COURT OF APPEALS
DECISION
DATED AND FILED

February 20, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP2273-CR **Cir. Ct. No. 2007CF1230**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LENGEORGE MAURICE BURNS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Kenosha County: BRUCE E. SCHROEDER, Judge. *Affirmed.*

Before Brown, C.J., Reilly and Gundrum, JJ.

¶1 PER CURIAM. A jury convicted Lengeorge Burns of armed robbery, first-degree reckless injury, and three counts of false imprisonment. Burns was charged as a habitual offender who acted as party to the crime and while using a dangerous weapon. Burns appeals from the judgment of conviction

and from an order denying his postconviction motion. On appeal, Burns challenges the sufficiency of the evidence and the assistance rendered by trial counsel. We conclude that the evidence was sufficient and the circuit court did not err in denying his postconviction motion without an evidentiary hearing. Therefore, we affirm the judgment and order.

¶2 The charges against Burns arose from the armed robbery of a tavern. Burns concedes that the State proved the robbery and associated crimes. He concedes that he procured the vehicle used to transport the co-actors to the tavern and he drove the robbers away in the vehicle immediately after the robbery. However, he argues that the evidence was not sufficient to establish his party to the crime liability because there was no evidence that he knew the armed robbery would occur and that he intended to assist in the robbery before it was committed. Specifically, Burns claims that there was no evidence about his knowledge or intent before or during the robbery.

¶3 We will uphold a criminal conviction unless the evidence, viewed most favorably to the State and the conviction, "is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***State v. Booker***, 2006 WI 79, ¶22, 292 Wis. 2d 43, 717 N.W.2d 676 (citation omitted). If more than one inference can be drawn from the evidence, we must adopt the inference that supports the verdict. ***State v. Poellinger***, 153 Wis. 2d 493, 506-07, 451 N.W.2d 752 (1990). If any possibility exists that the jury could have drawn the appropriate inferences from the evidence to find Burns guilty, we may not overturn the verdict. ***Id.*** at 507. The standard is the same whether the evidence is direct or circumstantial. ***Id.*** Assessing the credibility of the witnesses was within the jury's province, and we defer to the jury's function of weighing and sifting

conflicting testimony. ***State v. Wilson***, 149 Wis. 2d 878, 894, 440 N.W.2d 534 (1989).

¶4 Burns argues that there was no direct evidence of his party to the crime liability, i.e., that he knew the armed robbery would occur and that he intended to assist in the robbery before it was committed. The jury was instructed that party to the crime liability arises when "a person intentionally aids and abets the commission of a crime."

> A person intentionally aids and abets the commission of a crime when acting with knowledge or belief that another person is committing or intends to commit a crime, he [or she] knowingly either assists the person who commits the crime or is ready and willing to assist and the person who commits the crime knows of the willingness to assist.
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> To intentionally aid and abet armed robbery, the defendant must have known that another person was committing or intended to commit the crime of armed robbery and he [or she] must have had the purpose to assist in the commission of that crime. However, a person does not aid and abet if he [or she] is only a bystander or spectator and does nothing to assist the commission of the crime.

¶5 The following evidence was adduced at trial. On the day of the robbery, Burns borrowed his girlfriend's vehicle. Two men exited from the vehicle at a Family Dollar store where they purchased disposable gloves. The vehicle circled the tavern's block several times. Burns' three co-actors entered the tavern and committed the crimes; Burns remained in the vehicle. The robbers fled the tavern and jumped into the vehicle. One of the fleeing men remarked, "I popped him" (a reference to a patron shot during the robbery). The vehicle was found outside the apartment of a co-actor's aunt. When police entered the apartment, Burns and his co-actors escaped through the apartment's bedroom window. Burns was arrested in the apartment complex's parking lot while trying to get a ride. Burns had $260 in

twenty dollar bills in his pocket. The tavern's stolen bank bag, which contained checks and cash, was found in the vehicle used in the robbery.

