COURT OF APPEALS
DECISION
DATED AND FILED

February 1, 2000

Cornelia G. Clark
Acting Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. ***See*** **WIS. STAT. § 808.10 and RULE 809.62.**

No. 98-3621-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROBERT D. KEITH,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Schudson, JJ.

¶1 PER CURIAM. Robert Keith appeals from a judgment entered after a jury found him guilty of burglary, as a party to a crime. *See* WIS. STAT. §§ 943.10(1)(a), 939.05 (1997–98). He also appeals from an order denying his motion for postconviction relief. He argues: (1) that the evidence is insufficient to

sustain his conviction; (2) that he is entitled to a hearing on his allegations that a juror responded incorrectly during voir dire, and that his attorney was ineffective in failing to properly communicate with him regarding the juror; (3) that the trial court erred in admitting other-acts evidence; and (4) that the trial court erred in admitting hearsay. We affirm.

BACKGROUND

¶2 On the evening of September 19, 1997, the office of a Milwaukee business was burglarized. The back door of the business was forced open, and a safe was taken from underneath a desk in the office. The safe contained blank checks and the business owner's signature stamp.

¶3 A few days later, some of the stolen checks were cashed. The police arrested and interviewed two women who had cashed stolen checks. Both women identified Keith's house as the place where they received the checks, and one of the women described Keith as the person who gave her the checks. The owner of the business, Jesse Lucas, told the police that Keith used to work for him, and that Keith was a friend of his former business partner, Gregory Moon, whom he had bought out of the business after they had an irreconcilable disagreement. Thereafter, police arrested Keith.

¶4 At the police station, the police informed Keith of his ***Miranda*** rights, and Keith waived those rights and agreed to talk to the police. Keith said that he received the stolen checks from John Hamiel, who was selling the checks for $25-$50 per sheet. He said that Hamiel had called him and offered to sell him the checks, and that the two later met at a gas station, where Keith took some of the checks and told Hamiel that he would pay him if he made a profit from the checks. Keith said that he was not involved in the burglary.

¶5 Two days later, however, Keith made another statement to the police, admitting that he was involved in the burglary. He said that prior to the burglary, Moon had called him and said that he wanted someone to "hit" Lucas's business. He said that Moon gave him the combination to the safe, and that he knew there were checks in the safe because he had worked at Lucas's business. Keith said that Hamiel also called him during the week before the burglary, and asked him where he could get some checks. Keith said that he suggested Lucas's business, and that he drove to the business with Hamiel and pointed it out to him, but told Hamiel that he didn't want to be involved in the burglary.

¶6 Keith said that, after dark on September 19, 1997, he, Hamiel, and Darryl Crowder went to Lucas's business. He said that Hamiel entered the back door of the business while he waited in the car with Crowder, the driver. He said that after Hamiel returned with the safe, the three men went to Hamiel's house, where they divided up the blank checks.

¶7 Keith said that some of the checks were cashed the next day, and he received about $600-$700. He said that he told Moon that Hamiel had taken the safe, and that Moon later came over and asked him for some money. Keith said that he gave Moon $200.

¶8 A jury convicted Keith of burglary, as a party to a crime, and the trial court entered judgment accordingly. Thereafter, Keith filed a motion for postconviction relief. In the motion, Keith asserted that the evidence was insufficient to support his conviction, that a juror responded falsely during voir dire, and that his attorney was ineffective because he allegedly ignored Keith's attempted communication regarding the juror who allegedly responded falsely. The trial court denied Keith's motion without a hearing.

DISCUSSION

¶9 Keith argues that the evidence is insufficient to support his burglary conviction. He argues that he did not commit burglary because, according to his statement, he told Hamiel that he did not want to be involved in the burglary and he waited in the car while Hamiel entered the building.

> [I]n reviewing the sufficiency of the evidence to support a conviction, an appellate court may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn a verdict even if it believes that the trier of fact should not have found guilt based on the evidence before it.

State v. Poellinger, 153 Wis. 2d 493, 507, 451 N.W.2d 752, 757–758 (1990) (citations omitted). Thus, "[t]his court will only substitute its judgment for that of the trier of fact when the fact finder relied upon evidence that was inherently or patently incredible - that kind of evidence which conflicts with the laws of nature or with fully-established or conceded facts." ***State v. Tarantino***, 157 Wis. 2d 199, 218, 458 N.W.2d 582, 590 (Ct. App. 1990).

¶10 As noted, Keith was convicted of burglary as a party to a crime. Section 943.10(1)(a) of the Wisconsin Statutes provides:

> **Burglary. (1)** Whoever intentionally enters any of the following places without the consent of the person in lawful possession and with intent to steal or commit a felony in such place is guilty of a Class C felony:
>
> (a) Any building or dwelling ….

