COURT OF APPEALS
DECISION
DATED AND FILED

August 2, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP1355-CR **Cir. Ct. No. 2014CF2526**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

STANLEY CLEOFIUS SLATER,

DEFENDANT-APPELLANT.

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

Before Reilly, P.J., Gundrum and Hagedorn, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. Stanley Cleofius Slater appeals from a judgment convicting him of armed robbery as party to a crime (PTAC) and an order denying his motion for postconviction relief. He contends that confrontation clause violations warrant a new trial either because of plain error or in the interests of justice or, alternatively, that he received ineffective assistance of counsel such that we should remand for a ***Machner***[1] hearing. We disagree and affirm.

¶2 Slater and his brother Shemon Slater robbed BF at gunpoint, taking $170 and his cell phone. Using a computer, BF's Google account, and the cell phone's locater app, police determined that BF's phone placed a call to Slater's and Shemon's mother seven minutes after the robbery and were able to track the phone to a barbershop. Two men who matched the robbers' general description, later identified as Slater and Shemon, were inside sitting next to each other. Shemon was using a phone that fit the description of the stolen phone. He told the officer that the phone was his, that he had had it "for a minute," and that he did not know the phone's number. When asked where he got it, he pointed to Slater. At that, Slater immediately got up to leave, broke free from the officer's hold on his forearm, and fled. Shemon called his mother to come pick him up.

¶3 Police found Slater hiding in the crawl space of a nearby residence. He was arrested and searched. He had in his possession several $20 bills, folded in sharply creased thirds, as BF had described to police.[2] Slater's mother and Shemon appeared at the scene of the arrest in the mother's minivan. When she opened one of its doors so officers could speak to Shemon, he threw something

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

[2] BF concealed bills in a credit-card pocket of his wallet.

into the back of the van. An officer retrieved a cell phone. BF later examined its contacts list and confirmed that it was his. He testified that he saw text messages on his phone that had been sent to or from Slater or Shemon. Upon his arrest, Shemon also had in his possession one of the uniquely folded $20 bills. Slater's fingerprint was found on a credit card of BF's left at the scene of the robbery, and a partial palm print on BF's vehicle matched Shemon's right palm.

¶4 Slater and Shemon were charged with PTAC armed robbery. Shemon pled guilty; Slater went to trial. Although BF had been unable to identify either of the robbers from photo arrays he viewed shortly after the robbery, at trial he identified Slater as one of the robbers.

¶5 Despite being granted immunity, Shemon refused to testify. Other witnesses testified to his out-of-court statements, however, that inculpated him and Slater in the crime. The officer who spoke to Shemon at the barbershop testified that Shemon pointed to Slater when asked where he got the phone. BF testified that, as police kept him up to date on the robbery matter, he was aware that Shemon had pled guilty to PTAC armed robbery. He also testified that it was "[i]mpossible" for Slater's print to have been on the credit card unless he was one of the robbers and that there was no valid reason for Shemon's print to have been on his car. The Milwaukee Police Department's chief latent print examiner testified that error rates of fingerprint-based identification have been shown to be less than one percent, and that no two people in the world—including identical twins—have been known to have identical fingerprints. In closing, the State argued that, as Shemon had been found guilty through his plea, "[t]he only question left is … the other actor … Slater." The prosecutor then recited the evidence. The jury found Slater guilty.

¶6 Slater filed a motion for a new trial, arguing that BF's testimony that he knew Shemon pled guilty and the officer's testimony about Shemon's nonverbal implication of him violated his constitutional right to confrontation because he had no opportunity to cross-examine Shemon. He also asserted that trial counsel provided ineffective assistance by not seeking to keep that testimony from the jury. The court denied the motion.

¶7 Slater renews his claims on appeal. He argues that confrontation violations warrant relief either because they were plain error, trial counsel ineffectively failed to object to them, or they prevented the real controversy from being fully tried.

¶8 The doctrine of plain error permits an appellate court to review error otherwise waived by a party's failure to object. ***State v. Jorgensen***, 2008 WI 60, ¶21, 310 Wis. 2d 138, 754 N.W.2d 77. As the error must be "obvious and substantial" and so fundamental that relief is warranted, the doctrine should be used "sparingly." ***Id.*** (citation omitted).

¶9 If the defendant shows that the unobjected-to error is fundamental, obvious, and substantial, the burden shifts to the State to prove beyond a reasonable doubt that the error was harmless—i.e., "that a rational jury would have found the defendant guilty absent the error[]." ***Id.***, ¶23 (citation omitted). Factors aiding a harmless-error analysis include the frequency of the error, the importance of the erroneously admitted evidence, the presence or absence of evidence corroborating or contradicting the erroneously admitted evidence, whether the erroneously admitted evidence duplicates untainted evidence, the nature of the defense, the nature of the State's case, and the overall strength of the State's case. ***State v. Mayo***, 2007 WI 78, ¶48, 301 Wis. 2d 642, 734 N.W.2d 115.

¶10 "The Confrontation Clauses of the United States and Wisconsin Constitutions guarantee criminal defendants the right to confront the witnesses against them." ***State v. Hale***, 2005 WI 7, ¶43, 277 Wis. 2d 593, 691 N.W.2d 637. The Confrontation Clause "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted," ***Crawford v. Washington***, 541 U.S. 36, 59 n.9 (2004), or the use of nontestimonial statements, ***State v. Jensen***, 2011 WI App 3, ¶23, 331 Wis. 2d 440, 794 N.W.2d 482.

