COURT OF APPEALS
DECISION
DATED AND FILED

December 30, 2014

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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Appeal No. 2014AP378-CR **Cir. Ct. No. 2012CF2150**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TERRANCE L. WARE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DENNIS P. MORONEY, Judge. *Affirmed*.

Before Kessler and Brennan, JJ., and Thomas Cane, Reserve Judge.

¶1 CANE, J. Terrance Ware appeals a judgment entered on a jury verdict convicting him of being a felon in possession of a firearm, and an order denying his motion for a new trial, arguing ineffective assistance of counsel. Ware first contends that the trial court erred by denying his suppression motion

because the officers lacked reasonable suspicion to do a protective search of the car Ware was driving after a traffic stop. Ware also argues he was denied effective assistance of counsel because his trial counsel did not object to testimony of an officer regarding the veracity of another witness's testimony, and because his trial counsel did not object when the prosecutor made an incorrect statement in closing argument. Ware contends the trial court erred when it denied his ineffective assistance claim without a ***Machner*** hearing.[1]

¶2 We determine that the officers had reasonable suspicion to conduct a protective search of Ware's car for weapons to ensure their safety. We also determine that Ware was not denied effective assistance of counsel because the officer's testimony was not improper opinion testimony about another witness's truthfulness and because there was no evidence in Ware's case to object to the prosecutor's statement. The trial court did not err in denying his ineffective assistance claim without a ***Machner*** hearing. Therefore, we affirm the trial court's judgment and order.

BACKGROUND

¶3 In April 2012, Milwaukee police officers Kenton Burtch, Christine Schulz, and Jason DeWitt saw the driver of a white Cadillac Escalade driving in a suspicious manner after the driver saw their squad car. The Cadillac abruptly turned from the wrong lane, accelerated away from the squad car, and did not have a front license plate. The Cadillac did not stop at a stop sign or signal that it was turning. The officers made a U-turn to follow the Cadillac and when they caught

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

up with the Cadillac at a red light, the officers activated the squad's emergency lights and siren to stop the Cadillac. The Cadillac traveled slowly for half a block before stopping, and during that time, the officers directed the squad's spotlight into the Cadillac. The officers observed the Cadillac's front seat passenger bending forward in a manner that they thought meant he was either retrieving or hiding a weapon. The officers asked both driver and passenger to get out of the car. The driver was Terrance Ware and the passenger was his brother, Marques Ware. The officers did a pat-down on Terrance first and then Marques. The frisk was done one at a time for officer safety. The officers did not find any weapons or drugs during the pat-down of the Wares, and asked both to step to the back of the car. Marques complied but Terrance had to be physically directed to the back of the car. When the officers approached the car to do a protective search for weapons, Terrance yelled that they could not search it. The officers found a semi-automatic handgun in the glove compartment during the protective search of the car.[2]

¶4 Marques told officer Burtch during interrogation initially that he knew nothing about the firearm, then said Terrance put it in the glove compartment and upon further questioning, finally said that Terrance tossed the gun onto Marques' lap when he saw police stopping him and Marques put the gun into the glove compartment. Terrance's girlfriend, Schanelle Rodgers, who came to the scene after Terrance called her, told police that the Cadillac and the gun belonged to her, that she had loaned the car to Terrance, that she kept the gun in

[2] To avoid confusion between the Ware brothers and for the sake of clarity, we will refer to the appellant as Terrance and his brother as Marques throughout the rest of this opinion.

her apartment not her car, and that Terrance knew where she kept the gun and was the only person who had access to it.

¶5 The State charged both brothers with one count each of being a felon in possession of a firearm, although the State later dismissed Marques' charge because he agreed to testify truthfully at Terrance's trial. Terrance filed a motion to suppress, arguing the traffic stop did not give the police reasonable suspicion to search him or the car for weapons.

¶6 At the suppression hearing, the trial court heard testimony from officer Burtch and from Terrance, and afterwards, denied the motion, ruling that the officers had the right to stop Terrance's vehicle because he did not have a license plate, he disobeyed a traffic signal, was speeding, and turned from the wrong lane. The trial court also found that the furtive movement described by Burtch, the vehicle's failure to stop immediately, and Terrance's testimony that he did not see his brother moving around during the traffic stop gave the officers reasonable suspicion to search the vehicle for weapons for their own safety.

