COURT OF APPEALS
DECISION
DATED AND FILED

January 9, 2018

Diane M. Fremgen
Acting Clerk of Court of Appeals

Appeal No. 2016AP1926-CR **Cir. Ct. No. 2012CF1282**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CORDELL LESLIE ADAMS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JONATHAN D. WATTS and FREDERICK C. ROSA, Judges. *Affirmed*.

Before Kessler, Brash and Dugan, JJ.

¶1 PER CURIAM. Cordell Leslie Adams appeals from his judgment of conviction, entered upon a jury's verdict, for two counts of felon in possession of a firearm and one count of possession of a controlled substance. He further appeals from the postconviction order denying his motion for a new trial.

¶2 Adams's arguments on appeal relate to the firearms charges. Specifically, Adams argues that the trial court[1] improperly permitted the firearms expert to rely on the eTrace report for his testimony regarding the ownership of the gun because the eTrace report was inadmissible hearsay. He also asserts that his trial counsel was ineffective for failing to object to several alleged errors during the trial, including: (1) a police detective's testimony regarding Adams's failure to answer certain questions during the police interrogation, which Adams contends violated his right to remain silent; (2) additional testimony of that police detective regarding his belief of whether Adams was being completely truthful during the interrogation; and (3) the trial court's questioning of witnesses after they were examined by counsel. Finally, Adams argues that his right to confrontation was violated when the trial court admitted testimony that one of the guns he was charged with possessing had been stolen. We affirm.

BACKGROUND

¶3 The charges against Adams stem from a traffic stop of the vehicle he was driving after Milwaukee police officers observed Adams's involvement in what they believed was a hand-to-hand drug transaction. Upon approaching the vehicle, the officers observed Adams motioning toward the center console and the

[1] The trial was before the Honorable Jonathan D. Watts; we refer to this court as the "trial court."

floor of the vehicle; based on these movements, the officers thought Adams might have a weapon. Furthermore, Adams did not follow the officers' orders to put his hands in the air where they could see them. As a result, one of the officers broke the passenger-side window because the doors were locked, gained entry to the vehicle, and took Adams into custody.

¶4 In a search of Adams's vehicle the officers discovered marijuana, plastic baggies, a digital scale, two cell phones, and $2600 in cash. The officers then obtained a search warrant for the cell phones. That search by a forensics officer uncovered text messages that referenced drug transactions, along with photographs of several different firearms. Six of those gun photographs contained metadata showing that the photos had been taken with that phone, the date the photos were taken, and the GPS coordinates of the location where the photos had been taken.

¶5 In one of the photographs that contained metadata, a black pistol, identified later by police as a Hi-Point firearm, is being held by a black male who is visible only from the chest down, wearing a brown t-shirt with a tattoo on his arm. Another photo taken on the same day with the same Hi-Point pistol shows a scar or indentation on the index finger of the hand holding the pistol. The metadata indicated that these photos were taken at Adams's residence.

¶6 Another photo found on the phone depicts a green and black pistol, later identified by police as a Springfield firearm, that was resting on the leg of someone wearing gray sweatpants. This was a thumbnail image, so there was no way to determine the location where the photo was taken; the forensics officer who conducted the search testified that GPS information does not attach to thumbnail images. However, the forensics officer was able to retrieve the serial

number from that gun with all of the numbers except for one. A detective investigating the case, Detective Michael Caballero, testified that he then contacted the manufacturer of the gun—Springfield—in an effort to find out the missing number. Based on the known portion of the serial number and a description of the gun, the manufacturer was able to provide the missing digit to complete the serial number.

¶7 Detective Caballero then provided the complete serial number to an officer working at the gun desk, Officer Michael Perez, where guns obtained by the Milwaukee Police Department are processed. Officer Perez ran an eTrace report, which is a software program maintained by the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) that is "designed … to identify the origins of a gun." By using an eTrace report, the police can determine when a gun was manufactured, where it was shipped, and to whom it was originally sold. Additionally, eTrace reports only reveal information about real guns, as opposed to fake or facsimile firearms such as BB guns or water pistols.

