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DISTRICT II

September 23, 2020

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You are hereby notified that the Court has entered the following opinion and order:

2019AP851-CR State of Wisconsin v. Reginald Washington (L.C. #2018CF86)

Before Neubauer, C.J., Gundrum and Davis, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Reginald Washington appeals from judgments convicting him of two counts of felony delivery of cocaine and one count of misdemeanor possession of cocaine and from an order denying his motion for a new trial. On appeal, he challenges the circuit court's denial of his ineffective assistance of counsel claim. Based upon our review of the briefs and record, we

conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2017-18).[1] We affirm.

To succeed on an ineffective assistance of counsel claim, a defendant must demonstrate that counsel's representation was deficient and that the deficiency was prejudicial. ***State v. Jeannie M.P.***, 2005 WI App 183, ¶6, 286 Wis. 2d 721, 703 N.W.2d 694. We review de novo whether counsel's performance was deficient or prejudicial. ***Id.*** "The defendant has the burden of proof on both components." ***State v. Smith***, 207 Wis. 2d 258, 273, 558 N.W.2d 379 (1997).

To establish prejudice, the defendant "'must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" ***State v. Reed***, 2002 WI App 209, ¶17, 256 Wis. 2d 1019, 650 N.W.2d 885 (citation omitted).

At trial, a confidential informant testified that he knew Washington before he made two controlled drug buys from him in January 2018. The drug buys were made in concert with law enforcement officers who testified about the surrounding circumstances. The confidential informant made audio recordings of both transactions and, while their quality was poor in a number of places, those audio recordings were admitted into evidence.

[1] Despite counsel's certification to the contrary, the appendix to the appellant's brief does not comply with WIS. STAT. RULE 809.19(2) (2017-18). The appendix contains only one judgment of conviction. The appendix should contain, "at a minimum, the findings or opinion of the circuit court, limited portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues …." ***Id.*** In the future, counsel shall comply with the Rules of Appellate Procedure with regard to the contents of the appendix.

In February 2018, Washington allowed law enforcement officers into his apartment. Washington admitted to the officers that he had drugs on the premises, and he opened a drawer in which the officers saw a plate with white powdery residue (later determined to be cocaine). The officers also saw six baggies with the corners ripped off, which a law enforcement officer testified was consistent with the packaging of the cocaine the confidential informant delivered to the law enforcement officers after he made two controlled buys from Washington.

Washington's ineffective assistance of counsel claim arises from trial counsel's direct examination of Washington. Counsel asked and Washington answered the following questions:

> Trial counsel: Now, in February of this year, you were approached by Deputy Winger on the street, right?
>
> Washington: Yes.
>
> ….
>
> Trial counsel: Okay. Now, you let Deputy Winger and some other people into your home, right?
>
> Washington: Yes.
>
> Trial counsel: Did they ask you anything?
>
> Washington: Well, yes, he did ask me did I have any drugs in the house?
>
> Trial counsel: Did you?
>
> Washington: I said no. Then he said: Well, since you're on probation, we have the right to search. So I was like, yeah, I have some dust from some personal use I had back—partied on the holiday for New Year's.
>
> Trial counsel: So you had drugs in the house?
>
> Washington: Yes.
>
> Trial counsel: So you accept that you were in possession of drugs?
>
> Washington: Yes, I do.

Trial counsel: Reggie, are you a drug dealer?

Washington: No.

Trial counsel: In January of 2018, were you dealing drugs?

Washington: No, I was not.

In response to this testimony, the State argued that by denying that he was dealing drugs, Washington had opened the door to evidence of prior convictions involving drugs. Notwithstanding the "opening the door" rationale provided by the State, the circuit court applied the ***State v. Sullivan***, 216 Wis. 2d 768, 772-73, 576 N.W.2d 30 (1998), "other acts" analysis to resolve the admissibility of the prior conviction. In reaching its discretionary decision to admit the prior conviction, ***State v. Gray***, 225 Wis. 2d 39, 48, 590 N.W.2d 918 (1999), the circuit court determined that the prior conviction was relevant, offered for an acceptable purpose, and its probative value was not substantially outweighed by the danger of unfair prejudice. ***Sullivan***, 216 Wis. 2d at 772.

