COURT OF APPEALS
DECISION
DATED AND FILED

March 21, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP2638-CR **Cir. Ct. No. 2013CF1502**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

VICTORIA WARD,

DEFENDANT-APPELLANT.

APPEAL from a judgment and orders of the circuit court for Milwaukee County: DANIEL L. KONKEL, Judge. *Affirmed*.

Before Brennan, P.J., Kessler, and Brash, JJ.

¶1 BRENNAN, P.J. Victoria Ward appeals from a judgment of conviction for keeping a drug house and possession of heroin with intent to deliver, both as a party to a crime. She also appeals orders denying her postconviction motions.

¶2 She argues that the trial court erred with regard to two evidentiary decisions: excluding testimony she wished to elicit to impeach a witness and admitting testimony about a gun the police found hidden under her mattress. She also argues that she is entitled to an evidentiary hearing on her claim of ineffective assistance of counsel, which is based on counsel's allegedly inadequate efforts to impeach the witness. Finally, she argues that she is entitled to a new trial in the interest of justice.

¶3 We disagree and affirm.

BACKGROUND

¶4 In early 2013, Ward's mother and uncle were under investigation for dealing heroin. Ward's apartment was suspected of being used as a "stash house" for drug storage. Police observed Ward's mother and uncle go to Ward's apartment building before and after controlled drug buys. On February 13, 2013, an officer brought a police dog to conduct a sniff search in the apartment building, and the dog alerted at the door of Ward's apartment. On February 14, 2013, police executed a search warrant at Ward's mother's home.

¶5 On February 15, 2013, Ward's uncle came to Ward's apartment at about 7:00 a.m. and then left. Police went to Ward's apartment about 11:30 a.m., questioned her about whether there were drugs in her apartment, obtained her consent to search, and searched the apartment. Ward directed police to a gun hidden under her mattress. Inside of a woman's boot on a shelf in the bedroom closet, police also found fifty-six bindles of heroin totaling about five grams and one large baggie containing about eighteen grams of heroin.

¶6 Ward was charged with felony counts of maintaining a drug house and possession with intent to deliver; in an amended information, both counts were charged as a party to a crime.

¶7 The issues Ward raises regarding impeachment stem from testimony given by Corporal Jeffrey Zientek, a canine handler who was at the scene, at pre-trial hearings and at trial. That testimony related to Zientek's presence at the moment of Ward's initial encounter with police.

¶8 At the preliminary hearing on May 15, 2013, Zientek testified that he had taken the elevator from the lobby to the fourth floor with the other officers and had been outside Ward's door with the other officers when they made initial contact with Ward. Zientek testified that while he was present during that initial contact, he had overheard Ward give consent to Officer Nick Stachula to search the apartment.

¶9 At the hearing on Ward's motion to suppress evidence and statements on September 25, 2013, Stachula testified that at the point when he and other officers arrived at Ward's door for a knock-and-talk encounter, Zientek was not present. Stachula testified that Zientek remained outside the building to monitor the unit's exterior balcony. Stachula was cross-examined about the discrepancies between his testimony and his written police report about the encounter. His report stated that the six "[o]fficers present for the initial contact at the door of Unit No. 14" included Zientek. He testified on cross-examination that "[i]t would be a misprint because Zientek was outside.… And it just wasn't worded properly as far as being present at the location." Consistent with his testimony at the suppression hearing, at the jury trial, Stachula testified that Zientek was outside during the initial contact with Ward.

¶10 Zientek also testified at the trial that he was outside the building watching the balcony while the first officers went to make contact with Ward and that he then joined them to conduct the search with the dog. On cross-examination of Zientek, after eliciting testimony regarding Zientek's arrival at the apartment, trial counsel attempted to ask, "[t]hat portion of the conversation you overheard between Ms. Ward and Detective Stachula, Ms. Ward said that --" and was interrupted by the State with an objection on hearsay grounds. The trial court sustained the objection. Trial counsel asked two further questions on this topic:

> [Counsel]: Did you overhear the conversation between Ms. Ward and the detective?
>
> [Zientek]: Just bits and pieces.
>
> [Counsel]: Did you ever hear Ms. Ward say that --
>
> [State]: Objection, hearsay.
>
> The Court: Sustained.
>
> [Counsel]: Your Honor, it is to impeach the former officer's testimony.
>
> The Court: Sustained, hearsay.

