COURT OF APPEALS
DECISION
DATED AND FILED

September 16, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP2747-CR **Cir. Ct. No. 2011CF1267**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAMES WILSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DAVID A. HANSHER and TIMOTHY M. WITKOWIAK, Judges. *Affirmed.*

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

¶1 PER CURIAM. James Wilson appeals a judgment of conviction entered after a jury found him guilty of four counts of armed robbery and one count of robbery, all as a party to a crime. He also appeals an order denying

postconviction relief.[1] He contends that the circuit court lost subject matter jurisdiction over this matter and erroneously exercised its sentencing discretion, and that his trial counsel gave him constitutionally ineffective assistance. We reject his contentions and affirm.

BACKGROUND

¶2 In March 2011, the State charged Wilson with one count of armed robbery as a party to a crime. The circuit court arraigned him on the charge the following month. After the matter had been pending for some time, the State filed an amended complaint in February 2012 and then an amended information in March 2012 charging Wilson with a total of five counts of armed robbery as a party to a crime. The State alleged that Wilson was one of a group of men who robbed five people at gunpoint during the late-night and early-morning hours of March 13-14, 2011, in Milwaukee, Wisconsin. Wilson's co-defendants each pled guilty to one count of armed robbery as a party to a crime, and each co-defendant received a seventeen-year sentence bifurcated as seven years of initial confinement and ten years of extended supervision. Wilson elected to go to trial. The jury found him guilty, as a party to a crime, of four counts of armed robbery and one

[1] The Honorable David A. Hansher presided over the trial and sentencing and entered the judgment of conviction in this matter. The Honorable Timothy M. Witkowiak presided over the postconviction proceedings and entered the order denying postconviction relief.

count of robbery.[2] For the armed robbery counts, the circuit court imposed four concurrent sentences of twenty-two years of imprisonment, each bifurcated as twelve years of initial confinement and ten years of extended supervision. For the robbery count, the circuit court imposed a concurrent, evenly bifurcated ten-year term of imprisonment.

¶3 Wilson filed a postconviction motion, asserting that his trial counsel was ineffective in various ways and that the circuit court erroneously exercised its sentencing discretion and imposed unduly harsh sentences by requiring that he serve five more years in initial confinement than must his co-defendants. The circuit court denied the motion without a hearing, and Wilson appeals.

DISCUSSION

¶4 On appeal, Wilson first asserts that the circuit court lacked jurisdiction over all of the counts against him except the original charge because the State did not move for leave to file the additional four charges. Wilson did not first present this claim to the circuit court. We normally do not address issues raised for the first time on appeal. *See* ***State v. Huebner***, 2000 WI 59, ¶10, 235 Wis. 2d 486, 611 N.W.2d 727. Here, however, Wilson challenges the circuit court's subject matter jurisdiction, an issue that cannot be waived. *See* ***State ex***

[2] The record includes a judgment of conviction and two corrected judgments of conviction. All of the judgments reflect that the jury found Wilson guilty of armed robbery as a party to a crime in each of the five counts against him, specifically, counts two, four, five, six, and seven of the amended information. The record is clear, however, that, as to count seven, the jury found Wilson guilty of robbery as a party to a crime. Upon remittitur, the circuit court shall oversee entry of a corrected judgment of conviction reflecting that Wilson is convicted in count seven of robbery as a party to a crime. *See* ***State v. Prihoda***, 2000 WI 123, ¶¶16-17, 239 Wis. 2d 244, 618 N.W.2d 857 (circuit court may correct clerical error in judgment of conviction at any time and may direct clerk of circuit court to make the correction).

rel. Skinkis v. Treffert, 90 Wis. 2d 528, 531-32, 280 N.W.2d 316 (1979). Accordingly, we address the issue now. *See* ***id.*** We reject the claim.

