COURT OF APPEALS
DECISION
DATED AND FILED

February 16, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP187-CR **Cir. Ct. No. 2013CF24**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DENNIS L. MARSH,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Grant County: ROBERT P. VAN DE HEY, Judge. *Affirmed.*

Before Kloppenburg, P.J., Sherman, and Blanchard, JJ.

¶1 PER CURIAM. A jury found Dennis L. Marsh guilty of battery by a prisoner, first-degree reckless endangerment, false imprisonment, and disorderly

conduct, all as a repeater, arising from Marsh's assault on Jane Doe, a prison guard.[1] Marsh, already serving two consecutive life sentences, received a sentence that added thirteen years and six months of initial confinement and five years of extended supervision to his sentence.[2] On appeal, Marsh argues that the circuit court erred when it ordered that Marsh be visibly restrained during trial and that the sentence was harsh and excessive. We affirm.

Facts

¶2 Marsh was an inmate and Jane Doe was a guard at the Wisconsin Secure Program Facility in Boscobel. Marsh was alone in a dayroom while Doe stood near the doorway. Marsh got up to leave. Marsh started to walk past Doe, then grabbed her by the neck and started hitting her in the face. Doe fell to the floor and Marsh got on top of her, continuing to hit her. Marsh continued to assault Doe until other guards responded and pulled Marsh away. Doe sustained numerous facial injuries, including five lacerations that needed stitches and a small sinus fracture. Guards found pens, pencils, a broken protractor, and safety scissors in the area of the assault. When guards searched Marsh after the incident, they

[1] Pursuant to WIS. STAT. RULE 809.86(4) (2015-16), we use a gender-specific pseudonym instead of the victim's name.

All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

[2] The precise sentence was ten years for the battery by a prisoner, comprised of seven years of initial confinement and three years of extended supervision; eighteen years and six months for the first-degree reckless endangerment, comprised of thirteen years and six months of initial confinement and five years of extended supervision; eleven years for the false imprisonment, comprised of seven years of initial confinement and four years of extended supervision; and two years for the disorderly conduct, comprised of one year of initial confinement and one year of extended supervision. The sentences were ordered to run concurrently to each other and consecutively to any other sentence.

found string tied around one of his ankles with a pen attached to the string and pencils hidden under a wrist brace. Further facts will be stated below as needed.

Restraints

¶3 During trial, Marsh was restrained by use of a "belly chain" and his hands were shackled. It is undisputed that the restraints were visible. Additionally, when he testified, he did so from his position at counsel's table; he did not testify from the witness stand. On appeal, Marsh argues that the use of visible restraints was arbitrary and disproportionate and that testifying from counsel's table "suggest[ed] to the jury that [he] was a dangerous person and erod[ed] the presumption of innocence."[3] Although Marsh broadly challenges the use of visible restraints, the majority of Marsh's argument focuses on the circuit court's decision that Marsh should testify from his seat at counsel's table rather than the witness stand. Marsh faults the circuit court for not making an "individualized finding" that Marsh was so dangerous that he could not testify from the witness stand.

¶4 The record reveals the following. Throughout the proceedings, Marsh was increasingly hostile. At a pretrial status conference, defense counsel raised the question of security, conceding that "extra efforts" would be needed to

[3] In his postconviction motion, Marsh also argued that his attorney was ineffective for not objecting to the use of restraints. In his brief to this court, however, Marsh does not challenge counsel's representation. Therefore, that issue is forfeited. *See* ***Atkinson v. Everbrite, Inc.***, 224 Wis. 2d 724, 730 n.2, 592 N.W.2d 299 (Ct. App. 1999). Regardless, as explained below, the use of restraints was not erroneous so counsel was not ineffective for not objecting. *See* ***State v. Toliver***, 187 Wis. 2d 346, 360, 523 N.W.2d 113 (Ct. App. 1994) (counsel cannot be faulted for not making a meritless objection). Because Marsh repeatedly objected to being restrained, we choose to address the propriety of the use of restraints despite the lack of objection from defense counsel.

"keep the courtroom, the lawyers, and everyone else as safe as possible." The court replied that it had used a "stun belt underneath" civilian clothes in the past and that handcuffs or leg restraints could be used if necessary.

¶5 On the first day scheduled for trial, Marsh had an apparent seizure just before coming to court. The next day, however, a deputy advised the court that hospital staff found nothing wrong with Marsh and released him back to the jail. Shortly after returning to the jail, Marsh was "jogging in place and doing pushups."

¶6 Just prior to jury selection, and immediately after the circuit court admonished Marsh to not be disruptive, a disagreement with his attorney escalated into an obscenity-laden verbal outburst that caused the court to have Marsh removed from the courtroom. After Marsh's removal, the lead security officer informed the court that Marsh "ranted all the way down about murdering people." The officer then requested that a "belly chain" be kept on Marsh when he returned to the courtroom and Marsh's attorney agreed that such a restraint was appropriate. Upon Marsh's return, the court declined to remove Marsh's wrist restraints. When Marsh testified, the court had him testify from his seat at counsel's table.

