COURT OF APPEALS
DECISION
DATED AND FILED

August 5, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-2297-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DONALD HARRIS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Racine County: GERALD P. PTACEK, Judge. *Affirmed.*

Before Snyder, P.J., Nettesheim and Anderson, JJ.

PER CURIAM. Donald Harris appeals pro se from a judgment of conviction of first-degree recklessly endangering safety, felon in possession of a firearm and possession of a controlled substance with intent to deliver. He also appeals from an order denying his postconviction motion. The issues on appeal are whether there was sufficient evidence to convict Harris and whether Harris

was denied the effective assistance of trial counsel. We affirm the judgment and the order.

We may not reverse a conviction on the basis of insufficient evidence "unless the evidence, viewed most favorably to the State and the conviction, is so insufficient in probative value and force 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." ***State v. Poellinger***, 153 Wis.2d 493, 501, 451 N.W.2d 752, 755 (1990). In reviewing the sufficiency of circumstantial evidence, an appellate court need not concern itself in any way with evidence that might support other theories of the crime. *See* ***id.*** at 507-08, 451 N.W.2d at 758. "[W]hen faced with a record of historical facts which supports more than one inference, an appellate court must accept and follow the inference drawn by the trier of fact unless the evidence on which that inference is based is incredible as a matter of law." ***Id.*** at 506-07, 451 N.W.2d at 757.

The evidence at trial was as follows. City of Racine Police Officer Daniel Petersen observed a group of fifteen to twenty people leaving a bar at approximately 2:00 a.m. It looked as if a skirmish was about to take place. Petersen then heard a gunshot and observed gun smoke rising into the air in the proximity of a man wearing a leather jacket and with pink curlers in his hair. The group dispersed in all directions. Officer Petersen followed the individual with the pink curlers. He heard another gun shot. He saw the individual he was pursuing running down a street with two other individuals running somewhat behind him. When the officer was attempting to stop the man at a distance, he observed the man toss an object with a yellowish tint into the grass. Officers discovered a handgun, a plastic baggie containing an off-white chunky substance, and a package of peanut butter crackers in the area where the man, later identified as

Harris, had tossed something aside. The gun and the baggie were dry even though the ground was damp. Harris was in possession of two pagers, a cocaine pipe and $564 cash at the time of his arrest. The substance in the baggie was tested and determined to be cocaine base.

Pictures of the gun demonstrated that it had a gold handle. Officer Petersen indicated that ammunition in the gun was jammed. He explained that when a jammed weapon is cleared, a live round would be ejected. One live round and a spent casing were found at the location outside the bar where the people were standing when Petersen heard the first gunshot.

Harris argues that there was insufficient proof that he ever possessed the "contraband" found on the ground in close proximity to his arrest. He points out that the officer only observed that one object was tossed aside but that three were found. He also believes that the evidence of possession was weak because the area was known as a high crime and drug activity area and there was a possibility that the gun and drugs were already on the ground.

We reject Harris' contention that the only inference to be drawn from the officer's observation of the yellowish object is that Harris only threw away the peanut butter crackers. The combined effect of throwing away the objects found could leave an impression that a yellowish object was thrown. It is not necessary that fingerprints be found on the gun or the baggie. A finding of guilt may rest upon evidence that is entirely circumstantial. *See* ***id.*** at 501, 451 N.W.2d at 755. Given the officer's observation that Harris left the scene where a gun was discharged, that Harris threw something away, that the objects were found in close proximity to where Harris was stopped, and that the items were dry

amid damp grass,[1] the evidence was sufficient to support a finding that Harris was in possession of the gun and drugs. This was more than a "mere proximity" to drugs.[2]

