COURT OF APPEALS
DECISION
DATED AND FILED

October 8, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-1580-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

CRAIG J. ANDERSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dane County: MARK A. FRANKEL, Judge. *Affirmed.*

Before Dykman, P.J., Eich and Vergeront, JJ.

PER CURIAM. Craig J. Anderson appeals from a judgment convicting him on two counts of being party to the crime of aggravated battery with use of a dangerous weapon, and an order denying his motion for postconviction relief. He raises a number of claims, but for the reasons discussed

below, we conclude that none of them have merit. We accordingly affirm the judgment and order.

BACKGROUND

On the evening of September 12, 1993, Anderson and his friend Shawn Hauser played a game of pool against Frank DiCastri and his roommate at the Plaza Tavern. During the game, Brian Peterson wandered over and rearranged the pool balls, telling Anderson that he had been racking them incorrectly. Anderson did not appreciate the advice, and the two exchanged insults several times as the evening progressed.

When Peterson and his friend Paul Okray were ready to leave, Anderson approached them and suggested that he and Peterson go outside. They did. Peterson pushed Anderson a few times, then turned and began walking away when he saw that Hauser had followed Anderson outside with a pool cue. Anderson ran after Peterson and punched him in the face, then began hitting him over the head with a segment of Hauser's pool cue. When Okray exited the bar and went to assist Peterson, Anderson started hitting him over the head with the cue as well. When DiCastri left the bar to head home, he saw Anderson beating Peterson and Okray and yelled at them to stop. Anderson struck DiCastri in the face with the cue, causing severe injuries which required the permanent insertion of a metal plate and screws. Anderson and Hauser then ran off.

ANALYSIS

Delay in Postconviction Proceedings

Anderson's original postconviction counsel suffered some serious health problems, and closed her practice. Although she thought that she had

advised Anderson that she would be withdrawing as counsel, she later discovered that she had failed to do so. As a result, Anderson experienced a substantial delay in his postconviction proceedings. He now claims that this delay warrants a reversal of his conviction. He does not, however, identify any harm to his appeal caused by the delay. We therefore conclude that, by granting Anderson the extensions he needed to maintain his appeal, we have remedied counsel's arguably deficient performance.

Hearing Attendance

Anderson claims that the trial court erred when it refused to order his production for the postconviction hearing or to issue a subpoena to compel the attendance of his codefendant.[1] A prisoner does not need to be physically present for a postconviction hearing unless he raises substantial issues of fact regarding matters in which he participated and his claims are supported by more than cursory allegations. ***State v. Vennemann***, 180 Wis.2d 81, 94-95, 508 N.W.2d 404, 909-10 (1993). Only one of Anderson's claims raised a factual issue for which his testimony would be relevant: namely, his alleged lack of understanding of the party-to-the-crime statute. The trial court was not required to produce Anderson to testify on this issue, however, because Anderson failed to support his allegation with an affidavit or any other corroborating evidence. Further, as we discuss more fully below, even if Anderson's factual allegation that he misunderstood the party-to-the-crime statute were true, it fails to state a claim upon which relief could be granted. *See* ***Nelson v. State***, 54 Wis.2d 489, 497-98, 195 N.W.2d 629, 633 (1972).

[1] Hauser was still at large when Anderson was tried.

Similarly, Anderson presented no allegations which would justify the issuance of a subpoena for Hauser. First, a codefendant's testimony is not "newly discovered" merely because it is not presented at trial. ***Venneman***, 180 Wis.2d at 98, 508 N.W.2d at 411. The defendant may be presumed to have known of the existence of whatever his codefendant knew. ***Id***. Moreover, Anderson admitted he did not even know what testimony Hauser might have to offer. The trial court therefore had no basis to evaluate whether the potential testimony, if accepted as true, would establish any other ground for relief, and was not required to hold a hearing much less issue a subpoena. *See* ***Nelson***, 54 Wis.2d at 497-98, 195 N.W.2d at 633.

