COURT OF APPEALS
DECISION
DATED AND FILED

April 17, 2018

Sheila T. Reiff
Clerk of Court of Appeals

Appeal No. 2016AP2201-CR **Cir. Ct. No. 2012CF006098**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LARRY L. GARNER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DAVID L. BOROWSKI, Judge. *Affirmed*.

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

¶1 DUGAN, J. Larry L. Garner appeals from a judgment of conviction for two counts of armed robbery, party to a crime (PTAC), and one count of

felony murder.[1] Garner challenges the judgment of conviction entered following the second jury trial on the charges in April 2014. He also appeals the trial court's order denying his postconviction motion.

¶2 On appeal, Garner argues that the trial court (1) violated his constitutional right to confrontation by permitting the testimony of co-defendant Vanetta C. Gholson-Wells from the first trial to be read to the jury at the second trial; (2) erred by allowing the State to file the amended information without first filing a motion; and (3) imposed an improper sentence because it relied on inaccurate information and sentenced him more harshly as punishment for going to trial. We disagree and affirm.

¶3 These background facts provide context for the issues raised on appeal. Additional relevant facts are included in our discussion.

BACKGROUND

¶4 On December 21, 2012, the State charged Garner with one count of armed robbery, use of force, PTAC, with J.G. as the victim; and one count of felony murder, PTAC, with R.C. as the victim. Both crimes allegedly occurred on December 17, 2012. The State also charged three other co-defendants, Jeronne Brown, John Eggars, and Gholson-Wells in the complaint. Subsequently, based upon the parties' stipulation, the trial court ordered separate trials of the defendants.

[1] In the fall of 2013, the charges against Garner were tried to a jury; however, the trial court declared a mistrial due to juror misconduct.

¶5 At a May 31, 2013 pretrial conference the State said that, if Garner proceeded to trial, it might file an amended information charging him with a second count of armed robbery. At an October 1, 2013 pretrial conference, the State indicated that, later that day, it would be filing an amended information adding the second armed robbery count and suggested that the arraignment could be done on the October 28, 2013 jury trial date. On October 1, 2013, the State filed an amended information adding the second armed robbery count, PTAC, with T.L. as the victim.

¶6 On October 28, 2013, before the first trial began, Garner was arraigned on the amended information. The trial continued through November 7, 2013, but ended in a mistrial due to juror misconduct.

¶7 The charges against Garner were then tried again in an April 2014 jury trial. The jury found Garner guilty of all three counts. The trial court sentenced Garner on June 5, 2014.

¶8 Garner filed a postconviction motion seeking relief.[2] The trial court denied the motion without a hearing. This appeal followed.

STANDARDS OF REVIEW

¶9 We apply the following standards of review to the issues raised on appeal. First, we note that "[w]hile a [trial] court's decision to admit evidence is ordinarily a matter for the court's discretion, whether the admission of such evidence violates a defendant's right to confrontation is a question of law subject

[2] The exhibits attached to the postconviction motion include the transcript of Gholson-Wells' sentencing in ***State v. Gholson-Wells***, Milwaukee County case No. 2012-CF-6099.

to independent appellate review." ***State v. Hale***, 2005 WI 7, ¶41, 277 Wis. 2d 593, 691 N.W.2d 637. Whether a witness is unavailable for confrontation purposes presents a constitutional fact, which is also reviewed *de novo*. ***State v. King***, 2005 WI App 224, ¶11, 287 Wis. 2d 756, 706 N.W.2d 181.

¶10 Second, a trial court's decision to permit amendment of an information is discretionary and is reviewed on appeal for an erroneous exercise of that discretion. ***State v. Flakes***, 140 Wis. 2d 411, 416, 410 N.W.2d 614 (Ct. App. 1987). Where the record establishes that the trial court exercised its discretion and a reasonable basis exists for its ruling, we will sustain it. *See* ***id.***

¶11 Third, whether a defendant has been denied his or her constitutional right to a sentence based on accurate information presents a constitutional issue that we review *de novo*. *See* ***State v. Tiepelman***, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1.

