COURT OF APPEALS
DECISION
DATED AND FILED

March 29, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP1592-CR **Cir. Ct. No. 2002CF1235**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

THOMAS S. MAYO,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Racine County: RICHARD J. KREUL, Judge. *Affirmed*.

Before Snyder, P.J., Brown and Anderson, JJ.

¶1 PER CURIAM. A jury found Thomas S. Mayo guilty of armed robbery with use of force contrary to WIS. STAT. § 943.32(2) (2001-02),[1] obstructing an officer contrary to WIS. STAT. § 946.41(1), and battery with use of a dangerous weapon contrary to WIS. STAT. § 940.19(1). Thereafter, the circuit court denied Mayo's postconviction motion for a new trial on the grounds of ineffective assistance of trial counsel or in the interest of justice. We affirm the judgments and order because Mayo was not prejudiced by the conduct of his counsel, and the interests of justice do not require a new trial.

¶2 The criminal complaint alleged that on November 16, 2002, Mayo hit Clarence Price on the head with a weapon, stole money from him and fled. The next day, November 17, Price called police to report a sighting of Mayo. Police responded to Mayo's reported location, but Mayo fled. Mayo was later apprehended, and Price identified Mayo at the scene as his attacker from the previous day. Mayo countered that Price assaulted and threatened him on November 17 by swinging a tire iron. Mayo explained that he fled from the police so that he could dispose of a crack pipe in his possession. The jury convicted Mayo of offenses stemming from the November 16, 2002 robbery of Price.

¶3 Postconviction, Mayo challenged remarks made by the prosecutor during her closing argument. Mayo claimed his trial counsel was ineffective for failing to object to these remarks and that the prosecutor's conduct required a new trial in the interest of justice. We will review the facts further as we address each of Mayo's claims.

[1] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

¶4 Mayo faults the following remarks by the prosecutor during closing argument:

> The way a criminal case works is police reports are forwarded into the District Attorney's Office, we review them, we determine whether there should be a charge or there shouldn't be a charge. We have the discretion to do that. The case is then charged, and we have an open file policy, meaning that the defendant and defense attorney can have access to all of the police reports, so the defendant has had access and seen what all the evidence is against him and what the victim has said and what the police have said. He's had almost five months to come up with something to attempt to explain his actions away, and you have now heard what he has come up with, which is something new.
>
> ....
>
> Let's look at some of the statements the defendant made while on the stand as opposed to the facts as we know them or the things he previously stated.... My opinion would be that this was a crime of opportunity.
>
> ....
>
> Defense counsel has indicated that it's my job to put a spin on the evidence to convict the defendant. I described briefly what my job is in the first part of my closing. I look up police reports. I determine whether I believe a person is guilty and whether I think it's just. I also have the discretion when a case is pending to decide to dismiss the charges if I think they're unjust, if they didn't happen, if it's not provable.
>
> ....
>
> The defense attorney here, Mr. Kremkoski, has one job. His job is to get his client off the hook. That's his only job here, not to see justice done but to see that his client is acquitted, and he's fighting hard for his client.

¶5 In ruling on Mayo's postconviction motion, the circuit court found that the prosecutor "unfairly referenced matters not in evidence, unfairly

referenced her opinion, [and] unfairly referenced the defendant's silence." Nevertheless, placing the prosecutor's remarks in the context of the entire trial, the court gave several reasons for its conclusion that the prosecutor's conduct did not affect the reliability of the trial's outcome. First, the jury was instructed that closing arguments do not constitute evidence, and juries are presumed to follow the instructions given to them. ***State v. Truax***, 151 Wis. 2d 354, 362, 444 N.W.2d 432 (Ct. App. 1989). Second, viewing the remarks in the context of the entire trial, the court found that the jury clearly determined that Mayo's testimony was incredible and contradicted by testimony from the victim and police officers. Third, defense counsel explained his reason for not objecting to the prosecutor's remarks. The circuit court found this explanation reasonable and a permissible strategy, and therefore counsel was not ineffective.

