COURT OF APPEALS
DECISION
DATED AND FILED

January 30, 2007

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2006AP750-CR **Cir. Ct. No. 2003CF1913**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ARTURO HERNANDEZ,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DENNIS P. MORONEY, Judge. *Affirmed*.

Before Wedemeyer, P.J., Curley and Kessler, JJ.

¶1 CURLEY, J. Arturo Hernandez appeals the judgment, entered following his conviction by a jury, of one count of delivery of a controlled substance—cocaine (more than 40 grams), as party to a crime, contrary to WIS.

STAT. §§ 961.16(2)(b)1., 961.41(1)(cm)4. and 939.05 (2003-04).[1] He also appeals from the order denying his postconviction motion. Hernandez argues that he is entitled to a ***Machner*** hearing[2] because his attorney was ineffective for failing to: (1) obtain, prior to the trial for Hernandez's review, a copy of the body-wire tape conversation between Hernandez and the undercover officer; (2) object to defective jury instructions; and (3) object to the undercover officer's "persistent and improper speculation regarding Hernandez'[s] knowledge and intent." In addition, Hernandez contends that he is entitled to a new trial in the interest of justice pursuant to WIS. STAT. § 752.35 on two bases—because the real controversy was not tried and because there was a miscarriage of justice.

¶2 Because Hernandez listened to the less than one-minute tape prior to testifying, the jury instructions were not defective, and the attorney did address on cross-examination the undercover police officer's assumptions that Hernandez was involved in the sale of a "kilo," the attorney's performance was not deficient. Additionally, there is no need for a new trial in the interest of justice because the real controversy was tried and there was no miscarriage of justice. Accordingly, we affirm.

I. BACKGROUND.

¶3 At trial, Willie Huerta, an undercover officer for the Milwaukee Metropolitan Drug Enforcement Group, testified that on March 27, 2003, he parked his car in the parking lot of a grocery store located on the south side of

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

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

Milwaukee as a result of a prearranged meeting with Juan Carlos Angulo and Erika Rodriguez, for the purchase of a kilo of cocaine. Upon arriving in the parking lot, Huerta saw Angulo and Rodriguez sitting in the front seat of a Ford truck. Huerta parked, and Angulo got out of the car and entered Huerta's car and told Huerta that the cocaine was coming. Some time later, Angulo said his supplier "was on the lot," or words to that effect, and Huerta then saw a man, later identified as Hernandez, get out of a Mazda automobile and approach the truck occupied by Rodriguez. Rodriguez got out of the truck and she and Hernandez had a brief conversation. Then both Rodriguez and Hernandez approached Huerta's car, and Angulo got out of the car. Rodriguez got in the backseat and Hernandez got in the front passenger's seat.

¶4 During a conversation between Hernandez and Huerta which was recorded by the officer and later played to the jury, Hernandez said something along the lines of, "This is the stuff you are going to get," and Hernandez handed Huerta a folded five-dollar bill that contained cocaine. Huerta asked whether the cocaine was good for cooking into crack cocaine, and Hernandez responded that it was pure and good for cooking. Huerta said the sample was acceptable and Hernandez exited the car. While standing outside the car, Hernandez said to Huerta, "You can call me next time," or words to that effect.

¶5 The conversation was partly in English and partly in Spanish. Huerta testified that after they talked in the car, Hernandez then went to the Ford truck and had a brief conversation with Rodriguez. Meanwhile, Angulo got into Huerta's car. Hernandez left in the Mazda and Rodriguez went and sat in the truck for about twenty minutes. Huerta saw Rodriguez talking on her cell phone and then she drove off.