¶11 The State introduced evidence of the gun in Ward's apartment and testimony by the officers that Ward had first told them that the gun belonged to a boyfriend who was incarcerated before admitting that it belonged to her uncle. Ward objected, unsuccessfully, on the grounds that the evidence of gun was irrelevant to the charges and unduly prejudicial.

¶12 The jury returned a verdict of guilty as to both charges.

¶13 Judgment was entered on the two counts, and Ward was sentenced to four years of initial confinement and four years of extended supervision on the

first count, and one year of initial confinement and one year of extended supervision on the second sentence, to run concurrent.

Postconviction motions

¶14 As relevant to this appeal, Ward filed a postconviction motion[1] seeking a new trial on the grounds that the trial court erred in excluding the impeachment evidence and in admitting evidence of the gun and seeking an evidentiary hearing on a claim of ineffective assistance of counsel. The trial court denied the motion without a hearing. This appeal follows.[2]

DISCUSSION

¶15 Ward argues that she is entitled to a new trial due to the trial court's erroneous exercise of discretion as to two evidentiary rulings. She also argues that she is entitled to a hearing on her claim of ineffective assistance of counsel. In the alternative, she argues that she is entitled to a new trial in the interest of justice under WIS. STAT. § 752.35 (2015-16).[3] For the reasons stated below, we disagree.

[1] An initial postconviction motion sought to modify the judgment of conviction to make Ward eligible for early release programs. The circuit court denied the motion. She has abandoned that issue on appeal despite including it in her notice of appeal.

[2] Ward's second postconviction motion also included an additional argument related to alleged juror bias. She has abandoned that issue on appeal. We address only the issues remaining in her second postconviction motion and her appeal to this court for a new trial in the interest of justice.

[3] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

1. Ward is not entitled to a new trial based on the trial court's evidentiary decisions.

a. It was not error for the trial court to exclude the hearsay evidence because the proponent did not articulate a basis for admissibility.

¶16 Ward argues that the trial court erred when it sustained objections by the State to trial counsel's two attempts to elicit from Zientek what he heard Ward say to Stachula. We disagree.

¶17 A trial court's decision to admit or exclude evidence is a discretionary determination that will not be upset on appeal if it has "a reasonable basis" and was made "in accordance with accepted legal standards and in accordance with the facts of record." ***Lievrouw v. Roth***, 157 Wis. 2d 332, 348, 459 N.W.2d 850 (Ct. App. 1990) (citations and quotation marks omitted). "Hearsay is not admissible except as provided by these rules or by other rules adopted by the supreme court or by statute." WIS. STAT. § 908.02. "'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).

¶18 "[W]here counsel fails to state the purpose of a question to which an objection is sustained on grounds of materiality, the trial court may exercise its discretion to exclude the evidence." ***State v. Friedrich***, 135 Wis. 2d 1, 14, 398 N.W.2d 763 (1987).

> [T]he judge must be fairly informed of *the basis for the proponent's claim of admissibility* …. To this end the statement must be reasonably specific, must state the purpose of proof offered unless that is apparent, and where the offered facts suggest a question as to their materiality or competency the offer must show the facts on which relevancy of admissibility depends.

Id. at 14-15 (emphasis added; citations omitted). "[I]t is *the proponent's burden* to prove that the evidence fits into a specific exception to the hearsay rule." ***State v. Peters***, 166 Wis. 2d 168, 174, 479 N.W.2d 198 (Ct. App. 1991) (emphasis added). "Where a line of inquiry is sought to be justified on a theory no[t] ... readily apparent ... counsel owes it to the court to point out the proper reason for it." ***Heims v. Hanke***, 5 Wis. 2d 465, 471, 93 N.W.2d 455 (1958) (overruled in part on other grounds). If counsel fails to do so, "rejection of the evidence will not ordinarily be considered to warrant reversal." ***Id.***

¶19 In this case, the first question is whether the trial court erred when it ruled that the answer to trial counsel's question was inadmissible as hearsay. Trial counsel asked Zientek what he had heard Ward say:

> [Counsel]: Did you ever see or hear Ms. Ward say that –
>
> [State]: Objection, hearsay.

Clearly the question called for hearsay. It attempted to ask the non-declarant what the declarant had said—and so the trial court properly sustained the objection. Trial counsel had the opportunity to try again to come up with a proper basis for admissibility. But trial counsel's only response was:

> [Counsel]: Your honor, it is to impeach the former officer's testimony.

Counsel's response is inadequate in that it offered no legal basis for admissibility as we discuss below. Simply stating a desire to "impeach" the officer does is not enough. It is the proponent's burden to articulate the basis for admissibility. *See* ***Peters***, 166 Wis. 2d at 174. Ward failed to meet this burden. Thus, the trial court cannot be faulted for its proper legal ruling excluding clear hearsay.

