

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 30, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

No. 97-3320-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DENNIS L. STEELE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Jackson County:
ROBERT W. RADCLIFFE, Judge. *Affirmed.*

VERGERONT, J.¹ Dennis Steele appeals a judgment of conviction and sentence for violation of a domestic abuse injunction contrary to § 813.12(8)(a)(1), STATS., as a repeater under § 939.62, STATS. He also appeals the order denying his postconviction motion for a new trial. He contends that

¹ This appeal is decided by one judge pursuant to § 752.31(2)(f), STATS.

there was insufficient evidence to submit the charge to the jury and to support the jury's verdict; that the trial court erroneously exercised its sentencing discretion; and that his trial counsel was ineffective. We reject each of these contentions and affirm the conviction and sentence.

BACKGROUND

The charge against Steele arose out of conduct in connection with a domestic abuse injunction against Steele that had been issued on petition of Jeanette Williams. The injunction, issued on June 11, 1996, provided that Steele was to avoid contacting or causing any person other than a party's attorney to contact Williams unless Williams consented in writing. The complaint alleged that Steele had asked Danny Michalek to communicate with Williams on his behalf and Michalek did so. The State's witnesses at trial were Danny Michalek, Jeanette Williams and Shannon Geisler.

Michalek testified that Steele sent him about twelve or thirteen letters and called him by telephone from the Fox Lake prison system. In one letter, Michalek testified, Steele wrote that he felt like he could kill Williams and Christine Brandt and come after the Geislars for what they had done to him, and that Michalek should let Williams know. Michalek did not have that letter anymore.² On cross-examination, Michalek testified that Steele wanted Williams to know that, but did not give a specific directive. However, on redirect, Michalek testified that Steele said in the letter "to let them know"; he also testified that Steele asked him to say he (Michalek) made up everything about what the letter

² Michalek testified that Steele asked for a letter back and Michalek sent it back, but it is unclear that it was the letter in which Steele said he felt like he could kill Williams. Michalek also testified that he lost the letter.

said, but Michalek told Steele he would not do that. According to Michalek's testimony on cross-examination, Steele never asked him to play the song "Love Hurts" for Williams and never told him to give his letters to Williams.

Williams testified that Michalek pulled up in front of a residence where she was sitting outside and had the song "Love Hurts" playing on the radio very loudly. He told her that Steele wanted him to play it for her. Michalek also asked her to read a letter from Steele, but she refused. Michalek told her, she testified, that Steele was going to get back at everyone who stabbed him in the back; he was going to "get even with her or kill her or something." She felt that was a message that Steele wanted him to deliver to her, but Michalek didn't tell her that Steele told him to do it.

Shannon Geisler testified that she is resident manager of the apartment complex where Williams lives. Williams told her that Michalek had conveyed threats to her and she (Geisler) agreed to speak to Michalek (who apparently was also a tenant in the apartment complex). Geisler did, and Michalek told her that he had had some things he needed to tell Williams, that Steele had said that Williams and another tenant and the Geislars were in trouble because of what they had done to Steele. Geisler specifically remembered that Michalek said he was delivering a message from Steele. However, Geisler acknowledged that she had never seen any letters from Steele to Michalek; she knew only what Michalek told her.

After the State rested its case, Steele moved to dismiss on the basis of insufficient evidence.³ The trial court denied the motion. The court stated that

³ Steele calls the motion one for a directed verdict, but it was in fact a motion for dismissal of the charges at the close of the State's case.

the disputed element of the offense was whether Steele directed that Michalek have contact with Williams. The court acknowledged that Michalek's testimony was "far from clear or even possibly credible," but that he did at one point testify Steele instructed him to relay the message to Williams. The court concluded that the credibility and interpretation of Michalek's testimony was for the jury to decide.

Steele did not present any witnesses. The jury returned a verdict of guilty. The court sentenced Steele to three years in prison. Steele filed a motion for a new trial claiming that he was denied effective assistance of counsel. The court denied the motion, finding that trial counsel's performance was not deficient and Steele had not shown prejudice.

DISCUSSION

We first address the contention that there was insufficient evidence for a guilty verdict. Steele contends that Michalek testified that he was not directed by Steele to tell Williams; his prior statements to the police were inconsistent on this point; he was tearful while testifying; and he only testified that Steele did say to let Williams know after the prosecutor reminded him that he could be charged with perjury or obstructing an officer because of statements he made to police earlier. We conclude that the trial court properly denied the dismissal motion and that there was sufficient evidence to support the jury's verdict.⁴

⁴ Although Steele refers both to the propriety of denying the dismissal motion and to the sufficiency of evidence to support the jury's verdict, the substance of his argument focuses on the latter issue. Since Steele presented no evidence in his defense, the analysis for both issues is essentially the same.

