COURT OF APPEALS DECISION DATED AND FILED

May 26, 1998

Marilyn L. Graves
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* § 808.10 and RULE 809.62, STATS.

No. 97-0748-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LILLIAN L. NASH,

DEFENDANT-APPELLANT.

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

Before Fine, Schudson and Curley, JJ.

PER CURIAM. Lillian L. Nash appeals from a judgment of conviction entered after a jury found her guilty, as a party to a crime, of possession of five grams or fewer of cocaine with intent to deliver, within one thousand feet of a school. *See* §§ 161.16(2)(b)(1), 161.41(1m)(cm)(1), 161.49(1) and (2), and

939.05, STATS., 1993-94.[1] Nash also appeals from an order denying her motion for postconviction relief. Nash claims that: (1) the evidence is insufficient to sustain her conviction; (2) the trial court erred in refusing to compel her sister's testimony; and (3) the trial court erred in denying her request for a ***Machner*** hearing based on her allegations of ineffective assistance of counsel.[2] We affirm.

I. BACKGROUND

On the evening of February 8, 1996, Officer John Kaltenbrun of the Milwaukee Police Department received a report of drug trafficking at 2010 North 22nd Street in Milwaukee. Officer Kaltenbrun and his partner, Officer Lawrence Pierce, and three other officers drove to the area, parked near the house, and observed it for about thirty-five minutes. They saw three separate people enter the house, stay for about one minute, and then leave.

Two of the officers then went up to the house and knocked on the door. A male answered the door, and the officers identified themselves as police. The male then turned around, dropped some cocaine from his hand, and fled into the house. The officers pursued the male into the house. Inside the house they saw Nash's sister, Pauline, leaving a bedroom. When Pauline Nash saw the officers, she turned back into the bedroom and dropped some rock cocaine to the floor. The officers recovered about ten packages of rock cocaine from the floor of the bedroom. They also found Lillian Nash's identification in the same bedroom.

---

[1] Effective July 9, 1996, §§ 161.16(2)(b)(1), 161.41(1m)(cm)(1), and 161.49, STATS., 1993-94, were recodified in chapter 961, STATS., 1995-96. *See* 1995 Wis. Act 448, §§ 173, 245, 289, 515.

[2] ***State v. Machner***, 92 Wis.2d 797, 285 N.W.2d 905 (Ct. App. 1979).

Pauline Nash had been speaking to Lillian Nash on the phone when the police first entered the home. Pauline Nash told her that the police were raiding the house. Lillian Nash then took a cab to the house. Upon arrival, she told the police that she lived in the house, and she asked them what was going on. The police told her that they had found cocaine in the house, and that Pauline Nash had admitted that she was selling cocaine from the house. At that point, the officers asked Lillian Nash to remain outside while they interviewed the people they found inside the house.

Fifteen to twenty minutes later, the police allowed Lillian Nash to enter the house. They told her that she faced possible felony charges for keeping a drug house. They also repeated that Pauline Nash had admitted that she was selling cocaine from the house. Pauline Nash confirmed this to Lillian Nash. At that point, Lillian Nash said that she gave rock cocaine to Pauline Nash to sell.

The officers did not arrest either of the Nashes at that time, but rather told them to report to the police station on February 12, 1996. On February 12, Lillian Nash went to the police station and gave a statement. She again said that she gave rock cocaine to Pauline Nash. Lillian Nash said that she packaged the rock cocaine in mini-ziploc bags, and that, on February 8, she gave Pauline Nash ten bags of rock cocaine to sell. Lillian Nash further said that the bedroom where the rock cocaine was found was her bedroom.

At trial, Lillian Nash testified that she had lied when she said that she gave the cocaine to her sister. She testified that she lied in order to protect her sister, who was a pregnant seventeen-year-old with a one-year-old child. She testified that she did not live at 2010 North 22nd and that she did not give Pauline Nash the cocaine. The jury found Lillian Nash guilty, as a party to a crime, of

possession of five grams or less of a controlled substance (cocaine), within one thousand feet of a school. The trial court entered judgment accordingly.

II. DISCUSSION

A. Sufficiency of the Evidence

Lillian Nash alleges that the only evidence of her guilt is her uncorroborated confession, and that the evidence is therefore insufficient to sustain her conviction. She argues that she recanted her confession, and that the State was required to present corroborating evidence to support her conviction.

