COURT OF APPEALS
DECISION
DATED AND FILED

May 17, 2017

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal Nos. 2016AP457-CR
2016AP458-CR

Cir. Ct. No. 2012CF1393
2013CF270

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DELANTE H. HIGGENBOTTOM,

DEFENDANT-APPELLANT.

APPEALS from judgments and an order of the circuit court for Racine County: TIMOTHY D. BOYLE, Judge. *Affirmed*.

Before Neubauer, C.J., Gundrum and Hagedorn, JJ.

¶1 PER CURIAM. In these consolidated appeals, Delante D. Higgenbottom appeals from judgments convicting him of armed robbery as party to a crime (PTAC), felon in possession of a firearm, and carrying a concealed

weapon. Higgenbottom argues the trial court erroneously exercised its discretion in denying (1) his motion for a mistrial after the jury heard certain DNA-related evidence and (2) his postconviction motion for a new trial based on the denial of the mistrial motion and on his claim of ineffective assistance of trial counsel. We reject his contentions and affirm.

I. Background

¶2 Mount Pleasant Police Officer John Garner responded to a report of an armed robbery at 11:53 p.m. outside a motel. The victim, "Mike," told Garner that he went to the motel to meet "Autumn," a woman he met through an online dating service; that two black men in winter hats and scarves or masks over their faces robbed him as he exited his truck; that one man had a silver handgun; and that he believed "Autumn" had set him up. Mike described "Autumn" as Italian with dark hair and crooked teeth and described the car she drove as a newer, dark-colored, large-bodied, low-wheel-profile BMW.[1] Garner issued a bulletin.

¶3 A few hours later, Officer Francisco Jaramillo stopped a BMW with tinted windows that matched the car Mike described. Higgenbottom was in the driver's seat; Ashley Ferguson, who matched "Autumn's" description, was in the front passenger's seat. Jaramillo detected the odor of alcohol through Higgenbottom's lowered window and saw an open bottle of beer in the console. After Higgenbottom passed field sobriety tests, Jaramillo asked Ferguson to exit the car. As she did, he saw a silver-barreled handgun beneath the passenger seat. Higgenbottom volunteered that the gun, which proved to be fully loaded, was his.

[1] The car actually belonged to Higgenbottom.

Both were arrested. Jaramillo also found two "wrap-around" ear-warmers and two winter caps in the car. Cash in denominations consistent with money taken from Mike was found in Higgenbottom's pocket.[2]

¶4 Records from Ferguson's cell phone on the night of the robbery showed frequent text messages between her phone and Mike's. Between 11:22 p.m. and 11:47 p.m., cell phone geospatial location plots placed Higgenbottom within a mile of the motel. Surveillance video retrieved from a business near the motel showed two men approaching the robbery scene within two minutes of it occurring. One wore a three-quarter-length black pea coat like the one Higgenbottom was wearing when he was arrested. Both men wore stocking caps—one black, one gray—that matched the ones found in Higgenbottom's car. Ferguson testified that, at Higgenbottom's direction, she texted Mike that she was in the motel lobby (although she was at home) so he would get out of his vehicle.

¶5 The jury found Higgenbottom guilty on all three counts. His motion for postconviction relief was denied. This appeal followed.

II. Motion for Mistrial

¶6 Higgenbottom first contends the trial court erroneously exercised its discretion in denying his motion for a mistrial after Police Investigator John Rusfeldt testified that Higgenbottom's DNA was found when the State Crime Lab tested the hats and ear-warmers found in Higgenbottom's car.

[2] Mike testified that he had a $100 bill, two or three twenties, and a few singles in his wallet. Higgenbottom had $243: two $100 bills, two twenties, and three singles.

¶7 Whether to grant a mistrial lies within the sound discretion of the trial court. ***State v. Ross***, 2003 WI App 27, ¶47, 260 Wis. 2d 291, 659 N.W.2d 122. The court must determine whether, in light of the whole proceeding, the claimed error was sufficiently prejudicial to warrant a new trial. ***Id.*** We do not reverse the denial of a mistrial motion absent a clear showing of an erroneous exercise of discretion. ***Id.***

¶8 Rusfeldt testified from a State Crime Lab report that DNA tests on the hats and ear-warmers found in the BMW revealed the presence of Higgenbottom's DNA. Defense counsel, Attorney Lori Kuehn, objected outside the presence of the jury. She argued that Rusfeldt was not competent to testify on the subject as he is not a DNA analyst or expert. She moved for a mistrial. When the court denied the motion, Kuehn asked the court to strike the testimony about the DNA and to give some form of curative instruction. The court agreed to later include the stricken-testimony jury instruction; it also immediately issued a curative instruction to the jury "to strike that testimony as it is not to be evidence in any way" or "considered as evidence in any of your deliberations."