This court affirms a conviction if we conclude that the jurors, acting reasonably, could be convinced beyond a reasonable doubt by evidence they were entitled to accept as true. *State v. Sharp*, 180 Wis.2d 640, 659, 511 N.W.2d 316, 324 (Ct. App. 1993). Where there are inconsistencies within a witness's testimony or between witnesses, the jury determines the credibility of each witness and the weight of evidence. *Id.* We do not substitute our judgment for the judgment of the jury unless the evidence supporting the jury's verdict conflicts with nature or the fully established facts, or unless the testimony supporting and essential to the verdict is inherently credible. *Id.* Similarly, the trial court may not grant a motion to dismiss at the close of the State's case unless, as a matter of law, no reasonable jury could disagree on the proper facts or the inferences to be drawn from these facts and there is no credible evidence to support the verdict the State seeks. *See Weiss v. United Fire & Cas. Co.*, 197 Wis.2d 365, 388, 541 N.W.2d 753, 761 (1995).

Michalek's testimony was inconsistent, and the State concedes he was a difficult witness. However, as the trial court correctly stated, it was the jury's role to determine how to interpret his testimony and which portions to credit. A reasonable jury could believe Michalek's testimony that Steele told him to contact Williams, and that his statements to the contrary, his evasiveness, and his tearfulness were the result of his hesitancy to testify against a friend. There may be other plausible interpretations of Michalek's testimony, other ways to resolve the inconsistencies, and other reasonable inferences to draw from his testimony, but that is not the correct legal standard. The trial court applied the correct legal standard and correctly decided that Steele was not entitled to a dismissal at the close of the State's evidence. A reasonable jury could conclude from that evidence that Steele was guilty beyond a reasonable doubt.

Steele next argues that the trial court erroneously exercised its sentencing discretion in sentencing Steele to three years, the maximum for this offense by a repeater. Steele contends that the court gave too much weight to the gravity of the offense, because there was only one violation of the injunction, and Steele was incarcerated at the time. Steele emphasizes that he did not harm Williams or stalk her or break into her residence. Steele also points out that his counsel argued for time served; the presentence report did not recommend the maximum sentence; and the State recommended only two years. Steele suggests that the court “may have been biased against [him] for some reason,” but does not explain that further.

At sentencing, Steele’s counsel made some corrections to the presentence report, and Steele spoke, as well as his counsel. In imposing the sentence, the trial court stated that it was considering Steele’s past record, which included endangering safety, burglary, escapes, rape as party to the crime, battery against his wife and teenage kids, another battery to a child, and disorderly conduct. The trial court observed that the timing of these offenses showed he had not been successful on probation or parole. The court also observed that Steele had an ongoing problem with anger management and assaultive conduct; he was a danger to society and society had to be protected from him. When Steele pointed out that he had been involved in programs in prison to treat his problems, the court responded that he had not learned what the programs were trying to teach him, because he continued to engage in unacceptable conduct.

We review a trial court’s sentence for an erroneous exercise of discretion. *McCleary v. State*, 49 Wis.2d 263, 276, 182 N.W.2d 512, 519-20 (1971). The burden is upon the defendant to show that there is some unreasonable or unjustifiable basis for the sentence. *Elias v. State*, 93 Wis.2d 278, 282, 286

N.W.2d 559, 560 (1980). We recognize the strong public policy against interfering with a trial court's sentencing decision. *Id.* at 281, 286 N.W.2d at 560. The rationale is that the trial court has the advantage in considering all relevant factors, including the opportunity to observe the defendant. *Cunningham v. State*, 76 Wis.2d 277, 280, 251 N.W.2d 65, 67 (1977)

The primary factors a court must consider in fashioning a sentence are the gravity of the offense, the character of the offender, and the need for public protection. *McCleary*, 49 Wis.2d at 274-76, 182 N.W.2d at 518-19. The court may also consider, among other things, the defendant's criminal record; history of undesirable behavior patterns; personality, character and social traits; results of a presentence investigation; vicious or aggravated nature of the crime; degree of culpability; demeanor at trial; age, educational background and employment record; remorse, repentance and cooperativeness; need for close rehabilitative control; rights of the public and length of pretrial detention. *State v. Iglesias*, 185 Wis.2d 117, 129, 517 N.W.2d 175, 178 (1994).

Although all relevant factors must be considered, the sentence may be based upon any one or more of the three primary factors. *Anderson v. State*, 76 Wis.2d 361, 368, 251 N.W.2d 768, 772 (1977). The trial court determines how much weight to give each factor. See *State v. Spears*, 147 Wis.2d 429, 446, 433 N.W.2d 595, 603 (Ct. App. 1988).

