COURT OF APPEALS
DECISION
DATED AND FILED

June 22, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP1304-CR **Cir. Ct. No. 2007CF5244**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MELVIN G. WALTON,

DEFENDANT-APPELLANT.

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

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

¶1 KESSLER, J. Melvin G. Walton appeals from a corrected judgment of conviction for delivering less than one gram of cocaine and

possessing cocaine, both as a party to a crime, contrary to WIS. STAT. §§ 961.41(1)(cm)1g., 961.41(3g)(c) and 939.05 (2007-08).[1] He also appeals from an order denying his motion for postconviction relief. He argues that he is entitled to a new trial because: (1) the State failed to disclose an audio recording of an interview with a key witness; (2) trial counsel provided ineffective assistance when he failed to effectively impeach a witness and failed to move to suppress in-court and out-of-court identification testimony; and (3) the interests of justice require a new trial. We reject his arguments and affirm.

BACKGROUND

¶2 A jury found Walton guilty of the aforementioned drug charges based on events that occurred on October 25, 2007. The following trial testimony was presented.[2]

¶3 City of Milwaukee Police Officer Rodolfo Ayala testified that he was working undercover on October 25, 2007. He received information from another officer that drugs were being sold from a particular residence in Milwaukee by a man nicknamed "Ski" who was described as "a black male, [in his] twenties, six foot and ... 170 pounds." Based on that information, Ayala went to the residence to attempt to buy drugs. Ayala went to the residence alone, but other officers were nearby in vehicles, aware of the plan to attempt a drug buy.

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

[2] This testimony is summarized to provide background. We do not attempt to reconcile inconsistencies in the testimony. Additional facts are provided in the discussion section.

¶4 Ayala knocked on the front door and heard a male voice say, "[W]ho is it[?]" Ayala answered, "Ramon," which was a name he used as an undercover officer. The man stated, "who you looking for" and Ayala replied, "Ski." According to Ayala, the man said through a partially opened front door, "['M]an, I don't know you,[']or something to that effect, and proceeded to close the door."[3]

¶5 Alaya was about to leave the residence, but then he heard a female voice ask the man who was at the front door. The man replied that he did not know. The woman, later identified as Monique Cruz, opened the door and asked Alaya who he was and who he knew.

¶6 Ayala told Cruz that he knew "Angel."[4] After Cruz heard the name Angel, she let Ayala into the home. At that point, Ayala, Cruz and the man all stood in a five-to-seven-foot hallway just inside the front door.[5] The man said, "[W]hat do you need," and Ayala told him, "[T]wo dubs," meaning two twenty-dollar bags of cocaine base. Ayala handed the man two twenty-dollar bills, the serial numbers of which Ayala had previously recorded.

¶7 The man turned to Cruz and asked if she knew Ayala, and Cruz replied that Ayala knew Angel. Then Ayala saw the man "reach into his left

[3] At trial, Ayala identified Walton as the man who opened the door, but because the man's identification is contested, we will continue to refer to him as "the man" as we summarize Ayala's testimony.

[4] At trial, Alayla testified that he used the name "Angel" because it is "a common street prostitute name" that he has come across in his narcotics investigations.

[5] Ayala testified that while they stood in the hallway, he could hear other people talking in the background, but he could not see anyone and he did not proceed into the home farther than the hallway.

tennis shoe and retrieve a clear plastic baggy," inside of which "were numerous smaller clear plastic corner cut baggies with suspected cocaine base."

¶8 Ayala testified at trial that the man seemed uncertain whether Ayala was really a drug user and not a police officer. Ayala testified that the man stated, "I don't know," and Cruz said, "[W]ell, if you're not going to serve him, give him back his $40." The man then reached for Ayala's head, which was covered with a hat, and indicated he wanted to get a better look at Ayala. The man patted Ayala's head and chest, which Ayala speculated was done to check for surveillance wires. Then the man again asked Cruz if she knew Ayala and she replied, "[Y]eah, he's good, serve him." Ayala also said he was "good."

