COURT OF APPEALS
DECISION
DATED AND FILED

August 29, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

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

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

No. 99-2538-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

KENYATTA THIGPEN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: KITTY K. BRENNAN, Judge. *Affirmed.*

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

¶1 PER CURIAM. Kenyatta Thigpen appeals from a judgment entered after a jury found him guilty of possession of a controlled substance (cocaine), with intent to deliver, party to a crime, contrary to WIS. STAT. § 961.41(1m)(cm)1

(1997-98).[1] He claims the trial court erroneously exercised its discretion when it: (1) excluded Jermaine Butler's former testimony about why Thigpen drove Butler to the location of the arrest; (2) admitted into evidence the rifle recovered from the residence where Thigpen was arrested; and (3) imposed an unduly harsh sentence. Because the trial court did not erroneously exercise its discretion when it excluded Butler's former testimony, admitted the rifle, and sentenced Thigpen, we affirm.

I. BACKGROUND

¶2 On September 19, 1998, the police arrived at 1025 West Madison Street in the City of Milwaukee to investigate a narcotics complaint. When they arrived, three of the officers went to the front door, and the fourth officer, Chris Yesbeck, went around to cover the back door. While at the rear of the house, Yesbeck was able to see into the home through a window. Yesbeck observed Thigpen, who was carrying a white, ceramic dinner plate, walk into the bathroom and then dump a substance from the plate into the toilet. Yesbeck saw Thigpen leave the bathroom, place the plate on the kitchen counter, and return to the dining room area.

¶3 Shortly thereafter, the officers were permitted into the residence and the owner, Butler, consented to a search of the home. During that time, Yesbeck observed Thigpen attempt to conceal a plastic bag, which contained rock cocaine. Thigpen gave a statement to police indicating that Butler had asked him for a ride home and, when they arrived at the residence, Thigpen observed the cocaine on the plate. Thigpen indicated that he was trying to dispose of the illegal substance so that Butler, and others in the home, would not be charged with possession.

[1] All references to the Wisconsin Statutes are to the 1997-98 version.

¶4 Thigpen was charged with possession of a controlled substance with intent to deliver. The case was tried to a jury. During the trial, Thigpen attempted to introduce into evidence former testimony from Butler regarding the purpose for which Thigpen drove Butler to the house. Thigpen wanted to either read the former testimony to the jury or paraphrase the former testimony for the jury. Thigpen claimed this former testimony was significant because then the jury would have known that Butler had asked Thigpen for a ride to the residence because Butler suspected his home was being used as a drug house, and he wanted to go there to address the problem and get rid of the drug dealing. Butler, who, at the suppression hearing had offered some testimony to support Thigpen's claim, subsequently refused to testify at trial, and instead invoked his Fifth Amendment right not to incriminate himself. The trial court excluded the proffered testimony, ruling it was irrelevant.

¶5 The trial court also admitted into evidence the rifle that was discovered during the search of Butler's home. The State introduced the rifle as evidence of the intent to deliver element of the charge, as drug paraphernalia and weapons are indicators of drug dealing. The jury found Thigpen guilty and he was sentenced to two years in prison. Thigpen now appeals.

II. DISCUSSION

A. Exclusion of Butler's Testimony.

¶6 Thigpen first claims that the trial court erroneously exercised its discretion when it refused to allow Thigpen to introduce testimony regarding why he drove Butler to the residence, either by reading to the jury Butler's former testimony, or by having Thigpen paraphrase the former testimony for the jury. We do not agree. Trial courts are permitted broad discretion in determining whether to

admit or exclude evidence. *See* ***State v. Larsen***, 165 Wis. 2d 316, 319-20, 477 N.W.2d 87 (Ct. App. 1991). We review evidentiary decisions under the erroneous exercise of discretion standard and will not overturn the trial court's ruling if there was a reasonable basis for the decision. *See* ***State v. McConnohie***, 113 Wis. 2d 362, 370, 334 N.W.2d 903 (1983).

¶7 Thigpen claims that the testimony was admissible pursuant to WIS. STAT. § 908.045(4), which permits admission of statements against interest where the declarant is unavailable. *See* ***id.*** Here, Thigpen argues that Butler was unavailable because he exercised his right not to testify. Accordingly, Thigpen contends the trial court should have allowed him to read to the jury Butler's former testimony, or should have permitted him to tell the jury why Butler wanted to go to the residence. The State responds that Thigpen did not assert this argument before the trial court and therefore, we should not consider it. The State points out that Thigpen raised only a § 908.045(1) objection at the trial court level. Thigpen counters, however, that the trial court's ruling clearly foreclosed the introduction of this evidence under any theory and therefore, he could not have raised § 908.045(4) during trial. We need not resolve this conflict, however, because when Thigpen attempted to introduce the proffered testimony during the trial to establish Butler's purpose for coming home, the trial court ruled the evidence was irrelevant:

> It is not relevant either because why Mr. Thigpen was at the residence is already explained to the jury. He has told them he was there because Butler asked him to take him there from the CCC. Why Butler asked him to take him there is not relevant as to Mr. Thigpen. So it will not be gone into.

