COURT OF APPEALS
DECISION
DATED AND FILED

June 22, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-2616-CR **Cir. Ct. No. 02CF004873**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARK T. SMITH,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: KAREN E. CHRISTENSON, Judge. *Affirmed*.

Before Wedemeyer, P.J., Fine and Curley, JJ.

¶1 PER CURIAM. Mark T. Smith appeals from a judgment entered on a jury verdict convicting him of burglary as an habitual criminal. *See* WIS. STAT.

§§ 943.10(1)(a), 939.62 (2001–02).[1] Smith claims that: (1) the trial court erred when it refused to order a competency evaluation; (2) his right to present a defense was violated when the trial court excluded an expert witness's testimony; (3) his right to confront the witnesses against him was violated when the trial court limited his cross-examination of a State witness; (4) the prosecutor allegedly commented on his decision not to testify; and (5) the trial court erred when it denied his motion to set aside the verdict and enter a plea of not guilty by reason of mental disease or defect. We affirm.

I.

¶2 Mark T. Smith was charged with burglarizing a house at 2930-A North Booth Street in the City of Milwaukee. He pled not guilty and went to trial. At trial, a woman testified that she lived next to the house that Smith burglarized. She told the jury that on August 22, 2002, she was talking to a friend on the telephone when she heard the sound of breaking glass. The woman looked out of her bedroom window and saw a man, whom she identified at the trial as Smith, kicking out a basement window of the house. She testified that after Smith kicked out the glass, he went into the house feet first through the window. According to the woman, approximately three to five minutes later, Smith left the house with power tools in his arms. The woman called her landlord, who lived downstairs from her, and told him that someone had just broken into the house next door. The woman's landlord called the police and Smith was arrested.

[1] All references to the Wisconsin Statutes are to the 2001–02 version unless otherwise noted.

¶3 After initially denying his guilt, Smith confessed to the burglary. He told the police that he had done some work for the man who owned the house on Booth Street and knew that the man had "lots of tools." According to Smith, he went to the house and pushed in a basement window. He then went into the house through the window and took three power tools. Smith told the police that he committed the burglary "to survive in the streets."

¶4 As we have seen, a jury found Smith guilty. After the jury rendered its verdict, but before sentencing, Smith filed a "motion to set aside [the] verdict." He claimed that the real controversy was not tried due to a previously "untreated mental illness." Smith thus requested a competency evaluation and the opportunity to withdraw his not guilty plea and enter a plea of not guilty by reason of mental disease or defect. *See* WIS. STAT. § 971.06(1)(d) (plea of not guilty by reason of mental disease or defect). As proof that he suffered from a mental illness, Smith alleged that "[d]uring the trial [he] made several outbursts in front of the jury and evidence was presented to the jury of uncontrolled outbursts by the defendant at the scene of the alleged crime all consistent with the mental disorder which the defendant has been diagnosed with."

¶5 Smith also submitted a report written by John Pankiewicz, M.D. Dr. Pankiewicz examined Smith on February 7, 2003, to evaluate Smith's competency to stand trial in a different case. Dr. Pankiewicz diagnosed Smith with intermittent explosive disorder, which he defined as "a condition in which individuals experience discrete episodes of failure to resist aggressive impulses that result in serious assaultive acts or destruction of property. The degree of aggressiveness expressed during an episode is grossly out of proportion to any provocation or precipitating stressor." Nonetheless, Dr. Pankiewicz opined to a reasonable degree of medical certainty that Smith was competent.

¶6 The trial court held a hearing on Smith's motion. At the hearing, Smith's lawyer argued that Smith's condition not only affected Smith's ability to assist at trial, but interfered with his ability to take part at sentencing. The trial court orally denied Smith's motion. It concluded that a plea of not guilty by reason of mental disease or defect founded on the report would not have applied to the facts of this case:

> [F]irst of all, the issues in a [plea of not guilty by reason of mental disease or defect] relate to whether the defendant lacks substantial capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law.
>
> The case you litigated in this court was a burglary charge. It did not involve any kind of aggressive acts toward others, and the substance of the facts which constitute the offense did not involve any acting out or any aggressive conduct.
>
> ….
>
> So I don't think that a [plea of not guilty by reason of mental disease or defect] would have any relevance to this particular set of facts that [were] litigated.

