COURT OF APPEALS
DECISION
DATED AND FILED

May 22, 2018

Sheila T. Reiff
Clerk of Court of Appeals

Appeal No. 2016AP74-CR **Cir. Ct. No. 2010CF4189**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROBERT ROSS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and orders of the circuit court for Milwaukee County: CHARLES F. KAHN, JR. and FREDERICK C. ROSA, Judges. *Affirmed*.

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

¶1 PER CURIAM. Robert Ross appeals a judgment of conviction and orders denying him postconviction relief. He alleges that he was deprived of the right to be present at his trial when the circuit court considered a jury question while he was absent from the courtroom. He further alleges that the circuit court erroneously exercised its sentencing discretion, and that a new factor warrants sentence modification. We reject his claims and affirm.

Background

¶2 The State charged Ross with first-degree reckless injury by use of a dangerous weapon and possessing a firearm while a felon. The matter proceeded to trial. The State presented evidence that on May 30, 2009, Ross followed a woman, K.J., into the restroom of a tavern and grabbed her from behind as she stood before a mirror. K.J. saw Ross had a gun, then heard a loud bang and realized she had been shot. Ross fled the scene without responding to K.J.'s pleas that he call an ambulance.

¶3 Ross stipulated that he was a felon as of May 30, 2009. He otherwise did not present evidence or call witnesses on his behalf.

¶4 In conformity with WIS JI—CRIMINAL 1250, the circuit court instructed the jury on the elements of first-degree reckless injury, stating as relevant here:

> [b]efore you may find the defendant guilty of first-degree reckless injury, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present. One, the defendant caused great bodily harm to [the victim].... The second element of this offense of first degree reckless injury is that the defendant caused great bodily harm by criminally reckless conduct.... The third element ... is that the circumstances of the defendant's conduct showed utter disregard for human life.
>
> In determining whether the conduct showed utter disregard for human life, you should consider these factors[:] what the defendant was doing, why the defendant was engaged in that conduct, how dangerous the conduct was, how obvious the danger was and whether the conduct showed any regard for life and all other facts and circumstances relating to the conduct.

¶5 The circuit court went on to instruct the jury on the elements of the lesser-included offense of second-degree reckless injury. The circuit court prefaced that instruction by explaining that the jury could not convict the defendant of the lesser offense unless the State proved two elements, and that those elements are "exactly the same as the first two elements of first-degree reckless injury." The circuit court next explained that "[t]he one thing that distinguishes second-degree reckless injury from first-degree reckless injury is that the third element which exists in first-degree reckless injury, that is, utter disregard of human life, is not present in the lesser included offense." The circuit court then reiterated the two elements that the State was required to prove before the jury could find Ross guilty of second-degree reckless injury, namely, that Ross caused great bodily harm to the victim and did so by criminally reckless conduct.

¶6 During deliberations, the jury submitted a question and the circuit court met with counsel to consider the appropriate response. The circuit court began by reading the jury's question aloud and explaining it:[1]

> Quote, why the defendant was engaged in that conduct, close quote, does that section direct us to consider intent? ... They are referring to the third element of the first degree reckless injury.... What they are saying is that on the [element of] utter disregard for human life, one of the considerations is why the defendant was engaged in that conduct, and the question from the jury is does that section direct [them] to consider intent?

¶7 Both attorneys urged the circuit court to refer the jury back to the language in WIS JI—CRIMINAL 1250, the pattern jury instruction for first-degree reckless injury. The circuit court rejected that approach in favor of giving the jury "a little more guidance." After concluding that the pattern instruction allowed the jury to consider intent, the circuit court proposed responding to the jury's question with a written answer stating "you may consider intent." The State agreed.

¶8 Ross's trial counsel then left the courtroom to consult with Ross, who was in a courthouse holding area. When counsel returned, counsel advised that the defense had no objection to the proposed response to the jury's question.

