COURT OF APPEALS
DECISION
DATED AND RELEASED

October 15, 1997

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-3490-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

ALEX NMI SKOULLOU,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Walworth County: ROBERT J. KENNEDY, Judge. *Affirmed.*

Before Brown, Nettesheim, and Anderson, JJ.

PER CURIAM. Alex Skoullou appeals from a judgment convicting him of damage to property, attempted escape and disorderly conduct contrary to §§ 943.01(1) and (2)(d), 946.42(3)(a), 939.32(1) and 947.01, STATS., and from an order denying his postconviction motion. On appeal, he claims that (1) the evidence of attempted escape and property damage in excess of $1000 was

insufficient; (2) the trial court misused its discretion in sentencing; and (3) the jury was erroneously instructed on the lesser included offense of attempted escape. We reject each of these claims and affirm.

Skoullou was an inmate at the Walworth County Jail Huber Facility. On September 4, 1995, after a confrontation with a corrections officer, Paul Yakowenko, Skoullou's Huber privileges were revoked and arrangements were made to return him to the main jail. Skoullou was awaiting transport to the main jail when he exited the Huber building through an unlocked door.[1] Shortly after Skoullou exited the building, Yakowenko followed him. Skoullou ran around the grounds of the Huber facility, yelled at the officer, threw traffic cones and used a two-by-four to hit a dumpster and an air conditioning unit. Once damaged, the air conditioning unit released a vapor cloud which obscured Yakowenko's vision. Skoullou then ran around the other side of the building, where he was apprehended by Lieutenant David Graves, who was responding to the reported escape. Graves testified that Skoullou surrendered on demand.

Skoullou testified that after the disagreement with Yakowenko, he went in search of cigarettes and was standing outside the Huber facility door when Yakowenko found him. Skoullou admitted jumping on a delivery truck in the parking lot, hitting a dumpster with a stick and throwing the stick at the air conditioning unit. He then walked to the other side of the building where he encountered Graves.

[1] The corrections officer testified that Skoullou bolted out the door. Skoullou testified that he walked out the door after indicating to another officer that he was going to have a cigarette. Another inmate testified that Skoullou walked out the door after briefly conversing with another officer.

On cross-examination, Skoullou admitted that he did not have permission to leave the facility to smoke a cigarette and that he was supposed to be waiting for transport to the jail at the time he walked out of the facility. He admitted that he intentionally threw the stick and that the stick hit the air conditioning unit. Skoullou stated that he did not want to surrender to Yakowenko, who was not armed, but that he knew that Graves was armed and so he surrendered to him.

Skoullou first argues that the evidence was insufficient to permit an instruction on the lesser included offense of attempted escape and to support the jury's guilty verdict on this charge. Our review of the record causes us to reject both contentions.

Upon a challenge to the sufficiency of the evidence to support a jury's guilty verdict, we may not substitute our judgment for that of the jury "unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force" that no reasonable jury "could have found guilt beyond a reasonable doubt." ***State v. Poellinger,*** 153 Wis.2d 493, 507, 451 N.W.2d 752, 757-58 (1990). We will uphold the verdict if any possibility exists that the jury could have drawn the inference of guilt from the evidence. *See* ***id.*** at 507, 451 N.W.2d at 758. It is within the jury's province to fairly resolve conflicts in the testimony, weigh the evidence and draw reasonable inferences from the facts. *See* ***id.*** at 506, 451 N.W.2d at 757. If more than one inference can be drawn from the evidence, the inference which supports the jury's finding must be followed unless the testimony was incredible as a matter of law. *See* ***State v. Witkowski,*** 143 Wis.2d 216, 223, 420 N.W.2d 420, 423 (Ct. App. 1988).

As to Skoullou's challenge to the lesser included offense instruction, we independently review whether the evidence was sufficient to warrant instruction on the lesser included offense of attempted escape.[2] *See* ***State v. Wilson,*** 149 Wis.2d 878, 898, 440 N.W.2d 534, 541 (1989). Instruction on a lesser included offense "is proper *only* when there are reasonable grounds in the evidence both for acquittal on the greater charge and conviction on the lesser offense." ***Id.*** at 898, 440 N.W.2d at 542 (emphasis in original). In deciding whether the evidentiary standard for the giving of a lesser included offense instruction is satisfied, the court views the evidence in the light most favorable to the defendant. *See* ***State v. Chapman,*** 175 Wis.2d 231, 241, 499 N.W.2d 222, 226 (Ct. App. 1993).