We conclude that the trial court properly exercised its sentencing discretion. It considered the appropriate factors and did not consider any inappropriate factors. It was for the trial court to determine the weight to give each factor. The court could reasonably give significant weight to Steele's history of assaultive behavior and his failure to learn from past sanctions, incarcerations,

and treatment programs. The court could reasonably reject Steele's view that the fact that he was incarcerated at the time of this violation and therefore did not harm Williams was a "mitigating factor." A violation of the no contact provision in a domestic abuse injunction does not require harm to the victim. The fact that Steele could not carry out the threat because he was incarcerated does not reflect positively on Steele.

Steele's third challenge is that he was denied effective assistance of counsel in violation of his rights under the Sixth Amendment to the United States Constitution. He claims that his trial counsel never advised him of his right to a substitution of a judge; did not cross-examine Michalek in an effective way; did not call witnesses on his behalf; and did not conduct a full investigation or spend enough time with him to properly defend him. Steele and his trial counsel testified at the postconviction hearing. The trial court determined that Steele had not demonstrated he was prejudiced by any failure to request a substitution of judge and that the witnesses were adequately cross-examined. With respect to witnesses for the defense, the court stated that the only ones Steele mentioned were other inmates who did not have the opportunity to observe first hand the matters that were the subject at trial, and that there would be credibility and admissibility problems concerning their testimony. With respect to the State's witnesses, the court found that Steele had presented no testimony that they had any information helpful to the defense that trial counsel could have discovered. The court found that trial counsel had spent a substantial amount of time in preparation and trial; he practiced before the court frequently; and he was an experienced, competent trial attorney.

In order to prevail on a claim for ineffective assistance of counsel, Steele has the burden of proving the trial counsel's performance was deficient and

that the deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Johnson*, 153 Wis.2d 121, 128, 449 N.W.2d 845, 848 (1990). Prejudice occurs when there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. *Strickland*, 466 U.S. at 694. We reject an ineffective assistance claim if the defendant fails to satisfy either element. *Johnson*, 153 Wis.2d at 128, 449 N.W.2d at 848.

We conclude that Steele has not shown that he was prejudiced by any of the alleged failures of trial counsel. With respect to failing to request a substitution of Judge Radcliffe,⁵ Steele argues that he was prejudiced because Judge Radcliffe denied the motion to dismiss. However, we have held that ruling was correct. Steele also argues that it is unlikely that another judge would have sentenced Steele to the maximum prison term. We have held that Judge Radcliffe properly exercised his sentencing discretion. Steele's statement about what another judge would have done is purely speculation and does not meet a defendant's burden to prove prejudice.

Steele has not shown prejudice, either, with respect to trial counsel's cross-examination of Michalek. Trial counsel did bring out Michalek's prior statements that were favorable to Steele and did elicit from Michalek the testimony that there were no specific directives in Steele's letter that he tell

⁵ Trial counsel testified that he did not recall having a conversation regarding the substitution of a judge and that Steele did not mention that he had some concerns about the assigned judge until after the initial appearance, after the time limit for requesting a substitution had expired. Steele testified that he told his trial counsel before the time limits had expired, but also testified that he was not familiar with the process. The trial court found that Steele was not an unsophisticated defendant, was a habitual criminal and had been before that court or the courts of the state on other occasions, but it made no findings on what Steele did or did not discuss with his attorney concerning substitution of judge and when those conversations, if any, took place. Such findings were not necessary because the court concluded Steele had shown no prejudice.

Williams. Steele testified that he told his trial counsel that Michalek made the statements he did to Williams because Michalek was angry that Williams and her friend had called him a “fat geek.” Steele argues that trial counsel should have brought this out on cross-examination.⁶ We are not persuaded that, had trial counsel questioned Michalek on that comment, there is a reasonable possibility that the outcome of the trial would have been different.

Steele’s testimony on the witnesses he claims should have been called in his defense does not establish a reasonable possibility that the testimony of those witnesses would have been admissible and would have altered the outcome of the trial. Also, Steele presented no testimony that investigation of the State’s witnesses would have turned up something that would have made a different outcome reasonably possible. The same is true with respect to his claim that trial counsel should have spent more time on the case and with him: the record is devoid of testimony as to how that might have made a difference. We conclude the trial court correctly denied the post-verdict motion claiming ineffective assistance of counsel.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.

⁶ Trial counsel testified that he did not recall Steele telling him that Michalek had been called a “fat geek,” but Steele did say he thought that Michalek “was a little soft in the head and that he took this upon himself to help a friend.” The trial court made no finding on whether Steele told his counsel about the “fat geek” comment.

