COURT OF APPEALS
DECISION
DATED AND FILED

September 22, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-0635-CR-NM

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

TRAVIS A. CURTIS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: DIANE S. SYKES, Judge. *Affirmed.*

Before Wedemeyer, P.J., Schudson and Curley, JJ.

PER CURIAM. Travis Curtis appeals his three convictions for armed burglary as a party to the crime, armed robbery as a party to the crime, and first-degree sexual assault, after a trial by jury. The same jury acquitted Curtis of two additional counts of first-degree sexual assault arising from the same incident. The trial court sentenced Curtis to three consecutive forty-year prison terms, the

maximum for each crime, for a total sentence of 120 years. The prosecution first sought to try Curtis separately, then joined his prosecution with a coassailant's, and later agreed with the coassailant to again sever the two prosecutions. Curtis's counsel has filed a no merit report under ***Anders v. California***, 386 U.S. 738 (1967). Curtis received a copy of the report and has filed a response. Appellate counsel raises several arguments: (1) the trial court misinstructed the jury; (2) trial counsel was ineffective in failing to pursue an alibi defense; (3) the trial court should have declared a mistrial when jurors talked to each other during the trial; and (4) the verdict and sentence constitute a miscarriage of justice. We conclude that the no merit report properly analyzes these issues, and we will not discuss them further, except to the extent Curtis addresses them in his pro se response.

Curtis raises several arguments in his pro se response: (1) trial counsel gave him ineffective representation by failing to move to suppress an identification, to seek a speedy trial, and to call Curtis's mother as an alibi witness; (2) the trial court misinstructed the jury on party to a crime and wrongly denied Curtis's request for a falsus in uno instruction; (3) the conversing jurors were guilty of misconduct requiring a new trial; (4) the trial court should not have severed Curtis's trial from his coassailant's and should have stood by its original decision to hold a joint trial; (5) the armed-robbery and armed-burglary charges were multiplicitous offenses; (6) the prosecution did not prove Curtis's guilt beyond a reasonable doubt on the first-degree sexual assault charge, in light of conflicts in the victims' testimony and the absence of corroborating physical evidence such as semen and pubic hair; and (7) the 120-year consecutive sentence constituted cruel and unusual punishment under the Eighth Amendment of the United States Constitution. We conclude that none of these issues has arguable merit. We therefore adopt the no merit report, affirm Curtis' convictions, and

discharge Curtis' appellate counsel of his obligation to represent Curtis further in this appeal.

After 2:00 a.m. on April 27, 1995, Curtis and two coassailants forced their way into the home of two of the victims. One male and three females were home at the time. The victims had been socializing and smoking cocaine. The assailants had armed themselves with a knife, screw driver, and pipe wrench, and one then additionally armed himself with an ice pick he found in the home. The three assailants kicked the male, stole his wallet, and beat him bloody with the pipe wrench until he feigned unconsciousness; he needed forty-eight stitches to close his wounds. The three assailants then forced the three females to undress and proceeded to gang-rape them, sometimes raping two victims at one time. Over the course of an hour, they forced the females into multiple sex acts, including penis-to-mouth, penis-to-vagina, and penis-to-anus sex acts, as well as three-way sex acts. These events took place while the home was in a dimly lit state and while two of the assailants had disguised themselves. The police later recovered the male victim's wallet from Curtis's car and a droplet of blood from Curtis's tennis shoe that DNA evidence matched to the male victim's. Two of the female victims viewed and identified Curtis as a perpetrator, in the hours after the crimes. Curtis lived next door to the scene of the crimes.

We initially reject Curtis' three claims of ineffective trial counsel. Curtis must show both deficient performance by trial counsel and resulting prejudice. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). First, Curtis cites counsel's failure to move to suppress the identification. He claims no victim testified to his prominent left-arm tattoos; he evidently thinks this shows the identification's inherent incredibility. Courts seldom suppress evidence on such grounds. *See* ***State v. Outlaw***, 108 Wis.2d 112, 137-38, 321 N.W.2d 145, 158-59

(1982). Here, Curtis gives no information about his tattoos. Regardless, the rooms were dimly lit, and the victims could easily overlook tattoos. We see nothing meriting suppression and thus no ***Strickland*** prejudice. Second, Curtis cites his counsel's failure to seek a speedy trial. The case did not come to trial for nine months mainly because of FBI lab-testing delays; changes in the prosecution's joinder-severance requests had a minor role. In assessing speedy trial delays, factors can include the length and reason for the delay and the prejudice to the accused. *See* ***Barker v. Wingo***, 407 U.S. 514, 530 (1972). FBI lab-testing delays gave good cause for the adjournment, and nine months was not excessive under the circumstances. Curtis was already detained under a probation revocation, and the delay did no evident harm to his defense. We thus see no ***Strickland*** prejudice. Third, Curtis cites counsel's failure to call Curtis's mother as an alibi witness. We again see no ***Strickland*** prejudice. The mother gave inexact, evasive, and unpersuasive testimony in a coassailant's trial, and, in all likelihood, it would not have helped Curtis's defense had she testified in his behalf.

