**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**November 24, 2015**

**Diane M. Fremgen**
**Clerk of Court of Appeals**



**Appeal No. 2014AP2965-CR** **Cir. Ct. No. 2013CF2559**

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

**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**TIRON JUSTIN GRANT,**

**DEFENDANT-APPELLANT.**

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DANIEL L. KONKOL and JONATHAN D. WATTS, Judges.[1] *Affirmed*.

Before Curley, P.J., Kessler and Brennan, JJ.

[1] The Honorable Daniel L. Konkol presided over the trial and sentencing and entered the judgment of conviction. The Honorable Jonathan D. Watts entered the order denying Grant's motion for a new trial and alternate relief.

¶1 CURLEY, P.J. Tiron Justin Grant appeals the judgment of conviction for possession of cocaine with the intent to deliver, contrary to WIS. STAT. §§ 961.41(1m)(cm)1r. and 939.50(3)(f) (2013-14),[2] and the order denying his postconviction motion. He is seeking a new trial, or, in the alternative, eligibility for two early release programs. He claims he is entitled to a new trial: (1) due to insufficiency of the evidence/erroneous ruling as to the chain of custody evidence; (2) due to a due process violation; (3) due to ineffective assistance of counsel; and (4) in the interests of justice. With respect to his early release programs request, Grant argues that the trial court erroneously exercised its discretion when it refused to make him eligible for the two programs. We disagree with all of his contentions and affirm.

## BACKGROUND

¶2 On June 3, 2013, Grant was charged with one count of possession with intent to deliver cocaine in an amount more than one gram but not more than five grams, contrary to WIS. STAT. §§ 961.41(1m)(cm)1r. and 939.50(3)(f). He was also charged with obstructing an officer, which was later dismissed.

¶3 Grant entered a plea of not guilty and requested a jury trial. Before trial, Grant brought a motion to suppress evidence; however, Grant ultimately chose not to pursue that motion.

¶4 Various witnesses testified at the jury trial. Officer Brian Maciejewski testified that he was assigned to the bicycle unit on May 30, 2013,

[2] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

when he observed a group of individuals standing in the street. He then saw Grant run up to a porch. The officer asked Grant if he lived there, but Grant did not respond. Instead, Grant jumped off the porch and ran into a back alley. The officer saw Grant drop a phone. Another officer then took up the chase.

¶5 Officer Martez Ball recounted that he, too, was a member of the bicycle unit on May 30, 2013, when he saw a group of people standing in the street. Officer Ball testified that a man, later identified as Grant, ran up to a front porch, and when Officer Maciejewski tried to engage this person in conversation, Grant jumped off the porch and ran away. Officer Ball said that he told Grant to stop and identified himself as a police officer, but instead, Grant jumped a fence and the officer chased after him. As he was chasing Grant, Ball saw him take out a pill bottle. When Grant was trying to climb over a fence, Ball grabbed his ankles and he then saw Grant throw the pill bottle about ten to fifteen feet away. Grant then fell off the fence. Two other police officers arrested him and handcuffed him. Officer Ball instructed another officer to retrieve the pill bottle.

¶6 Officer Matthew Bughman also testified. He recovered the pill bottle that he saw Grant throw away. It contained two plastic bags that both contained corner cuts of cocaine, twenty-three in all. He took the evidence back to the police station and field-tested it. It tested positive for cocaine. He then weighed it and it weighed 2.79 grams. He then put the cocaine, but not the pill bottle, in a paper fold and sealed it and put it in the drug safe. This evidence, which was eventually sent to the crime lab, was accompanied by an inventory which reflected where the drugs were recovered, the time they were recovered, and who witnessed the sealing of the envelope. The inventory contained an identifying number.

¶7 At trial, Officer Bughman identified the inventory that he filled out and the drugs that were found in the pill bottle thrown by Grant. When asked where the pill bottle was, he said he thought the pill bottle was inventoried. However, no pill bottle was presented at trial. He also told the jury that he never wrote a police report outlining his observations because he assumed the other officers would include his recovery of the drugs in their reports.

¶8 The State also called Detective James Henner to testify as an expert witness. Detective Henner related that he has been a member of the Milwaukee Police Department for thirteen years and, for the last seven, as a detective. For most of his years of service he dealt primarily with drug-related investigations. Based on his vast experience, he told the jury that the way the drugs obtained from Grant were packaged and the amount of the drugs recovered indicated that Grant was selling drugs, not simply possessing them for personal use. On cross-examination, his expert opinions were not challenged.

¶9 The final State's witness was a woman from the Wisconsin State Crime Laboratory. She testified as to her qualifications and her testing procedures. She identified an exhibit that bore her initials as cocaine she received from the Milwaukee Police Department. The package bore the same inventory numbers that Officer Bughman testified he used when packaging the drugs recovered from Grant. She related to the jury the tests that she performed on the substances and explained the results were positive for cocaine base. She explained that when she weighed the cocaine it was lighter than when it left the police department, but she did not find that difference remarkable because, based on her numerous years of experience, cocaine base loses weight over time due to numerous variables, including how it was processed, packaged, and stored.

