COURT OF APPEALS
DECISION
DATED AND FILED

October 14, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP569-CR **Cir. Ct. No. 2007CF2714**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DARRYL E. DERAMUS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEFFREY A. KREMERS and KEVIN E. MARTENS, Judges. *Affirmed.*

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

¶1 PER CURIAM. Darryl E. Deramus appeals from a judgment of conviction, entered upon a jury's verdict, for one count of felon in possession of a firearm and one count of obstructing an officer. He also appeals an order denying

a motion for postconviction relief.[1] Deramus asserts that it was error for the court to admit evidence of additional guns recovered when Deramus was not alleged to have possessed those weapons. He also asserts that he was denied the right to effective assistance of counsel when his trial attorney failed to object to this evidence on relevancy grounds, and when counsel failed to object to testimony about a "shooter's nest." We conclude that the circuit court did not erroneously exercise its discretion in admitting the evidence of additional weapons and that counsel was not ineffective. We therefore affirm the judgment and order.

BACKGROUND

¶2 On June 17, 2007, at approximately 11:15 p.m., a caravan of four Milwaukee police squad cars was on patrol as part of the "neighborhood safety initiative." They approached a home on North 28th Street; a sign had been posted, stating, "No Loitering, No Prowling." However, a group of individuals had congregated outside the home. It also appeared some of the individuals were publicly consuming alcohol. The lead car of the caravan stopped to investigate; the other squads followed suit.

¶3 As the police vehicles stopped, one of the individuals—later identified as Deramus, who was not a resident of the home—turned away from the officers and fled inside the house. As Deramus was turning, one of the officers noticed a gun, calling out its presence to the other officers. That officer and two others noticed Deramus toss or drop the gun to his side; the police later recovered

[1] The Honorable Jeffrey A. Kremers presided over the trial and entered the judgment of conviction. The Honorable Kevin E. Martens entered the order denying the postconviction motion.

an Intratec 9mm semi-automatic handgun, loaded with twenty-seven rounds, in the area where Deramus had tossed his weapon. The gun had been tossed near some bushes, landing near a beer can and a beer bottle.

¶4 Officers pursued Deramus into the home. Officer Eric Rom was the first officer behind him; Rom was followed immediately by Officer Rodolfo Gomez. Deramus, who was wearing a black T-shirt, had locked a "Chicago-style" security door behind him but, as the door had no glass or screen, Rom was able to reach in and open the door from the inside. Deramus then tried to close the interior door on Rom, who blocked it. Deramus fled through the house and up a set of stairs. As Rom entered the home, another individual appeared from a side room; Rom secured that individual as two other officers came in behind him; Gomez continued forward while Officer Kevin Bolyard took over with the new individual so that Rom could continue to pursue Deramus.

¶5 Gomez and Rom pursued Deramus upstairs. Gomez had observed him run up the stairs and heard a door slam, but the officers were uncertain if he was on the second floor or in the third-floor attic. As another officer secured and covered a locked door leading to the second floor apartment,[2] Gomez and Rom quickly checked the attic to ensure no one was hiding there, waiting to ambush police. In the attic, the officers noticed that the windows were barricaded with mattresses and cardboard and there were hundreds of rounds of ammunition; Gomez later described this as a "shooter's nest."

[2] The home was a duplex-style house, with separate residences on the first and second floors.

¶6 Having confirmed no one was on the third floor, Gomez and Rom returned to the second floor, where Rom broke open the locked door. As the officers were making their way through that apartment, Officer Thomas Obregon—who was outside, securing the weapon Deramus had discarded—radioed that the suspect was now out on the second-floor porch. The officers approached and apprehended Deramus, who was now wearing a white T-shirt or tank. A sweaty black T-shirt was recovered in the doorway to the porch. As he was apprehended, Deramus stated he had been inside playing video games and was not the person police were seeking.[3]

¶7 Deramus, who had previous drug-related felony convictions, was arrested and charged for being a felon in possession of a firearm for the Intratec 9mm gun recovered outside the home; carrying a concealed weapon, also relating to the Intratec weapon, which at least one officer reported was pulled from Deramus's waistband; and obstructing an officer for fleeing from Rom, discarding the weapon, and entering a home not his own in an attempt to elude police.

