COURT OF APPEALS
DECISION
DATED AND FILED

February 13, 2018

Diane M. Fremgen
Acting Clerk of Court of Appeals

Appeal No. 2016AP2211-CR **Cir. Ct. No. 2014CF1273**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ORLANDO LLOYD COTTON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: CLARE L. FIORENZA, Judge. *Affirmed*.

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

¶1 BRASH, J. Orlando Lloyd Cotton appeals a judgment of conviction entered on a jury verdict and an order denying his postconviction motion for a new

trial or sentence modification.[1] Cotton was convicted of possessing cocaine with intent to deliver and possessing marijuana with intent to deliver, both as a party to a crime, and for maintaining a drug house. He argues that the evidence was insufficient to support the convictions and that he received ineffective assistance from his trial counsel. We affirm.

BACKGROUND

¶2 The charges against Cotton stem from a no-knock search warrant issued as part of a drug investigation that was executed on March 17, 2014, at a residence located at 2571 North 34th Street in Milwaukee. The target of the warrant was Cotton; the warrant was issued based on information provided by a confidential police informant who had recently made a "controlled buy" of cocaine from Cotton at that address. As the police officers executing the warrant entered the property, they saw four men inside the house run upstairs and ordered them to come down. One of those men was Cotton. The other three men were identified as Elijah Gilmore, Sean Overton, and Jamall Nash, Cotton's son. It was later discovered that the name Jamall Nash is an alias, and that Nash's given name is also Orlando Cotton.[2]

¶3 During the search of the property, police officers noted that there was a digital surveillance camera located on the porch of the property that provided live video feed to a television in the living room. The front door and the door from the porch to the living room were fortified with two-by-four boards, and

[1] Both the jury trial and the postconviction motion were before the Honorable Clare L. Fiorenza.

[2] To avoid confusion, we will refer to Cotton's son as "Nash" throughout this opinion.

all of the first-level windows were boarded up from the inside. The back door was completely sealed, but there was a small round hole, "chest height or maybe head height, depending on how tall a person is," that had been drilled into the wall next to the back door, with the vinyl siding outside of the house acting as a sliding panel to provide access. This type of "service hole" is often used by drug dealers to complete transactions with individuals outside so that the dealer can remain anonymous.

¶4 Furthermore, the officers found over 500 grams of marijuana in several rooms of the residence, including on a table in the living room, on top of a bed in a bedroom, next to and inside of a bathtub, and inside of a toilet bowl. They also found cocaine in the house. Moreover, the officers found evidence indicating that these substances were for distribution, such as plastic baggies, several digital scales with marijuana and cocaine residue on them, and multiple cell phones. The police also discovered over $1000 in cash in various denominations and three loaded firearms.

¶5 Additionally, officers found a jacket in the living room that was a size 2X or 3X. The pocket of the jacket contained a Wisconsin QUEST card, used to obtain FoodShare benefits through a state program, in Cotton's name. There was also a large set of keys, similar to janitor's keys, as well as a set of keys that fit Cotton's car. An officer gave the jacket to Cotton to wear after he was arrested, assuming it was his because of the size—Cotton was the only one in the house at that time who was large enough to fit into that jacket. Cotton never indicated that it was not his jacket.

¶6 After his arrest, Cotton told the police that his mother owned the property that was searched and that it was an investment property that Cotton

managed for her. He stated that he was supposed to be "fixing the upstairs unit," and that he was allowing an individual named Johnny Tate to live in the lower unit rent-free, without his mother's knowledge, because Cotton owed him money. Cotton stated that he merely "hangs out" at the property, gambling, smoking marijuana, and doing cocaine, but denied selling drugs.

¶7 Cotton and Gilmore were both charged with possession with intent to deliver cocaine and marijuana, and Cotton was charged with keeping a drug house. They were to be tried together, but shortly before trial Gilmore pled guilty to the marijuana charge. Cotton's case was tried to a jury in March 2015.

