COURT OF APPEALS
DECISION
DATED AND FILED

November 16, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP2728 **Cir. Ct. No. 2003CF3899**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DANIEL LUKE NEWKIRK,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: TIMOTHY G. DUGAN, Judge. *Affirmed.*

Before Lundsten, P.J., Vergeront and Deininger, JJ.

¶1 PER CURIAM. Daniel Newkirk appeals a judgment convicting him on four counts of possessing illegal drugs, and one count of possessing an electric weapon. He also appeals an order denying postconviction relief. The

issue is whether the trial court properly denied his postconviction motion without a hearing. On review of the record and the parties' replacement briefs, we affirm.[1]

¶2 Police officer Liane Scharnott stopped Newkirk for a traffic violation. A few minutes later, a second officer, Jeffrey Cook, arrived at the scene. Together, Scharnott and Cook arrested Newkirk on an outstanding warrant and seized a stun gun and quantities of what appeared to be illegal substances.

¶3 Newkirk went to trial on the resulting drug and weapon charges. Cook testified to the circumstances of Newkirk's arrest, and described how he found a stun gun and drugs when he searched Newkirk. He testified that he looked for and found the stun gun in a case attached to Newkirk's belt, after he

[1] We ordered replacement briefs because the parties' initial briefs ignored the proper posture of this case, that is, that the circuit court denied a motion for a new trial based on ineffective assistance of counsel without holding an evidentiary hearing. Beginning with the proper context is no small matter. When motions alleging ineffective assistance of counsel are deficient, it is usually not necessary for the court to address the merits of the defendant's arguments. When, as here, the parties ignore the content of a post-trial ineffective assistance motion and go directly to arguing the merits of the claimed ineffective assistance, this court is left wondering if the parties appreciate that the content of the motion often matters. Although indirectly, the State has now effectively informed us that it is not arguing that Newkirk's motion could be denied without a hearing because it contained only conclusory allegations, but instead means to persuade us that the circuit court properly denied the motion without a hearing because the "record conclusively demonstrates that [Newkirk] is not entitled to relief." ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. The State also is not arguing waiver based on omitted arguments.

In retrospect, we acknowledge that our order would have been better had we given the State the option of simply conceding these things, rather than only ordering replacement briefs. We advise the parties that because the plain purpose of our order was to direct the parties' attention to the sufficiency of the trial court motion—asking, as we did that, you "focus on whether the motion papers do or do not entitle the appellant to a hearing"—it would have been appropriate for the State to respond to our order by informing us that it did not intend to make any argument based on the content of Newkirk's motion and that replacement briefs would not advance the purpose of our order, and requesting that we proceed on the basis of the briefs on file. We do not order parties to go through the time and expense needed to file additional briefs for reasons of mere formality.

observed Newkirk moving his hand toward his belt. In Cook's version of events, Newkirk moved his hand toward the gun while standing outside the car. Scharnott did not appear at trial, but in her report of the arrest she described Newkirk reaching toward his belt while he was still sitting in the car.

¶4 The seized drugs included twenty-one pills of one description, and seven pills of another. When Cook became confused about which type was which, he used a written inventory of the seized drugs to clarify his answer.

¶5 The State's proof that Newkirk intended to deliver drugs included evidence that he was carrying $1,502 in cash when arrested. However, the only evidence of that amount was a personal property inventory report that Scharnott prepared after Newkirk's arrest. Although Scharnott was not available to authenticate the inventory, nor face cross-examination on it, the trial court allowed the inventory into evidence as a regularly prepared business document, over Newkirk's objection. The evidence of cash Newkirk carried was significant to prove his intent to deliver because the State offered testimony that drug dealers typically carried large amounts of cash in similar denominations.

¶6 Newkirk testified that he found the gun in the console of the car when stopped, and gave it to the officers voluntarily. He also testified that Scharnott found the drugs while searching the car. The car was not his, and he asserted that he had no idea that it contained the contraband. Cook testified that he and Scharnott neither searched the car, nor impounded it, but left it at the side of the road where Scharnott stopped Newkirk.

