

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 10, 2009

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2008AP301-CR
STATE OF WISCONSIN**

Cir. Ct. No. 2006CF232

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CARLE F. DUKE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Barron County: JAMES C. BABLER, Judge. *Affirmed.*

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

¶1 PER CURIAM. Carle Duke appeals from a judgment of conviction for two counts of delivery of cocaine and an order denying postconviction relief. Duke claims he is entitled to a new trial because his trial counsel failed to impeach the State's key witness with his multiple prior convictions. We conclude Duke has

not established he was prejudiced by any deficient representation. Accordingly, we affirm.

BACKGROUND

¶2 A criminal complaint charged Duke with two counts of delivery of cocaine, contrary to WIS. STAT. § 961.41(1)(cm)1r.¹ A third count of delivery of cocaine was added after the preliminary hearing.

¶3 Confidential informant David Diehl testified at trial he made three separate cocaine purchases from Duke. The first was an uncontrolled buy at Duke's residence on July 11, 2006. Barron County Sheriff's Department Detective Jason Hagen had provided Diehl with the purchase money. Hagen subsequently drove by Duke's residence, where he observed Diehl's vehicle. A short time later, Diehl met Hagen and turned over the cocaine.

¶4 The second and third purchases were controlled buys, occurring on July 12 and 14, 2006. Diehl was once again provided with the purchase money, but, in addition, he was searched prior to the buy. He was also "wired," monitored by police, and provided a vehicle that had also been searched. Two police vehicles were used to conduct surveillance; one followed Diehl to and from Duke's residence and the other monitored and recorded Diehl's conversations. After each purchase, Diehl turned cocaine over to Hagen.

¶5 Hagen testified that he monitored the two controlled buys. Regarding the July 12 purchase, he testified that after Diehl arrived at Duke's

¹ All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

residence, Duke subsequently left on foot for a brief period of time. When Duke returned, “that’s when he gave him the cocaine.” Hagen also testified Duke had unexpectedly raised the price of the cocaine, which was referred to as “nose candy.”

¶6 A recorded phone call was placed to Duke prior to the controlled buys to confirm the drug deals. Prior to the July 14 buy, Duke told Diehl to wait fifteen to twenty minutes. Hagen testified he “didn’t remember for sure,” but he believed “it was because he said the cocaine wasn’t there yet, like he was still waiting for it to come to his house.” After Diehl went to the residence, Duke again left for about a half hour. When Duke returned, Diehl weighed the cocaine with a digital scale the detectives had provided and discovered the cocaine was “light.” Duke used Diehl’s cell phone to contact his source. Either there was no answer or Duke pretended there was no answer and he then told Diehl he would make it up to him next time. After some further discussions about a future deal for a larger purchase, Diehl left and drove back to the Barron County Justice Center where he turned over the cocaine.

¶7 Deputy Ron Baures testified he questioned Duke about his contacts with Diehl. Duke denied selling Diehl cocaine, but stated that on one occasion he took money from Diehl, gave the money to a source and provided cocaine to Diehl. Duke did not indicate when that event occurred and refused to provide additional information.

¶8 Duke did not testify at trial and the defense rested without calling witnesses. Duke was convicted on all three counts and sentenced to three years’ initial incarceration and three years’ extended supervision, consecutive to another unrelated sentence Duke was then serving.

¶9 Duke moved for postconviction relief, arguing he was deprived of effective assistance of counsel because his trial counsel did not impeach Diehl with Diehl's prior convictions. The State provided documents to counsel during discovery that established Diehl had multiple criminal convictions, including conspiracy to smuggle aliens, illegal transportation of aliens, and robbery in 1981; possession of burglarious tools and burglary in 1986; two counts of manufacturing or delivery of THC in 1997; and disorderly conduct in 2001 and 2004.²

¶10 At the first hearing on Duke's postconviction motion, the State agreed it provided Diehl's criminal record to trial counsel, and stipulated the failure to impeach him with his criminal record was an oversight on counsel's part and she had no strategic reason for not impeaching Diehl with the prior convictions. Due to the State's stipulation, trial counsel did not testify and the *Machner*³ hearing that had been scheduled was converted into argument on the legal ramifications of the oversight. The circuit court ultimately agreed with Duke that counsel's performance was deficient, and the matter was set over for additional argument on the prejudice prong.

¶11 At the second hearing, the court ordered a new trial on count one, the uncontrolled buy. The court stated count one "almost revolved entirely on the testimony of Mr. Diehl." The court concluded:

I did not know that Mr. Diehl had any criminal convictions,
but had that been argued, I'm not saying the result would

² The circuit court did not specifically rule on whether all of Duke's prior convictions could have been used, stating, "some of those may be remote." The court did state, however, "at least some of those would have been allowed in for purposes of impeachment."

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

have been different, but it could have been different. But it's just not reliable.

