**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

December 16, 1997

**Marilyn L. Graves**
**Clerk, Court of Appeals**
**of Wisconsin**



**Nos. 96-2287-CR & 96-2288-CR**

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

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**v.**

**JOSEPH WILLIAMS,**

**DEFENDANT-APPELLANT.**

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APPEAL from judgments and an order of the circuit court for Milwaukee County: VICTOR MANIAN, Judge. *Affirmed.*

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

PER CURIAM. Joseph Williams appeals from judgments convicting him, following a jury trial, of loan sharking, robbery and armed robbery, all as a party to a crime, contrary to §§ 943.28(2), 943.32(1)(b) & (2), and 939.05, STATS. Williams also appeals from the order denying his postconviction motion and motion to reconsider. Williams argues that the trial court erred in:

denying his motion to suppress evidence found in co-defendant Reginald Green's car; finding that the evidence presented at trial was sufficient to convict Williams; finding no ineffective assistance of trial counsel; and, finally, in sentencing Williams to thirty years' imprisonment.

The trial court found that the co-defendant consented to the search of Williams's car; that the evidence was sufficient to convict Williams; that Williams failed to meet his burden of proof in his ineffective assistance of counsel claim; and that the thirty-year sentence was not excessive and unduly harsh. Because none of these findings was clearly erroneous, we affirm.

## I. BACKGROUND.

Joseph Williams and his co-defendant, Reginald Green, were charged in one complaint with the armed robbery of Faheem Hamdani and of engaging in prohibited loan sharking practices with Danielle Malliet, both as party to a crime. Both were also charged in a separate complaint with the robbery of William Gales, again, as party to a crime. The cases were consolidated for trial. Williams brought a motion to suppress evidence of the loan sharking scheme found in co-defendant Green's car. The motion was denied. Following a jury trial, Williams was convicted of one count of armed robbery, one count of robbery, and the loan sharking charge, all as a party to a crime. Green was found guilty of loan sharking and robbery, but not armed robbery. The trial court sentenced Williams to ten years on all three counts, to be served consecutively. Williams brought a postconviction motion and a motion for reconsideration which were denied. Williams now appeals.

## II. ANALYSIS.

*A. Motion to suppress.*

Under the Fourth Amendment, a warrantless entry and search is presumptively unreasonable. *See* ***Schneckloth v. Bustamonte***, 412 U.S. 218, 219 (1973); ***State v. Boggess***, 115 Wis.2d 443, 448-49, 340 N.W.2d 516, 520 (1983). Consent, however, is a recognized exception to the Fourth Amendment requirements for a warrant and probable cause. *See* ***Schneckloth***, 412 U.S. at 219, cited in ***State v. Flynn***, 190 Wis.2d 31, 41, 527 N.W2d 343, 347 (Ct. App. 1994), *cert. denied*, 514 U.S. 1030 (1995). Whether consent was given and the scope of the consent are factual determinations for the trial court that we must accept unless clearly erroneous. *See* ***State v. Garcia***, 195 Wis.2d 68, 75, 535 N.W.2d 124, 127 (Ct. App. 1995).

At the motion to suppress the evidence, a City of Milwaukee police officer testified that he was responsible for securing the perimeter of Green's apartment after Green's arrest. In the process, he positioned himself next to a green van in the parking lot adjacent to Green's apartment, and he looked into the van to see if anyone was inside. In peering into the van he noticed papers with numbers on them lying on the dashboard. Later, after requesting and receiving permission from Green to search his storage bin and his vehicle for weapons, he discovered that this green van belonged to Green. Believing the papers to be evidence of the loan transactions, he seized them. The papers were later introduced as evidence of the loan sharking scheme.

Williams characterizes this search as illegal, relying, in part, on Green's testimony that he gave no one permission to search his automobile. Williams argues that the officer's failure to note that Green consented to the

search in either his memo book or his supplemental report, coupled with his inability to recall Green's exact words when consenting to the search, is proof that the officer was not telling the truth. Further, he also argues that since Green signed no consent form and no one else testified to hearing Green consent to the search, the trial court erred in denying his motion. Finally, he claims that under these circumstances the police were required to secure a search warrant. The trial court, however, determined that consent had been given.

