COURT OF APPEALS
DECISION
DATED AND FILED

August 18, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP2107-CR **Cir. Ct. No. 1997CF970032**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BOBBY ROBINSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DAVID A. HANSHER and JEFFREY A. WAGNER, Judges.[1] *Affirmed*.

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

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[1] The Honorable David A. Hansher presided over Robinson's trial and sentencing. The Honorable Jeffrey A. Wagner denied Robinson's motion for postconviction relief.

¶1 CURLEY, P.J. Bobby Robinson appeals the judgment, entered following his no-contest plea, convicting him of first-degree reckless homicide, as a party to the crime, contrary to WIS. STAT. §§ 940.02(1) and 939.05 (1995-96).[2] Robinson also appeals the order denying his postconviction motion.[3] On appeal, Robinson contends that: (1) the trial court erred in not suppressing his statements given to police; (2) his attorney was ineffective for failing to "fully litigate the voluntariness" of his confession; (3) his plea was not knowing and voluntary because he was misinformed by the trial court concerning what constituted first-degree reckless homicide; and (4) the trial court erroneously exercised its discretion in sentencing him to the maximum sentence of forty years. Because the trial courts' rulings in the two ***Miranda-Goodchild***[4] hearings were not clearly erroneous, finding that Robinson was advised of his ***Miranda*** rights, understood them and voluntarily gave statements to the police; Robinson's trial attorney properly litigated the ***Miranda-Goodchild*** hearing; the trial court did not misinform Robinson about what constituted first-degree reckless homicide; and the trial court properly exercised its discretion in sentencing Robinson, we affirm.

I. BACKGROUND.

¶2 According to the criminal complaint filed on January 2, 1997, and testimony taken during Robinson's two jury trials and motion hearings, Robinson,

[2] All references to the Wisconsin Statutes are to the 1995-96 version unless otherwise noted.

[3] Robinson's postconviction and appellate rights were reinstated on September 6, 2007, and he then brought a postconviction motion.

[4] ***Miranda v. Arizona***, 384 U.S. 436 (1966); ***State ex rel. Goodchild v. Burke***, 27 Wis. 2d 244, 133 N.W.2d 753 (1965).

then a little more than a week away from his fifteenth birthday, was charged with first-degree reckless homicide while armed, attempted armed robbery, and first-degree recklessly endangering safety while armed, all charged as a party to the crime.[5]

¶3 The charges resulted from an incident that occurred on December 25, 1996. According to William Kirk Daniel, who ran a business selling rock salt out of his house at 2757 North 20th Street in Milwaukee, at approximately 10:00 p.m. on Christmas night he was watching television when he heard someone trying to open his front storm door. He went to the door and saw three males wearing black ski masks and dark jackets at the door. He asked what they wanted, and they told him they wished to purchase some rock salt. Daniel told them that the business was closed and they would have to come back tomorrow. The three then left, and shortly thereafter, Daniel went outside to close the gate which had been left open by the three. He came back into the house, closed and locked the storm door, but left the front door open.

¶4 Daniel then went back to watching television, but told his live-in girlfriend, Patsy King, who he referred to as his common-law wife, about the three people coming to the door. She remarked that the three males' behavior was "strange," and she told Daniel that she was going to lock the front door. She

[5] Robinson, who at the time of his trial was a juvenile, was tried in adult court. This occurred because, after the trial court ruled at the preliminary hearing that the State had established probable cause to believe Robinson had committed a felony, his attorney informed the court that he did not believe he would be successful at a reverse waiver hearing which would have sent the case back to the Children's Court. Consequently, after inquiring whether Robinson understood his attorney's recommendation, and determining that he did, the trial court, pursuant to WIS. STAT. § 970.032 (1997-98), found that Robinson did not meet his burden to have the case heard in Children's Court, and the case remained in adult court.

began walking to the door to lock the inner door when Daniel heard a gunshot and saw King fall to the ground. King later died during surgery as a result of the shooting. Daniel was also injured by what was later determined to be a shotgun blast. Daniel related to police that shortly after King fell to the ground he saw an arm reaching through the hole in the plexiglass storm door trying to unlock the door and, as a result, he picked up his own gun and shot at the door, emptying his gun. When he finally approached the door he did not see anyone.

