COURT OF APPEALS
DECISION
DATED AND RELEASED

FEBRUARY 18, 1997

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. 96-2215-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ANTHONY S. SZABLEWSKI,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Marathon County: TIMOTHY L. VOCKE, Reserve Judge. *Affirmed*.

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. Anthony Szablewski appeals a judgment convicting him of attempted armed robbery and use of capsicum spray. He also appeals an order denying his postconviction motion. Szablewski argues that the trial court lacked jurisdiction because he was unlawfully arrested, identification and physical evidence should have been suppressed, the State failed to disclose exculpatory evidence and the consecutive sentences totaling

twelve years were excessive and resulted from the trial court's consideration of improper factors. We reject these arguments and affirm the judgment and order.

The State presented evidence that Szablewski and his accomplice, Joseph McGowen, accosted Russell Reinertson outside a motel at about 2:12 a.m. after they followed him from a bar. Szablewski approached Reinertson and asked "Why did you say that to my girlfriend?" After Reinertson replied that he did not know what Szablewski was talking about, Szablewski sprayed him in the face with a chemical that made his face burn. McGowen then came up behind Reinertson with a baseball bat. When Reinertson asked "What's this all about?" Szablewski responded "Just give us your money and we won't hurt you." Reinertson refused and stated that he would go to the lobby and report them. McGowen then struck him with the baseball bat on his left leg. Szablewski demanded Reinertson's money three or four times during the altercation. Reinertson eventually escaped and ran to the lobby. Szablewski and McGowen fled in a red sports car.

At 2:17 a.m., a police officer observed a small red vehicle driven by a white male and occupied by a black male. The car and the occupants fit the description of the assailants that had previously been broadcast over the police radio. The officer stopped the car and observed a three-piece pool stick, nunchakus and a canister of pepper spray. Approximately twenty-two minutes after the initial dispatch, Reinertson identified Szablewski and McGowen as his assailants at a "show-up" identification.

The trial court did not lack jurisdiction based on an unlawful arrest.[1] An unlawful arrest does not deprive the court of jurisdiction. ***State v. Smith***, 131 Wis.2d 220, 229, 388 N.W.2d 601, 610 (1986). In addition, there is no basis for suppressing the identification or physical evidence. The officer had sufficient cause to stop the vehicle and hold the occupants for the show-up identification. The officer based the stop on the description of the vehicle, the

[1] This issue and others are stated in terms of a challenge to the trial court's jurisdiction because of the alleged errors. The alleged errors do not present any jurisdictional issues. The State argues that this issue and others were not properly preserved. Because we conclude that the issues lack merit, we do not rely on Szablewski's waivers.

description of the perpetrators, the timing and proximity to the scene of the crime and the small number of cars on the road at 2:20 a.m. These factors constitute specific, articulable facts that provided adequate grounds for the officer's suspicion that the occupants were the perpetrators of the crime. ***State v. Guzy***, 139 Wis.2d 663, 675, 407 N.W.2d 548, 553 (1987).

There is no basis for challenging the identification based on a suggestive show up. The show-up identification occurred within a half-hour of the crime and Reinertson unequivocally identified each of the perpetrators. This procedure was approved in ***State v. Isham***, 70 Wis.2d 718, 725, 235 N.W.2d 506, 510 (1975).

The record discloses no basis for suppressing the pool stick, nunchakus and canister of pepper spray found in the red sports car. The officer testified that he could see these items while standing outside the car. Szablewski argues that it is "intuitively obvious" that these items were not in plain view based on the written police report that stated these items were found "under the passenger's seat" and "stuck between the driver's seat and the console." The police report does not contradict the officer's testimony that he could see these items from outside the car. His testimony and the police report can be easily reconciled by concluding that the pool stick and nunchakus were partially visible although tucked under the passenger seat and that the pepper spray was not entirely concealed between the driver's seat and the console.

The record does not support Szablewski's argument that the State withheld exculpatory evidence. He argues that one of two statements made by McGowen was exculpatory and was not revealed before trial. That statement, given to his probation agent after being taken into custody, stated in part:

> Tony told me about a guy that had some money and that was going to be with Carol after the bar closed. Carol was suppose to take the man (Russell Reinertson) to a motel which turned out to be the Day's Inn in Mosinee. While at the Showtime Bar, Tony explained to me that he intended to rob the identified guy at some point. Tony seemed to be experienced at doing this. Tony told me that Reinertson was

> leaving and that he wanted us to go. He went out to the car while I said goodbye to Amy. Tony had identified his car and caught up with him on Highway 51. I had never met Russ Reinertson before 05/09/95. Reinertson pulled into a grocery store in Mosinee and Tony pulled off the road to wait for him. Reinertson then came back out, got in his car and we followed him to the Day's Inn in Mosinee. Tony parked right next to the guy's car at Day's Inn. He got out and I stayed in the car. Tony approached Reinertson in-between the two vehicles and they talked for about one or two minutes. I knew that Tony had pepper spray and two pool sticks in the car. I didn't know that Lorene had the numchucks in the car. I saw Tony spray Reinertson with the pepper spray and I saw both Tony and Reinertson's hands moving. I got out of the car and went up to them. I didn't have anything in my hands. Reinertson attempted to run into the motel lobby and I pushed him down on the ground. Tony either tried to pepper spray him again or hit Reinertson but I'm not sure. Reinertson eventually made it into the hotel and we went to the car and drove away. I deny hitting Reinertson with a bat or any weapon other than pushing him on the ground. We took off in the car in a hurry and were stopped on Grand Avenue. Tony was driving.

