COURT OF APPEALS
DECISION
DATED AND FILED

June 1, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP1783-CR **Cir. Ct. No. 2012CF5979**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARLON RUSSELL BRITTON,

DEFENDANT-APPELLANT.

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

Before Kessler, Brennan and Brash, JJ.

¶1 PER CURIAM. Marlon Russell Britton appeals from a judgment of conviction, entered on a jury's verdicts, on one count of disorderly conduct as a domestic abuse incident and one count of possession of a firearm by a felon, both as a repeater. Britton also appeals from an order that denied his postconviction

motion without a hearing. Britton contends that trial counsel was ineffective for failing to challenge certain "other acts" evidence. We affirm.

Background

¶2 On December 6, 2012, Brown Deer police responded to a disturbance call at a condominium owned by Britton's girlfriend, T.M. She told police she had been awakened by Britton screaming at her and accusing her of infidelity. T.M. also told police that Britton took a gun from her purse and held it while they argued.

¶3 One of the officers testified that T.M. told her Britton had put the gun under a couch cushion, and the officer indeed recovered a gun from the couch. The officer also testified that Britton was in the process of removing his items from the condo, going in and out of the unit, until he disappeared, leaving his property outside. Britton called T.M. while police were still at the condo. The officer spoke with Britton, encouraging him to turn himself in or the officer would seek an arrest warrant. Britton did not turn himself in, and a warrant was issued.

¶4 On December 7, 2012, Milwaukee police officers were assigned to locate and arrest Britton. They found him behind an apartment building, and he ran when officers tried to handcuff him. Officer Eric Dillman grabbed Britton, causing them both to fall down an embankment and land on concrete below. Britton gave up when police threatened to use the Taser.[1] Dillman and Britton were both treated for injuries sustained in the fall.

[1] For this attempted flight, Britton was charged with one misdemeanor count of resisting or obstructing an officer in a separate case. He pled guilty to that offense, and it is not before us in this appeal.

¶5 Britton was charged with the disorderly conduct and firearm offenses described above. While in jail, he made phone calls to T.M., which resulted in a new charge of witness intimidation as an act of domestic abuse as a repeater. The two cases were joined for trial. A jury convicted Britton of the two original charges and acquitted him of the intimidation charge. The trial court imposed consecutive sentences totaling five years and three months of imprisonment. Britton filed a postconviction motion alleging ineffective assistance of trial counsel. After briefing, the court denied the motion without a hearing.[2] Britton appeals.

Discussion

Standards of Review

¶6 To be entitled to a hearing on a postconviction motion, the motion must allege on its face "sufficient material facts 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. If the motion does not raise sufficient facts to entitle the movant to relief or if it presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the trial court has the discretion to grant or deny a hearing. *See* ***id.*** Sufficiency of the motion is a question of law. *See* ***id.***

¶7 A defendant alleging ineffective assistance of counsel must show that counsel's performance was deficient and that the deficient performance was

[2] Britton also sought a new trial in the interests of justice, but he does not renew that argument on appeal.

prejudicial. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Counsel's performance is constitutionally deficient if it falls below an objective standard of reasonableness. *See* ***State v. Thiel***, 2003 WI 111, ¶19, 264 Wis. 2d 571, 665 N.W.2d 305. However, an attorney "'need not be perfect, indeed not even very good, to be constitutionally adequate.'" ***State v. Williquette***, 180 Wis. 2d 589, 605, 510 N.W.2d 708 (1993) (citation omitted). To demonstrate prejudice, the defendant must show that, but for counsel's errors, there is "'a reasonable probability that … the result of the proceeding would have been different.'" *See* ***Allen***, 274 Wis. 2d 568, ¶26 (citations omitted). "'A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" ***Id.*** (citation omitted). The defendant must make a successful showing on both prongs to be afforded relief. *See* ***id.***

¶8 Whether counsel was ineffective is a mixed question of fact and law. *See* ***State ex rel. Flores v. State***, 183 Wis. 2d 587, 609, 516 N.W.2d 362 (1994). The trial court's findings of fact are not disturbed unless clearly erroneous. *See* ***State v. McDowell***, 2004 WI 70, ¶31, 272 Wis. 2d 488, 681 N.W.2d 500. The ultimate conclusion as to whether there was ineffective assistance of counsel is a question of law. *See* ***Flores***, 183 Wis. 2d at 609.

