

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 31, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

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No. 99-2825-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAMES A. JOHNSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Oneida County:
ROBERT E. KINNEY, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 HOOVER, P.J. James Johnson appeals a conviction for armed robbery while masked, contrary to WIS. STAT. §§ 943.32(2) and 939.641(2).¹

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

Johnson claims that the trial court erroneously admitted evidence that he was just out of prison, on parole, and was drinking in violation of parole at the time he was arrested as a suspect in this case. We agree that admission of the evidence was error, but conclude that the error was harmless. Accordingly, the judgment is affirmed.

¶2 This case arises from a gas station robbery in Minocqua. A person wearing blue jeans, a black T-shirt, gym shoes, and a white mask over his head robbed the station at approximately 9:45 p.m. The robber fled on foot. Shortly thereafter, the police observed an individual in the immediate vicinity, running along a road and then into a cemetery. Several minutes later, the police found Johnson hiding in the cemetery under a bush.

¶3 Johnson told detectives that he had been on his way from his home in Woodruff to the bars in Minocqua. When asked why he was hiding from the police, Johnson responded that "he had been out of prison now for three months and he was on parole and he had been drinking and in violation of his parole" Johnson further explained that "he was hiding because there was a lot of police in the area and he didn't know what was going on." Indeed, there were at least ten squad cars descending on the cemetery, several officers on foot, and a canine unit.

¶4 Johnson sought to exclude the evidence of his incarceration, parole status, and violation of parole conditions from the trial. He claimed that the evidence was not relevant and, even if it was relevant, its prejudicial effect substantially outweighed its probative value. The trial court recognized that the information was prejudicial, but concluded that the portion of the statement concerning Johnson's parole status was admissible on the grounds that it was

Johnson's own statement and part of the *res gestae*.² Johnson was convicted following a jury trial. Additional facts will be set forth in the discussion.

Discussion

1. Admissibility of the parole status evidence

¶5 The admission of evidence is within the trial court's discretion. *See State v. Pharr*, 115 Wis. 2d 334, 342, 340 N.W.2d 498 (1983). We will affirm if the court examined the relevant facts, applied a proper standard of law and, using a demonstrative rational process, reached a conclusion that a reasonable judge could reach. *See State v. Sullivan*, 216 Wis. 2d 768, 780-81, 576 N.W.2d 30 (1998). In considering whether the trial court applied the proper legal standard, however, no deference is due. *See State v. Keith*, 216 Wis. 2d 61, 69, 573 N.W.2d 888 (Ct. App. 1997). We also review de novo whether the evidence before the trial court was legally sufficient to support its rulings. *See id.*

¶6 Johnson claims that the trial court erroneously "concluded that anything Mr. Johnson said to the police, no matter how marginally relevant or unfairly prejudicial, was admissible simply because it was part of Mr. Johnson's statement." He contends that the evidence was not relevant and, even if relevant, the "probative value of evidence concerning his parole status was substantially outweighed by the danger of unfair prejudice."

¶7 Only relevant evidence is admissible. *See* WIS. STAT. § 904.02.³ WISCONSIN STAT. § 904.01 defines "relevant evidence" as "evidence having any

² By *res gestae*, the trial court apparently meant that the evidence of Johnson's parole status was necessary to give meaning to the entire statement. *See* BLACK'S LAW DICTIONARY 1310 (7th ed. 1999). By stating his reasons for hiding, Johnson admitted fleeing from the police.

tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Relevant evidence, however, "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice" WIS. STAT. § 904.03.

¶8 Initially, we conclude that Johnson's statement concerning his parole status was relevant. Johnson concedes that his attempt to elude the police was properly before the jury. The State could use his flight to show consciousness of guilt concerning the robbery.⁴ See *State v. Winston*, 120 Wis. 2d 500, 505, 355 N.W.2d 553 (Ct. App. 1984).⁵ Because Johnson's statement provided an explanation for his attempt to elude the police that is inconsistent with guilt for the robbery, it had a tendency to make his commission of the robbery less probable than it would be without that evidence.

¶9 Because the statement was relevant, we must examine whether its probative value was substantially outweighed by its prejudicial effect. See WIS. STAT. § 904.03. In *State v. Ingram*, 204 Wis. 2d 177, 186, 554 N.W.2d 833 (Ct. App. 1996), we acknowledged that evidence of a defendant's parole status and violation of parole conditions is inherently prejudicial. We held, however, that

³ WISCONSIN STAT. § 904.02 provides that "[a]ll relevant evidence is admissible, except as otherwise provided by the constitutions of the United States and the state of Wisconsin, by statute, by these rules, or by other rules adopted by the supreme court. Evidence which is not relevant is not admissible."

⁴ Additionally, the State could have introduced Johnson's acknowledgement that he was hiding without disclosing his full answer.

