

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 30, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

No. 96-2857-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

CRAIG T. BATES,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Racine County: DENNIS J. BARRY, Judge. *Affirmed.*

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

PER CURIAM. Craig T. Bates appeals pro se from a judgment of conviction of party to the crime of attempted burglary and possession of burglary tools and from an order denying his motion for postconviction relief. He claims that the trial court should have allowed a continuance so defense counsel would have adequate time to prepare for trial, that he was deprived of the effective

assistance of trial counsel, and that the evidence was insufficient to support the convictions. We reject these claims and affirm the judgment and the order.

On March 19, 1995 at approximately 3:40 a.m., City of Racine police officers were notified that an individual was attempting to pry open the back door of a tavern. The individual was observed leaving the scene in a two-toned vehicle. The responding officers eventually stopped a car in which Bates was a passenger. Screwdrivers, a tire iron, a hunting knife, a pair of gloves and two pillow cases were found in the car. Bates was identified at the scene by the witness who first alerted police.

Bates was bound over for trial at a preliminary hearing held on April 18, 1995. Bates made a speedy trial demand. *See* § 971.10(2)(a), STATS. (trial to be held within ninety days of the date of demand). At a May 8, 1995 status conference, this case was set for trial on Friday, May 12, 1995. Another pending case in which Bates was charged with operating a motor vehicle without the owner's consent (OMVWOC) was set for trial on Thursday, May 11, 1995. There was no objection to the trial date.

When the parties appeared for jury selection for the OMVWOC trial on May 10, 1995, the prosecution obtained an adjournment to complete palm print analysis. It was suggested that the parties proceed with the trial in this case. The trial court asked Bates' attorney if he had a problem picking the jury on May 10 and going to trial on May 11, one day early. Defense counsel stated that he had no objection, and jury selection was completed.

At the beginning of the trial on May 11, defense counsel expressed concern about his preparedness for trial. Defense counsel asked for a continuance in order to permit his investigator to complete work. After further discussion,

counsel asked that the case be moved back at least one day to its originally scheduled date. The trial court denied the requested continuance.

Bates argues that the trial court erroneously exercised its discretion in denying a continuance. The decision whether to grant or deny a continuance is within the discretion of the trial court. *See State v. Fink*, 195 Wis.2d 330, 338, 536 N.W.2d 401, 404 (Ct. App. 1995). The trial court should consider the length of delay requested; whether other continuances have been requested and received by the defendant; inconvenience to parties, witnesses and the court; whether delay seems to be for legitimate reasons or for a dilatory purpose; and other relevant factors. *See id.* at 339 n.2, 536 N.W.2d at 404. On review, we balance the defendant's right to adequate representation by counsel against the public interest in prompt and efficient administration of justice. *See id.* at 338, 536 N.W.2d at 404.

The trial court properly balanced the factors. Only the day before, there was no objection to proceeding one day early. Albeit the requested continuance was short, when asked what relevant evidence the additional investigation would produce, defense counsel had no substantive answer. Defense counsel contended that additional investigation was needed to locate people to corroborate Bates' story as to his whereabouts on the night of the crime. Yet alibi was not the defense. There was no showing that the lack of complete investigation would impair the defense. Moreover, the trial court found that the request for a continuance was made for the purpose of manipulating the judicial system. The court noted that Bates had made a speedy trial demand a month before but had waited until a few days before trial to advise his attorney of matters which needed follow-up investigation. The trial court was caught between satisfying Bates'

speedy trial demand and the continuance request. We conclude that the trial court properly exercised its discretion in denying the continuance.

Bates next argues that he was deprived of the effective assistance of counsel by defense counsel's failure to make a discovery demand earlier in the proceeding. He also contends that his attorney should have waived the speedy trial demand when counsel became aware that he did not have enough time to prepare for trial.

