verdict is supported by the record. Officer Spano testified as to the multiple methods used to attempt to arrest Nicholson and stated that Nicholson pushed Officer Floriani and attempted to strike Officer Floriani with his (Nicholson's) elbow. Officer Spano stated that Nicholson also refused to put his hands behind his back by stating: "I ain't gonna do shit, you're gonna have to turn me around." Officer Floriani testified that during one of his attempts to apprehend Nicholson, his (Floriani's) hand slipped and Nicholson "flung [him] forward." Floriani also testified that while trying to restrain Nicholson from behind, Nicholson "nudge[d]" his elbows into the left side of Floriani's abdominal area. The record reflects that Nicholson verbally challenged his arrest and attempted to physically fight the officers. These facts support the jury's conclusion that Nicholson resisted Officer Floriani and that Nicholson knew his conduct would resist the officer.

¶16 For the foregoing reasons, we affirm the trial court.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.