¶9 The admission of other acts evidence is reviewed using a three-step analysis. *See* ***State v. Sullivan***, 216 Wis. 2d 768, 771-73, 576 N.W.2d 30 (1998). Other acts evidence is not admissible to show a person has a poor character and has acted in conformity with that bad character. *See* ***id.*** at 782-83. The trial court's decision to admit other acts evidence is reviewed for an erroneous exercise of discretion. *See* ***id.*** at 780.

I. The Circumstances of Britton's Arrest

¶10 Britton says that "the first category of other acts evidence" improperly introduced by the State, to which trial counsel should have objected, was the details of his arrest. Generally, this complaint relates to evidence of his flight from Milwaukee police, but also specifically includes a question from the State to Officer Dillman about whether he was injured during Britton's arrest. Dillman told the jury he received injuries to his right elbow and hand, which were treated at the hospital. Britton complains that this evidence's "only purpose was to appeal to the jury's sympathies" and that it fails the other acts admissibility test. He asserts the jury would have been "shocked and upset" and "alarmed and disturbed" to learn he "sent an officer to the hospital in order to avoid arrest."

¶11 We agree with the trial court and the State that evidence about the circumstances of Britton's arrest is not other acts evidence; rather, it is evidence of consciousness of guilt. *See* ***State v. Neuser***, 191 Wis. 2d 131, 144, 528 N.W.2d 49 (Ct. App. 1995). Evidence that Britton struggled with police while attempting to flee is admissible. *See* ***State v. Quiroz***, 2009 WI App 120, ¶18, 320 Wis. 2d 706, 772 N.W.2d 710 ("The fact of an accused's flight is generally admissible against the accused as circumstantial evidence of consciousness of guilt[.]"); *see also* ***State v. Bettinger***, 100 Wis. 2d 691, 698, 303 N.W.2d 585 (1981) ("It is generally acknowledged that evidence of criminal acts of an accused which are intended to obstruct justice or avoid punishment are admissible to prove a consciousness of guilt[.]"). Trial counsel was therefore not deficient for failing to object to such evidence generally.[3]

[3] We do not agree with Britton that his failure to turn himself in when so requested by police prior to the issuance of an arrest warrant is the same kind of evidence as actual or attempted flight from officers who are attempting to execute an arrest warrant.

¶12 The State concedes that trial counsel "probably should have objected" to the specific question and answer about whether Dillman was injured while arresting Britton. The State argues, however, that there was no prejudice from the lack of objection. We agree. There is no suggestion that Britton intended to injure Dillman, only that the officer sustained injuries. The fact that the officer was treated at a hospital for injuries to an extremity is not particularly shocking; it is not the same thing as actually being hospitalized for the injuries. Ultimately, we are not persuaded that the mere mention of Dillman's injuries was so inflammatory as to rob the proceedings of their reliability, *see* ***State v. Pinno***, 2014 WI 74, ¶82, 356 Wis. 2d 106, 850 N.W.2d 207, or to undermine our confidence therein, *see* ***Allen***, 274 Wis. 2d 568, ¶26.

II. Reference to the Repeater Allegation

¶13 An investigator for the district attorney's office testified that she was aware Britton had been charged with disorderly conduct as a repeater.[4] Trial counsel objected but did not move to strike the testimony. The trial court simply responded, "[W]e'll move along." Making a record outside the jury's presence, the State conceded the objection was appropriate but asserted that there was no prejudice. The trial court agreed, noting that the reference was brief and it was unlikely the jurors knew what being a "repeater" meant.

