COURT OF APPEALS
DECISION
DATED AND FILED

July 3, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-2048-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ALPHONSO L. ROBINSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Kenosha County: DAVID M. BASTIANELLI, Judge. *Affirmed.*

Before Brown, P.J., Nettesheim and Anderson, JJ.

¶1 PER CURIAM. Alphonso L. Robinson appeals from a judgment of conviction and an order denying postconviction relief. The issues on appeal are: whether the prosecutor engaged in improper cross-examination and improper closing argument, whether the trial court erred in giving the jury instruction on

flight, and whether the trial court misused its discretion when it sentenced Robinson to 100 years. We resolve these issues against Robinson since we conclude that errors, if any, were harmless. Finally, Robinson argues that he is entitled to a new trial in the interests of justice. We also affirm on this issue because Robinson has failed to demonstrate that this is an exceptional case warranting this court's exercise of its discretionary authority to reverse the underlying judgment.

¶2 On August 1, 1997, the State filed a criminal complaint charging Robinson with burglary, second-degree sexual assault, threats to injure and theft. After a preliminary hearing, the State filed an information charging Robinson with burglary, second-degree sexual assault and armed robbery. A jury found Robinson guilty on all three charges and the trial court sentenced him to forty years for the burglary, twenty years for the sexual assault and forty years for armed robbery, to be served consecutively. A motion for postconviction relief was heard and denied by the trial court and this appeal followed.

¶3 At trial, M.P. testified that on July 22, 1997, she had entertained friends at her apartment until about midnight when everyone left the residence. At approximately 2:30 a.m., there was a knock on her door. She answered the door, assuming it was her brother, and a man, later identified as Robinson, punched her in her left eye. She fell onto her bed and he ordered her to take off her underwear and then sexually assaulted her. She further testified that during the assault, he told her that he had a gun and would kill her if she did not remain quiet. Immediately after the sexual assault, he hit her over the head with a beer bottle, rummaged through her residence, and left with approximately $190 of her money.

¶4 Other witnesses, including M.P.'s neighborhood friend, a doctor and police officers, testified as to her highly emotional state as well as her physical injuries after the incident. Robinson also testified, contending that the two had consensual sexual relations. He admitted that he took money from her without her consent. He also maintained that he never hit her.

¶5 Robinson first contends that the prosecutor engaged in improper cross-examination of him, entitling him to a new trial. He asserts that her questioning required him to comment on another witness's truthfulness, contrary to Wisconsin case law.

¶6 The following questioning occurred at trial and is the subject of this appellate issue:

> [Asst. D.A.]: Mr. Robinson, do you have any explanation for why it is that Ms. [P.] would believe that you raped her?
>
> [Mr. Robinson]: My only explanation would be is she trying to cover up for somebody else who she had dinners with, who she owe money or something to.
>
> [Asst. D.A.]: But that's just a guess on your part, isn't it, Mr. Robinson? You are speculating, aren't you, as to why she would say this if it weren't true?
>
> [Mr. Robinson]: Correct.

¶7 The issue of a witness commenting on the truthfulness of another witness was discussed in ***State v. Haseltine***, 120 Wis. 2d 92, 352 N.W.2d 673 (Ct. App. 1984), and ***State v. Kuehl***, 199 Wis. 2d 143, 545 N.W.2d 840 (Ct. App. 1995). In ***Haseltine***, the defendant was charged with sexual contact with his daughter and his daughter's psychiatrist testified at trial that there "was no doubt whatsoever" that she was an incest victim. ***Haseltine***, 120 Wis. 2d at 95-96. We held that no witness, expert or otherwise, should be permitted to give an opinion

that another mentally and physically competent witness is telling the truth. ***Id.*** at 96. We determined that the psychiatrist's statement was tantamount to saying the daughter was telling the truth. ***Id.*** We reversed the defendant's conviction because credibility was the main issue in the case and the jury could have easily abdicated its fact-finding role to the psychiatrist. ***Id.***

¶8 In ***Kuehl***, the trial court ruled that the State could not ask the defendant if the victim was lying, only whether she was mistaken. ***Kuehl***, 199 Wis. 2d at 147. On appeal, we concluded that questions about another's veracity, whether posed as someone lying or being mistaken, were improper under the ***Haseltine*** analysis. ***Kuehl***, 199 Wis. 2d at 149. We further held that "[e]very question presupposes the ability of the witness to answer. If that ability is not within the command of the witness, the question is improper." ***Id.*** at 151.

