COURT OF APPEALS
DECISION
DATED AND FILED

March 15, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 04-0557-CR **Cir. Ct. No. 02CF003860**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RICKEY A. TAYLOR,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed*.

Before Fine, Curley and Kessler, JJ.

¶1 CURLEY, J. Rickey A. Taylor appeals from a judgment, entered after a court trial, convicting him of one count of battery, special circumstances, to a public transit passenger, as a habitual criminal, in violation of WIS. STAT.

§§ 940.20(6)(b)1. and 939.62 (2001-02).[1] He also appeals from the order denying his motion for postconviction relief. Taylor contends that: (1) the trial court improperly admitted statements of the alleged victim under the excited utterance exception of the hearsay rule; (2) the evidence was insufficient to convict him; and (3) the trial court erroneously exercised its sentencing discretion. Because the statements were properly admitted, there was sufficient evidence to support the conviction, and the trial court properly exercised its sentencing discretion, we affirm.

I. BACKGROUND.

¶2 On Friday, July 12, 2002, Taylor was involved in an argument with the mother of two of his children, Bridgett O., on a Milwaukee County Transit bus. He allegedly struck her several times in the face. A silent alarm was activated, and security officers for the Milwaukee County Transit System were dispatched to investigate the incident. Christopher Poff, one of the security officers, testified that, when they arrived at the scene within three minutes of being dispatched, they found Bridgett O. upset and crying, with her face swollen and blood coming out of her ear. He testified that she appeared fearful, he spoke to her within one minute of his arrival at the scene, and she told him that Taylor had punched her in the face twice. Bridgett O. then described Taylor, and what he was wearing. Poff saw Taylor in police custody shortly thereafter, and testified that he matched the description Bridgett O. had given.

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

¶3 Jay Karas, a City of Milwaukee police officer, also responded to a call reporting the incident on the bus. Karas testified that he was sent to check for a subject wanted for "battering a female on a transit bus," and was given a description of the subject—a black male wearing a white t-shirt, black shorts, and a black visor. Upon arriving at the location, he saw an individual matching the description, who was later identified as Taylor. He testified that he asked Taylor if he had been on a transit bus, and Taylor responded that he had not been on a bus, but had actually walked downtown from the east side. In response to Karas's question as to whether he had hit anyone, Taylor answered in the negative. Karas testified that he nonetheless concluded that Taylor was the individual who had been on the bus, and arrested him.

¶4 The incident was also caught on surveillance tape, which was entered into evidence during the trial. During the court trial, Poff and Karas both identified Taylor in an image captured on the surveillance tape. Bridgett O. did not testify.

¶5 Near the end of the trial, Taylor moved for dismissal based on a lack of evidence. That motion was denied. After both sides rested, Taylor renewed his motion to exclude any statements made by Bridgett O. that were admitted as excited utterances. Taylor argued that the statements were inherently unreliable, and were "the product of an interview, not of an excited utterance[.]" The trial court denied the motion, and thereafter found Taylor guilty beyond a reasonable doubt. He was subsequently sentenced to eleven years of imprisonment, consisting of seven years of initial confinement and four years of extended supervision.

¶6 Taylor filed a motion for sentence modification asserting that "the trial court erroneously exercised its sentencing discretion in sentencing him in this matter." He insisted that the "offense was not extremely serious[,]" and the trial court failed to take into consideration the fact that Taylor had been free from drugs for five years. That motion was denied. Taylor now appeals.

II. ANALYSIS.

A. The trial court properly admitted Bridgett O.'s statements as excited utterances.

¶7 Taylor contends that the trial court improperly admitted Bridgett O.'s statements under the excited utterance exception to the hearsay rule. He insists that since Poff was unable to testify as to when the alleged event actually took place, could only testify as to when the alarm was triggered, and was unable to testify as to how much time elapsed between the alleged event and when the alarm was triggered, "[t]here is not a nexus established between the alleged event and [Bridgett O.'s] statements to establish that [he] was the individual who struck [her]." He also asserts that there was no evidence presented indicating that Bridgett O. made the statements while "she was still under the stress of the excitement of the alleged event." He further contends, without citation to any legal authority, that Bridgett O.'s statements were not spontaneous because Poff initiated the conversation. Taylor also argues that since she responded that she did not want medical attention when asked, she was able to think rationally, and thus, her statements were not excited utterances. We are unpersuaded.

¶8 The admission of evidence under a hearsay exception is within the trial court's discretion. *See* ***State v. Moats***, 156 Wis. 2d 74, 96, 457 N.W.2d 299 (1990). "If we can discern a reasonable basis for its evidentiary decision, then the

[trial] court has not committed an erroneous exercise of discretion." ***State v. Huntington***, 216 Wis. 2d 671, 681, 575 N.W.2d 268 (1998). An excited utterance must meet three conditions to be admissible: (1) there must be a startling event or condition; (2) the statement must relate to the startling event or condition; and (3) the statement must be made while the declarant is still under the stress or excitement caused by the event or condition. WIS. STAT. § 908.03(2); ***Huntington***, 216 Wis. 2d at 682.[2] Indeed, "'[i]t must be shown that the statement was made so spontaneously or under such psychological or physical pressure or excitement that the rational mind could not interpose itself between the spontaneous statement or utterance stimulated by the event and the event itself.'" ***Huntington***, 216 Wis. 2d at 682 (citations omitted).