¶7 At the jury trial in May 2013, the prosecutor questioned officer Burtch about his interview of Marques during the investigation of this case, and how Marques changed his version of events regarding the gun. Burtch testified that at first, Marques denied knowing anything about the firearm, that "His first answers were almost like a test as to how I took them, and when I'd say 'I don't believe you', he told the truth after about it." The prosecutor asked Burtch "[W]hen did Marques come clean, I guess, in your opinion?" Terrance's trial counsel did not object to Burtch's testimony about Marques or the prosecutor's question about Marques coming clean.

¶8 The defense called only Terrance's girlfriend, Rodgers, to testify. She told the jury that she had put the gun in the glove compartment of her Cadillac on April 22, 2012, and forgot it was still in there when she let Terrance borrow her car. She also denied telling officers at the scene that Terrance knew where she kept her gun and that he had access to it.

¶9 During the State's closing, the prosecutor argued:

> [T]he defense theory that Schanelle Rodgers put [her gun] in the car on April 22nd which she tells us now for the first time today ever, that's not reasonable, that story is not plausible, it is not reasonable. That story was concocted after the defendant knew the case against him and after Schanelle Rodgers knew the evidence against him and could do whatever she could to save her boyfriend.

Terrance's trial counsel did not object to the prosecutor's statement that Rodgers said "for the first time today ever" that she had previously put the gun in her car.

¶10 The jury found Terrance guilty of being a felon in possession of a firearm. Terrance filed a postconviction motion asking the trial court to reconsider its suppression ruling and asserting that his trial counsel was ineffective for not objecting to officer Burtch's testimony about Marques and for not objecting to the prosecutor's statement in closing that the trial was the first time Rodgers told anyone that she put the gun in the car a few days before Terrance drove it. The trial court denied the motion without a hearing. Terrance now appeals.

DISCUSSION

A. *Suppression.*

¶11 Terrance claims the trial court erred in denying his motion to suppress the firearm. He argues the officers did not have reasonable suspicion to

conduct a protective search of the vehicle because the trial court erred when it found credible officer Burtch's testimony that he saw Marques move in a way that looked like he was hiding or retrieving a weapon. Terrance claims Burtch could not possibly have seen this because it was dark outside and the vehicle Terrance drove had tinted windows. Terrance also argues that even if Burtch saw furtive movements, that alone is insufficient to create reasonable suspicion.[3]

¶12 When reviewing a motion to suppress, we apply a two-step analysis. ***State v. Dubose***, 2005 WI 126, ¶16, 285 Wis. 2d 143, 699 N.W.2d 582. First, we review the circuit court's findings of facts under the clearly erroneous standard, ***State v. Smiter***, 2011 WI App 15, ¶9, 331 Wis. 2d 431, 793 N.W.2d 920 (WI App 2010), with the circuit court acting as the ultimate arbiter of witness credibility, ***Noll v. Dimiceli's, Inc.***, 115 Wis. 2d 641, 644, 340 N.W.2d 575 (Ct. App. 1983). Second, "we must review independently the application of relevant constitutional principles to those facts." ***Dubose***, 285 Wis. 2d 143, ¶16.

¶13 During an investigative stop, police are allowed to frisk the stopped person if reasonable suspicion exists to believe that the person may be armed with a weapon and therefore be dangerous, *see* ***Terry v. Ohio***, 392 U.S. 1, 21 (1968); ***State v. Sumner***, 2008 WI 94, ¶21, 312 Wis. 2d 292, 752 N.W.2d 783, and police are allowed to do a protective search of a car "when an officer reasonably suspects that the person 'is dangerous and … may gain immediate control of weapons' placed or hidden in the passenger compartment." ***State v. Johnson***, 2007 WI 32, ¶24, 299 Wis. 2d 675, 729 N.W.2d 182 (quoting ***Michigan v. Long***, 463 U.S.

[3] On appeal, Terrance does not challenge the validity of the initial stop of the vehicle or the pat-down.

1032, 1049 (1983) (ellipsis in ***Johnson***). Police may take necessary measures to neutralize any threat of physical harm to themselves or others. ***Terry***, 392 U.S. at 23-24. In reviewing whether reasonable suspicion exists to support an officer's protective search of a vehicle for weapons, we look at the totality of the circumstances. *See* ***Johnson***, 299 Wis. 2d 675, ¶22.