¶5 WISCONSIN STAT. § 971.29(1) permits the State to amend charges without judicial approval only prior to the defendant's arraignment. ***State v. Conger***, 2010 WI 56, ¶48, 325 Wis. 2d 664, 797 N.W.2d 341. Nonetheless:

> [t]he failure of the State to obtain the permission of the [circuit] court to file a post-arraignment amended information does not deprive the [circuit] court of subject matter jurisdiction because, once subject matter attaches with the filing of the criminal complaint, it continues until the final disposition of the case. Accordingly, while the failure to obtain the [circuit] court's permission to file an amended information is a procedural defect, this failure neither implicates a lack of subject matter jurisdiction, nor is it reversible error without a showing of prejudice on the part of the defendant.

State v. Webster, 196 Wis. 2d 308, 319, 538 N.W.2d 810 (Ct. App. 1995) (citation omitted). The circuit court thus did not lack subject matter jurisdiction here.

¶6 Additionally, we note the State's argument that the circuit court approved the filing of the amended complaint and information. The State directs our attention to a December 2011 hearing at which the State disclosed in open court that it planned to charge Wilson with three additional armed robberies, and the circuit court responded: "okay." Further, at a hearing two months later, the State told the circuit court that earlier in the week the State had filed an amended charging document "adding an additional four counts of armed robbery. And we're here for the initial appearance on that." The circuit court again responded "okay." The circuit court went on to determine that the amended complaint stated probable cause to believe that Wilson had committed a felony. The State argues that these proceedings demonstrate that it had leave to file amended charging documents in this case.

¶7 Wilson did not file a reply brief in this matter. We conclude that he concedes the contention that the State filed the amended charging documents with leave of the circuit court. *See* ***State v. Normington***, 2008 WI App 8, ¶44, 306 Wis. 2d 727, 744 N.W.2d 867 (appellant's failure to refute a proposition constitutes a concession). We accept the concession and conclude that the circuit court approved filing amended charging documents in this case. Accordingly, those filings do not constitute a procedural defect.

¶8 Wilson next claims that he received ineffective assistance from his trial counsel. A familiar two-prong test governs such claims. To prevail on a claim of ineffective assistance of trial counsel, a defendant must show both that trial counsel's performance was deficient and that the deficient performance prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Whether counsel's performance was deficient and whether the deficiency was prejudicial are questions of law that we review *de novo*. ***State v. Johnson***, 153 Wis. 2d 121, 128, 449 N.W.2d 845 (1990). A reviewing court need not address both prongs of the analysis if the defendant makes an insufficient showing on either one. *See* ***Strickland***, 466 U.S. at 697.

¶9 When a defendant pursues postconviction relief based on trial counsel's alleged ineffectiveness, the defendant must preserve trial counsel's testimony in a postconviction hearing. ***State v. Curtis***, 218 Wis. 2d 550, 554-55, 582 N.W.2d 409 (Ct. App. 1998). Nonetheless, a defendant is not automatically entitled to a hearing upon filing a postconviction motion that alleges ineffective assistance of counsel. A circuit court must grant a hearing only if the motion contains allegations of material fact that, if true, would entitle the defendant to relief. ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. The motion should "allege the five 'w's' and one 'h'; that is, who, what, where, when,

why, and how." *See* ***id.***, ¶23. Whether the motion contains sufficient allegations of material fact to earn a hearing presents an additional question of law for our independent review. ***Id.***, ¶9. If, however, the petitioner does not allege sufficient material facts that, if true, entitle him or her to relief, if the allegations are merely conclusory, or if the record conclusively shows that the petitioner is not entitled to relief, the circuit court has discretion to deny a postconviction motion without a hearing. *See* ***id.*** We review a circuit court's discretionary decisions with deference. ***Id.***

¶10 Wilson contends that his trial counsel was ineffective for failing to object when the State filed amended charging documents. He shows no deficiency. Trial counsel had no basis for an objection because, as we have already determined, the circuit court approved the filings. *See* ***Webster***, 196 Wis. 2d at 319. The circuit court correctly rejected this claim without a hearing. *See* ***Allen***, 274 Wis. 2d 568, ¶9.

¶11 Wilson next contends that his trial counsel was ineffective for failing to seek suppression of his inculpatory custodial statement to police on the ground that he gave the statement involuntarily. A defendant's involuntary statement is inadmissible at the defendant's trial. *See* ***State v. Samuel***, 2002 WI 34, ¶19, 252 Wis. 2d 26, 643 N.W.2d 423.

