COURT OF APPEALS DECISION DATED AND FILED

December 30, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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

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.

No. 97-0867-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOSEPH D. HAAS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Waukesha County: MARIANNE E. BECKER, Judge. *Affirmed.*

Before Snyder, P.J., Nettesheim and Anderson, JJ.

PER CURIAM. Joseph D. Haas appeals from a judgment of conviction of felony bail jumping. He claims that a jury question existed as to whether he was not guilty by reason of a mental disease. He also argues that the trial court erroneously exercised its discretion in admitting hearsay evidence. We reject his claims and affirm the judgment.

In July 1995, Haas was on trial for more than ten counts of burglary. On the last day of the six-day jury trial, Haas did not appear for court. He was eventually found in Miami, Florida. Proceeding pro se, Haas entered a not guilty and not guilty by reason of insanity (NGI) plea to the felony bail jumping charge. He claimed that when he left the state just before the last day of his trial, he was suffering from a brief reactive psychosis occasioned by a lifetime of traumatic losses, tremendous stress from the trial, and significant concerns about the legal strategy pursued in his defense and the failure of counsel to call certain witnesses.

During the responsibility phase of the trial,[1] two expert witnesses testified that to a reasonable degree of medical certainty Haas was not suffering from any sort of mental disease or defect when he fled Wisconsin. Haas's former girlfriend testified that in the months before the trial Haas was having dizzy spells, was over tired and was "stressed out." Haas did not testify. The trial court granted the prosecution's motion for a directed verdict on Haas's NGI defense.

Haas argues that a directed verdict on his NGI defense was improper. A trial court is permitted to direct a verdict against a defendant if it finds that "there is no credible probative evidence toward meeting the burden of establishing the defense of not guilty by reason of mental disease or defect by a preponderance of the evidence after giving the evidence the most favorable interpretation in favor of the accused asserting the defense." ***State v. Leach***, 124 Wis.2d 648, 663, 370 N.W.2d 240, 249 (1985). The verdict should be directed if

[1] The first phase of the bifurcated trial determines whether the defendant is guilty of the alleged crime. *See* ***State v. Morgan,*** 195 Wis.2d 388, 405, 536 N.W.2d 425, 431 (Ct. App. 1995). The second phase addresses whether there should be criminal responsibility for the acts for which the defendant was found guilty. *See* ***id.*** at 406, 536 N.W.2d at 431. The issue is whether the defendant is excused from criminal responsibility. *See* ***id.***

there is but one inference or conclusion that can be reached by a reasonable person. *See* ***id.*** at 664, 370 N.W.2d at 249. Our standard of review is whether the trial court was "clearly wrong." *See* ***id.*** at 665, 370 N.W.2d at 249.

Haas contends that the jury, as the ultimate arbiter of credibility, could have rejected the expert testimony, and therefore, it should have been allowed to consider the NGI defense. It is true that the weight and credibility of evidence, and inferences drawn therefrom, are matters for the jury. *See* ***Holloway v. K-Mart Corp.***, 113 Wis.2d 143, 150, 334 N.W.2d 570, 574 (Ct. App. 1983). However, even if the jury rejected the expert testimony given here, there was no other evidence from which the jury could conclude that Haas suffered from a mental disease or defect at the time he fled Wisconsin.

Haas relies heavily on the histories he provided to the experts about the traumatic events in his past and his scattered recollections of his actions on the day he left Wisconsin. Haas never testified about these matters. Although the experts recounted that Haas had told them those things, these matters were not of record for consideration by the jury. Matters upon which an expert relies in formulating an opinion may be disclosed to the jury as a basis for the opinion, but those matters are not received as substantive evidence. *See* ***Heyden v. Safeco Title Ins. Co.***, 175 Wis.2d 508, 522, 498 N.W.2d 905, 910 (Ct. App. 1993), *overruled on other grounds by* ***Weiss v. United Fire & Cas. Co.,*** 197 Wis.2d 365, 382, 541

N.W.2d 753, 759 (1995). There was no substantive evidence of Haas's background and his recollection of the time he spent in flight.[2]

Even assuming the jury was to consider Haas's traumatic history and the testimony of his former girlfriend that he was very depressed, restless and that his thinking was fragmented before the burglary trial, Haas's NGI defense was subject to a directed verdict. There was absolutely no testimony that Haas suffered from any condition at the time he took flight that rendered him unable to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law. *See* ***State v. Morgan,*** 195 Wis.2d 388, 446 n.29, 536 N.W.2d 425, 447 (Ct. App. 1995) (quoting WIS J I—CRIMINAL 605). The jury could not be left to speculate on that crucial element. *See* ***Leach,*** 124 Wis.2d at 666, 370 N.W.2d at 250. Indeed, the evidence established that Haas's conduct was purposeful and calculated to avoid the consequences of his trial.[3]

The trial court correctly concluded that there was only one conclusion to be drawn from the evidence. The directed verdict was correct.

During trial, a sheriff deputy who accompanied Haas from Florida testified that he overheard Haas's conversation with an airline flight attendant in which Haas said he was afraid to return to prison. Haas contends that this was

[2] Haas's questions of the experts suggested that there was some report recounting Haas's state of mind as he sat in the Florida jail after his apprehension. Haas did not produce the record at trial and did not testify himself about his state of mind. Because the responsibility phase constitutes a civil proceeding, Haas's right against self-incrimination is not implicated by our holding that he failed to offer substantive evidence of his state of mind at the time of his flight.

[3] Haas had called his former girlfriend in Arkansas for the number of her brother-in-law in Miami. Haas was found in possession of his passport, two birth certificates, names and addresses of acquaintances in foreign countries, and foreign currency.

hearsay evidence and highly prejudicial because it suggested an alternative reason for Haas's flight from Wisconsin.

There was no objection to this testimony and Haas has waived his right to review of the issue. *See* ***State v. Boshcka***, 178 Wis.2d 628, 642, 496 N.W.2d 627, 632 (Ct. App. 1992). Haas contends that we should review his claim under a plain error rule.

The plain error rule does not provide Haas with relief. "A 'plain error' is one that is 'both obvious and substantial' or 'grave,' and the rule is 'reserved for cases where there is the likelihood that the [error] ... has denied a defendant a basic constitutional right.'" ***State v. Vinson***, 183 Wis.2d 297, 303, 515 N.W.2d 314, 317 (Ct. App. 1994) (citations and quoted sources omitted). Here the testimony was not hearsay but a party admission. *See* § 908.01(4)(b)1, STATS.; *see also* ***Beamon v. State***, 93 Wis.2d 215, 219, 286 N.W.2d 592, 595 (1980). Additionally, even if admission of the statement was error, it was harmless error. Haas made similar remarks directly to deputies and the deputies testified about them. The testimony that Haas indicated to the flight attendant that he was afraid of prison was cumulative to other evidence properly admitted. There was no plain error which needs to be addressed.

By the Court.—Judgment affirmed.

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