COURT OF APPEALS
DECISION
DATED AND FILED

June 12, 2018

Sheila T. Reiff
Clerk of Court of Appeals

Appeal No. 2017AP1439-CR **Cir. Ct. No. 2015CF204**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DYLAN JAMES SWANSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Douglas County: KELLY J. THIMM, Judge. *Affirmed*.

Before Stark, P.J., Hruz and Seidl, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. Dylan Swanson appeals a judgment of conviction for three counts of burglary as party to the crime and an order denying his

postconviction motion. Swanson argues he was denied his due process right to a fair trial because of prosecutorial misconduct. The alleged misconduct took two forms: (1) the prosecutor "overcharging" him with a total of nineteen burglary offenses, sixteen of which were dismissed at the close of the State's case based on a lack of evidence; and (2) certain comments the prosecutor made during the State's closing argument. Swanson also argues his sentences for the three burglary convictions were based on an improper factor, namely, the facts underlying the offenses for which he was acquitted.

¶2 Because his trial attorney failed to object to any of the alleged errors, Swanson argues the plain error doctrine warrants reversal. We conclude none of the alleged instances of prosecutorial misconduct rises to the level of a plain-error due process violation. We also conclude the circuit court's exercise of its sentencing discretion was based upon proper factors. Accordingly, we affirm.

BACKGROUND

¶3 In June 2015, the State charged Swanson with nineteen burglaries, all of which had been committed between August and November 2013. During that time, cabins and sheds in Douglas County had been broken into, primarily in the towns of Gordon and Wascott. A suspect in unrelated crimes, Eric Patterson, implicated Swanson and Swanson's former roommate, Jacob King, in the burglaries.[1] Upon searching Swanson's residence, police discovered a trail camera, hand-held radios, and animal pelts, all items that appeared to have been

[1] Prior to June 2015, the State had filed charges against Swanson. The State voluntarily dismissed those charges based on the unavailability of King, who had absconded. The State subsequently refiled the charges, which are at issue in the present case.

stolen in three of the burglaries. Police also found an inordinate number of power tools—far in excess of what would be considered normal[2]—that appeared to match tools stolen in the burglaries, but the officers were unable to determine from which specific locations the tools had been stolen from.

¶4 Police located King, who eventually told them he had committed "ten to fifteen" burglaries with Swanson between September and November 2013. King accompanied detectives Jeff Bethards and Mike Miller to several locations he admitted to burglarizing and described how the burglaries occurred. After being shown a map of the burglaries that had occurred during the time King and Swanson were burglarizing, King admitted they had "probably" done all of them. King told police he and Swanson would drive around in Swanson's vehicle looking for cabins with no parked vehicles and no lights on. They would break in, "grabbing whatever they could," including alcohol, tools, and "anything else they liked." King said the details of the burglaries were "fuzzy" because they would smoke marijuana and drink the alcohol they found. According to King, Swanson would then sell the stolen goods to his father.

¶5 At the preliminary hearing, the State called detective Bradley Hoyt, who testified as to the foregoing information. Swanson argued the State had failed to present sufficient information to bind him over for trial, and he urged the court commissioner to either dismiss the complaint or amend the charges to three counts of misdemeanor possession of stolen property with respect to the trail camera, hand-held radios, and animal pelts discovered during the search of Swanson's

[2] For example, the complaint identified "more than a dozen drills of the same type, multiple air compressors, multiple generators, and multiple high-end chainsaws."

residence. The court commissioner concluded that for a multi-count complaint, the State was required to show probable cause for a single felony to achieve bindover, and it had met that burden. In doing so, the commissioner remarked, "I don't believe [the State was] trying to show, hopefully, probable cause on 19 burglaries."

¶6 The State subsequently filed a nineteen-count Information, which Swanson moved to dismiss for lack of probable cause. Swanson argued the State had presented evidence to support only three specific burglaries: count one, relating to the theft of the hand-held radios; count eight, relating to the theft of the trail camera; and count nine, relating to the theft of the animal pelts. The circuit court agreed there was not probable cause for all nineteen counts presented in the Information, but it determined there was probable cause to support at least one of the charges, and the criminal complaint provided a sufficient transactional nexus to support the remainder of the charges.