It also concluded that Smith was competent at trial and for sentencing, and noted that "Mr. Smith's loss of control is very convenient to Mr. Smith."

¶7 The trial court sentenced Smith the next day. After Smith had an outburst during the prosecutor's sentencing comments, Smith's lawyer renewed the motion for a competency examination. The trial court again denied the motion: "[Smith] was evaluated for competence. He was found to be competent … First of all, Dr. Pankiewicz in his report, as I said yesterday and you well know, said your client is competent, and Judge McMahon found him competent this week."

II.

A. Competency

¶8 Smith alleges that the trial court erroneously exercised its discretion when it denied his post-trial request for a competency evaluation because, once he raised the issue of competency, the trial court was "required by law" to conduct an evaluation. He further argues that the trial court erroneously relied on Dr. Pankiewicz's report and another judge's competency evaluation in making its determination. While not fully clear on appeal, it appears that Smith claims that the trial court had reason to doubt his competency both at the time of his trial and at sentencing. We disagree.

¶9 WISCONSIN STAT. § 971.14 requires a court to order a competency hearing "whenever there is reason to doubt a defendant's competency to proceed." ***State v. Weber***, 146 Wis. 2d 817, 823, 433 N.W.2d 583, 585 (Ct. App. 1988). A person is incompetent to proceed if he or she "lacks substantial mental capacity to understand the proceedings or assist in his or her own defense." WIS. STAT. § 971.13(1). Before the defendant's competency at the time of the proceedings is determined, however, there must be some evidence raising doubt as to his or her competence or a motion setting forth grounds for the belief competency is lacking. ***State v. McKnight***, 65 Wis. 2d 582, 595, 223 N.W.2d 550, 557 (1974). A trial court's finding of whether there is a reason to doubt a defendant's competency under § 971.14 is a finding of fact that we will not overturn on appeal unless it is clearly erroneous. *See* ***id.***, 65 Wis. 2d at 596, 223 N.W.2d at 557.

¶10 We cannot say on the record before us that the trial court erroneously exercised its discretion in not ordering a competency examination. At the outset, we note that, contrary to Smith's assertion, "an attorney's statement

that he questions his client's competence is not a controlling factor for initiating competency proceedings." ***Weber***, 146 Wis. 2d at 826, 433 N.W.2d at 587. Rather, as the Judicial Council Committee's Note to WIS. STAT. § 971.13 provides:

> [c]ompetency is a judicial … determination. Not every mentally disordered defendant is incompetent; the court must consider the degree of impairment in the defendant's capacity to assist counsel and make decisions which counsel cannot make for him or her.

Judicial Council Committee's Note, 1981, WIS. STAT. § 971.13. In this case, the trial court found that Smith was able to communicate effectively with his lawyer during the trial: "I think that you [] and your client were interacting most appropriately and communicating very well until the point where your client lost control." *See* ***Weber***, 146 Wis. 2d at 828, 433 N.W.2d at 587 (trial court may conclude that there is no reason to doubt defendant's competency based on firsthand observations). This assessment is not clearly erroneous. The following evidence shows that Smith was competent to assist his lawyer during the pre-trial and trial proceedings.

- At his initial appearance, Smith told the court that he understood the charges against him and that he was required to have no contact with his father as a condition of bail. Although he refused to sign the no-contact order, there is no evidence that he did not understand what it prohibited.

- Smith corrected his criminal record at the arraignment, showing that he was following and understood the proceeding.

- Smith testified clearly and coherently at a ***Miranda-Goodchild*** hearing. Although he was argumentative at times, he did not show an inability to understand the proceeding.

