COURT OF APPEALS
DECISION
DATED AND FILED

July 19, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 99-2204-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

SCOTT D. DAHLEN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Washington County: RICHARD T. BECKER, Judge. *Affirmed.*

Before Nettesheim, Anderson and Snyder, JJ.

¶1 PER CURIAM. Scott D. Dahlen appeals from a judgment convicting him of first-degree intentional homicide and burglary armed with a dangerous weapon. He argues on appeal that there was insufficient evidence at trial to support the burglary charge. He also argues that the trial court erred by

denying his motion to suppress, by not allowing his expert to testify, by not allowing evidence to show that the victim committed suicide, and in certain of its evidentiary rulings. Because we conclude that there was sufficient evidence and that the trial court did not err, we affirm.

¶2 Dahlen was charged with the murder of his father. The homicide took place in 1992 in the apartment of Dahlen's father, Phillip Dahlen. Dahlen was charged in 1997 after he made a series of statements to law enforcement officers. He was convicted after trial and sentenced to life imprisonment on the homicide charge and to ten years, concurrent, on the burglary charge.

¶3 The first issue Dahlen raises on appeal is that there was insufficient evidence to support the burglary conviction. Specifically, he argues that burglary requires that the actor enter the dwelling of another without the owner's consent. *See* WIS. STAT. § 943.10(1)(a) (1997-98).[1] He argues that he had his parents' consent to enter their apartment where the incident occurred and therefore he cannot be guilty of burglary.

¶4 The State responds that Dahlen stipulated at the start of trial to the fact that he did not have consent to enter his parents' apartment. The record supports the State's assertion that Dahlen stipulated to this element of the crime of burglary. A defendant may be bound by his or her stipulation to the element of nonconsent in a charge of burglary. *See* ***State v. Benoit***, 229 Wis. 2d 630, 640, 600 N.W.2d 193 (Ct. App. 1999), *review denied*, ___ Wis. 2d ___, 604 N.W.2d 571 (Wis. Sept. 28, 1999) (No. 98-1531). Since Dahlen stipulated to this element of the crime, his argument must fail.

[1] All references to the Wisconsin Statutes are to the 1997-98 version.

¶5 The next issue Dahlen raises on appeal is that the trial court erred when it denied Dahlen's motion to suppress a series of statements he made to the police. Dahlen's father was killed in January 1992. Dahlen was interviewed by the police shortly thereafter. He was not interviewed by the police again until November 1993 when he was incarcerated on another matter. Following this interview, Dahlen obtained counsel from the Office of the State Public Defender. Both Dahlen and his counsel sent letters to the Germantown police and the Washington County District Attorney's Office advising them that Dahlen should not be questioned further without his counsel present.

¶6 In December 1995, Dahlen was arrested in Waukesha for operating a motor vehicle while intoxicated. At the motion hearing, the Waukesha detective who interviewed Dahlen testified as to what happened. After Dahlen was arrested, the detective found counsel's business card in Dahlen's wallet. The detective called counsel, and Dahlen was allowed to talk to him.

¶7 The detective also found the card of one of the Germantown police officers who was investigating the death of Dahlen's father. Dahlen then told the Waukesha detective to call the Germantown police and tell them that he had killed his father. Later, while the detective was escorting Dahlen to his cell, Dahlen again asked if the detective wanted to know how he did it. Dahlen then stated that he put a gun to his father's head and blew his father's head off. Dahlen also said that he shot his father in the chest. Dahlen kept repeating that he had killed his father.

¶8 The Waukesha detective then asked if Dahlen would be willing to speak to the Germantown officers, and Dahlen replied that he would. When the Germantown police came, Dahlen waived his rights and agreed to speak to the

officers. Dahlen was subsequently released into the custody of the Germantown police. When talking to the Germantown officers, Dahlen stated that his prior statements were not true.

¶9 In December 1996, Dahlen was again arrested in Waukesha for failing to return to the jail after being released erroneously. He again waived his rights and agreed to speak to the officer about the incident. Dahlen again began talking about his father's death. Dahlen was subsequently interviewed several other times and each time he waived his right to counsel.

¶10 Dahlen argues that his statements to the police should have been suppressed because of the letters that both he and his counsel had sent to the police. Although the parties have both addressed the question of whether a defendant may anticipatorily invoke his or her right to counsel, we decline to reach that issue. The record establishes that Dahlen waived his right to counsel by initiating discussions regarding the killing in his encounters with the police.

¶11 Dahlen attempts to distinguish between his conversations with the Waukesha police officers, who were investigating unrelated matters, and his conversations with the Germantown police officers, who were investigating the death of his father. He appears to argue that any statements he made to the Waukesha police about his role in his father's death are irrelevant to whether he initiated discussions with the police, and that only the conversations he had with the Germantown police are indicative of whether he initiated the conversations.

