COURT OF APPEALS
DECISION
DATED AND FILED

June 20, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP2586-CR **Cir. Ct. No. 2013CF1562**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BRANDON L. HILGENBERG,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Brown County: MARC A. HAMMER, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 PER CURIAM. Brandon Hilgenberg appeals judgments of conviction, entered following a jury trial, for three drug-related crimes (two felonies and one misdemeanor), as well as an order denying his postconviction

motion. He challenges certain of the circuit court's evidentiary rulings, argues his attorney rendered constitutionally ineffective assistance, and asserts the evidence was insufficient to convict him of possession of drug paraphernalia.

¶2 The State concedes Hilgenberg's conviction for possession of drug paraphernalia cannot stand. We therefore reverse the judgment of conviction separately entered for that count and the associated portion of the postconviction order, and we remand with directions that the circuit court vacate that judgment and dismiss that charge. In all other respects, we reject Hilgenberg's arguments and affirm.

BACKGROUND

¶3 At trial, De Pere police officer Anthony Phelps testified that on October 1, 2013, he observed a motorcycle that failed to stop at a sign, "popped a wheelie," and took off at a "very high rate of speed." The cyclist began to pull over and stop near a pedestrian, later identified as Hilgenberg. Phelps saw Hilgenberg point out his squad car to the cyclist, who then turned to look back at Phelps before taking off at a high speed. Phelps pursued the cyclist for a distance before terminating the chase and returning to interview Hilgenberg, who said his vehicle had run out of gas and he was waiting for his girlfriend, Megan Kopplin, to pick him up. After police determined Hilgenberg was obstructing their investigation, he was ultimately taken into custody. A motorcycle similar to that involved in the police pursuit was later found parked in Hilgenberg's driveway.

¶4 Kopplin, who was living with Hilgenberg at the time of his arrest, testified that prior to the incident, Hilgenberg had purchased cocaine from someone named Chris who lived in Beloit. On the date of Hilgenberg's arrest, he telephoned Kopplin to tell her that he had run out of gas. Kopplin and Bruce

Kemp then went looking for Hilgenberg. They recovered Hilgenberg's motorcycle and Kemp drove it away. The incident with police happened shortly thereafter.

¶5 Hilgenberg spoke on the telephone with several individuals while he was in police custody, and audio recordings of those conversations were played at trial. During an interview, Kopplin had told investigators that Hilgenberg "had all of his cocaine with him at the time and hid it when he broke down." At trial, she testified that references to a "helmet strap" in the recorded conversations meant cocaine, which Hilgenberg had left in a nearby field when he ran out of gas. Kopplin revealed during one of the conversations that the cocaine had been recovered and moved to Hilgenberg's sister, Breanna's, house. Breanna had also taken a scale from Hilgenberg and Kopplin's residence. Police did not find drugs or a scale when they performed a consensual search at Kopplin and Hilgenberg's residence on October 3, 2013.

¶6 Breanna and her roommate, Kemp, testified they went to a field to retrieve certain of Hilgenberg's items after he was taken into custody. Breanna testified they were only looking for a helmet. When confronted with a jail audio recording of her conversation with Hilgenberg, Breanna acknowledged that she did not go to the field to find a "helmet strap," but rather there was "something else. I didn't quite know what it was or what it looked like, but I never found it." Earlier, Breanna had told investigator Andrew Wysocki that they had gone to the field to find Hilgenberg's cocaine. Breanna had also said she knew Hilgenberg had paid $6000 for the four-ounce ball of cocaine she had found, and that Hilgenberg's father, Aaron Hilgenberg, was aware of the cocaine. Kemp testified he and Breanna went to find a helmet and something else, though he was "not

completely sure what the other item was." Kemp testified that during a second trip to the field, Kemp believed Breanna found a white substance.

¶7 Law enforcement conducted a search of Breanna and Kemp's apartment on October 3, 2013. They discovered Inositol (a cutting agent for cocaine), a digital scale, and approximately 109 grams of cocaine taped underneath a bed post.[1] Police also obtained Breanna's cell phone and discovered incriminating text messages between Breanna and Aaron.

¶8 An amended criminal complaint charged Hilgenberg with one count each of conspiracy to deliver more than 40 grams of cocaine, maintaining a drug trafficking place, and possession of drug paraphernalia, the latter two counts as a party to the crimes. The jury convicted him of all counts. The circuit court denied Hilgenberg's postconviction motion following an evidentiary hearing. Hilgenberg now appeals.

