COURT OF APPEALS
DECISION
DATED AND FILED

April 29, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP1115-CR **Cir. Ct. No. 2012CF823**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DONALD D. DIETZMAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Waukesha County: KATHRYN W. FOSTER, Judge. *Affirmed*.

Before Brown, C.J., Neubauer, P.J., and Gundrum, J.

¶1 PER CURIAM. Donald D. Dietzman appeals from a judgment of conviction entered after a jury found him guilty of attempting to flee or elude a traffic officer, second-degree recklessly endangering safety, operating a motor

vehicle while intoxicated as a third offense (OWI),[1] operating with a prohibited blood alcohol concentration as a third offense (PAC), resisting an officer, disorderly conduct, and from an order denying his postconviction motion. Dietzman argues that the trial court erred in denying his motion for a mistrial and that trial counsel was ineffective for failing to file a suppression motion. We conclude that the trial court properly exercised its discretion in denying Dietzman's mistrial motion, and that because Dietzman's warrantless arrest was justified by exigent circumstances, trial counsel's decision not to file a suppression motion did not constitute ineffective assistance of counsel. We affirm.

¶2 On June 28, 2012, City of Oconomowoc firefighter Brian Dorn was standing on a street corner as part of a training program when he saw a gray car with a loud muffler jump a curb and swerve into traffic. The car nearly struck Dorn and three other firefighters. The car veered into oncoming traffic, almost hitting three parked cars before correcting itself. Dorn called the City of Oconomowoc Police Department and reported the car's description and location. At around 8:05 p.m., Dorn spotted and began following the same gray car. Dorn again called the police department and provided the gray car's location and license plate number. Dorn saw the car repeatedly cross into the center lane and then swerve back to hit the passenger side curb.

[1] Though Dietzman was convicted of both operating while intoxicated contrary to WIS. STAT. § 346.63(1)(a) (2013-14), and operating with a prohibited alcohol concentration contrary to § 346.63(1)(b), the OWI count was dismissed prior to sentencing on the State's motion pursuant to § 346.63(1)(c), which provides that if a person found guilty of both paras. (a) and (b) "for acts arising out of the same incident or occurrence, there shall be a single conviction for purposes of sentencing …." All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

¶3 After receiving the dispatch report, Officer Ryan Wollenhaupt located and caught up to the gray car. The car crossed into the center turn lane several times and Wollenhaupt activated his siren and emergency lights. He was able to see that the driver was a male and there was a pit bull in the passenger seat. Wollenhaupt observed that the gray car was speeding and made an abrupt turn onto the Highway 67 bypass. Wollenhaupt continued following the car and as it rounded the on-ramp's curve, the driver began to lose control and almost headed into a ditch. The car continued accelerating and other officers arrived to assist. Dispatch advised that the car was registered to the defendant, Donald A. Dietzman.

¶4 The gray car stopped at a red light and the driver closed the car's windows. Officers positioned themselves on both sides of the gray car. Wollenhaupt, who was directly behind the car, exited his squad and yelled for the driver to show his hands. The light turned green and the gray car drove off at a high rate of speed. Multiple officers continued to pursue the car as it traveled north, reaching speeds of about fifteen to twenty miles over the posted limit. Wollenhaupt saw the car begin to drift over the fog line directly toward a southbound jogger. The jogger reported that the driver looked directly at and swerved toward him, causing the jogger to run eight to ten yards into the ditch for safety. Officers continued pursuing the car and reached sixty-five to seventy miles per hour with the car still pulling away. The car drove through an intersection's stop sign and at that point, Wollenhaupt terminated the chase due to public safety concerns. The pursuit lasted over seven miles for a total of nine minutes with speeds reaching eighty miles per hour.

