COURT OF APPEALS
DECISION
DATED AND FILED

December 11, 2001

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-0817-CR **Cir. Ct. No. 99 CF 5150**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LISIMBA LOVE,

DEFENDANT-APPELLANT.

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

Before Wedemeyer, P.J., Fine and Schudson, JJ.

¶1 PER CURIAM. Lisimba Love appeals from an amended judgment of conviction entered on a jury verdict finding him guilty of armed robbery as a party to a crime and as a habitual criminal, contrary to WIS. STAT.

§§ 943.32(2), 939.05, and 939.62 (1999-2000).[1] He also appeals from an order denying his postconviction motions for a ***Machner*** hearing and for resentencing.[2] Love claims that: (1) his trial counsel was ineffective because she failed to object to the prosecutor's references to the preliminary examination during the trial and because she failed to object to the prosecutor's suggestion that the jury consider allegedly extraneous factors; (2) the trial court erred when it denied Love's request to admit his offer to take a polygraph test; and (3) the trial court erroneously exercised its discretion when it imposed what he claims is an unduly harsh sentence. We affirm.

I. BACKGROUND

¶2 Lisimba Love was tried for robbing Glenn Robinson outside of Junior's Sports Bar. At trial, Robinson testified that he was walking to his car in the parking lot of Junior's around midnight when two men approached him. One of the men, whom Robinson identified at trial as Love, was standing an arm's length away from Robinson when he pointed a gun at Robinson's face and said "break yourself." Robinson understood Love's statement to mean that he was being robbed. Robinson took off some of his jewelry and gave it to Love. Love then grabbed a necklace off of Robinson's neck and took money, a wallet, keys, a cellular phone, and a diamond earring from Robinson.

¶3 Robinson estimated that the entire incident took about two minutes, and testified that during this time he was able to focus on Love's face, despite the

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

[2] ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905, 908-909 (Ct. App. 1979).

fact that it was "dark." The prosecutor asked Robinson if, in addition to the in-court identification, he was able to identify Love at Love's preliminary examination. Robinson responded "Yes." Another witness, Tawanda Knox, also testified that she saw Love at Junior's on the night of the robbery, although she could not see who the gunman was during the robbery.

¶4 The prosecutor referred to Robinson's pre-trial identification of Love a second time during closing arguments to show that Robinson consistently identified Love as the man who robbed him. During closing arguments, the prosecutor also asked the jury to consider the time frame of the robbery, stating:

> When you go back to the jury room select one of your member[s] to just time two minutes. Look at somebody approximately arm's length from you. If you want turn down the lights in the jury room so it gets poor lighting and then have somebody say when thirty -- when that person is timing you does thirty seconds and then one minute and then one minute thirty and then two minutes. That's a long time when you're looking down the barrel of a gun.

¶5 The jury found Love guilty of one count of armed robbery. The trial court sentenced Love to forty-four years in prison to run consecutive to all other sentences.

¶6 Love filed two post-conviction motions. In his first motion, Love claimed that the judgment of conviction should be vacated and he should receive a ***Machner*** hearing because his trial counsel was ineffective. Specifically, he claimed that his trial counsel was ineffective because: (1) she failed to object to the prosecutor's reference to the preliminary examination during the trial and closing arguments, and (2) she failed to object to the prosecutor's invitation to "conduct an improper experiment during their deliberations" when the prosecutor asked the jurors to turn down the lights and time two minutes. In his second

motion, Love asked to be resentenced because, he claimed, the trial court erroneously exercised its sentencing discretion. He claimed that the trial court failed to consider that this was a single incident where the victim was not harmed. Love also alleged that the trial court overemphasized the seriousness of his prior record and punished him for failing to accept responsibility for this crime because he decided to go to trial. The trial court denied both motions without a hearing. We address each of his arguments in turn.

II. DISCUSSION

A. Ineffective Assistance of Counsel

¶7 Love asks this court to remand the case for a ***Machner*** hearing to determine whether his trial counsel was ineffective. The trial court has discretion to deny a postconviction motion "if the defendant fails to allege sufficient facts in his motion to raise a question of fact, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief." ***State v. Bentley***, 201 Wis. 2d 303, 309–310, 548 N.W.2d 50, 53 (1996) (quoted source omitted). "Whether a motion alleges facts which, if true, would entitle a defendant to relief is a question of law that we review *de novo*." ***Id***., 201 Wis. 2d at 310, 548 N.W.2d at 53 (italics added).