⁵ In *State v. Winston*, 120 Wis. 2d 500, 505, 355 N.W.2d 553 (Ct. App. 1984), we said: "Analytically, flight is an admission by conduct. The fact of an accused's flight or related conduct is generally admissible against the accused as circumstantial evidence of consciousness of guilt and thus of guilt itself." (Citations omitted.)

such evidence was admissible because its prejudicial effect did not substantially outweigh its probative value. *See id.* at 185. Ingram was charged with fleeing an officer. *See id.* at 180. The evidence concerning Ingram's parole was "crucial" to the State's case because it directly explained his motive for fleeing; drinking violated his parole conditions, and Ingram did not want to be caught after he had been out drinking. *See id.* at 183. We opined, however, that "we cannot imagine too many other instances where informing the jury about the defendant's current probation or parole status, or about the defendant's success under supervision, could be more relevant than prejudicial." *Id.* at 190.

¶10 In *State v. Kourtidas*, 206 Wis. 2d 574, 557 N.W.2d 858 (Ct. App. 1996), we rejected the State's attempt to use evidence that a defendant was on parole and violating his parole conditions to show that the defendant had an irresistible impulse to commit the type of crime with which he was charged. *See id.* at 586. We announced the law governing admission of a defendant's parole status:

[E]vidence of a defendant's probation or parole status and relevant conditions thereof are admissible in the proper exercise of judicial discretion if such evidence demonstrates the motive for, or otherwise explains, the defendant's alleged criminal conduct. Absent that scenario, such evidence is inadmissible because the nexus between the conduct and the potential penalty is too tenuous.

Id. at 585 (citation omitted).

¶11 In this case, the nexus required between the parole status and the criminal conduct is not present. Johnson obviously did not attempt to rob the gas station because he was on parole or because he was trying to avoid the

consequences of parole revocation. To the contrary, he acted criminally despite his status and the possible consequences.

¶12 Although neither *Ingram* nor *Kourtidias* involved a defendant's own statements regarding his parole status and the violation of parole conditions, we see no reason not to apply the *Kourtidias* rule here. A statement, even if part of the *res gestae*, must still comply with the other evidentiary rules to be admissible. Moreover, simply because the State's vehicle for introducing the parole status evidence was the defendant's own statement as opposed to a parole officer's testimony, that does not diminish or extenuate its inherently prejudicial nature. Similarly, that Johnson's words also had the effect of acknowledging his fleeing from the police does not change their prejudicial impact. The unduly prejudicial effect derives from the State's introduction in its case-in-chief of evidence that Johnson is a criminal fresh out of prison, on parole, and violating parole conditions.

¶13 Notwithstanding *Kourtidias*, the State argues that the evidence's probative value "was close to or equal in value to its prejudicial effect" because it showed "consciousness of guilt and, therefore, guilt itself." We disagree. Although Johnson's attempt to elude the police is relevant and admissible to show consciousness of guilt, the parole status evidence did not show guilt for the crime charged, but rather guilt for violating parole conditions.

¶14 Moreover, independent of *Kourtidias*, the statement's prejudicial effect substantially outweighs its probative value. Indeed, the prosecutor conceded that he could not introduce this evidence in his case-in-chief absent it being in the form of the defendant's statement. Introduction of the parole status evidence added nothing to assist the State in meeting its burden of proof. Rather,

the statement weakened the State's case by providing Johnson with an at least plausible explanation for eluding the police that was inconsistent with his guilt for the robbery.

¶15 Admitting the parole status evidence in the State's case only served to inform the jury that Johnson was recently released from prison, on parole, and violating parole conditions. It constituted an invitation to focus on Johnson's character and punish him for being a bad person regardless of his guilt of the crime charged. *See Sullivan*, 216 Wis. 2d at 783. Therefore it was error to admit Johnson's statement.

2. *Harmless Error*

¶16 Improperly admitted evidence constitutes harmless error unless “an examination of the entire proceeding reveals that the admission of the evidence has ‘affected the substantial rights’ of the party seeking the reversal.” *State v. Armstrong*, 223 Wis. 2d 331, 368, 588 N.W.2d 606 (1999) (quoting WIS. STAT. § 805.18(2)). The test for harmless error is whether there is a reasonable possibility that the error contributed to the conviction. *See State v. Patricia A.M.*, 176 Wis. 2d 542, 556, 500 N.W.2d 289 (1993). A reasonable possibility is one that is sufficient to undermine our confidence in the outcome of the proceeding. *See id.* “The conviction must be reversed unless the court is certain the error did not influence the jury.” *Sullivan*, 216 Wis. 2d at 792 (citations omitted). The burden of establishing that there is no reasonable possibility that the error contributed to the conviction is on the State. *See id.*

¶17 We conclude that admitting Johnson's full statement was harmless error. First, independent of the remainder of the State's case, the jury knew, and was entitled to know, that Johnson had attempted to elude the police. Johnson's

dilemma is that his flight was evidence of his consciousness of guilt. Absent the court's admission of his parole status and violation of parole conditions shortly after getting out of prison, the only deed the jury was aware that he could be guilty of was the robbery. Had Johnson offered some explanation for his flight other than his drinking and parole status, the State could have used his full statement in rebuttal.⁶ In this context, admission of his imprisonment and parole status was harmless error. It offered an exculpatory explanation for his flight independent of the robbery.

