COURT OF APPEALS
DECISION
DATED AND FILED

September 13, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 99-2823-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JASON R. BURKS,

DEFENDANT-APPELLANT.

APPEAL from judgments and orders of the circuit court for Green Lake County: WILLIAM M. MCMONIGAL, Judge. *Affirmed.*

Before Brown, P.J., Anderson and Snyder, JJ.

¶1 PER CURIAM. Jason R. Burks appeals from judgments convicting him of criminal damage to property, theft, burglary, and operation and attempted operation of a motor vehicle without the owner's consent, and from orders denying his postconviction motions. On appeal, Burks challenges evidentiary

rulings at trial, the effectiveness of his trial counsel and the length of his sentence. We reject these challenges and affirm.

¶2 The criminal complaint alleged that after fighting with and being abandoned by his companions in Markesan, Burks entered and damaged several vehicles, ultimately driving an agricultural supply store van home to Theresa. The van was found the next day in Theresa. Burks was charged with numerous counts of criminal damage to property, theft, burglary, and operation and attempted operation of a motor vehicle without the owner's consent.

¶3 On appeal, Burks challenges an evidentiary ruling relating to the testimony of one of his companions, Jason Conrad. On cross-examination, Conrad steadfastly maintained that he did not recall telling Burks's mother, Jean Burks, that he gave Burks a ride home on the evening in question. Conrad stated that it was not possible that he gave Burks a ride home that night.

¶4 In response to this testimony, Burks sought to present the testimony of his mother that Conrad told her that he drove Burks home that night. Such testimony would tend to weaken the State's claim that Burks stole a van and drove it to Theresa. Burks argued that Jean Burks could impeach Conrad's testimony by offering Conrad's prior inconsistent statement to her. The State countered that Conrad had stated, in good faith, that he could not recall if he made the statement Jean Burks attributed to him. Therefore, the State argued, Conrad did not make a prior inconsistent statement. *See* ***State v. Lenarchick***, 74 Wis. 2d 425, 436, 247 N.W.2d 80 (1976) (when the declarant in good faith does not remember making a prior statement, evidence of the prior statement is excluded from evidence). The court found that Conrad could not recall whether he made the statement to

Jean Burks. Therefore, Jean Burks could not testify that Conrad told her that he gave Burks a ride home.

¶5 On appeal, Burks concedes that the circuit court exercised its discretion in excluding the testimony of Jean Burks. *See* ***State v. Mares***, 149 Wis. 2d 519, 525, 439 N.W.2d 146 (Ct. App. 1989). Nevertheless, he argues that the evidentiary ruling is reversible error because it denied him his constitutional right to present evidence in his defense. *See* ***State v. Pulizzano***, 155 Wis. 2d 633, 645-46, 456 N.W.2d 325 (1990) (constitutional right to present defense discussed). However, Burks did not make this argument to the circuit court, and the circuit court was not required to divine it from Burks's insistence that Conrad made inconsistent statements. *Cf.* ***State v. Marshall***, 113 Wis. 2d 643, 653, 335 N.W.2d 612 (1983) (constitutional grounds for evidentiary objections must be made known to the circuit court). Our role is to correct errors made by the circuit court, not to rule on matters never presented to that court. *See* ***Vollmer v. Luety***, 156 Wis. 2d 1, 10-11, 456 N.W.2d 797 (1990). Because it was not raised in the circuit court, the argument, even though it is constitutional in its dimension, is waived on appeal. *See* ***Maclin v. State***, 92 Wis. 2d 323, 328-29, 284 N.W.2d 661 (1979).

¶6 Burks next argues that the testimony of Lynn Guden, a rebuttal witness for the State, violated his constitutional right to confront witnesses. Guden, a victim-witness coordinator for the county, testified on rebuttal that after being told she would be sequestered and unable to observe her son's trial, Jean Burks said that she would not testify for the State and would be a hostile witness. Burks objected to Guden's testimony on hearsay grounds. The court overruled the objection.

