COURT OF APPEALS
DECISION
DATED AND FILED

May 17, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP1124-CR **Cir. Ct. No. 2013CF1594**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANTONIO LAVELLE STEWART,

DEFENDANT-APPELLANT.

APPEAL from a judgement and an order of the circuit court for Milwaukee County: DANIEL L. KONKOL and J.D. WATTS, Judges. *Affirmed.*

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

¶1 PER CURIAM. Antonio Lavelle Stewart appeals the judgment entered after a jury found him guilty of possession of tetrahydrocannabinols

("THC") as a second/subsequent offense. *See* WIS. STAT. § 961.41(3g)(e) (2013-14).[1] He also appeals the order denying his postconviction motion.[2] Stewart argues: (1) the trial court erred in permitting evidence related to why officers went to the residence located at 1327 South 20th Street; (2) his trial counsel was ineffective for not objecting at trial when the State exceeded the scope of the trial court's evidentiary ruling; and (3) he is entitled to a new trial in the interests of justice because the admission of this evidence was prejudicial. We disagree and affirm.

BACKGROUND

¶2 Stewart was charged with possession of THC as a second/subsequent offense following an incident that occurred in May 2013 at 1327 South 20th Street in Milwaukee. According to the complaint, Milwaukee police officers were dispatched to that location "where several individuals were loitering outside the residence and were observed conducting hand to hand drug transactions."

¶3 Prior to trial, Stewart moved to exclude evidence of the reason police officers arrived at 1327 South 20th Street. Specifically, Stewart asked the trial court to exclude the following:

> A. Any discussion or evidence indicating that the residence located at 1327 South 20th Street was a known drug house.

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

[2] The Honorable Daniel L. Konkol presided over Stewart's trial and sentencing proceedings. The Honorable J.D. Watts issued the order denying Stewart's postconviction motion.

> B. Any discussion or evidence indicating that officers previously observed hand-to-hand drug transactions occurring at that location.
>
> C. Any discussion or evidence that officers visited the residence on the day in question to investigate potential drug activity.

¶4 The trial court ruled that if the State had a witness who personally observed Stewart dealing drugs, such testimony would be relevant as to whether he possessed them. However, the trial court stated, "Short of that, I won't allow the testimony." The trial court continued:

> The officers can testify as to why they were going to that location. The jury is going to be wondering what was going on, why they were at that location.
>
> That would be relevant as to the purpose of their going there.
>
> So I will allow the officers can [sic] testify they were going there to investigate a complaint. That doesn't say that the defendant did or did not have the controlled substance, but apparently there's a complaint, that's why the officers are there.
>
> So with regard to, I guess letter C, that is admissible. With regard to letter[s] A and B, again, unless there's some particular eyewitness that saw the defendant with the hand-to-hand transaction, you will not be able to use evidence with regard to A and B.

¶5 At trial, during her opening statement, the prosecutor told the jury that "officers had received a number of complaints regarding drug dealing activity near 1327 South 20th Street." Three officers who responded to the dispatch the night Stewart was arrested testified for the State. The officers, who were on

bicycle patrol at the time, testified that they were investigating complaints of drug dealing in the area of 1327 South 20th Street.[3]

¶6 The officers further explained that when they arrived at 1327 South 20th Street, Stewart ran. One of the officers chased and eventually detained Stewart. During the chase, the officer "observed [Stewart] reach towards his right waistband, right front area, [and] retrieve[] an unknown object." The officer relayed, "[a]t that point, I believed he was recovering contraband of some sort. At that point I threw down my bicycle to chase on foot." The officer saw Stewart holding "some sort of packaging material."

¶7 The officer subsequently saw Stewart kneel down next to a set of three trash cans. Due to his position, the officer testified that he did not actually

[3] Stewart takes issue with the following testimony:

- Sergeant Jay Karas testified the group of officers at the scene had set out to investigate "information … of drug dealing in the area of 20th and Greenfield."
- Sergeant Karas testified, "we [i.e., the officers] were there to investigate a drug complaint."
- Officer Michael Dukat testified the officers had been "assigned to conduct some follow-up investigation on some drug dealing complaints at 1327 South 20th Street."
- Officer Dukat also testified that he "saw a group of subjects in front of the address that we were given with the drug dealing complaint."
- Officer Jonathan Caya testified he was there "to investigate a narcotics dealing complaint in the area of 1327-1329 South 20th Street. It's a duplex, upper and lower." However, Officer Caya testified he believed the lower unit of the duplex was vacant.

see Stewart discard the object he had in his hand. However, the officer was able to see that Stewart reached to the right of the trash can and that, before this, the officer saw the object in Stewart's hand.

