

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 29, 2008

David R. Schanker
Clerk of Court of Appeals

NOTICE

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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.

Appeal No. 2006AP2031-CR

Cir. Ct. No. 2004CF1192

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

E. P. WALLACE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: ELSA C. LAMELAS, Judge. *Affirmed.*

Before Curley, P.J., Wedemeyer¹ and Fine, JJ.

¹ This opinion was circulated and approved before Judge Wedemeyer's death.

¶1 PER CURIAM. E. P. Wallace appeals from a judgment of conviction for first-degree reckless homicide and battery, and from a postconviction order denying sentence modification. The issues are whether there was sufficient evidence to support the jury’s guilty verdict for the reckless homicide, and whether the trial court erroneously exercised its sentencing discretion. We conclude that there was sufficient evidence to support the jury’s guilty verdict against Wallace for (the lesser included offense of first-degree) reckless homicide, and that the trial court properly exercised its sentencing discretion when it imposed a thirty-year sentence on a dangerous drug dealer with a criminal record who perpetrated a homicide. Therefore, we affirm.

¶2 Wallace was a drug dealer. Chaveon Brodie sold crack cocaine. Wallace gave Brodie and her boyfriend, Jerry Taylor, \$500 worth of crack to sell. Brodie went to buy orange juice and cigarettes, and could not remember whether she took the crack with her or left it at Taylor’s apartment. When she returned shortly thereafter, the crack was missing. Wallace went to Taylor’s apartment and confronted Brodie about the missing crack. Wallace was angry and hit Brodie “hard” in the back of the head with a metal iron, causing her to “black[] out.” Taylor became involved in the fracas, and Wallace’s brother, also present, slipped Wallace a gun that Wallace used to shoot Taylor. Taylor was hospitalized, treated for his gunshot wound and released. Taylor died seven months later from complications from an exploratory laparotomy due to the gunshot wound.

¶3 Wallace was charged with first-degree intentional homicide, intimidating a witness, and battery. The jury found Wallace guilty of the lesser-included offense of first-degree reckless homicide as a party to the crime, in

violation of WIS. STAT. §§ 940.02(1) (2003-04) and 939.05 (2003-04), and battery, in violation of WIS. STAT. § 940.19(1) (2003-04).² The trial court imposed a thirty-year sentence for the homicide, comprised of twenty-two- and eight-year respective periods initial confinement and extended supervision, and a nine-month concurrent jail term for the battery. Wallace moved for sentence modification, which the trial court denied. On appeal, Wallace challenges the homicide conviction as to the sufficiency of the evidence, and as to the length of the sentence.

¶4 Wallace contends that there was insufficient evidence to support the homicide conviction; specifically, he claims that the testimony of the prosecution's lead witness was uncorroborated, and that she lacked credibility, as evidenced by her tentative and evasive responses. We disagree; Brodie's testimony was not inherently incredible, and as such, the deficiencies in and lack of corroboration for her testimony and her credibility were matters for the jury to evaluate. *See Johnson v. Merta*, 95 Wis. 2d 141, 151-52, 289 N.W.2d 813 (1980). The jury evaluated the evidence as a whole, including Brodie's testimony, and found Wallace guilty of the lesser-included offense of first-degree reckless homicide, as opposed to first-degree intentional homicide. The difference in proof between these two offenses is that reckless homicide requires proof that "show[s] utter disregard for human life," whereas intentional homicide requires proof of the "intent to kill that person or another." *See* WIS. STAT. §§ 940.02(1); 940.01(1)(a). Additionally, reckless homicide is a Class B felony, carrying a maximum potential sentence of sixty years, whereas intentional homicide is a Class A felony,

² All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

requiring the imposition of a life sentence. *See* WIS. STAT. §§ 940.02(1); 940.01(1)(a); 939.50(3)(b) and (a).

¶5 First-degree reckless homicide has two elements: that the defendant (1) “recklessly cause[] the death of another human being [and (2)] under circumstances which show utter disregard for human life.” WIS. STAT. § 940.02(1). Brodie testified that Wallace was struggling with Taylor, and Wallace’s brother slid a gun to Wallace who shot Taylor with that gun. Brodie also testified that Wallace was wearing a light-colored shirt and black shorts that day. Two neighbors testified that after hearing a “loud thud,” they each saw a black man with a yellow jacket or T-shirt running from Taylor’s apartment toward the stairs, and upon entering Taylor’s apartment, saw Brodie on the floor crying, and Taylor lying on the floor bleeding.³ One of the neighbors also noticed that the man fleeing in the yellow shirt was wearing black pants. Wallace presented his mother and sister as alibi witnesses, each of whom had credibility problems.

¶6

[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.

³ Only one of the neighbors remembered seeing Brodie on the floor crying.

State v. Poellinger, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990) (citation omitted). Credibility determinations are within the fact-finder’s province unless the evidence is incredible as a matter of law. *See Johnson*, 95 Wis. 2d at 151-52. As long as there is sufficient evidence to convict, it is the jury’s obligation, not that of the appellate court, to weigh the evidence and reconcile inconsistencies in the testimony. *See Poellinger*, 153 Wis. 2d at 506-07.

¶7 Wallace moved to dismiss the charges and to strike Brodie’s testimony, contending that she was so tentative that she was unable to prove the State’s case, and that Wallace was denied the right to any “meaningful cross examination” because most of Brodie’s responses consisted of “I don’t know [or] I don’t remember.” Nevertheless, the trial court decided that Brodie’s testimony was sufficient to allow Wallace a meaningful cross-examination, and was sufficient to allow the jury to evaluate Brodie’s responses and her credibility, and denied both motions.

