COURT OF APPEALS
DECISION
DATED AND FILED

November 1, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP2222-CR **Cir. Ct. No. 2014CF1597**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CYNTHIA CALDWELL,

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., Brennan and Brash, JJ.

¶1 PER CURIAM. Cynthia Caldwell appeals a judgment of conviction entered after a jury found her guilty of keeping a drug house and of possession with intent to deliver more than fifteen but less than forty grams of cocaine, both as a party to a crime. *See* Wis. Stat. §§ 961.42(1),

961.41(1m)(cm)3., & 939.05 (2013-14).[1] She also appeals the order denying her postconviction motion. On appeal, Caldwell makes three arguments: (1) the trial court erred when it denied her a new trial based on a violation of her right against self-incrimination and her trial attorney's related ineffective assistance; (2) the trial court erred when it denied her a new trial based on her trial attorney's ineffective assistance for failing to present relevant evidence regarding the nature of her relationship with Joshua Sloan, her co-actor; and (3) alternatively, the trial court erred when it denied her motion for sentence modification or resentencing. We disagree and affirm.

BACKGROUND

¶2 After police executed a search warrant at her home, Caldwell was charged with one count of keeping a drug house and one count of possession with intent to deliver cocaine, both as a party to a crime. As summed up by the trial court in its decision denying Caldwell's postconviction motion and substantiated by the record, the evidence presented at trial to support the charges against Caldwell was overwhelming:

> [West Allis Police Corporal Jeffrey Zientek] testified that he recovered an oven mitt containing suspected crack cocaine from the kitchen drawer. From another drawer in the kitchen island he recovered razor blades, three digital scales, test weights for scales, latex gloves, a mask, and packaging materials. Materials identifying the defendant were located throughout the house. He recovered a bag of an unknown white powder, a suspected cutting agent, four cellular phones, and identifying materials of the defendant from a purse. Corporal Zientek also testified that he located a loaded handgun among women's clothing in a

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

> closet in the master bedroom. Identifying materials for Joshua Sloan were also found. West Allis Police Detective Nick Stachula testified that no paraphernalia showing the use of cocaine or crack cocaine was found in the residence. He testified that the rubber gloves, sandwich bags, razors, weights, mask, and scales recovered were indicative of packaging drugs. Detective Stachula concluded that the evidence located in the residence was "consistent of [sic] someone that is selling narcotics and not using for personal use."

(Record citations omitted.) A jury found Caldwell guilty of both crimes.

¶3 For keeping a drug house, the trial court sentenced her to two years, comprised of one year of initial confinement and one year of extended supervision. On the count of possession with intent to deliver cocaine, the trial court sentenced Caldwell to four years of imprisonment, comprised of two years of initial confinement and two years of extended supervision, to be served concurrently.

¶4 Caldwell filed a WIS. STAT. § 809.30 postconviction motion requesting a new trial on the grounds that her trial attorney was ineffective for not objecting to Police Detective Nick Stachula's testimony that she did not answer questions about the oven mitt in which drugs were found. Caldwell claimed this violated her right against self-incrimination. She also requested a new trial on grounds that her trial attorney was ineffective for failing to properly prepare her to testify about her sexual relationship with Sloan. Alternatively, Caldwell argued that she was entitled to sentence modification or resentencing.

¶5 After briefing, the trial court denied Caldwell's postconviction motion without a hearing. Additional facts relevant to the issues are set forth below.

DISCUSSION

¶6 Caldwell renews her postconviction arguments on appeal.

¶7 To prove a claim of ineffective assistance of counsel, a defendant must show that his attorney 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. ***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. ***Strickland***, 466 U.S. at 697.

¶8 Whether counsel provided constitutionally ineffective assistance presents mixed questions of law and fact. ***State v. Pitsch***, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985). "[W]e will not reverse the [trial] court's findings of fact, that is, the underlying findings of what happened, unless they are clearly erroneous." ***Id.*** at 634. "[W]hether counsel's behavior was deficient and whether it was prejudicial to the defendant are questions of law." ***Id.*** We review questions of law independently of the [trial] court. ***Id.***

¶9 A trial court may hold an evidentiary hearing when a defendant alleges that trial counsel provided ineffective assistance. *See* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). However, a trial court may exercise its discretion to deny a postconviction motion without holding a ***Machner*** hearing if the motion fails to allege sufficient facts to raise a question of fact or presents only conclusory allegations, or if the record conclusively demonstrates

that the defendant is not entitled to relief. ***State v. Ortiz-Mondragon***, 2015 WI 73, ¶58, 364 Wis. 2d 1, 866 N.W.2d 717. The following standards of review apply:

> First, we determine whether the motion on its face alleges sufficient material facts that, if true, would entitle the defendant to relief. This is a question of law that we review *de novo*. If the motion raises such facts, the [trial] court must hold an evidentiary hearing. 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 [trial] court has the discretion to grant or deny a hearing.... We review a [trial] court's discretionary decisions under the deferential erroneous exercise of discretion standard.