¶14 Here, the trial court found officer Burtch's testimony about Marques' furtive movements credible and found that Terrance's testimony that he did not see what Marques was doing as self-serving. The trial court also found that the officers had reasonable suspicion to do a protective search of the vehicle in order "to double check for officer safety and the like whether or not a crime was committed with a person trying to secret away contraband or some type of gun." The trial court's findings are supported by the testimony at the suppression hearing.

¶15 Officer Burtch testified that he was assigned to the anti-gang unit to police high crime areas of the city; that he focused on violent crimes, drug crimes, gang crimes and firearm crimes; and that he had taken between 50 and 100 firearms off the streets. Although a high crime area alone does not create reasonable suspicion, it is one factor that supports it. *See* ***State v. Allen***, 226 Wis. 2d 66, 74, 593 N.W.2d 504 (Ct. App. 1999) (high crime area is one factor to consider in determining whether reasonable suspicion exists). Next, Burtch testified about Terrance's evasive and reckless driving, his excessive speed, the turn from the wrong lane, the disregard of the traffic sign, the failure to signal a turn, the lack of a license plate, and that Terrance slowed down but did not pull over right away. As Terrance concedes on appeal by not raising the issue, these facts clearly establish reasonable suspicion to conduct the traffic stop. *See* ***State v. Griffin***, 183 Wis. 2d 327, 333-34, 515 N.W.2d 535 (Ct. App. 1994) (lack of

license plate justifies traffic stop); ***State v. Popke***, 2009 WI 37, ¶¶22-27, 317 Wis. 2d 118, 765 N.W.2d 569 (officer had reasonable suspicion to stop a vehicle for traffic violations); ***State v. Anderson***, 155 Wis. 2d 77, 84, 454 N.W.2d 763 (1990) (driving rapidly away after seeing a police car "certainly gives rise to a reasonable suspicion that all is not well.").

¶16 Next, officer Burtch testified that after the officers activated the squad's lights and siren, and directed their spotlight into Terrance's car, he saw the passenger, later identified as Marques, making furtive movements that looked like he was trying to hide or retrieve a gun. These movements included moments when Marques' head and shoulders were hidden from view. Further, Terrance testified at the suppression hearing that he did not know if Marques was moving around in the car as he was not paying attention to Marques. Thus, there was no evidence at the suppression hearing to dispute Burtch's account. These facts support the trial court's finding that the officers had reasonable suspicion to believe that there was a weapon in the vehicle and that the officers' safety was at risk.

¶17 After the stop occurred, Terrance continued to act unusual. Officer Burtch testified that when Terrance finally stopped the car, he continued to act suspiciously by locking the car after getting out, standing close to the door to block police access to the car, yelling at the officers that they could not search the car, and disobeying the officer's order to move to the back of the car. Moreover, Burtch said that they immediately frisked both Terrance and Marques for weapons, although they did so one at a time for safety reasons, suggesting that their immediate concern was for their own safety. The suspicious behavior after the stop and the immediate frisk are factors supporting a finding of reasonable suspicion. *See* ***State v. Morgan***, 197 Wis. 2d 200, 212-13, 539 N.W.2d 887

(1995) (nervous actions by driver after traffic stop can be additional factor to support reasonable suspicion); ***State v. Alexander***, 2008 WI App 9, ¶16, 307 Wis. 2d 323, 744 N.W.2d 909 (reasonable suspicion found when pat-down is priority over traffic violation).

¶18 Officer Burtch also told the trial court at the suppression hearing that when the officers did not find a weapon during the pat-down of Terrance or Marques, they were concerned that it might be hidden in the vehicle and they did not want to put Terrance right back into the vehicle thereby giving him immediate access to a weapon. This fact actually heightens the officers' reasonable suspicion that a weapon is involved and their safety is at risk. *See* ***State v. Williams***, 2001 WI 21, ¶¶51-55, 241 Wis. 2d 631, 623 N.W.2d 106 (officers had reasonable suspicion to protectively search vehicle when pat-down did not turn up a weapon after furtive movements caused officers to believe a weapon was hidden in vehicle that suspect would return to after investigatory stop). The fact that the furtive movements might have an innocent explanation does not change our analysis. When an officer reasonably believes a weapon may endanger safety, the officer is not required to rule out innocent explanations for the suspect's behavior. *See*, *e.g.*, ***State v. Nieves***, 2007 WI App 189, ¶14, 304 Wis. 2d 182, 738 N.W.2d 125 (police not required to rule out innocent explanations when reasonable inference supports reasonable suspicion); ***Williams***, 241 Wis. 2d 631, ¶46.

