COURT OF APPEALS
DECISION
DATED AND FILED

November 5, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-3395-CR **Cir. Ct. No. 99-CF-1041**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ERIK GRACIA,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Brown County: SUE E. BISCHEL, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 HOOVER, P.J. Erik Gracia appeals a judgment of conviction and an order denying postconviction relief. Gracia was convicted of first-degree

intentional homicide, contrary to WIS. STAT. § 940.01(1)(a).[1] He claims that the conviction arises from illegally seized notes written by his mother after the State promised not to use the notes at trial, a discovery violation by the State and an improper single-photo array (or "showup") used for pretrial identification. Gracia also claims his trial counsel was ineffective for failing to object to certain evidence. We reject Gracia's arguments and affirm the judgment and order.

Background

A. Aranka's Notes/Ineffective Assistance of Counsel

¶2 Gracia was arrested for murdering his wife, Colleen, who was killed on or about May 10, 1999. As part of the investigation, police executed a search warrant at the apartment Gracia shared with his mother, Aranka. The warrant authorized the police to look for "any diaries or journals of Colleen Gracia." The police seized a "journal and notes" from the top of the microwave. These notes, apparently written on the back of an envelope,[2] turned out to be Aranka's, not Colleen's.

¶3 Gracia filed a pretrial motion to suppress physical evidence. At the time of the motion, however, Aranka's notes were not considered because the State had not yet decided whether it planned to use the notes at trial. The State ultimately concluded it would not seek to introduce Aranka's notes.

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[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

[2] Gracia tells us the relevant notes were on an envelope. The State says the parties referred to the notes as a "journal" in the trial court and used that designation throughout its brief. We will simply refer to them as "Aranka's notes." We also mention that the writings in question are not part of the record, although their format is ultimately irrelevant.

¶4 On direct examination at trial, Aranka testified regarding the time Gracia was at home on May 10, contradicting what she had previously told the police. On cross-examination, the State asked Aranka about a statement she gave to the public defender:

> Q: Now, in the statement that, that you gave to the Public Defender's office, you indicated in response to a question that you had started keeping something of like a diary regarding Colleen's parenting skills; is that correct?
>
> A: Yeah.
>
> Q: And what did that really entail? Would you take notes and write them down about what you observed with Colleen?
>
> A: I was also taking notes about their arguing back and forth, coming back and forth, and stuff like that also.
>
> Q: And would you also write down things that Erik would tell you about Colleen?
>
> A: No, I didn't have that.
>
> Q: Well, it says in this, in this statement that in this kind of diary that you were compiling, May 10th, 1999, Erik took [their daughter] to school, picked her up around 5 p.m., drove past Colleen's house, no car, passed around 10 o'clock, still no car. Is that what you stated during that interview?
>
> A: Yes.
>
> Q: And is that in fact what shows up in your journal or diary?
>
> ….
>
> Q: ... [I]sn't it true that in your diary, it doesn't say anything about a phone call, it just says, passed around 10 o'clock, still no car. Is that correct?
>
> A: I know. I know.

Gracia did not object to this line of questioning.

¶5 During the State's rebuttal, the prosecutor indicated he wanted to offer Aranka's notes and asked if Gracia would object. Gracia objected because the prosecutor had stated before trial that he would not offer any evidence obtained under the warrant. The court therefore never ruled on the notes' admissibility when deciding the suppression motion. The State ultimately withdrew its attempt to introduce Aranka's notes, although the prosecutor referred to the notes in his closing arguments. Gracia did not object to the closing arguments.

B. Discovery "Violation"

¶6 During the investigation by police, a detective asked Gracia what "he thought was important in his life." Gracia told the detective his car, his job, and his computer. The State did not inform Gracia prior to trial that it intended to use this conversation against him at trial. The State did not, however, refer to this conversation during its case-in-chief.

¶7 During Gracia's direct testimony, his counsel asked him what the three happiest moments in his life were. Gracia answered: when he proposed to Colleen, when they were married, and when their child was born. Counsel then asked what the three saddest moments in his life were. Gracia answered: when his dad died, when Colleen died, and when he was arrested in this case. The State then asked Gracia about the "important in life" conversation with the police on cross-examination, although Gracia testified he did not remember answering the question.

¶8 In its rebuttal case, the State called the detective, who testified that he had asked Gracia the question "just to get a general feel." The detective also testified that he asked Gracia why he did not mention his daughter Erika. Gracia

told him Erika was naturally important, but that he just "didn't have it in the list of things."

