COURT OF APPEALS
DECISION
DATED AND FILED

October 18, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP1709-CR **Cir. Ct. No. 2007CF41**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KEVIN D. FLOWERS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Brown County: TIMOTHY A. HINKFUSS, Judge. *Affirmed*.

Before Hoover, P.J., Peterson, J., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Kevin Flowers appeals a judgment of conviction for five counts of burglary, as a party to the crime, and an order denying his motion for postconviction relief. Flowers argues: he received ineffective assistance of counsel; the circuit court erroneously failed to sever the charges; the

jury improperly heard prejudicial impeachment testimony on a collateral issue; there was insufficient evidence to convict on three charges; and he is entitled to a new trial in the interest of justice. We reject Flowers' arguments and affirm.

BACKGROUND

¶2 Flowers was charged with committing five residential burglaries in Green Bay over a span of approximately three weeks. The burglaries were all committed within a three-mile area and each residence was between 1.2 and 2 miles from Flowers' home. The burglaries occurred as follows: October 2, 2006 at the Wilson home; October 9 at the Dollar home; October 9 at the Bielski home; October 17 at the Kriesel home; and October 24 at the Olave/Macias home. The first three robberies were on Mondays; the latter two occurred on Tuesdays.

¶3 The following evidence was presented at trial. Robert Wilson testified that his front door, which had been secured by two deadbolts, was kicked in, with the doorjamb torn from the frame. The drawers in the dining room and the bedrooms were open and emptied on the floor. Removed from the Wilsons' home were a box of silverware, a handgun, and a box of .22 caliber "Blazer" brand bullets.

¶4 One week later, the Dollars' front door, which had been secured by a deadbolt, was kicked in, doorjamb and all. The drawers were pulled out in the kitchen, office, and bedrooms, and their contents strewn about. Credit cards, a coin collection, and a significant amount of jewelry were taken. That same day, an African-American couple used the Dollars' Sears credit card to purchase a big screen plasma television system. The next day, Flowers drove to a Milwaukee pawnshop and sold ten items of jewelry, all belonging to the Dollars.

¶5 Sharon Mauldin lived across the street from the Dollars. On the day of the Dollar robbery, a man came to her door and stated he was looking for a house in the neighborhood where he was to cut down a tree. Mauldin found several things about the encounter memorable. Later that day, a police officer canvassing the neighborhood about the burglary asked Mauldin if she had noticed anything strange. Mauldin reported the visitor, who she described as a black male, approximately five feet, eleven inches tall and weighing 180 pounds. A couple of weeks later, a detective asked Mauldin if she could identify the man at her door in a photo lineup. She identified Flowers. However, the first time she saw his picture, she was only 75% sure; the second time she looked at it, she was 95% sure. At trial, it was revealed that Flowers' lineup photo stated he was five feet, ten inches and 242 pounds.

¶6 The Bielski home was burglarized the same day as the Dollars' home. The front door, secured by a deadbolt, was kicked in and the doorframe was broken. The back door was also damaged from an unsuccessful effort to kick it in. Doors and drawers were open throughout the house. Missing were a portable DVD player, Nintendo game cubes, and several pieces of jewelry.

¶7 Eight days later, Jennifer Kriesel's apartment, located at the rear of a two-family house, was burglarized. Her door and doorframe were kicked in. Drawers were emptied on the floor. Kriesel's laptop computer, digital camera, Nikon camera, Asics running shoes, and a bag of Christmas gifts were missing.

¶8 One week after the Kriesel burglary, Eva Olave's and Mario Macias's home was burglarized. The doors from the outside into the garage and from the garage into the house were both broken. The outside door was "split from the frame." On the inside door, only the window glass was broken. The

kitchen cupboards and bedroom dresser drawers were open. More than thirty pieces of jewelry were stolen, as well as a Play Station 2, video games, and movies. Macias's wallet and credit cards were also taken.

¶9 On the next day, October 25, officer Michael Francois pulled Flowers over for a traffic violation. Flowers' wife, Erica Ware, was in the car with him. Flowers initially lied about his identity. During the course of the stop, Francois noticed a plastic grocery bag full of jewelry in the console between the front seats. Flowers said the jewelry was Ware's and they were going to pawn it. Ware told Francois the jewelry was not hers and she did not know whose it was. Francois then noticed more jewelry on the floor and seats. Later that day, the police searched Flowers' and Ware's home. Among other items, police found the television purchased at Sears, along with the receipt.

