COURT OF APPEALS
DECISION
DATED AND FILED

January 8, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-2563-CR **Cir. Ct. No. 99-CF-418**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JASON E. BRAASCH,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Walworth County: JAMES L. CARLSON, Judge. *Affirmed*.

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

¶1 PER CURIAM. Jason E. Braasch appeals from a judgment convicting him as a party to the crime of burglary while armed, armed robbery, and felony murder. He also appeals from an order denying his motion for postconviction relief. He argues that it was error to permit evidence of postcrime activities, that it was error to exclude evidence of his mental health history, that

the evidence was insufficient to support the armed burglary conviction, that his potential for rehabilitation is a new factor supporting sentence modification, and that he was denied the effective assistance of counsel at trial and sentencing. He also requests a new trial or resentencing in the interests of justice. WIS. STAT. § 752.35 (1999-2000).[1] We reject Braasch's claims and affirm the judgment and order.

¶2 While at Braasch's apartment, Michael Schumacher, Ricardo Vela, Theodore Krawczyk and Braasch discussed a plan for Schumacher to get money he was owed from Frank Fazio. Braasch did not want Schumacher to use his car because Schumacher did not have a license, so Braasch drove them to Fazio's apartment. Braasch and Krawczyk waited in the car. Schumacher took a baseball bat with him. Schumacher and Vela beat and stabbed Fazio to death and robbed him of money, coins, jewelry, knives, beer and wine.

¶3 The first issues raised in the appeal challenge evidentiary rulings. Evidentiary rulings, particularly relevancy determinations, are left to the discretion of the trial court and will not be upset on appeal unless the court erroneously exercised its discretion. *See* ***Shawn B.N. v. State***, 173 Wis. 2d 343, 366-67, 497 N.W.2d 141 (Ct. App. 1992). We will affirm the trial court's discretionary ruling if it is supported by a logical rationale, is based on facts of record and involves no error of law. ***Id.*** at 367.

¶4 By a pretrial motion in limine, Braasch sought to exclude evidence of everything that happened after leaving Fazio's apartment. The motion was

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

denied. Consequently the jury heard that after Schumacher and Vela returned to the car, the four men returned to Braasch's apartment. Schumacher testified that Braasch hid two knives under the cushion of the couch in the bedroom. Later they drove to a Lake Geneva hotel. On the way, the baseball bat was put in a dumpster. They stayed at the hotel drinking for a couple of hours. They left the hotel to drive to Wisconsin Rapids where Schumacher had a girlfriend. On the way they stopped in Princeton where they met a couple of women. They drank with the women. One of the women testified that the men said they were in the Latin Kings gang and that they joked about killing people as part of doing what is necessary. Although Vela could not remember telling the women this, his testimony confirmed that he and Braasch are Latin Kings. Once in Wisconsin Rapids, the four checked into a motel. They pawned some of the stolen items and went to the mall and bought some new clothes. When Vela and Braasch returned home the next day, and after learning that Fazio had died, Braasch helped Vela dispose of his blood-stained boots and pants in a dumpster.

¶5 Braasch argues that the postcrime events are not relevant and are wholly unrelated to the charged offenses. He also claims that even if relevant, the probative value of such evidence was outweighed by unfair prejudice because it depicted Braasch as an unsavory character. He points specifically to evidence of his gang affiliation, his partying and drinking with others, about "picking up" women they did not know, having sex with one of those women and not telling his fiancée about it, and assistance he gave in hiding the knives, bat and clothing.

¶6 We conclude that the trial court properly exercised its discretion in determining that postcrime conduct was relevant. Braasch's theory of defense was that he did not know in advance that Schumacher and Vela intended to rob Fazio, but rather he thought they were merely going to collect a debt. He relied on

