COURT OF APPEALS
DECISION
DATED AND RELEASED

October 23, 1997

NOTICE

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.

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

No. 97-1537-CR-NM

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JAMES L. GILMORE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for La Crosse County: MICHAEL J. MULROY, Judge. *Affirmed.*

Before Eich, C.J., Dykman, P.J., and Deininger, J.

PER CURIAM. James Gilmore appeals his convictions for masked armed robbery and masked armed burglary, after a trial by jury. The trial court issued consecutive fifteen- and five-year prison sentences on the two charges. The crimes took place in La Crosse, and a few days after the trial court issued an arrest warrant, North Carolina authorities apprehended Gilmore. Gilmore's counsel has

filed a no merit report under ***Anders v. California***, 386 U.S. 738 (1967), and provided Gilmore a copy of the report. Gilmore has filed a brief response requesting either new counsel or the right to proceed pro se, together with copies of the transcripts. The no merit report raises only two issues: (1) the trial court should have granted Gilmore a continuance; and (2) trial counsel was ineffective. We also review whether: (1) the evidence was sufficient to support the conviction; and (2) the sentence was excessive. Upon review of the record, we are satisfied that the no merit report properly analyzes the issues it raises, that the additional two issues warrant no further proceedings, and that Gilmore's appeal has no arguable merit. Accordingly, we adopt the no merit report, reject Gilmore's request for new counsel or for permission to proceed pro se, affirm the conviction, and discharge Gilmore's appellate counsel of his obligation to represent Gilmore further in this appeal.

We first conclude that the evidence was sufficient to permit Gilmore's conviction. We must affirm the conviction if the prosecution proved his guilt beyond a reasonable doubt. ***State v. Oimen***, 184 Wis.2d 423, 436-37, 516 N.W.2d 399, 405 (1994). The jury, not this court, decides the credibility of witnesses and the weight of their testimony, ***State v. Poellinger***, 153 Wis.2d 493, 503-04, 451 N.W.2d 752, 756 (1990), and resolves any conflicts in the evidence. ***State v. Daniels***, 117 Wis.2d 9, 18, 343 N.W.2d 411, 416 (Ct. App. 1983). Here, the prosecution gave the jury proof beyond a reasonable doubt: (1) Gilmore knew there was money in the burglarized residence; (2) the victim identified Gilmore as the perpetrator; (3) one perpetrator referred to another at the scene as "Pumpkin," Gilmore's nickname; (4) Gilmore left the state the next day while inexplicably failing to tell his mother; (5) Gilmore told a jail-mate details of the crime a nonparticipant would not know; (6) Gilmore tried to extort the same jail-mate's

silence through intimidation; (7) Gilmore made incriminating statements in North Carolina about a La Crosse theft; and (8) North Carolina police found a black ski mask in his car like one used in the crimes. Taken together, this evidence was sufficient to convict Gilmore of the crimes beyond a reasonable doubt.

Moreover, Gilmore testified in his own defense and evidently made an unfavorable impression on the jury in terms of credibility and substantive testimony. The State impeached Gilmore to a high degree. The prosecution forced him to admit that he had six prior convictions; this severely damaged his credibility. *See* MCCORMICK ON EVIDENCE § 43, at 84-90 (2d ed. 1972). The prosecution also forced Gilmore to admit that he had given North Carolina authorities false information; this damaged his credibility and provided circumstantial evidence of guilt. *See* ***Price v. State***, 37 Wis.2d 117, 132, 154 N.W.2d 222, 229 (1967); MCCORMICK § 271, at 655. The prosecution next forced Gilmore to admit that he had disregarded court orders and contacted persons involved in his case. This wrongful conduct further damaged his credibility. *See* ***McClelland v. State***, 84 Wis.2d 145, 159, 267 N.W.2d 843, 849 (1978). Gilmore likewise admitted illegal drug use and involvement in illegal drug transactions, misconduct that further impeached his credibility. *See* ***id***. Last, a witness testified that Gilmore had tried to intimidate him into silence; this supplied both impeachment evidence and substantive evidence of guilt. *See* ***Price***, 37 Wis.2d at 132, 154 N.W.2d at 229; MCCORMICK § 271, at 655. All of this gave a rational jury a sufficient basis to disbelieve Gilmore's testimony and find him guilty beyond a reasonable doubt.

