COURT OF APPEALS
DECISION
DATED AND FILED

June 15, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-2439-CR **Cir. Ct. No. 02CF003776**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LONNY MAYER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: PATRICIA D. McMAHON, Judge. *Affirmed*.

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

¶1 PER CURIAM. Lonny Mayer appeals from a judgment entered after a jury found him guilty of solicitation to commit battery to a witness and conspiracy to commit battery to a witness in violation of WIS. STAT. §§ 939.30(1),

939.31 and 940.201(2) (2001-02).[1] He also appeals from an order denying his postconviction motion. Mayer claims: (1) the trial court erred in refusing to give an entrapment instruction to the jury; and (2) the trial court erroneously exercised its sentencing discretion by imposing consecutive sentences. Because the trial court did not err in declining to give the entrapment instruction and because the trial court did not erroneously exercise its discretion in imposing sentence, we affirm.

I. BACKGROUND

¶2 On July 2, 2002, Mayer was sentenced in a misdemeanor case in which his ex-girlfriend, T.K., submitted a victim impact statement to the court. After being sentenced, Mayer was in the Milwaukee County jail, wherein all telephone conversations are recorded. On July 2, 2002, at 1:27 p.m., Mayer talked by telephone with a person named "Roger." The phone conversation disclosed that Mayer was upset with T.K. for submitting the victim impact statement, which stated that T.K. was afraid of Mayer and she feared that he would kill her when he was released from prison. During this conversation, Mayer told Roger, "I'm not going down like this. She's getting it. I don't give a f---. I'm doin [sic] time she's gonna [sic] get it for it. You know she's gonna [sic] write another one to my parole board."

¶3 At 8:02 p.m. on July 2, 2002, Mayer had a telephone conversation with Matthew Rahman. Again, Mayer expressed his anger over T.K.'s victim impact statement and shared its contents with Rahman. Subsequently, Milwaukee

[1] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

Sheriff's Detective Darrell Fischer was notified regarding a possible solicitation to commit a felony from inside the Milwaukee County Criminal Justice Facility. Fischer and Detective Steve Wolf went to the facility to interview Douglas Boyd. Neither detective knew how Boyd became an informant or whether he was getting anything in exchange for being an informant.

¶4 Boyd was an inmate in the facility and spoke with Mayer after he was sentenced. Boyd acted as an intermediary between the undercover detective, Frederick Gayle, and Mayer. On July 9, 2002, Mayer met with Gayle, who was acting as "Rico." Gayle testified that during this meeting, Mayer solicited him to assault T.K.—to knock her teeth out. Mayer provided Gayle with T.K.'s address and with the name and phone number of Mayer's friend, Rahman, who would pay Gayle after the job had been completed.

¶5 On July 10, Mayer called Rahman and told him he would be getting a phone call from a guy named Rico, who was taking care of something for Mayer and asked if Rahman would loan him $300. Mayer said when the job is done, it's $300 and he "wants some teeth."

¶6 On July 11, Gayle phoned Rahman and had a conversation indicating that Rahman had been instructed to pay Gayle after Gayle took care of what Mayer wanted done to his ex-girlfriend T.K.

¶7 At some point, Detectives Fischer and Wolf confronted Mayer and explained that he was a suspect in the solicitation to hire somebody to batter T.K. Mayer responded: "That's bullshit. It's just jag talk." Mayer denied that he had arranged to have Rico hurt T.K., he denied giving Rico T.K.'s address and said he met with Rico only to find out where his motorcycle was. When the detectives

played a portion of the recorded conversation between Rico and Mayer, Mayer began laughing and then indicated that the recording was wrong.

¶8 As a result of this conduct, Mayer was charged with solicitation of battery and conspiring to batter a witness. He pled not guilty and the case was tried to a jury. Mayer's theory of defense was that Boyd had coerced him into committing the crimes with which he was charged. He also argued that Boyd was acting as a police informant and therefore he was entitled to the defense of entrapment. During the jury instruction conference, the trial court agreed that there was sufficient evidence to submit the coercion instruction to the jury, but there was not sufficient evidence to submit the entrapment instruction to the jury. The jury found Mayer guilty on both counts and he was sentenced to eleven years (six years' initial confinement and five years' extended supervision) on each crime, to be served consecutively.