¶9 The man then "reached into the clear plastic baggies and retrieved two smaller clear plastic baggies with suspected cocaine base and handed them" to Ayala. Having spent "[m]aybe five minutes" in the home, Ayala then left the house and walked to an undercover police vehicle, where he informed other officers about the transaction and described the man and woman who sold him the drugs. The other officers began to act on Ayala's information and eventually approached the home, but Ayala did not return to the residence.

¶10 The second witness who testified at Walton's trial was Cruz. At the outset, she testified that she had been convicted of a crime on three occasions, including a crime related to her role in the sale of drugs to Ayala on October 25, 2007.[6] She said that at the time of the sale, she and her roommate, Angel, were on

[6] According to automated circuit court records, Cruz pled guilty to maintaining a drug trafficking place, contrary to WIS. STAT. § 961.42(1), a Class I felony. She was sentenced to one year in jail. However, that sentence was stayed and she was placed on probation for two years with four months in jail as a condition of probation.

drugs and brought tricks to the house.[7] When she saw Ayala at the door, she thought he was one of Angel's tricks. Ayala told Cruz that Angel had sent him to buy drugs and asked for "Ski," which Cruz knew to be Walton's street name.

¶11 Cruz identified Walton as the man who answered the door. She said she told Walton that Ayala was "cool" and that Walton could serve him. She said only Walton, Ayala, Cruz and her dog, a pit bull, were in the hallway. She testified: "So after I told [Walton] that Ayala was okay, then he pulled out the bag of dope out of his sock and served [Ayala] $40 worth and Ayala gave him the money. After Ayala got the drugs, I told him to cuff it, put it away." Cruz testified that she did not see Walton touch Ayala, noting: "Only thing I saw was just a drug transaction."

¶12 Cruz said that Ayala left and that "[a]n hour later," the police "were banging on the door," asking her to put her dog away. Cruz said she put the dog in one of three bedrooms. As she put the dog away, Walton was in another bedroom. As she went to the front door to talk with the police officers, she saw Walton come out of the bathroom.

¶13 Cruz opened the door to the officers and gave them permission to search her home. She and Walton were both arrested. Cruz ultimately gave a statement to police, which is discussed *infra*.

¶14 At trial, Cruz testified that the District Attorney's Office had not promised her anything to get her to testify against Walton, and she said that she

[7] Ayala testified it just so happened that the name he offered as his referring source—Angel—was also the name of Cruz's roommate.

was not given any consideration as far as her sentence, which had already been imposed.

¶15 The third witness was David Bublitz, a City of Milwaukee police officer. He testified that he was involved in the search of Cruz's home, where he recovered "corner cut baggies of suspected cocaine base" from the floor of a bedroom closet and from the toilet. He also recovered fifteen dollars in bills, but they did not match the prerecorded buy money. Bublitz said he arrested Walton after a police detective directed him to do so.

¶16 The police detective who directed Bublitz to arrest Walton was Robert Rehbein, the final witness at trial. While the drug sale occurred, Rehbein was in an undercover vehicle nearby. He spoke with Ayala in the vehicle just after the drug sale. Rehbein said Ayala described the man and woman who sold him the drugs as follows:

> He described suspect number one as a black male, early twenties, approximately six feet tall, 175 pounds, thin build, wearing a gray designer T-shirt that had the words Marithe Francois Girbaud across the chest, gray sweatpants and gray and white tennis shoes. [The second suspect was] a dark-skinned female, either African-American or of Hispanic origin, approximately five-three to five-foot-four, thin build, wearing a dark sweater and dark pants.

Rehbein said Ayala told him the man had conducted "a hand-to-hand transaction" with Ayala and that the woman "appeared to somewhat okay the deal inside the residence."

¶17 Rehbein testified that he conducted surveillance on the residence for about forty minutes, during which time he hoped the suspects would emerge so that the officers would not have to "contend with that pit bull." However, ultimately he and officers approached the home. He said that after he knocked on

the door and called out "Milwaukee Police," he waited for two-and-one-half minutes for someone to answer the door. Cruz answered the door and, after hearing that Rehbein was searching for suspects and evidence, she told Rehbein "that she would fully cooperate."