¶6 While sitting in the car, Huerta received a phone call from Rodriguez. She asked to change the location of the purchase because the person she was getting the kilo from did not feel comfortable in that location. Huerta refused to change the location of the transfer. The phone call ended and Huerta received a second phone call from Rodriguez, who instructed Huerta to go the trunk of his car and get the money. She said she would be in a different vehicle when she returned. Huerta then saw the Mazda but could not see the occupants. Huerta also saw the Ford truck, now being driven by Hernandez, drive by. Shortly thereafter, Huerta saw Rodriguez in the parking lot, and while he retrieved the bag of money from the trunk, Rodriguez jogged towards him with a white bag. Rodriguez handed Huerta the bag and Huerta saw what he believed to be a brick of cocaine, which later testing confirmed. Huerta then gave a signal, and Rodriguez, Angulo and the driver of the Mazda, Sergio Herrera-Alvarez, were arrested. Hernandez was not present when the others were arrested.

¶7 After the arrests Hernandez, along with the other three, was charged. A warrant was issued for Hernandez's arrest and he was arrested several months later. Hernandez, who was born in Mexico and had been in the United States for approximately six years, claimed at trial that he did not read or write English, although he did speak some English. After he was arrested, Hernandez was interviewed by Huerta, who took his statement and wrote it in English. Huerta then read it back to Hernandez in English.

¶8 At the trial, Huerta testified to the contents of the statement given by Hernandez at the time of his arrest, in which Hernandez stated that his friend Rodriguez had asked him to sell her a kilo of cocaine and he told her that he could not get a kilo and Rodriguez then agreed to buy one ounce of cocaine. Hernandez admitted getting into Huerta's car and handing him a five-dollar bill that contained

cocaine and he admitted that he told Huerta that the cocaine would be good for cooking. Hernandez claimed he had sold drugs before, but never in big quantities. He said: "I don't know why I was selling that [expletive], I was just partying. I don't need that. I was making good money with selling cars…."

¶9 In his statement, Hernandez told the officer that when the officer mentioned a price of "26," he was shocked because he had not agreed to sell a kilo of cocaine and, as proof of this, he claimed Rodriguez immediately interrupted and told Huerta that the deal was between Huerta and her. Hernandez stated that he then got out of the car and told Rodriguez he could not get her a kilo of cocaine and Rodriguez said she would get it from somebody else. In his statement, Hernandez said he then drove away and went to his brother's house where Rodriguez called him and asked him to meet her. Hernandez thought that Rodriguez was going to give him $700 to purchase an ounce of cocaine, so he agreed to meet her. After Rodriguez arrived at the gas station where he was told to go, he got into Rodriguez's truck. Rodriguez explained to him that she did not have the money. Hernandez asked to be taken home, and they passed co-defendant Sergio Herrera-Alvarez, who was sitting in a car. Rodriguez asked Hernandez to tell Herrera-Alvarez to meet her at 35th and Burnham. Hernandez explained in his statement to Huerta that he did not want any part of the deal to sell a kilo of cocaine because "he knew in his heart that Erika was going to sell the officer a kilo of cocaine." He said that although he agreed to drive Rodriguez, he became nervous and told Rodriguez he did not want to be in the middle of her business and he dropped her off. He claimed that Rodriguez then exited her truck and took a white bag that was on the floor. Before getting out of the car, Rodriguez called Herrera-Alvarez, who agreed to give Rodriguez and Angulo a ride home after the deal. Hernandez told the officer that he then drove

Rodriguez's truck to her home and left it and the keys. At the trial, on cross-examination, Huerta admitted that Hernandez never used the word "kilo" during the conversation, and when Huerta brought up the price of "26" (which he explained was drug slang for $26,000), that Rodriguez jumped into the conversation and "basically stopped me from talking to Hernandez," and that Hernandez said to him, "you and me nothing."

