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March 2, 2021

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

2019AP1975-CR State of Wisconsin v. Willie Charles Etherly (L.C. # 2016CF1346)

Before Dugan, Donald and White, 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).

Willie Charles Etherly appeals a judgment, entered after a jury trial, convicting him of possession with intent to deliver oxycodone, a controlled substance, as a second or subsequent offense. He also appeals an order denying postconviction relief. Etherly claims that his trial counsel was ineffective for failing to challenge the admissibility of a police sergeant's testimony on the ground that the sergeant was not qualified to testify as an expert on the issue of drug trafficking. Etherly also claims that the circuit court should have granted his motion for a

mistrial on the ground that the prosecutor's closing argument included an improper reference to Etherly's decision not to testify. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. § 809.21 (2017-18).[1] We summarily affirm.

We take the facts from the trial transcripts. Police Officer Bret Vanden Boogard testified that on November 15, 2015, at approximately 2:00 a.m., he was patrolling in the area of a West Allis tavern that had generated a variety of complaints from its neighbors about drugs, noise, and disorderly conduct. In a parking lot behind the tavern, Vanden Boogard observed a car with its lights on and its engine running. He approached the car and saw a man, subsequently identified as Etherly, who appeared to be sleeping in the front passenger seat. When the man did not respond to the light from Vanden Boogard's flashlight, the officer knocked on the car's window. Etherly rolled down the window, and Vanden Boogard immediately smelled the odor of marijuana.

Due to the odor of illicit drugs coming through the window, Vanden Boogard directed Etherly to get out of the car and to keep his hands visible. Etherly immediately dropped his hands out of sight. Only after receiving a second directive did he show his hands and get out of the car.

Vanden Boogard looked inside the car and saw an unlabeled pill bottle plainly visible in the area where Etherly had been sitting. The bottle held sixty-four tablets that the parties stipulated contained oxycodone.

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

Vanden Boogard then searched the car, which he determined was a rental vehicle. He found marijuana "all over the center console" and two cellphones in the glove box. He said that during the search, a man approached the car and asked to retrieve a jacket from the rear passenger area. Vanden Boogard searched the jacket and gave it to the man after confirming the man's identity. Vanden Boogard acknowledged that he did not question the man or document his identity in a report.

Vanden Boogard arrested Etherly and brought him to the police station. During the booking process, Vanden Boogard searched Etherly and found two more cellphones and $6,256 in cash. The cash included eighty-nine twenty-dollar bills, thirty-four fifty-dollar bills, twenty-seven 100-dollar bills, and some other denominations as well.

Sergeant Jared Manthe testified that at the time of Etherly's arrest, he was a patrol officer and that he provided assistance to Vanden Boogard that night by patting Etherly down for weapons and securing the scene. Manthe went on to testify about his training and experience. He said that he had attended the police academy, that he had served as a patrol officer for approximately seven years, and that he had been promoted to the rank of sergeant approximately one month before the trial. Manthe testified that he participated in mandatory training at least twice a year and that his training included matters specific to drug investigations. He also testified that he had participated in "over a couple hundred" drug investigations in his career and that he continued to participate in multiple drug investigations every week. He said that his investigations involved marijuana, cocaine, heroin, and prescription medications, including oxycodone.

Manthe then testified about factors that he looks for in determining whether a suspect in a drug investigation is a drug user or a drug dealer. He said that factors indicating sales include large quantities of drugs, large amounts of cash in small denominations, and multiple cellphones. Additionally, Manthe testified that drug dealers often use cars that protect the dealer's anonymity in the event of a police chase, and he said that rental cars serve that purpose.

Manthe opined that the oxycodone in this case was intended for sale. He said he based his opinion on the number of pills at issue, the large amount of cash that Etherly was carrying, and the involvement of a rental car. Manthe also emphasized that the "price point" for oxycodone is twenty dollars per pill and that "89 of the bills [found on Etherly] were $20 bills which would be consistent with the ... street value for an oxycodone."

Neither the State nor Etherly presented any other witnesses. Etherly elected not to testify on his own behalf.

