COURT OF APPEALS
DECISION
DATED AND FILED

December 1, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-2019-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

RODERICK BANKSTON,

DEFENDANT-APPELLANT,

DEATRALLE GRAY,

DEFENDANT.

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

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

PER CURIAM. Roderick Bankston appeals from a judgment of conviction entered after a jury found him guilty of first-degree intentional

homicide and first-degree reckless injury, each as a party to a crime. He also appeals from an order denying his motion for postconviction relief. Bankston claims that the trial court erred: (1) in denying his motion for a mistrial based on a State witness's testimony that he took a polygraph test and that, as a result, the charges against him were dropped; (2) in granting the State a recess during its direct examination of its witness; and (3) in allowing a convicted co-assailant to invoke his Fifth Amendment privilege. Bankston also claims that the evidence was insufficient to support his conviction and that the trial court erroneously exercised sentencing discretion. We affirm.

I. BACKGROUND

Trial evidence established that on May 12, 1995, Bankston and three friends, Deatralle Gray, Romell O'Quin, and Edward Harris, drove to the Westlawn Housing Project where they became involved in an altercation with two other groups of men. The altercation arose after Bankston and his friends were motioned by Derrick Armstrong to stop their car in front of 6221 West Sheridan Street. Armstrong and his companions, DeAngelo Hawthorne, and two others were standing on the sidewalk in front of 6221 West Sheridan Street at the time Armstrong motioned for Bankston to stop.

After Bankston and his friends exited their car, Armstrong asked him if he had any "drama," meaning any problem with him. At trial, Armstrong testified that he posed this question to Bankston because earlier that day he thought that Bankston had tried to run him over. Bankston replied that he had no problem with Armstrong and the two groups of men began what was later described as a friendly conversation.

Approximately thirty minutes later, however, this tone changed when a third group of men approached Bankston's and Armstrong's groups. The third group of men consisted of John Bradshaw, and four others identified only as Aaron, Pooh, Shawn, and Little Mike. As they approached Bankston's and Armstrong's gathering, Bradshaw said something to the effect of, "I should bust one of those whore ass niggers." On hearing Bradshaw's remark, Bankston and his group returned to their car and retrieved their guns.

As Bankston headed back towards Bradshaw, Hawthorne approached him (Bankston), the two began to argue, and Bankston started yelling, "Shoot that nigger." O'Quinn and Gray intervened and led Bankston back to the car. As the three returned to the car, Harris and Bankston started shooting at the group of men who remained standing on the sidewalk. Hawthorne was killed and Michael Cornelius, a friend of Armstrong, was injured.[1]

Bankston and Harris's companions, Gray and O'Quin, were originally charged in connection with the shooting as party to a crime, but the State ultimately dropped the charges against them and they became State witnesses. Harris pleaded guilty to a lesser offense. Bankston went to trial and was convicted of the first-degree intentional homicide of Hawthorne and of the first-degree reckless injury of Cornelius. The trial court sentenced him to life imprisonment with no parole eligibility for thirty years for the first-degree intentional homicide charge and to a consecutive five-year term for the first-degree reckless injury charge.

[1] At trial, Gray testified that Bankston was armed with a .38 revolver and that Harris had an automatic weapon. Trial testimony also established that a .22 caliber bullet was removed from Hawthorne This testimony establishes that Harris fired the .22 caliber bullet that killed Hawthorne.

II. ANALYSIS

A. Motion for Mistrial

Bankston first argues that the trial court erred in denying his motion for a mistrial because State witness Deatralle Gray testified that the charges against him were dropped because he took a lie detector test. We reject his argument.

The decision whether to grant a motion for mistrial lies within the discretion of the trial court. *See* ***State v. Pankow***, 144 Wis.2d 23, 47, 422 N.W.2d 913, 921 (Ct. App. 1988). "The trial court must determine, in light of the whole proceeding, whether the claimed error was sufficiently prejudicial to warrant a new trial." ***Id.*** On appeal, this court will not reverse the denial of a motion for mistrial absent a clear showing of an erroneous exercise of discretion by the trial court. *See* ***id.*** "A trial court properly exercises its discretion when it has examined the relevant facts, applied the proper standard of law, and engaged in a rational decision-making process." ***State v. Bunch***, 191 Wis.2d 501, 506-07, 529 N.W.2d 923, 925 (Ct. App. 1995).

During Gray's direct examination, the prosecutor asked:

> Q You in fact at some point were charged with being involved in this offense; isn't that right?
>
> A Yes.
>
> Q But you are not charged anymore; isn't that right?
>
> A Yes.
>
> Q Why is that?
>
> A 'Cause I took a lie detective [sic] test and found out I didn't do it.
>
> [DEFENSE COUNSEL]: Objection.