¶8 The eTrace report for the Springfield pistol revealed that it was purchased on February 21, 2004, by an individual living in Wausaukee, Wisconsin. However, at some point during the investigation police learned that the gun had been stolen from that buyer.

¶9 During his police interview, Adams did not admit that he was the person holding the Hi-Point pistol. However, he admitted that the tattoo on the arm of the person holding the gun was his, and that the photos were taken at his residence. Also, he acknowledged that the marking on the index finger in the photo looked like his finger, and that he had a shirt similar to the one being worn in the photo. He further admitted that he had taken the photo of the Springfield

pistol at a residence located at 36th Street and Lloyd Street in Milwaukee, but denied that he had held the gun. Additionally, Adams admitted that both firearms were real, although when he testified at trial he stated that the Hi-Point pistol was not a real gun.

¶10 A jury convicted Adams of both weapons charges and the possession of a controlled substance charge in September 2013. He was sentenced to a total of three years for each weapons charge, to run concurrently.[2] Adams filed a motion for postconviction relief which was denied without a hearing.[3] This appeal follows.

DISCUSSION

I. eTrace Report

¶11 We first discuss Adams's argument that the testimony of Officer Perez, the gun desk officer, was inadmissible in that it relied on the eTrace report which was hearsay. Adams raised a hearsay objection at trial which was overruled by the trial court on the basis that the eTrace report was a business record and, pursuant to WIS. STAT. § 908.03(6) (2015-16),[4] was thus an exception to the hearsay rule. The postconviction court declined to "second guess" this ruling, but noted that even if it was error to admit the evidence relating to the eTrace report,

[2] Adams received a $500 fine plus costs for the possession charge.

[3] Adams's postconviction motion was before the Honorable Frederick C. Rosa; we refer to this court as the "postconviction court."

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

the error was harmless because the State had "more than enough" evidence independent of the eTrace report to support a guilty verdict.

¶12 "The trial court has 'broad discretion to admit or exclude evidence,' and this court may overturn its decision only if the trial court erroneously exercised its discretion." ***State v. Giacomantonio***, 2016 WI App 62, ¶17, 371 Wis. 2d 452, 885 N.W.2d 394 (citation omitted). Accordingly, we will uphold a trial court's decision to admit evidence if it "correctly applied accepted legal standards to the facts of record and, using a rational process, reached a conclusion that a reasonable judge could reach." ***State v. Jensen***, 2011 WI App 3, ¶75, 331 Wis. 2d 440, 794 N.W.2d 482.

¶13 A "[r]ecord[] of [r]egularly [c]onducted [a]ctivity" is not excluded by the hearsay rule if it is shown to be

> [a] memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, all in the course of a regularly conducted activity, as shown by the testimony of the custodian or other qualified witness….

WIS. STAT. § 908.03(6). There is no Wisconsin case law that supports admitting an eTrace report under the business record exception. However, as Adams acknowledges, there is federal case law that permits the admission of eTrace reports under the residual hearsay exception.

¶14 The residual hearsay exception, set forth at WIS. STAT. § 908.03(24), provides that "[a] statement not specifically covered by any of the foregoing exceptions but having comparable circumstantial guarantees of trustworthiness" will not be excluded by the hearsay rule. ***Id.*** Our supreme court has further explained the residual hearsay exception as being "designed as a catch-all

exception that allows hearsay statements that may not comport with established exceptions, but which still demonstrate sufficient indicia of reliability to be admitted." ***State v. Huntington***, 216 Wis. 2d 671, 687, 575 N.W.2d 268 (1998).

¶15 In the federal case cited by Adams, ***United States v. Simmons***, the government sought to admit the ATF trace forms as evidence under the business record exception set forth at FED. R. EVID. 803(6). ***Simmons***, 773 F.2d 1455, 1458 (4th Cir. 1985). The Fourth Circuit rejected that argument, noting that the trace forms "were neither made for a regular business purpose by the manufacturer nor completed at the time the weapons were manufactured, shipped, or sold. Moreover, the records were not kept in the regular course of the ATF's business at the time of manufacture or shipment." ***Id.*** at 1458 n.4.

