COURT OF APPEALS
DECISION
DATED AND FILED

October 30, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP830-CR **Cir. Ct. No. 2009CF256**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DANIEL BUCHANAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: PATRICIA D. McMAHON and KEVIN E. MARTENS, Judges. *Affirmed*.

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

¶1 KESSLER, J. Daniel Buchanan appeals from a judgment of conviction for felony murder, following a jury trial. Buchanan also appeals from an order of the trial court denying his motion for postconviction relief. Buchanan

argues that: (1) the trial court erroneously admitted hearsay statements and a transcript of the statements into evidence; (2) his trial counsel was ineffective for not attempting to restrict the amount of hearsay testimony heard and read by the jury; and (3) the trial court erroneously exercised its sentencing discretion. We affirm.

BACKGROUND

¶2 On January 15, 2009, Buchanan was charged with felony murder, stemming from the attempted armed robbery and death of Ahmadou Fall. According to the complaint, on January 8, 2009, Buchanan, Vamonta Ward and Dentonicco Magett were all involved in the attempted armed robbery of the Mobile Mall, a business run by Fall and his business partner, Roderick Crape. The Mobile Mall was a van from which Fall and Crape sold shoes and various other clothing items. Crape told police that on the afternoon of January 8, he and Fall received a phone call from a person expressing interest in purchasing shoes. Crape told police that a meeting point and time were established—the intersection of North Teutonia Avenue and West Villard Avenue, in Milwaukee, at 3:00 p.m. Crape further told police that shortly after arriving at the meeting point, he and Fall were approached by two males—identified in the complaint as Buchanan and Ward—one of whom approached the passenger side of the van and pulled out a gun. The man with the gun—identified in the complaint as Ward—instructed Fall and Crape to "[g]ive it up." The complaint indicates that a shot was then fired into the vehicle, striking Fall, the driver. Fall still drove away, but eventually lost consciousness and control of the vehicle. Fall eventually died from the gunshot wound.

¶3 In a recorded statement made on January 12, 2009, Ward admitted to police that he fired a shot into the Mobile Mall, but stated that the shooting was accidental. Ward told police that he was unaware that he had even hit Fall because Fall drove away immediately, but later heard from the local news that Fall had died. Ward further told police that in the early afternoon on the day of the attempted robbery and shooting death of Fall, he and Magett drove up to Saukville to pick up Deangelo Cunningham. The three drove back to Milwaukee and stopped at a north side McDonalds, where they initially saw the Mobile Mall. Ward told police that they spoke with "the shoe man," looked at a few pairs of shoes, and then left the McDonald's parking lot. Ward further told police that the three then went to pick up Buchanan and that Magett instructed Buchanan to bring his gun along because they had planned to rob Fall and Crape. Ward went on to tell police that he called the Mobile Mall and set up a time and meeting point with Fall and Crape. Ward stated that Magett and Cunningham dropped Ward and Buchanan off at a gas station and then drove to a nearby location to wait for them (Ward and Buchanan). According to Ward, Buchanan handed Ward the gun and the two approached the Mobile Mall when it arrived at the meeting point. Ward stated that Fall attempted to hurriedly drive away upon realizing that Ward and Buchanan were attempting a robbery, prompting Ward to jump back and the gun to fire.

¶4 Ward also testified at Buchanan's trial, relaying virtually the same information to the jury that he relayed to police. During cross-examination, Buchanan's defense counsel initiated the following line of questioning:

> [Defense Counsel]: And, eventually, at some point in time you talked to the detectives and you give them the version or you give the information that you've told us here today, right?

[Ward]: Yes.

[Defense Counsel]: In addition, there's been at least some type of agreement worked out between you and the State regarding your testimony here today, hasn't there?

[Ward]: No.

[Defense Counsel]: No deal?

[Ward]: No.

[Defense Counsel]: So you're indicating to me that you're just going to plea and whatever happens, happens? The State hasn't made any deal at all?

[Ward]: Yes.

[Defense Counsel]: Just doing this out of the kindness of your heart?

[Ward]: Yes.

[Defense Counsel]: You don't recall any discussions about you pleading guilty to felony murder, because you were the individual pulling the trigger, that the State would recommend substantial prison but leave the sentencing up to the Court? You don't recall any discussions about that at all?

[Ward]: No.

[Defense Counsel]: And you're not expecting anything good to happen from you sitting here testifying?

[Ward]: No.

[Defense Counsel]: Thanks. That's all I have.

