

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 3, 2018

Sheila T. Reiff
Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2016AP889-CR

Cir. Ct. No. 2012CF5573

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LUIS F. PIZZARO,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DAVID L. BOROWSKI and M. JOSEPH DONALD, Judges.
Affirmed.

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

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. Luis Pizzaro¹ appeals a judgment of conviction for three felonies and an order denying his postconviction motion. Pizzaro argues he was denied his due process right to a fair trial because the circuit court repeatedly reminded a witness who was testifying on the State’s behalf pursuant to a grant of immunity that she was required to testify truthfully and could be subject to a perjury charge for testifying falsely. Pizzaro also argues his trial counsel rendered ineffective assistance by failing to object to those admonitions.

¶2 We conclude Pizzaro has forfeited his due process argument based on his attorney’s failure to object. We also conclude Pizzaro has failed to demonstrate he was prejudiced by his counsel not objecting, as the circuit court’s admonitions were warranted by the witness’s behavior and were not objectively so strong as to render the witness’s subsequent testimony involuntary. Moreover, there is no evidence supporting a conclusion that the witness actually felt coerced or testified falsely in response to the court’s reasonable admonishments. Accordingly, we affirm.

BACKGROUND

¶3 Pizzaro was charged with two counts of physical abuse of a child and one count of causing a child under the age of thirteen to view or listen to sexual activity as party to a crime. The charges related to Pizzaro’s actions in the summer of 2012 while he was living in Milwaukee with Maria and her two children, Amanda and David, who were then ages twelve and eleven,

¹ Portions of the record on appeal use the spelling “Pizarro.” We use the spelling reflected in the case caption created in the circuit court.

respectively.² Pizzaro was in a romantic relationship with Maria, although he would spend weekends with his wife in Madison.

¶4 At trial, Amanda testified that she had once been punished for eating some ice cream. Pizzaro made her extend her hands, and he placed three cans of tomato sauce on one of her palms. She testified that when she dropped them, Pizzaro repeatedly hit her with a studded leather belt, causing her to bleed. Amanda stated her mother had also hit her with a belt on other occasions.

¶5 Amanda also testified that her brother David had shown her injuries to his hands, back, shoulder and legs that he claimed Pizzaro had caused. David testified that Pizzaro had hit him with a belt on numerous occasions. One such occasion was precipitated by David receiving a warning at school for taking too many breakfasts one day. Once home, Pizzaro took David to a bedroom, had him take off all his clothes, and hit him with a belt approximately six times. Pizzaro then put David in a cold shower and repeatedly hit him again. When they went back to David's room, Pizzaro continued hitting him with the belt. During another incident, Pizzaro hit David with a television cable cord.

¶6 Amanda also testified that Pizzaro told her she was beautiful and she should be a model. Several times he instructed her to put on shorts and a tank top and pose by putting her "butt up in the air" while he took pictures with a cell phone camera. One night in August 2012, Maria woke Amanda and told her to

² Consistent with the policy underlying WIS. STAT. RULE 809.86 (2015-16), we use pseudonyms for the victim and their mother to protect the victims' identities.

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

come to the bedroom she shared with Pizzaro. Amanda joined Pizzaro and Maria in the queen-sized bed. She then saw and heard Pizzaro and Maria having sex next to her. Upon observing this, Amanda turned over and went back to sleep.

¶7 The same sequence occurred the next night, but this time Amanda attempted to leave after Pizzaro and Maria had sex. Her mother instructed her to return to the bed, where she ultimately spent the night. The following day, Pizzaro told Amanda that whenever he or Maria told Amanda to go in the bedroom, she had to go there and was not allowed to leave. Amanda testified this happened about five more times. One time Amanda was able to leave the room by pretending she was sleepwalking.

¶8 The State called Maria at Pizzaro's trial to testify about these events. Maria had been charged in the same criminal complaint as Pizzaro with a single count of causing a child under the age of thirteen to view or listen to sexual activity as party to a crime.³ While outside the jury's presence, Maria, who was represented by counsel at the trial, invoked her constitutional privilege against self-incrimination and was granted use and derivative use immunity by the State pursuant to WIS. STAT. §§ 972.08 and 972.085.