During the jury instruction conference, Etherly, by counsel, asked the circuit court to instruct the jury using WIS JI—CRIMINAL 201, the instruction applicable to assessing opinion testimony from lay witnesses. The State, however, argued that the appropriate instruction was WIS JI—CRIMINAL 200, governing expert testimony, because under the standard imposed by ***Daubert v. Merrell Dow Pharmaceuticals, Inc.***, 509 U.S. 579 (1993), Manthe was qualified as an expert by virtue of his training and experience. The circuit court agreed with the State.

The circuit court also instructed the jury in accord with WIS JI—CRIMINAL 315. That instruction provides, in part, that: "[a] defendant in a criminal case has the absolute constitutional right not to testify. The defendant's decision not to testify must not be considered by you in any way and must not influence your verdict in any manner."

In closing argument, the State discussed the evidence presented in the case and then said:

> You are not to search for doubt. You are not to look for reasons. [Sic.] We do not have testimony as to why [Etherly] had that cash on him. There has been no testimony no evidence as to what he was doing there or whose car is it [sic]. Why was he sitting in someone's car? Why was he sitting in a car? Why did he have two cell phones on him?

Etherly, by trial counsel, interposed an objection, stating that he would present his argument in a subsequent motion. The State then concluded its remarks, saying: "There has been no testimony of that, and you are instructed not to search for doubt. You are to search for the truth. And the truth is [Etherly] possessed the oxycodone with the intent to deliver it, and I ask that you return a verdict of guilty."

Before the jury retired to deliberate, the circuit court reiterated a portion of the instruction on the burden of proof. Specifically, the circuit court reminded the jury that Etherly was not required to prove his innocence and that the State must prove every element of the crime beyond a reasonable doubt before the jury could return a guilty verdict.

While the jury was deliberating, Etherly moved for a mistrial on the ground that the State had improperly commented on his decision not to testify. In addressing the motion, the circuit court first found that the State had not directly referred to Etherly's decision to remain silent. The circuit court acknowledged, however, that it was "concerned" about the State's argument, and the circuit court explained that it therefore "did repeat the instruction about the presumption of innocence and the burden of proof." The circuit court concluded that the jury was "thoroughly instructed that Mr. Etherly is presumed innocent. There was no burden on the defense to present a defense." The circuit court therefore denied the motion.

The jury found Etherly guilty as charged, and he moved for postconviction relief. As grounds, he alleged that his trial counsel was ineffective for failing to seek a pretrial hearing pursuant to ***Daubert*** to challenge the admissibility of Manthe's testimony on the ground that Manthe was not qualified to testify as an expert. Etherly also alleged that the circuit court erred by denying his motion for a mistrial. The circuit court denied the postconviction claims without a hearing, and Etherly appeals.

We first consider Etherly's claim that his trial counsel was ineffective. A defendant who claims that trial counsel was ineffective must prove both that trial counsel's performance was deficient and that the deficiency prejudiced the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Whether counsel's performance was deficient and whether the deficiency was prejudicial are questions of law that we review *de novo*. *See* ***State v. Johnson***, 153 Wis. 2d 121, 128, 449 N.W.2d 845 (1990).

To demonstrate deficient performance, the defendant must show that counsel's actions or omissions "fell below an objective standard of reasonableness." *See* ***Strickland***, 466 U.S. 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 address the other. *See* ***id.*** at 697.

A defendant is not automatically entitled to a hearing upon filing a postconviction motion that alleges ineffective assistance of counsel. A circuit court must grant a hearing only if, as a matter of law, the motion contains allegations of material fact that, if true, would entitle the defendant to relief. *See* ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. We

independently review a circuit court's decision to grant or deny a hearing. *See* ***id.*** If, however, the defendant does not allege sufficient material facts that, if true, would entitle him or her to relief, if the allegations are merely conclusory, or if the record conclusively shows that the defendant is not entitled to relief, the circuit court has discretion to deny a postconviction motion without a hearing. *See* ***id.*** We review a circuit court's discretionary decisions with deference. *See* ***id.***

According to Etherly, his trial counsel was ineffective for failing to file a pretrial motion to bar Manthe's testimony because Manthe improperly offered expert testimony that Etherly's conduct was consistent with drug trafficking. Admissibility of expert testimony in Wisconsin is governed by WIS. STAT. § 907.02, which codifies the ***Daubert*** standard. *See* ***State v. Giese***, 2014 WI App 92, ¶¶2, 17, 356 Wis.2d 796, 854 N.W.2d 687. The statute provides, in pertinent part:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if the testimony is based upon sufficient facts or data, the testimony is the product of reliable principles and methods, and the witness has applied the principles and methods reliably to the facts of the case.