¶10 Hernandez also testified at the trial with the help of an interpreter. Hernandez's defense was that he took no part in Rodriguez's plan to sell a kilo, but he was guilty of possessing the cocaine in the five-dollar bill. Hernandez testified that Rodriguez had called him and told him to meet her at the grocery store parking lot. When he arrived, Huerta was outside the car and Hernandez introduced himself. Hernandez, Rodriguez, Angulo and Huerta then got into Huerta's car, at which time Hernandez admitted giving Huerta a five-dollar bill with cocaine in it. He claimed that Rodriguez had asked him to get it. He denied being part of the plan to sell a kilo of cocaine and said he had never been involved in dealing large amounts of drugs. He maintained that there was never a conversation between Rodriguez and him to buy a kilo. He also explained that when he said "call me later" after exiting Huerta's car (a comment heard on the tape), he was not talking to Huerta; rather, the comment was addressed to Rodriguez.

¶11 On cross-examination, Hernandez admitted that he knew the cocaine in the five-dollar bill was not good for "cooking," contrary to what he told Huerta in the car, because it was cut with baking soda. With respect to the potential purchase of an ounce of cocaine, Hernandez stated that he had not planned to sell Rodriguez any cocaine; rather, he was going to take Rodriguez to a bar where she could purchase an ounce of cocaine. Although Hernandez admitted that he

initialed the statement written by Huerta, he claimed not to read or write English, and he stated he did not know whether what was read back to him was what was written on the document.

¶12 Following the close of testimony, the trial court asked Hernandez's attorney if he wanted the withdrawal jury instruction given and the attorney stated that he did not. His attorney did request that a question concerning entrapment be placed on the verdict.

¶13 The trial court instructed the jury on the law, including an instruction explaining "party to a crime" liability, and gave them three verdicts. One read:

> We, the jury, find the defendant, Arturo Hernandez, guilty of delivery of cocaine more than 40 grams, as party to the crime, as charged in the information.

Another read:

> We, the jury, find the defendant, Arturo Hernandez, guilty of delivery of cocaine less than one gram, at the time and place charged in the information.

The third verdict read:

> We, the jury, find the defendant, Arturo Hernandez, not guilty.

The jury returned a verdict finding Hernandez guilty of delivery of more than forty grams of cocaine. He brought a postconviction motion that was denied, and this appeal follows.

II. ANALYSIS.

A. Hernandez's attorney was not deficient in his representation of Hernandez.

¶14 Hernandez first argues that his attorney was ineffective for failing to: (1) obtain a copy of the body wire tape recording of his conversation with Huerta in the car; (2) object to defective jury instructions; and (3) object to Huerta's "persistent and improper speculation regarding Hernandez's knowledge and intent." As a result, he contends the trial court erred in denying the motion without holding a hearing. We are not persuaded.

¶15 In order to prevail on a claim of ineffective assistance of counsel, a defendant must show that his attorney's performance was deficient and that he was prejudiced as a result of his attorney's deficient conduct. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); *see also* ***State v. Pitsch***, 124 Wis. 2d 628, 633, 369 N.W.2d 711 (1985). To prove deficient performance, the defendant must show specific acts or omissions of his attorney that fall "outside the wide range of professionally competent assistance." ***Strickland***, 466 U.S. at 690. To show prejudice, the defendant must demonstrate that the deficient performance made the result of the proceeding unreliable. ***Id.*** at 687. If the defendant fails on either prong—deficient performance or prejudice—his ineffective assistance of counsel claim fails. ***Id.*** at 697. We "strongly presume" counsel has rendered adequate assistance. ***Id.*** at 690. Both the question of whether the attorney's performance was deficient and whether the defendant was prejudiced are questions of law that this court reviews *de novo*. *See* ***Pitsch***, 124 Wis. 2d at 634.

