COURT OF APPEALS
DECISION
DATED AND FILED

July 26, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP2263-CR **Cir. Ct. No. 2003CF157**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

WILLIE NUNN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: MARY M. KUHNMUENCH, Judge. *Affirmed*.

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

¶1 KESSLER, J. Willie Nunn appeals from a judgment of conviction for felony murder, party to a crime, in violation of WIS. STAT. §§ 940.03 and

939.05 (2001-02).[1] Nunn also appeals from an order denying his motion for postconviction relief. Nunn argues that the trial court erroneously denied Nunn's motion to suppress the fourth of five statements he gave the police, and that his sentence was unduly harsh. For the reasons set forth below, we affirm the judgment and order.

BACKGROUND

¶2 This case involves the death of Dorothy Roberts, who was shot in her home on November 21, 2002. Three men were alleged to have been involved in the death: Nunn and two fellow gang members, Jermaine Smith and Cornelius Blair.[2] The record in this case is not as fully developed as that in Smith's appellate case. Thus, for purposes of background, we provide a summary of the facts as outlined in ***State v. Smith***, No. 2004AP1077-CR, unpublished slip op. (WI App June 7, 2005):

> On November 21, 2002, Smith and two fellow gang members, Willie Nunn and Cornelius Blair, went to the home of Andrew and Dorothy Roberts. Andrew Roberts was the landlord for Smith's gang leader, Michael Davis. Davis was angry because Roberts had evicted him as a result of drug activity taking place in the Davis rental unit. As a result, Davis enlisted Smith, Nunn and Blair to rob Mr. and Mrs. Roberts.
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> Smith gave a statement to police indicating that the three went to the Roberts's home. Smith and Blair, armed with

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

[2] Smith and Blair were also charged and convicted in connection with this crime. Smith appealed his conviction, relying on an exculpatory statement by Nunn. We recently affirmed Smith's conviction in ***State v. Smith***, No. 2004AP1077-CR, unpublished slip op. (WI App June 7, 2005). Blair's conviction was summarily affirmed in ***State v. Blair***, No. 2004AP769-CRNM, unpublished slip op. (WI App Feb. 2, 2005).

> guns, went into the home while Nunn stayed outside and acted as lookout. Mrs. Roberts answered the door and was ordered to the floor. Smith then approached Mr. Roberts and demanded his money. Mr. Roberts complied and then was ordered to the floor. Smith said that as he was leaving, Mr. Roberts grabbed his leg, which caused Smith to shoot towards Mr. Roberts. Believing he had killed Mr. Roberts, Smith then shot Mrs. Roberts in the head so there would be no witnesses.
>
> Mrs. Roberts died as a result of the gunshot wound to the head. Mr. Roberts survived the ordeal.

Id., ¶¶2-4.

¶3 Nunn was arrested in connection with the Roberts murder on January 7, 2003, at about 8:00 p.m. He was interviewed five times between January 8 and January 10. Nunn was given ***Miranda***[3] warnings before each of the interviews. Over that three-day period, Nunn was given food, drinks, cigarettes, numerous breaks and a shower. There were breaks in between the five interviews of six to seventeen hours. On January 8, Nunn also received medical attention at a hospital, when he complained of a wrist injury.

¶4 At issue in this appeal are incriminating statements that Nunn made during the fourth interview, which occurred on January 9, 2003, between 2:30 p.m. and 11:20 p.m. The break before Nunn made the incriminating statements was eleven hours in length. In this interview, Nunn admitted his involvement in the crime. Nunn moved to suppress the statements. The trial court denied the motion and the case proceeded to trial.[4]

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

[4] The Honorable John Franke presided over the suppression hearing. Because of judicial reassignment, the Honorable Mary M. Kuhnmuench presided over the trial, sentencing and motion to reconsider.

¶5 A jury found Nunn guilty and Nunn was convicted. He was sentenced to forty years of initial confinement followed by twenty years of extended supervision. His postconviction motion was denied by the trial court without a hearing. This appeal followed.

DISCUSSION

¶6 Nunn argues two issues on appeal. First, he claims that the trial court should have suppressed his fourth statement to police because it was involuntary for a variety of reasons, all of which have to do with police conduct over the period of interrogation. Second, Nunn contends that the sentence was unduly harsh. Because we are not persuaded by his arguments, we affirm.