Harris argues that there was no evidence that he knew that he was in possession of cocaine. Knowing possession may be inferred from the circumstances. *See* ***State v. Trimbell***, 64 Wis.2d 379, 384-85, 219 N.W.2d 369, 371 (1974). The large baggie Harris possessed contained six smaller bags holding individual portions of cocaine base. The manner of packaging gives rise to an inference that Harris knew that he possessed cocaine base. That Harris attempted to dispose of the package before being apprehended by police demonstrates a consciousness of guilt about the contents of the package. Harris offered no evidence suggesting that the nuggets in his possession could have been mistaken to be anything else. Harris' possession of the cocaine pipe,[3] pagers and a large amount of cash supports the inference that Harris was a drug dealer who possessed the drugs with intent to deliver. *See* ***State v. Brewer***, 195 Wis.2d 295, 305-06, 536 N.W.2d 406, 410-11 (Ct. App. 1995).

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[1] It is not inherently incredible that the gun and the baggie were dry in comparison to the dampness of the ground.

[2] Harris cites ***United States v. Batimana***, 623 F.2d 1366, 1369 (9th Cir. 1980), for the proposition that more than a "mere proximity" to drugs must be shown to support a finding of possession.

[3] For the first time in his reply brief, Harris argues that Petersen should not have been allowed to testify that the pipe Harris possessed was a cocaine pipe. There is no merit to a claim that the evidence should have been excluded or that trial counsel was deficient for not objecting. Another police officer testified that the glass pipe that Harris possessed was commonly used for smoking crack cocaine. These are matters within the knowledge and experience of police officers.

Harris characterizes the evidence supporting the conviction of first-degree recklessly endangering safety as mere "personal assumptions based upon unfound and unsound premises, which falls much shorter than even circumstantial evidence." He proceeds to attack Petersen's credibility with respect to the observation of the gun smoke rising near Harris because Petersen did not acknowledge that another person pointed to Harris as the person doing the shooting.[4]

It is for the jury, not this court, to determine the credibility of witnesses. *See* ***State v. Fettig***, 172 Wis.2d 428, 448, 493 N.W.2d 254, 262 (Ct. App. 1992). Even if the jury had heard testimony that someone pointed Harris out as the shooter, it could rely on the officer's observation. The officer had already made his observation as to the location of the smoke and the persons near it before he exited his squad car. The officer's observation was not incredible or suspect simply because an individual confirmed the officer's observation as to the possible gunman. The jury could reasonably conclude that Harris had discharged the gun into the group of people. Again, Harris' claim that there was no direct evidence is of no import.[5] The circumstantial evidence was sufficient.

Harris claims that his trial counsel was constitutionally deficient. "There are two components to a claim of ineffective assistance of counsel: a

[4] Officer Petersen testified at the preliminary hearing that after hearing the shot he looked toward the group of people, saw the smoke rising into the air, exited his squad car, and a person pointed out a male with pink and green curlers in his hair as the one doing the shooting. This testimony was excluded at trial based on a defense motion. Thus, the jury did not hear the testimony that Harris contends makes the officer's testimony suspect.

[5] Harris points out that there was no evidence of the gun having been recently fired, no gun powder residue testing of his hands and clothing, and no testing to see if the shells found matched those discharged by the gun.

demonstration that counsel's performance was deficient, and a demonstration that such deficient performance prejudiced the defendant. The defendant has the burden of proof on both components." ***State v. Smith***, 207 Wis.2d 258, 273, 558 N.W.2d 379, 386 (1997) (citation omitted). The test for ineffective assistance of counsel is the same under the state and federal constitutions. *See* ***State v. Sanchez***, 201 Wis.2d 219, 236, 548 N.W.2d 69, 76 (1996). Whether counsel's actions constitute ineffective assistance is a mixed question of law and fact. *See* ***id.*** The trial court's findings of what counsel did and the basis for the challenged conduct are factual and will be upheld unless clearly erroneous. *See* ***id.*** However, whether counsel's conduct amounted to ineffective assistance is a question of law which we review de novo. *See* ***id.*** at 236-37, 548 N.W.2d at 76.

