COURT OF APPEALS
DECISION
DATED AND FILED

December 5, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP32-CR **Cir. Ct. No. 2004CF1520**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RONELL HIBBLER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Racine County: GERALD P. PTACEK, Judge. *Affirmed.*

Before Brown, C.J., Anderson, P.J., and Nettesheim, J.

¶1 PER CURIAM. Ronell Hibbler appeals from a judgment convicting him of intimidating a victim and attempting to bribe a witness, both as party to the crime, and two counts of bail jumping relating to these offenses. He also appeals from the circuit court's order denying his request for a new trial due to ineffective

assistance of counsel. We conclude that the evidence was sufficient to convict Hibbler and that his trial counsel provided effective assistance. We affirm the judgment and the order.

¶2 Hibbler was charged with intimidating and attempting to bribe Ronnie Jones while Hibbler was released on bond. The charges arose as Hibbler and his family sought to deter Jones from testifying against Hibbler's brother, Lenell, who was charged with shooting Jones. Jones' testimony at Hibbler's trial was marked by numerous failures to recall the circumstances of intimidation and attempted bribery. However, an investigator testified about Jones' statements to him.

¶3 Investigator Fellion investigated the shooting of Jones by Lenell Hibbler, Hibbler's brother. Fellion testified that Jones told him that Lenell beat him, shot him and threatened to kill him. Jones told the investigator that he subsequently encountered Hibbler at a car wash and that Hibbler threatened him about testifying against Lenell. Jones also told the investigator that Hibbler was driving a van when it later pulled up outside Jones' residence; Hibbler's father was also in the van. Hibbler threatened Jones to get him into the van, and Jones complied. As he entered the van, the father showed Jones a gun in his waistband. During the one-hour van ride with Hibbler, Nicole Seay, Hibbler's girlfriend, and Hibbler's father, the father threatened Jones and offered him $300 to keep him from testifying against Lenell. Later that day, Jones was walking with his girlfriend when Hibbler called him over to a house to speak with his father. Jones spoke with Hibbler's father, and the father again threatened Jones and offered him $300 not to testify against Lenell. Jones had no difficulty recalling or describing the incidents to the investigator the day after they occurred. The investigator had

to pick up Jones for each court appearance in Lenell's case and stay with him because Jones was afraid for his safety and did not want to testify.

¶4 Robert Repischak, a Racine county assistant district attorney, testified that he spoke with Jones before a hearing in Lenell's case. Jones was very nervous and afraid, and he expressed a strong desire not to testify due to fear for his family.

¶5 Jones testified that he gave a statement to Fellion. Jones testified that he "might" recall being afraid to testify against Lenell and that he told Fellion about threats made against him. Jones testified that Lenell's father[1] had threatened him about testifying against Lenell. Jones remembered telling Fellion about a contact with Hibbler at a car wash, but Jones did not recall if Hibbler made any threats during their conversation at the car wash, and he did not recall advising the investigator of these threats. Jones recalled telling the investigator that while he was on his front porch later on the day of the car wash encounter, Hibbler arrived in a van and Jones entered the van. Jones did not recall who else was in the van. The father had a gun, but Jones did not recall any threats made while he was in the van or that he told the investigator that he was threatened or offered $300 not to testify. Jones encountered Hibbler a third time that day, but he could not recall if Hibbler threatened him about testifying against Lenell or if he told the investigator about this threat. On cross-examination, Jones testified that the threats came from Hibbler's father, not Hibbler, and that Hibbler did not offer him any money to stay out of court in Lenell's case.

[1] Jones believed that Hibbler's father had died before Hibbler's trial.

¶6 The jury found Hibbler guilty of intimidating a victim as party to the crime and attempted bribery of a witness and two counts of bail jumping.[2]

¶7 Hibbler contends that the evidence was insufficient to convict him because Jones either did not recall criminal conduct by Hibbler or he identified Hibbler's father as the source of the threats and bribe. Hibbler discounts Jones' prior inconsistent statements to the investigator because the statements were not made under oath and their veracity could not be assured. Therefore, Hibbler contends, the evidence at trial was not sufficient to convict Hibbler.

¶8 Prior inconsistent statements can be used as substantive evidence, as they were here. ***Vogel v. State***, 96 Wis. 2d 372, 386, 291 N.W.2d 838 (1980). Inconsistencies between trial testimony and previous statements do not, in and of themselves, render a witness wholly incredible. ***State v. Smith***, 2002 WI App 118, ¶20, 254 Wis. 2d 654, 648 N.W.2d 15. It is well settled that when a jury is faced with inconsistent statements from a witness, the jury may choose to disbelieve either version or choose one version over another. ***State v. Saunders***, 196 Wis. 2d 45, 54, 538 N.W.2d 546 (Ct. App. 1995). Here, the jury clearly accepted the investigator's testimony that Jones told him of Hibbler's threats and bribery attempt.

¶9 We review whether the evidence, viewed in the light most favorable to the State, is so insufficient in probative value and force that as a matter of law no reasonable jury could have found guilt beyond a reasonable doubt. ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). "If more than one

[2] The jury acquitted Hibbler of another count of intimidating a witness and bail jumping stemming from the car wash encounter.

inference can be drawn from the evidence, the inference which supports the jury finding must be followed unless the testimony was incredible as a matter of law." ***State v. Wilson***, 149 Wis. 2d 878, 894, 440 N.W.2d 534 (1989). We defer to the jury's weighing and sifting of conflicting testimony, recognizing the jury's ability to assess "those nonverbal attributes of the witnesses which are often persuasive indicia of guilt or innocence." ***Id.***

¶10 With these principles in mind, we conclude that the evidence was sufficient to convict Hibbler of intimidating Jones in the van and bail jumping for committing this crime while on bond. Although Jones claimed that he could not remember much, Jones admitted that he talked to the investigator about threats that were made against him. The investigator related Jones' statements to him about the van ride and Hibbler's threats against Jones. An assistant district attorney testified that Jones was afraid when he had to testify against Lenell.

