COURT OF APPEALS
DECISION
DATED AND RELEASED

JULY 29, 1997

NOTICE

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

Nos. 96-2716-CR
97-0287-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

STEVEN W. GAUERKE,

DEFENDANT-APPELLANT.

APPEALS from a judgment and an order of the circuit court for Outagamie County: MICHAEL W. GAGE, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. Steven Gauerke appeals his conviction for burglary, as a party to the crime, having pleaded no contest to the charge and having received a ten-year prison sentence, including joint and several restitution with an accomplice. Gauerke and his accomplice burglarized Appleton East High

School, in an indiscriminate vandalism spree that caused about $20,000 in damage to school property. After sentencing, Gauerke filed a motion to withdraw his plea and to modify his sentence. To withdraw his plea, Gauerke needed to show that his plea was not intelligent and voluntary, *see* ***State v. James***, 176 Wis.2d 230, 236-37, 500 N.W.2d 345, 348 (Ct. App. 1993), and produced a manifest injustice. *See* ***State v. Woods***, 173 Wis.2d 129, 140, 496 N.W.2d 144, 149 (Ct. App. 1992). On appeal, Gauerke makes four basic arguments: (1) the plea lacked an adequate factual basis in several ways, including his lack of prior knowledge of the crime; (2) Gauerke did not understand what it meant to be a party to the crime; (3) trial counsel was ineffective, as demonstrated by a key witness' postjudgment effort to qualify some allegations she made to the police; and (4) the trial court's ten-year prison sentence was excessive. We reject these arguments and therefore affirm Gauerke's conviction.

We first conclude that Gauerke's plea had an adequate factual basis. The criminal complaint and preliminary hearing transcript supplied sufficient information of his guilt. Several individuals indicated that Gauerke admitted involvement, and Gauerke's accomplice identified him as a co-burglar. Gauerke also gave evasive answers to police questioning, *see* ***Scott v. State***, 211 Wis. 548, 556, 248 N.W. 473, 476 (1933), and the police found a knife in Gauerke's residence that the burglars took from the school. These facts, by themselves, were enough to support the plea. Moreover, Gauerke's plea constituted an admission of guilt, *see* ***State v. Rachwal***, 159 Wis.2d 494, 506, 465 N.W.2d 490, 494-95 (1991), and reversed the presumption of innocence. *See* ***State v. Koerner***, 32 Wis.2d 60, 67, 145 N.W.2d 157, 160-61 (1966). The factual basis does not become inadequate by virtue of the fact that some witnesses may clarify or qualify their stories on a postjudgment basis. Such recantations are commonplace; they

do not enlarge plea makers' rights. *See* ***Hussong v. Froelich***, 62 Wis.2d 577, 603-04, 215 N.W.2d 390, 404 (1974). Nor was Gauerke's prior knowledge of the crime essential to his guilt; the essential point was his participation in the burglary, and the criminal complaint and preliminary hearing furnished sufficient facts on this point.

Nonetheless, Gauerke identifies several specific gaps in the prosecution's case that he believes destroyed his plea's factual basis: (1) no one besides his accomplice saw him at the high school participating in the crime; (2) the only fingerprints the police recovered were those of his accomplice; (3) a lab test connected his accomplice, not him, to cigarette butts found at the high school; (4) no physical evidence tied Gauerke to the crime scene; (5) the criminal complaint falsely reported a theft of a camera from the high school; and (6) his accomplice implicated Gauerke under pressure and later repudiated those allegations. These points are not entirely accurate. The knife did tie Gauerke to the burglary. Moreover, Gauerke overestimates the value of these gaps in terms of refuting the prosecution's case; most are basically guilt neutral, neither exculpatory nor inculpatory. Besides, the prosecution supplied other facts that counterbalanced any doubts the gaps Gauerke cites might otherwise raise about the factual basis. For example, an officer testified at the preliminary hearing about Gauerke's questioning by police. Gauerke stated repeatedly during that questioning that he was so drunk the night of the burglary that he did not know whether he committed it; he may have been involved and could not rule out that possibility. Gauerke also admitted complicity to a former baby-sitter in a drunken 2 a.m. telephone conversation, expressing concern to her that his accomplice would turn him in. In short, the factual basis was adequate.

Gauerke cannot invalidate his plea on the ground that he did not understand all aspects of what it means to be a party to the crime. The complaint and preliminary hearing transcript both showed that Gauerke was a direct participant in the burglary. Direct participants in crimes are also parties to a crime. *See* ***State v. Sharlow***, 106 Wis.2d 440, 449, 317 N.W.2d 150, 154 (Ct. App. 1982). The facts left an inference that Gauerke was a direct participant, not merely an accessory. This provided a factual basis for Gauerke's guilt independent of Gauerke's misunderstanding and thereby made Gauerke's misunderstanding immaterial. Under these circumstances, Gauerke did not need to fully understanding all the details of the party to a crime doctrine; such matters were not essential to his plea. Plea makers' misunderstandings on the factual basis do not create a manifest injustice unless they have some direct, material, and practical bearing on the actual factual basis that permitted the finding of guilt. *See* ***State v. Bentley***, 201 Wis.2d 303, 313, 548 N.W.2d 59, 54-55 (1996); *cf.* ***Ernst v. State***, 43 Wis.2d 661, 672, 170 N.W.2d 713, 718 (1969) (plea misunderstandings must have some practical consequence to the result). In short, Gauerke's misunderstanding was not material and created no manifest injustice that would invalidate his plea.