We next conclude that the trial court issued a proper sentence. Sentencing is a discretionary determination left to the trial court. ***State v. Macemon***, 113 Wis.2d 662, 667-68, 335 N.W.2d 402, 405-06 (1983). Trial courts

base their sentences on such factors as the gravity of the offense, the character of the defendant, the public's need for protection, and the interests of deterrence. ***State v. Sarabia***, 118 Wis.2d 655, 673-74, 348 N.W.2d 527, 537 (1984). The trial court issued a fifteen-year prison sentence for masked armed robbery and a five-year sentence for masked armed burglary, sentences to run consecutive and concurrent to a sentence Gilmore was then serving. The trial court applied the relevant sentencing factors to Gilmore's crimes, issuing sentences commensurate with Gilmore's culpability, his criminal justice record, the severity of his crimes, the protection of the public, and the need to deter Gilmore and other like-minded wrongdoers from such criminal activity. We are satisfied that the trial court's findings represent a balanced exercise of sentencing discretion. The violence and severity of Gilmore's crimes demanded a proportionate sentence, and we see nothing excessive in Gilmore's combined twenty-year sentence.

We see no instances of ineffective defense counsel. Gilmore needs to show both deficient performance by counsel and prejudice from the performance. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Here, we see no evidence of deficient performance or prejudice. Trial counsel effectively cross-examined the prosecution's witnesses and otherwise furnished competent representation. Gilmore's appellate counsel points out that trial counsel was unable to locate two witnesses Gilmore believed would provide favorable testimony. Trial counsel evidently made good faith efforts to find these witnesses without success. We therefore see no deficient performance. Moreover, we see no indication that the two witnesses Gilmore stated he needed would have provided any valuable evidence to the defense; Gilmore has not suggested the whereabouts of these witnesses even now, at this postconviction stage of proceedings. At this point in the proceedings, Gilmore has an obligation to supply

some proof that the witnesses he states he needed actually have relevant, admissible and important exculpatory evidence for his defense. From the proceedings to date, we have no reason to believe that these witnesses would provide anything more than cumulative evidence. In short, Gilmore's trial does not meet the two-pronged ***Strickland*** standards.

Finally, we will not reverse Gilmore's conviction on the basis of the trial court's failure to provide him a continuance before the trial. The trial court's decision was discretionary, ***State v. Wedgeworth***, 100 Wis.2d 514, 520, 302 N.W.2d 810, 814 (1981), and we will affirm such discretionary decisions as long as they have a reasonable basis in the record. ***Littmann v. Littmann***, 57 Wis.2d 238, 250, 203 N.W.2d 901, 907 (1973). Relevant factors include the length of the delay, other continuances, convenience to the parties and witnesses, reasons for the delay, the public's interest in prompt justice, and other pertinent factors. ***Wedgeworth***, 100 Wis.2d at 520-21, 302 N.W.2d at 814. After jury selection, he announced that he wanted a continuance to get new counsel outside the public defender system. The trial court granted the request and dismissed the jurors. Gilmore failed to obtain new counsel over the next few weeks. Instead, the public defender's office eventually offered him a new public defender appointment. Gilmore accepted, and the public defender appointed new counsel. New counsel then sought a further continuance from the trial court, claiming that sixteen days was not enough trial preparation time. The trial court denied the motion on the ground that Gilmore had "dragged his feet" in retaining counsel and created his own predicament in terms of counsel's trial preparation time. The trial court also noted that the State's witnesses had already been scheduled, some of whom resided in North Carolina.

The trial court had good grounds for its decision. Gilmore's proceedings had already experienced considerable delay, with one continuance already granted at his request, and three separate trial dates. Gilmore provided no substantial reason for the additional delay. He had failed to follow through on his original plan to obtain counsel outside the public defender system and thereby failed to embrace the opportunity the trial court had already given him. By that point, his request for more delay was losing credibility. On the other hand, the public interest demanded prompt justice. *See* ***State v. Lomax***, 146 Wis.2d 356, 360, 432 N.W.2d 89, 91 (1988). Gilmore stood accused of violent crimes, and the State could reasonably insist on timely prosecution of such proceedings. Moreover, Gilmore suffered no prejudice and otherwise received a fair trial; trial counsel effectively cross-examined the prosecution's witnesses, Gilmore himself testified, and trial counsel provided effective closing argument. Although trial counsel indicated to the court that he was unable to locate two witnesses, Gilmore has not located them yet or shown what important evidence they would have supplied. We therefore have no reason to conclude that he suffered any prejudice. In sum, further proceedings in this appeal would have no arguable merit, and we therefore discharge Thomas Knothe of his obligation to represent Gilmore further in this appeal.

By the Court.—Judgment affirmed.