¶20 Although Ward belatedly argued in her postconviction and appellate briefing a basis for admissibility—that the testimony was not hearsay because it was not offered for the truth of the matter asserted—trial counsel did not provide the trial court a basis for admissibility *at the time of the ruling*. It is not error for a trial court to fail to take into consideration an argument "that could have been but was not raised in resolving an issue." *See* ***Schonscheck v. Paccar, Inc.***, 2003 WI App 79, ¶11, 261 Wis. 2d 769, 661 N.W.2d 476. Therefore it was not error for the trial court to exclude the evidence because counsel failed to articulate a basis for the evidence's admissibility. *See* ***Heims***, 5 Wis. 2d at 471.

b. The exclusion of the hearsay evidence did not constitute a due process violation.

¶21 Ward argues that the trial court's "erroneous ruling," which prohibited Zientek from answering what he heard Ward say, "denied Ward the ability to use the officer's prior inconsistent statement to show his lack of credibility[]" and that this deprivation was a violation of Ward's due process rights. We disagree.

¶22 Ward cites to ***Myers v. State***, 60 Wis. 2d 248, 263-64, 208 N.W.2d 311 (1973), for the proposition that a trial court's failure "to allow the defendant at trial 'access to' and the 'right to use' prior inconsistent statements for 'impeachment purposes' is a violation of his constitutional right to due process of law." ***Id.*** Ward's argument fails for several reasons, most importantly because it is based on a mischaracterization of what the trial court did here. Ward never asked Zientek about his *own* statement, and the trial court did not prevent Ward from exercising her right to impeach Zientek with Zientek's *own* statement, as was the case in ***Myers***. Thus ***Myers*** is completely distinguishable.

¶23 In ***Myers***, the trial court had prohibited the defendant from cross-examining a State's witness with her own prior inconsistent testimony. ***Id.*** at 265. This was reversible error. ***Id.*** Contrary to Ward's assertion in her brief, the trial court here did not deny Ward the ability to use the officer's prior inconsistent statement to show his lack of credibility. In such a case, ***Myers*** would require reversal. The statement Ward sought to elicit here was someone else's statement, i.e., hearsay. Thus ***Myers*** offers no support to Ward's due process argument, and she offers no other development of the issue.

¶24 Because the trial court's ruling did not prohibit Ward from cross-examining Zientek with his own prior inconsistent testimony, it did not violate Ward's due process rights.

c. Admitting the gun evidence was not an erroneous exercise of discretion.

¶25 Ward argues that the trial court erroneously exercised its discretion in admitting the gun evidence because its prejudicial effect outweighs its probative value. *See* WIS. STAT. § 904.03 (relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice). She concedes that it was relevant. She argues that the trial court's failure to conduct the balancing test of the probative value and unfair prejudice for this evidence means that the ruling must be reversed. We disagree.

¶26 As noted above, a trial court's decision to admit or exclude evidence is a discretionary determination that will not be upset on appeal if it has "a reasonable basis" and was made "in accordance with accepted legal standards and in accordance with the facts of record." ***Lievrouw***, 157 Wis. 2d at 348 (citations omitted). "If the trial court's decision is supportable by the record, we will not

reverse even if the trial court gave the wrong reason or no reason at all." ***State v. Jenkins***, 168 Wis. 2d 175, 186, 483 N.W.2d 262 (Ct. App. 1992). *See also* ***State v. Johnson***, 184 Wis. 2d 324, 337, 516 N.W.2d 463 (Ct. App. 1994) (where "the court did not specifically perform the balancing test required" we may independently review the evidence to determine whether it supports the trial court's ruling).

¶27 "[S]ec[tion] (Rule) 904.03, STATS., favors admissibility in that it mandates that … evidence will be admitted unless the opponent of the evidence can show that the probative value of the evidence is *substantially* outweighed by unfair prejudice." ***State v. Speer***, 176 Wis. 2d 1101, 1115, 501 N.W.2d 429 (1993). "The term 'substantially' indicates that if the probative value of the evidence is close or equal to its unfair prejudicial effect, the evidence must be admitted." ***Id.*** "Nearly all evidence operates to the prejudice of the party against whom it is offered." ***Johnson***, 184 Wis. 2d at 340. "The test is whether the resulting prejudice of relevant evidence is *fair* or *unfair*." ***Id.*** "In most instances, as the probative value of relevant evidence increases, so will the *fairness* of its prejudicial effect." ***Id.*** "Thus, the standard for unfair prejudice is not whether the evidence harms the opposing party's case, but rather whether the evidence tends to influence the outcome of the case by 'improper means.'" ***Id.***