¶9 The jury convicted Ross of second-degree reckless injury by use of a dangerous weapon. The jury also convicted him of possessing a firearm while a felon. At sentencing, the circuit court imposed two maximum consecutive sentences resulting in an aggregate term of imprisonment

[1] The jury's written question is not part of the appellate record. Ross advises that the writing is lost. He does not dispute the accuracy of the circuit court's reading of the question.

of seventeen-and-one-half years of initial confinement and ten years of extended supervision. *See* WIS. STAT. §§ 940.23(2)(a) (2009-10), 939.63(1)(b) (2009-10), 941.29(2) (2009-10), 939.50(3)(f)-(g) (2009-10).[2] The circuit court went on to find that Ross had "substantial" needs that might be addressed in prison through his participation in the challenge incarceration program, and the circuit court declared him eligible for that program after serving fourteen years of initial confinement.

¶10 Ross moved for postconviction relief. He alleged that the circuit court deprived him of the right to be present at his trial because the circuit court considered and resolved the deliberating jury's question without bringing him into the courtroom to participate personally in the discussion that followed the submission of that question. Relatedly, he alleged that his trial counsel was ineffective for failing to protect his right to be present. Ross also sought sentence modification on various grounds. The circuit court denied postconviction relief without a hearing, and Ross appeals.[3]

Discussion

¶11 Ross first claims that the circuit court violated his statutory and constitutional rights to be present at trial. Whether a defendant suffered a

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

[3] The Honorable Charles F. Kahn, Jr., presided over the trial, imposed sentence, and addressed Ross's postconviction challenge to the exercise of sentencing discretion. The Honorable Fredrick C. Rosa presided over Ross's postconviction motion alleging error during trial, challenging the effectiveness of Ross's trial counsel, and contending that a new factor warranted sentence modification.

violation of those rights is a question of law that we consider *de novo*. *See* ***State v. Alexander***, 2013 WI 70, ¶18, 349 Wis. 2d 327, 833 N.W.2d 126.

¶12 A defendant has a statutory right to be present at trial pursuant to WIS. STAT. § 971.04(1)(b), but the statute "does not require the defendant to be present before the [circuit] court can respond to every question posed by a deliberating jury." ***State v. May***, 97 Wis. 2d 175, 187, 293 N.W.2d 478 (1980). Rather, the statute '"recognizes that at certain hearings such as arguments on matters of law ... a defendant need not be present."' ***Id.*** (citation omitted).

¶13 A defendant also has a constitutional right to be present at trial, a right that, as relevant here, is found in the due process clauses of the State and Federal Constitutions. *See* ***Alexander***, 349 Wis. 2d 327, ¶20 & n.6. '"However, the presence of a defendant is constitutionally required only to the extent a fair and just hearing would be thwarted by his absence. The constitution does not assure the privilege of presence when presence would be useless, or the benefit but a shadow."' ***Id.***, ¶22 (brackets, citations, ellipsis, and one set of quotation marks omitted). When determining whether a defendant's presence is required at a mid-trial conference, relevant factors include "whether the defendant could meaningfully participate, whether he would gain anything by attending, and whether the presence of the defendant would be counterproductive." ***Id.***, ¶30.

¶14 In this case, the circuit court conferred with counsel in response to a jury question concerning proof of the third element of first-degree reckless injury, namely, utter disregard for human life. *See* WIS. STAT. § 940.23(1)(a)(2009-10). As we have seen, the circuit court had earlier instructed the jury that its decision on this element required consideration of the defendant's conduct. *See* WIS JI—CRIMINAL 1250. The deliberating jury inquired about the import of one clause in

the instruction, namely, "why the defendant was engaged in that conduct," asking whether that clause "direct[s the jury] to consider intent."

¶15 The response to the jury's question turned on the circuit court's analyses of the statutory elements of first-degree reckless injury and of the jury instruction regarding that offense. A court's interpretations of a jury instruction and the underlying statute present only questions of law. *See* ***State v. Krawczyk***, 2003 WI App 6, ¶10, 259 Wis. 2d 843, 657 N.W.2d 77. Thus, the discussion between the circuit court and counsel focused on legal questions for which Ross could not be expected to provide meaningful assistance. *See* ***State v. Peterson***, 220 Wis. 2d 474, 489-90, 584 N.W.2d 144 (Ct. App. 1998). His presence during the discussion was therefore not required by WIS. STAT. § 971.04(1)(b). *See* ***May***, 97 Wis. 2d at 187.

