COURT OF APPEALS
DECISION
DATED AND FILED

July 13, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal Nos. 2015AP1643-CR
2015AP1644-CR

Cir. Ct. Nos. 2013CF2663
2013CM3733

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ARIEN J. DUNBAR,

DEFENDANT-APPELLANT.

APPEALS from judgments and orders of the circuit court for Milwaukee County: LINDSEY CANONIE GRADY, Judge. *Affirmed*.

Before Kloppenburg, P.J., Lundsten and Sherman, JJ.

¶1 PER CURIAM. Arien Dunbar, pro se, appeals judgments of conviction for battery and two counts of violating a domestic abuse injunction. He also appeals orders denying his motion for postconviction relief and his motion for reconsideration. Dunbar claims that the circuit court erred in denying several pretrial motions, failed to properly inform him during the plea colloquy about the consequences of his guilty plea, and relied on inaccurate information when sentencing him. Dunbar also contends that his attorneys were ineffective. We reject Dunbar's arguments and affirm.

BACKGROUND

¶2 H.D. obtained a domestic abuse injunction that prohibited Dunbar from contacting her without her written consent. This injunction further barred Dunbar from H.D.'s residence. Officers subsequently responded to a call from a neighbor reporting an incident at H.D.'s residence. Based on that incident, Dunbar was charged with battery and violating a domestic abuse injunction.

¶3 After the arrest warrant was issued for these charges, an officer again visited H.D.'s apartment and found Dunbar present. Dunbar refused to identify himself, and attempted to block the officer from entering the apartment. Based on this second incident, Dunbar was charged with violating a domestic abuse injunction and obstructing an officer.

¶4 Following the circuit court's denial of several pretrial motions, Dunbar pled guilty to one count of battery to an injunction petitioner and two counts of violating a domestic abuse injunction, all as a repeater. The obstructing an officer charge was dismissed and read in. Dunbar's postconviction motion was denied, as was his motion for reconsideration. This appeal followed.

DISCUSSION

¶5 Dunbar makes four sets of arguments: (1) he is entitled to plea withdrawal because of a plea colloquy defect involving information about the scope of his appellate waiver; (2) the circuit court erred in denying his pretrial motions and finding probable cause at the preliminary hearing; (3) the circuit court relied on inaccurate information in sentencing him; and (4) his attorneys were ineffective. We address each set of arguments below.

A. Challenge to the Plea Colloquy

¶6 We begin with Dunbar's argument that the plea colloquy was defective because the circuit court gave him incorrect information about whether he was waiving his right to appeal the circuit court's rulings on his pretrial motions by pleading guilty. Dunbar argues that he specifically asked if he would be able to appeal the circuit court's rulings on his pretrial motions if he pled guilty, and the court indicated that he would be able to appeal the suppression motion and may be able to appeal other pretrial motions as well. According to Dunbar, when he later renewed his probable cause arguments in his postconviction motion, the circuit court, contrary to the court's statements during the plea colloquy, stated that Dunbar had waived these issues by pleading guilty.

¶7 Dunbar then filed a motion for reconsideration arguing that he had not knowingly waived his appellate rights. The circuit court denied this motion. Dunbar contends that he did not understand that he was waiving the right to appeal the probable cause determinations, and that he would have gone to trial if he had understood the scope of the appellate waiver.

¶8 We interpret this as a ***Bangert*** claim. *See* ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986). ***Bangert*** requires the circuit court to address the defendant personally and establish that the defendant is entering a knowing and voluntary plea. *See* ***id.*** at 266-67. Where a defendant pleads guilty incorrectly believing that he has the right to appellate review of particular issues, a plea is not knowing and voluntary. *See* ***State v. Riekkoff***, 112 Wis. 2d 119, 128, 332 N.W.2d 744 (1983).

¶9 We will assume, without deciding, that the circuit court gave misleading information about Dunbar's right to appeal some issues. However, as the State correctly points out, an alternative to allowing plea withdrawal in this situation is simply to consider the merits of any waived issues on appeal. ***State v. Kazee***, 192 Wis. 2d 213, 220, 531 N.W.2d 332 (Ct. App. 1995). We do so here. Below, we consider all of Dunbar's contentions regarding the circuit court's resolution of his pretrial motions.

