COURT OF APPEALS
DECISION
DATED AND FILED

June 12, 2018

Sheila T. Reiff
Clerk of Court of Appeals

Appeal No. 2016AP2400-CR **Cir. Ct. No. 2013CF4340**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CESARIO REYES,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: CLARE L. FIORENZA and DAVID C. SWANSON, Judges. *Affirmed*.

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

¶1 PER CURIAM. Cesario Reyes appeals from a judgment, entered upon a jury's verdict, convicting him on one count of possession with intent to deliver more than forty grams of cocaine and one count of maintaining a drug trafficking place, both as party to a crime. Reyes also appeals from an order that denied his postconviction motion. Reyes claims the trial court erred when it allowed the State to amend the information, failed to find the State's expert was appropriately qualified, and erroneously exercised its sentencing discretion.[1] We reject these arguments and affirm the judgment and order.

BACKGROUND

¶2 The facts underlying Reyes's convictions are undisputed on appeal. Having obtained information from a confidential informant, West Allis police set up a controlled cocaine buy from someone the informant knew as "Cesar," later determined to be Reyes. On September 11, 2013, police provided the informant with pre-recorded funds and conducted surveillance of the buy. The informant returned with suspected cocaine, which he turned over to police and which yielded a positive result from a field test.

¶3 Based on information from the controlled buy, police obtained a search warrant for Reyes's residence on South 59th Street. When the warrant was executed on September 17, 2013, only Reyes was in the residence. He was apprehended in the southwest bedroom. With the assistance of a K-9 unit, officers recovered approximately eighty-nine bags and 140 corner cuts of cocaine, totaling

[1] The Honorable Clare L. Fiorenza presided at trial and sentencing; we will refer to her as the trial court. The Honorable David C. Swanson reviewed and denied the postconviction motion; we will refer to him as the circuit court.

over 660 grams, plus $5899 cash from the southwest bedroom. From the northwest bedroom, police recovered eleven bags and forty corner cuts of cocaine, totaling over 104 grams, along with a kilogram brick of cocaine weighing 1004 grams and more than $30,000 cash. The cash recovered included $1300 in pre-recorded currency from the controlled buy. Police also recovered multiple digital scales, plastic sandwich baggies, and containers for "vitamins" used as a cutting agent for the cocaine, along with identifiers for Reyes—including an identification card, social security card, birth certificate, and phone bill—and others. In total, police recovered $46,609 and more than 1770 grams of cocaine.

¶4 On September 20, 2013, Reyes was charged with one count of possession with intent to deliver more than forty grams of cocaine. On October 16, 2013, the State sent an offer letter to Reyes's attorney. If Reyes pled guilty to the crime charged, the State would recommend a twenty-year sentence out of a possible maximum of forty years' imprisonment. The offer letter also stated that there was "evidence to support additional charges or penalty enhancers against your client, including **Delivery of a Controlled Substance – Cocaine, Maintaining a Drug Trafficking Place.** The State will seek to file an amended information at the final pretrial conference if your client fails to express prompt responsibility for his actions[.]"

¶5 Reyes discharged appointed counsel multiple times before hiring a lawyer in October 2014. On October 16, 2014, the State informed Reyes's new attorney, in response to counsel's inquiry, that as of the final pretrial date, the State would withdraw its offer and the court would not allow further negotiations. Additionally, contrary to what Reyes's prior counsel may have said, the State "was not amending the offer. We are dealing with 2 kilos of cocaine, $46,000, and several additional charges that were not initially charged on this matter that I

specified on the offer letter, which I will likely pursue if this matter proceeds to trial." Reyes declined the State's plea offer.

¶6 At the final pretrial hearing on Monday, April 6, 2015, after the trial court denied a suppression motion Reyes had filed, the State filed an amended information. The amended information added the party-to-a-crime modifier to the original possession-with-intent charge and charged a new count of maintaining a drug trafficking place as a party to a crime. Reyes's attorney told the trial court he had received a draft of the amended information the preceding Friday and a paper copy that morning. Reyes waived reading of the amended information and entered not guilty pleas to the two charges.

¶7 A five-day trial began on April 13, 2015. Among the State's witnesses was Bodo Gajevic, a special agent working for the Wisconsin Department of Justice Division of Criminal Investigation Narcotics Enforcement. At the time, Gajevic had been with the Department of Justice for seven months but, prior to that, he had worked for the Milwaukee Police Department for twenty-nine years. For twenty of those twenty-nine years, Gajevic had been involved with narcotics investigations, having been assigned to the Gang Crimes Intelligence and Vice Control Divisions to investigate narcotics trafficking. He had also been "partially assigned" to the HIDTA (High Intensity Drug Trafficking Area) Heroin Task Force as a narcotics investigator, a role to which he was also assigned as a Department of Justice special agent. Reyes's defense was that another person was the named tenant of the residence, that the drugs belonged to that person, and that he (Reyes) had no access to the rooms or locations where the drugs and paraphernalia were found and no knowledge of any drug activity.