¶16 Ross nonetheless asserts that he "could have made a difference" to the resolution of the jury's question by bringing "his perspective" to the discussion. Ross does not describe the specifics of his perspective, but he indicates he would have personally opposed a supplemental instruction telling the jury it could consider intent. Ross wholly fails, however, to demonstrate why his personal statement in this regard would have affected the circuit court's reasoning. Indeed, both his trial counsel and the State argued that the jury should simply be directed back to the original instruction, but the circuit court responded that "the judge is the interpreter of the law" and concluded that the jury should receive a supplemental instruction. Nothing in Ross's submission demonstrates that his input would have assisted the circuit court in determining what the law required. Because Ross does not show that he could have participated meaningfully in the supplemental instruction conference, gained anything by attending, or aided the

circuit court, we are satisfied that his presence was not constitutionally required. *See* ***Alexander***, 349 Wis. 2d 327, ¶30.

¶17 Moreover, assuming for the sake of argument only that the circuit court erred by excluding Ross from the courtroom during the supplemental instruction conference, any such error was harmless because the response that the circuit court ultimately gave to the jury did not prejudice him. *See* ***May***, 97 Wis. 2d at 186 (fair and just trial not thwarted by defendant's absence when nothing prejudicial transpired outside defendant's presence). Ross's arguments to the contrary are not persuasive.

¶18 In an effort to show prejudice, Ross begins by asserting that the circuit court's response to the jury did not identify the specific charge for which the jury could consider intent. Therefore, he says, the circuit court's response "add[ed] an element of *intent* to the instructions for the first *and* second degree reckless injury offenses." (Emphasis in original.) Ross recognizes, however, that he was "found not guilty of the first-degree reckless offense," and he therefore goes on to say that "his argument is focused on the harm he suffered as a result of the conviction for which he was found guilty, namely the second-degree reckless injury offense." Thus, his actual contention is that he was prejudiced because the circuit court "add[ed] an element of intent" to the offense of second-degree reckless injury. The claim fails.

¶19 First, Ross's contention that the supplemental instruction "add[ed] an element of intent" to the offense of second-degree reckless injury is not tethered to the facts. The jury's inquiry was specifically in regard to a clause found solely in the instruction for first-degree reckless injury. Ross does not offer a persuasive reason that the circuit court's supplemental instruction about that

clause would have been construed by the jurors as relevant to the instruction for second-degree reckless injury, which does not include the clause at issue.

¶20 Second, and perhaps more significantly, Ross fails to explain why he was harmed even assuming the jury believed that the circuit court "add[ed] an element of intent" to the offense of second-degree reckless injury. As courts across the country have explained in numerous opinions, an erroneous instruction requiring the State to shoulder the burden of proving an additional element is not only harmless but in fact benefits the defense. *See e.g.*, ***State v. Hards***, 345 P.3d 769, 773-74 (Utah Ct. App. 2015) (adding element for the State to prove not only harmless but also cuts in the defendant's favor); ***State v. Vogel***, 315 N.W.2d 324, 328 (S.D. 1982) ("the fact that the trial court required the State to prove intent is an additional burden on the State, not appellant"); ***People v. McGuire***, 53 N.E.3d 77, 78-79 (Ill. App. Ct. 2015) (any error in requiring jury to find additional element not required under statute favored the defendant); ***State v. Evans***, 276 N.E.2d 665, 667 (Ohio Ct. App. 1971) ("An additional element to be proved could only work to the advantage of the accused and against the [S]tate by increasing its burden.").

¶21 We are satisfied that Ross fails to show any way in which he was prejudiced when the circuit court considered and responded to the jury's inquiry without bringing him into the courtroom. We reject his claim for relief based on any alleged violation of his right to be present at trial.

¶22 Ross also raises a claim that his trial counsel was ineffective for failing to protect his right to be present at trial. The claim is meritless. To prove that counsel was ineffective, a defendant must make a two-prong showing that counsel's performance was deficient and that the deficiency prejudiced the

defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). We may consider either prong first, and if a defendant fails to make the necessary showing as to one prong, we need not consider the other. *See* ***id.*** at 697. Ross alleges that his trial counsel performed deficiently because, he says: (1) he told his trial counsel when the two conferred in the courthouse holding area that he did not understand the proposed answer to the jury's question; and (2) he did not waive the right to be in the courtroom for any trial proceedings. Regardless of whether those contentions are true, we have already seen that Ross suffered no prejudice from any alleged violation of his right to be present. Accordingly, he cannot show that trial counsel was ineffective in failing to protect that right. *See* ***id.***

¶23 We turn to Ross's challenges to his sentences. Our review of a sentencing decision "start[s] with the presumption that the circuit court acted reasonably." ***State v. Lechner***, 217 Wis. 2d 392, 418, 576 N.W.2d 912 (1998). We will not disturb a sentence unless the circuit court erroneously exercised its sentencing discretion. *See* ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197.