¶12 This is too artificial a view of the events. While the Waukesha police were interrogating Dahlen on matters entirely unrelated to the murder, Dahlen repeatedly interjected with references to the murder, including confessing to the act. When the Waukesha police contacted the Germantown police and the

Germantown police talked to Dahlen, this was merely a continuation of the conversations begun by Dahlen. And before each communication, Dahlen was advised of his rights and waived those rights.

¶13 When an accused has expressed his or her desire to have counsel present, he or she is not subject to further interrogation by the authorities without counsel "unless the accused himself initiates further communication, exchanges, or conversations with the police." ***Edwards v. Arizona***, 451 U.S. 477, 484-85 (1981). Assuming, without deciding, that Dahlen anticipatorily invoked his right to counsel, we conclude that the statements he made about his father's death can be used against him because he initiated the conversations with the police.[2]

¶14 Dahlen next argues that the statement he made on December 26, 1996, was involuntary because, he asserts, he was experiencing emotional problems at the time of the interview. In order to find that a statement was involuntarily given, "there must be some affirmative evidence of improper police practices deliberately used to procure a confession." ***State v. Clappes***, 136 Wis. 2d 222, 239, 401 N.W.2d 759 (1987).

¶15 The standard of review for a trial court's findings of fact is that they will not be disturbed unless they are against the great weight and clear preponderance of the evidence. *See* ***id.*** at 235. The trial court found that Dahlen did not suffer from any physical or mental illness which would affect the voluntariness of his statements, and that the police did not use any physical force,

[2] In responding to the State's argument on this point in his reply brief, Dahlen's counsel makes some objectionable and inappropriate comments about the police officers involved in this case. These kinds of statements are completely uncalled for and should not appear in a brief before this court.

threats, or promises to induce him to make the statements. These findings are not clearly erroneous. Therefore, we conclude that the statement made by Dahlen on December 26, 1996, was voluntary.

¶16 Dahlen next argues that the trial court erred when it excluded the testimony of his expert witness, Dr. Smerz. Smerz would have testified that Dahlen had a propensity to lie. The trial court rejected the testimony, finding that the probative value of this testimony was outweighed by the potential prejudicial effect on the jury. The court found that the jury might believe that the defense was offering some sort of mental defect defense. The court further found that it was up to the jury to determine the credibility of Dahlen's statements.

¶17 A trial court's decision to admit or exclude expert testimony is a discretionary decision that 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. Blair***, 164 Wis. 2d 64, 74, 473 N.W.2d 566, 571 (Ct. App. 1991) (citations omitted). Under Wisconsin law, a witness may not testify that another witness is telling the truth. *See* ***State v. Jensen***, 147 Wis. 2d 240, 249, 432 N.W.2d 913 (1988). The expert would have testified about Dahlen's truthfulness, or lack thereof. Further, there was substantial other evidence to show that Dahlen was a liar. We agree with the trial court's conclusion that the expert's proffered testimony would have invaded the province of the jury. We conclude that the court properly exercised its discretion when it excluded the testimony.

¶18 Dahlen next argues that the trial court erred when it prevented him from demonstrating that his father committed suicide. The court would not allow the evidence because it concluded that the prejudicial effect outweighed its

probative value. We agree with the trial court's conclusion that the evidence was not relevant. The evidence, which included testimony about his father's sexual activity many years before his death, and statements that his father fabricated certain stories he told about his own life, was purely speculative and would have distracted the jury from the facts of the case. Further, as the trial court stated, it was not the victim who was on trial.

¶19 Dahlen also raises three minor issues. First, he argues that the court should not have allowed the witnesses to refer to his statements as "confessions" because this implies that the statements were true. We conclude that the trial court properly rejected this argument. The question of whether the statements were true was up to the jury to decide. The jury was aware that Dahlen contested the truth of those statements. The jury was instructed that it had to determine whether it believed his statements. The use of the term "confession" did not create a presumption that the statements were true.

¶20 Next, Dahlen contends that the trial court should not have allowed the jury to see a videotape of him in jail garb. The court concluded that, given the circumstances of this case, it would be impossible to keep out the fact that Dahlen had been in custody during some of his conversations with the police. We agree.

¶21 Dahlen also contends that the trial court erred when it allowed a videotape which had been excised to omit his statement that he had passed a polygraph test. Dahlen wanted the statement included because it was not true and it would establish his propensity to lie. As we concluded earlier, however, there was plenty of evidence from which the jury could conclude that Dahlen lied. Again, we agree with the trial court's conclusion that the prejudicial effect outweighed its probative value.

¶22 As his final argument, Dahlen asserts that this court should reverse and remand for a new trial in the interests of justice because of the cumulative effect of the errors discussed above. We have concluded, however, that the trial court did not err in its rulings. We therefore decline to exercise our discretion to reverse and remand for a new trial. We affirm the judgment of the trial court.

By the Court.—Judgment affirmed.

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