COURT OF APPEALS
DECISION
DATED AND FILED

September 9, 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. 2008AP3227-CR

Cir. Ct. No. 2007CF111

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHRISTOPHER L. SERVANTEZ,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Ozaukee County: JOSEPH D. McCORMACK, Judge. *Affirmed*.

Before Brown, C.J., Neubauer, P.J., and Anderson, J.

¶1 PER CURIAM. Christopher L. Servantez appeals a judgment, entered upon a jury verdict, convicting him of one count each of possession of tetrahydrocannabinols (THC or marijuana), operating a motor vehicle while

intoxicated, operating a motor vehicle with a prohibited alcohol concentration and operating after revocation. The charges arose from a traffic stop and subsequent vehicle search. According to a state crime lab report, Servantez's blood alcohol content was 0.24 and plant materials found in his car contained THC. Servantez also appeals an order denying his postconviction motion seeking a new trial on the possession charge for several reasons, among them that trial counsel was ineffective for failing to object that the crime lab report was inadmissible hearsay. We conclude that a new trial is unwarranted. We affirm.

¶2 Before the jury was empaneled, defense counsel advised that Servantez would stipulate that he knew he was revoked. This discussion followed:

> MR. SISLEY [prosecutor]: So, Judge, we have a stipulation that he knew he was revoked. We also have a stipulation that the substances found in the car were marijuana, and I believe stipulating to the report to that, in effect, and we're also stipulating to the chain of custody from the Thiensville Police Department to the crime lab…. I believe the stipulation is the substances that were in the car they're stipulating are, in fact, marijuana. They're not stipulating they knew they were there, not that they were his, just that they were marijuana; is that right?
>
> MS. CANADY [defense counsel]: Yes.
>
> THE COURT: All right. And someplace during the trial, we'll be so informing the jury that such a stipulation is in place.
>
> MR. SISLEY: Correct, Judge.
>
> THE COURT: Probably just before the jury instructions, I would normally—we can even make it part of the jury instructions.
>
> MR. SISLEY: That would probably be better.
>
> MS. CANADY: Yeah, because I do have a jury—there's a jury—obviously a jury instruction for stipulated facts.

The court did not address Servantez about the stipulation and defense counsel did not ask the court to do so. Defense counsel also did not object when the prosecutor referred to the stipulation twice during opening statements and to the "stipulated[-]to crime lab report" in closing arguments.[1]

¶3 During the trial, the arresting officer testified that a search of Servantez's vehicle yielded marijuana seeds and stems in the ashtray, in a can beneath the passenger seat and scattered "throughout the whole vehicle," a jar of what looked like marijuana seed stems in the glove compartment, and a bong with residue that, through his police training, he recognized as smelling like burnt marijuana. The prosecutor then stated: "Judge, we have a stipulation that the substances were transferred to the crime lab and that the substances did test positive for the presence of THC, and we have a stipulation as to what's marke[d] as state's exhibit number 6, the crime report, to that extent…. I'd ask that exhibit 6 be admitted into evidence." When defense counsel had no objection, the court admitted the report.

¶4 Servantez also testified. He stated that he did not notice any of the stems and seeds in the car but that he has friends who smoke pot in his car and he believed the marijuana was theirs. He testified that the seized bong likewise belonged to a friend, that he had used it, that it had been used to smoke marijuana in his vehicle, and that he knows what marijuana looks and smells like. He also

[1] The court cautioned the jury before opening statements that what attorneys say during opening statements is not evidence. Similarly, it later instructed the jury that while closing arguments should be carefully considered they also are not evidence and that the verdict must be decided solely on the evidence and the court's instructions. We presume jurors follow their instructions. *See **State v. Gary M.B.***, 2004 WI 33, ¶33, 270 Wis. 2d 62, 676 N.W.2d 475.

affirmed that there was marijuana in the ashtray of the vehicle but that he did not know the container of marijuana was in the glove compartment. At the end of Servantez's testimony, the parties rested.