Sec. 907.02(1). Under this standard, the circuit court has a "gate-keeper function ... to ensure that the expert's opinion is based on a reliable foundation and is relevant to the material issues.... The goal is to prevent the jury from hearing conjecture dressed up in the guise of expert opinion." ***Giese***, 356 Wis.2d 796, ¶¶18-19. The ultimate decision to admit or exclude expert testimony rests in the circuit court's broad discretion, *see* ***State v. Smith***, 2016 WI App 8, ¶10, 366 Wis. 2d 613, 874 N.W.2d 610, and we accept the circuit court's decision "if it has a rational

basis and was made in accordance with accepted legal standards in view of the facts in the record," *see* ***Giese***, 356 Wis. 2d 796, ¶16.

The record conclusively shows that Etherly's trial counsel did not perform deficiently by forgoing a pretrial challenge to the admissibility of Manthe's testimony. Manthe testified at trial that he had participated in a "couple hundred" drug investigations, and that he had received specialized training specific to such investigations. Based on that training and extensive experience, he concluded that Etherly intended to distribute the sixty-four oxycodone pills found with him in the rental car on November 15, 2015. Manthe explained that the quantity of the pills and the thousands of dollars in cash that Etherly had on his person were all indicators of drug trafficking. The presence of many twenty-dollar bills was also a trafficking indicator, he said, because the street value of an oxycodone pill is normally twenty dollars in the West Allis community. Additionally, Manthe testified that drug traffickers commonly use vehicles that assist the dealers in maintaining anonymity, and Etherly matched that aspect of the drug trafficking profile because police discovered him in a rental car. At the close of the evidence, the circuit court found that the jury could consider Manthe an expert and instructed the jury as to the how it should evaluate expert testimony.

The circuit court made similar findings and reached similar conclusions in postconviction proceedings. Based on Manthe's trial testimony, the circuit court determined that Manthe was "more than qualified as an expert to testify about intent to deliver based on his extensive training and experience." The circuit court highlighted Manthe's years of police work and his hundreds of drug investigations, including investigations involving sales of oxycodone and other prescription drugs, and the circuit court took into account the indicia of drug trafficking that Manthe described.

In light of the circuit court's findings at trial and in postconviction proceedings, Etherly fails to demonstrate that the circuit court's conclusions about Manthe's expertise would have been different if trial counsel had raised the issue in a pretrial hearing. Accordingly, Etherly fails to show that his trial counsel performed deficiently by not pursuing such a hearing. *See* ***State v. Ziebart***, 2003 WI App 258, ¶14, 268 Wis. 2d 468, 673 N.W.2d 369 (explaining that counsel's failure to present a legal challenge is not deficient performance if the challenge would not have succeeded).

Because Etherly fails to satisfy the deficiency prong of the ***Strickland*** analysis, we need not reach the prejudice prong, *see* ***id.***, 466 U.S. at 697, but we elect to do so for the sake of completeness. The record conclusively shows that Etherly was not prejudiced by the omission of a pretrial ***Daubert*** hearing. Etherly asserts that, but for trial counsel's deficient performance, the jury would not have heard Manthe's expert testimony but, as Etherly acknowledges, "some courts have recognized that a police officer's training and experience are sufficient under the ***Daubert*** standard to testify as an expert in the field of drugs and drug trafficking." The State's response directs our attention to several such cases, from a variety of jurisdictions.[2] Indeed, in a case upholding a trial court's decision to permit expert testimony from a police officer about street-level drug dealing, the Sixth Circuit observed: "Courts have *overwhelmingly* found police

[2] *See, e.g.*, ***United States v. Schwarck***, 719 F.3d 921, 923-24 (8th Cir. 2013) (permitting a police officer to give expert testimony concerning the modus operandi of drug dealers to rebut the defendant's claim that he was merely a user and not a trafficker); ***United States v. West***, 671 F.3d 1195, 1201 n.6 (10th Cir. 2012) (upholding a police officer's expert opinion that items found in the defendant's apartment were consistent with the distribution of marijuana); ***United States v. Garcia***, 447 F.3d 1327, 1335 (11th Cir. 2006) (recognizing that an experienced narcotics officer may provide expert testimony to help a jury understand the significance of certain conduct or methods of operation unique to drug trafficking); ***United States v. Parra***, 402 F.3d 752, 757-59 (7th Cir. 2005) (allowing a DEA agent to testify as an expert about the *modus operandi* of drug traffickers).

officers' expert testimony admissible where it will aid the jury's understanding of an area, such as drug dealing, not within the experience of the average juror." *See* ***United States v. Harris***, 192 F.3d 580, 588-89 (6th Cir. 1999) (citation omitted, emphasis added).