DISCUSSION

I. The Trial Court Properly Determined that Gholson-Wells was Unavailable to Testify

¶12 The only confrontation issue in this appeal is unavailability. On the issue of unavailability, Garner argues that the State had to subpoena Gholson-Wells before the trial court could find her to be unavailable, citing ***King***, 287 Wis. 2d 756. He also maintains that the trial court was required to hold an evidentiary hearing before making the determination that Gholson-Wells was unavailable.

¶13 "In all criminal prosecutions, the accused shall enjoy the right … to be confronted with the witnesses against him." U.S. CONST. amend. VI. The Confrontation Clause applies to the states through the Fourteenth Amendment. ***Pointer v. Texas***, 380 U.S. 400, 403 (1965). Courts may admit prior testimony

against a defendant only if the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness. ***Crawford v. Washington***, 541 U.S. 36, 53-54 (2004). A witness is unavailable when the proponent of the witness' testimony makes a good-faith effort to obtain the witness' presence at trial. ***Barber v. Page***, 390 U.S. 719, 724-25 (1968). "The lengths to which the prosecution must go to produce a witness … is a question of reasonableness." ***Hardy v. Cross***, 565 U.S. 65, 70 (2011) (citation and two sets of quotation marks omitted).

The State was not Required to Subpoena the Witness, and the Evidentiary Hearing Issue was Forfeited

¶14 The Confrontation Clause "does not require the prosecution to exhaust every avenue of inquiry, no matter how unpromising" because it is "always possible to think of additional steps that the prosecution might have taken" to produce a witness at trial. ***Id.*** at 71-72. The proponent of the evidence must demonstrate a good-faith effort and due diligence in trying to locate and produce an absent witness. ***State v. Williams***, 2002 WI 58, ¶¶62-63, 253 Wis. 2d 99, 644 N.W.2d 919.

¶15 The Wisconsin rules of evidence also address the issue of unavailability of a witness. WISCONSIN STAT. § 908.04(1)(e)[3] provides that "'[u]navailability as a witness' includes situations in which the declarant … [i]s 'absent from the hearing and the proponent of the declarant's statement has been unable to procure the declarant's attendance *by process or other reasonable means*.'" (Emphasis added.)

[3] All references to Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

¶16 In ***State v. Zellmer***, the court explained, "[w]e do not find the use of process to be, in every case, essential to a determination of unavailability[.]" ***Id.***, 100 Wis. 2d 136, 148-49, 301 N.W.2d 209 (1981). This is consistent with the United States Supreme Court's holding in ***Cross***: "We have never held that the prosecution must have issued a subpoena if it wishes to prove that a witness who goes into hiding is unavailable for Confrontation Clause purposes." ***Id.***, 565 U.S. at 71.

¶17 In ***King***, this court held that failure to serve the witness "with a subpoena *when that was possible* and *when that step was a foreseeable potential condition to her presence at trial* was not reasonable, and does not reflect the constitutionally required good-faith effort[.]" *See* ***id.***, 287 Wis. 2d 756, ¶17 (emphasis added). Nonetheless, ***King*** does not hold that in every case a witness must be subpoenaed before a court can find the witness is unavailable. Rather, this court stated that the subpoena was necessary if it was a "foreseeable potential condition" on the witness's presence at trial and serving the witness with a subpoena was possible. *See* ***id.*** ***Zellmer***'s holding is controlling here: a witness need not always be subpoenaed before the trial court can find that the witness is unavailable for confrontation purposes. *See* ***id.***, 100 Wis. 2d at 148-49.

¶18 Although Garner also contends that the trial court was required to hold an evidentiary hearing to determine whether a witness is unavailable, Garner has not preserved the issue for appeal. "'[U]nobjected-to errors are generally considered waived; and the rule applies to both evidentiary and constitutional

errors.'"[4] ***State v. Davis***, 199 Wis. 2d 513, 517, 545 N.W.2d 244 (Ct. App. 1996) (citation omitted). Here, without any objection, the State explained to the trial court its efforts to locate Gholson-Wells. Trial counsel did not assert that the State should present the information through testimony at an evidentiary hearing or any other means. By failing to object to the manner in which the State presented the facts demonstrating its efforts to locate and produce Gholson-Wells at trial, Garner forfeited his right to raise any error regarding that procedure. Next, we consider the trial court's determination that the State established that Gholson-Wells was not available.