¶5 Robinson was arrested after the police went to a house in the neighborhood that housed several people who had previously been in an altercation with Daniel. When the police went to the house, Robinson, Fletcher Barnes, and the third accomplice were there. The police arrested Robinson and discovered that he had given them a false name. The police determined his true identity and discovered that he was a runaway. After his arrest, he was interviewed by the police on three separate occasions.

¶6 At the first ***Miranda-Goodchild*** hearing held prior to the first jury trial, three detectives testified. Each told the court that Robinson was given his ***Miranda*** rights and Robinson indicated that he understood them. The first interview lasted approximately two-and-one-half hours, from 9:30 a.m. on December 26, 1996, until 12:00 noon. During the interview, Robinson denied any involvement in the shooting. According to the testimony given at trial, the second interview occurred later that same day, starting at approximately 7:00 p.m. and continuing until 9:30 p.m. During the second interview, Robinson again denied being involved in the shooting. The third interview took place on December 27, 1996, between the hours of 7:30 p.m. and 10:35 p.m. At the third interview, Robinson admitted his involvement in the shooting. All of the detectives testified that they were confident that Robinson understood his ***Miranda*** rights, and in two

instances, the detectives had him either write his initials on the report after the listing of the individual ***Miranda*** right or write his name indicating he understood his rights. All the interviews took place in an interview office which contained a table and chairs. Two of the detectives testified that during the questioning Robinson was either given food and a bathroom break or asked if he wanted food or drink. At the conclusion of the hearing, the trial court found that Robinson was given his ***Miranda*** rights, and that he freely, voluntarily, and intelligently waived them. In addition, the trial court found that there was no police coercion.

¶7 More than eleven years later, in front of a different trial court judge, another ***Miranda-Goodchild*** hearing was held in response to a postconviction motion filed by Robinson's postconviction and appellate attorney.[6] At this hearing Robinson testified, as did two detectives. At the conclusion of testimony, the trial court found that Robinson had decided, in consultation with his trial attorney, not to testify at the first ***Miranda-Goodchild*** hearing. Further, the court found that Robinson was properly advised of his ***Miranda*** rights, he understood them, and he waived those rights. The trial court stated that there was no evidence of police coercion or improper police practices, and concluded that, under the totality of the circumstances and balancing the personal characteristics of Robinson against the pressures imposed by the police, Robinson freely and voluntarily gave the police a statement incriminating himself in the death of Patsy King.

¶8 According to Robinson's statement to the police, the day before the murder, a friend, Barnes, came over to the house with a twenty-gauge pump

[6] Robinson's trial attorney died before Robinson's postconviction and appellate rights were reinstated.

sawed-off shotgun that he wanted Robinson to buy. Barnes left, but came back later and said he knew where to get some money. Barnes suggested that they rob the salt house. The next day, Barnes came over and Robinson was allowed to handle the gun and use the pump mechanism. The two of them went in an alley and Barnes shot the gun at an abandoned building. Barnes again left, but he eventually came back when it was dark outside. Then the three of them, Robinson, Barnes, and another friend, went to the rear of the salt house and Barnes gave Robinson the shotgun. Robinson claimed that Barnes and the other friend who accompanied them went to the front of the house. He stated that when he got to the front door, Barnes was talking with a woman telling her to give them the money. When the woman said she had no money, Robinson went up to the door, pumped the gun and pulled the trigger.[7] When the gun fired, he turned and ran and heard additional shots as he ran away. Robinson said he threw the gun away and went to his step-uncle's house where he fell asleep.

