COURT OF APPEALS
DECISION
DATED AND FILED

September 3, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP2799-CR **Cir. Ct. No. 2001CF400**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TIMOTHY M. ALI,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Jefferson County: JOHN M. ULLSVIK, Judge. *Affirmed.*

Before Dykman, P.J., Higginbotham and Bridge, JJ.

¶1 PER CURIAM. Timothy Ali appeals a judgment, entered after a trial to the court, convicting him of criminal damage to property and possession of burglarious tools, both counts as party to a crime. Ali also appeals the order denying his motion for postconviction relief. Ali argues the trial court committed

reversible error by admitting testimony about Ali's possession of evidence that had been suppressed in an earlier case. We reject Ali's arguments and affirm the judgment and order.

BACKGROUND

¶2 The State charged Ali with criminal damage to property and possession of burglarious tools, both counts as party to a crime. The charges arose from allegations that Ali[1] and two co-defendants, William Hermann and Tony Wilson, damaged a soda machine in a grocery store parking lot while attempting to break into it with "some type of pry bar." According to the complaint, City of Jefferson police responded to the scene and stopped a vehicle occupied by Ali, Hermann and Wilson. During the course of their investigation, police discovered a tire iron and five barrel key rings—commonly used for opening vending machines—in the parking lot. Additional barrel key rings were found in the locked glove box of the car.

¶3 Ali filed a motion in limine to exclude testimony from Sergeant Jay Johnson, a Greenfield police officer, regarding a previous incident in which Ali was alleged to have possessed several barrel keys. The State sought to introduce this evidence to prove both identity and intent. In the subject case, Milwaukee County Circuit Court case No. 1998CM13167, Ali was charged with receiving stolen property, but the matter was ultimately dismissed after the court suppressed evidence—specifically, cash and the barrel keys—as fruit of an illegal stop. Ali argued that the admission of testimony regarding his possession of barrel keys

[1] Although the Complaint and Information identify the defendants as William J. Hermann, Jude C. McInnes and Tony C. Wilson, an amended Information clarifies that "Jude C. McInnes" is Ali's alias.

would be both "irrelevant to the proceedings" and unfairly prejudicial. The court ultimately admitted the subject testimony. Ali was convicted after a trial to the court and sentenced to one year of initial confinement and one year of extended supervision on the possession of burglarious tools conviction. With respect to his conviction for criminal damage to property, the court assessed costs against Ali.

¶4 Ali filed a motion for postconviction relief, claiming the officer's testimony was barred by issue preclusion. The circuit court denied the postconviction motion concluding Ali forfeited the issue preclusion argument by failing to adequately raise it at trial. The court nevertheless concluded that, even if the issue were preserved, public policy and circumstances of the Milwaukee County case would have allowed the court to independently determine the testimony was admissible as other acts evidence in the present case. Finally, the court concluded the error, if any, in admitting the other acts evidence was harmless. This appeal follows.

DISCUSSION

¶5 Ali argues the court erred by concluding that he had forfeited his issue preclusion argument. Generally, "an objection to the admission or exclusion of evidence must be specific and state the ground of the objection." ***State v. Hoffman***, 240 Wis. 142, 150, 2 N.W.2d 707 (1942). Further, "[o]bjections to the admissibility of testimony not specific enough to raise the precise question upon which the objector relies in the trial court are insufficient in this court." ***Id.*** at 151. Issue preclusion limits the relitigation of issues that have been decided in a previous case. ***State v. Miller***, 2004 WI App 117, ¶19, 274 Wis. 2d 471, 683 N.W.2d 485. "The burden is on the party asserting issue preclusion to establish that it should be applied." ***Id.***

¶6 Here, Ali concedes that neither his motion nor counsel's argument at the motion hearing specifically identified issue preclusion as grounds for excluding Johnson's testimony. Ali nevertheless claims that both the State and the court knew issue preclusion was the grounds for the motion. We are not persuaded. At the motion hearing, the prosecutor expressed awareness that there might be a problem with using evidence that had been suppressed in another case; however, the prosecutor made no mention of issue preclusion. Rather, the only legal theory mentioned by the prosecutor was "law of the case." Similarly, although the court discussed whether it was bound by the other court's decision regarding admissibility of the barrel key rings, it acknowledged it had not done research on the question and never specifically mentioned "issue preclusion" as the theory for excluding the testimony. Based on this record, we cannot conclude that Ali adequately preserved this argument for appeal.