I. Voluntariness of Nunn's statements

¶7 On review of a trial court order denying a motion to suppress, we will uphold a trial court's findings of historical fact unless they are clearly erroneous. ***State v. Waldner***, 206 Wis. 2d 51, 54, 556 N.W.2d 681 (1996). However, we review *de novo* the issue of whether those facts satisfy the constitutional requirement that the disputed confession was voluntary. ***State v. Griffin***, 131 Wis. 2d 41, 62, 388 N.W.2d 535 (1986), *aff'd*, 483 U.S. 868 (1987); *see also* ***State v. Clappes***, 136 Wis. 2d 222, 235, 401 N.W.2d 759 (1987); and ***State v. Franklin***, 228 Wis. 2d 408, 413, 596 N.W.2d 855 (Ct. App. 1999).

¶8 Whether a statement is voluntary or involuntary depends on whether it was compelled by coercive means or improper police practices. ***Franklin***, 228 Wis. 2d at 413. Some coercion or pressure by the police is a necessary component

of an ultimate finding of involuntariness. ***Clappes***, 136 Wis. 2d at 239.[5] In order to suppress the statement, a court must find that "the circumstances deprived [the defendant] of the ability to make a rational choice." ***Norwood v. State***, 74 Wis. 2d 343, 364, 246 N.W.2d 801 (1976).

¶9 We conclude, like the trial court, that Nunn's statement was voluntary. There was no impropriety in the conduct of the police over the three days and the five interviews. The record supports the trial court's findings concerning the following police conduct towards Nunn: Nunn received ***Miranda*** warnings before each interview. Nunn never requested counsel and was cooperative in the interviews. He was given food and drink. He was taken to the hospital to receive medical attention for his wrist on June 8, the day before he made the incriminating statements. He was given numerous and extensive breaks, including one of eleven hours, another of seven, and others of two or more hours. He was allowed to shower. The trial court found that Nunn never complained of a hangover, of serious pain, or gave any indication that he did not understand the officers' questions. These findings by the trial court are not clearly erroneous.

¶10 Nunn complains that the interview room was small, that he was interviewed by several different teams of officers, that some of the interviews were conducted in late evening and early morning hours, and that at times he was

[5] In ***State v. Clappes***, 136 Wis. 2d 222, 401 N.W.2d 759 (1987), the court concluded that the defendant's statement was voluntary where the defendant was interviewed in a hospital emergency room where he was receiving treatment for lacerations, a ruptured bladder, a dislocated elbow, a fractured femur, a fractured pelvis, and shock. ***Id.*** at 226, 238-39. The court stated: "[I]n order to justify a finding of involuntariness, there must be some affirmative evidence of improper police practices deliberately used to procure a confession." ***Id.*** at 239. In the absence of these practices, the defendant's confession was voluntary, even though he was in pain at the time. *See* ***id.*** at 240.

tired. This litany does not amount to coercive police tactics in view of the other undisputed facts of long breaks, medical treatment, food, drink and a shower during the periods of interrogation.

¶11 Nunn complains additionally that he was hungover, and going through alcohol withdrawal. The trial court found that Nunn's testimony on those issues was unbelievable. Moreover, assuming that Nunn was hungover on June 7, there is no evidence that he would still be hungover two days later. Finally, even if Nunn was feeling poorly, that is not a basis to conclude that his confession was coerced. "[I]n order to justify a finding of involuntariness, there must be some affirmative evidence of improper police practices deliberately used to procure a confession." ***Clappes***, 136 Wis. 2d at 239. In the absence of improper police practices, Nunn's confession was voluntary, even if he was not feeling well at the time. *See* ***id.*** at 240.

II. Challenge to Nunn's sentence

¶12 Nunn challenges his sentence on grounds that it is unduly harsh and unconscionable. Sentencing lies within the discretion of the circuit court. ***State v. Echols***, 175 Wis. 2d 653, 681, 499 N.W.2d 631 (1993). In reviewing a sentence, this court is limited to determining whether there was an erroneous exercise of discretion. ***Id.*** There is a strong public policy against interfering with the sentencing discretion of the circuit court, and sentences are afforded the presumption that the circuit court acted reasonably. ***Id.*** at 681-82.

