COURT OF APPEALS
DECISION
DATED AND FILED

February 4, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-1490-CR **Cir. Ct. No. 00 CF 3197**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANTHONY M. FLETCHER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: ROBERT CRAWFORD, Judge. *Reversed and cause remanded with directions*.

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

¶1 PER CURIAM. Anthony M. Fletcher appeals from a judgment entered on a jury verdict finding him guilty of one count of second-degree recklessly endangering safety and one count of endangering safety by the use of a dangerous weapon for intentionally discharging a firearm from a vehicle toward

another vehicle. *See* WIS. STAT. §§ 941.30(2) and 941.20(3)(a) (1999–2000).[1] He also appeals from an order denying his postconviction motion for resentencing.

¶2 Fletcher argues that he is entitled to resentencing because the trial court violated his right against self-incrimination when it considered as an "aggravating" sentencing factor: his refusal to name an alleged accomplice. We agree and reverse for resentencing.

¶3 Fletcher also contends that he is entitled to resentencing because: (1) the trial court sentenced him based on allegedly inaccurate information; and (2) he was denied the effective assistance of trial counsel when his trial attorney failed to object to the allegedly inaccurate information. In light of our resolution of the first claim of trial court error, we will not discuss the remaining issues. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663, 665 (1938) (only dispositive issue need be addressed).

I.

¶4 Anthony M. Fletcher was charged with shooting at Laquan Smith from the passenger side of a van. He pled not guilty and went to trial. At Fletcher's trial, Smith testified that he was waiting at a traffic light on Center Street in Milwaukee when he saw a man whom he recognized as Fletcher on the passenger side of a gray and black van. Smith testified that he recognized Fletcher because he had shot Fletcher in the back in 1997 when Fletcher tried to "jump" him. According to Smith, Fletcher "hung out the passenger side of the … van with a chrome gun and asked me, what's up now." Fletcher then shot at Smith

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

twice. Fletcher hit Smith's car on the left side of the hood. Fletcher maintained his innocence throughout the trial, and presented an alibi witness. A jury found Fletcher guilty on both charges.

¶5 At sentencing, Fletcher did not admit that he was involved in the shooting when he addressed the court:

> **THE COURT:** I'll take Anthony Fletcher's statement in allocution then. Mr. Fletcher, what would you like to say about your conduct and your punishment?
>
> **THE DEFENDANT:** Like I can say [sic], Your Honor, I did a lot of things as a juvenile. And, you know, I can't take them [sic] things back. I can just say I'm sorry and learn from my mistakes. Over the past year I really changed my life. I think to send me to jail, you know, without giving me the opportunity or a chance, it really wouldn't be right.
>
> **THE COURT:** I understand that you profess your innocence….
>
> I'm satisfied that there was ample evidence given Laquan Smith's eyewitness identification and the in-court identifications from the other witnesses….
>
> What else would you like to say, Mr. Fletcher?
>
> **THE DEFENDANT:** Just ask you for the opportunity, Judge, just to show that I can be productive in the community. And things I did as a child, you know, I thought as a child, I acted as a child. You know, I'm an adult now and I have a daughter to raise. And you going to [sic] send me to jail. That wouldn't do [sic] right.
>
> **THE COURT:** Anything else?
>
> **THE DEFENDANT:** No, sir.

The trial court indicated that one of the factors it considered in fashioning the sentence was Fletcher's failure to name his accomplice:

> The coactor who drove the automobile from which you shot has never been identified. I find that passing

> strange and consider it to be an effort on your part to protect your accomplice. Under Roberts against United States from 1980, I'm entitled to consider your willingness to protect your accomplice in assessing your character.

It also considered: the aggravated nature of the offense, Fletcher's history of undesirable behavior, Fletcher's educational background, and the need to deter Fletcher and members of the community from engaging in such conduct. *See* ***State v. Jones***, 151 Wis. 2d 488, 495, 444 N.W.2d 760, 763 (Ct. App. 1989) (factors a trial court may consider in sentencing). The trial court sentenced Fletcher to five years in prison for count one, to consist of two years of confinement and three years of extended supervision, and fifteen years in prison for count two, to consist of six years of confinement and nine years of extended supervision, to run consecutive to count one.

