COURT OF APPEALS
DECISION
DATED AND FILED

February 22, 2017

Diane M. Fremgen
Clerk of Court of Appeals

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Appeal No. 2015AP92-CR **Cir. Ct. No. 2011CF519**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARCUS M. HENRY,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Sheboygan County: L. EDWARD STENGEL, Judge. *Affirmed.*

Before Reilly, P.J., Gundrum and Hagedorn, JJ.

¶1 PER CURIAM. Marcus Henry appeals from a judgment convicting him of possessing cocaine with intent to deliver and maintaining a drug trafficking place and from an order denying his postconviction motion seeking a new trial due to ineffective assistance of trial counsel. On appeal, Henry argues that the search

warrant was not supported by probable cause and other acts evidence was admitted at trial that exceeded the scope of the pretrial circuit court order admitting such evidence. We are not persuaded by Henry's arguments. We further hold that Henry forfeited his argument that the judge who issued the search warrant should not have presided over Henry's motion to suppress challenging the search warrant as not supported by probable cause. We affirm the judgment of conviction and the order denying the postconviction motion.

¶2 Henry moved to suppress evidence collected at a 38th Street, Sheboygan property allegedly being used for drug trafficking. The evidence found during execution of the warrant included drugs, drug-use and drug-selling paraphernalia, and multiple identifiers for Henry. Henry alleged that the investigator's affidavit in support of the search warrant did not establish probable cause to issue the warrant.

¶3 The investigator's affidavit related the statements of confidential informants who had experience conducting drug buys that led to search warrants and arrests. The informants stated that a person known to them by street names connected to Henry was selling crack cocaine in the Sheboygan area and doing so at specific properties on 29th Street and 38th Street in Sheboygan. The informants described Henry's vehicle and stated that he used the vehicle in his drug dealing business. One informant had observed Henry conducting drug sales within the previous two weeks. A confidential informant purchased crack cocaine from Henry at the 29th Street property.

¶4 The affidavit alleged that Henry was known to the investigator's drug enforcement unit as a violent drug offender. Investigators observed what appeared to be drug sales at the 38th Street property while Henry was present at

the property. The investigators observed known drug users at the 38th Street property and persons entering and leaving the property in short periods of time which, in the investigator's experience, suggested drug-dealing. C.W., a resident of the 38th Street property, was known to let drug dealers use the property to sell drugs. Henry was observed at the 38th Street property with B.B., a resident of the 29th Street property. B.B. was known to law enforcement as a middleman in drug sales who allowed Henry to use the 29th Street property for drug interactions on multiple occasions. The informants were not asked to make controlled drug buys from Henry because of his dangerousness and vigilance against informants. Based on the foregoing, the affidavit sought a search warrant for Henry's vehicle, the 29th Street and 38th Street properties and any storage areas associated with the properties. The warrant issued on probable cause.

¶5 In his motion to suppress evidence found during the execution of the search warrant, Henry argued that the affidavit was not specific enough because it did not provide a basis for the confidential informants' knowledge about Henry's alleged drug dealing, the affidavit offered misleading information about Henry's prior offense history, and the affidavit lacked the necessary overall specificity about Henry's alleged conduct.

¶6 In presiding over Henry's motion to suppress, the circuit court observed that it had also issued the warrant. After reviewing the totality of the circumstances, the court concluded that the warrant was supported by probable cause and denied Henry's motion to suppress.

¶7 On appeal, Henry acknowledges that he now raises for the first time that the judge who issued the warrant should not have presided over the hearing on his motion to suppress. We agree with the State that Henry forfeited this argument

by not raising it first in the circuit court. ***State v. Ndina***, 2009 WI 21, ¶30, 315 Wis. 2d 653, 761 N.W.2d 612 (forfeiture occurs when a party does not make a claim in the circuit court); *see* ***State v. Schulpius***, 2006 WI 1, ¶26, 287 Wis. 2d 44, 707 N.W.2d 495 (we do not decide issues raised for the first time on appeal).

