COURT OF APPEALS
DECISION
DATED AND FILED

March 6, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2010AP2559-CR **Cir. Ct. No. 2006CF4983**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JERMAINE KENNARD YOUNG,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: TIMOTHY M. WITKOWIAK and CARL ASHLEY, Judges.[1] *Affirmed*.

[1] The Honorable Timothy M. Witkowiak presided over the suppression hearing and trial and entered the judgment of conviction. The Honorable Carl Ashley entered the order denying the defendant's postconviction motion.

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

¶1 BRENNAN, J. Jermaine Kennard Young was convicted of one count of possession with intent to deliver cocaine, in violation of WIS. STAT. § 961.41(1m)(cm)4. (2009-10),[2] following a jury trial.[3] Young appeals from the judgment of conviction and from the trial court's order denying his postconviction motion for a new trial. He raises three issues on appeal. First, Young argues that the trial court erred in not suppressing the drug evidence because he was unlawfully stopped, searched and arrested.[4] Second, he argues that the trial court erred in granting the State's request for a party-to-a-crime ("PTAC") jury instruction. Finally, he argues that his trial counsel was ineffective for failing to: (1) request a lesser-included jury instruction on simple possession; (2) ask for an entrapment jury instruction; and (3) file an ***Outlaw***[5] motion seeking the name of the confidential informant ("CI"). We reject each of his arguments and affirm.

[2] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

[3] Young was acquitted on two other charges, which we do not discuss in this opinion.

[4] In a single sentence, Young also asserts that his statements to the police should be suppressed. This argument is not developed and will not be considered. *See* ***Harris v. Kritzik***, 166 Wis. 2d 689, 694, 480 N.W.2d 514 (Ct. App. 1992) (undeveloped arguments need not be considered).

[5] *See* ***State v. Outlaw***, 108 Wis. 2d 112, 121, 321 N.W.2d 145 (1982) (setting forth the requirements a defendant must meet before the State is required to identify a confidential informant).

BACKGROUND

¶2 Young was charged with intent to deliver a controlled substance after police arrested him at a restaurant with cocaine. Prior to trial, Young's trial counsel filed a motion to suppress. At the suppression hearing, which was held over several days, Milwaukee Police Officer Alejandro Arce, an experienced narcotics investigator, testified that a CI, who was known to police but not named in the case, told officers that a drug sale was going to take place one hour from then. The CI said that at 2:00 p.m., a thin black male in his thirties would be driving a blue two-door Chevy Tahoe with chrome rims to 60th Street and Burnham Street, with two ounces of cocaine on his person, to conduct a drug transaction. The CI told Officer Arce that he knew that the transaction was occurring because he spoke with the seller and was personally supposed to go to a particular location and purchase the cocaine. While the CI had never before purchased cocaine from the seller, the CI had spoken with the seller over the phone and a third party had contacted the seller to vouch for the CI. Officer Arce testified that he did not know this third party, but that the CI had given Officer Arce accurate information leading to a narcotics and firearm arrest one time in the past.

¶3 Officer Arce went to 60th Street and Burnham Street at 1:55 p.m. on September 14, 2006. While sitting in an unmarked police vehicle on the street, he observed a black male, later identified as Young, driving a blue two-door Chevy Tahoe. He saw the Tahoe travel eastbound down the 6100 block of West Burnham Street and pull into the parking lot of Johnnie's 7 restaurant at 6000 West Burnham Street. Officer Arce saw Young and another man get out of the vehicle and enter the restaurant. Through a window in the restaurant, Officer Arce observed Young "on a cell phone, looking out the window as if he was looking or

waiting for somebody." Officer Arce testified that Young did not buy anything in the restaurant and did not go to the counter to order. Officer Arce then called the police officers he had on standby and notified them of his observations, so that they could perform a field interview.

¶4 Milwaukee Police Officer Todd Bohlen testified at the suppression hearing that Officer Arce had notified him that a drug deal was going to take place at 60th Street and Burnham Street. Officer Arce gave him the description of the subject and said that the subject was bringing two ounces of cocaine to that location. When Officer Bohlen arrived at the location, he looked through the restaurant window and saw that Young was standing inside the restaurant, talking on a cell phone. Officer Bohlen opened the door to the restaurant and entered. He identified himself as a police officer and Young then put his hand in his left pants pocket "in a quick motion" and appeared "to be very excited, as if scared." Officer Bohlen told Young to put his hands up. Young did not comply even when Officer Bohlen drew his weapon and ordered Young to show his hands.

