COURT OF APPEALS
DECISION
DATED AND FILED

January 29, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP274-CR **Cir. Ct. No. 2011CF167**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

EXAVIER LAO,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Winnebago County: SCOTT C. WOLDT, Judge. *Affirmed*.

Before Brown, C.J., Reilly and Gundrum, JJ.

¶1 PER CURIAM. Exavier Lao appeals a judgment convicting him of armed robbery, as party to a crime, and an order denying his postconviction motion seeking a new trial or resentencing. We reject Lao's contentions that the

trial court demonstrated judicial bias, his trial counsel rendered ineffective assistance, the State withheld impeachment evidence, and the trial court relied on inaccurate information and improper factors at sentencing. We affirm.

¶2 Cary Bradley told police that someone named "Mookie" had sent him a text message to stop by Mookie's apartment and that, when Bradley arrived, Mookie and a gunman mugged and robbed him of, among other things, cash and his iPhone. Lao arrived during a search of "Mookie's" apartment, admitted using the name Mookie, and confirmed that his telephone number matched the number from which Bradley received the text. Lao denied involvement in the Bradley incident, but his fingerprints were on Bradley's iPhone and on a box of ammunition found in the search, and his own cellphone contained a picture of the gun used in the offense. A jury found Lao guilty. His motion for postconviction relief was denied. He appeals, seeking either a new trial or resentencing.

¶3 Lao first contends that Judge Woldt repeatedly demonstrated bias against him and defense counsel, Attorney Jeffrey Brandt. Lao asserts that Judge Woldt "irreparably damaged" Brandt's credibility by leveling "personal attacks" at him, engaging him in "insulting exchanges," and showing "open hostility," both in front of the jury and outside its presence.

¶4 Every person charged with a crime is entitled to "an impartial and unbiased judge." ***State v. Bell***, 62 Wis. 2d 534, 536, 215 N.W.2d 535 (1974). Whether a judge was unbiased is a question of constitutional fact we review de novo. ***State v. Neuaone***, 2005 WI App 124, ¶16, 284 Wis. 2d 473, 700 N.W.2d 298. We presume a judge has acted fairly, impartially, and without bias, but the presumption is rebuttable. ***State v. Gudgeon***, 2006 WI App 143, ¶20, 295 Wis. 2d 189, 720 N.W.2d 114. The burden is on the party asserting judicial bias to

demonstrate that bias by a preponderance of the evidence. ***Neuaone***, 284 Wis. 2d 473, ¶16. Either subjective or objective bias "can violate a defendant's due process right to an impartial judge." ***Gudgeon***, 295 Wis. 2d 189, ¶20. Lao complains only that Judge Woldt was objectively biased.

¶5 The objective bias test "asks whether a reasonable person could question the judge's impartiality." ***Id.***, ¶21. It is not sufficient to show only that there is an appearance of partiality or that the circumstances might lead one to speculate that the judge is biased. ***State v. McBride***, 187 Wis. 2d 409, 417, 523 N.W.2d 106 (Ct. App. 1994). Rather, a party must show objective facts that demonstrate actual bias, *see* ***id.*** at 416, or that, under all the circumstances, a reasonable person could conclude the average judge could not be trusted to "hold the balance nice, clear and true," ***Gudgeon***, 295 Wis. 2d 189, ¶¶24-25.

¶6 Lao offers the following examples. Out of the presence of the jury, Judge Woldt asked Brandt where he was going with a line of questioning in his cross-examination of a detective. Brandt said he was trying to get the detective to acknowledge that a DVD recording had been made of another suspect's statement, although the State had not produced it. Judge Woldt chastised Brandt for not filing a pretrial motion to obtain the DVD, as local rules require, and called Brandt's strategy of waiting until trial to bring up the DVD "trial by ambush" and "dirty bush-league stuff," repeating the term "bush-league" several times.

¶7 Similarly, later in the same cross-examination, Brandt asked the detective to review the investigation incident report "to see whether you itemized an owner of the phone number that I was talking about." This exchange followed:

> **MR. CEMAN [Prosecutor]:** I got no objection, Your Honor, if the defense wants to direct him right to the page. It's a pretty healthy report.

