COURT OF APPEALS
DECISION
DATED AND FILED

July 6, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal Nos. 2015AP999-CR
2015AP1000-CR

Cir. Ct. Nos. 2013CF956
2013CF1704

STATE OF WISCONSIN

IN COURT OF APPEALS

DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL K. MCGUIRE,

DEFENDANT-APPELLANT.

APPEAL from judgments and orders of the court for Brown County: DONALD R. ZUIDMULDER, Judge. *Affirmed*.

Before Kessler, Brennan and Brash, JJ.

¶1 ¶PER CURIAM. Michael K. McGuire appeals judgments of conviction entered after a bench trial in which the circuit court found him guilty of delivering not more than one gram of cocaine as a second or subsequent offense,

intimidating a witness, and battery. He also appeals orders denying postconviction relief. McGuire contends his trial counsel was ineffective for failing to file a suppression motion as to the cocaine charge and for failing to present evidence to challenge the witness intimidation charge. The circuit court rejected his claims, and we affirm.

BACKGROUND

¶2 The State charged McGuire in Brown County circuit court case No. 2013CF956 with one count of delivering cocaine as a second or subsequent offense. Several months later, the State charged him in Brown County circuit court case No. 2013CF1704 with bail jumping, battery, and intimidating a witness to the crime charged in case No. 2013CF956. The matters were joined and tried to the court.

¶3 At trial, only the State presented witnesses. Law enforcement officers assigned to the Brown County Drug Task Force established that police were working with a confidential informant to investigate the activities of Ted Kniess and Mary Larson, who were identified as distributing cocaine from their home at 1237 Cedar Street in Green Bay, Wisconsin. On July 18, 2013, the informant placed a telephone call to Kniess and arranged to purchase cocaine. Police then gave the informant a transmitter and video recorder along with $200 in prerecorded buy money. The informant entered 1237 Cedar Street and the transmitter/recorder captured Kniess saying that his source for cocaine would arrive in ten minutes. Soon thereafter, one of the officers conducting surveillance outside the Cedar Street home saw a silver Lexus pull up to the Cedar Street residence. A black male in a yellow shirt got out of the passenger side of the car and went inside. Surveillance videos captured the black male's arrival, his entry

into the residence, and his departure a few minutes later. Investigators did not see anyone else enter or exit the residence while the informant was inside.

¶4 Next, police watched the informant leave the Cedar Street residence with Larson. When police stopped them shortly thereafter, the informant had a quantity of crack cocaine and the recording device.

¶5 Police also stopped the silver Lexus, approximately twenty minutes after its departure from Cedar Street. Felton Currie was identified as the driver. A black male subsequently identified as McGuire was in the passenger seat wearing a yellow shirt. Police searched McGuire and found the prerecorded $200 in his pocket, along with additional cash totaling more than $1300. Additionally, police conducted a post-arrest interview with Currie, who denied any knowledge of why police had stopped him.

¶6 The confidential informant testified, describing her work with the officers and the events that occurred on July 18, 2013. She explained that when she arrived at the Cedar Street residence that day, Kniess—who she knew only by a nickname—did not have any cocaine. Kniess placed a call and someone else arrived, but the informant did not see that person because Kniess required her to wait with Larson in another room. The informant said that while she was waiting, Kniess collected the $200 she had brought and subsequently gave her a packet of cocaine after he and Larson each took some from the packet.

¶7 Currie testified and said that when police arrested him on July 18, 2013, he gave a post-arrest statement in which he described running errands with McGuire and denied knowing why they were stopped. Currie went on to say that a few months later, he encountered McGuire at a gas station. According to Currie,

McGuire said, "you need to be cool. You talk too much," and punched Currie in the mouth.

¶8 The circuit court found McGuire guilty of three of the four charges: delivery of cocaine, intimidating a witness, and battery. McGuire then sought postconviction relief, alleging that his trial counsel was ineffective for failing to seek suppression of the evidence found when police searched him incident to his July 18, 2013 arrest, and for failing to offer evidence that Currie was not named on the witness list the State filed when it charged McGuire with delivery of cocaine.