¶16 An evidentiary hearing is required only if the motion alleges facts which, if proven, would entitle the defendant to relief. *See* ***State v. Bentley***, 201 Wis. 2d 303, 310, 548 N.W.2d 50 (1996). If the postconviction motion, "on its

face alleges facts [that] would entitle the defendant to relief," the trial court must hold an evidentiary hearing, and as such, "[w]hether a motion alleges facts [that], if true, would entitle a defendant to relief is a question of law that we review de novo." ***Id.*** However, if the postconviction motion "does not raise facts sufficient to entitle the movant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief," it is within the trial court's discretion whether to grant or deny a hearing. ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. In such a case, we review the trial courts exercise of discretion under the erroneous exercise of discretion standard. ***Id.***

¶17 Hernandez first argues that his attorney was ineffective because he failed to obtain a copy of the body wire tape of the conversation between Huerta, Hernandez and Rodriguez in Huerta's car. The record reflects that Hernandez's attorney did listen to the tape prior to trial and had asked for a copy, but the State refused to make a duplicate of the tape. When the matter was brought to the trial court's attention, the trial court stated that it would have granted a motion seeking a copy of the tape, but no motion was ever filed. Hernandez now argues that his attorney's assistance was ineffective because his attorney's failure to bring such a motion constituted deficient performance. We disagree.

¶18 During the trial, the tape was played during Huerta's testimony. The court also ordered that the tape be stopped after each sentence in order for Hernandez's interpreter and the interpreter for the jury to explain what had just been said. While the better practice may have been to file a motion to obtain the tape prior to trial, Hernandez not only heard what was on the tape, but also had the benefit of the interpretation before he testified. In addition, Officer Huerta testified that the tape was only fifteen seconds long. Given the short duration of

the tape, Hernandez had the opportunity to hear and absorb the entire conversation prior to his testifying. Consequently, Hernandez's attorney was not deficient for failing to bring a motion seeking a copy of the tape before trial.

¶19 Next, Hernandez claims that the attorney provided ineffective assistance of counsel because he failed to object to what Hernandez claims were defective jury instructions. Hernandez argues that the jury instructions, particularly the instructions touching on "party to the crime" liability, "failed to either permit or require the jury to account for the limited nature of the offense [he] intended to assist." He insists that his attorney should have requested WIS JI—CRIMINAL 406, and his failure to do so was deficient performance. The trial court gave the party to a crime instruction found in WIS JI—CRIMINAL 400. WIS JI—CRIMINAL 400 does not contain the "natural and probable consequences" language found in WIS JI—CRIMINAL 406, which reads:

> Finally, consider whether under the circumstances (name charged crime) was a natural and probable consequence of (name intended crime).
>
> A crime is a natural and probable consequence of another crime if, in the light of ordinary experience, it was a result to be expected, not an extraordinary or surprising result. The probability that one crime would result from another should be judged by the facts and circumstances known to the defendant at the time the events occurred. If the defendant knew, or if a reasonable person in the defendant's position would have known, that the crime of (name charged crime) was likely to result from the commission of (name intended crime), then you may find that under the circumstances (name charged crime) was a natural and probable consequence of (name intended crime).

(Footnote omitted.) Hernandez argues that since he never intended to take part in the delivery of a kilo of cocaine, the jury could have exonerated him if the jury had been given the alternative "party to a crime" instruction because the crime of

delivery of over forty grams of cocaine is not the natural and probable consequence of the crime of simple cocaine possession. We disagree.

¶20 Here, the trial court crafted verdict forms that accommodated Hernandez's defense. The jury was permitted to find Hernandez guilty of delivery of an ounce of cocaine or a kilo of cocaine or to find him not guilty of any crime. The jury was well aware of Hernandez's claim that he was unaware of the plan to sell a kilo of cocaine to Huerta until the $26,000 was mentioned in the car. Had the jury believed Hernandez's contention that he had no advance knowledge that the sale involved a kilo of cocaine, the verdict for possessing an ounce of cocaine would have been used. It is clear that the jury did not believe Hernandez. Indeed, the alternative instruction may well have confused the jury because the jury may have felt obligated to convict Hernandez of the greater crime because of the natural and probable consequences language found in the instruction. Thus, the instructions were not defective. Therefore, Hernandez's attorney was not deficient for failing to ask for a different "party to a crime" instruction.