¶9 Shortly after, still under questioning by the State, Rusfeldt testified that as an investigator he uses DNA as a tool to identify people but acknowledged that there are cases in which "you get a report back where the Crime Lab says there's something here but it doesn't rise to the statistical level that we can say for certain." Kuehn once again objected about Rusfeldt's DNA qualifications. The court allowed the testimony for the limited purpose of showing Rusfeldt's "experience in using DNA as an investigative tool."

¶10 There was no clear showing that the trial court erroneously exercised its discretion in concluding a new trial was unwarranted. It found that Rusfeldt's

testimony was limited to his knowledge of what was in the Crime Lab report, the report had been provided to the defense, and there was no further questioning about whether the DNA was conclusively proved to be Higgenbottom's. It also issued a prompt curative instruction and later reminded jurors to "[d]isregard all stricken testimony." Any potential prejudice was presumptively erased. *See* ***State v. Collier***, 220 Wis. 2d 825, 837, 584 N.W.2d 689 (Ct. App. 1998).

¶11 Postconviction, the trial court once again concluded that a new trial was not warranted. It found that, in view of the entire proceeding, Rusfeldt's "rather vague" DNA testimony was brief—"about two or three pages at most of an almost 200[-]page transcript of a trial"—that DNA was hardly an issue, and that other evidence against Higgenbottom, notably Ferguson's "damaging testimony," was significant. Even without the mention of DNA, we are satisfied beyond a reasonable doubt that a rational jury still would have convicted Higgenbottom. If there was error, it was harmless. *See* ***State v. Harvey***, 2002 WI 93, ¶49, 254 Wis. 2d 442, 647 N.W.2d 189.

III. Effective Assistance of Counsel

¶12 Higgenbottom next contends he was denied his constitutional right to the effective assistance of counsel by Kuehn's failure to: (1) renew the motion for a mistrial after Rusfeldt's second DNA testimony; (2) obtain copies of search warrants that would have allowed for a motion to suppress his cell phone records; (3) question the State's witnesses about inconsistencies between investigative reports and officer testimony; (4) safeguard information about defense strategies and weaknesses in the State's case prior to trial; and (5) challenge the initial stop.

¶13 To prevail on an ineffective-assistance-of-counsel claim, a defendant must prove both that counsel's representation was deficient and that the deficiency was prejudicial. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). To prove deficient performance, the defendant must point to specific acts or omissions by counsel that were "outside the wide range of professionally competent assistance." ***Strickland***, 466 U.S. at 690. To prove prejudice, the defendant must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** at 694. We uphold a trial court's factual findings regarding deficient performance and prejudice unless they are clearly erroneous. ***Johnson***, 153 Wis. 2d at 127. Determining deficiency and prejudice are questions of law we review independently. ***Id.*** at 128. We need not consider both prongs if the defendant fails to make a sufficient showing on either one. *See* ***Strickland***, 466 U.S. at 697.

A. Failure to Renew Motion for Mistrial

¶14 Higgenbottom argues that a second mistrial motion was necessary because, by allowing the DNA issue to be raised again over his objection, the jury was left with the misimpression that any flaw in the State's case that led the court to strike the previous DNA testimony had been remedied so that it now could consider that his DNA was found on items allegedly used to conceal his identity.

¶15 We are not persuaded by this unsupported assertion. Kuehn testified at the ***Machner***[3] hearing that she made the strategic decision not to highlight the

[3] *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

testimony with a mistrial request. That choice was reasonable under the circumstances and thus will be sustained. *See* ***State v. Balliette***, 2011 WI 79, ¶26, 336 Wis. 2d 358, 805 N.W.2d 334. Further, the clear instruction that the DNA testimony was stricken and not to be considered as evidence in any of the jury's deliberations was not rescinded. That was sufficient to eliminate prejudice.

¶16 The trial court denied the first mistrial motion, then reaffirmed its decision postconviction. Thus, a second motion likely would have been denied as well. Counsel cannot be faulted for not bringing a motion that would have failed. ***State v. Simpson***, 185 Wis. 2d 772, 784, 519 N.W.2d 662 (Ct. App. 1994).

B. Search Warrants for Cell Phone Records

¶17 Higgenbottom claims his cell phone records were improperly obtained with stale search warrants. Had Kuehn challenged the warrants, he asserts, she could have moved to suppress records showing that he was near the motel at the time Mike was being robbed, not in Milwaukee as he claimed.

¶18 Police believed Higgenbottom's password-protected phone held useful evidence. Officers generally must obtain a warrant before conducting a search of data on cell phones. ***Riley v. California***, 573 U.S. ___, 134 S. Ct. 2473, 2485 (2014). As the police department had IBM computer equipment, Higgenbottom's iPhone had to be sent to Apple for data retrieval. The original warrant, granted December 17, 2012, was not timely executed and had to be re-signed. A second, applied for on February 28, 2013, expired unexecuted on March 7. It does not appear that a subsequent application was made or a warrant granted. The February 28 warrant was executed on May 9, 2013, when Apple finally completed its task and returned the phone to police.