¶8 Prior to trial, the State advised that it would likely introduce testimony relating to "two or three" other guns that had been found in the house as police made their way through. One had been found near the individual Rom encountered when first entering the home. The other was found in plain view on a mattress as officers cleared the second floor. Deramus's attorney objected, arguing that the probative value of that testimony would be far outweighed by the danger of unfair prejudice. The court denied the motion, but offered to give a

[3] After Deramus made this claim, one of the officers felt the television that was in the room and noted that it was cool to the touch, suggesting it had not been recently turned on.

curative instruction to the jury, which would remind them that Deramus was only charged with respect to the weapon recovered outside the house.

¶9 After a two-day trial at which five officers testified, the jury convicted Deramus on the felon in possession and obstruction counts, but acquitted him on the concealed weapon charge. He was sentenced to four years' initial confinement and five years' extended supervision on the possession count, and a consecutive nine months in jail on the obstruction charge.

¶10 Deramus then filed a postconviction motion. He alleged it was error for the court to admit evidence of other guns because that evidence was irrelevant or, if relevant, unfairly prejudicial. This was demonstrated, he argued, by a question the jury sent to the court and by its split verdict. Deramus also argued that counsel was ineffective for not objecting to the other guns evidence on relevancy grounds and for failing to object at all to the testimony regarding the "shooter's nest." The court denied this motion on briefs, stating that the information was relevant: given that Deramus's defense went to identification, the testimony was necessary to provide a "full and meaningful narrative." The court further stated that because the information was relevant, and would have been admissible even over appropriate objections, counsel was not ineffective. Deramus appeals.

DISCUSSION

I. Admissibility of Evidence, Relevance Grounds

¶11 Deramus first posits that evidence of weapons found inside the house was not relevant because he was only charged with possession of the

Intratec 9 mm found outside the house. Therefore, he reasons, evidence of other guns should not have been admitted.

¶12 Generally, all relevant evidence is admissible and irrelevant evidence is inadmissible. *See* WIS. STAT. § 904.02 (2007-08).[4] The question of admissibility is committed to the trial court's discretion. ***State v. Dukes***, 2007 WI App 175, ¶26, 303 Wis. 2d 208, 736 N.W.2d 515. Relevant evidence is evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." WIS. STAT. § 904.01.

¶13 "The proffered evidence need not prove a fact in a 'substantial way,' but it must do more than 'simply afford[] a possible ground of suspicion against another person ….'" ***Michael R.B. v. State***, 175 Wis. 2d 713, 724, 499 N.W.2d 641 (1993) (citation omitted). The evidence must connect the defendant to the crime, "either directly or inferentially–'factual resemblance' alone is not enough." ***Id.*** at 725.

¶14 The circuit court never made a determination regarding relevance of evidence of other guns because it was not asked to. Deramus argues that the circuit court, in reviewing the prejudice objection, should have made a threshold relevancy determination. *See* WIS. STAT. § 901.04(1).[5] It is not clear that § 901.04(1) requires such a determination in the absence of a direct challenge to

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

[5] WISCONSIN STAT. § 901.04(1) states, in relevant part, only that "[p]reliminary questions concerning … the admissibility of evidence shall be determined by the judge ...."

relevance: a party is required to state an objection with specificity to facilitate the court's review, *see* ***State v. Nielsen***, 2001 WI App 192, ¶11, 247 Wis. 2d 466, 634 N.W.2d 325, and a prejudice objection presupposes the evidence otherwise, *see* WIS. STAT. § 904.03.