¶16 However, the court found that the trace forms were admissible under the residual hearsay exception set forth at FED. R. EVID. 803(24). ***Simmons***, 773 F.2d at 1458. At the time of the ***Simmons*** court's analysis,[5] the federal residual exception provided:

> A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing

[5] In 1997, FED. R. EVID. 803(24) was combined with FED. R. EVID. 804(b)(5) and renumbered as a new rule, FED. R. EVID. 807; as relevant here, the new Rule contains the same provisions as the previous version.

> to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

Simmons, 773 F.2d at 1459 (citing FED. R. EVID. 803(24)). WISCONSIN STAT. § 908.03(24) is based on this federal rule. *See* ***State v. Sorenson***, 143 Wis. 2d 226, 242, 421 N.W.2d 77 (1988).

¶17 The ***Simmons*** court found that ATF trace forms "have the circumstantial guarantees of trustworthiness" because there would be "simply no reason for the manufacturers of these weapons to falsify the entries on the routine ATF forms." ***Id.***, 773 F.2d at 1459. Therefore, the court held that the admission of the trace forms "serves the general purposes of the [Federal Rules of Evidence] and the interests of justice." ***Id.***

¶18 Subsequently, the Eighth Circuit in ***United States v. Banks*** discussed the ***Simmons*** court's analysis of the ATF trace form, distinguishing it from a different ATF form, Form 4473, which was at issue in ***Banks***. ***Banks***, 514 F.3d 769, 777 (8th Cir. 2008). In ***Banks***, the court found that Form 4473 is "similar to a sales receipt in that a gun dealer routinely fills out a Form 4473 at the time of sale and holds it as a regular business record," and therefore could be admitted as such.[6] ***Id.*** at 777-78. In contrast, the court noted that the tracing form is only completed by a gun manufacturer at the request of the ATF, generally for investigative purposes. ***Id.*** *See also* ***Simmons***, 773 F.2d at 1457. We agree with this analysis by the federal courts, and therefore disagree with the trial court's

[6] We note that in ***Banks*** ATF Form 4473 was not admitted as a business record because the government failed to call a witness to establish a foundation for admitting the form as a business record. ***United States v. Banks***, 514 F.3d 769, 778 (8th Cir. 2008). Instead, the form was admitted under the federal residual hearsay exception rule. ***Id.*** at 777.

ruling that the eTrace report was a business record. However, we find that the eTrace report was nevertheless admissible under the residual hearsay exception, and we therefore affirm the trial court's ruling to admit Officer Perez's testimony that relates to the eTrace report. *See* ***Kolpin v. Pioneer Power & Light Co., Inc.***, 162 Wis. 2d 1, 30, 469 N.W.2d 595 (1991) (where the court held that though the trial court "reached the right result for a different, or arguably erroneous reason," there was enough evidence to support the jury's verdict and uphold the trial court's denial of a motion for judgment notwithstanding the verdict).

II. Ineffective Assistance of Counsel Claims

¶19 Adams next argues that his trial counsel was ineffective for failing to object to several alleged errors during the trial. To prove ineffective assistance of counsel, a defendant must show that his trial counsel's performance was deficient and that the deficiency prejudiced the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). "Wisconsin applies the two-part test described in ***Strickland*** for evaluating claims of ineffective assistance of counsel." ***State v. Roberson***, 2006 WI 80, ¶28, 292 Wis. 2d 280, 717 N.W.2d 111 (internal citation omitted).

¶20 "To prove constitutional deficiency, the defendant must establish that counsel's conduct falls below an objective standard of reasonableness." ***State v. Love***, 2005 WI 116, ¶30, 284 Wis. 2d 111, 700 N.W.2d 62. "To prove constitutional 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. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** (citations and internal

quotation marks omitted). If a defendant fails to satisfy one component of the analysis, a court need not address the other. ***Strickland***, 466 U.S at 697.

¶21 In our review of an ineffective assistance of counsel claim, "'[w]e review *de novo* the legal questions of whether deficient performance has been established and whether it led to prejudice rising to a level undermining the reliability of the proceeding.'" ***Roberson***, 292 Wis. 2d 280, ¶24 (citation omitted; italics added).