Escape occurs when a person in custody intentionally escapes or leaves in any manner without lawful permission or authority. *See* § 946.42(3), STATS. In order to be guilty of an attempt to commit that crime, the defendant must "have an intent to perform acts and attain a result which, if accomplished, would constitute such crime" and the defendant must have acted toward commission of the crime demonstrating that he or she formed the intent and "would commit the crime except for the intervention of another person or some other extraneous factor." *See* § 939.32(3), STATS.

Skoullou argues that because he was acquitted of escape, the jury must have found he had no intent to escape and therefore he should not have been convicted of attempted escape. Skoullou's argument ignores the evidence in this

[2] An attempt to commit the crime charged is a lesser included offense of the crime charged. *See* § 939.66(4), STATS. Skoullou was charged with escape contrary to § 946.42(3)(a), STATS.

case. The evidence was in conflict as to whether Skoullou's step outside of the door of the Huber dorm demonstrated an intent to escape. There was some evidence that Huber inmates were permitted to stand outside the entrance to the facility and that the rule that they could not was not strictly enforced by all corrections officers. After stepping outside, Skoullou jumped onto the back of a delivery truck and then used a large piece of wood to bang on a garbage receptacle and an air conditioning unit. From this evidence, the jury could have determined that Skoullou was acting out, rather than escaping.

However, Skoullou then left the area and headed away from the facility toward other buildings. He ignored Yakowenko's orders to stop and stopped only when an armed officer arrived in a squad with lights and siren activated. From this evidence, the jury could have reasonably inferred that but for Graves' intervention, Skoullou would have continued to make his way off the Huber dorm grounds. Herein lies the evidentiary basis for convicting Skoullou of attempted escape and acquitting him of escape.

Having held that the evidence was sufficient to convict Skoullou of attempted escape, we necessarily hold that the trial court properly instructed the jury on the lesser included offense of attempted escape since the evidence presented the possibility of an acquittal on the greater charge of escape and a conviction on the lesser charge.

Skoullou next argues that the evidence did not establish that he damaged property in an amount greater than $1000. We previously stated our standard of review for sufficiency of the evidence to support a guilty verdict. Skoullou does not deny that he damaged the air conditioning unit. However, he argues that there was insufficient evidence regarding the nature and cost of the

repairs to show that damage greater than $1000, which made the crime a felony rather than a misdemeanor, occurred. *See* § 943.01(2)(d), STATS.

Carol Amborn, service manager for the heating and air conditioning company which did the repairs, testified that the unit was repaired in two phases. A temporary or short-term repair was made to the unit the day after Skoullou damaged it to permit its continued use during the cooling season. The second, permanent, repair was completed later in the fall. Amborn's company submitted a $1578 bid to repair the unit which was accepted and paid by the sheriff's department. The technician who performed the repair testified that he worked two hours on the unit the date after Skoullou damaged it just to get it "back operational." He later made permanent repairs once the cooling season ended.

Skoullou's witness, Ross Bilello, president of a heating and cooling company, testified that he inspected the air conditioning unit after the temporary repair and before the final repair. He testified that the first repair looked "like a temporary repair."

It is undisputed that the initial repair was a temporary repair which did not restore the unit to its prior condition. Even Skoullou's witness testified that the unit still had a hole in it after the temporary repair. Skoullou's contention that the final repair was not necessary because it was not accomplished until the cooling season ended is not persuasive. Rather, there was testimony, even from Skoullou's expert, that a temporary repair was made because the facility needed the air conditioner at the time Skoullou damaged it and a final repair was necessary.

A person who damages property thereby reducing it in value by more than $1000 is guilty of a felony. *See* § 943.01(2)(d), STATS. The statute

defines reduction in value as "the amount which it would cost either to repair or replace [the property], whichever is less." ***Id.*** Here, the cost of repairing the air conditioning unit was $1578, comprised of a temporary repair of $341 and a final repair of $1237. Amborn testified that the cost of replacing the unit would have exceeded $2000. Therefore, the measure of damages was the cost to repair the unit, and the evidence of that damage is sufficient to sustain the felony conviction.

