COURT OF APPEALS
DECISION
DATED AND FILED

October 8, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP963-CR **Cir. Ct. No. 2011CF472**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CRAIG K. ASH,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dane County: MARYANN SUMI, Judge. *Affirmed*.

Before Kloppenburg, P.J., Lundsten and Blanchard, JJ.

¶1 PER CURIAM. Craig Ash appeals a judgment of conviction, following a jury trial, for operating while intoxicated, fourth offense, failure to install an ignition interlock device, and operating a vehicle after revocation of his license. He also appeals an order denying postconviction relief. Ash contends

that: (1) he was denied his Sixth Amendment rights when the circuit court erroneously determined that Ash had forfeited his right to counsel and was not competent to proceed pro se; (2) police illegally searched Ash's garage, requiring suppression of evidence obtained in that search and in a subsequent interrogation of Ash; (3) he was denied the effective assistance of counsel when his counsel failed to argue that Ash's statements to police were involuntary, failed to obtain expert testimony on the issue of blood alcohol concentration, and failed to present evidence that the damage to Ash's vehicle was caused by an earlier collision with a gas station stanchion; and (4) the evidence was insufficient to support the jury verdicts.

¶2 The criminal complaint sets forth the following. In the early evening of March 16, 2011, a witness reported to police that a car had struck a utility pole and driven away. The witness reported the vehicle's license plate number, which police traced to Ash. Police called a number they had for Ash and made contact with Ash's mother, Carolyn. Carolyn reported that Ash's vehicle was in the garage and that she had noticed damage to the vehicle. The first investigating officer arrived at Ash's home and made contact with Ash around 8:20 p.m. A second investigating officer arrived and observed Ash's vehicle in the garage, noting that the vehicle had front-end damage, and then made contact with Ash. The officers observed signs of intoxication, and questioned Ash as to his drinking that day and whether he had been in an accident. Ash stated that he had been drinking earlier in the day; that he had nothing to drink after he arrived home; and that he did not remember if he had been in an accident. Police transported Ash to the hospital, where he submitted to a blood draw.

¶3 The State charged Ash with operating while intoxicated, fourth offense, failing to install an ignition interlock device, and operating after

revocation. The State Public Defender's Office (SPD) appointed counsel to represent Ash. When breakdowns in the attorney/client relationship caused three of Ash's SPD-appointed attorneys to withdraw, the circuit court warned Ash that Ash's repeated inability to work with SPD-appointed counsel could result in forfeiture of the right to counsel, and that Ash's options would then be to hire his own counsel or to proceed pro se.

¶4 After Ash's fourth SPD-appointed counsel withdrew, the circuit court found that Ash had forfeited his right to counsel, and appointed Attorney Jessa Nicholson to assist Ash as standby counsel. However, later, at Ash's request, Nicholson began to fully represent Ash. Still later, Ash asked the court whether he would be allowed to bring in several other attorneys to assist him as well, and the court informed Ash that he would not be allowed to do so. At a final pretrial conference, Nicholson stated that she was returning to standby counsel status and that Ash appeared pro se. At the same time, Ash informed the circuit court that he wished to be represented by counsel. The court found that Ash was not competent to proceed pro se. In yet another turn of events, Nicholson represented Ash at trial. Ash was convicted of the charged offenses. Ash filed a postconviction motion, which the circuit court denied after a hearing. Ash appeals.

¶5 Ash contends first that he was denied his Sixth Amendment rights to counsel of his choice and self-representation when the circuit court informed Ash that he would not be allowed to bring retained counsel to trial and found Ash not competent to represent himself. However, Ash does not dispute that he never moved to substitute retained counsel and never moved to proceed pro se. Instead, Ash cites an exchange between Ash and the circuit court at the conclusion of the suppression hearing as evidencing the circuit court's denial of Ash's request to

bring retained counsel to trial, and argues that Ash wished to proceed pro se if he could not have retained counsel of his choice. However, during the cited exchange, Ash asked the court whether he could have multiple retained counsel in addition to his appointed counsel, and the court informed him he could not. The court had already informed Ash, at previous hearings, that he had the option to retain counsel at his own expense or to proceed pro se. We do not agree with Ash that the circuit court was required to remind Ash of his right to retain counsel or to proceed pro se when Ash asked if he could have several other counsel in addition to his appointed counsel. Ultimately, Ash never moved to substitute retained counsel for his appointed counsel or to proceed pro se. We discern no violation of Ash's Sixth Amendment right to counsel of his choice or to self-representation.