¶11 With regard to the bribery and associated bail jumping charge, the evidence showed that Hibbler summoned Jones to meet with his father in the van and at a residence and, on both occasions, Jones was offered $300 not to testify against Lenell. This evidence supports Hibbler's party to the crime liability for attempting to bribe a witness. WIS. STAT. § 939.05(2)(b) (2005-06)[3] (a person is party to the commission of a crime if he or she intentionally aids and abets the commission of the crime).

[3] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

¶12 The jury could have relied upon Jones' lack of recall and the investigator's testimony to draw a reasonable inference that Hibbler intimidated Jones and attempted to bribe him. The evidence was sufficient to convict Hibbler.

¶13 We turn to Hibbler's ineffective assistance of trial counsel claim. Postconviction, Hibbler sought a new trial because his trial counsel did not present the testimony of the female occupant of the van, Nicole Seay, Hibbler's girlfriend, with whom he has children. Hibbler contends that Seay's testimony would have corroborated Jones' testimony that Hibbler did not threaten or attempt to bribe him. At the hearing on the postconviction motion, Seay[4] testified that Jones asked Hibbler to bring his van to help move a large mirror and that she drove Hibbler and his father to Jones' house in the van in response to this request. Jones sat in the back seat with Hibbler's father, and Jones helped her find the place to which the mirror was being delivered. Hibbler never talked to Jones or his father during the ride. Seay was not able to hear any conversation in the back seat where Jones and Hibbler's father were sitting. She spoke with Hibbler's trial attorney before trial, but he said he did not need her to testify at trial.

¶14 Trial counsel testified that he discussed with Hibbler the possibility of having Seay testify. Counsel understood that Hibbler sat in the front of the van and that Hibbler maintained that he did not see or hear anything untoward involving Jones. Seay was in the same position in the van. Seay told counsel that she preferred not to testify, and counsel felt that Seay's testimony would not be that helpful or necessary, particularly because Jones' testimony was laced with

[4] At the hearing, Seay stated that her first name is Gwendolyn, although she is also known as Nicole.

failures to recall. Also, Seay's status as Hibbler's girlfriend might have compromised her credibility. Counsel asserted that his decision not to present Seay's testimony was a tactical decision.

¶15 The circuit court found that Seay's likely testimony was known to the defense prior to trial, and trial counsel made a strategic decision not to have her testify given her apparent bias as Hibbler's girlfriend and the weakness of the State's case, including the inconsistency of Jones' testimony. The court concluded that trial counsel did not perform deficiently, and therefore counsel was not ineffective.

¶16 On appeal, Hibbler claims that he was prejudiced by trial counsel's failure to present Seay's testimony. The ineffective assistance of counsel standards are:

> The familiar two-pronged test for ineffective assistance of counsel claims requires defendants to prove: (1) deficient performance, and (2) prejudice. To prove deficient performance, a defendant must show specific acts or omissions of counsel that were "outside the wide range of professionally competent assistance." To prove prejudice, a defendant must show that counsel's errors were so serious that the defendant was deprived of a fair trial and a reliable outcome. In other words, "[t]he 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."
>
> Ineffective assistance of counsel claims present mixed questions of fact and law. A trial court's factual findings must be upheld unless they are clearly erroneous. Whether counsel's performance was deficient and, if so, whether the deficient performance prejudiced the defendant are questions of law, which we review *de novo*. The defendant has the burden of persuasion on both prongs of the test.

State v. Marshall, 2002 WI App 73, ¶¶5-6, 251 Wis. 2d 408, 642 N.W.2d 571 (citations omitted). We do not second-guess a matter of defense strategy if such

strategy was found by the circuit court. ***State v. Mayo***, 2007 WI 78, ¶63, ___ Wis. 2d ___, 734 N.W.2d 115. A circuit court's determination that counsel had a reasonable trial strategy is "virtually unassailable in an ineffective assistance of counsel analysis." ***State v. Maloney***, 2004 WI App 141, ¶23, 275 Wis. 2d 557, 685 N.W.2d 620, *aff'd*, 2006 WI 15, 288 Wis. 2d 551, 709 N.W.2d 436.

¶17 We need not reach the question of prejudice if counsel did not perform deficiently. *See* ***Strickland v. Washington***, 466 U.S. 668, 697 (1984). We assess whether counsel's "performance was reasonable under the circumstances of the particular case." ***State v. Hubanks***, 173 Wis. 2d 1, 25, 496 N.W.2d 96 (Ct. App. 1992).

¶18 Counsel was worried about Seay's credibility due to her relationship with Hibbler, Seay told counsel she preferred not to testify, and Jones had already backed away from his allegations that Hibbler threatened and attempted to bribe him. The court's finding that counsel had a strategy in mind when he declined to present Seay's testimony is not clearly erroneous based upon the record before us. Counsel performed reasonably under the circumstances and an unsuccessful strategy does not amount to ineffective assistance. ***State v. Teynor***, 141 Wis. 2d 187, 212, 414 N.W.2d 76 (Ct. App. 1987). Therefore, the deficient performance prong of the ineffective assistance test is not satisfied, and the ineffective assistance claim fails.

By the Court.—Judgment and order affirmed.

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