

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 30, 2008

David R. Schanker
Clerk of Court of Appeals

NOTICE

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Appeal No. 2007AP2324-CR

Cir. Ct. No. 2005CF3374

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL BROWN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEFFREY A. KREMERS, Judge. *Reversed and cause remanded with directions.*

Before Curley, P.J., Kessler, J., and Daniel L. LaRocque, Reserve Judge.

¶1 KESSLER, J. Michael Brown appeals from a judgment of conviction, entered after a jury trial, for being a felon in possession of a weapon, contrary to WIS. STAT. § 941.29(2)(a) (2005-06).¹ He also appeals from an order partially denying his motion for postconviction relief.² Brown argues that he is entitled to a new trial because he was denied his constitutional rights to confront a witness, to present a defense, and to have the effective assistance of counsel. He also argues that a new trial should be granted in the interest of justice. We conclude that trial counsel provided ineffective assistance when he failed to explore Brown's roommate's motivations to testify in a certain manner at trial, which denied Brown the constitutional right to confront a witness. We reverse and remand for a new trial.

BACKGROUND

¶2 On June 12, 2005, police were called to investigate allegations that Brown had a confrontation with his sister and fired several shots from a gun into the air.³ The officers' investigation led them to Brown's home, where they obtained permission from Brown's roommate, Teri Johnson, to search for weapons.⁴ According to Officer Andrew Moutry, Johnson told him she owned a

¹ All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

² The trial court partially granted Brown's postconviction motion, agreeing to resentence him, which resulted in a reduced sentence. Brown's sentence is not at issue in this appeal and will not be addressed.

³ Although Brown was also charged with disorderly conduct in connection with that alleged incident, the State did not pursue the charge at trial and it was dismissed on the State's motion.

⁴ The record sometimes refers to Johnson as Brown's roommate, and sometimes refers to her as his girlfriend. Determination of the precise nature of their relationship is not required for this appeal.

gun and led him to it. Moutry recovered it from a bedroom that included men's shoes and clothing. The gun, which was a .22 caliber rifle, was between the two mattresses of the bed.

¶3 The next day, Officer Denmark Morrison interviewed Johnson about the gun. Although the details of that interview were disputed at trial, it is undisputed that Brown was subsequently charged with being a felon in possession of a weapon for allegedly handling Johnson's gun.

¶4 At the preliminary hearing held on July 6, 2005, Johnson appeared with Brown. Although she had not been subpoenaed, the prosecutor called her to the witness stand. When Johnson expressed reluctance to testify, the court commissioner instructed her to testify. Johnson testified about how she knew Brown and the details of how and when the gun was purchased.

¶5 Specifically, Johnson said that she purchased the gun at Wal-Mart two months earlier and was accompanied by three friends, including Brown. She said she bought the gun for protection from neighbors who had threatened her, and that Brown told her how to use the gun. She also testified that the only time Brown ever handled the gun was when her children came to visit. She said Brown put the gun in his bedroom so that it would not be in Johnson's bedroom, where the children slept.

¶6 Brown was bound over for trial. Nearly four months later, Johnson sent a notarized letter to the trial court in which she said that her statements to the police on June 12-14, 2005, and her testimony at the preliminary hearing, were inaccurate. Specifically, she said that when she first spoke with Morrison in June,

she told him that the gun was hers, that she was the only one who ever moved it, and that she kept it under lock and key at all times.⁵ The letter continued:

The officer didn't want to accept my statement. He kept accusing me of lying; I kept telling him it was the truth. He went on to say, "You don't want to mess up your good record," "You don't want to go to jail, have your children lose their mother, and ruin the rest of your life." The officer stated: "You heard of [Taycheedah Correctional Institution, a prison for female inmates] haven't you, obstructing justice?" So, I became scared.... I felt like if I didn't change my statement, they'd try to arrest me and send me to jail. So, I told the officer what he wanted to [hear].

