COURT OF APPEALS
DECISION
DATED AND FILED

July 15, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2009AP662-CR **Cir. Ct. No. 2004CF393**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RENARDO L. CARTER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and order of the circuit court for Wood County: JON M. COUNSELL, Judge. *Affirmed*.

Before Dykman, P.J., Lundsten and Higginbotham JJ.

¶1 PER CURIAM. Renardo Carter appeals from a judgment, entered after a jury verdict, convicting him of eluding and obstructing an officer, and possession with intent to deliver between five and fifteen grams of cocaine, all

three counts as a habitual offender.[1] Carter also challenges the order denying his motion for postconviction relief. Carter argues the admission of what he claims was inadmissible hearsay deprived him of a fair trial. Carter also challenges the sufficiency of the evidence to support his conviction for possession with intent to deliver between five and fifteen grams of cocaine. We reject these arguments and affirm the judgment and order.

BACKGROUND

¶2 The State charged Carter with four crimes as a repeat offender: possession with intent to deliver between fifteen and forty grams of cocaine; recklessly endangering safety; eluding an officer; and obstructing an officer. A jury acquitted Carter of recklessly endangering safety, but found him guilty of eluding and obstructing an officer. The jury also found Carter guilty of possession with intent to deliver cocaine, in an amount of between five and fifteen grams. The court imposed consecutive and concurrent sentences totaling ten years' initial confinement and six years' extended supervision. The trial court denied Carter's motion for postconviction relief after a ***Machner***[2] hearing and he appeals.

DISCUSSION

¶3 Carter argues he was denied a fair trial by a narcotics officer's testimony recounting his conversation with a confidential informant, in which the informant identified Carter as a drug dealer and arranged to purchase cocaine in

[1] This is Carter's second appeal in this matter. In the first, this court reversed the judgment and remanded the matter, enabling Carter to withdraw his no-contest pleas. Upon remand, the State reinstated the original charges and the case proceeded to trial.

[2] ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

quantities of "teeners." Specifically, Carter claims the testimony was inadmissible hearsay that violated his right of confrontation. Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." WIS. STAT. § 908.01(3) (2007-08).[3]

¶4 As the State recounts, it sought to call the informant as a witness at trial but his testimony was excluded during the State's case-in-chief. The parties agreed, and the trial court ruled, however, that the State would be allowed to present limited testimony from the officer regarding his contact with the informant. That testimony would be presented not for the truth of the matter, but only to explain its effect on the listener.

¶5 At trial, the officer testified that on the day of Carter's arrest, the officer met with the informant outside of an Econo Lodge Hotel. As Carter exited the hotel and proceeded to his vehicle, the informant identified him as an individual involved in distributing controlled substances. The officer then directed the informant to telephone Carter and indicate his interest in purchasing cocaine in quantities of "teeners"—a teener being one-sixteenth of an ounce. The informant called Carter in the officer's presence and the officer observed Carter both answer his cellular phone and hang up at the end of the conversation. During the informant's conversation with Carter, the officer heard the informant make the buy request.

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

¶6 The officer continued his surveillance of Carter's vehicle, but relayed the vehicle's description and license number to the officer who ultimately pursued and apprehended Carter. When Carter later left in his vehicle, the narcotics officer followed him and informed the arresting officer that the vehicle was on the move. The narcotics officer observed the other officer follow Carter's vehicle and engage his lights and siren. The narcotics officer also observed Carter's vehicle increase speed "in an attempt to flee." Carter failed to object to the narcotics officer's testimony at trial, but he claims relief is nevertheless warranted under the following three theories: ineffective assistance of counsel, plain error or interest of justice.

¶7 This court's review of an ineffective assistance of counsel claim is a mixed question of fact and law. ***State v. Erickson***, 227 Wis. 2d 758, 768, 596 N.W.2d 749 (1999). The trial court's findings of fact will not be disturbed unless they are clearly erroneous. ***Id.*** "However, the ultimate determination of whether the attorney's performance falls below the constitutional minimum is a question of law which this court reviews independently." ***Id.***

¶8 "The benchmark for judging whether counsel has acted ineffectively is stated in ***Strickland v. Washington***, 466 U.S. 668 … (1984)." ***State v. Johnson***, 153 Wis. 2d 121, 126, 449 N.W.2d 845 (1990). To succeed on his ineffective assistance of counsel claim, Carter must show both (1) that his counsel's representation was deficient and (2) that this deficiency prejudiced him. ***Strickland***, 466 U.S. at 694.