¶8 The familiar two-pronged test for ineffective assistance of counsel claims requires a defendant to prove: (1) deficient performance, and (2) prejudice. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient performance, a defendant must show specific acts or omissions of counsel that are "outside the wide range of professionally competent assistance." ***Id.*** at 690. There is a "strong presumption that counsel acted reasonably within professional norms." ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845, 848 (1990).

¶9 To prove prejudice, a defendant must show that counsel's errors were so serious that the defendant was deprived of a fair trial and a reliable outcome. ***Strickland***, 466 U.S. at 687. In order to succeed, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id***. at 694.

¶10 Our standard for reviewing this claim involves a mixed question of law and fact. ***Johnson***, 153 Wis. 2d at 127, 449 N.W.2d at 848. Findings of fact will not be disturbed unless clearly erroneous. ***Id***. The legal conclusions, however, as to whether counsel's performance was deficient and prejudicial, present a question of law. ***Id***., 153 Wis. 2d at 128, 449 N.W.2d at 848. Finally, we need not address both ***Strickland*** prongs if the defendant fails to make a sufficient showing on either one. ***Strickland***, 466 U.S. at 697.

1. Preliminary Examination References

¶11 Love claims that his trial counsel was ineffective because she did not object when the prosecutor referred to the preliminary examination during the trial and the closing argument. He claims that the prejudicial effect of these references substantially outweighs the probative value under WIS. STAT. RULE § 904.03 because the references to the preliminary examination suggested to the jury that a prior hearing took place and that the magistrate believed Robinson's version of the events rather than Love's. We disagree.

¶12 Relevant evidence may be excluded under § 904.03 "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." "Evidence is unduly prejudicial when it

threatens the fundamental goals of accuracy and fairness of the trial by misleading the jury or by influencing the jury to decide the case upon an improper basis." ***State v. DeSantis***, 155 Wis. 2d 774, 791–792, 456 N.W.2d 600, 608 (1990). Moreover, evidence is *unfairly* prejudicial "if the evidence tends to influence the outcome by improper means, or it appeals to the jury's sympathies, arouses its sense of horror, promotes its desire to punish, or otherwise causes the jury to base its decision on extraneous considerations." ***State v. Patricia A. M.***, 176 Wis. 2d 542, 554, 500 N.W.2d 289, 294 (1993).

¶13 During the trial, the prosecutor referred to Love's preliminary examination for identification purposes, asking: "did you come to a … court to testify in a preliminary hearing regarding Mr. Love? … Did you make an identification [of Love] that day?" The prosecutor also referred to the preliminary examination during his closing argument, stating: "Think of the number of times Glenn Robinson has had to tell his story…. At the preliminary hearing for Love, that's six."

¶14 These statements did not unfairly prejudice Love. The prosecutor referred to Robinson's identification of Love at the preliminary examination to show that Robinson identified Love consistently. The prosecutor never informed the jury of the purpose for the preliminary examination or of any conclusion reached by the magistrate. Thus, it is highly unlikely that these isolated references to a "preliminary hearing" would lead a jury of laypersons to infer that a magistrate ruled against Love because it found Robinson more credible.

¶15 Moreover, there is nothing in the two references that would have caused the jury to react in horror or promote its desire to punish Love. In addition to the preliminary examination, Robinson identified Love at a photographic array,

a lineup, and at the trial. The probative value of the consistency of his identifications far outweighs any prejudice to Love. Thus, Love has not demonstrated a "reasonable probability" that but for his trial lawyer's failure to object "the result of the proceeding would have been different." ***Strickland***, 466 U.S. at 694.

2. Extraneous Information

¶16 Next, Love claims that his trial counsel was ineffective because she did not object when the prosecutor "invited" the jurors to turn down the lights and time themselves for two minutes during deliberations. Love contends that he was prejudiced by this suggestion because the prosecutor encouraged the jury to consider extraneous information by suggesting that the jury could accurately replicate the lighting of the crime scene in the jury room. We disagree.