We next reject Curtis's two claims on the jury instructions. First, Curtis cites the trial court's failure to change the party-to-a-crime instructions to clarify that it covered only the armed-robbery and armed-burglary charges. Curtis fears that the jury may have found him guilty of sexual assault as a party to the crime. The trial court had considerable discretion on jury instructions, *see* ***State v. Lenarchick***, 74 Wis.2d 425, 455, 247 N.W.2d 80, 96 (1976), and the trial court correctly exercised its discretion. The evidence made plain that Curtis himself had committed at least one sexual assault, and we see little risk that the party-to-a-crime instructions confused any juror faced with the proof presented at trial. In fact, there was evidence of multiple sexual assaults by Curtis. Second, Curtis cites

the trial court's refusal to give the falsus in uno instruction as to coassailant and witness Richard Jacobs. Courts rarely give this disfavored instruction, *see* ***State v. Williamson***, 84 Wis.2d 370, 395, 267 N.W.2d 337, 349 (1978), and we see no need for it here. Jacobs turned State's evidence, and the trial brought out his obvious bias and self-interest. Moreover, Curtis's counsel impeached Jacobs on cross-examination in several ways, including his criminal record and his own role in the incident. We are satisfied that the jury fully appreciated Jacobs's self-interest in his testimony, what he stood to gain, and the other gaps in his credibility; the jury knew this both from the evidence itself and the closing arguments of counsel. Under these circumstances, the jury needed no special falsus in uno instruction to help judge Jacobs's credibility.

We next reject Curtis's two claims on procedural matters. First, he characterizes some juror misconduct as a miscarriage of justice. He points out that one or more jurors spoke to each other during the trial. The trial court admonished the jury for this misconduct, and this conduct merits a new trial only if it prejudiced Curtis's rights. *See* ***Castaneda v. Pederson***, 185 Wis.2d 199, 209, 518 N.W.2d 246, 250 (1994). Here, we are satisfied that the trial court's instructions cured any problem of the jurors' misconduct, and we therefore see no basis for a new trial. Moreover, Curtis personally waived his right to seek a mistrial in open court and assured the court that he wanted the trial to proceed. Second, Curtis claims joinder-severance defects. The prosecution first wanted to try Curtis separately. It later joined his case with a coassailant. After that, however, the prosecution reversed directions, joining the coassailant's motion to hold separate trials. We see no prejudice to Curtis. Curtis received a fair trial before an impartial jury. He was able to offer the evidence and arguments he wished. In fact, the final severance likely aided Curtis's defense. It may have helped keep out

of Curtis's trial some damaging evidence about the coassailant that could have indirectly influenced the jury's ruling on Curtis's guilt in a joint trial. In short, we see no basis for a new trial in Curtis's joinder-severance concerns.

We next reject Curtis's argument that the armed-robbery and armed-burglary charges were improper. Curtis is evidently arguing that the charges were multiplicitous. Courts apply a two-pronged test to decide this question. *See* ***State v. Grayson***, 172 Wis.2d 156, 159, 493 N.W.2d 23, 25 (1992). First, the two charges must be identical in both law and fact. ***Id.*** Second, the charges are multiplicitous if the legislature intended them to be brought in a single count, not two counts. ***Id.*** Curtis's charges did not meet the first test. The armed-burglary charge concerned a battery of a person. *See* § 943.10(2)(d), STATS. The armed-robbery charge concerned the taking of property. *See* § 943.32(2)(b), STATS. During the burglary, Curtis helped batter the male victim and take his wallet; he needed forty-eight stitches to close his wounds. These were two qualitatively different offenses, both in terms of the facts and the law. One concerned harm to property, the other to the person. Each crime required different proof, each could have been committed without the other, and each punished separate acts by Curtis and his coassailants. The criminal law has long treated such wrongs as separate crimes, and we see no indication that the legislature would have intended the prosecution to charge Curtis with only one offense under the facts of this case. As a result, the prosecution could charge Curtis separately, and the jury could convict him of both as a party to the crime, without running afoul of the prohibition against multiplicitous charges.

We next reject Curtis's argument that the evidence did not support his sexual-assault conviction for penis-to-vagina intercourse. The prosecution had to prove his guilt beyond a reasonable doubt. *See* ***State v. Poellinger***, 153 Wis.2d