¶9 Robinson's first jury trial ended in a mistrial when the jury became deadlocked. Robinson testified at this trial and denied any involvement in the shooting. He also said the police made him sign a confession by "torturing" him by continually asking the same questions. A second jury trial began several months later. During the trial, in the middle of his testimony, Robinson pled no contest to a charge of first-degree reckless homicide as a party to the crime. The State agreed to dismiss the additional counts and the penalty enhancers, but they were to be read in for purposes of sentencing. The trial court ordered a

[7] It should be noted that Daniel testified he did not believe King ever made it to the door or talked to anyone. This inconsistency between Daniel's version of the events and Robinson's confession has never been clarified.

presentence investigation, and after it was completed, the trial court sentenced Robinson to a forty-year sentence. Although Robinson indicated that he wished to pursue a postconviction motion, no postconviction motion was filed until 2007.[8] As noted, Robinson's appellate rights were reinstated. His later postconviction motion, brought by his postconviction and appellate attorney, was denied after an evidentiary hearing, and this appeal follows.

II. ANALYSIS.

A. The trial court properly found that Robinson's various statements to police were admissible.

¶10 Robinson's first argument is that the original trial court erred in finding that his statements, given to police on three separate occasions, should not have been suppressed. He submits that "the [S]tate failed to meet its burden that his statements were voluntary under the 'totality of the circumstances.'"

¶11 The State has the burden of proving, by a preponderance of the evidence, the sufficiency of the ***Miranda*** warnings and the knowing and intelligent waiver of ***Miranda*** rights. *See* ***State v. Agnello***, 2004 WI App 2, ¶8, 269 Wis. 2d 260, 674 N.W.2d 594; ***State v. Santiago***, 206 Wis. 2d 3, 12, 556 N.W.2d 687 (1996). In Wisconsin, we review those determinations *de novo*. *See* ***id.*** at 18. The State also has the burden of proving the defendant's statements were voluntary. *See* ***State v. Jiles***, 2003 WI 66, ¶26, 262 Wis. 2d 457, 663 N.W.2d 798. We review that determination without deference as well. *See* ***State v. Turner***, 136 Wis. 2d 333, 344, 401 N.W.2d 827 (1987)**.** In both cases, it is the application of the constitutional standard to historical facts that is the question of law. *See*

[8] Robinson, acting *pro se*, filed a postconviction motion in 2005, which was denied.

Agnello, 269 Wis. 2d 260, ¶8. We will uphold the trial court's findings of historical or evidentiary fact unless they are clearly erroneous. *See* ***State v. Henderson***, 2001 WI 97, ¶16, 245 Wis. 2d 345, 629 N.W.2d 613.

¶12 The test of voluntariness for juvenile statements is the same test applied to adult confessions: the totality of the circumstances. That test requires "balancing ... the personal characteristics of the defendant against the pressures imposed upon the defendant by law enforcement officers." ***State v. Hoppe***, 2003 WI 43, ¶38, 261 Wis. 2d 294, 661 N.W.2d 407.

¶13 In deciding whether a confession is voluntary, we first inquire whether the confession was produced by coercion or was the product of improper police pressure. We focus on that question because its answer determines whether an inculpatory statement is the product of "a 'free and unconstrained will, reflecting deliberateness of choice.'" ***State v. Clappes***, 136 Wis. 2d 222, 236, 401 N.W.2d 759 (1987) (citation omitted). Police conduct need not be egregious in order to be coercive. ***Hoppe***, 261 Wis. 2d 294, ¶46. A defendant's condition can render him or her highly susceptible to police pressures. ***Id.*** Thus, pressures may be coercive under one set of circumstances and not necessarily under another set. ***Id.***

¶14 The totality of the circumstances contemplates balancing the characteristics of the suspect against the type of police tactics that were employed to obtain the suspect's statement. ***State v. Davis***, 2008 WI 71, ¶37, 310 Wis. 2d 583, 751 N.W.2d 332. In evaluating the suspect's characteristics, we consider his or her "age, education, intelligence, physical or emotional condition, and prior experience with law enforcement." ***Id.*** "The more sophisticated and less vulnerable the suspect is, the more likely it becomes that his or her statements

were voluntary." ***State v. Ward***, 2009 WI 60, ¶19, ___ Wis. 2d ___, 767 N.W.2d 236.