Here, the circuit court expressly found in postconviction proceedings that, if trial counsel had brought a pretrial motion to exclude Manthe's expert testimony under ***Daubert*** and WIS. STAT. § 907.02, the circuit court would have denied the motion in light of the substantial expertise Manthe displayed. Etherly fails to show that such a ruling would have constituted an erroneous exercise of the circuit court's broad discretion in resolving evidentiary disputes. *Cf.* ***Smith***, 366 Wis. 2d 613, ¶10. Accordingly, Etherly fails to show a reasonable probability that the outcome of the trial would have been different if his trial counsel had brought a pretrial motion to exclude Manthe's testimony. *See* ***State v. Giebel***, 198 Wis. 2d 207, 219, 541 N.W.2d 815 (Ct. App. 1995) (concluding, in the context of a sentencing challenge, that the defendant did not prove prejudice where the circuit court found it would not have exercised its discretion any differently if trial counsel had performed as defendant suggested).

In sum, the record conclusively shows that Etherly's trial counsel was not ineffective for failing to file a pretrial motion to exclude Manthe's expert testimony. The circuit court therefore properly denied this claim without a hearing.

We turn to the claim that the circuit court erred by denying Etherly a mistrial on the ground that the prosecutor's closing argument improperly referenced his decision not to testify. The State appears to concede that the prosecutor's comment was improper and argues that any error was harmless. *See* ***State v. Lindell***, 2001 WI 108, ¶107 n.16, 245 Wis. 2d 689, 629 N.W.2d 223 (recognizing that a prosecutor's comment on the defendant's choice not to testify is subject

to harmless error analysis). We assume without so holding that the prosecutor erred. We agree with the State that any error was harmless beyond a reasonable doubt.

Whether an error was harmless in a particular case presents a question of law that we review *de novo*. *See* ***State v. Nelson***, 2014 WI 70, ¶18, 355 Wis. 2d 722, 849 N.W.2d 317. We must determine "whether it is beyond a reasonable doubt that the jury would have come to the same conclusion absent the error," or, stated differently, "whether it was 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" ***State v. Magett***, 2014 WI 67, ¶29, 355 Wis. 2d 617, 850 N.W.2d 42 (citations omitted). "We review the totality of the circumstances to determine harmless error." ***State v. Harris***, 2008 WI 15, ¶48, 307 Wis. 2d 555, 745 N.W.2d 397.

In reviewing the totality of the circumstances here, we first consider the circuit court's instructions to the jury, in conformity with WIS JI—CRIMINAL 315, that the defendant "has the absolute constitutional right not to testify" and that "the defendant's decision not to testify must not be considered by you in any way and must not influence your verdict in any manner." Etherly suggests that these instructions were insufficient, pointing to the Criminal Jury Instruction Committee Comment providing: "where the prosecutor makes improper comment about the defendant's failure to take the witness stand, a more detailed instruction may be required that directs the jury to disregard the comment." *See* WIS JI—CRIMINAL 315, cmt. However, the Committee's recognition that some circumstances may require an instruction to disregard a prosecutor's remark does not suggest that such an instruction is always required. *Cf.* ***Watson v. State***, 64 Wis. 2d 264, 279, 219 Wis. 2d 398 (1974) (observing that a corrective instruction to disregard a prosecutor's comment on the defendant's refusal to give a statement may draw unwanted attention to the defendant's silence). In this case, the circuit court instructed

the jury three times that the State had the burden to prove the defendant's guilt, giving the jury the third iteration of this instruction immediately after the prosecutor concluded her closing remarks. In doing so, the circuit court reminded the jury that defendants "are not required to prove their innocence." The circuit court also told the jury that the defendant had the "absolute constitutional right not to testify" and directed the jury not to consider the defendant's silence. We assume that jurors follow instructions. *See* ***State v. LaCount***, 2008 WI 59, ¶23, 310 Wis. 2d 85, 750 N.W.2d 780.