¶21 Next, Hernandez argues that his attorney was ineffective because his performance was deficient for not objecting to what he terms "Officer Huerta's persistent and improper speculation regarding Hernandez's knowledge and intent." Again, we disagree. First, Huerta did not engage in "persistent and improper speculation" concerning Hernandez's involvement. Huerta purchased, in an undercover buy, a kilo of cocaine, so during trial it was proper to preface his comments using the term "kilo." The issue in the case was Hernandez's knowledge of the amount of the cocaine being purchased. Huerta believed Hernandez was the supplier of the cocaine, while Hernandez testified he was just asked to supply a sample of cocaine. Second, Hernandez's attorney established that the word "kilo" was never uttered during the taped conversation. His attorney

was also successful in introducing other actions and statements that suggested Hernandez might not have been the cocaine supplier. Huerta was specifically asked:

> [DEFENSE COUNSEL]: And Mr. Hernandez didn't talk about a kilo of cocaine, you did, didn't you?
>
> [OFFICER HUERTA]: I guess we both did, sir.
>
> We were both talking about the same thing.
>
> [DEFENSE COUNSEL]: Are you saying now that Mr. Hernandez used the word[], kilo, on that tape?
>
> [OFFICER HUERTA]: I never said that he used the word, kilo, and I discussed that yesterday.
>
> The word, kilo, never came up as far as I was concerned.
>
> [DEFENSE COUNSEL]: Well, you talked about a kilo of cocaine and the word didn't come up?
>
> [OFFICER HUERTA]: Yes, that is correct.
>
> [DEFENSE COUNSEL]: And now is it true that during the conversation, Erika Rodriguez also negotiated the deal with you and did she?
>
> [OFFICER HUERTA]: She also did negotiate, yes.
>
> [DEFENSE COUNSEL]: Okay.
>
> And did she assure you that Angulo and her would be dealing with you from then on?
>
> [OFFICER HUERTA]: I would – I would say, yes, yes, to that.
>
> [DEFENSE COUNSEL]: And now, did you hear that on the tape when you listened to [Rodriguez] telling you that from that – telling you that Angulo and herself would be dealing with you from that point on?
>
> Did you hear that on the tape?
>
> [OFFICER HUERTA]: Yes, I did, sir.

> That was towards the end of the conversation when I brought up the price of 26, she jumped in from the back seat and basically stopped me from talking to Hernandez, stating that, [she] would be dealing with [me] next time.
>
> [DEFENSE COUNSEL]: On the tape, did you hear Mr. Hernandez say to you with the deal, you and me nothing?
>
> [OFFICER HUERTA]: Yes, I heard him say that.

The jury was well aware of the fact that Hernandez denied he took part in any negotiations for a kilo of cocaine and that he contended that he only supplied a sample at Rodriguez's request. Thus, Hernandez's attorney attacked the officer's assumption that Hernandez had not only knowledge of the sale of a kilo, but also the intent to deliver the greater amount. Consequently, his attorney was not deficient. Because none of Hernandez's arguments alleging that his attorney's performance was deficient are successful, we need not address his grounds for why he was allegedly prejudiced, *see* ***Strickland***, 466 U.S. at 697, and it therefore follows that his attorney did not provide ineffective assistance of counsel. Accordingly, no ***Machner*** hearing was required.

B. No new trial is needed either in the interest of justice or because the real controversy was not tried.

¶22 Hernandez argues that he is entitled to a new trial on either of two bases—either because the real controversy was not tried, or in the interest of justice. We disagree.

¶23 Under WIS. STAT. § 752.35, we have the authority to grant a discretionary reversal of a conviction in the interest of justice if the real controversy was not fully tried. ***Vollmer v. Luety***, 156 Wis. 2d 1, 11-20, 456 N.W.2d 797 (1990). Under the "real controversy not tried" standard, discretionary reversal arises in two circumstances:

> (1) [W]hen the jury was erroneously not given the opportunity to hear important testimony that bore on an important issue of the case; and (2) when the jury had before it evidence not properly admitted which so clouded a crucial issue that it may be fairly said that the real controversy was not fully tried.