¶9 Here, the trial court concluded:

> [B]ased upon the testimony, based upon the case law, based upon the statute the testimony is uncontroverted that the officer of the transit authority arrived within minutes after the event whereupon his observations were that the individual in question who was the victim of the offense, Bridgett [O.], was upset, crying, fearful, swelling. She was bleeding from her ear. She was crying and those injuries were observed to the left side of the face. And that she

[2] WISCONSIN STAT. § 908.03(2) provides:

> **Hearsay exceptions; availability of declarant immaterial.** The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> ….
>
> **(2)** EXCITED UTTERANCE. A statement relating to a starling event or condition made while the declarant was under the stress or excitement caused by the event or condition.

> was, in fact, fearful and frightened upon the arrival of the officers.
>
> Based upon that the Court believes – and the statement that was given the Court believes that certainly that the exception to the hearsay rule as the excited utterance would be received and so the Court will consider it as such, meeting certainly the test of the excited utterance rule.

That was reasonable, and a proper exercise of the trial court's discretion.

¶10 Contrary to Taylor's assertions, there was evidence presented suggesting that Bridgett O. made the statements while she was still under the stress and excitement caused by the event. There was testimony indicating that she was upset and crying, and appeared fearful. Poff also testified that he spoke to her within a minute of his arrival on the scene, which was approximately three or four minutes after the alarm was triggered, and she told him that Taylor hit her. While Taylor attempts to attach significance to the fact that there was no testimony specifying exactly how much time elapsed between the incident and when the driver triggered the silent alarm, it is reasonable to infer that the bus driver activated the alarm immediately after or during the incident. As such, that "lack of evidence" is insignificant. Moreover, "[f]or the purpose of determining the admissibility of hearsay statements under the excited utterance exception, the interval between the incident and the declaration is not measured by the mere lapse of time but by the duration of the excitement the event caused." ***State v. Boshcka***, 178 Wis. 2d 628, 640, 496 N.W.2d 627 (Ct. App. 1992). Finally, with regard to Taylor's assertion that because Poff initiated the conversation, Bridgett O.'s statements were not "spontaneous," we are similarly unpersuaded. Taylor has provided no legal authority to support such a proposition, and there is nothing in the record indicating that Bridgett O.'s excited state was lessened upon the initiation of the conversation.

B. There was sufficient evidence to support the conviction.

¶11 Taylor contends that the evidence presented—the surveillance tape and the testimony of Poff and Karas—was insufficient to support the conviction. He argues that no eyewitnesses ever testified, even though the complaint indicated that there were numerous witnesses; neither Poff nor Karas personally observed Taylor strike Bridgett O. or the interaction between them; and Bridgett O. did not testify at the trial.[3] He also insists that the "excited utterance regarding the identification of [Taylor] as the assailant by [Bridgett O.] was unreliable." Finally, Taylor asserts that "there was no evidence presented to the court that [he] allegedly struck [Bridgett O.] intentionally while she was on the bus or that if he did strike [her], it was done without her consent."

¶12 As the supreme court reiterated in ***State v. Poellinger***, 153 Wis. 2d 493, 503-04, 451 N.W.2d 752 (1990) (citations omitted) (alterations and omissions in original):

> 'The burden of proof is upon the state to prove every essential element of the crime charged beyond reasonable doubt. The test is not whether this court or any of the members thereof are convinced [of the defendant's guilt] beyond reasonable doubt, but whether this court can conclude the trier of facts could, acting reasonably, be so convinced by evidence it had a right to believe and accept as true.... The credibility of the witnesses and the weight of the evidence is for the trier of fact. In reviewing the evidence to challenge a finding of fact, we view the evidence in the light most favorable to the finding. Reasonable inferences drawn from the evidence can support a finding of fact and, if more than one reasonable

[3] Taylor also argues: "In fact, when she spoke with the pre-sentence investigation writer, she stated that … Taylor did not strike her at all." We refuse to address this argument. Any statements Bridgett O. may or may not have made after the conviction have no bearing on the sufficiency of the evidence supporting the finding of guilt.

> inference can be drawn from the evidence, the inference which supports the finding is the one that must be adopted.'

An appellate court gives deference to a trial court's findings because of "the superior opportunity of the trial court to observe the demeanor of witnesses and to gauge the persuasiveness of their testimony." ***Kleinstick v. Daleiden***, 71 Wis. 2d 432, 442, 238 N.W.2d 714 (1976). Moreover, "[o]nly when the evidence is inherently or patently incredible will [the court] substitute [its] judgment for that of the factfinder." ***State v. Saunders***, 196 Wis. 2d 45, 54, 538 N.W.2d 546 (Ct. App. 1995) (citation omitted).