¶9 The circuit court then engaged Maria in an extensive colloquy regarding the scope of her immunity and the necessity of her testifying. The court instructed Maria she would have to testify and the State could not use her testimony against her. However, it reminded her that testifying falsely could lead to a prosecution for perjury or false swearing. Maria acknowledged she was

³ Maria's case was severed from Pizzaro's prior to trial.

required to answer questions truthfully. The jury returned, Maria was sworn before the jurors, and the prosecutor commenced direct examination.

¶10 After some preliminary questions about Maria and Pizzaro's living arrangement, the State began questioning Maria about the ice cream incident involving Amanda. Maria testified she did not know whether Amanda was ever disciplined for taking ice cream, Amanda had never shown Maria any injuries allegedly inflicted by Pizzaro, and she had never seen or heard David being whipped with a belt. Maria claimed not to be able to recall whether she had told a police detective that Pizzaro had whipped David with a studded belt or whether she had said she "didn't need him to go to jail for this."⁴

¶11 At that point, the circuit court excused the jury. The court reminded Maria she was required to give truthful testimony and could be charged with perjury or false swearing if she lied on the stand. Maria confirmed she understood, and the circuit court told her: "[Maria], that's my last warning. You are expected to tell the truth. I don't know what the truth is." Maria's attorney apparently found the court's admonition humorous, to which the court responded: "I don't find anything about this funny. Arguably your client's lying on the stand, maybe, maybe not. I'm warning her that she can be charged with perjury because I doubt that she forgets what she told the cop about her child or children being beaten." The jury was brought back in and questioning resumed.

¶12 The prosecutor then changed topics and questioned Maria about the school breakfast incident involving David. Maria initially testified Pizzaro

⁴ The record reflects that Maria's interview with the police detective was video recorded.

disciplined David following that incident, that she heard David screaming, and that she had told Pizzaro he needed to stop what he was doing. When questioned about what Pizzaro needed to stop, Maria answered, “Whatever he was doing because I heard him like yelling and screaming” Maria then denied she meant that Pizzaro should stop hurting David; she testified she meant she wanted the yelling to stop. Maria believed David was screaming because the shower water was cold. Maria initially testified that she could not recall whether she told a police detective she had seen injuries on David, but she then acknowledged both seeing “welts” on David and advising the detective of this observation.

¶13 The prosecutor later returned to the subject of David’s injuries and asked whether David had ever shown her any injuries Pizzaro allegedly caused. Maria responded that David had “shown me injuries but when he would fall and I would ask him and he’ll be oh, I fell.” The prosecutor responded, “You know that’s not what I’m asking you,” and the court instructed Maria to answer the question. Maria then acknowledged that David had shown her injuries allegedly caused by Pizzaro on more than one occasion.

¶14 Even after the circuit court’s earlier admonition, Maria continued to testify inconsistently regarding whether she told the detective she “didn’t want to see him [Pizzaro] go to jail for this.” She repeatedly denied making any such statement, but then upon further questioning said, “I would say yes, I did say it.” After eliciting Maria’s acknowledgment, the prosecutor asked what she was scared Pizzaro would go to jail for. Maria replied, “Fear, scared.” The prosecutor pressed her on this, asking whether it was Maria’s testimony that, at the time she was interviewed by the police detective, she was worried Pizzaro would go to jail for scaring her son. Maria responded that she “did say that,” and the prosecutor again asked for clarification about what she meant. Maria responded, “I don’t

know.” The court then reminded Maria that she was under oath. Maria replied: “Scared. I mean at that time love was blind. I apologize.” Maria then acknowledged she was worried Pizzaro would go to jail for hurting David with the belt.