....

> When we stopped at the grocery store I tried to tell Tony that we should leave. He said that he came this far so I'm going to get the money. We never did get any from Reinertson. I knew what we were doing wasn't right but I got involved as I thought they were fighting. I think if I would have discouraged Tony earlier the whole thing wouldn't have happened.

McGowen's statements are not exculpatory. They show a premeditated plan to rob Reinertson and depict Szablewski as the primary

perpetrator. Szablewski argues that the statement contained evidence that would mitigate the degree of the offense by revealing that Szablewski did not strike Reinertson and that no money was taken. Even if the statement could be construed as Szablewski contends, neither of the offenses has striking Reinertson or taking his money as an element. Szablewski argues that a possible interpretation of McGowen's statement is that Szablewski and Reinertson were involved in a fight "as opposed to an assault." Again, the distinction is irrelevant. The fact that Szablewski and Reinertson fought is not inconsistent with attempted armed robbery or use of pepper spray. Taken as a whole, the statement supports the theory that Szablewski's attack was motivated by robbery. Finally, Szablewski argues that the statement "casts aspersions on the credibility of Russell Reinertson." While the statement differed in some details from Reinertson's testimony, it tended to corroborate all of the elements of the crimes charged.

Szablewski also argues that a statement by Amy Monhead constituted exculpatory evidence that was withheld by the State. He contends that Monhead's statement would have shown that Reinertson was harassing her. Monhead in fact testified to that effect. She also stated that she talked to someone "from Russell's side" but did not ascertain his identity. This record establishes neither the existence of a statement in the State's possession nor the exculpatory nature of the alleged statement. Szablewski is required to show a reasonable probability that the undisclosed evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the outcome. ***Kyles v. Whitley***, 115 S. Ct. 1555, 1565-66 (1995). The alleged pretrial statement that Reinertson was harassing Monhead at the bar does not negate any of the elements of armed robbery or use of pepper spray and does not undermine confidence in the verdict.

The trial court properly exercised its sentencing discretion when it imposed consecutive sentences totaling twelve years. The trial court is presumed to have acted reasonably in the exercise of its sentencing discretion and Szablewski has the burden of overcoming that presumption by showing an unreasonable or unjustifiable basis for the sentence. ***State v. Johnson***, 178 Wis.2d 42, 52-53, 503 N.W.2d 575, 578 (Ct. App. 1993). The court appropriately considered the gravity of the offense, Szablewski's character and rehabilitative needs and the need to protect the public, *see* ***State v. Sarabia***, 118 Wis.2d 655, 673, 348 N.W.2d 527, 537 (1984), and properly gave to each factor the weight the

court deemed appropriate. *See* ***State v. Larsen***, 141 Wis.2d 412, 428, 415 N.W.2d 535, 541 (Ct. App. 1987).

Szablewski first challenges the sentence because his accomplice, who was on probation at the time, received only a four-year sentence. He contends that McGowen was more culpable as well. We disagree. While McGowen struck Reinertson during the confrontation, Reinertson's testimony establishes that Szablewski repeatedly demanded his money and sprayed him with pepper spray. While McGowen may have inflicted greater injury, the attempted robbery and use of pepper spray appear to have been Szablewski's idea. In addition, mere discrepancy between the sentences does not establish a basis for challenging the sentence. *See* ***Drinkwater v. State***, 73 Wis.2d 674, 679, 245 N.W.2d 664, 667 (1976). McGowen's sentence was imposed pursuant to a plea agreement and with the expectation that it would be consecutive to other offenses. It was imposed by a different court. Nothing in the record supports Szablewski's argument that his longer sentence shows that the trial court punished him for going to trial or for exercising his right of allocution. The court noted "whatever went into Mr. McGowen's sentence I had nothing to do with it. I had no input into it at all." The court was aware of McGowen's sentence but chose to impose a twelve-year sentence on Szablewski based on the crimes he committed, his character and his "complete lack of remorse."

Finally, Szablewski argues that the trial court gave no reason for departing from the sentencing guidelines. The reasons the court gave imposing the twelve-year sentence also constitute its reasons for not giving a lesser sentence. In addition, even the sentencing court's complete failure to consider the sentencing guidelines is not subject to appellate review. ***State v. Halbert***, 147 Wis.2d 123, 131-32, 432 N.W.2d 633, 637 (Ct. App. 1988), *aff'd* ***State v. Elam***, 195 Wis.2d 683, 685, 538 N.W.2d 249, 249 (1995).

By the Court.—Judgment and order affirmed.

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