WIS. STAT. § 943.10(1)(a) (1997–98). Section 939.05 of the Wisconsin Statutes provides, in relevant part:

> **Parties to crime. (1)** Whoever is concerned in the commission of a crime is a principal and may be charged with and convicted of the commission of the crime although the person did not directly commit it and although the person who directly committed it has not been convicted or has been convicted of some other degree of the crime or of some other crime based on the same act.
>
> **(2)** A person is concerned in the commission of a crime if the person:
>
> (a) Directly commits the crime; or
>
> (b) Intentionally aids and abets the commission of it[.]

WIS. STAT. § 939.05 (1997–98).

> The elements of aiding and abetting are that a person (1) undertakes conduct (either verbal or overt action) which as a matter of objective fact aids another person in the execution of a crime, and further (2) he consciously desires or intends that his conduct will yield such assistance. Where one defendant knows another is committing a criminal act, he should be considered a party thereto "when he acted in furtherance of the other's conduct, was aware of the fact that a crime was being committed, and acquiesced or participated in its perpetration." "[D]efendants may be found guilty of being concerned in the commission of a crime if, between them, they perform all the necessary elements of the crime with mutual awareness of what the other is doing."

Frankovis v. State, 94 Wis. 2d 141, 149, 287 N.W.2d 791, 795 (1980) (citations omitted) (brackets in original), *overruled on other grounds by* ***State v. Poellinger***, 153 Wis. 2d 493, 451 N.W.2d 752 (1990); *see also* ***State v. Hecht***, 116 Wis. 2d 605, 620, 342 N.W.2d 721, 729 (1984).

¶11 The evidence supports a conclusion that Keith aided Hamiel in the commission of the burglary by both his words and his conduct. According to Keith's statement, Hamiel asked him where he could get some checks, and Keith

suggested Lucas's business because he knew that there were checks in the safe and he knew the combination of the safe. He then took Hamiel to Lucas's business and pointed out the intended target of the burglary. Thereafter, he accompanied Hamiel to Lucas's business, where he knew that Hamiel would be breaking into the building to steal the safe full of checks. Keith later shared in the fruits of the burglary.

¶12 The evidence that Keith suggested the target of the burglary, provided information about the target of the burglary, accompanied Hamiel to the scene of the burglary, and shared in the fruits of the burglary is sufficient to support the jury's conclusion that Keith was a party to the burglary. Keith had full knowledge of Hamiel's intent to burglarize Lucas's business, and his actions facilitated the burglary.

¶13 Keith next argues that the trial court erred in denying his postconviction motion without a hearing. He alleges that a juror responded incorrectly to a question posed during voir dire, and that his trial counsel was ineffective for failing to listen to him when he allegedly attempted to inform counsel of the incorrect answer. Keith's postconviction motion argued that a juror responded falsely when asked if he knew Keith, and included an affidavit from Keith containing the following allegations:

> That I was familiar with one of the jurors on the jury panel that eventually convicted me. The juror's name was [Juror T]. I worked with [Juror T] at Wisconsin Meat Packing. [Juror T] lived on the next block from me and I would see him. Also, my brother had contact with him some time ago. [Juror T] and my brother had a disagreement/dispute and there was "bad blood" between the two of them. [Juror T] knew the relationship between myself and my brother.
>
> That during my jury trial I attempted to discuss my knowledge of [Juror T] with my trial attorney …. I

> attempted to do so before my jury was picked. However, every time that I attempted to discuss this matter, [my attorney] would not listen to me or would be too busy discussing this matter with the prosecutor.

¶14 "The decision whether to deny a motion for a new trial on the basis of a juror's incorrect or incomplete response to a question during *voir dire* lies within the discretion of the circuit court." ***State v. Delgado***, 223 Wis. 2d 270, 280, 588 N.W.2d 1, 5–6 (1999). "An appellate court will not reverse a circuit court's decision on a motion for a new trial when a juror fails to fully disclose information during *voir dire*, unless the circuit court erroneously exercised its discretion. ***Id.***

¶15 Whether a new trial should be granted upon a claim that a juror gave an incorrect or incomplete response to a question during voir dire involves a two-part analysis:

> To be awarded a new trial upon such a claim, the defendant in this case must demonstrate: "(1) that the juror incorrectly or incompletely responded to a material question on *voir dire*; and, if so, (2) that it is more probable than not that under the facts and circumstances surrounding the particular case, the juror was biased against the moving party."

Id., 223 Wis. 2d at 281, 588 N.W.2d at 6.[1] "Whether a juror answers a particular question on voir dire honestly or dishonestly, or whether an incorrect or incomplete answer was inadvertent or intentional, are factors to be considered in

[1] "[T]he bias, that is, the partiality of a juror, may be actual, implied or inferred." ***State v. Delgado***, 223 Wis. 2d 270, 282, 588 N.W.2d 1, 6 (1999). "Actual bias" means that "the prospective juror has expressed or formed any opinion, or is aware of any bias or prejudice in the case." ***Id.***, 223 Wis. 2d at 282 n.6, 588 N.W.2d at 6 n.6 (internal quotation marks omitted). "Implied bias" means bias "based upon specific grounds that will automatically disqualify prospective jurors without regard to whether that person is actually biased." ***Id.*** (internal quotation marks omitted). "Inferred bias" is bias that can be "inferred from the facts and circumstances surrounding the prospective juror's answers during *voir dire*." ***Id.***, 223 Wis. 2d at 283, 588 N.W.2d at 6.

determining whether the juror was biased against the defendant." ***Id.***, 223 Wis. 2d at 282, 588 N.W.2d at 6.