¶24 A circuit court imposing sentence must consider the primary sentencing factors of "the gravity of the offense, the character of the defendant, and the need to protect the public." ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. The circuit court may also consider a wide range of other factors concerning the defendant, the offense, and the community, *see* ***id.***, and the circuit court has discretion "to discuss only those factors it believes are relevant," *see* ***State v. Stenzel***, 2004 WI App 181, ¶16, 276 Wis. 2d 224, 688 N.W.2d 20.

¶25 When a defendant challenges a sentence, the postconviction proceedings afford the circuit court an additional opportunity to explain the sentencing rationale. *See* ***State v. Fuerst***, 181 Wis. 2d 903, 915, 512 N.W.2d 243 (Ct. App. 1994). If the defendant thereafter pursues an appeal, a reviewing court will search the entire record for reasons to sustain the circuit court's exercise of sentencing discretion. *See* ***McCleary v. State***, 49 Wis. 2d 263, 282, 182 N.W.2d 512 (1971).

¶26 The sentencing court here appropriately considered the primary sentencing factors. It indicated that the offenses were serious because Ross abandoned a person he had gravely injured and because he committed the crimes while on extended supervision for a conviction that also involved reckless injury. The circuit court considered Ross's character, observing that he had a prior felony conviction and a history of arrests for battery and disorderly conduct that signaled "a troubled approach to life." The circuit court discussed the need to protect the public, stating that Ross "solves problems with anger and violence" and that the circuit court had a responsibility to "protect others from someone who is dangerous."

¶27 Ross complains, however, that the circuit court erred because it failed to give adequate weight to mitigating factors, did not take into account his expressions of remorse, and imposed maximum sentences that he views as unduly harsh and excessive. We reject these contentions.

¶28 The circuit court did not disregard mitigating factors. It recognized that Ross had "taken a few steps forward." It acknowledged that he had obtained a driver's license and that he had earned a high school equivalency degree in prison. The circuit court also explicitly noted in the postconviction proceedings that it

understood Ross was remorseful. In the circuit court's view, however, the mitigating factors were outweighed by the fact that Ross's history raised "substantial concerns about ... the likelihood of additional violence." The circuit court, not this court, determines the relevant sentencing factors and the weight that they deserve. *See* ***Stenzel***, 276 Wis. 2d 224, ¶16. The circuit court could properly emphasize the need to protect the public when fashioning an appropriate sentence.

¶29 As to Ross's complaint that the sentences were unduly harsh, '"[w]hat constitutes adequate punishment is ordinarily left to the discretion of the trial judge. If the sentence is within the statutory limit, appellate courts will not interfere unless clearly cruel and unusual.'" ***State v. Cummings***, 2014 WI 88, ¶75, 357 Wis. 2d 1, 850 N.W.2d 915 (citation and one set of quotation marks omitted). Accordingly, this court normally will sustain an exercise of sentencing discretion if the record reflects that the circuit court applied the proper legal standards, considered the relevant facts, and used a process of reasoning to reach a result that a reasonable judge could reach. *See* ***id.***

¶30 As the circuit court explained in the postconviction order here, Ross committed a violent crime that left the victim with "horrific" injuries, he had a history of violent acts, and he presented "a strong likelihood of future violence." In light of the totality of the relevant factors, the circuit court ultimately "determined that a maximum sentence was the only outcome that was fair to the community." Although another court might have reached a different conclusion, we cannot say that the circuit court's sentencing decision was unreasonable. Accordingly, we must sustain it. *See* ***State v. Prineas***, 2009 WI App 28, ¶34, 316 Wis. 2d 414, 766 N.W.2d 206 ("[O]ur inquiry is whether discretion was exercised, not whether it could have been exercised differently.").