> **THE COURT:** You can. Feel free. Feel free to help us move things along. I don't have a problem with that.
>
> **MR. BRANDT:** I don't believe it's there.
>
> **MR. CEMAN:** Well, I guess—
>
> **THE COURT:** What game are you playing then?
>
> **MR. BRANDT:** I'm not playing a game.
>
> **THE COURT:** Yeah, you are.
>
> ….
>
> **THE COURT:** If you have a question, Counsel, ask the question. If the question is: Is it true that it's not there, ask the question.

Then, after sustaining an objection that Brandt asked a leading question, the court interjected: "What part of sustained didn't you understand? Move on."

¶8 "[J]udicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge," ***Liteky v. United States***, 510 U.S. 540, 555 (1994), and bias is not demonstrated by mere "expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women … sometimes display," ***id.*** at 555-56. Rather, the challenged remarks must "reveal such a high degree of favoritism or antagonism as to make fair judgment impossible." ***Id***. at 555.

¶9 Such is not the case here. At the postconviction hearing, Judge Woldt explained that he was not questioning Brandt's credibility or competence but instead was "trying to … move counsel along, get him off certain issues, because he was getting repetitive." This is proper. *See* WIS. STAT. § 906.11(1)(b) (2011-12); *see also* ***Liteky***, 510 U.S. at 555 (a judge's "ordinary efforts at

courtroom administration," even if "stern and short-tempered," are immune from a bias or partiality challenge). Asking what "game" Brandt was playing when he asked the detective to locate something Brandt knew was not in the report prevented embarrassing the witness. *See* § 906.11(1)(c). Also Judge Woldt instructed jurors to disregard any impression they might have formed of his opinion about Lao's culpability, presumptively erasing any possible prejudice. *See* ***State v. Bowie***, 92 Wis. 2d 192, 209-10, 284 N.W.2d 613 (1979). Finally, Brandt testified that it is "rare" for counsel not to be reprimanded during a trial and he did not think any rebuke he received damaged his or Lao's credibility.

¶10 Lao asserts that Judge Woldt again showed his bias during the "insufficient and … impatient" colloquy with him to determine whether he would testify. We disagree.

¶11 A criminal defendant has the constitutional right either to testify or not. ***State v. Denson***, 2011 WI 70, ¶49, 335 Wis. 2d 681, 799 N.W.2d 831. To ensure a knowing, voluntary, and intelligent waiver of the right to testify, "a court should conduct an on-the-record colloquy with the defendant, outside the jury's presence," and inquire whether the defendant is aware of the right to testify and has discussed this right with counsel. ***Id.***, ¶61. Defense counsel bears the primary responsibility for advising the defendant of these corollary rights and for explaining the tactical implications of both. ***Id.***, ¶65. No colloquy need be done when waiving the right not to testify. ***Id.***, ¶63.

¶12 Here, the court advised Lao of his rights to testify or not, and verified both that no promises or threats induced Lao's decision and that he had sufficient time to discuss the matter with Brandt. When Lao said he was "not sure yet" if he had arrived at a decision, the court told him, "Well, now's the time to

make your decision because we're going to be bringing the jury up in a minute." Lao answered, "Yeah." Brandt, a seasoned defense lawyer, assured the court that he was satisfied that Lao made his decision freely, voluntarily, and intelligently.

¶13 Lao also objects to the manner in which Judge Woldt questioned Lao on the stand. Judge Woldt asked Lao if he could explain how the picture of the robbery gun came to be on his cell phone. Lao could not. He contends Judge Woldt's questioning smacked of prosecutorial advocacy and "clearly intimated disbelief" and an "appearance of partisanship." This argument overreaches.

¶14 A trial judge "may interrogate witnesses, whether called by the judge or by a party." WIS. STAT. § 906.14(2); *see also* ***State v. Carprue***, 2004 WI 111, ¶31, 274 Wis. 2d 656, 683 N.W.2d 31. Further, a judge may "clarify questions and answers and make inquiries where obvious important evidentiary matters are ignored or inadequately covered." ***State v. Asfoor***, 75 Wis. 2d 411, 437, 249 N.W.2d 529 (1977). He or she must do so carefully and impartially, however, ***id.***, being mindful that one cannot serve as both judge and advocate, ***State v. Pettit***, 171 Wis. 2d 627, 647, 492 N.W.2d 633 (Ct. App. 1992).