¶5 On redirect, the following exchange took place between Ward and the State:

[State]: You do expect the judge to take into consideration what you're saying today?

[Defense Counsel]: Objection, leading.

[Ward]: Maybe.

[The Court]: Overruled. You may answer the question.

[State]: Is that right?

[Ward]: Maybe, yes.

¶6 The State then moved to admit the prior statement that Ward had given to police, arguing that the statement was consistent with Ward's trial testimony and was necessary to rebut the defense's implication that Ward fabricated his testimony as a result of an agreement made with the State. Buchanan's defense counsel objected, stating that he did not make an implied charge of recent fabrication or improper motive because Ward had, in fact, reached a deal with the State in which Ward would agree to plead guilty to felony murder in exchange for the State's recommendation for substantial confinement, leaving the sentence up to the court. The trial court overruled the objection, and permitted the State to play the recording of Ward's police interview, in its entirety,[1] for the jury, stating:

> [The Court]: [Defense counsel] implied by your question that he was here testifying because he had an offer from the State and that offer from the State would only have come after he had an attorney and after things were going and so forth. That was the clear implication, is that he was – he was testifying the way he was testifying because he had a deal to do that when, in fact, he gave his statement – which I accept the representation, that it's essentially the same as what he said in his interview with [police] – before he had a lawyer, before any charges were filed.
>
> [Defense Counsel]: But just because he made a statement doesn't mean that he was going to testify here in court regardless of whether there's a deal. It doesn't say that he's lying up there. It says that this is what he got and now he's up there. It's not saying other than exactly what reality is.
>
> [State]: Well, the only way it's relevant is if he's—if the inference—

[1] The jury was also provided with a forty-seven page transcript of the interview.

> [The Court]: That's the problem, is the inference. The problem is the inference, that somehow this is a deal.
>
> [State]: The reason the question was asked was to infer to the jury that he's testifying because he's got this deal. The statute is clear that I can put in a prior consistent statement before he got the deal.
>
> [Defense Counsel]: Obviously, I'll abide by the Court's ruling, and anybody else can look at it. Quite frankly, I've listened to it. I don't think it's any different—
>
> [The Court]: I know you've listened to it, but I still don't – you asked the question after having listened to it. You asked the question that says – that gave the inference that a deal – the inference is that a deal was cooked up between his lawyer and the State to craft his testimony to be favorable to the State.
>
> ….
>
> [State]: … [Defense counsel] inferred to the jury that that's why he was testifying.
>
> [The Court]: Without that, I think he could argue to the jury that disregard all his testimony. He's only doing it to get the deal from the State. I think without that, that's the clear argument. And that wouldn't be accurate because that would be based on an argument that there's recent fabrication, which is classic prior consistent statement.

¶7 Buchanan was convicted of felony murder and sentenced to twenty-five years, comprised of twenty years' initial confinement and five years' extended supervision. Buchanan filed a postconviction motion for relief, arguing that the trial court erroneously admitted hearsay statements, his trial counsel was ineffective, and his sentence was unjust. The postconviction court denied the motion. This appeal follows. Additional facts are provided as relevant to the discussion.

DISCUSSION

¶8 On appeal, Buchannan argues that: (1) the trial court erroneously admitted hearsay statements by allowing the State to introduce both Ward's recorded police statement and a transcript of the statement; (2) his trial counsel was ineffective for failing to limit the amount of the recording heard and transcribed; and (3) his sentence was unduly harsh. We disagree.

I. Prior Consistent Statement.

¶9 Buchanan contends that a new trial should be granted based on the improper admission of Ward's prior consistent statement. At trial, Ward admitted to shooting Fall, albeit unknowingly, but also stated that he obtained the gun from Buchanan. Buchanan's defense counsel questioned Ward about his statement to police and asked whether Ward received a deal from the State for testifying against Buchanan. Over defense counsel's objection, the trial court concluded that Ward's recorded police interview was an exception to the hearsay rule under WIS. STAT. § 908.01(4)(a)2. (2009-10).[2]

¶10 The admission of evidence is generally within the discretion of the trial court. *See* ***State v. Pharr***, 115 Wis. 2d 334, 342, 340 N.W.2d 498 (1983). We review a trial court's ruling on the admissibility of evidence for an erroneous exercise of discretion. *See* ***State v. Buelow***, 122 Wis. 2d 465, 476, 363 N.W.2d 255 (Ct. App. 1984). To sustain a discretionary ruling, we need only find that the trial court examined the relevant facts, applied a proper standard of law and, using

[2] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

a rational process, reached a reasonable conclusion. *See* ***Franz v. Brennan***, 150 Wis. 2d 1, 6, 440 N.W.2d 562 (1989).