State v. Allen, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433 (internal citations omitted).

I. Alleged violation of right against self-incrimination.

¶10 First, Caldwell argues her right against self-incrimination was violated and her trial attorney was ineffective for failing to object to testimony that she invoked her right to counsel and her right to remain silent when she was asked about the contents of the oven mitt.

¶11 Evidence of post-***Miranda*** silence may not be used in criminal trials.[2] ***Doyle v. Ohio***, 426 U.S. 610, 618-19 (1976). Whether the State has impermissibly commented on a defendant's silence depends on whether the allegedly improper statements were "manifestly intended" as a comment on the defendant's silence or would "naturally and necessarily" be viewed as such by a jury. *See* ***State v. Nielsen***, 2001 WI App 192, ¶32, 247 Wis. 2d 466, 634 N.W.2d

[2] *See* ***Miranda v. Arizona***, 384 U.S. 436 (1966).

325. Trial courts do not analyze statements in a vacuum; instead, they "look at the context in which the statement was made in order to determine the manifest intention which prompted it and its natural and necessary impact on the jury." ***Id.*** This court independently determines whether a defendant's right to remain silent was violated. *See* ***id.***

¶12 The challenged rebuttal testimony by Detective Stachula went as follows:

> Q Detective, did you speak with the defendant on March 26 when she arrived to [sic] her residence?
>
> A I did.
>
> Q And where did this conversation t[ake] place?
>
> A Initially I spoke with her at the residence briefly, and after that I spoke with her more in[-]depth at our interview room in the Detective Bureau at the West Allis Police Department.
>
> THE COURT: At the what?
>
> [DETECTIVE STACHULA]: West Allis Police Department.
>
> BY [THE PROSECUTOR]:
>
> Q And during this conversation did you ask her about the digital scales that were found?
>
> A I did.
>
> Q And what did she say with regard to the scales?
>
> A She admitted to seeing the scales, knowing about them. She indicated that they belonged to him and that the items in the drawer in the kitchen belonged to him, and I—she said, "do you want me to tell you who?" and I said "Yes. I just want the truth," and she said they belong to Mr. Sloan and that she was aware that those items were in the drawer that would be on the island.

> Q And did you have a conversation with her regarding the—whether or not she liked to cook or bake?
>
> A I did.
>
> Q What did you ask her?
>
> A I asked her—First of all, I said "Do you cook?" and she said, "Yes." I said "do you enjoy baking, cooking, using your stove?" and she said "Yes," and then I asked her if she used her oven mit[t] in that process.
>
> Q And what was her answer?
>
> A At that point the interview was concluded. She no longer wanted to answer questions.

¶13 With this line of questioning, Caldwell submits that her post-arrest, post-***Miranda*** silence was used by the State to establish guilt. Because the State rested immediately after eliciting the evidence related to her silence, Caldwell asserts that "[t]here can be little question" it was used as highly prejudicial evidence against her. We are not convinced.

¶14 Beyond conclusory assertions, Caldwell has not established that when the State elicited the rebuttal testimony, it was manifestly intended to be a comment on her right to remain silent. *See* ***Ortiz-Mondragon***, 364 Wis. 2d 1, ¶58 (reiterating the well-established rule that a trial court can deny a postconviction motion without a ***Machner*** hearing if the motion presents only conclusory allegations). Furthermore, as noted by the trial court: "Given the context in which the detective's statement was made, the court finds that it was not of such character that the jury would naturally and necessarily take it to be a comment on the defendant's right to remain silent." *See* ***Nielsen***, 247 Wis. 2d 466, ¶34. This context included the fact that Detective Stachula never mentioned that Caldwell invoked her right to counsel when she did not answer the question, and the State did not comment on Detective Stachula's testimony that Caldwell did not answer

his question about the oven mitt. Additionally, Caldwell testified on her own behalf at trial, which provided the jury with her version of the facts.

¶15 Because Caldwell has not shown that the State's questions of Detective Stachula on rebuttal constituted a violation of her right to remain silent, her trial attorney did not perform deficiently for failing to object. *See* ***State v. Wheat***, 2002 WI App 153, ¶14, 256 Wis. 2d 270, 647 N.W.2d 441 ("Failure to raise an issue of law is not deficient performance if the legal issue is later determined to be without merit."). Moreover, by not objecting, Caldwell's trial attorney avoided drawing attention to the testimony. *See* ***Nielsen***, 247 Wis. 2d 466, ¶44 (When it comes to trial tactics or strategies, "we 'judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct.'") (citation omitted).