- After Smith had an outburst at a hearing on his motion to suppress a witness identification, Smith's attorney

> told the court that Smith had been "significantly helpful" to him "in his observations [and] his recollection of events."
>
> • The trial court held a colloquy with Smith on his choice not to testify. During the colloquy, Smith expressed frustration at the way the police investigated his case, but indicated that he understood the right he was waiving.

The record reflects that Smith's outbursts did not interfere with his ability to understand the proceedings. Smith conducted himself properly and helped his attorney when he chose to, but became disruptive when a decision or testimony was not in his favor. As the trial court noted, Smith's behavior was "perfectly fine until I ruled against him in the motions and it was at that point that his conduct became very, very difficult, to put it nicely." The trial court had no reason to doubt Smith's competency to stand trial.

¶11 Moreover, the trial court properly relied on Dr. Pankiewicz's report and another judge's competency evaluation in denying Smith's motion for a competency hearing prior to sentencing. Dr. Pankiewicz examined Smith and found him to be competent approximately one month before the sentencing hearing in this case. Furthermore, as we have seen, according to the trial court in this case, another trial court found Smith competent within approximately one week of Smith's sentencing. Smith does not allege that there were any changes in his condition after these findings or new circumstances that warranted another competency evaluation or hearing. *See* ***State v. Meeks***, 2002 WI App 65, ¶¶60–62, 251 Wis. 2d 361, 643 N.W.2d 526, *rev'd on other grounds*, 2003 WI 104, 263 Wis. 2d 794, 666 N.W.2d 859. Accordingly, the trial court had no reason to doubt Smith's competency prior to sentencing and was, therefore, not required to order a competency evaluation.

B. Expert Testimony

¶12 At trial, Smith proffered the testimony of Robert Rollander, whom he alleged was a Milwaukee County Sheriff's Office fingerprint expert, to rebut the testimony of Detective Barry DeBraska. DeBraska testified that the police did not dust the crime scene for fingerprints because dust and moisture would have prevented the recovery of fingerprints:

> The glass [from the basement window] was extremely filthy, and latent fingerprints do not adhere to extremely filthy surfaces.
>
> ….
>
> [W]hen I observed the interior of this home, these items were in an extremely dusty condition. This home was being rehabilitated, and there were saws being used, several different types of saws, [that] by my determination there, were creating dust everywhere. … [W]hen you have dust on any surfaces as there were on many of these tools, you don't leave behind latent fingerprints.
>
> ….
>
> [I]t was raining out that day. These items came in contact with some degree of moisture. There was moisture misting in the air as well as rain. They weren't soaking wet. They were – nonetheless, they were damp, and, again, that causes a problem if you even attempt to lift latent fingerprints.

After DeBraska's direct-examination, Smith proffered Rollander's testimony, alleging that Rollander would testify that it may have been possible to recover fingerprints from the scene. The trial court denied Smith's request, finding that Rollander's proposed testimony was irrelevant.

¶13 Smith claims that the exclusion of Rollander's testimony violated his right to present a defense. "[T]he test for whether the exclusion of evidence violates the right to present a defense has been stated as an inquiry into whether

the proffered evidence was 'essential to' the defense, and whether without the proffered evidence, the defendant had 'no reasonable means of defending his case'"[2] ***State v. Williams***, 2002 WI 58, ¶70, 253 Wis. 2d 99, 644 N.W.2d 919 (quoted source omitted). Whether the application of an evidentiary rule deprives a defendant of his right to present a defense is a question of constitutional fact that we review *de novo*. ***Id.***, ¶69.