¶6 Next, Ash contends that the police entry into Ash's attached garage violated his Fourth Amendment rights, and thus the circuit court erred by denying Ash's suppression motion. Ash contends that police illegally observed Ash's car in the garage and illegally obtained subsequent statements from Ash. Ash cites Officer Kathleen Riffenburg's testimony from the suppression hearing that Riffenburg inspected Ash's vehicle prior to making contact with any occupants of the residence, and Officer Richard Bennett's testimony that Ash's vehicle was inside the garage. Ash argues that the police lacked a warrant or consent to enter the garage, and thus the entry violated Ash's Fourth Amendment rights. The State responds that Riffenburg's entry into the garage was irrelevant because, at the time Riffenburg entered the garage, Riffenburg and Bennett had already viewed the damage to Ash's car from outside the garage and Bennett had already taken an inculpatory statement from Ash. We agree with the State that any error in failing to suppress evidence the police obtained when Riffenburg entered the garage was harmless. *See* ***State v. Crowell***, 149 Wis. 2d 859, 873, 440 N.W.2d 352 (1989)

(test for harmless error is "whether there is a reasonable possibility that the error contributed to the conviction").

¶7 At the suppression hearing, Riffenburg and Bennett testified that they observed Ash's vehicle from outside the garage while approaching the front door of the house because the garage door was open and a light was on inside the garage, illuminating the vehicle. Riffenburg and Bennett testified that, from outside the garage, they were able to observe that the vehicle matched the description and license plate number of the vehicle reported as having been involved in the crash, and that the front end of the vehicle was damaged. Thus, even if the observations Riffenburg made from inside the garage had been suppressed, the officers' observations from outside the garage would have been admissible because the vehicle was in plain view.[1] *See* ***State v. Bell***, 62 Wis. 2d 534, 540, 215 N.W.2d 535 (1974) ("[O]bjects falling within the plain view of an officer who has a right to be in the position to have the view are subject to valid seizure and may be introduced in evidence.").

¶8 As to Ash's statements to Riffenburg and Bennett, we conclude that the evidence at the suppression hearing supports the circuit court's ultimate finding that Riffenburg and Bennett had valid consent from the owner of the home, Carolyn Ash, to be present in the home to question Ash. Because police were legally present in the home based on the consent of the owner, and because police were able to view the vehicle in the garage from outside the garage, we

[1] Ash contends that Riffenburg was able to testify that the damage to the front end of Ash's vehicle was "indented like a curve and to me that curve would match striking a pole" only because she had entered the garage to get a closer look. However, Ash does not cite anything in the record indicating that Riffenburg's testimony as to the damage to the vehicle was based on observations she made inside rather than outside the garage.

reject Ash's contention that police questioning of Ash derived from the entry into the garage. *See* ***State v. Davis***, 2011 WI App 74, ¶16, 333 Wis. 2d 490, 798 N.W.2d 902 (evidence derived from search warrant that was based on illegally obtained evidence must be suppressed).

¶9 Ash also contends that his trial counsel was ineffective by failing to argue that Ash's statements to police were involuntary. Ash contends that the officers' questioning of Ash while he was extremely intoxicated rendered his statements involuntary. He argues that his trial counsel was ineffective by failing to seek suppression of Ash's statements to police as involuntary, in contrast to the meritless suppression argument counsel chose to raise. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984) (claim of ineffective assistance of counsel "must show that counsel's performance was deficient ... [in that] counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment," and also that "the deficient performance prejudiced the defense," that is, that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable").