¶10 In fact, all of the victims recovered some of their property from the seizures from Flowers' car and home. The Wilsons' silverware box was found in Flowers' home. Blazer ammunition, which may have been Wilson's, was found in both the car and home. In addition to the jewelry recovered from the Milwaukee pawnshop and the television from Sears, the police recovered two pieces of the Dollars' property from Flowers' vehicle: a certificate of authenticity from the coin collection and a medal. Various items of Bielski's jewelry were found in Flowers' car. Kriesel's Asics shoes and Nikon camera were found in Flowers' car. The Play Station and games from the Olave/Macias house were found in a bedroom at Flowers' house. Their jewelry and three credit cards were found in Flowers' car. Macias's wallet was found in a garbage can outside Flowers' home.

¶11 At trial, the theory of defense was that even though Flowers was in possession of stolen property, he did not commit the underlying burglaries either

directly or as an accomplice. Flowers testified that he knew Ware was in the business of buying or trading stolen property. It was argued that because both Flowers and Ware were in the vehicle when it was stopped and both occupied the residence, Flowers' possession of stolen property did not prove that he had anything to do with the burglaries. It was further argued that, although Mauldin identified Flowers as the man on her porch the day of the Dollar and Bielski burglaries, her original description did not match Flowers' height and weight, and she failed to mention a prominent facial mole. Additionally, another neighborhood resident saw a black male matching Mauldin's original description drop a bag of jewelry on his lawn. The defense also noted that police spoke with another black male in the neighborhood who had a prior burglary conviction. Finally, the defense emphasized that no fingerprints or DNA directly linked Flowers to the burglaries.

¶12 The jury convicted Flowers on all five counts. Flowers moved for postconviction relief on multiple grounds. Following an evidentiary hearing, the court denied the motion. Flowers now appeals.

DISCUSSION

Ineffective assistance of counsel

¶13 Flowers asserts his counsel was ineffective for two reasons. This requires Flowers to establish: (1) that counsel's performance was deficient, and (2) that the deficient performance was prejudicial. *See* ***State v. Pitsch***, 124 Wis. 2d 628, 633, 369 N.W.2d 711 (1985). If the defendant fails on one prong, the court need not address the other. ***State v. Evans***, 187 Wis. 2d 66, 93, 522 N.W.2d 554 (Ct. App. 1994). An attorney's performance is deficient if it falls below an objective standard of reasonableness. ***State v. Love***, 2005 WI 116, ¶30,

284 Wis. 2d 111, 700 N.W.2d 62. Prejudice is established if there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. ***State v. White***, 2004 WI App 78, ¶10, 271 Wis. 2d 742, 680 N.W.2d 362. A reasonable probability is one that undermines confidence in the outcome. ***Pitsch***, 124 Wis. 2d at 642. The cumulative effect of an attorney's multiple errors can result in prejudice. ***State v. Thiel***, 2003 WI 111, ¶¶59, 62-63, 264 Wis. 2d 571, 665 N.W.2d 305.

¶14 Flowers first contends his counsel was ineffective for entering into an incomplete factual stipulation. Because counsel was unable to produce witness Kevin Debroux, or the detective who had interviewed him, the jury received the following stipulation:[1]

> In late October or early November, 2006, Detective Jeff Gloeckler showed the photo array containing the picture of Kevin Flowers to a citizen-witness, Kevin Debroux. … It was reported Debroux saw a black male in his front yard at 1132 South Quincy Street drop a bag, pick it up and leave the area. Debroux found a few items of jewelry in the area where he saw the man drop the bag. Debroux was not able to identify anyone from the line-up and stated he never really got a good look at the guy. Debroux said the men in the photo array were heavier than the man he saw who he described as 6 feet tall and 190 pounds.

Flowers criticizes the stipulation's exclusion of the following facts: the sighting occurred at 1:00 p.m on October 9th or 10th—coinciding with the Dollar burglary—and the items of jewelry Debroux found were from the Dollar burglary.

