COURT OF APPEALS
DECISION
DATED AND FILED

February 22, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP2554-CR **Cir. Ct. No. 2013CF132**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOHN W. CLARDY,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Brown County: KENDALL M. KELLEY, Judge. *Affirmed*.

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 PER CURIAM. John Clardy appeals a judgment convicting him of delivering heroin within 1000 feet of a park, two counts of delivering heroin, conspiracy to deliver heroin, and possession of THC. He also appeals an order denying his postconviction motion in which he alleged ineffective assistance of

trial counsel. He contends his trial counsel was ineffective for (1) failing to object to the introduction of a threatening statement that he made in a jail telephone call and (2) failing to object to the prosecutor's closing rebuttal argument that there was "nothing to refute" the State's evidence. Because we conclude Clardy failed to establish ineffective assistance of trial counsel, we affirm the judgment and order.

BACKGROUND

¶2 The State's witnesses included two confidential informants (CIs) known as Tim and Bear, and several police officers who conducted surveillance and searches during the drug transactions. They testified Clardy sold Tim three bags of heroin at two locations on one day and three more bags of heroin at another location nine days later. The other CI, Bear, arranged over the telephone to buy $500 worth of heroin, but police took Clardy into custody before that transaction took place. At the time of his arrest, no heroin was found on Clardy, but police recovered a small baggie of marijuana.

¶3 In order to avoid informing the jury that the calls were made from the jail, the parties stipulated to having narcotics investigator Ryan Windorff summarize Clardy's jail telephone calls. In those phone calls, Clardy made numerous self-incriminating statements that corroborated aspects of the State's witnesses' testimony. Windorff testified Clardy said, "they got me for Tim and Bear. Snitch asses." "One with Bear that didn't even go through, but they tried to and that's when they got me …." Clardy referred to "fifties" and "a hundred and fifty on me twice," which Windorff explained referred to two buys of three bags of heroin for $150. Clardy said, "Tim and Bear tried to snitch also, but Bear didn't get a chance to. That's when they got me. They got eight cars man [inaudible].

Trying to get me for a $500 lick." Windorff explained the "$500 lick" referred to the agreement for the $500 purchase that was the basis of the conspiracy charge.

¶4 In another telephone call to an unidentified woman, Clardy said, "I want you to call Mike[1] and you tell him I know he's a CI, I know he got a number. He know what it is, tell him …. Tell him he knew Bear when he bring Bear to me, he was a snitch." Clardy further said, "You tell him I'm pissed. Tell him I'm pissed at him."

¶5 In a third telephone call, Clardy said, "Tell him I know he's a snitch. Tell him he set me up. Tell that nigger he set me up, with the two of those mother fuckers. Tell him he ain't getting away with it …. Tell him I'm going to make him cry. He'll shed some tears."

¶6 Clardy elected not to testify, and the defense called no witnesses. Rather, the defense relied on challenges to the credibility of the CIs, the lack of recordings of the transactions, and the lack of a firm agreement on the conspiracy charge. Clardy's attorney argued the phone calls merely showed Clardy was angry with the people who fabricated evidence against him.

DISCUSSION

¶7 Clardy contends his trial counsel was ineffective for failing to object to testimony about the threats he made in the jail phone calls and for failing to object to the prosecutor's closing rebuttal argument. To establish ineffective

[1] Windorff's notes show he believed "Mike" referred to Michael Harris. In one of the phone calls Clardy talked about "going after Mr. Harris's mother because he thinks Mr. Harris was the one who brought the CIs," even though Harris had nothing to do with the case.

assistance of counsel, Clardy must show both deficient performance and prejudice to the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Our review of counsel's performance is highly deferential, and there is a strong presumption that counsel rendered adequate assistance. ***Id.*** at 689-90. Counsel's strategic decisions made after thorough investigation of the law and facts are virtually unchallengeable. ***Id.*** Because Clardy must show both deficient performance and prejudice, if this court finds an insufficient showing of either deficient performance or prejudice, we need not review the other prong. *See* ***id.*** at 697.

¶8 Clardy has not established deficient performance from his trial attorney's failure to object to introduction of the threatening statements contained in his jail phone calls. Counsel is not ineffective for failing to pursue meritless challenges. *See* ***State v. Harvey***, 139 Wis. 2d 353, 380, 407 N.W.2d 235 (1987). Clardy contends the threatening statements were inadmissible "other acts evidence" or "character evidence." That argument was rejected in ***State v. Bauer***, 2000 WI App 206, ¶¶5-7, 238 Wis. 2d 687, 617 N.W.2d 902. Rather, evidence of threats is relevant and probative circumstantial evidence of the defendant's consciousness of guilt. ***Id.*** Such evidence is admissible even when it causes substantial prejudice to the defendant. ***State v. Neuser***, 191 Wis. 2d 131, 144-45, 528 N.W.2d 49 (Ct. App. 1995).

¶9 Clardy attempts to distinguish ***Neuser*** on the ground that ***Neuser*** involved a direct threat to the victim, while Clardy's comments were not made directly to the individuals with whom Clardy was angry. We reject that distinction. Asking another person to tell a suspected "snitch" that "I'm going to make him cry" displays the same consciousness of guilt as a direct threat.

¶10 Clardy also failed to establish deficient performance from his counsel's failure to object to the State's closing rebuttal argument because the argument was not an improper comment on Clardy's failure to testify. The prosecutor, responding to defense counsel's argument that the State failed to prove its case, argued "You hear from the witnesses that all of this occurred. There was nothing to refute it. This is what happened." The test for determining whether the prosecutor's argument was a comment on the defendant's failure to testify is whether it was "manifestly intended or was of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify." ***State v. Jaimes***, 2006 WI App 93, ¶22, 292 Wis. 2d 656, 715 N.W.2d 669.

> For the prosecutor's comment to constitute an improper reference to the defendant's failure to testify, three factors must be present: (1) the comment must constitute a reference to the defendant's failure to testify; (2) the comment must propose that the failure to testify demonstrates guilt; and (3) the comment must not be a fair response to a defense argument.

Id., ¶21. The prosecutor's argument here meets none of these criteria. The prosecutor's brief remark did not reference Clardy's decision not to testify, did not propose to the jury that Clardy's failure to testify demonstrated his guilt, and was a fair response to the defense argument that the State failed to prove its case.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2015-16).