DISCUSSION

I. Evidentiary rulings

¶9 Hilgenberg argues he is entitled to a new trial by virtue of two allegedly erroneous evidentiary rulings. "We review a circuit court's decision to admit or exclude evidence under an erroneous exercise of discretion standard." ***Martindale v. Ripp***, 2001 WI 113, ¶28, 246 Wis. 2d 67, 629 N.W.2d 698. We will uphold the circuit court's discretionary determination as long as it examined the relevant facts, applied a proper legal standard, and, using a demonstrated rational

[1] One-hundred-nine grams of cocaine equals approximately 3.8 ounces.

process, reached a reasonable conclusion. ***Id.*** Hilgenberg argues the circuit court erroneously exercised its discretion by admitting certain statements his sister told to investigator Wysocki, as well as evidence of a phone conversation that purportedly occurred between Hilgenberg and his father.

A. Breanna's prior inconsistent statements

¶10 At trial, Breanna testified Hilgenberg had asked her to go to a field to find a helmet, which she eventually retrieved. She denied ever seeing Hilgenberg with cocaine. Breanna was then questioned regarding a prior statement she had made to investigator Wysocki wherein she claimed that she had retrieved Hilgenberg's cocaine from the field. Breanna asserted at trial that she could not recall that statement and was under the influence at the time she gave it. Breanna denied finding cocaine in the field and asserted the cocaine found in her apartment was hers.

¶11 Wysocki later testified about the statements Breanna made during his interview with her. Hilgenberg argues two of Breanna's statements testified to by Wysocki were inadmissible. First, Wysocki testified that during the interview, Breanna told him that she and others were not sure why Hilgenberg was in the Wrightstown area and "that's not like [Hilgenberg] to have his shit on him, referring to his cocaine." Wysocki also testified that during the interview, Breanna told him "Brandon knows I have his back and I'll get shit for him and hide it." Hilgenberg contends these statements were inadmissible hearsay.

¶12 We reject Hilgenberg's argument. A prior statement by a witness who testifies at trial and is subject to cross-examination is not hearsay if the

statement is inconsistent with the declarant's trial testimony. WIS. STAT. § 908.01(4)(a)1. (2015-16).[2] Although Hilgenberg asserts the two statements testified to by Wysocki "do nothing to refute Breanna's trial testimony that the cocaine in her apartment belonged to her," we perceive a clear inconsistency between that trial testimony and the two statements Breanna gave during her interview with Wysocki. Based on the latter two statements, a reasonable factfinder could find that, contrary to Breanna's trial testimony, Breanna had retrieved Hilgenberg's cocaine and possessed it on his behalf. The statements involved here are near-textbook examples of prior inconsistent statements.[3]

B. Evidence of the phone conversation between Hilgenberg and his father

¶13 During the trial, the State called Hilgenberg's father, Aaron, as a witness. Aaron denied speaking by phone with Hilgenberg on October 3, 2013, but confirmed that the number dialed was his. The prosecution then played an audio recording, apparently of a phone call made on that date.[4] The defense did not object contemporaneously to the playing of this recording. Aaron denied that it was his voice on the recording and began complaining that he had not been subpoenaed and that the prosecutor was violating his rights. Following a sidebar

[2] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

[3] Hilgenberg also argues it was error for the circuit court to conclude Breanna's "blanket denial" to retrieving Hilgenberg's cocaine opened the door to allowing all of her prior statements. However, he specifically challenges only the two prior statements indicated above. He otherwise fails to explain what other of Breanna's prior statements the court erred in admitting, and we therefore reject this aspect of his argument as undeveloped. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

[4] The transcript is not clear what audio was played, other than to indicate the prosecutor "[p]lay[ed] a tape." According to Hilgenberg, the recording contained a conversation between two individuals regarding a "helmet strap."

conference with the attorneys and a single cross-examination question, Hilgenberg was excused as a witness.

¶14 During a recess, the parties made a record of what had occurred during the sidebar conference. The court noted Aaron's demeanor was hostile and that his answers had, at best, extremely limited evidentiary value. The court had concerns about whether Aaron's answers could implicate him in a crime, and it advised the prosecution that further questioning would require an offer of immunity and counsel. The prosecution then decided to terminate its questioning.