¶5 A team of officers met briefly and decided to proceed to Dietzman's residence. Officer Kurt Franke and two Dodge county deputies arrived at

Dietzman's residence and headed up the driveway. As officers pulled up to Dietzman's residence, they saw a man sitting in a chair on the side of the house. Upon spotting the officers, the man ran into the woods behind the residence. Officers noticed several dogs in the area, including a pit bull. Police searched for the man for about ten to fifteen minutes. He eventually walked out of the woods toward the officers. He refused to comply with police orders to stop and Franke tased him. The man, soon identified as Dietzman, smelled of intoxicants and had bloodshot, glassy eyes and slurred speech. Dietzman was transported to a hospital where he smashed his head into the bed rails, yelled profanities at the officers, and had to be physically restrained. A blood draw was performed without his consent and revealed that his blood-alcohol concentration was .300 grams per 100 milliliters. The car was located in the woods. Dietzman's wallet and driver's license were inside the vehicle.

¶6 The State filed a pretrial motion requesting the admission of the defendant's prior bad acts, namely a similar 2005 incident wherein Dietzman, while intoxicated, was involved in a high-speed motor chase with police.[2] The trial court observed that the incidents were "strikingly similar" and determined that the introduction of this evidence in the State's case-in-chief would be unfairly prejudicial:

[2] The State's motion attached documents from the 2005 incident reflecting that Dietzman was alleged to have engaged in very similar conduct, including a ten-mile, high-speed motor-vehicle chase with marked police cars that ended in a combative arrest and convictions for fleeing/eluding law enforcement, resisting an officer, and operating while intoxicated. Noting that trial counsel had suggested that part of Dietzman's defense might be that he had suffered a brain injury that negated his ability to form intent, the State asserted that the other acts were relevant to prove intent, plan and lack of accident or mistake. In the alternative, the State argued that the other acts were relevant to prove identity.

> [W]hat is profound in this case is the existence of all three of those crimes in sequence, as the State argues here. And that is the good news and the bad news, I believe, because it just so clearly speaks to propensity. He did this all before in the same order basically that he did it again.

The trial court ruled that it would exclude the evidence in the State's case-in-chief, but "was prepared to revisit this issue at the conclusion of the defense's case, depending on which track the defense's defense goes."

¶7 At trial, the State explained that it intended to play Officer Wollenhaupt's squad car video during his testimony and noted that a brief portion of the audio contained the dispatcher's statement that Dietzman "has a prior eluding and he is a two-officer individual." The State was concerned that the reference to Dietzman's prior conviction would violate the trial court's other acts ruling and agreed to start the audio portion of the video after the dispatcher's statement.

¶8 After the DVD was played for the jury, trial counsel requested a side bar and asserted that he "heard the dispatcher say [the] car is registered to Donald D. Dietzman, and he has a history of eluding." The trial court stated it "did not hear that" and replayed the recording with the court reporter simultaneously transcribing as follows:

> DVD: 844 Robert Mary Francis, 1990 gray Toyota Corolla to a Donald Dietzman out of Hartford. Per Dodge, you guys have to have—(unintelligible)—
>
> [Trial counsel]: That is the offending portion. He has a habit for eluding, fleeing.
>
> [The Court]: I heard Hartford and I heard eluding and Dodge. I didn't hear the per habit. That to me is not audible.

The recording was replayed and this time, the court heard "habit" but stated "I did not hear habit even the second time until it was broken down for me."[3]

¶9 Trial counsel moved for a mistrial on the ground that the dispatcher's statement violated the trial court's other acts ruling. The trial court denied the motion, determining that it was uncertain whether the offending portion of the audio was played for the jury and that even if it was, it was unlikely that the jury was able to hear the reference to Dietzman's "habit of fleeing." The court further concluded that even if the jury heard the dispatcher's statement, the brief reference was not sufficiently prejudicial to warrant a mistrial.