¶7 Johnson's letter said that when she appeared at the preliminary hearing, she told Brown's attorney, and attempted to tell the prosecutor and the police officers, that parts of her statement were not accurate. She said the prosecutor responded: "I have no problems with you; you haven't given me a reason to come after you." The affidavit continued:

[T]hat put even more fear in me. When the hearing started, the [prosecutor] called me to the stand. Two officers escorted me to the stand. I told the commissioner I didn't want to testify.... I knew my signed statement wasn't accurate, but I thought if I changed my testimony, the [prosecutor] would come after me. I was able to give the true statement to [Brown's previous parole officer].

...I bought the gun for my own protection. Michael Brown had no knowledge of the gun. We were roommates, with separate locked rooms.

Now I feel inaccurate statements [that] I made out of fear and coercion [are] keeping an innocent man in jail.

⁵ It is undisputed that Johnson was not a felon and could legally purchase and possess a firearm.

¶8 No action was taken as a result of the letter. New counsel was appointed for Brown and over the next eleven months, the trial court⁶ heard a variety of motions, some of which related to the State's inability to find and serve Johnson, who it considered a key witness for the State. Information suggested that Johnson was trying to avoid service. Ultimately, a material witness warrant was issued and Johnson was taken into custody. The trial court ordered Johnson to post bail of \$5000 in cash, pursuant to WIS. STAT. § 969.01(3), governing bail for witnesses. Unable to post bail, Johnson remained in jail until the trial began, seven days after she was taken into custody.

¶9 Before trial, Johnson retained Attorney Wendy Patrickus as counsel to represent her in connection with her testimony in Brown's case. The next day, Brown's counsel told the trial court that he had not been able to contact Patrickus and that he wanted to speak with her. The prosecutor said that he had spoken with Patrickus that morning, and had "given her information about the case." He continued: "I believe she went to speak with her client, but told me that she would certainly not be encouraging her to take a position that might expose her to charges for perjury." The trial court assured Brown's trial counsel that he would have time to speak with Patrickus prior to Johnson's testimony. However, it is undisputed that trial counsel and Patrickus did not speak before Johnson testified.

¶10 At trial, the State called Johnson as a witness. She offered testimony that varied from her testimony at the preliminary hearing and from Morrison's testimony about his interview of Johnson. She said that Brown had not shown her

⁶ Two judges heard the pretrial motions, while the Honorable Jeffery A. Kremers presided over the trial, sentencing and postconviction motion hearing.

how to use the gun (and that instead, a man named Lee had), that Brown told her she should not have a gun in the house, and that Johnson would sometimes put the gun in Brown's room when he was gone so that her children would not find it. She also testified Brown sat at the window with the gun when he was afraid someone would break into the house.

¶11 In response to questions from the State, Johnson acknowledged that she did not want to testify against Brown, and that she had been taken into custody to assure her appearance. She said she was not testifying voluntarily. Johnson also testified that when she first spoke with Morrison, he did not want to believe her statement that Brown did not know about the gun, and suggested she would be in trouble if she kept saying so.

¶12 Trial counsel asked Johnson about the letter she wrote to the trial court in October 2005. Under cross-examination, Johnson acknowledged that the letter never mentioned that Brown sat up at night with the gun, and that it stated Brown had no knowledge of the gun. On redirect, Johnson testified that statements in the letter were lies, and that she wrote the letter to help Brown.

¶13 Defense counsel then attempted to ask Johnson about the reasons for her testimony. The following exchange took place:

[COUNSEL]: In fact, you were granted immunity to testify here; correct?

[STATE]: No, Your Honor, if we might approach the side bar? That is not a correct statement.

THE COURT: Sustained. Not a correct statement.

[COUNSEL]: That's all I have. Thank you.

The transcript does not reflect that a sidebar discussion took place, although affidavits later described a sidebar discussion among counsel and the trial court. There was no attempt to summarize any sidebar discussion on the record.

¶14 The State ultimately produced a total of four witnesses, including Johnson and three police officers. The only testimony that placed the gun in Brown's possession was Johnson's, offered directly and through the testimony of two officers. The jury found Brown guilty and he was convicted and sentenced.