State v. Hicks, 202 Wis. 2d 150, 160, 549 N.W.2d 435 (1996). This court can also reverse in the interest of justice if an erroneous instruction prevented the real controversy from being tried. *See* ***State v. Harp***, 161 Wis. 2d 773, 780-82, 469 N.W.2d 210 (Ct. App. 1991). We are to exercise our statutory power of discretionary reversal "infrequently and judiciously." ***State v. Ray***, 166 Wis. 2d 855, 874, 481 N.W.2d 288 (Ct. App. 1992).

¶24 Hernandez contends that:

> [T]he combined effect of counsel's failure to obtain a copy of the body-wire tape for Hernandez' review prior to trial, Officer Huerta's persistent, misleading references to his conversation with Hernandez as concerning the delivery of a kilogram of cocaine, and the absence of proper party-to-a-crime instructions resulted in the real controversy, Hernandez' liability for the kilo delivery, not being fully tried.

However, we have already concluded that while the failure to obtain the wiretap prior to trial was not the best practice, Hernandez suffered no harm because the less than a minute tape was not only played in open court before Hernandez testified, but also Hernandez enjoyed the benefit of having it interpreted. So too, our review of the record does not support Hernandez's contention that the undercover officer's testimony persistently and improperly misled the jury regarding Hernandez's intent. Finally, we have concluded that the jury instructions concerning "party to a crime" liability were proper. Consequently, the real controversy was fully and fairly tried. *See* ***Mentek v. State***, 71 Wis. 2d 799, 809, 238 N.W.2d 752 (1976) ("Zero plus zero equals zero.").

¶25 Next, Hernandez argues that he is entitled to a new trial in the interest of justice. He submits that justice has miscarried in this case because "this was a very close case," and "the weakness of the state's case," coupled with the previously discussed "errors," suggest that there would be "a substantial probability of a different result on retrial." We are not persuaded.

¶26 First, as already explained, we do not share Hernandez's view that his attorney was deficient in his performance. Second, this was not a close case. The best witness for the state was Hernandez himself. In his statement given after his arrest he claimed to be a small-time dealer who told Rodriguez that he could not obtain a kilo of cocaine. He claimed to have agreed to obtain a sample of cocaine at Rodriguez's request. However, at trial, he contradicted his earlier statement and testified that no conversation ever occurred regarding the delivery of a kilo of cocaine. He stated that he knew that the sample was not good for making into crack cocaine because it had been cut with baking soda. He failed to explain just where he got this sample and he failed to explain why Angulo would tell Huerta that his supplier had just arrived when Hernandez entered the parking lot. Thus, Huerta's testimony, coupled with Hernandez's fanciful testimony, provided more than ample evidence of Hernandez's guilt.

¶27 Finally, Hernandez argues he is entitled to a new trial in the interest of justice because the jury was never instructed that withdrawal was a defense to the crime. The trial court specifically asked Hernandez's attorney if he wanted a withdrawal jury instruction and he declined. Hernandez's defense was not that he withdrew from a plan to sell a kilo of cocaine, but that he was unaware of the amount of cocaine that was being negotiated and he thought only an ounce was being purchased. Had the jury believed this, he would have been convicted of the lesser offense. Clearly, the jury was unimpressed with Hernandez's explanation.

In addition to his explanation, Hernandez's attorney decided to argue entrapment rather than withdrawal. This was a proper, although unsuccessful, strategy. Moreover, it remains unclear whether the withdrawal instruction based upon WIS. STAT. § 939.05(2)(b), advocated by Hernandez on appeal, would be appropriately given when the State alleges that a person is an aider and abettor such as was alleged against Hernandez. Consequently, we are satisfied that on this basis an interest of justice reversal is unwarranted.

¶28 For the reasons stated, the judgment and order are affirmed.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.