¶7 We nevertheless conclude that the error, if any, in admitting Johnson's testimony was harmless. The test for harmless error is "whether there was a reasonable possibility that the error contributed to the conviction." ***State v. Dyess***, 124 Wis. 2d 525, 542-43, 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.

¶8 At trial, Megan Spang testified that she saw a man in front of a County Market grocery store attempting to pry the lock off a vending machine with an object about two and one-half feet long. Spang watched the man for five or ten minutes before calling the police. During her conversation with the dispatcher, Spang described the man's height, clothes and short "spikey" hair.

¶9 Officer Karen Hudy responded to the grocery store and as she arrived in the parking lot, she saw a man matching the description from dispatch getting into a car. The car was parked in the third marked stall from the vending machines, approximately fifty feet away. From that vantage point, as evidenced by photographs introduced at trial, there is a clear view of the machines.

¶10 As Hudy approached, the car started to pull away but was stopped before it left the parking lot with the assistance of Joe Szwec, another officer who arrived at the scene. Ali, the car's driver, was one of three occupants, and falsely identified himself to the officers as Jude McInnes. Ali told the officers that he and Wilson stayed in the car while Hermann went to the vending machines.

¶11 Szwec testified that the locking mechanism on one of the vending machines had been damaged, and confirmed that a metal bar covering the barrel key slot had been almost completely pried off. Szwec opined that a tire iron could have made the pry marks. Szwec found a tire iron about twenty feet from where Ali's vehicle was parked, along with what would have been a straight path leading from the machine to the vehicle. Further, Hudy found several barrel key rings on the ground near where Ali's vehicle had been parked.

¶12 Upon a search of the vehicle, the officers discovered a screwdriver, a baseball cap with attached wig, a bent coat hanger and a wooden garden tool handle. During a subsequent search pursuant to a warrant, another screwdriver and a ring of barrel keys were found locked in the glove compartment. A hammer and hacksaw were discovered in the trunk of the car.

¶13 Ali focuses on the State's motion to admit Johnson's testimony as evidence of its importance to his ultimate conviction. That the State initially thought the testimony worth admitting, however, does not mean it ultimately

impacted the outcome in a way that undermines our confidence in the conviction. Despite Ali's argument to the contrary, we conclude the court was presented with strong evidence of Ali's guilt. The witness and officers' respective testimonies, combined with the discovery of barrel key rings and a tire iron in close proximity to Ali's vehicle, exhibit Ali's tacit consent for Hermann to break into the vending machine. A person who conspires to commit a crime is guilty not only of the intended crime but also any other crime that is a natural and probable consequence of the intended crime. ***State v. Hecht***, 112 Wis. 2d 28, 36, 331 N.W.2d 639 (1983). Because damaging a vending machine is a natural and probable consequence of breaking into the machine, Ali was guilty not only of conspiring to break into the machine but also of damaging the machine during that process. Further, the evidence shows Ali aided Hermann by driving the "getaway car." *See* ***Carter v. State***, 27 Wis. 2d 451, 454-55a, 134 N.W.2d 444, 446 (1965) (recognizing that lookout and getaway driver properly convicted of principal offense as party to the crime). Additionally, by giving the police a false identity, Ali arguably demonstrated consciousness of guilt. *See* ***State v. Bauer***, 2000 WI App 206, ¶6, 238 Wis. 2d 687, 617 N.W.2d 902.

¶14 With respect to his conviction for party to the crime of possessing burglarious tools, the fact-finder could have reasonably concluded Hermann possessed both the tire iron and the barrel keys discovered in the parking lot. As a coconspirator, Ali was equally responsible for his accomplice's possession of the tools necessary to break into the vending machine. Moreover, as the car's driver, Ali possessed the burglarious tools found therein. *Cf*. ***Schmidt v. State***, 77 Wis. 2d 370, 379, 253 N.W.2d 204 (1977) (possession may be imputed when contraband found in place immediately accessible to accused and subject to accused's exclusive or joint dominion and control, provided accused has

knowledge of contraband's presence). Based on the strong evidence of Ali's guilt, we conclude that the error, if any, in admitting Johnson's testimony was harmless.

By the Court.—Judgment and order affirmed.

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