> [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). A confession must be corroborated by independent evidence in order to support a conviction; however, "[a]ll the elements of the crime do not have to be proved independently of an accused's confession." ***Holt v. State***, 17 Wis.2d 468, 480, 117 N.W.2d 626, 633 (1962). The corroborating evidence "can be far less than is necessary to establish the crime independent of the confession. If there is corroboration of any significant fact, that is sufficient under the Wisconsin test." ***Id.***

The record reveals that there was sufficient evidence presented to corroborate Lillian Nash's confession and sustain her conviction. Independent evidence corroborated her confession with respect to the form, amount, location, and packaging of the cocaine that had been seized from the house. At the house, she confessed that she gave Pauline Nash rock cocaine to sell. Later, at the police station, Lillian Nash again confessed that she gave her sister rock cocaine to sell. She also said that she packaged the cocaine in mini-ziploc bags, and that she gave about ten bags to her sister to sell. The police did, in fact, discover about ten mini-ziploc bags of rock cocaine. Further, Lillian Nash said that the room in which the rock cocaine was discovered was her room. This statement was corroborated by the discovery of items of her identification in the room. The presence of the cocaine in Lillian Nash's room supports the inference that she had a possessory interest in the cocaine. *See* ***State v. Peete***, 185 Wis.2d 4, 16, 517 N.W.2d 149, 153 (1994) (a person possesses an item if the item is in an area over which the person has control and the person intends to exercise control over the item). There was sufficient evidence to corroborate Lillian Nash's confession and to sustain her conviction.

B. Failure to Compel Testimony

Lillian Nash next argues that the trial court erred in refusing to compel the testimony of her sister, Pauline Nash. At the time of Lillian Nash's trial, Pauline Nash had entered a guilty plea to a charge which arose from the events of February 8, 1996, and was awaiting sentencing. In accordance with her attorney's advice, Pauline Nash invoked her Fifth Amendment privilege against self-incrimination and chose not to testify at Lillian Nash's trial.

Lillian Nash provides neither legal authority nor cogent argument in support of her assertion that the trial court erred in honoring Pauline Nash's assertion of privilege. She has therefore waived the issue. *See* ***Barakat v. DHSS***, 191 Wis.2d 769, 786, 530 N.W.2d 392, 398 (Ct. App. 1995) (reviewing court need not address "amorphous and insufficiently developed" arguments); ***State v. Pettit***, 171 Wis.2d 627, 646, 492 N.W.2d 633, 642 (Ct. App. 1992) ("Arguments unsupported by references to legal authority will not be considered."). Moreover, Lillian Nash's trial attorney did not move to compel Pauline Nash's testimony, but rather specifically stated, "I don't have any objection to the Court's decision." Thus, Lillian Nash has not preserved the issue for appeal. *See* ***State v. Rogers***, 196 Wis.2d 817, 826–827, 539 N.W.2d 897, 900–901 (Ct. App. 1995).

C. Ineffective Assistance of Counsel

Lillian Nash's final argument is that the trial court erred in denying her request for a ***Machner*** hearing based on her allegations of ineffective assistance of counsel. Lillian Nash cites four alleged deficiencies of her trial counsel: (1) he failed to seek suppression of the cocaine seized from the house; (2) he failed to request that the trial court compel Pauline Nash to testify at Lillian Nash's trial; (3) he failed to seek to exclude Lillian Nash's prior conviction for obstructing an officer; and (4) he failed to offer Pauline Nash's statements into evidence. Lillian Nash alleges that a hearing is necessary in order to determine whether or not she has been prejudiced by trial counsel's failure to introduce her sister's statements into evidence, and to determine whether trial counsel had a strategic reason for his alleged deficiencies.

If a defendant files a postconviction motion and alleges facts that, if true, would entitle the defendant to relief, the trial court must hold an evidentiary

hearing. *See* ***State v. Bentley***, 201 Wis.2d 303, 310, 548 N.W.2d 50, 53 (1996). Whether the motion alleges sufficient facts which, if true, would entitle the defendant to relief is a question of law, which we review *de novo*. ***Id.***

> However, if the defendant fails to allege sufficient facts in his motion to raise a question of fact, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the trial court may in the exercise of its legal discretion deny the motion without a hearing.

Id., 201 Wis.2d at 309–310, 548 N.W.2d at 53 (citations omitted). We will reverse the trial court's discretionary decision to deny an evidentiary hearing only for an erroneous exercise of discretion. *See* ***id.***, 201 Wis.2d at 311, 548 N.W.2d at 53.

To prevail on a claim of ineffective assistance of counsel, a defendant bears the burden to establish both that counsel's performance was deficient and that the deficient performance produced prejudice. ***State v. Sanchez***, 201 Wis.2d 219, 232–236, 548 N.W.2d 69, 74–76 (1996). To show prejudice, the defendant must demonstrate "that 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." ***Strickland v. Washington***, 466 U.S. 668, 694 (1984).

