COURT OF APPEALS
DECISION
DATED AND FILED

August 1, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2006AP182-CR **Cir. Ct. No. 2003CM8037**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JEROME E. BUIE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: WILLIAM W. BRASH, Judge. *Affirmed.*

¶1 WEDEMEYER, P.J.[1] Jerome E. Buie appeals from a judgment entered after a jury found him guilty of one count of violation of a domestic abuse

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2003-04).

injunction, contrary to WIS. STAT. § 813.12(8)(a) (2003-04).[2] He also appeals from an order denying his postconviction motion. Buie contends: (1) the trial court erred in allowing a surprise witness to testify on behalf of the State even though the witness had not been disclosed during discovery proceedings; (2) his trial counsel provided ineffective assistance by failing to request a continuance in response to the surprise witness; (3) the trial court failed to exclude the surprise witness's testimony despite the State's violation of the sequestration order; and (4) he is entitled to a new trial in the interest of justice. Because the trial court did not err in permitting the witness's testimony or in ruling on the sequestration challenge; because Buie failed to prove that his attorney provided ineffective assistance; and because the interest of justice does not require that Buie be granted a new trial, this court affirms.

BACKGROUND

¶2 On August 29, 2003, Eula Anderson obtained a domestic abuse injunction prohibiting her ex-husband, Jerome Buie, from having any contact with her for four years. According to the complaints filed in the case, and later consolidated for trial, Buie violated that injunction on September 16, October 15, November 7, December 26, and December 31, 2003, by repeatedly contacting Anderson. He was charged with multiple counts of violation of a domestic abuse injunction and bail jumping.

¶3 On September 7, 2004, the case commenced before a jury. During Anderson's testimony, she described the contacts Buie made with her on each

[2] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

occasion. When she testified about the October 15th incident, she stated that as she was coming out of her garage to go to work, she observed Buie jump out of his car and go underneath her garage door. She told him to get away and he said he was getting his things. She told him he had better leave or she would call the police; he said "go ahead." She attempted to dial 911, but the call did not go through because her cell phone was off. She started calling for her neighbor and when the neighbor came out, Buie left.

¶4 Subsequent to Anderson's testimony, the prosecutor asked the police officer to get the name and contact information for the neighbor. The neighbor was identified as Johnnie Johnson. The prosecutor advised the court and counsel that the State intended to call Johnson as a witness, as Johnson confirmed that she saw Buie in the alley on October 15th. Defense counsel objected, and asked that Johnson be excluded as her name was not on the witness list or disclosed in discovery. The court suggested that defense counsel have the defense investigator talk to Johnson, but defense counsel indicated that the investigator was not available due to a family emergency. Defense counsel also argued that this conduct violated the sequestration issue and, therefore, Johnson's testimony should be excluded. The court took the motion under advisement and ordered a recess for lunch.

¶5 Later, the trial court ruled that Johnson's testimony would be permitted. Johnson testified that she saw Buie on October 15th in the alley behind Anderson's garage. There was some yelling; she saw Buie picking up things and then saw him driving away.

¶6 The jury acquitted Buie on all of the counts with the exception of the charge stemming from the October 15th date. He was sentenced to ninety days in

the House of Correction. He filed a postconvction motion, raising the same issues he raises in this appeal. The trial court denied his motion. Buie now appeals.

DISCUSSION

A. Surprise Witness.

¶7 Buie's first claim is that the trial court erred in permitting the surprise witness, Johnson, to testify. He contends that allowing this witness to testify violated discovery rules and had a significant prejudicial impact on Buie as this was the only count on which the jury found him guilty. This court rejects his contention.

¶8 The criminal discovery statutes require the prosecutor to disclose to a defendant "[a] list of all witnesses and their addresses whom the district attorney intends to call at the trial." WIS. STAT. § 971.23(1)(d). If the prosecutor wants to call a witness who was not disclosed, he/she may do so only if the trial court determines good cause has been established for failing to previously disclose the witness. WIS. STAT. § 971.23(7m). This issue involves application of statutes to a particular set of facts, which presents a legal issue reviewed independently. ***State v. DeLao***, 2002 WI 49, ¶¶14-15, 252 Wis. 2d 289, 643 N.W.2d 480.

¶9 Here, the surprise witness was unknown to the prosecutor until referred to during Anderson's testimony. The prosecutor then promptly disclosed the name and address to the defense, fulfilling the statutory requirements. Buie contends this is not enough. Relying on ***DeLao***, he contends that ignorance is no excuse and that the prosecutor had a duty to discover this witness and that Anderson's knowledge that the witness existed should be imputed to the prosecutor. This court is not persuaded.