¶6 We focus on whether Mayo was prejudiced by either the prosecutor's remarks or his defense counsel's conduct. In the context of an ineffective assistance claim, whether a defendant was prejudiced by counsel's conduct presents a question of law which we decide independently of the circuit court. ***State v. Kimbrough***, 2001 WI App 138, ¶¶26-27, 246 Wis. 2d 648, 630 N.W.2d 752. The test for prejudice is whether our confidence in the outcome is sufficiently undermined. ***Strickland v. Washington***, 466 U.S. 668, 694 (1984). We will uphold the circuit court's findings of fact regarding trial counsel's conduct unless the findings are clearly erroneous. ***State v. Sanchez***, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996).

¶7 In the context of either a request for a new trial in the interest of justice or a claim of plain error to circumvent defense counsel's failure to object to the prosecutor's alleged misconduct, we determine whether the prosecutor's remarks "so infected the trial with unfairness as to make the resulting conviction a

denial of due process." ***State v. Davidson***, 2000 WI 91, ¶88, 236 Wis. 2d 537, 613 N.W.2d 606 (citation omitted). We hold that even though certain of the prosecutor's remarks were improper, the remarks did not constitute plain error or require reversal in the interest of justice. We further hold that Mayo was not prejudiced by his trial counsel's failure to object to the remarks.

¶8 Mayo challenges the prosecutor's remark about "[t]he way a criminal case works," the operation of the district attorney's office and the charging decision, the prosecutor's opinion that Mayo engaged in a crime of opportunity, the prosecutor's description of her job, and the prosecutor's remarks about the role of defense counsel as improper because they relied upon information outside of the record. Mayo further argues that trial counsel was ineffective for not objecting to these remarks.

¶9 We conclude that Mayo was not prejudiced by these remarks or by trial counsel's failure to object to them because the remarks neither infected the trial with unfairness nor sufficiently undermine our confidence in the outcome of the trial. We are mindful that the jurors were instructed that the arguments of counsel are not evidence, and the jurors are presumed to follow their instructions. ***Truax***, 151 Wis. 2d at 362.

¶10 The prosecutor's remarks about the operation of the district attorney's office referred to common knowledge that the prosecutor brings the charges.

¶11 We agree with the State that the prosecutor's reference to "the facts as we know them" and "crime of opportunity" were not expressions of the prosecutor's personal opinion. The remarks clearly referred to the facts before the jury. The prosecutor may "comment on the evidence, detail the evidence, argue

from it to a conclusion, and state that the evidence convinces him or her and should convince the jurors. The prosecutor may not, however, suggest that the jury arrive at its verdict by considering factors other than the evidence." ***State v. Adams***, 221 Wis. 2d 1, 19, 584 N.W.2d 695 (Ct. App. 1998) (citations omitted). These remarks fell within ***Adams***.

¶12 Although we conclude that the prosecutor's remarks about the role of defense counsel do not undermine our confidence in the outcome and did not infect the trial with unfairness, the remarks are nevertheless deserving of condemnation. We disagree with the State that the prosecutor's characterizations of defense counsel's job as "get[ting] his client off the hook" and "not to see justice done" are simply colloquial expressions of the general understanding of defense counsel's role in a criminal proceeding. Rather, the remarks disparaged defense counsel and cast defense counsel, an equal participant in the proceeding, in a pejorative light. The remarks reflect poorly on the prosecutor. The remarks cannot be excused, as the State would have us do, as a measured or invited response to defense counsel's assertion that the prosecutor's job was to "spin[] the evidence into the way the prosecutor wants you to see it." The prosecutor's remarks crossed the line separating measured or invited response and outright disparagement.

¶13 Mayo next contends that the prosecutor impermissibly and repeatedly commented upon his pre-***Miranda***[2] silence during the State's case-in-chief. Mayo also challenges his trial counsel's failure to object to the prosecutor's references to his pre-***Miranda*** silence.

[2] ***Miranda v. Arizona***, 384 U.S. 436 (1966).