¶5 Despite repeated commands, to put his hands up, Young kept his hand in his pocket. Officer Bohlen then "walked closer to [Young] and pinched his hand inside his pocket so his hand could not be quickly removed, fearing he might have a weapon in that pocket based on his actions and his expressions and his failure to comply with my commands." Officer Bohlen testified that, at that point, based on his experience, he felt what he believed to be "a larger quantity of cocaine" in Young's pocket. Officer Bohlen and another officer on the scene removed two clear plastic baggies from Young's pocket that were later determined to contain two ounces of cocaine with a street value of approximately $2000.

¶6 The trial court found the officers' testimony to be credible and denied Young's motion to suppress. The case proceeded to trial. During closing argument, trial counsel moved for a mistrial based on the State's argument concerning party-to-a-crime liability. After the jury found Young guilty, trial counsel renewed that motion but the trial court denied it after post-trial briefing.

¶7 Young was sentenced to seven years of initial confinement and seven years of extended supervision. After postconviction counsel was appointed, Young filed a motion for a new trial based on the same arguments addressed in this appeal. The trial court conducted an evidentiary hearing on the ineffective assistance of trial counsel. The trial court denied the motion and this appeal follows.

DISCUSSION

I. The Stop, Search and Seizure Were Lawful.

¶8 On appeal, Young challenges the stop, search and seizure of cocaine on two grounds: (1) the police lacked probable cause for his arrest and for the subsequent search; and (2) the arrest and search could not be justified under the exigent circumstances exception to the Fourth Amendment's warrant requirement. The crux of Young's argument is that the police lacked probable cause to arrest him because they acted on a tip from a CI, whose information was not sufficiently reliable, in that it was based, in part, on information obtained from a third party unknown to police.

¶9 The State argues on appeal that there was sufficient evidence for probable cause, but even if there was not, the police had sufficient reasonable suspicion to justify a valid ***Terry***[6] stop, leading to a lawful protective search for weapons and the plain view discovery of the cocaine in Young's pocket. We agree with the State's reasonable suspicion/plain view argument and affirm the trial court's denial of Young's motion to suppress, albeit on different grounds than the trial court.[7]

¶10 The Fourth Amendment to the United States Constitution and article I, section 11 of the Wisconsin Constitution prohibit unreasonable searches and seizures by police. ***State v. Richardson***, 156 Wis. 2d 128, 137, 456 N.W.2d 830 (1990). On review of Young's Fourth Amendment challenge, we uphold the trial court's factual findings unless they are clearly erroneous. *See* ***State v. Matejka***, 2001 WI 5, ¶16, 241 Wis. 2d 52, 621 N.W.2d 891. We review the application of constitutional principles to the evidentiary facts independently of the trial court. ***Id.***

¶11 It is well-established that the police may lawfully perform an investigatory stop of a person if they possess reasonable suspicion that the person has, or is, committing a crime. *See* ***Terry v. Ohio***, 392 U.S. 1, 30 (1968); *see also*

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[6] *See* ***Terry v. Ohio***, 392 U.S. 1 (1968).

[7] Before the trial court, the State argued, and the trial court concluded, that the police had sufficient probable cause for Young's arrest and the subsequent search. We need not reach either Young's probable cause or exigent circumstances arguments because we conclude that the stop, search and arrest are lawful on other grounds. *See* ***State v. Blalock***, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989) (We decide cases on the narrowest possible ground.); *see also* ***State v. Matejka***, 2001 WI 5, ¶16, 241 Wis. 2d 52, 621 N.W.2d 891 (We determine the lawfulness of the search independently of the trial court.).

WIS. STAT. § 968.24. Reasonable suspicion must be based on "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." ***Terry***, 392 U.S. at 21.

> Reasonable suspicion is a less demanding standard than probable cause not only in the sense that reasonable suspicion can be established with information that is different in quantity or content than that required to establish probable cause, but also in the sense that reasonable suspicion can arise from information that is less reliable than that required to show probable cause.