¶5 Before the jury was called in the next day, the parties and the court discussed the jury instructions. Defense counsel agreed that they could include the stipulated fact that the crime lab report showed the seized substances to be THC. The prosecutor observed that when stipulated facts involve an element of the offense, "there has to be a personal waiver by the defendant [and] that's something we did not do yesterday." At that point, the court addressed Servantez personally. The court asked him: "And your attorney is advising the Court that you agree that the substance was in fact marijuana or its technical name is THC or tetrahydrocannabinol; do you understand that?" For the first time, Servantez advised the court that he was not agreeing that the substance was THC.

¶6 The prosecutor noted that Servantez's changed stance would require reopening the testimony to bring in someone from the crime lab. The court was reluctant to send the jury home only to "come back a month from now or whenever they can get the crime lab person in here because this defendant suddenly tells us he's not agreeing that it's marijuana."

> THE COURT: As far as I'm concerned, I think whether or not it's hearsay or not, I think that that report's been received in evidence without objection and can form the basis of a conviction.
>
> MR. SISLEY: That's fine.
>
> THE COURT: So it's not a stipulation; it's just an exhibit at this point. And I'm not going to hold up this trial because he's decided to play games here.
>
> ….

MS. CANADY: One more thing, Judge, I think for the record I have to object.

THE COURT: Well, fine, your objection's noted.

¶7 The trial court instructed the jury that it must be satisfied beyond a reasonable doubt that the following three elements were present: that Servantez possessed a substance; that the substance was THC; and that he knew or believed the substance was THC, by whatever name he knew it as. The court also instructed the jury that the parties had stipulated to the existence of three facts that it must accept as conclusively proved: that Servantez's operating privileges were revoked at the time he operated his motor vehicle; that he knew his operating privileges had been revoked; and that the substances found in the vehicle arrived at the state crime lab in the same manner as which they were found. The court did not instruct the jury that the seized substances were marijuana, as the parties had been contemplating. The jury returned guilty verdicts on all four counts.

¶8 Servantez moved for postconviction relief seeking a new trial on the possession-of-THC count on grounds that the State's references to a stipulation to the substance's identity relieved the State of proving each element of the offense beyond a reasonable doubt; ineffective assistance of counsel; plain error; and in the interest of justice because the real controversy was not fully tried.

¶9 Defense counsel testified to the following at a ***Machner*** hearing.[2] She spoke to Servantez twice before trial about formulating a defense theory. He told her that he had recently bought the car used and had not decluttered the glove compartment where the container of marijuana was found. He agreed all along

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

that rather than attack the crime lab results the better strategy was to stipulate that the seized material was marijuana and proceed on a theory that he did not know the marijuana was there. Servantez did not tell her that he no longer agreed with the stipulation until the close of evidence, after the crime lab report was admitted. Defense counsel acknowledged that she was not familiar with ***State v. Williams***, 2002 WI 58, ¶¶32-49, 253 Wis. 2d 99, 644 N.W.2d 919, which held that a crime lab report generally is inadmissible hearsay.

¶10 The trial court denied Servantez's motion. It found that Servantez had entered into a stipulation, that his request to withdraw it was untimely, that counsel's trial strategy reflected sound judgment and that ***Williams*** did not control, since the report was received as an exhibit by stipulation. The court also stated that it was "of the opinion" that a personal colloquy with Servantez was unnecessary "over one of the elements of the crime." The court thus concluded that Servantez's rights were not violated and that he received competent representation. Servantez now appeals.

1. Trial court error

¶11 Servantez first argues that a valid stipulation to the identity of the substance at issue could not have existed because he did not personally consent to it on the record; the court itself said the lab report was "not a stipulation; it's just an exhibit at this point"; and the court did not instruct the jury that the identity of the substance was an agreed fact. He contends that the court's finding that he entered into a stipulation on this issue is against the great weight and clear preponderance of the evidence and that, without a valid stipulation, the crime lab report was wrongly admitted. This argument fails.

