

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 10, 2018

Sheila T. Reiff
Clerk of Court of Appeals

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 WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2016AP2097-CR

Cir. Ct. No. 2014CF4663

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DEON M. HARRIS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: WILLIAM S. POCAN, Judge. *Affirmed.*

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

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. Deon M. Harris appeals from a judgment, entered upon his guilty plea, convicting him on one count of armed robbery with the use of force as a party to a crime. Harris complains that the circuit court erroneously exercised its discretion when it sentenced him because it relied on “incredible information” that Harris “played a major role in the offense.” We reject Harris’s challenge to his sentence and affirm the judgment.

BACKGROUND

¶2 On July 4, 2014, Harris and Phillip Brooks robbed a Pizza Hut with the assistance of Ian Godley, an employee of the restaurant. Brooks, a former employee of the restaurant, organized the robbery with Godley, whose role was to text Brooks when the prior day’s cash was out of the safe and being counted.

¶3 The assistant manager told police she was counting the money when she heard the back door click. She looked to see who was coming in and saw a man in a dark baseball cap and hooded sweatshirt with the hood up. The man pointed a handgun at her; the gun made two clicks as if the man had pulled the trigger. The man knocked her into a wall, injuring her arm, then hit her in the head, knocking her to the floor. The man zip-tied her hands and repeatedly told her to stay down. He also told her at least twice that they were not there to hurt her, just to get the money. The assistant manager did not see a second suspect, but the first suspect’s behavior—saying things like, “Alright, come on. Let’s go.”—led her believe another person was there. The robbers took approximately \$3000.

¶4 Police obtained surveillance footage from the store. The footage shows two men entering through the back door, apparently by typing an access code on a keypad; there was no sign of forced entry. The footage shows one of the

men striking the assistant manager while the other took the money from where it was being counted, then both men leaving together.

¶5 On August 1, 2014, police interviewed Godley, who identified Brooks. Godley told police that he only needed to text Brooks when the money was out. Godley said he did not have to do anything else because Brooks knew the door code to enter. Godley also said he did not know the man with Brooks.

¶6 On August 3, 2014, police interviewed Brooks. Brooks told police he took the money from the counter and identified Harris as his co-actor. Brooks said he did not know the assistant manager had been injured, and stated that they had used a BB gun.

¶7 On October 20, 2014, the State charged Harris with one count of armed robbery with the use of force as a party to a crime. He pled guilty to the offense in February 2015.

¶8 Harris's sentencing hearing was in September 2015. The State called Godley to testify. Godley said Brooks had taken the money and was not the gunman. On cross-examination, he admitted his identification of the perpetrators was based solely on Brooks telling him that he (Brooks) was the one who put the money in the bag. The State also argued that the surveillance video of the rear door showed the gunman—identifiable because he was wearing a red¹ shirt—trying unsuccessfully to enter the code on the box before the other man entered the code and opened the door. According to the State, the second man must have been

¹ In the brief, appellate counsel describes it as orange.

Brooks, familiar with the door code as a former employee, making Harris the gunman. However, no faces are visible on the video.

¶9 The circuit court largely adopted the State’s sentencing arguments. It commented that Harris was likely the gunman because the gunman was the only one who spoke, and it would not have made sense for former employee Brooks to speak and risk being identified by his voice. The circuit court sentenced Harris to five years’ initial confinement and five years’ extended supervision. Brooks, who was also convicted of armed robbery with the use of force as party to a crime, was sentenced by a different judge to two years’ initial confinement and two years’ extended supervision. Harris appeals.

DISCUSSION

I. Procedural Posture

¶10 The only issue Harris raises on appeal is an argument that the circuit court erroneously exercised its sentencing discretion by relying on “incredible information” regarding his degree of culpability. Before we address the merits of the appeal, though, we address the procedural posture of the case.

¶11 Ordinarily, a defendant seeking postconviction relief “shall file a motion for postconviction ... relief before a notice of appeal is filed unless the grounds for seeking relief are sufficiency of the evidence or issues previously raised.” *See* WIS. STAT. RULE 809.30(2)(h) (2015-16).² Harris did not file a postconviction motion before his appeal. Thus, prior to filing its brief, the State

² All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

moved for summary disposition, seeking to dismiss the appeal. In response to the motion, Harris contended that “defense counsel properly raised and preserved the issue for appeal,” so the issues for appeal were “previously raised.” He also claimed that this is a “sufficiency of the evidence” case. We denied the motion to dismiss, stating only that the matter should be decided with the benefit of full briefing. However, save for a brief mention of the lack of a postconviction motion, the State did not renew its dismissal argument in its brief.