Alabama v. White, 496 U.S. 325, 330 (1990). The reasonableness of the suspicion is judged by an objective standard and is based on the totality of the circumstances. ***Richardson***, 156 Wis. 2d at 139.

¶12 A CI's tip may form the basis for reasonable suspicion, just as it may for probable cause, as long as under the totality of the circumstances, the information is sufficiently reliable. *See* ***White***, 496 U.S. at 330. Even when the informant is anonymous, the same totality of the circumstances test applies to determine the reliability of the information and existence of reasonable suspicion for a lawful ***Terry*** stop. ***White***, 496 U.S. at 330-31.

¶13 When determining the reliability of a CI's tip, the police may consider, among other things: (1) past police experience with the CI, *see* ***State v. McAttee***, 2001 WI App 262, ¶9, 248 Wis. 2d 865, 637 N.W.2d 774; (2) the content and specificity of the CI's tip; and (3) the ability to verify the details of the CI's tip, *see* ***Richardson***, 156 Wis. 2d 141-42. However, "[t]here are no longer specific prerequisites to a finding of confidential informant reliability." ***State v. Jones***, 2002 WI App 196, ¶13, 257 Wis. 2d 319, 651 N.W.2d 305. "Reasonable suspicion, like probable cause, is dependent upon both the content of information possessed by police and its degree of reliability." ***White***, 496 U.S. at 330. The

more specific and unique the details of the informant's tip, the more likely the informant is telling the truth. ***Richardson***, 156 Wis. 2d at 142. When the police are able to corroborate even innocent details, an inference arises that the informant is telling the truth about the criminal activity. ***Id.***

¶14 Here, the totality of the circumstances support the conclusion that the CI's tip was reliable: (1) the CI was known to police and had provided reliable information in the past; (2) the CI's tip was specific and detailed; and (3) the police were able to corroborate many details of the tip before the stop.

¶15 First, the CI was known to police and had proven himself reliable in one past narcotics and firearm arrest. A known informant's past proven reliability is sufficient indicia of the reliability of his or her present information even without corroboration. ***McAttee***, 248 Wis. 2d 865, ¶12 ("[F]or purposes of probable cause to arrest, the police were entitled to rely on information from a known and reliable informant without independently determining the reliability of the informant's source or the source's information.").

¶16 Second, the CI here gave many specific details, such as: the description of the drug dealer (a thin black male in his thirties); a unique and detailed description of the car the subject would be driving (a blue two-door Chevy Tahoe with chrome rims); the time, date and location of the drug deal (2:00 p.m. on September 14, 2006, at 60th Street and Burnham Street); and the type and amount of the drug to be purchased from the subject (two ounces of cocaine). The degree of detail provided here enhances the reliability of the CI's tip. *See* ***Richardson***, 156 Wis. 2d at 142 ("[T]he greater the amount, specificity and uniqueness of the detail contained in an anonymous tip, the more likely it is that the informant has an adequate basis of knowledge.").

¶17 Third, prior to the stop, the police corroborated many of the details provided by the CI.

¶18 Officer Arce testified that he went to 60th Street and Burnham Street at 1:55 p.m. and observed Young, a black male, driving a blue two-door Chevy Tahoe, traveling eastbound in the 6100 block of West Burnham Street. As such, police verified the subject, car, location and time provided by the CI. Officer Arce saw Young pull into the parking lot of Johnnie's 7 restaurant at 6000 West Burnham Street. Officer Arce watched as Young got out of the car and went into the restaurant. Once Young was in the restaurant, Officer Arce saw him on a cell phone, "looking out the window as if he was looking or waiting for somebody." Officer Arce did not see Young buy anything and did not see Young go to the counter to order. These observations corroborate the CI's statement that Young was there to sell drugs. Officer Arce testified that he then called the officers he had on standby and notified them of his observations so that they could perform a field interview of Young.

¶19 Officer Bohlen further corroborated the CI's tip prior to performing the stop. Before he entered the restaurant, Officer Bohlen saw, through the window, that a man matching the CI's description was standing inside the restaurant, talking on a cell phone. Officer Bohlen testified that the subject "appeared very nervous. He was talking on his cell phone. Appeared to be—eyes darting around."

¶20 Thus, many details of the proven-reliable CI's tip were corroborated extensively by police before the stop occurred. The police are not required to corroborate every detail provided by a CI and corroboration of even "innocent" details may be sufficient. ***Id.*** ("[C]orroboration by police of innocent details of an

anonymous tip may under the totality of the circumstances give rise to reasonable suspicion to make a stop.").