Skoullou next argues that his trial counsel was ineffective for failing to present evidence that the unit was damaged in an amount less than $1000. To prevail on a claim of ineffective assistance of counsel, a defendant must prove: (1) that counsel's action constituted deficient performance; and (2) that the deficiency prejudiced his or her defense. *See* ***State v. Brewer***, 195 Wis.2d 295, 300, 536 N.W.2d 406, 408 (Ct. App. 1995). Whether counsel's actions constitute ineffective assistance is a mixed question of law and fact. *See* ***State v. Smith***, 170 Wis.2d 701, 714, 490 N.W.2d 40, 46 (Ct. App. 1992). The trial court's findings of what counsel did and the basis for the challenged conduct are factual and will be upheld unless clearly erroneous. *See* ***id.*** However, whether counsel's conduct amounted to ineffective assistance is a question of law which we review de novo. *See* ***id.*** However, we need not consider whether trial counsel's performance was deficient if we can resolve the ineffectiveness issue on the ground of lack of prejudice. *See* ***State v. Kuhn,*** 178 Wis.2d 428, 438, 504 N.W.2d 405, 410 (Ct. App. 1993).

Skoullou complains that trial counsel did not ask his expert, Bilello, any questions regarding the value of the repairs or the need to have a second repair after the cooling season ended. At the postconviction motion, Bilello testified that he viewed the initial repair as a temporary repair because it put the air conditioner in working order at a time when the facility needed its air conditioner. Bilello

testified on cross-examination that if a temporary repair had to be made out of necessity, a permanent repair could only be done later and that the cost of such a repair would likely exceed $1000. The trial court found that Bilello's testimony did not support Skoullou's contention that the repair could have been made for less than $1000. On the testimony offered at the postconviction motion hearing, this finding is not clearly erroneous and it is upheld on appeal. *See* ***Smith,*** 170 Wis.2d at 714, 490 N.W.2d at 46.

There is no evidence that the repairs were unnecessary or in excess of reasonable cost. Because the expert testimony offered at the postconviction motion hearing would not have supported Skoullou's contention that he did not damage the unit in an amount exceeding $1000, we conclude that he was not prejudiced by trial counsel's failure to present this testimony at trial.

Finally, Skoullou attacks the trial court's sentence as being too harsh and founded on improper factors. The court sentenced Skoullou to two and one-half years on the attempted escape charge and ninety days on the misdemeanor disorderly conduct charge to be served consecutively, and imposed and stayed a five-year consecutive sentence for damage to property and placed him on probation for five years. Additionally, the trial court ordered restitution in the amount of $1578, the repair expense for the air conditioner.

We review whether the trial court misused its sentencing discretion. *See* ***State v. J.E.B.,*** 161 Wis.2d 655, 661, 469 N.W.2d 192, 195 (Ct. App. 1991). We presume that the trial court acted reasonably, and the defendant must show that the trial court relied upon an unreasonable or unjustifiable basis for its sentence. *See* ***id.***

The primary factors to be considered by the trial court in imposing a sentence are the gravity of the offense, the offender's character and the need to protect the public. *See* ***State v. Borrell,*** 167 Wis.2d 749, 773, 482 N.W.2d 883, 892 (1992). The weight to be given to each of the sentencing factors is within the sentencing judge's discretion. *See* ***J.E.B.***, 161 Wis.2d at 662, 469 N.W.2d at 195. We conclude that the trial court considered the proper factors and properly exercised its discretion in sentencing Skoullou. *See* ***State v. Teynor,*** 141 Wis.2d 187, 219, 414 N.W.2d 76, 88 (Ct. App. 1987).

In its sentencing remarks, the trial court focused on the three factors set forth above. The trial court considered the need to protect the public, Skoullou's history of criminal conduct and other antisocial behavior, his previous failure on probation, the nature of the offenses for which Skoullou was being sentenced, and his undesirable behavior patterns, including the facts which led law enforcement to arrest Skoullou before sentencing to insure his appearance.

Skoullou argues that the trial court unduly emphasized his "emotional baggage" when it sentenced him for criminal damage to property. The court noted that this "baggage" has led to very serious and threatening type of conduct. Skoullou mistakenly latches onto this comment to support his claim that the trial court placed undue weight on this concern. The court's concern reflects Skoullou's character and the conduct surrounding the property damage. It was within the trial court's discretion to weigh this factor along with the numerous other factors it considered. We discern no misuse of the trial court's discretion in this regard.

Skoullou also argues that the trial court erroneously focused on the fact that he was arrested several hours before the sentencing hearing because there

was concern that he would not appear. Given the length of the trial court's sentencing comments, we do not discern that the trial court placed undue weight upon this information.

By the Court.—Judgment and order affirmed.

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