COURT OF APPEALS
DECISION
DATED AND FILED

October 27, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-1643-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

MICHAEL MIRR,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: ROBERT C. CRAWFORD, Judge. *Affirmed in part; reversed in part and cause remanded.*

CURLEY, J. Michael Mirr appeals the judgment of conviction entered after a jury found him guilty of criminal damage to property and from the order denying his postconviction motion. Mirr claims the trial court erred: (1) in advising the jury panel during voir dire that Mirr had a prior criminal record and for failing to hold a hearing pursuant to § 906.09(3), STATS., to determine the

admissibility of the prior convictions; (2) in failing to follow the dictates of § 904.04(2) and articulate its analysis for permitting other crimes evidence to be admitted at trial; (3) in prohibiting Mirr from calling several witnesses; and (4) in sentencing Mirr to a sentence consecutive to time he was serving as a condition of probation. We affirm in part and reverse in part.

I. BACKGROUND.

Mirr was convicted by a jury of criminal damage to property, party to a crime, on October 3, 1997. The charge arose from an incident which occurred in a park and ride lot on June 27, 1997. The victim testified he was in his parked truck when he noticed a Honda Accord with three occupants driving around the lot for some period of time. Shortly thereafter, he heard voices on the side of his truck and saw two of his rear windows smashed in. At the same time, the victim observed two people who were standing near the rear windows run away. He was able to follow one individual, later identified as Nicholas Barbian, and the other individual ran out of sight. The victim testified that he then saw the one individual he was able to follow get into the Honda Accord, which was occupied by a third individual, the driver. He was able to block the Honda when it tried to flee the park and ride lot and he called the police. A police officer testified Mirr was identified as the individual who ran away by one of the two people arrested at the scene. A co-defendant, who stated at his guilty plea hearing that Mirr was also breaking windows, but who recanted at Mirr's trial, testified that he and a third person, not Mirr, were smashing windows because they were looking for radar devices to steal. Over Mirr's objection, the investigating officer was also permitted to testify that he saw several other cars in the lot damaged in the same fashion.

II. ANALYSIS.

Mirr's first argument is that the trial court erred when, as Mirr characterizes it, the trial court "informed the jury that the defendant … had been previously convicted of a crime" before holding a hearing on the admissibility of the prior convictions as mandated by § 906.09(3), STATS.[1] A review of the record does not support Mirr's arguments.

During voir dire, Mirr's attorney asked the jury panel the question, "Would your answer be the same if I told you that on one or two occasions my client has been convicted of a crime?" The trial court interjected, expressing its concern that the attorney was quizzing the jury on the law, and stated "I will allow for a very limited purpose evidence to be received that Mr. Michael Mirr has previously been convicted of a crime, should he choose to testify." Contrary to Mirr's argument, it was his attorney, not the trial court, who introduced the fact that Mirr had previously been convicted of a crime. Although the trial court's wording was not artfully stated, as its comments could be construed as suggesting that Mirr had been convicted of a crime, the trial court never elaborated on the nature or the number of crimes. Rather, the trial court merely advised the jury of the proper use of this information.

Mirr has also argued that the trial court failed to hold a hearing pursuant to § 906.09(3) and, in any event, did not hold a hearing prior to the trial court's remarks to the jury concerning Mirr's prior convictions. Again, the record

[1] Section 906.09(3), STATS., provides: "ADMISSIBILITY OF CONVICTION OR ADJUDICATION. No question inquiring with respect to a conviction of a crime or an adjudication of delinquency, nor introduction of evidence with respect thereto, shall be permitted until the judge determines pursuant to s. 901.04 (preliminary evidentiary questions) whether the evidence should be excluded."

does not support this claim. The record reflects that a hearing was held outside the jury's presence, although after voir dire. The State informed the court that it was their position that Mirr had three previous convictions and the State recited the type of convictions and the dates of the convictions. Mirr's attorney argued that since there were only two transactions, the court should permit Mirr to state, if he testified, that he was only convicted twice previously. The trial court responded, "Okay, overruled. A single course of conduct may give rise to several crimes. He's convicted of three crimes." This colloquy, although brief, satisfies the requirements of the statute. The trial court heard the arguments of both counsel and knew the type of convictions and the fact that all three convictions occurred in 1997. Implicit in the trial court's finding was its discretionary determination that the probative value of the prior convictions substantially outweighed the danger of unfair prejudice. The fact that the hearing took place after the trial court's brief reference to Mirr's prior convictions was made to the jury is the fault of Mirr's attorney and not the trial court. Mirr's attorney invited the trial court's comments and cannot now claim it as error. *See* ***Sailing v. Wallestad***, 32 Wis.2d 435, 446, 145 N.W.2d 725, 731 (1966).