¶7 A two-day trial was held in 2016. At the pretrial conference, the prosecutor represented to the circuit court that Swanson's attorney had expressed a willingness to enter into a stipulation regarding the burglaries. The prosecutor stated she believed this would result in relieving the State of its obligation to have all of the victims testify. Swanson ultimately entered into a stipulation with the State acknowledging that each victim's "building was entered into without … permission and personal items … were stolen without … permission."

¶8 During the State's opening statements at trial, the prosecutor argued to the jury that the evidence would be sufficient for the jury to find Swanson guilty of nineteen burglaries. The prosecutor specifically referenced the hand-held radios, trail camera, and animal pelts that were discovered during the search of

Swanson's residence. Swanson's attorney argued in his opening statement that those items belonged to King, who left them behind when he was "thrown out" of the apartment. He also asserted the State had no evidence tying Swanson to the remainder of the burglaries.

¶9 Through Hoyt, the State presented photographs of the cabins that had been burglarized, and he established the types of items stolen and the similar methods of entry. Hoyt and Bethards, who was also called to testify, described how police came to suspect Swanson, their interactions with King, the search of Swanson's residence, and their recovery of what they believed were stolen items. Hoyt conceded on cross-examination that the hand-held radios, the trail camera, and the animal pelts were the only items discovered in Swanson's possession that directly connected Swanson with the crimes. Many of the stolen items were never recovered.

¶10 The State's case-in-chief also included the testimony of the victims of the crimes identified in counts one, eight, and nine—i.e., the thefts of the hand-held radios, trail camera and animal pelts, respectively. The State also called Patterson, who testified that Swanson and King had told him they were responsible for the burglaries in the area and that he had given this information to police. A friend of Swanson testified that during the time period in question, Swanson would say he was "going criming" on weekends. King testified that he committed numerous burglaries with Swanson, but he did not testify in detail regarding the thefts from any specific address.[3] Indeed, he admitted on cross-

[3] In exchange for his testimony against Swanson, the State agreed to recommend that King receive one year in jail with six years' probation for his role in the crimes.

examination that he did "not exactly" know which of the burglaries he and Swanson had committed.

¶11 After the State rested, Swanson brought a motion to dismiss all but counts one, eight and nine on the basis of insufficient evidence. Following argument, the circuit court stated it had been "waiting throughout the whole case" for the State to "fill-in the blanks," for example by presenting "a deputy or a detective … saying … ['I went to [the victim's] cabin. It's located here in Douglas County and in it these items were stolen.'" The court remarked that the State was "wil[l]fully inadequate in [its] presentation of the evidence," and the court stated it had "never had it where the evidence has been so lacking to tie" a defendant to the crimes alleged.[4] The court granted Swanson's motion and dismissed all but counts one, eight and nine.

¶12 The jury returned to the courtroom and was advised that sixteen counts had been dismissed. The circuit court then instructed the jury that it would be rendering a verdict on only the three counts specified above. The jury found Swanson guilty of those crimes. The court imposed a twelve-year sentence consisting of six years' initial confinement and six years' extended supervision.

¶13 Swanson filed a postconviction motion seeking a new trial or, in the alternative, resentencing. Swanson argued the State had committed prosecutorial misconduct because it allegedly "had no intention of proving more than three of the nineteen counts of burglary that it charged" and had therefore engaged in overcharging. Swanson argued the State compounded this error in its closing

[4] We observe that, at the postconviction hearing, the circuit court stated the prosecutor's presentation of the case at trial was "woefully inadequate." *See infra* ¶26.

argument, in which it referred to "tools" and "gasoline cans," even though the remaining counts did not involve the thefts of those items. Swanson contended the State's alleged misconduct constituted a plain-error due process violation and a violation of his right to the effective assistance of counsel by virtue of his attorney's failure to object. He also sought resentencing based on what he argued was the circuit court's improper "consideration of charges for which the defendant was just acquitted."