¶15 The trial court asked clarifying questions of both defense and State witnesses. It posed its questions to Lao only after the prosecutor finished cross-examining him. Here, considering the other evidence of Lao's guilt, even if the questioning did amount to error, it was harmless.

¶16 To wind up the bias issue, we would say that Judge Woldt's word choices and demeanor, to the extent the latter can be discerned from a transcript, perhaps were more intemperate and querulous than becomes the office of a judge. Also, a judge who dons the hat of an advocate "skates on thin ice." ***State v. Garner***, 54 Wis. 2d 100, 104, 194 N.W.2d 649 (1972). Still, their context, the

strength of the evidence against Lao, and the postconviction proceedings satisfy this court that there was no actual bias or the appearance of it to the eyes of a reasonable person.

¶17 Lao next asserts that Brandt's failure to object to the alleged instances of bias or to move for a mistrial denied him his right to the effective assistance of counsel. We disagree. To prove an ineffective assistance of counsel claim, a defendant must show both that trial counsel's performance was deficient and prejudicial. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). A reviewing court may dispose of a claim of ineffective assistance of counsel if either ground is not proved. ***Id.*** at 697. We review the denial of an ineffective assistance claim as a mixed question of fact and law. ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). We uphold the trial court's factual findings unless clearly erroneous and independently review as a question of law the two-pronged determination of trial counsel's performance. ***Id.*** at 127-28.

¶18 Testifying at the postconviction hearing, Brandt gave several reasons for not objecting or moving for a mistrial. First, he did not believe Judge Woldt's comments were inappropriate or undermined his or Lao's credibility before the jury. Second, judicial admonitions come with the territory of a jury trial. Third, in his experience of trying over a hundred cases, juries generally dislike objections, especially in regard to a judge's action. The trial court found that Brandt's performance was not deficient. A trial court's determination—here, implicitly made—that counsel had a reasonable trial strategy "is virtually unassailable in an ineffective assistance of counsel analysis." ***State v. Maloney***, 2004 WI App 141, ¶23, 275 Wis. 2d 557, 685 N.W.2d 620.

¶19 Lao next contends that the State withheld evidence of an unrelated felony drug distribution charge filed against Bradley, the alleged victim. The defense theory was that the alleged robbery actually was a drug deal gone bad between Bradley and two others who then made Lao the fall guy to hide Bradley's involvement. Lao asserts that the drug charge evidence could have been used to impeach the credibility of Bradley, the State's chief witness. Lao contends the pending charge gave Bradley "an incentive to lie" and the motivation to testify due to an "expectation of favorable treatment in exchange for his testimony."

¶20 Nondisclosure of evidence favorable to an accused violates due process where the evidence is material to guilt or punishment, regardless of the prosecution's good or bad faith. ***Brady v. Maryland***, 373 U.S. 83, 87 (1963). Impeachment and exculpatory evidence fall within the ***Brady*** rule. ***United States v. Bagley***, 473 U.S. 667, 676 (1985). Evidence is favorable to an accused when, "if disclosed and used effectively, it may make the difference between conviction and acquittal." ***Id.***

¶21 Lao's argument fails. Bradley planned to testify for the State well before the new charge was filed. Also, the charge was filed just the day before Lao's trial began. It therefore did not appear in the criminal investigation background report and was not yet entered on CCAP when the prosecutor printed off CCAP reports the day before trial, leaving him unaware of the charge.