¶15 In any event, there was at least an implicit determination that the evidence of other guns was relevant. The trial court explained that "given that they had to go in this house and search for the person they saw running into the house, having allegedly dropped a gun outside, I think it would unfairly restrict the State's witnesses" because they would effectively have to edit their narrative testimony while on the stand. The postconviction court, in rejecting Deramus's postconviction motion, also explained that "the evidence was relevant to establish what the officers encountered of their pursuit of the defendant in the home and to provide a full and meaningful narrative of events to jurors." We agree.

¶16 Deramus's defense strategy was to challenge the officers' identification of him: he was wearing a black T-shirt out front but the arrested individual was wearing a white shirt. The officers' testimony about the entire sequence of events from their perspectives served to create a contextual explanation for how the officers could be certain they had arrested the correct individual.

¶17 It appears easy enough, when reviewing the transcripts of the officers' testimony, to excise the brief portions of testimony referring to other guns. However, as the trial court recognized during the motion *in limine* hearing, and as the postconviction court explained, "it would have been extremely limiting for the officers to trim their testimony and not provide an overall picture of what they encountered in the home." *See* ***Dukes***, 303 Wis. 2d 208, ¶28 (evidence not

excludable as other acts "if it is part of the panorama of evidence needed to completely describe the crime that occurred and is thereby inextricably intertwined with the crime").

¶18 Further, the entire sequence of events goes not only to the question of Deramus's possession of a firearm, but to the obstruction charge as well. "[E]vidence of flight and resistance to arrest has probative value as to guilt." ***State v. Miller***, 231 Wis. 2d 447, 460, 605 N.W.2d 567 (Ct. App. 1999). A discussion of what happened during Deramus's flight is therefore relevant and admissible.[6]

II. Admissibility of Evidence, Prejudice Grounds

¶19 Deramus also argues that even if the evidence of the other weapons was admissible, the court nevertheless erred by not excluding the evidence because it was unfairly prejudicial. He asserts prejudice is shown by a question the jury sent to the court during deliberations asking, "if a felon was aware of the existence of a weapon and it was within his reach is this considered possession of a firearm?"[7] The prejudice is further shown, Deramus claims, by the fact that the jury convicted him of possession, but not concealment.

¶20 First, it is not clear that the evidence, considered in context, is prejudicial. Although two officers testified they had found guns inside the home, the officers also testified that those additional guns were not linked to the

[6] Deramus's flight also raises a question of why he attempted to flee by going *inside* the house, rather than attempting to elude officers outside, in the dark. The State suggests it may have been precisely because Deramus knew weapons were in the home. Although this is a provocative theory, it is largely speculative.

[7] The court responded, with the parties' agreement, by advising the jury to re-read the instruction on possession.

defendant. In addition, the State emphasized in its own opening and closing statements that the additional guns were not the ones for which Deramus was charged.

¶21 Second, the court properly gave a cautionary instruction to the jury, advising jurors that they "heard some testimony about other guns being located inside the house. Mr. Deramus is not charged … with respect to any other weapons found in the house or on that date. The only weapon that he is charged with possessing is [the Intratec, introduced as Exhibit 10] and that is the only weapon you should consider[.]" We presume jurors follow the court's instructions. ***State v. Adams***, 221 Wis. 2d 1, 12, 584 N.W.2d 695 (Ct. App. 1998). Although Deramus complains the court had to be reminded to give the instruction, we discern no error. The instruction was timely given prior to closing arguments and deliberation.[8]

¶22 Third, the jury's question and the split verdict are entirely consistent with theories put up by defense counsel. The Intratec gun was recovered on the ground, close to some bushes and next to a beer bottle. Counsel tried to establish, through cross-examination, that perhaps the gun—which was recovered with mud in and on the barrel—had been on the ground and it was the bottle, not the gun, that they had observed Deramus drop. The jury's question is quite logical in this context, attempting to ascertain whether, even if they believed the gun was already on the ground, Deramus could nevertheless be deemed in possession of it.

[8] The fact that it was given separately from other instructions may actually have served to emphasize the instruction's importance, rather than diminish it.

