COURT OF APPEALS
DECISION
DATED AND FILED

January 15, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP725-CR **Cir. Ct. No. 2009CF947**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL R. LUEDTKE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Outagamie County: NANCY J. KRUEGER, Judge. *Affirmed.*

Before Hoover, P.J., Mangerson, J., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Michael Luedtke appeals a judgment of conviction for seventh-offense OWI, and an order denying his postconviction motion.[1] Luedtke argues his trial counsel provided ineffective assistance, and he also seeks a new trial in the interest of justice. Luedtke contends he is entitled to a new trial because one of the State's witnesses improperly testified as to Luedtke's untruthfulness and that another witness improperly testified Luedtke was on probation and had been in prison. We reject Luedtke's arguments, and affirm.

BACKGROUND

¶2 Police stopped Luedtke's truck near downtown Appleton at approximately 12:30 p.m. on December 2, 2009. Angie Dagitz, a clinical therapist, testified she conducted a two-hour counseling session with Luedtke that day from 10:00 a.m. to noon at her office in downtown Appleton. She stated Luedtke did not appear to be under the influence of intoxicants.

¶3 William Richmond, a long-time friend of Luedtke, testified that Luedtke arrived at his home around noon. Richmond gave Luedtke one sixteen-ounce can of beer. Approximately fifteen to twenty minutes after Luedtke arrived, he drove Richmond to a nearby gas station. Richmond stated he was not sure, but thought they left before Luedtke finished the drink. Luedtke did not appear intoxicated to Richmond.

[1] In addition to the OWI conviction, the jury found Luedtke guilty of operating with a prohibited alcohol concentration of .02 or more and operating with a detectable amount of THC. The trial court subsequently dismissed the latter two charges, presumably based on WIS. STAT. § 346.63(1)(c) (2009-10), which provides that in the case of multiple charges such as those here, "the offenses shall be joined," and, in the event of multiple convictions, "there shall be a single conviction for purposes of sentencing and for purposes of counting convictions …."

All references to the Wisconsin Statutes are to the 2009-10 version.

¶4 Officer Josef Whitney testified he observed Luedtke's truck travel approximately six blocks without incident after leaving a gas station. He stopped the vehicle because Luedtke's driver's license was suspended and the windshield was cracked. Whitney approached the truck and spoke with Luedtke for a minute or two. At the end of the conversation, Whitney noticed a faint odor of intoxicants coming from Luedtke and inquired whether he had been drinking. Whitney testified that, following his question:

> There was a long pause, and generally in my experience with that, somebody is kind of deciding how to answer that question. Before I guess I was willing to allow him to give me a different explanation, I informed him I could smell it coming from him. He stated he had a sip of alcohol earlier in the day.

Whitney asked no further questions, returned to his vehicle, and informed his partner, John Ostermeier, that the driver had "admitted to drinking." Ostermeier testified that Luedtke stated he consumed less than a half can of beer about half an hour before he was stopped. Ostermeier administered field sobriety tests to Luedtke and, ultimately, arrested him.

¶5 During the State's redirect of Whitney, the following exchange occurred:

> Q It was a long pause?
>
> A Long enough that in my experience that I believed he was thinking of an answer. I didn't think it was going to be truthful.
>
> Q Was that based on your prior experience?
>
> A Yes.
>
> Q That kind of pause happened in the past during one of your several hundred traffic stops for investigations like these?

> A Yes. On all investigations in general people think of an answer that might not be the truth.

¶6 Luedtke's counsel scrutinized the matter on recross-examination of Whitney, as follows:

> Q [T]here was a pause that seemed longer than usual, is that fair to say?
>
> A Yes.
>
> Q And in previous encounters that had suggested a lie, is that my understanding?
>
> A No, it suggests that someone is thinking what they want to say, in a question I believe I asked him, have you been drinking today. To the average person, if I would stop anybody else, it would be a simple quick yes or no. Because there was a pause that was longer than normal, it was my conclusion I believed he was thinking of how he wanted to react to that question.
>
> Q Speaking of your general training and experience, do you find that your interaction with people can cause them stress when you are talking to them, in your professional capacity?
>
> A At times.
>
> Q Would you say that when somebody is speaking to an officer they ought to make certain that their answers are truthful?
>
> A Yes.
>
> Q And regardless of the length of the pause, he did acknowledge to you he had something to drink that day?
>
> A Yes.
>
> Q Which you deemed to be a truthful answer?
>
> A Yes.

¶7 The issues at trial were whether, at the time he was driving, Luedtke was intoxicated, had a prohibited blood alcohol concentration of .02 or greater, or

had THC in his blood. Luedtke and the State presented conflicting lab test results on the blood specimen that was obtained from Luedtke a little over an hour after the traffic stop.