As a result of this conclusion, the State was allowed to elicit from Washington the following testimony on cross-examination:

State: Have you ever been convicted of a crime?

Washington: Yes.

State: How many times?

Washington: Twice.

State: And you pled guilty to possession with intent to deliver cocaine as a party to a crime?

Washington: Yes.

The circuit court gave the jury the standard instruction limiting the use of the prior conviction evidence. Following deliberations, which included a request for a replay of the audio recordings, the jury found Washington guilty.

Washington filed a postconviction motion seeking a new trial due to ineffective assistance of trial counsel in opening the door to his prior convictions. After holding an evidentiary hearing under ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979), the circuit court concluded that counsel performed deficiently in the questioning of Washington but that prejudice was not demonstrated. The court observed that the "other acts" evidence was properly admitted under ***Sullivan*** even without the door being opened through questioning. The court further noted that even before counsel asked him if he was dealing drugs, Washington had already volunteered that he was on probation, which suggested to the jury the existence of a prior conviction. Finally, the court recognized the other evidence in the case and that the weight and credibility of that evidence was a question for the jury.

On appeal, Washington challenges the circuit court's no prejudice conclusion. We reject the challenge because the substantial evidence against Washington convinces us that there is no reasonable probability that the outcome would have been different in the absence of the brief reference to Washington's prior convictions. Washington places particular emphasis on the credibility determinations the jury had to make as it evaluated the confidential informant's testimony and Washington's denials, and argues that trial counsel's question played a critical role in harming his case in that regard. However, Washington overlooks all of the other evidence, described above, that supported his conviction. Such evidence included the undisputed evidence of drugs in his apartment packaged in a manner consistent with the confidential informant's testimony, the testimony of the law enforcement officers about the events

surrounding the drug buys, an audio recording that, while of poor quality, appeared to reflect a drug buy (and was important to the jury's deliberation as shown by its request to have it re-played) and Washington's own unprompted admission that he was on probation when the law enforcement officers found drugs in his apartment.[2] That the jury also heard, with a limiting instruction, that Washington had two prior drug convictions simply does not rise to the level of evidence the exclusion of which would have been reasonably probable to result in a different outcome. ***Reed***, 256 Wis. 2d 1019, ¶17.[3] In the absence of prejudice arising from counsel's deficient performance, Washington did not meet his burden of proof, ***Smith***, 207 Wis. 2d at 273, and a new trial was not required.

Upon the foregoing reasons,

IT IS ORDERED that the judgments and order of the circuit court are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

[2] Washington volunteered that he was on probation in response to a question from his counsel that did not require such information. Whatever problem Washington created by revealing to the jury that he was on probation was a problem of his own making and undercuts the notion that the additional information about two prior convictions which included a drug offense was significant new information. *See* ***State v. Gove***, 148 Wis. 2d 936, 944, 437 N.W.2d 218 (1989).

[3] As previously noted, the circuit court conducted a ***Sullivan*** analysis despite the fact that defense counsel had seemingly "opened the door" to the "other acts" evidence. ***State v. Sullivan***, 216 Wis. 2d 768, 772-73, 576 N.W.2d 30 (1998). We cannot conclude that this analysis was in error. Indeed, Washington fails to show how it was, arguing instead only that the analysis "would never have been necessary but for the ineffective questioning by defense counsel." We need not speculate as to whether the State would (or successfully could) have sought admission of this testimony as "other acts" evidence had Washington's counsel not opened the door to it; for purposes of the prejudice inquiry on which we decide this appeal, it is important only to note that the analysis included an instruction that evidence of the prior conviction bore only upon Washington's credibility and was not proof of guilt of the charged offenses. WIS JI—CRIMINAL 275. We must assume that the jury heeded this limiting instruction. ***State v. Grande***, 169 Wis. 2d 422, 436, 485 N.W.2d 282 (Ct. App. 1992).

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals