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DISTRICT I

January 20, 2021

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

2019AP1216-CR State of Wisconsin v. Domanique Lavell Scott
(L.C. # 2016CF5628)

Before Blanchard, Dugan and Donald, 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).

Domanique Scott appeals a judgment convicting him of one count of delivery of heroin and an order denying his motion for postconviction relief. Scott argues that he received ineffective assistance of trial counsel. After 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.

Scott was charged with three counts of delivery of heroin, three grams or less, stemming from controlled buys through the use of a confidential informant on August 10, 2016 (count one), August 25, 2016 (count two), and September 22, 2016 (count three). Scott argued that he had been incorrectly identified as the perpetrator, that he did not know the confidential informant, and that he was not the person in the video, photo, and audio evidence presented to the jury. The jury convicted him on count one, was unable to reach a verdict on count two (which was not retried), and acquitted him on count three. The circuit court sentenced Scott to eighteen months of initial confinement and two years of extended supervision. Scott filed a postconviction motion alleging that he received ineffective assistance of trial counsel. The circuit court denied the motion without a hearing.

A defendant claiming ineffective assistance of counsel must demonstrate both that counsel's performance was deficient and that the deficient performance prejudiced the defense. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). To prove deficient performance, the defendant must show that counsel's actions or omissions "fell below an objective standard of reasonableness." *See id.* at 688. To demonstrate prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. If a defendant fails to satisfy one component of the analysis, a reviewing court need not consider the other. *See id.* at 697.

¹ All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

Scott argues that his trial counsel's performance was deficient because counsel did not object when Wauwatosa Police Officer Stephen Schmidt testified to the following: text messages taken from a phone seized from the vehicle in which Scott was arrested announced in slang terminology that the person using the phone had heroin for sale; the confidential informant said that he had purchased heroin from Scott three to four times a week for two years at various locations; it was common for drug dealers to change or remove license plates on their vehicles; and drug dealers sometimes used an evasive technique called "tripping" to discern whether police were following them prior to a drug transaction. Scott also argues that his trial counsel should have objected to the confidential informant's testimony regarding the confidential informant's purported motive for working with the police and to the introduction of a photograph of a baggie of heroin seized from the car in which Scott was arrested because no charges were brought against Scott as to those drugs. Scott contends that the evidence consisting of Officer Schmidt's testimony and the photograph constitute inadmissible other-acts evidence, improper expert opinion, and hearsay evidence, and that his trial counsel should have objected and requested curative jury instructions.

Assuming but not deciding that trial counsel's actions constituted deficient performance, Scott's argument that he received ineffective assistance of trial counsel fails because he cannot show that counsel's performance prejudiced the defense. There is not a reasonable probability that the jury would have failed to reach a guilty verdict as to the August 10, 2016 charge, which was the sole charge the jury found Scott guilty of committing, had counsel objected to the challenged evidence.

Regarding the evidence bearing on the count one charge, Officer Schmidt testified that on August 10, 2016, he was with the confidential informant when the confidential informant made a

phone call to his heroin dealer to arrange to purchase heroin. Officer Schmidt testified that he watched as the confidential informant called a particular phone number and the State presented an audio recording of the resulting telephone conversation to the jury. The State then played for the jury the video and audio recordings of the heroin being purchased and showed the jury still frame pictures of the transaction. The video and still frame evidence shows Scott's face clearly and shows him handing something to the confidential informant. The State introduced a Kyocera-brand phone recovered just outside the vehicle in which Scott was arrested in October that was assigned the same phone number that Schmidt saw the confidential informant call to set up the drug purchase on August 10, 2016. Officer Schmidt also testified that he searched the confidential informant to ensure that he had no drugs before the transaction and searched him immediately afterward, with continuous surveillance during the entire process. Officer Schmidt then retrieved the drugs that had been purchased and turned them over to the crime lab, where they were identified as heroin.

Based on this evidence, we conclude that there was not a reasonable probability that there would have been a different result at trial if counsel had objected to and sought curative instructions pertaining to the evidence that Scott argues should not have been admitted. *See id.* at 694. On this basis, we reject Scott's argument that he received constitutionally ineffective assistance of counsel.

Scott contends that the jury's split verdict shows that the case as a whole presented a close call, and therefore the admission of the evidence that he now highlights was likely to have had an improper effect on the jury's verdict. But as we have explained, the incriminating evidence was strong on count one, which is the only count at issue in this appeal.

IT IS ORDERED that the judgment and order of the circuit court are summarily affirmed.

See WIS. STAT. RULE 809.21.

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

Sheila T. Reiff
Clerk of Court of Appeals