493, 507, 451 N.W.2d 752, 757-58 (1990). The jury, not appellate courts, decides the credibility of witnesses and the weight of their testimony. *See* ***id.*** at 506, 451 N.W.2d at 757. The jury also resolves any conflicts in the evidence. *See* ***State v. Daniels***, 117 Wis.2d 9, 18, 343 N.W.2d 411, 416 (Ct. App. 1983). If the jury could have drawn more than one reasonable inference, reviewing courts must accept the inference that supports the verdict. *See* ***State v. Alles***, 106 Wis.2d 368, 377, 316 N.W.2d 378, 382 (1982). We consider the evidence and all its reasonable inferences in the light most favorable to the verdict, *see* ***Jackson v. Virginia***, 443 U.S. 307, 319 (1979), and we search the record for such inferences. *See* ***State v. Stark***, 162 Wis.2d 537, 549, 470 N.W.2d 317, 322 (Ct. App. 1991). The test is not whether we are convinced of guilt beyond a reasonable doubt, but whether the jury could be thus convinced by the evidence it had right to believe and accept as true. *See* ***Bautista v. State***, 53 Wis.2d 218, 223, 191 N.W.2d 725, 727-28 (1971). We will overturn a jury verdict only if the evidence, when viewed most favorably to the conviction, was inherently or patently incredible, or so lacking in probative value that no jury could have found the defendant guilty beyond a reasonable doubt. *See* ***State v. Karow***, 154 Wis.2d 375, 383, 453 N.W.2d 181, 184 (Ct. App. 1990).

Here, Curtis cites the lack of physical evidence such as semen and pubic hair. He also claims that one victim gave inconsistent testimony as to whether Curtis forced both penis-to-mouth and penis-to-vagina intercourse, rather than just penis-to-mouth intercourse. At the preliminary hearing, she testified to only penis-to-mouth intercourse. At one point during the trial, she testified to only penis-to-mouth intercourse. She later testified, however, that Curtis forced both penis-to-mouth and penis-to-vagina intercourse. The jury could reasonably discount these variances and conclude that victims in her situation could become

confused; near the end of her testimony, this victim confirmed without qualification that Curtis forced penis-to-vagina intercourse, and a rational jury could accept this testimony. The jury could also reasonably discount conflicting testimony between two of the victims on who was in what room when particular sex acts took place. The jury could ascribe such variances to the rooms' dimly lit state, the multiple assaults, and the overall confusion that night. The jury could likewise convict Curtis on the strength of the victims' testimonies, the coassailant's testimony, and the blood DNA evidence, without other physical evidence like semen and pubic hair; a prosecution witness testified that the lack of such evidence was not uncommon. The trial court at sentencing characterized the evidence of guilt as overwhelming, and we see nothing in the victims' testimonies that creates a reasonable doubt. In short, we are satisfied that a rational jury could reasonably find Curtis guilty beyond a reasonable doubt of first-degree sexual assault comprised of penis-to-vagina intercourse.

Last, we reject Curtis' claim that his 120-year sentence was an erroneous exercise of sentencing discretion and cruel and unusual punishment under the Eighth Amendment. The trial court has a wide range of discretion in sentencing, dependent on the gravity of the offense, the character of the defendant, the public's need for protection, and the interests of deterrence. *See* ***State v. Sarabia***, 118 Wis.2d 655, 673-74, 348 N.W.2d 527, 537 (1984). Sentencing courts have discretion to determine the weight to give each of the factors and may base their sentences on any of the factors after all have been reviewed. *See* ***Ocanas v. State***, 70 Wis.2d 179, 185, 233 N.W.2d 457, 461 (1975); ***Anderson v. State***, 76 Wis.2d 361, 366-67, 251 N.W.2d 768, 771 (1977). Other factors include the defendant's age, character, personality, social traits, remorse, repentance, cooperativeness, educational level, employment background, degree of culpability,

demeanor at trial, need for close rehabilitative control, the rights of the public, and the vicious or aggravated nature of his crime. *See* ***State v. Killory***, 73 Wis.2d 400, 408, 243 N.W.2d 475, 481 (1976). The Eighth Amendment bars disproportionate sentences; but these are constitutionally offensive only if they are so excessive, unusual, and disproportionate to the crime that they shock public sentiment and violate the judgment of reasonable people. *See* ***State v. Pratt***, 36 Wis.2d 312, 322, 153 N.W.2d 18, 22 (1967).

Here, Curtis considers his 120-year consecutive sentence inhumane. He states that will not be eligible for parole until age eighty-two, and he believes that three concurrent sentences would have served the interests of justice under the circumstances. We see no erroneous exercise of discretion or Eighth Amendment violation, given the severity of Curtis's crimes and the demonstrated danger that these crimes show he poses to the public. Curtis and his coassailants committed a series of vicious and debased crimes that invaded the safety of the home. They brutalized and dehumanized the victims, leaving them scarred for life. Curtis himself, though denying complicity, characterized the crimes as despicable and unspeakable. The victims suffered physical injuries and long-term psychological damage, and the crimes showed a high degree of culpability by Curtis and his coassailants. Under these circumstances, the trial court had discretion to render a sentence that both furnished substantial punishment and safeguarded the public from the manifest danger Curtis posed. In the discharge of this discretion, the trial court made a well-considered set of sentencing findings that addressed the relevant sentencing factors and that gave proper weight to the severity of the crimes. We are satisfied that the trial court issued sentences commensurate with Curtis' culpability, the severity of his crimes, the ongoing danger he posed to the public, and the need to deter Curtis and like-minded wrongdoers from such crimes. In

short, we see nothing in Curtis's 120-year consecutive sentence that exceeds permissible trial court sentencing discretion or shocks public sentiment under the Eighth Amendment.

By the Court.—Judgment affirmed.

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