C. The Photo Identification

¶9 Erica Rodriguez, Colleen's neighbor, testified on the State's behalf. On the day Colleen was murdered, then ten-year-old Rodriguez was playing outside and saw a car driven by a man pull up across the street. Although it was close to dark, there was still some light. The man looked at her and she looked directly at him for about three minutes. She ran in to tell her mother because the driver looked like someone Rodriguez had seen on "America's Most Wanted."[3]

¶10 Her mother notified the police seventeen days after Rodriguez had seen the man and Rodriguez did not participate in an identification session until nearly three months after Colleen's death. When Rodriguez was in the police station for the identification, the officer placed a single photograph in front of her without saying anything. Rodriguez gasped and immediately identified the man in the photo, Gracia, as the man she had seen in the car. Gracia moved at trial to suppress the testimony, claiming that the single photo was highly suggestive. The trial court, however, allowed the testimony.

Discussion

¶11 Gracia argues that his trial counsel was ineffective for failing to object to references to Aranka's notes. Gracia also claims the State broke a promise not to use the notes. He further claims the State violated its discovery

[3] "America's Most Wanted" is a television program that profiles criminal suspects and their crimes.

obligations because Gracia's statement to the detective about the "most important things" was not divulged before trial. Finally, Gracia renews his complaint that use of a single photo for identification in this case was improper. For the reasons below, we reject Gracia's arguments.

A. Aranka's Notes/Ineffective Assistance of Counsel

¶12 Gracia claims the seizure of Aranka's notes, taken while the police were executing a search warrant at the apartment he shared with her, violated his Fourth Amendment protections against unreasonable search and seizure and that defense counsel was ineffective for failing to object to references to the notes. We disagree.

¶13 There are two parts to an ineffective assistance of counsel claim: a demonstration that counsel's performance was deficient and a demonstration that this deficiency prejudiced the defendant. ***State v. Smith***, 207 Wis. 2d 258, 273, 558 N.W.2d 379 (1997). Prejudice requires demonstrating that counsel's errors were so serious that we question the outcome of the trial. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). The defendant has the burden of proof on both elements. ***Smith***, 207 Wis. 2d at 273.

¶14 Determining whether particular acts amount to ineffective assistance is a mixed question of law and fact. ***State v. Sanchez***, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996). We will uphold the trial court's finding of facts concerning the circumstances of the case and counsel's conduct unless the findings are clearly erroneous. ***Id.*** But the questions whether counsel's performance was deficient and prejudiced the defendant are questions of law we review de novo. ***Id.*** at 236-37. Counsel's performance was not deficient, nor was Gracia prejudiced by the testimony relating to Aranka's notes.

¶15 Evidence suggests that Colleen was alive as late as 9:41 p.m. on May 10. Using a phone call she received from a friend as a reference point, Aranka testified that Gracia had come home before the call ended and he did not go back out that evening. Phone records show Aranka received the phone call at 8:21 p.m. and it lasted just under thirty-three minutes, putting Gracia at home before 9 p.m.

¶16 Before trial, however, Aranka had told the police that she thought she had received the phone call between 9 and 10 p.m. This testimony suggested that Gracia had returned home before the time Colleen was killed. However, Aranka had also given a statement to the public defender describing a set of notes she was keeping regarding Colleen's relationship with Gracia. In the statement, she told the public defender about her entry for May 10, 1999, which indicated Gracia was still out driving near Colleen's home around 10 p.m.

¶17 The State never inquired about these notes during its case-in-chief. Following Aranka's direct testimony that her son was in the apartment before 9 p.m. on the night of Colleen's murder, however, the State sought to impeach her. Gracia claims the State improperly used the notes in its questioning. However, the State asked Aranka about what she said to the public defender. It did not produce the notes. Although the State later sought to physically introduce the notes, it ultimately withdrew its request to do so.

¶18 "It is unreasonable for a criminal defendant at the outset of trial to assume that the evidence presented at trial may not affect the state's prosecuting position." ***State v. Fleming***, 181 Wis. 2d 546, 559, 510 N.W.2d 837 (Ct. App. 1993). The State was responding to Aranka's direct testimony providing her son with an alibi. She had given contradictory information to the police and to the

public defender, and the State used the information that Aranka—not the search warrant—provided to impeach her.

¶19 Even if we were to conclude defense counsel was deficient for failing to object to references to Aranka's notes, we would still be unable to conclude that counsel was ineffective because there is no prejudice to Gracia. Despite the trial court's statement that it would have ruled Aranka's notes inadmissible, we conclude as a matter of law that there was no underlying Fourth Amendment violation, the basis upon which Gracia claims he wanted counsel to object and keep Aranka's notes out of evidence.