¶8 We turn to Henry's challenge to the warrant as unsupported by probable cause. In assessing whether there was probable cause to issue the warrant, we give great deference to the warrant-issuing magistrate's determination. ***State v. Ward***, 2000 WI 3, ¶21, 231 Wis. 2d 723, 604 N.W.2d 517. The magistrate must "make a practical, commonsense decision whether, given all the circumstances set forth in the affidavit …, including the veracity and basis of knowledge of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." ***Id.***, ¶23 (citation omitted). The magistrate may draw reasonable inferences from the information provided in the affidavit to reach a probable cause determination. ***Id.***, ¶26. The magistrate's probable cause determination stands unless Henry "establishes that the facts are clearly insufficient to support a probable cause finding." ***Id.***, ¶21.

¶9 Applying the totality of the circumstances test to the probable cause inquiry, ***id.***, ¶26, we determine whether "the record before the warrant-issuing judge provided 'sufficient facts to excite an honest belief in a reasonable mind that the objects sought are linked with the commission of a crime, and that they will be found in the place to be searched.'" ***Id.***, ¶27 (citation omitted).

¶10 On appeal, Henry argues that the affidavit does not state that any controlled drug buys were made at either property and the surveillance of the 38th

Street property, including short-term visits by known drug users, was insufficient to establish probable cause.

¶11 We agree with the circuit court that under the totality of the circumstances, the warrant was supported by probable cause. The affidavit in support of the warrant offered information provided by confidential informants who knew Henry and had purchased drugs from him. The affidavit related information gathered by investigators who observed Henry and activity consistent with drug selling at the 38th Street property. The affidavit related that Henry sold drugs at the 29th Street property. The record before the issuing judge was sufficient "to excite an honest belief in a reasonable mind that the objects sought are linked with the commission of a crime, and that they will be found" in the locations identified in the affidavit. ***Id.***, ¶27 (citation omitted).

¶12 We turn to Henry's final issue: whether, on redirect examination of B.B., a resident of the 29th Street property, the State elicited evidence that exceeded the scope of the circuit court order permitting other acts evidence at trial.

¶13 Pretrial, the State moved the court in limine to admit via B.B.'s testimony evidence that Henry engaged in the "possession and delivery of cocaine both prior to and at the time of the execution of multiple search warrants that led to" Henry's arrest and charges in the case.[1] The motion stated that B.B. knew that Henry drove to Milwaukee to obtain drugs to sell and that she had purchased drugs from him. The motion referred to police reports attached to the motion in which

[1] Henry does not challenge the pretrial evidentiary ruling admitting other acts evidence, only whether the evidence at trial conformed with that pretrial ruling. Because Henry only challenges B.B.'s testimony, we do not address any other aspect of the pretrial order admitting other acts evidence.

B.B. gave the following information about Henry's drug activities: Henry concealed "larger amounts of crack," and he individually packaged smaller amounts. The police report reciting B.B.'s statements does not mention the specific testimony Henry complains exceeded the scope of the other acts order, as discussed below. After considering the proximity to the charged crimes of the other acts evidence of Henry's drug-dealing, the circuit court granted the State's other acts motion.

¶14 With this background, we discuss the trial testimony to which Henry objected as outside the scope of the other acts order and for which he sought a mistrial. The testimony occurred on redirect examination of B.B., who had prior drug offenses and was known to permit the 29th Street property to be used for drug sales. On direct examination by the State, B.B. testified that in the two to three months preceding the execution of the search warrant, she drove Henry to Milwaukee on "a lot" of occasions to pick up drugs for sale. She would often drop Henry off at the 38th Street property after a Milwaukee trip. Henry entered the 38th Street property with the drugs he had purchased, and he later emerged without most of those drugs.