¶15 The circuit court denied Hilgenberg's postconviction motion regarding the authenticity/admissibility of the audio recording played during Aaron's testimony. The court concluded Hilgenberg had not preserved any argument regarding whether there was a sufficient foundation for the playing of the recording because Hilgenberg's counsel had only objected as to the issue of "how the jury would perceive [Aaron's] hostile nature." The circuit court concluded Hilgenberg's alternative postconviction argument, raising the ineffectiveness of his trial counsel, was inadequately briefed and, in any event, failed on the prejudice prong of the analysis. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984) (requiring a defendant to show deficient performance on the part of counsel that prejudiced the defense).

¶16 On appeal, Hilgenberg asserts his defense counsel's objection to Aaron's testimony "in its entirety" was sufficient to preserve the issue for review. We agree with the State, however, that the record does not demonstrate, or in any way allow an inference, that Hilgenberg objected to the admission of the audio recording. The admissibility of Aaron's testimony and the playing of the audio recording were separate issues, and Hilgenberg failed at any time to put the circuit

court on notice that he wished to challenge the latter issue. "A litigant must raise an issue with sufficient prominence such that the trial court understands that it is being called upon to make a ruling." *See* ***Bishop v. City of Burlington***, 2001 WI App 154, ¶8, 246 Wis. 2d 879, 631 N.W.2d 656.

¶17 Hilgenberg argues in the alternative that his defense counsel was constitutionally ineffective by not challenging the recording's admissibility on hearsay grounds. However, as a prerequisite to an ineffective assistance of counsel claim, the defendant must preserve the testimony of his or her trial counsel. ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). At the ***Machner*** hearing in this case, Hilgenberg did not question counsel regarding her failure to object to the audio recording's admissibility. As such, he has not adequately preserved this ineffective assistance of counsel issue for appellate review.[5]

II. Ineffective assistance of counsel

¶18 To establish ineffective assistance of counsel, Hilgenberg must show both that his counsel's performance was not within the range of competence demanded of attorneys in criminal cases and that the deficient performance resulted in prejudice. *See* ***Strickland***, 466 U.S. at 687 (1984). Prejudice requires a showing of a reasonable probability that the result of the proceeding would have been different absent counsel's unprofessional errors. ***State v. Jenkins***, 2014 WI

[5] Hilgenberg argues we should ignore his forfeiture in this case given that the State did not dispute Hilgenberg's assertion that the issue was preserved for review. However, the defendant bears the burden of proving ineffective assistance, ***State v. Burton***, 2013 WI 61, ¶47, 349 Wis. 2d 1, 832 N.W.2d 611, and we are unable to grant relief on such a claim without trial counsel's testimony regarding his or her trial strategy, ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

59, ¶37, 355 Wis. 2d 180, 848 N.W.2d 786. Whether a defendant received ineffective assistance of counsel is a mixed question of fact and law. ***Id.***, ¶38.

¶19 Here, Hilgenberg argues defense counsel performed deficiently in three respects that warrant a new trial: (1) failure to object to a summary of text messages between Breanna and Aaron, introduced during investigator Wysocki's testimony; (2) failure to object to several alleged prior acts by Hilgenberg; and (3) failure to challenge the legality of Hilgenberg's initial arrest. We reject each of these arguments.

A. Failure to object to text messages

¶20 Wysocki testified that Breanna gave him consent to look at her cell phone, wherein he discovered text messages between Breanna and "Dad." The text messages' contents were contained in Exhibit No. 22, which was admitted and published to the jury without objection. According to Exhibit No. 22, on October 2, 2013, Breanna sent her father Aaron the following message: "Dad found it. :-)" A few hours later, Aaron responded: "Okay cool. Don't let anyone touch it because he knows how much is there KKK[.]" Defense counsel testified at the ***Machner*** hearing that she did not object to the admission of Exhibit No. 22 because she believed the evidence was validly admitted.