¶12 We disagree with Harris’s contention that trial counsel preserved the issue of sentencing discretion. Trial counsel made certain sentencing arguments, hoping to have the circuit court exercise its discretion in a certain way, but this is not the same as raising a challenge to the circuit court’s exercise of that discretion. *See State v. Walker*, 2006 WI 82, ¶30, 292 Wis. 2d 326, 716 N.W.2d 498 (postconviction motions are required “to give the circuit court ... an opportunity to correct any error” before expending appellate resources). Further, “sufficiency of the evidence” in WIS. STAT. RULE 809.30(2)(h) refers to sufficiency of the evidence to support the verdict; a circuit court’s evidentiary decisions at sentencing are simply a matter of discretion. *See State v. Hubert*, 181 Wis. 2d 333, 345, 510 N.W.2d 799 (Ct. App. 1993).

¶13 Thus, we reiterate the rule: “[a] postconviction motion in the circuit court is a prerequisite to appellate review when a defendant challenges a sentence as an erroneous exercise of discretion[.]” *See Walker*, 292 Wis. 2d 326, ¶31. Nevertheless, we may overlook the postconviction motion requirement when “compelling circumstances” so justify. *See id.*, ¶31; *see also County of Ozaukee v. Quelle*, 198 Wis. 2d 269, 275-76, 542 N.W.2d 196 (Ct. App. 1995), *abrogated on other grounds by Washburn Cty. v. Smith*, 2008 WI 23, ¶64, 308 Wis. 2d 65, 746 N.W.2d 243. We do so here in the interests of judicial efficiency, because the

substantive issue of the circuit court’s exercise of sentencing discretion has been fully briefed by the parties, and to avoid a later claim of ineffective assistance of postconviction counsel.

II. Whether the Circuit Court Properly Exercised Its Sentencing Discretion

¶14 Sentencing is committed to the circuit court’s discretion. *See State v. Gallion*, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. Our review is limited to determining whether the circuit court properly exercised that discretion. *See id.* The exercise of discretion “contemplates a process of reasoning. This process must depend on facts that are of record or that are reasonably derived by inference from the record and a conclusion based on a logical rationale founded upon proper legal standards.” *Id.*, ¶19 (citing *McCleary v. State*, 49 Wis. 2d 263, 277, 182 N.W.2d 512 (1971)). “When a criminal defendant challenges the sentence imposed by the circuit court, the defendant has the burden to show some unreasonable or unjustifiable basis in the record for the sentence at issue.” *State v. Lechner*, 217 Wis. 2d 392, 418, 576 N.W.2d 912 (1998). We presume the circuit court acted reasonably. *See id.*

¶15 Harris contends the circuit court erroneously exercised its discretion “based on incredible information” about his role in the robbery. Specifically, he complains that: (1) the circuit court erred in relying on Godley’s “confused and contradictory” testimony, (2) its review of the surveillance footage is incorrect, and (3) it is “speculative and not based in fact” for the circuit court to have concluded Brooks did not speak to avoid being identified. Thus, Harris also complains that the circuit court relied on inaccurate information—its conclusion he was the gunman—when imposing his sentence.

a. Godley's Testimony

¶16 Godley initially claimed he could identify Brooks in the video, though he appeared to concede on cross-examination that he could not distinguish either man from the recordings. Although the circuit court commented that Godley's testimony supported a finding that Harris was the gunman, it expressed skepticism about "to what degree it swayed me." However, Godley also testified that Brooks said he was the bagman, and the circuit court noted that Godley was unlikely to be so testifying in order to protect Brooks because Brooks had already been sentenced. Harris complains that Godley's testimony "is a mass of contradictions and falsehoods" that the circuit court should not have considered.

¶17 Decisions about a witness's credibility are left to the circuit court as trier of fact. See *State v. Kimbrough*, 2001 WI App 138, ¶29, 246 Wis. 2d 648, 630 N.W.2d 752. This means accepting or rejecting any or all of the testimony as the circuit court deems credible. See *id.* In so doing, a circuit court may consider uncorroborated hearsay if the defendant as had an opportunity to rebut it. See *State v. Spears*, 227 Wis. 2d 495, 509, 596 N.W.2d 375 (1999) (citing *United States v. Lawrence*, 934 F.2d 868, 874 (7th Cir. 1991)).