¶18 Rehbein entered the residence and saw a man—later identified as Walton—who was sitting on a couch in the living room and who Rehbein thought matched the physical description Ayala had given. Rehbein testified:

> I observed that he was wearing a white T-shirt, gray sweatpants, gray and white tennis shoes. And I observed on the – – I guess you'd call it the headrest on the couch next to him a gray T-shirt, a designer T-shirt with the words Marithe Francois Girbaud.

Based on Walton's match of the physical description Ayala had reported, Rehbein directed Bublitz to arrest Walton.

¶19 Rehbein also testified that in addition to Walton and Cruz, there were two other occupants of the residence: a black man named Equantez Sloan (who is Cruz's nephew) and a white woman. Rehbein said no one besides Walton was wearing shoes, and the shoes he recovered from Walton matched the description Ayala had given him. Rehbein said he focused his attention on Walton "because he did match the description [Ayala had given] based on his physical appearance and clothes."

¶20 Rehbein testified that after Walton was arrested, Rehbein

> walked [Walton] directly out in front onto the sidewalk, and I did observe that Officer Ayala was watching him from my undercover vehicle. And [Walton] was placed inside an unmarked police squad. I then had contact with Officer Ayala who informed me that he did make a positive identification of [Walton as the suspect from whom Ayala had purchased cocaine].

¶21 The jury convicted Walton of delivery of cocaine and possession of cocaine, both as a party to a crime.[8] He was convicted and sentenced as follows: for the delivery of cocaine, four years of initial confinement and four years of extended supervision, concurrent to the possession count but consecutive to any other sentences;[9] and for the possession count, one year and six months of initial confinement and two years of extended supervision, concurrent to the delivery count.

¶22 Postconviction counsel was appointed and Walton filed a motion for postconviction relief in the trial court. He sought a new trial on grounds that his trial counsel provided ineffective assistance and that the State failed to provide trial counsel with an audio recording of an interview with Cruz. The trial court denied the motion without a hearing. This appeal follows.

DISCUSSION

¶23 On appeal, Walton renews arguments he presented in his postconviction motion. He argues that he is entitled to a new trial because: (1) the State failed to disclose an audio recording of an interview with Cruz; (2) trial counsel provided ineffective assistance when he failed to effectively impeach Cruz and failed to move to suppress testimony concerning Ayala's in-court and out-of-court identification of Walton; and (3) the interests of justice require a new trial. We consider each issue in turn.

[8] The jury elected to find Walton guilty of the lesser-included offense of possession, rather than possession with intent to deliver.

[9] The record indicates that at the time Walton committed these crimes, he was on extended supervision; two months prior to sentencing in this case he was ordered reconfined on the prior case.

I. Disclosure of the audio recording.

¶24 In his postconviction motion, Walton for the first time alleged that the State had failed to provide trial counsel with a copy of an audio recording of Cruz's post-arrest interview with police. He argued that the information on the CD could have been used to show that Cruz only identified Walton "after police essentially told her that they knew Walton was the seller and wanted her to confirm this." He also asserted that the recording confirmed "Cruz's motive to cooperate with police" because an officer discussed consideration she might receive for her cooperation.

¶25 In response, the State said that it believed it had turned over all discovery materials to the defense, including a compact disc (CD) containing the interview and a written summary of the interview, and that it had not been informed that the CD was missing. In any event, the State argued, the burden was on Walton to prove that the withheld evidence was material to an issue at trial.

¶26 The trial court reviewed the audio recording and disagreed with several assertions made by postconviction counsel about the content of the recording. The trial court concluded that even if trial counsel had had a copy of the audio recording and used it to show Cruz had a motive to falsify her testimony, the evidence would not have affected the outcome of the trial. Thus, the trial court concluded, Walton was not prejudiced. It denied Walton's postconviction motion without a hearing.