¶15 In evaluating police conduct, we examine "the length of questioning, general conditions or circumstances in which the statement was taken, whether any excessive physical or psychological pressure was used, and whether any inducements, threats, methods, or strategies were utilized in order to elicit a statement from the defendant." ***Davis***, 310 Wis. 2d 583, ¶37.

¶16 Robinson argues that had the totality of the circumstances been considered at the first ***Miranda-Goodchild*** hearing, the trial court would have had to suppress the statements. He points to his young age, the lengths of the interviews and the conditions of the room where he was interviewed, the length of time he had been in custody with no contact with his family, the fact that no explanations were given to him as to what the ***Miranda*** rights meant, his poor educational levels, his chaotic family background, his low intelligence and his limited prior experience with police as reasons that would have tipped the scale in his favor. In addition, he claims that he was frightened of the police, exhausted, and he cried during the third interview, indicating he was overwhelmed by the police. We are not persuaded.

¶17 We first observe that today an interrogation of a person of Robinson's age would have to be electrically recorded per the holding in ***State v. Jerrell C.J.***, 2005 WI 105, ¶58, 283 Wis. 2d 145, 699 N.W.2d 110 ("All custodial interrogation of juveniles in future cases shall be electronically recorded where feasible, and without exception when questioning occurs at a place of detention."). But, of course, no such rule was in existence when Robinson was arrested.

However, both Robinson and the detectives involved in the interrogations have all testified.

¶18 While age is a factor in determining voluntariness, case law has found a statement given by a thirteen-year-old to police to be voluntary. *See* ***Shawn B.N. v. State***, 173 Wis. 2d 343, 365-66, 497 N.W.2d 141 (Ct. App. 1992). Here, the detectives testified that Robinson stated he understood his rights, and during two of the interviews either initialed the form setting forth his ***Miranda*** rights or signed his name. Further, it is undisputed that Robinson asked no questions of the detectives concerning what the rights meant. With regard to the length of his custody, the interviews occurred relatively soon after he was arrested and were concluded within two days of his arrest. As a result of the relatively short period of time that Robinson was in custody prior to the interviews, the fact that he had not seen a family member since his arrest would not appear to play a big role in his resistance to police pressure, particularly since he was a runaway at the time of this arrest. The interviews were also spaced apart so as to give Robinson ample time between interviews to regain his composure, and the interviews were not excessively long. The testimony of the detectives indicated each interview lasted between approximately two-and-one-half hours to three hours.

¶19 Although Robinson claimed that he was in the eighth grade but had stopped going to school because it was too hard, it was revealed that he was actually suspended from school. Despite Robinson's downplaying his ability to read, he was able to clearly read passages of the reports generated by his interrogations to the jury during his trial. In addition, the reports by the doctors who evaluated him and found him competent stated that while he admittedly lagged behind in school work, he had no problems with memory and fell within

the low average range in testing. Although the doctors made mention of his dysfunctional family life, no mental or psychological illnesses were noted that would have prevented him from understanding his ***Miranda*** rights. Finally, while Robinson claimed to never have been the subject of police questioning before, he was no stranger to the juvenile justice system, having been arrested more than once previously.