Next, Mirr argues that the trial court erred when it permitted the State to introduce evidence that other cars were vandalized by Mirr and the co-defendant at the same time as the victim's car. The standard of review for a trial court's admission of other acts evidence is whether the trial court properly exercised its discretion. *See* ***State v. Pharr***, 115 Wis.2d 334, 342, 340 N.W.2d 498, 501 (1983). The admission of other acts evidence is governed by

§ 904.04(2).[2] Recent case law sets out the required analysis in determining whether other acts evidence can be admitted. In ***State v. Sullivan***, 216 Wis.2d 768, 771-73, 576 N.W.2d 30, 32-33 (1998), the supreme court set forth a three-step analysis. First, the trial court must determine whether the other acts evidence is offered for an acceptable purpose such as motive, opportunity, etc. If so, the second step then requires the trial court to decide if the evidence is relevant. With respect to relevance, before the evidence can be admitted the trial court must find that the proffered evidence is both related to a fact that is of consequence to the determination of the action and that the evidence has probative value. If the trial court decides that the other acts evidence passes steps one and two, the trial court then must weigh whether the probative value of this evidence is substantially outweighed by the danger of unfair prejudice. Here, the record does not contain the trial court's analysis. When a circuit court fails to set forth its reasoning, appellate courts independently review the record to determine whether it provides a basis for the circuit court's exercise of discretion. *See* ***id.*** at 781, 576 N.W.2d at 36.

A review reveals that the trial court's decision to admit the other acts evidence was a proper exercise of its discretion. The other acts evidence consisted of the jury being told that several other cars had been vandalized in a similar manner at the same time as the victim's car was damaged. Further, the jury was

[2] Section 904.04(2), STATS., reads:

> OTHER CRIMES, WRONGS OR ACTS. Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that person acted in conformity therewith. This subsection does not exclude the evidence when offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence or mistake or accident.

advised that the reason for the window breaking was in hopes of stealing radar detectors. Mirr was not arrested at the park and ride lot. His defense at trial was that he was present when the victim's window was smashed, but he denied taking part in the crime. Thus, this other acts evidence satisfies the first step as the evidence provides an acceptable purpose for its introduction; that is, a motive and identity of the parties involved. Clearly, the evidence was relevant—it was related to an issue of consequence in the trial and it was probative of the issues presented by the parties. Finally, the probative value of this other acts evidence was not outweighed by the danger of unfair prejudice. Here, the other acts crimes occurred almost simultaneously with the charged crime and the evidence was provided both by a co-defendant who actually broke the windows and the investigating officer who saw the other broken windows. The other acts evidence directly impacted on Mirr's defense. Contrast this evidence with that found improperly admitted in ***Sullivan***, 216 Wis.2d at 794, 576 N.W.2d at 41-42, where the supreme court found that the introduction of evidence, at the defendant's battery trial, of the defendant's previous arguments and verbal abuse of his wife (not the victim in the new charge) which occurred several years earlier, was inadmissible. Finally, it should be noted that the trial court, in the present case, gave a cautionary instruction to the jury advising them of the limited use of "other acts" evidence, thus clearly limiting the use of this evidence to what is permitted by § 904.04(2), STATS.

Mirr's next argument is that the trial court erred in failing to permit him to call two witnesses, his mother and Andy Wagner. Mirr argues that his mother would have provided testimony which went to the identification of the person who ran away from the scene as she would have testified that the clothing that Mirr was wearing contradicted that observed by the investigating officer when

he arrested Mirr. He also now submits that "[t]estimony from other witnesses would be important to go to the issue of the identification of the individual who ran from the scene." The argument made to the trial court however, was far more abbreviated. In reply to the trial court's request that defense counsel provide an offer of proof as to what the two witnesses would be testifying to, defense counsel only told the court that Mirr's mother would testify that she did not smell alcohol on her son when he returned home. Counsel made no specific argument as to what Andy Wagner would say. Pursuant to ***State v. Rogers***, 196 Wis.2d 817, 539 N.W.2d 897 (1995), a failure to raise specific challenges in the trial court waives the right to raise them on appeal. ***Id.*** at 825-26, 539 N.W.2d at 900. Mirr has thus waived his right to raise such arguments here.

Finally, Mirr argues, relying on ***State v. Maron***, 214 Wis.2d 383, 571 N.W.2d 454 (1997), that the sentence imposed on him is illegal because his sentence was to be served consecutive to time he was serving as a condition of probation. The State concedes that the sentence imposed on Mirr is contrary to law. The ***Maron*** case is directly on point. "We conclude that sec. 973.15(2) does not permit a court to impose a [jail] sentence consecutive to a term of probation." ***Id.*** at 394, 571 N.W.2d at 458. Thus, the trial court could not impose a jail sentence consecutive to the jail time Mirr was serving as a condition of probation in another case. As a result, the matter must be remanded for resentencing.

By the Court.—Judgment and order affirmed in part; reversed in part and cause remanded.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.