¶19 All of these factors together convince us that the officers had reasonable suspicion to do the protective search of Terrance's vehicle. The protective search was based on specific and articulable facts that, cumulatively, justified the officers' actions. The totality of the circumstances here establishes that it was reasonable for the officers to believe that the Wares may have been

armed and that the situation was dangerous. Accordingly, we affirm the trial court's decision denying Terrance's motion to suppress.[4]

B. *Ineffective Assistance*.

¶20 Terrance next claims he was denied effective assistance of counsel on two grounds: first, counsel did not object during officer Burtch's testimony about Marques; and second, counsel did not object to the prosecutor's statement in closing argument. Specifically, he argues that Burtch's testimony in effect gave the opinion that Marques was telling the truth when he testified that Terrance tossed the gun on Marques' lap and told him to put it in the glove compartment, and that the prosecutor's statement hurt Rodgers' credibility and, in fact, was incorrect because Rodgers had testified at Marques' preliminary hearing in May of 2012, that she put the gun in her car on April 22, 2012, and forgot it was there when she let Terrance drive her car. Terrance contends that based on these arguments, the trial court should have held a ***Machner*** hearing.

¶21 Whether a defendant has been denied the right to effective assistance of counsel presents a mixed question of law and fact. ***State v. Trawitzki***, 2001 WI 77, ¶19, 244 Wis. 2d 523, 628 N.W.2d 801. The circuit court's findings of historical fact will not be disturbed unless they are clearly erroneous. ***Id.*** The

[4] We also reject Terrance's argument that this case is analogous to, and therefore controlled by, our decision in ***State v. Johnson***, 2006 WI App 15, 288 Wis. 2d 718, 709 N.W.2d 491, where we held that furtive movements without more was insufficient to create reasonable suspicion to protectively search a vehicle after a traffic stop for an emissions violation. ***Id.***, ¶18. Terrance's case is not analogous to and therefore not controlled by ***Johnson***. In ***Johnson***, the traffic stop was not in a high crime area, Johnson cooperated with police, and Johnson did not act in a suspicious manner. ***Id.*** In Terrance's case, we have all three of these factors plus a whole lot more. Unlike Terrance, Johnson did not evade police and stopped his vehicle without delay. ***Id.***, ¶2. Johnson also obeyed the officer's directive to step to the back of the vehicle, did not shout at the officers, and did not lock his vehicle. ***Id.***, ¶5.

ultimate determinations based upon those findings of whether counsel's performance was constitutionally deficient and prejudicial are questions of law subject to independent review. ***Id.*** The defendant bears the burden of proving both that counsel's performance was deficient and, if so, that such performance prejudiced his defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). "Counsel's conduct is constitutionally deficient if it falls below an objective standard of reasonableness." ***State v. Thiel***, 2003 WI 111, ¶19, 264 Wis. 2d 571, 665 N.W.2d 305. The defendant must overcome a strong presumption that his or her counsel acted reasonably within professional norms. ***Johnson***, 153 Wis. 2d at 127. Counsel's performance is not deficient if he or she did not object to an issue that has no merit. *See* ***State v. Wheat***, 2002 WI App 153, ¶14, 256 Wis. 2d 270, 647 N.W.2d 441.

¶22 To show prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Strickland***, 466 U.S. at 694. If analyzing ineffective assistance, we may choose to address either the deficient performance component or the prejudice component first. *See* ***id.*** at 697. If the defendant has made an inadequate showing on either component, we need not address the other. *See* ***id.***

¶23 The circuit court must hold an evidentiary hearing on an ineffective-assistance claim only if the defendant "'alleges sufficient material facts that, if true, would entitle the defendant to relief.'" ***State v. Love***, 2005 WI 116, ¶26, 284 Wis. 2d 111, 700 N.W.2d 62 (quoted source omitted). If the postconviction motion does not assert sufficient facts, or presents only conclusory allegations, or

if the record conclusively demonstrates that the defendant is not entitled to relief, the circuit court may deny the claim without a hearing. ***Id.*** We review *de novo* whether a defendant is entitled to an evidentiary hearing. ***State v. Bentley***, 201 Wis. 2d 303, 310, 548 N.W.2d 50 (1996).

