COURT OF APPEALS
DECISION
DATED AND FILED

October 29, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-0601-CR **Cir. Ct. No. 98-CF-1133**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DYKES G. JUPP,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Brown County: JOHN D. McKAY, Judge. *Affirmed*.

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Dykes Jupp appeals a judgment convicting him of three counts of robbery with use of force and three counts of aggravated battery, all as a party to a crime and as a repeater. He also appeals an order denying his postconviction motion in which he alleged ineffective assistance of trial counsel. He argues that: (1) the State failed to present sufficient evidence to support the

convictions; (2) his trial counsel was ineffective for encouraging Jupp not to testify, failing to investigate the possibility of challenging Jupp's competency or presenting an insanity defense, and failing to call alibi witnesses or codefendant Edward Steinhoff; and (3) the trial court failed to consider mitigating factors when it imposed prison terms totaling forty-eight years.[1]

¶2 The evidence, viewed most favorably to the State, is sufficient to support the convictions. *See* ***State v. Poellinger***, 153 Wis. 2d 493, 501-02, 451 N.W.2d 752 (1990). Although no witnesses could identify Jupp, the State presented sufficient circumstantial evidence that he was a party to three purse snatchings and batteries to the elderly victims. Jupp borrowed a car in Milwaukee and failed to return it. When the car was eventually recovered, it contained purses and identification papers from the Green Bay purse-snatching victims. The State also presented videotapes showing Jupp withdrawing cash from automated teller machines with the victims' bankcards within hours after the robberies. Jupp did not testify at his trial. His unexplained possession of recently stolen goods raises an inference that he participated in the robberies. *See* ***State v. Johnson***, 11 Wis. 2d 130, 139, 104 N.W.2d 379 (1960).

[1] The first and third issues were argued as ineffective assistance of counsel for failing to challenge the sufficiency of the evidence and the trial court's sentencing discretion. We conclude that this presentation adds an unnecessary layer to the analysis. The third issue also refers to "plain error" in the sentencing proceedings. The plain error rule refers to admissibility of evidence. *See* WIS. STAT. § 901.03(4). It is not applicable to a challenge to the sentencing proceedings and will not be addressed. Finally, Jupp also argues that he is entitled to an evidentiary hearing on newly discovered evidence. The record does not contain any motion alleging newly discovered evidence in the trial court. That issue will not be considered for the first time on appeal. *See* ***Terpstra v. Soiltest, Inc.***, 63 Wis. 2d 585, 593, 218 N.W.2d 129 (1974). However, we will consider the psychological reports to the extent that they apply to Jupp's argument that his trial counsel should have pursued incompetency or insanity issues.

¶3 Jupp has not established deficient performance from his counsel's advice not to testify. To establish deficient performance, Jupp must show that his counsel's representation fell below an objective standard of reasonableness. *See* ***Strickland v. Washington***, 466 U.S. 668, 688 (1984). Jupp's trial counsel explained at the postconviction hearing that he encouraged Jupp not to testify because Jupp's defense would force him to admit numerous other crimes to present his defense in this case. In addition to auto theft, he would admit to drug dealing and receiving stolen property. Counsel appropriately discouraged Jupp from admitting to these offenses on the slim prospect that the trial court would believe that he drove the perpetrators from Milwaukee to Green Bay, let them use the car for robberies committed without his knowledge, procured the bankcards from them without asking or being told where they came from, and innocently drove them back to Milwaukee.