1. Suppression.

Lillian Nash asserts that because the officers did not have a warrant to search the home from which they recovered the cocaine, the search was illegal and her trial counsel was deficient in not moving to suppress the evidence seized. The record discloses, however, that the officers were faced with exigent circumstances that justified their warrantless search of the house. After knocking

on the door and announcing that they were police, the officers observed a male drop rock cocaine and flee into the house. Under these circumstances, the officers were justified in entering the house without a warrant to look for the fleeing person. *See* ***State v. Smith***, 131 Wis.2d 220, 229, 388 N.W.2d 601, 605 (1986) (exigent circumstances justify warrantless search when there is a likelihood that a suspect will flee).

Thus, the record conclusively shows that Lillian Nash's attorney was not ineffective in failing to move to suppress the evidence because there was no prejudice; and such motion would have been denied. Lillian Nash is not entitled to relief on this ground.

2. Failure to move to compel testimony.

Lillian Nash contends that her trial counsel was ineffective in failing to request that the trial court compel Pauline Nash's testimony. Lillian Nash argues that her sister would not have suffered any prejudice by testifying at her trial because Pauline Nash would only have had to disclose whether or not Lillian Nash provided the cocaine to her, and thus, if Lillian Nash's attorney had moved to compel Pauline Nash's testimony, the trial court would have erred in not granting the motion.

A defendant who has entered a plea but has not yet been sentenced for the crime retains the privilege against self-incrimination with respect to that crime, and may refuse to testify concerning the facts of that crime. *See* ***State v. McConnohie***, 121 Wis.2d 57, 65, 358 N.W.2d 256, 260–261 (1984). The trial court must honor this privilege unless it is perfectly clear, from a careful consideration of all the circumstances in the case, that the witness asserting the privilege is mistaken, and that the testimony cannot possibly have a tendency to

incriminate. *See* ***id.***, 121 Wis.2d at 69, 358 N.W.2d at 262. We will not overturn a trial court's finding that a witness has a valid reason to assert the privilege against self-incrimination unless the trial court's finding is against the great weight and clear preponderance of the evidence. *See* ***State v. Seibert***, 141 Wis.2d 753, 760, 416 N.W.2d 900, 903 (Ct. App. 1987).

It is not perfectly clear that Pauline Nash's testimony regarding the source of the cocaine "cannot possibly have a tendency to incriminate." *See* ***id.***, 141 Wis.2d at 760–761, 416 N.W.2d at 903–904 (where witness awaited sentencing for related criminal charge, it was "readily apparent that her testimony could result in 'injurious disclosure'"). Pauline Nash's testimony regarding her possession of the cocaine could implicate her in criminal conduct. The trial court would not have erred in denying a request to compel her to testify. Lillian Nash's trial counsel was not ineffective because there was no prejudice.

3. Failure to seek exclusion of prior conviction.

Lillian Nash argues that her trial counsel was ineffective in failing to seek exclusion of her one prior conviction. She argues that the conviction undermined her credibility, and that the prejudicial effect of the evidence greatly outweighed its probative value.

Evidence of conviction of a crime is admissible to attack the credibility of a witness. *See* ***State v. Kuntz***, 160 Wis.2d 722, 750, 467 N.W.2d 531, 542 (1991). The conviction may be a misdemeanor, and need not involve dishonesty. *See* ***id.***, 160 Wis.2d at 750–752, 467 N.W.2d at 542–543.

> [T]he prejudice that may accompany introducing past misdemeanor convictions which do not involve dishonesty is mitigated by the restrictions placed on the scope of the inquiry into the past convictions. The examiner may only

> ask the witness if he has ever been convicted of a crime and if so how many times. If the witness's answers are truthful and accurate, then no further inquiry may be made.

Id., 160 Wis.2d at 752, 467 N.W.2d at 542–543 (citations omitted). Lillian Nash has not demonstrated that any motion to exclude would have been successful; she has not established prejudice and is not, therefore, entitled to relief.

4. Failure to offer Pauline Nash's statements.

Lillian Nash argues that her trial counsel was ineffective in failing to offer Pauline Nash's statements into evidence. She contends that her sister's statements had exculpatory value; however, she fails to show how. Lillian Nash also makes a conclusory allegation that the statements were admissible under an exception to the hearsay rule, but fails to even identify a specific exception under which the statements would fall. Because her argument is insufficiently developed, and because her postconviction motion similarly made only conclusory allegations, we reject her contention that she was entitled to a ***Machner*** hearing on this ground. *See* ***Barakat***, 191 Wis.2d at 786, 530 N.W.2d at 398 (reviewing court need not address "amorphous and insufficiently developed" arguments); ***Bentley***, 201 Wis.2d at 309–310, 548 N.W.2d at 53 (trial court may deny postconviction motion without a hearing if the defendant presents only conclusory allegations).

By the Court.—Judgment and order affirmed.

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