¶15 Maria also acknowledged that Amanda told her Pizzaro had taken some pictures of her, although she denied being told that some of the pictures were not “regular pictures.” Maria stated she had retrieved Amanda to sleep in bed with her and Pizzaro in August 2012, and that she and Pizzaro had sex while Amanda was in the bed. But Maria was evasive when asked whether it was “even remotely possible” that Amanda would not have known Maria and Pizzaro were having sex, repeatedly answering, “I don’t know.” The circuit court overruled an unspecified objection from Pizzaro’s defense counsel, specifically finding Maria was “avoiding answering” and observing she “hasn’t given a straight answer.” Maria testified she and Pizzaro only had sex with Amanda in the room twice.

¶16 During cross-examination, Pizzaro’s defense attorney returned to the topic of the ice cream incident with Amanda. When asked again whether she had seen Pizzaro discipline Amanda, Maria answered both “yes” and “no” before the circuit court requested her to clarify her answer. Ultimately, Maria testified she had not witnessed Pizzaro disciplining Amanda, nor had she seen any injuries on Amanda. Maria testified inconsistently regarding who had made Amanda hold out her hands, at times claiming she had done it and at times claiming Pizzaro had done it.

¶17 During the prosecutor’s redirect examination, Maria testified she had made Amanda hold up the cans of tomato sauce at Pizzaro’s direction. When Amanda dropped the cans, Maria testified Pizzaro “struck a belt into the wall.”

When Maria denied that Pizzaro had struck Amanda with the belt, the following exchange then occurred:

Q He didn't strike her? It's your testimony he didn't strike her with the belt one time that day?

A I mean --

THE COURT: Ma'am, you're under oath.

THE WITNESS: I understand. I mean, when he had struck her, I mean he probably hit her with one of the pegs, the studs, from hitting them from the wall.

BY [THE PROSECUTOR]

Q [Maria], I want to know what really happened, okay? I don't want some fancy story about "maybe a stud." He either hit her or he didn't hit her. You were standing right there.

A I'm going to say yes, he did hit her.

Maria then described how Pizzaro would take the belt off and how he held it when he would strike Amanda.

¶18 After testifying that Pizzaro would fold the belt in half with the studs inside, Maria added Pizzaro "was just hitting the wall, like, like messing with her, just hitting the wall and it struck her." The prosecutor then explored whether Maria believed Pizzaro struck Amanda intentionally. This question produced an incoherent and inconsistent answer from Maria, which ultimately resulted in the circuit court again imploring Maria to tell the truth:

Q He struck her on purpose; isn't that correct?

A No. I mean, I don't know. I can't --I mean, I'm going to say yes because --I mean, he was hitting the wall, I mean.

Q I want to know what really happened.

THE COURT: Wait a minute. I'm sending the jury out again. All rise. Jury goes out, witness stays on the stand.

(Jurors exit courtroom.)

THE COURT: The jury's been sent out. The jury's not in the room.

Ma'am, I'm going to pick up on what the DA was about to say. He said I want to know what really happened. I don't know what happened, I wasn't there. I'm not telling you what to say, but I am telling you to tell the truth. You were sworn to tell the truth. You have been given use immunity. As I made clear to you half an hour ago that does not apply to perjury. You continue to answer questions like "well, I'm going to say this." "Well, if you say that" or "well, I guess, maybe, I mean." You at times have answered yes and no to the same question inside of 45 seconds. You're expected to answer honestly and truthfully. Do you understand that?

THE WITNESS: Yes, sir.

THE COURT: And I believe you do know what happened since you were there for all or most of these incidents. I'm not telling you how to testify but I'm telling you how to testify in that you are expected to testify truthfully. You took an oath. Do you understand that?

THE WITNESS: Yes, sir.

THE COURT: Beyond that, you're facing perjury charges if you're not telling the truth. Do you understand that?

THE WITNESS: Yes, sir.

THE COURT: That is the last warning I'm going to give this witness who has at best been somewhat non[-]compliant. I'll say that I've given the DA some latitude because she's been very difficult as a witness, very adverse in many ways. We'll continue. I expect this witness to tell the truth. She's been sworn to tell the truth. I'll bring the jury back in. Let's continue, please.