¶21 Hilgenberg has not shown his counsel performed deficiently. He argues the text messages were hearsay, contrary to the State's assertion that the text messages were admissible as statements "by a coconspirator of a party during the course and in furtherance of the conspiracy." *See* WIS. STAT. § 908.01(4)(b)5. Hilgenberg notes that admissibility under § 908.01(4)(b)5. requires the State to make a prima facie showing of conspiracy; he argues that, under ***State v. Dorcey***, 103 Wis. 2d 152, 307 N.W.2d 612 (1981), and ***State v. Rochelt***, 165 Wis. 2d 373,

477 N.W.2d 659 (Ct. App. 1991), the conspiracy upon which admissibility depends must be proven independently of the purported hearsay testimony at issue. "***Dorcey*** made Wisconsin's hearsay-treatment of co-conspirator statements consistent with federal law by adopting ***Glasser***'s[6] anti-bootstrapping precept." ***State v. Whitaker***, 167 Wis. 2d 247, 261, 481 N.W.2d 649 (Ct. App. 1992).

¶22 However, in ***Whitaker***, this court recognized that the federal law upon which the ***Dorcey*** rule was based had changed. Accordingly, we held that, contrary to ***Dorcey***, "an out-of-court declaration by a party's alleged co-conspirator[s may] … be considered by the trial court in determining whether there was a conspiracy." ***Whitaker***, 167 Wis. 2d at 262. As a result, there was no basis for defense counsel to make the objection Hilgenberg proposes. A defense attorney does not perform deficiently by failing to make a meritless objection. ***State v. Swinson***, 2003 WI App 45, ¶59, 261 Wis. 2d 633, 660 N.W.2d 12.[7]

B. Failure to object to other acts evidence

¶23 Prior to trial, the circuit court instructed the State not to present "other events, other [drug] deliveries at least in their case in chief." Hilgenberg contends the State ignored this instruction in three instances, and his trial attorney performed deficiently by failing to object to each of them: (1) Kopplin's statement that she assumed Hilgenberg kept illegal substances in their basement; (2) Kopplin's statement that $6000 in Hilgenberg's possession prior to October 1,

[6] *See* ***Glasser v. United States***, 315 U.S. 60 (1942).

[7] In any event, even if the law were as Hilgenberg contends, there was sufficient evidence in the record, independent of the text messages at issue, to show that Breanna and Aaron were co-conspirators. Breanna told Wysocki the cocaine was Hilgenberg's, and she also stated Aaron knew about the cocaine found in her residence.

2013, came from cocaine sales; and (3) Wysocki's testimony that Breanna stated mushrooms found during the search of her residence came from Hilgenberg.

¶24 The admissibility of other acts evidence is determined using a three-step analysis. ***State v. Sullivan***, 216 Wis. 2d 768, 771, 576 N.W.2d 30 (1998). The first question is whether the other acts evidence is offered for an acceptable purpose under WIS. STAT. § 904.04(2). ***Sullivan***, 216 Wis. 2d at 772. Next, the court must consider whether the evidence is relevant under WIS. STAT. § 904.01. ***Sullivan***, 216 Wis. 2d at 772. Finally, the evidence's probative value must not be substantially outweighed by the danger of unfair prejudice or other concerns articulated under WIS. STAT. § 904.03. ***Sullivan***, 216 Wis. 2d at 772-73. However, evidence is not "other acts" evidence 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." ***State v. Dukes***, 2007 WI App 175, ¶28, 303 Wis. 2d 208, 736 N.W.2d 515. Again, we review a decision to admit evidence for an erroneous exercise of discretion. *See* ***Martindale***, 246 Wis. 2d 67, ¶28.

1. Kopplin's statement regarding Hilgenberg's keeping illegal substances

¶25 Hilgenberg challenges his attorney's failure to object to the following portion of Kopplin's testimony:

> Q. Are you aware if he kept anything along with the scale in the basement of your residence?
>
> A. Like what?
>
> Q. Any illegal controlled substances?
>
> A. I assumed he did.

The prosecution then asked, "And what was that?" Hilgenberg's counsel objected to any further testimony for lack of foundation, specifically that Kopplin's testimony "cannot be based upon assumptions." The circuit court sustained the objection, and the State did not return to the topic. Hilgenberg contends that, because the State's theory was that Hilgenberg aided Breanna in maintaining a drug trafficking place at *her* residence, Kopplin's statement that she assumed Hilgenberg kept controlled substances at his residence should have been excluded.