After a sidebar discussion, which was not recorded, the court instructed the jury: "Members of the jury, there's been an objection. The objection has been sustained. You should disregard the last question and answer. It is stricken from the record."

During a recess a short time later, defense counsel renewed the motion for a mistrial based on Gray's reference to his lie detector test. In response, the prosecutor explained:

> [Gray] and I talked previous to his testimony that he couldn't talk about lie detector tests. I didn't expect that. I expected that he was going to say [the charges were dropped] because it was determined that [he] wasn't involved and I – I really didn't expect that at all.

The court then denied the motion, concluding that Gray's answer was unintelligible to the court, and that it probably was unintelligible to the jurors. The court also noted that the jury is presumed to follow an instruction to disregard stricken testimony.

Bankston now argues, however, that the State was lax in its preparation of Gray and therefore, under ***Bunch***, this court should not give deference to the trial court's decision. Instead, Bankston argues that because he based his motion for a mistrial on the laxness of the State, this court should review the trial court's ruling with strict scrutiny. We disagree.

In ***Bunch***, this court noted that "[t]he deference which we accord the trial court's mistrial ruling depends on the reason for the request." ***Id.*** at 507, 529 N.W.2d at 925. "When the basis for a defendant's mistrial request is the State's overreaching or laxness, we give the trial court's ruling strict scrutiny out of concern for the defendant's double jeopardy rights." ***Id.***

In the instant case, however, Bankston did not base either of his motions for mistrial on prosecutorial laxness. Rather, defense counsel's motions for mistrial were based on his belief that the mentioning of a lie detector test connoted that "A) [Gray] did nothing wrong, and, B) That his testimony here today is true because he is a truthful person who passed this polygraph." Moreover, the record clearly defeats any claim that the prosecutor was lax in her preparation of her witness. In fact, defense counsel even conceded that he believed that the prosecutor "never thought in a million years" that Gray would respond to her question by mentioning the lie detector test. Accordingly, we reject Bankston's argument that this court needs to apply strict scrutiny in its review of the trial court's denial of his motion for a mistrial decision.

We conclude that the trial court correctly considered the facts and the arguments from both counsel, and provided the proper instruction requiring the jury to disregard the question and answer. Thus, any prejudicial effect that might have flowed from the testimony was cured by the trial court's immediate instruction. *See* ***State v. Medrano***, 84 Wis.2d 11, 25, 267 N.W.2d 586, 592 (1978).

B. Request for Recess

Bankston next argues that the trial court erred in granting the State a recess to allegedly confer with Gray, during his testimony, in order to have Gray clarify the reasons charges were dropped against him. Bankston complains that this was unfair because "the State was not forced to rehabilitate its witness before the jury, but instead was able to instruct him how to answer during a recess." Again, we reject his argument.

Contrary to Bankston's assertion, no evidence supports his claim that the prosecutor conferred with Gray during the recess. In fact, on cross-examination following the recess, when defense counsel asked the witness when he last talked to the prosecutor, Gray responded, "last—a couple of weeks ago." Although Bankston maintains that coaching did in fact occur, he fails to cite any record reference to either support his claim or refute the State's contention that "the record demonstrates that there is nothing improper about the prosecutor's request for the recess and that nothing improper occurred during the recess." Accordingly, his argument fails. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis.2d 97, 109, 279 N.W.2d 493, 499 (Ct. App. 1979) (arguments not refuted are deemed admitted).

C. Invocation of Fifth Amendment Right

Bankston also claims that the trial court erred in permitting Edward Harris to avoid testifying by invoking his Fifth Amendment privilege. He also contends that, since Harris was an unavailable witness due to his Fifth Amendment invocation, the trial court erred in not admitting into evidence Harris's judgment of conviction and sentencing transcript.

Citing ***State v. Marks***, 194 Wis.2d 79, 533 N.W.2d 730 (1995), Bankston argues the trial court erred in finding that Harris had a Fifth Amendment right to refuse to testify after he had been convicted and sentenced. Bankston contends that under ***Marks***, the trial court should not have found that Harris could invoke his Fifth Amendment right unless it first determined that Harris had an appreciable chance of success on his appeal. We disagree.

Bankston misreads ***Marks***. In ***Marks***, the supreme court recognized that a witness has a right to invoke the Fifth Amendment while a direct appeal

from a judgment of conviction is pending. *See* ***id.*** at 92-93, 533 N.W.2d at 734. The ***Marks***'s court's use of the concept of the privilege turning on whether the defendant can "show an appreciable chance of success" refers only to the situation where the direct appeal avenue has already been exhausted and there is a motion to modify sentence or some other motion for postconviction relief subsequent to appeal. *See* ***id.*** at 93-96, 533 N.W.2d at 734-35. In this case, Harris's direct appeal was pending at the time he invoked the Fifth Amendment. Under ***Marks***, therefore, the trial court correctly concluded that Harris could invoke his Fifth Amendment right and refuse to testify.