¶28 Appellate courts have frequently recognized the specific relevance of gun evidence in drug cases. "[W]eapons are often 'tools of the trade' for drug dealers." ***State v. Guy***, 172 Wis. 2d 86, 96, 492 N.W.2d 311 (1992) (citation omitted). "This court has recognized that '[t]he violence associated with drug trafficking today places law enforcement officers in extreme danger.'" ***Id.*** (citation omitted). *See also* ***State v. Richardson***, 156 Wis. 2d 128, 144,

456 N.W.2d 830 (1990) ("Several cases have found that drug dealers and weapons go hand in hand, thus warranting a ***Terry*** frisk for weapons.").[4]

¶29 In this case, Ward had volunteered to the police that the gun was in the apartment when police asked her whether there was "anything illegal in the home." The evidence showed that the gun's serial number had been scratched off. There was testimony by the officers that Ward initially told them that the gun was left there by an old boyfriend. Later she admitted to Officer Stachula that the gun belonged to her uncle. She denied this subsequent admission at trial. The jury had the opportunity to weigh the testimony and decide who to believe.

¶30 Because the question for the jury in this case was whether Ward knew of the presence of drugs in her apartment, her knowledge of the presence of the gun and who left it there was highly relevant. If the jury believed it was her uncle's gun, it lent support to proof of her knowledge that her home was used for drug dealing. Therefore, the evidence concerning the gun was highly probative of her knowledge of that element of the offenses. And just because the admission of the gun evidence rebutted her denial, that does not mean it was unfair or that it tended to influence the outcome of the case by "improper means." "Nearly all evidence operates to the prejudice of the party against whom it is offered." *See* ***Johnson***, 184 Wis. 2d at 340. Rather, applying the balancing test, we conclude that the probative value is not "substantially" outweighed by the prejudice to Ward in this case—it is neither close to nor equal to any unfair prejudicial effect. *See* ***Speer***, 176 Wis. 2d at 1115. Accordingly, we conclude that the evidence was properly admitted. There are facts of record which "could

[4] ***Terry v. Ohio***, 392 U.S. 1 (1968).

support the circuit court's decision, had discretion been exercised on the basis of those facts," and we therefore conclude that admitting the gun evidence was not error. *See* ***Kolpin v. Pioneer Power & Light Co., Inc.***, 162 Wis. 2d 1, 30, 469 N.W.2d 595 (1991).

d. Ward is not entitled to an evidentiary hearing on her claim of ineffective assistance of counsel.

¶31 Ward argues that she is entitled to an evidentiary hearing on her claim that trial counsel performed deficiently by failing to pursue impeachment of Zientek and that this performance prejudiced her. Ward argues that the case turned on credibility determinations, and, for this reason, the outcome was so affected by counsel's failure to impeach Zientek with his inconsistent testimony about his initial whereabouts that a different outcome is reasonably probable without this failure.

¶32 Our review of a trial court's legal conclusions as to whether the lawyer's performance was deficient and, if so, prejudicial, are questions of law that we review *de novo*. *See* ***State v. Johnson***, 153 Wis. 2d 121, 128, 449 N.W.2d 845 (1990). A defendant is entitled to an evidentiary hearing on such a claim only if the defendant alleges facts that, if true, would entitle her to relief. ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. If the motion raises sufficient facts, the trial court must hold a hearing. ***Id.*** "[I]f the motion does not raise facts sufficient to entitle the movant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the [trial] court has the discretion to grant or deny a hearing." ***Id.*** "We review a [trial] court's discretionary decisions under the deferential erroneous exercise of discretion standard." ***Id.***

¶33 To satisfy the prejudice prong, Ward must show that there is a reasonable probability of a different outcome, *see* ***Strickland v. Washington***, 466 U.S. 668, 694 (1984), and "a reasonable probability that a jury … would have a reasonable doubt as to the defendant's guilt," *see* ***State v. McCallum***, 208 Wis. 2d 463, 474, 561 N.W.2d 707 (1997). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Strickland***, 466 U.S. at 694.

