COURT OF APPEALS
DECISION
DATED AND FILED

May 17, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP1578-CR **Cir. Ct. No. 2012CF3246**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JERRELL LAMAR TAYLOR,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: CLARE L. FIORENZA, Judge. *Affirmed*.

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

¶1 PER CURIAM. Jerrell Lamar Taylor appeals a judgment, entered after a jury trial, convicting him of obstructing an officer and possessing with intent to deliver more than forty grams of cocaine as a second or subsequent offense. *See* WIS. STAT. §§ 946.41(1), 961.41(1m)(cm)4., 961.48(1)(a) (2011-

12).[1] He also appeals an order denying postconviction relief. Taylor raises two issues. First, he claims the circuit court wrongly denied his pretrial motion to suppress the evidence found during a vehicular search. Second, he claims the circuit court wrongly denied the motion he made for a mistrial after the jury heard evidence that he believes suggested he was on supervision at the time of his arrest. We reject both claims and affirm.

BACKGROUND

¶2 The State charged Taylor with obstructing an officer and possessing with intent to deliver more than forty grams of cocaine as a second or subsequent offense.[2] He moved to suppress the evidence found during the search of a van parked outside of his home.

¶3 The testimony at the suppression hearing revealed that Taylor was serving a term of extended supervision when Department of Corrections Agent Christopher Gomes and Milwaukee Police Officer James Hunter conducted an unannounced home visit at about 2:00 p.m. on June 27, 2012. As Gomes and Hunter approached the residence, Taylor got out of a van parked next to the building. Hunter could see into the van and observed a large amount of paper currency in various denominations strewn about the rear passenger area. Taylor had two cell phones hanging from a lanyard around his neck, and a pat-down search revealed that he had more than two hundred dollars in his pocket. Gomes

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

[2] The original charges also included allegations that Taylor possessed a firearm while a felon and that he was a habitual offender for purposes of all of the crimes. The State later dismissed those allegations for reasons that are not material to this opinion.

testified that Taylor's rules of supervision included a 12:00 p.m. curfew and prohibited Taylor from possessing a cell phone or more than $100 in cash.

¶4 Neither Gomes nor Hunter recalled seeing Taylor with keys for the van. Gomes testified that, in response to his inquiry, Taylor first said the van belonged to his cousin, then said it belonged to his girlfriend, Kimberly Webb. Hunter determined that Webb was in fact the registered owner.

¶5 Gomes, Hunter, and Taylor entered the home. On the bedroom floor, Hunter saw numerous torn plastic sandwich baggies that he identified as "corner cuts," and he testified that he knew from his experience in law enforcement that corners cut from sandwich baggies are used to package illegal drugs. Hunter further testified that Taylor appeared nervous, started pacing, and then abruptly fled the scene. Hunter gave chase, and Taylor was eventually apprehended after approximately fifteen minutes. When Hunter returned to the residence, he determined that the van was unlocked. He entered the van and began gathering the money inside for safe keeping. During this process, he found several baggies containing a large quantity of a chalky substance that he believed was crack cocaine. He also found a digital scale and a handgun under the front passenger's seat.

¶6 At the conclusion of the hearing, the circuit court denied Taylor's motion to suppress the items found in the van. After making findings of fact and considering several legal theories arguably justifying Hunter's entry into the van, the circuit court concluded that probable cause existed for a vehicular search.

¶7 The matter proceeded to a jury trial. At the outset of the proceedings, the parties agreed to refer to Gomes as "Agent Gomes" without specifying that he worked for the Department of Corrections in order to prevent

the jury from learning that Taylor was on supervision at the time of the arrest. When Hunter took the stand, however, he referred to Gomes as "his"—meaning Taylor's—agent, and the State asked a follow-up question that also included the phrase "his agent." The circuit court ruled that Gomes should be denominated "Mr. Gomes" for the remainder of the trial, and the parties complied.

¶8 Gomes and Hunter testified about their interactions with Taylor on June 27, 2012, and about the money and paraphernalia he had on his person and in his home. Hunter described searching the van and finding $203, a digital scale, a gun, and multiple baggies containing a total of 110.07 grams of crack cocaine. An expert witness for the State told the jury that the amount of cocaine represented 1100 servings, had a street value of $11,000, and far exceeded the amount a person would possess for personal use. Additional experts for the State described lifting a fingerprint from one of the baggies containing cocaine and determining that the print matched the third finger on Taylor's right hand.

¶9 Toward the end of the State's case-in-chief, Gomes laid the foundation for audio recordings of Taylor's post-arrest telephone calls, testifying he could recognize Taylor's voice based on weekly contact with Taylor during a period of three-and-a-half months. Outside the jury's presence, the State discussed the segments of the recordings it wanted to play. Taylor objected to the jury's hearing him say he "had the bracelet on" because the statement implied he was on supervision, and the State agreed to omit that statement. The State then played portions of the recorded calls for the jury, including Taylor's statements that he was "getting out of the van ... and they pulled up.... [I]t was an

inopportune time."[3] Additionally, however, the State miscued one of the recordings and played the portion in which Taylor mentioned "the bracelet."

