COURT OF APPEALS
DECISION
DATED AND FILED

July 5, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP965-CR **Cir. Ct. No. 2009CF431**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANTHONY A. ACE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Jefferson County: JENNIFER L. WESTON, Judge. *Affirmed*.

Before Lundsten, P.J., Vergeront and Blanchard, JJ.

¶1 PER CURIAM. Anthony Ace appeals a judgment of conviction. The issues relate to admission of evidence and harmless error. We affirm.

¶2 Ace was charged with burglary. He was accused of being one of three men who, at approximately 3:00 a.m., broke into a house that was used to store antiques. At trial, his theory of defense was that he believed their entry into the house was with consent to select items for sale, but that, unknown to him, his companions were there to steal.

¶3 Ace first argues that the circuit court erred by admitting evidence that his two companions were convicted of the crime. The State concedes this was error, based on a case holding that codefendant guilty pleas are inadmissible hearsay. *See* ***Cranmore v. State***, 85 Wis. 2d 722, 739-40, 271 N.W.2d 402 (Ct. App. 1978). A guilty plea appears to meet the definition of a "statement" that would be covered by the hearsay rule, WIS. STAT. § 908.01 (2009-10).[1] However, in this case, the parties have not told us that evidence of *guilty pleas* was introduced, but only that the victim testified that he was aware that the codefendants had been *convicted*. It is not immediately apparent that the fact of conviction qualifies as a statement for purposes of the hearsay rule.

¶4 We also note that the objection at trial was not on hearsay grounds, but was based on the theory that, if the jury knew the codefendants were convicted, they would think Ace was guilty also. Whether the fact of conviction, as opposed to a guilty plea, is inadmissible on hearsay grounds, or on some other ground, is not a question that has been addressed by the parties, and we decline to decide that point.

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

¶5 However, even if we assume for purposes of this appeal that admission of the fact of conviction was error, we conclude the error was harmless. Ace's attorney conceded to the jury that his codefendants were there to steal, and the evidence against Ace also tended to support that conclusion. Therefore, telling the jury about the codefendants' convictions does not appear to add anything prejudicial to Ace beyond what the jury had already been told about them.

¶6 Ace next argues that the circuit court erred by admitting ten of his twenty-eight prior convictions, rather than eight. We conclude that any error was harmless. The jury was instructed that the convictions were to be used only for the purpose of judging Ace's credibility as a witness. When used for that purpose, the difference between ten and eight convictions is sufficiently minimal to be harmless.

¶7 Finally, Ace argues that the circuit court erred in excluding his testimony that his codefendant, David Meltz, told him they had consent to be in the house. The court concluded that this would be hearsay because it would be offered for the truth of the matter asserted. The State concedes that the court erred in reaching this conclusion, but argues that the error was harmless because of the strong evidence against Ace.

¶8 We agree with the State's concession that the court's ruling was error. Ace's defense was not that the intruders had consent in fact; his defense was that he lacked the requisite intent because he believed (incorrectly, he now concedes) that they had consent. Therefore, if Ace sought to testify that Meltz told him they had consent to be on the premises, the statement would not be offered to prove the truth of the matter asserted by Meltz, namely, that they had consent to be on the premises. Instead, the evidence would be offered only to show a source for

Ace's own belief that their entry was consensual. In that light, Meltz's statement would be offered more for its *falseness* than for its truth.

¶9 However, although we agree the court's ruling was error, the record shows that this ruling did not exclude any evidence that Ace sought to have admitted. The record shows that the State objected on hearsay grounds when Ace's attorney tried to ask Ace "what kind of lead" he received in a telephone call from codefendant Meltz. The first response by Ace's attorney was: "I don't anticipate he is going to testify to anything that David Meltz said." During the ensuing discussion, Ace's attorney stated that his intent was to have Ace testify that he had previously functioned as a "picker" with Meltz on other occasions, and Ace believed this was another such occasion. Again, counsel stated "we are not going to testify to anything David Meltz said." After the court ruled that Ace could not testify about what was said during the telephone call, counsel replied: "We don't intend to."

¶10 Therefore, while the court's ruling was error, it appears the ruling was ultimately superfluous because Ace was not offering testimony excluded by the court's ruling. Thus, the court's error was harmless.

By the Court.—Judgment affirmed.

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