A. Violation of the Right to Remain Silent

¶22 Adams first asserts that his counsel was ineffective for failing to object to certain testimony of Detective Caballero which Adams asserts violated his right to remain silent. The testimony at issue involves Detective Caballero's statement that during his interview Adams would not admit to holding the Hi-Point pistol in the photographs from his cell phone. Adams contends that the detective's testimony suggests that Adams's failure to answer the detective's questions was equivalent to confessing to the crime, and damaged Adams's credibility.

¶23 The right to remain silent "includes two separate protections": (1) "the right, prior to questioning, to remain silent unless the suspect chooses to speak in the unfettered exercise of his or her own will"; and (2) "the right to cut off questioning." ***State v. Markwardt***, 2007 WI App 242, ¶24, 306 Wis. 2d 420, 742 N.W.2d 546. Furthermore, the right to remain silent must be unambiguously invoked by a suspect pursuant to the "clear articulation rule" that this court adopted in ***State v. Ross***, 203 Wis. 2d 66, 75-76, 552 N.W.2d 428 (Ct. App. 1996). Based on that rule, even "a suspect's silence, standing alone, is insufficient to unambiguously invoke the right to remain silent." ***Id.*** at 77-78. Rather, the

suspect "must, by either an oral or written assertion or non-verbal conduct that is intended by the suspect as an assertion and is reasonably perceived by the police as such, inform the police that he or she wishes to remain silent." ***Id.*** at 78.

¶24 In support of his argument, Adams cites ***Odell v. State***, where our supreme court addressed this issue in a similar context. ***Id.***, 90 Wis. 2d 149, 151, 279 N.W.2d 706 (1979). In ***Odell***, testimony was elicited from a police detective regarding Odell's failure to explain where he had gotten a significant amount of money that was found on him when he was arrested; Odell was suspected of stealing the money from an office at the Badger Bus Depot. ***Id.*** The court held that the police detective's testimony was a violation of Odell's right to remain silent because the testimony was "designed to demonstrate a tacit admission of guilt on the part of the defendant. The purpose of the evidence was to allow the jury to draw an inference of defendant's guilt from his refusal to explain the presence of the money." ***Id.*** at 152.

¶25 In contrast, the State argues that Adams did not clearly articulate that he was invoking his right to remain silent. In particular, after being read his ***Miranda***[7] rights, Adams indicated to Detective Caballero that he was willing to waive those rights and make a statement. Furthermore, Adams admitted during his testimony that he never told the detective that he did not want to talk to him at any time during the interrogation.

¶26 Even if Adams's trial counsel was deficient in failing to object to Detective Caballero's testimony, based on the ruling in ***Odell***, Adams fails to

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

prove the second prong of the ***Strickland*** test, prejudice, due to the other evidence against him. *See* ***id.***, 466 U.S. at 687. In particular, Adams had admitted that the man holding the Hi-Point gun in the cell phone photos had the same tattoo, shirt, and mark on his index finger as Adams. Moreover, Adams's own testimony given during the trial affected his credibility when he claimed that the Hi-Point pistol was fake even though he had previously admitted during the interrogation that both guns were real.

¶27 Accordingly, we find that there is not a reasonable probability that Detective Caballero's testimony affected the outcome of the trial. *See* ***Love***, 284 Wis. 2d 111, ¶30. Therefore, Adams's ineffective assistance claim on this issue fails.

B. Testimony Regarding Adams's Truthfulness

¶28 Adams's next ineffective assistance claim relates to his trial counsel's failure to object to Detective Caballero's testimony that during the interrogation, he believed that Adams was not being completely truthful. During the trial, after Detective Caballero's testimony, the trial court permitted the jurors to submit written questions for the detective. One of the jurors asked whether the detective felt that Adams was cooperative during the interrogation; Detective Caballero replied that he was. The court then followed up with its own question as to whether Detective Caballero believed Adams was "hiding anything," to which the detective answered in the affirmative.

¶29 For his argument, Adams relies on ***State v. Haseltine***, where the court clearly reiterated that "[n]o witness, expert or otherwise, should be permitted to give an opinion that another mentally and physically competent witness is telling the truth." ***Id.***, 120 Wis. 2d 92, 96, 352 N.W.2d 673 (Ct. App. 1984).