¶15 Brown moved the trial court for a new trial pursuant to WIS. STAT. § 809.30. He argued that he had been denied the right to confrontation and to present a defense, by both trial court and trial counsel error. Brown's motion included affidavits from postconviction counsel, Patrickus and Johnson.

¶16 The affidavit from postconviction counsel explained that she had spoken with trial counsel and that trial counsel said Brown "told him of the possibility that Ms. Johnson had entered into some kind of agreement with the State in exchange for her testimony against Mr. Brown at trial." Further, the affidavit asserted that trial counsel said he never discussed any potential agreement with Patrickus, that he attempted to cross-examine Johnson about an immunity agreement, and that he did not recall if a sidebar took place in response to the State's objection to his question about immunity.

¶17 The affidavit from Patrickus stated that she met with the prosecutor to discuss Johnson's "release and what [Patrickus] needed to do in order for that to occur forthwith." Patrickus said the prosecutor "indicated that he needed Ms. Johnson's testimony in the impending trial ... and that if [Johnson] were to testify truthfully she would be released without charges ... for ignoring the subpoena." Patrickus said she asked for a written agreement concerning immunity from future

charges, but the prosecutor said that this was not a traditional immunity situation and “simply indicated he would agree to lift the [body attachment] warrant if [Johnson] honored the subpoena by testifying, thereby not giving the State anything to charge her with, unless of course she were to commit perjury which in that case would be a different charge altogether.”

¶18 Johnson’s affidavit stated that Patrickus told her “that if I testified on behalf of the State that I saw Mr. Brown in possession of a firearm, I would be granted immunity from any obstruction of justice type charges. I believed that if I did not do the above, I could be facing criminal charges.” Johnson stated: “I got scared that I might be sent to jail and that my life would be ruined, so I decided to testify against Mr. Brown on behalf of the State.”

¶19 The trial court conducted a *Machner*⁷ hearing, at which Patrickus, Johnson and trial counsel all testified. Patrickus testified consistent with her affidavit, adding that she met with Johnson before the trial and told her

that she needed to testify in the trial and she needed to do so truthfully because that was part of the discussion that I had with [the State] and that if she chose not to she would be, continue to be held on this warrant and she would also be potentially facing an additional charge of obstructing.

Patrickus said she told the prosecutor that she wanted the agreement in writing, but the prosecutor indicated there was not enough time because the trial was about to begin. She also asked the prosecutor to memorialize the agreement in some way so that the trial court would be aware of it, but this did not occur.

⁷ *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

¶20 Trial counsel testified about his representation. He said that although he remembered representing Brown at trial, he had no memory of: learning that Johnson was in custody and had retained counsel; telling the trial court that he had attempted to contact Johnson’s counsel; asking to speak with Johnson’s counsel; attempting to contact Johnson’s counsel before Johnson testified; learning that Johnson’s counsel had spoken with the prosecutor and was going to speak with Johnson; learning that Johnson had possibly been given immunity; or deciding to ask Johnson about immunity. Trial counsel also said he did not remember any sidebars, and why he did not ask to make a record of them. He testified that he did not know why he did not make an offer of proof to the court concerning his question on immunity, or seek to *voir dire* Johnson outside the jury’s presence. In short, trial counsel could not recall any of the information pertinent to Brown’s postconviction motion, so the strategy behind his objections and questions, or lack thereof, was not explained.⁸

¶21 Johnson testified that when she met with Patrickus the morning of trial, Patrickus told her that “it didn’t look good” for Johnson because the State “had surveillance on me and ... if I didn’t testify, for sure [the prosecutor] would file against me for obstruction of justice and perjury and I would not be getting out of jail.” Johnson said she

was supposed to testify that ... she saw Michael Brown in possession of a firearm. That is the only way and then I asked [Patrickus], Well, is there any kind of form to sign to verify that, yes, if I did this I would have immunity? But she told me I couldn’t get that until [the prosecutor] was

⁸ Although the trial court praised trial counsel’s trial performance, it expressed its opinion that when trial counsel testified at the postconviction hearing, he had not been “candid or as forthright with the court as he could be.”

satisfied with my testimony after the trial. Then I would get [a piece of paper].