¶26 We disagree with Hilgenberg. The jury was instructed that, to prove the conspiracy charge, the State must show a "mutual understanding to accomplish some common criminal objective or to work together for a common criminal purpose," as well as an act towards the commission of the intended crime. Likewise, it was necessary for the State to show that Hilgenberg aided and abetted Breanna in maintaining a drug trafficking place. Immediately prior to the questions at issue, Kopplin had testified that a scale she knew was in the basement belonged to Hilgenberg. Kopplin's answer to the State's follow-up question regarding illegal substances constituted relevant evidence regarding the source of the drugs and other items found in Breanna's residence.

¶27 Contrary to Hilgenberg's argument, the State's theory was not only that Hilgenberg helped, in some amorphous way, Breanna in maintaining a drug trafficking place. Rather, as the State made clear in its closing argument, its theory was much more concrete: that Breanna had taken the cocaine and the scale, formerly kept at Hilgenberg's house, "into custody for the defendant because of the circumstances that were occurring." As such, whether Hilgenberg kept the drugs at his residence prior to Breanna receiving them was an issue directly related to both of the present felony charges. Hilgenberg has not satisfied his burden of showing that Kopplin's "assumption" testimony constituted "evidence of other

crimes, wrongs or acts" under WIS. STAT. § 904.04(2)(a), such that his trial counsel performed deficiently by failing to object. *See* ***State v. Bauer***, 2000 WI App 206, ¶7 n.2, 238 Wis. 2d 687, 617 N.W.2d 902 (observing that an act is not "other acts evidence" simply because it is "different" than the act complained of).

2. Kopplin's statement regarding the source of Hilgenberg's money

¶28 Hilgenberg next argues his attorney should have objected to Kopplin's testimony during redirect examination that Hilgenberg had $6000 on him shortly before October 1, 2013, which money he had obtained from drug sales:

> Q. Ms. Kopplin, you were questioned about the income that Mr. Hilgenberg was bringing in around October 1, 2013, and just prior to that. Do you remember that?
>
> A. Yes.
>
> Q. Okay. And do you also remember when you gave a statement to Investigator Wysocki regarding $6,000 that you had seen the defendant with? Do you recall that?
>
> A. Yes.
>
> Q. And when did you see the defendant with that money?
>
> A. A couple days prior.
>
> Q. To the October 1st date?
>
> A. Yes.
>
> Q. And in your statement you indicated you knew where that money came from. Where did it come from?
>
> A. Cocaine.

¶29 During her ***Machner*** testimony, trial counsel agreed this testimony "flirts on the possibility of showing that there were previous deliveries." Counsel

testified, "I certainly would have tried to keep it out if I thought I could." However, counsel expressed difficulty remembering what occurred, stating, "I can't answer what was going through my head at that precise moment because it doesn't stand out in my memory of the trial." The totality of her testimony suggested she believed the testimony to be admissible because it was "directly relevant to what was transpiring with the alleged cocaine in the October 1st to 3rd range." She wanted to use this to her advantage, to "introduce evidence that [Hilgenberg] had other forms of income besides potentially delivering drugs as a means of profit." The circuit court determined Hilgenberg's counsel's answers concerning her thought process were "muddled," and it declined to make any finding regarding a strategic basis for failing to object. Instead, the circuit court concluded no prejudice resulted from the challenged testimony.

¶30 We conclude Hilgenberg's trial counsel did not perform deficiently by not objecting to Kopplin's answer regarding the source of the $6000 she observed Hilgenberg with shortly before the events at issue. The State properly attempted to circumstantially prove during its direct examination of Kopplin that Hilgenberg derived income from dealing in controlled substances. *See* ***United States v. Penny***, 60 F.3d 1257, 1263 (7th Cir. 1995) (holding evidence of unexplained wealth is probative if it creates a reasonable inference of a defendant's involvement in a drug conspiracy or trafficking). Kopplin testified that Hilgenberg was unemployed on October 1, 2013; that she and Hilgenberg split living expenses, including monthly rent of $850, and Kopplin earned $1200 per month; and that Hilgenberg had four vehicles—an Ultima, a Jaguar and two motorcycles—that he had purchased with cash.

¶31 During cross-examination, Hilgenberg's counsel engaged Kopplin in extensive questioning regarding Hilgenberg's sources of income. Through this cross-examination, Hilgenberg's counsel established the following:

- Hilgenberg was employed as a seasonal landscaper in the summer of 2013.
- Hilgenberg bought, repaired, and sold cars with his father.
- Hilgenberg worked occasionally in 2013 doing repossession work for a company.