¶12 Preliminarily, we observe that Wilson does not dispute receiving the warnings required by ***Miranda v. Arizona***, 384 U.S. 436, 478-79 (1966).[3]

[3] Before questioning a suspect in custody, officers must inform the person of, *inter alia*, the right to remain silent, the fact that any statements made may be used at trial, the right to have an attorney present during questioning, and the right to have an attorney appointed if the person cannot afford one. *See* ***Miranda v. Arizona***, 384 U.S. 436, 478-79 (1966).

"'[C]ases in which a defendant can make a colorable argument that a self-incriminating statement was 'compelled' despite the fact that the law enforcement authorities adhered to the dictates of ***Miranda*** are rare.'" ***State v. Ward***, 2009 WI 60, ¶61, 318 Wis. 2d 301, 767 N.W.2d 236 (citations omitted). Thus, to demonstrate that trial counsel was ineffective here, Wilson must demonstrate that his case is among a rare few. *See* ***State v. Berggren***, 2009 WI App 82, ¶21, 320 Wis. 2d 209, 769 N.W.2d 110 ("an attorney is not ineffective for not making a motion that would have been denied").

¶13 When we assess whether a defendant voluntarily offered a custodial statement, "'the essential inquiry is whether the confession was procured via coercive means or whether it was the product of improper pressures exercised by the police.'" ***Id.***, ¶30 (citation omitted). The process involves an examination of the totality of the circumstances, "balancing the characteristics of the suspect against the type of police tactics that were employed to obtain the suspect's statement." ***Ward***, 318 Wis. 2d 301, ¶19. If, however, "there is no evidence of either physical or psychological coercive tactics by [law enforcement officers], the balancing test is unnecessary." ***Berggren***, 320 Wis. 2d 209, ¶30. This is so because a defendant claiming that his or her statement was involuntary must show some "coercive or improper police conduct" in securing the statement. *See* ***State v. Hoppe***, 2003 WI 43, ¶46, 261 Wis. 2d 294, 661 N.W.2d 407.

¶14 Wilson asserts that his trial counsel had "meritorious grounds" to suppress his statement because he was seventeen years old when he was questioned, he has a learning disability, he reads at a sixth grade level, he has attention deficit disorder, and he had only one prior contact with law enforcement before his arrest in this case. Although these characteristics arguably might, under some circumstances, render a defendant vulnerable to police misconduct, Wilson

did not allege any police misconduct or show that the police used any coercive tactics in obtaining his statement. He therefore fails to demonstrate a basis for concluding that he gave his statement involuntarily. Accordingly, his trial counsel did not perform deficiently by foregoing a motion to suppress his inculpatory statement. *See* ***Berggren***, 320 Wis. 2d 209, ¶21.

¶15 Wilson next contends that his trial counsel was ineffective for failing to seek severance of the five counts against him. Pursuant to WIS. STAT. § 971.12(3), a court may sever joined counts and order separate trials of those counts "[i]f it appears that a defendant ... is prejudiced by a joinder of crimes." Wilson contends that two of the robbery victims, Robin Moore and Thomas Cruz, were unable to identify Wilson and that his trial counsel therefore performed deficiently by failing to seek severance, because "if defense counsel had filed a motion requesting ... separate trials for the five counts, [counsel] could have argued that it was too prejudicial for the same jury to consider counts in which the defendant had been positively identified and those in which he had not." In support of his allegation that the claimed deficiency prejudiced the defense, Wilson asserts that, if the circuit court had granted the severance motion and ordered separate trials, the jury would have had "a serious question" about whether he robbed Moore, and the evidence would have been insufficient to convict him of robbing Cruz.

¶16 Wilson's argument is undeveloped, and, on its face, illogical. Wilson does not claim that the evidence presented at the joint trial was insufficient to convict him of crimes against Cruz and Moore. He does not claim that the jury improperly considered any of the evidence presented at the joint trial in order to convict him of robbing Cruz and Moore. He does not claim that any of the evidence offered at the joint trial would have been inadmissible in separate trials.