¶9 The circuit court conducted postconviction evidentiary hearings to address McGuire's claims. After considering the testimony and the record, the circuit court concluded that trial counsel had no obligation to take the steps McGuire faulted counsel for omitting and that, if trial counsel had taken those steps, they would not have changed the outcome of the proceedings. The circuit court therefore denied postconviction relief, and McGuire appeals.

DISCUSSION

¶10 A defendant who claims trial counsel was ineffective must prove both that trial counsel's performance was deficient and that the deficiency prejudiced the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To demonstrate deficient performance, the defendant must show that counsel's actions or omissions "fell below an objective standard of reasonableness." *See* ***id.*** at 688. To demonstrate prejudice, "[t]he 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.*** at 694. Whether counsel's performance was deficient and whether the deficiency was prejudicial are questions of law that we review *de novo*. ***State v. Johnson***, 153 Wis. 2d 121, 128,

449 N.W.2d 845 (1990). If a defendant fails to satisfy one component of the analysis, a reviewing court need not address the other. ***Strickland***, 466 U.S. at 697.

¶11 We first address the claim that trial counsel was ineffective for failing to file a suppression motion. According to McGuire, the police lacked probable cause to arrest him after he left the Cedar Street residence, and trial counsel therefore should have moved to suppress the money that police found when they searched him incident to that arrest.

¶12 "Probable cause is a flexible, commonsense standard." ***State v. Nieves***, 2007 WI App 189, ¶14, 304 Wis. 2d 182, 738 N.W.2d 125. We assess the question of probable cause "on a case-by-case basis, looking at the totality of the circumstances." ***State v. Lange***, 2009 WI 49, ¶20, 317 Wis. 2d 383, 766 N.W.2d 551. A police officer has probable cause to arrest when the totality of the circumstances within that officer's knowledge at the time of the arrest would lead a reasonable officer to believe that the defendant probably committed a crime. ***State v. Koch***, 175 Wis. 2d 684, 701, 499 N.W.2d 152 (Ct. App. 1993). The facts and circumstances known to the officer need only lead to the conclusion that guilt is more than a possibility. *See* ***State v. Richardson***, 156 Wis. 2d 128, 148, 456 N.W.2d 830 (1990).

¶13 In this case, as we have seen, police were working with a known informant in an investigation of suspected drug activity involving Kniess and Larson. On July 18, 2013, police fitted the informant with an audio/video recorder/transmitter and conducted surveillance while the informant went to the targets' Cedar Street residence. The informant's recording device captured Kniess telling the informant that a person who had cocaine would soon arrive at the home.

A few minutes later, investigators saw a black male wearing a yellow shirt arrive as a passenger in a silver Lexus. The investigators videotaped the black male as he arrived, went into the home, and left shortly thereafter. The informant did not see the person who arrived at the residence because Kniess and Larson required the informant to remain in another room, but after the person left, Kniess gave the informant a quantity of cocaine. No one except the passenger in the silver Lexus came or went from the residence while the informant was inside. Officers followed the silver Lexus and stopped it within twenty minutes after it left Cedar Street. McGuire, wearing a yellow shirt, was the passenger.

¶14 The foregoing facts provide more than a possibility that McGuire delivered cocaine to Kniess on July 18, 2013. McGuire contends his actions while under surveillance were unremarkable, but '"[p]robable 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.'" *See* ***State v. Robinson***, 2010 WI 80, ¶29, 327 Wis. 2d 302, 786 N.W.2d 463 (citation omitted). Moreover, while McGuire emphasizes that the confidential informant did not see him deliver cocaine and therefore did not provide direct evidence of his guilt, "[c]ircumstantial evidence may be and often is stronger and more satisfactory than direct evidence." *See* ***Kluck v. State***, 37 Wis. 2d 378, 391, 155 N.W.2d 26 (1967). The circumstantial evidence here supplied abundant probable cause to believe McGuire delivered cocaine to Cedar Street.

¶15 Because the police had probable cause to arrest McGuire, they were entitled to search him incident to his arrest. *See* ***State v. Sykes***, 2005 WI 48, ¶14, 279 Wis. 2d 742, 695 N.W.2d 277 (search incident to lawful arrest is reasonable). A contrary argument would have lacked merit. "[A]n attorney's failure to pursue

a meritless motion does not constitute deficient performance." *See* ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 678, 556 N.W.2d 136 (Ct. App. 1996). Trial counsel therefore was not ineffective for failing to seek suppression of the evidence found during the search.