¶6 Fletcher filed a postconviction motion for resentencing, alleging, among other things, that the trial court "improperly penalized him for exercising … his right against self-incrimination because he failed to identify his alleged coactor." The trial court denied the motion.

II.

¶7 We will not disturb a sentence imposed by a trial court unless the trial court erroneously exercised its discretion. ***Ocanas v. State***, 70 Wis. 2d 179, 183, 233 N.W.2d 457, 460 (1975). A strong public policy exists against interfering with the trial court's discretion in determining sentences and the trial court is presumed to have acted reasonably. ***Harris v. State***, 75 Wis. 2d 513, 518, 250 N.W.2d 7, 10 (1977). A sentencing court erroneously exercises its discretion, however, when it "reli[es] upon factors which are totally irrelevant or immaterial to the type of decision to be made." ***Id.*** (quoted source omitted).

¶8 Fletcher alleges that the trial court erroneously exercised its discretion when it considered his failure to name the driver of the van "as an aggravating factor at sentencing." (Uppercasing omitted.) He claims that this violated his right against self-incrimination because he could not name the driver of the van without incriminating himself. We agree.

¶9 The right against self-incrimination is guaranteed by the Fifth Amendment of the United States Constitution and Article I, § 8 of the Wisconsin Constitution. ***Grant v. State***, 83 Wis. 2d 77, 80, 264 N.W.2d 587, 590 (1978).

> The privilege against self-incrimination exists whenever a witness has a real and appreciable apprehension that the information requested could be used against him [or her] in a criminal proceeding. It extends not only to testimony which would support a conviction but also to evidence which would furnish a link in a chain of evidence necessary to prosecution.

Id., 83 Wis. 2d at 81, 264 N.W.2d at 590 (citations omitted).

¶10 A court may not penalize a defendant for exercising his or her right against self-incrimination, even after the jury's finding of guilt. ***Scales v. State***, 64 Wis. 2d 485, 496, 219 N.W.2d 286, 293 (1974). The privilege against self-incrimination:

> extends beyond sentencing as long as a defendant has a real and appreciable fear of further incrimination as may be the case where an appeal is pending, before an appeal as of right or plea withdrawal has expired, or where the defendant intends or is in the process of moving to modify his or her sentence and can show an appreciable chance of success.

State v. Marks, 194 Wis. 2d 79, 95–96, 533 N.W.2d 730, 735 (1995).

¶11 As we have seen, the trial court considered Fletcher's refusal to name his accomplice as a sentencing factor:

> The coactor who drove the automobile from which you shot has never been identified. I find that passing strange and consider it to be an effort on your part to protect your accomplice. Under Roberts against United States from 1980, I'm entitled to consider your willingness to protect your accomplice in assessing your character.

The trial court's reliance on ***Roberts v. United States***, 445 U.S. 552 (1980), was misplaced. In ***Roberts***, the United States Supreme Court held that a sentencing judge properly considered, as one factor, the defendant's refusal to identify other persons involved in a heroin conspiracy. ***Id.*** at 553, 561. The defendant in ***Roberts***, however, waived his right against self-incrimination when he confessed to his involvement in the crime and pled guilty. *See* ***id.*** at 554; *see also* ***Boykin v. Alabama***, 395 U.S. 238, 243 (1969) (guilty plea waives Fifth Amendment right against self-incrimination). In contrast, Fletcher consistently exercised his right against self-incrimination when he maintained his innocence throughout the trial and at sentencing. This is what distinguishes this case from ***State v. Kaczynski***, 2002 WI App 276, ___ Wis. 2d ___, 654 N.W.2d 300. In ***Kaczynski***, the defendant pled guilty; here, Fletcher did not. ***Id.*** at ¶1.

¶12 Fletcher's failure to name his accomplice resulted in a more severe sentence. We agree that Fletcher could not have named his accomplice without confessing his own guilt. *See* ***United States v. Safirstein***, 827 F.2d 1380, 1388 (9th Cir. 1987) ("[I]mplication of others often amounts at least to tacit admission of one's own complicity"). Thus, the trial court improperly penalized Fletcher by taking Fletcher's exercise of his right against self-incrimination into account when sentencing him. Accordingly, we reverse and remand for resentencing.

By the Court.—Judgment and order reversed and cause remanded with directions.

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