¶9 The questioning in the instant case falls squarely within the ***Haseltine*** and ***Kuehl*** prohibitions. In essence, the prosecutor was asking Robinson to comment on the veracity of the victim/witness. This was improper. "The jury is the lie detector in the courtroom." ***Haseltine***, 120 Wis. 2d at 96. However, Robinson did not object to the improper questioning at trial. Therefore, the issue is waived unless this court decides to exercise its own discretion to review and reverse. *See* ***Vollmer v. Luety***, 156 Wis. 2d 1, 11, 456 N.W.2d 797 (1990).

¶10 WISCONSIN STAT. § 752.35 (1997-98) governs our authority to grant a new trial and provides:

> In an appeal to the court of appeals, if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried, the court may reverse the judgment or order appealed from,

> regardless of whether the proper motion or objection appears in the record ….

¶11 We decline to exercise our discretion to reverse and grant a new trial. We "will exercise [our] power of discretionary reversal and review only in exceptional cases." ***Vollmer***, 156 Wis. 2d at 11 (citation omitted). We will reverse the judgment of conviction if we determine that the real controversy has not been fully tried or if there has been a miscarriage of justice. ***Id.*** at 19. In order to reverse for the second category of error, the appellate court must make a finding of a substantial probability of a different result on retrial. ***Id.***

¶12 The testimony of several other witnesses corroborated M.P.'s testimony that she was physically injured and contradicted Robinson's testimony that they engaged in consensual sexual activity. Robinson does not persuade us that the real controversy was not tried, that the claimed error clouded the real issue in the case or that justice was miscarried. Moreover, we cannot conclude that there is a substantial probability of a different result on retrial. Finally, this case does not rise to the level of the exceptional case in which we exercise our authority to reverse and remand.

¶13 Second, Robinson contends that the evidence did not warrant giving the jury an instruction on flight.[1] "The decision to give or not to give a requested

[1] The following jury instruction was provided to the jury at trial:

> Evidence of the conduct or the whereabouts of a person after a crime has been committed or after that person has been accused of crime are circumstances which you may consider, along with all the other evidence, in determining guilt or innocence.
>
> Whether or not evidence of such conduct or whereabouts in this case show a consciousness of guilt and whether or not consciousness of guilt shows actual guilt are matters exclusively for you, the jury, to determine and you must consider that there may be many reasons unrelated to guilt for such conduct. You

(continued)

jury instruction lies within the trial court's discretion. We will not reverse such a determination absent an erroneous exercise of discretion." ***State v. Miller***, 231 Wis. 2d 447, 464, 605 N.W.2d 567 (Ct. App. 1999), *review denied*, 233 Wis. 2d 84, 609 N.W.2d 473 (Wis. Jan. 18, 2000) (No. 98-2089-CR). "A trial court has broad discretion in instructing the jury on the law, and we will not reverse if the instruction at issue correctly states the law and is supported by facts that were properly before the jury." ***State v. Selders***, 163 Wis. 2d 607, 620, 472 N.W.2d 526 (Ct. App. 1991). We conclude that the flight instruction correctly stated the law and was supported by the facts.

¶14 The following testimony supported the instruction:

> [Asst. D.A.]: Sir, why is it after this friendly, affectionate sort of free sex relationship with [M.P.] you didn't have any contact with her after July 22, 1997?
>
> [Mr. Robinson:] Because at about maybe July 25—First of all, I knew I had stole the money from her crib so, I mean, I'm not fixing to go over there, hey baby, you know, even though she knows I stole the money from her. Then on top of that *I had heard like through the grapevine, word on the street, that the police had been looking for me, you know, for some things I didn't do. So I was like, hey, man, I ain't—I ain't trying to have no dealings with her or, you know, with nobody messing around in that period.* You know, I was scared so—
>
> [Asst. D.A.]: *So you knew the police were looking for you for these things right here that you are denying having done, correct.*
>
> [Mr. Robinson]: *Correct.* (Emphasis added.)

