COURT OF APPEALS
DECISION
DATED AND FILED

October 30, 2001

Cornelia G. Clark
Clerk of Court of Appeals

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. 00-3393-CR

STATE OF WISCONSIN IN COURT OF APPEALS
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LARRY LAMONT GATEWOOD,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed and cause remanded with directions.*

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

¶1 PER CURIAM. Larry Lamont Gatewood appeals from a judgment entered after a jury convicted him of two counts of kidnapping, three counts of first-degree sexual assault, and armed robbery, all as party to a crime, contrary to WIS. STAT. §§ 940.31(1)(a), 940.225(1)(b)-(c), 943.32(2), 939.05 and 939.63

(1999-2000).[1] Gatewood claims: (1) his due process rights were violated when he was sentenced on inaccurate information relative to DNA evidence on two additional sexual assaults, but not the assaults for which he was convicted; (2) his double jeopardy rights were violated; (3) the prosecutor violated his right to a fair trial when the jury was informed about his potential penalty, when the prosecutor attempted to use an exhibit reflecting a marijuana arrest, and when the prosecutor referred to Gatewood as an "African-American"; and (4) the trial court erroneously exercised its discretion when it ruled that the State could rebut Gatewood's reputational evidence with specific instances of other bad acts. Because the record does not clearly reveal whether the DNA evidence presented during the sentencing hearing was true and accurate, we remand the matter to the trial court with directions. We resolve the remaining issues in favor of upholding the judgment.

I. BACKGROUND

¶2 On April 1, 1999, Cara S. was walking home when two men, later identified as Gatewood and an accomplice, Larry Minnis, forced her, at gunpoint, into the rear yard behind a house. Cara was forced to engage in oral sex with Gatewood, and then with Minnis. When Minnis was unable to ejaculate, he became angry and ripped Cara's pants. She screamed and the men ran.

¶3 Later that same evening, Gatewood and Minnis robbed Dan Arent at gunpoint. They forced Arent into the trunk of a stolen car that they were driving and sped away. Milwaukee Police Officer Cassandra Richardson was on patrol

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

that evening and observed the stolen car attempt to turn the wrong way down a one-way street. Officer Richardson followed the car and attempted to pull Gatewood and Minnis over; however, they sped off and Richardson gave chase. Eventually, Minnis, who was driving, crashed the car into a tree and both men fled on foot. Gatewood and Minnis were ultimately located and charged in connection with the incidents involved in this case.

¶4 Gatewood's defense at trial was that Minnis coerced him into participating in the criminal activity. The jury convicted Gatewood on the charges noted above. During the sentencing hearing, the prosecutor presented evidence related to two additional sexual assaults which occurred in Milwaukee in August 1998. The prosecutor argued that DNA evidence connected Gatewood to those two assaults, which were never prosecuted because the victims were not willing to testify. Gatewood objected to the presentation of this DNA evidence, arguing that he had repeatedly requested that the prosecutor turn over the underlying data for the DNA testing from the 1998 assaults, but he had never received the information. Gatewood contended that the DNA information was erroneous and he presented several witnesses who testified that he was in Indiana on the date that the 1998 assaults occurred.

¶5 The trial court did not resolve the issue and instructed the parties to "move on." In sentencing Gatewood, it is clear from the record that the trial court relied on, and believed in, the accuracy of the DNA evidence connecting Gatewood to the August 1998 assaults. Judgment was entered. Gatewood now appeals.

II. DISCUSSION

A. Sentencing/Due Process.

¶6 Gatewood argues that his due process rights were violated when the prosecutor argued at sentencing that DNA evidence connected him to two assaults from August 1998. Gatewood advised the trial court that he had never been provided the data from the DNA tests, although he had requested it. As a result, Gatewood argued that he never had a fair opportunity to challenge the State's report. The prosecutor denied that Gatewood had requested the information and, without resolving the disagreement, the trial court advised both sides to "move on."