¶22 The trial court issued its decision from the bench. The trial court made several credibility determinations. It found that Patrickus had testified truthfully, and that Johnson was not a credible witness, given her inconsistent statements and admissions that she testified untruthfully under oath. The court questioned trial counsel's credibility, in light of his inability to remember anything about the trial. Ultimately, the trial court found, based on Patrickus's testimony, that "the only agreement ... or understanding [with the State], was that [Johnson] was to take the stand, testify truthfully and she would not be charged with not coming to court and honoring her subpoenas." This agreement, the trial court said, was not a grant of immunity and, therefore, there was no error when trial counsel was denied the right to ask about immunity. Further, the trial court noted, Johnson was questioned about her motivation for speaking, which included her testimony that she was forced to testify.

¶23 The trial court concluded that Brown had not been prejudiced by the limits on Johnson's testimony and had not proven ineffective assistance of counsel. It denied Brown's motion for a new trial. This appeal follows.

DISCUSSION

¶24 Brown contends that the trial court's rulings and/or trial counsel's deficient performance violated his constitutional right to confront and cross-examine witnesses testifying against him, and to present a defense. For reasons discussed below, we conclude that trial counsel provided ineffective assistance when he failed to explore Johnson's motivations to testify in a certain manner at trial, which denied Brown the constitutional right to confront a witness, and that

Brown is therefore entitled to a new trial. Therefore, we reverse and remand for further proceedings.

I. Legal standards.

¶25 In Wisconsin, a criminal defendant's right to confront witnesses is guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and article I, section 7 of the Wisconsin Constitution. *State v. Hoover*, 2003 WI App 117, ¶6, 265 Wis. 2d 607, 666 N.W.2d 74. A defendant's confrontation rights are the same under both constitutions. *Id. Hoover* explained: "The right of confrontation includes the right to cross-examine adverse witnesses to expose potential bias. Although a court may not prohibit all inquiry into the possibility of bias, reasonable limitation on 'interrogation that is repetitive or only marginally relevant' is appropriate." *Id.* (citations omitted).

¶26 Generally, whether to admit or exclude evidence is a matter within the trial court's discretion. *State v. Jensen*, 2007 WI App 256, ¶9, 306 Wis. 2d 572, 743 N.W.2d 468. "However, 'if an evidentiary issue requires construction or application of a statute to a set of facts, a question of law is presented, and our review is de novo.'" *Id.* (citation omitted). "Further, whether a defendant was denied the constitutional right to present a defense through the exclusion of evidence is a question of constitutional fact, which we review de novo." *Id.*

¶27 A defendant claiming ineffective assistance of counsel must establish that the lawyer was deficient and that the defendant was prejudiced as a result. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). If a reviewing court determines that a defendant has failed to satisfy either prong of the *Strickland* test, it need not consider the other one. *Id.* at 697. A finding of deficient performance "requires showing that counsel made errors so serious that counsel was not

functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” *Id.* at 687. To satisfy the prejudice prong, the defendant must show that counsel’s errors were serious enough to render the resulting conviction unreliable. *Id.* When considering an ineffective assistance of counsel claim, we review the trial court’s findings of fact regarding counsel’s conduct under a clearly erroneous standard. *State v. Johnson*, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). Conclusions by the trial court concerning whether the lawyer’s performance was deficient and prejudicial present questions of law that we review *de novo*. *Id.* at 128.