¶13 The trial court is permitted to rely upon circumstantial evidence, as it "may be and often is stronger and more satisfactory than direct evidence[.]" ***State v. Johnson***, 11 Wis. 2d 130, 135, 104 N.W.2d 379 (1960). Indeed, "[a] criminal conviction can stand based in whole or in part upon circumstantial evidence." ***Bautista v. State***, 53 Wis. 2d 218, 223, 191 N.W.2d 725 (1971). Finally, "[r]easonable inferences drawn from the evidence can support a finding of fact and, if more than one reasonable inference can be drawn from the evidence, the inference [that] supports the finding is the one that must be adopted." ***Id.***

¶14 Here, first and foremost, there was a statement from the victim, properly admitted as an excited utterance, indicating that Taylor hit her in the face. This is arguably sufficient to support the conviction. But, more than that, there was a surveillance tape admitted into evidence depicting the altercation between Taylor and Bridgett O., during which Taylor appeared to strike Bridgett O. in the face. There was also testimony indicating that, immediately after the incident, Bridgett O.'s face was swollen and there was blood coming out of her ear. And finally, in regard to the consent issue, the trial court concluded: "[T]he Court can make a reasonable inference as to the consent issue based upon the visual showing

of the CD Rom and, of course, the statements that were made." We agree. Bridgett O. responded to being struck by Taylor by trying to push him away, raising her hands in a defensive manner, and appearing fearful—this was clearly not a case of consensual horseplay. As such, there was more than sufficient evidence to support the conviction.

C. The trial court properly exercised its sentencing discretion.

¶15 Finally, Taylor contends that the trial court erroneously exercised its sentencing discretion in that "this offense was not extremely serious[,]" and "the Court noted that this was not one of the most aggravating cases that the Court had seen." He argues that, had the incident not occurred on a bus, it would only have been charged as a misdemeanor. He also asserts that the trial court failed to take into consideration the fact that he had been free from drugs for five years.

¶16 Sentencing is well within the discretion of the trial court, ***State v. Larsen***, 141 Wis. 2d 412, 426, 415 N.W.2d 535 (Ct. App. 1987), and "[t]he trial court has great latitude in passing sentence[,]" ***State v. J.E.B.***, 161 Wis. 2d 655, 662, 469 N.W.2d 192 (Ct. App. 1991). Our review "is limited to determining whether there was an [erroneous exercise] of discretion." ***Larsen***, 141 Wis. 2d at 426. Further, there is a "strong public policy against interference with the sentencing discretion of the trial court and sentences are afforded the presumption that the trial court acted reasonably." ***State v. Harris***, 119 Wis. 2d 612, 622, 350 N.W.2d 633 (1984). "An [erroneous exercise] of discretion will be found 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." ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

¶17 The trial court is to consider three primary factors in passing sentence: (1) the gravity of the offense; (2) the defendant's character; and (3) the need for protection of the public. ***Elias v. State***, 93 Wis. 2d 278, 284, 286 N.W.2d 559 (1980). The trial court *may* also consider:

> the vicious or aggravated nature of the crime; the past record of criminal offenses; any history of undesirable behavior patterns; the defendant's personality, character and social traits; the results of a presentence investigation; 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 and cooperativeness; the defendant's need for rehabilitative control; the right of the public; and the length of pretrial detention.

State v. Borrell, 167 Wis. 2d 749, 773-74, 482 N.W.2d 883 (1992). The weight to be attributed to each factor "is a determination which appears to be particularly within the wide discretion of the sentencing judge." ***Ocanas***, 70 Wis. 2d at 185. Thus, "[i]f the facts are fairly inferable from the record, and the reasons indicate the consideration of legally relevant factors, the sentence should ordinarily be affirmed." ***McCleary v. State***, 49 Wis. 2d 263, 281, 182 N.W.2d 512 (1971).

¶18 Here, the trial court considered the proper factors, and, although noting that this was "not one of the most aggravating cases that the Court has … seen[,]" concluded that after considering Taylor's past criminal history and "assaultive behavior" the crime "becomes certainly more egregious." The trial court found Taylor's previous history to be especially telling, as it included, *inter alia*, numerous batteries, a substantial battery, and burglaries. It noted that the presentence investigation report indicated that "Taylor's law violating behavior is so well ingrained, that probation, parole or prison has done little for him to change the course of his life and that [he] minimize[s] [his] behavior with excuses." As such, the trial court sentenced Taylor to eleven years of imprisonment, with seven

years of initial confinement, and four years of extended supervision. This was a proper exercise of discretion. It remains within the realm of the trial court to determine which factors it believes to be relevant, and what weight should be attached thereto. *See* ***State v. Stenzel***, 2004 WI App 181, ¶16, 276 Wis. 2d 224, 688 N.W.2d 20. The trial court's exercise of sentencing discretion is not rendered erroneous because it did not focus on a factor that Taylor would have preferred. Accordingly, we affirm.

By the Court.—Judgment and order affirmed.

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