COURT OF APPEALS
DECISION
DATED AND FILED

August 9, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP2254-CR **Cir. Ct. No. 2013CF202**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RENAUL E. GLOVER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Kenosha County: WILBUR W. WARREN, III, Judge. *Affirmed.*

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

¶1 PER CURIAM. Renaul E. Glover appeals from a judgment of conviction and an order denying his motion for postconviction relief. Glover claims his trial counsel provided ineffective assistance of counsel by failing to move to suppress evidence obtained from an overly broad warrant, failing to move to suppress witness identifications, and failing to object to statements during the State's closing arguments. We reject Glover's arguments and affirm.

Background

¶2 The charges in this case stem from three burglaries in Kenosha, Wisconsin. On August 20, 2012, a witness reported seeing a man putting items, including televisions, into the trunk of a "two-tone Buick or Cougar" at an address on 37th Avenue, and the owner of the apartment later reported property missing. The witness and the owner located the distinctive vehicle parked at a home on 60th Street, and the witness identified Glover as the man he saw. Police later recovered a fingerprint on the rear outer door of the apartment building belonging to Glover. The vehicle, a Buick with custom rims, was registered to a woman who police identified as Glover's live-in girlfriend.

¶3 On November 20, 2012, the owner of a home on 31st Avenue reported that he found one of the doors open and tools were missing from the garage. Surveillance footage from the tavern across the street appeared to show the burglary in the background, and a witness identified the car shown on the video as the same Buick located at the home on 60th Street. Witnesses, E.S. and G.S., who saw the burglary also later identified the man in the video as the same man they had seen committing the burglary, identified by his lanyard, jacket, and hoodie.

¶4 On November 23, 2012, the owners of a home on Washington Road also returned to find their home burglarized. A computer, engagement ring, watch, camera, money, an iphone, and Nike Jordan sneakers were reported missing. That same day, Detective Keith Dumesic obtained and executed a search warrant for Glover's home, and Dumesic testified that officers were searching for "electronics, power tools" and "anything else connected with a burglary." The iphone, with pictures of the owner's children, and the sneakers, identified through glitter allegedly belonging to the owner's young child, were recovered from Glover's home. None of the items reported stolen from the homes on 37th Avenue and 31st Avenue were recovered from Glover's home.

¶5 Glover was charged with three counts each of burglary of a building or dwelling, misdemeanor theft, and misdemeanor bail jumping, for a total of nine counts, all as a repeater. A jury found Glover guilty on all counts, and the court imposed a sentence of thirteen years' initial confinement and six years' extended supervision. Glover filed a postconviction motion, arguing ineffective assistance of trial counsel. Following a ***Machner***[1] hearing, the circuit court denied Glover's motion. Glover appeals.

¶6 The issues in this case arise in the context of an ineffective assistance of counsel claim. A claim of ineffective assistance of counsel is predicated on a finding of deficient performance and resulting prejudice to the defendant. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To establish deficient performance, the defendant must establish that "counsel's representation fell below an objective standard of reasonableness." ***Id.*** at 688. Prejudice is

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

demonstrated where the defendant proves 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." ***Id.*** at 694. If the defendant fails to establish one prong of the ***Strickland*** test, we may dispense with the second prong. ***Id.*** at 697; ***State v. Trawitzki***, 2001 WI 77, ¶40, 244 Wis. 2d 523, 628 N.W.2d 801.

¶7 Whether a defendant has been deprived of effective assistance of counsel is a mixed question of law and fact. ***Trawitzki***, 244 Wis. 2d 523, ¶19. "We will uphold the trial court's findings of fact unless they are clearly erroneous. We review whether defense counsel's performance was deficient and prejudicial de novo." ***State v. Tkacz***, 2002 WI App 281, ¶18, 258 Wis. 2d 611, 654 N.W.2d 37 (citation omitted).

Search Warrant

¶8 On appeal, Glover argues that trial counsel was ineffective for not moving to suppress the evidence police recovered from Glover's home as the search warrant was insufficiently particular and officers exceeded its scope.[2] We disagree. Even if we were to assume, as the State does in its response brief, that the search warrant was insufficiently particular and, thus, invalid, we fail to find deficient performance by trial counsel.

[2] "[T]he warrant clause requires 'that warrants [] particularly describe the place to be searched, as well as the items to be seized.'" ***State v. Sveum***, 2010 WI 92, ¶27, 328 Wis. 2d 369, 787 N.W.2d 317 (citation omitted; alternation in original).