¶12 The right to a jury trial includes the right to have a jury determine each element of the crime. ***State v. Hauk***, 2002 WI App 226, ¶32, 257 Wis. 2d 579, 652 N.W.2d 393. That right can be waived only by the defendant personally, on the record. *See* ***State v. Villarreal***, 153 Wis. 2d 323, 332, 450 N.W.2d 519 (Ct. App. 1989). We review de novo whether the parties entered into a valid stipulation. *See* ***In re Estate of Cavanaugh v. Andrade***, 191 Wis. 2d 244, 264, 528 N.W.2d 492, 499 (Ct. App. 1995), *rev'd on other grounds*, 202 Wis. 2d 290, 550 N.W.2d 103 (1996).

¶13 We conclude there was an intended stipulation that did not come to fruition because of the unique turn of events. We interpret the trial court's conclusion that a stipulation existed as an explanation of why the lab report initially was admitted into evidence. The trial court should have had a colloquy with Servantez at the outset of the trial rather than simply accepting the attorneys' representations that a stipulation was in place. Nonetheless, unobjected-to hearsay is admissible as substantive evidence, *see* ***State v. Jenkins***, 168 Wis. 2d 175, 203, 483 N.W.2d 262 (Ct. App. 1992), entitled to whatever probative value it inherently possesses. *See* ***Lasnicka v. Lasnicka***, 46 Wis. 2d 614, 618, 176 N.W.2d 297 (1970).

¶14 Once Servantez's position became clear, the report remained an exhibit. If under ***Williams*** it now was inadmissible, the trial court itself had no duty to sua sponte strike it. *See* ***State v. Mayer***, 220 Wis. 2d 419, 430, 583 N.W.2d 430 (Ct. App. 1998). Servantez concedes the court did not instruct the jury that the parties stipulated to the presence of THC. Therefore, although the nascent stipulation ultimately fell apart, Servantez was not deprived of his right to a jury trial on this element.

2. Ineffective assistance of counsel

¶15 Servantez next contends his counsel provided ineffective assistance in regard to the stipulation and to the admission of the crime lab report. The familiar two-pronged test for ineffective-assistance-of-counsel claims requires a defendant to prove both deficient performance and prejudice. ***State v. Joyner***, 2002 WI App 250, ¶7, 258 Wis. 2d 249, 653 N.W.2d 290 (citing ***Strickland v. Washington***, 466 U.S. 668, 687 (1984)). To prove deficient performance, a defendant must show specific acts or omissions of counsel that are "outside the wide range of professionally competent assistance." ***Strickland***, 466 U.S. at 690. To prove prejudice, the defendant must show that counsel's errors were so serious as to deprive the defendant of a fair trial and a reliable outcome. ***Strickland***, 466 U.S. at 687. The defendant must show a reasonable probability that, "but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** at 694. We need not address both ***Strickland*** prongs if the defendant fails to make a sufficient showing on either one. ***Joyner***, 258 Wis. 2d 249, ¶9. We will uphold the trial court's findings of fact unless they are clearly erroneous. ***State v. Mayo***, 2007 WI 78, ¶32, 301 Wis. 2d 642, 734 N.W.2d 115. Whether counsel's performance was deficient and prejudicial are questions of law that we review de novo. ***Id.***

a. Stipulation

¶16 Counsel testified that she and Servantez agreed on a trial strategy to stipulate that the substance was marijuana and challenge his knowledge of its presence in the vehicle. We accept the reasonableness of that strategy. Servantez nonetheless asserts counsel performed deficiently when she failed to ensure that

the stipulation to the identity of the substance was valid, to object to any reference to the stipulation and to "act accordingly" once she learned he no longer wanted to join in the planned strategy. We need not examine his allegations of counsel's deficient performance because he does not claim any prejudice from it, and we see none. His failure to establish the prejudice prong means he cannot prevail on this angle of his ineffective assistance claim. *See* ***Joyner***, 258 Wis. 2d 249, ¶9.

b. Admission of lab report

¶17 Servantez also argues that counsel was ineffective for failing to object that the crime lab report was inadmissible hearsay, a failure due not to a tactical decision but to her admitted unfamiliarity with ***Williams***. We agree the defense could have successfully used ***Williams*** as a basis for an objection to the crime lab report's admission. The report initially was admitted consistent with a defense theory to which she testified Servantez had agreed, however. An objection at that point was both unnecessary and incompatible with the defense theory. And once Servantez voiced his disagreement, counsel did object, albeit not with ***Williams*** in mind.