In a related argument, Bankston argues that, given the trial court's ruling that Harris did not have to testify, it erred in refusing to admit Harris's judgment of conviction and sentencing transcript to establish his (Harris's) involvement in the crimes. The State concedes that Harris was an "unavailable" witness. The State argues, however, that Bankston failed to provide a sufficient offer of proof. We agree with the State.

The record contains a lengthy discussion among Bankston's defense counsel, Harris's defense counsel, the prosecutor and the trial court regarding Harris's invocation of his Fifth Amendment right. First, Harris's attorney told the court that Harris had filed an appeal and that he (Harris's defense counsel) did not want to prejudice Harris's appeal or his chance to prevail at a trial, if his appeal should be successful. Then Bankston's counsel argued that the court should permit him to submit Harris's judgment of conviction and sentencing transcript wherein, defense counsel argued, Harris admitted to being the actual shooter of Hawthorne. Defense counsel never made a sufficient offer of proof; he never submitted either document to the court, or offered any detailed information from

the transcript to support his claim.[2] Accordingly, we conclude that Bankston's alleged offer of proof was insufficient. *See* RULE 901.03 (1)(b), STATS.[3]

D. Sufficiency of the Evidence

Bankston also claims that the evidence was not sufficient to support his conviction for first-degree intentional homicide, party to a crime.[4] He contends that the evidence was "completely incredible as to whether or not [he] even possessed a gun at the relevant point in time, much less pointed the same and, even less, fired the same at all." The record refutes his claim.

Our standard of review is clear:

> [I]n reviewing the sufficiency of the evidence to support a conviction, an appellate court may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact,

[2] Bankston has offered nothing to suggest that Harris's statements at sentencing would have exculpated him. That is, the State's evidence established that the shot Harris fired killed Hawthorne, but that both Bankston and Harris were guilty. Consequently, the transcript would have been immaterial.

[3] RULE 901.03(1)(b), STATS., provides:

> **Rulings on evidence. (1)** EFFECT OF ERRONEOUS RULING. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected; and
>
> ….
>
> (b) *Offer of proof.* In case the ruling is one excluding evidence, the substance of the evidence was made known to the judge by offer or was apparent from the context within which questions were asked.

[4] Bankston only argues that the evidence was insufficient to support his conviction for first-degree intentional homicide. Consequently, we shall limit our discussion to the sufficiency of the evidence on this charge.

> acting reasonably, could have found guilt beyond a reasonable doubt. If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn a verdict even if it believes that the trier of fact should not have found guilt based on the evidence before it.

State v. Poellinger, 153 Wis.2d 493, 507, 451 N.W.2d 752, 757-58 (1990) (citation omitted). Further, the determination of the credibility of witnesses and the resolution of conflicting testimony are matters within the jury's province. *See* ***Wheeler v. State***, 87 Wis.2d 626, 634, 275 N.W.2d 651, 655 (1979).

Following the close of evidence, the trial court instructed the jury that "a person is concerned in the commission of a crime if he, A) directly commits the crime; or, B) intentionally aids and abets in the commission of it; or C) is a party to a conspiracy with another to commit it or advises, hires, counsels or otherwise procures another to commit it." The jury was also instructed that before it could find Bankston guilty, it had to conclude:

> First, that the defendant, Roderick Bankston, or another acting with him as a party to a crime, in this case Edward Harris, caused the death of DeAngelo Hawthorne.
>
> Second, that the defendant, Roderick Bankston, or another acting with him as a party to a crime, again in this case, Edward Harris, intended to kill DeAngelo Hawthorne.

As the supreme court explained in ***State v. Hecht***, 116 Wis.2d 605, 619-20, 342 N.W.2d 721, 729 (1984), the elements of aiding or abetting "are that a person (1) undertakes conduct (either verbal or overt action) which as a matter of objective fact aids another person in the execution of a crime, and further (2) he consciously desires or intends that his conduct will yield such assistance." ***Id.*** at 620, 342 N.W.2d at 729 (citations omitted). In ***Hecht***, the court also explained that party to a crime liability under the conspiracy theory contains two elements:

> (1) An agreement among two or more persons to direct their conduct toward the realization of a criminal objective.
>
> (2) Each member of the conspiracy must individually consciously intend the realization of the particular criminal objective. Each must have an individual "stake in the venture."