¶9 At the ***Machner*** hearing, Glover's trial counsel testified that he did not file a motion to suppress because he "didn't think it was a valid motion," specifically that he didn't believe the motion would be successful on the merits. "An attorney does not perform deficiently by failing to make a losing argument." ***State v. Jacobsen***, 2014 WI App 13, ¶49, 352 Wis. 2d 409, 842 N.W.2d 365. Further, "the test for effective assistance of counsel is not the legal correctness of counsel's judgments, but rather the *reasonableness* of counsel's judgments under the facts of the particular case *viewed as of the time of counsel's conduct*." ***State v. Weber***, 174 Wis. 2d 98, 115, 496 N.W.2d 762 (Ct. App. 1993) (citing ***State v. Pitsch***, 124 Wis. 2d 628, 636-37, 369 N.W.2d 711 (1985)).

¶10 Here, trial counsel's decision not to file a motion to suppress was not deficient performance as it was reasonable to conclude that the circuit court would have applied the good faith exception to the exclusionary rule to deny the motion. We apply the good faith exception where "the officers conducting an illegal search 'acted in the objectively reasonable belief that their conduct did not violate the Fourth Amendment.'" ***State v. Dearborn***, 2010 WI 84, ¶33, 327 Wis. 2d 252, 786 N.W.2d 97 (quoting ***United States v. Leon***, 468 U.S. 897, 918 (1984)). Where officers act in accordance with a search warrant, we apply the good faith exception if (1) "officers conducted a significant investigation prior to obtaining the warrant," (2) "the affidavit supporting the warrant was reviewed by either a police officer trained and knowledgeable in the requirements of probable cause and reasonable suspicion, or a knowledgeable government attorney," and (3) "a reasonably well-trained officer would have known that the search was illegal despite the magistrate's authorization, rendering the officers' reliance on the warrant unreasonable." ***State v. Scull***, 2015 WI 22, ¶38, 361 Wis. 2d 288, 862 N.W.2d 562.

¶11 In this case, Dumesic's testimony at trial outlined the significant investigation used to narrow in on Glover as the suspect through surveillance footage, photographs, and personal interviews. Specifically, Dumesic identified the distinctive Buick seen in the surveillance footage from the tavern, learned from another officer that Glover had been regularly seen driving that Buick, and met with E.S. and G.S. who said that Glover looked like the burglar. Dumesic testified that he had prepared about sixty or so search warrants during his twenty-two year career, and the affidavit properly sought to establish probable cause through a discussion of the investigation into the November 20 burglary and other burglaries in which he suspected Glover's involvement.

¶12 Finally, the officers' reliance on the warrant was not unreasonable. The warrant specified that officers were looking for "[m]any items of various tools power and non power of a variety of assortments, a variety of electronics equipment which would include any lap top computers, or flat screen televisions" and evidence of "things [that] were stolen from their true owner" and "may constitute evidence of a crime." At the time Dumesic drafted the warrant, he suspected that Glover was involved in approximately fourteen burglaries, in which some homes had more than forty-five items stolen. Dumesic testified that he did not "think there was any realistic way to literally list all the items, especially since some of the people didn't have the serial numbers or even know the brand name of the items that were stolen." Under the circumstances, the warrant was not so facially deficient that an officer could not reasonably rely on its validity. *See* ***State v. Marquardt***, 2005 WI 157, ¶25, 286 Wis. 2d 204, 705 N.W.2d 878. Accordingly, trial counsel was not deficient as a reasonable attorney could have concluded that a motion to suppress the evidence recovered under the search warrant was not meritorious.

Out-of-Court Identification

¶13 Glover objects to the identifications provided by E.S. and G.S., who witnessed the burglary on November 20. Dumesic had E.S. and G.S. review the tavern surveillance footage taken during the burglary as well as surveillance video from the same tavern three days later.[3] E.S. and G.S. told police that the individual in both videos looked like the same individual responsible for the burglary, although neither saw the perpetrator's face and identified the individual in the video through his clothing, identification badge, and his build. At trial, E.S. testified that he would be unable to identify the individual if he saw him again and he told the same to Dumesic on the day of the burglary. Glover claims that Dumesic "used an impermissibly suggestive method to obtain identifications from [E.S. and G.S.] who already told police they would not be able to identify the burglar." Glover argues, therefore, that trial counsel was ineffective for failing to object to E.S.'s and G.S.'s out-of-court identifications. We disagree.