B. Probable Cause in Criminal Complaint—Case No. 2013CF2663

¶10 Dunbar argues that the criminal complaint in case No. 2013CF2663 did not set forth probable cause that he committed any crimes.

¶11 Whether a criminal complaint sets forth probable cause is a legal determination that we review de novo. ***State v. Reed***, 2005 WI 53, ¶11, 280 Wis. 2d 68, 695 N.W.2d 315. In evaluating probable cause, we determine whether the facts and reasonable inferences within the four corners of the complaint are sufficient to allow a reasonable person to determine that a crime was probably committed and that the defendant probably committed it. ***Id.***, ¶12. "A complaint is sufficient if it answers the following questions: '(1) Who is charged?; (2) What is the person charged with?; (3) When and where did the alleged offense take

place?; (4) Why is this particular person being charged?; and (5) Who says so? or how reliable is the informant?'" ***Id.*** (quoted source omitted). We evaluate the sufficiency of the complaint in a common-sense manner, rather than a hypertechnical manner. ***State v. Chagnon***, 2015 WI App 66, ¶7, 364 Wis. 2d 719, 870 N.W.2d 27.

¶12 The criminal complaint in case No. 2013CF2663 charged Dunbar with one count of battery to a domestic abuse petitioner in violation of WIS. STAT. § 940.20(1m)(a) (2015-16)[1] and one count of violating a domestic abuse injunction in violation of WIS. STAT. § 813.12(4) and (8)(a).

¶13 Battery to a domestic abuse petitioner has five elements: (1) the offense involves a victim who has petitioned for a domestic abuse injunction; (2) the defendant is subject to the injunction at the time of the offense; (3) the defendant intentionally caused bodily harm to the victim; (4) the victim has not consented; and (5) the defendant is aware of the injunction as well as the victim's lack of consent. WIS JI—CRIMINAL 1229. The allegations here were easily sufficient with respect to this battery-to-a-domestic-abuse-petitioner crime.

¶14 H.D. obtained a domestic abuse injunction that prohibited Dunbar from contacting her without her prior written consent. This injunction further barred Dunbar from H.D.'s residence. This injunction was served on Dunbar. Officers subsequently responded to a call from a neighbor reporting an incident at H.D.'s residence. The neighbor, who did not know Dunbar, stated that she had

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted. Because there have been no changes to the statutes relevant to the issues on appeal, we refer to the current version of the statutes when discussing statutes applicable to Dunbar.

witnessed the father of H.D.'s child run down the hallway chased by H.D., who was bleeding from the mouth and yelling, "I'll cut you!" Officers found H.D. inside the apartment crying, with blood dripping from her mouth and onto her chest and shirt. There was a significant amount of blood on the floor and on a mattress.

¶15 H.D. was not cooperative with the officers, but made various statements that implicated the father of her child and her past abuser, such as, "This happened before with him. I went to the DA, court, it went to trial, and he went to jail." She also said, "He always comes back. I've went through too much." and "I am going to die and he is going to be the one to kill me." She did not identify Dunbar by name, but stated that it was the child's father who was going to kill her and described the child's father as the man she had a restraining order against, the man who did this before, her boyfriend, and the man who went to jail. Officers also found mail addressed to Dunbar inside the apartment.

¶16 Dunbar argues that the complaint does not establish probable cause because there was no "complaining witness" and the complaint alleges no acts committed by Dunbar. We understand Dunbar to be arguing that no witness actually identified him as the perpetrator. We disagree.

¶17 Dunbar is correct that neither the neighbor nor H.D. identified him by name, nor did any witness identify Dunbar by name. However, H.D's statements make clear that she was referring to Dunbar. H.D. said she feared being killed by her "child's father," who she also referred to as "[t]he man [she] has a restraining order against," "[t]he man who did this before," and "[t]he man who went to jail." These statements, in conjunction with the record of H.D.'s restraining order and Dunbar's prior offenses, and the statement of the 911 caller

who heard an argument and identified the man running away from a bloodied H.D. as the father of H.D.'s child, are sufficient to establish Dunbar's identity. *See* ***Reed***, 280 Wis. 2d 68, ¶¶12, 47.