This testimony was presumably intended to show that Hilgenberg may have been meeting his financial obligations using money derived from legitimate sources, as opposed to drug dealing.

¶32 Given the foregoing, we reject Hilgenberg's appellate argument. He has not developed any argument that the questioning of Kopplin regarding Hilgenberg's income and employment status, including that by his attorney on cross-examination, was improper. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992). As a result, he cannot demonstrate that the State's more direct question—and Kopplin's answer—regarding the source of the $6000 that Kopplin had seen him with shortly before the incident was somehow improper. If Hilgenberg wished to challenge Kopplin's answer during redirect examination, it was necessary for him to challenge the entire line of questioning, from which Kopplin's testimony logically flowed.

¶33 This shortcoming aside, the circuit court would not have erred in admitting Kopplin's redirect examination testimony even if Hilgenberg's trial counsel had interposed an "other acts" objection. The evidence was not, strictly speaking, "other acts evidence" under WIS. STAT. § 904.04(2). The jury learned during Breanna's testimony that Hilgenberg had paid $6000 for the cocaine later

located in her possession. Kopplin's testimony, unchallenged by Hilgenberg here, was that she saw Hilgenberg with $6000 shortly before Hilgenberg was apprehended. The State's question regarding whether Kopplin knew the source of that money was clearly proper, as it was direct evidence concerning the events in question. Kopplin's redirect testimony explained how Hilgenberg was able to pay for the cocaine he was later charged with possessing by conspiracy. Although we agree with Hilgenberg that Kopplin's redirect testimony was "direct evidence that Hilgenberg is a drug dealer," Kopplin's testimony had significant probative value relating to the specific charges in this case, making it more likely that Hilgenberg committed the conspiracy and trafficking charges.

¶34 Additionally, we conclude Kopplin's answer regarding the source of the $6000 she observed in Hilgenberg's possession did not cause prejudice in the constitutional sense. Hilgenberg's only argument regarding prejudice arising from Kopplin's answer consists of the following statement: "This harmful evidence prejudiced Hilgenberg, as it provided corroboration and propensity evidence to support the State's theory that the helmet and strap that Hilgenberg requested Breanna retrieve was actually cocaine." However, this mere assertion that Kopplin's redirect testimony harmed his case is insufficient.[8] For ineffective assistance of counsel purposes, Hilgenberg must show a reasonable probability that the result of the proceeding would have been different. *See* ***Jenkins***, 355 Wis. 2d 180, ¶37. He has not done so.

[8] Later in his brief, Hilgenberg appears to make an argument that the totality of trial counsel's alleged errors regarding the "other acts evidence" was sufficient to establish prejudice. We disagree, as two of the three evidentiary items complained of are not even properly categorized as "other acts" evidence.

3. Wysocki's testimony regarding Breanna's prior statements about mushrooms

¶35 Police also discovered .798 grams of mushroom material from Breanna's residence. At trial, Breanna claimed to have been "under the influence of three different types of drugs," including mushrooms, at the time she gave her statement to investigator Wysocki. Late in the trial, the State recalled Wysocki, who testified that Breanna told him during the interview she obtained the mushrooms from Hilgenberg and "they came from Brandon's house."

¶36 This testimony was presented without objection from Hilgenberg's trial counsel, who testified at the ***Machner*** hearing she could not recall her thinking on the matter. The circuit court concluded there was no prejudice, as the mushroom evidence was "rather innocuous as [Hilgenberg] was not charged with mushroom distribution. Considering the other evidence available to the jury, there is not a reasonable probability of a different result if this evidence was not introduced."

¶37 Hilgenberg asserts the admission of the mushroom evidence was prejudicial because "the State's evidence against Hilgenberg was weak, consisting only of initial finger pointing by Hilgenberg's alleged accomplices and by tenuous circumstantial evidence." We disagree with this characterization. Although Hilgenberg was arrested without cocaine in his direct possession, the evidence of his guilt on both the conspiracy and drug trafficking charges was substantial and included his incriminating jail telephone conversations, Kopplin's testimony, and Breanna's prior statements to law enforcement. The jury clearly found incredible Breanna's assertions at trial that the cocaine was hers and that she was intoxicated when she gave her initial statement, and it was unlikely that the mushroom evidence affected this determination. Rather, Wysocki testified Breanna appeared

"very responsive" and "lucid" during his 10 a.m. interview of her, and he observed no signs of impairment.