The competing versions surrounding the issue of consent were rightfully matters to be determined by the trial court. The credibility of the witnesses and the weight to be given their testimony are for the trier of fact to determine. ***Schultz v. State***, 87 Wis.2d 167, 173, 274 N.W.2d 614, 617 (1979). The trial court was faced with a credibility contest. After personally observing the demeanor of each witness and testing the versions against the backdrop of logic, common sense and police practices, the trial court found the police officer more credible. In reaching its decision, the trial court stated: "I think that the officer is telling the truth. I don't doubt what he says is true, and I believe him and therefore the motion to suppress is denied." The defendant challenged the officer's credibility based on his failure to note Green's consent in his written reports, and his failure to recall Green's exact statements. The trial court concluded, however, that the officer's action in connecting up the pieces of paper with the loan sharking charge was "good police work," and appropriately discounted the technical omissions. The trial court is in a better position to gauge the truthfulness and credibility of the witnesses than is an appellate court. Given the competing versions of the events, there is nothing "clearly erroneous" in the trial court's determination that the officer's account was more truthful. Thus, its factual finding that consent was given to search the vehicle must be upheld. *See*

***Garcia***, 195 Wis.2d at 75, 535 N.W.2d at 127. Further, Williams's belief that a search warrant was required under these circumstances is mislaid. Once consent was given, the police were under no obligation to obtain a search warrant.

*B. Insufficient evidence.*

Williams argues that the evidence was insufficient to support his conviction for loan sharking. Williams was charged with making an extortionate extension of credit between the dates of October 1, 1994, and October 28, 1994. The victims of the crimes testified to originally obtaining illicit drugs from the defendants for which they would be charged "crazy interest." The undisputed testimony of the victims, however, was that no drugs were sold on credit during that time frame; rather, that the only transactions with the defendants were requests for payment of money still outstanding from previous drug purchases. Williams posits that a reading of the definition of the words "extortionate extension of credit" found in § 943.28(1)(b), STATS.,[1] requires proof of an understanding between the creditor and debtor *at the time* of the original transaction that any delay or repayment could result in the use of violence or other criminal means. Stated otherwise, Williams claims that the timing of the threats is crucial and the "understanding" referenced in the statute between debtor and

[1] Section 943.28(1)(b), STATS., provides:

> **Loan sharking prohibited. (1)** For the purposes of this section:
>
> ….
>
> (b) An extortionate extension of credit is an extension of credit with respect to which it is the understanding of the creditor and the debtor at the time it is made that delay in making repayment or failure to make repayment could result in the use of violence or other criminal means to cause harm to the person, reputation or property of any person.

creditor must be reached at the time of the initial loan. Thus, he contends, the statute does not encompass subsequent renewals of the debt or extensions of time to pay. Accordingly, he argues, an essential element of the crime of loan sharking was not met because the only activity that occurred between October 1 and October 28 was a request for payment of monies extended at an earlier date. As a result, Green claims his verdict must be overturned because due process protects him against conviction unless every fact necessary to the crime charged is proved beyond a reasonable doubt. *See* ***Turner v. State***, 76 Wis.2d 1, 10, 250 N.W.2d 706, 711 (1977).

This issue was addressed and decided in Williams's co-defendant's case, ***State v. Green***, 208 Wis.2d 290, 560 N.W.2d 295 (Ct. App. 1997). In ***Green***, this court looked to federal law for guidance on the interpretation of the statute as the legislative history to § 943.28, STATS., "reflects that the statute was 'intended to bring the Wisconsin law somewhat in line with the federal law, both in terms of the prohibited conduct and in terms of penalty." ***Id***. at 300, 560 N.W.2d at 298. In ***Green***, we compared the two statutes and commented that there are additional definitions found in the federal law which are absent from the Wisconsin version of loan sharking, although we noted that the federal and state definitions of "extortionate extension of credit" are identical. As a consequence, we stated that "[w]e [we]re persuaded that the definition of extending credit under the federal law should also guide Wisconsin courts in cases arising out of § 943.28(1)(b)." ***Id***. at 300-01, 560 N.W.2d at 298-99.

In looking to the federal counterpart to our loan sharking law and federal case law interpreting it, we noted that "[u]nder 18 U.S.C. § 891, '[t]o extend credit' means 'to make or renew any loan, or to enter into any agreement, tacit or express, whereby the repayment or satisfaction of any debt or claim,

whether acknowledged or disputed, valid or invalid, and however arising, may or will be deferred.'" ***Id***. at 300, 560 N.W.2d at 298. We concluded that, under this definition, a person may be prosecuted for making an extortionate extension of credit at the time of a renewal or an extension of a preexisting debt. ***Id***. Additionally, we acknowledged that various federal cases support this conclusion. *See, e.g.,* ***United States v. Polizzi***, 801 F.2d 1543, 1556-57 (9th Cir. 1986). Finally, we determined that the allegations against the co-defendant fell within the ambit of the prohibited conduct being addressed in the statute. ***Green***, 208 Wis.2d at 302, 560 N.W.2d at 299. Williams has not presented us with any argument or facts distinguishing his case from ***Green***. Thus, according to the interpretation of § 943.28 we adopted in ***Green***, there was sufficient evidence to support the jury's verdict against Williams.

*C. Ineffective assistance of counsel.*

Williams charges that the trial court erred by not finding that his counsel was ineffective. Williams claims that his trial counsel's performance was deficient in several manners. He contends that his trial counsel failed to conduct a proper investigation; failed to object to jury instructions;[2] and failed to request that the jury conference be placed on the record.