¶10 Taylor moved for a mistrial. Citing the references to "his agent," the miscued recording, and the testimony that he had weekly contact with Gomes, Taylor argued the jury could deduce he was on supervision and he was thereby unfairly prejudiced. The circuit court took the motion under advisement.

¶11 Webb and Taylor testified for the defense. Webb said she co-owned the van with her friend Tiffany Johnson, who had used the vehicle on the morning of Taylor's arrest and then parked at Taylor's house. For his part, Taylor testified he had never been inside the van and that nothing found in the van was his.

¶12 After both parties rested, the circuit court denied Taylor's motion for a mistrial, concluding it was not warranted in light of the totality of the evidence. The case went to the jury, which found Taylor guilty.[4]

¶13 Taylor moved for postconviction relief, claiming, as relevant here, that the circuit court should have granted his motions to suppress evidence and for a mistrial.[5] The circuit court denied his claims without a hearing, and he appeals.

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[3] The recordings are not in the appellate record. The State read the quoted statements aloud, and Taylor acknowledged making them.

[4] After the jury returned its verdict finding Taylor guilty of possessing with intent to deliver more than forty grams of cocaine, the circuit court found, pursuant to WIS. STAT. § 961.48(1)(a), that he committed the crime as a second or subsequent offense. *See* ***State v. Miles***, 221 Wis. 2d 56, 67-68, 584 N.W.2d 703 (Ct. App. 1998) (State may prove prior drug convictions with evidence presented to the circuit court before sentencing).

[5] The postconviction motion included a claim of newly discovered evidence. Taylor does not discuss that claim in his appellate briefs, and we deem it abandoned. *See* ***Cosio v. Medical Coll. of Wisconsin, Inc.***, 139 Wis. 2d 241, 242-43, 407 N.W.2d 302 (Ct. App. 1987).

DISCUSSION

¶14 Taylor maintains that the circuit court erred when it denied his motion to suppress the evidence found in the van. Preliminarily, we must correct his contention that we review orders denying suppression motions for an erroneous exercise of discretion. Rather, when we review an order denying suppression of evidence, we accept the circuit court's findings of fact unless they are clearly erroneous. *See* ***State v. Drew***, 2007 WI App 213, ¶11, 305 Wis. 2d 641, 740 N.W.2d 404. Application of the facts to governing constitutional principals is a question of law that we review independently. *See* ***id.*** With our standard of review clarified, we turn to Taylor's substantive claim.

¶15 "The Fourth Amendment to the United States Constitution and Article I, Section 11 of the Wisconsin Constitution prohibit unreasonable searches and seizures." ***State v. Artic***, 2010 WI 83, ¶28, 327 Wis. 2d 392, 786 N.W.2d 430. Warrantless searches are presumptively unreasonable subject to a few carefully delineated exceptions. ***State v. Johnston***, 184 Wis. 2d 794, 806, 518 N.W.2d 759 (1994). One such exception applies to automobiles. ***State v. Marquardt***, 2001 WI App 219, ¶26, 247 Wis. 2d 765, 635 N.W.2d 188. Police may conduct a warrantless search of a vehicle if it is readily mobile and probable cause exists for the search. *See* ***id.***, ¶¶31-33.

¶16 Taylor says the automobile exception does not permit the search here because, first, "the key for the van was not present at the scene," and therefore the van was not readily mobile. Taylor offers no citations demonstrating that the presence of a key is a relevant consideration when assessing mobility. For this reason alone, we may reject the argument. *See* ***id.***, ¶41 (observing that we need not consider arguments unsupported by authority). Moreover, as we

explained in ***Marquardt***, arguments of this nature are meritless. Unavailability of a key renders a vehicle less accessible, not less mobile. *See* ***id.***, ¶¶41-42.

¶17 Second, Taylor says the automobile exception does not apply because, regardless of the availability of a key, the van was not demonstrably mobile. In support, he says "no evidence exists that the van had recently been driven." That is incorrect. The car's registered owner, Webb, testified at trial that her friend Johnson drove the van on June 27, 2012, and parked it at Taylor's house. *See* ***State v. Gaines***, 197 Wis. 2d 102, 106 n.1, 539 N.W.2d 723 (Ct. App. 1995) (appellate court may consider trial evidence when reviewing a suppression order). Further, the automobile exception turns on a vehicle's inherent mobility rather than the vehicle's demonstrated mobility. *See* ***South Dakota v. Opperman***, 428 U.S. 364, 367 (1976); *see also* ***United States v. Zahursky***, 580 F.3d 515, 523 (7th Cir. 2009) (automobile exception applied because "van 'was inherently, even if not immediately, mobile'") (citation omitted).

¶18 Third, Taylor says the automobile exception does not apply here because the police lacked probable cause to search the van. Probable cause is a "practical, common-sense determination" based on the totality of the circumstances. *See* ***State v. Robinson***, 2010 WI 80, ¶27, 327 Wis. 2d 302, 786 N.W.2d 463. "In the search context, the quantum of evidence required to establish probable cause is a 'fair probability' that contraband or evidence of a crime will be found in a particular place." ***State v. Harwood***, 2003 WI App 215, ¶12, 267 Wis. 2d 386, 671 N.W.2d 325 (citation omitted). On review, we assess whether law enforcement acted reasonably, keeping in mind that probabilities are "the factual and practical considerations of everyday life." *See* ***Robinson***, 327 Wis. 2d 302, ¶26.