¶6 Burns does not dispute that this evidence was sufficient to substantiate his involvement in the crimes. However, he argues that the evidence was not sufficient to prove that he knew the armed robbery would occur and that he intended to assist in its commission. We agree with the State that the jury could infer from Burns' conduct that he was not a bystander or spectator. Rather, the jury could infer that he was involved in planning and intended to assist in the commission of the crimes.

¶7 Intent to aid and abet can be inferred from conduct. ***State v. Marshall***, 92 Wis. 2d 101, 122-23, 284 N.W.2d 592 (1979) (driving a get-away vehicle after the offense was completed is the type of willing participation that would constitute aiding and abetting). Jurors consider the evidence in the aggregate, not in individual pieces, and they use common sense. ***State v. Smith***, 2012 WI 91, ¶36, 342 Wis. 2d 710, 817 N.W.2d 410. The jury had sufficient evidence from which it could infer that Burns aided and abetted the armed robbery: Burns arranged for the vehicle, he waited in the vehicle while the robbery was committed, he drove the get-away vehicle, he fled police, and he had a significant amount of cash on his person when apprehended. The evidence was sufficient to convict Burns as party to the crime.

¶8 Postconviction, Burns alleged that his trial counsel was ineffective in three respects. The circuit court denied Burns an evidentiary hearing on these claims. The circuit court had the discretion to deny a postconviction motion without a hearing. ***State v. Allen***, 2004 WI 106, ¶12, 274 Wis. 2d 568, 682 N.W.2d 433.

> The circuit court may deny a postconviction motion for a hearing if all the facts alleged in the motion, assuming them to be true, do not entitle the movant to relief; if one or more key factual allegations in the motion are conclusory; or if the record conclusively demonstrates that the movant is not entitled to relief.

Id. (footnote omitted).

¶9 "There are two components to a claim of ineffective [trial] counsel: a demonstration that counsel's performance was deficient, and a demonstration that such deficient performance prejudiced the defendant. The defendant has the burden of proof on both components." ***State v. Smith***, 207 Wis. 2d 258, 273, 558 N.W.2d 379 (1997) (citation omitted).

¶10 Burns alleged in his second amended motion for a new trial that trial counsel was ineffective because he did not call Jimmie Green, a co-actor, to testify at trial. Burns claims that Green's trial testimony would have been exculpatory in light of Green's prior testimony at Burns' probation revocation hearing. In written argument to the administrative law judge presiding over the revocation hearing, Burns' trial counsel summarized Green's testimony as follows: the robbery was never discussed in front of Burns, Burns could not have known about the robbery plan from sitting in the vehicle and driving the other defendants in the vehicle, the guns and bandannas used in the robbery were not visible in the vehicle, and Green purchased the disposable gloves from the Family Dollar store. Burns contended he was prejudiced because had Green testified, as Burns desired, the jury would have heard evidence supporting Burns' claim that he had no advance knowledge that the robbery would take place.

¶11 At the postconviction motion hearing, the State argued that during the trial, Burns confirmed that he had made a strategic decision not to call Green

to testify. The circuit court noted that Green's testimony did not save Burns from having his probation revoked, and Green's testimony would not have persuaded the jury either. The circuit court denied an evidentiary hearing on this claim.

¶12 On appeal, Burns argues that trial counsel was ineffective for not calling Green to testify. This is not the issue on appeal. The issue is whether the circuit court misused its discretion in denying this claim without an evidentiary hearing. ***Allen***, 274 Wis. 2d 568, ¶12.

¶13 The record establishes that Burns decided, during trial, not to call Green as a witness. At trial, counsel recited that he and Burns had discussed the decision and had determined not to call Green. Burns' postconviction motion does not allege any facts showing that this strategic decision amounted to deficient performance. In addition, had Green testified, the State was prepared to present inconsistent statements of Green to impeach his testimony and the testimony of other co-defendants regarding Burns' knowledge of and involvement in the robbery. The value of Green's testimony would have been severely degraded. Burns' postconviction motion did not demonstrate that the outcome of the proceeding would have been altered had Green testified. The circuit court did not misuse its discretion in denying an evidentiary hearing on this issue.