¶23 Indeed, the jury instruction advises, in part, that an item is "in a person's possession if it is in an area over which the person has control and the person intends to exercise control over the item." *See* WIS JI—CRIMINAL 1343. Unlike evidence that established Deramus's proximity to the Intratec weapon, nothing about the officers' testimony actually established that the guns found inside the home were within Deramus's reach. Therefore, the jury's question does not appear to indicate that it was attempting to find him guilty for the weapons in the home.

¶24 The split verdict is also wholly logical in context of both the defense theory posited above and the testimony as a whole. If the jury was subscribing to the defense theory that the weapon was already on the ground, they could not call the weapon concealed. Alternatively, while officers testified that Deramus pulled the weapon from his waistband area, at least one officer testified he did not see the weapon until Deramus actually had it in his hand. The jury could therefore accept the latter testimony and conclude that Deramus had possession of a weapon without also having to accept that he had concealed it.

¶25 Neither the jury's question nor the split verdict persuades us that the additional gun evidence was unfairly prejudicial and subject to exclusion. The court did not erroneously exercise its discretion.

III. Ineffective Assistance of Counsel

¶26 Deramus also alleged that counsel was ineffective for failing to object to the additional gun evidence on relevance grounds, and for failing to object to evidence of a "shooter's nest" on any grounds. The postconviction court determined this evidence would have been admitted over any objection and, therefore, counsel was not ineffective. We agree.

¶27 To demonstrate ineffective assistance of counsel, Deramus must show that counsel's performance was deficient, and that the deficiency prejudiced the defense. *See* ***Strickland v. Washington***, 466 U.S. 608, 687 (1984). We have already determined that the other gun evidence was relevant and admissible. Therefore, counsel was not ineffective for failing to raise a relevance objection. *See* ***State v. Anderson***, 2005 WI App 238, ¶29, 288 Wis. 2d 83, 707 N.W.2d 159, *reversed on other grounds by* 2006 WI 77, 291 Wis. 2d 673, 717 N.W.2d 74 (counsel not deficient for failing to raise meritless objection); ***State v. Allen***, 2004 WI 106, ¶26, 274 Wis. 2d 568, 682 N.W.2d 433 (defendant must satisfy both prongs to be entitled to relief on ineffective assistance claim).

¶28 Deramus also complains that counsel should have been prepared for the "shooter's nest" testimony, in light of a reference to the term in the criminal complaint. As with the other gun evidence, Deramus complains of unfair prejudice and irrelevance.

¶29 The only testimony about a "shooter's nest" came from Officer Rodolfo Gomez. He was explaining the pursuit of Deramus, and testified as follows on direct examination:

> Q You check the attic. How long does that take?
>
> A It was pretty quick, a minute at the most.
>
> Q No one in the attic?
>
> A No, ma'am.
>
> Q Do you see anyone flying out windows off the top of the building or anything like that?
>
> A No. The windows were barricaded with mattresses and cardboard.
>
> Q Up in the attic?

> A Yes. It was a shooter's nest, as I would describe it, up there.
>
> Q Okay. So no one is in the attic. And now you come back downstairs. …

¶30 This is the only "shooter's nest" reference; none of the other officers used the term and the State did not use it in any of its arguments. Although the term might be slightly inflammatory—assuming jurors knew its meaning—we are not persuaded that the evidence is unfairly prejudicial, particularly in light of the probative value of Gomez's testimony. A description of the barricaded windows was relevant to the identification issue, explaining how officers went through the home and cleared the third floor and knew their black-shirted suspect did not leave through an attic window. Because the description of the area was relevant, it would have been admissible over counsel's objection.[9] Counsel is therefore not deficient for failing to make the objection. *See* ***Anderson***, 288 Wis. 2d 83, ¶29.

By the Court.—Judgment and order affirmed.

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

[9] Counsel may also have made a strategic decision to forgo an objection so as to avoid calling attention to the term.