COURT OF APPEALS
DECISION
DATED AND FILED

June 23, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-1827-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

MYRON A. GLADNEY,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: MAXINE A. WHITE, Judge. *Affirmed.*

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

PER CURIAM. Myron A. Gladney appeals from a judgment entered after a jury found him guilty of first-degree intentional homicide, contrary to § 940.01(1), STATS. He also appeals from an order denying his motion for post-conviction relief. Gladney claims that: (1) the trial court erred in refusing to instruct the jury on the lesser-included offenses of first-degree reckless homicide

and second-degree reckless homicide; (2) the trial court erred in giving the jury the *falsus in uno* instruction; and (3) the trial court erroneously exercised discretion in imposing an allegedly excessive sentence. We affirm.

I. BACKGROUND

On the morning of August 21, 1996, Christopher Wilson was talking with some friends on the front porch of a house located at 4250 North 26th Street, in Milwaukee. Gladney approached Wilson and asked him about some money. Wilson said that he did not have any money for Gladney, and Gladney then became aggressive. Gladney testified that he pulled out a gun, and the two began to struggle. Gladney first shot himself in the left wrist, but then shot Wilson. Wilson sustained gunshot wounds to the right chest, right back, middle lower back, right side, right arm, and back of the neck. One of the bullets entered Wilson's lower back and exited from his chest, after passing through his kidney, aorta and liver; the entrance wound was a contact wound. Wilson bled to death as a result of the multiple gunshot wounds.

II. DISCUSSION

Gladney argues that the trial court erred in failing to instruct the jury on the lesser-included offenses of first-degree reckless homicide and second-degree reckless homicide. He argues that there were reasonable grounds in the evidence to allow the jury to acquit him of first-degree intentional homicide and to convict him instead of first-degree or second-degree reckless homicide.

Whether a lesser-included offense should be submitted to the jury for consideration is a legal issue that we determine independently of the trial court. *See* ***State v. Kramar***, 149 Wis.2d 767, 791, 440 N.W.2d 317, 327 (1989). A jury

should be instructed on the lesser-included offense "*only* when there are reasonable grounds in the evidence both for acquittal on the greater charge and conviction on the lesser offense." ***Id.***, 149 Wis.2d at 792, 440 N.W.2d at 327. On review of the denial of a requested instruction, the evidence is to be viewed in the light most favorable to the defendant. *See* ***State v. Stoehr***, 134 Wis.2d 66, 87, 396 N.W.2d 177, 185 (1986).

A defendant who "causes the death of another human being with intent to kill that person or another" is guilty of first-degree intentional homicide. *See* § 940.01(1), STATS. A defendant who "recklessly causes the death of another human being under circumstances which show utter disregard for human life" is guilty of first-degree reckless homicide. *See* § 940.02(1), STATS. A defendant who "recklessly causes the death of another human being" is guilty of second-degree reckless homicide. *See* § 940.06, STATS. Thus, the jury could not have acquitted Gladney of the greater offense and convicted him of one of the lesser offenses unless there were reasonable grounds in the evidence to conclude that Gladney did not have the intent to kill, but acted recklessly in shooting and killing Wilson.

We conclude that there were not reasonable grounds in the evidence for the jury to find that Gladney did not have the intent to kill Wilson, and thus the trial court properly refused to give the instructions on the lesser-included offenses of first-degree or second-degree reckless homicide. The evidence discloses that Gladney shot Wilson several times at close range, hitting Wilson's vital organs, and causing him to bleed to death. Gladney testified at trial that he intended to shoot Wilson with each of the several shots he fired, but he claimed that he was acting in self-defense. Based upon this evidence that Gladney intentionally shot Wilson multiple times in vital areas, the jury could not reasonably conclude that

Gladney did not have the intent to kill Wilson. *See* ***Kramar***, 149 Wis.2d at 793, 440 N.W.2d at 328 ("[W]hen one intentionally points a loaded gun at a vital part of the body of another and discharges it, it cannot be said that he did not intend the natural, usual, and ordinary consequences.").

Gladney next argues that the trial court erred in giving the jury the *falsus in uno* instruction. The trial court instructed the jury as follows: "If you become satisfied from the evidence that any witness has willfully testified false[ly] as to any material fact, you may, in your discretion, disregard all the testimony of any such witness which is not supported by other credible evidence in the case." Gladney argues that no witness willfully testified falsely, and that the instruction was thus not warranted.

A trial court had broad discretion in determining which instructions to give the jury. *See* ***State v. Turner***, 114 Wis.2d 544, 551, 339 N.W.2d 134, 138 (Ct. App. 1983). A trial court's discretionary decision will be sustained if it is "the product of a rational mental process by which the facts of record and law relied upon are stated and are considered together for the purpose of achieving a reasoned and reasonable determination." ***Hartung v. Hartung***, 102 Wis.2d 58, 66, 306 N.W.2d 16, 20 (1981). The trial court has properly exercised discretion if the instructions given adequately cover the law applicable to the facts. *See* ***State v. Higginbotham***, 110 Wis.2d 393, 403–404, 329 N.W.2d 250, 255 (Ct. App. 1982). When a witness willfully and intentionally gives false testimony on an issue material to the case, the *falsus in uno* instruction is appropriate. *See* ***State v. Robinson***, 145 Wis.2d 273, 281–282, 426 N.W.2d 606, 610–611 (Ct. App. 1988).

