COURT OF APPEALS
DECISION
DATED AND FILED

March 25, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-1394-CR-NM

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

MILTON F. POZO,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County: PATRICK J. FIEDLER, Judge. *Affirmed.*

Before Dykman, P.J., Eich and Vergeront, JJ.

PER CURIAM. Milton F. Pozo appeals from a judgment entered on a jury conviction of interfering with firefighters contrary to § 941.12(1),

STATS.[1] He was sentenced to three years' probation with thirty days in the county jail as a condition. The sentence has been stayed pending this appeal.[2]

The state public defender appointed Attorney Glenn Cushing to represent Pozo on appeal. Attorney Cushing filed a no merit report with this court pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and RULE 809.32, STATS., and reported that a copy had been sent to Pozo. In compliance with ***Anders***, both Attorney Cushing and this court informed Pozo that he could respond to the report, but he has not done so.

After an independent review of the record as mandated by ***Anders***, we conclude that any further proceedings in this matter would be wholly frivolous and without arguable merit. Pozo's conviction is affirmed and we grant Attorney Cushing's motion to withdraw from further representation before this court.

This appeal arises from an incident in the early morning of May 5, 1996, when after-hour celebrants at the Mifflin Street Block Party lit bonfires. Law enforcement and firefighting officials attempting to extinguish the fires were pelted with bottles and other debris. Pozo was arrested at the scene and was later convicted at a jury trial. The no merit report raises several arguments which we address below.

SUFFICIENT EVIDENCE

[1] Section 941.12, STATS., interfering with fire fighting, provides:

> Whoever intentionally interferes with the proper functioning of a fire alarm system or the lawful efforts of fire fighters to extinguish a fire is guilty of a Class E felony.

[2] Pozo was also convicted of the misdemeanor of interfering with firefighting equipment, contrary to § 941.12(2), STATS., but that count was dismissed after conviction.

There would be no merit to an argument that Pozo was convicted on insufficient evidence. A photojournalist videotaped Pozo, distinctively dressed in black, lobbing an object. Testimony established that the object was a bottle. Specifically, Pozo testified under oath that over the course of one hour, he threw fifteen bottles in the direction of fire trucks attempting to fight the fires set on Mifflin Street. On cross-examination, the following exchange took place:

> [Prosecutor]: At counter 101 [on the videotape], Mr. Pozo, that is you, is that correct?
>
> [Pozo]: Yes.
>
> [Prosecutor]: With the bottle in your hand, is that right?
>
> [Pozo]: I don't know. I'm assuming that would be.
>
> [Prosecutor]: Because that's what you were throwing, is that right?
>
> [Pozo]: Yes.

Another witness testified that he saw a bottle leave Pozo's hand and crack a fire truck windshield.

In reviewing the sufficiency of the evidence, the test is not whether this court is convinced of the guilt of the defendant beyond a reasonable doubt, but whether this court can conclude that the jury, acting reasonably, was convinced. On review, we are obliged to view the evidence in the light most favorable to sustaining the conviction. *See* ***State v. Hamilton***, 120 Wis.2d 532, 541, 356 N.W.2d 169, 173 (1984); ***Bautista v. State*** 53 Wis.2d 218, 223, 191 N.W.2d 725, 728 (1971). This evidence against Pozo was more than sufficient to sustain the conviction.

JUROR STRIKE

During individual voir dire, a juror indicated that she felt the Mifflin Street Block Party had become dangerous, expensive to the city, and she did not see any reason for continuing it. The juror also indicated she had friends who were firefighters, she had heard about the incident, and she could not think of any reason why a person would be justified in throwing beer bottles at firefighting equipment or at people. Pozo attempted to strike this juror for cause. The court recalled the juror to an in camera examination, and asked whether she would put aside other things she may have heard and reach a verdict strictly on the evidence presented. The juror stated "yes."

A circuit court errs when it fails to strike for cause a juror whose bias is "manifest." Having opinions or prior knowledge is not manifest bias where, as here, the juror is willing to put those aside in making the decision. ***State v. Ferron***, 219 Wis.2d 481, 498-501, 579 N.W.2d 654, 660-62 (1998).

EXCLUSION OF EVIDENCE

The circuit court did not err when it denied Pozo's motions to exclude videotape evidence. Pozo argued that the tape was hearsay and unfairly prejudicial. The admissibility of evidence is submitted to the sound discretion of the trial court, and its rulings will not be overturned unless its discretionary decision was wholly unreasonable. ***Vonch v. American Standard Ins. Co.***, 151 Wis.2d 138, 150, 442 N.W.2d 598, 602 (Ct. App. 1989); ***Hayzes v. State***, 64 Wis.2d 189, 200, 218 N.W.2d 717, 723 (1974).

Our independent analysis of the record supports the circuit court's determination that the tape was properly admissible. The tape was authenticated by the photojournalist who created it, eyewitnesses testified independently about the same actions as were captured on the tape, and Pozo himself admitted being on

the tape. Further, Pozo's trial theory was that the arresting officer was unlikely to have been in a position to distinguish Pozo from other members of the large and unruly crowd. The tape showing Pozo in action was thus neither unduly prejudicial nor cumulative.