¶11 WISCONSIN STAT. § 908.01(4)(a)2. provides, in relevant part:

> A statement is not hearsay if: … [t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is … [c]onsistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive.

(Some formatting altered.)

¶12 Under WIS. STAT. § 908.01(4)(a)2., a prior consistent statement of a witness is not hearsay and may be offered for substantive purposes if: (1) the declarant testifies at trial and is subject to cross-examination concerning the statement; (2) the statement is consistent with the declarant's testimony; and (3) the statement is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive. *See* ***id.***

¶13 Here, the declarant, Ward, testified at trial; he was subject to cross-examination concerning his statement to police; and his earlier statement was consistent with his trial testimony. Therefore, the only disputed issue is whether the recording was offered to rebut an implied charge against Ward of recent fabrication or improper influence or motive.

¶14 To use prior consistent statements, the proponent of the statements must also show that the statements predated the alleged recent fabrication and that there was an express or implied charge of fabrication at trial. ***State v. Peters***, 166 Wis. 2d 168, 177, 479 N.W.2d 198 (Ct. App. 1991); *see also* ***State v. Mares***, 149 Wis. 2d 519, 527, 439 N.W.2d 146 (Ct. App. 1989). If the prior consistent

statements predate the alleged recent fabrication, then the statements have probative value and are admissible. ***Peters***, 166 Wis. 2d at 177.

¶15 Buchanan is correct that a deal with the State in and of itself does not necessarily imply fabricated testimony or an improper motive. However, there was not simply an implication that Ward was motivated to testify as a result of a deal with the State. There was also an implication that Ward was motivated to testify falsely that Buchanan was involved in Fall's murder. By asking Ward whether he was testifying simply out of "the kindness of [his] heart," and whether he was "expecting anything good to happen from [him] sitting here testifying," defense counsel presented the jury with the inference that Ward had ulterior motives for testifying the way that he did. Ward's statements to police, which were consistent with his testimony, were made before Ward was charged with any offense, before Ward had an attorney, and before Ward received a plea offer. Therefore, Ward's prior consistent statements were properly admitted under WIS. STAT. § 908.01(4)(a)2. to rebut the implied charge of recent fabrication.

II. Ineffective Assistance of Counsel.

¶16 Buchanan also argues that his defense counsel was ineffective because he did not ask the trial court to limit the amount of Ward's recorded police statements played for the jury and to restrict the length of the transcript provided to the jury. Buchanan contends that the State's request to have the prior consistent statement confirmed could have been accomplished by introducing only the beginning of the recorded interview, transcribed as the first eight pages of the transcript received by the jury. In essence, Buchanan argues that once the prior consistent statements were ruled admissible, defense counsel had a "responsibility to limit the damage."

¶17 In order to prevail on a claim of ineffective assistance of counsel, a defendant must show that his attorney's performance was deficient and that he was prejudiced as a result of his attorney's deficient conduct. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient performance, the defendant must identify specific acts or omissions of his or her attorney that fall "outside the wide range of professionally competent assistance." ***Id.*** at 690. To show prejudice, the defendant must demonstrate that the result of the proceeding was unreliable. ***Id.*** at 687. If the defendant fails on either prong—deficient performance or prejudice—his ineffective assistance of counsel claim fails. ***Id.*** at 697.

¶18 Buchanan argues that the recording consisted of a number of inadmissible statements, over three hundred questions asked by the interviewing officers, and editorial comments from the officers providing their own interpretations of Ward's truthfulness. This additional information, Buchanan contends, was "left unchecked by the opportunity to cross-examine," and therefore prejudiced his defense.

¶19 In denying Buchanan's postconviction motion, the postconviction court concluded that Buchanan had not sufficiently demonstrated that he was prejudiced by the entry of Ward's entire recorded and transcribed statement. The postconviction court concluded that "[t]here is no reasonable probability that restricting the statement … to the prior consistent statement would have resulted in a different verdict." The postconviction court applied the correct test of whether prejudice is shown. *See* ***id.*** at 694 (To demonstrate prejudice, a defendant must show a reasonable probability that, but for his counsel's unprofessional errors, the result of the trial would have been different.).

