COURT OF APPEALS
DECISION
DATED AND FILED

April 8, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-0858-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

HARRISON FRANKLIN,

DEFENDANT-APPELLANT.

APPEAL from judgments of the circuit court for Kenosha County: BRUCE E. SCHROEDER, Judge. *Affirmed.*

Before Snyder, P.J., Brown and Nettesheim, JJ.

PER CURIAM. Harrison Franklin has appealed from judgments convicting him after a jury trial of one count of armed robbery, two counts of first-degree recklessly endangering safety while armed with a dangerous weapon, and one count of bail jumping, all as a habitual offender. He was sentenced to consecutive prison terms of fifty years for the armed robbery, three years for the

bail jumping, and sixteen years each for the endangering safety charges. The latter sentences were stayed and he was placed on a consecutive term of probation for sixteen years.

Franklin contends on appeal that the trial court judge erred in refusing to recuse himself at sentencing and in refusing to instruct the jury on the lesser-included offense of robbery. We reject his arguments and affirm the judgments.

Due process requires a neutral and detached judge, and if a judge evidences a lack of impartiality, the judge cannot sit in judgment. *See* ***State v. Rochelt***, 165 Wis.2d 373, 378, 477 N.W.2d 659, 661 (Ct. App. 1991). To determine whether a defendant's due process right to an impartial decisionmaker has been denied, a two-part test applies. *See* ***id.*** Reviewing courts must apply a subjective test based on the judge's own determination as to his or her impartiality and an objective test based on whether impartiality can reasonably be questioned. *See* ***id.***

Franklin moved the trial court judge for recusal when, after trial but before sentencing, his counsel discovered a newspaper article discussing a memorandum written by the trial judge in another case. The memorandum had been written before the trial in this case, and it set forth the trial court's reasons for denying a misdemeanor defendant's motion for an order seeking release on bail pending appeal without the posting of cash bail. In setting forth its reasons for denying the motion, the trial court discussed generally its reasons for believing that indigent misdemeanants should not automatically be entitled to release without bail pending appeal. In the context of that discussion, it noted that this case was pending before it and set forth Franklin's criminal history, which

indicated that Franklin committed the current offenses while released on bail pending appeal of a misdemeanor conviction.

In denying Franklin's motion for recusal, the trial court judge pointed out that he had declined to be interviewed by the newspaper reporter who had discussed his memorandum in the article on misdemeanor bonds. In discussing his reasons for denying the motion, he also indicated that he was not biased against Franklin, thus satisfying the subjective test for recusal. *See* ***id.*** at 379, 477 N.W.2d at 661.

The objective test of whether the trial court's impartiality could reasonably be questioned presents a question of law for our de novo review. *See* ***id.*** After reviewing the memorandum, we conclude that it gives rise to no reasonable question regarding the trial court's impartiality. The references to Franklin's case in the memorandum were accurate and factual in nature, referring to Franklin's criminal history and to the "alleged" stabbing of two men during a robbery in this case. The memorandum also set forth the length of time that Franklin was on release pending and following his appeal in his misdemeanor case. There were no editorial comments concerning Franklin's pending case or any remarks like those in ***Rochelt*** which gave the appearance that the trial court was predisposed in favor of the State and its witnesses. *Cf.* ***id.*** at 379-80, 477 N.W.2d at 662.

We further note that nothing in Franklin's brief on appeal disputes the accuracy of any of the facts set forth in the trial court's memorandum. Even at trial, Franklin did not dispute that he took money out of the cash register at a liquor store and stabbed two men as he tried to flee. His defense at trial related to the degree and nature of the offense, not to the basic facts.

Because Franklin points to nothing else in the record of the trial or sentencing which suggests that the trial court lacked impartiality, we conclude that he has failed to demonstrate that recusal was warranted under the objective portion of the recusal test. The motion for disqualification was therefore properly denied by the trial court.[1]

Franklin's final argument is that the trial court should have granted his request for a lesser-included offense instruction on robbery by use of force. A defendant is entitled to a lesser-included offense instruction only when there exists reasonable grounds in the evidence both for acquittal of the greater offense and conviction on the lesser offense. *See* ***State v. Foster***, 191 Wis.2d 14, 23, 528 N.W.2d 22, 26 (Ct. App. 1995). A lesser-included instruction should be submitted only if there is a reasonable doubt as to some particular element included in the greater offense. *See* ***id.*** A challenge to the trial court's refusal to submit a lesser-included instruction presents a question of law which we review de novo. *See* ***id.***

The undisputed evidence in this case indicated that Franklin entered a liquor store and attempted to grab ten and twenty dollar bills from an open cash register drawer. He began to flee with twenty dollar bills in hand, meeting resistance first from the cashier and seconds later from customers and employees of an adjoining tavern. He then pulled a knife and stabbed two men before being subdued.

[1] In his brief, Franklin also argues that the trial court's conduct violated SCR 60.04 (West 1996). However, this issue is irrelevant to this case. To be entitled to relief from a criminal conviction, a defendant must establish a violation under the test set forth in ***State v. Rochelt***, 165 Wis.2d 373, 477 N.W.2d 659 (Ct. App. 1991). Franklin has not done so here.

Franklin contends that the evidence supported an instruction on robbery as a lesser-included offense of armed robbery because he did not use or threaten to use his knife while taking the money from the cash register. However, asportation, or the carrying away of the stolen property from the area where it was intended to be, is as much a part of the crime of armed robbery as is the actual taking of the property. *See* ***State v. Johnson***, 207 Wis.2d 239, 242, 558 N.W.2d 375, 376 (1997). A defendant is guilty of armed robbery when he or she uses or threatens to use a weapon to assist in the asportation of the stolen property. *See* ***State v. Grady***, 93 Wis.2d 1, 5-7, 286 N.W.2d 607, 608-09 (Ct. App. 1979). Thus, there were no reasonable grounds in the evidence for acquittal of the armed robbery charge and conviction of the lesser charge of robbery. The trial court therefore properly refused to give a lesser-included instruction.

By the Court.—Judgments affirmed.

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