¶14 Trial counsel's alleged failure to object to E.S.'s and G.S.'s identification was neither deficient performance nor prejudicial to Glover. Trial counsel testified at the ***Machner*** hearing that he was not "sure that [E.S. and G.S.] identified Mr. Glover. They provided descriptions of an individual from what I can remember and a clothing description." He explained that their "identification wasn't great" and that "there were inconsistencies," which he strategically attempted to use for Glover's advantage: "I thought that was better to have some

[3] The tavern surveillance from November 20 as well as two still photographs taken three days later were admitted at trial. Dumesic showed E.S. and G.S. the videos in a large basement, and while they were watching the videos separately, they were in the same room. Dumesic acknowledged at the ***Machner*** hearing that separating witnesses was "proper procedure."

confusion in front of a jury than to try to keep certain information out because strategically sometimes your best bet is confusing a jury." Trial counsel saw the inconsistencies in the witnesses' identifications as beneficial to weaken their credibility. Trial counsel is "'presumed to have rendered' adequate assistance within the bounds of reasonable professional judgment." ***State v. Balliette***, 2011 WI 79, ¶25, 336 Wis. 2d 358, 805 N.W.2d 334 (citation omitted). And trial counsel's strategic decisions are to be given great deference and are to be sustained if reasonable. ***Id.***, ¶26. Trial counsel's strategic decision not to challenge E.S.'s and G.S.'s identification was reasonable under the circumstances and fails to satisfy the deficient performance prong.[4]

Closing Argument

¶15 Glover alleged that trial counsel was ineffective for not objecting when the State "improperly bolstered the credibility of its key detective based on facts outside the record." During closing argument, the State explained to the jury, "[Glover] can tell us that … Detective Dumesic is a liar. But who has more to lose? If Detective Dumesic lies to you, he loses his job. If Renaul Glover lies to you, he gets found not guilty." Glover directs our attention to ***Jordan v. Hepp***, 831 F.3d 837, 847 (7th Cir. 2016), where the Seventh Circuit Court of Appeals found that a strikingly similar statement was "a textbook case of improper

[4] Although we need not reach the prejudice prong, we agree with the circuit court's assessment that Glover was not prejudiced. As the circuit court explained, E.S. and G.S. never identified the perpetrator as Glover. The witnesses said they thought the individual responsible for the burglary was the same individual in both the tavern surveillance footage on November 20 and 23. The jury saw this video as well as still images and were free to agree or disagree with the witnesses' assessment. It was Glover himself who admitted that he was the man in the video on November 23. According to the circuit court, if E.S. and G.S. identified Glover at all, they did so indirectly.

vouching." Finding that the case rested entirely on witness credibility, the court found prejudice to the defendant. ***Id.*** at 849. The court in ***Hepp***, however, did not reach the performance prong as there was no evidence in the record demonstrating whether counsel's decision was or was not a strategic decision and remanded for a hearing on the issue. ***Id.*** at 848-49.

¶16 Here, trial counsel testified at the ***Machner*** hearing that his decision to forgo an objection to the State's comments was purely strategic. Trial counsel feared that if he objected to the statement and the judge had overruled his objection, he would only have succeeded in drawing negative attention to the issue. He explained that in his opinion, Glover's testimony "was not very good or favorable for him," so his goal was to not highlight credibility. For these same reasons, trial counsel made clear that he did not ask for a corrective jury instruction because it "would have just highlighted the situation."

¶17 The circuit court concluded that although the State's "statement is unquestionably prejudicial," trial counsel's decision was "one of the plausible options" "done for a strategic reason" and "does not rise to the level of being deficient in the performance of his duties in that regard." We agree.[5] A decision not to call the jury's attention to the statement by objecting constitutes a reasonable trial strategy. *See* ***State v. Jackson***, 2011 WI App 63, ¶31, 333 Wis. 2d 665, 799 N.W.2d 461; ***State v. Cooks***, 2006 WI App 262, ¶44, 297 Wis. 2d 633, 726 N.W.2d 322. Strategic decisions made with full knowledge of the facts and

[5] Although we agree that the State's discussion was improper, we question whether the statement was prejudicial as the facts of this case did not rest on the competing credibility of Dumesic and Glover. *See* ***Jordan v. Hepp***, 831 F.3d 837, 849 (7th Cir. 2016). Other direct and circumstantial evidence supported the jury's verdict. As we decide this issue on the performance prong, however, we need not reach this issue.

law are virtually unchallengeable. *See* ***Strickland***, 466 U.S. at 690-91. Therefore, while the State's discussion during closing argument was improper, it does not provide a basis for a successful ineffective assistance claim.

By the Court.—Judgment and order affirmed.

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