COURT OF APPEALS
DECISION
DATED AND FILED

September 19, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP981-CR **Cir. Ct. No. 2013CF209**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARIO EMMANUEL JAMES,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JONATHAN D. WATTS and FREDERICK C. ROSA, Judges. *Affirmed*.

Before Brennan, P.J., Kessler and Dugan, JJ.

¶1 PER CURIAM. Mario Emmanuel James appeals from a judgment, entered upon a jury's verdict, convicting him of one count of armed robbery with the use of force as party to a crime and one count of burglary, arming himself with a dangerous weapon while within the burglarized enclosure, as party to a crime. James also appeals from an order denying his motion for postconviction relief.[1] James asserts that it was a due process violation for him to be convicted solely on uncorroborated accomplice testimony and that it was an erroneous exercise of discretion for the trial court to impose a greater sentence on James than that imposed upon the accomplice. We reject James's arguments and affirm.

BACKGROUND

¶2 J.W. collected guns. He had worked with Lamont Donnell Sholar, and had shown photos of the guns to Sholar. On October 27, 2010, a man knocked on J.W.'s door, looking for someone named Rodriguez. J.W. told the man that a person with that last name lived upstairs, but not in J.W.'s apartment. A short time later, the man knocked again, claiming he was a process server. J.W. closed the door on him. Twenty to thirty minutes later, the man knocked again. He asked J.W. to look at a photograph to see if he recognized the person. When J.W. opened the door to look, another man appeared, pushed the door open, and pushed J.W. back into the apartment.

¶3 Both men ordered J.W. to the floor and onto his stomach. When J.W. turned over, one of his guns fell out of his hoodie. The two men then zip-tied

[1] The Honorable Jonathan D.. Watts presided at trial and imposed sentence; we will refer to Judge Watts as "the trial court." The Honorable Frederick C. Rosa reviewed and denied the postconviction motion; we will refer to Judge Rosa as "the circuit court."

J.W.'s hands behind his back, duct-taped his legs together, and put duct tape over his mouth. The two men were in the apartment for about ten minutes, taking property, before one of them made a phone call and told the person on the other end of the line, "Come get us."

¶4 After the men were gone, J.W. was able to free himself and called 911. Police came and took an inventory of missing property. The burglars had taken all of J.W.'s guns except for one, military vests, cases for the guns, magazines for the guns, night vision goggles, and other items, including J.W.'s wallet with his identification and credit cards. J.W. provided the guns' serial numbers to police.

¶5 That same day, but unrelatedly, police received a report that occupants of a residence on South 19th Street had illegal firearms. Police responded and entered the upper apartment, where they found Jennifer Ludwig, her infant, and Anthony Santiago. Ludwig told police the apartment was hers and consented to a search. Four guns were found in the attic. While executing the search, police searching Ludwig's home learned of the burglary and robbery at J.W.'s apartment. They found several of J.W.'s items at the residence, including one of the guns and J.W.'s identification and credit cards. Santiago eventually admitted that he had been involved in the burglary and robbery with "Lamont" and "Dutch."[2] "Lamont" was Sholar, and "Dutch" was determined to be James.

¶6 James and Sholar were both charged with one count of armed robbery with the use of force as party to a crime and one count of burglary in

[2] It does not appear that Ludwig had any involvement with the offenses.

which the defendant armed himself in the burglarized enclosure as party to a crime. Santiago was charged with those two offenses plus six counts of possession of a firearm by a felon. The charges against James and Sholar were initially dismissed when statements Sholar had given were suppressed, but the charges were re-filed after Santiago agreed to testify against them.

¶7 At trial, Santiago testified that he had been behind in his rent, and commented to James over the phone that he was about to be evicted and needed $300 for rent. Santiago said that James had an idea, and around noon, James and Sholar arrived to pick up Santiago. Sholar was driving and said he knew a guy with a lot of guns, and that he had seen pictures of the guns. Sholar drove them to a restaurant parking lot, where Sholar's brother provided a gun. They then went to J.W.'s house. Santiago saw a file folder in the back seat of Sholar's car and thought it would be a good idea to pose as a process server; Sholar agreed. Santiago further testified that when J.W. opened the door to look at the photo Santiago claimed to have, James rushed in and put a gun to J.W.'s face. Santiago then let Sholar into the apartment. Santiago's remaining testimony about what happened in the apartment generally matched J.W.'s account.

¶8 A jury convicted James of both offenses. The trial court sentenced him to twenty-five years' imprisonment for the armed robbery and a concurrent fifteen years' imprisonment for the burglary, consecutive to another sentence James was then serving. Sholar pled guilty to the robbery and four counts of possession of a firearm by a felon. He was sentenced to concurrent sentences totaling seven and one-half years' imprisonment.

¶9 James filed a postconviction motion, arguing that it "constitutes a denial of due process" to convict him solely on the testimony of a co-defendant

without other evidence establishing he had been a participant in the crime and complaining that it was an erroneous exercise of discretion for the trial court to sentence him to twenty-five years' imprisonment "without adequately stating its reasons" why his sentence was greater than Santiago's. The circuit court denied the motion, noting that in Wisconsin, "even entirely uncorroborated testimony of an accomplice to a crime" can be sufficient evidence for a guilty verdict. The circuit court also explained why James's greater sentence was not an erroneous exercise of discretion. James appeals.

DISCUSSION

I. Accomplice Testimony

¶10 James's first argument on appeal is that "[i]t constitutes a denial of Due Process of law to convict a defendant solely on the testimony of a co-defendant, without any other evidence establishing that the defendant had participated in the crime[.]" He asserts that because only Santiago's testimony linked him to the crimes, he "is entitled to have his convictions reversed and the charges dismissed." This argument, however, is directly contrary to Wisconsin law.