But I have to tell you, Counts 2 and 3 were markedly different at trial than Count 1. And that's why it was in stark contrast.

....

All I know is what I heard, the same thing the jury heard, which at the time was the officer's statements regarding what he heard. But knowing that – And the jury, I would have to say, jurors would have to know or assume that people buying drugs often have criminal convictions. But it goes to their credibility.

So knowing that the officer listened to the wire, heard the conversations, corroborates the conversations. I find that the conversations on Counts 2 and 3 are reliable and that the defense has not met its burden on those two counts. But I am ordering a new trial on Count 1, if the State so wishes to try that.

The State then reopened and dismissed count one. Duke appeals from the order denying a new trial on counts two and three.

DISCUSSION

¶12 To maintain an ineffective assistance of counsel claim, the defendant must show that trial counsel's performance was deficient, and the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Roberson*, 2006 WI 80, ¶24, 292 Wis. 2d 280, 717 N.W.2d 111. To establish deficient performance, the defendant must show that counsel's representation was below objective standards of reasonableness. *See State v. McMahon*, 186 Wis. 2d 68, 80, 519 N.W.2d 621 (Ct. App. 1994). To establish prejudice, the defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. The focus of the inquiry "is not on the

outcome of the trial, but on ‘the reliability of the proceedings.’” *State v. Thiel*, 2003 WI 111, ¶20, 264 Wis. 2d 571, 665 N.W.2d 305 (citation omitted). If this court concludes the defendant has not proved either the deficiency or prejudice prong, we need not address the other prong. *Strickland*, 466 U.S. at 697. The circuit court’s findings of fact will be upheld unless clearly erroneous. *State v. Pitsch*, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985). But proof of either the deficiency or prejudice prong is a question of law we decide independently. *Id.*

¶13 Duke acknowledges the controlled nature of the drug buys in counts two and three, together with the monitoring and surveillance accompanying those incidents, made the State’s case against Duke “stronger” as to those counts. Nevertheless, Duke insists the failure to impeach Diehl on his prior multiple criminal convictions “rendered the result of this trial unreliable, despite the corroboration provided by the testimony of Detective Hagen.”

¶14 However, even if the jury had heard Diehl was convicted of multiple prior crimes, it still would have heard overwhelming evidence of Duke’s guilt. Before setting up the second meeting to purchase cocaine, Diehl went to the sheriff’s department and telephoned Duke on a recorded line to confirm the drug transaction. Hagen then searched Diehl and gave him a transmitter, as well as the money to make the drug buy. While Diehl was at Duke’s residence, two police vehicles conducted surveillance. One police vehicle was used to follow Diehl and the other was equipped with an audio receiver to record the transaction. Hagen heard a conversation between Duke and Diehl in which they used the term “nose candy” and Duke was heard increasing the price for the cocaine. After the transaction, Hagen met Diehl at the sheriff’s office, where Diehl turned over a package of cocaine.

¶15 Two days later, Diehl participated in another controlled buy. Diehl again telephoned Duke from the sheriff's office and the call was recorded. Diehl was again searched, wired, and given the money for the purchase. The police again sent two surveillance vehicles to monitor the transaction. Duke again left the residence, returning a short time later. Diehl then weighed the cocaine and told Duke it was light. Duke told Diehl he would make up the difference next time. Hagen heard Duke and Diehl discuss future transactions for larger quantities. Diehl left and drove to the sheriff's office where he turned over the cocaine he just purchased. The jury also heard detective Baures testify Duke subsequently provided a statement that admitted he provided cocaine to Diehl, although he denied selling Diehl cocaine.

¶16 We are not persuaded the failure to impeach Diehl with his prior convictions deprived Duke of a reliable verdict. Diehl's testimony was corroborated by the testimony of Hagen and Baures, and also by the circumstances surrounding the surveillance and audio recordings of the multiple transactions.

¶17 Duke argues Hagen testified that, during the telephone call to Duke prior to the first controlled buy, he could not positively identify Duke's voice. However, Hagen testified that although "at the time I really couldn't say for sure ... it sounded like his voice." Moreover, Hagen testified he was familiar with Duke's voice from prior contact, and there is no indication Hagen had difficulty identifying Duke's voice while monitoring the drug buys.

¶18 Duke also argues that although Hagen was listening to what occurred inside Duke's house, he did not personally witness Duke giving the cocaine to Diehl. However, Duke underplays the significance of the controlled nature of the drug buys. There was no evidence of other individuals present in

Duke's residence during the transactions, and the on-the-scene remarks overheard by Hagen amply corroborated Diehl's testimony that Duke sold the cocaine.

¶19 We conclude Duke has not demonstrated the prejudice necessary to establish that his trial counsel provided ineffective assistance for failing to impeach Diehl with his prior criminal convictions. The circuit court did not err in denying the motion for a new trial on counts two and three.

By the Court.—Judgment and order affirmed.

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

