

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 18, 2004

Cornelia G. Clark
Clerk of Court of Appeals

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 WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 03-2451-CR

Cir. Ct. No. 01-CF-126

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

BRUCE E. CAVER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Eau Claire County: ERIC J. WAHL, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Bruce Caver appeals a judgment of conviction for armed robbery. Caver argues that evidence of a nontestifying accomplice's identification of him as the perpetrator violated his right to confront his accuser. We conclude any error in this regard was harmless. Further, Caver attacks as irrelevant and prejudicial evidence that the money stolen was for Hentz-Tesch's

college tuition and that she was unable to return to school as a result of the robbery. We disagree and affirm the judgment.

BACKGROUND

¶2 Erin Hentz-Tesch and Guy Wagner were at their apartment on July 7, 2000. Two men came to the door and Hentz-Tesch let them in. One man was Joshua Schmitt, but Hentz-Tesch did not know the other man. The unknown man pulled out a knife and demanded money. Hentz-Tesch gave him \$3,200 and the man fled. Hentz-Tesch and Wagner did not initially tell the police that Schmitt was involved. However, eventually they did and Schmitt named Caver as the man with the knife. The State charged Caver with armed robbery.¹

¶3 On the day of Caver's trial, Caver stated he wanted to show that the Hentz-Tesch residence was a drug house, in order to show that Hentz-Tesch and Wagner were lying about the robbery. The court determined that bringing up the subject of drugs would be irrelevant and overly prejudicial and limited Caver to asking whether Hentz-Tesch and Wagner were engaged in illegal activity prior to, during or after the incident.

¶4 Caver objected to allowing Hentz-Tesch to testify that the \$3,200 was for tuition. He argued it was intended to elicit sympathy from the jury, and was irrelevant and prejudicial. The court stated it would allow testimony regarding why Hentz-Tesch had that much cash in her possession.

¹ Schmitt was also charged with armed robbery. The State's motion to join the two cases was denied.

¶5 When Hentz-Tesch testified, she stated that the money was for her tuition at the University of Minnesota. She added that because of the robbery she did not go back to school and instead moved to Los Angeles and worked in an office. She identified Caver as the man who robbed her. Wagner also testified that the money was for Hentz-Tesch's tuition, and identified Caver as the perpetrator.

¶6 Samuel Wampole, Schmitt's former roommate, testified that he spoke with Caver at a bar and Caver "kind of" admitted involvement in the robbery. Wampole also previously told the police that Caver stated he thought he was going to get away with it.

¶7 Finally, officer Donn Adams testified. He was asked, "How was it that you were able to determine that Bruce Caver was the person that was involved in the armed robbery?" Adams stated, "This was done through an interview with Joshua Schmitt." Caver moved for a mistrial based on Adams' statement, arguing that his right to confront witnesses against him was violated by introducing statements by Schmitt. The court noted that Adams did not say anything specific about any statement by Schmitt. The court concluded, "There had to be some ... method of getting Mr. Caver in the picture ... and what Officer Adams said was enough of a connecting point without raising further inferences." Thus, the court denied the motion.

¶8 During deliberations, the jury asked to see an exhibit containing Wampole's written statement to the police. The court sent back a redacted statement, which read:

I seen Bruce at the Bar on Water Street a few months later and I asked him if he heard anything else about the case, he told me that Josh had left town and they couldn't find the

people he and Josh robbed so he thought they would throw the case out. My conversation with Bruce only lasted about 5 min. and that's the last time I talked to him.

The jury returned a guilty verdict.

DISCUSSION

A. Right to Confront

¶9 “[T]he right of cross-examination is included in the right of an accused in a criminal case to confront the witnesses against him,” as secured by the Sixth Amendment. *Pointer v. State of Texas*, 380 U.S. 400, 404 (1965). *Bruton v. United States*, 391 U.S. 123, 137 (1968), holds that introduction of a nontestifying accomplice’s confession violates a defendant’s right to confront witnesses. Caver argues that his right to confront was violated when evidence was admitted that Schmitt implicated Caver in the robbery.

¶10 We do not need to decide whether the trial court erred because any error was harmless. The test for harmless error is “whether there is a reasonable possibility that the error contributed to the conviction.” *State v. Dyess*, 124 Wis. 2d 525, 543, 370 N.W.2d 222 (1985). A reasonable possibility is a “possibility sufficient to undermine our confidence in the conviction.” *State v. Williams*, 2002 WI 58, ¶50, 253 Wis. 2d 99, 644 N.W.2d 919.

¶11 First, we note that Adams did not directly testify that Schmitt implicated Caver in the robbery. Adams merely said he determined Caver was involved based on Adams’ interview with Schmitt. Adams did not say that Schmitt confessed or that Schmitt said Caver committed the robbery.

¶12 Second, there was sufficient additional evidence to support the jury's verdict. During their testimony, both Hentz-Tesch and Wagner identified Cave as the perpetrator. Furthermore, Wampole testified that Caver admitted that he thought he would get away with the robbery. Wampole told the police that "Josh [Schmitt] had left town and they couldn't find the people He and Josh robbed so he thought they would throw the case out." Thus, absent any reference to Schmitt, the jury could directly conclude from Hentz-Tesch, Wagner and Wampole that Caver was indeed involved in the armed robbery. Consequently, our confidence in the outcome is not undermined.

B. Evidence that the Stolen Money was for Hentz-Tesch's Tuition

¶13 Caver attacks as irrelevant Hentz-Tesch's testimony that the stolen money was for her education and that she was unable to return to school. Whether to admit evidence is addressed to the trial court's discretion. *State v. Pharr*, 115 Wis. 2d 334, 342, 340 N.W.2d 498 (1983). An appellate court will sustain an evidentiary ruling if it finds that the trial court examined the relevant facts, applied a proper standard of law and, using a demonstrative rational process, reached a conclusion that a reasonable judge could reach. *Loy v. Bunderson*, 107 Wis. 2d 400, 414-15, 320 N.W.2d 175 (1982).

¶14 Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." WIS. STAT. RULE 904.01. This is not a high hurdle. Evidence is relevant if it "tends to cast any light" on the controversy. *Zdiarstek v. State*, 53 Wis. 2d 420, 428, 192 N.W.2d 833 (1972).

¶15 Here, the fact of consequence is the source of the money that was stolen. Before trial, Caver indicated he wanted to ask Hentz-Tesch and Wagner

about the source of the money and argue that it was from the sale of drugs. The court did not allow this, but did allow Caver to ask them whether they were engaged in any illegal activity. Caver also asked them about the source of the money and how they were supporting themselves. The result of this line of questioning was to intimate that the money was obtained by illegal means and to cast doubt on Hentz-Tesch's and Wagner's credibility. Thus, Hentz-Tesch's and Wager's testimony that the money was for Hentz-Tesch's tuition became relevant in order to rebut Caver's implication that the money was obtained by illegal means.

¶16 We also conclude the testimony was not unfairly prejudicial.

Unfair prejudice results when the proffered evidence has a tendency to influence the outcome by improper means or if it appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish or otherwise causes a jury to base its decision on something other than the established propositions in the case.

State v. Davidson, 2000 WI 91, ¶73, 236 Wis. 2d 537, 613 N.W.2d 606 (citations omitted). First, a jury will appreciate that a theft of \$3,200 will have an adverse impact on the victim. Moreover, there is nothing to suggest that Hentz-Tesch's testimony regarding the intended use of the money or the fact that she was unable to return to school as a result of the robbery improperly influenced the jury. As detailed above, there was sufficient additional testimony to support the jury's verdict.

By the Court.—Judgment affirmed.

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