To prevail in a claim of ineffective assistance of counsel, the appellant is required to meet the well-known two-prong test set forth in ***Strickland***

[2] Williams claims that the failure to object to the jury instructions was not waived; however, he alternatively argues that if waiver is found, his attorney was ineffective for failing to object. We choose to address the latter argument because under ***State v. Schumacher***, 144 Wis.2d 388, 409, 424 N.W.2d 672, 680 (1988), Williams has waived his right to be heard on the former argument.

***v. Washington***, 466 U.S. 668 (1984). "First the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense." ***Id***. at 687. Whether counsel's performance was deficient and prejudicial are issues of law that we review *de novo*. *See* ***State v. Sanchez***, 201 Wis.2d 219, 236-37, 548 N.W.2d 69, 76 (1996). We may dispose of an effective assistance claim if the defendant fails to make either showing. ***Id***. at 236, 548 N.W.2d at 76.

At the ***Machner***[3] hearing, the trial court found that trial counsel's pretrial investigation was adequate. We agree that trial counsel's investigation was appropriate, and further note that Williams has made no showing that the outcome would have been different had trial counsel conducted a more extensive investigation. With respect to counsel's failure to object to the loan sharking jury instructions, Williams fails to state why the given instruction was faulty or what the transcript of the jury instruction conference would reveal. Therefore, he has failed to show any deficient performance or prejudice by his attorney's failure to object to the loan sharking jury instruction or to request a recording of the jury instruction conference.

Next, Williams argues that the failure either to object to a lack of a unanimity instruction or to request one constitutes ineffective assistance of counsel. Williams argues that without such an instruction the jury may have believed either one of the testifying witnesses to the loan sharking events was the

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

victim of the loan sharking charge. While this may or may not have constituted deficient performance, we find that Williams has not met the second prong of the ***Strickland*** test which requires a showing of prejudice. Williams has failed to show that a more specific instruction or verdict form would have yielded a different result. Here, the prosecutor repeatedly advised the jury in both the questioning of the witnesses as well as in argument that the victim of the loan sharking charge was Danielle Malliet. Further, the prosecutor cautioned the jury that the other witness, William Gales, was not the victim of the loan sharking charge brought by the State. Thus, in this case there was no possibility of jury confusion over the issue and the verdict was a reliable one.

*D. Sentencing.*

Finally, Williams complains that the trial court erroneously exercised its discretion when it sentenced him to ten years on each count to be served consecutively. In reviewing sentencing decisions, there is a strong policy against interfering with the trial court's sentencing discretion. *See* ***State v. Killory***, 73 Wis.2d 400, 408, 243 N.W.2d 475, 481 (1976). Our review of sentencing is limited to a two-step inquiry. We first determine whether the trial court properly exercised its discretion in imposing sentence. If so, we then consider whether that discretion was erroneously exercised by imposing an excessive sentence. ***State v. Smith***, 100 Wis.2d 317, 323, 302 N.W.2d 54, 57 (Ct. App. 1981), *overruled on other grounds*, ***State v. Firkus***, 119 Wis.2d 154, 350 N.W.2d 82 (1984).

Williams's underlying premise is that the trial court erroneously exercised its discretion because there is a disparity between his sentence and that of the co-defendant. He states that "it is simply wrong to sentence defendants to differing terms for the exact same transaction." Williams's argument, however, is

flawed. Williams and Green were not convicted of identical crimes. The jury elected to find Williams guilty of armed robbery, while determining that Green was guilty of robbery. Even so, Williams argues that "the disparate verdicts are legally incomprehensible." We disagree. The jury was free to evaluate the actions of the defendants and determine whether their actions called for different verdicts. Williams agreed to permit the jury to consider the lesser-included offenses of robbery for both defendants and he should not now be heard to complain that the jury found him, but not the co-defendant, guilty of the greater offense.

Williams concedes that he drew and displayed his gun, while Green's gun was merely visible. As the trial court, in addressing the issue at sentencing, stated: "[T]he record reflects, Mr. Williams was the one who had the gun in his hand, the other fellow [Green] didn't have his gun displayed, nor was he threatening anyone with it." Thus, Williams's conduct was more egregious than Green's, because drawing and displaying a weapon during the course of a robbery is a far more serious act than coercing a victim to give up their belongings with a verbal threat, when a gun is merely "visible." A defendant who claims a sentence is excessive has a heavy burden. We will find that a trial court erroneously exercised its sentencing discretion by imposing an unduly harsh or excessive sentence "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, 461 (1975). Given the different actions of the defendants during the commission of the crime, the trial court properly exercised its discretion in sentencing Williams to an additional five years for the armed robbery.

*By the Court*.—Judgments and order affirmed.

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