COURT OF APPEALS
DECISION
DATED AND RELEASED

JULY 1, 1997

NOTICE

No. 96-3457-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JOHN R. JAGUSCH,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Polk County: GARY B. SCHLOSSTEIN, Reserve Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

CANE, P.J. John Jagusch appeals a judgment of conviction for two counts of attempted mayhem, as a party to a crime, contrary to §§ 940.21, 939.05 and 939.32, STATS. Jagusch argues that the court erred when it excluded psychological testimony regarding his susceptibility to being induced to commit the offense, and denied his request for two jury instructions and his objection to

the prosecutor's closing argument. The State asserts the court properly excluded the evidence because it was irrelevant absent proof of inducement. The State also contends that susceptibility to inducement is not suitable for expert testimony and the exclusion of the evidence was harmless error. Also, the State asserts Jagusch's remaining argument is not sufficiently developed to warrant serious consideration and is without merit. Because Jagusch did not prove inducement, the evidence was irrelevant. We therefore affirm the judgment.

This case arose during Jagusch's incarceration for a 1995 battery conviction, for which Judge Robert H. Rasmussen sentenced him to 120 days in the county jail, with Huber privileges. Jagusch began his sentence on October 20, 1995. Fellow inmate Brent Rud testified that mid-November, Jagusch told him he wanted "to find somebody to have a couple people taken care of," namely, a pilot from Amery and Judge Rasmussen. According to Rud, Jagusch said he "[w]anted them busted up, legs broken, arms broken so they couldn't work, walk whatever … 'cuz the one ripped him off, jet motor, and the judge 'cuz he threw the case out when he [Jagusch] … wanted to sue [Geipel] for ripping him off." After Jagusch discussed this subject with him five or six times, Rud reported it to the police.

Jamie Anderson, another fellow inmate, testified that while reading a magazine in the common area of a dormitory cell, he saw an ad for a vehicle and jokingly wondered aloud who he would have to kill to get one. When Jagusch raised his head from his bunk and asked if Anderson "would consider something like that," Anderson replied that he did not know.

In subsequent conversations, Jagusch again asked Anderson if he would consider killing someone, and then said he just wanted some people injured. Jagusch identified his two intended victims as Bill Geipel, an airline pilot, and

Judge Rasmussen, and drew a map to their homes. Jagusch wanted Geipel injured because he believed Geipel had cheated him in a transaction involving an airplane motor, and wanted Rasmussen injured because he dismissed a lawsuit he brought against Geipel and also sentenced Jagusch for the battery conviction. Anderson told Jagusch that he might know of a hit man, and then contacted the sheriff instead, and gave the sheriff the maps. There was conflicting testimony regarding whether Jagusch or Anderson initiated these subsequent conversations.

On January 9, Anderson agreed to wear a wire to record his next conversation with Jagusch. Following his instructions from the police, Anderson asked Jagusch to repeat his request. Jagusch reiterated that he wanted someone to injure Geipel and Judge Rasmussen, and Anderson told Jagusch he would get a friend of a friend to do the job.

Pretending to be the hit man, Ronald Ebben, special agent for the Wisconsin Division of Criminal Investigation, called Jagusch and asked him if he had work for him to do. Jagusch said he did, and agreed to meet in Ebben's car, which had been equipped with a camera to videotape their conversation. On videotape, Jagusch had a detailed conversation with Ebben about the hit on Geipel and offered Ebben money to injure Geipel's knees so he could never fly again. Jagusch also offered Ebben money to maim Rasmussen six months later. The police arrested Jagusch after executing a search warrant for his office.

Jagusch was charged with two counts of attempted mayhem, as a party to a crime, contrary to §§ 940.21, 939.05 and 939.32, STATS. In order to establish the defense of entrapment, Jagusch wanted to present expert psychological testimony regarding his susceptibility to inducement and lack of predisposition to commit the offense. The court permitted evidence regarding

Jagusch's mental health history, symptoms and characteristics, but decided the psychologist's conclusion that a person with Jagusch's mental health profile "would be overwhelmingly vulnerable to any proposal, no matter how outrageous, that would feed his need to be seen as high status, important person in the context in which he finds himself, as a man to be reckoned with" was inadmissible. After a five-day jury trial, Jagusch was convicted. He now appeals the judgment of conviction.

The first issue is whether the testimony regarding Jagusch's psychological state was properly kept from the jury. Whether to admit or exclude evidence is addressed to the trial court's discretion and "will not be upset on appeal if it has a 'reasonable basis' and was made 'in accordance with accepted legal standards and in accordance with the facts of record.'" ***State v. Jenkins***, 168 Wis.2d 175, 186, 483 N.W.2d 262, 265 (Ct. App. 1992) (quoting ***Lievrouw v. Roth***, 157 Wis.2d 332, 348, 459 N.W.2d 850, 855 (Ct. App. 1990)). The court of appeals may sustain the trial court's holding, sua sponte or at the urging of the respondent, on a theory not presented to it. ***State v. Davis***, 171 Wis.2d 711, 722, 492 N.W.2d 174, 178 (Ct. App. 1992).