¶27 On appeal, the State notes that it remains puzzled as to why trial counsel did not receive the CD or ask for it after reviewing the written summary referencing the CD. Nonetheless, the State contends that even if it failed to provide trial counsel with the CD, a new trial is not warranted. We agree.

¶28 The State has two separate evidence-disclosure responsibilities: a statutory responsibility imposed by WIS. STAT. § 971.23 and a constitutional responsibility imposed by ***Brady v. Maryland***, 373 U.S. 83 (1963). Section 971.23(1) identifies what the State must disclose to a defendant. If the State does not show good cause for failing to disclose the information, the court must determine whether the defendant was prejudiced, applying the harmless error test. *See* ***State v. Harris***, 2008 WI 15, ¶¶15, 41-42, 307 Wis. 2d 555, 745 N.W.2d 397. Whether a defendant has been prejudiced presents a question of law subject to our independent review. ***Id.***, ¶15.

¶29 Under ***Brady***, "a defendant has a constitutional right to evidence favorable to the accused and that a defendant's due process right is violated when favorable evidence is suppressed by the State either willfully or inadvertently, and when prejudice has ensued." ***Harris***, 307 Wis. 2d 555, ¶61. "Prejudice means that 'there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" ***Id.*** (citations and one set of quotation marks omitted). ***Harris*** continued: "'[S]trictly speaking, there is never a real ***Brady*** violation unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict.'" ***Harris***, 307 Wis. 2d 555, ¶61. (citations and one set of quotation marks omitted).

¶30 Applying these standards, we conclude that Walton was not prejudiced by the State's failure to provide the CD and, therefore, Walton is not entitled to a new trial based on nondisclosure of the CD. As noted, Walton asserts that not having the recording on the CD harmed his defense because it could have been used to demonstrate that: (1) Cruz falsely implicated Walton "because she

believed that was the only way to be viewed as 'truthful' by the police"; and (2) Cruz had a motive to cooperate with police.

¶31 We have reviewed the recording and we are unconvinced that had this recording been provided to the defense prior to trial, the result of the proceeding would have been different. *See* ***id.*** We do not agree that the recording suggests Cruz falsely implicated Walton "because she believed that was the only way to be viewed as 'truthful' by the police." The police officer questioning Cruz encouraged her to tell the truth. He asked her to identify people who were in the apartment. It is true that he told Cruz the police believed Ski was the seller, but he also gave Cruz an opportunity to identify the seller, asking whether it was Walton, Sloan or Cruz. The overall tenor of the interview was not that of coercing testimony, but of gathering information (such as how long Cruz had known Ski and to whom she was related).

¶32 We also do not agree that the recording reveals new information about Cruz's motivations for cooperating. At the end of the recording, after Cruz had already cooperated with the police at her home and by giving the interview, Cruz asked the officer what she would be charged with. In response, the officer said she had been arrested for three felonies and that the district attorney would decide how to charge her. The officer said he would let the district attorney know that she cooperated when the police came to her residence and that she agreed to be interviewed. He said that people "most of the time, not all of the time, but most of the time" get consideration for cooperation. He made clear he could not make her any promises concerning potential charges.

¶33 We are unconvinced that this recorded exchange, had it been provided to trial counsel, would have affected the trial. Trial counsel already

knew that Cruz had cooperated at her residence. The written report summarizing the interview noted Cruz's assertion that she had cooperated with police at her residence, such as by putting the pitbull away when police officers asked her to. Trial counsel had the opportunity to ask Cruz about her motivations for cooperating, and in fact did so.

¶34 Even if the recording could have helped trial counsel more effectively impeach Cruz concerning her identification of Ski and her cooperation, we are unconvinced that "'the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict.'" *See* ***id.*** (citation omitted). At issue is whether Ski was the man who sold drugs to Ayala. Ayala had five minutes to observe the man, who stood two feet away from Ayala. Ayala gave Rehbein a detailed description of the man and the man's clothing. When Rehbein arrived forty minutes later, Walton matched the description given, including being the only person in the apartment wearing shoes like those described in detail by Ayala. Cruz's testimony confirmed the identification, but even without her testimony, strong evidence pointed to Walton as the seller. For these reasons, we reject Walton's argument concerning the nondisclosure of the CD recording.