¶10 "In determining whether a [statement] was voluntarily made, the essential inquiry is whether the [statement] was procured via coercive means or whether it was the product of improper pressures exercised by the police." ***State v. Clappes***, 136 Wis. 2d 222, 235-36, 401 N.W.2d 759 (1987). "The ultimate determination of whether a [statement] is voluntary under the totality of the circumstances standard requires the court to balance the personal characteristics of the defendant against the pressures imposed upon him by police in order to induce him to respond to the questioning." ***Id.*** at 236. "The relevant personal characteristics of the [defendant] include his age, his education and intelligence, his physical and emotional condition, and his prior experience with the police."

Id. Those factors must be considered in light of the pressures imposed by police, which includes an analysis of "the length of the interrogation," as well as "the general conditions under which the [statements] took place, any excessive physical or psychological pressure brought to bear on the declarant, any inducements, threats, methods or strategies utilized by the police to compel a response, and whether the individual was informed of his right to counsel and right against self-incrimination." ***Id.*** at 236-37.

¶11 Here, Ash argues that the following circumstances support a finding that his statements were involuntary: (1) the questioning lasted over an hour, as officers arrived at Ash's home at 8:20 p.m. and questioned him until Ash was arrested at 9:29 p.m.; (2) Bennett and Riffenburg alternated questioning Ash; (3) Ash asked the officers to leave, and sometimes stared silently at the officers rather than answer their questions; (4) Ash was never advised of his right to counsel or to remain silent; (5) Ash was seated at his kitchen table, and the officers were standing over him in full uniform; and (6) Ash was extremely intoxicated, to the point of confusion. Ash contrasts the circumstances in this case to those found non-coercive in ***Clappes***, where the questioning lasted only a few minutes; the police questioning did not involve "engaging relays of interrogators"; and the defendants, although intoxicated, were coherent and intelligible. *See* ***id.*** at 238-39. Ash argues that, while the circumstances may not have rendered his statements involuntary had Ash not been extremely drunk, here, Ash's physical symptoms rose to the level of rendering his statements involuntary, as in ***State v. Hoppe***, 2003 WI 43, 261 Wis. 2d 294, 661 N.W.2d 407. Ash then contends that Nicholson was ineffective by pursuing the meritless claim that Ash revoked his mother's consent when Ash asked the officers to leave, rather than arguing that Ash's statements were involuntary. The State responds that Nicholson's decision

not to pursue a claim that Ash's statements were involuntary was neither deficient nor prejudicial, because that argument would have failed.

¶12 We conclude that Ash's ineffective assistance of counsel claim fails on the prejudice prong. *See* ***State v. Sanchez***, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996) (if ineffective assistance of counsel claim fails as to prejudice, we need not address deficient performance). Our review of the totality of the circumstances surrounding the police questioning of Ash establishes that a claim that Ash's statements were involuntary would have lacked merit. As to Ash's personal characteristics, Ash was 48 years old at the time of the questioning, and had prior experience with police through his three prior OWI offenses. Additionally, Ash had a college degree and had served in the military. As to police pressures, Ash was questioned in his own home, for around an hour, by two police officers in uniform; Ash asked the officers to leave and sometimes remained silent; Ash was not advised of his rights; and Ash was extremely intoxicated. We conclude that, considering Ash's personal characteristics in light of the police pressures, a claim that Ash's statements were involuntary would have lacked merit.

¶13 Ash acknowledges that the police tactics, by themselves, were not improper, but argues that he was so intoxicated that his statements were involuntary. Ash likens his mental state to that of the defendant in ***Hoppe***. The Hoppe court, however, cited the following personal characteristics as rendering Hoppe's statements involuntary, while noting that "the question of voluntariness in this case is a very difficult one": Hoppe "was suffering from cognitive impairment associated with his chronic alcoholism"; "had deficits in his short-term memory and impairment of his reasoning and problem-solving abilities"; "was hallucinating"; "was confabulating, meaning that he was making up for his deficits

