COURT OF APPEALS
DECISION
DATED AND FILED

October 30, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP2158-CR **Cir. Ct. No. 2008CF931**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JESUS M. MORELOS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Brown County: WILLIAM M. ATKINSON, Judge. *Affirmed*.

Before Hoover, P.J., Peterson and Mangerson, JJ.

¶1 PER CURIAM. Jesus Morelos appeals a judgment of conviction for conspiracy to possess more than 2,500 grams but not more than 10,000 grams of marijuana with intent to deliver. He asserts he received ineffective assistance of trial counsel: (1) as a result of his attorney's failure to object to a police officer's

testimony purportedly vouching for another witness's credibility; and (2) as a result of his attorney's failure to request a jury instruction regarding a witness's prior criminal convictions. We conclude Morelos received constitutionally sufficient representation at trial and that, regardless, he was not prejudiced by any arguable deficiency. Accordingly, we affirm.

BACKGROUND

¶2 Morelos was charged by criminal complaint with two counts. The first was conspiracy to commit possession with intent to deliver a certain quantity of marijuana, and the second was possession with intent to deliver a smaller quantity of marijuana as party to a crime. As probable cause, the complaint alleged that Drug Enforcement Administration special agent Bernard Bolf, while present at a United Parcel Service facility in Green Bay, seized a suspicious package sent via next-day air from Mission, Texas. The package was opened pursuant to a search warrant and contained a 7.5-pound block of marijuana. The package was to be delivered at "Curves for Women," a business owned by Carin Baumgarten.

¶3 Bolf attempted a controlled delivery at Curves. Baumgarten was not present, but authorized Bolf to leave the package. The package was tracked from Curves to Baumgarten's residence. A search of the residence revealed additional marijuana, a basement safe, firearms, and drug paraphernalia. Western Union money transfer receipts with Morelos's name were also found. A garbage bag containing marijuana was sent to the Wisconsin State Crime Laboratory, where analysts found a print matching Morelos's right thumb.

¶4 Baumgarten waived her ***Miranda*** rights and gave police a written statement in which she incriminated herself and Morelos.[1] She stated she had purchased marijuana from Morelos for resale in the past. Baumgarten agreed with Morelos that he could have a package shipped via next-day air to Curves, and knew it contained marijuana. Initially, Baumgarten said that only a small quantity of marijuana would be found in her garage. Later, when confronted with the results of the home search, Baumgarten told officers about the safe and the marijuana in the basement. Baumgarten admitted to possessing some of the marijuana in her home, and stated that Morelos had purchased the safe and helped her pick out a firearm for the drug operation.

¶5 Bolf testified at trial about his interview with Baumgarten. The following exchange occurred during cross-examination:

> Q Ms. Baumgarten—it's fair to say that Ms. Baumgarten had been cooperating with you and Investigator Dernbach, correct?
>
> A Eventually she did, yes.
>
> Q Okay. She was giving you the name of somebody else who was involved in this, and obviously you were interested in knowing about anybody else that would be involved?
>
> A Yes.
>
> Q Okay. I mean the point in any—I mean any time you arrest somebody, the point is hopefully you'll be able to get more than one arrest?
>
> A Well, we always want to find out who actually—in her case you wanted to further the investigation and find out who actually ordered the marijuana to be delivered, yes.

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

> Q Because she's telling you it wasn't her and it wasn't her package?
>
> A Well, nineteen years of experience will tell you it wasn't her. I just had that feeling from interviewing her that she was not responsible for having the package shipped up from … Mission, Texas, up to her business. I didn't think she was savvy enough to—of a drug dealer to organize all this to be delivered. I did not believe that from just the interview and the nature of her—

Bolf then acknowledged that Baumgarten had mostly cooperated while in law enforcement custody.

¶6 Baumgarten also testified at trial and implicated Morelos. She acknowledged she had been charged and convicted for her role in the operation. Baumgarten stated the charges had not been reduced in exchange for her testimony and she was testifying pursuant to a subpoena. She acknowledged dating Morelos and initially protecting him.

¶7 The court held a jury instruction conference at the conclusion of the trial. The court reviewed the jury instructions to which the parties agreed, and then addressed instructions requested by only one party. One such instruction, WIS JI—CRIMINAL 325 (Apr. 2001), entitled, "Impeachment of Witness: Prior Conviction," was requested only by the State. The circuit court reviewed this instruction at conference and concluded it was not appropriate, stating, "I don't think anything was done at all. That's gone."[2]

[2] Presumably, this statement reflected the court's understanding that no party had attempted to impeach Baumgarten pursuant to the procedure outlined in ***Nicholas v. State***, 49 Wis. 2d 683, 689, 183 N.W.2d 11 (1971).