¶8 The State's crime lab expert, Laura Liddicoat, testified that Luedtke's blood specimen was tested on December 8, 2009 and contained a .032 alcohol concentration. The lab retested the specimen on January 22, 2010, and it registered .031. The lab also conducted a drug screening test on January 25 that indicated the presence of THC. It conducted a confirmation test on June 24 and found a delta-9 THC concentration of 2.1 nanograms per millileter, as well as metabolites. Based on the concentrations, Liddicoat estimated Luedtke used marijuana three and one-half to four hours prior to sample collection, but she indicated it could have been anywhere from one to ten hours prior. Liddicoat opined that a delay in testing could result in a lower level of delta-9 THC because the substance would break down, and that the level found in her lab's testing could have completely dissipated by the time Luedtke's private lab tested it. Liddicoat similarly opined that a delay in testing could have resulted in a lower alcohol concentration.

¶9 Luedtke's expert, Dr. Edward Barbieri, testified that his lab tested the blood specimen on September 22, 2010. The alcohol concentration of the sample was .021. The lab detected no delta-9 THC, only inactive metabolites. Barbieri acknowledged that delta-9 THC, like all drugs, can degrade over time. He explained that, at room temperature, degradation can be seen after seven days, and the substance would degrade even in frozen temperatures after a couple of

months.[2] As to alcohol, Barbieri observed there can be very small losses, less than one or two percent, every time a test tube is opened.

¶10 The two experts testified that a .02 blood alcohol concentration would represent consumption of one or slightly less than one standard drink such as a twelve-ounce can of beer. Barbieri explained that, on an empty stomach, it would take approximately one hour for the entire drink to be absorbed into the blood, and on a full stomach could take two to three hours. Liddicoat explained that, once absorbed into the blood, the body eliminates alcohol at an average rate of .015 per hour.

¶11 The jury convicted Luedtke on all three counts, concluding Luedtke drove while intoxicated, while having THC in his system, and while he had a blood alcohol concentration of at least .02. The trial court denied Luedtke's postconviction motion without conducting an evidentiary hearing. Luedtke now appeals.

DISCUSSION

Ineffective assistance of counsel

¶12 Luedtke first argues his trial counsel was ineffective. To prevail on this claim, Luedtke must demonstrate that counsel's performance was deficient and that he suffered prejudice as a result. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). If either prong is not shown, we need not address the other.

[2] Liddicoat testified that, while at the state crime lab, the blood specimen was stored in a refrigerated cooler. However, it was removed for several hours and brought up to room temperature for various tests at least five times.

State v. O'Brien, 223 Wis. 2d 303, 324, 588 N.W.2d 8 (1999). To prove deficient performance, Luedtke must show that counsel's act or omission was "objectively unreasonable." *See* ***State v. Oswald***, 2000 WI App 2, ¶63, 232 Wis. 2d 62, 606 N.W.2d 207. Prejudice exists if there is a reasonable probability that, but for counsel's alleged errors, the result of the proceeding would have been different. ***O'Brien***, 223 Wis. 2d at 324. A reasonable probability is one that undermines our confidence in the outcome. ***Id.*** We defer to the trial court's factual determinations, but independently assess whether the facts demonstrate deficient performance and prejudice. ***Id.*** at 324-25.

¶13 Luedtke argues his attorney was ineffective for not objecting to Whitney's testimony about the pause preceding Luedtke's response when asked whether he had been drinking. Luedtke argues the testimony was an opinion as to his truthfulness and was therefore prohibited by ***State v. Haseltine***, 120 Wis. 2d 92, 352 N.W.2d 673 (Ct. App. 1984).

¶14 We held in ***Haseltine*** 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.*** at 96. "***Haseltine*** prohibits a witness from testifying that another witness is telling the truth *at trial*." ***State v. Snider***, 2003 WI App 172, ¶27, 266 Wis. 2d 830, 668 N.W.2d 784 (emphasis added). However, when an officer merely testifies to a belief that a defendant knew a lot more than he was telling the officer, it does not violate the ***Haseltine*** rule. ***Id.*** (discussing ***State v. Smith***, 170 Wis. 2d 701, 718-19, 490 N.W.2d 40 (Ct. App. 1992)).

¶15 Concluding that an officer's recounting of how he conducted his investigation does not violate the ***Haseltine*** rule, in ***Snider*** we explained:

> The detective in ***Smith*** also testified that he did not believe the defendant's story so "he continued the interrogation until he got what he believed to be the truth." Here, the detective similarly testified to what he believed at the time he was conducting the investigation, not whether Snider or the victim was telling the truth at trial. The detective … recounted how he conducted the interrogation and his thought processes at that time. As in ***Smith***, his testimony did not violate the ***Haseltine*** rule.

Snider, 266 Wis. 2d 830, ¶27 (citation omitted).

¶16 Applying the rule of ***Smith*** and ***Snider***, we conclude there was no ***Haseltine*** violation here. Whitney did not offer any opinion as to Luedtke's truthfulness at trial; indeed, Luedtke never testified. Rather, Whitney recounted his thought processes at the time of the traffic stop. His thoughts provided context as to why he interjected before Luedtke responded to the question.

¶17 Moreover, Whitney testified only to his expectation that Luedtke was considering answering untruthfully. Thus, it was at most a prediction, not an opinion as to the truthfulness of Luedtke's actual, subsequent statement. Furthermore, Whitney explicitly testified that he viewed Luedtke's response to be truthful.