The trial court gave the *falsus in uno* instruction after concluding that a defense witness had willfully and intentionally falsely testified that the

victim had gained possession of the gun and shot Gladney. The witness initially testified that he never saw Gladney point a gun at the victim, but that he first saw a gun when the victim jumped at Gladney. Later, however, the witness testified that he saw Gladney holding a gun while the victim was sitting on the porch. The witness further testified that he had previously told the police that the victim got the gun and shot Gladney, and that he was telling the truth when he spoke to the officers. Gladney, however, testified that the victim never had the gun, and that Gladney shot himself in the arm. The trial court found that the witness's testimony as a whole was inherently incredible and internally inconsistent, and that the witness intentionally gave false testimony. The record supports this conclusion. The testimony regarding who had possession of the gun and who shot Gladney was material to Gladney's claim of self-defense, and the witness's intentionally false and self-contradictory testimony on the issue warranted the *falsus in uno* instruction. *See* ***id.***

Gladney's final argument is that the trial court imposed an excessive sentence by setting his parole date beyond his expected lifetime. He also argues that the sentence was greater than necessary to protect society and deter others, and that the sentence is therefore excessive. He therefore requests that we remand his case for resentencing.

Sentencing is left to the sound discretion of the trial court, and we are limited on review to determining whether the trial court committed an abuse of discretion. *See* ***State v. Harris***, 119 Wis.2d 612, 622, 350 N.W.2d 633, 638 (1984). We presume that the trial court acted reasonably in imposing sentence, and the defendant has the burden to show some unreasonable or unjustified basis in the record for the sentence of which the defendant complains. *See* ***id.***, 119 Wis.2d at 622–623, 350 N.W.2d at 638–639. The primary factors to be considered

in imposing sentence are the gravity of the offense, the character and rehabilitative needs of the defendant, and the protection of the public. *See* ***State v. Sarabia***, 118 Wis.2d 655, 673, 348 N.W.2d 527, 537 (1984); ***State v. Curbello-Rodriguez***, 119 Wis.2d 414, 433, 351 N.W.2d 758, 767 (Ct. App. 1984) (citation omitted). The trial court may also consider the defendant's criminal record; history of undesirable behavior patterns; personality and social traits; degree of culpability; demeanor at trial; remorse, repentance and cooperativeness; age, educational background and employment record; the results of a presentence investigation; the nature of the crime; the need for close rehabilitative control; and the rights of the public. *See* ***Curbello-Rodriguez***, 119 Wis.2d at 433, 351 N.W.2d at 767.

A trial court exceeds its discretion when it imposes a sentence so excessive as to shock the public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances. *See* ***State v. Thompson***, 172 Wis.2d 257, 264, 493 N.W.2d 729, 732 (Ct. App. 1992). A defendant bears a heavy burden in challenging a sentence as excessive. *See* ***State v. Glotz***, 122 Wis.2d 519, 524, 362 N.W.2d 179, 182 (Ct. App. 1984). This court will not upset a particular sentence merely because we would have meted out a different sentence. *See* ***State v. Roubik***, 137 Wis.2d 301, 310–311, 404 N.W.2d 105, 108–109 (Ct. App. 1987).

Gladney does not assert that the trial court failed to consider the proper factors in imposing sentence, and he concedes that his sentence is not so disproportionate to his crime as to shock the public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances. He argues, however, that the sentence is excessive because his parole eligibility date is outside his expected lifetime, and because, he claims, the sentence is greater than necessary to protect the public and deter others.

The supreme court has held in ***State v. Setagord***, 211 Wis.2d 397, 401, 565 N.W.2d 506, 508 (1997), that a trial court has the discretion to impose a parole eligibility date beyond the defendant's expected lifetime. In making a determination of a parole eligibility date, the trial court considers the same factors as those it considers in imposing sentence. *See* ***State v. Borrell***, 167 Wis.2d 749, 774, 482 N.W.2d 883, 892 (1992). Inasmuch as Gladney does not challenge the trial court's consideration of the proper factors, we conclude that he is not entitled to relief based upon the fact that his parole eligibility date is beyond his expected lifetime. Indeed, the record reflects that the trial court considered the proper factors, including the gravity of the offense, the need to protect the public, Gladney's character, and his prior record.[1]

We also reject Gladney's contention that the sentence is greater than necessary to protect the public and deter others. Gladney's contention is merely a request for us to reweigh the sentencing factors and impose a lesser sentence than that imposed by the trial court. As noted, we will not upset a particular sentence merely because we would have meted out a different sentence. *See* ***Roubik***, 137 Wis.2d at 310–311, 404 N.W.2d at 108–109.

[1] The trial court noted, among other things, that Gladney was a convicted felon and was thus illegally carrying a gun at the time of the crime, that Gladney was on parole, that the crime was brutal because Gladney shot the victim several times, and that the community needed protection from those who carry guns.

By the Court.—Judgment and order affirmed.

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