Accordingly, we need not address the hearsay issue because the trial court excluded the testimony on the basis of relevance.

¶8 Before evidence may be admissible, it must be relevant—"evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." WIS. STAT. § 904.01. Here, the trial court ruled that Thigpen already told the jury *his* purpose for being at the residence: Butler asked him to drive him there. The trial court found that *Butler's purpose* for going to the home was not relevant to Thigpen. This conclusion was reasonable. Butler was not on trial; nor was he testifying as a witness during Thigpen's trial. Butler's purpose for going to the home was not relevant. Thigpen contends that excluding this evidence allowed the jury to conclude that Thigpen went to the home to use the drugs rather than to help Butler get rid of the drugs. We disagree.

¶9 Thigpen was free to tell the jury that he was not there to use the drugs, that he did not use drugs, and that he went to the home to flush the drugs down the toilet. Bringing Butler's purpose for being at the house into issue, however, was not relevant to Thigpen's trial. We conclude, therefore, that the trial court did not erroneously exercise its discretion when it refused to allow Thigpen to either read Butler's former testimony to the jury or summarize Butler's testimony regarding his purpose for going to the residence.[2]

B. Admission of Rifle.

¶10 Next, Thigpen argues that admitting the rifle into evidence was unduly prejudicial. He claims that the rifle was "an extremely prejudicial piece of evidence that stacked the cards against Mr. Thigpen." We reject Thigpen's claim.

[2] We also note that Thigpen did not cite any authority to establish that the proffered evidence could be introduced by him summarizing or paraphrasing Butler's prior testimony.

We apply the same deferential standard of review on this issue as we set forth above: admitting evidence is reviewed under the erroneous exercise of discretion standard. *See* ***Larsen***, 165 Wis. 2d at 319-20. We will affirm the trial court's decision if it sets forth a reasonable basis for admitting the rifle. *See* ***id.***

¶11 The State contends that we need not even reach this issue because Thigpen never objected to the admission of the rifle during trial. Thigpen concedes in his reply brief that he did not object to the rifle's admission during trial, but contends that he did object to its introduction via a motion in limine. He cites us to 43:31-33 of the record. We have reviewed that portion of the record. It does not contain a motion in limine to exclude the rifle, nor does it contain the trial court's ruling on such motion. This record citation is three pages of Officer Yesbeck's cross-examination during trial.

¶12 We have reviewed the entire appeal record. The only document that resembles a motion in limine involved a challenge to the consent to enter and search the residence. There is no specific reference to the rifle. There is a general request to "suppress evidence" obtained; however, it is insufficient to preserve the unduly prejudicial issue that Thigpen raises for the first time on appeal. A defendant who seeks to have a trial court exclude evidence on the grounds of unfair prejudice must object on that ground. *See* ***State v. Wyss***, 124 Wis. 2d 681, 712-13, 370 N.W.2d 745 (1985), *overruled on other grounds*, ***State v. Poellinger***, 153 Wis. 2d 493, 506, 451 N.W.2d 752 (1990). Because Thigpen failed to do so, WIS. STAT. § 904.03 "provides no basis for a claim of error." ***Id.*** at 713.

C. Sentencing Decision.

¶13 Thigpen's last complaint is that the trial court imposed an unduly harsh sentence. We disagree. There is a consistent and strong policy against

interference with the discretion of the trial court in passing sentence. *See* ***State v. Paske***, 163 Wis. 2d 52, 61-62, 471 N.W.2d 55 (1991). This policy is based on the great advantage the trial court has in considering the relevant factors and the demeanor of the defendant. *See* ***State v. Harris***, 119 Wis. 2d 612, 622, 350 N.W.2d 633 (1984). Furthermore, the trial court is presumed to have acted reasonably, and the burden is on the appellant to show some unreasonable or unjustifiable basis in the record for the sentence imposed. *See* ***State v. Thompson***, 172 Wis. 2d 257, 263, 493 N.W.2d 729 (Ct. App. 1992). A trial court's sentence is reviewed for an erroneous exercise of discretion. *See* ***Paske***, 163 Wis. 2d at 70.

¶14 Trial courts must consider three primary factors in passing sentence: the gravity of the offense; the character and rehabilitative needs of the defendant; and the need to protect the public. *See* ***id.*** at 62. The length of the sentence imposed by a trial court will be disturbed on appeal 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. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

¶15 Here, the trial court considered each of the three primary factors. It addressed his character, noting his "code of honor," and his prior criminal record. The trial court took into account the gravity of the offense, characterizing the crime as "very serious." The police were able to recover over five grams of cocaine base. Finally, the trial court considered Thigpen's rehabilitative needs and the need to protect the public. Thigpen faced a maximum potential sentence of ten years in prison. The State recommended a four-year sentence. The trial court imposed two years. The trial court's sentence was eminently reasonable, and certainly not "shocking." There was no erroneous exercise of discretion.

By the Court.—Judgment affirmed.

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