evidence that he was out of the room when discussions about robbing Fazio were held. Thus, at issue was what Braasch knew and when he knew it. Postcrime conduct that reflects a consciousness of guilt is relevant to such knowledge. *See* ***State v. Bettinger***, 100 Wis. 2d 691, 698, 303 N.W.2d 585 (1981) (evidence of the defendant's subsequent bribery of the sexual assault victim was admissible and properly joined with the sexual assault charge); ***Price v. State***, 37 Wis. 2d 117, 131, 154 N.W.2d 222 (1967) (evidence of acts intended to obstruct justice or avoid punishment for the present crime are admissible in evidence as admissions by conduct); ***State v. Neuser***, 191 Wis. 2d 131, 144-45, 528 N.W.2d 49 (Ct. App. 1995) (evidence of the defendant's subsequent verbal threat to the victim was properly admitted); ***State v. Winston***, 120 Wis. 2d 500, 505, 355 N.W.2d 553 (Ct. App. 1984) (an accused's flight or related conduct is generally admissible as circumstantial evidence of consciousness of guilt and thus of guilt itself). "Conduct of a suspected person after the crime is a legitimate subject for consideration, as bearing upon the probability of his guilt …." ***Paulson v. State***, 118 Wis. 89, 106, 94 N.W. 771 (1903). While the postcrime "road trip" to Wisconsin Rapids may not have been intended as flight, things that happened along the way were indicative of a consciousness of guilt. The postcrime conduct, particularly the concealing of evidence, served as an admission by conduct and therefore was highly probative. *See* ***Price***, 37 Wis. 2d at 132. Thus, it was admissible even in light of the claim of substantial prejudice.[2] *See* ***Neuser***, 191 Wis. 2d at 144-45. There was no error in the admission of postcrime activities.

[2] We reject Braasch's claim that the trial court failed to exercise its discretion with respect to balancing the probative value and prejudice under WIS. STAT. § 904.03. The trial court acknowledged the applicability of the balance test. It specifically ruled that evidence that the men consumed controlled substances or had sex with the women they met in Princeton was more prejudicial than probative.

¶7 As additional support for his theory of defense that he did not know Schumacher planned to rob Fazio, Braasch sought to introduce the testimony of Dr. David Mann, a psychologist. The offer of proof explained that Dr. Mann would testify about Braasch's IQ of eighty-two, Braasch's limited ability to respond to external stimuli and process information, how interruptions affect his ability to process information, and his memory. Dr. Mann had Braasch complete certain tests to determine the extent of his abilities. Through this testimony Braasch wanted to show that even if he was in the room when Schumacher discussed a plan to rob Fazio or do whatever it took to get the money, Braasch may not have processed or remembered that information because his attention was focused on something else.[3] The trial court concluded that Dr. Mann's testimony was not relevant and excluded it.

¶8 We agree with the trial court's determination that the evidence was not relevant. First, Dr. Mann was not going to render an expert opinion about whether Braasch actually absorbed and processed the information about Schumacher's plan. Second, and more important, Braasch's ability to hear and process the plan was not at issue because Braasch himself admitted to police that he engaged in conversation with Schumacher about what would happen if Fazio did not give Schumacher the requested sum of money. Braasch stated he heard Schumacher say he would hit Fazio with the baseball bat and rob him, or kill and rob Fazio. Braasch dismissed Schumacher's comment as a joke. Dr. Mann's

[3] Krawczyk testified that Braasch was fiddling with the radio during part of the discussion. Braasch's fiancée testified that Braasch could only concentrate on one thing and would not hear someone speaking to him if he was focused on something else.

explanation that Braasch had difficulties processing conversations when distracted was irrelevant because Braasch admitted he heard and understood Schumacher.

¶9 Braasch argues that Dr. Mann's testimony was admissible as mental health history. *See* ***State v. Flattum***, 122 Wis. 2d 282, 305, 361 N.W.2d 705 (1985) ("properly qualified psychiatric testimony with respect to a defendant's mental health history is admissible if such testimony is shown to be relevant"). However, even assuming Dr. Mann would have testified about Braasch's mental history and that Braasch suffers from attention deficit disorder (ADD),[4] there was no evidentiary basis for the jury to conclude that the disorder came into play during the conversation about getting money from Fazio. Again, Braasch's own admission that he heard and understood Schumacher makes evidence of ADD irrelevant. The trial court properly exercised its discretion in excluding Dr. Mann's testimony.

¶10 Braasch argues that because Schumacher and Vela concocted a plan to enter Fazio's apartment without Fazio's consent as they were on the steps to the apartment,[5] the evidence was insufficient to support a finding that Braasch was guilty as a party to the crime of armed burglary. We may not reverse a conviction

[4] At the postconviction motion hearing, Braasch offered the testimony of Dr. Donald Meyer, a psychologist. Dr. Meyer reviewed past reports pertaining to educational and psychological information about Braasch. He opined that Braasch suffers from attention deficit disorder and therefore, in a situation where there were lots of distractions, Braasch would not take in information and process it as well as the general population. Dr. Mann also testified that he was prepared to give trial testimony about Braasch's mental health history.

