COURT OF APPEALS
DECISION
DATED AND FILED

SEPTEMBER 29, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-2217-CR

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DONALD MITCHELL,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Racine County: EMMANUEL VUVUNAS, Judge. *Affirmed.*

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

PER CURIAM. Donald Mitchell appeals from a judgment of conviction of party to the crime of burglary, as a habitual offender, and from an order denying his postconviction motion. He argues that he was denied a fair trial because the information was amended at trial to include the party to the crime

allegation, the prosecution was allowed for the first time to seek admission of other acts evidence after its opening statement, and the prosecution made an improper comment in its closing argument. He also argues that he was denied the effective assistance of counsel which resulted in his uninformed rejection of a plea agreement. We reject Mitchell's claims and affirm the judgment and the order.

The criminal complaint charged Mitchell and David Hansen with party to the crime of burglary, with Mitchell charged as a habitual offender. It alleged that Mitchell cut the phone line of a home, entered the home, and fled when the home's occupant awoke and started to yell. Hansen had given a statement that on the night of the burglary he and Mitchell were walking about extremely intoxicated and that Mitchell was out of sight for a few moments and returned, telling Hansen to run. Hansen stated that the next morning Mitchell said he had cut the phone line of several houses, gone into one house and ran out when the woman in the house began to yell.

The information did not cite the party to a crime statute. At the jury instruction conference, the prosecution asked for WIS J I—CRIMINAL 400, the party to a crime instruction. Mitchell objected because he had not been charged as a party to the crime and the prosecution's theory was that Mitchell was the one who had entered the home. The instruction was given.

Mitchell argues that he was prejudiced by the "on again-off again-on again use of the party to a crime statute." He claims that had he known he could be convicted as a party to the crime, he would have taken the plea offer.

Bethards v. State, 45 Wis.2d 606, 618, 173 N.W.2d 634, 641 (1970), commends the practice of including the party to a crime charge in the information when, as here, the prosecution likely knows prior to the filing of the information

that the defendant could be charged as a party to the crime. The ***Bethards*** court refused to mandate that the party to a crime statute be referenced in the information. *See* ***id.*** The failure to include that charge in the information will preclude an instruction on party to the crime liability only in "circumstances showing a detrimental effect on the defendant." ***Id.***

Here, there was no detrimental effect to Mitchell. The complaint charged Mitchell as a party to the crime. It included factual allegations that laid out a basis for the charge as a party to the crime. Nothing suggested that the proof at trial would not track the allegations of the complaint. Adding the party to the crime allegation did not change the nature of the crime or the burden of proof. Thus, Mitchell knew what the evidence was going to show.

Moreover, § 971.29(2), STATS., allows the court to amend the information at the trial to conform with the proof at trial where such amendment is not prejudicial to the defendant. The proof at trial justified the amendment of the information to include the party to the crime charge. The victim testified that she heard at least two persons conversing just prior to the door to her home being kicked in. Another witness testified that Mitchell told her that he and Hansen had gone out walking and that "they snipped" telephone wires on some houses. There was evidence that could give rise to an inference of concerted activity.

Mitchell also claims surprise with respect to the prosecution's intent to use evidence that a number of homes in the vicinity of the victim's home had cable and telephone wires cut that same night. The prosecutor mentioned such evidence in the opening statement and then a hearing was held on the admissibility of that evidence prior to the testimony of the first witness. Mitchell characterizes this evidence as other acts evidence which required the prosecution to obtain a

pretrial ruling on its admissibility. *See* § 904.04, STATS. He again suggests that had he known the other acts evidence would be used at trial, he would have accepted the plea offer.

We do not condone the prosecution's conduct here of waiting until the opening of trial to raise and obtain a hearing on the admissibility of other acts evidence.[1] That practice is inefficient and puts in peril the prosecution's preparation and intended presentation of its case.

The prosecution's delay in obtaining a hearing on the admissibility of the other acts evidence did not prejudice Mitchell. From the outset of the case, the prosecution offered a plea agreement which foreclosed it from issuing additional charges on other "referrals." Thus, right from the start Mitchell knew that the prosecution had information about cable and telephone wires being cut on the night of the burglary. Mitchell did not request an adjournment after the ruling that the evidence was admissible so he could evaluate his case in the light of something he now characterizes as critical to his decision to reject the plea offer. Further, as trial counsel confirmed, the admission of the other acts evidence had little bearing on the defense theory that it was Hansen who entered the home.

Mitchell claims that trial counsel was ineffective for not securing an earlier ruling on whether the other acts evidence would or would not be used at trial. He also contends that he rejected the plea offer because he believed he could

[1] Because Mitchell does not challenge the admissibility of the evidence, we need not decide whether the evidence was other acts evidence or merely part of the panorama of evidence needed to completely describe or confirm what occurred that night. *See* ***State v. Hereford***, 195 Wis.2d 1054, 1069, 537 N.W.2d 62, 68 (Ct. App. 1995) ("Testimony of other acts for the purpose of providing the background or context of a case is not prohibited by § 904.04(2), STATS."); ***State v. Clemons***, 164 Wis.2d 506, 514, 476 N.W.2d 283, 286 (Ct. App. 1991) (other acts evidence admissible if necessary to give a complete presentation of the case at trial).

not be convicted as a party to the crime. The right to the effective assistance of counsel applies to advice as to whether a defendant should accept or reject a plea bargain. *See* ***State v. Fritz***, 212 Wis.2d 284, 293, 569 N.W.2d 48, 52 (Ct. App. 1997). "There are two components to a claim of ineffective assistance of 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, 386 (1997) (citation omitted).