¶21 Here, based upon the known CI's detailed tip and the police officers' independent verification of many of the details of that tip, the police had a reasonable suspicion that Young was about to sell drugs, and thus, the police were lawfully justified in making an investigative stop.

¶22 Young argues that the police were not entitled to rely on the CI's tip as a basis for the ***Terry*** stop because the tip was based on hearsay from a third party unknown to police. Essentially, Young contends that the police must corroborate *every* detail before they have reasonable suspicion for a stop. That is not the law. "[C]orroboration by police of innocent details of an anonymous tip may under the totality of the circumstances give rise to reasonable suspicion to make a stop." ***Richardson***, 156 Wis. 2d at 142.

¶23 Additionally, Young argues that Officer Bohlen entered the restaurant with his gun drawn, which turned the stop into an impermissible arrest without probable cause. In doing so, Young challenges the trial court's factual finding that Officer Bohlen's testimony was credible. Officer Bohlen testified that he did not draw his gun until he entered the restaurant, saw Young fail to comply with the command to put his hands up and saw Young put his left hand inside his left pants pocket. Officer Bohlen's testimony provides a reasonable explanation of the circumstances and supports the trial court's factual finding. We will not upset a trial court's factual finding unless clearly erroneous. *See* ***id.*** at 137.

¶24 Following the execution of a valid ***Terry*** stop, Officer Bohlen's pinch of Young's hand inside his pocket was a permissible protective search. An officer may conduct a limited protective search for concealed weapons as part of

an investigatory stop, if "he has reason to believe that he is dealing with an armed and dangerous individual." ***Id.***, 392 U.S. at 27. Officer Bohlen's experience had taught him that drug dealers commonly are armed with guns, and Officer Bohlen had a reasonable suspicion that Young was at the restaurant to sell cocaine. Although ordered to show his hands, Young put and kept his hand in his pocket. Thus, Officer Bohlen was justified in protecting himself by pinching Young's hand.

¶25 The protective pinch of Young's hand in his pocket did not exceed the limited scope of an investigatory search. *See* ***State v. McGill***, 2000 WI 38, ¶23, 234 Wis. 2d 560, 609 N.W.2d 795 (Whether a protective search exceeds the scope of an investigatory stop—and turns an investigatory stop into something more—depends on its reasonableness given the totality of the circumstances.); *see also* ***Richardson***, 156 Wis. 2d at 139. It was reasonable for Officer Bohlen to pinch Young's hand to keep Young from potentially harming Officer Bohlen and his fellow officers. Officer Bohlen did not search Young further. He limited his gesture and even so, felt the cocaine.

¶26 In the process of pinching Young's hand over the pocket, Officer Bohlen felt a substance that was consistent with his experience of the feel of the quantity of cocaine to be sold here—two ounces. Seizing evidence of a crime in plain view, or evident by plain feel, is permissible. *See* ***Richardson***, 156 Wis. 2d at 149. Officer Bohlen testified that he believed that it was cocaine based on his past experience with several people who have had larger quantities of cocaine, such as he felt here.

¶27 Because we conclude that the police had reasonable suspicion for the stop based upon the totality of the circumstances, and because we conclude that the resulting search was lawfully limited in scope, we affirm the trial court.

II. The Trial Court Properly Exercised Its Discretion in Giving The PTAC Jury Instruction.

¶28 Young claims that the trial court erred in giving the PTAC jury instruction at the State's request over the defense's objection.[8] Young further argues that the court compounded the error by denying Young's motion for a mistrial based on the giving of the PTAC jury instruction. The basis of Young's argument is that neither his nor the State's version of the facts supported the instruction.

¶29 "[The trial] court has broad discretion in deciding whether to give a particular jury instruction." ***State v. Fonte***, 2005 WI 77, ¶9, 281 Wis. 2d 654, 698 N.W.2d 594. A trial court properly exercises its discretion by giving an instruction that "'fully and fairly inform[s] the jury of the rules of law applicable to the case and … assist[s] the jury in making a reasonable analysis of the evidence.'" ***Id.*** (citation omitted).