II. Alleged ineffective assistance for failing to present relevant evidence.

¶16 In her postconviction motion, Caldwell asserted that she permitted Sloan to have a casual sexual relationship with her in return for financial support. This information was presented in Caldwell's unsigned statement to the court, which was submitted with postconviction counsel's affidavit. According to Caldwell, her "letter makes clear that she feels ashamed and foolish for essentially selling her body in exchange for Sloan's financial help, explaining why these matters have not come out sooner." Caldwell submits that the arrangement, if believed by a jury, would be contrary to the State's narrative that Sloan's financial help was given in exchange for her assisting his drug business.

¶17 Again, Caldwell offers only conclusory assertions to support her argument that her trial attorney failed to properly prepare her for trial and failed to

learn the reality of her situation with Sloan. *See* ***Ortiz-Mondragon***, 364 Wis. 2d 1, ¶58. These fall short of establishing that he performed deficiently.[3] Additionally,

[3] Furthermore, as highlighted by the trial court, if Caldwell wanted to clarify the nature of her relationship with Sloan, she had the opportunity to do so when she was questioned during cross-examination. She was specifically questioned as follows:

> Q … So what was your relationship?
>
> ….
>
> [CALDWELL]: It was a sexual relationship, and he helped me time to time and that was mainly about it….
>
> BY [THE PROSECUTOR]:
>
> Q So this person, did you know him that well?
>
> A I met him in November, and then, as I found out, he had a—his—a family so it really wasn't—it wasn't a relationship that I would get something into like serious. It was a sexual relationship.
>
> Q He had a key to your house.
>
> A Yes, he had a key to my house.
>
> Q Okay. And you allowed him to pay your rent?
>
> A He paid half of my rent.
>
> Q He paid half of your rent?
>
> A Yes.
>
> Q How did he do that?
>
> A I never asked.
>
> ….
>
> Q Why was he paying for half your rent?
>
> [DEFENSE COUNSEL]: Objection, relevance.
>
> THE COURT: Overruled. You can answer.

(continued)

Caldwell has not shown that she was prejudiced by the lack of testimony about the fact that Sloan was providing her financial help in exchange for sex.

¶18 Despite overwhelming evidence to the contrary, Caldwell testified that she was unaware that there were drugs in her home, that she did not put drugs in the oven mitt, and that she had never seen Sloan with drugs. In finding her guilty, the jury concluded that Caldwell's testimony was not credible. Caldwell has not demonstrated that if the nature of her relationship with Sloan had been presented, there is a reasonable probability that the jury would have overlooked the other evidence supporting the charges and acquitted her. Accordingly, Caldwell was not prejudiced by the omission of this testimony.

III. Denial of motion for sentence modification or resentencing.

¶19 Next, Caldwell argues the trial court improperly determined that perceived inconsistencies in her trial testimony amounted to lies and held those lies against her at sentencing. She argues that this violated her right to be sentenced on the basis of true facts.

¶20 "A defendant has a constitutionally protected due process right to be sentenced upon accurate information." ***State v. Tiepelman***, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1. A postconviction claim that a sentence was based on

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> [CALDWELL]: That was just something he wanted to do on his own.
>
> BY [THE PROSECUTOR]:
>
> Q You never asked why?
>
> A He said he wanted to help me out.

inaccurate information must show that the information was inaccurate and that the court actually relied on the information in imposing the sentence. ***Id.***, ¶26.

¶21 We agree with the State that "Caldwell's conclusory allegations that she did not lie on the witness stand are contrary to the court's credibility determination which [is] entitled to great deference." *See* ***State v. Hughes***, 2000 WI 24, ¶2 n.1, 233 Wis. 2d 280, 607 N.W.2d 621. As aptly summed up by the trial court in its decision denying Caldwell's postconviction motion:

> The defendant was convicted by a jury and the court was entitled to rely on the guilty verdicts at sentencing. Like the jury, the court did not believe the defendant's testimony. The court did not punish the defendant for testifying falsely at trial; the court punished the defendant for her conduct in this case, and nothing in the court's sentencing decision supports the defendant's claim.

(Footnote omitted.) *See* ***State v. Fuerst***, 181 Wis. 2d 903, 915, 512 N.W.2d 243 (Ct. App. 1994) (The trial court has an additional opportunity to explain its sentence when challenged by postconviction motion.).

¶22 Caldwell has not met her burden of proof to show by clear and convincing evidence that the information the court had when sentencing her was actually inaccurate. *See* ***State v. Travis***, 2013 WI 38, ¶22, 347 Wis. 2d 142, 832 N.W.2d 491. Here, the sentencing transcript reveals that the trial court properly considered relevant sentencing factors, which included the serious nature of the offenses, Caldwell's character, and the interest of society. *See* ***State v. Spears***, 227 Wis. 2d 495, 506, 596 N.W.2d 375 (1999) (There is a "'strong public policy against interference with the sentencing discretion of the trial court and sentences are afforded the presumption that the trial court acted reasonably.'") (citation omitted). Therefore, Caldwell was not entitled to relief on this claim.

By the Court.—Judgment and order affirmed.

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