COURT OF APPEALS
DECISION
DATED AND FILED

September 13, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP2521-CR **Cir. Ct. No. 2008CF3252**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DERMITRE B. WATTS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: REBECCA F. DALLET and MICHAEL D. GUOLEE, Judges. *Affirmed*.

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

¶1 PER CURIAM. Dermitre B. Watts appeals from a judgment of conviction, entered upon a jury's verdict, on one count of possession with intent to deliver between fifteen and forty grams of cocaine as a second or subsequent

offense. He contends that the evidence was insufficient to support the verdict. Watts also appeals from an order denying his postconviction motion for a new trial without a hearing.[1] He had alleged that trial counsel was ineffective for failing to object to a portion of the State's closing argument, but the trial court ruled that the State's argument was not improper. We affirm.

BACKGROUND

¶2 Watts was a passenger in a car stopped by Milwaukee police officers Dustin Langfeldt and Paul Viljevac. Watts was seated in the back. At trial, Langfeldt testified that as they stopped the vehicle, he observed Watts lean forward toward his feet and lower legs, near the car's floorboards, with his head moving back and forth. Viljevac testified that he saw Watts "ducking down and keep moving."

¶3 When the officers removed the three individuals from the car, cocaine fell from front-seat-passenger Rafeal Carter's pants leg. No drugs were found on Watts, but Viljevac testified that he recovered $740 in cash and two cell phones from Watts. In addition, there were two boxes of plastic baggies on the rear seat near Watts. Viljevac also testified that in searching the car, the rear bench seat lifted from the front and, under where Watts had been seated, over twenty-six grams of cocaine base were recovered.

¶4 At trial, Watts attempted to challenge Viljevac's testimony with the testimony of private investigator William Kohl. Kohl had examined the car—

[1] The Honorable Rebecca F. Dallet presided over the trial and entered the judgment of conviction. The Honorable Michael D. Guolee entered the order denying the postconviction motion.

which had not been impounded, photographed, or otherwise preserved by police—and noted that the bench seat lifted from the rear, not the front. Kohl further testified it was much easier for the seat to be opened with the car doors opened because in the closed position, the doors' armrests blocked the bench from lifting. Kohl conceded, however, that he had only viewed the car prior to trial and he had no way to know its condition months earlier at the time of the stop. The jury convicted Watts.

¶5 As noted, Watts filed a postconviction motion seeking a new trial, alleging ineffective assistance of trial counsel. During the trial, Viljevac gave his background information: he spent four years at the University of Minnesota, then worked as a corrections officer for the Milwaukee County Sheriff's Department before becoming a police officer. During its closing argument, the State argued in part, that "the idea that Police Officer Viljevac would go to university for four years, go become a correction officer, become a police officer and then come in here and lie to you about where he recovered these drugs from and how he recovered the drugs is not reasonable."

¶6 Watts asserted the State was improperly bolstering Viljevac's credibility and that trial counsel had been ineffective for not objecting. The trial court concluded that the remark was not improper and, in any event, that there was no reasonable probability that the comment would have altered the trial's outcome. It denied the motion without a hearing. Watts appeals.

DISCUSSION

A. Sufficiency of the Evidence

¶7 Watts challenges the sufficiency of the evidence available to convict him, highlighting several factors that he believes should have swayed the jury in his favor. He points out that no witness ever observed him in possession of drugs; Viljevac did not testify how far inside the seat the drugs had been found; the vehicle was registered to a woman, not Watts; neither officer had a truly solid vantage point during the stop; Watts never admitted possession of drugs; the cash found on Watts had never been tested for drug residue; no drugs were found on him during the stop; no firearms were recovered; no fingerprints were recovered; and Watts, unlike the other two individuals in the car, was cooperative with police.

¶8 When we review the sufficiency of the evidence to support a jury's verdict, the test is not whether this court is convinced of the defendant's guilt beyond a reasonable doubt, but whether a jury, acting reasonably, could be so convinced by evidence that it had a right to believe and accept as true. *See* ***State v. Poellinger***, 153 Wis. 2d 493, 503-04, 451 N.W.2d 752 (1990). The credibility of the witnesses and the weight of the evidence is for the jury. ***Id.*** at 504.

¶9 We view the evidence in the light most favorable to the verdict and, if more than one reasonable inference can be drawn from the evidence, we must accept the inference drawn by the jury. ***Id.*** The jury's verdict will be reversed "'only if, viewing the evidence most favorably to the [S]tate and the conviction, it is inherently or patently incredible, or so lacking in probative value that no jury could have found guilt beyond a reasonable doubt.'" ***State v. Alles***, 106 Wis. 2d 368, 376-77, 316 N.W.2d 378 (1982) (citation omitted).

¶10 Convictions may be supported solely by circumstantial evidence. ***Poellinger***, 153 Wis. 2d at 501. In some cases, circumstantial evidence may be stronger and more satisfactory than direct evidence. ***Id.*** The standard of review is the same whether the conviction relies upon direct or circumstantial evidence. ***Id.*** at 503. But once a jury "accepts the theory of guilt, an appellate court need only decide whether the evidence supporting that theory is sufficient to sustain the verdict." ***State v. Mertes***, 2008 WI App 179, ¶11, 315 Wis. 2d 756, 762 N.W.2d 813.