¶10 Grant testified in his own defense. He claimed that he ran from the police because he thought he had an outstanding warrant. He denied ever having a pill bottle and claimed the police set him up due to his refusal to work as a confidential informant.

¶11 Grant was found guilty of possession with intent to deliver cocaine, more than one gram. He received a sentence of three years' incarceration and three years' extended supervision. The trial court determined he was not eligible for the Challenge Incarceration Program or the Substance Abuse Program. Following sentencing, Grant filed a postconviction motion raising many of the same issues he raises on appeal. The trial court denied his motion and this appeal follows.

## ANALYSIS

*(1) Sufficient evidence was produced at Grant's trial.*

¶12 When reviewing a challenge to a jury verdict based on the sufficiency of the evidence, our standard of review is extremely deferential to the jury verdict. *See* ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). An appellate court may not reverse a jury verdict "unless the evidence, viewed most favorably to the state and the conviction, is so insufficient ... that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***Id.***

¶13 In order to find Grant guilty of possessing cocaine with intent to deliver, the State had to prove that Grant possessed a substance, that the substance was cocaine, that Grant knew it was cocaine, and finally, that Grant intended to deliver it. *See* WIS JI—CRIMINAL 6035. The State also had to prove that

the cocaine weighed between one and five grams. *See* WIS. STAT. § 961.41(lm)(cm)1r.

¶14 On appeal, Grant contends that the State did not lay a sufficient foundation through the chain of custody to introduce the cocaine into evidence. We disagree. The degree of proof necessary to establish a chain of custody is a matter within the trial court's discretion. ***State v. Simmons***, 57 Wis. 2d 285, 295-96, 203 N.W.2d 887 (1973). We will not reverse a discretionary determination absent an erroneous exercise of the trial court's discretion. *See* ***State v. Evans***, 187 Wis. 2d 66, 77, 522 N.W.2d 554 (Ct. App. 1994).

¶15 "The elaborateness of the chain of custody will depend upon what the evidence is being offered to prove. The foundation is a function of relevancy, not ritual." 7 DANIEL D. BLINKA, WISCONSIN PRACTICE SERIES: WISCONSIN EVIDENCE § 9015.1 at 756 (2d ed. 2001). "The testimony [on the chain of custody] must be sufficiently complete so as to render it improbable that the original item has been exchanged, contaminated or tampered with." ***B.A.C. v. T.L.G.***, 135 Wis. 2d 280, 290, 400 N.W.2d 48 (Ct. App. 1986). "All 'links' in the chain need not testify." 7 DANIEL D. BLINKA, at 756; *see* ***Simmons***, 57 Wis. 2d at 296. All that is necessary for admission of the evidence is foundational testimony "sufficient to support a finding that the matter in question is what its proponent claims [it to be]." WIS. STAT. § 909.01.

¶16 Grant contends that the cocaine was not properly admitted into evidence because the pill bottle it was in was never admitted into evidence. However, the inventory numbers testified to by both the packaging police officer and the State Crime Lab technician were identical. The lab technician testified that there were no alterations to the bag the evidence was sealed in since she had

last seen it. Grant's argument that the pill bottle was essential is a red herring. Had the drugs been found in a purse or glove compartment, no one would expect or require the purse or car to be admitted as a vital link in the chain of custody. Given the testimony of the officer and lab technician, the pill bottle was not an essential link in the chain of custody. The trial court properly exercised its discretion when it allowed the cocaine to be admitted into evidence. *See* ***Simmons***, 57 Wis. 2d at 295-96 (admission of evidence is within trial court's discretion).

*(2) There was no violation of Grant's due process rights.*

¶17 Grant next argues that his due process rights were violated when the pill bottle was not admitted into evidence. He contends that having the actual pill bottle in court could have provided some exculpatory evidence in contrast to Officer Bughman's testimony.

¶18 Due process is guaranteed by the United States and Wisconsin Constitutions. *See* U.S. CONST. amend XIV, § 1; WIS. CONST. art. 1, § 8. "Whether state action constitutes a violation of due process presents a question of law, which this court decides independently." ***State v. Neumann***, 2013 WI 58, ¶32, 348 Wis. 2d 455, 832 N.W.2d 560. A defendant's due process rights as to the loss of evidence are violated if the police: (1) fail to preserve evidence that is apparently exculpatory; or (2) act in bad faith by failing to preserve evidence that is potentially exculpatory. *See* ***State v. Luedtke***, 2015 WI 42, ¶¶39, 46, 362 Wis. 2d 1, 863 N.W.2d 592.