¶18 The facts relating to the domestic abuse injunction and its service on Dunbar are sufficient to establish the remaining three elements of battery to a domestic abuse petitioner, namely, that H.D. had an injunction against Dunbar, that Dunbar was subject to the injunction at the time of the offense, and that Dunbar was aware of the injunction as well as the victim's lack of consent.

¶19 We therefore agree with the circuit court that the complaint sets forth probable cause that Dunbar committed battery to a domestic abuse petitioner.

¶20 We turn our attention to the sufficiency of the complaint with respect to the violation of an injunction, WIS. STAT. § 813.12(4) and (8)(a). Dunbar argues that the complaint is insufficient because it is silent regarding whether he knowingly violated the injunction. The elements of this offense are: (1) an injunction was issued against the defendant in favor of the petitioner; (2) the defendant committed an act that violated the terms of the injunction; and (3) the defendant knew about the injunction and that he was violating its terms. WIS JI—CRIMINAL 2040. As stated in the complaint, the injunction required Dunbar to avoid H.D.'s residence. As explained above, the complaint creates a reasonable inference that Dunbar was present at H.D.'s apartment. That inference, together with the fact that the injunction was personally served on Dunbar, is sufficient to set forth probable cause as to Dunbar's violation of § 813.12(4) and (8)(a).

C. Probable Cause in Criminal Complaint—Case No. 2013CM3733

¶21 We now turn to Dunbar's challenge to the criminal complaint in case No. 2013CM3733, which charged Dunbar with one count of violating a domestic abuse injunction in violation of WIS. STAT. § 813.12(4) and (8)(a). Dunbar argues that the circuit court failed to consider letters that H.D. submitted to the court after the incident, stating that she had given Dunbar written consent to come to her house on the date in question.

¶22 Dunbar's argument fails for three reasons. First, the letters are not evidence and the court was free to disregard them. Second, the possibility that H.D. may have consented is not relevant to the probable cause determination. As explained above, in reviewing the sufficiency of the complaint, we look only to the four corners of the complaint. *See* ***Reed***, 280 Wis. 2d 68, ¶12. Moreover, a complaint need not negate all defenses. *See* ***State v. Olson***, 106 Wis. 2d 572, 584, 317 N.W.2d 448 (1982). Here, the circuit court determined that the four corners of the complaint were sufficient to establish probable cause, and Dunbar has offered no argument to challenge this determination.

¶23 Third, the letters are also irrelevant to the crime that was charged. The only provision in the injunction that is subject to H.D.'s written consent is the no contact provision. However, the injunction prohibits Dunbar from visiting H.D.'s residence with or without consent. Here, Dunbar is charged with being at H.D.'s residence. H.D.'s consent is irrelevant to whether Dunbar violated this provision of the injunction. For these reasons, we reject Dunbar's challenge to the complaint in case No. 2013CM3733.

D. Challenge to the Preliminary Hearing in Case No. 2013CF2663

¶24 Dunbar also argues that the preliminary hearing in case No. 2013CF2663 was flawed because the court improperly determined that there was probable cause to bind him over for trial. A preliminary hearing is "'a summary proceeding to determine essential or basic facts as to probability'" in order to establish probable cause to hold a defendant for trial. ***State v. Schaefer***, 2008 WI 25, ¶34, 308 Wis. 2d 279, 746 N.W.2d 457 (quoted source omitted).

¶25 The court heard testimony of two witnesses: one of the officers who responded to the call about the argument in H.D.'s apartment, and the deputy who served the domestic abuse injunction on Dunbar. Dunbar had no questions for either witness. Following their testimony, the court concluded that there was probable cause to hold Dunbar for trial. After the court's probable cause determination, H.D. addressed the court to contest its no contact order. In an unsworn statement, H.D. said that the incident never happened, and that she never told officers that Dunbar had done anything. This evidence provides probable cause.

¶26 In the alternative, Dunbar argues, essentially, that the court erred by failing to assess the credibility of the officer's testimony. He argues that the officer's testimony was not believable because it was inconsistent. Dunbar misunderstands the law. A preliminary hearing is not a "mini-trial," ***id.***, nor is it "'a proper forum to choose between conflicting facts or inferences, or to weigh the state's evidence against evidence favorable to the defendant,'" ***id.*** (quoted source omitted). Therefore, Dunbar's arguments regarding inconsistencies in the officer's testimony are unavailing. *See* ***State v. Knudson***, 51 Wis. 2d 270, 280-81, 187 N.W.2d 321 (1971) (calling witnesses in an attempt to expose inconsistencies

in testimony is impermissible at the preliminary hearing). We see no error in the circuit court's determination that there was probable cause to hold Dunbar for trial on the two charges.