¶19 We readily conclude that the totality of the circumstances in this case gave rise to a fair probability that the van contained evidence of drug dealing. When Hunter and Gomes arrived to conduct a home visit, Taylor emerged from the van, and Hunter saw it was littered with cash; Taylor had hundreds of dollars on his person and drug paraphernalia in his home; he was violating numerous rules of his community supervision, including carrying two cell phones; he acted nervous, then fled the scene; and he was apprehended only after leading police on a fifteen-minute chase. Although some details in isolation might be characterized as innocent, '"probable cause requires only a probability or substantial chance of criminal activity, not an actual showing of such activity.... [I]nnocent behavior frequently will provide the basis for a showing of probable cause.'" ***Id.***, ¶29 (citation and one set of brackets omitted). A practical, common-sense assessment of the facts supports the circuit court's conclusion that police had probable cause to search the van.

¶20 Taylor next claims he should have been granted a mistrial based on statements and evidence that he believes suggested to the jury he was on supervision at the time of his arrest. The decision to grant or deny a mistrial rests in the sound discretion of the circuit court. ***State v. Bunch***, 191 Wis. 2d 501, 506, 529 N.W.2d 923 (Ct. App. 1995). A motion for a mistrial is not warranted unless, in light of the entire proceeding, the basis for the mistrial motion is sufficiently prejudicial to warrant a new trial. ***Id.*** We will reverse the denial of a motion for mistrial "only on a clear showing of an erroneous use of discretion." ***State v. Ross***, 2003 WI App 27, ¶47, 260 Wis. 2d 291, 659 N.W.2d 122. We search the record for reasons to sustain a circuit court's discretionary decision. *See* ***State v. Hershberger***, 2014 WI App 86, ¶43, 356 Wis. 2d 220, 853 N.W.2d 586.

¶21 As we have seen, Taylor asked the circuit court to grant a mistrial based on three occurrences. First, when Hunter testified, he once used the phrase "his agent"—meaning "Taylor's agent"—when referring to Gomes, and the State echoed the phrase in a follow up question. Second, Gomes testified that he recognized Taylor's voice on a recording because Gomes had regular contact with Taylor for a period exceeding three months. Third, the State played for the jury several seconds of a recorded telephone conversation in which Taylor said he "had the bracelet on." The circuit court concluded that Taylor did not show sufficient prejudice as to warrant a mistrial. On appeal, Taylor renews his claim for a mistrial, arguing the three occurrences run afoul of the rule that, with exceptions not relevant here, excludes evidence a defendant is or was on supervision. *See* ***State v. Kourtidias***, 206 Wis. 2d 574, 585, 557 N.W.2d 858 (Ct. App. 1996).

¶22 The record supports the circuit court's decision to deny a mistrial. Evidence that the defendant is serving a term of supervision reveals the existence of a past criminal history and is normally excluded to avoid the risk of unfairly prejudicing the defendant with disclosure of his or her prior conduct. *See* ***id.*** at 584-85; *see also* ***State v. Ingram***, 204 Wis. 2d 177, 186-90, 554 N.W.2d 833 (Ct. App. 1996) (discussing admission of parole status). Here, however, Taylor took the stand and testified he had three prior criminal convictions and three prior adjudications of juvenile delinquency. Thus, Taylor himself supplied evidence of his extensive criminal history. The incidental and oblique statements that he believes suggested to the jury he was on supervision added nothing of significance to the information Taylor provided.

¶23 Moreover, the totality of the other trial evidence amply supported the convictions. *Cf.* ***Kourtidias***, 206 Wis. 2d at 586-87 (inadmissible testimony from parole officer harmless given the strength of the other evidence). Indeed, Taylor

conceded that the evidence supported a conviction for obstructing an officer, explicitly arguing to the jury that, as to the elements of that offense, "every one of them has been proved by the State beyond a reasonable doubt."

¶24 As to the charge of possessing with intent to deliver more than forty grams of cocaine, the evidence showed Taylor had two cell phones hanging from his neck and hundreds of dollars in his pocket when he emerged from a van full of loose currency. He gave inconsistent answers when asked who owned the van. His home contained evidence of drug dealing, and he fled from the premises after Hunter observed that evidence. When Hunter subsequently searched the van, he found a lot of money, a gun, a digital scale, and multiple baggies containing a total of 110.07 grams of cocaine. The State established that Taylor's fingerprint was on one of the baggies of cocaine and that the quantity of cocaine in the van far exceeded the amount a person would possess for personal use.

¶25 Because the evidence against Taylor was overwhelming, and because he personally testified about his criminal history, the statements arguably suggesting he was on supervision were harmless here. Harmless error does not warrant a mistrial. *See* ***Bunch***, 191 Wis. 2d at 506.

By the Court.—Judgment and order affirmed.

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