II. Analysis.

¶28 Brown’s constitutional arguments are related to his assertion that the jury should have had an opportunity to hear whether Johnson believed she had been granted immunity, or something short of immunity, in exchange for her testimony. We note at the outset that we do not believe the trial court erred when it sustained the State’s objection to trial counsel’s single question concerning immunity. Specifically, trial counsel asked: “In fact, you were granted immunity to testify here; correct?” The trial court did not allow the question to be answered, indicating it was not a factually correct question. We agree with the trial court that there was no formal immunity agreement, as that term is commonly understood in criminal prosecution, and so the question as posed was arguably incorrect. However, there were follow-up questions concerning Johnson’s motivation for testifying and her understanding of a cooperation agreement with the State that potentially *could* and *should* have been asked, as we discuss below. But no follow-up questions were asked, so we can hardly fault the trial court for not allowing the witness to answer a question she was never asked. For these reasons,

our resolution of this case is based on an ineffective-assistance-of-counsel analysis.

A. Deficient performance.

¶29 We consider trial counsel's performance. As noted, only Johnson's testimony and prior statement, offered directly and through two officers, connected Brown with the gun. Thus, Johnson was the key witness in the case, and trial counsel knew this. Trial counsel also knew that Johnson had previously testified in a way that varied from the statement she allegedly made to Morrison, and had sent the court a letter admitting that she lied at the preliminary hearing and in her statement to Morrison. Further, counsel knew that Johnson had retained counsel to represent her concerning her testimony, and that Johnson had been in custody for a week to insure her appearance at the trial. In addition, counsel was aware that Patrickus had spoken with the prosecutor about Johnson's testimony. Indeed, he said he hoped to speak with Patrickus before Johnson's testimony, but ultimately he did not speak with her.

¶30 Based on this knowledge, trial counsel recognized that Johnson's motivation to testify, and in particular to testify in a way that satisfied the State, presented potential bias that should be explored. Thus, he asked Johnson whether she had been granted immunity. When the trial court sustained the State's objection, the discussion ended. Whether trial counsel even considered asking the question differently, making an offer of proof, conducting *voir dire* of Johnson outside the jury's presence, or making a record of any sidebar discussions that might have influenced his questioning is not known because trial counsel testified that he could recall virtually nothing about the trial or his strategy. This failure of memory does not necessarily mean counsel's performance was deficient, but it

requires us to consider, based on the information available, whether counsel's trial tactics were objectively reasonable. *See State v. Koller*, 2001 WI App 253, ¶53, 248 Wis. 2d 259, 635 N.W.2d 838 (reviewing court can determine that trial counsel's performance was objectively reasonable, even if trial counsel offers no sound strategic reasons for decisions made), *modified on other grounds, State v. Schaefer*, 2003 WI App 164, 266 Wis. 2d 719, 668 N.W.2d 760. We conclude that they were not.

¶31 Based on the undisputed facts known to trial counsel, including that Patrickus had spoken with the prosecutor about Johnson's testimony and that Johnson had offered conflicting statements inside and outside of the courtroom, we conclude that counsel should have followed up his question concerning immunity, so that he could explore Johnson's motivations to testify that Brown handled the gun. If for some reason counsel believed that question was precluded, then he should have recorded his objection and made a record to preserve the issue for appellate review. His failure to do so was deficient performance.

¶32 Our conclusion that trial counsel's performance was deficient in this case is consistent with our decision in *State v. Delgado*, 194 Wis. 2d 737, 535 N.W.2d 450 (Ct. App. 1995), where we concluded that trial counsel's performance was deficient "for failing to impeach the State's principal witness with readily available evidence that would have shown, first, that the witness had been promised substantial consideration in exchange for his testimony and, second, that the witness lied about whether he had been promised anything." *Id.* at 741. In *Delgado*, we recognized that the lack of a finalized deal between the State and the witness did not affect whether the witness could and should have been impeached. We stated:

The “particular importance of searching cross-examination of witnesses who have substantial incentive to cooperate with the prosecution’ ... does not depend upon whether or not some deal in fact exists between the witness and the Government.” *United States v. Lankford*, 955 F.2d 1545, 1548-1549 (11th Cir. 1992) (trial court erred in refusing to allow cross-examination of government’s chief witness to expose witness’s possible motive to cooperate stemming from arrest of sons in unrelated case, despite the fact that witness and government had made no deal) [citations omitted]. Further, “[w]hat tells, of course, is not the actual existence of a deal but the witness’ belief or disbelief that a deal exists.” *United States v. Onori*, 535 F.2d 938, 945 (5th Cir. 1976); see also *Hoover v. State of Maryland*, 714 F.2d 301, 305 (4th Cir. 1983) (“The vital question” is not what government understands terms of agreement to be, but rather “what the *witness* understands he or she will receive, for it is this understanding which is of probative value on the issue of bias.”).