¶20 On the other side of the ledger, we see no patently coercive conduct on behalf of the detectives when interviewing Robinson. Several of the detectives who testified stated that Robinson was given bathroom breaks and asked if he wanted food or drink. According to several of the police witnesses, Robinson was not handcuffed during the interviews, and two of the detectives said that the interviewing technique used by Milwaukee detectives is to provide creature comforts and be respectful of the person to be interviewed in order to gain a rapport with him or her. The detectives testified that no threats or promises were made to Robinson, and indeed, Robinson testified that most of the detectives were "polite." In balancing the personal characteristics of Robinson against the police tactics, it is also well to remember that Robinson was able to lie to the detectives about his involvement in the incident during the first two interviews which lasted approximately five hours. This ability to lie strongly suggests that Robinson was neither intimidated by the detectives nor highly vulnerable to police pressure. Although Robinson testified that he considered the questioning "torture," given the findings made by two separate trial courts, we are satisfied that under the totality of the circumstances, Robinson's statements were voluntarily made after being advised of his ***Miranda*** rights, which he claimed he understood.

B. Robinson's trial counsel was not ineffective.

¶21 Robinson claims that his trial attorney was ineffective for failing to introduce evidence concerning Robinson's "intelligence, education, prior experience with police, interrogation tactics or isolation in the jail" in order to prove that Robinson's statements to police were not voluntary. The trial court hearing the postconviction motion found that Robinson's trial attorney was not ineffective. We agree.

¶22 To establish an ineffective assistance of counsel claim, a defendant must show both that counsel's performance was deficient and that he or she was prejudiced by the deficient performance. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). A reviewing court may dispose of a claim of ineffective assistance of counsel on either ground. ***Id.*** at 697. "Consequently, if counsel's performance was not deficient the claim fails and this court's inquiry is done." ***State v. Kimbrough***, 2001 WI App 138, ¶26, 246 Wis. 2d 648, 630 N.W.2d 752.

¶23 We review the denial of an ineffective assistance claim as a mixed question of fact and law. ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). We will not reverse the trial court's factual findings unless they are clearly erroneous. ***Id.*** "However, we review the two-pronged determination of trial counsel's effectiveness independently as a question of law." ***Kimbrough***, 246 Wis. 2d 648, ¶27. To establish prejudice, "the defendant must affirmatively prove that the alleged defect in counsel's performance actually had an adverse effect on the defense." ***State v. Reed***, 2002 WI App 209, ¶17, 256 Wis. 2d 1019, 650 N.W.2d 885. The defendant "'must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to

undermine confidence in the outcome.'" ***Id.*** (quoting ***Strickland***, 466 U.S. at 694).

¶24 The general rule is to conduct a ***Machner*** hearing when the allegations against counsel would constitute deficient performance and there is a reasonable probability that, but for the deficient performance, the result of the proceedings would have been different.[9] Here, however, no ***Machner*** hearing was possible because Robinson's trial attorney had passed away before Robinson's postconviction and appellate rights were reinstated.

¶25 In ***State v. Lukasik***, 115 Wis. 2d 134, 140, 340 N.W.2d 62 (Ct. App. 1983), we determined:

> If the counsel in question cannot appear to explain or rebut the defendant's contentions because of death, insanity or unavailability for other reasons, then the defendant should not, by uncorroborated allegations, be allowed to make a case for ineffectiveness. The defendant must support his allegations with corroborating evidence. Such evidence could be letters from the attorney to the client, transcripts of statements made by the attorney or any other tangible evidence which would show the attorney's ineffective representation. "A defendant 'is not entitled to the ideal, perfect defense or the best defense but only to one which under all the facts gives him reasonably effective representation.'" ***State v. Rock***, 92 Wis. 2d 554, 560, 285 N.W.2d 739 (1979) (citations omitted). In other words, we will presume that counsel had a reasonable basis for his actions, and the defendant cannot by his own words rebut this presumption. Such a burden will assure that post-conviction proceedings will not be brought solely on the basis of ineffective counsel when counsel dies or for some other reason becomes unavailable to explain his or her prior actions.

Lukasik, 115 Wis. 2d at 140.