¶19 Despite the circuit court’s admonition, Maria continued to equivocate regarding whether she believed Pizzaro had struck Amanda intentionally. Maria testified that Pizzaro folded the belt such that the studs were on the inside, adding that when Pizzaro “went like this it popped open and it struck her. The stud fell.”⁵ The prosecutor asked whether Maria’s testimony was now that the belt strike was accidental. Maria answered, “No, it’s not. I’m telling you how the way it was, you know, the --belt. I’m going to say it was on purpose.” The prosecutor responded he did not want Maria to preface her statements with “I’m going to say”; rather, he wanted Maria to testify to what she remembered. Maria then acknowledged the event was intense, unusual, and something that she remembered “really well.” Despite this testimony, Maria continued to answer the intent question inconsistently, testifying within seconds both that it “wasn’t [done] intentionally” and “[i]t was on purpose.”

¶20 After Maria stated Pizzaro had struck Amanda on purpose, the prosecutor explored further details of that incident and others with Maria. After some additional re-cross-examination by defense counsel concerning some inconsistencies between what Maria had told police and her trial testimony, the State called its final witnesses. Pizzaro testified in his own defense. The jury ultimately found Pizzaro guilty of all three offenses.

¶21 Pizzaro filed a postconviction motion asserting he was denied his due process right to a fair trial “when the trial court, on more than one occasion, threatened a witness with sanctions during her testimony.” He also asserted that

⁵ The record on appeal does not reflect what, if any, gesture Maria made while making this statement.

he was denied the effective assistance of his trial counsel because counsel failed to object to these admonitions or move for mistrial. The postconviction court entered a written order denying the motion without a hearing. It observed, among other things, that Pizzaro's contention that the court's admonitions caused Maria to alter her testimony to please the court was unsupported.⁶ Pizzaro now appeals.

DISCUSSION

¶22 Pizzaro first argues he was denied his due process right to fair trial. Although the parameters of his argument are somewhat unclear, he appears to argue the circuit court usurped the prosecutor's role and impermissibly inserted itself into the proceedings as an advocate. *See State v. Jiles*, 2003 WI 66, ¶39, 262 Wis. 2d 457, 663 N.W.2d 798. In Pizzaro's view, the record "clearly shows that the court did not believe [Maria's] testimony and that the court expected her to incriminate Mr. Pizarro."

¶23 The State responds that Pizzaro forfeited his right to raise the alleged error directly on appeal. The record shows that Pizzaro's trial attorney at no point objected to the circuit court's admonitions to Maria. When the extent of a judge's involvement in the proceedings is questioned, an objection to the alleged judicial misconduct must be timely raised. *State v. Wolter*, 85 Wis. 2d 353, 373, 270 N.W.2d 230 (Ct. App. 1978). "A failure to make a timely objection constitutes a waiver of objection."⁷ *Id.* In such instances, the normal procedure in criminal

⁶ The Honorable David Borowski presided over the jury trial. The Honorable M. Joseph Donald denied Pizzaro's postconviction motion.

⁷ Older cases sometimes used the term "waiver" when referring to "forfeiture." *State v. Ndina*, 2009 WI 21, ¶29, 315 Wis. 2d 653, 761 N.W.2d 612. "Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the intentional relinquishment or abandonment of a known right." *Id.*

cases is to address the forfeiture within the rubric of the ineffective assistance of counsel. *State v. Carprue*, 2004 WI 111, ¶47, 274 Wis. 2d 656, 683 N.W.2d 31.