Gauerke's ineffective trial counsel claims have no merit. Gauerke needed to show that the claimed ineffectiveness had a direct, material bearing on his decision to plead no contest. *See* ***Bentley***, 201 Wis.2d at 313, 548 N.W.2d at 54-55. Gauerke must show both deficient performance and prejudice. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Gauerke makes two basic claims. First, he claims that his trial counsel should have learned before the plea about a witness who he claims changed her story in his favor during postconviction proceedings. The criminal complaint reported that she identified

Appleton East High School as the burglarized school; she testified at the postconviction hearing, however, that she had never identified a particular school to the police. The criminal complaint also reported that Gauerke had told her he burglarized the school and had "his lies ready"; she stated at the postconviction hearing, however, that Gauerke had admitted only that he "was there" and "knew about it." Second, Gauerke claims that his trial counsel never informed him of the results of a pretrial jury conference before he entered his plea. He evidently believes that this ultimately had some adverse effect on his decision to plead no contest. We see nothing in either of these arguments that would constitute ineffective trial counsel.

First, we see no variations between the criminal complaint and Ramos' specific postconviction testimony that would exonerate Gauerke. Ramos' testimony was more in the nature of clarification than recantation, explaining her ignorance of the burglarized school's name and trying to narrow the content of Gauerke's remarks to her about the incident. These qualifications may have marginally weakened the strength of the criminal complaint's allegations. They did not, however, nullify the essential factual basis for Gauerke's plea. Ramos' backtracking was irresolute both in manner and substance; she qualified her reported allegations in a hesitating and insubstantial way. Moreover, the prosecution's factual basis rested on more than her allegations; she did not testify at the preliminary hearing. Further, Ramos' belated qualifications would not have materially persuaded a reasonable jury to find Gauerke innocent; she had been and continued to be Gauerke's girlfriend. *See* MCCORMICK ON EVIDENCE § 43, at 84-90 (2d ed. 1972). In short, Ramos' halfhearted clarifications continued to permit a fair-minded inference that Gauerke was guilty of the burglary. Consequently, if trial counsel ineptly overlooked Ramos, it did not affect Gauerke's substantial

rights. *See* ***Herman v. Butterworth***, 929 F.2d 623, 628 (11th Cir. 1991). Last, Gauerke has not shown how anything that took place at the jury conference could have conceivably changed his decision to plead no contest.

Finally, Gauerke argues that his ten-year prison sentence was excessive and that the trial court should have granted his motion to modify the sentence. The trial court made a discretionary decision, *see* ***State v. Macemon***, 113 Wis.2d 662, 667-68, 335 N.W.2d 402, 405-06 (1983), based on the gravity of Gauerke's offense, the attributes of his character, the public's need for protection, and the interests of deterrence. *See* ***State v. Sarabia,*** 118 Wis.2d 655, 673-74, 348 N.W.2d 527, 537 (1984). Gauerke states that the prosecution gave the trial court erroneous sentencing information, that the presentence report writer worked with Gauerke's estranged ex-brother-in-law, and that the trial court wrongly punished Gauerke for having questionable remorsefulness and failing to accept full responsibility for his criminal wrongdoing. In Gauerke's view, these matters erroneously took on the dominant role in his sentencing. We reject these arguments. Gauerke's postconviction hearing produced little material evidence on these matters, and we see no evidence that any of them ultimately had any tangible influence on Gauerke's sentence. We are satisfied that the trial court properly adhered to standard sentencing practices and rightfully based its sentence on the proper sentencing factors.

The trial court mentioned Gauerke's questionable remorsefulness and refusal to accept full responsibility in an offhanded way; they were ultimately not essential to the court's findings or critical to Gauerke's sentence. We are satisfied that the trial court placed greater emphasis on other relevant sentencing factors. Likewise, Gauerke introduced no evidence that his ex-brother-in-law had any influence on the writer of Gauerke's presentence report; Gauerke infers such

involvement without any supporting facts. In addition, the errors Gauerke alleges in the presentence report would not have had a material effect on the sentence, when compared to the severity of Gauerke's crime, his extensive criminal record, his public dangerousness, and his multiple failures on previous probation and parole supervisions. These factors, in the end, rightly assumed the dominant role in Gauerke's sentence. Moreover, the trial counsel made the trial court aware of the presentence report errors at the original sentencing hearing. Finally, the trial court's sentence was directly proportionate to the severity of Gauerke's crime, his proven dangerousness to the public, the defects in his character, and the need to deter Gauerke and other like-minded wrongdoers from such crimes. In short, Gauerke's $20,000 rampage warranted a commensurate term of incarceration, and we see nothing excessive in his ten-year prison sentence.

By the Court.—Judgment and order affirmed.

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