¶15 Robinson objected to the instruction, but the trial court concluded that the instruction was appropriate. Robinson further argued that he provided an

---

> must also consider that feelings of guilt do not necessarily reflect actual guilt.

innocent explanation for evading the warrant for approximately one year. The trial court determined that the State had provided enough evidence to give the instruction and then it was the jury's duty to decide which explanation to believe as well as which inference to make from the testimony. We agree. Robinson testified that when he heard that the police were seeking him in connection with the assault, he decided to "lay low." The trial court did not erroneously exercise its discretion when it gave the jury instruction on flight.

¶16 Third, Robinson contends that the prosecutor's closing argument was improper and violated his right to due process. He further asserts that her closing argument was tantamount to the jury arriving at a conviction by considering factors other than the evidence. Counsel is allowed considerable latitude in closing argument. ***State v. Neuser***, 191 Wis. 2d 131, 136, 528 N.W.2d 49 (Ct. App. 1995). It is within the trial court's discretion to determine the propriety of counsel's statements and arguments before the jury. ***Id.*** "We will affirm the court's ruling unless there has been a misuse of discretion which is likely to have affected the jury's verdict." ***Id.*** [2]

[2] ***State v. Neuser***, 191 Wis. 2d 131, 136, 528 N.W.2d 49 (Ct. App. 1995), further provides:

> The line between permissible and impermissible argument is drawn where the prosecutor goes beyond reasoning from the evidence and suggests that the jury should arrive at a verdict by considering factors other than the evidence. The constitutional test is whether the prosecutor's remarks "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Whether the prosecutor's conduct affected the fairness of the trial is determined by viewing the statements in context. Thus, we examine the prosecutor's arguments in the context of the entire trial. (Citation omitted.)

¶17 Robinson complains of five errors in the State's closing argument. First, he contends that the argument that the victim abandoned her apartment after the sexual assault was not based on the evidence. However, the victim testified without objection that she never stayed in her apartment again after the sexual assault. That statement, along with other testimony demonstrating her fear of Robinson, led to the inference that she was afraid of him due to the assault. This is an appropriate inference and makes it more likely that M.P. told the truth about the sexual assault. The State's argument is supported by the evidence and was proper.

¶18 Second, Robinson argues that the prosecutor's comments about the flight instruction were improper. However, we determined above that the flight instruction was supported by the evidence and was therefore proper. Hence, the prosecutor's comments about the instruction were also proper.

¶19 Third, Robinson states that the prosecutor improperly vouched for the victim's credibility. We note that defense counsel told the jury during his opening statement that he did not believe the victim and he did not think the jury should believe her either. Robinson put the victim's credibility at issue from the start by that statement. When the prosecutor addressed the victim's credibility, she was responding to the defense characterization of the victim. Any error in the prosecutor's statements regarding the victim's credibility was invited error. ***Shawn B.N. v. State***, 173 Wis. 2d 343, 372, 497 N.W.2d 141 (Ct. App. 1992). We will not review invited error. ***Id.***

¶20 Fourth, Robinson challenges the State's description of him during closing argument, stating that the prosecutor inflamed the jury. The prosecutor referred to Robinson as a "rapist," a "studly guy" and a "stud boy." We note that

the evidence, particularly Robinson's testimony, invited these comments. Robinson testified with braggadocio about his sexual stamina. Moreover, the prosecutor used these words in analyzing the evidence. ***State v. Johnson***, 153 Wis. 2d 121, 132, 449 N.W.2d 845 (1990); *see also* ***United States v. Scott***, 660 F.2d 1145, 1177 (7th Cir. 1981) ("[u]nflattering characterizations of a defendant will not provide a reversal when such descriptions are supported by the evidence") (citations omitted).