¶8 During the trial, Cotton testified in his own defense. He testified that he had gone to the property on the morning the search warrant was executed to retrieve his vehicle because he had left it there two nights earlier when he had attended a party at the property. He further testified that the windows in the lower unit had been partially boarded up due to several break-ins at the property. Moreover, he declared that he had not installed the surveillance camera and did not know who had. He stated that he did not have keys to the property, and that Gilmore had let him in on the day of the search. He denied seeing any cocaine or marijuana at the property that day. He also denied that the jacket found in the living room was his, and denied that the keys and QUEST card found in the pockets were his.

¶9 Additionally, Cotton's trial counsel elicited testimony from a police officer that of the seventeen fingerprints that were recovered from the items seized from the property, none of them matched Cotton's.

¶10 The jury convicted Cotton on all counts. He was sentenced to a total of ten and one-half years of initial confinement and seven and one-half years of

extended supervision for the three counts. Cotton then filed a postconviction motion seeking a new trial, asserting that the evidence was insufficient to support his convictions and that his trial counsel was ineffective with regard to several evidentiary issues that arose during the trial. Alternatively, Cotton sought modification of his sentence. The circuit court denied the motion in its entirety without a hearing. This appeal follows.

DISCUSSION

1. Sufficiency of the Evidence

¶11 Cotton first asserts that the evidence was not sufficient to support his convictions. While he concedes that the State presented "[s]trong [e]vidence of [d]rug-[r]elated activity," he contends that the evidence did not prove his involvement.

¶12 "When a defendant challenges a verdict based on sufficiency of the evidence, we give deference to the jury's determination and view the evidence in the light most favorable to the State." ***State v. Long***, 2009 WI 36, ¶19, 317 Wis. 2d 92, 765 N.W.2d 557. This court will not reverse a conviction "unless the evidence, viewed most favorably to the [S]tate and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). Furthermore, in our review we must "accept and follow" any inference drawn by the jury "unless the evidence on which that inference is based is incredible as a matter of law." *See* ***id.*** at 507. In other words, as long as "any possibility exists" that the jury could have drawn "appropriate inferences" from the evidence presented at trial, we may not overturn the verdict. *See* ***id.***

a. Charges for Possession with Intent to Deliver

¶13 As for the counts relating to the possession with the intent to deliver both cocaine and marijuana, the State first had to prove that Cotton possessed the substances. This is achieved if the substances were in an area in which Cotton had control, and that he intended to exercise control over those substances. To that end, the circuit court instructed the jury that proof that Cotton "own[ed]" the drugs was not required to find him guilty of possession. Additionally, the court included in its instruction that "[p]ossession may be shared with another person."

¶14 At the time the search warrant was executed, Cotton was found in the house with substantial amounts of marijuana as well as cocaine. He also admitted to being the property manager for his mother, who owned the property. Although Cotton denied having keys to the property, a large set of keys, similar to those a property manager might possess, were found in the pocket of a jacket that presumably belonged to him. Thus, there was sufficient evidence for the jury to draw a reasonable inference that Cotton had control over the property where the drugs were found. *See* ***Poellinger***, 153 Wis. 2d at 507.

¶15 The State also had to prove that the substances were marijuana and cocaine, and that Cotton knew that the substances were cocaine and marijuana. *See* WIS. JI—CRIMINAL 6035. Cotton does not dispute these elements; in fact, Cotton admitted to using both marijuana and cocaine, so it is logical to presume that he would recognize these substances.

¶16 The final element for these charges is proving that Cotton intended to deliver the drugs. *See* ***id.*** We point out that Cotton was charged with these counts as a party to the crime. Thus, the circuit court instructed the jury that Cotton could be convicted of both the charges for possession with intent to deliver

if it found that he was guilty of (1) directly committing the crimes himself; or (2) intentionally aiding and abetting the person who directly committed the crimes. *See* WIS. JI—CRIMINAL 400. The jury was further instructed by the court as to the definition of "aiding and abetting," which is where a defendant either "knowingly … assists the person who commits the crime" or "is ready and willing to assist," and the person who directly commits the crime "knows of the willingness to assist." ***Id.***

¶17 As described above, significant amounts of marijuana and cocaine were found at the property during the search. Additionally, the police officers executing the warrant found substantial evidence of drug-dealing: the packaging supplies (digital scales with marijuana and cocaine residue on them, and plastic baggies), the state of the property (reinforced and sealed doors, the "service hole," the surveillance camera), and the presence of loaded firearms and cash. This evidence is sufficient for the jury to have drawn the reasonable inference that the men arrested at the property when the search warrant was executed intended to distribute the drugs that were found there. *See* ***Poellinger***, 153 Wis. 2d at 507.