At the postconviction motion hearing, trial counsel confirmed that prior to trial Mitchell was concerned about the other uncharged acts being used against him at trial. Counsel informed Mitchell that the prosecution had not filed a motion to obtain admission of the other acts evidence and that "short of a motion, it would not be presented at trial." Counsel also advised Mitchell that if the plea offer was rejected, the prosecution would file other charges. Counsel further indicated that she did not file a motion in limine to prevent the admission of the other acts evidence because she believed it was the prosecution's obligation to file a motion to gain admission and she did not "see any reason to remind the prosecutor that that information was there." Counsel could not recall if Mitchell had informed her that if those other acts were to come in he would not go to trial. Counsel indicated that the question of whether Mitchell could be convicted as a party to the crime never came up. She did not believe that Mitchell would have known that there was a possibility that he could be charged and convicted as a party to the crime.

Counsel advanced a strategy reason for not pursuing a motion on whether the other acts evidence was admissible. We are not to second-guess trial counsel's selection of trial tactics or the exercise of professional judgment after

weighing the alternatives. *See* ***State v. Felton***, 110 Wis.2d 485, 502, 329 N.W.2d 161, 169 (1983). Trial counsel's performance was not deficient when she considered and rejected for a sound reason the course of action Mitchell now claims should have been followed.

Mitchell's claim of ineffective assistance of counsel also fails because he has not demonstrated prejudice. To prove prejudice, the defendant must show that there "'is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" ***State v. Ludwig***, 124 Wis.2d 600, 609, 369 N.W.2d 722, 726 (1985) (quoting ***Strickland v. Washington***, 466 U.S. 668, 694 (1984)). Mitchell did not testify at the postconviction hearing. Trial counsel's testimony that the question of whether Mitchell could be convicted as a party to the crime never came up is uncontroverted.[2] There is nothing in the record to substantiate Mitchell's contention that the critical factors in his decision to reject the plea offer were a belief imposed by counsel that he could not be convicted as a party to the crime and that the other acts evidence would not be used at trial. Once these developments occurred during trial, Mitchell never asked trial counsel to explore whether the plea offer was still available. Mitchell chose to proceed to trial, to test the veracity of the evidence and to see if he could obtain a sentence less than that

[2] Postconviction counsel's affidavit in support of the motion for postconviction relief indicates that Mitchell was concerned about whether he could be convicted as a party to a crime and that had Mitchell known the prosecution could get the party to a crime jury instruction, Mitchell would have taken the plea offer. Presumably the affidavit is based on what Mitchell told postconviction counsel and thus is based on hearsay. It lacks probative value in light of trial counsel's testimony. *See* ***State v. McConnohie***, 113 Wis.2d 362, 372, 334 N.W.2d 903, 908 (1983); ***State v. Simmons***, 57 Wis.2d 285, 294, 203 N.W.2d 887, 893 (1973); ***State v. Lass***, 194 Wis.2d 591, 599, 535 N.W.2d 904, 907 (Ct. App. 1995).

recommended in the plea offer. Being unhappy with the final result does not permit him to return to the path not taken. *See* ***Farrar v. State***, 52 Wis.2d 651, 662, 191 N.W.2d 214, 220 (1971) ("He chose which road he would walk down and is not to be returned to the fork or crossing so he can try the other one.").

Mitchell seeks review of an allegedly improper comment in the prosecutor's closing argument as plain error. *See* ***State v. Neuser***, 191 Wis.2d 131, 140, 528 N.W.2d 49, 53 (Ct. App. 1995) (court may overlook waiver where the error is so plain or fundamental as to affect the substantial rights of the defendant). The allegedly offending statement was: "You have to look at the two individuals, and I'm not saying look at David Hansen, who's up here and taken responsibility for his actions awaiting sentencing and compare him to the person who is rightfully asked for his constitutional rights by a jury."[3] Mitchell contends that the reference to the codefendant's conviction was an improper suggestion of Mitchell's guilt. *See* ***Cranmore v. State***, 85 Wis.2d 722, 739-40, 271 N.W.2d 402, 412 (Ct. App. 1978). He also claims that the prosecutor's statement was an improper comment on his constitutional right to a jury trial.

> The line between permissible and impermissible argument is drawn where the prosecutor goes beyond reasoning from the evidence and 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, 789 (1979). The constitutional test is whether the prosecutor's remarks "so infected the trial with unfairness as to make the resulting conviction a denial of due process." [***State v. Wolff***, 171 Wis.2d 161, 167, 491 N.W.2d 498, 501 (Ct. App. 1992)] (quoted source omitted). Whether the prosecutor's conduct affected the fairness of the trial is determined by viewing the statements in context. ***Id.*** at 168, 491 N.W.2d at 501. Thus, we examine the prosecutor's arguments in the context of the entire trial.

[3] No objection was made to the comment.

Neuser, 191 Wis.2d at 136, 528 N.W.2d at 51.

The context of the prosecutor's comment was related to the credibility of Hansen and the plausibility of Mitchell's theory of defense. The prosecutor continued: "What I'm asking you to look at is a comparison between a man who is 32 years old and a 19 year old, you have to make a decision and look at your common sense." The prosecutor went on to suggest that only in extraordinary circumstances was it probable that the nineteen year old would be the dominant force in a friendship and, therefore, the jury could reject Mitchell's theory that he was just hanging around with Hansen. The prosecutor asked the jury to find that it was Mitchell, the thirty-two-year-old man, who was the leader—the one who came up with the ideas. The prosecutor's comment was not an attempt to use Hansen's guilty plea as evidence of Mitchell's guilt. The prosecutor did not ask the jury to decide the case on improper factors.

By the Court.—Judgment and order affirmed.

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