¶14 During her examination of Clarence Price, the prosecutor asked Price if Mayo said anything when Price identified him. Price responded that Mayo did not say anything. The prosecutor asked Sergeant Ackley, "When the victim pointed at the defendant and said that's the guy that robbed me, did the defendant say anything?" The officer responded, "Not that I recall." The prosecutor asked the same question of Officer Small, who answered in the same fashion as Sergeant Ackley. Trial counsel did not object to any of the remarks Mayo challenges.

¶15 Postconviction, the circuit court found that Mayo did not, in fact, remain silent after he was apprehended and after Price identified him.[3] Mayo testified that after he was apprehended and Price identified him, he immediately denied robbing Price or anyone. On this record, the prosecutor's reference to testimony that Mayo did not respond when Price identified him was proper impeachment of Mayo's testimony, not an impermissible comment on silence, which Mayo himself testified he did not maintain.

¶16 In summary, we conclude that the prosecutor's remarks and trial counsel's failure to object to those remarks do not undermine our confidence in the outcome of the trial and do not require a new trial.

¶17 Mayo seeks a new trial because impermissible hearsay came into evidence. Mayo challenges the following testimony elicited by the prosecutor from Clarence Price about what he told police the night he was robbed:

> Q: Did they talk to you about what happened?
>
> A: Yes.

[3] We are puzzled why neither party discusses this finding of the circuit court, which is not clearly erroneous.

> Q: Did you tell them what happened?
>
> A: Yes.
>
> Q: Did you tell them that you recognized this guy as an acquaintance, Thomas?
>
> A: Yes.
>
> Q: Did you tell them that you believed your uncle could find this guy?
>
> A: Yes.

¶18 Mayo also challenges as impermissible hearsay the testimony of Officer Langendorf. Officer Langendorf related what Price told him about the November 16 robbery. Mayo also complains about other occasions in which Price's out-of-court statements were repeated via the testimony of police officers and the introduction into evidence of police reports which included Price's out-of-court statements. Mayo contends that because Price's out-of-court statements were offered for the truth of his allegations, they were hearsay. WIS. STAT. § 908.01(3). Because this evidence did not fall within a recognized hearsay exception, it should not have been admitted. And, because trial counsel did not object to this evidence, trial counsel was ineffective.

¶19 In disposing of that portion of Mayo's postconviction motion which raised these hearsay claims, the circuit court concluded that Price's statements constituted an excited utterance, an exception to hearsay under WIS. STAT. § 908.03(2).[4]

[4] WISCONSIN STAT. § 908.03(2) defines an excited utterance as "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition."

¶20 An out-of-court statement may be admissible as an excited utterance if it meets three requirements. "First, there must be a 'startling event or condition.'" ***State v. Huntington***, 216 Wis. 2d 671, 682, 575 N.W.2d 268 (1998) (citation omitted). Next, the statement must relate to the startling event or condition. ***Id.*** Finally, the statement "must be made while the declarant is still under the stress or excitement caused by the event or condition." ***Id.*** (citation omitted); WIS. STAT. § 908.03(2).

¶21 "The excited utterance exception ... is based upon spontaneity and stress which, like the bases for all exceptions to the hearsay rule, 'endow such statements with sufficient trustworthiness to overcome the reasons for exclusion of hearsay.'" ***Huntington***, 216 Wis. 2d at 681-82 (citation omitted). The interval between the startling event and the utterance is key, and "time is measured by the duration of the condition of excitement rather than mere time lapse from the event or condition described." ***Christensen v. Economy Fire & Cas. Co.***, 77 Wis. 2d 50, 57, 252 N.W.2d 81 (1977). "The significant factor is the stress or nervous shock acting on the declarant at the time of the statement." ***Id.*** at 57-58.

¶22 Based on the evidence at trial, the interval between the robbery and Price's statements was between ten minutes (according to Price's account of when he met with police) and an hour (according to Mayo's account of when he encountered Price). The circuit court noted that when the police first spoke to him, Price was bleeding from a deep head wound, he was upset and a bit disoriented. The court found that Price had suffered a traumatic event, and at the time he made the statements, he was still reacting to the event and was in a condition of excitement. Because the evidence was admissible, trial counsel was not ineffective for failing to object to it. *See* ***State v. Simpson***, 185 Wis. 2d 772,

784, 519 N.W.2d 662 (Ct. App. 1994) (counsel cannot be faulted for not bringing a motion that would have failed).