¶7 Gatewood has a right to be sentenced on accurate information. ***State v. Slagoski***, 2001 WI App 112, ¶7, 244 Wis. 2d 49, 629 N.W.2d 50. As a part of that right, Gatewood must be allowed to "rebut evidence that is admitted by a sentencing court." ***State v. Spears***, 227 Wis. 2d 495, 508, 596 N.W.2d 375 (1999). A defendant who seeks resentencing on the basis of inaccurate information carries the burden of showing by clear and convincing evidence that the information in question was inaccurate and that the court actually relied on the information when it imposed the sentence. ***State v. Littrup***, 164 Wis. 2d 120, 132, 473 N.W.2d 164 (Ct. App. 1991).

¶8 We conclude that Gatewood satisfied the second part of the burden. The record reflects that the trial court relied on the proffered DNA evidence when it imposed sentence here. It is less clear whether or not the information was inaccurate. Gatewood was not afforded the proper opportunity to rebut the evidence because the State failed to provide him with the underlying data associated with the DNA testing results. Gatewood has a right to postconviction

discovery if the evidence is relevant to an issue of consequence. ***State v. O'Brien***, 223 Wis. 2d 303, 321, 588 N.W.2d 8 (1999). When the state seeks to present DNA evidence at sentencing which links a defendant to an unproven or uncharged crime, the defendant should have an opportunity to examine such evidence and make an independent determination as to its reliability. ***Id.*** at 320-21.

¶9 Although the record demonstrates that Gatewood presented alibi witnesses to challenge the accuracy of the August 1998 DNA evidence, he was not given the opportunity to review the underlying data to determine whether the DNA evidence was reliable. Consequently, we remand the matter to the trial court with directions. The State is hereby ordered to produce and turn over to Gatewood the underlying data relative to the August 1998 DNA testing. Gatewood will then be permitted an opportunity to examine the evidence and move for resentencing if he can make a prima facie showing that the DNA results are unreliable. If Gatewood determines that the DNA evidence cannot be challenged as unreliable, then resentencing is not necessary.

B. Double Jeopardy.

¶10 Next, Gatewood claims that his double jeopardy rights were violated. First, he argues that counts two and three of the complaint were multiplicitous.[2] Second, he claims that counts three and four were multiplicitous

[2] In the alternative, Gatewood contends that there is insufficient evidence to uphold his conviction on count two. We disagree.

(continued)

because the jury instructions referred to both counts as identical acts. We reject both arguments on the basis of waiver.

¶11 Whether double jeopardy was implicated presents a question of law, which we review independently. ***State v. Anderson***, 219 Wis. 2d 739, 746, 580 N.W.2d 329 (1998). Double jeopardy prohibits charging a single offense in separate counts. ***Id.***

¶12 First, Gatewood argues that counts two and three are multiplicitous. Gatewood, however, failed to raise this argument in the trial court. He did not permit the trial court a chance to address this issue. A timely multiplicity

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> [I]n reviewing the sufficiency of the evidence to support a conviction, an appellate court may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn a verdict even if it believes that the trier of fact should not have found guilt based on the evidence before it.

State v. Poellinger, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990) (citations omitted). Count two charged Gatewood with first-degree sexual assault, as a party to a crime, while using a dangerous weapon. Gatewood contends there is no evidence that he ever sexually assaulted Cara while threatening to use, or while using, a dangerous weapon. He argues that he did not threaten Cara with a gun when he was assaulting her.

Gatewood fails to understand that holding a gun during his direct assault on Cara was not necessary to sustain the conviction here. He was charged as party to a crime. Therefore, all that was necessary was evidence demonstrating that the defendant *or a person he aided and abetted* had sexual intercourse with Cara by use, or threat of use, of a dangerous weapon. There was evidence presented indicating that Gatewood's sexual act occurred while Minnis brandished the gun and served as a lookout, and Minnis's sexual act occurred while either or both men controlled the gun in Cara's immediate vicinity. Either act is sufficient to form the basis of count two. Both men coerced and manipulated Cara throughout the episode by threat of the gun. A reasonable jury could conclude that this evidence is sufficient to find Gatewood guilty beyond a reasonable doubt on count two.

objection gives the state a fair chance to flesh out the factual record and to distinguish between charges, or to amend the complaint as necessary.