¶9 In order to establish deficient performance, a defendant must show that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Id.*** at 687.

However, "every effort is made to avoid determinations of ineffectiveness based on hindsight … and the burden is placed on the defendant to overcome a strong presumption that counsel acted reasonably within professional norms." ***Johnson***, 153 Wis. 2d at 127. In reviewing counsel's performance, we judge the reasonableness of counsel's conduct based on the facts of the particular case as they existed at the time of the conduct and determine whether, in light of all the circumstances, the omissions fell outside the wide range of professionally competent representation. ***Strickland***, 466 U.S. at 690. Because "[j]udicial scrutiny of counsel's performance must be highly deferential … the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" ***Id.*** at 689 (citation omitted).

¶10 The prejudice prong of the ***Strickland*** test is satisfied where the attorney's error is of such magnitude that there is a reasonable probability that, absent the error, the result of the proceeding would have been different. ***Id.*** at 694. We may address the tests in the order we choose. If Carter fails to establish prejudice, we need not address deficient performance. *See* ***State v. Sanchez***, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996).

¶11 At the ***Machner*** hearing, trial counsel testified he did not object to the narcotics officer's testimony regarding the confidential informant because in his opinion, the testimony was not objectionable, not offered for the truth of the matter asserted, not inadmissible hearsay and did not violate Carter's rights. As counsel explained:

> My conclusion was … the testimony was regarding verbal conduct that [the officer] was observing. And then at the same time, he was within eyeshot of Mr. Carter who was on a cell phone. And every time the [informant] would talk and … pause, there would be some type of apparently communicative conduct by Mr. Carter on his end. So it

> wasn't really hearsay in the sense that it was being offered for its truth. He was observing verbal conduct, one-half of … what appeared to be a drug transaction. And corresponding conduct by Mr. Carter that he concluded … was in response to what the [informant] was saying.

When asked to clarify his belief that information about the request to purchase "teeners" was not offered for the truth of the matter asserted, counsel replied:

> It was a direct observation of statements that the officer heard made by the confidential informant and then statements that were resulted in a response by Mr. Carter. So it wasn't hearsay in the sense that he was trying to say that there was some external fact that was true. He was simply overhearing half of a drug transaction.

¶12 Citing lower court federal case law, Carter disputes his trial counsel's professional assessment. The federal cases cited, however, are not precedent in Wisconsin. *See* ***State v. Webster***, 114 Wis. 2d 418, 426 n.4, 338 N.W.2d 474 (1983). It follows, therefore, that if a court is not required to consider or address case law from other jurisdictions, counsel's failure to object based on that case law is not objectively unreasonable.

¶13 Carter cites ***State v. Britt***, 203 Wis. 2d 25, 39-41, 553 N.W.2d 528 (Ct. App. 1996), to support his claim that the officer's testimony was admitted to prove the substance of the informant's conversation with Carter—specifically, that the informant had arranged a cocaine buy from Carter. ***Britt***, however, is distinguishable on its facts. There, a fellow inmate testified that the defendant stated he was going to have his sister bribe witnesses. ***Id.*** at 38. A victim then testified that an unidentified female caller offered him cocaine worth approximately $5000 in exchange for his refusal to testify against the defendant. ***Id.*** We concluded that despite the State's claim to the contrary, the victim's testimony regarding the unidentified female caller was offered to prove the truth of

the matter asserted—that the defendant attempted to carry out his bribery scheme. ***Id.*** at 39.