¶10 Although Buie is correct that ***DeLao*** affirms the principle that a prosecutor must use due diligence in obtaining witness statements before trial and that statements made to law enforcement may be imputable to the prosecutor, ***id.***, ¶¶21, 33, the ***DeLao*** case is significantly different from the facts presented here. Here, Buie wants to impute the victim's knowledge to the prosecutor, wherein in ***DeLao***, the case involved imputing an investigator's knowledge to the prosecutor.[3] It is undisputed here, that the neighbor witness's testimony was not discovered by any investigator. No one (other than the victim) knew of Johnnie Johnson's existence until she was referred to by Anderson during the trial. Under these facts and circumstances, this court concludes that no discovery violation occurred and, even if one concluded that the discovery statute was violated, good cause was established to permit the testimony of Johnson.

¶11 Buie contends that Johnson's testimony had a prejudicial effect on the outcome of the case as evidenced by the fact that the jury convicted him only of the count relating to October 15th. He states that the only difference between the other counts and the October 15th count was Johnson's testimony. This court is not persuaded by his contention. Although it is true that the jury acquitted on the other counts, a review of the record demonstrates that there was other independent corroboration of the October 15th incident besides Johnson's testimony. The State offered the testimony of Officer Vincent Lopez, the desk sergeant on October 15th, who took Anderson's walk-in complaint. Lopez also

[3] ***State v. DeLao***, 2002 WI 49, ¶¶5-7, 252 Wis. 2d 289, 643 N.W.2d 480, is also distinguishable from the instant case because it involved a defendant's statements, which were made to different law enforcement officers who had interviewed the defendant, not being turned over to the defense because the prosecutor did not know about the statements. These facts are clearly significantly different than the facts presented in the instant case.

testified that after he received Anderson's complaint, he was informed that a squad car had been independently dispensed to the alley behind Anderson's home after a neighbor called in reporting a potential entry into a garage. This may have been the information that made a difference to the jury, leading to a conclusion that Buie violated the injunction beyond a reasonable doubt on October 15th.

B. Ineffective Assistance.

¶12 Buie also contends that his trial counsel provided ineffective assistance by: (1) failing to ask the court for a recess after the court permitted the State to introduce Johnson as a witness; (2) failing to file a written discovery demand; and (3) not requesting an adjournment. This court rejects Buie's contentions.

¶13 In order to establish that he or she did not receive effective assistance of counsel, the defendant must prove two things: (1) that his or her lawyer's performance was deficient; and (2) that "the deficient performance prejudiced the defense." ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); ***State v. Sanchez***, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996). A lawyer's performance is not deficient unless he or she "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Strickland***, 466 U.S. at 687. Even if a defendant can show that his or her counsel's performance was deficient, he or she is not entitled to relief unless he or she can also prove prejudice; that is, he or she must demonstrate that his or her counsel's errors "were so serious as to deprive [him or her] of a fair trial, a trial whose result is reliable." ***Id.*** Stated another way, to satisfy the prejudice-prong, "'[a] 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.'" ***Sanchez***, 201 Wis. 2d at 236 (citation omitted).

¶14 In assessing a defendant's claim, this court does not need to address both the deficient performance and prejudice components if he or she cannot make a sufficient showing on one. *See* ***Strickland***, 466 U.S. at 697. The issues of performance and prejudice present mixed questions of fact and law. *See* ***Sanchez***, 201 Wis. 2d at 236. Findings of historical fact will not be upset unless they are clearly erroneous, *see* ***id.***, and the questions of whether counsel's performance was deficient or prejudicial are legal issues this court reviews independently. *See* ***id.*** at 236-37.

¶15 Buie complains that trial counsel did not request a recess or an adjournment. Counsel explained the reason for not doing so: he thought the case was going well, he thought he could handle the Johnson testimony on cross, he did not think an adjournment would be granted, and he felt it was in Buie's best interest to have the case proceed to conclusion. These reasons provide a sufficient strategic explanation for forgoing a request to delay the proceedings. Further, the record demonstrated that several earlier adjournments had been granted and that the case had been pending for some time. Thus, defense counsel's feeling that an adjournment would not be granted is supported by the record.

¶16 Buie also criticizes counsel for failing to file a written discovery demand—instead of simply making an oral request for discovery. Buie fails to demonstrate any prejudice related to this claim. The trial court explained that it treats oral discovery demands and written discovery demands in the same fashion. Accordingly, there was no prejudice established by any failure to make a written demand.