¶14 On appeal, Britton cannot argue that trial counsel was ineffective for failing to object to the evidence, so he argues that counsel was deficient for failing

[4] Whether an individual is a repeat offender is not an element of crime and should typically not be presented to a jury. *See* ***State v. Saunders***, 2002 WI 107, ¶46, 255 Wis. 2d 589, 649 N.W.2d 263.

to move to strike the objectionable testimony. He asserts that "[e]veryone knows what the word repeater means. It means the person did it before, and has done it again." However, Britton concedes that the reference to his repeater status was "not likely prejudicial on its own" but contends it was "another inadmissible piece of evidence that was piled on to paint [him] as a recidivist criminal."

¶15 Assuming without deciding that trial counsel was deficient for failing to move to strike the investigator's testimony, we reject the claim of prejudice for two reasons. First, Britton neither alleges nor demonstrates that the trial court would have granted such a motion had it been made. Second, one of Britton's charges was possession of a firearm by a felon, so the jury already knew, if not in exact legal terminology, that Britton was a "repeater."[5]

III. The Fact of Britton's Probation

¶16 Finally, Britton complains about the introduction of evidence that he was on probation. He asserts that trial counsel "was the first person to inform the jury that [he] was on probation during opening statements." He asserts that trial counsel had no reasonably strategic explanation for informing the jury that he was on probation.

¶17 However, Britton cites the portion of opening statements where counsel told the jury that T.M. "knew that he was a convicted felon, knew that his

[5] To be charged as a repeater, a person must have been "convicted of a felony during the 5-year period immediately preceding the commission of the crime for which the [person] presently is being sentenced, or … convicted of a misdemeanor on 3 separate occasions during that same period, which convictions remain of record and unreversed." WIS. STAT. § 939.62(2) (2011-12). In this case, the jury was informed that as of April 21, 2011, Britton had been convicted of a felony, which is within five years of the December 6, 2012 offense date.

possession of that gun was likely [to] result in his being in court today." This statement makes no reference to *probation*. It references only Britton's status as a convicted felon, something the jury was going to be told anyway in light of the felon-in-possession charge.[6]

¶18 Britton further complains about testimony from his probation agent that the agent had known him for seven years. This testimony was introduced as foundational evidence so that the agent could identify Britton's voice on outgoing phone calls relative to the witness intimidation charge. Britton argues that the State could have used other witnesses, including victim T.M., to identify his voice, so trial counsel should have objected to the use of the probation agent or, alternatively, offered to stipulate that the voice was Britton's.

¶19 While Britton asserts the State could have used other witnesses to identify his voice, the State is "'entitled to prove its case by evidence of its own choice[.]'"[7] ***State v. Veach***, 2002 WI 110, ¶125, 255 Wis. 2d 390, 648 N.W.2d 447 (quoting ***Old Chief v. United States***, 519 U.S. 172, 186-87 (1997)). With respect to a possible stipulation, Britton does not claim he would have agreed to one had counsel offered it and, in any event, neither the State nor the trial court is obligated to accept a stipulation to an element of a criminal act: "'a criminal defendant may not stipulate or admit his way out of the full evidentiary force of the case as the Government chooses to present it.'" *See* ***Veach***, 255 Wis. 2d 390,

[6] Likewise, the portion of closing arguments that Britton also cites only references his status as a felon, not his probation status.

[7] It is disingenuous for Britton to assert that the State could have used T.M. to identify his voice when Britton's theory of defense for at least one charge was that T.M. was fabricating her story.

¶125 (citation omitted). In any event, reference to Britton's status as a probationer was also clearly not prejudicial: he was acquitted of the intimidation charge for which the agent's testimony was introduced.

¶20 In sum, even if counsel was deficient for not challenging the admission of certain evidence, the record demonstrates that Britton suffered no prejudice from those deficiencies. Accordingly, we conclude the trial court properly denied the postconviction motion without a hearing.

By the Court.—Judgment and order affirmed.

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