¶8 The jury found Morelos guilty on count one; he was acquitted on count two. Morelos filed a postconviction motion for a new trial alleging his trial counsel was ineffective because she failed to: (1) object to Bolf's testimony, which impermissibly vouched for Baumgarten, the State's main witness; and (2) request WIS JI—CRIMINAL 325.[3]

¶9 The court held a ***Machner*** hearing on the postconviction motion.[4] With respect to Bolf's testimony, trial counsel stated she did not object because Bolf was providing "simply background information relating to an interview that he had with Ms. Baumgarten." Counsel continued:

> I recall that I was asking [Bolf] generally how he conducts his investigations and whether or not it's common in an investigation to want to get the next person up. In other words, Ms. Baumgarten wasn't his target. It was wanting the guy above her.
>
> And the questions that I was asking were general to his investigation, and he generally answered that based on his investigations in other drug cases that there is normally someone else involved in a situation similar to [the] one that we had in this case. I at the time believed that he was, again, simply giving testimony relating to his experience as a DEA officer and why he would continue to interrogate or question Ms. Baumgarten because it's his belief or his strategy that there is always somebody else higher up and that was the information that he was after.

Trial counsel stated she did not request WIS JI—CRIMINAL 325 because she was attempting to impeach Baumgarten by using her cooperation with law enforcement

[3] The motion also asserted trial counsel was ineffective for failing to object to inadmissible hearsay testimony. That ground has been abandoned on appeal.

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

to suggest that she sought favorable treatment from prosecutors. At the conclusion of the hearing, the court denied Morelos's motion.

DISCUSSION

¶10 Morelos's only contention on appeal is that he received ineffective assistance of trial counsel. The question of whether counsel's actions constitute ineffective assistance is a mixed question of law and fact. ***State v. Smith***, 207 Wis. 2d 258, 266, 558 N.W.2d 379 (1997). The circuit court's findings of fact will not be reversed unless they are clearly erroneous. ***Id.*** Findings of fact include the circumstances of the case and counsel's conduct and strategy. ***State v. Thiel***, 2003 WI 111, ¶21, 264 Wis. 2d 571, 665 N.W.2d 305. The ultimate conclusion of whether counsel rendered constitutionally sufficient representation is a question of law that we decide de novo. ***Smith***, 207 Wis. 2d at 266-67.

¶11 A defendant alleging ineffective assistance of counsel must show that counsel's performance was deficient. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). This requires proof that counsel made errors "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Id.*** Our review of counsel's performance is highly deferential and a fair assessment requires that "every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." ***Id.*** at 689.

¶12 A defendant must also show that any deficiencies in the representation prejudiced the defense. ***Id.*** at 692. To demonstrate 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.'"

Thiel, 264 Wis. 2d 571, ¶20 (quoting ***Strickland***, 466 U.S. at 694). A reasonable probability is a probability sufficient to undermine our confidence in the outcome. ***Id.*** "The focus of this inquiry is not on the outcome of the trial, but on 'the reliability of the proceedings.'" ***Id.*** (quoting ***State v. Pitsch***, 124 Wis. 2d 628, 642, 369 N.W.2d 711 (1985)).

¶13 Morelos first maintains trial counsel was deficient for failing to object to Bolf's testimony purportedly "vouching" for Baumgarten. Morelos primarily relies on ***State v. Haseltine***, 120 Wis. 2d 92, 352 N.W.2d 673 (Ct. App. 1984). In that case, we held that a psychiatric expert who opined that he had "no doubt whatsoever" that the defendant's daughter was an incest victim went too far. ***Id.*** at 95-96. At bottom, we concluded this testimony was "an opinion that [the victim] was telling the truth." ***Id.*** at 96. "No witness, expert or otherwise, should be permitted to give an opinion that another mentally and physically competent witness is telling the truth." ***Id.***; *see also* ***State v. Romero***, 147 Wis. 2d 264, 278, 432 N.W.2d 899 (1988) (adopting ***Haseltine***).

¶14 A law enforcement officer does not, however, violate ***Haseltine***'s prohibition by discussing at trial his or her pretrial impressions of an accomplice's statements. In ***State v. Smith***, 170 Wis. 2d 701, 705-06, 490 N.W.2d 40 (Ct. App. 1992), James Smith started a fire in an apartment building. Scott Kentopp acted as lookout and was later interrogated by police. ***Id.*** The police detective conducting the interrogation testified at Smith's trial that, in his opinion, "Mr. Kentopp knew a lot more than he was telling me, but it was my thought I was getting closer to a point with him where he might just tell me the truth." ***Id.*** at 706.