¶14 The circuit court denied Swanson's postconviction motion following an evidentiary hearing.[5] It specifically found that the prosecutor had intended to present sufficient evidence to prove nineteen burglaries, but she had done "an inept job." The court remarked that it was unclear how the State's case development had proceeded outside the courtroom, including possible difficulties with King's anticipated testimony. The court also speculated that the prosecutor thought the parties' stipulation "pieced things together better than [it] actually did." In all, the court concluded Swanson had failed to prove prosecutorial misconduct, let alone misconduct that rose to the level of a plain-error due process violation. It also rejected Swanson's request for resentencing, reasoning that it had considered Swanson's general behavior when it sentenced him and not the specific charges for which Swanson was acquitted. Swanson now appeals.

[5] Swanson's trial counsel testified at the hearing. We need not recount that testimony in detail because Swanson does not resurrect his ineffective assistance of counsel claims on appeal.

DISCUSSION

I. Prosecutorial Misconduct

¶15 Swanson first argues he was denied his due process right to a fair trial by virtue of the prosecutor's alleged misconduct. Prosecutorial misconduct that is so serious that it "poisons the entire atmosphere of the trial" violates a defendant's right to due process. ***United States v. Pirovolos***, 844 F.2d 415, 425 (7th Cir. 1988). Swanson acknowledges that reversing a criminal conviction on the basis of prosecutorial misconduct is a "drastic step" that we approach with caution. *See* ***State v. Lettice***, 205 Wis. 2d 347, 352, 556 N.W.2d 376 (Ct. App. 1996). A "determination of whether prosecutorial misconduct occurred and whether such conduct requires a new trial is within the trial court's discretion." ***Id.***

¶16 Swanson faces the additional hurdle of arguing that the asserted misconduct in this case constituted plain error. "The plain error doctrine allows appellate courts to review errors that were otherwise waived by a party's failure to object." ***State v. Jorgensen***, 2008 WI 60, ¶21, 310 Wis. 2d 138, 754 N.W.2d 77. No bright-line rule exists to determine when there has been reversible error, but we use the doctrine sparingly, and only to correct those errors that are "fundamental, obvious, and substantial." ***Id.***, ¶1; *see also* ***id.***, ¶¶21-22 (quoting ***State v. Sonnenberg***, 117 Wis. 2d 159, 177, 344 N.W.2d 95 (1984)).

A. Overcharging

¶17 The first instance of alleged misconduct was the prosecutor's decision to charge Swanson with nineteen burglary offenses. Swanson argues "the record reviewed in its entirety clearly shows that the prosecutor had no intention

[of] proving more than three of the charges brought." A prosecutor abuses his or her charging discretion when the evidence is "clearly insufficient to support a conviction" or the prosecutor brings charges on "counts of doubtful merit for the purpose of coercing a defendant to plead guilty to a less serious offense." ***Thompson v. State***, 61 Wis. 2d 325, 330, 212 N.W.2d 109 (1973).

¶18 Swanson's argument, although somewhat unclear, appears to be that the prosecutor knew she lacked sufficient evidence to support convictions on the dismissed burglary counts, but she nonetheless "went forward to trial on nineteen counts of burglary … with no intention of proving more" than counts one, eight and nine. He argues this conduct infected the trial with unfairness because the State was allowed to "go forward and tell the jury that Dylan Swanson was a burglar," thereby "poison[ing] the jury at trial with the implication that Swanson had committed many more burglaries than the three which the State was prepared to prove."

¶19 We conclude Swanson has not met his burden of demonstrating that the prosecutor's alleged misconduct amounted to plain error. The circuit court found the State's trial presentation "inept," but it also specifically found that the State had attempted to present its case as best it could and that the prosecutor "fully intended to present evidence of 19 burglaries and she did what she thought was her best at doing it." Swanson has not convinced us that this finding is clearly erroneous, so as to support a conclusion that the court erroneously exercised its discretion in finding no prosecutorial misconduct. Ultimately, while the court dismissed the bulk of the charges against Swanson, that ruling alone does not demonstrate prosecutorial misconduct, much less a "fundamental, obvious, and substantial" error in that regard.

