COURT OF APPEALS
DECISION
DATED AND RELEASED

November 5, 1996

NOTICE

No. 96-0861-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JEFFREY J. BEARDSLEY,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Brown County: N. PATRICK CROOKS, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

MYSE, J. Jeffrey J. Beardsley appeals his conviction as a party to the crime of armed robbery. Beardsley attacks the judgment on four different theories: (1) the trial court erred by admitting other acts evidence of a previous armed robbery; (2) that certain evidence should have been suppressed because probable cause did not exist for Beardsley's arrest and the search of his vehicle; (3) the trial court abused its discretion by denying a request for an adjournment for Beardsley's fingerprint expert to prepare; and (4) that the interests of justice warrant a new trial. Because we conclude that the other acts evidence was admissible, probable cause existed for Beardsley's arrest, the request for an

adjournment was properly denied, and that a new trial is not warranted in the interests of justice, the judgment is affirmed.

The manager of a pizza place had been robbed while making the night deposit at the bank. Officer Steven Fencl, responding to the armed robbery call minutes after it occurred, observed Beardsley's automobile speeding away from the general area of the robbery. Although the speed limit was thirty miles per hour, Fencl estimated the car's speed to be between fifty-five and sixty miles per hour. Fencl pulled the vehicle over to the side of the road and Beardsley got out his car and walked toward the police car. Fencl ordered him to stop, but Beardsley continued toward Fencl's car. It was not until after Fencl backed up his vehicle that Beardsley stopped and returned to his car as instructed.

Fencl observed two other individuals moving around a great deal in the car's back seat. After approximately one minute, the two individuals in the back seat fled on foot. Fencl stepped out of his car and ordered them to stop. As the two ran, Fencl noted that one of the individual's clothing matched the description of the armed robber. At this time, Beardsley also got out of the car and came toward Fencl. Fencl ordered him back into his car and Beardsley obeyed. Once assistance arrived, Fencl arrested Beardsley.

The officers then proceeded to search the seat and floor of the automobile. This search yielded an Uzi-type gun, which later proved to be a BB-gun, located on the ground outside of the vehicle. The officers also observed clothes, two walkie-talkies and a moneybag. Upon finding the moneybag, they sealed the car with its contents and took it to the station. At the station, Beardsley gave his consent to a search of his car. This second, more thorough search produced another BB-gun styled as a large handgun and a bank bag with checks in it. The two men who fled the scene, Rhoderick Fields and Latrick Whiters, were subsequently apprehended.

The trial began December 19, 1994. Fields and Whiters, who both had worked for the robbed pizza place, testified that Beardsley had planned and performed the robbery and, after the police stopped them, gave them the cash proceeds and told them to run. Beardsley, in contrast, testified that he had merely picked up Fields and Whiters as a result of a chance meeting at a gas

station. He gave the two a ride and they directed him to a house. Fields and Whiters got out of the car, requested that Beardsley wait for them, and walked between the houses. They returned between ten and fifteen minutes later and got into the back seat. The trial was adjourned on December 22, 1994, for the Christmas break and resumed on January 3, 1995. The jury returned a guilty verdict that day. Additional facts will be set forth when necessary.

Other Crime Evidence

Whiters and Fields testified that when they were watching television at Whiters' home with Beardsley, a Crimestoppers segment came on regarding the robbery of the Green Bay Credit Union. According to Whiters and Fields, Beardsley bragged that he had committed the highlighted crime. In rebuttal testimony, a detective from the Green Bay Police Department identified a signed statement in which Beardsley admitted to committing the credit union robbery. Beardsley does not deny committing the credit union robbery but, rather, denies discussing it with Fields and Whiters. Beardsley argues that the evidence of this previous robbery was erroneously admitted.

Section 904.04(2), STATS., controls the admissibility of other crimes evidence. It specifically allows evidence of other crimes to be used to show preparation, plan and intent, among other things. ***Id***. Even if the evidence is admissible under that section, the court must inquire whether the prejudicial effect of the evidence substantially outweighs its probative value under § 904.03, STATS. The standard of review for the admissibility of evidence is well-settled. "A trial court's decision to admit or exclude evidence is a discretionary determination that will not be upset on appeal if it has 'a reasonable basis' and was made 'in accordance with accepted legal standards and in accordance with the facts of record." ***Lievrouw v. Roth***, 157 Wis.2d 332, 348, 459 N.W.2d 850, 855 (Ct. App. 1990) (citations omitted). The inquiry is not whether this court would have admitted this evidence ruling in the first instance. ***State v. Fishnick***, 127 Wis.2d 247, 257, 378 N.W.2d 272, 278 (1985). As long as the trial court's decision has a reasonable basis in the record, we will not reverse even if the trial court gave the wrong reason or no reason. ***State v. Jenkins***, 168 Wis.2d 175, 186, 483 N.W.2d 262, 265 (Ct. App. 1992).

The prosecution introduced this evidence to show preparation or plan in that Beardsley was attempting to convince Whiters and Fields to join him and using his criminal experience as an inducement to do so. The State argues these statements were made in the context of planning the charged offense. Our review of the record not only reveals a reasonable basis for the trial court's decision but also that the trial court articulated that basis. The trial court performed the exact analysis required. The court first went through the § 904.04(2), STATS., analysis, then immediately turned to the § 904.03 question of prejudice.