¶24 Pizzaro appears to principally rely on *Webb v. Texas*, 409 U.S. 95 (1972) (per curiam), to assert that his fair trial argument is not susceptible to a forfeiture analysis. In that case, the trial court admonished the witness to tell the truth and threatened that, if she lied, it would “personally see that your case goes to the grand jury and you will be indicted for perjury and the [likelihood] is that you would get convicted of perjury and that it would be stacked onto what you have already got” *Id.* at 95-96. However, as even Pizzaro notes, the defense attorney in that case did interpose an objection at the conclusion of the court’s remarks to the witness, who ultimately decided not to testify. *Id.* at 96-97. The Supreme Court merely held that the defendant or his counsel did not need to “interrupt[] the judge in the middle of his remarks to object.” *Id.* at 97. Thus, *Webb* does not stand for the proposition that, in cases such as this one, an objection is not required at all.⁸

⁸ Pizzaro’s reply brief argues that, for public policy reasons, forfeiture principles should not apply to a defendant’s assertion that a circuit court’s instructions to a witness deprived the defendant of a fair trial. However, he does not make a coherent plain error argument, which is the typical way one obtains review of unobjected-to error. See *State v. Jorgensen*, 2008 WI 60, ¶21, 310 Wis. 2d 138, 754 N.W.2d 77. Instead, he appears to assert that a defendant’s right to a fair trial can only be waived, not forfeited. The Wisconsin authorities on which he relies—*Ndina* and *State v. Pinno*, 2014 WI 74, 356 Wis. 2d 106, 850 N.W.2d 207—concerned whether a defendant’s right to a public trial was subject to waiver or forfeiture principles. While Pizzaro also cites some foreign cases, he has directed us to no binding authority holding that a claim based on a judge’s interaction with a witness may be reviewed directly in the absence of an objection. Moreover, *State v. Wolter*, 85 Wis. 2d 353, 373, 270 N.W.2d 230 (Ct. App. 1978), seems to hold precisely the opposite. Accordingly, we deem this aspect of his argument regarding forfeiture inadequately developed, and we decline to address it further. See *State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992). Pizzaro also requests that we exercise our discretion to conduct a direct review his claim despite his forfeiture. Given his undeveloped argument, his failure to raise the issue in the circuit court, and the inability of that court to address Pizzaro’s concerns regarding its conduct at the time, we decline to do so.

¶25 We therefore review Pizzaro’s claimed error under the ineffective assistance of counsel rubric. Such a claim requires Pizzaro to demonstrate both that counsel’s representation was deficient and that the deficiency prejudiced him to a degree sufficient to undermine our confidence in the outcome of the proceeding. *See Carprue*, 274 Wis.2d 656, ¶48; *see also Strickland v. Washington*, 466 U.S. 668, 687 (1984). If we conclude a defendant’s claim fails for lack of sufficient prejudice, we may dispose of it on that ground alone. *Carprue*, 274 Wis. 2d 656, ¶49. We conclude Pizzaro has not demonstrated a reasonable probability that the result of the proceeding would have been different but for any purported deficient performance on the part of his attorney. *See Strickland*, 466 U.S. at 694.

¶26 Ineffective assistance of counsel is a mixed question of law and fact. *State v. Pinno*, 2014 WI 74, ¶37, 356 Wis. 2d 106, 850 N.W.2d 207. We will uphold the circuit court’s factual findings, to the extent it made any, unless they are clearly erroneous. *Id.* Ultimately, the question of whether counsel provided ineffective assistance is a question of law subject to de novo review. *Id.* Moreover, the question of whether a postconviction motion was properly denied without an evidentiary hearing is a question of law. *Id.*, ¶38.

¶27 Pizzaro argues that, under the circumstances present here, prejudice is presumed. He relies on *Pinno*’s general observation that in instances of a structural error during trial, including the showing of a biased judge, “defendants generally do not have to show prejudice when they bring a properly preserved claim of violation.” *Pinno*, 356 Wis. 2d 106, ¶50. However, Pizzaro has not demonstrated he benefits from such a “presumed prejudice” rule. His attorney’s failure to interpose an objection that would have alerted the circuit court to Pizzaro’s concerns regarding its conduct, *see Carprue*, 274 Wis. 2d 656, ¶38,

coupled with his failure to craft a coherent plain error argument on appeal, requires that we review his claim under the ineffective assistance of counsel framework. This framework requires that he make an affirmative showing of prejudice.