¶19 Specifically, when the police fail to preserve evidence, the defendant's due process rights can be violated in one of two ways. ***State v. Greenwold***, 189 Wis. 2d 59, 67, 525 N.W.2d 294 (Ct. App. 1994). The first is

when police fail to preserve evidence "that might be expected to play a significant role in the suspect's defense." ***California v. Trombetta***, 467 U.S. 479, 488 (1984). To satisfy this standard, the evidence must both: (1) possess an exculpatory value that was apparent to those who had custody of the evidence before the evidence was destroyed; and (2) be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means. ***State v. Oinas***, 125 Wis. 2d 487, 490, 373 N.W.2d 463 (Ct. App. 1985). The second way a defendant's due process rights can be violated involves bad faith, *see* ***Luedtke***, 362 Wis. 2d 1, ¶¶39, 46, but Grant has no evidence of that, and it is his burden to prove bad faith, *see* ***Arizona v. Youngblood***, 488 U.S. 51, 58 (1988). Consequently, that claim is not relevant here.

¶20 In ***Youngblood***, the United States Supreme Court distinguished "potentially useful evidence" from "exculpatory evidence." ***Id.*** at 57-58. It held that "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." ***Id.*** at 58.

¶21 Here, it is unclear whether the police destroyed the pill bottle or simply did not make it available for trial. Grant submits that it was apparently exculpatory because it might have been too small to hold the amount of cocaine recovered or it might have shown signs of having been exposed to weather conditions, which would contradict police officer testimony that it had been tossed by Grant shortly before his arrest and recovered immediately. We disagree with Grant's contentions.

¶22 At best, the pill bottle was potentially exculpatory. As the State notes, the pill bottle was more likely to be inculpatory if it was both big enough to

accommodate twenty-three corner cuts of cocaine and if it appeared to be a clean, new bottle, suggesting it was recently discarded. Here, the police would not have known or expected that the pill bottle played a significant role in Grant's defense. In fact, at trial, Grant used the non-appearance of the pill bottle to his advantage by claiming that there was no pill bottle and that the police were framing him. There was no due process violation as the trial court correctly found.

*(3) Grant's trial attorney was not ineffective.*

¶23 Under the Sixth Amendment to the United States Constitution, a criminal defendant is guaranteed the right to effective assistance of counsel. ***Strickland v. Washington***, 466 U.S. 668, 685-86 (1984). The Supreme Court explained in ***Strickland*** that a convicted defendant must show two elements to establish that his counsel's assistance was constitutionally ineffective: first, that counsel's performance was deficient; and second, that the deficient performance resulted in prejudice to the defense. ***Id.*** at 687.

¶24 The proper standard for judging attorney performance is that of reasonably effective assistance, considering all the circumstances. ***Id.*** "When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness." ***Id.*** at 687-88.

¶25 The proper test for prejudice in the context of an ineffective assistance of counsel claim is whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** at 694.

¶26 Importantly, counsel is "strongly presumed to have rendered adequate assistance" within the bounds of reasonable professional judgment. ***Id.*** at 690; *see also* ***State v. Guerard***, 2004 WI 85, ¶43, 273 Wis. 2d 250, 682 N.W.2d 12.

¶27 Grant argues that his trial attorney was ineffective because she did not challenge the State's expert witness's qualifications by bringing a ***Daubert*** motion. ***Daubert*** refers to the case of ***Daubert v. Merrell Dow Pharmaceuticals, Inc.***, 509 U.S. 579 (1993), which outlines three requirements for the admission of expert testimony as evidence. First, the expert witness must be qualified to discuss the subject matter, meaning the expert must have special expertise by education, training, or experience. *See* ***id.*** at 588-90. Second, the subject matter must be qualified for admission, meaning the principles and methodology must be reliable to be considered by the trier of fact. *See* ***id.*** at 588-91. Third, the expert witness must have properly applied the qualified subject matter methodology to the facts in the case. *See* ***id.*** at 592-95.[3] The trial court has discretion to admit or exclude testimony. *See* ***State v. Giese***, 2014 WI App 92, ¶16, 356 Wis. 2d 796, 854 N.W. 2d 687.

[3] In 2011, the legislature amended WIS. STAT. § 907.02 to make Wisconsin law consistent with the ***Daubert*** reliability standard embodied in FED. R. EVID. 702. *See* 2011 Wis. Act 2, § 34m; ***Daubert v. Merrell Dow Pharm., Inc.***, 509 U.S. 579 (1993). WISCONSIN STAT. § 907.02(1) provides:

> If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if the testimony is based upon sufficient facts or data, the testimony is the product of reliable principles and methods, and the witness has applied the principles and methods reliably to the facts of the case.