Based on the Information Presented to the Trial Court, Gholson-Wells was Not Available

¶19 The first question is whether the State was required to subpoena Gholson-Wells in order to establish her unavailability. The record establishes that on April 7, 2014, the first day of Garner's second trial, the State informed the trial court that two of its witnesses, including Gholson-Wells, were not present.[5] It explained that "up until Friday, we had reason to believe that [Gholson-Wells] would be here in court voluntarily." The State had maintained contact with Gholson-Wells through her trial counsel. She had pled guilty as part of a plea

[4] In ***State v. Ndina***, our supreme court clarified the distinction between the terms "forfeiture" and "waiver." *See* ***id.***, 2009 WI 21, ¶¶28-32, 315 Wis. 2d 653, 761 N.W.2d 612. "Although cases sometimes use the words 'forfeiture' and 'waiver' interchangeably, the two words embody very different legal concepts. 'Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the intentional relinquishment or abandonment of a known right.'" ***Id.***, ¶29. (citation omitted). Thus, we use "forfeiture," which the appropriate legal term for the result when a party fails to make the timely assertion of a legal right by failing to object.

[5] The other witness was victim T.L., who was located sometime prior to the afternoon of April 7, 2014. Although T.L. initially told the police he would not testify, ultimately he did. We omit further mention of T.L. from the narrative of events.

negotiation and voluntarily testified in the first trial. She had been cooperating with her attorney and the State. Additionally, her trial counsel told the State that Gholson-Wells would be present.

¶20 The State explained that prior to April 2, 2014, there was no indication that Gholson-Wells would not appear to testify at trial. However, on April 2, 2014, Gholson-Wells apparently tested positive for drugs when she reported to Justice Point, the pretrial services program that was supervising her as a part of her release on bail after she testified at Garner's first trial. A Justice Point staff member who was going to bring Gholson-Wells to the trial court to address the violation, permitted her to go to an ATM (automated teller machine), and she did not return.

¶21 Even after Gholson-Wells violated her conditions of bail by testing positive for drugs and fleeing from Justice Point, she called and said she would come to court the next day, April 3, 2014. She knew she had to come to court. When she did not appear on April 3, a bench warrant was issued for her arrest.

¶22 The record establishes that Gholson-Wells was a compliant witness and was expected to appear voluntarily at the second trial. It was not until Gholson-Wells was facing possible revocation of her bail that she decided to flee. Based on the record, we hold that it was not unreasonable for the State not to issue a subpoena for Gholson-Wells to appear at trial.

¶23 The next question is whether the State established that Gholson-Wells was unavailable. As stated, on the first day of Garner's second trial, the State advised the trial court that Gholson-Wells had not appeared. The prosecutor then raised the possibility of presenting Gholson-Wells' testimony from Garner's first trial in the second trial. Trial counsel objected, arguing the State had failed to

serve Gholson-Wells with a subpoena, and, therefore, the trial court could not declare her unavailable. Trial counsel also invoked Garner's right to confrontation. The State advised the trial court that the police continued to search for Gholson-Wells and that it was working with her trial counsel in an effort to locate her.

¶24 On the afternoon of the first trial day, the trial court asked the State about the status of the missing witness and asked the State to report on its efforts to locate Gholson-Wells. The State advised the trial court that it had not located Gholson-Wells, that the police continued to look for her, and that Milwaukee homicide detectives were also involved in the search. The State also moved the trial court to allow it to read the transcripts of the testimony of Gholson-Wells from the first trial. The trial court did not decide the issue at that time—it decided to start the trial.

¶25 The next morning, the second trial day, the trial court asked again about the status of the witnesses. The State told the court that police homicide detectives had joined members of the warrant squad in the search. Trial counsel also said that he had informed the State that his investigator learned that Gholson-Wells was at her grandmother's house and when the investigator went there, he was told she was staying with "Lulu" at 69th and Center. The trial court asked if the police would follow up and the State responded that it was "following up on everything."