¶18 Luedtke unpersuasively attempts to distinguish ***Snider***. First, he argues that in ***Snider*** it was defense counsel rather than the prosecutor who elicited the challenged testimony. That fact, however, does not dictate a different outcome here. Our conclusion in ***Snider*** that the testimony did not violate ***Haseltine*** was in no way predicated upon who elicited the testimony. *See* ***Snider***, 266 Wis. 2d 830, ¶27.

¶19 Luedtke further agues ***Snider*** is distinguishable because the defendant there received a ***Machner***[3] hearing, whereas here the trial court denied the motion without conducting an evidentiary hearing. That distinction too is irrelevant. We rejected the defense argument on two alternative rationales in ***Snider***, both because there was no ***Haseltine*** violation and because the questioning constituted a reasonable trial strategy. *See* ***id.***, ¶26. We rely only on the ***Haseltine*** issue here.

¶20 Because there was no ***Haseltine*** violation, an objection to Whitney's testimony would have been overruled. Counsel therefore did not perform deficiently. *See* ***State v. Wheat***, 2002 WI App 153, ¶23, 256 Wis. 2d 270, 647 N.W.2d 441. Nor was Luedtke prejudiced by the alleged deficiency. The jury was essentially asked to decide the case based on the expert testimony. Whether Whitney believed Luedtke had "a sip" of alcohol was irrelevant. Further, Luedtke admitted to Ostermeier that he had more than a sip, and Luedtke's own expert testified that Luedtke had about one drink. In the end, the case did not turn on Luedtke's credibility, particularly given that Luedtke never testified.[4]

Interest of justice

¶21 Luedtke alternatively seeks a new trial in the interest of justice. He argues the real controversy was not tried due to the ***Haseltine*** violation and because a witness testified Luedtke was on probation and had been in prison.

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

[4] In any event, even if we accepted Luedtke's ineffective assistance of counsel argument, we fail to see how it would have any effect on his "alternative" conviction for operating under the influence of THC.

Because we have concluded there was no ***Haseltine*** violation and, in fact, no opinion of untruthfulness offered, we do not consider that issue further. It provides no basis for relief either alone or considered in combination with the probation and prison testimony.

¶22 Pursuant to WIS. STAT. § 752.35, we may order a new trial in the interest of justice "whenever the real controversy has not been fully tried." ***State v. Wyss***, 124 Wis. 2d 681, 735, 370 N.W.2d 745 (1985), *overruled on other grounds*, ***State v. Poellinger***, 153 Wis. 2d 493, 451 N.W.2d 752 (1990). One situation that may merit a new trial is where "the jury had before it evidence not properly admitted which so clouded the crucial issue that it may be fairly said that the real controversy was not fully tried." ***Id.*** However, "[o]ur discretionary reversal power is formidable, and should be exercised sparingly and with great caution." ***State v. Williams***, 2006 WI App 212, ¶36, 296 Wis. 2d 834, 723 N.W.2d 719. We exercise it "only in exceptional cases." ***State v. Armstrong***, 2005 WI 119, ¶114, 283 Wis. 2d 639, 700 N.W.2d 98.

¶23 Luedtke bases his request for a new trial on testimony volunteered by his friend, Richmond, whom he had driven to the gas station. At the close of Richmond's cross-examination, the prosecutor inquired whether Richmond was Luedtke's friend and did not want him to get in trouble. Richmond responded, "Well, he's already in trouble. He was on probation." The court instructed the jury to disregard Richmond's response. Moments later, Richmond confirmed he and Luedtke were close friends, adding, "We saw each other off and on except for when he went to prison." The court again directed the jury to disregard Richmond's response.

¶24 Luedtke's attorney then moved for a mistrial based on the disclosure that Luedtke had been in prison. The court denied the request, observing that although "the statement by the last witness [was] prejudicial, the jury was immediately admonished to disregard the testimony." The court subsequently submitted a cautionary instruction advising jurors not to consider Richmond's testimony concerning Luedtke's prior conduct. The jury is presumed to follow the instructions it receives. ***State v. LaCount***, 2008 WI 59, ¶23, 310 Wis. 2d 85, 750 N.W.2d 780.

¶25 We do not view this as one of those "exceptional cases" warranting the exercise of our discretionary reversal power. The jury was promptly instructed to disregard the improper testimony and again instructed not to consider it during deliberations. Additionally, Luedtke does not argue the trial court erred in any manner, including in its denial of his mistrial motion. Further, as the trial court found, the prosecutor did not intentionally elicit Richmond's statements.

¶26 Luedtke argues the disclosures were particularly prejudicial because they would have suggested to the jury that he had prior OWI convictions. This contention rests on bald speculation. Moreover, we suspect it was just as likely that the jurors already knew of this fact by way of their applying a .02, rather than .08, blood alcohol content standard. In any event, we are satisfied that the real controversy—whether Luedtke was intoxicated, had a prohibited blood alcohol concentration of .02 or greater, or had THC in his blood when he was driving—was fully tried.

By the Court.—Judgment and order affirmed.

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