Cf. WIS. STAT. § 904.04(2) (providing that evidence of other crimes, wrongs, or acts is inadmissible to prove a propensity to commit crimes but is not excluded for other purposes, such as "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident"). He thus wholly fails to explain why the evidence that was properly before the jury and sufficient to support five convictions after a joint trial would not have sufficed to support five convictions after separate trials.

¶17 Moreover, as the State points out, testimony from Cruz and Moore identifying Wilson was simply not necessary to prove that he robbed those victims. Wilson's inculpatory statement to police included information about the Cruz robbery, and police officers testified about the statement and about the subsequent investigation that corroborated Wilson's information. If the circuit court had severed the charge involving Cruz from the other counts, Wilson's statement and the police investigation would have been presented in support of the single count. As to the crime against Moore, she was unable to identify Wilson as one of the men who robbed her and her companion, Tiffany Smith, but Smith testified and identified Wilson as one of the robbers. The State could have elicited the same identification testimony from Smith at a separate trial involving just the crime against Moore. Accordingly, Wilson fails to show that severing the counts would have resulted in insufficient evidence to support his convictions of crimes against Cruz and Moore. Wilson thus fails to identify any prejudice flowing from his trial counsel's decision not to move for severance. He is not entitled to a hearing to pursue the issue further. *See* ***Allen***, 274 Wis. 2d 568, ¶9.

¶18 Wilson next claims that his trial counsel was ineffective for not moving to suppress identification evidence offered by robbery victim Teanis Tillmon. Tillmon described for the jury how he was robbed at gunpoint on

March 13, 2011, and he identified Wilson at trial as one of the robbers. During cross examination, Tillmon said that he saw Wilson once after the robbery, "on my [sic] last court date." Wilson contends that this testimony should have led his trial counsel to seek suppression of Tillmon's identification testimony.

¶19 Wilson does not suggest that Tillmon's identification testimony amounted to a constitutional violation. *Cf.* ***State v. Benton***, 2001 WI App 81, ¶5, 243 Wis. 2d 54, 625 N.W.2d 923 (stating that "[a] criminal defendant is denied due process when identification evidence admitted at trial stems from a pretrial police procedure that is 'so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification'") (citations and one set of quotation marks omitted). Rather, Wilson contends that his trial counsel should have argued, pursuant to WIS. STAT. § 904.03, that the identification testimony was more prejudicial than probative because Tillmon previously viewed Wilson "singly and in custody at a prior court proceeding in this matter." Wilson asserts that if his trial counsel had made this argument, the circuit court "would have been required to suppress Tillmon's in-court identification of the defendant." Wilson cites no case in support of this optimistic conclusion. This is not surprising, because the supreme court emphasizes:

> in most instances, questions as to the reliability of constitutionally admissible eyewitness identification evidence will remain for the jury to answer. Generally we are "content to rely upon the good sense and judgment of American juries, for evidence with some element of untrustworthiness is customary grist for the jury mill." Juries can often "measure intelligently the weight of identification testimony that has some questionable feature."

State v. Hibl, 2006 WI 52, ¶53, 290 Wis. 2d 595, 714 N.W.2d 194 (citations omitted).

¶20 To be sure, the ***Hibl*** court determined that circuit courts have a "limited gate-keeping function" to ensure that particularly unreliable but constitutionally admissible eye-witness testimony is not put before the jury. *See* ***id.***, ¶¶52-53. Wilson, however, offers nothing to demonstrate that the circumstances under which Tillmon saw Wilson in the courthouse some time before trial renders Tillmon's later identification at trial so unreliable as to warrant excluding that identification as more prejudicial than probative. Indeed, Wilson has never explained the circumstances under which Tillmon saw Wilson in the courthouse. Thus, Wilson fails to show precisely: (1) when Tillmon made the courthouse observation; (2) where he made the observation; (3) how he made the observation; (4) why he had the opportunity to make the observation; and (5) what, exactly, he saw. *See* ***Allen***, 274 Wis. 2d 568, ¶23. Wilson thus failed to shoulder his burden to show that Tillmon's identification in this case was too prejudicial for evaluation by the jury and that his trial counsel performed deficiently by failing to raise the claim during trial. The circuit court therefore properly rejected Wilson's claim without a hearing. *See* ***id.***, ¶9.