[8] The trial court instructed the jury that Young was guilty of possessing with the intent to deliver cocaine if he aided and abetted someone who did, stating:

> To intentionally aid and abet a person with possession of cocaine with intent to deliver, the defendant must know that another person is committing or intends to commit the crime of possession of cocaine with intent to deliver and have the purpose to assist the commission of that crime.

See WIS. STAT. § 939.05; WIS JI—CRIMINAL 400.

¶30 Young does not challenge the accuracy of the statement of law in the PTAC jury instruction given here. Rather, he argues that the facts in the record fail to support giving the instruction. Whether there is sufficient evidence to support the giving of an instruction is a question of law which we review independently of the trial court. ***State v. Head***, 2002 WI 99, ¶44, 255 Wis. 2d 194, 648 N.W.2d 413. "A court errs when it fails to give an instruction on an issue raised by the evidence." ***Id.***

¶31 The State requested the PTAC jury instruction during Young's cross-examination at trial, on the grounds that Young's testimony supported giving the instruction. Trial counsel objected on the grounds that there was no evidence that another person was involved in the drug sale.[9] The trial court granted the State's request and gave the instruction.

¶32 Young testified at trial that he went to the restaurant expecting to receive two music CDs from a cousin of a man he knew as "Jay."[10] As Young was getting out of his vehicle at the restaurant, a man handed him a bag of cocaine, which Young took, believing it was the CDs. Young testified that he realized it was cocaine, intended to throw the cocaine away, but first went inside the restaurant to call Jay.

[9] The defense also objected on the grounds that the request was untimely coming so late in the testimony. On appeal, Young has abandoned that ground. *See* ***Tatur v. Solsrud***, 167 Wis. 2d 266, 269, 481 N.W.2d 657 (Ct. App. 1992) (An issue raised in the trial court, but not raised on appeal, is deemed abandoned.).

[10] Young describes his caller as "J" in his appellate brief. The State refers to him as "Jay" in its brief. We refer to him as "Jay" to remain consistent with the transcripts in the record.

¶33 The State argued that Young's testimony on cross-examination—that he realized that the bag contained cocaine and did not throw it in the trash or call the police, but instead called Jay—was illogical and created a reasonable inference that Young intended to deliver the cocaine to Jay, thus supporting giving the PTAC jury instruction.

¶34 The defense argued that the instruction was unwarranted because it was based on Young's testimony and if the jury believed his testimony, then there was no evidence that Young intended to deliver the cocaine. But Young overlooks the evidence supporting the opposite inference—that Young intended to deliver cocaine as a party to the crime. It is for the jury, not the court, to determine which facts to believe. Because there was evidence and reasonable inferences supporting the State's PTAC theory from both direct and cross-examination testimony, the trial court did not err in giving the PTAC jury instruction. *See* ***id.***; *see also* ***State v. Coleman***, 206 Wis. 2d 199, 214, 556 N.W.2d 701 (1996) (The source of the evidence supporting the giving of a jury instruction can be either direct testimony elicited by the State or the defense, or cross-examination.).

III. Young's Trial Counsel was Not Ineffective.

¶35 Next, Young argues that his trial counsel provided ineffective assistance in three ways: (1) by failing to request a lesser-included simple possession jury instruction; (2) by failing to request an entrapment jury instruction; and (3) by failing to file an ***Outlaw*** motion to force the State to disclose the name of the CI. We conclude that trial counsel's representation was neither deficient nor prejudicial and affirm.

¶36 It is well-established that for a successful ineffective assistance of counsel claim, the defendant bears the burden of proving both that his lawyer was

deficient and that the deficient representation prejudiced the defendant. ***State v. Allen***, 2004 WI 106, ¶26, 274 Wis. 2d 568, 682 N.W.2d 433. The Sixth Amendment does not guarantee perfect representation. *See* ***State v. Williquette***, 180 Wis. 2d 589, 605, 510 N.W.2d 708 (Ct. App. 1993). For representation to be deficient, it must consist of "'errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment.'" ***Allen***, 274 Wis. 2d 568, ¶26 (citation omitted). To prove prejudice, a defendant must show that there is a reasonable probability that but for the deficiency, the result of the proceedings would have been different. ***Id.*** "'A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" ***Id.*** (citation omitted).