¶19 Were we to accept for argument's sake that the trial court "certainly" would have granted the motion to suppress, thus keeping out the records placing Higgenbottom, or at least his cell phone, on-scene at the time of the robbery, our confidence in the outcome of the trial is not undermined. Ample other evidence supported a guilty verdict. Besides the surveillance video and the distinctive BMW with "Autumn," the silver gun, and the suspicious headgear inside, there was Ferguson's testimony for the State. Although both she and the State frankly acknowledged she had been loose with the truth, the jury nonetheless could have found credible her testimony about using the ruse of a tryst with Mike as a feint for helping Higgenbottom set up the robbery. By the time of trial, she, too, had been charged with PTAC armed robbery. While she readily admitted she hoped to benefit from cooperating, nothing had been promised or suggested to her. The cell phone evidence alone did not determine Higgenbottom's guilt; the absence of that evidence does not undermine our confidence in the outcome.

C. Inconsistencies Between Police Testimony and Investigative Reports

¶20 Officer Jaramillo testified at trial that two ear-warmers and a gray and a black hat were found in Higgenbottom's car. Jaramillo earlier had filed a report stating that shortly after the robbery he found a black knit hat on Durand Avenue, a street near the motel. Garner likewise filed a report confirming that a black knit hat was found on Durand. Higgenbottom contends that questioning the officers about this discrepancy "would have cast a very real doubt" on the link the State sought to forge between him and the inculpatory evidence in his car.

¶21 Higgenbottom's assertion does not prove deficient performance. Finding a black knit hat on a Wisconsin street in November does not negate the finding of a black knit hat—or a gray knit hat and two ear-warmers—in

Higgenbottom's car. We agree with the trial court that, looking at the whole of the proceedings, Higgenbottom's speculative argument about the hat in the street alters nothing and does not warrant a new trial.

D. Revealing Strategy Information to State

¶22 Higgenbottom next contends Kuehn undermined his defense by sharing with the State weaknesses she saw in Ferguson's anticipated testimony, thereby allowing the State to structure its direct examination and remedy the deficiencies Kuehn revealed. The trial court rightly termed this argument "weak."

¶23 Kuehn testified at the ***Machner*** hearing that she mentioned to the prosecutor the holes she saw in its case in an effort to negotiate a better deal for Higgenbottom so he might rethink his "firm" stance on going to trial. Plea negotiations are commonplace. It was a reasonable strategy for Kuehn to try to capitalize on the liabilities of which the State already was aware so as to benefit her client's interests.

E. Not Challenging Initial Stop

¶24 Finally, Higgenbottom contends Kuehn should have challenged the stop of his vehicle because Jaramillo lacked reasonable suspicion that he was violating or had violated a traffic law. He asserts that the claimed bases for the stop—the car matched the suspect vehicle and the "pretext[ual]" equipment violation (overtinted windows)[4]—amount to nothing more than an "inchoate and

[4] WISCONSIN ADMINISTRATIVE CODE § Trans 305.32(4)(b), (5)(b), (6)(b) (Mar. 2017) regulates automobile window tinting.

unparticularized suspicion or 'hunch,'" *see* ***Terry v. Ohio***, 392 U.S. 1, 27 (1968), because the description of the car was "imprecise[e]" and, as the stop occurred at 2:16 a.m., Jaramillo could not reasonably have determined that the car windows were improperly tinted. We disagree.

¶25 Kuehn testified that she and Higgenbottom discussed a ***Terry***-stop challenge: "[W]e talked about the fact that [Mount Pleasant is] a small town and there's not likely [at] two, three in the morning BMW's, a lot of BMW's, and I d[id]n't think that there was sufficient evidence to bring that type of motion."

¶26 Jaramillo was aware of the robbery, the description of the car from Garner's bulletin was not imprecise, and Kuehn's rationale is logical. Further, tinted windows add to suspicion. ***State v. Floyd***, 2016 WI App 64, ¶16, 371 Wis. 2d 404, 885 N.W.2d 156, *review granted*, (WI Jan. 10, 2017) (No. 2015AP1294). If Jaramillo reasonably, but mistakenly, suspected the BMW's windows were overtinted, that mistake of fact will not invalidate his reasonable suspicion to support the traffic stop. *See* ***Heien v. North Carolina***, 135 S. Ct. 530, 536 (2014). *See also* ***State v. Houghton***, 2015 WI 79, ¶45, 364 Wis. 2d 234, 868 N.W.2d 143 (quoting ***Heien***), and ***United States v. Wallace***, 213 F.3d 1216, 1220-21 (9th Cir. 2000) (holding that officer had reasonable suspicion to stop car with tinted windows, though later established windows not sufficiently tinted to violate law).

¶27 The trial court observed that, while the traffic-stop issue probably was the defense's best argument, even it did not rise to the level of saying "everything would be different if [Higgenbottom] had a do[-]over." Rather, it was "speculation at best" that such a motion, first, was necessary and, second, would have changed the underlying circumstances. We agree that counsel's performance in this regard was not deficient.

By the Court.—Judgments and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. This opinion may not be cited under RULE 809.23(3)(b).