COURT OF APPEALS
DECISION
DATED AND FILED

January 13, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-0476-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

WILLIE BURNSIDE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Racine County: GERALD P. PTACEK, Judge. *Affirmed.*

Before Snyder, P.J., Brown and Anderson, JJ.

PER CURIAM. Willie Burnside appeals from a judgment convicting him of two counts of armed robbery as party to the crime and from an order denying his postconviction motion for a new trial. We affirm.

Burnside argues that the circuit court did not discharge its obligation under § 805.08(1), STATS., to examine the jurors during voir dire regarding relationships by blood or marriage to any party or attorney in the case, financial interests in the case, and opinion, bias or prejudice regarding the case. The State argues waiver because Burnside's counsel did not object to the procedure at voir dire and accepted the jury after its selection.

We agree with the State that this claim is waived in the absence of a timely objection, particularly where, as here, the court could have remedied the alleged deficiency at the time of the objection. *See* ***Vollmer v. Luety***, 156 Wis.2d 1, 11, 456 N.W.2d 797, 802 (1990). Burnside erroneously counters that the plain error rule applies and that his substantive rights were affected. *See* § 805.18, STATS. Again, we disagree. The plain error rule only applies to evidentiary questions. *See* ***State v. Schumacher***, 144 Wis.2d 388, 402, 424 N.W.2d 672, 677 (1988). We also conclude that Burnside's substantial rights were not affected by the failure to pose these exact questions to the jurors. *See* § 805.18(2). Notably, Burnside does not claim that he was denied an impartial jury.

We note that the circuit court involved both attorneys in the questioning of potential jurors during voir dire, and counsel and the court posed questions sufficiently similar to the inquiries contemplated in § 805.08(1), STATS. The court introduced the attorneys, associates and witnesses to the potential jurors and then inquired whether any of the potential jurors knew any of the participants in the trial. The court also inquired whether the potential jurors had heard anything about the case, if they had prior jury experience, and whether they or a family member had been a victim of a crime or prosecuted for criminal conduct. Defense counsel inquired whether any potential juror could not be fair, harbored racial prejudice or had close friends in law enforcement. Notwithstanding

Burnside's challenge to the voir dire, the potential jurors were effectively questioned in the areas covered by § 805.08(1).[1] We conclude that there was substantial compliance with § 805.08(1).

Burnside next challenges the prosecutor's reference in his opening statement to a person whose stolen check and credit cards were used during one of the armed robberies. During his opening statement, the prosecutor stated that a coactor, Dwight Moore, unsuccessfully tried to use stolen credit cards at the site of one of the armed robberies. Another coactor, Bertha Miller, then entered the gas station and used a stolen check to purchase items before the armed robbery occurred. The prosecutor then identified by name the person whose stolen check and credit cards were used. Burnside claims this reference to a previous crime, which was not charged in this case or subject to a motion in limine as other acts evidence, was improper and highly prejudicial because it implied that Burnside was involved in obtaining the stolen check and credit cards.

We disagree with Burnside that this remark constituted evidence, let alone other acts evidence.[2] First, opening statements are not evidence and the jury was so instructed. *See* WIS J I—CRIMINAL 103. Second, the reference to the stolen check and credit cards was related to the fabric of the crime and gave the jury the sequence of events leading up to one of the armed robberies. Finally, even if the prosecutor may have intended to present the testimony of the individual

[1] We acknowledge that the potential jurors were not specifically asked about financial interest in the case. However, there is no evidence that any juror had a financial interest and this inquiry seems of less concern under the facts of the charged crimes.

[2] Although the absence of an objection during opening statement constitutes waiver, *see* ***State v. Goodrum***, 152 Wis.2d 540, 549, 449 N.W.2d 41, 45 (Ct. App. 1989), we nevertheless choose to address this issue on the merits. *See* ***Wirth v. Ehly***, 93 Wis.2d 433, 444, 287 N.W.2d 140, 146 (1980).

whose check and credit cards were stolen, we discern no error because the trial changes as it progresses and counsel has flexibility in the presentation of evidence. Finally, the jurors were instructed to disregard any remarks of counsel which implied the existence of any facts not in evidence. Moreover, the evidence at trial about the check and credit cards did not implicate Burnside in their acquisition.

Finally, Burnside argues that the court erred when it admitted five prior adult convictions and seven of eleven juvenile adjudications for impeachment purposes because the court did not consider the risk of unfair prejudice. Burnside was twenty-four years old at the time of trial.

A prior conviction is relevant to the credibility of a witness. *See* ***State v. Kruzycki,*** 192 Wis.2d 509, 524, 531 N.W.2d 429, 435 (Ct. App. 1995). A person who has been convicted of a crime is less likely to be a truthful witness than a person who has not been convicted. *See* ***id.*** Whether to allow prior conviction evidence for impeachment purposes under § 906.09, STATS., is within the court's discretion. *See* ***Kruzycki***, 192 Wis.2d at 525, 531 N.W.2d at 435. "A court properly exercises its discretion when it correctly applies accepted legal standards to the facts of record and uses a rational process to reach a reasonable conclusion." ***Id.***

When deciding whether to admit evidence of a prior conviction for impeachment purposes, a circuit court should

> consider whether from the lapse of time since the conviction, the rehabilitation or pardon of the person convicted, the gravity of the crime, the involvement of dishonesty or false statement in the crime ... the probative value of the evidence of the crime is substantially outweighed by the danger of undue prejudice.

Id. (quoted source omitted).

Burnside complains that the court did not consider the danger of unfair prejudice in admitting the prior convictions and adjudications. First, we note that Burnside did not argue to the circuit court that this analysis was lacking. Second, we conclude that the court did consider the danger of unfair prejudice when it excluded the four oldest juvenile adjudications because they were too remote in time. We conclude that the court performed the requisite balancing test in admitting the prior convictions.

By the Court.—Judgment and order affirmed.

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