C. Sequestration Violation.

¶17 Buie next argues that the State's violation of the sequestration order should have resulted in exclusion of the witness. Buie contends that the State violated the sequestration order in the manner in which it located Anderson's "neighbor," Johnnie Johnson. This court reviews this issue under the erroneous exercise of discretion standard. *See* ***State v. Bembenek***, 111 Wis. 2d 617, 637, 331 N.W.2d 616 (Ct. App. 1983). Based on the facts and circumstances presented here, this court concludes that the trial court did not erroneously exercise its discretion when it permitted Johnson to testify.

¶18 Here, the record reflects that no one was aware of Johnson as a potential witness until Anderson referred to her generally as "my neighbor" during Anderson's testimony. At that point, the prosecutor asked the court officer to question Anderson to discover the neighbor's name and address. Anderson provided the information to the officer. The officer then contacted Johnson and asked her if she remembered anything happening in October of 2003 with respect to her neighbor in the alley. Anderson indicated that she observed a man in the alley picking up some things and that the man was arguing with Anderson. The officer then asked Johnson to come to court to testify. Johnson complied. There were no conversations between Johnson and Anderson regarding Johnson's testimony. After trial, the defense submitted an affidavit from Johnson, indicating that she did not recall the exact date of this incident.

¶19 Based on these facts, Buie argues that the prosecutor participated in the violation of the sequestration order and that the officer who spoke to both Anderson and Johnson violated the sequestration order as this officer was present in court during Anderson's testimony. This court is not convinced that a violation

of the sequestration order occurred; and, even if it did, there was no actual prejudice.

¶20 The sequestration statute, WIS. STAT. § 906.15, provides that, at the "request of a party, the judge … shall order witnesses excluded so that they cannot hear the testimony of other witnesses." The reason for the "sequestration order is to assure a fair trial, and more specifically, to prevent the shaping of testimony by one witness to match that given by other witnesses." ***Nyberg v. State***, 75 Wis. 2d 400, 409, 249 N.W.2d 524 (1977), *overruled on other grounds by* ***State v. Ferron***, 219 Wis. 2d 481, 579 N.W.2d 654 (1998). The statute does not prohibit the prosecutor from talking to his or her witnesses or in attempting to locate witnesses discovered during the course of a trial. Although it would probably have been a better practice for the prosecutor to utilize an officer who was not in court for the testimony under the circumstances presented here, the record reflects that the officer did not attempt to "shape" Johnson's testimony to match Anderson's testimony. Rather, the conversation was general in nature to see whether Johnson remembered any incidents involving Anderson and her ex-husband. Johnson did not discuss her testimony with Anderson and Anderson did not discuss her testimony with Johnson. In fact, as the State points out, their testimony about the October incident differed in the details.

¶21 Further, even if there was a violation of the sequestration order, the trial court may still permit the witness's testimony unless actual prejudice to the defendant occurred. *See* ***Nyberg***, 75 Wis. 2d at 409-10. Here, Buie has not demonstrated any actual prejudice arising out of the alleged violation of the sequestration order. The State could have procured this witness without any

violation, and the witness independently remembered the incident in the alley between Anderson and Buie.[4]

¶22 Buie contends that he was prejudiced because the incident testified to by Johnson was the only incident on which the jury found him guilty. This court is not persuaded. As noted, the record also contains police testimony regarding the October incident. This testimony independently corroborated the victim's testimony and could alone be the reason why the jury convicted Buie on the October count.

D. Interest of Justice.

¶23 Buie's last contention is that he is entitled to a new trial in the interest of justice because the real controversy was not tried. This court disagrees.

¶24 Buie's argument here rehashes his complaints about the neighbor witness and the prosecutor's representation to the court and defense counsel as to what the neighbor would say. He asks this court to exercise its discretionary reversal authority to grant him a new trial on this basis. *See* ***Vollmer v. Luety***, 156 Wis. 2d 1, 19-21, 456 N.W.2d 797 (1990). This court declines to exercise its discretionary reversal authority because this court has rejected each of Buie's claims of error, and because this court's review of the record reveals nothing to support Buie's assertion that a new trial is necessary in the interest of justice.

[4] Buie contends that Johnson's testimony about the specific date was "shaped" by the prosecutor. This court is not persuaded that this fact requires ruling in Buie's favor. This witness remembered the incident and believed it to be in October. If the prosecutor assisted with a more specific date, Johnson was free to express uncertainty about the exact date and defense counsel was free to challenge Johnson's recollection of the exact date during her testimony. The substance of Johnson's testimony was not "shaped" as prohibited by the sequestration order.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.