¶7 On appeal, Burks argues that Guden's testimony was inadmissible hearsay. The court admitted the testimony as an admission against interest or a prior

statement. We will affirm the circuit court if the court reached the right result for the wrong reason. *See* ***Mueller v. Mizia***, 33 Wis. 2d 311, 318, 147 N.W.2d 269 (1967).

¶8 We conclude that Guden's testimony was admissible under WIS. STAT. § 908.03(3) (1997-98) as a statement of the declarant's then-existing state of mind. Guden testified that Jean Burks made her "hostile witness" remark while she was upset and after learning that she could not attend her son's trial. Jean Burks then gave testimony favorable to the defense.[1] Evidence regarding her state of mind was relevant to her credibility. Her "statement of a present intent to do an act in the future [was] admissible to prove that [she] acted in conformity" with her stated intention to be a hostile witness. ***State v. Everett***, 231 Wis. 2d 616, 630, 605 N.W.2d 633 (Ct. App. 1999) (citation omitted), *review denied*, ___ Wis. 2d ___, 609 N.W.2d 474 (Wis. Jan. 18, 2000) (No. 98-3444-CR).

¶9 Burks also argues that the admission of Guden's testimony violated his constitutional right to confront witnesses because the State did not ask Jean Burks if she made this statement to Guden.[2] However, Burks did not make this argument in the circuit court. Therefore, the argument is waived. *See* ***Maclin***, 92 Wis. 2d at 328-29.

¶10 Burks next argues that his trial counsel was ineffective because he did not challenge evidence which was procured outside the scope of a search warrant. Police obtained a search warrant in response to an allegation that Burks battered Chad Olig on the night in question. Olig described Burks to the police, including his

[1] Jean Burks testified for the defense that she did not remember telling police that Burks returned home on foot, had a fight with his companions in Markesan, and took a van from Markesan to Theresa.

[2] We note that Burks did not call Jean Burks to rebut Guden's testimony.

clothing and footwear, and stated that Burks had taken a pager from him. The search warrant authorized police to search Burks's residence for these items. The police located these items, but also seized a black jacket, which had not been identified by Olig, a brown jacket, two screwdrivers, and a paper roll from a $10 roll of quarters which had been taken from one of the vehicles entered that night in Markesan.[3]

¶11 At trial, the Markesan police chief testified about the items found at Burks's residence pursuant to the search warrant. The jacket tested positive for the presence of a cow laxative, which was found spilled on the seat of the van stolen from the agricultural supply store and abandoned in Theresa by Burks. A crime lab witness testified that the damage to the ignitions of the vehicles in Markesan was consistent with the use of a screwdriver like that taken from Burks's residence.

¶12 Postconviction, trial counsel testified that he was aware that the State intended to introduce the jacket and the screwdrivers at trial and that these items had not been listed on the search warrant. Counsel testified that he did not move to suppress these items or object to their presentation at trial because his analysis led him to conclude that the items were in plain view when they were seized by officers who were lawfully in Burks's residence with a search warrant. Therefore, counsel did not believe that an objection to the items would succeed.

¶13 Burks argued to the circuit court that the seizure of the jacket and screwdrivers unlawfully expanded the battery-related search warrant. The court rejected this argument, found trial counsel's testimony credible and concluded that trial counsel exercised reasonable legal judgment when he evaluated the likelihood

[3] Trial counsel did not file a motion to suppress any of this evidence. Burks concedes that the search warrant was properly issued.

of suppressing the jacket and the screwdrivers. The court ruled that these items were in plain view.