by answering questions by stating what he thought sounded correct or reasonable"; "had difficulty understanding the questions as evidenced by a need for repetition and long pauses between questions and answers"; "demonstrated difficulty following simple directions"; "had slurred speech and drifted off"; and "was lethargic, dehydrated, had been vomiting, and suffered tremors." ***Hoppe***, 261 Wis. 2d 294, ¶¶48-49, 57. Additionally, an evaluating doctor "believed that Hoppe was not competent to consent to questioning." ***Id.***, ¶50. Here, Ash cites only his high blood alcohol concentration of .32, which would generally cause confusion; his slurred speech and inconsistent answers; and Riffenburg's testimony that Ash appeared "confused." This argument fails because the evidence Ash points to, even if accepted as true, does not demonstrate that his statements were involuntary. The indicators of intoxication do not rise to the level of impairment identified in ***Hoppe*** or ***Clappes***. *See* ***Clappes***, 136 Wis. 2d at 241-42 ("Proof of … intoxication should not affect the admissibility of the evidence where there is no proof that the confessor was irrational, unable to understand the questions or his responses, otherwise incapable of giving a voluntary response, or reluctant to answer the questions posed by the authorities.").

¶14 Ash also contends that his trial counsel was ineffective by failing to introduce evidence to explain Ash's blood alcohol content and to support his theory that the damage to his vehicle was caused by an earlier accident. Ash contends that expert testimony was necessary to establish that Ash could have reached such an elevated blood alcohol content simply by drinking high alcohol content beer between the time he returned home and the time police arrived, and that photographs comparing the gas station stanchion to the utility pole would have supported the argument that the damage to Ash's vehicle was caused by an earlier collision with the stanchion. Ash argues that that evidence was necessary

to answer two important questions for the jury: How did Ash get so drunk and how did his car get damaged? The State responds that Nicholson pursued a reasonable strategy and thus was not deficient. We agree with the State.

¶15 Nicholson testified at the postconviction motion hearing that she chose not to pursue an expert as to blood alcohol concentration because the State was already presenting an expert witness on that issue, allowing Nicholson the opportunity to cross-examine as to blood alcohol content calculations. Nicholson also explained that she believed the evidence would indicate that Ash was an alcoholic, and that the jury by common sense would understand that alcoholics are capable of consuming large quantities of alcohol in a short amount of time. Indeed, at trial, Nicholson elicited testimony from the State's expert that it was possible that Ash's blood alcohol content could have resulted if the alcohol consumption began about thirty minutes after the time of driving, and stopped around the time of police contact. Ash has not explained why it was deficient performance for Nicholson to elicit this testimony from the State's expert rather than presenting a different expert to provide the same testimony.

¶16 Nicholson also testified at the postconviction motion hearing that she did not pursue the defense of a prior accident causing damage to Ash's vehicle because her investigation of that defense did not reveal supporting evidence, because there was other evidence tying Ash's vehicle to the scene of the accident, and because Ash was not charged with the accident itself. Because Nicholson set forth a reasonable strategic decision, her performance was not deficient. *See* ***State v. Felton***, 110 Wis. 2d 485, 502-03, 329 N.W.2d 161 (1983).

¶17 Finally, Ash contends that the evidence was insufficient to support the jury verdicts. Ash attacks the evidence on grounds that Ash's inculpatory

statements to police were incredible given his highly intoxicated state, and because the witness who reported the accident did not actually see Ash's vehicle strike a utility pole. We are not persuaded. We sustain a jury verdict "'unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force'" that, as a matter of law, "'no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt.'" ***State v. Zimmerman***, 2003 WI App 196, ¶24, 266 Wis. 2d 1003, 669 N.W.2d 762 (quoted source omitted). Here, as explained above, Ash's intoxication went to the interpretation of and the weight to be given his statements to police, which were issues for the jury to decide. It was similarly the function of the jury to decide what weight to give the witness's report of hearing the accident and then viewing Ash's vehicle driving away. That evidence together with other trial evidence, if deemed credible by the jury, was sufficient to sustain the verdicts.

By the Court.—Judgment and order affirmed.

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