¶17 Extraneous information is information that is not of record and is not part of a juror's general knowledge. ***Castaneda v. Pederson***, 185 Wis. 2d 199, 209, 518 N.W.2d 246, 250 (1994). The methodology for determining whether to overturn a verdict and grant a new trial because of juror misconduct is well established. ***Castaneda***, 185 Wis. 2d at 208, 518 N.W.2d at 249. "The court must first determine whether the jurors are competent to testify in an inquiry into the validity of the verdict, an evidentiary issue governed by sec. (Rule) 906.06(2)." ***Castaneda***, 185 Wis. 2d at 208, 518 N.W.2d at 249–250.

¶18 Under WIS. STAT. RULE § 906.06(2), the party seeking to impeach the verdict must demonstrate that a juror's testimony is admissible by establishing: (1) that the juror's testimony concerns extraneous information (rather than the deliberative process of the jurors); (2) that the extraneous information was improperly brought to the jury's attention; and (3) that the extraneous information

was potentially prejudicial.[3] ***State v. Eison***, 194 Wis. 2d 160, 172, 533 N.W.2d 738, 743 (1995). After the trial court determines whether the party satisfies the initial burdens under § 906.06(2), it determines whether one or more of the jurors engaged in the alleged conduct and whether or not the error was prejudicial. ***Eison***, 194 Wis. 2d at 172–173, 533 N.W.2d at 743.

¶19 We reject Love's claim for two reasons. First, Love fails to present any evidence indicating that the jurors actually followed the prosecutor's suggestion and turned down the lights for two minutes—there is no testimony from any juror on this issue.

¶20 Second, Love fails to show how the prosecutor's mere suggestion, exposed the jury to extraneous information. In ***Eison***, a juror brought two wrenches from his home into the jury room during deliberations and the jurors compared the finish on the wrenches to evaluate a witness's testimony on the finish of a gun. ***Eison***, 194 Wis. 2d at 169–170, 533 N.W.2d at 741–742. ***Eison*** concluded that the wrenches were "extraneous information" because they were

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[3] WISCONSIN STAT. RULE 906.06(2) states:

> **(2)** INQUIRY INTO VALIDITY OF VERDICT OR INDICTMENT. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon the juror's or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may the juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received.

brought in from the outside and the knowledge gained from the "experiment" was not within the general knowledge of the jurors. ***Eison***, 194 Wis. 2d at 175, 533 N.W.2d at 744.

¶21 In contrast, the prosecutor in this case invited the jurors to consider the lighting conditions and the time frame in which the robbery occurred. Both of these elements, time and light, are within the common knowledge of a juror—a jury does not need outside tools or information to make determinations relevant to these matters because the jury heard testimony about the lighting during the robbery. Therefore, Love has not shown that the result of the trial would have been different had his lawyer objected. Accordingly, his trial counsel was not ineffective when she failed to object and a ***Machner*** hearing is not warranted. ***Bentley***, 201 Wis. 2d at 309–310, 548 N.W.2d at 53.

B. Polygraph Test

¶22 Love also alleges that the trial court erred when it refused to allow him to introduce his request to take a polygraph test. Love claims that the trial court confused the issue of admissibility of the results of a polygraph test with the admissibility of an offer to take a test. While Love correctly points out that an offer to take a polygraph test is admissible under certain circumstances, while the results of the test are not, *see* ***State v. Santana-Lopez***, 2000 WI App 122, ¶4, 237 Wis. 2d 332, 613 N.W.2d 918 ("an offer to take a polygraph examination is relevant to an assessment of the offeror's credibility and may be admissible for that purpose, even though the test results might not be admissible") (quoted source omitted), he failed to preserve this issue for appellate review.

¶23 WISCONSIN STAT. § 974.02(2) requires a defendant to file a postconviction motion in the trial court raising the issue unless "the grounds are

sufficiency of the evidence or issues previously raised." Love did not raise this issue anywhere in his postconviction motion.

¶24 Moreover, when Love's attorney objected at trial, she objected to the trial court's exclusion of this evidence on the grounds that "an investigative technique [was] available and [was] not used." On appeal, Love argues that his offer to take a polygraph test is relevant to his credibility. "[A]n offer to take a polygraph test … [is] relevant to the state of mind of the person making the offer—so long as the person making the offer believes that the test or analysis is possible, accurate and admissible." ***Santana-Lopez***, 2000 WI App 122 at ¶4.