¶14 Smith has not shown that the exclusion of Rollander's testimony left him with no reasonable means of defending his case. He claims that Rollander's testimony, that the police may have been able to recover fingerprints, would have bolstered his defense that the police framed him for the burglary by not collecting exculpatory evidence. Smith was able to raise this issue, however, during his cross-examination of DeBraska. During an extensive cross-examination, DeBraska admitted that there was a possibility that fingerprints could have been collected. Smith was then able to present this point during his closing argument, where he argued that the police could have lifted fingerprints, but did not, as part of his defense that the police did not perform a proper investigation. Under these circumstances, testimony from Rollander as to whether or not it may have been

[2] On appeal, Smith raises the two-part framework for determining the admissibility of expert testimony set out in ***State v. St. George***, 2002 WI 50, 252 Wis. 2d 499, 643 N.W.2d 777. The first part requires the defendant to show: (1) the testimony qualifies as expert testimony under WIS. STAT. RULE 907.02; (2) the testimony was clearly relevant to a material issue in the case; (3) the testimony was necessary to the defendant's case; and (4) the probative value of the testimony outweighed its prejudicial effect. ***St. George***, 252 Wis. 2d 499, ¶54. Smith did not argue these elements before the trial court. Thus, we use the general test, which addresses the third element of the first part of the ***St. George*** test. *See* ***McClelland v. State***, 84 Wis. 2d 145, 158, 267 N.W.2d 843, 849 (1978) ("'This court has not looked with favor upon claims of prejudicial error based upon the trial court's failure to act when no action was requested by counsel.'") (quoted source omitted); *see also* ***State v. Williams***, 2002 WI 58, ¶¶69–73, 253 Wis. 2d 99, 644 N.W.2d 919 (applying general form of test to defendant's claim that his right to present a defense was violated).

possible to lift fingerprints was not essential to Smith's defense. Smith had a reasonable means of presenting and arguing the theory that he was framed.

C. Cross-Examination

¶15 At trial, Detective Octavio Delgado testified that he interviewed Smith about the burglary, and that during the interview Smith confessed. On cross-examination, Smith's lawyer asked Delgado about what the lawyer claimed was Delgado's involuntary transfer out of the vice department. The prosecutor objected on the ground that the evidence was not relevant and the trial court excused the jury. Smith's lawyer then explained that he wanted to ask Delgado about a "prior disciplinary record [] because it does go to [Delgado's] credibility." The trial court allowed Smith's lawyer to question Delgado about the transfer. Delgado told the trial court that he was a party to a then-pending federal civil lawsuit regarding the involuntary transfer, but that he did not wish to discuss the matter without his attorney. The trial court ruled that the federal lawsuit was not relevant:

> [W]e are not going into whatever the allegations in a pending federal lawsuit are at this time. If you want to do that, then there should have been a motion with all sorts of material so that it could have been subject to some kind of appropriate review in advance.
>
> ….
>
> You have not yet established that there is anything out there that's relevant to credibility to my satisfaction.

In response, Smith's attorney explained that he was not going to question Delgado about the lawsuit itself, but that he wanted to ask Delgado about "whether he had been disciplined for his handling of witness information, and he alleges as the

plaintiff in the lawsuit that indeed he was transferred due to his handling of alleged witness information."

¶16 The trial court reiterated its finding that the lawsuit was irrelevant and further concluded that it would be prejudicial and confuse the jury. Nonetheless, it permitted Smith's lawyer to make an offer of proof "for the record." As an offer of proof, Smith's lawyer alleged that in a prior case Delgado took a statement from a witness who had positively identified a burglary suspect. According to Smith's lawyer, the case was later dismissed because the defendant was incarcerated at the time of the alleged burglary.

¶17 The prosecutor then suggested that it might be helpful if he talked to Delgado. The trial court agreed and, after the prosecutor talked to Delgado, he told the court that Delgado told him that Smith's lawyer had raised the same issue in a prior case in which Delgado was scheduled to testify. According to the prosecutor in this case, the prosecutor in the prior case wrote a letter to the trial court indicating that the Milwaukee Police Department did not believe that there was any merit to the allegations against Delgado. The trial court reaffirmed its ruling, and the cross-examination of Delgado resumed.