[5] As they climbed the stairs, Schumacher told Vela they would claim their car had broken down and ask to use Fazio's phone. Schumacher's deceit negated Fazio's consent in permitting Schumacher and Vela entrance to his apartment. *See* ***State v. Inglin***, 224 Wis. 2d 764, 775, 592 N.W.2d 666 (Ct. App. 1999). There was no consent in fact. WIS. STAT. § 939.22(48)(c).

on the basis of insufficient evidence "unless the evidence, viewed most favorably to the state and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). We must accept the reasonable inferences drawn from the evidence by the jury. ***Id.*** at 506-07.

¶11 The State was not required to show an express agreement amongst the four men as to how their criminal objective would be met. While proof of "[a]n agreement among two or more persons to direct their conduct toward the realization of a criminal objective" is required, "a mere tacit understanding of a shared goal is sufficient." ***State v. Hecht***, 116 Wis. 2d 605, 625, 342 N.W.2d 721 (1984) (citation omitted). Additionally, "an aider and abettor may be guilty not only of the particular crime that to his knowledge his confederates intend to commit, but also for different crimes committed that are a natural and probable consequence of the particular act that the defendant knowingly aided or encouraged." ***State v. Ivy***, 119 Wis. 2d 591, 596-97, 350 N.W.2d 622 (1984).

¶12 The jury heard sufficient evidence to conclude that the four men went to Fazio's residence for the purpose of robbing Fazio. It was 1:30 in the morning, Schumacher had a baseball bat, and Braasch turned off his headlights as he pulled into the parking lot at Fazio's residence. Early in the conversation about money, Schumacher reportedly said he would do "whatever it takes." A reasonable inference exists that entrance would be gained to the apartment by whatever means necessary. Thus, armed burglary was a natural and probable consequence and within the tacit understanding to commit the crime. The evidence was sufficient to support the jury's guilty verdict for party to the crime of armed burglary.

¶13 As part of his motion for postconviction relief, Braasch sought sentence modification based on a new factor—information about his potential for rehabilitation. Sentence modification because of a new factor requires the defendant to first demonstrate by clear and convincing evidence that there is a new factor. ***State v. Franklin***, 148 Wis. 2d 1, 8-9, 434 N.W.2d 609 (1989). Whether a fact is a new factor warranting resentencing is a question of law. ***Id.*** at 8. The new factor must be an event or development that frustrates the purpose of the original sentence. ***State v. Johnson***, 158 Wis. 2d 458, 466, 463 N.W.2d 352 (Ct. App. 1990).

¶14 We conclude that the potential for rehabilitation was not a new factor because the trial court considered that potential at sentencing. At sentencing defense counsel focused on Braasch's mental health history and asked that Braasch be given the opportunity to learn to conform his behavior to society's expectations. The trial court found Braasch's need for rehabilitative control to be "moderate." Thus, the trial court did not believe Braasch lacked the potential for rehabilitation. Indeed, the driving force behind the sentence was the severity of the offenses and Braasch's role in driving to the crime. All Braasch sought to do by his new factor motion was put a finer spin on a matter the court had already considered and found not to be a significant factor in the sentence. We are not convinced that the potential for rehabilitation was new information or information that frustrated the purpose of the sentence.

¶15 Braasch claims he was denied the effective assistance of counsel during the trial and at sentencing.[6] "There are two components to a claim of

[6] After trial, Braasch requested trial counsel to withdraw. New counsel was appointed for sentencing.

ineffective assistance of counsel: a demonstration that counsel's performance was deficient, and a demonstration that such deficient performance prejudiced the defendant. The defendant has the burden of proof on both components." ***State v. Smith***, 207 Wis. 2d 258, 273, 558 N.W.2d 379 (1997) (citations omitted). When a defendant fails to prove either prong of the test, the reviewing court need not consider the remaining prong. *See* ***State v. Hubanks***, 173 Wis. 2d 1, 25, 496 N.W.2d 96 (Ct. App. 1992). Whether counsel's actions constitute ineffective assistance is a mixed question of law and fact. ***State v. Sanchez***, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996). The trial court's findings of what counsel did and the basis for the challenged conduct are factual and will be upheld unless clearly erroneous. *See* ***id.*** However, whether counsel's conduct amounted to ineffective assistance is a question of law which we review de novo. ***Id.*** at 236-37.

¶16 Braasch contends that trial counsel should have directed Dr. Mann to be prepared to testify about Braasch's mental health history so that Dr. Mann's testimony would be admissible under ***Flattum***, 122 Wis. 2d at 305. We have considered and rejected the claim that testimony about Braasch's mental health history was relevant. Braasch was not prejudiced by counsel's failure to define Dr. Mann's testimony in any other fashion.