¶18 Nevertheless, Cotton argues that the fact that his fingerprints were not lifted from any of the evidence is a significant factor in determining whether the evidence was sufficient to convict him. However, this argument does not take into consideration that he was convicted as a party to the crime of possession of marijuana and cocaine. As we recognized in ***State v. Dukes***, a conviction as a party to a crime "does not turn on whether [the defendant's] fingerprints or DNA were not found on any of the recovered items." ***Id.***, 2007 WI App 175, ¶23, 303 Wis. 2d 208, 736 N.W.2d 515. Like the defendant in ***Dukes***, Cotton "appears to overlook the fact that even if the State is unable to show that he personally possessed the cocaine with the intent to personally deliver it, to be found guilty as

party to the crime the jury need only conclude that he intended to aid and abet in the commission of the crime." *See* ***id.***

¶19 Therefore, we agree with the circuit court that there was sufficient evidence to support the jury's finding that Cotton possessed and intended to either deliver the drugs directly himself or was ready and willing to assist the other men found at the property with the distribution of the drugs. *See* ***Poellinger***, 153 Wis. 2d at 507. *See also* WIS. JI—CRIMINAL 400.

b. Charge of Maintaining a Drug House

¶20 Cotton also argues that the evidence was not sufficient to support his conviction of maintaining a drug house. For this charge, the State was required to prove: (1) that Cotton exercised management or control over the place; (2) that the place was used for delivering drugs; and (3) that Cotton knowingly maintained the place. *See* WIS. JI—CRIMINAL 6037B.

¶21 In support of his argument, Cotton cites ***State v. Omot***, an unpublished case where this court reversed Omot's conviction for maintaining a drug house due to insufficient evidence. ***Id.***, No. 2010AP899-CR, unpublished slip op. ¶1 (WI App Dec. 23, 2010). In ***Omot***, we found that the evidence presented at trial was sufficient to prove that Omot's roommate was maintaining a drug house, but not sufficient to prove that Omot had aided and abetted his roommate. ***Id.***, ¶17. The State's evidence against Omot was based on a photo of Omot holding a gun and sketches drawn by Omot of someone shooting "snitches." ***Id.***, ¶¶18-20. We determined that this was not sufficient evidence to support the inference that Omot aided and abetted his roommate with the distribution of marijuana. ***Id.***, ¶23.

¶22 We do not find ***Omot*** to be persuasive in this case. The evidence against Cotton is much more substantial than the evidence presented against Omot. For example, here the property appears to have been used primarily as a drug house, and was not Cotton's residence. Furthermore, as noted above, Cotton admitted that he managed the property for his mother, and police found a large set of keys in his jacket pocket which is consistent with that admission. Cotton had also admitted to allowing an individual to live in the property without his mother's knowledge, indicating his measure of control over the property. We therefore agree with the circuit court that there was sufficient evidence to support the jury's finding that Cotton was maintaining the property as a drug house.

¶23 Accordingly, we affirm the judgment of conviction as well as the circuit court's ruling in its decision and order denying postconviction relief with regard to the sufficiency of the evidence.

2. Ineffective Assistance of Counsel

¶24 Cotton next argues that he is entitled to a new trial[3] or, alternatively, an evidentiary hearing, on grounds that his trial counsel was ineffective for various reasons relating to evidentiary issues.

¶25 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).

[3] Cotton asserts that he is entitled to a new trial in the interests of justice based on alleged ineffectiveness by his trial counsel. Although Cotton addresses it separately, this claim is properly reviewed and analyzed within the parameters of the test set forth in ***Strickland v. Washington***, 466 U.S. 668 (1984). *See* ***State v. Mayo***, 2007 WI 78, ¶60, 301 Wis. 2d 642, 734 N.W.2d 115.