An important element of this case was that Beardsley enlisted Fields and Whiters to commit this robbery. His statements made in an attempt to show that they would succeed because he had previously been successful are relevant. Beardsley allegedly made these statements just prior to planning the charged offense with Fields and Whiters. Examined in the context of inducing Fields and Whiters to assist in and plan the robbery, the record provides a reasonable basis for admitting Beardsley's statements. Beardsley's statements regarding the credit union robbery are relevant to proving plan or preparation. Although the danger of prejudice seems inordinate to their relevance, we conclude the standard of review requires affirming this discretionary decision of the trial court.

Probable Cause

Beardsley asserts that Fencl lacked probable cause to arrest him and consequently the searches at the scene and at the police station were illegal requiring the evidence to be suppressed. Police can search the passenger compartment of an automobile incident to a lawful arrest, including arrests for traffic offenses. ***State v. King***, 142 Wis.2d 207, 210-12, 418 N.W.2d 11, 13 (Ct. App. 1987). An arrest is illegal unless it is supported by probable cause. ***State v. Riddle***, 192 Wis.2d 470, 475-76, 531 N.W.2d 408, 410 (Ct. App. 1995). "Probable cause refers to the quantum of evidence which would lead a reasonable police officer to believe that defendant committed a crime." ***State v. Mitchell***, 167 Wis.2d 672, 681, 482 N.W.2d 364, 367 (1992). This requires more than a suspicion or possibility that the defendant committed an offense, but does not need to reach the level that guilt is more likely than not. ***Id.*** at 681-82, 482 N.W.2d at 367-68. Whether probable cause existed for an arrest is a

question of law. ***State v. Truax***, 151 Wis.2d 354, 360, 444 N.W.2d 432, 435 (Ct. App. 1989).

Beardsley was initially stopped for speeding. Although Fencl may have suspected an involvement between Beardsley and the armed robbery, at the time of the stop this was not the basis upon which Fencl initially stopped the vehicle. Beardsley was arrested on the basis of all of the events that occurred from the time he was stopped to his arrest.

We conclude that there was sufficient probable cause for Beardsley's arrest and as a result the evidence gathered in the subsequent searches was lawfully obtained. Fencl was responding to the robbery call within minutes of the incident. As he approached the area, he observed an automobile leaving at an extremely high rate of speed and stopped the car. It was nearly two in the morning, and traffic in this area was usually sparse at this time of night. The car's occupants acted suspiciously, and even initially disobeyed Fencl's directions. After a minute, two of the three suspects fled on foot. As one of them fled, Fencl observed clothing that matched the description of the robbery suspect. All of these factors, taken together, created sufficient probable cause for an arrest.

Request for an Adjournment

Beardsley argues that the trial court abused its discretion by failing to grant an adjournment so Beardsley's fingerprint expert could examine the State's fingerprint evidence. We conclude Beardsley had ample pretrial opportunity to inspect this material and the trial court's discretion was properly exercised.

A trial court's ruling on a motion for continuance will be reversed only if the court clearly erred in exercising its discretion. ***State v. Echols***, 175 Wis.2d 653, 680, 499 N.W.2d 631, 640 (1993). In considering the request, the court should consider the circumstances surrounding the case, including

whether the moving party has been guilty of any neglect in procuring the attendance or preparation of the witness. *See* ***Bowie v. State***, 85 Wis.2d 549, 556, 271 N.W.2d 110, 113 (1978).

The State and the defense had a working agreement that the State would not present fingerprint evidence as long as the defense did not make it an issue in the case. The State rested without presenting any fingerprint evidence. Beardsley testified that he had never seen any of the evidence of the robbery in his car prior to his arrest. This testimony, the State correctly argues, placed Beardsley's fingerprints located on the bank moneybag retrieved from his car at issue. The State needed an adjournment from December 22, 1994 to January 3, 1995 in order to present its fingerprint expert who was previously unavailable due to a scheduled surgery. After the State's expert gave his testimony, the defense asked for an adjournment to give its expert an opportunity to review the State's materials. This request was denied but the court did recess for two hours to allow the defense expert to examine these materials.

Beardsley's argument of abuse of discretion is unavailing. Beardsley knew since December 22, 1994, that the State intended to present this evidence. The defense, however, did nothing to prepare its own expert witness during this time. Moreover, the defense knew of this material at least six months before trial. Also, after having examined the material the defense expert largely agreed with the State's expert analysis. Further, Beardsley stated that he handled the material while in police custody, making the presence of his fingerprints unremarkable or impeaching. Because Beardsley had an adequate opportunity to obtain expert fingerprint testimony, we conclude the trial court properly exercised its discretion by denying the request for an adjournment and granting a short recess to the defense in light of the circumstances of this case.

Last, Beardsley asks this court to exercise its power of discretionary reversal and order a new trial in the interests of justice. Because the record discloses no substantial probability that a different result is likely on retrial we decline to exercise this power.

By the Court.—Judgment affirmed.

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