¶15 Flowers argues that the purpose of the stipulation was to show that someone other than Flowers was responsible for the Dollar burglary, and that this

[1] Debroux had moved out of state, and the detective had retired.

purpose was significantly undermined by the factual omissions. Flowers asserts that the dates identified in the stipulation were inaccurate statements of the date Debroux's observation occurred, and thus placed the sighting after the dates of the robberies, when Flowers was already in custody. This assertion is not borne out by the content of the stipulation and is therefore meritless.[2] The stipulation clearly indicates that the date range specified therein was when the photo lineup was conducted. Naturally, the lineup had to have occurred at a point in time after Debroux's observation of the suspicious man in his yard.

¶16 We conclude the omission of the additional facts was not prejudicial. In fact, Flowers' prejudice discussion centers on the misguided argument we have deemed meritless. Further, according to Flowers' argument, the stipulated facts only applied to the Dollar burglary. The State's case, however, was cumulative based on all five of the similar burglaries. Additionally, we agree with the State that the jurors would understand that Debroux's observation of the man in his yard occurred at a time proximate to the burglary spree, as opposed to some wholly irrelevant time period. Finally, Flowers was charged as a party to the crime. The stipulation—as is, or as desired—was entirely consistent with the theory that Flowers was one of multiple individuals working together to commit the burglaries. While Flowers complains this requires speculation, the State was not required to prove the identity of other potential co-conspirators.

¶17 Flowers next asserts his attorney was ineffective for failing to call another witness, Kenneth Mingus, who reported a suspicious black male on

[2] Moreover, the fact that a potential burglar was spotted in the neighborhood of the robbery spree after Flowers was already in custody could be viewed as exculpatory.

October 9. Mingus testified at the postconviction hearing that the man knocked on his door and said "he was there because someone in the neighborhood wanted to hire him to do some roofing." Mingus described the man, who left on foot, as being about six feet tall and 190 pounds. Detective Gloeckler confirmed that Mingus said the man who came to his door was not in the photo lineup. Consistent with Debroux's observation, Mingus stated the men in the photo array were all too heavy.

¶18 Trial counsel testified he made a strategic decision not to call Mingus because he felt Mingus would not make a good witness and because he was afraid Mingus might change his mind and identify Flowers in court. However, counsel also acknowledged that he had planned to get in the details about Mingus's encounter through officer David Paral. Counsel testified he later decided not to ask Paral about Mingus's report because during the course of questioning at trial, Paral was becoming increasingly vague and unfriendly.

¶19 We agree with the circuit court that counsel's decision not to introduce the Mingus evidence was reasonable trial strategy and therefore did not constitute deficient performance. The decision whether to call witnesses is generally left to trial counsel's discretion. ***Whitmore v. State***, 56 Wis. 2d 706, 715, 203 N.W.2d 56 (1973). Following Mingus's postconviction testimony, the circuit court, too, determined Mingus was a poor witness. Trial counsel's strategic decision to terminate his examination of the increasingly hostile Paral was also reasonable, particularly given the fact that Mingus's observation of a suspicious skinnier black male was largely cumulative to the evidence introduced by Mauldin and the Debroux stipulation.

¶20 Because of the cumulative nature of the evidence, and again because a second perpetrator is consistent with a party to the crime theory, the omission of Mingus's testimony was also nonprejudicial. Further, the evidence bore primarily on the Dollar burglary and, because the Dollars' credit card was used the same day and Flowers sold their jewelry the following day, it is more probable that the jury would simply believe the unidentified man was Flowers' accomplice, rather than an unaffiliated burglar who then immediately transferred the Dollars' stolen property to Flowers or Ware. Our confidence in the trial outcome is not undermined by the omissions in the Debroux stipulation or of Mingus's testimony, even if considered together.

Joinder/severance of the charges

¶21 Flowers next argues the circuit court improperly allowed joinder of the five burglary charges in a single case or, alternatively, erroneously failed to sever the charges due to prejudice. The joinder statute provides:

> **(1)** JOINDER OF CRIMES. Two or more crimes may be charged in the same complaint, information or indictment in a separate count for each crime if the crimes charged ... are of the same or similar character or are based on the same act or transaction or on 2 or more acts or transactions connected together or constituting parts of a common scheme or plan.
>
> ….
>
> **(3)** RELIEF FROM PREJUDICIAL JOINDER. If it appears that a defendant ... is prejudiced by a joinder of crimes ... in a complaint, information or indictment ..., the court may order separate trials of counts ... or provide whatever other relief justice requires ….