¶31 Last we consider the claim that Ross is entitled to sentence modification based on an alleged new factor, namely, his age-related inability to participate in the challenge incarceration program. The challenge incarceration program is a prison program that, upon successful completion, permits an inmate serving a bifurcated sentence to convert his or her remaining initial confinement time to extended supervision time. *See* WIS. STAT. § 302.045(3m). Unless a defendant is statutorily excluded from participating in the program, a circuit court is required to exercise discretion at sentencing to determine whether a defendant is eligible to participate. *See* WIS. STAT. § 973.01(3m). Regardless of the circuit court's discretionary determination, however, the Department of Corrections may not place an inmate in the program if the inmate will reach the age of forty before his or her participation will begin. *See* § 302.045(2)(b). In this case, the circuit court decided that Ross would be eligible to participate in the program after serving fourteen years of initial confinement. The parties agree that Ross will be older than forty when he completes the fourteen-year waiting period. Ross claims that his age-related ineligibility to participate in the program is a new factor warranting a shorter sentence. *Cf.* ***State v. Harbor***, 2011 WI 28, ¶35, 333 Wis. 2d 53, 797 N.W.2d 828 (circuit court may modify a criminal sentence upon a showing of a new factor). We disagree.[4]

[4] Ross is imprisoned for, *inter alia*, violating WIS. STAT. § 940.23(2) (2009-10), and we observe that inmates who are incarcerated in regard to a crime specified in WIS. STAT. ch. 940 are statutorily excluded from participating in the challenge incarceration program. *See* WIS. STAT. § 302.045(2)(c). Thus, it appears Ross could not have participated in the program regardless of the circuit court's eligibility decision. Ross does not suggest that this crime-based statutory exclusion is a new factor—indeed, he does not discuss this exclusion—and we do not consider it further. *See* ***State v. Pettit***, 171 Wis. 2d 627, 647, 492 N.W.2d 633 (Ct. App. 1992)(we do not address issues that are not briefed or argued).

¶32 A new factor is '"a fact or set of facts highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in existence or because ... it was unknowingly overlooked by all of the parties.'" ***Id.***, ¶40 (citation omitted). Whether a fact or set of facts satisfies this standard presents a question of law. ***Id.***, ¶33. If the facts do not constitute a new factor, a court need go no further in its analysis. ***Id.***, ¶38. If the defendant shows that a new factor exists, however, then the circuit court has discretion to determine whether the new factor warrants sentence modification. *See* ***id.***, ¶37.

¶33 Ross fails to show that his age-related disqualification from participation in the challenge incarceration program constitutes a new factor as ***Harbor*** defines that concept. The circuit court found at sentencing that Ross was dangerous and must receive maximum sentences for the protection of the community. Although the circuit court went on to order that Ross could participate in the challenge incarceration program after serving fourteen years in prison, nothing in the circuit court's remarks implied that the reason for allowing participation was to permit Ross to shorten his term of initial confinement. Rather, the circuit court expressly stated that the reason for allowing participation was that Ross "has substantial needs, which hopefully the challenge incarceration program can ... help [address]." Accordingly, Ross fails to show that his inability to participate in the challenge incarceration program was highly relevant to the circuit court's conclusion that maximum terms of imprisonment were the only appropriate dispositions.

¶34 Moreover, assuming for the sake of argument that Ross's age-related disqualification from program participation constitutes a new factor as a matter of law, we would sustain the order denying sentence modification as an appropriate

exercise of discretion. *See* ***id.***, ¶37. As set forth in the postconviction order denying Ross's claim, Ross received maximum sentences because he had committed a senseless crime that was "strikingly similar" to one he had previously committed, and the sentencing court therefore believed he was dangerous and should be "incarcerated for as long as possible." While the sentencing court also expressed the hope that participation in the challenge incarceration program might assist Ross in treating his substantial needs, his inability to access such treatment is not a reason to shorten his sentences. To the contrary, such inability reinforces the propriety of the maximum sentences that the sentencing court imposed to protect the public from a violent person with significant untreated needs. *Cf.* ***State v. Sepulvada***, 119 Wis. 2d 546, 562, 350 N.W.2d 96 (1984) (holding that where a defendant failed to qualify for the mental health treatment contemplated as a condition of probation, circuit court appropriately exercised discretion by modifying the grant of probation to include imprisonment).

By the Court.—Judgment and orders affirmed.

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