E. Denial of the Motion to Suppress

¶27 The last pretrial ruling challenged by Dunbar is the circuit court's denial of his motion to suppress. Dunbar argues that the court should have granted his motion to suppress because the officer's entry into H.D.'s apartment violated his Fourth Amendment rights. The State argues that the entry was proper because the officer had a warrant to arrest Dunbar as well as reason to believe that Dunbar was residing at the premises and could be found there at the time of entry.[2] *See* ***State v. Blanco***, 2000 WI App 119, ¶¶10-11, 237 Wis. 2d 395, 614 N.W.2d 512.

¶28 In denying the motion to suppress, the circuit court found the following facts. First, a reasonable officer would have believed that he was executing a valid arrest warrant. Second, the officer had reason to believe Dunbar was residing at the apartment. Third, the officer had reason to believe that Dunbar was present in the apartment. Accordingly, the court concluded that the entry and arrest were proper and denied Dunbar's motion to suppress.[3]

[2] The State also argues that Dunbar did not have a legitimate expectation of privacy in the premises because he was there in violation of a court injunction. *See, e.g.,* ***Commonwealth v. Morrison***, 710 N.E.2d 584, 586 (Mass. 1999) (describing as "nonsense" the assertion that a defendant subject to an injunction had a reasonable expectation of privacy in the premises that he had been ordered not to visit). Because we accept the State's alternate ground for affirming the denial of the motion to suppress, we need not consider this basis for rejecting Dunbar's Fourth Amendment claim.

[3] The circuit court also upheld the entry under the community caretaker doctrine. *See* ***State v. Matalonis***, 2016 WI 7, ¶30, 366 Wis. 2d 443, 875 N.W.2d 567. However, the State does not ask us to affirm on that ground.

¶29 "'Our review of an order granting or denying a motion to suppress evidence presents a question of constitutional fact.'" ***State v. Tullberg***, 2014 WI 134, ¶27, 359 Wis. 2d 421, 857 N.W.2d 120 (quoting ***State v. Robinson***, 2010 WI 80, ¶22, 327 Wis. 2d 302, 786 N.W.2d 463). "When presented with a question of constitutional fact, this court engages in a two-step inquiry." ***Robinson***, 327 Wis. 2d 302, ¶22. First, the circuit "court's findings of evidentiary or historical fact will not be overturned unless they are clearly erroneous." ***State v. Richter***, 2000 WI 58, ¶26, 235 Wis. 2d 524, 612 N.W.2d 29. We then "independently determine whether the historical or evidentiary facts establish" a constitutional violation. ***Id.***

¶30 Dunbar contends that his arrest was illegal because the warrant affidavit lacked probable cause. However, even a defective warrant sometimes supplies a legal basis for entry into a residence to execute an arrest. *See* ***State v. Collins***, 122 Wis. 2d 320, 325-26, 363 N.W.2d 229 (Ct. App. 1984). This is true because the application of the exclusionary rule serves no purpose if an officer acted in reasonable reliance on the existence of a valid warrant, and there is probable cause for the arrest. *See* ***id.*** Thus, suppression of evidence obtained by an officer pursuant to a warrant is not required if there is probable cause and the officer reasonably relied on the warrant, even though the warrant is defective. Here, the circuit court found that the officer acted in good faith reliance when entering Dunbar's apartment to arrest him. Dunbar does not challenge this aspect of the circuit court's decision.

¶31 Dunbar also argues that the officer did not have a basis to believe Dunbar was present in the apartment at the time the warrant was executed. However, Dunbar merely makes the conclusory assertion that the officer's belief was unreasonable. Dunbar does not support that assertion, and we disregard it.

See ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (court may disregard undeveloped arguments).

¶32 Dunbar's remaining arguments rely on published decisions that involve warrantless entries. Those decisions are therefore distinguishable. For the reasons explained above, we agree with the State that the facts found by the circuit court establish that the officer's entry into the apartment did not violate the Fourth Amendment. *See* ***Blanco***, 237 Wis. 2d 395, ¶¶10-11, 14-16.