¶20 As the circuit court observed, the reasons for the State's inadequate presentation are unclear. It is plausible that the prosecutor believed the stipulation, combined with the testimony of Swanson's accomplice and other inculpatory witnesses, would carry the State further than it did in connecting Swanson to more of the burglaries. However, we cannot conclude the State's case was so lacking that the mere presentation of evidence on the charges that were ultimately dismissed "poisoned the entire atmosphere of the trial." *See* ***Pirovolos***, 844 F.2d at 425. Indeed, if the State's case on those counts was as vapid as Swanson suggests, it is difficult to see how the evidence could have impermissibly tainted the jury. Further to this point, Swanson's trial counsel stressed the dismissal of the sixteen charges in his closing argument, and he did so in an apparent attempt to convince the jury of the overall weakness of the State's case, including the remaining charges.

¶21 In support of his misconduct argument, Swanson primarily relies on ***Lettice*** and ***Roehl v. State***, 77 Wis. 2d 398, 253 N.W.2d 210 (1977). Neither case is on point. In ***Lettice***, we concluded the prosecutor's filing of unfounded charges against the defendant's attorney on the eve of trial was a violation of the defendant's due process rights because it was intended to hamper defense counsel's trial preparation. ***Lettice***, 205 Wis. 2d at 353-55. The charges here were not filed to disqualify Swanson's attorney or delay the trial, but rather were based on a reasonable belief that Swanson was involved in perpetrating all of the crimes.

¶22 In ***Roehl***, the defendant argued he was "irretrievably prejudiced" because an information was read to the jury that contained three counts of armed robbery for which the State was unable to produce supporting witnesses. ***Roehl***, 77 Wis. 2d at 409. The supreme court found misconduct in the State's presentation of its case at trial because the State knew it would need the witnesses

but, by the second day of trial, was aware that it could not produce them. ***Id.*** at 411. Here, by contrast, the circuit court specifically found that the prosecutor believed she could prove the burglary charges that were ultimately dismissed. Her belief turned out to be wrong, but it was not misconduct—let alone misconduct constituting plain error—for her to continue prosecuting all of the burglary charges, given that there were some factual and contextual bases to believe the defendant committed those burglaries.

B. Closing Arguments

¶23 Next, Swanson contends prosecutorial misconduct occurred during the State's closing argument. Swanson argues the State erred by commenting upon evidence that gasoline cans, tools, and other items were taken in burglaries other than those charged in counts one, eight and nine. Swanson also takes issue with the prosecutor's statement during her rebuttal remarks, in which she told the jury, "I won't dismiss or deny my disappointment that the court dismissed those 16 counts. But what we're left with is three."

¶24 Swanson offers the conclusory statement that the State's closing arguments "poisoned the entire atmosphere of the trial such that Swanson could not get a fair trial on the three counts that survived dismissal." His reasoning for this conclusion is not apparent. The jury was advised that the attorneys' arguments were not evidence. With respect to the prosecutor's references to the gasoline cans and tools, we agree with the circuit court's rationale that these were minor mistakes that did not rise to the level of plain error. The jury had already heard significant evidence regarding the theft of those items during the State's case-in-chief, and although those charges were dismissed, Swanson does not argue the evidence was improperly admitted. Moreover, during his closing argument,

Swanson's defense attorney reminded the jury that the evidence regarding the gasoline cans and tools was irrelevant.

¶25 With respect to the prosecutor's statement that she was disappointed that sixteen charges had been dismissed, we again perceive no plain-error due process violation. The prosecutor's statement reminded the jury that the majority of the burglary counts had been dismissed for insufficient evidence—something that Swanson's defense counsel repeatedly emphasized during his closing argument. Ultimately, Swanson never explains how the prosecutor's professed disappointment regarding the dismissed charges poisoned the atmosphere of the trial.