Id. at 625, 342 N.W.2d at 732 (citations omitted). In addition, the court noted that a conspiracy may be shown by circumstantial evidence. *See* ***id.***

In this case, the evidence was more than sufficient to support the jury's verdict. Derrick Armstrong testified that, at first, everyone in his group and Bankston's group seemed friendly. According to Armstrong, things changed when another group approached and Bankston said that he heard somebody in the new group comment about killing him. Armstrong further testified that Bankston said he was going to get his "thing," which Armstrong knew to mean his gun. Armstrong said that Bankston then went to the passenger side of the car, reached under the seat and pulled out a revolver. According to Armstrong, Bankston then went to the back of the car and Harris started pointing his gun at the crowd. Armstrong testified that when Hawthorne tried to calm things down, Bankston said, "'Shoot that whore ass Nigger,'" or "'Shoot that mother fucker. Shoot that nigger.'" Armstrong said that Harris and Bankston were pointing guns at him and Hawthorne and that they both fired shots.

Michael Cornelius testified that he saw Hawthorne talking to Bankston. According to Cornelius, after Bankston said, "'I ain't a whore ass nigger,'" Hawthorne said, "'I ain't sayin' you is.'" Cornelius said Bankston and three others then fired guns. Cornelius said that he saw Hawthorne drop to the ground and then get up and run toward the house. Cornelius testified that when he turned to run toward the house, he was shot in the foot.

Deatralle Gray testified that Bankston went to the car and got a gun from under the front seat. Gray stated that he told Bankston, "I know we ain't gonna shoot the dude in front of all these people and I told him we should go." Gray said he walked Bankston to the back of the car and then he heard a gunshot. Gray said that when he turned around he saw Harris firing his gun and that he then saw Bankston fire shots.

Bankston's and Harris's words and actions established that Bankston committed first-degree intentional homicide, party to a crime. Bankston's commands to shoot Hawthorne and Bankston's firing of shots established his aiding and abetting of Harris in his shooting. Accordingly, we conclude that the evidence was more than sufficient to support the conviction.

E. Sentencing

Bankston claims that the trial court erroneously exercised discretion in sentencing him to life imprisonment with no parole eligibility for thirty years. We disagree.

The setting of the parole eligibility date is a matter within the discretion of the trial court. *See* ***State v. Borrell***, 167 Wis.2d 749, 767, 482 N.W.2d 883, 889 (1992). In setting the parole eligibility date, the court may consider the same factors it considers in imposing sentence. *See* ***id.*** at 774, 482 N.W.2d at 892.

The principles governing appellate review of a court's sentencing decision are well established. *See* ***State v. Larsen***, 141 Wis.2d 412, 426, 415 N.W.2d 535, 541 (Ct. App. 1987). Appellate review is tempered by a strong policy against interfering with the trial court's sentencing discretion. *See* ***id.*** We

will not reverse a sentence absent an erroneous exercise of discretion. *See* ***State v. Thompson***, 172 Wis.2d 257, 263, 493 N.W.2d 729, 732 (Ct. App. 1992). In reviewing whether a trial court erroneously exercised sentencing discretion, we consider: (1) whether the trial court considered the appropriate sentencing factors; and (2) whether the trial court imposed an excessive sentence. *See* ***State v. Glotz***, 122 Wis.2d 519, 524, 362 N.W.2d 179, 182 (Ct. App. 1984). The primary factors a sentencing court must consider are the gravity of the offense, the character of the offender, and the protection of the public. *See* ***Larsen***, 141 Wis.2d at 427, 415 N.W.2d at 541. The weight to be given each factor is within the sentencing court's discretion. *See* ***Cunningham v. State***, 76 Wis.2d 277, 282, 251 N.W.2d 65, 67-68 (1977). A trial court exceeds its discretion, however, 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* ***Thompson***, 172 Wis.2d at 264, 493 N.W.2d at 732.

In imposing sentence, the trial court addressed each of the primary factors. The court noted that the crimes were very serious, leaving one man dead and another seriously injured. The court also commented on the number of shots fired into a group of people at close range. Noting that Bankston was "the one who put all of these events into play" and that he and his friends went to the scene armed, the court weighed Bankston's role in the case. The court also considered Bankston's lengthy juvenile record, which included violent offenses and weapon charges. The court expressed its dismay with Bankston for not having taken advantage of the opportunities the juvenile justice system had given him to turn away from the criminal lifestyle. The court also observed that Bankston had not finished his education, had a sporadic job history, and had fathered children but did not support them. Finally, the court considered the community's needs,

stating that the community needed to be protected from repeat criminals such as Bankston. For these reasons, the court set Bankston's parole eligibility date at thirty years, which was ten years less than what the State had requested. The record clearly establishes that the trial court considered the relevant factors in setting Bankston's parole eligibility date. Moreover, given the senselessness and severity of the crime, we conclude that the sentence was not excessive.

By the Court.—Judgment and order affirmed.

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