¶10 The jury found Dietzman guilty of all counts. Dietzman filed a postconviction motion alleging that trial counsel was ineffective for failing to move to suppress the results of his blood-draw and photographic lineup identification as fruits of an illegal arrest. Following an evidentiary ***Machner***[4] hearing, the trial court denied the postconviction motion, determining that exigent circumstances justified police officers' warrantless entry onto Dietzman's property as well as his arrest. The court concluded that trial counsel's performance was neither deficient nor prejudicial because the suppression motion "had absolutely no chance of being successful." Dietzman appeals.

[3] The State asserted that the offending portion was not even played to the jury because the prosecutor asked the clerk to stop the audio as soon as it said "Per Dodge."

[4] ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979) (where a defendant claims he or she received the ineffective assistance of trial counsel, a postconviction hearing "is a prerequisite … on appeal to preserve the testimony of trial counsel.").

The trial court did not erroneously exercise its discretion in denying Dietzman's mistrial motion

¶11 Whether to grant a mistrial lies within the trial court's sound discretion. ***State v. Doss***, 2008 WI 93, ¶69, 312 Wis. 2d 570, 754 N.W.2d 150. The trial court must assess, in light of the whole proceeding, whether the basis for the mistrial request is sufficiently prejudicial to warrant a new trial. ***Id.*** "The denial of a motion for mistrial will be reversed only on a clear showing of an erroneous use of discretion" by the trial court. ***Id.*** (citation omitted).

¶12 We conclude that the trial court properly exercised its discretion in denying Dietzman's mistrial motion. When trial counsel raised the issue, the court initially stated:

> Well I think we need to make another record. I need to see it again or listen, because what I heard now would not be a violation. What I heard the first time through to me would not be a violation of the spirit of the original—

¶13 The court stated its recollection that the audio was immediately cut off after the reference to Dodge county and found that the clerk may have silenced the audio before the potentially objectionable material. Nonetheless, the court carefully attempted to reconstruct what the jury might have heard by replaying and carefully listening to the audio. After thoughtful consideration, the court stated:

> Even hearing it played back to me now I do not hear, quote, habit of fleeing until I am told that that is what is being said. And that is just the nature of that audio, which generally is very difficult to understand unless, you know, you have been there or you know it because you have listened to it several times, like apparently counsel has.

¶14 After finding it unlikely that the jury heard and understood the dispatcher's words,[5] the court further determined that the brief reference to Dietzman's "habit of fleeing" was not sufficiently prejudicial to warrant a mistrial:

> I think habit of fleeing is potentially damaging, but it is not as much as a prior conviction with all the trimmings that go with it … as contained in the State's motion.

In denying the mistrial motion, the trial court examined the relevant facts, applied a proper legal standard and employed a rational decision-making process. *See* ***State v. Bunch***, 191 Wis. 2d 501, 506-07, 529 N.W.2d 923 (Ct. App. 1995). This constitutes a proper exercise of discretion.

¶15 We reject Dietzman's claim that the trial court should have provided a more specific curative instruction to the jury. First, the court actually instructed the jury to disregard anything the dispatcher said. Second, Dietzman never requested an instruction. *See* ***Bergeron v. State***, 85 Wis. 2d 595, 604, 271 N.W.2d 386 (1978) ("This court will not find error in the failure of a trial court to give a particular instruction in the absence of a timely and specific request …"). Third, the trial court sua sponte considered but rejected the idea of providing a further curative instruction, explaining that on these facts, any additional instruction "would only highlight what may be inferred they could have heard, and I am going to leave it at that."

[5] Additionally, the trial court considered that when the DVD was replayed for the jury during trial counsel's cross-examination, the court explicitly instructed the jury that it was turning off the audio because "what the dispatcher may or may not have said … is not evidence."