¶8 Stewart ran to the residence's front door entrance where the officer detained him. The officer testified that, at that time, Stewart no longer had the object. When the officer returned to the trash cans where he saw Stewart kneel, he recovered a sandwich bag containing what appeared to be eight corner cuts of marijuana. According to the officer, less than one minute lapsed between the time he detained Stewart and the time he searched the trash cans.

¶9 Stewart's defense at trial was that he "didn't run. He didn't throw anything. He didn't possess anything." Instead, he presented the testimony of two witnesses—a woman he was in a relationship with and a friend. Both testified that Stewart was standing in the doorway of the residence when an officer rushed to the door, yelled "freeze," and then pointed a pistol at Stewart.

¶10 The jury convicted him of possession of THC as a second/subsequent offense.

¶11 Stewart filed a postconviction motion arguing that he was entitled to a new trial because the trial court erred when it allowed the officers to testify that they were at the residence to investigate drug-dealing activity. He also argued his trial counsel was ineffective for failing to object when the State exceeded the scope of the trial court's evidentiary ruling and when the prosecutor referenced numerous complaints of drug dealing activity in her opening statement. Lastly, Stewart claimed he was entitled to a new trial in the interest of justice because the real controversy was not fully tried.

¶12 The postconviction court denied Stewart's motion without a hearing. In its decision, the postconviction court concluded there was no error in allowing evidence that the officers went to 1327 South 20th Street to investigate a complaint of drug dealing because the jury was not told the complaint involved any activity inside the house, the jury was not told Stewart was involved, and Stewart was not charged with dealing drugs. Additionally, the postconviction court ruled that even if the testimony exceeded the scope of its evidentiary ruling, Stewart failed to demonstrate that he was prejudiced. The postconviction court was not persuaded that a new trial was warranted in the interest of justice.

DISCUSSION

¶13 On appeal, Stewart renews his postconviction arguments. We address each in turn.

1. *Evidence as to why the officers were present at the scene.*

¶14 Stewart argues that the trial court erroneously exercised its discretion when it allowed evidence to be presented at trial related to why the officers went to 1327 South 20th Street. He contends the evidence admitted during trial far exceeded the scope of the trial court's evidentiary ruling. According to Stewart, this information was not relevant because there was no reason for the jury to know why the officers went to the residence as it did not make the existence of whether he possessed drugs more or less probable.

¶15 Evidence is relevant if it has any tendency to make the existence of any fact of consequence to the determination of the action more or less probable than it would be without the evidence. WIS. STAT. § 904.01. Although evidence may be relevant, it nonetheless may be excluded if its probative value is

substantially outweighed by the risk of unfair prejudice. WIS. STAT. § 904.03. We review evidentiary rulings with deference, limiting our analysis to whether the trial court properly exercised its discretion based upon the facts and accepted legal standards. ***State v. Mayo***, 2007 WI 78, ¶31, 301 Wis. 2d 642, 734 N.W.2d 115. We will uphold a trial court's decision to admit or exclude evidence if the court "examined the relevant facts, applied a proper legal standard, and reached a reasonable conclusion using a demonstrated rational process." ***Id.***

¶16 Here, we agree with the postconviction court that the "investigative-complaints evidence" is relevant because it provided context for the officers' encounter with Stewart. In this regard, the postconviction court explained:

> [T]he defendant was not prejudiced by evidence which merely provided the jury with a context for the officers' decision to go to that location and their actions at the scene. It is the *defendant's conduct* as observed by the officers that set the ball in motion for the possession charge, and therefore, there is no reason to believe that the outcome of the trial would have been any different if the jury was not allowed to hear contextual evidence of this nature.

(Emphasis in original.)

¶17 Evidence may be admissible to show context when the evidence will "'complete the story of the crime on trial by proving its immediate context of happenings near in time and place.'" *See* ***State v. Pharr***, 115 Wis. 2d 334, 348, 340 N.W.2d 498 (1983) (citation and one set of quotation marks omitted). Context was important in this case because it completed the story and allowed the jury to better evaluate the credibility of the witnesses. Specifically, whether the jury believed the three officers' testimony about Stewart's actions or whether the jury believed Stewart's witnesses and his defense that he did not run, he did not throw anything, and he did not possess anything.