In order to establish ineffective assistance of counsel, the defendant must demonstrate both deficient performance of counsel and prejudice to his or her defense resulting from the deficient performance. See *Strickland v. Washington*, 466 U.S. 668, 687 (1984); see also *State v. Pitsch*, 124 Wis.2d 628, 633, 369 N.W.2d 711, 714 (1985). However, we need not consider whether trial counsel's performance was deficient if we can resolve the ineffectiveness issue on the ground of lack of prejudice. See *State v. Moats*, 156 Wis.2d 74, 101, 457 N.W.2d 299, 311 (1990). To establish prejudice, the defendant must show that there is a reasonable probability that the outcome of the proceeding would have been different but for counsel's errors. See *Pitsch*, 124 Wis.2d at 642, 369 N.W.2d at 718. But this is not an outcome determinative standard. See *id.* Rather, reasonable probability contemplates a probability sufficient to undermine confidence in the outcome. See *id.* at 642, 369 N.W.2d at 719. Whether counsel's performance prejudiced the defendant is a question of law which we review de novo without deference to the trial court's conclusion. See *Moats*, 156 Wis.2d at 101, 457 N.W.2d at 311.

We reject Bates' apparent belief that he has established ineffective assistance of counsel because defense counsel testified that he was not

comfortable with the amount of time he had to prepare for trial. Bates' claim fails on the prejudice prong. Bates does not point to one piece of evidence which counsel was ill-prepared to meet because of the allegedly belated discovery request. Even assuming that withdrawal of the speedy trial demand would have given defense counsel more time to investigate, Bates does not suggest what probative evidence would have resulted from the additional work time. Bates' inability to demonstrate any undiscovered evidence, coupled with the sufficient and probative evidence produced at trial, leads us to conclude that he was not prejudiced by the alleged deficient conduct by counsel.

Bates' final contention is that the evidence was insufficient to support his conviction of attempted burglary and possession of burglary tools. The State must prove each essential element of the crime beyond a reasonable doubt. *See State v. Poellinger*, 153 Wis.2d 493, 502, 451 N.W.2d 752, 755 (1990). In reviewing the sufficiency of circumstantial evidence, an appellate court need not concern itself in any way with evidence which might support other theories of the crime. *See id.* at 507-08, 451 N.W.2d at 758. An appellate court need only decide whether the theory of guilt accepted by the trier of fact is supported by sufficient evidence. *See id.* at 508, 451 N.W.2d at 758.

Bates claims that there was no evidence of his intent to burglarize the tavern because there is no evidence of why the crime was not completed. It is not necessary for the prosecution to establish as a separate element that another person or some other extraneous factor prevented the defendant from completing the criminal act. *See Hamiel v. State*, 92 Wis.2d 656, 666, 285 N.W.2d 639, 645 (1979). All that must be proven is that the defendant had the requisite intent to commit the crime and that the defendant had taken sufficient steps in furtherance of the crime so that it was improbable that he or she would have voluntarily

terminated participation in the commission of the crime. *See id.* at 666, 285 N.W.2d at 646. It can be inferred from the evidence, particularly the time of day and the tool employed, that Bates had the requisite intent to commit burglary. Intent may be inferred from the defendant's conduct in the context of the circumstances. *See State v. Stewart*, 143 Wis.2d 28, 35, 420 N.W.2d 44, 47 (1988). "Failure, if and by whatever means the actor's efforts are frustrated, is relevant and significant only insofar as it may negate any inference that the actor did in fact possess the necessary criminal intent to commit the crime in question." *Id.* at 36, 420 N.W.2d at 47 (quoted source omitted). Here, only the inability to break the door open prevented completion of the crime and that inability does not negate intent to commit burglary.

Bates suggests that there was insufficient identification evidence. However, the witness who alerted police reported that the would-be burglar was a passenger in the car and the witness gave a description of the suspects' car. Police stopped the described car and found two men, one of whom was Bates. Bates was found in the passenger seat. There was no need for a definite eyewitness identification. Circumstantial evidence supports the finding that Bates was one of the men engaged in the attempted break-in.

Bates argues that there was no evidence that the burglary tools found in the car were in his personal possession. It is important to note that Bates was charged as a party to the crime of possession. The tire iron was discovered stuffed part way under the front bench seat of the car, between the passenger and the driver side. The pillow cases, pair of gloves and small screwdriver were found by Bates' feet. The burglary tools were in close proximity and well within Bates' reach so as to support an inference that they were in his control and possession.

By the Court.—Judgment and order affirmed.

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