Delgado, 194 Wis. 2d at 753 (ellipses and second set of brackets in original; emphasis supplied by *Hoover*).

¶33 Similarly, even though there was not a formal immunity agreement in this case, there was, as the trial court found at the *Machner* hearing, an “agreement” or “understanding” reached with the State whereby Johnson was to “take the stand, testify truthfully and she would not be charged with not coming to court and honoring her subpoenas.” If she did not testify truthfully, she would be facing charges of obstruction. While the prosecutor may not have explicitly told Johnson she had to testify that Brown handled the gun, the prosecutor had already made clear that he did not believe Johnson’s statements that she alone handled it. Thus, the State was, in effect, requiring Johnson to testify in a certain manner. If Johnson chose to tell what she claimed in her letter to the trial court and at the *Machner* hearing was the truth—that only she handled the gun—the State would pursue charges against her. This created great motivation for Johnson to testify in

a way that would satisfy the State, regardless of what she believed the truth to be.⁹ Trial counsel should have elicited testimony about Johnson’s motivation, to strengthen Brown’s case that Johnson was lying to protect herself.¹⁰ *See Delgado*, 194 Wis. 2d at 753. Counsel’s failure to attempt to follow up on this area of questioning after the trial court sustained the State’s objection to his question concerning immunity was constitutionally deficient.

B. Prejudice.

¶34 Having concluded that trial counsel’s performance was deficient, we next consider whether the performance was prejudicial. “To establish constitutional prejudice the defendant must show that but for counsel’s unprofessional errors, there is a reasonable probability that the result of the proceeding would have been different.” *State v. Champlain*, 2008 WI App 5, ¶28, 307 Wis. 2d 232, 744 N.W.2d 889. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694. “The focus of this inquiry is not the outcome of the trial, but on ‘the reliability of the proceedings.’” *State v. Thiel*, 2003 WI 111, ¶20, 264 Wis. 2d 571, 665 N.W.2d 305 (citation omitted). Applying these standards, we conclude that trial counsel’s deficiency was prejudicial.

⁹ We do not mean to suggest that this court knows which of Johnson’s versions of the truth are accurate. The trial court’s finding that Johnson was not a credible witness is not clearly erroneous. However, what is at issue is whether Johnson’s motivations to testify that Brown handled the gun should have been explored. We conclude trial counsel should have elicited the testimony, or attempted to do so more effectively.

¹⁰ Trial counsel did elicit testimony from Johnson that she was not voluntarily testifying. However, being compelled to testify through the issuance of a subpoena or material witness warrant is not the same as being required to testify in a way that satisfies the State so that one can avoid threatened prosecution.

¶35 Johnson’s statements provided the only direct evidence that Brown had handled the gun. Her statements were inconsistent, some indicating Brown had handled the gun, others saying he had not. The jury’s determination of Brown’s potential guilt depended on which of Johnson’s versions of the truth the jury accepted. Thus, Johnson’s possible motivation to lie at the trial was extremely relevant. Johnson had great incentive to testify in a manner that would satisfy the State: she was already facing potential charges for ignoring the subpoena and obstructing justice, and she had already spent a week in jail to insure that she would testify against Brown. The jury never heard that the State agreed to forego prosecution if she testified “truthfully”—which we interpret under these facts as being “that Brown handled the gun”—and that undermines our confidence in the outcome of the trial. *See Strickland*, 466 U.S. at 694.

¶36 Because we conclude that Brown’s trial counsel provided ineffective assistance, Brown is entitled to a new trial. We reverse and remand for a new trial.

By the Court.—Judgment and order reversed and cause remanded with directions.

Not recommended for publication in the official reports.