¶26 The following morning, the third trial day, the State told the trial court that, "Detectives and the warrant squad have been hitting this hard"—"they have been spending a lot of time and resources attempting to find her."

¶27 Ultimately, on the fourth day of trial, the trial court found that the parties had made unsuccessful efforts to locate Gholson-Wells and she was unavailable, and it held that the prosecution could present her testimony by reading the transcript of her testimony from the first trial. Trial counsel requested that the trial court inform the jury that it was the trial court's decision that Gholson-Wells was unavailable and it was allowing the reading of her testimony, that the testimony was given under oath at a prior proceeding, and that both sides had made efforts to procure her attendance at the trial. The State agreed to trial counsel's request.

¶28 As agreed, the trial court informed the jury regarding Gholson-Wells' testimony. The prosecutor and the detective then read the transcript of Gholson-Wells' prior testimony to the jury. That testimony included Gholson-Wells' statement that she saw Garner shoot R.C. During the trial, Eggars also testified that Garner shot R.C.

¶29 We hold that the State's efforts were reasonable under all the facts of the case. *See* ***Williams***, 253 Wis. 2d 99, ¶¶62-63. There was no reason for the State to anticipate that Gholson-Wells would not appear and testify. She testified in the first trial, she was a cooperating witness with a plea deal that was dependent upon her testifying, and the State was communicating with her trial counsel who told the State that she would appear at trial. The first indication that she might not appear arose following her violation of her bail conditions a few days before the trial was to start. The State asked for, and the trial court immediately issued, a bench warrant because of her violation.

¶30 The State immediately dispatched officers to search for Gholson-Wells and later homicide detectives joined the search. When Garner's trial

counsel suggested possible leads on where she could be found, the officers followed up on those leads. The State also continued to work with Gholson-Wells' trial counsel to locate her.

¶31 Garner argues that ***King*** controls this case. However, the facts in ***King*** are distinguishable from those of this case. In ***King***, a detective found the witness and spoke with her after the victim-advocate learned that the witness "believes she didn't have to come if she didn't get a subpoena." ***Id.***, 287 Wis. 2d 756, ¶¶12-13. The State did not subpoena the witness. ***Id.*** By contrast here, as mentioned above, there was no reason to believe that Gholson-Wells would not appear voluntarily to testify. Furthermore, even though a bench warrant was issued for Gholson-Wells on April 3, 2014, the State was unable to locate her. Since the State could not find Gholson-Wells to execute the bench warrant, there is no probability that requiring the State to serve her with a subpoena would have made any difference.

¶32 As we noted earlier, the efforts that the State took to produce a witness for trial are evaluated for reasonableness. We hold that the State's efforts to produce Gholson-Wells were reasonable under the circumstances. We further hold that, under the facts of this case, the State showed due diligence and made a good-faith effort to obtain Gholson-Wells' presence during the trial and the trial

court properly found that she was unavailable for Confrontation Clause purposes and WIS. STAT. § 908.04(1)(e).[6]

II. The Trial Court Properly Exercised its Discretion in Allowing the State to File the Amended Information

¶33 Citing WIS. STAT. § 971.29(1), Garner argues that since he was arraigned on the original information, the State was required to file a motion to amend the information and obtain the consent of the trial court.[7] He asserts that the State failed to comply with the statute.

¶34 We disagree. The determination of what is required by WIS. STAT. § 971.29(1) is a matter of statutory interpretation, which is a question of law. *See* ***Estate of Miller v. Storey***, 2017 WI 99, ¶25, 378 Wis. 2d. 358, 903 N.W.2d 759. "'[S]tatutory interpretation begins with the language of the statute.'" ***Id.***, ¶35 (quoting ***State ex rel. Kalal v. Circuit Ct. for Dane Cty.***, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110). The words of a statute are to be understood in their "ordinary everyday meaning." ***Id.***

¶35 The statute merely states, "A[n] …information may be amended at any time prior to arraignment without leave of the court." WIS. STAT. § 971.29(1).