¶9 Mayer filed a postconviction motion claiming that the trial court erred in refusing to instruct the jury on the entrapment defense and that the trial court should not have made his sentences run consecutively. The trial court denied the motion. Mayer now appeals.

II. DISCUSSION

A. Entrapment Instruction.

¶10 Mayer contends that the trial court erred when it denied his request for an entrapment instruction. He argues that Boyd, a police informant, pressured Mayer to consummate the offenses by physically threatening him and that Mayer's testimony to this effect provided a sufficient factual basis to submit the entrapment instruction to the jury. The State argues that Mayer failed to satisfy the requisite

burden of persuasion to justify an entrapment instruction. The trial court agreed with the State.

¶11 Generally, we afford broad discretion to the trial court in determining what jury instructions should be submitted, ***State v. Glenn***, 199 Wis. 2d 575, 581-82, 545 N.W.2d 230 (1996); however, when the issue is whether the evidence adduced is sufficient to permit the instruction, our review is *de novo*, ***State v. Wilson***, 149 Wis. 2d 878, 898, 440 N.W.2d 534 (1989). If the evidence is sufficient for a reasonable jury to find in favor of a defendant, then the trial court should submit the instruction to the jury. ***Id.*** Conversely, if the issue finds no support in the evidence, then the trial court should not submit the instruction to the jury. ***Id.***

¶12 Here, the trial court ruled that there was insufficient evidence to support submitting an entrapment instruction to the jury. We agree. Entrapment is defined as "the inducement of one to commit a crime not contemplated by him for the mere purpose of instituting criminal prosecution against him." ***State v. Hochman***, 2 Wis. 2d 410, 413, 86 N.W.2d 446 (1957). The essence of an entrapment defense is that the "'evil intent' and the 'criminal design' of the offense originate in the mind of the government agent, and the defendant would not have committed an offense of that character except for the urging of the agent." ***State v. Schuman***, 226 Wis. 2d 398, 403, 595 N.W.2d 86 (Ct. App. 1999).

¶13 Thus, in order to be entitled to the entrapment instruction, Mayer must satisfy the burden of proof by a preponderance of the evidence that he was induced to commit the offenses by a government agent. ***State v. Pence***, 150 Wis. 2d 759, 765, 442 N.W.2d 540 (Ct. App. 1989); ***State v. Saternus***, 127 Wis. 2d 460, 471-72, 381 N.W.2d 290 (1986).

¶14 Here, Mayer failed to satisfy that burden. The evidence proffered by Mayer is his self-serving testimony that he felt physically threatened by Boyd to meet with Rico and order the battering of T.K. Even when viewing this evidence in a light most favorable to Mayer, he falls far short of proving *inducement* by a preponderance of the evidence.

¶15 The record evidence reflects recorded phone calls between Mayer and his friends wherein the origin of the intent to batter T.K. is discussed. These conversations preceded any involvement or alleged inducement by the government agent. The evidence also demonstrates that when the detectives confronted Mayer about the crimes, he denied them. When the detectives played portions of the recorded conversations between Rico and Mayer, Mayer laughed and claimed the tapes were wrong. He never stated that Boyd physically threatened him into committing the crimes. Further, the evidence revealed that Mayer provided Rico with Rahman's correct phone number and phoned Rahman to let him know that Rico would be calling. These actions do not support Mayer's claim that he was forced into committing the crimes.

¶16 Under these circumstances, we cannot hold that the trial court erred in denying Mayer's request for an entrapment instruction. There is insufficient evidence to prove that Mayer was induced to commit the crime. Thus, the entrapment instruction was not reasonably required by the evidence. Rather, the evidence shows that Mayer was phoning friends in an attempt to solicit help to harm T.K.