¶14 Next, Burns alleged that trial counsel was ineffective because he failed to object to the use of WIS JI—CRIMINAL 173, "Circumstantial Evidence—Possession of Recently Stolen Property." The jury was instructed as follows:

> Evidence has been presented that the defendant had recently stolen property in his possession. Whether the evidence shows that the defendant participated in some way in the taking of the property, it's exclusively for you to decide. Consider the time and circumstances of the possession in determining the weight that you give to this evidence.

Burns argued that his trial counsel should have objected to this instruction because Burns' defense was that he had no knowledge of the impending robbery. Instructing the jury that Burns possessed recently stolen property, i.e., currency, was inappropriate because the State did not link the currency to the robbery via any direct testimony.

¶15 The circuit court did not err in denying an evidentiary hearing on this claim. First, there was sufficient circumstantial evidence from which the jury could properly infer that Burns possessed stolen property. Second, we agree with the circuit court that the instruction did not direct the jury to presume that such evidence was true or relieve the State of its burden at trial. The record conclusively demonstrates that Burns would not have prevailed on this claim because the instruction was not given in error.

¶16 Finally, Burns alleged that his trial counsel was ineffective because he did not object to certain of the prosecutor's comments during closing arguments. During closing arguments, the prosecutor remarked:

> We start that day with the fact that Mr. Burns and Mr. Tyson team up with Mr.—well, Mr. Burns and Mr. Green team up with Mr. Tyson. And the two of them—the three of them decide to do something. What are they going to do?
>
> Well, there's this discussion you heard the testimony that-and it comes in in a couple different ways because Charlene Tyson—she—you heard her testimony. You heard Desiree Norval. That is the girlfriend of the defendant [Burns] who says she borrows her car to the defendant [Burns].

Burns claimed that these remarks suggested to the jury that there was evidence about a discussion among co-actors, but no witness testified to the discussion. Later, the prosecutor argued:

> Knowing now that some of the glue of these statements that were shared between the co-defendants did not become part of the this record, we did not make the argument as to the third theory that the State could argue, and this is co-conspiracy that could be inferred, but there is not any direct testimony with regards to this discussion that was had between the four defendants.

¶17 Burns complains that his trial counsel should have objected to the prosecutor's suggestion that planning conversations occurred between Burns and some of his co-actors when there was no testimony that such conversations occurred. The record supports the circuit court's denial of an evidentiary hearing on this claim. Even if there was no direct evidence that Burns engaged in planning discussions, as the prosecutor later conceded in his closing argument, there was sufficient circumstantial evidence that Burns aided and abetted the robbery. The prosecutor's remarks did not stray from the evidence. "The line between permissible and impermissible argument is thus drawn where the prosecutor goes beyond reasoning from the evidence to a conclusion of guilt and instead suggests that the jury arrive at a verdict by considering factors other than the evidence." ***State v. Draize***, 88 Wis. 2d 445, 454, 276 N.W.2d 784 (1979). The prosecutor did not cross that line here.

¶18 The jury was instructed that if an attorney's remarks suggested facts that were not in evidence, the jury had to disregard that suggestion. The jury is presumed to follow the circuit court's instructions. ***State v. Truax***, 151 Wis. 2d 354, 362, 444 N.W.2d 432 (Ct. App. 1989). We cannot conclude that had trial counsel objected to these remarks, the outcome of the trial could have been different. Because the record does not establish that Burns was prejudiced by his trial counsel's failure to object, the circuit court did not err in rejecting this claim without an evidentiary hearing.

¶19 Burns seeks a new trial in the interests of justice and because his trial counsel did not provide a defense. He argues that the extent of his knowledge of the impending robbery was not fully tried. As a basis for a new trial, Burns essentially restates the arguments we have rejected in this appeal. A final catch-all plea for discretionary reversal based on the cumulative effect of nonerrors cannot succeed. ***State v. Marhal***, 172 Wis. 2d 491, 507, 493 N.W.2d 758 (Ct. App. 1992).

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2011-12).