Moreover, the evidence against Etherly was overwhelming. To obtain a conviction for possession with intent to deliver oxycodone, the State was required to prove four elements beyond a reasonable doubt: (1) Etherly possessed a substance; (2) the substance was oxycodone; (3) Etherly knew or believed that the substance was oxycodone; and (4) Etherly intended to deliver oxycodone. *See* WIS JI—CRIMINAL 6035. The parties stipulated to the second element, however, so the State was required to produce evidence to prove only the other three.

To prove that Etherly possessed oxycodone, the State presented testimony from Vanden Boogard that he saw Etherly alone in a car with its motor running. When Etherly got out of the car, Vanden Boogard saw in plain view an unlabeled pill bottle in the passenger area. The bottle contained sixty-four oxycodone tablets.

To prove that Etherly knew that the sixty-four tablets contained oxycodone and that he intended to deliver them, the State presented evidence that when Vanden Boogard directed Etherly to keep his hands visible, Etherly instead dropped them out of sight. The State also showed that Etherly was near a business whose neighbors had complained about drug activity in the area. Further, the State showed that Vanden Boogard found Etherly in a rental car, that

Vanden Boogard smelled the odor of marijuana emanating from that car, and that Vanden Boogard saw marijuana "all over the center console" of that car. Vanden Boogard found two cellphones in the rental car and two cellphones on Etherly's person at the time of his arrest. Etherly also had more than $6,000 in cash, including eighty-nine twenty-dollar bills. Manthe gave expert testimony about why the rental car, the number of oxycodone pills at issue, the substantial amount of cash in small denominations, and the numerous cellphones indicated drug trafficking.

Etherly directs our attention to Vanden Boogard's testimony that a man approached the car while Vanden Boogard was searching it and that the man asked to retrieve a jacket and wallet. Etherly also emphasizes that he appeared to be sleeping before his arrest in the parking lot, that he did not confess, and that the State did not present any forensic evidence, such as fingerprints or DNA analysis, connecting him to the bottle of oxycodone. These aspects of the case, however, do not aid his claim for relief.

Etherly implies that Vanden Boogard's testimony about an unidentified man who approached the car during the search somehow undermines the evidence that Etherly possessed oxycodone and intended to deliver it. The bottle of oxycodone pills, however, was in the car, in the area where Etherly was seated, and in the area where Etherly dropped his hands. The significance and strength of that evidence is not diminished by testimony about an unidentified man outside of the car. Even assuming that such testimony gives rise to an inference that the unidentified man had some connection to the oxycodone, possession of an item may be shared, *see* ***State v. Peete***, 185 Wis. 2d 4, 16, 517 N.W.2d 149 (1994), and the circuit court so instructed the jury.

We also agree with the State that Etherly fails to explain how the State's case is weakened by testimony that he was apparently sleeping in the rental car when Vanden Boogard approached it.[3] As to Etherly's emphasis on the absence of a confession and the lack of either DNA or fingerprint analysis, this is merely a way of saying that the evidence was circumstantial rather than direct. We agree with that assessment, but we reject the suggestion that the evidence was less powerful for that reason. As Wisconsin courts have long recognized, "circumstantial evidence is oftentimes stronger and more satisfactory than direct evidence." *See* ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990).

In sum, the evidence that the State presented was overwhelming, and the jury received repeated and proper instruction on how to assess that evidence. Accordingly, we do not hesitate to conclude that the prosecutor's closing remarks, assuming that they were made in error, were harmless beyond a reasonable doubt. For all the foregoing reasons, we affirm.

IT IS ORDERED that the judgment and postconviction order 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

[3] In the reply brief, Etherly seeks to explain why his sleeping in the rental car undermines the State's evidence. We do not consider arguments presented for the first time in a reply brief. *See* ***Bilda v. County of Milwaukee***, 2006 WI App 57, ¶20 n.7, 292 Wis. 2d 212, 713 N.W.2d 661. Moreover, the single sentence that he offers is nothing more than a speculative assertion that, because he fell asleep, he was not pursuing any drug deals.