¶4 Jupp has not established that he was prejudiced by his counsel's failure to further investigate his competency to stand trial. To establish prejudice, Jupp must show that, but for his counsel's unprofessional errors, there is a reasonable probability that the result of the trial would have been different. A reasonable probability is one that undermines this court's confidence in the outcome. ***Id.*** at 694. While Jupp presented evidence that he suffers from mental illnesses, he has not established that any psychological expert would have testified that he met the criteria for incompetency to stand trial. To be incompetent to stand trial, Jupp would have to lack substantial mental capacity to understand the proceedings or assist in his own defense. *See* WIS. STAT. § 971.13.[2] The record

[2] All references to the Wisconsin Statutes are to the 1999-2000 version.

contains no expert opinion that he meets that definition and the trial court found that Jupp was "very capable and, in fact, participated in his own defense to a great degree." Jupp has not established prejudice from his counsel's failure to pursue a claim of incompetency to stand trial because he has not established that there is any evidence that would support that claim.

¶5 Likewise, Jupp has not established prejudice from his trial counsel's failure to pursue an insanity defense because he has not produced any expert witness to support that defense. To be not guilty by reason of mental disease or defect, it is not enough to have a mental illness. Rather, he must show that the mental disease or defect caused him to lack substantial capacity either to appreciate the wrongfulness of his conduct or conform his conduct to the requirements of law. *See* WIS. STAT. § 971.15(1). Because Jupp has produced no evidence that any expert witness would testify that Jupp lacked that capacity, he has not established any prejudice from his counsel's failure to pursue that defense.

¶6 Jupp has not established prejudice from his trial counsel's failure to call alibi witnesses from the Court House tavern. Jupp claims that he was at the tavern during the second and third robberies and that the owners would recognize him because he talked to them when he lost change in their pay phone and he asked to use their telephone. Jupp's trial counsel testified at the postconviction hearing that he contacted the witnesses and they denied any knowledge of Jupp's presence at the tavern at the time the crimes were committed. Even if they remembered him, it is unlikely that they could specify the exact times he was at the tavern. In addition, Jupp indicated in his postconviction testimony that the bartender told him that a tavern across the street had a telephone he could use, and Jupp left the tavern shortly after the conversation, undercutting any alibi defense. At the postconviction hearing, Jupp did not call any witnesses to establish that he

was at the tavern during the second and third robberies. Therefore, he has established no prejudice from his counsel's failure to call alibi witnesses.

¶7 Jupp also faults his trial attorney for failing to call codefendant Edward Steinhoff to testify that Jupp had nothing to do with the robberies. At the postconviction hearing, Steinhoff testified that he and two other men, not Jupp, committed the purse snatchings. On cross-examination, Steinhoff admitted that he made statements to the police inculpating Jupp after Jupp's trial. He explained that he only told the officers what they wanted to hear. Jupp has not established that Steinhoff would have provided favorable testimony at Jupp's trial. At the postconviction hearing, Steinhoff did not indicate that he was willing to testify at Jupp's trial. From the fact that he continued to accuse Jupp in statements to the police after Jupp's trial, it appears unlikely that he would have testified for Jupp at an earlier date. In addition, Steinhoff's inconsistent statements provide a reasonable basis for the trial court to entirely disregard his testimony. Therefore, Jupp has not established any prejudice from his counsel's failure to call Steinhoff.

¶8 The trial court appropriately exercised its sentencing discretion. It considered the gravity of the offenses, Jupp's character, including past criminal offenses, and the need to protect the public. *See* ***State v. Thompson***, 172 Wis. 2d 257, 264, 493 N.W.2d 729 (Ct. App. 1992). Jupp complains that the court erroneously failed to consider his culpability as the getaway car driver rather than the actual perpetrator of the robberies and batteries. The trial court did consider his culpability, and reasonably determined that a getaway car driver, in these circumstances, was as culpable as the other perpetrator.

¶9 Jupp also argues that the trial court failed to consider his mental health as a factor when it imposed sentence. The court was aware that Jupp had a significant mental health history. It did not consider his mental health a substantial mitigating factor. The record discloses nothing about Jupp's mental illnesses that would mitigate his involvement in purse snatchings against elderly women, pushing them to the ground or kicking them. Jupp has not established any fact unknown to the trial court at the time of sentencing that would mitigate his involvement in these crimes.

By the Court.—Judgment and order affirmed.

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