¶8 The jury convicted Reyes of both offenses. The trial court imposed a sentence of fifteen years' initial confinement and ten years' extended supervision for the possession-with-intent conviction, plus three and one-half years' imprisonment for the drug trafficking place. The sentences were concurrent to each other, but consecutive to any other sentence.

¶9 Reyes filed a postconviction motion raising three issues. First, he claimed that the trial court "should not have allowed the State to file an Amended Information … because the State had failed to obtain the Court's permission … and did not have good cause for filing it." Second, he asserted that the trial court's "admission into evidence of the testimony of a police officer as an expert witness … violated the ***Daubert*** rule[.]" *See* ***Daubert v. Merrell Dow Pharm., Inc.***, 509 U.S. 579 (1993). Finally, Reyes argued his twenty-five-year sentence "was unduly harsh and severe and failed to take into account the rehabilitation factor[.]" Based on his claims of error, Reyes sought dismissal of the charges in the amended information, a new trial, or resentencing, respectively.

¶10 The circuit court denied the motion. It concluded that, in the absence of an ineffective-assistance claim against trial counsel, Reyes had waived[2] any challenge to the amended information or Gajevic's testimony because there had been no objection to either. The circuit court also determined that, even if it liberally construed the postconviction motion to claim ineffective assistance, relief was still not warranted. Among other points, the circuit court noted that it

[2] It appears that "forfeiture" would be the more appropriate term than "waiver" under the circumstances of this case, *see* ***State v. Ndina***, 2009 WI 21, ¶¶28-32, 315 Wis. 2d 653, 761 N.W.2d 612 (distinguishing waiver from forfeiture), but the terminology is ultimately inconsequential here.

perceived no prejudice from the timing of the amended information, there was no reasonable probability that Gajevic's testimony would have been excluded under a ***Daubert*** analysis, and the sentencing transcript showed a proper exercise of discretion by the trial court. Reyes appeals, renewing his postconviction claims.

DISCUSSION

I. The Amended Information

¶11 "A complaint or information may be amended at any time prior to arraignment without leave of the court." WIS. STAT. § 971.29(1) (2015-16).[3] Section 971.29 "does not directly address the question of the amendment of the information after arraignment and before trial" but "should be read to permit amendment of the information before trial and within a reasonable time after arraignment, with leave of the court, provided the defendant's rights are not prejudiced, including the right to notice, speedy trial and the opportunity to defend." ***Whitaker v. State***, 83 Wis. 2d 368, 372, 374, 265 N.W.2d 575 (1978). Whether to permit amendment to the information is a matter for the trial court's discretion. *See* ***State v. Neudorff***, 170 Wis. 2d 608, 615, 489 N.W.2d 689 (Ct. App. 1992).

¶12 "The purpose of a charging document is to inform the defendant of the acts he allegedly committed and to allow him to understand the offense charged so that he can prepare a defense." ***State v. Flakes***, 140 Wis. 2d 411, 419, 410 N.W.2d 614 (Ct. App. 1987). "The key factor in determining whether an

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

amended charging document prejudiced the defendant is whether the defendant had notice of the nature and cause of the accusations against him." ***Id.*** "There is no prejudice when the defendant has such notice." ***Id.***

¶13 On appeal, Reyes objects to the amended information for multiple reasons. He contends that: (1) the State was required to file a formal motion; (2) the State did not offer a reason or show good cause for the amendment, but its actual reason was to pressure a plea, and, if the trial court had known that, it would not have allowed the amendment; (3) the trial court did not expressly approve the amendment; and (4) he was prejudiced by the amendment because he had no way of knowing the State believed another party was involved in the cocaine possession.

¶14 As the State notes, Reyes did not object to the amended information during trial court proceedings. Because Reyes does not claim trial counsel was ineffective, the State contends we can only review this issue under the plain error doctrine, which "allows appellate courts to review errors that were otherwise waived by a party's failure to object." *See* ***State v. Jorgensen***, 2008 WI 60, ¶21, 310 Wis. 2d 138, 754 N.W.2d 77. "Plain error is 'error so fundamental that a new trial or other relief must be granted even though the action was not objected to at the time.'" ***Id.*** (one set of quotation marks and citation omitted). The error must be obvious and substantial, and we are to apply the doctrine sparingly. *See* ***id.*** Reyes counters that this is precisely why the State was required to file a motion—so that he would have an opportunity to object.