Harris first suggests that trial counsel was deficient for not cross-examining Petersen about his "contradictory testimony of his acquiring defendant's identity." As indicated earlier, the defense successfully pursued a motion to prohibit Petersen from testifying that an individual pointed out a man with pink and green curlers in his hair as the shooter.[6] Counsel performed professionally by staying away from evidence that the court had declared inadmissible. *See* ***State v. Behnke***, 203 Wis.2d 43, 62-63, 553 N.W.2d 265, 274 (Ct. App. 1996). Moreover, that another person identified the shooter would only have served to confirm the officer's observation and would have provided another link between Harris and the shot. Trial counsel was not deficient in this respect.[7]

[6] The prosecution conceded that the evidence was hearsay and prejudicial.

[7] Harris does not dispute that he was in the group of people over which the gun smoke rose. It matters little why Petersen decided to pursue Harris. There was sufficient evidence that Harris was in possession of a gun. A reasonable inference can be drawn that he fired the gun.

The prosecution's forensic chemist testified that the contents of the six individual baggies were combined, ground into a powder and tested. Trial counsel did not cross-examine the chemist. Harris claims that counsel was deficient for not challenging the accuracy and reliability of the procedure used by the chemist. He suggests that cross-examination would have highlighted the chemist's failure to identify each of the six individual items as cocaine base. Harris extrapolates that if the items were not individually tested, the prosecution failed to meet its burden of proof that he possessed cocaine of five to fifteen total grams.[8] *See* § 961.41(1m)(cm)2, STATS.

Harris fails to indicate what additional investigation regarding the chemist's procedure would have revealed and how it would have changed the outcome of the trial. *See* ***State v. Flynn***, 190 Wis.2d 31, 48, 527 N.W.2d 343, 349-50 (Ct. App. 1994). The chemist's testimony at the ***Machner***[9] hearing demonstrates that cross-examination challenging the procedure used would have had no impact on the reliability of the test results. The chemist indicated that a visual examination of the individual baggies was performed and that the content of each looked the same. He also explained that because of the purity of cocaine base, the combined testing procedure is used. Harris was not prejudiced by trial

[8] The chemist testified as to the weight of the substance in each individual baggie. The total weight was 11.9824 grams.

After briefing was completed, Harris provided this court with a copy of ***State v. Robinson***, 517 N.W.2d 336 (Minn. 1994), as additional authority. The holding of ***Robinson***, that there was insufficient proof that the substances tested exceeded ten grams, is not applicable here. ***Robinson*** involved random testing of the bindles recovered. Here, all the material recovered was tested.

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

counsel's failure to cross-examine the chemist because it would not have revealed anything out of the ordinary.[10]

In his reply brief, Harris argues that trial counsel was deficient for proceeding to trial without the "McMorris sisters," whom Harris characterizes as critical exculpatory witnesses. He also complains that counsel failed to call Officer James Zuehlke to report the information provided by the McMorris sisters. These claims are raised for the first time in the reply brief and we will not address them. *See* ***State v. Grade,*** 165 Wis.2d 143, 151 n.2, 477 N.W.2d 315, 318 (Ct. App. 1991). Moreover, there is no merit to Harris' claims. At trial a record was made of Harris' desire to have the trial continue to completion despite the failure of one of the McMorris sisters to appear pursuant to a subpoena. Trial counsel also acknowledged that information that could have been elicited from Zuehlke was objectionable as hearsay.

By the Court.—Judgment and order affirmed.

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

[10] Although we have disposed of Harris' claim on the prejudice prong, we do not suggest that counsel's performance was deficient. There was no basis for counsel to question the content of each bag. The police officers testified that the packaging and appearance of each individual baggie were consistent with cocaine base. *See* ***State v. Dye***, 215 Wis.2d 280, 290, 572 N.W.2d 524, 528 (Ct. App. 1997), *cert. denied*, 118 S. Ct. 1825 (1998).