¶20 The record contains overwhelming evidence suggesting that the jury would still have found Buchanan guilty beyond a reasonable doubt without the admission of the entire recording and transcript. At trial, Crape identified Buchanan as the person who approached his van and who was standing near Ward when Fall was shot. Cunningham also testified at trial, telling the jury that he was with Ward when Ward called Buchanan to tell him (Buchanan) to bring his gun. Cunningham identified Buchanan in court and testified that while he did not see Buchanan with a gun when he, Ward and Magett picked Buchanan up, Buchanan was known to carry a gun and had been seen with a .38 revolver on previous occasions. The bullet that was removed from Fall during an autopsy was identified as a .38/.357 caliber full metal jacketed bullet fired from a revolver. Further, Officer Eric Draeger, an intelligence analyst for the Milwaukee Police Department, testified about cell phone calls made between Ward's and Fall's phones just before the shooting. Draeger testified that he also located a phone call between Ward's and Buchanan's phones, shortly before the shooting. Draeger stated that, based on cell tower technology, he was able to determine that both Ward's and Buchanan's cell phones were at the location of the crime scene at the time of the murder.

¶21 We therefore conclude that Buchanan has not demonstrated a reasonable probability that, but for his counsel's unprofessional errors, the result of his trial would have been different. *See* ***Strickland***, 466 U.S. at 694. Buchanan's counsel was not ineffective.

III. Sentence Modification.

¶22 Buchanan alternatively argues that he is entitled to sentence modification because his sentence was unduly harsh as compared to his co-defendants.

¶23 Sentencing decisions are committed to the discretion of the trial court and our review is limited to determining whether the trial court erroneously exercised its discretion. ***McCleary v. State***, 49 Wis. 2d 263, 278, 182 N.W.2d 512 (1971). To obtain relief on appeal, the defendant has the burden to "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 (1992). The fact that Buchanan's co-defendants received different sentences is not sufficient to show that his sentence was unduly harsh. *See* ***State v. Perez***, 170 Wis. 2d 130, 144, 487 N.W.2d 630 (Ct. App. 1992). Buchanan must show that the disparity in sentences was arbitrary or not based upon appropriate sentencing considerations. *See* ***id.***

¶24 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." ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). However, "[a] sentence well within the limits of the maximum sentence is not so disproportionate to the offense committed as to shock the public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." ***State v. Daniels***, 117 Wis. 2d 9, 22, 343 N.W.2d 411 (Ct. App. 1983); *see also* ***State v. Scaccio***, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622

N.W.2d 449 ("A sentence well within the limits of the maximum sentence is unlikely to be unduly harsh or unconscionable.").

¶25 The postconviction court, in reviewing the sentencing court's decision, noted that Magett was charged with a lesser offense, due, in part, to his cooperation with the State, and that Ward was also very cooperative. A review of the sentencing record demonstrates that the sentencing court addressed the objectives of Buchanan's sentence, as well as the factors necessary for consideration under ***State v. Gallion***, 2004 WI 42, ¶¶40-43, 270 Wis. 2d 535, 678 N.W.2d 197. The sentencing court noted that: (1) Buchanan had a prior juvenile adjudication for sexual assault; (2) Buchanan displayed a pattern of attempting to minimize his culpability for his crimes; (3) Buchanan was a "key part" in Fall's death; and (4) the community was in need of protection. The sentencing court also recognized the trauma caused to Fall's family and co-worker.

¶26 Here, Buchanan was sentenced to twenty-five years, comprised of twenty years of initial confinement and five years of extended supervision, to be served consecutively to any other sentence. Magett was convicted of aiding a felon and was sentenced to one year and six months of initial confinement, and two years of extended supervision.[3] Ward was convicted of felony murder and was sentenced to fifteen years of initial confinement followed by five years of extended supervision.[4] Felony murder, in this circumstance, carries a maximum possible sentence of thirty-five years. *See* WIS. STAT. §§ 940.03, 943.32(2), 939.32 & 939.50(3)(c). Buchanan was convicted of felony murder. His sentence of twenty-five years is five years longer than Ward's but ten years less than the

[3] *See* Milwaukee County Circuit Court Case No. 2009CF000257.

[4] *See* Milwaukee County Circuit Court Case No. 2009CF000255.

maximum possible sentence. We conclude that the sentencing court considered the appropriate factors and imposed a sentence that is not "so disproportionate to the offense committed as to shock the public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." *See* ***Daniels***, 117 Wis. 2d at 22.

¶27 For the foregoing reasons, we affirm the trial court.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.