C. Failure to challenge the legality of Hilgenberg's arrest

¶38 Hilgenberg contends his attorney was ineffective for failing to challenge the legality of his initial arrest. Police questioned Hilgenberg following the motorcycle chase, during which time he appeared to be "perspiring and shaking." He drank a beverage and smoked a cigarette "very quickly." He initially told police his car broke down in Wrightstown, but police were not able to verify this information, and the clerk at the gas station where Hilgenberg was found told police he had heard Hilgenberg say his "bike" was out of gas. Hilgenberg claimed he did not know why the motorcycle driver had approached him and he did not know the driver. Hilgenberg stated that by pointing out the police, he was merely alerting the cyclist that there was a "cop" behind him with its lights on.

¶39 Hilgenberg told police Kopplin was coming to pick him up. When police began to speak with Kopplin, Hilgenberg became angry and said, "[C]an you do me a favor? Tell that officer to get the fuck away from MY car!" Hilgenberg twice said sarcastically "he was 'sorry' the motorcyclist was able to elude" police. He was then arrested for obstruction. Hilgenberg claims his attorney should have challenged the legality of this arrest because officers "lacked probable cause to believe that Hilgenberg had lied to them" and that he had done so intentionally.

¶40 An arrest is justified whenever there are facts and circumstances sufficient to warrant a reasonable police officer in believing that the defendant committed or was committing a crime. ***State v. Koch***, 175 Wis. 2d 684, 701, 499

N.W.2d 152 (1993). A person commits obstruction by knowingly giving false information to an officer with intent to mislead the officer in the performance of his or her duty. ***State v. Reed***, 2005 WI 53, ¶24, 280 Wis. 2d 68, 695 N.W.2d 315. The circuit court denied Hilgenberg's postconviction motion on this issue, noting that, "[i]n addition to observing a communication between Hilgenberg and the driver of the motorcycle, the officers also received information [from witnesses] that Hilgenberg was not being truthful …."

¶41 We agree with the circuit court's assessment of the evidence. Although Hilgenberg claims there was no evidence of a "communication" between the cyclist and Hilgenberg, the record clearly belies this claim. Hilgenberg ignores that a "communication" need not be verbal. While speaking with police, Hilgenberg appeared nervous, gave information that was inconsistent with information they had obtained from the gas station clerk, and eventually became belligerent. The police reasonably believed Hilgenberg was lying to them, and they were not required to accept his innocent explanations for the events in question. An officer is not required to draw a reasonable inference that favors innocence when there also is a reasonable inference that favors probable cause. ***State v. Nieves***, 2007 WI App 189, ¶14, 304 Wis. 2d 182, 738 N.W.2d 125. Hence, there was no valid basis for trial counsel to challenge the legality of Hilgenberg's arrest.

III. Sufficiency of the evidence supporting possession of drug paraphernalia

¶42 Hilgenberg argues, and the State agrees, that there was insufficient evidence to support Hilgenberg's conviction for possession of drug paraphernalia as a party to a crime. The drug paraphernalia statute, WIS. STAT. § 961.571, contains a lengthy definition of "drug paraphernalia," only a portion of which was

given to the jury in this case: "The words 'drug paraphernalia' mean all equipment, products or materials of any kind that are used, designed for use or primarily intended for use to *ingest, inhale, or otherwise introduce into the human body a controlled substance*." (Emphasis added.) The State concedes "[t]he postconviction court erred when it determined that the cutting agent [Insolitol] could be considered paraphernalia under the jury instruction because it could have been used 'to ingest the cocaine.'"

¶43 Given the State's concession, we reverse the judgment convicting Hilgenberg of misdemeanor possession of drug paraphernalia as a party to the crime and that portion of the postconviction order upholding his conviction on that charge. We remand to the circuit court with directions to vacate the misdemeanor judgment and dismiss that charge.

By the Court.—Judgments and order affirmed in part; reversed in part and cause remanded with directions.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. This opinion may not be cited except as provided under RULE 809.23(3).