Plea

Anderson's claim that he is entitled to relief because he would have accepted a plea bargain had he fully understood the party-to-the-crime doctrine is completely without merit. The body of law which allows a defendant to withdraw a guilty or no contest plea which was not knowingly and voluntarily made is designed to assure that the constitutional due process rights associated with trial are not lightly or inadvertently waived. *See, e.g.*, ***State v. Krieger***, 163 Wis.2d 241, 250-51, 471 N.W.2d 599, 602 (Ct. App. 1991). Anderson did not waive his constitutional rights; he asserted them. We do not consider a defendant who puts the State to its burden of proof to have suffered a manifest injustice when the State meets that burden.

Jury Instructions

The trial court instructed the jury that a person is privileged to use that amount of force which he or she reasonably believes to be necessary to terminate another's unlawful interference with his or her person. *See* WIS J I—

CRIMINAL 800. Anderson argues that he was entitled to additional jury instructions on privilege based on one of several theories: that Peterson's act of interrupting the pool game constituted a provocation which could be reasonably expected to incite an escalated response; that Peterson consented to the battery by agreeing to stop outside to fight; or that Anderson was entitled to defend Hauser. However, because Anderson did not request instructions on any of these theories, the trial court was not required to consider them. ***State v. Hamm***, 146 Wis.2d 130, 150, 430 N.W.2d 584, 593 (Ct. App. 1988).

Sentence

Anderson next contends that he is entitled to have his sentence modified due to the significant discrepancy between his sentence and that of his codefendant. Sentencing lies within the discretion of the trial court, however, and we will not disturb a sentence unless the defendant shows that there was some unreasonable basis for it. ***State v. Perez***, 170 Wis.2d 130, 142, 487 N.W.2d 630, 634 (Ct. App. 1992). Here, the record shows that the trial court properly exercised its sentencing discretion by considering the gravity of the offense, the character of the offender, and the need to protect the public. *See* ***State v. Harris***, 119 Wis.2d 612, 623, 350 N.W.2d 633, 639 (1984). The facts that Anderson had a prior record and that it was he who wielded the pool cue justify a heavier sentence for him than for Hauser.

Assistance of Counsel

Finally, Anderson raises the issue of ineffective assistance of counsel in a supplemental brief. The test for ineffective assistance of counsel has two parts: (1) a demonstration that counsel's performance was deficient, and (2) a demonstration that the deficient performance prejudiced the defendant. ***Strickland***

v. Washington, 466 U.S. 668, 687 (1984). Whether counsel's actions were deficient or prejudicial is a mixed question of law and fact. ***Id***. at 698. The circuit court's findings of fact will not be reversed, unless they are clearly erroneous. Section 805.17(2), STATS.; ***State v. Pitsch***, 124 Wis.2d 628, 634, 369 N.W.2d 711, 714 (1985). However, whether counsel's conduct violated the defendant's right to effective assistance of counsel is a legal determination, which this court decides *de novo*. ***Id.*** at 634, 369 N.W.2d at 715.

To prove deficient performance, a defendant must establish that his or her counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***State v. Johnson***, 153 Wis.2d 121, 127, 449 N.W.2d 845, 847 (1990). The defendant must overcome a strong presumption that his or her counsel acted reasonably within professional norms. ***Id.*** To satisfy the prejudice element, the defendant usually must show that counsel's errors were serious enough to render the resulting conviction unreliable. ***Strickland***, 466 U.S. at 687. We need not address both components of the test if the defendant fails to make a sufficient showing on one of them. ***Johnson***, 153 Wis.2d at 128, 449 N.W.2d at 848.

Anderson claims that counsel was ineffective for failing to adequately instruct him on the party-to-the-crime doctrine and for failing to request jury instructions on forseeability or defense of others. However, the trial court's determination that counsel had instructed Anderson on the elements of the offense is not clearly erroneous. Moreover, as discussed above, Anderson was not prejudiced by his failure to understand the doctrine, because he nonetheless exercised his constitutional right to trial. Similarly, the record supports the trial court's determination that there was no factual basis for the instructions which Anderson claimed should have been given. There was no evidence that either

Anderson or Hauser faced any physical danger which would have justified battering three people with a pool cue. Therefore, counsel was not deficient for failing to request the instructions based upon the defendant's novel theories, and the defendant was not prejudiced by the absence of a request which would have been denied.

By the Court.—Judgment and order affirmed.

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