¶18 Having concluded that the evidence was relevant, we will address Stewart's argument that the "investigative-complaints evidence" should have been excluded because it was highly prejudicial insofar as it provided the link to convict him of possession—i.e., numerous complaints of drug dealing at Stewart's home meant Stewart had drugs.[4] *See* ***State v. Sullivan***, 216 Wis. 2d 768, 789-90, 576 N.W.2d 30 (1998) (explaining unfair prejudice occurs where the evidence at issue "has a tendency to influence the outcome by improper means or if it appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish or otherwise causes a jury to base its decision on something other than the established propositions in the case."). Stewart stresses that the evidence against him was all circumstantial and submits that when distilled to its essence, the State's case was that he allegedly ran when officers arrived at the residence and then knelt down by the dumpsters. According to Stewart, there was no evidence linking him to the package of marijuana found near the dumpster.

¶19 To the extent Stewart's argument challenges the validity of circumstantial evidence, it is a nonstarter: "It is well established that a finding of guilt may rest upon evidence that is entirely circumstantial and that circumstantial evidence is oftentimes stronger and more satisfactory than direct evidence." ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). The circumstantial evidence in this case was substantial with three officers testifying that they observed Stewart take flight and with the officer who ultimately detained him testifying to his observations of Stewart reaching toward his waistband, retrieving

[4] Stewart also presents an insufficiently developed argument that this evidence was inadmissible hearsay. This court does not address undeveloped arguments. *See* ***Associates Fin. Servs. Co. of Wis., Inc. v. Brown***, 2002 WI App 300, ¶4 n.3, 258 Wis. 2d 915, 656 N.W.2d 56.

an object, and then reaching to the right of the trash can where the officer later recovered suspected marijuana. Again, the link to Stewart's conviction was not the "investigative-complaints evidence," it was Stewart's conduct. We are not convinced that the probative value of the "investigative-complaints evidence" was outweighed by the danger of unfair prejudice.

2. *Ineffective assistance of counsel.*

¶20 Stewart alternatively argues his trial counsel was ineffective for failing to exclude and limit the "investigative-complaints evidence" and the prosecutor's remark during her opening statement. According to Stewart, there was no strategic benefit for failing to object. Instead, it was deficient performance.

¶21 To prove a claim of ineffective assistance of counsel, a defendant must show that his lawyer performed deficiently and that this deficient performance prejudiced him. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). The test for deficient performance is whether counsel's representation fell below objective standards of reasonableness. *See* ***State v. Carter***, 2010 WI 40, ¶22, 324 Wis. 2d 640, 782 N.W.2d 695. To show prejudice, "the defendant must show that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" ***Id.***, ¶37 (citation omitted). A reviewing court may dispose of a claim of ineffective assistance of counsel on either ground. *See* ***Strickland***, 466 U.S. at 697.

¶22 A postconviction claim of ineffective assistance of counsel requires an evidentiary hearing only if the motion contains allegations of material fact that, if true, would entitle the defendant to relief. *See* ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. "However, if the motion does not raise facts

sufficient to entitle the movant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the [postconviction] court has the discretion to grant or deny a hearing." ***Id.*** We independently determine whether the facts set forth in a postconviction motion require an evidentiary hearing. *See* ***id.*** If they do not, we review a postconviction court's decision as to whether to hold a hearing for an erroneous exercise of discretion. *See* ***id.***

¶23 We conclude that even if counsel's failure to exclude or limit the "investigative-complaints evidence" was deficient, Stewart was not prejudiced. Again, the link to Stewart's conviction was not the "investigative-complaints evidence," it was Stewart's conduct.

3. *New trial in the interest of justice.*

¶24 Stewart next argues that we should exercise our discretionary power under WIS. STAT. § 752.35 to order a new trial in the interests of justice on the grounds that the real controversy was not fully tried. We decline to do so because the record establishes that the real controversy—whether Stewart possessed THC—was fully tried.

¶25 An appellate court will exercise its discretion to grant a new trial in the interest of justice "only in exceptional cases." ***State v. Cuyler***, 110 Wis. 2d 133, 141, 327 N.W.2d 662 (1983). Our review of the trial and postconviction proceedings in this case, as well as Stewart's arguments on appeal, leads us to

conclude that a new trial in the interest of justice is not warranted.[5] For all of these reasons, we affirm.

By the Court.—Judgment and order affirmed.

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

[5] To the extent the postconviction court may have applied the wrong legal standard in its analysis of whether Stewart was entitled to a new trial in the interest of justice, we note that it is well established that we can affirm when the court reaches the right result for the wrong reason. *See* ***Milton v. Washburn Cty.***, 2011 WI App 48, ¶8 n.5, 332 Wis. 2d 319, 797 N.W.2d 924.