¶18 Second, the remainder of the State's case ineluctably tied Johnson to the robbery. Although no direct evidence implicated Johnson, the State presented a strong circumstantial case. Less than ten minutes after the robbery was reported, police spotted a suspect running across a road toward a cemetery. The road was in the immediate vicinity of the robbery location. The suspect was running in a direction consistent with where the robber ran after leaving the gas station. The suspect turned out to be Johnson. When caught, Johnson was "sweating and his glasses were fogged over." The police also observed that he looked "like he was very tired out and had been running."

¶19 Johnson initially denied ever having been near the gas station, much less south of Highway J.⁷ During their investigation, the police found four partial footprints near the gas station along the path that the robber took when he fled the station. The gas station and these footprints were approximately 560 feet south of

⁶ Johnson's defense consisted largely of pointing out weaknesses in the State's case. He did not testify.

⁷ The cemetery where Johnson was found hiding abuts the north side of Highway J.

Highway J.⁸ Johnson was present when the officers showed the footprints to a detective and overheard officers discussing footprints in the snow by the WPS building, which was south of Hwy J. Johnson then conceded that he had been south of Highway J and been near the WPS building.

¶20 The jury also heard that the shortest route from Johnson's motel, on the east side of Highway 51 to his destination, the Minocqua taverns, was on the east side of Highway 51. Yet Johnson was found on the west side of that highway. The gas station abutted the west side of Highway 51, and the WPS building was several blocks west of the highway.

¶21 The gas station attendant observed that the robber wielded a folding knife, had on a black T-shirt, and used a white plastic bag to hold the money from the cash register. A folding knife was found on Johnson's person when arrested. The police uncovered a black T-shirt and a white plastic bag while backtracking from the cemetery to the gas station. Moreover, when Johnson was found, the shirt he had on had only one button buttoned despite it being a "cooler night."

¶22 The robber fled the station with \$147.61 in currency and coins. Johnson was found with approximately \$150, including \$10 in coins. Yet, the evidence showed that Johnson had virtually no income other than the money he claimed to have won from gambling. He worked approximately ten hours per week for six dollars an hour, and his mother received his paychecks. She paid his rent and occasionally gave Johnson two or three dollars at a time.

⁸ The police made casts of the footprints and made impressions of Johnson's shoes. Although the State did not present expert testimony matching the casts to Johnson's shoes, the jury was able to view the evidence and draw its own conclusions.

¶23 Finally, the gas station attendant had observed the robber wearing a white cloth tied over his head. The police located a white mask with holes cut in it during their search. They also recovered a white sheet from the motel room where Johnson had stayed. A corner of the sheet had been torn away. An analyst examined the sheet and the mask and opined that the mask had come from the sheet in Johnson's room.

¶24 The State's circumstantial case was overwhelming. Particularly damning is the match of the mask to the sheet from Johnson's room. Given the strength of the State's case, there is no reasonable possibility that admitting the parole status evidence contributed to Johnson's conviction. Accordingly, the judgment is affirmed.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

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¶25 PETERSON, J. (*concurring*). I agree with the majority's holding that it was harmless error to admit Johnson's statement about prison and parole. However, I disagree with the majority's conclusion that Johnson's statement was relevant in the first place.

¶26 The majority reasons that Johnson's parole status was relevant because it tended "to make his commission of the robbery less probable than it would be without that evidence." Majority op. at ¶8. Although this is the only theory under which Johnson's parole status could make a fact of consequence more or less likely, this theory also begs the question: Why did the State want to introduce the evidence? Johnson did not testify and therefore the evidence could not be used to attack his credibility. Nor did the evidence provide any motive or shed any light on Johnson's intent to commit the robbery.

¶27 There is no doubt that the act of running from the police, alone, was relevant to show consciousness of guilt for the robbery. *See State v. Winston*, 120 Wis. 2d 500, 505, 355 N.W.2d 553 (Ct. App. 1984). But evidence of Johnson's parole status only provided a plausible justification inconsistent with the theory for introducing his flight in the first place. The evidence did not in any way "help[]

the State prove its case”⁹ *State v. Ingram*, 204 Wis. 2d 177, 187, 554 N.W.2d 833 (Ct. App. 1996).

⁹ “Relevancy in logic is the tendency of evidence to establish a proposition which it is offered to prove” *Miller v. State*, 53 Wis. 2d 358, 366-67, 192 N.W.2d 921 (1972) (citation omitted); *see also* MICHAEL H. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 401.1, at 203 n. 16 (4th ed. 1996) (Implicit in the definition of relevance are two requirements: “(1) The evidence must be probative of the proposition it is offered to prove, and (2) the proposition to be proved must be one that is of consequence to the determination of the action.”). The State offered Johnson’s flight as circumstantial evidence that identified Johnson as the robber. Details that Johnson was on parole and had just been released from prison only provided a reason for Johnson’s flight that was inconsistent with that proposition. The evidence, when offered by the State, should have been excluded as irrelevant.