[6] Garner also asserts that after the second trial was completed and Gholson-Wells was arrested, many facts came out about Gholson-Wells that showed her testimony was completely untrustworthy and, that if she had testified at the second trial, those facts would have come out. His arguments are purely speculative. But more importantly, he does not explain how the lost possibility of a second opportunity to impeach her is relevant to the determination of whether Gholson-Wells was unavailable—the issue on appeal. *See* ***Barber v. Page***, 390 U.S. 719, 724-25 (1968) (stating that a witness is unavailable when the proponent of the witness' testimony makes a good-faith effort to obtain the witness' testimony).

[7] We have corrected a typographical error in Garner's brief; he cited subsection two of WIS. STAT. § 971.29, instead of subsection one.

It can be inferred that after arraignment, leave of the court is required, but no procedure is prescribed for obtaining the consent. *See* ***State v. Conger***, 2010 WI 56, ¶3, 325 Wis. 2d 664, 797 N.W.2d 341 (referring to the requirement of "judicial approval" when a charge is amended after arraignment). In Wisconsin, the trial court may allow the State to amend an information at any time in the absence of prejudice to the defendant. ***Flakes***, 140 Wis. 2d at 418. There is no requirement in the statute that the State must file a formal motion prior to filing an amended information. What procedures the State must follow in seeking to amend the information is left to the discretion of the trial court.

¶36 As stated, during the May 31, 2013 pretrial conference, the State said that if Garner went to trial, it "might" file an amended information, adding the second armed robbery charge. At the October 1, 2013 final pretrial conference, the State told the trial court that it would file an amended information that afternoon. The trial court then asked Garner whether he understood that the State was adding a charge. Garner responded, "Yes, sir." Trial counsel did not object to the filing of the amended information at either pretrial conference.

¶37 On October 28, 2013, before the first trial began, the trial court raised the issue of the amended information and the need for an arraignment. The trial court asked trial counsel for a response. Trial counsel, again, did not object to the filing of the information or its timeliness, but he did object to allowing the information to be amended. The substance of that objection was that there was insufficient evidence to link Garner to the new charge.[8] The trial court overruled the objection and arraigned Garner.

[8] Garner does not make that argument on appeal.

¶38 Garner did not object to the absence of a formal motion to amend the original information. "'[U]nobjected-to errors are generally considered waived; and the rule applies to both evidentiary and constitutional errors.'" ***Davis***, 199 Wis. 2d at 517 (citation omitted). Garner forfeited his right to appeal on this issue. *See* ***State v. Ndina***, 2009 WI 21, ¶29, 315 Wis. 2d 653, 761 N.W.2d 612. Moreover, even if Garner had preserved the issue, he would not prevail. WISCONSIN STAT. § 971.29(1) does not require any formal procedures for amending an information—any procedures are left to the discretion of the trial court. Further, the trial court permitted the State to file the amended information. *See* ***Conger***, 325 Wis. 2d 664, ¶3.

¶39 Garner further argues that the trial court cannot rubber stamp the State's decision to file an amended information and must consider whether the amendment would prejudice Garner's rights, including his right to notice, his right to a speedy trial, and his right to have the opportunity to defend the charges. However, Garner does not explain how any of his rights were prejudiced. Moreover, he did not claim that the amendment failed to adequately inform him of the acts he allegedly committed, that he did not understand the new offense well enough to defend himself against it, or that he lacked sufficient notice of the amendment to defend against the new charge. Garner's assertion is not developed and, thus, we decline to further consider it. ***See State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992).

¶40 However, to be complete, we note that Garner's only argument is that, while he knew of the facts of the added armed robbery charge by the time of the second trial, he did not know of them when the amended information was filed before the first trial. He does not deny that he did not suffer any prejudice at the

second trial. He merely asserts that he was deeply prejudiced by the filing of the amended information at the first trial. We have rejected that argument.