PROSECUTORIAL JUROR STRIKE

The prosecutor used a preemptory strike to remove a twenty-year-old juror. Citing ***Batson v. Kentucky***, 476 U.S. 79 (1986), Pozo objected that the strike was discriminatory. This argument is meritless. ***Batson*** protects discriminatory strikes of jurors who belong to groups subject to heightened scrutiny. Young adults are not such a group. *See* ***United States v. Jackson***, 983 F.2d 757, 762 (7th Cir. 1993); ***United States v. Cresta***, 825 F.2d 538, 545 (lst Cir. 1987); ***United States v. Pichay***, 986 F.2d 1259, 1260 (9th Cir. 1993). Further, the prosecutor offered an independent reason for the strike: the juror was dressed all in black, as Pozo had been during the incident, and the prosecutor felt undue sympathy might arise. *See* ***Purkett v. Elem***, 514 U.S. 765, 769 (1995) (strikes based on juror appearance do not offend constitutional protections).

DEFENDANT'S MOTION FOR MISTRIAL

The state introduced a surprise witness who, with two supporting photographs, testified that the fire truck's windshield had been chipped. Pozo moved to strike the testimony, as well as for mistrial. Pozo claimed prejudice because he had no opportunity prior to trial to examine the witness or the photographs, and because he could have subpoenaed the fire chief to introduce contrary evidence had he known this would be an issue. The court admitted the surprise testimony, as well as the photographs. However, to compensate for Pozo's failure to subpoena the fire chief, the court permitted Pozo to introduce the

fire chief's otherwise inadmissible hearsay evidence statements that the truck had sustained no damage.

A motion for mistrial is addressed to the court's discretion and will not be overturned absent a clearly erroneous use of discretion. ***State v. Davidson***, 44 Wis.2d 177, 194, 170 N.W.2d 755, 764 (1969); ***Haskins v. State***, 97 Wis.2d 408, 419, 294 N.W.2d 25, 33 (1980). Likewise, the admissibility of evidence is submitted to the sound discretion of the trial court. ***Vonch***, 151 Wis.2d at 150, 442 at 602. If there was a "reasoned and reasonable" rationale for the trial court's decision, we will uphold it on appeal. ***Hartung v. Hartung***, 102 Wis.2d 58, 66, 306 N.W.2d 16, 20 (1981). The circuit court in this case noted that, other than subpoenaing the fire chief, Pozo was unable to say what he would have done differently had he known of the proposed damaging testimony. The court overcame Pozo's subpoena problem by permitting the fire chief's otherwise inadmissible hearsay statements into evidence. This was a "reasoned and reasonable" rationale, and we sustain the court's denial of the motion for mistrial.

SENTENCING

Sentencing lies within the trial court's discretion and our review is limited to whether the trial court erroneously exercised that discretion. ***State v. Larsen***, 141 Wis.2d 412, 426, 415 N.W.2d 535, 541 (Ct. App. 1987). The primary factors which the trial court must consider are the gravity of the offense, the character of the offender and the need for public protection. ***Id.*** at 426-27, 415 N.W.2d at 541. The weight to be given to each of these factors is within the trial court's discretion. ***Cunningham v. State***, 76 Wis.2d 277, 282, 251 N.W.2d 65, 67-68 (1977).

The trial court read and considered materials submitted by counsel, statements of counsel and Pozo's personal statement. The court considered Pozo's record, noting that while Pozo was only one of many people involved, he had unquestionably thrown beer bottles and hampered firefighting efforts. Because Pozo had no previous record and did well in school, the court imposed three years' probation. However, the court also imposed thirty days of jail time with Huber privileges because the court considered that public protection required a message to be sent regarding this type of behavior. The sentence was a proper exercise of discretion under ***Cunningham***, and we affirm.

OTHER ARGUMENTS

We conclude that there is no merit to any argument raised in the no merit report. We independently conclude that there would be no merit to any other arguments, and specifically, that there would be no merit to any argument of ineffective assistance of counsel.

To prevail on an ineffectiveness argument, Pozo would have to show: (1) his counsel's performance was deficient, and (2) that deficient performance prejudiced his defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). We must scrutinize counsel's performance to determine whether "counsel's representation fell below an objective standard of reasonableness." ***Id.*** at 688. *See also* ***State v. Ambuehl***, 145 Wis.2d 343, 351, 425 N.W.2d 649, 652 (Ct. App. 1988). Here Pozo's original counsel apparently advised him to plead no contest. Thereafter counsel withdrew. Successor counsel successfully moved to withdraw the plea. Successor counsel was prepared for trial, raised appropriate objections, diligently examined and cross-examined witnesses and employed appropriate trial strategy. In addition, counsel was able to obtain dismissal of a misdemeanor charge even after conviction. An ineffectiveness claim would be meritless.

Based on our independent review of the record, we conclude that any further appellate proceedings would be without arguable merit, and would be wholly frivolous, within the meaning of ***Anders***, as well as RULE 809.32, STATS. Accordingly, the judgment of conviction is affirmed and Attorney Cushing is relieved of further representation in this appeal.

By the Court.—Judgment affirmed.