¶34 The circuit court resolved Ward's ineffectiveness claim on the prejudice ground. In its order denying Ward's postconviction motion on this issue, the circuit court stated, "[i]t is possible that posing further questions to Corporal Zientek about his whereabouts could have resulted in the successful impeachment of his testimony." However, the circuit court concluded that there was no prejudice to Ward because "even if some degree of impeachment had been pursued or accomplished, there is not a reasonable probability of a different result."

¶35 We agree that Ward is not entitled to an evidentiary hearing because the record conclusively demonstrates that Ward was not prejudiced by the absence of impeachment of Officer Zientek with his inconsistent testimony about where he was when Officer Stachula first made contact with Ward. Even assuming the failure to impeach was deficient representation, an issue we do not decide, the inconsistency was too minor in the context of all of the other testimony to undermine our confidence in the result.

¶36 We first examine the inconsistency. At the preliminary hearing Zientek, the officer in charge of the K-9 unit during the search, testified that he was with Officer Stachula when Stachula first contacted Ward at her door. Officer Stachula, at the preliminary hearing, testified differently—that Zientek was

outside when Stachula first contacted Ward. At trial both Zientek and Stachula testified that Zientek was outside the building where he could observe the apartment's balcony when Stachula first contacted Ward at her door. The inconsistency relates to *where* Zientek was at the time *first contact* was made with Ward. There is no other claimed inconsistency in Zientek's testimony about the search and the dog alerting at the heroin in Ward's closet.

¶37 The record shows that Zientek's testimony as to all the other events was consistent with that of Ward and Stachula. Zientek gave a detailed explanation of the process of a dog-assisted search, how the dog had alerted, and what was found in the closet. Ward does not dispute that she gave consent to search or that she volunteered that the gun was present in her apartment.

¶38 Thus, even if Ward had successfully impeached Zientek such that it cast doubt on the accuracy of his *prior testimony* from the preliminary hearing on *where* he was at the point of first contact with Ward, his testimony *at trial* about his role in the encounter with Ward was corroborated by both Stachula and Ward's testimony. Ward had nothing to gain by impeachment on this minor point and therefore was not prejudiced by its omission.

¶39 Additionally, we note that the two significant differences in testimony did not involve Zientek at all. They were between Stachula's testimony and Ward's testimony concerning whether Ward had told Stachula her uncle was storing drugs in her home and whether she had told Stachula that the gun belonged to her uncle. Ward denied both statements. Thus, Ward's denial of these critical facts would have been unaffected by impeachment of Zientek. Accordingly, impeachment of Zientek on this minor point of where he was at the initial contact does not undermine our confidence in the result.

¶40 In light of the entire record, there is not a reasonable probability of a different outcome but for trial counsel's failure to impeach Zientek with his prior inconsistent testimony. Therefore we conclude that the circuit court properly exercised its discretion in denying Ward's motion for a hearing on her ineffectiveness claim.

e. Ward is not entitled to a new trial in the interest of justice.

¶41 Ward argues that she is entitled to a new trial in the interest of justice, pursuant to WIS. STAT. § 752.35, which permits discretionary reversal "if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried[.]" She argues that justice has miscarried and that absent the inadequate impeachment of Zientek and the admission of the gun evidence, the evidence would have predominated in her favor. We disagree.

¶42 Our supreme court has held that the "exceptional cases" that are appropriate for discretionary reversal under WIS. STAT. § 752.35 are cases where the jury was wrongly prevented from hearing important testimony or considered improper evidence that "clouded a crucial issue," and cases where "an erroneous instruction prevented the real controversy in a case from being tried." ***State v. Doss***, 2008 WI 93, ¶86, 312 Wis. 2d 570, 754 N.W.2d 150 (citations omitted).

¶43 Ward's first argument on this point fails because it is simply her ineffective assistance of counsel argument. Where a defendant argues under WIS. STAT. § 752.35 that she is entitled to a new trial because her counsel's deficiencies prevented the real controversy from being fully tried, the appropriate analytical framework is provided by ***Strickland***. ***State v. Mayo***, 2007 WI 78, ¶60,

301 Wis. 2d 642, 734 N.W.2d 115. We have already conducted the ***Strickland*** analysis and need not repeat it here.

¶44 Ward's second argument is that she is entitled to a new trial in the interest of justice because the trial court wrongly admitted the gun evidence. We have already reviewed that discretionary ruling by the trial court and concluded that it was not erroneous. There is therefore no basis for a discretionary reversal in the interest of justice.

¶45 For these reasons, we affirm the judgment of conviction and the orders denying postconviction relief.

By the Court.—Judgment and orders affirmed.

Not recommended for publication in the official reports.