¶13 If the record contains evidence that the circuit court properly exercised its discretion, we must affirm. ***State v. Cooper***, 117 Wis. 2d 30, 40, 344 N.W.2d 194 (Ct. App. 1983). Proper sentencing discretion is demonstrated if the record shows that the court "examined the facts and stated its reasons for the

sentence imposed, 'using a demonstrated rational process.'" ***State v. Spears***, 147 Wis. 2d 429, 447, 433 N.W.2d 595 (Ct. App. 1988) (citation omitted). "To overturn a sentence, [a] defendant must show some unreasonable or unjustifiable basis for the sentence in the record." ***Cooper***, 117 Wis. 2d at 40.

¶14 The three primary factors that a sentencing court must address are the: (1) gravity of the offense; (2) character and rehabilitative needs of the offender; and (3) need for protection of the public. ***State v. Sarabia***, 118 Wis. 2d 655, 673, 348 N.W.2d 527 (1984). The weight to be given each of the primary factors is within the discretion of the sentencing court, and the sentence may be based on any or all of the three primary factors after all relevant factors have been considered. ***State v. Wickstrom***, 118 Wis. 2d 339, 355, 348 N.W.2d 183 (Ct. App. 1984).

¶15 When a defendant argues that his or her sentence is unduly harsh or excessive, we will hold that the sentencing court erroneously exercised its discretion "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." ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

¶16 Here, Nunn does not allege that the trial court failed to consider the appropriate factors. Rather, Nunn argues that the trial court erroneously exercised its discretion when it imposed an "unduly harsh sentence in light of the mitigating circumstances." Nunn claims that imposition of the maximum sentence in his case is unduly harsh because one of his co-defendants—the one who actually entered the Roberts home with a weapon—received a lesser sentence. Nunn contends that

he was the least culpable of the three defendants, and yet received the same sentence as one and a greater sentence than another. Nunn explains:

> He was not even alleged to be inside the house when the crime was committed, but in an alley a block or two away from the house.[6] Further, the State's theory of the case was that Mr. Nunn did not even stay and complete his lookout duties but ran away at some point during the incident…. His role in the crime, therefore, mitigates the seriousness of the offense.

¶17 Our review of the record shows that the trial court properly considered the gravity of the offense, the character of the offender, and the need to protect the public. *See* ***Sarabia***, 118 Wis. 2d at 673. The trial court described this crime as "the worst type of offense we have" and acknowledged the serious impact that the victim's death had on her family. The trial court described Nunn's character as that of an unemployed, drinking gang member who fathered a child out of wedlock, behaved as an irresponsible father, beat people and stole. The court explained that Nunn's conduct and the choices he had made with his life were "why it's important to protect the community, because we want to say to individuals that would be willing to do this, enough. There are some things we will not tolerate. There are some things where I'm sorry is simply not enough."

¶18 The trial court provided additional explanation for its ruling in its order denying Nunn's motion to reconsider the sentence. The trial court noted that it had rejected Nunn's assertion that he played a "minor" role in the robbery and murder. The trial court also noted that at issue was an "execution-style murder, an offense which could only be described as shocking and unbelievable." Finally, the

[6] In contrast, the State argued at sentencing that Nunn held a superior status in the gang hierarchy, and thus was in a position to stop the robbery, but did not do so.

trial court noted that Nunn had a serious criminal history, which included possession with intent to deliver cocaine, second-degree sexual assault of a child and theft—all for which he had been paroled and revoked. The trial court concluded that:

> Given the extreme severity of the offense, the defendant's serious criminal history, the fact that the defendant had been released from incarceration only a few months before the date of the offense and involved himself in additional criminal activity (going to threaten, batter and rob two senior citizens), and the absolute need for protection in this community, the sentence imposed was appropriate.

¶19 We conclude that the trial court did not erroneously exercise its discretion. The fact that Nunn received the maximum sentence that was greater than one co-defendant does not automatically make his sentence unconscionable. *See* ***State v. Toliver***, 187 Wis. 2d 346, 362, 523 N.W.2d 113 (Ct. App. 1994) ("A mere disparity between the sentences of codefendants is not improper if the individual sentences are based upon individual culpability and the need for rehabilitation."). The record shows that the trial court considered the appropriate factors when it imposed Nunn's sentence. Further, that sentence is not "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***, 70 Wis. 2d at 185. The crime at issue was horrific, and Nunn's role in it significant. We affirm the sentence.

By the Court.—Judgment and order affirmed.

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