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

¶26 The burden of proving grounds for withdrawal of a plea is by clear and convincing evidence. ***White v. State***, 85 Wis. 2d 485, 491, 271 N.W.2d 97 (1978). "The burden on the defendant of proving ineffective counsel when that counsel is unavailable for response will be the same." ***Lukasik***, 115 Wis. 2d at 140.

¶27 Robinson submits that his attorney knew of his mental and educational deficiencies because they were well-documented in the competency reports that trial counsel had requested. In addition, Robinson faults his trial attorney for failing to elicit testimony that Robinson was held in a cell isolated from others for approximately thirty-six hours before he confessed, that he had no ability to contact his family, and that he had been questioned for nearly eight hours and was feeling exhausted and frightened. Robinson insists that because his attorney failed to offer this information at the first ***Miranda-Goodchild*** hearing, he has met the corroboration test. We disagree.

¶28 First, we observe that we have already determined that the ***Miranda*** warnings were properly read to Robinson, that he understood them, and that he voluntarily gave an incriminating statement to the police. We also concluded that there was no police coercion or improper practices. Thus, it is unlikely that if this information from the reports had been submitted, it would have resulted in a different outcome. In addition, Robinson testified that his attorney cautioned him not to testify at the ***Miranda-Goodchild*** hearing because his statements could be used against him at trial. It may be that Robinson's attorney made a strategic decision not to explore Robinson's deficiencies at the ***Miranda-Goodchild*** hearing because to do so would have required Robinson to testify. In any event, the fact that he failed to introduce this evidence at the ***Miranda-Goodchild*** hearing is not corroboration of his alleged deficient performance. We also are not persuaded that

the failure of Robinson's attorney to argue that Robinson was isolated in a cell and was unable to contact his family, along with his claim that he was feeling exhausted and frightened, is evidence of ineffective assistance of counsel. First, it is not unusual for juveniles to be segregated from adult prisoners and, given Robinson's status as a "runaway," we fail to view his inability to contact family members as crucial in this case. We also do not believe his attorney's failure to argue that he was exhausted and frightened as being fatal to his suppression motion. Common sense would suggest that most people are often exhausted and frightened when being interviewed. It is well to remember that even if he was both exhausted and frightened, he was able to lie to the police during the first two interviews. Consequently, Robinson has not met his burden of proof concerning his allegation of his lawyer's ineffectiveness.

C. Robinson's plea to first-degree reckless homicide was knowingly, voluntarily and intelligently entered.

¶29 Robinson next argues that he is entitled to withdraw his plea of no contest to first-degree reckless homicide because it was not knowingly, voluntarily, and intelligently entered. Robinson claims that the trial court misinformed him as to what actions constituted the crime. Specifically, Robinson points to the following comments made by the trial court during the plea colloquy in response to Robinson's question:

> THE DEFENDANT: You say I tried to do it intentionally?
>
> THE COURT: No. Recklessly. The charge [i]s first[-]degree reckless [homicide], that you while using a dangerous weapon recklessly caused a death of another, pointing a gun, I assume, and it went off. Why it went off, we don't know. No one knows through the testimony if you're trying to scare someone or it went off by accident but you were pointing the gun at that point.

THE DEFENDANT: Yes.

¶30 A defendant seeking to withdraw a guilty or no-contest plea after sentencing bears "the heavy burden of establishing, by clear and convincing evidence, that withdrawal of the plea is necessary to correct a manifest injustice." ***State v. McCallum***, 208 Wis. 2d 463, 473, 561 N.W.2d 707 (1997). "A manifest injustice occurs when a defendant makes a plea involuntarily or without knowledge of the charge or potential punishment if convicted." ***State v. Merten***, 2003 WI App 171, ¶6, 266 Wis. 2d 588, 668 N.W.2d 750 (internal quotation marks omitted). "A defendant's understanding of the nature of the charge must 'include an awareness of the essential elements of the crime.'" ***State v. Lange***, 2003 WI App 2, ¶17, 259 Wis. 2d 774, 656 N.W.2d 480 (citation omitted).