¶16 McGuire next alleges his trial counsel was ineffective for failing to present evidence that he claims would have been relevant to the charge of intimidating a witness. A person is guilty of felonious witness intimidation if the person "knowingly and maliciously prevents or dissuades, or ... attempts to so prevent or dissuade any witness from attending or giving testimony at any trial, proceeding or inquiry authorized by law." *See* WIS. STAT. §§ 940.42, 940.43 (2013-14).[1] The State here alleged McGuire intimidated Currie—a witness to the crime of cocaine delivery charged in case No. 2013CF956—by punching him and accusing him of talking too much. According to McGuire, his trial counsel should have offered into evidence the State's witness list filed in case No. 2013CF956. Because Currie's name was not on that witness list, McGuire claims the list would have supported a defense by "call[ing] into question whether McGuire knew that Currie was a witness" to the crime of delivering cocaine.

¶17 Preliminarily, we observe that McGuire's argument is disingenuous at best. When Currie took the stand at trial, McGuire's lawyer said: "[y]our honor, I have an objection I need to voice. Mr. Currie is not on the witness list for 956 [i.e. case No. 2013CF956]." The State did not dispute this assertion, which trial counsel then reiterated, and the circuit court accepted trial counsel's

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

representation that Currie's name was not on the State's witness list. After hearing trial counsel's argument as to why Currie's testimony should be excluded or limited based on the State's omission of Currie's name from the witness list in case No. 2013CF956, the circuit court overruled the objection because McGuire offered no argument that Currie was a surprise witness or that McGuire lacked knowledge of the testimony Currie could offer. In short, the circuit court was well aware that Currie's name was not on the State's witness list in case No. 2013CF956 and was free to draw whatever conclusions from the omission that the court believed appropriate.

¶18 Moreover, a "witness" for purposes of the crime of witness intimidation includes anyone "who has provided information concerning any crime to any peace officer or prosecutor" and anyone "who by reason of having relevant information is subject to call or likely to be called as witness, whether or not any action or proceeding has as yet been commenced." *See* WIS. STAT. § 940.41(3). In this case, no dispute exists that Currie, driving a silver Lexus, brought McGuire to Kniess's residence on July 18, 2013. Nor is there a dispute that Currie was with McGuire when they both were arrested in that Lexus twenty minutes later. Similarly, no dispute exists that, following the arrest, Currie spoke to the police about his interactions with McGuire that day. Indeed, Currie's post-arrest statement to police is described in the criminal complaint filed in case No. 2013CF956, and McGuire acknowledged at his initial appearance that he had received a copy of that criminal complaint. The record thus incontrovertibly shows that, from the inception of the cocaine delivery case, McGuire was aware Currie was a "witness," that is, a person with relevant information about the allegation that McGuire delivered cocaine, *see* § 940.41(3), and who had provided information concerning the crime to a police officer, *see* ***id.***

¶19 In light of the foregoing facts, offering the State's witness list in case No. 2013CF956 as evidence in case No. 2013CF1704 would have had no effect on the latter proceedings. The circuit court—the fact finder here—knew that Currie's name was not on the witness list, so marking the list as a trial exhibit would not have increased the information available to the fact finder in determining guilt or innocence. Further, the absence of Currie's name from the witness list does not tend to show that McGuire lacked knowledge Currie was a "witness" as that term is defined in WIS. STAT. § 940.41(3). As the statute makes clear, proof of a pending prosecution is wholly unnecessary to show that a person is a witness. To the contrary, a prosecution need not be commenced at all. *See* ***id.***

¶20 The witness list that McGuire believes should have been offered as an exhibit would have added nothing to the case. Because the proposed exhibit would have added nothing, McGuire suffered no prejudice when his trial counsel did not offer it at trial. Because McGuire was not prejudiced, his trial counsel was not ineffective. *See* ***Strickland***, 466 U.S. at 687.

By the Court.—Judgments and orders affirmed.

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