Thus, trial counsel's failure to object to the trial court's question could again be deemed a deficiency.

¶30 However, Adams again fails to satisfy the prejudice prong of the ***Strickland*** test because there is not a reasonable probability that Detective Caballero's comment damaged Adams's credibility to the extent that it affected the outcome of the trial. *See* ***Love***, 284 Wis. 2d 111, ¶30. In fact, Adams's defense for this charge was that he had lied to the detective during the interrogation about the black pistol being real because he wanted to be moved from a holding cell at the Police Administration Building, which was cold, to the Milwaukee County Jail, which was warmer. As the postconviction court points out, Adams's "own testimony was more than enough to damage his credibility." Therefore, Adams's ineffective assistance claim on this issue fails as well.

C. Trial Court's Questioning of Witnesses

¶31 Adams's last ineffective assistance claim is that his trial counsel failed to object when the trial court asked clarifying questions to witnesses after they were examined by counsel. The questions at issue were posed to Officer Perez, the gun desk officer, and involved general inquiries relating to the definition of a firearm as compared to a fake or facsimile weapon.

¶32 Adams concedes that the trial court is entitled to ask clarifying questions pursuant to WIS. STAT. § 906.14(2). However, he alleges that the trial court here engaged in questioning witnesses as an advocate for the State, which is not permitted. *See* ***State v. Garner***, 54 Wis. 2d 100, 104, 194 N.W.2d 649 (1972).

¶33 In our review of the record, we find no evidence that the trial court's questions were inappropriate or impermissible. As a result, Adams's trial counsel

was not deficient for failing to object to these questions because trial counsel cannot be deemed to have been ineffective "for failing to make [a] meritless argument[]." *See* ***State v. Allen***, 2017 WI 7, ¶46, 373 Wis. 2d 98, 890 N.W.2d 245. Accordingly, this ineffective assistance argument also fails.

III. Violation of Right to Confrontation

¶34 Finally, Adams argues that his right to confrontation was violated when Officer Perez, the gun desk officer, testified that the Springfield pistol had been reported stolen. "'The Confrontation Clause of the United States and Wisconsin Constitutions guarantee criminal defendants the right to confront witnesses against them.'" ***State v. Jensen***, 2007 WI 26, ¶13, 299 Wis. 2d 267, 727 N.W.2d 518 (citations and one set of quotation marks omitted). The Confrontation Clause "bars admission of an out-of-court-testimonial statement unless the declarant is unavailable and the defendant has had a prior opportunity to examine the declarant with respect to the statement." ***Id.***, ¶15. "'[A] statement is testimonial if a reasonable person in the position of the declarant would objectively foresee that his statement might be used in the investigation or prosecution of a crime.'" ***Id.***, ¶25 (citation omitted). "'[W]hether the admission of evidence violates a defendant's right to confrontation is a question of law'" that we review *de novo*. ***Id.***, ¶12 (citation omitted).

¶35 The statement in the eTrace report regarding the gun's ownership status (i.e. stolen) was not testimonial because Adams was not charged with any crime relating to stealing the gun or receiving it as stolen property. In other words, the evidence was not admitted to prove the truth of the matter asserted—that the gun was stolen—but rather to demonstrate that the gun was no longer in

the possession of the person who had legally purchased it. As a result, there was no Confrontation Clause violation.

¶36 Furthermore, the State points out that Adams's trial counsel opened the door to this line of questioning by asking Officer Perez whether the gun had been reported stolen. As such, to the extent that Adams could assert an ineffective assistance claim on this issue, we note that no prejudice resulted from this line of questioning. In light of the other evidence presented, as discussed above, there is no reasonable probability that the outcome of the trial would have been different had this evidence not been admitted. *See* ***Love***, 284 Wis. 2d 111, ¶30. In sum, Adams cannot prevail on any of his ineffective assistance of counsel claims.

¶37 Accordingly, we affirm both the judgment of conviction and the decision and order denying Adams's motion for postconviction relief.

By the Court.—Judgment and order affirmed.

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