At trial, Jagusch's defense was entrapment. "Entrapment is the inducement of one to commit a crime not contemplated by him for the mere purpose of instituting criminal prosecution against him." ***State v. Hochman***, 2 Wis.2d 410, 413, 86 N.W.2d 446, 448 (1957).

> [T]he general rule is that if the criminal intent or the willing disposition to commit the crime originates in the mind of the accused and the criminal offense is completed, the fact that the opportunity is furnished or that the accused is aided in the commission of the crime in order to secure the evidence necessary to prosecute him for it, constitutes no

> defense. However, if the evil intent and the criminal design originate in the mind of the government agent, and the accused is lured into the commission of the offense charged in order to prosecute him for it, when he would not have committed an offense of that character except for the urging of the agent, no conviction may be had.

Id. at 414, 86 N.W.2d at 448.

To prove entrapment, the defendant has the initial burden to show by a preponderance of the evidence that he or she was induced by an agent for the government to commit the offense. ***State v. Saternus,*** 127 Wis.2d 460, 472, 381 N.W.2d 290, 295 (1986). Although law enforcement officers may engage in "some inducement, encouragement, or solicitation in order to detect criminals … entrapment will only be established if the law enforcement officer used *excessive* incitement, urging, persuasion, or temptation, and prior to the inducement, the defendant was not already disposed to commit the crime." ***State v. Hillesheim***, 172 Wis.2d 1, 9, 492 N.W.2d 381, 384 (Ct. App. 1992) (emphasis in original). "[E]ntrapment exists only 'where the police have instigated, induced, lured or incited the commission of the crime' to such a degree as to 'remove the element of volition from the conduct of the defendant.'" ***State v. Bjerkaas***, 163 Wis.2d 949, 955, 472 N.W.2d 615, 617 (Ct. App. 1991) (quoting ***State v. Amundson***, 69 Wis.2d 554, 565, 230 N.W.2d 775, 781 (1975)). Whether inducement exists is a question of law we review de novo. *See* ***Kersten v. H.C. Prange Co.***, 186 Wis.2d 49, 56, 520 N.W.2d 99, 102 (Ct. App. 1994) ("[W]hether the facts fulfill a particular legal standard is a question of law which we decide independently and without deference to the trial court.").

If the defendant proves he or she was induced, the burden then shifts to the State to prove beyond a reasonable doubt that the defendant was

predisposed to commit the crime, despite the government's inducement. ***Saternus,*** 127 Wis.2d at 474, 381 N.W.2d at 296. However, if the defendant does not prove inducement, the issue whether the defendant was predisposed becomes irrelevant, and "how the defendant's criminal intent originated is inconsequential." ***Id.*** at 479-80, 381 N.W.2d at 299.

The State contends the evidence regarding Jagusch's susceptibility to inducement was irrelevant because Jagusch did not first prove inducement. We agree. The facts are that Jagusch first discussed his plot to injure Geipel and Rasmussen with fellow inmates Rud and Anderson, and specifically asked Anderson if he would consider killing or injuring someone for him. Acting as an agent for the police, Anderson then wore a wire and recorded Jagusch stating that he wanted someone to injure Geipel and Rasmussen. Anderson told Jagusch he would get a friend of a friend to do the work. Special agent Ebben telephoned Jagusch and asked if Jagusch had work for him. Jagusch said he did, and he and Ebben met in Ebben's car, where they had a videotaped discussion in which Jagusch described in detail his plan to injure Geipel and Rasmussen and made Ebben an offer of money to do the work. After negotiating the prices for hits on each of the victims, Ebben accepted Jagusch's offer.

From these facts, it is evident that Jagusch's intent to injure Geipel and Rasmussen originated in Jagusch's mind, and Jagusch was not subjected to any "*excessive* incitement, urging, persuasion, or temptation" by the police to encourage him to commit the offense. *See* ***Hillesheim,*** 172 Wis.2d at 9, 492 N.W.2d at 384 (emphasis in original). Instead, through Anderson and Ebben, the police merely accommodated Jagusch's repeated requests for help from them to carry out his plan to injure Geipel and Rasmussen. Providing the defendant with an opportunity to commit the crime does not by itself constitute entrapment. *See*

id. (citing ***Hochman***, 2 Wis.2d at 414, 86 N.W.2d at 448). Given the facts and circumstances presented, it is impossible to find any basis to support Jagusch's claim of entrapment. Therefore, we conclude the expert opinion evidence regarding Jagusch's predisposition and susceptibility to inducement was properly excluded because it was irrelevant.

Next, Jagusch contends the trial court improperly denied two of his requested jury instructions and denied his objection to a remark in the prosecutor's closing argument. Because Jagusch inadequately briefed these issues in less than one full page of his brief, with no citations to legal authority and inadequate citations to the record, we decline to review them. *See* ***State v. Pettit***, 171 Wis.2d 627, 647, 492 N.W.2d 633, 642 (Ct. App. 1992); ***State v. Shaffer***, 96 Wis.2d 531, 545-46, 292 N.W.2d 370, 378 (Ct. App. 1980).

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.