COURT OF APPEALS
DECISION
DATED AND FILED

November 7, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP1748-CR **Cir. Ct. No. 2013CF97**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHRISTOPHER P. DAVIS-CLAIR,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed*.

Before Brennan, P.J., Kessler and Dugan, JJ.

¶1 PER CURIAM. Christopher Davis-Clair (Davis) appeals a judgment of conviction, following a guilty plea, of one count of first-degree intentional homicide as a party to a crime, and one count of first-degree reckless injury. He also appeals the order denying his postconviction motion for postconviction discovery and a new trial. We affirm.

BACKGROUND

¶2 On February 9, 2013, Davis was charged with one count of first-degree intentional homicide as a party to a crime for the shooting death of K.J. and one count of attempted first-degree intentional homicide as a party to the crime for gunshot wounds sustained by L.S. Davis was arrested after an informant told Milwaukee police about Davis's involvement in the shooting.

¶3 Davis was arrested on February 4, 2013. The following morning, Detectives Michael Sarenac and David Chavez attempted to interrogate Davis. Davis denied shooting K.J., but began vomiting shortly thereafter and told the detectives he was coming down from a marijuana high. The detectives moved Davis, but ended the interrogation after Davis showed signs of becoming ill again. Later that night, Detectives Timothy Graham and Dennis Devalkenaere attempted a second interrogation. Graham read Davis his ***Miranda*** rights.[1] The following exchange ensued:

> [Graham]: … You understand those rights? You willing to talk to my partner and I?

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

The transcript of the interrogation does not indicate which detective conducted the interrogation, but the trial court's written decision on the motion to suppress indicates that Graham did the questioning.

[Davis]: I don't really want to talk now I was talking earlier man.

[Graham]: Huh.

[Davis]: I ain't finna say nothing I was talking earlier.

[Graham]: You don't want to talk to us. You don't want to explain your side of this.

[Davis]: I did yesterday, or earlier.

The detectives went on to tell Davis that witnesses identified him as the shooter and that Davis's girlfriend was at risk of being arrested because her car was identified as being used in the shooting. The detectives told Davis that if his girlfriend was arrested, Child Protective Services would have to get involved on behalf of her children. Ultimately, Davis confessed that he was one of the shooters.

¶4 Davis filed a motion to suppress his statements, alleging that he invoked his right to remain silent but that the detectives dismissed it. He also alleged that his statements were coerced. The trial court denied the motion.

¶5 Davis reached a plea agreement with the State, whereby he pled guilty to one count of first-degree intentional homicide as a party to a crime and to an amended count of first-degree reckless injury. The court accepted Davis's guilty pleas. Before sentencing, however, Davis's counsel moved to withdraw, which the court allowed. New counsel was appointed. Ultimately, Davis was sentenced.

¶6 Postconviction, Davis filed a motion for postconviction discovery, arguing that "[t]he motion seeks discovery whether police threats during [Davis's] third interrogation were 'objectively unwarranted' as it affects his claim [that] his

inculpatory statements were involuntarily made." The motion alleged that Davis entered pleas to the two charges in the Amended Information after the trial court denied his motion to suppress. The motion essentially alleged that the interrogating detectives had no basis to arrest Davis's girlfriend or to have her children removed from her home and that Davis confessed out of fear for harm to his girlfriend and her children. Davis argued that postconviction discovery as to what evidence detectives did and did not have at the time of his confession would also "allow post-conviction counsel to determine whether trial counsel's failure to further investigate and seek pre-trial discovery in support of the suppression motion, and present additional evidence of 'unwarranted' coercion relevant to 'voluntariness,' was reasonable."