¶17 Mayer argues that this case is controlled by ***Schuman***, wherein this court reversed a conviction based on the trial court's refusal to submit an entrapment instruction to the jury. 226 Wis. 2d at 400. We disagree. ***Schuman*** is

distinguishable from the facts and circumstances in the present case. Schuman testified he never told anyone that he wanted his wife killed and this idea was not mentioned until the meeting with the undercover officer posing as a hit man. ***Id.*** at 404. In a recorded conversation, Mayer indicated his intent to harm T.K. to at least one friend and asked another friend what he was going to do. These conversations occurred before any police involvement and the content of the conversations are undisputed. This distinction is significant in assessing whether Mayer satisfied his burden of proving inducement.

¶18 Further, the State sets forth a cogent analysis of the state of entrapment law in Wisconsin and other jurisdictions. It cautioned this court with regard to cases relied on in ***Schuman***, which were from foreign jurisdictions that have different entrapment standards. Because of our disposition here, we need not delve further into the ***Schuman*** analysis. Nevertheless, the State presents a compelling argument that Wisconsin courts should not submit an entrapment instruction based solely on the uncorroborated self-serving testimony of the defendant.

B. Sentencing.

¶19 Mayer contends that the trial court erroneously exercised its sentencing discretion by making his sentences consecutive rather than concurrent. He claims that this was erroneous because both crimes stem from the same core set of facts. The State responds that solicitation and conspiracy are distinct crimes with different elements and there is no reason why the sentence on each crime cannot run consecutive to each other. The trial court imposed consecutive sentences because:

> These were two distinct and separate offenses -- one involving the defendant's conversation with Detective Gayle posing as "Rico," which involved "taking care of" Tracie K. and the other involving his conversation with Matthew Rahman as his contact person outside the jail, ensuring that Rahman knew he would receive a phone call from "Rico," why he would receive the phone call, and what was expected of Rahman in return (paying "Rico" for the job when it was done). These were two distinct acts, albeit designed to achieve one ultimate result, but significantly different: the first involved legislating the plan; the second involved executing it.

¶20 In reviewing sentencing issues, our standard is limited. Sentencing is committed to the discretion of the trial court and we will not reverse a sentencing determination unless the trial court erroneously exercised its discretion. ***State v. J.E.B.***, 161 Wis. 2d 655, 661, 469 N.W.2d 192 (Ct. App. 1991). Appellate courts have a strong policy against interfering with the trial court's sentencing discretion. ***Id.*** at 661-62. Therefore, we apply the presumption that the trial court acted reasonably and the defendant must show some unreasonable or unjustifiable basis for the sentence complained of. ***State v. Petrone***, 161 Wis. 2d 530, 563, 468 N.W.2d 676 (1991).

¶21 Under the facts of this case, we cannot conclude that the trial court erroneously exercised its discretion. The trial court addressed the pertinent sentencing factors, including the nature and seriousness of the crime, the impact on the victim, Mayer's background, criminal history, risk to the community and treatment needs. *See* ***State v. Echols***, 175 Wis. 2d 653, 681-82, 499 N.W.2d 631 (1993).

¶22 Mayer does not argue the trial court failed to address the proper factors. His argument is focused solely on his contention that the trial court failed to articulate a reason for the consecutive sentences. We conclude that the trial court adequately articulated a reason for the imposition of consecutive sentences

as set forth above in the quoted excerpt. The trial court found that because Mayer engaged in two separate acts—legislating the plan *and* taking action to execute it—consecutive sentences were appropriate. Based on the foregoing, we conclude that the trial court did not erroneously exercise its discretion in this case. It considered the pertinent factors and provided a reasonable justification for the imposition of consecutive sentences. Mayer went through with both parts of his plan. He was found guilty of two distinct crimes. Accordingly, we affirm the trial court's sentencing decision.

By the Court.—Judgment and order affirmed.

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