¶18 In addition, the jury had before it other evidence of the substance's identity. It had the police officer's testimony that he recognized from his experience that the leaves, seeds, stems and bong residue were marijuana. It also had Servantez's admission that the material in the ashtray was marijuana, and his testimony that it belonged to friends who smoked pot in his car, that the bong (also allegedly a friend's) was used to smoke pot in his car, and that he did not notice the numerous plant materials scattered about the car. It was for the jury to decide which evidence was credible and which was not, how to resolve conflicts in the evidence and, within the bounds of reason, whether to reject testimony suggesting

Servantez's innocence. *See* ***State v. Pankow***, 144 Wis. 2d 23, 30-31, 422 N.W.2d 913 (Ct. App. 1988).

¶19 Finally, the State argued in closing that, unlike the direct evidence supporting the other counts, except for the lab report most of the evidence of possession was circumstantial. It argued that "you can't believe the defendant on this" because Servantez admitted to using the bong to smoke marijuana, the police officer "smells the marijuana … in the pipe" and "[j]ust because [the evidence is] circumstantial doesn't mean it's not reliable." The court instructed the jury that it could find facts based on either direct or circumstantial evidence. *See* WIS JI—CRIMINAL 170.

¶20 Therefore, whether or not counsel performed deficiently by failing or choosing not to object, this claim, too, fails because Servantez has not established that admitting the report prejudiced him.

3. Plain error

¶21 Servantez next argues that he is entitled to a new trial because admitting the crime lab report was "plain error." Plain error is error that is obvious, substantial and "so fundamental that a new trial or other relief must be granted even though the action was not objected to at the time." ***State v. Sonnenberg***, 117 Wis. 2d 159, 177, 344 N.W.2d 95 (1984) (citation omitted). If the defendant shows that an unobjected—to error is fundamental, obvious and substantial, the burden then shifts to the State to show the error was harmless. ***State v. Jorgensen***, 2008 WI 60, ¶23, 310 Wis. 2d 138, 754 N.W.2d 77.

¶22 This is not plain error. As noted, when the defense offered no objection to the report's admission, it was admissible as substantive evidence, *see*

Jenkins, 168 Wis. 2d at 203, which the court was not duty-bound to keep out. *See* ***Mayer***, 220 Wis. 2d at 430. At that point, it was part of a trial strategy with which defense counsel, the State and the court believed Servantez was in accord. Admitting it, therefore, was not plain error.

4. New trial in the interest of justice

¶23 Finally, Servantez requests a new trial in the interest of justice. *See* WIS. STAT. § 752.35 (2007-08).[3] He claims the stipulation and crime lab report both were referenced throughout the trial, thus putting before the jury improperly admitted evidence which so clouded a crucial issue that it may be said that the real controversy was not fully tried. *See* ***State v. Hicks***, 202 Wis. 2d 150, 160, 549 N.W.2d 435 (1996). We disagree.

¶24 The crime lab report provided substantive evidence of one of the elements on which the State had the burden, that Servantez possessed THC. Once again, the court properly admitted it absent a defense objection. The report did not stand alone as evidence of the presence of marijuana, however. This is not an "exceptional case" meriting a new trial in the interest of justice. *See* ***Gonzalez v. City of Franklin***, 137 Wis. 2d 109, 133, 403 N.W.2d 747 (1987).

By the Court.—Judgment and order affirmed.

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

[3] All references to the Wisconsin Statutes are to the 2007-08 version.