F. Dunbar's Challenge to His Sentence

¶33 Dunbar next challenges his sentence, arguing that the circuit court relied on inaccurate information. Dunbar's arguments on this score are underdeveloped, but he appears to take issue with the fact that the court relied on a supplemental memorandum submitted by an agent of the Department of Corrections recounting an interview with H.D. In this interview, H.D. stated that she lived in fear of Dunbar due to his abuse and threats, and that her son was starting to act out due to witnessing the abuse.

¶34 A defendant has a constitutional due process right to receive a sentence based upon accurate information. ***State v. Lechner***, 217 Wis. 2d 392, 419, 576 N.W.2d 912 (1998). A defendant who moves for resentencing on the ground that the circuit court relied on inaccurate information must establish that there was information before the court that was inaccurate, and that the court actually relied on the inaccurate information. ***State v. Travis***, 2013 WI 38, ¶21, 347 Wis. 2d 142, 832 N.W.2d 491. As a threshold question for this inquiry, a defendant must prove that information is inaccurate. ***Id.***, ¶22. We review whether a defendant has been denied this constitutional right de novo, benefiting from the analysis of the circuit court. ***Id.***, ¶20.

¶35 Dunbar has not proven that any information was inaccurate. At the sentencing hearing, Dunbar argued that the circuit court should disregard the supplemental memorandum recounting the interview with H.D. because it falsely purported to convey H.D.'s perspective and was also unreliable in its content. But Dunbar has not presented information showing that the memorandum is inaccurate.

G. Dunbar's Claims of Ineffective Assistance of Counsel

¶36 Finally, Dunbar argues that his attorneys were ineffective. To establish ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that such performance prejudiced his defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). We need not address both components of the analysis if the defendant makes an inadequate showing on one. ***Id.*** at 697.

¶37 A claim of ineffective assistance of counsel is a mixed question of fact and law. ***State v. Carter***, 2010 WI 40, ¶19, 324 Wis. 2d 640, 782 N.W.2d 695. "We will uphold the circuit court's findings of fact unless they are clearly erroneous," but "the ultimate determination of whether counsel's assistance was ineffective is a question of law, which we review de novo." ***Id.***

¶38 Dunbar points to two specific errors. First, he argues that his attorney should have objected to the introduction of the arrest warrant at the suppression hearing. In Dunbar's view, the arrest warrant failed to satisfy statutory requirements because it was not accompanied by a sworn affidavit and there was no probable cause to issue the warrant. Dunbar further contends that, without the warrant, there would not have been probable cause to hold him for trial in case No. 2013CM3733, and he would never have taken the plea.

¶39 In denying Dunbar's postconviction motion, the circuit court rejected Dunbar's arguments relating to the warrant, explaining that the warrant was supported by the sworn complaint of a detective, which is permissible.[4] The court concluded that any objection would have been frivolous. We agree that the attorney's failure to object to the arrest warrant did not render counsel's performance ineffective. *See* ***State v. Wheat***, 2002 WI App 153, ¶14, 256 Wis. 2d 270, 647 N.W.2d 441 (failing to present a meritless argument is not deficient performance).

¶40 Second, Dunbar argues that his attorney should have done more to resolve disputed issues of fact at the sentencing hearing. In its responsive brief, the State argues that Dunbar failed to develop this argument by failing to identify with specificity what his attorney could have done differently and how it would have changed the outcome. The State therefore asks us to decline to consider this claim as conclusory and undeveloped. *See* ***Pettit***, 171 Wis. 2d at 646-47. Dunbar did not file a reply brief. We agree that we need not consider Dunbar's undeveloped arguments regarding his attorney's performance at the sentencing hearing. *See* ***id.***

CONCLUSION

¶41 For the foregoing reasons, we affirm the judgments of the circuit court, as well as the denial of the postconviction motion and the denial of the motion for reconsideration.

[4] The circuit court cited WIS. STAT. § 986.04(1) to support its conclusion that the warrant was plainly in the proper form. However, the correct citation to the requirement for the form of warrants is WIS. STAT. § 968.04(1).

By the Court.—Judgments and orders affirmed.

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