¶13 The record reflects that Gatewood did not raise this specific double jeopardy claim before the appeal and, therefore, did not give the State or the trial court a fair opportunity to address it. Accordingly, we apply waiver, and decline to address the issue for the first time here. ***Peretz v. United States***, 501 U.S. 923, 936 (1991) (A constitutional right, including double jeopardy, can be forfeited if defendant fails to make timely assertion of that right.).

¶14 Second, we address Gatewood's claim that the jury instructions with respect to counts three and four were erroneous because the instruction failed to specify between Gatewood and Minnis as the direct actor for each particular count. Counts three and four of the complaint charged Gatewood and Minnis with first-degree sexual assault, as party to a crime, alleging that both defendants, "as parties to a crime, being aided and abetted by one or more other persons, did have sexual intercourse with Cara S.[] without her consent and by use of force."

¶15 The jury instruction challenged here referred to "the defendant" as the direct actor in counts three and four, even though for count four, the theory the State presented to the jury was that Minnis was the direct actor, and was aided and abetted by Gatewood. Gatewood, however, failed to raise this objection during the instruction conference or when the instructions were given. "A party's failure to raise an objection to the instructions at trial constitutes a waiver of that party's right to raise the objection on appeal." ***State v. McBride***, 187 Wis. 2d 409, 420, 523 N.W.2d 106 (Ct. App. 1994). Because Gatewood failed to raise the "direct actor" distinction in the instructions at the trial court level, he waived his right to raise it on appeal.

C. Prosecutorial Misconduct.

¶16 Next, Gatewood argues that the prosecutor engaged in three instances of misconduct. First, during cross-examination, he asked Gatewood whether he understood that he might go to prison for the rest of his life. He points out that it is reversible error for the court or counsel to inform the jury of the effect of its answers on the ultimate result of its verdict. ***McGowan v. Story***, 70 Wis. 2d 189, 196, 234 N.W.2d 325 (1975). Second, the prosecutor displayed an exhibit which contained other bad acts evidence. Third, the prosecutor repeatedly referred to Gatewood's race. We reject each argument.

¶17 The record reflects that the prosecutor asked the "life in prison" question to challenge Gatewood's motivation to lie. Although case law generally prohibits discussing punishment during the guilt/innocence stage of a criminal trial, *see, e.g.,* ***Bruton v. State***, 921 S.W.2d 531, 536 (Tex. Crim. App. 1996), the reason for the rule is to prevent the defendant from seeking sympathy and influencing the jury's verdict. Moreover, the rule is subject to a harmless-error analysis. ***State v. Martin***, 23 P.3d 216, 225-26 (Mont. 2001).

¶18 Here, any reference to Gatewood's "life in prison" punishment constitutes harmless error for two reasons. First, the jury reasonably would have known that Gatewood, if convicted, faced a long prison term based on the number of counts charged and the severity of those types of crimes. Second, the trial court issued a cautionary instruction to the jury, advising them "not to consider" possible penalties facing Gatewood and to "disregard" the reference to life in prison, because "[t]hat's not the law in this case." Potential prejudice is cured when the trial court gives a cautionary instruction. ***State v. Collier***, 220 Wis. 2d

825, 837, 584 N.W.2d 689 (Ct. App. 1998). Accordingly, the prosecutor's question here constitutes harmless error.

¶19 Gatewood also argues that his right to a fair trial was violated when the State placed an exhibit in front of the jury, which revealed that Gatewood had previously been arrested for an incident involving marijuana. The exhibit was an enlarged poster, which recited that Gatewood had previously been advised of his ***Miranda***[3] rights when he was arrested for an incident involving marijuana. The exhibit was intended to show that Gatewood understood his ***Miranda*** rights. The defense immediately objected to the use of the exhibit. The trial court *voir dired* the jury, and discovered that only one juror had read the exhibit, and that that juror had only read Gatewood's name on the exhibit. The trial court also found that the exhibit was removed within seconds, and could not have prejudiced Gatewood. The trial court's decision was reasonable.

¶20 Finally, Gatewood argues that the prosecutor prejudiced him by referring to Gatewood as "African-American" throughout the trial. We reject this argument because Gatewood failed to object at the time the prosecutor used the racial reference. ***State v. Boshcka***, 178 Wis. 2d 628, 642-43, 496 N.W.2d 627 (Ct. App. 1992). Failure to contemporaneously object has been construed as counsel's belief that the alleged error was insignificant. ***State v. Sorenson***, 143 Wis. 2d 226, 263-64, 421 N.W.2d 77 (1988).