¶22 Furthermore, the extent and scope of cross-examination allowed for impeachment purposes is a matter within the trial court's sound discretion. ***Rogers v. State***, 93 Wis. 2d 682, 689, 287 N.W.2d 774 (1980). The court has a duty to place limits on an examination that would cause confusion by diverting the jury's attention to, or unduly emphasizing, extraneous matters. ***State v. Rhodes***,

2011 WI 73, ¶47, 336 Wis. 2d 64, 799 N.W.2d 850. The trial court stated at the postconviction hearing that it would have disallowed the evidence anyway because, even if relevant, its prejudicial effect outweighed its probative value and it could have led to a confusing, time-wasting "trial within a trial." The court's reasonably based rationale represents a proper exercise of discretion. *See* ***State v. McCall***, 202 Wis. 2d 29, 36, 549 N.W.2d 418 (1996).

¶23 Lao next contends he was sentenced in reliance on inaccurate information. To prevail, he must establish both that the court had inaccurate information and actually relied upon it. ***State v. Tiepelman***, 2006 WI 66, ¶31, 291 Wis. 2d 179, 717 N.W.2d 1. "Actually relied" means the court gave "explicit attention" or "specific consideration" to the misinformation, so that it "formed part of the basis for the sentence." ***Id.***, ¶14 (citation omitted). One seeking resentencing must clearly and convincingly show it is "highly probable or reasonably certain" that the court actually relied on the misinformation. ***State v. Harris***, 2010 WI 79, ¶34-35, 326 Wis. 2d 685, 786 N.W.2d 409.

¶24 While addressing the sentencing factors and objectives, the court commented on the similarity between Lao's current offense and one he committed as a juvenile. Lao asserted that he was accused of robbery as a juvenile "because I was walking with somebody and he decided to just rob someone who went to my school." The court observed that it found his juvenile record "real interesting … what is it? Some other person you're with with a gun stealing money and a cell phone. Wow, doesn't that sound familiar?" Lao immediately said, "Not with a gun." Terming it "basically … the same situation," the court noted that Lao denied responsibility both times. Brandt repeated that no gun was involved in Lao's earlier offense. The court responded, "All right. The same facts, though….

We have taking money and a cell phone from some kid, and it's a robbery that he was charged with."

¶25 We conclude the court simply misspoke and did not give such explicit attention or specific consideration to the misstatement that it formed part of the basis for the sentence. ***Tiepelman***, 291 Wis. 2d 179, ¶14. If there was an erroneous momentary reliance, the court's explanation of its sentencing rationale convinces us that it was harmless, as there is no reasonable probability of a different outcome, *i.e.*, a probability sufficient to undermine confidence in the outcome. *See* ***State v. Dyess***, 124 Wis. 2d 525, 545, 370 N.W.2d 222 (1985).

¶26 Lao also contends the court relied on improper factors at sentencing. A court must consider the gravity of the offense, the defendant's character, and the need to protect the public, and may consider numerous related factors. ***Harris***, 326 Wis. 2d 685, ¶28. The weight to be assigned to each is within the circuit court's discretion. ***Id.*** A court erroneously exercises its discretion when it imposes sentence based on clearly irrelevant or improper factors. ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197.

¶27 The improper factors of which Lao complains are his refusal to admit having committed the robbery and name his accomplice, and a violation he committed in jail while awaiting sentencing. Judge Woldt commented that Lao might have gotten probation had he admitted his guilt and named names. Lao contends that, as a result, he is being punished more harshly for exercising his Fifth Amendment right against self-incrimination. We see it differently.

¶28 True, a trial court's sole *reliance* on a defendant's refusal to admit guilt amounts to an improper consideration, but the court may *consider* it as an indication of a lack of remorse. ***State v. Fuerst***, 181 Wis. 2d 903, 915-16, 512

N.W.2d 243 (Ct. App. 1994). Here, the court evaluated Lao's stance in the context of his demeanor, his need for rehabilitation, and the extent to which the public might be endangered. *See* ***State v. Baldwin***, 101 Wis. 2d 441, 459, 304 N.W.2d 742 (1981). Lao's violent outburst in jail, and his effort to hide it from the court,[1] told the court "something about [Lao's] character." These all are proper considerations at sentencing. We see no misuse of discretion.

By the Court.—Judgment and order affirmed.

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

[1] Lao asked to be allowed to appear at sentencing in street clothes so he would not have to wear jail attire indicating his disciplinary status.