¶23 Mayo next contends that his trial counsel was ineffective because he did not present evidence which would have corroborated Mayo's testimony. Specifically, Mayo contends that counsel did not present the testimony of Argo McMorris. McMorris' testimony was presented as an offer of proof at the postconviction motion hearing. At that hearing, McMorris testified that she knew Mayo from the neighborhood, and she also knew Price. On November 17, the day after Mayo allegedly robbed Price, McMorris was walking down a street when she saw Mayo running with an injury to his forehead. McMorris described Mayo as out-of-breath and scared. Mayo told McMorris that Price and others were after him, and Price tried to hit Mayo with a tire iron. Mayo blocked the assault with his arm. Mayo entered a restaurant to call the police; Price was standing outside of the restaurant but then left the scene. McMorris stated that neither Mayo's counsel nor an investigator contacted her.[5]

¶24 Postconviction, Mayo testified that McMorris had information about the Mayo-Price encounter on November 17, the day after the robbery. However, Mayo did not tell police that McMorris had information about that encounter.

¶25 Postconviction, trial counsel testified that even though he did not know of McMorris or what testimony she might have offered at trial, his trial strategy was to minimize the encounter on November 17, the day after the robbery, in favor of emphasizing that the November 16 encounter between Price

[5] Trial counsel admitted at the postconviction motion hearing that he did not retain an investigator or independently investigate the case. Trial counsel relied upon the police reports.

and Mayo was a failed drug deal, not a robbery. Mayo claimed that he tried to purchase drugs from Price on November 16, Price did not deliver as promised and Mayo recovered the money he had given to Price.

¶26 The circuit court found trial counsel's testimony credible and candid. We will uphold the circuit court's findings of fact regarding trial counsel's conduct unless the findings are clearly erroneous. ***Sanchez***, 201 Wis. 2d at 236. Credibility determinations are for the circuit court to make as the fact finder at the postconviction motion hearing. *See* ***State v. Lackershire***, 2005 WI App 265, ¶12, ___ Wis. 2d ___, 707 N.W.2d 891.

¶27 We will not "second-guess a trial attorney's 'considered selection of trial tactics or the exercise of a professional judgment in the face of alternatives that have been weighed by trial counsel.' A strategic decision rationally based on the facts and the law will not support a claim of ineffective assistance of counsel." ***State v. Elm***, 201 Wis. 2d 452, 464-65, 549 N.W.2d 471 (Ct. App. 1996) (citation omitted). Even if it appears, in hindsight, that another defense would have been more effective, the strategic decision will be upheld as long as it was founded on a knowledge of the law and the facts. ***State v. Felton***, 110 Wis. 2d 485, 502, 329 N.W.2d 161 (1983). Merely because counsel's strategy was unsuccessful does not mean that counsel's performance was legally insufficient. ***State v. Teynor***, 141 Wis. 2d 187, 212, 414 N.W.2d 76 (Ct. App. 1987).

¶28 Trial counsel employed a strategy which rendered Argo McMorris' testimony of minimal use. Counsel was not ineffective for failing to present McMorris' testimony.

¶29 Finally, Mayo contends that his trial counsel was ineffective because he did not present evidence which would have impeached Price's testimony.

Mayo contends that his counsel should have impeached Price with his testimony at Mayo's preliminary examination. At trial, Price twice stated that no one else was present when Mayo approached and robbed him on the street on November 16. However, at the preliminary examination, Price testified that Mayo had a companion, although Price could not identify him. Counsel did not obtain a transcript of the preliminary examination so that he could compare Price's preliminary examination and trial testimony.

¶30 We conclude that Mayo was not prejudiced by counsel's failure to impeach Price with his preliminary examination testimony. Mayo testified that no one witnessed his November 16 drug transaction with Price, the same transaction Price and the State characterized as an armed robbery. Therefore, attempting to impeach Price with an alleged inconsistency would also have impeached Mayo.

By the Court.—Judgments and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2003-04).