WIS. STAT. § 971.12.[3] "Whether charges are properly joined in a criminal complaint is a question of law." ***State v. Hamm***, 146 Wis. 2d 130, 138, 430 N.W.2d 584 (Ct. App. 1988). "To be of the 'same or similar character' … crimes must be the same type of offenses occurring over a relatively short period of time and the evidence as to each must overlap. It is not sufficient that the offenses involve merely the same type of criminal charge." ***Id.*** (citing ***State v. Hoffman***, 106 Wis. 2d 185, 208, 316 N.W.2d 143 (Ct. App. 1982)). Where the crimes are "greatly similar and the [evidentiary] overlap is substantial," even a time period as long as fifteen or eighteen months is "relatively short." ***Id.*** at 140.

¶22 We conclude the circuit court properly joined the burglary charges. The five burglaries all occurred in the daytime, on a Monday or Tuesday, within three miles of each other,[4] over the course of just twenty-two days. The invasions were all of private residences, where the burglars kicked down doors, ransacked the homes, and stole small, portable items. Items from all five burglaries were found in Flowers' possession. This case was a prime candidate for joinder; Flowers' minimally developed argument lacks merit.

¶23 We also reject Flowers' argument that prejudice required severance of the charges. If the charged offenses are properly joined for trial, it is presumed that the defendant will suffer no prejudice from the joinder. ***State v. Linton***, 2010 WI App 129, ¶20, 329 Wis. 2d 687, 791 N.W.2d 222. The defendant may rebut that presumption. ***State v. Leach***, 124 Wis. 2d 648, 669, 370 N.W.2d 240 (1985).

[3] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

[4] Additionally, four of the burglaries were within the defined Astor Park neighborhood.

This requires a showing of substantial prejudice to the defense; some prejudice is not enough. ***Hoffman***, 106 Wis. 2d at 209-10. "The danger of prejudice arising from the jury's exposure to evidence that the defendant committed more than one crime is minimized when the evidence of both counts would be admissible in separate trials." ***Id.*** at 210. In other words, if evidence of one count would be admissible at a separate trial on another count under WIS. STAT. § 904.04(2), the defendant suffers no substantial prejudice from the joinder of the two counts. ***Id.***

¶24 The State argues, as it did in the circuit court, that the evidence of the individual burglaries would have been admissible in each trial on separate counts. Specifically, the State contends the evidence was admissible under WIS. STAT. § 904.04(2) on the grounds of identification and modus operandi. *See* ***State v. Hall***, 103 Wis. 2d 125, 139, 144-45, 307 N.W.2d 289 (1981). Flowers fails to reply to this argument and therefore concedes it. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979). Moreover, the danger of prejudice can be overcome by a proper cautionary instruction. ***Hoffman***, 106 Wis. 2d at 213. Such an instruction was given here.

Impeachment testimony

¶25 Flowers argues the circuit court erroneously allowed the State to introduce collateral testimony impeaching his own testimony that he was employed during the time of the robberies. A matter is collateral if it does not meet the following test: "Could the fact ... have been shown in evidence for any purpose independently of the contradiction?" ***McClelland v. State***, 84 Wis. 2d 145, 159, 267 N.W.2d 843 (1978). Specific instances of a witness's conduct for the purpose of challenging credibility may be pursued during cross-examination,

but not proven through extrinsic evidence. *See* WIS. STAT. § 906.08(2); ***McClelland***, 84 Wis. 2d at 155.

¶26 However, "[o]nce a defendant presents a theory of defense, … the credibility of that theory becomes an issue in the case" subject to rebuttal. ***State v. Sandoval***, 2009 WI App 61, ¶31, 318 Wis. 2d 126, 767 N.W.2d 291. Admissible rebuttal evidence includes evidence that impeaches the defendant's testimony concerning his theory of defense. *See* ***State v. Konkol***, 2002 WI App 174, ¶19, 256 Wis. 2d 725, 649 N.W.2d 300 (expert testimony admissible to rebut OWI defendant's "one drink" defense); ***Simpson v. State***, 83 Wis. 2d 494, 514, 266 N.W.2d 270 (1978) (rebuttal evidence admissible to impeach defendant's claim that he never threatened to shoot victim). A circuit court's decisions whether to admit evidence, whether a matter is collateral under WIS. STAT. § 906.08, and whether testimony is proper rebuttal evidence are matters of discretion. *See* ***Evans***, 187 Wis. 2d at 77; ***State v. Spraggin***, 71 Wis. 2d 604, 623, 239 N.W.2d 297 (1976); ***Simpson***, 83 Wis. 2d at 513.