¶7 Davis also filed a postconviction motion to "withdraw no contest pleas, new trial and re-sentencing, pursuant to Rule 809.30, Stats." (Bolding and capitalization omitted.) As relevant to this appeal, Davis alleged that his trial counsel was ineffective for failing to conduct discovery that would have supported his suppression motion and for "fail[ing] to consider and discuss alternative strategies for acquittal at trial on the two pending counts," particularly, "fail[ing] to inform [Davis] of a lesser-included strategical option." The motion also alleged that Davis's guilty pleas were not knowing, intelligent or voluntary. The postconviction court denied the motion without a hearing. This appeal follows.

DISCUSSION

¶8 On appeal, Davis argues that: (1) the trial court erroneously denied his motion to suppress his inculpatory statements because he invoked his right to remain silent and he was coerced into a confession; (2) the postconviction court erroneously denied his request for a postconviction evidentiary hearing on both

postconviction motions;[2] and (3) trial counsel was ineffective, rendering Davis's guilty pleas unknowing, involuntary, and unintelligent. We disagree.

Davis's Motion to Suppress

¶9 A trial court's ruling on a motion to suppress evidence presents a mixed question of fact and law. ***State v. Casarez***, 2008 WI App 166, ¶9, 314 Wis. 2d 661, 762 N.W.2d 385. We will not overturn the trial court's findings of fact unless they are clearly erroneous. *See* ***id.***; WIS. STAT. § 805.17(2) (made applicable to criminal proceedings by WIS. STAT. § 972.11(1) (2015-16)).[3] The trial court is the sole judge of the credibility of the witnesses testifying at the suppression hearing. *See* ***State v. Garcia***, 195 Wis. 2d 68, 75, 535 N.W.2d 124 (Ct. App. 1995). We review *de novo* the trial court's application of constitutional principles. *See* ***Casarez***, 314 Wis. 2d 661, ¶9.

A. Davis's right to remain silent

¶10 An individual must unequivocally invoke his right to remain silent in order to stop questioning. *See* ***State v. Cummings***, 2014 WI 88, ¶48, 357 Wis. 2d 1, 850 N.W.2d 915. The test is whether a reasonable officer would regard the individual's statements and non-verbal cues to be an unequivocal invocation of the right to remain silent. *See* ***State v. Ross***, 203 Wis. 2d 66, 78, 552 N.W.2d 428 (Ct. App. 1996). Whether an individual has unequivocally invoked the right to remain

[2] In addition to arguing that the postconviction court wrongly denied his two postconviction motions without a hearing, Davis also argues that the postconviction court erroneously denied his motion for postconviction discovery. We need not address this issue separately from Davis's argument that the postconviction court wrongly denied his postconviction motions without a hearing.

[3] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

silent turns on the person's statements "[i]n the full context of [the] interrogation." *See* ***Cummings***, 357 Wis. 2d 1, ¶61. If an individual's statement is susceptible to reasonable competing inferences as to its meaning, then the individual did not sufficiently invoke his right to remain silent. *See* ***State v. Markwardt***, 2007 WI App 242, ¶36, 306 Wis. 2d 420, 742 N.W.2d 546.

¶11 "Whether a person has invoked his or her right to remain silent is a question of constitutional fact." ***Cummings***, 357 Wis. 2d 1, ¶43. When presented with a question of constitutional fact, we engage in a two-step inquiry. *See* ***id.***, ¶44. First, we review the trial court's findings of historical fact under a deferential standard, upholding them unless they are clearly erroneous. *See* ***id.*** Second, we independently apply constitutional principles to those facts. *See* ***id.***

¶12 The trial court found that Davis did not unambiguously and unequivocally invoke his right to remain silent and that no coercion occurred. The record supports the trial court's factual findings. Davis said he "ain't finna say nothing," and he "was talking earlier." These statements are ambiguous. At the motion hearing, Graham testified that he did not understand what Davis meant by "finna say nothing." Graham also testified that Davis was mumbling and the only part of Davis's interrogation that Graham understood was that Davis "talked earlier." The trial court found Graham credible. We uphold the trial court's credibility determinations. *See* ***State v. Pote***, 2003 WI App 31, ¶17, 260 Wis. 2d 426, 659 N.W.2d 82. On those facts, we conclude, as did the trial court, that Davis did not clearly invoke his right to remain silent. Davis continued to respond and answer questions after he claims he invoked his right to remain silent. His conduct is inconsistent with a clear intent not to answer further questions.