¶7 After conviction, Newkirk moved for postconviction relief, alleging ineffective assistance from trial counsel. The trial court decided the motion without a hearing, concluding that for each of the six listed errors the record

established that Newkirk suffered no prejudice. On appeal Newkirk argues that he was entitled to a hearing because trial counsel failed to:

1. Seek a remedy for the State's failure to divulge exculpatory evidence;

2. Exploit discrepancies between Cook's testimony and Scharnott's written report;

3. Seek exclusion of the drugs seized from Newkirk;

4. Seek exclusion of Scharnott's personal property inventory, the only evidence of the cash seized from Newkirk;

5. Call Newkirk's brother and sister as defense witnesses;

6. Object to a remark the prosecutor made during closing arguments.

He also contends that the trial court erroneously admitted the personal property inventory under the business record hearsay exception.

¶8 To establish ineffective assistance of counsel, a defendant must demonstrate prejudice from counsel's errors or omissions. ***Strickland v. Washington***, 466 U.S. 668, 697 (1984). The defendant shows prejudice where, but for counsel's deficient performance, there was a reasonable probability of a different trial outcome. ***State v. Erickson***, 227 Wis. 2d 758, 773, 596 N.W.2d 749 (1999).

¶9 The trial court may deny an ineffective assistance of counsel claim without a hearing if the record conclusively demonstrates that the defendant is not entitled to relief. *See* ***State v. Bentley***, 201 Wis. 2d 303, 310, 548 N.W.2d 50 (1996) (citations omitted). We review the decision to deny relief for this reason using the erroneous exercise of discretion standard. ***Id.*** at 311.

¶10 A defendant has a constitutional right to exculpatory evidence in the prosecutor's possession. ***Brady v. Maryland***, 373 U.S. 83, 87 (1963). Here, Newkirk contends that the discrepancy between Scharnott's written description of the discovery of the contraband and Cook's version of it was exculpatory evidence. He contends that the prosecutor should have disclosed this discrepancy to Newkirk before trial and, when trial counsel learned of it at trial, he should have moved to exclude Cook's testimony. If that failed, Newkirk contends, counsel should have introduced Scharnott's report into evidence in order to cross-examine Cook on this discrepancy.

¶11 The trial court reasonably concluded that the discrepancy was minor and non-prejudicial. Cook and Scharnott gave consistent accounts of the stop and subsequent arrest but for Newkirk's location when he moved his hand toward his belt. Most significantly, both stated that they discovered the gun in a case attached to his belt and the drugs hidden in his crotch. If anything, the report, if admitted, would have further damaged Newkirk's defense by pitting his testimony against two officers rather than one. Consequently, there was no reasonable probability of a different outcome due to counsel's omissions.

¶12 Newkirk next points to Cook's testimony concerning the quantity and appearance of the drugs in Newkirk's possession. During testimony Cook refreshed his recollection by reviewing a drug inventory report. In Newkirk's view, the transcript demonstrates that Cook had no personal recollection of the drugs, but essentially used his testimony about them to read the drug inventory into the record. This, he argues, violated his confrontation rights because the author of the report, Scharnott, did not testify. Newkirk asserts that counsel therefore should have moved to strike all of Cook's testimony describing the drugs seized.

¶13 Newkirk's argument fails for two reasons. First, the record does not establish that Scharnott prepared the report, or at least the part of it that Cook reviewed. Officer Michael Garcia testified that he recorded the amount and description of the drugs on the inventory report, and that record is presumably what Cook considered.[2] Because Garcia appeared as a witness, he was available for cross-examination. Second, Newkirk mischaracterizes Cook's testimony. Cook testified extensively about the incident and the drugs without using written reports. He briefly consulted the drug inventory only toward the end of his testimony, when he became confused whether there were twenty-one pills with one label or logo and seven with another, or vice versa. Consequently, the record does not substantiate Newkirk's claim that Cook had no recollection of the incident but was merely parroting written reports of other officers. The trial court properly concluded that Cook used the drug inventory for its permissible purpose, to refresh his personal recollection. *See* WIS. STAT. § 908.03(5) (2003-04).[3]