¶11 "The uncorroborated testimony of an accomplice is … competent evidence upon which to base a verdict of guilty if it is of such a nature that it is entitled to belief and the jury believes it."[3] ***Sparkman v. State***, 27 Wis. 2d 92, 95, 133 N.W.2d 776 (1965). A fact-finder "should be allowed to accept or reject such

[3] Incidentally, we note that an evidence technician testified that Sholar's phone contained a phone number for "Dutch" that was later shown to be James's phone number. Thus, at least one aspect of Santiago's information was corroborated.

testimony, and if in a given case under proper instructions uncorroborated testimony of … [an] accomplice is accepted as credible and convinces the trier of facts beyond a reasonable doubt of the guilt of the accused, the testimony is sufficient."[4] ***State v. Yancey***, 32 Wis. 2d 104, 109, 145 N.W.2d 145 (1966). While "accomplice testimony should be weighed with greater caution than the testimony of other witnesses," ***Linse v. State***, 93 Wis. 2d 163, 171-72, 286 N.W.2d 554 (1980), "[t]he jury may convict on the basis of uncorroborated testimony unless that testimony is patently or inherently incredible," ***Kohlhoff v. State***, 85 Wis. 2d 148, 153-54, 270 N.W.2d 63 (1978) (citation omitted).

¶12 We have no authority to overrule the supreme court's clear dictates regarding the use of accomplice testimony. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997) ("The supreme court is the only state court with the power to overrule, modify or withdraw language from a previous supreme court case."). James suggests that even if we cannot overrule existing precedent, we should "signal [our] disfavor" or explain that we believe "a prior case was wrongly decided." *See* ***id.*** at 190. However, we are not persuaded that the existing precedent is incorrect; "the Constitution imposes no requirement that the testimony of an accomplice-witness be corroborated by independent evidence."[5] *See* ***Brown v. Collins***, 937 F.2d 175, 182 n.12 (5th Cir. 1991).

[4] James does not challenge the cautionary instruction given to the jury about Santiago's testimony; it appears to be an appropriate instruction for accomplice testimony.

[5] As a general rule, we treat the United States and Wisconsin Due Process Clauses "as consistent with each other[.]" *See* ***Blake v. Jossart***, 2016 WI 57, ¶28, 370 Wis. 2d 1, 884 N.W.2d 484. While the Wisconsin Constitution may be interpreted to provide greater protections than its federal counterpart, *see* ***State v. Dubose***, 2005 WI 126, ¶40, 285 Wis. 2d 143, 699 N.W.2d 582, we are not persuaded it is necessary to do so here. In any event, "law development and law defining rest primarily with the supreme court." ***Cook v. Cook***, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997).

II. Disparate Sentencing

¶13 James also contends that it was an erroneous exercise of sentencing discretion for the trial court, "without adequately stating its reasons for doing so," to sentence James to twenty-five years' imprisonment and Santiago to only seven and one-half years' imprisonment. James asserts that considering the conduct to which Santiago admitted, "the discrepancy between their sentences was almost shocking." This is really a claim that James and Santiago received unduly disparate sentences, violating equal protection.

¶14 "The mere fact that the [two] sentences are different is not enough to support a conclusion that [James's] sentence is unduly disparate." *See* ***State v. Perez***, 170 Wis. 2d 130, 144, 487 N.W.2d 630 (Ct. App. 1992). Defendants do not receive the same punishment simply because they are convicted of the same offenses.[6] So long as the disparity is not arbitrary or based on irrelevant considerations, there is no actionable equal protection violation. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 186-87, 189, 233 N.W.2d 457 (1975). James "bears the burden of establishing that the disparity in sentences was arbitrary or based upon considerations not pertinent to proper sentencing." *See* ***Perez***, 170 Wis. 2d at 144. However, he fails to meet his burden.

¶15 The circuit court explained the trial court's reasons for imposing a greater sentence on James. First, James was being sentenced in this case shortly after his conviction and sentencing for another armed robbery with "'remarkably similar behavior'" to James's behavior in this case. Second, the trial court

[6] We note, of course, that James and Santiago were convicted of only one common offense.

considered Santiago to have provided the least amount of violence, and noted that his criminal record "did not reveal a 'pattern or history for violence,' in clear contrast" to James's record. In short, the trial court viewed Santiago as the "'least culpable'" defendant. Finally, Santiago benefitted from his cooperation with the State, successful completion of prior probationary terms, and a remorseful attitude.

¶16 James does not contend that, as a stand-alone sentence, the trial court improperly exercised its sentencing discretion; that is, James does not claim the trial court identified any improper sentencing objectives or factors. *See, e.g.*, ***State v. Gallion***, 2004 WI 42, ¶40, 270 Wis. 2d 535, 678 N.W.2d 197; ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. While James takes issue with the trial court's assessment of Santiago as the least culpable defendant, this is ultimately nothing more than a disagreement with the relative weight the trial court assigned to various sentencing factors. *See, e.g.*, ***State v. Odom***, 2006 WI App 145, ¶7, 294 Wis. 2d 844, 720 N.W.2d 695. However, "the weight that is attached to any particular factor in sentencing is within the wide discretion of the sentencing court." ***Perez***, 170 Wis. 2d at 143.

¶17 James has not established that his sentence "was arbitrary or based upon considerations not pertinent to sentencing." *See* ***id.*** at 144. We further discern no erroneous exercise of the trial court's sentencing discretion or of the circuit court's discretion in denying the postconviction motion. *See* ***Gallion***, 270 Wis. 2d 535, ¶17; *see also* ***State v. Grindemann***, 2002 WI App 106, ¶30, 255 Wis. 2d 632, 648 N.W.2d 507.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2015-16).