¶24 Terrance relies on ***State v. Haseltine***, 120 Wis. 2d 92, 352 N.W.2d 673 (Ct. App. 1984), to support his claim that his trial counsel's failure to object to the prosecution's questioning of officer Burtch about Marques' veracity was deficient. In ***Haseltine***, we determined that "[n]o witness, expert or otherwise, should be permitted to give an opinion that another mentally and physically competent witness is telling the truth." ***Id.*** at 96. This is not allowed because it is solely the factfinder's role to determine credibility. ***State v. Romero***, 147 Wis. 2d 264, 278, 432 N.W.2d 899 (1988).

¶25 The State does not dispute the ***Haseltine*** rule, but points out that ***Haseltine*** does not prohibit an officer from testifying about what happened during his investigation and what he believed at the time of his investigation. *See* ***State v. Johnson***, 2004 WI 94, ¶14 n.2, 273 Wis. 2d 626, 681 N.W.2d 901. The State asserts that officer Burtch's testimony about Marques did not violate ***Haseltine*** because he was not giving an opinion about whether Marques was telling the truth at trial. Rather, Burtch was testifying about what happened during his investigation—what Marques told him, what Burtch said in response, and what Burtch thought at the time.

¶26 To determine whether officer Burtch improperly testified about Marques' veracity in violation of ***Haseltine***, we examine the purpose of the testimony and its effect. *See* ***State v. Tutlewski***, 231 Wis. 2d 379, 388, 605 N.W.2d 561 (Ct. App. 1999). This is a question of law that we review *de novo*.

See ***State v. Davis***, 199 Wis. 2d 513, 519, 545 N.W.2d 244 (Ct. App. 1996). Terrance argues his trial counsel should have objected when: (1) Burtch testified that Marques initially denied knowing anything about the gun, but after additional questioning "told the truth"; (2) Burtch testified that he continued to question Marques because Burtch did not believe Marques' explanations; and (3) the prosecutor asked about when Marques "came clean."

¶27 The purpose and effect of all three examples was not to vouch for the veracity of Marques' trial testimony. Marques had not yet even testified. Rather, the purpose and effect of this testimony was to allow Officer Burtch to explain how and why he conducted his interview of Marques, to tell the jury his thought process during the interview, and to explain what Burtch believed at that time. This is all permitted under Wisconsin case law. *See* ***State v. Snider***, 2003 WI App 172, ¶27, 266 Wis. 2d 830, 668 N.W.2d 784 (a police detective's testimony about what he believed at the time of his investigation did not improperly comment on whether the defendant's or victim's testimony at trial was truthful); ***State v. Smith***, 170 Wis. 2d 701, 718, 490 N.W.2d 40 (Ct. App. 1992) ("[T]he detective's testimony that [the witness] later changed his story to what the detective 'felt was the truth' was not an attempt to bolster [the witness's] credibility, but was simply an explanation of the course of events during the interrogation.").

¶28 Accordingly, officer Burtch's testimony and the prosecutor's questions to him were not improper, did not violate ***Haseltine***, and were not objectionable. Therefore, Terrance's trial counsel was not ineffective when he did not object, and the trial court properly exercised its discretion in denying his request for a ***Machner*** hearing on this ground.

¶29 Terrance next complains that his trial counsel did not object when the prosecutor told the jury that this trial was the first time that Rodgers said she put her gun in her car on April 22nd. He argues his attorney should have objected because Rodgers *did* testify to this at Marques' preliminary hearing in May of 2012.

¶30 The record, however, conclusively shows that the prosecutor's statement did not require an objection. There is nothing in Terrance's record establishing that Rodgers publicly announced that she put the gun in the vehicle before Terrance drove it. All of the police reports, police testimony, and accounts of Rodgers' statements say she did not put the gun in the car. The prosecutor handling Terrance's trial was different from the prosecutor who handled Marques' preliminary hearing and case. The first time the prosecutor here heard Rodgers' new version of how the gun got in the car was at Terrance's trial when Rodgers took the stand for the defense. Thus, the prosecutor cannot be faulted for making an argument in closing that, based on all the material in the record, appeared to be true. Likewise, neither Terrance nor his trial counsel attended Marques' preliminary hearing to hear Rodgers' testimony. Accordingly, we cannot fault Terrance's trial counsel for not objecting to a statement he did not know was incorrect.

¶31 The record conclusively shows that the prosecutor's closing argument did not require Terrance's trial counsel to object; therefore, the trial court properly exercised its discretion in denying his request for a ***Machner*** hearing on this ground.

By the Court.—Judgment and order affirmed.

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