¶14 A defendant's constitutional right to confront witnesses is violated when hearsay in the form of a "testimonial" out-of-court statement is admitted at trial if the declarant is unavailable and the defendant had no prior opportunity to cross-examine the declarant. ***Crawford v. Washington***, 541 U.S. 36, 68-69 (2004). Here, Newkirk contends that counsel should have objected on ***Crawford*** grounds to admission of the personal property inventory showing the cash and denominations because it was testimonial, Officer Scharnott prepared it, and he

[2] The report was not in evidence and is not in the record so we cannot determine what information the report contained other than what Garcia provided.

[3] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

had no prior opportunity to cross-examine her. However, to obtain an evidentiary hearing on an ineffective assistance of counsel claim, the defendant's motion must be sufficient to allow the trial court to meaningfully review the defendant's claim. ***Bentley***, 201 Wis. 2d at 314. In this case, Newkirk's postconviction motion failed to adequately identify admission of the property inventory as a separate argument. Instead, Newkirk argued for exclusion of testimony from Officers Cook and Garcia that, in his opinion, relayed information that only Officer Scharnott knew first hand, including the amount of cash Newkirk carried. That is a different argument, requiring a different analysis. The motion also failed to explain why admission of the inventory report was prejudicial. Consequently, Newkirk failed to establish grounds to hold a hearing on this particular claim.

¶15 In any event, counsel's failure to make a ***Crawford*** objection was harmless, as was the court's decision to admit the inventory under a hearsay exception. In his opening statement, Newkirk's counsel informed the jury that he was arrested with $1,502 in his pocket. An opening statement is not evidence, but does demonstrate the nature of a party's trial presentation. ***State v. Eugenio***, 210 Wis. 2d 347, 358, 565 N.W.2d 798 (Ct. App. 1997) *affirmed* 219 Wis. 2d 391, 579 N.W.2d 642 (1998). The argument created an expectation that Newkirk would explain the cash, leading to the jury's unavoidable presumption that he conceded its existence. Therefore, even if the inventory report was improperly admitted, either as a hearsay exception or ***Crawford*** violation, it was not prejudicial.

¶16 Newkirk next contends that counsel should have called two of his siblings as witnesses. Newkirk testified that Scharnott found the drugs during a search of the car. He also testified that the cash he carried came from his legitimate business dealings. He asserts that his brother and sister could have provided corroboration and impeached Cook by testifying that the car appeared

searched when they recovered it. His sister also would have corroborated his testimony about his business dealings.

¶17 The trial court reasonably determined that the record conclusively shows that the testimony of the siblings would not have affected the outcome of the trial. According to their statements in support of the postconviction motion, neither sibling could have testified to the condition of the car as Newkirk left it. Their testimony would have been, essentially, that the car was messy when recovered. Additionally, they did not recover the car until at least four days after Newkirk's arrest, during which time a sunroof on the car remained open. Newkirk testified that the car windows were open as well. Even if believed, the siblings' testimony would have been evidence only that someone might have searched the car after Newkirk's arrest, but not necessarily Scharnott at the time of his arrest. As for testimony about Newkirk's business dealings, such testimony would have been tangential, at best.

¶18 During closing arguments, the prosecutor addressed Scharnott's absence and stated, without objection:

> Would Officer Scharnott have corroborated? My belief is yes. I can't say that for a definite fact because I can't tell what she would have said because that's inappropriate, quite frankly, to do that. My belief is she would have corroborated Sergeant Cook's testimony."

Newkirk contends that this was an improper comment, requiring a mistrial, and defense counsel should have acted accordingly. Again, the trial court reasonably concluded that the comment was not prejudicial to Newkirk. In his closing argument, Newkirk's counsel stated "Officer Scharnott, for all we know, refused to come here in order to back up a false story by another officer." The trial court determined that if the prosecutor's comment in rebuttal was inappropriate, it was

harmless in context, especially given the strength of the state's case. Newkirk fails to demonstrate that this conclusion was unreasonable.

By the Court.—Judgment and order affirmed.

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