¶41 Moreover, even if Garner could establish that he was prejudiced by the amended information in the first trial, that trial ended in a mistrial because of juror misconduct. "[T]he trial after a mistrial is not a continuation of the mistrial—it stands alone." ***United States v. McAllister***, 29 F.3d 1180, 1183 (7th Cir. 1994). Furthermore, as Garner acknowledges, "[t]he purpose of the information is to inform the defendant of the charges against him. Notice is the key factor." ***Whitaker v. State***, 83 Wis. 2d 368, 373, 265 N.W.2d 575 (1978). The second trial was conducted five months after the first trial. At that time, Garner had the full details of not only the nature of the added charge, but also of the State's evidence in support of that charge. Further, during that five-month period, Garner did not raise any of the objections to the amended information that he now argues on appeal. Garner was not prejudiced by the amended information during the second trial.

¶42 Lastly, Garner argues that the only reason the State filed the amended information was to pressure him into entering a plea to the other charges. He cites the State's statement to the court that "the State may file an amended [i]nformation, including armed robbery, if this were to proceed to trial." Citing ***State v. Hooper***, he argues that the State may not bring new charges "'of doubtful merit for the purpose of coercing a defendant to plead guilty to a less serious offense.'" ***Id.***, 101 Wis. 2d 517, 538, 305 N.W.2d 110 (1981) (citation omitted).

¶43 Although ***Hooper*** does stand for that proposition, those are not the facts in this case. Here, the new charge was not of doubtful merit. It was

supported by the following evidence: T.L.'s statement to the police (which was included in the complaint); and T.L.'s testimony at trial.

¶44 Garner has not shown that the State filed the amended information a new charge "of doubtful merit" to pressure him into entering a plea to the other charges. Based on the foregoing, we reject Garner's challenges to the filing of the amended information.

III. The Trial Court did not Rely on Inaccurate Information When Sentencing Garner or Sentence Garner More Harshly for Exercising his Right to a Trial

¶45 Garner argues that at the time of sentencing, the trial court relied on inaccurate information: that Garner shot the victim, R.C., when in fact, the evidence showed that co-defendant Jeronne Brown was the shooter.

¶46 Although the trial court did not state at Garner's sentencing that Garner was the shooter, the following day at Gholson-Wells' sentencing, the trial court stated, "Frankly, I think the jury got it right. I think [Garner] was as guilty as could be. He was the shooter." Garner asserts that the trial court's conclusion was based on the testimony of Eggars and Gholson-Wells, and that testimony was completely untrustworthy and should never have been the basis for finding Garner guilty of felony murder. Therefore, he argues at sentencing, the trial court relied on that inaccurate information.

¶47 Garner "has the constitutionally protected due process right to be sentenced upon accurate information." ***Tiepelman***, 291 Wis. 2d 179, ¶9. "A defendant who requests resentencing due to the [trial] court's use of inaccurate information at the sentencing hearing 'must show both that the information was inaccurate and that the court actually relied on the inaccurate information in the

sentencing.'" ***Id.***, ¶26 (citations and one set of quotation marks omitted). "A defendant bears the burden of proving, by clear and convincing evidence, that the sentencing court actually relied on irrelevant or improper factors." ***State v. Alexander***, 2015 WI 6, ¶17, 360 Wis. 2d 292, 858 N.W.2d 662.

¶48 In its written decision denying Garner's postconviction motion, the trial court explained that its opinion that Garner was the shooter was supported by the trial testimony of co-defendants Eggars and Brown, and the read-in testimony of Gholson-Wells. Eggars testified that Garner was the person who had shot R.C. Gholson-Wells had also testified in the first trial that Garner was the shooter. The trial court presided over the trial, heard all the testimony and observed the witnesses, and made credibility determinations.

¶49 On appeal, we do not disturb the trial court's credibility determinations. *See* ***State v. Turner***, 114 Wis. 2d 544, 550, 339 N.W.2d 134 (Ct. App. 1983) (stating that, "[w]hen required to make a finding of fact, the trial court determines the credibility of the witnesses and the weight to be given to their testimony and its determination will not be disturbed by this court on appeal where more than one inference may be drawn from the evidence."). *See also* WIS. STAT. § 805.17(2) (made applicable to criminal proceedings by WIS. STAT. § 972.11(1)), stating that,"[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses."

¶50 Garner merely disagrees with the trial court's opinion that he was the shooter. The trial court found that Eggars and Gholson-Wells were credible and that determination will not be disturbed on appeal. *See* ***Turner***, 114 Wis. 2d at

550. In other words, Garner's disagreement with the trial court's credibility determination does not provide a basis for overturning that determination.