"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).

¶26 "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.

¶27 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. Trial Counsel's Failure to Object to the State's Characterization of Cotton Being the "Target" of the Search Warrant

¶28 Cotton first argues that his trial counsel was ineffective for not objecting to the characterization of Cotton as the target of the search warrant. The State made this reference in its opening statement, and later elicited testimony from a police officer involved in the investigation who testified that Cotton was the target of the warrant.

¶29 We need not determine whether counsel's failure to object was a deficiency, however, because Cotton fails to explain how his case was prejudiced by these exchanges. *See* ***Strickland***, 466 U.S. at 697. As discussed above, there was substantial evidence against Cotton, such as the drugs, packaging supplies, loaded firearms, and cash that were found at the property, as well as the state of the property, which included sealed doors, a "service hole" for drug deals, and a surveillance camera. Cotton fails to explain how the two references to his being the target of the search warrant, when considered together with all of this evidence, creates a reasonable probability that the outcome of the case would have been different. *See* ***State v. Koller***, 2001 WI App 253, ¶9, 248 Wis. 2d 259, 635 N.W.2d 838 ("Showing prejudice means showing that counsel's alleged errors actually had some adverse effect on the defense."); ***Love***, 284 Wis. 2d 111, ¶30. Therefore, this claim fails.

b. Trial Counsel's Failure to Present Evidence that Gilmore had Admitted Responsibility for the Marijuana Found in the Bedroom

¶30 Cotton next contends that his trial counsel was ineffective because he failed to present evidence that Gilmore, upon entering his guilty plea just prior to Cotton's trial, had admitted that the marijuana in the bedroom was his. However, he fails to explain how his trial counsel was expected to introduce that evidence.

¶31 First, Gilmore had invoked his Fifth Amendment right against self incrimination, and thus was not available to testify. *See* ***United States v. Serrano***, 406 F.3d 1208, 1215 (10th Cir. 2005) ("[A] defendant's right to present a defense does not include the right to compel a witness to waive his Fifth Amendment privilege against self incrimination").

¶32 Furthermore, admission of the plea and sentencing hearing transcripts for Gilmore would have been difficult to achieve based on the hearsay rules of evidence. *See* WIS. STAT. § 908.02 (2015-16).[4] Moreover, even if that evidence had been admitted, Gilmore's statements would not have dispelled Cotton's culpability for the crimes since Cotton was charged as a party to a crime for both possession charges. *See* WIS JI—CRIMINAL 400.

¶33 Additionally, the jury did in fact hear testimony that a backpack belonging to Gilmore was recovered in a bedroom where over a pound of marijuana was found. Therefore, the jury had an opportunity to weigh evidence relating to Gilmore's involvement with these crimes. Thus, Cotton has failed to demonstrate how his trial counsel's failure to present any additional evidence relating to Gilmore prejudiced Cotton's case such that the outcome would have been different. *See* ***Love***, 284 Wis. 2d 111, ¶30.

c. Trial Counsel's Failure to Present Evidence that the QUEST Card Recovered during the Search Belonged to Cotton's Son

¶34 Cotton next argues that his trial counsel was ineffective for failing to present evidence that the QUEST card found in the pocket of the jacket that was presumed to belong to Cotton instead actually belonged to Nash, Cotton's son.

¶35 The record indicates that Cotton's counsel sought to call Nash to testify. However, the circuit court refused to allow it because Cotton was observed speaking with Nash during a break, in violation of the sequestration

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

order that the court had in place during the trial. Thus, the failure to present this evidence was the result of Cotton's own actions, not the result of a deficiency on the part of his trial counsel. Therefore, Cotton's claim on this issue is not permissible. *See, e.g.,* ***Nickel v. United States***, 2012 WI 22, ¶23, 339 Wis. 2d 48, 810 N.W.2d 450 (where the court, in discussing a defendant's claim of circuit court error where the defendant had been "complicit in the error cited," stated that it is "contrary to fundamental principles of justice and orderly procedure" for the defendant to be permitted to appeal that issue).

d. Trial Counsel's Failure to Object to Opinion Evidence

¶36 Cotton's next argument is that his trial counsel failed to object to the opinion evidence proffered by one of the police officers regarding Cotton's claimed lack of knowledge with regard to the drug activity occurring at the property. The officer, who stated that he had previously been a landlord, testified that it "struck [him] as very odd" that Cotton, the son of the landlord for the property, had not contacted the police when he entered the property and saw all of the evidence of drug activity that was in plain view. Cotton argues that his trial counsel objected to the testimony but did not move to strike it, and that this was ineffective assistance.