II. Ineffective assistance of trial counsel.

¶35 Walton argues that he was denied the effective assistance of trial counsel. To establish an ineffective assistance of counsel claim, a defendant must show both that counsel's performance was deficient and that he was prejudiced by the deficient performance. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). A reviewing court may dispose of a claim of ineffective assistance of counsel on either ground. ***Id.*** We review the denial of an ineffective assistance claim as a

mixed question of fact and law. ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). We will not reverse the circuit court's factual findings unless they are clearly erroneous. ***Id.*** However, we review the two-pronged determination of trial counsel's performance independently as a question of law. ***Id.*** at 128.

A. Alleged failure to effectively impeach Cruz.

¶36 Walton argues that his trial counsel performed deficiently when he failed to effectively impeach Cruz. First, in a two-sentence argument, he contends that his trial counsel should have elicited evidence that Sloan was Cruz's nephew because that constituted "a motive to divert suspicion away from Sloan and toward Walton." Walton does not attempt to explain how "inform[ing] the jury of the familial relationship between Cruz and Sloan" would have affected the outcome of the case. We are not willing to develop Walton's argument for him, *see* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (we need not address undeveloped arguments), and we are not persuaded that Walton was prejudiced by this alleged trial counsel error.

¶37 Next, Walton argues that his trial counsel "failed to effectively present Cruz's motivation to lessen the severity of her own charges by cooperating against Walton." Walton acknowledges that trial counsel did ask "Cruz whether she had received any consideration for her testimony, attempting to show that she had a motive to lie," and that Cruz's response was that she had not received any consideration. However, Walton argues:

> [C]ounsel failed to point out that regardless of whether the State explicitly promised Cruz anything in exchange for her testimony, she still had a motive to falsely minimize her own role and exaggerate Walton's role in the hope of lessening the severity of the charges against her. Indeed,

> because she actively participated in the sale to an undercover officer and because all of the drugs were found in her home, Cruz could have been charged as party to the same crimes Walton was charged with, delivery of cocaine and possession with intent to deliver cocaine. Instead, Cruz was charged only with a single, less serious felony, running a drug house. Although Cruz may not have been explicitly promised leniency for her testimony, the hope of such leniency provided a substantial motive for the statement and testimony she provided.

(Record citation omitted.)

¶38 We are unconvinced that trial counsel performed deficiently. Walton has not produced any evidence that Cruz actually received leniency for her cooperation. Walton simply speculates that Cruz could have been charged with other crimes. He has not shown that a particular question asked of Cruz would have yielded a different answer. To the extent Walton is arguing trial counsel should have argued differently, we are unconvinced that failing to provide additional argument concerning Cruz's motivation to cooperate prior to or at trial was an error "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *See* ***Strickland***, 466 U.S. at 687. Because Walton has not shown prejudice, his ineffective assistance claim fails. *See* ***id.***

B. Failure to move to suppress Ayala's identification testimony.

¶39 Walton argues that his trial counsel provided ineffective assistance by failing to move to suppress Ayala's out-of-court and in-court identifications of Walton, based on the illegal "showup identification" that Ayala made as Walton was taken from the residence. *See* ***State v. Dubose***, 2005 WI 126, ¶33, 285 Wis. 2d 143, 699 N.W.2d 582 ("Evidence obtained from an out-of-court showup is inherently suggestive and will not be admissible unless, based on the totality of the circumstances, the procedure was necessary.").

¶40 In response, the State makes several concessions with respect to the showup. It concedes that Ayala's identification of Walton when Walton was removed from the residence qualified as a showup, and that the showup "did not qualify as 'necessary' for ***Dubose*** purposes." Thus, the State explains:

> Here, because the police had probable cause to arrest Walton and because the record does not indicate the existence of an exigent circumstance precluding a lineup or photo array, the State acknowledges that the circuit court would have excluded evidence about Officer Ayala's showup identification of Walton if defense counsel had moved to suppress the out-of-court identification. Consequently, the State acknowledges that defense counsel performed deficiently by failing to seek suppression of the out-of-court identification.