¶18 Smith alleges that the trial court's ruling violated his right to confront Delgado. He further contends that the trial court erroneously exercised its discretion because its decision to limit his cross-examination of Delgado "was based primarily on the grounds that defense counsel had not previously made the court aware of the evidence," and argues that he should have been able to cross-examine Delgado under WIS. STAT. RULE 906.08(2). We disagree.

¶19 The constitutional right to confront a witness is not absolute. ***State v. McCall***, 202 Wis. 2d 29, 43, 549 N.W.2d 418, 424 (1996). "'[T]rial judges

retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant.'" ***Id.***, 202 Wis. 2d at 44, 549 N.W.2d at 424 (quoted source omitted).

¶20 In this case, the record shows that the trial court did not deny Smith's request to cross-examine Delgado about a prior witness statement because Smith failed to timely raise the issue. Indeed, as we have seen, the trial court gave Smith's lawyer an adequate opportunity to explain why the evidence was admissible and relevant. Instead, it denied Smith's motion because it found that the evidence was irrelevant and prejudicial:

> I don't think whether he was disciplined for anything, if this comes out of an allegation in a lawsuit, it is not something that's established and I don't think that it is relevant. I think that it clearly is a side issue. It is more prejudicial than it is relevant to anything. It's collateral. It's going to confuse the jury, and we're not going to do it.

This was a valid exercise of the trial court's discretion. *See* ***id.*** Smith's lawyer did not offer any evidence to substantiate the misconduct allegation and could not explain how it was relevant to this case.[3]

¶21 Moreover, cross-examination in connection with prior conduct that would be permitted under WIS. STAT. RULE 906.08 to test a witness's credibility

[3] The trial court erroneously exercised its discretion when it heard the prosecutor's testimony on what Delgado told him about the pending lawsuit. The prosecutor was not sworn as a witness, *see* WIS. STAT. RULE 906.03(1), and statements of counsel are not evidence, WIS JI—CIVIL 110. Nonetheless, we can uphold a discretionary decision if there are facts of record which would support the court's decision had discretion been exercised on the basis of those facts. ***Liddle v. Liddle***, 140 Wis. 2d 132, 150–151, 410 N.W.2d 196, 204 (Ct. App. 1987). As we have seen, the record in this case supports the trial court's exercise of discretion.

may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. ***McClelland v. State***, 84 Wis. 2d 145, 156–157, 267 N.W.2d 843, 848 (1978); *see also* WIS. STAT. RULE 904.03. As we have seen from the trial court's statement quoted above, the trial court appeared to weigh the probative value of the proffered testimony against its prejudice. *See* ***Schneller v. St. Mary's Hosp. Med. Ctr.***, 162 Wis. 2d 296, 311–312, 470 N.W.2d 873, 878–879 (1991) (a trial court's finding of fact may be implicit from its ruling). Given the lack of supporting evidence, the relevancy of Delgado's alleged misconduct was substantially outweighed by its potential for unfair prejudice. Smith's right of confrontation was not violated.

D. Prosecutor's Closing Statement

¶22 Smith argues that the prosecutor impermissibly commented on his decision not to testify during the prosecutor's closing argument. Smith did not object, however, to the prosecutor's closing remarks. The State thus contends that the issue is waived. *See* ***State v. Guzman***, 2001 WI App 54, ¶25, 241 Wis. 2d 310, 624 N.W.2d 717 ("when a timely objection is not made challenging the closing remarks of the prosecutor, a defendant waives his or her right to a review on that issue"). Smith did not file a reply brief. Accordingly, we deem the State's claim that Smith waived any objection to the prosecutor's closing argument admitted. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493, 499 (Ct. App. 1979) ("'Respondents on appeal cannot complain if propositions of appellants are taken as confessed which they do not undertake to refute.'") (quoted source omitted).