¶8 Our review of the evidence also demonstrates that Brodie’s testimony was consistent with the testimony of each neighbor, and could be appropriately reconciled with the other evidence and reasonable inferences from that evidence to prove Wallace’s guilt. We agree that Brodie’s testimony was not inherently incredible as a matter of law, and was sufficient to allow the jury to evaluate Brodie’s credibility, weigh and reconcile the evidence, and find the facts. *See id.* at 506-07; *Johnson*, 95 Wis. 2d at 151-52.

¶9 Wallace also contends that the trial court erroneously exercised its sentencing discretion because a thirty-year sentence was unduly harsh and excessive for a homicide in which he was not the shooter. Although the jury found that the State had not proven that Wallace had the requisite “intent to kill,”

it found that Wallace had caused Taylor's death "under circumstances" that showed an "utter disregard for human life." *See* WIS. STAT. § 940.02(1).

¶10 Our principal focus is whether the trial court erroneously exercised its sentencing discretion.

When a criminal defendant challenges the sentence imposed by the [trial] court, the defendant has the burden to show some unreasonable or unjustifiable basis in the record for the sentence at issue. When reviewing a sentence imposed by the [trial] court, we start with the presumption that the [trial] court acted reasonably. We will not interfere with the [trial] court's sentencing decision unless the [trial] court erroneously exercised its discretion.

State v. Lechner, 217 Wis. 2d 392, 418-19, 576 N.W.2d 912 (1998) (citations and footnote omitted).

¶11 The primary sentencing factors are the gravity of the offense, the character of the offender, and the need for public protection. *State v. Larsen*, 141 Wis. 2d 412, 427, 415 N.W.2d 535 (Ct. App. 1987). The weight the trial court accords each factor is a discretionary determination. *Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). The trial court's obligation is to consider the primary sentencing factors and to exercise its discretion in imposing a reasoned and reasonable sentence. *See Larsen*, 141 Wis. 2d at 426-28. The trial court has an additional opportunity to explain its sentence when challenged by postconviction motion. *See State v. Fuerst*, 181 Wis. 2d 903, 915, 512 N.W.2d 243 (Ct. App. 1994).

¶12 The trial court addressed each of the primary sentencing factors. The trial court explained that "[a]ny crime that involves loss of human li[f]e ... is an extremely serious crime." The trial court continued to explain that nothing

compare[s] to the loss of life by the victim himself who has been deprived of his life, of continuing to live and enjoy life or to his family who won't have him anymore, and [the trial court] know[s] that there's really nothing that anyone can do, least of all [the trial court], to make that right. What happened on that day is final with respect to that victim. That's what makes homicide such a serious crime, and that has to be reflected in the sentence ... impose[d] today.

The trial court addressed Wallace's character. While the trial court has sentenced convicted defendants with a "worse" character than that of Wallace, the trial court commented that Wallace "hardly [has] the conduct and the background of a law-abiding person who is trying to show that [he honors] his responsibilities, with respect to the community, as an ordinary citizen or as a father." The trial court was extremely troubled that Wallace was involved in drug-dealing at the time of the homicide. The trial court summarized its assessment of Wallace by concluding that "[t]he circumstances of the crime reveal that the defendant is an extremely dangerous person to have behaved as he did on the day in question." The trial court concluded its remarks by explaining that it must impose a sentence that will punish the defendant and protect the community from him. The trial court properly exercised its discretion.

¶13 Wallace also claims that the trial court did not impose a sentence that met the minimum custody standard, namely that imposed the least amount of confinement necessary to meet the sentencing objectives. *See State v. Gallion*, 2004 WI 42, ¶23, 270 Wis. 2d 535, 678 N.W.2d 197. The trial court explicitly acknowledged that it was

required to impose the least severe sentence that accomplishes the sentencing goals. [The trial court's] sentencing goals here are to reflect the seriousness of this crime, to punish the defendant for having taken a human life in the manner in which [he] did ... and to protect the community from Mr. Wallace.

In response to that same criticism in his postconviction motion, the trial court further explained that it “found that 30 years was the least severe sentence that would address the extreme seriousness of the offense, the particular character of the defendant, and the need for protection in the community.” Additionally, the trial court explained that it applied each of the primary sentencing factors in meeting the minimum custody standard, which we previously addressed. We are satisfied that the trial court’s explicit comments at sentencing, and more detailed comments in its postconviction order directly explain how it exercised its sentencing discretion in meeting the minimum custody standard.

¶14 Incident to Wallace’s other sentencing challenges, he also contends that the sentence imposed was unduly harsh and excessive. Preliminarily, Wallace’s sentencing challenges are predicated on his claim that he was not the shooter. The jury and the trial court judge presiding over that jury trial found Wallace guilty of first-degree reckless homicide. Consequently, the trial court properly imposed sentence for that offense.

¶15 “A sentence well within the limits of the maximum sentence is not so disproportionate to the offense committed as to shock the public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances.” *State v. Daniels*, 117 Wis. 2d 9, 22, 343 N.W.2d 411 (Ct. App. 1983). First-degree reckless homicide is a Class B felony carrying a maximum potential penalty of sixty years. *See* WIS. STAT. §§ 940.02(1); 939.50(3)(b). Imposition of half of that sentence – thirty years (including twenty-two years of initial confinement) – is not disproportionate to the offense of first-degree reckless homicide, nor is that sentence unduly harsh, excessive, or shocking to the public sentiment.

By the Court.—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5. (2005-06).