¶7 "A criminal defendant generally should not be restrained during the trial because such freedom is 'an important component of a fair and impartial trial.'" ***State v. Champlain***, 2008 WI App 5, ¶22, 307 Wis. 2d 232, 744 N.W.2d 889 (Ct. App. 2007) (quoting ***Sparkman v. State***, 27 Wis. 2d 92, 96-97, 133 N.W.2d 776 (1965)). However, a defendant may be subjected to physical restraint while in court if the circuit court "has found such restraint reasonably necessary to maintain order." ***Id.*** "[T]he safety of the court, counsel, witnesses, jurors, and the

public may demand shackles on an accused even in the presence of a jury." ***State v. Cassel***, 48 Wis. 2d 619, 624, 180 N.W.2d 607 (1970).

¶8 "A trial court maintains the discretion to decide whether a defendant should be shackled during a trial as long as the reasons justifying the restraints have been set forth in the record." ***State v. Grinder***, 190 Wis. 2d 541, 550, 527 N.W.2d 326 (1995). The court's "'discretionary determination must be 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.'" ***Id.*** (quoted source omitted). The court's decision to restrain a defendant will be upheld unless it can be shown that the court erroneously exercised its discretion. ***Id.***

¶9 The record here fully supports the circuit court's decision to use visible restraints and to have Marsh testify from counsel's table. The starting point is Marsh's background. He was serving consecutive life sentences arising from the murder of his estranged wife. The charges against Marsh arose from an unprovoked physical attack. That attack was on a prison guard. The incident was captured on video, and it shows Marsh repeatedly hitting Doe in the face with his fist and stabbing her with writing implements and a broken protractor. Throughout the pendency of the case, Marsh had become increasingly obstructionist, leading to the pretrial suggestion by Marsh's attorney that enhanced security may be necessary at trial. Marsh likely feigned a medical emergency to delay the trial. Finally, on the morning of trial, Marsh erupted in court with a vile rant, followed by out-of-court threats of murder. When it declined to remove the wrist restraints, the circuit court referenced Marsh's "threatening comments." The record shows that the court did not erroneously exercise its discretion, either in using visible restraints or in having Marsh testify from the counsel's table.

¶10 We also reject Marsh's argument that he should have been able to testify from the witness stand. *See* WIS. STAT. §§ 885.40–885.44 (no requirement that a discrete witness stand be used when preserving testimony on videotape). In this case, the jury was already aware of the need to restrain Marsh during trial. Testifying from counsel's table was justified by the same security concerns. No error occurred.

Sentence

¶11 Sentencing is left to the discretion of the circuit court and appellate review is limited to determining whether there was an erroneous exercise of discretion. ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. When the proper exercise of discretion has been demonstrated at sentencing, this court follows a strong and consistent policy of refraining from interference with the circuit court's decision. ***State v. Ziegler***, 2006 WI App 49, ¶22, 289 Wis. 2d 594, 712 N.W.2d 76. We afford a strong presumption of reasonability to the determinations of a sentencing court because that court is best suited to consider the relevant factors and demeanor of the defendant. ***Id.***

¶12 To properly exercise its discretion, a circuit court "must provide a rational and explainable basis for the sentence." ***State v. Stenzel***, 2004 WI App 181, ¶8, 276 Wis. 2d 224, 688 N.W.2d 20. "It must specify the objectives of the sentence on the record, which include, but are not limited to, the protection of the community, punishment of the defendant, rehabilitation of the defendant, and deterrence of others." ***Id.*** "The primary sentencing factors which a court must consider are the gravity of the offense, the character of the defendant, and the need to protect the public." ***Ziegler***, 289 Wis. 2d 594, ¶23. The weight to be given each sentencing factor remains within the wide discretion of the circuit court.

Stenzel, 276 Wis. 2d 224, ¶9. A strong presumption of reasonableness is afforded sentencing decisions because the circuit court is in the best position to consider the relevant factors and assess the defendant's demeanor. *See* ***State v. Setagord***, 211 Wis. 2d 397, 418, 565 N.W.2d 506 (1997).

¶13 The circuit court here properly exercised sentencing discretion. The court properly considered the deterrence value that Marsh's sentence may have on other inmates. *See* ***State v. Speer***, 176 Wis. 2d 1101, 1128, 501 N.W.2d 429 (1993) (deterrence is a proper sentencing factor). The court's consideration of the "horrific" nature of the "unprovoked assault" on Doe and its effect on her was proper. *See* ***Ziegler***, 289 Wis. 2d 594, ¶23. The court discussed Marsh's disruptive and offensive behavior in court and stated that Marsh was a danger to others even in a maximum security prison. *See* ***id.*** (defendant's character is a proper sentencing factor). The sentencing court properly exercised its sentencing discretion.

¶14 Marsh argues that the imposition of the maximum sentence for first-degree reckless endangerment, to run consecutively to the sentences Marsh was already serving, was harsh and excessive. A sentence is harsh and excessive when it is "so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975) (citations omitted).

¶15 Public sentiment and the judgment of reasonable people would not be shocked by the sentence here. The crime was extraordinarily serious and threatened institutional security. By running the sentences concurrently, the total additional time added to Marsh's sentence is well within the statutory maximum.

And, given that Marsh is already serving two consecutive life sentences, this additional sentence is of little practical consequence. Marsh himself recognized that fact during sentencing when he suggested facetiously that the court impose a sentence of 666, 1000, or 16,000 years. Marsh's challenge to the sentence fails.

By the Court.—Judgment and order affirmed.

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