¶51 Garner further argues that he is entitled to resentencing because the trial court punished him for exercising his constitutional right to go to trial. He bases his argument on the trial court's short statement at sentencing that "he had a chance to take a deal in this case. He chose not to take the deal. He was offered the exact same things as the other … defendants. He could have maybe saved himself time in prison[.]" Garner then states that he had been offered a sentence of ten years if he had pled guilty, but after going to trial, he received forty years instead.

¶52 Garner's assertion that a post-trial sentence higher than the sentence offered in a plea agreement is per se evidence of a constitutional violation is not supported by any citation to legal authority and is not developed. Thus, we could decline to further consider it. *See* ***Pettit***, 171 Wis. 2d at 646-47. Even though we need not address this argument, we do so to be complete. "A defendant cannot receive a harsher sentence solely because he has availed himself of the important constitutional right of trial by jury." ***Kubart v. State***, 70 Wis. 2d 94, 97, 233 N.W.2d 404 (1975). However, there is no evidence in the record that the trial court imposed a harsher sentence on Garner because he chose to go to trial.

¶53 At sentencing, the trial court acknowledged Garner's constitutional right to go to trial. It stated, "[Garner] is not being punished for taking this case to trial.… He does not get credit for accepting responsibility." The court went on to distinguish factors that it would consider when sentencing Eggars and Brown. "All those things I am going to have to give the co-actors credit for[:] cooperation, willingness to testify against [Garner], pleading guilty, accepting responsibility,

some level of remorse, some cooperation with the DA's office or the police or other authorities, so each and every other case is different." The trial court noted that Garner "refused to do all that, so he doesn't get any of that credit." It went on to say, "I don't punish people for taking cases to trial."

¶54 The trial court was explaining why the co-actors might be sentenced differently than Garner, not that Garner was being sentenced more harshly for choosing to go to trial. *See* ***Williams v. State***, 79 Wis. 2d 235, 238, 255 N.W.2d 504 (1977). We do not set forth the trial court's lengthy statement at the sentencing hearing; however, it is readily apparent that the trial court objectively considered Garner's past record of criminal offenses and history of undesirable behavior patterns; his personality, character, and social traits; the results of the presentence report; the vicious and aggravated nature of the crimes of armed robbery and felony murder; the degree of culpability and Garner's demeanor at trial, educational background, employment record, lack of remorse, repentance and cooperativeness; and the rights of the public.

¶55 However, the following are a few of the comments the trial court made about Garner at sentencing: "This defendant is a menace to society. He's done nothing productive in his life except break the law; drugs, robberies, guns and now a killing"; Garner's "character is very, very poor, borderline atrocious, multiple, multiple criminal records going back to his juvenile years in prison"; Garner "is just an absolute total menace to society"; "[t]hat is an absolute, complete and total lack of morals"; "[Garner]'s a significant, serious, high risk to the community"; and "[h]e needs to go away. I need to protect the citizens of the state and the citizens of Milwaukee County."

¶56 Even in spite of this strong language regarding Garner, the trial court stated, "Does this need to be a life sentence? No. Does it need to be quite as what the State is asking for? Most likely not. But it needs to be a very long sentence to protect the community, to punish [Garner], to deter [Garner], to have some limited general deterrence, but mostly specific deterrence." The trial court was not punishing Garner for going to trial. It was protecting the community from him and punishing him for his violent extensive criminal history.

¶57 Our review of the record leads us to conclude that the trial court articulated a deliberate and fair process of reasoning in arriving at the sentence imposed. There is no indication in the record that the trial court based the sentence upon Garner's exercise of his constitutional right to a trial. The trial court did not erroneously exercise its discretion in sentencing Garner.

CONCLUSION

¶58 For the reasons stated above, we hold that Gholson-Wells was unavailable to testify at the second trial and, therefore, Garner's confrontation rights were not violated; the trial court properly exercised its discretion in allowing the State to amend the information; and Garner was not sentenced on inaccurate information or more harshly because he chose to go to trial. Therefore, we affirm.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.