¶27 At trial, Flowers' explanation for the presence of the loot from the five robberies in his house and car was that Ware was in the business of receiving stolen property. He testified that he worked third shift during the month that the robberies occurred and therefore spent much of the day sleeping. Additionally, his purported job was a one-hour drive away. Over Flowers' objection, the State called his employer's human resources manager, Larry Jaeger, to testify. Jaeger testified Flowers was discharged on September 11, 2006 and never worked for the employer again.

¶28 Jaeger's testimony was not collateral. Aside from its obvious impeachment value, the testimony was admissible on the issues of both motive

and opportunity. *See* WIS. STAT. § 904.04(2). Specifically, the testimony demonstrated Flowers had motive to steal because he had lost his job three weeks prior to the first burglary, and, for the same reason, it showed he had a substantial opportunity to plan and commit the burglaries.

¶29 Moreover, the circuit court properly admitted Jaeger's testimony to rebut Flowers' theory of defense that because he was spending so much time working, driving, and sleeping, he was unaware of Ware's criminal undertakings. The court observed:

> The hypothesis is that Erica Ware was buying and selling stolen property and committing lots of other crimes, and he was just sort of along for the ride, and really, he was busy working down in Green Lake County the third shift and didn't really know everything she was doing.
>
> Many times in his testimony, and I've reviewed the trial transcript, he talked about working the third shift …. But what became critical to me was, during this trial, is that he was working, and that he was down there being a working man, working third shift. He didn't know a lot was going on because he was sleeping …. It isn't a collateral issue. It's really central to what this case ... is all about.

(Quotation marks omitted.) Because Jaeger's testimony tended to rebut Flowers' theory of defense, the circuit court properly exercised its discretion in admitting it.

Sufficiency of the evidence

¶30 Next, Flowers argues the State failed to provide sufficient evidence to convict him of three of the five burglary counts. Specifically, Flowers challenges the sufficiency of the evidence as to the Wilson, Kriesel, and Olave/Macias burglaries. He concedes there was sufficient evidence to convict him on the Dollar and Bielski burglaries.

¶31 Flowers omits the standard of review, instead emphasizing the State's burden at trial to prove his guilt beyond a reasonable doubt. On appeal, however:

> We review the evidence in the light most favorable to the verdict and, if the evidence permits drawing more than one reasonable inference, we draw the one that supports the verdict. The credibility of the witnesses, the weight of the evidence, and resolving inconsistencies in a witness's testimony all are for the trier of fact.

State v. Bowden, 2007 WI App 234, ¶14, 306 Wis. 2d 393, 742 N.W.2d 332 (citations omitted). Additionally, "[i]t is well established that a finding of guilt may rest upon evidence that is entirely circumstantial and that circumstantial evidence is oftentimes stronger and more satisfactory than direct evidence." ***State v. Poellinger***, 153 Wis. 2d 493, 501-02, 451 N.W.2d 752 (1990).

¶32 In addition to failing to apply the proper standard of review, Flowers wrongly confines his assessment of the evidence on each count. The five counts were demonstrably interconnected; the evidence supporting them therefore overlapped. Because we have already rejected Flowers' argument that the counts should have been tried separately, and he concedes two counts were supported by sufficient evidence, we reject Flowers' argument that the three remaining counts were insufficiently proven. Given the similarities among the burglaries, it is highly improbable that Flowers committed the two burglaries, but was only a receiver of stolen property in the other three cases. We recounted the facts at length at the outset of this decision; taken together, the evidence was more than sufficient to convict on all counts.

Interest of justice

¶33 Finally, Flowers asks for a new trial in the interest of justice, arguing the real controversy was not fully tried because of the combined effect of the errors he has asserted. Because we have rejected each of those underlying assertions of error, we reject this argument too.

By the Court.—Judgment and order affirmed.

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