B. Coercion

¶13 A statement is voluntary if it "was the product of a 'free and unconstrained will, reflecting deliberateness of choice.'" ***State v. Clappes***, 136 Wis. 2d 222, 236, 401 N.W.2d 759 (1987) (citation omitted). In determining whether Davis's statements were involuntary, we look to whether police used "'improper pressures.'" *See* ***State v. Williams***, 220 Wis. 2d 458, 464, 583 N.W.2d 845 (Ct. App. 1998) (citation omitted). Our "analysis involves a balancing of the personal characteristics of the defendant against the pressures and tactics" of the police. *See* ***State v. Jerrell C.J.***, 2005 WI 105, ¶20, 283 Wis. 2d 145, 699 N.W.2d 110. We apply a totality of the circumstances test to determine whether a statement is voluntary. *See* ***id.***

¶14 Davis argues that the interrogating detectives coerced him to confess by suggesting Davis's girlfriend could be arrested and her children taken into custody by Child Protective Services. During the interrogation, one of the detectives told Davis that because Davis's girlfriend's car was used during the shooting, Davis's girlfriend could be "implicated." The detective also told Davis that his girlfriend could be "arrested for obstructing, possibly aiding a felon" if the girlfriend "leav[es] stuff out" during a police interview. The detective told Davis that if Davis's girlfriend was arrested, Child Protective Services would have to get involved.

¶15 Davis argues that the detective's scenarios were feigned. At the suppression hearing, Graham testified that the detectives simply told Davis the truth—Davis's girlfriend's car was used in the crime, his girlfriend could be implicated, and if she was implicated, Child Protective Services would have to get involved. The postconviction court found Graham credible and determined that

the detectives' statements did not amount to coercion. The statements did not contain any express or implied threats or promises. We conclude that Davis has not established facts from which coercion could be reasonably inferred. The trial court did not err in denying Davis's suppression motion, based either on the invocation of the right to remain silent or on coercion by the police.

Davis's Postconviction Motions

¶16 Davis argues that the postconviction court erred when it denied both his motion for postconviction discovery and his motion for a new trial and plea withdrawal.

¶17 A defendant has a right to postconviction discovery if the evidence that he or she seeks is relevant to an issue of consequence. ***State v. Ziebart***, 2003 WI App 258, ¶32, 268 Wis. 2d 468, 673 N.W.2d 369. The defendant seeking discovery "must establish that the evidence probably would have changed the outcome of the trial." ***Id.*** We review the postconviction court's decision as an exercise of discretion. *See* ***id.***

¶18 A plea may be withdrawn after sentencing only when the defendant can demonstrate by clear and convincing evidence that plea withdrawal is necessary to correct a manifest injustice. ***State v. LeMere***, 2016 WI 41, ¶22, 368 Wis. 2d 624, 879 N.W.2d 580. Ineffective assistance of counsel is one type of manifest injustice. ***Id.***, ¶23. Whether trial counsel provided ineffective assistance of counsel presents a mixed question of fact and law. ***Id.*** We will uphold the postconviction court's factual findings unless they are clearly erroneous, but review *de novo* the legal question of whether counsel's performance satisfies the constitutional standard for ineffective assistance of counsel. *See* ***id.***

¶19 To establish that his or her trial counsel was not effective, a defendant must show both that trial counsel's performance was deficient, and that counsel's deficient performance prejudiced the defendant's defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient representation, a defendant must point to specific acts or omissions by the lawyer that are "outside the wide range of professionally competent assistance." ***Id.*** at 690. To prove prejudice, a defendant must demonstrate that "there is 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. A reviewing court may dispose of a claim of ineffective assistance of counsel on either ground without addressing the other ground. ***Id.*** at 697.