¶31 In 1996, the first-degree reckless homicide statute required the State to prove the following: that Robinson recklessly caused the death of another under circumstances which showed utter disregard for human life. *See* WIS. STAT. § 940.02(1). As noted in the comments to WIS JI—CRIMINAL 1020, the first-degree reckless homicide jury instruction, this statute has had several revisions. Of particular note are the following statements:

> "Under circumstances which show utter disregard for human life" is the factor that distinguishes this offense from second degree reckless homicide. The Judicial Council Note to § 940.02 provides that it is intended to reflect the substance of case law defining "conduct evincing a depraved mind, regardless of human life."

WIS JI—CRIMINAL 1020, cmt. 4. Thus, case law addressing what constitutes "conduct evincing a depraved mind, regardless of human life" is synonymous with what encompasses "utter disregard for human life." Robinson acknowledges that the element previously called "conduct evincing a depraved mind" is now referred to as "utter disregard for human life" and cites to ***State v. Weso***, 60 Wis. 2d 404,

210 N.W.2d 442 (1973), for his belief that the trial court's comment was inaccurate because, as ***Weso*** states: "To constitute a depraved mind, more than a high degree of negligence or recklessness must exist." ***Id.*** at 411. We disagree with his contention.

¶32 In ***State v. Davis***, 144 Wis. 2d 852, 864, 425 N.W.2d 411 (1988), our supreme court, in addressing an almost identical fact situation as exists here, said: "Aiming a loaded gun at a vital part of a person's body at close range and the shooting at another have been found sufficient to show a depraved mind." (Citing ***State v. LaTender***, 86 Wis. 2d 410, 430, 273 N.W.2d 260 (1979); *see also* ***State v. Bernal***, 111 Wis. 2d 280, 285, 330 N.W.2d 219 (Ct. App. 1983) (intentionally pointing a loaded gun ready to shoot at another person is conduct imminently dangerous to another)). In addition, the supreme court observed in ***Davis*** that "an utter lack of concern for the life and safety of the woman Davis robbed was evidenced by his decision to flee the scene though he knew she had fallen after his gun went off." ***Id.*** Here, Robinson admitted to standing on the porch with the intent to rob King, and he admitted pointing the shotgun at her from a short distance and it went off. Like the robber in ***Davis***, after the gun went off, Robinson ran from the scene.

¶33 Robinson claims that he did not know the gun was loaded, and that he only brought it to "scare" King. However, we know that he knew the gun was functional because he claimed to have seen Barnes shoot it the day before, and Robinson confessed to actually pumping the gun the day before. Second, pointing a functioning shotgun at another person who is in close proximity, and not knowing whether it is loaded or not is equally as reckless and showing of utter disregard for human life as is the person who knows the gun is loaded and points it at another. Thus, Robinson's conduct clearly falls within the definition of "utter

disregard for human life" and, as a consequence, the trial court did not misinform him of the elements of the crime.

D. The trial court properly exercised its discretion in sentencing Robinson to the maximum term of forty years.

¶34 Robinson's final argument is that the trial court erroneously exercised its discretion in giving him a forty-year sentence. As a result, Robinson is seeking a resentencing. Robinson first complains that the forty-year sentence was unduly harsh and excessive because he was only fourteen years old when this incident occurred, and the sentencing court never explained why a maximum sentence was necessary. Further, Robinson believes that the trial court relied on inaccurate information during sentencing because the trial court mentioned he had a prior gun offense at sentencing, when in fact, he did not. Robinson also takes issue with the trial court's characterization of him as being "very impulsive." Robinson argues that because the trial court stated that the origin of the trial court's comment came from the competency report submitted earlier in the litigation, in which the doctor only stated that Robinson was "impulsive," not "very impulsive," the trial court was mistaken. We disagree with all of Robinson's contentions.