¶14 Counsel renders ineffective assistance if counsel's performance was deficient and the deficient performance prejudiced the defendant. *See* ***State v. Oswald***, 2000 WI App 2, ¶49, 232 Wis. 2d 62, 606 N.W.2d 207, *review denied*, ___ Wis. 2d ___, 609 N.W.2d 473 (Wis. Feb. 22, 2000) (No. 97-1026-CR). Whether counsel's conduct constitutes ineffective assistance is a mixed question of fact and law. *See* ***id.*** at ¶51. We will uphold the circuit court's findings of fact concerning the circumstances of the case and counsel's conduct and strategy unless the findings are clearly erroneous. *See* ***id.*** However, the final determinations of deficient performance and prejudice present questions of law which we decide independently of the circuit court. *See* ***id.***

¶15 The circuit court's finding regarding trial counsel's credibility is not clearly erroneous. Therefore, we accept it. However, we independently evaluate whether counsel's performance was deficient. *See* ***id.*** To prove deficient performance, a defendant must show that his or her counsel made errors so serious that he or she was not functioning as the "counsel" guaranteed by the Sixth Amendment. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). The case is reviewed from counsel's perspective at the time of trial, and the defendant has the burden to overcome a strong presumption that counsel acted reasonably within professional norms. *See* ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990).

¶16 We agree with the circuit court that the disputed items were in plain view and were properly seized.

> The plain view exception has three prerequisites. The officer must have a prior justification for being in the position from which the "plain view" discovery was made; the evidence must have been in plain view of the discovering officer; and the item seized, in itself or in itself with facts known to the officer at the time, provides probable cause to believe there is a connection between the evidence and criminal activity.

State v. Edgeberg, 188 Wis. 2d 339, 345, 524 N.W.2d 911 (Ct. App. 1994).

¶17 Burks concedes that the police were lawfully in his residence pursuant to a search warrant. Therefore, the police had prior justification for being in Burks's residence. The police chief testified that he found the jackets in Burks's bedroom, where he was authorized to search. The chief found a screwdriver in the pocket of a brown leather jacket.[4] The brown jacket was stuffed into the black jacket. Cow laxative was found in the pocket of the black jacket. The circuit court found that the screwdriver and the cow laxative were connected to information known to the searching officer about possible additional criminal activity by Burks.[5] The court concluded that the plain view doctrine was satisfied and the items were lawfully seized. We agree. Therefore, a motion to suppress this evidence would have been unsuccessful. Counsel cannot be faulted for foregoing a suppression motion that would have failed. *See* ***State v. Harvey***, 139 Wis. 2d 353, 380, 407 N.W.2d 235 (1987).

¶18 In his reply brief, Burks argues that the police had to inadvertently discover the screwdriver and the jacket in order to satisfy the requirements of plain

[4] Plain view includes what an officer recognizes through any of his or her senses, including touch. *See* ***State v. Guy***, 172 Wis. 2d 86, 101, 492 N.W.2d 311 (1992).

[5] Burks concedes that the searching officer was aware that Burks was a suspect in the automobile break-ins and theft of the agricultural supply store van on whose front seat cow laxative was spilled.

view. However, inadvertent discovery is no longer part of the plain view test. *See* ***State v. Guy***, 172 Wis. 2d 86, 101, 492 N.W.2d 311 (1992).

¶19 Finally, Burks complains about his sentence. The court sentenced him to approximately fifteen years in prison. He argues that the court did not consider his age (nineteen) or that he had to serve four years of another sentence. Burks argues that a lesser period of incarceration would have adequately protected the public and rehabilitated him.

¶20 There is a strong public policy against interfering with the circuit court's sentencing discretion. *See* ***State v. Mosley***, 201 Wis. 2d 36, 43, 547 N.W.2d 806 (Ct. App. 1996). The record must show that the circuit court exercised its discretion and stated its reasons for the sentence it imposed. *See* ***id.*** Here, the circuit court did so. The court considered the proper sentencing factors, including the gravity of the offenses, Burks's character and the need to protect the public. *See* ***State v. Paske***, 163 Wis. 2d 52, 62, 471 N.W.2d 55 (1991). The court noted Burks's history of criminal activity, including the fourteen crimes for which he was convicted in this case. The court noted that Burks was relatively young to have such an extensive history of criminal activity. The court properly exercised its sentencing discretion.

By the Court.—Judgments and orders affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (1997-98).