¶17 Trial counsel is faulted for not calling character witnesses at trial. Trial counsel explained that he did not seek out character witnesses because he did not want to open the door for the prosecution to present rebuttal evidence regarding character. Counsel stated, "Jason had some difficulties in his background. I just didn't believe that all the character evidence would be positive." Counsel's decision was a strategic one and rationally based on the facts and law. *See* ***State v. Felton***, 110 Wis. 2d 485, 502, 329 N.W.2d 161 (1983). Counsel was not ineffective for not calling character witnesses.

¶18 Braasch contends that trial counsel should have objected to testimony from his fiancée that he lied about having sex with one of the Princeton women and testimony about his gang affiliation. Trial counsel was not asked about his failure to object when Braasch's fiancée was asked if Braasch had ever told her that he had sex with one of the Princeton women. Therefore, the issue is not preserved for review. *See* ***State v. Krieger***, 163 Wis. 2d 241, 253-54, 471 N.W.2d 599 (Ct. App. 1991) (trial counsel must be given opportunity at postconviction hearing to explain his or her conduct during the proceedings). Even considering the claim, Braasch was not prejudiced. His fiancée was asked a single question, "Did he tell you he ever had sex with any of them?" She responded that "he said he did not." Although the testimony reflects that Braasch lied to his fiancée because he admitted in his police statement that he did have sex with one of the women, it was not a matter of prominence in the trial. It was never mentioned in the prosecutor's closing statement when the numerous lies Braasch told his fiancée were recounted. The admission of this testimony does not undermine confidence in the outcome so as to constitute prejudice. *See* ***State v. Pitsch***, 124 Wis. 2d 628, 642, 369 N.W.2d 711 (1985).

¶19 Trial counsel was also not questioned about the failure to object to references to Braasch's gang affiliation. Again, the issue is not properly preserved. *See* ***Krieger***, 163 Wis. 2d at 253-54. Even so, Braasch was not prejudiced. Evidence that Braasch was a gang member came in as part of the contextual explanation of postcrime activity. *See* ***State v. Hereford***, 195 Wis. 2d 1054, 1069, 537 N.W.2d 62 (Ct. App. 1995) ("Testimony of other acts for the purpose of providing the background or context of a case is not prohibited ….") . It was relevant to show Braasch's understanding of his friends' vernacular for

doing "whatever it takes" or "what is necessary." Had an objection been made, it would have been a proper exercise of discretion to overrule the objection.

¶20 The complaints launched against sentencing counsel are that he did not spend enough time with Braasch, did not explain the sentencing process, did not inquire about potential witnesses to speak favorably about Braasch at sentencing, and did not obtain an independent sentencing investigation. Counsel explained why he did not want to present live testimony in support of Braasch and why he had potential witnesses submit letters instead. Counsel also considered that an independent sentencing investigation might not turn out favorably. Further, counsel's testimony contradicted Braasch's with respect to the length and scope of meetings the two had and the solicitation of comments favorable to Braasch. Thus, resolution of the complaints that counsel was inadequately prepared is dependent on the trial court's credibility determination. The trial court found counsel's representation to be competent and thereby found counsel's testimony to be more credible. *See* ***Marshall v. Lonberger***, 459 U.S. 422, 433 (1983) (where it is clear that the trial court would have granted the relief sought by the defendant if it believed the defendant's testimony, its failure to grant the relief is tantamount to a finding against the defendant's credibility); ***State v. Long***, 190 Wis. 2d 386, 398, 526 N.W.2d 826 (Ct. App. 1994) ("when a trial court fails to make express findings of fact necessary to support its legal conclusions, we assume that the trial court made such findings in the way that supports its decision"). Further, Braasch has failed to suggest how the sentence, based primarily on the severity of the offenses, would have been different if counsel had performed differently. Braasch was not denied the effective assistance of counsel.

¶21 Finally, Braasch requests that a new trial or resentencing be granted in the interests of justice. We exercise our discretionary power to grant a new trial

infrequently and judiciously. ***State v. Ray***, 166 Wis. 2d 855, 874, 481 N.W.2d 288 (Ct. App. 1992). We have found no error to suggest that the real controversy was not fully tried or that justice has miscarried. *See* ***State v. Marhal***, 172 Wis. 2d 491, 507, 493 N.W.2d 758 (Ct. App. 1992) (a final catchall plea for discretionary reversal based on the cumulative effect of nonerrors cannot succeed). Even though Braasch claims he was tricked into replacing counsel before sentencing, sentencing counsel provided adequate representation and the sentencing proceeding was fair. We deny the request under WIS. STAT. § 752.35.

By the Court.—Judgment and order affirmed.

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