¶20 Davis's postconviction motions go hand in hand. His argument for postconviction discovery centers on his contention that trial counsel failed to conduct pretrial discovery to support his motion to suppress, the result of which led to the denial of his suppression motion and ultimately to the entry of involuntary guilty pleas. Davis also contends that counsel failed to advise him of alternative trial strategies.

¶21 We agree with the postconviction court that Davis has not shown that the evidence he sought would have changed the outcome of his case. Davis is not entitled to withdraw his pleas.

¶22 First, Davis has not established that any of the postconviction discovery he sought—evidence pertaining to whether detectives had probable cause to arrest his girlfriend—is actually consequential to his ineffective assistance of counsel claim. Davis's motion did not seek postconviction discovery to support

a definitive claim of ineffective assistance of counsel; rather, Davis argues that he is entitled to postconviction discovery to "determine whether [trial counsel's performance] was deficient," which would then allow him to "determine[] whether this performance prejudiced [him]." Davis is essentially asking this court to authorize a fishing expedition. This is insufficient to entitle Davis to postconviction discovery. *See* ***State v. O'Brien***, 223 Wis. 2d 303, 321, 588 N.W.2d 8 (1999) ("The mere possibility that an item of undisclosed information might have helped the defense ... does not establish a consequential fact in the constitutional sense.") (citation, brackets, and multiple sets of quotation marks omitted; ellipses in ***O'Brien***).

¶23 Next, the postconviction court determined that "even if trial counsel had obtained information through pretrial discovery which would have bolstered the defendant's claim that the alleged threats [to Davis's girlfriend] by police during interrogation were objectively unwarranted," the court still would have denied Davis's motion to suppress for the same reasons the trial court denied the motion. Accordingly, Davis did not establish that counsel's alleged failure to obtain discovery prejudiced his case; thus, counsel cannot be found ineffective. *See* ***State v. Simpson***, 185 Wis. 2d 772, 784, 519 N.W.2d 662 (Ct. App. 1994) (if the motion would have been unsuccessful, there can be no prejudice and the claim of ineffective assistance of counsel fails).

¶24 Finally, there is no reasonable probability that evidence of alleged police threats towards Davis's girlfriend would have altered the outcome of Davis's case because such evidence would not have required suppression of Davis's statements. *See* ***Clappes***, 136 Wis. 2d at 236 ("In examining whether a confession was rationally and deliberately made, it is important to determine that the defendant was not the 'victim of a conspicuously unequal confrontation in

which the pressures brought to bear on him by representatives of the [S]tate exceed[ed] the defendant's ability to resist.' This determination is made, in turn, by examining the totality of the facts and circumstances surrounding the confession.") (internal citation and quoted source omitted; second set of brackets in ***Clappes***). The postconviction court would have to assess the totality of the circumstances surrounding Davis's confession. *See* ***id.*** In denying the suppression motion, the trial court found Graham's testimony credible and assessed Davis's education and significant prior experience with law enforcement, including prior arrests and convictions. The court also noted that Davis was Mirandized, the detective's tactics were not excessive, and that the interrogations were relatively short. In short, the trial court did consider the totality of the circumstances and found no reasonable probability of a different outcome.

¶25 As to Davis's claim that trial counsel failed to explain all possible defense strategies, particularly, the possibility of requesting a lesser-included offense at trial, we conclude that Davis has not established ineffective assistance. Davis has not shown that counsel's actual strategy of negotiating a plea and advising Davis to take the plea was unreasonable. "There are countless ways to provide effective assistance in any given case." ***Strickland***, 466 U.S. at 689.

¶26 Because Davis has not established that his motion for postconviction discovery should have been granted, or that trial counsel was ineffective, he has failed to establish a manifest injustice requiring the withdrawal of his pleas.

¶27 For the foregoing reasons, we affirm.

By the Court.—Judgment and order affirmed.

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