¶37 We review an ineffective assistance claim as a mixed question of law and fact. ***State v. Kimbrough***, 2001 WI App 138, ¶27, 246 Wis. 2d 648, 630 N.W.2d 752. "We will not reverse the trial court's factual findings unless they are clearly erroneous," but we review the effectiveness and prejudice questions independently of the trial court. ***Id.***

A. Failure to Request a Lesser-Included Simple Possession Instruction

¶38 Young's argument that his trial counsel was ineffective for failing to request a lesser-included simple possession instruction is largely based on trial counsel's testimony at the ***Machner***[11] hearing that she "probably should have"

[11] *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

asked for the instruction.[12] Young argues that trial counsel conceded ineffectiveness during the ***Machner*** hearing when she: (1) did not claim any conscious strategic reason for not requesting the instruction; and (2) argued in her postconviction brief that the factual record supported giving the simple possession instruction. While acknowledging that trial counsel's concession of ineffectiveness does not decide the issue, Young argues that trial counsel's failure to request the instruction was not "objectively reasonable."[13] *See* ***Kimbrough***, 246 Wis. 2d 648, ¶31 ("[O]ur function upon appeal is to determine whether defense counsel's performance was objectively reasonable according to prevailing professional norms."); *see also* ***Strickland v. Washington***, 466 U.S. 668, 688 (1984) (To prove ineffective assistance of counsel, a "defendant must show that counsel's representation fell below an objective standard of reasonableness.").

¶39 The State counters that the totality of trial counsel's testimony at the ***Machner*** hearing shows that trial counsel did not concede ineffectiveness and was not deficient for failing to request the lesser-included instruction, nor was Young prejudiced by the instruction's omission. We agree. Although trial counsel did testify that she "probably should have" asked for a lesser-included possession

[12] The State correctly points out that Young fails to indicate which possession instruction should have been requested. We assume, as the State did, that Young argues that his trial counsel should have requested the instruction for possession of cocaine, to wit, WIS. STAT. § 961.41(3g)(c), which makes cocaine possession a Class I felony when it is a second or subsequent offense.

[13] In ***State v. Kimbrough***, 2001 WI App 138, 246 Wis. 2d 648, 630 N.W.2d 752, we held that the test for ineffectiveness is not trial counsel's subjective averments at the postconviction hearing that he had intended to ask for a lesser-included instruction, but he inadvertently failed to do so, but rather whether trial counsel's "performance was objectively reasonable according to prevailing professional norms." *See* ***id.***, ¶¶ 24, 31.

instruction, she gave a strong strategic reason at the ***Machner*** hearing for not seeking the lesser-included instruction, namely its incompatibility with the defense strategy. "A strategic trial decision rationally based on the facts and the law will not support a claim of ineffective assistance of counsel." *See* ***State v. Elm***, 201 Wis. 2d 452, 464-65, 549 N.W.2d 471 (Ct. App. 1996).

¶40 Trial counsel testified at the ***Machner*** hearing that the defense's theory—that Young accidentally received the cocaine—would have been hurt by the inclusion of the lesser-included possession instruction. Trial counsel testified that although she and Young did not have a "conscious discussion about, well, should we hedge our bets," with the lesser-included instruction, the defense strategy had been *accidental* receipt of cocaine, not a knowing possession, much less a delivery. Trial counsel testified that "it was clearly our defense strategy that this was only temporary inadvertence, that it was because of the circumstances beyond his control and, therefore, he was not guilty." We conclude this was an objectively reasonable strategy.

¶41 Simple possession of cocaine requires proof of the following elements: (1) that the defendant possessed a substance; (2) that the substance was cocaine; and (3) that the defendant knew or believed that the substance was cocaine. *See* WIS JI—CRIMINAL 6030 (2010). Trial counsel's strategy was an all-or-nothing, inadvertent, innocent possession of the drug. Knowing possession of cocaine is inconsistent with that strategy. The trial court recognized this incompatibility when, speaking to Young at the ***Machner*** hearing, the trial court found:

> [I]t was a strategic decision that she didn't want to deal with the issue that yes, you had the cocaine and it was just for possession because that wasn't your theory.

> You were trying to get rid of it based on your own testimony through the documents. You were trying to get it back out of your hands, that you never had any idea not only of selling it or to possessing it, so she was concerned that having this lesser included would undercut your position that number one, you were just doing a friend a favor....
>
> … I can see why she would feel that you could get up on the witness stand and give your view of what happened and hopefully the jury would accept your version over that of the prosecution.