II. Sentencing Discretion

¶26 Finally, Swanson argues the circuit court erred in exercising its sentencing discretion. While remarking upon Swanson's character, the court stated at sentencing that the dismissed charges were caused by "the ineptitude of the District Attorney's office in their lack of understanding how to present those charges." The court stated the prosecutor had "dropped the ball," and it concluded it could consider Swanson's other conduct "just like it can consider uncharged offenses when sentencing a defendant." Later, when rejecting probation, the court stated:

> [W]e're talking about three convictions but a number of others that if the State hadn't screwed up, maybe there could have been convictions on but they were woefully inadequate in their presentation of … those cases. And I don't want to say got dismissed on a technicality but they couldn't prove venue on it, and they didn't provide enough detail on it, and it seemed like that evidence was there. They just neglected to present it. So, again, that's the State's fault, but he doesn't acknowledge responsibility so I don't see how placing him on probation would not unduly depreciate the seriousness of these crimes.

In remarking upon the seriousness of the offenses, the court again stated there "could have been more [offenses], as I indicated, if the State hadn't dropped the ball." Finally, in remarking upon the public protection factor, the court stated that, given the "other behavior that he was not convicted of but charged and dismissed because of the State's mistakes," it was important to construct a sentence that would deter Swanson from future criminal acts.

¶27 Swanson argues that consideration of the facts underlying offenses for which a defendant has been acquitted by virtue of a dismissal constitutes reliance upon an improper factor at sentencing. A circuit court erroneously exercises its sentencing discretion when it actually relies on a clearly irrelevant or improper factor. ***State v. Alexander***, 2015 WI 6, ¶17, 360 Wis. 2d 292, 858 N.W.2d 662. "A defendant bears the burden of proving, by clear and convincing evidence, that the sentencing court actually relied on irrelevant or improper factors." ***Id.*** We decide as a matter of law whether a factor is irrelevant or improper. *Cf.* ***State v. Loomis***, 2016 WI 68, ¶31, 371 Wis. 2d 235, 881 N.W.2d 749.

¶28 The State agrees with Swanson that, by dismissing the sixteen burglary counts after jeopardy had attached, the circuit court effectively acquitted him of those charges. However, the State argues nothing precluded the court from considering at sentencing "the facts underlying acquitted charges." To the contrary, "[i]t is well-established that sentencing courts must acquire 'full knowledge of the character and behavior pattern of the convicted defendant before imposing sentence.' Thus, a sentencing court may consider uncharged and unproven offenses *and facts related to offenses for which the defendant has been acquitted*." ***State v. Allen***, 2017 WI 7, ¶30, 373 Wis. 2d 98, 890 N.W.2d 245 (citations omitted; emphasis added). We therefore agree with the State that the

circuit court was not prohibited from considering factual matters that may have formed the basis of the charges that were dismissed mid-trial. Those were not improper factors as a matter of law.

¶29 In his reply brief, Swanson concedes that a sentencing court may consider the facts underlying offenses for which the defendant was acquitted, contrary to his initial argument. However, he asserts that under ***United States v. Watts***, 519 U.S. 148 (1997) (per curiam), the court can consider such conduct only if the government establishes that it occurred by a preponderance of the evidence. *See* ***id.*** at 149. The two cases under review in ***Watts***, however, involved adjustments to the defendants' respective base offense levels under the federal sentencing guidelines. ***Id.*** at 150-51. Swanson has not directed us to any Wisconsin case law adopting ***Watts***' "preponderance of the evidence" standard for conduct underlying an acquittal, and we are aware of none. Indeed, a review of ***Watts*** demonstrates the Court's conclusion in that regard was specifically derived from matters related to the federal sentencing guidelines, which are obviously inapplicable here. Accordingly, we conclude Swanson is not entitled to resentencing.

By the Court.—Judgment and order affirmed.

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