¶11 Possession with intent to deliver cocaine requires that the defendant possessed a substance, that the substance was cocaine, that the defendant knew or believed the substance to be cocaine, and that the defendant planned to deliver the cocaine. *See* WIS JI—CRIMINAL 6035. Here, Watts only challenges the sufficiency of the evidence supporting the "possession" element of the crime.

¶12 There is sufficient evidence to support the verdict, even though it is circumstantial. "Possession" requires actual physical control of the substance. *See* ***id.*** Both officers saw Watts engage in furtive movements as they stopped the vehicle. The cocaine was under Watts' seat, and he was the only person seated in the back of the car. Viljevac testified that the rear seat was loose and lifted from the front. These circumstances are sufficient to convince a reasonable jury that the large quantity of cocaine base found under Watts' seat was under his actual physical control.[2]

[2] There was no dispute that the substance actually was cocaine, and the two boxes of plastic baggies nearby, the large amount of cash, and dual cell phones support the remaining elements.

B. Ineffective Assistance of Trial Counsel

¶13 Watts additionally challenged his trial attorney's failure to object to a portion of the State's closing argument. Again, the State had argued that it was unreasonable to think that Viljevac "would go to university for four years, go become a correction officer, become a police officer and then come in here and lie to you about where he recovered these drugs from and how he recovered the drugs[.]"

¶14 To demonstrate ineffective assistance of counsel, a defendant must show deficient performance by counsel and prejudice from that deficiency. *See* ***State v. Marks***, 2010 WI App 172, ¶12, 330 Wis. 2d 693, 794 N.W.2d 547. Deficient performance requires a showing that specific acts or omissions are outside the range of professionally competent assistance. ***Id.*** Prejudice requires a showing that there exists a reasonable probability that, but for counsel's deficiency, the result of the proceeding would have been different. ***Id.*** This court need not address both prongs if the defendant is unsuccessful on either. *See* ***id.***, ¶13.

¶15 "Generally, counsel is allowed latitude in closing argument and it is within the trial court's discretion to determine the propriety of counsel's statement and arguments to the jury." ***State v. Neuser***, 191 Wis. 2d 131, 136, 528 N.W.2d 49 (Ct. App. 1995). We affirm unless there was an erroneous exercise of discretion likely to have affected the jury's verdict. ***Id.***

¶16 "The line between permissible and impermissible argument is thus drawn where the [State] goes beyond reasoning from the evidence to a conclusion of guilt and instead suggests that the jury reach its verdict by considering factors other than the evidence." ***State v. Draize***, 88 Wis. 2d 445, 454, 276 N.W.2d 784

(1979). "The constitutional test is whether the prosecutor's remarks 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" ***Neuser***, 191 Wis. 2d at 136 (citation omitted). Whether the State's conduct affected the fairness of the trial is determined by viewing the challenged statements in context. ***Id.***

¶17 As noted, defense counsel attempted to undermine Viljevac's testimony by introducing testimony from a private investigator who had examined the car and testified that the rear seat opened in a fashion contrary to what Viljevac described. Thus, the State argued:

> You heard the defense witness [the private investigator] come in … but we're talking about eight months between the time that the defendant was stopped and the time the defense witness attempted to do anything with this evidence.…
>
> The idea that the car will be in the exact shape … isn't credible.… It wasn't the same. It wasn't impounded, if you remember, the car was unlocked and in an area where there was no fence around it, you just walked right into the car.
>
> And the idea that after eight months -- and the defense witness admitted himself that he had no idea what the car was like on June 27th, 2008. He has no knowledge, he wasn't there, no knowledge. But you did hear from someone who was there, and that's Police Officer Viljevac.
>
> You also heard, as defense counsel brought up, that he didn't -- he never met Dermitre Watts before that date. And that idea that Police Officer Viljevac would go to university for four years, go become a correction officer, become a police officer and then come in here to lie to you about where he recovered these drugs from and how he recovered the drugs is not reasonable. He has nothing against Dermitre Watts. They haven't shown anything that him and the defendant have any prior history.

¶18 First, we reject Watts' assertion that either ***State v. Albright***, 98 Wis. 2d 663, 298 N.W.2d 196 (Ct. App. 1980), or ***State v. Romero***, 147 Wis. 2d

264, 432 N.W.2d 899 (1988), applies here. ***Albright*** teaches that "[a]rgument from matters not in evidence is improper." ***Id.***, 98 Wis. 2d at 676. Nothing about the State's argument in this case is beyond the scope of the evidence presented. ***Romero*** stands for the proposition that opinions that a witness's statements are true, rather than opinions about the witness's character for truthfulness, are inadmissible. *See* ***id.***, 147 Wis. 2d at 277. Here, the State did nothing more than argue that the jury should not accept Watts' attack on Viljavec's credibility, because the evidence Watts used in that attack—the private investigator's testimony—was itself fraught with problems.

¶19 Indeed, the trial court, rejecting the postconviction motion, noted that the context reveals that the State's comments "were directed at trying to persuade the jury that there was no reasonable basis to believe the defendant's assertion … that he was the victim of some sort of set up." The comments did not suggest that the jury should believe Viljavec because of his education but, rather, that it simply ought to consider it in weighing his credibility. We agree.

¶20 In light of the trial court's conclusion, and our agreement, that the argument was not improper, we necessarily must conclude that trial counsel was not ineffective. Counsel is not ineffective for failing to pursue a meritless objection or argument. *See* ***State v. Toliver***, 187 Wis. 2d 346, 360, 523 N.W.2d 113 (Ct. App. 1994).

By the Court.—Judgment and order affirmed.

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