[3] ***Miranda v. Arizona***, 384 U.S. 436 (1966).

D. Evidentiary Ruling.

¶21 Finally, Gatewood challenges the trial court's ruling regarding his reputational evidence. Gatewood contends that the trial court erroneously exercised its discretion when it ruled that the State could rebut Gatewood's reputational evidence with specific acts of past criminal activity. We reject Gatewood's claim.

¶22 Evidentiary rulings are subject to discretionary review, and we will not overturn the trial court's decision unless it erroneously exercised its discretion. ***King v. State***, 75 Wis. 2d 26, 42, 248 N.W.2d 458 (1977). If the trial court considered the relevant facts, applied the correct law and reached a reasonable determination, we will affirm. Evidentiary rulings are also subject to the harmless error rule. ***State v. Keith***, 216 Wis. 2d 61, 75, 573 N.W.2d 888 (Ct. App. 1997). Generally, an error is harmless if there is no reasonable possibility that it contributed to the conviction. ***State v. Dyess***, 124 Wis. 2d 525, 543, 370 N.W.2d 222 (1985). A "reasonable possibility" is one which is sufficient to undermine confidence in the outcome of the proceeding. ***Id.*** at 544.

¶23 Gatewood moved the court to allow him to introduce testimony from several witnesses who would indicate that Gatewood had a reputation for being peaceful and nonviolent. The trial court ruled that it would allow the introduction of such evidence; however, the trial court determined that if Gatewood introduced the reputation evidence, the State would be permitted to cross-examine the witnesses using specific instances of bad conduct. The specific instances included information from past arrest reports regarding: (1) Gatewood driving off after hitting a car and then discarding a marijuana cigarette when stopped by police in

1998; (2) Gatewood carrying a gun tucked into the waistband of his pants; and (3) Gatewood's untruthful statements to police about possessing cocaine in 1993.

¶24 Gatewood objected to allowing the State such rebuttal because he had a permit for the gun, and the other conduct was not of a violent nature. The trial court ruled that the prosecutor would only be allowed to ask the character witnesses whether or not each was aware of the specific instance. The trial court indicated that if the prosecutor asked about something that had no relevance, it would sustain the objection. After conferring with Gatewood, defense counsel indicated they would not be calling the character witnesses.

¶25 The trial court's decision did not constitute an erroneous exercise of discretion. WISCONSIN STAT. § 904.04(1)(a) allows a defendant to present evidence of "a pertinent" character trait to suggest that the defendant would not have acted contrary to the trait by committing the charged crimes. WISCONSIN STAT. § 904.05(1) limits such evidence to "reputation" and "opinion" testimony. There is no dispute here that the charged crimes—kidnapping, sexual assault and armed robbery—are of a violent nature, thereby entitling Gatewood to present opinion or reputation testimony that he is peaceable. ***King***, 75 Wis. 2d at 39. If a defendant elects to present such reputational evidence, the prosecutor may rebut the opinion testimony. ***Id.*** The prosecutor may cross-examine the character witnesses as to their awareness of relevant "specific instances of conduct." ***Id.*** at 40. The trial court's rulings were well within the pertinent statutory authority.

¶26 Gatewood also complains that the arrest reports relied on by the prosecutor were not turned over to him and, therefore, he had an insufficient opportunity to challenge the veracity of the information contained therein. The timing, however, lies with Gatewood. He waited until the first day of trial to

advise of his intention to call character witnesses. The very next day, the prosecutor obtained and disclosed the arrest reports. The prosecutor did not obtain or intend to use the arrest reports until notified of Gatewood's intent to introduce reputational evidence. Under these circumstances, we cannot conclude that the prosecutor withheld relevant information. The trial court's decision was reasonable, and did not constitute an erroneous exercise of discretion. Moreover, even if the trial court ruled incorrectly, the decision was harmless. Gatewood's character witnesses included family members, and a reputation for truthfulness among relatives does not negate Gatewood's culpability for the crimes committed.

By the Court.—Judgment affirmed and cause remanded with directions.

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