¶15 We agree with the State that the issue was waived by lack of contemporaneous objection. We also note, however, that Reyes's complaints fail on their merits and, as a result, there is no plain error warranting relief.

¶16 First, WIS. STAT. § 971.29 does not prescribe a particular process—motion or otherwise—by which the State must seek the trial court's permission to amend the information between arraignment and trial.[4] Moreover, Reyes had an opportunity to object when the trial court inquired whether counsel had received the amended information; we know the opportunity presented itself because counsel specified that Reyes did not object to the amendment.

¶17 Second, WIS. STAT. § 971.29 also does not expressly require the State to show "good cause" for amendment. Nevertheless, Reyes asserts that the State's motivation for amending the information was as a means to try to secure a guilty plea from him and, had the trial court known this, it would not have allowed the amendment. Reyes further argues that "there is no precedent that allows the state to add new charges against the defendant or to change the character of the original charge against him for the sole purpose[] of pressuring him to waive his right to a jury trial and plead guilty to the original charge." On this point, however, Reyes is simply wrong.

¶18 "While confronting a defendant with the risk of more severe punishment clearly may have a 'discouraging effect on the defendant's assertion of his trial rights, the imposition of these difficult choices [is] an inevitable'—and permissible—'attribute of any legitimate system which tolerates and encourages the negotiation of pleas.'" ***Bordenkircher v. Hayes***, 434 U.S. 357, 364 (1978)

[4] Reyes argues that a motion is required because, in three cases, "the Court" approved a procedure in which the State filed a motion before amending the information. *See* ***State v. Conger***, 2010 WI 56, ¶8, 325 Wis. 2d 664, 797 N.W.2d 341; ***Whitaker v. State***, 83 Wis. 2d 368, 371, 265 N.W.2d 575 (1978); ***State v. Neudorff***, 170 Wis. 2d 608, 613, 489 N.W.2d 689 (Ct. App. 1992). Reyes does not, however, pinpoint where any of the cases held that a motion was *required* to amend the information, likely because none of the cases actually so holds.

(citation omitted; brackets in ***Bordenkircher***). "It follows that, by tolerating and encouraging the negotiation of pleas, [the Supreme] Court has necessarily accepted as constitutionally legitimate the simple reality that the prosecutor's interest at the bargaining table is to persuade the defendant to forgo his right to plead not guilty." ***Id.*** "[O]penly present[ing] the defendant with the unpleasant alternatives of forgoing trial or facing charges on which he was plainly subject to prosecution … [does] not violate" due process. ***Id.*** at 365; *see also* ***State v. Cameron***, 2012 WI App 93, ¶17, 344 Wis. 2d 101, 820 N.W.2d 433; ***State v. Williams***, 2004 WI App 56, ¶48, 270 Wis. 2d 761, 677 N.W.2d 691. In other words, the State was, in fact, permitted to threaten Reyes with additional charges as leverage during plea negotiations.

¶19 Third, Reyes also complains that the trial court "merely accepted" the State's announcement that it was filing an amended information and did not expressly approve the new document. The circuit court determined that the trial court's inquiry whether counsel had received the document and waived its reading and its inquiry as to Reyes's pleas "cannot reasonably be construed in any other way" but as an authorization for the State to file the amended information. Indeed, there is no specified procedure by which the trial court must express its approval, and we are generally loath to require the incantation of "magic words." *See* ***Michael A.P. v. Solsrud***, 178 Wis. 2d 137, 151, 502 N.W.2d 918 (Ct. App. 1993).

¶20 Finally, Reyes complains he was prejudiced by the amendment because "there is no indication whatsoever in the Criminal Complaint … that the officers involved in the investigation of this case believed there was another party involved in the possession of the items … [and] that he would be charged as party to a crime." This appears to be a complaint that Reyes was unable to properly fashion a defense.

¶21 The question is whether the defendant "had notice of the nature and cause of the accusations against him" so that he is able to prepare a defense. *See* ***Flakes***, 140 Wis. 2d at 419. Here, the record discloses no prejudice. As an initial matter, we note that Reyes appears to be complaining only about the addition of the party-to-a-crime modifier to the original possession charge; he does not appear to challenge the trafficking-place charge. Further, Reyes did have some notice that police and the State might suspect others were involved: at the preliminary hearing, a police officer testified that identifiers of other people had been found in the residence, notwithstanding Reyes's representation he lived there alone.