¶42 It was objectively reasonable for trial counsel to not seek the lesser-included instruction because she would have had to make awkward alternative arguments to the jury, which arguably undermined the defendant's credibility and the defense strategy. For instance, she would have had to argue that Young innocently received the cocaine and knowingly possessed cocaine, but he never intended to deliver cocaine. And arguably, giving the jury the option of conviction on a lesser charge, i.e., possession, instead of forcing the jury to choose between acquittal and delivery, was disadvantageous to Young. Thus, it was objectively reasonable for trial counsel to not seek the lesser-included instruction. *See* ***Kimbrough***, 246 Wis. 2d 648, ¶32 ("[I]f defense counsel here had chosen for strategic purposes to avoid the lesser-included defense instruction, the decision would have been imminently reasonable under the circumstances.").

¶43 Finally, Young fails to meet his burden of showing any prejudice due to the omission of the lesser-included possession instruction. Based on the jury's guilty verdict, the jurors did not believe Young's innocent-receipt testimony credible or his denial of intent to deliver. This court is not convinced that the jurors would have believed that Young only intended to possess cocaine. Also, the State's other evidence was strong: corroborated information from a reliable CI, observations of Young's nervous demeanor at the restaurant, the substantial

amount of cocaine found in his pocket, and his confession to the police that he took the cocaine into the restaurant to sell it. Accordingly, Young has not met his burden of showing a reasonable probability that giving a lesser-included instruction would have led to a different result. *See* ***Allen***, 274 Wis. 2d 568, ¶26.

B. Failure to Request an Entrapment Jury Instruction

¶44 In a two-paragraph argument that is not developed, Young asserts that his trial counsel was ineffective for failing to request an entrapment jury instruction. Young bases his entrapment argument on his testimony that the reason he went to the restaurant parking lot was because an individual named Jay called him repeatedly, asking Young to pick up two CDs, which turned out to be cocaine. In his brief, Young simply asserts, without any citation to the record for support, that Jay was a government agent. Thus he argues he was induced by a government agent into committing the crime and was thereby entitled to the entrapment jury instruction.

¶45 "Entrapment is a defense available to a defendant who has been induced by law enforcement to commit an offense which the defendant was not otherwise disposed to commit." ***State v. Pence***, 150 Wis. 2d 759, 765, 442 N.W.2d 540 (Ct. App. 1989). "The entrapment defense may only be applied when all the elements of the charged offense are established." ***State v. Jansen***, 198 Wis. 2d 765, 771, 543 N.W.2d 552 (Ct. App. 1995). After the elements for the charged crime are proven, the defendant has the burden of proof, by the greater weight of the credible evidence, to establish that he was induced to commit it. *See* WIS JI—CRIMINAL 780. If the defendant does so, the burden then shifts to the State to prove by evidence beyond a reasonable doubt, that the defendant was not

entrapped, either because the inducement was not excessive or because the defendant was predisposed to commit the crime before being induced.

¶46 First, we need not address Young's entrapment argument because it is undeveloped and unsubstantiated by any reference to the trial record. *See* ***Harris v. Kritzik***, 166 Wis. 2d 689, 694, 480 N.W.2d 514 (Ct. App. 1992). In his very brief appellate argument, Young glancingly argues that Jay's phone calls induced him to possess cocaine and that Jay was a government agent. But he points to no evidence in the record supporting a finding that Jay was a government agent, nor does our review of the record reveal any.[14]

¶47 Second, trial counsel testified at the ***Machner*** hearing that she had objectively reasonable strategic bases for not requesting the entrapment instruction: (1) entrapment was inconsistent with her innocent-receipt strategy; and (2) she did not think she could overcome the State's evidence of predisposition to commit a drug crime because of Young's past drug felony record. Trial counsel's "strategic trial decision rationally based on the facts" does not support Young's claim of ineffective assistance of counsel. *See* ***Elm***, 201 Wis. 2d at 464-65.