¶25 Here, Love failed to argue at trial that his offer to take the test was relevant to his state of mind. Instead, his objection focused on the completeness of the investigation. Nonetheless, Love argues that his mere request to take the test shows that he believed the test was possible, accurate, and admissible. This alone is not enough. The "admission of contested evidence is dependant upon the presentation of a sufficient foundation establishing the relevancy of the evidence under WIS. STAT. § 901.04(1)." ***Santana-Lopez***, 2000 WI App 122 at ¶7 (quoted source omitted). Thus, Love's mere objection does not establish a sufficient foundation for the trial court to consider whether Love thought the test was possible, accurate, and admissible. Accordingly, this issue is waived. *See* ***Wirth v. Ehly***, 93 Wis. 2d 433, 443–444, 287 N.W.2d 140, 145 (1980) (generally, an appellate court will not review an issue raised for the first time on appeal), *superseded on other grounds by* WIS. STAT. § 895.52.

C. Sentencing Discretion

¶26 Finally, Love claims that the trial court erroneously exercised its sentencing discretion because it failed to consider several mitigating factors, including that the robbery was a single event with one victim and that Love did not injure the victim. Love also claims that the trial court "overcharacterized" the seriousness of his prior record and punished him for proceeding to trial because it based its sentence upon its conclusion that Love refused to accept responsibility for the crime. We disagree.

¶27 We will not disturb a sentence imposed by a trial court unless the trial court erroneously exercised its discretion. ***Ocanas v. State***, 70 Wis. 2d 179, 183, 233 N.W.2d 457, 460 (1975). We will find an erroneous exercise of discretion where the trial court does not consider the appropriate factors or "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.***, 70 Wis. 2d at 185, 233 N.W.2d at 461. A strong public policy exists against interfering with the trial court's discretion in determining sentences, *see* ***State v. Sarabia***, 118 Wis. 2d 655, 673, 348 N.W.2d 527, 537 (1984), and "[t]he trial court is presumed to have acted reasonably." ***State v. Wickstrom***, 118 Wis. 2d 339, 354, 348 N.W.2d 183, 191 (Ct. App. 1984). To obtain relief on appeal, a defendant "must show some unreasonable or unjustified basis in the record for the sentence imposed." ***State v. Borrell***, 167 Wis. 2d 749, 782, 482 N.W.2d 883, 895 (1992).

¶28 The three primary factors which a sentencing court must consider are the gravity of the offense, the character of the defendant, and the need to

protect the public.[4] ***Sarabia***, 118 Wis. 2d at 673, 348 N.W.2d at 537. An examination of the record shows that the trial court considered the appropriate factors. First, the trial court considered the seriousness of the crime, commenting that "armed robbery is a very serious violation of the law" and that the particular facts of this case were "very serious" because Love targeted Robinson and robbed him at gunpoint.

¶29 The trial court also considered Love's character, including Love's: age; education; work history; and prior convictions of disorderly conduct, four counts of operating a vehicle without the owner's consent stemming from two separate incidents, battery, possession of a controlled substance, and homicide by the negligent use of a motor vehicle. Contrary to Love's assertion that the trial court punished him for going to trial when it concluded that Love failed to take responsibility for the robbery, the trial court based its sentence upon its conclusion that, in addition to denying responsibility for this crime, Love had a history of failing to take responsibility for his actions as evidenced by his prior record.

¶30 Finally, the trial court based its sentence upon the need to protect the community, concluding "if you continue to make excuses and deny[,] then you will continue to be a danger to this community." Given the totality of these

[4] The trial court may also consider: the defendant's past record of criminal offenses; the defendant's history of undesirable behavior patterns; the defendant's personality, character and social traits; the presentence investigation results; the viciousness or aggravated nature of the defendant's crime; the degree of the defendant's culpability; the defendant's demeanor at trial; the defendant's age, educational background and employment record; the defendant's remorse, repentance or cooperativeness; the defendant's rehabilitative needs; the rehabilitative needs of the victim; the needs and rights of the public; and, the length of the defendant's pretrial detention. ***State v. Jones***, 151 Wis. 2d 488, 495–496, 444 N.W.2d 760, 763–764 (Ct. App. 1989).

factors, Love's sentence was not excessive and the trial court did not erroneously exercise its discretion.

By the Court.—Judgment and order affirmed.

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