¶16 Keith's allegations do not support a conclusion "that it is more probable than not that under the facts and circumstances surrounding the particular case, the juror was biased against the moving party." *See* ***id.***, 223 Wis. 2d at 281, 588 N.W.2d at 6. Keith's vague assertion that, "some time ago," his brother and Juror T had a disagreement that resulted in "bad blood" between the two of them is insufficient from which to conclude that Juror T was more likely than not biased against Keith. The trial court properly denied Keith's request for a new trial on the basis of alleged juror misconduct. *See* ***State v. Marhal***, 172 Wis. 2d 491, 497, 493 N.W.2d 758, 761–762 (Ct. App. 1992) (the right to an evidentiary hearing regarding juror misconduct requires a preliminary showing of facts that, if true, would require a new trial). Accordingly, Keith is not entitled to a hearing on his ineffective-assistance-of-counsel claim because his allegations do not support a conclusion that he was prejudiced by his attorney's purported failure to communicate with him. *See* ***Strickland v. Washington***, 466 U.S. 668, 690–694 (1984) (to prevail on a claim of ineffective assistance of counsel a defendant must identify specific acts or omissions that constitute deficient performance and demonstrate how the deficient performance prejudiced the defense); ***State v. Bentley***, 201 Wis. 2d 303, 309–310, 548 N.W.2d 50, 53 (1996) (conclusory allegations are insufficient to entitle a defendant to a hearing on a claim of ineffective assistance of counsel; the defendant must allege sufficient facts to raise a question of fact).

¶17 Keith next argues that the trial court erred in admitting other-acts evidence. He asserts that evidence that the stolen checks were later forged and cashed was inadmissible other-acts evidence under WIS. STAT. RULE 904.04(2)

(1997–98).[2] Keith did not raise this objection in the trial court, however. We therefore decline to address it on appeal. *See* WIS. STAT. RULE 901.03(1)(a) (1997–98) (a party must make a specific and timely objection to the admission of evidence in order to preserve the issue for appeal); *see also* ***State v. Hartman***, 145 Wis. 2d 1, 9, 426 N.W.2d 320, 323 (1988).[3]

¶18 Finally, Keith argues that the trial court erred in admitting hearsay. He asserts that a police officer improperly testified about information he received from the two women who were arrested for cashing the stolen checks. We conclude that that admission of the challenged testimony was harmless. *See* ***State***

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[2] WISCONSIN STAT. RULE 904.04(2) (1997–98) provides:

> OTHER CRIMES, WRONGS, OR ACTS. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. This subsection does not exclude the evidence when offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

[3] In his opening statement, Keith's attorney said to the jury, "I want to caution you that if we start to get afield and start to get into a lot of forgery stuff, I'm going to be objecting quite a bit because I do not believe that's the case before you or the Court." Thereafter, he reiterated, "I'll be objecting if he starts to get into all these other things with which the defendant is not charged and which do not directly bear upon this case and these witnesses aren't here. This is a burglary case." The State later sought to admit evidence that the stolen checks were forged and cashed. Keith's attorney objected to the evidence, explaining, "I would think this could possibly lead to a mistrial if we start to get into things which Mr. Keith is not even charged with, and that's what concerns me." Keith's attorney never asserted that the evidence was inadmissible other-acts evidence under WIS. STAT. RULE 904.04(2). He argued only that the evidence did not "directly bear" on the burglary charge. Indeed, in response to the stated objections, the trial court ruled that the evidence was probative and relevant.

"[O]bjections to the admissibility of evidence must be made promptly and in terms which inform the circuit court of the exact grounds upon which the objection is based. Moreover, an objection preserves for appeal only the specific grounds stated in the objection." ***State v. Hartman***, 145 Wis. 2d 1, 9, 426 N.W.2d 320, 323 (1988) (citation omitted). The stated objections did not raise an issue as to whether the challenged evidence was inadmissible other-acts evidence, and did not preserve the issue for appeal.

v. Dyess, 124 Wis. 2d 525, 543–545, 370 N.W.2d 222, 231–232 (1985) (a conviction will be upheld despite trial court error if the State can demonstrate beyond a reasonable doubt that there is no reasonable possibility, i.e., no possibility sufficient to undermine confidence in the outcome of the proceeding, that the error contributed to the conviction).

¶19 As noted, Keith admitted to the police that he was involved in the burglary of Lucas's business. He said that he identified the business to Hamiel as a place to get checks, accompanied Hamiel to the business, and waited in the car while Hamiel broke in and took the safe full of checks. He told the police that he then took a share of the stolen checks. In light of this compelling evidence, there is no reasonable possibility that the outcome of the trial would have been different in the absence of the police officer's testimony that the women implicated Keith as the source of the stolen checks they had cashed.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (1997–98).