¶22 Reyes was able to prepare a defense in which he attempted to disassociate himself from the drugs and paraphernalia and to disavow knowledge of any drug activity by claiming someone else was the named tenant of the residence and that person was solely responsible for the drugs. Had the jury believed this defense, it would have been adequate to absolve him under any theory of party-to-a-crime liability—principal, aider and abettor, or co-conspirator. But the charges were virtually identical; at no point does Reyes identify a defense that would have been better suited to the modified charge but not applicable to the original charge, nor does he identify a better defense he would have used if only he had more notice of the modifier. *Cf.* ***Neudorff***, 170 Wis. 2d at 614-15, 618-19 (amendment of information prejudiced defendant because planned defense sufficed for original charge, but might not suffice for amended charge given significant differences between the charges). We discern no erroneous exercise of trial court discretion and no plain error in allowing the amended information.

II. Expert Testimony

¶23 WISCONSIN STAT. § 907.02(1) governs the admissibility of expert testimony at trial.

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if the testimony is based upon sufficient facts or data, the testimony is the product of reliable principles and methods, and the witness has applied the principles and methods reliably to the facts of the case.

This statute "adopts the reliability test established by ***Daubert***." ***State v. Smith***, 2016 WI App 8, ¶5, 366 Wis. 2d 613, 874 N.W.2d 610. "The goal is to prevent the jury from being presented with speculation dressed up as an expert opinion." ***Id.*** We review the trial court's decision to admit evidence for an erroneous exercise of discretion. *See* ***id.***, ¶4.

¶24 There is a "nonexhaustive list" of factors that courts might consider when evaluating whether an expert's opinion is sufficiently reliable for admission. *See* ***Seifert v. Balink***, 2017 WI 2, ¶62, 372 Wis. 2d 525, 888 N.W.2d 816. These factors include "'(1) whether the methodology can and has been tested; (2) whether the technique has been subjected to peer review and publication; (3) the known or potential rate of error of the methodology; and (4) whether the technique has been generally accepted in the scientific community.'" *See* ***id.*** (quoting ***Heller v. Shaw Indus., Inc.***, 167 F.3d 146, 152 (3rd Cir. 1999)); *and see* ***Daubert***, 509 U.S. at 592-93.

¶25 Reyes complains that Agent Gajevic's testimony violates WIS. STAT. § 907.02 because "[a]t no point during the trial had the Court ever [made] a

finding that he was qualified to testify as an expert witness." Reyes also complains that there was no evidence to establish Gajevic's "methodology" was ever tested or subjected to peer review or publication, there was "no evidence regarding the error rate of his conclusions," and there was no evidence that his conclusions were generally accepted by the law enforcement community.

¶26 As with the amended information, Reyes failed to object to or otherwise challenge Gajevic's testimony at trial. Thus, he is only entitled to relief on this issue if he can show plain error. *See* ***State v. Cameron***, 2016 WI App 54, ¶11, 370 Wis. 2d 661, 885 N.W.2d 611.

¶27 There is no plain error from the trial court's supposed failure to "make a finding" that Gajevic was qualified as an expert witness. The trial court has no obligation to engage in a *sua sponte* ***Daubert*** admissibility analysis in the absence of an objection. *See* ***Cameron***, 370 Wis. 2d 661, ¶13.

¶28 Moreover, the above-listed factors for evaluating admissibility of expert opinion, of which Reyes complains there is no evidence here, are part of a *nonexhaustive* list. *See* ***Seifert***, 372 Wis. 2d 525, ¶62. While the ***Daubert*** reliability test applies to all expert opinions, *see* ***Seifert***, 372 Wis. 2d 525, ¶60, courts are not constrained by the listed factors, *see* ***id.***, ¶64. "A trial court conducts its reliability analysis with wide latitude" and "may consider some, all, or none of the factors listed." *See* ***id.***, ¶¶64-65.

¶29 "[E]xperience-based expert evidence may pass muster as a method under the reliability requirement." ***Id.***, ¶67. "'In certain fields, experience is the predominant, if not sole, basis for a great deal of reliable expert testimony.'" *See* ***id.***, ¶77 (citation omitted). Thus, ***Seifert*** affirmed the use of an obstetrical expert witness whose conclusions were based largely on experience. *See* ***id.***, ¶¶5, 121-

22. Similarly, this court upheld the admission of a social worker's testimony offered based on experience, even though the proposed testimony did not neatly fit the ***Daubert*** factors. *See* ***Smith***, 366 Wis. 2d 613, ¶¶9-10.