¶18 We do not disturb credibility determinations unless a fact relied upon is inherently or patently false. See *Chapman v. State*, 69 Wis. 2d 581, 583, 230 N.W.2d 824 (1975). Inherently incredible evidence is evidence that is "in conflict with the uniform course of nature or with fully established or conceded facts" and is incredible as a matter of law. See *State v. King*, 187 Wis. 2d 548, 562, 523 N.W.2d 159 (Ct. App. 1994). Godley's testimony may have been confusing and contradictory, but Harris does not show it was incredible as a matter of law and the circuit court, having heard Godley's live testimony, was entitled to

give that testimony whatever weight it saw fit, including the testimony that Brooks confessed being the bagman to Godley. *See Johnson v. Merta*, 95 Wis. 2d 141, 151-52, 289 N.W.2d 813 (1980) (circuit court has superior opportunity to observe witness demeanor and gauge its persuasiveness).

b. The Surveillance Video

¶19 With respect to the video, there are two individuals shown at the back door. The first has on a dark baseball cap, a red shirt, light pants, and what appears to be a black hooded sweatshirt. The second has on a white shirt, dark pants, and a dark jacket with the hood up. It is undisputed that the person wearing the red shirt is the gunman. The question is only whether, based on the video of the men at the rear door, it can be inferred that Harris was the person wearing the red shirt.

¶20 According to the State, Harris was in the red shirt because the man in the white shirt successfully opened the door with the keypad, so the man in the white shirt must have been former employee Brooks. Harris disagrees with this interpretation of the video and says it actually shows the person in the red shirt entering the door code and the person in the white shirt entering thereafter. On appeal, the State suggests the video supports the district attorney's interpretation. Harris does not specifically identify the circuit court's conclusion regarding the video, though he states the circuit court adopted the State's arguments.

¶21 We think the video is slightly more ambiguous than the State represents, but not as dispositive as Harris believes. It shows the individual in the red shirt approaching the door and touching the keypad, hitting perhaps one or two keys. He looks at the door, but nothing happens, and he does not attempt to enter the restaurant. The red-shirted man then appears to input additional numbers via

the keypad as the white-shirted man approaches. The door is not opened immediately, and it appears that the white-shirted man may have also input something on the keypad because he did not directly approach the door but, rather, approached to the side near the keypad. The circuit court commented that the men entered the code together. It is, however, impossible to see what happens because the white-shirted man's body blocks any view of the keypad at this point. The white-shirted man then pulls the door open and the duo enters the restaurant.

¶22 There is no specific burden of proof requirement for fact-finding that might impact sentencing; it is only required that the circuit court properly exercise its discretion. *See Hubert*, 181 Wis.2d at 345. The inferences drawn on undisputed facts when multiple inferences are possible are binding on an appellate court; we must accept the circuit court's reasonable inferences. *See State v. Friday*, 147 Wis. 2d 359, 370-71, 434 N.W.2d 85 (1989).

¶23 It is a reasonable inference from the video that the man in the white shirt input the equivalent of an "enter" button or other final key in order for the door to respond to the code. This could support a further inference that although both men may have known the entry code, the man in the white shirt was Brooks, the former employee with experience operating the keypad, making the man in the red shirt, the gunman, Harris.

c. Whether Brooks Would Have Remained Silent

¶24 Finally, Harris complains that it is merely speculation that the gunman was Harris because he spoke and Brooks would not have done so. Harris argues that Brooks could have disguised his voice. However, that argument is at least as speculative as Harris accuses the circuit court of being. We simply are not

persuaded that this inference, in light of the other available evidence and inferences drawn therefrom, is so unreasonable that we must reject it.

III. Inaccurate Information

¶25 In light of our determination that the circuit court drew reasonable inferences to conclude that Harris was the gunman, any claim that he was sentenced on inaccurate information fails *ab initio*. A defendant who seeks resentencing based on inaccurate information must show that the information was inaccurate and that that circuit court actually relied on the inaccurate information at sentencing. See *State v. Tiepelman*, 2006 WI 66, ¶26, 291 Wis. 2d 179, 717 N.W.2d 1. Proving inaccuracy is thus a threshold question: there is no actual reliance on inaccurate information where the information is accurate. See *State v. Travis*, 2013 WI 38, ¶22, 347 Wis. 2d 142, 832 N.W.2d 491. Based on the analysis herein, Harris cannot demonstrate the circuit court relied on inaccurate information.

By the Court.—Judgment affirmed.

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