Further, the State concedes, "[b]ecause the ***Dubose***-prohibited showup identification preceded Officer Ayala's in-court identification of Walton, the State also acknowledges that defense counsel performed deficiently when he did not challenge the in-court identification as potentially tainted by the out-of-court identification."

¶41 While the State concedes that trial counsel's performance was deficient, it argues that Walton has not proven prejudice and, therefore, no new trial is warranted. The State relies on ***State v. Roberson***, 2006 WI 80, 292 Wis. 2d 280, 717 N.W.2d 111, where our supreme court discussed the defendant's burden to prove prejudice when the identification-suppression issue arises in the context of a claim of ineffective assistance. *See* ***id.***, ¶¶32-35. ***Roberson*** stated:

> An in-court identification is admissible, therefore, if the court determines that the identification is based on an independent source. The primary question is whether "the evidence to which the instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." To be admissible, the in-court identification must be made "by means sufficiently distinguishable to be

> purged of the primary taint." In other words, the in-court identification must rest on an independent recollection of the witness's initial encounter with the suspect.
>
> Ordinarily, an analysis of the admissibility of an in-court identification shifts to the State the heavy burden of establishing by clear and convincing evidence that the in-court identification was not tainted by the illegal activity. However, the question of the admissibility of the in-court identifications in this case arises as part of an ineffective assistance of counsel claim. In an ineffective assistance of counsel claim, ***Strickland*** "places the burden on the defendant to affirmatively prove prejudice." In determining whether the defendant has met his or her burden of proving prejudice, the reviewing courts are required to consider the totality of the evidence before the trier of fact.

Roberson, 292 Wis. 2d 280, ¶¶34-35 (citations and footnote omitted).

¶42 The State argues that "[t]he record conclusively refutes any contention that the failure to challenge and exclude Officer Ayala's in-court identification caused Walton any prejudice." The State points to evidence that Cruz:

> specified Walton as one of two males in the house at the time of the transaction, and she identified the defendant in the court as Walton. Cruz also testified that Walton went by the nickname "Ski" as his "street name" and that "[w]hen [Ayala] first came to the door, he asked for Melvin Walton's street name Ski."

Further, it notes that Ayala observed the man who sold him the drugs from a distance of two feet, spent five minutes with him and watched the man as he patted Ayala's head and chest. Based on this interaction, Ayala provided specific characteristics of the seller to his fellow officers. In turn, Rehbein testified that Walton matched the description given by Ayala, including wearing the described sweatpants and tennis shoes and having the Girbaud T-shirt on the couch headrest next to Walton. Rehbein also said that he did not have any difficulty

distinguishing Walton from Sloan, and that of the four people in the residence, only Walton fit the description provided by Ayala. The State concludes:

> In short, setting aside Officer Ayala's in-court identification of Walton and Detective Rehbein's reference to the showup identification, *all* of the evidence pointed to Walton as the seller. The trial record thus refutes any notion that Walton suffered any prejudice from a failure to exclude the in-court identification and from the failure to exclude the brief reference to the showup identification. Consequently, Walton's trial lawyer did not provide ineffective assistance when he failed to seek suppression of those identifications.

(Record citations and footnote omitted.)

¶43 We agree with the State. Walton has not convinced us that the result of the trial would have been different even if Ayala's in-court and out-of-court identifications of Walton had been excluded. *See* ***Strickland***, 466 U.S. at 687. Therefore, his ineffective assistance claim fails.

III. New trial in the interest of justice.

¶44 Walton argues that the errors in this case justify a new trial in the interest of justice, although he does not specify whether he seeks a new trial because "the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried." *See* WIS. STAT. § 752.35. Walton has not developed this argument and we will not develop it for him. *See* ***Pettit***, 171 Wis. 2d at 646-47. We discern no reason for discretionary reversal and we therefore decline to overturn the conviction in the interest of justice.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.