¶30 Here, Reyes makes no challenges to Gajevic's experience-based credentials. We are satisfied, based on the record, that Gajevic would properly qualify as an expert based on his experience. Indeed, we have long admitted experience-based expert testimony in drug cases. *See, e.g.*, ***State v. Brewer***, 195 Wis. 2d 295, 306-08, 536 N.W.2d 406 (Ct. App. 1995). Challenges might be made to the weight of Gajevic's testimony, but those challenges do not impact the admissibility of his expert testimony. *See* ***Seifert***, 372 Wis. 2d 525, ¶86. There was no plain error in allowing Gajevic's testimony.

III. Sentencing Discretion

¶31 At sentencing, a court must consider the principal objectives of sentencing, including the protection of the community, the punishment and rehabilitation of the defendant, and deterrence to others, ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76, and determine which objective or objectives are of greatest importance, *see* ***State v. Gallion***, 2004 WI 42, ¶41, 270 Wis. 2d 535, 678 N.W.2d 197. In seeking to fulfill the sentencing objectives, the court should consider a variety of factors, including the gravity of the offense, the character of the offender, and the protection of the public, and may consider several subfactors. *See* ***State v. Odom***, 2006 WI App 145, ¶7, 294 Wis. 2d 844, 720 N.W.2d 695.

¶32 We review the trial court's imposition of a sentence for an erroneous exercise of discretion. ***Gallion***, 270 Wis. 2d 535, ¶17. "We will not set aside a discretionary ruling of the trial court if it appears from the record that the court

applied the proper legal standards to the facts before it, and through a process of reasoning, reached a result which a reasonable judge could reach." ***State v. Grindemann***, 2002 WI App 106, ¶30, 255 Wis. 2d 632, 648 N.W.2d 507.

¶33 Reyes complains that the trial court's sentence was "unduly harsh and severe and failed to take into account the rehabilitation factor," thus constituting an erroneous exercise of discretion. He additionally complains that the trial court "never stated anything on the record as to the reason it believed 25 years was necessary to [rehabilitate] him."

¶34 These complaints are on the cusp of frivolity. When a defendant claims his or her sentence is unduly harsh, "a court may find an erroneous exercise of sentencing discretion 'only where the sentence is so excessive and unusual and 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.'" ***Id.***, ¶31 (quoting ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975)). A sentence well within the limits of the maximum possible sentence does not satisfy this test. *See* ***id.***; *see also* ***State v. Scaccio***, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449. Reyes's twenty-five-year sentence is well within the maximum possible forty-three and one-half years he faced and we do not believe, in light of the sheer volume of cocaine and amount of cash, that a sentence of less than sixty percent of the maximum would shock public sentiment.

¶35 While Reyes complains that the trial court did not explain why twenty-five years' imprisonment was necessary to rehabilitate him, the court was not required to do so. "[T]he exercise of discretion does not lend itself to mathematical precision." ***Gallion***, 270 Wis. 2d 535, ¶49. A sentencing court is

not required "to provide an explanation for the precise number of years chosen." *See* ***State v. Taylor***, 2006 WI 22, ¶30, 289 Wis. 2d 34, 710 N.W.2d 466. We simply expect an explanation for the general range of the sentence imposed. ***Gallion***, 270 Wis. 2d 535, ¶49.

¶36 The relative importance of each sentencing objective, including rehabilitation, is a matter of discretion with the circuit court. *See* ***id.***, ¶41. This means that some objectives may be of little importance in a given case. The weight given to the factors the trial court considers in attempting to fulfill the sentencing objectives is also discretionary. *See* ***Odom***, 294 Wis. 2d 844, ¶7.

¶37 Here, the circuit court clearly had less concern for rehabilitation and a greater concern for protecting the community, punishment, and deterrence in light of the seriousness of the offenses, which was marked by the sheer volume of cocaine—much of which was already broken down and packaged for distribution—and the amount of cash found. But it would be incorrect to claim the trial court paid no attention to the rehabilitation objective; it ordered an alcohol and drug assessment, along with any counseling or treatment that might be necessary. Additionally, the trial court imposed significant extended supervision, which "by its very nature is designed to serve rehabilitative objectives." *See* ***State v. Fisher***, 2005 WI App 175, ¶28, 285 Wis. 2d 433, 702 N.W.2d 56. We discern no erroneous exercise of discretion in the trial court's imposition of sentence. Accordingly, the circuit court properly denied the postconviction motion.

By the Court.—Judgment and order affirmed.

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