E. Plea of Not Guilty by Reason of Mental Disease or Defect

¶23 Smith contends that the trial court erred when it denied his motion to set aside the verdict and enter a plea of not guilty by reason of mental disease or defect. Smith alleges that "[a]lthough somewhat inartfully stated, the sum and substance of [his] motion to 'set aside the verdict' was for a new trial on the grounds that the real controversy (i.e. Smith['s] mental illness and his responsibility for the crime) had not been tried." (Footnote omitted.) We disagree.

¶24 Under WIS. STAT. § 752.35, we may reverse for a new trial if the real controversy has not been fully tried or if it is likely for any reason that justice has miscarried. ***State v. Wyss***, 124 Wis. 2d 681, 735, 370 N.W.2d 745, 770 (1985), *overruled on other grounds*, ***State v. Poellinger***, 153 Wis. 2d 493, 451 N.W.2d 752 (1990). In this case, the essence of Smith's claim is that the trial court should have allowed him to withdraw his not guilty plea and enter a plea of not guilty by reason of mental disease or defect.

¶25 A plea of not guilty by reason of metal disease or defect must be entered sufficiently in advance of trial so as to permit suitable notice to the prosecutor and time for implementation of the procedures mandated by WIS. STAT. § 971.16. ***State v. Kazee***, 192 Wis. 2d 213, 222, 531 N.W.2d 332, 336 (Ct. App. 1995). If the plea is entered late, the defendant must show why the change of plea was entered late and why it is appropriate by making an offer of proof laying out the elements of the defense, as set out in WIS. STAT. § 971.15 (mental responsibility of a defendant), which show a basis for the plea. ***Kazee***, 192 Wis. 2d at 222–223, 531 N.W.2d at 336. The decision whether to grant a defendant's motion to change his or her plea from not guilty to not guilty by

reason of mental disease or defect is within the trial court's discretion. ***Id.***, 192 Wis. 2d at 221, 531 N.W.2d at 335. We will not disturb that decision as long as it is "'consistent with the facts of record and established legal principles.'" ***Id.***, 192 Wis. 2d at 222, 531 N.W.2d at 336 (quoted source omitted).

¶26 Smith's claim fails on the second prong. He claims that Dr. Pankiewicz's report provides an adequate basis for a new trial.[4] We disagree. Dr. Pankiewicz's report addresses whether Smith was competent to stand trial under WIS. STAT. § 971.13. As we have seen, the standard for determining competency under § 971.13(1) is whether a defendant "lacks substantial mental capacity to understand the proceedings or assist in his or her own defense." Whether a defendant should be allowed to enter a plea of not guilty by reason of mental disease or defect, however, requires a showing that the defendant "lacked substantial capacity either to appreciate the wrongfulness of his or her conduct or conform his or her conduct to the requirements of law" at the time the crime was committed. *See* WIS. STAT. § 971.15(1). Dr. Pankiewicz's report did not address whether Smith lacked substantial capacity when he committed the burglary.

¶27 The elements of burglary are that the defendant: (1) entered a building or dwelling; (2) entered without the consent of the person in lawful possession; (3) knew that the entry was without consent; and (4) entered the building with intent to steal. WIS JI—CRIMINAL 1421. As we have seen, the trial court determined that Smith's diagnosis was not relevant to the burglary charge and we agree. The elements of burglary do not require a showing of aggressive

[4] In his brief on appeal, Smith refers to a report written by Kenneth Smail, Ph.D. The only report attached to Smith's motion to change his plea was the report written by Dr. Pankiewicz. Thus, we assume that Smith is referring to Dr. Pankiewicz's report.

behavior. Moreover, the facts, as they were presented at trial, do not show aggressive behavior. The only aggressive act Smith committed was to break a window. He has not presented any evidence that shows that this was anything other than a premeditated attempt to enter the house to take some tools. Thus, in this case, the real controversy—whether Smith was guilty beyond a reasonable doubt of the crime of burglary—was fully tried. Accordingly, the trial court properly denied Smith's motion for a new trial.

By the Court.—Judgment affirmed.

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