¶21 We turn to Wilson's claim for sentence modification. We presume that a sentencing court acted reasonably, and we adhere to a strong policy against interference with the exercise of sentencing discretion. *See* ***State v. Gallion***, 2004 WI 42, ¶¶17-18, 270 Wis. 2d 535, 678 N.W.2d 197. When imposing sentence, the circuit court must consider three primary factors, namely, "the gravity of the offense, the character of the defendant, and the need to protect the public." ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. The circuit court may additionally consider a wide range of other factors relating to the defendant, the crime and the community. ***Id.*** The circuit court must also "specify the objectives of the sentence on the record. These objectives include, but are not

limited to, the protection of the community, punishment of the defendant, rehabilitation of the defendant, and deterrence to others." ***Gallion***, 270 Wis. 2d 535, ¶40.

¶22 The circuit court here identified rehabilitation and protection of the community as primary sentencing goals, and the circuit court determined that any sentence shorter than twelve years of initial confinement and ten years of extended supervision would unduly depreciate the gravity of the crimes that Wilson committed. The circuit court considered a host of relevant factors in fashioning the sentence. The circuit court reminded Wilson that he committed violent crimes with traumatizing effects on the victims, and the circuit court considered the need to protect the public in light of his impulsive behavior and poor decision-making skills. The circuit court discussed mitigating considerations, including Wilson's youth, his history of emotional problems, his learning disability, and his limited criminal history. The circuit court noted with concern, however, that the assessment tools used in preparing the presentence investigation report revealed that Wilson's risk for violent recidivism was high, and the circuit court also took into account his tendency to "associate with a negative peer group."

¶23 Wilson complains because his co-defendants received sentences more lenient than his, and he asserts that he received an "extra five years in prison for not accepting a plea bargain." The circuit court explained at sentencing, however, that it would not punish Wilson for going to trial, but that Wilson could not receive credit for taking responsibility by entering a guilty plea. This represents an appropriate exercise of discretion. A circuit court properly takes into account the extent to which the defendant displays "remorse, repentance and cooperativeness." *See* ***Ziegler***, 289 Wis. 2d 594, ¶23. Relatedly, affording leniency to a person who pleads guilty "does not necessarily result in punishment

of a defendant who elects to stand trial. The basis of this line of reasoning is that recognition of guilt is the first step toward rehabilitation." *See* ***Drinkwater v. State***, 73 Wis. 2d 674, 681, 245 N.W.2d 664 (1976).

¶24 Moreover, Wilson and his co-defendants were simply not similarly situated at sentencing. Each of Wilson's four armed robbery convictions carried a maximum of forty years of imprisonment. *See* WIS. STAT. §§ 943.32(2), 939.50(3)(c). His robbery conviction exposed him to an additional fifteen-year prison term. *See* WIS. STAT. §§ 943.32(1), 939.50(3)(e). Wilson's co-defendants, however, each stood convicted of only a single count of armed robbery. Wilson thus faced more than four times the number of years of imprisonment faced by his co-defendants. We cannot conclude that the circuit court sentenced Wilson differently from his co-defendants merely because he went to trial.

¶25 We also cannot conclude that Wilsons's sentences were unduly harsh. A sentence is unduly harsh "'only where the sentence is so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances.'" *See* ***State v. Grindemann***, 2002 WI App 106, ¶31, 255 Wis. 2d 632, 648 N.W.2d 507 (citation omitted). A sentence well within the maximum, however, is presumptively not unduly harsh. *See* ***id.*** Wilson faced 175 years of imprisonment, including 110 years of initial confinement, as a result of his five convictions. *See* WIS. STAT. §§ 939.50(3)(c) & (e), 973.01(2)(c) 3. & 5. The sentence he received is only a small fraction of the maximum term of imprisonment that he faced. We are not persuaded that twelve years in prison and ten years of extended supervision for committing five serious felonies is shocking to the public conscience or offends the sensibilities of reasonable people.

By the Court.—Judgment and order affirmed.

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