¶21 Robinson contends that the fifth error in closing arguments was the prosecutor's insinuation of Robinson's gang affiliation based on his tattoo. This argument is without merit. The evidence does not suggest any allusion to which the prosecutor was referring when she spoke about the tattoo. She merely inferred that M.P. might have seen something familiar in the tattoo that made it easier for her to remember its appearance.

¶22 Robinson argues that the errors in toto warrant a new trial in the interests of justice. We have discussed the claimed errors in turn and find no error, even if improper, which would warrant a new trial. As stated above, we "will exercise [our] power of discretionary reversal and review only in exceptional cases." ***Vollmer***, 156 Wis. 2d at 11 (citation omitted). The State presented a strong case with numerous witnesses to support the victim's testimony. The real issue in this case was tried and the errors complained of did not stray beyond the evidence presented.

¶23 Finally, Robinson contends that the trial court misused its discretion when it sentenced him to 100 years in prison.

> Sentencing is within the broad discretion of the trial court and we will not overturn a sentencing decision unless there has been a clearly erroneous exercise of discretion. As

> long as there is evidence in the record that the trial court considered appropriate factors, this court will not second-guess a trial court's sentencing decision. The primary factors to be considered are the gravity of the offense, the character of the offender and the protection of the public.

State v. Gardner, 230 Wis. 2d 32, 48, 601 N.W.2d 670 (Ct. App. 1999), *review denied*, 231 Wis. 2d 375, 607 N.W.2d 291 (Wis. Nov. 17, 1999) (No. 98-2655-CR).

¶24 Robinson asserts that the issue in this case is not whether the court stated any reasons for the sentence it imposed, but whether the court exercised its discretion as to the particular sentence it imposed of 100 years. Robinson cites ***McCleary v. State***, 49 Wis. 2d 263, 182 N.W.2d 512 (1971), for the proposition that trial courts must explain with specificity the number of years to which a defendant is sentenced. ***McCleary*** is inapposite. ***McCleary*** concerns the issue of providing rationale for the particular sentence imposed, not differentiating between one particular sentence and another.[3]

¶25 We note that the trial court correctly addressed the three primary factors to be considered at sentencing as well as other appropriate factors. The trial court recounted Robinson's lengthy prior record, which included violent and assaultive offenses. The court noted his poor employment record and poor personal relationships. Additionally, the court discussed his unwillingness to avail

[3] In ***McCleary v. State***, 49 Wis. 2d 263, 182 N.W.2d 512 (1971), the Wisconsin Supreme Court concluded that the trial court abused its discretion in sentencing McCleary to the near maximum sentence. The appellate court stated that the trial court failed to provide reasons for the near maximum sentence for a first offender convicted of a property crime. ***Id.*** at 282-83. In searching for reasons to uphold the trial court's decision, the appellate court could find no facts to support the sentence imposed. It concluded that the trial court did not use any discretion justifying such a lengthy sentence. ***Id.*** at 284. ***McCleary*** does not state that trial courts must justify particular sentences as opposed to another particular sentence that might have been imposed. It stands for the proposition that a trial court must provide rationale for the sentence that it does impose.

himself of the opportunities of probation and rehabilitation, including his tendency to commit other crimes while on probation. The court also commented on Robinson's bad attitude, demeanor during trial and a negative prior psychological profile. The court acknowledged Robinson's GED as his only positive attribute. Finally, the trial court addressed the senseless and brutal assault on M.P. The trial court concluded that Robinson had a history of violent conduct, serious illegal activity, and selfish, careless and inconsiderate behavior.

¶26 The court sentenced Robinson to forty years for burglary, twenty years for sexual assault and forty years for armed robbery, to be served consecutively. The State recommended that specific sentence to the court. Additionally, the PSI recommended lengthy terms of imprisonment for each count, to be served consecutively. The court considered applicable factors and provided appropriate rationale in sentencing. We hold that the trial court did not erroneously exercise its discretion in pronouncing sentence.

By the Court.—Judgment and order affirmed.

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