¶28 Grant asserts that his trial attorney should have brought a ***Daubert*** motion to challenge the admissibility of Detective Henner's expert testimony concerning drug packaging. As noted, Detective Henner stated that the drugs that were thrown by Grant were consistent with drug sales and not personal use because of the way the drugs were packaged and the amount of drugs. Grant argues that it was deficient performance for his trial attorney to not challenge Detective Henner's expertise because his testimony was not reliable and this deficiency prejudiced Grant.

¶29 Grant concedes that there are cases where police officers have testified as expert witnesses concerning the drug trade and practices. *See* ***United States v. Robertson***, 387 F.3d 702 (8th Cir. 2004). Here, however, he contends that the officer's expertise lay elsewhere and was not sufficiently strong to permit his testimony. Again, we disagree.

¶30 Detective Henner testified that he has been a member of the Milwaukee Police Department for thirteen years, the last seven as a detective. At the time of his testimony he was assigned to a FBI task force concentrating on drug and gang-related incidents. When a police officer, most of Detective Henner's arrests were either drug- or gang-related. During his career as a member of the police force, he has been primarily focused on drug-related investigations. He estimated that he has executed over two hundred search warrants. In addition, he told the jury that he conducted undercover investigations in which he would purchase drugs or possibly set up a deal to sell narcotics. In light of his experiences, Detective Henner could confidently advise the jury as to the manner of packaging of drugs and the amount of drugs that would indicate a person was selling drugs rather than possessing an amount for personal use.

¶31 Had Grant's attorney challenged the officer's qualifications, the trial court would have permitted the testimony. This is so because Detective Henner was qualified to discuss the subject matter, had special expertise by training and experience, and his opinions were reliable. Grant's trial attorney was not deficient in failing to file a ***Daubert*** motion.

*(4) This is not an appropriate case for a reversal in the interest of justice.*

¶32 WISCONSIN STAT. § 752.35 permits a discretionary reversal. It reads:

> In an appeal to the court of appeals, if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried, the court may reverse the judgment or order appealed from, regardless of whether the proper motion or objection appears in the record and may direct the entry of the proper judgment or remit the case to the trial court for entry of the property judgment or for a new trial, and direct the making of such amendments in the pleadings and the adoption of such procedure in that court, not inconsistent with statutes or rules, as are necessary to accomplish the ends of justice.

Grant submits that we should reverse his conviction in the interests of justice because the cocaine should not have been admitted because there was "not a strong enough chain of custody to establish that it was the same drugs that [were] found on scene in an alleged orange pill bottle." We earlier disposed of that argument by finding that the pill bottle's admission was not essential to the chain of custody and that the trial court properly exercised its discretion when allowing the submission of the cocaine as evidence. We see no reason to further address this rarely-used exceptional discretionary power.

*(5) The trial court properly exercised its discretion when denying Grant eligibility for two early release programs.*

¶33 Subject to a few exceptions irrelevant to this appeal, when imposing a bifurcated sentence, the court shall, as part of the exercise of its sentencing discretion, decide whether the person being sentenced is eligible or ineligible to participate in the Wisconsin Substance Abuse Program, found in WIS. STAT. § 302.05, or the Challenge Incarceration Program, found in WIS. STAT. § 302.045. *See* WIS. STAT. §§ 973.01(3g) and (3m); *see also* WIS. STAT. §§ 302.05 and 302.045.

¶34 Grant complains that the trial court erroneously exercised its discretion when it refused to make him eligible for these two early release drug programs. The purpose of these two programs is to rehabilitate offenders who have been identified as having drug abuse problems. Successful completion of either program leads to early release from prison sentences. *See* ***id.***

¶35 Sentencing decisions are discretionary; we review only whether the trial court erroneously exercised its discretion. ***State v. Spears***, 227 Wis. 2d 495, 506, 596 N.W.2d 375 (1999). A discretionary decision will be affirmed if it is made and based upon the facts of record and in reliance on the appropriate law. ***Id.*** There is a strong public policy against interfering with the trial court's sentencing discretion, and we presume the trial court acted reasonably. ***State v. Harris***, 119 Wis. 2d 612, 622, 350 N.W.2d 633 (1984).

¶36 Grant submits that the trial court determined "without testing or substantive interviewing" that Grant did not have a drug problem; rather, he had a drug delivery problem. We disagree.

¶37 The trial court was aware that Grant had been convicted of possession of cocaine with intent to deliver in 2006, but the trial court did not believe Grant had a drug abuse problem. This impression may have been formed by the fact that Grant was able to maintain steady employment, and his numerous drug tests throughout these proceedings were all negative for drugs.

¶38 Thus, the trial court's determinations were reasonable and based on known facts. There was no erroneous exercise of discretion in making Grant ineligible for the programs.

¶39 For the reasons stated, the judgment of conviction and the postconviction order are affirmed.

*By the Court.*—Judgment and order affirmed.

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