¶37 In its decision on Cotton's postconviction motion, the circuit court agreed that this was likely a sustainable objection. However, for our review we need not make a determination regarding any deficiency of Cotton's trial counsel because Cotton fails to demonstrate how this statement prejudiced his case. The jurors were instructed that they "should use [their] common sense and experience" in weighing the credibility of the witnesses. *See* WIS JI—CRIMINAL 195. In our

review, we "presume the jury obeyed the instructions as given." ***State v. Abbott Labs.***, 2012 WI 62, ¶103, 341 Wis. 2d 510, 816 N.W.2d 145.

¶38 As the circuit court pointed out in its denial of Cotton's postconviction motion, "the opinions set forth by [the police officer] were commonplace observations that most jurors would have considered in determining the defendant's guilt." The court further stated that the officer's statements "did not consist of anything the average reasonable juror would not have considered on his [or her] own accord." We agree, and note that the jury had a plethora of evidence to consider with regard to the state of the property when the search warrant was executed. Accordingly, Cotton has not shown that his trial counsel's failure to strike the officer's statements prejudiced Cotton's case such that the outcome would have been different. *See* ***Love***, 284 Wis. 2d 111, ¶30.

¶39 Cotton also contends that his trial counsel was ineffective for eliciting testimony from the officer regarding Cotton's repeated denial of any knowledge relating to drug activity at the property. However, Cotton fails to develop an argument as to why this was prejudicial to his case, and we "will not abandon our neutrality to develop arguments" for parties. *See* ***Industrial Risk Insurers v. American Eng'g Testing, Inc.***, 2009 WI App 62, ¶25, 318 Wis. 2d 148, 769 N.W.2d 82.

e. Trial Counsel's Assertion of Prejudicial Facts Not in Evidence

¶40 Cotton's final ineffective assistance argument is that his trial counsel asserted facts not in evidence that were prejudicial to Cotton. Specifically, Cotton points to his trial counsel's statement during closing arguments where he references Cotton's admission to police that he had "even been a pimp." From our review of the record, this statement was made during closing arguments, where

Cotton's trial counsel was arguing that because Cotton had been forthcoming about other crimes he had committed—smoking marijuana, using cocaine, being a pimp—that he must have been telling the truth when he denied knowledge of the drug activity at the property. The State concedes that this was deficient performance by Cotton's trial counsel.

¶41 Although the fact that Cotton had admitted to being a pimp was not in evidence, the jury was instructed that "[r]emarks of the attorneys are not evidence," and that if any remarks made by the attorneys "suggested certain facts that are not in evidence, disregard the suggestion." Again, we presume that the jury followed the circuit court's instructions. *See* ***Abbott Labs.***, 341 Wis. 2d 510, ¶103.

¶42 Moreover, Cotton himself made several admissions relating to his criminal history during his testimony. For example, he stated that he had previously been convicted of two crimes, that he could not "be around firearms" because he was a convicted felon, and that he had previously given a DNA sample when he was released from prison. Cotton fails to show that the statement by his trial counsel, when considered in tandem with Cotton's own testimony, had a prejudicial effect on his case sufficient to give rise to a reasonable probability that the outcome would have been different. *See* ***Koller***, 248 Wis. 2d 259, ¶9; ***Love***, 284 Wis. 2d 111, ¶30.

¶43 In sum, for each of the issues raised by Cotton with regard to his ineffective assistance of counsel claim, he fails to prove at least one of the prongs of the ***Strickland*** test; therefore, the claim fails. *See* ***id.***, 466 U.S. at 687. Accordingly, we affirm the circuit court's denial of Cotton's postconviction motion.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.