¶35 When reviewing a trial court's sentencing determination, we apply an erroneous exercise of discretion standard. *See* ***State v. Lechner***, 217 Wis. 2d 392, 418, 576 N.W.2d 912 (1998). We commence our review with the presumption that the trial court acted reasonably when imposing its sentence. ***Id.*** In contrast, a defendant challenging a sentence has the heavy burden to demonstrate that the sentencing court relied on some unreasonable or unjustified basis in imposing the sentence. *See* ***id.***

¶36 A sentence is unduly harsh when it 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). In order to succeed in a claim that he was sentenced on the basis of inaccurate information, Robinson must show that the trial court was presented with inaccurate information and that the court relied on it at sentencing. *See* ***State v. Tiepelman***, 2006 WI 66, ¶26, 291 Wis. 2d 179, 717 N.W.2d 1.

¶37 There are three primary factors that the trial court must consider at sentencing: the gravity of the offense, the character of the offender, and the need to protect the public. ***State v. Smith***, 207 Wis. 2d 258, 281-82 n.14, 558 N.W.2d 379 (1997). The sentencing court may consider other factors, but it is not required to specifically address all of the other factors of record, ***State v. Echols***, 175 Wis. 2d 653, 683, 499 N.W.2d 631 (1993), and may base the sentence on any one of the three primary factors. Furthermore, the sentencing court has wide discretion in assigning various values to each of the relevant factors. ***State v. Larsen***, 141 Wis. 2d 412, 428, 415 N.W.2d 535 (Ct. App. 1987).

¶38 With respect to Robinson's argument that the trial court's maximum sentence was unduly harsh, we need only look at the trial court's sentencing remarks to establish that Robinson's sentence was appropriate. The trial court called the crime "extremely aggravating" and stated that King "was senselessly killed." The trial court further observed that the crime of first-degree reckless homicide is second in severity only to first-degree intentional homicide. The trial

court observed that "a further aggravating factor is [Robinson] admits to smoking blunts prior to this happening."[10] Also, the trial court noted that:

> I think he did receive a substantial break from the State in the sense of the other charges being dismissed and read in. If he was convicted by the jury, I would have had no problems with imposing a consecutive term for each one of them, giving a total of I believe around 65 years. This in spite of the fact he's so young and impulsive and kids make impulsive decisions but there's no question in my mind he is dangerous.… We're talking about use of drugs, use of a shotgun and the tragic consequences, and the only way to protect the [sic] society and to punish him is to impose a prison term.…
>
> The Court feels that based upon all these facts and circumstances nothing less than the maximum is called for in this case.

The trial court both properly exercised its discretion and explained the sentence given. Further, public sentiment is not shocked by the length of the sentence.

¶39 Robinson also complains that the trial court relied on inaccurate information when stating that he had a prior gun offense and that he was "very impulsive." We believe that Robinson is splitting hairs. While it is true that Robinson was never convicted of a gun offense, the trial court could have been referring to the fact that he had been arrested for a strong-arm robbery, or the court could have been referring to Robinson's having had possession of the gun. If, in fact, the trial court was simply wrong, the error was harmless. In ***State v. Dyess***, 124 Wis. 2d 525, 542-43, 370 N.W.2d 222 (1985), the definition of harmless error requires the State to establish that there is "no reasonable possibility that the error contributed to the conviction." That is certainly the case here. Whether or not

[10] "A 'blunt' is a hollowed-out cigar filled with marijuana." ***State v. Vorburger***, 2002 WI 105, ¶22 n.8, 255 Wis. 2d 537, 648 N.W.2d 829.

Robinson had a prior gun offense would not, given the trial court's thorough explanation of its sentence, have changed the sentence. We also find the trial court's characterization of the report calling Robinson "very impulsive" to be almost identical to the actual wording of the report, which stated that Robinson "appears rather impulsive."

¶40 Consequently, the trial court did not erroneously exercise its discretion at sentencing. For the reasons stated, the judgment of conviction and the order denying Robinson's postconviction motion are affirmed.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.