¶11 Statements are testimonial when "the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." ***State v. Rodriguez***, 2006 WI App 163, ¶18, 295 Wis. 2d 801, 722 N.W.2d 136. They are nontestimonial "when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency." ***Id.***

¶12 We review de novo whether a statement is admissible as a hearsay exception, ***State v. Joyner***, 2002 WI App 250, ¶16, 258 Wis. 2d 249, 653 N.W.2d 290, whether admission of hearsay evidence poses a confrontation clause violation, ***State v. Manuel***, 2005 WI 75, ¶25, 281 Wis. 2d 554, 697 N.W.2d 811, and whether a confrontation violation was harmless, ***State v. King***, 2005 WI App 224, ¶22, 287 Wis. 2d 756, 706 N.W.2d 181.

¶13 Slater again alleges that the officer's testimony about Shemon's indicating him as the source of the cell phone and BF's testimony about Shemon's guilty plea pose confrontation clause violations. We are not persuaded that either one is hearsay or testimonial and, therefore, not a substantial and obvious

confrontation violation, and so not plain error. Assuming for discussion's sake that they are, however, we consider whether their admission was harmless.

¶14 "In determining whether an error is plain or harmless, the quantum of other evidence properly admitted is relevant." ***Virgil v. State***, 84 Wis. 2d 166, 191, 267 N.W.2d 852 (1978). "Erroneously admitted evidence may tip the scales in favor of reversal in a close case, even though the same evidence would be harmless in the context of a case demonstrating overwhelming evidence of guilt." ***Id.*** The burden is on the State to prove that the plain error is harmless beyond a reasonable doubt. ***State v. King***, 205 Wis. 2d 81, 93, 555 N.W.2d 189 (Ct. App. 1996). The test for harmless error is whether there is a reasonable possibility that the error contributed to the conviction. ***Id.*** at 94.

¶15 The testimony to which Slater objects was not dwelt upon. More importantly, the admissible evidence that Slater and Shemon together robbed BF easily can be termed "overwhelming." BF testified that two men robbed him and took his cell phone. Shortly after it was used to place a call to Slater's and Shemon's mother. When police located the phone, Shemon was holding it and Slater was sitting next to him; the brothers fit the general description BF gave of the robbers. Police saw Shemon throw a cell phone into the back of his mother's van; BF confirmed that the phone was his and found text messages on it sent to or from Slater or Shemon.

¶16 Slater's fingerprint was on BF's credit card left at the scene; Shemon's palm print was on BF's vehicle. The latent print examiner testified that error rates of fingerprint-based identification are virtually zero. BF testified that the $20 bills the robbers took were folded into thirds. Upon their arrest, Shemon and Slater each had in their possession $20 bills folded into thirds.

¶17 Even if, but for a violation of Slater's right to confrontation, the jury would not have heard the testimony about Shemon's non-verbal implication of Slater or that BF learned that Shemon pled guilty to PTAC armed robbery, and even if BF identified Slater based on his knowledge of Shemon's guilty plea or other information from the police, the overwhelming evidence of Slater's guilt did not depend on the testimony that Slater challenges on confrontation grounds. We are satisfied that the State proved beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.

¶18 Slater's ineffective-assistance-of-counsel claim is based on counsel's failure to make any attempt to keep Shemon's "testimonial hearsay" statements from the jury, either by objecting to them, moving to strike them, or seeking a limiting instruction.

¶19 To prevail on a claim of ineffective assistance of counsel, a defendant must show that his or her counsel was deficient and that the deficient performance was prejudicial. ***State v. Pitsch***, 124 Wis. 2d 628, 633, 369 N.W.2d 711 (1985). Both components are mixed questions of law and fact. ***Id.*** at 633-34. We uphold the trial court's findings of fact unless they are clearly erroneous, but whether counsel's performance was deficient and prejudicial are questions of law subject to de novo review. *See* ***id.*** We need not approach the inquiry in a particular order or address both components if the defendant makes an insufficient showing on one. ***Strickland v. Washington***, 466 U.S. 668, 697 (1984).

¶20 Even if counsel's failure to take the actions Slater wishes amounted to error, it clearly was not prejudicial. First, we have determined that any error here was harmless beyond a reasonable doubt. *See* ***State v. Weed***, 2003 WI 85, ¶¶34–35, 263 Wis. 2d 434, 666 N.W.2d 485. Second, Slater could not show "that

there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," because counsel's failure to act as Slater thinks necessary is not sufficient to undermine confidence in the outcome. *See* ***Strickland***, 466 U.S. at 694

¶21 Finally, since error, if any, was harmless and not prejudicial, it cannot be said that the real controversy was not fully tried, or that it is probable that there was a miscarriage of justice. *See* WIS. STAT. § 752.35 (2015-16); *see also* ***State v. Wery***, 2007 WI App 169, ¶21, 304 Wis. 2d 355, 737 N.W.2d 66. We therefore decline to exercise our discretionary power of reversal.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2015-16).