¶15 On cross-examination, B.B. testified that Henry always left cocaine at the 38th Street property, and he had some cocaine "already packaged up" at the 38th Street property. B.B. testified that Henry hid drugs primarily in a back room and outside the 38th Street property. B.B. was closely questioned about how many times she had visited the 38th Street property.

¶16 The State resumed this line of questioning on redirect. B.B. reiterated that she had been inside the 38th Street property "many times." B.B. saw Henry place cocaine inside the property, and Henry hid cocaine in the pocket

of a jacket found in the property. The State asked, "Do you know the amounts? Is this a large or a small amount that you see him place inside?" B.B. responded, "Maybe 6 to 11 bags. Fifty bags. Fifty I mean like fifty-size bags. … 6 to 11 or so…." B.B. frequently saw Henry leave larger amounts of cocaine at the 38th Street property in addition to the fifty-size bags. She saw "two bags with about 50 to a hundred bags in each already bagged up." Defense counsel persisted in asking B.B. about the six to eleven bags of drugs, where they were hidden, and how much activity she saw involving those bags. Henry did not object to this testimony at the time it occurred.

¶17 After B.B. concluded her testimony, Henry complained that her testimony about "fifty to 100 bags" was not relevant and violated the other acts order. Henry sought a mistrial.

¶18 In addressing the mistrial motion, the circuit court recalled that its other acts ruling was intended to allow the presentation of evidence to establish a basis for B.B.'s interactions with Henry and to place her testimony in context. Henry responded that his counsel did not receive in discovery any material indicating that B.B. claimed that she saw fifty to 100 bags of drugs at the 38th Street property. The court found that B.B.'s testimony was within the scope of the pretrial other acts ruling and denied Henry's mistrial motion. Furthermore, the court gave specific jury instructions regarding B.B.'s testimony, because she received immunity and admitted she was involved in Henry's drug-dealing activity.

¶19 We review a circuit court's refusal to grant a mistrial for a misuse of discretion. ***State v. Bunch***, 191 Wis. 2d 501, 506, 529 N.W.2d 923 (Ct. App.

1995). The circuit court is charged with determining "whether the basis for the mistrial request is sufficiently prejudicial to warrant a new trial." ***Id.***

¶20 Henry complains that the circuit court did not undertake a ***Sullivan***[2] other acts analysis at the time B.B. testified about seeing fifty to 100 bags of drugs at the 38th Street property. However, the record does not reveal that Henry objected that B.B.'s testimony was new other acts evidence requiring a ***Sullivan*** analysis. We address this issue no further.

¶21 Henry argues that the State failed to disclose B.B.'s statement that she saw fifty to 100 bags of drugs. However, Henry offers no citation to the record indicating that the State was aware that B.B. would make such a claim but failed to disclose it. We address this issue no further. *See* ***Schulpius***, 287 Wis. 2d 44, ¶26.

¶22 We agree with the circuit court that B.B.'s testimony about seeing fifty to 100 bags of drugs at the 38th Street property did not exceed the scope of the pretrial other acts order. B.B.'s testimony was consistent with her statement to investigators that she transported Henry to and from Milwaukee to purchase drugs, took him to the 38th Street property to drop off drugs and saw Henry hide drugs at that property. B.B.'s statement to investigators related that there were drugs hidden in various places on the 38th Street property and that smaller amounts of crack cocaine would be individually packaged. Both the State and the defense questioned B.B. closely about these activities and each side drilled down for more details about the drugs B.B. saw at the 38th Street property, thereby expanding on

[2] ***State v. Sullivan***, 216 Wis. 2d 768, 576 N.W.2d 30 (1998).

B.B.'s trial testimony. Regardless of how detailed B.B.'s testimony eventually became, her testimony was consistent with the pretrial order granting the State's motion to admit B.B.'s testimony that Henry possessed and delivered cocaine prior to and at the time multiple search warrants were executed in this case.

¶23 Because the challenged testimony did not exceed the scope of the pretrial other acts order, the circuit court did not misuse its discretion when it denied Henry's motion for a mistrial.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2015-16).