Trial counsel's failure to file a suppression motion did not constitute ineffective assistance of counsel

¶16 Dietzman argues that his arrest was unlawful because it occurred on his property and without a warrant. He asserts that trial counsel's failure to move to suppress the fruits of his warrantless arrest constitutes ineffective assistance of counsel. The two-pronged test for ineffective assistance requires a defendant to demonstrate that (1) counsel's performance was deficient and (2) the deficiency prejudiced the defendant. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient performance, the defendant must establish that counsel's conduct fell below an objective standard of reasonableness. ***Id.*** The prejudice prong requires a demonstration that but for counsel's unprofessional errors a reasonable probability exists that the result of the proceeding would have been different. ***Id.*** at 694.

¶17 We conclude that trial counsel did not perform deficiently because Dietzman has failed to establish a reasonable probability that the motion to suppress would have been successful. *See* ***State v. Wheat***, 2002 WI App 153, ¶23, 256 Wis. 2d 270, 647 N.W.2d 441. Here, Dietzman's warrantless arrest[6] was justified by the exigent circumstances exception to the warrant requirement. *See* ***State v. Hughes***, 2000 WI 24, ¶17, 233 Wis. 2d 280, 607 N.W.2d 621 (an exception to the warrant requirement exists "where the government can show both probable cause and exigent circumstances that overcome the individual's right to be free from governmental interference."). Exigent circumstances justifying a warrantless entry are: (1) an arrest made in hot pursuit, (2) a threat to safety of a

[6] We will assume that Dietzman was arrested on his property and that officers had to enter onto his property or curtilage to make the arrest.

suspect or others, (3) a risk that evidence will be destroyed, and (4) a likelihood that the suspect will flee. ***State v. Phillips***, 2009 WI App 179, ¶8, 322 Wis. 2d 576, 778 N.W.2d 157.

¶18 Officers lawfully entered Dietzman's property using his driveway. ***State v. Edgeberg***, 188 Wis. 2d 339, 347, 524 N.W.2d 911 (Ct. App. 1994) ("Regarding protected areas in residential premises, a sidewalk, pathway, common entrance or similar passageway offers an implied permission to the public to enter which necessarily negates any reasonable expectation of privacy in regard to observations made there."). At the time they entered, they knew that a car registered to Dietzman had been driving erratically enough to merit a call to police and then engaged in a dangerous high-speed chase with marked squad cars to avoid capture. Officers were also aware that Dietzman had a prior record for eluding law enforcement officers and driving while intoxicated. *See* ***State v. Lange***, 2009 WI 49, ¶33, 317 Wis. 2d 383, 766 N.W.2d 551 (prior OWI convictions are a permissible factor in determining the existence of probable cause for an intoxicated driving offense). Before they could even exit their squads, a man sitting outside of Dietzman's residence spotted police and ran into the woods. As in the gray car, there was a pit bull on the property. Officers had ample probable cause to believe that Dietzman was the man running away and that he had committed at least two felonies.

¶19 These circumstances would also lead a police officer to reasonably believe that "delay in procuring a search warrant would gravely endanger life, risk destruction of evidence, or greatly enhance the likelihood of the suspect's escape." ***Hughes***, 233 Wis. 2d 280, ¶24. Dietzman's car was seen swerving, jumping curbs, and speeding. He nearly struck three firefighters and a jogger, and engaged officers in a high speed chase so dangerous that it was abruptly halted due to

safety concerns. It was reasonable to believe that Dietzman immediately needed to be located and stopped before he injured or killed someone. Additionally, police had reason to believe that Dietzman was operating while intoxicated. This increased his potential dangerousness. Once he was located, police observed numerous signs of intoxication. Officers possessed an objectively reasonable belief that a warrantless arrest was necessary to prevent the destruction of evidence. Finally, it was objectively reasonable for officers to believe that any delay caused by procuring a warrant would greatly enhance the likelihood of Dietzman's escape. Not only did Dietzman have a prior record for eluding and obstructing, he refused to pull over when officers attempted a traffic stop, engaged police in a high-speed chase, and fled on foot when he saw officers approaching his residence. We agree with the trial court's assessment; "This case screams of exigency."

By the Court.—Judgment and order affirmed.

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