¶28 Pizzaro argues he has otherwise shown prejudice because the circuit court's admonishments were made using "unnecessarily strong terms," and they could have exerted such duress on Maria's mental state so as to preclude her from making a free and voluntary choice regarding her testimony. Pizzaro also maintains Maria "changed her testimony in significant ways after being admonished by the court." We reject these arguments.

¶29 First, the language the circuit court used to caution Maria was not unreasonably strong. The court, troubled by Maria's general reluctance to answer questions and her frequent inconsistent and contradictory answers, merely reminded her on multiple occasions that she was under oath, was obligated to testify truthfully, and could be subject to a perjury charge for testifying falsely. These comments cannot be reasonably viewed as like in kind to the judge's comments at issue in *Webb*. There,

the judge implied that he expected [the witness] to lie, and went on to assure him that if he lied, he would be prosecuted and probably convicted for perjury, that the sentence for that conviction would be added to his present sentence, and that the result would be to impair his chances for parole.

Webb, 409 U.S. at 97. Rather, the court here appears to have done no more than warn Maria of possible sanctions for false testimony, which is permissible. *See United States v. Cavale*, 688 F.2d 1098, 1109 (7th Cir. 1982). Moreover, the court was judicious in doing so, reminding her of the possibility of such sanctions

only a few times at the outset of her testimony and then again during the re-direct examination. In addition, the court repeatedly told Maria that it did not know what the truth was, but only that it wanted her to provide the truth. In all, the court's admonitions were not of sufficient coercive force to render Maria's subsequent testimony objectively suspect.

¶30 Second, and more importantly, Pizzaro has presented no evidence that Maria's testimony was actually coerced or that she gave false testimony as a result of the circuit court's admonitions.⁹ The sole basis for Pizzaro's claim in this regard appears to be that Maria changed or otherwise clarified some of her testimony after the court's admonitions, something the State concedes occurred. However, Pizzaro did not include any evidentiary materials with his postconviction motion, and as such failed to meet his burden of showing that Maria in fact changed her testimony to falsely implicate Pizzaro. *See Velarde v. United States*, 972 F.2d 826, 829 (7th Cir. 1992) (noting defendant's burden to demonstrate the prosecution's case included perjured testimony). Rather, it is equally plausible that where there were inconsistencies in Maria's testimony, her initial testimony was false (or at least unclear) and her subsequent testimony—given following the court's reminder that she was under oath—was truthful. Pizzaro's motion contained only conclusory statements that the “circumstances ... clearly show the trial court believed [Maria] was lying” and that Maria “altered her testimony to please the court.”

⁹ We recognize that, because Maria testified under a grant of immunity, her testimony was not completely free from all elements of compulsion. However, for purposes of this case, “voluntariness” concerns the content of the witness's testimony, not whether he or she was required to give the testimony in the first instance. *Cf. Kastigar v. United States*, 406 U.S. 441, 448 (1972) (upholding constitutionality of statutes requiring witnesses invoking the Fifth Amendment to testify under a grant of immunity).

¶31 To the contrary, the circuit court repeatedly told Maria it was not telling her how to testify (except to the extent it wanted her to testify truthfully) and that it did not know what the truth was. In several instances, the court's admonishments appear to have been precipitated by Maria's giving inconsistent and contradictory answers, and her doing so without any intervening action by the trial judge. The only instances in which it can be fairly said the judge disbelieved Maria were when she testified she could not remember basic details of the incidents or what she told police, but that skepticism was merely a function of her acknowledgment to being physically present at the events in question. Even Maria later acknowledged she remembered the incident with Amanda "really well." None of the court's comments can be reasonably construed as suggesting it believed Maria was lying about the substance of what she claimed to remember. As a result, the record does not support Pizzaro's argument that Maria changed her testimony to falsely implicate Pizzaro or merely to please the court.

By the Court.—Judgment and order affirmed.

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