¶48 Trial counsel testified that entrapment was inconsistent with the defense's strategy of innocent receipt of the drugs: "[Young's] position was he

[14] We note that at the ***Machner*** hearing, Young argued that Jay was a government agent. The prosecutor advised the trial court that Jay was not the CI, and the postconviction court declared it "undisputed" that Jay was not the CI. However, because there is no evidence in the trial record as to whether Jay was a government agent, we cannot reach any conclusion on that subject.

didn't do a crime[,] not that he was entrapped into a crime." Trial counsel testified:

> Consistent with Mr. Young's defense that the person gave it to him, my defense is that that person is an agent of the State no matter -- somehow, whatever you want to call him, CI, witness, whatever, he's an agent of the State, and my defense is that it is him who provided the cocaine to Mr. Young and, therefore, you can't be party to the crime to an agent of the State.
>
> It didn't matter whether he was the CI or he wasn't a CI. It was Mr. Young's defense that that person gave him the cocaine and, therefore, he's an agent of the State, therefore, he can't be party to the crime.

¶49 Because entrapment is only available if all of the elements of the charged offense have been established, *see* ***Jansen***, 198 Wis. 2d at 771, a jury instruction on entrapment would have required the defense to ask the jury to believe Young that he was entrapped, after they rejected his innocent-receipt-of-drugs testimony. As a defense strategy, it was not unreasonable for trial counsel to want to avoid an inconsistent and awkward alternative argument that hinged on the jury both believing and disbelieving Young.

¶50 Additionally, trial counsel's concern about defeating the State's proof of Young's predisposition to commit the crime, given his past felony drug arrests, was objectively reasonable. "To establish the defense of entrapment, the defendant must show by a preponderance of the evidence that [he] was induced to commit the crime." ***State v. Hilleshiem***, 172 Wis. 2d 1, 8, 492 N.W.2d 381 (Ct. App. 1992). "[T]he burden [then] falls on the [S]tate to prove beyond a reasonable doubt that the defendant was predisposed to commit the crime." ***Id.*** at 8-9.

¶51 For all these reasons, trial counsel made an objectively reasoned decision not to pursue entrapment and her representation of Young was neither ineffective nor prejudicial. *See* ***Kimbrough***, 246 Wis. 2d 648, ¶26.

*C. Failure to Bring an **Outlaw** Motion*

¶52 The premise of Young's ***Outlaw*** argument is that had trial counsel brought an ***Outlaw*** motion to discover the name of the CI, it would have led to evidence that Jay was the CI. With that evidence, Young argues that he would have been: (1) entitled to the entrapment jury instruction; (2) able to impeach the CI's credibility by uncovering concessions the CI received for the tip; and (3) able to prevent the court from giving the PTAC jury instruction.

¶53 In ***State v. Outlaw***, 108 Wis. 2d 112, 121, 321 N.W.2d 145 (1982), the supreme court set forth the requirements a defendant must meet before the State is required to identify a CI. The first problem with Young's ***Outlaw*** argument is that it is based only on his speculation and conjecture. Young provides no evidentiary support for his assumptions that: (1) Jay was the CI; (2) Jay had pending charges for which he was seeking a plea bargain from the State; and (3) Jay's testimony would be consistent with Young's testimony.

¶54 Secondly, pursuing the ***Outlaw*** motion was incompatible with the defense strategy of enhancing Young's credibility and persuading the jury that he only inadvertently received cocaine and was therefore innocent. Trial counsel testified that she saw no benefit to Young, stating: "There was no possibility that this person [the CI] would support Mr. Young's defense so why would I pursue it?" By injecting testimony from the named CI, without knowing whether Jay was the informant and what he would testify to, the defense risked further impeaching Young with evidence contradictory to his version of events and introducing a more credible witness to the jury—one who may or may not be Jay and may or may not testify he was giving Young CDs. The CI might testify that he was selling Young

cocaine. Trial counsel chose a different strategy, one that was objectively reasonable.

¶55 Young provides no rebuttal to his trial counsel's strategy reasoning. He simply assumes that the CI's testimony would be favorable to him. Trial counsel's strategy was to avoid damaging unknowns and stick to the innocent-receipt strategy. As we noted above, counsel is not deficient unless her strategic call is not reasonable or adequate. *See* ***Williquette***, 180 Wis. 2d at 605. Here, trial counsel's strategy, based on this record, was very reasonable, not deficient and thus, not prejudicial. *See* ***Elm***, 201 Wis. 2d at 464-65.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.