¶15 We concluded the police testimony was permissible, as neither the purpose nor the effect of the testimony was to attest to Kentopp's truthfulness. ***Id.***

at 718. The detective's testimony was simply an explanation of the course of events during the interrogation, and the jury would have inferred that the detective deemed Kentopp's initial testimony incredible based on the continued questioning and eventual prosecution of Smith. ***Id.*** at 718-19. Further, the jury was instructed that it was the sole judge of the witnesses' credibility, which eliminated any risk that the jury used the detective's testimony to assess Kentopp's truthfulness. ***Id.***

¶16 Under our rationale in ***Smith***, we must conclude trial counsel did not perform deficiently for failing to object to Bolf's testimony. Here, as in ***Smith***, the police testimony had neither the purpose nor effect of vouching for another witness. Bolf was testifying about the events that led the State to suspect Morelos of the charged crimes. In other words, Bolf "made these statements in the context of explaining the circumstances of the witness's interrogation and the reasons for it." *See* ***State v. Miller***, 2012 WI App 68, ¶14, 341 Wis. 2d 737, 816 N.W.2d 331; ***State v. Snider***, 2003 WI App 172, ¶27, 266 Wis. 2d 830, 668 N.W.2d 784.

¶17 We also conclude Morelos has not shown prejudice. Bolf's testimony that he did not believe Baumgarten's initial story did not cause the jury to abdicate its fact-finding role. *See* ***State v. Davis***, 199 Wis. 2d 513, 521, 545 N.W.2d 244 (Ct. App. 1996). The jury likely would have inferred that Bolf disbelieved Baumgarten based on her continued interrogation and the charges against Morelos. *See* ***Smith***, 170 Wis. 2d at 718-19. Further, the jury was instructed that it was the sole arbiter of the witnesses' credibility. *See* ***id.***

¶18 We therefore conclude Morelos has failed to establish that he received ineffective assistance of counsel as a result of his attorney's failure to object to Bolf's testimony. Trial counsel did not perform deficiently, nor did any arguable deficiency prejudice Morelos.

¶19 Morelos also contends his attorney was ineffective for failing to request WIS JI—CRIMINAL 325. We need not linger on this argument. Regardless of which party proposed the instruction, the circuit court actually had the instruction before it and rejected it at the instruction conference. An attorney's failure to make a meritless argument does not constitute deficient performance. *See* ***State v. Harvey***, 139 Wis. 2d 353, 380, 407 N.W.2d 235 (1987). Further, the instruction would have barred the jury from using Baumgarten's convictions except as it pertained to her credibility. *See* WIS JI—CRIMINAL 325. The instruction's omission was actually beneficial for Morelos because without it, the jury was free to use Baumgarten's convictions for any purpose, including as support for the defense's theory that Baumgarten was solely responsible for the marijuana found in her home. Morelos has therefore failed to show he was prejudiced by any arguable deficiency.

¶20 Lastly, Morelos invokes the plain error doctrine under WIS. STAT. § 901.03(4).[5] Plain error is error so fundamental that a new trial must be granted even though the action was not objected to at the time. ***State v. Sonnenberg***, 117 Wis. 2d 159, 177, 344 N.W.2d 95 (1984). Plain error is one both obvious and substantial or grave, and is generally reserved for cases where it is likely that the error denied the defendant a basic constitutional right. ***State v. Frank***, 2002 WI App 31, ¶25, 250 Wis. 2d 95, 640 N.W.2d 198.

¶21 Morelos also argues for application of our discretionary reversal authority under WIS. STAT. § 752.35. We may reverse a judgment appealed from,

[5] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise indicated.

even in the absence of a proper objection, "if it appears from the record that the real controversy has not been fully tried." ***Id.*** Our power to grant a new trial is formidable, and will be exercised only in exceptional cases. ***State v. Sugden***, 2010 WI App 166, ¶37, 330 Wis. 2d 628, 795 N.W.2d 456.

¶22 Morelos's argument for reversal under WIS. STAT. §§ 901.03(4) or 752.35 is difficult to discern. He does not describe which errors qualify as "fundamental" or explain why they are so. Instead he states, in conclusory fashion, that "the errors of counsel were so fundamental that justice was miscarried and the real conspiracy was not fully tried." We have individually rejected both of Morelos's ineffective assistance claims; neither alleged error constituted deficient performance nor prejudiced the defense. Thus, they do not rise to the level of plain error, and we are unpersuaded that this is an exceptional case warranting exercise of our power of discretionary reversal.

By the Court.—Judgment affirmed.

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