COURT OF APPEALS
DECISION
DATED AND FILED

March 31, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal Nos. 2014AP1248
2014AP1249
2014AP1250
2014AP1251

Cir. Ct. Nos. 2011CF293
2011CF376
2012CF27
2013CF107

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

PATRICK K. TOURVILLE,

DEFENDANT-APPELLANT.

APPEALS from judgments and an order of the circuit court for Polk County: MOLLY E. GALEWYRICK, Judge. *Affirmed*.

Before Hoover, P.J., Stark and Hruz, JJ.

¶1 PER CURIAM. Patrick Tourville appeals judgments convicting him of four offenses and an order denying his postconviction motion to withdraw

his guilty and no contest pleas. He argues: (1) his trial counsel was ineffective for failing to object after the State allegedly violated the plea agreement by recommending consecutive sentences; and (2) there was an insufficient factual basis for the court to accept Tourville's guilty plea to felony theft as a party to a crime. We reject these arguments and affirm the judgments and order.

BACKGROUND

¶2 In four separate complaints, Tourville was charged with numerous offenses. One of the complaints alleged felony theft as a party to a crime and as a repeater based on the theft of a gun safe from a residence. According to the complaint, three men stole the gun safe and over one hundred assorted firearms from a residence, and took the safe to Tourville's residence where they told Tourville about the burglary and asked for his help opening the safe. The four men went to Tourville's campsite where they used a torch to open the safe. They then took the safe to a swamp where they dumped it along the side of a road.

¶3 Pursuant to a plea agreement, Tourville pled guilty or no contest to felony theft as a party to a crime, felony bail jumping, burglary while armed with a dangerous weapon and misdemeanor theft, all as a repeater. The plea agreement required the State to dismiss and read in the remaining counts, and to cap its sentence recommendation at the high end of the recommendation in the presentence investigation report (PSI). The PSI recommended prison terms for each of the offenses, but was silent as to recommending consecutive or concurrent sentences. The prosecutor recommended consecutive sentences at the high end of the PSI's recommendations.

DISCUSSION

Violation of the Plea Agreement

¶4 Because the State did not violate the terms of the plea agreement, Tourville established neither deficient performance nor prejudice from his counsel's failure to object to the State's recommendation. Citing cases in which a sentencing court failed to specify whether the sentences it imposed were intended to run concurrently or consecutively, resulting in a presumption that the sentences should be served concurrently, Tourville contends the same rule should apply in this situation. Those cases are based on the rule of lenity, which applies when there is ambiguity in the sentences a court imposes. We conclude the rule of lenity does not apply in this case because the ambiguity arises out of the parties' plea agreement and the PSI. This case is more similar to ***State v. Bowers***, 2005 WI App 72, ¶16, 280 Wis. 2d 534, 696 N.W.2d 255, where the plea agreement did not specify whether the recommended sentences would be concurrent or consecutive. Because the agreement was silent on that question, we refused to engraft onto the plea agreement conditions that were not contained in that document. As in ***Bowers***, Tourville's plea agreement did not place any obligation on the State to "recommend concurrent sentences."

¶5 Tourville attempts to distinguish his case from ***Bowers***, contending his plea agreement was not "silent as to recommending consecutive or concurrent sentences" because it required the State to limit its recommendation to the recommendation of the PSI. We are not persuaded. The plea agreement and PSI both were silent as to recommending consecutive or concurrent sentences. In the absence of any mention of consecutive or concurrent sentences in the plea

agreement or the PSI, we conclude ***Bowers*** is a closer fit to the facts presented in this case than the cases Tourville cites that involve discerning a court's intent after it imposed ambiguous sentences.

Factual Basis for the Felony Theft Plea

¶6 Tourville contends the circuit court failed to establish a factual basis for the charge of felony theft as a party to a crime because the complaint specified that Tourville "did take and carry away moveable property of another" as a party to a crime. Tourville contends there is no allegation in the complaint that he was even aware of the theft until after the asportation occurred. In addition, at the plea colloquy, Tourville did not admit to participating in the others' taking and carrying away of the safe.

¶7 To be guilty of aiding and abetting in a crime, it is only necessary for the defendant to have been a willing participant. ***State v. Marshall***, 92 Wis. 2d 101, 122, 284 N.W.2d 592 (1979). "Such participation as would constitute aiding and abetting does not even require that the defendant be present during the [crime]." ***Id.*** It is only necessary that he undertake some conduct, which as a matter of objective fact, aids another person in the execution of a crime, and that he consciously desires or intends that his conduct will in fact yield such assistance. ***Id.***

¶8 Tourville attempts to distinguish ***Marshall*** because Marshall's participation preceded the crime whereas Tourville's occurred after the crime was committed. That distinction is not persuasive. In ***State v. Grady***, 93 Wis. 2d 1, 5-9, 286 N.W.2d 607 (Ct. App. 1979), we rejected the argument that participation in a crime after asportation defeats a claim of aiding and abetting. We concluded,

"asportation, then, is a transaction which continues beyond the point in time when the property of another is taken." ***Id.*** at 6. Citing ***Hawpetoss v. State***, 52 Wis. 2d 71, 78, 187 N.W.2d 823 (1971), this court noted, "With regard to the crime of larceny in particular, it is generally held that one may be guilty of larceny *as a principal* where the crime was incomplete until he contributed his aid in the asportation or taking possession of and removal of stolen property." ***Grady***, 93 Wis. 2d at 6 (emphasis added).

¶9 Had Tourville participated in the asportation at an earlier stage, he could have been charged as a principal in the theft. He was charged as an aider and abettor because he willingly aided the thieves in their efforts to carry away the safe and guns, and assisted them in the asportation of the safe from the residence to the swamp. These activities constitute a sufficient factual basis to support Tourville's guilty plea.

By the Court.—Judgments and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2013-14).