¶14 Here, however, the officer's testimony about what he actually observed and overheard while with the informant was not offered to establish that Carter was selling drugs but, rather, provided background information for the jury to understand why the police tried to stop Carter's vehicle and chased him when he sped away. We have held that when evidence is offered for the limited purpose of explaining the actions of investigating officers, it is not hearsay. ***State v. Hines***, 173 Wis. 2d 850, 859, 496 N.W.2d 720 (Ct. App. 1993). We therefore reject Carter's claim that the testimony constituted inadmissible hearsay that violated his right of confrontation. Moreover, given the other evidence of Carter's guilt (*see infra*), we conclude there is no reasonable probability that absent this testimony, the result would have been different. Because Carter has failed to establish that trial counsel was deficient or that the claimed deficiency resulted in prejudice, we reject his ineffective assistance claim.

¶15 Carter alternatively invokes the plain error doctrine. "Nothing … precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the judge." WIS. STAT. § 901.03(4). To invoke the doctrine of plain error, a defendant bears the burden of showing that the error is fundamental, obvious and substantial. ***State v. Jorgensen***, 2008 WI 60, ¶23, 310 Wis. 2d 138, 754 N.W.2d 77. If the defendant meets his or her burden, that burden shifts to the State to show the error was harmless beyond a reasonable doubt. ***Id.*** As noted, we are not convinced that admission of the challenged testimony constituted error, much less plain error. Carter's request for a new trial in the interest of justice on these same grounds, likewise fails.

¶16 Finally, Carter claims the evidence was insufficient to prove that he possessed cocaine with intent to deliver between five and fifteen grams of cocaine. Whether the evidence supporting a conviction is direct or circumstantial, we utilize the same standard of review regarding its sufficiency. ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). We must uphold Carter's conviction "unless the evidence, viewed most favorably to the State and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***Id.*** If there is a possibility that the jury "could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt," we must uphold the verdict even if we believe that the jury "should not have found guilt based on the evidence before it." ***Id.*** at 507. It is the jury's function to decide the credibility of witnesses and reconcile any inconsistencies in the testimony. ***State v. Toy***, 125 Wis. 2d 216, 222, 371 N.W.2d 386 (Ct. App. 1985). Thus, if more than one inference can be drawn from the evidence, this court will follow the inference that supports the jury's finding "unless the evidence on which that inference is based is incredible as a matter of law." ***Poellinger***, 153 Wis. 2d at 506-07.

¶17 Trial testimony established that after the police engaged their emergency lights and siren to initiate a stop of Carter's vehicle, he sped up in an attempt to flee. The police pursued Carter's vehicle through parts of Wisconsin Rapids, and then on foot as Carter jumped into the Wisconsin River. As he fled on foot, one of the officers saw that Carter was carrying a large plastic bag containing a substance that, based on his experience, appeared to be cocaine and crack cocaine. The officer estimated the amount of cocaine in the large bag was in excess of "a couple of ounces." Police observed Carter in the river, crouched

behind a rock, where he repeatedly pulled plastic baggies of a white powdery substance out of his pockets, ripped them open with his mouth, dumped the contents into the water, churned the water with his hands and then threw the baggies into the water.

¶18 Upon his arrest, the officers observed that Carter had a white powdery substance on his mouth and teeth. Police observed plastic baggies and white residue resembling a powder slick floating in the water. Attempts to retrieve the floating powder failed, but an officer retrieved one rock of crack cocaine as well as twelve cut off corner baggie ends from the water. The baggies retrieved are consistent with baggies that would be packaged as a "teener," or as an "eight-ball," which would be one-eighth of an ounce.[4] The baggies also could have contained a larger amount, such as one-quarter and one-half ounce quantities. Because no more than 0.2 grams of cocaine were recovered from the river, Carter argues his conviction for possession with intent to deliver between five and fifteen grams is not supported by the evidence. We disagree and conclude that from the evidence, the jury was entitled to find that Carter possessed between five and fifteen grams of cocaine with intent to deliver.

By the Court.—Judgment and order affirmed.

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

[4] One ounce is equivalent to 28.35 grams. Therefore one-sixteenth of an ounce (.0625) is equal to 1.772 grams, and one-eighth of an ounce (.125) is equal to 3.544 grams.