¶20 The search warrant authorized the police to search for and seize "any diaries or journals of Colleen Gracia." Police can search all items found on the specified premises that are plausible repositories for objects named in the search warrant. ***State v. Andrews***, 201 Wis. 2d 383, 403, 549 N.W.2d 210 (1996). Gracia suggests that because Aranka's notes were not specified in the search warrant, their seizure was illegal.

¶21 There are, however, two reasons why the officers were entitled to seize Aranka's notes. First, the officers could not know at the time that Aranka, not Colleen, authored the notes, and they were not required to determine authorship immediately on site. *See* ***id.*** at 399 (citing ***United States v. Schmude***, 699 F. Supp. 200, 202 (E.D. Wis. 1988) (ownership or control of the various containers searched on the premises should not be a relevant consideration when the premises search warrant is valid)).[4] Indeed, requiring the police to remain at

[4] Gracia does not contest the validity of the search warrant itself, only the scope in which the officers applied it.

the home until authorship was conclusively established might lead to *more* intrusion on the home owner's privacy by the extended stay, compared with allowing the police to remove all "plausible receptacles" or "containers" of Colleen's writings for later examination off the premises.

¶22 Assuming, however, that we preferred a rule requiring the police to determine authorship of the writing at the scene, the officers would necessarily have had to read the notes on the envelope. Then the officers would have discovered a notation regarding Gracia's activities on the day of the murder. "When the incriminating nature of a document is apparent from a brief perusal, such document is justifiably seized under the plain view doctrine." ***State v. Oswald,*** 2000 WI App 3, ¶44, 232 Wis. 2d 103, 606 N.W.2d 238. Because the note puts Gracia at the scene of the crime near the time of its commission, the officers would have been justified in seizing Aranka's notes under the plain view rule.

¶23 Additionally, Gracia was not prejudiced by the discussion of Aranka's notes because both Aranka and Gracia had already been impeached by various other inconsistencies in their stories. Additional impeachment by reference to Aranka's notes is insignificant in the context of the entire record.

Finally, there was such overwhelming circumstantial evidence of Gracia's guilt[5] that had Aranka's notes been suppressed, we are satisfied that the jury would still have returned a guilty verdict. Because counsel's failure to object does not undermine our confidence in the result, *see* ***Strickland***, 466 U.S. at 687, use of the notes was not prejudicial.

B. Discovery "Violation"[6]

¶24 Gracia claims the State violated its discovery obligations by failing to disclose Gracia's response to an officer's question regarding the "most important things" in his life. In reviewing an alleged discovery violation we must address first whether the State actually violated its discovery obligations. ***State v.***

[5] This additional evidence includes: (1) Aranka's inconsistencies between her testimony and her statements to the police; (2) Gracia's own statement to the police that he drove past Colleen's at 10 p.m. on the night she was killed; (3) that Colleen wanted a divorce but Gracia did not; (4) that Gracia called Colleen's parents to tell them she was dead but told her father, "I didn't hit her;" (5) an email message that was sent from Colleen's computer at 9:41 p.m. on the night of her death, telling her "boyfriend" William Myers she had arrived home safely; (6) evidence of a sexual assault against Colleen, DNA specimens determining that Gracia had intercourse with Colleen within twenty-four hours of her death, Gracia's repeated statements to police that he had intercourse with Colleen last on April 30, Gracia's changed statement that he had intercourse with Colleen last on May 8, and then another statement that he had intercourse with her on the morning of May 10; and (7) Gracia's co-worker's testimony that when Gracia mentioned he felt bad because he had begun drinking after Colleen's death, she suggested he see a counselor. Gracia responded that he would not because a counselor would have to testify against him if subpoenaed, so the only safe confidant would be a priest.

[6] Gracia claims, "There are two unprofessional errors briefed herein [failure to object to Aranka's notes], in this argument section, and [failure to object to the discovery violation] in the subsequent one." However, the alleged discovery violation *was not briefed* as an ineffective assistance of counsel issue. We therefore decline to consider it in that context. *See* ***State v. Pettit***, 171 Wis. 2d 627, 647, 492 N.W.2d 633 (Ct. App. 1992) (this court may decline to review issues inadequately briefed). We note, however, that the result would be the same because our analysis ultimately shows no prejudice to Gracia. We also note that Gracia's allegation that the State violated its discovery obligations was not included in his motion for postconviction relief and was raised here for the first time. Appellate courts will generally not review issues raised for the first time on appeal, ***Wirth v. Ehly***, 93 Wis. 2d 433, 443-44, 287 N.W.2d 140 (1980), although we choose to address the question here.

DeLao, 2002 WI 49, ¶14, 252 Wis. 2d 289, 643 N.W.2d 480. If we find a violation, we must then address whether the State has shown good cause for the violation and, if not, whether the violation prejudiced the defendant. ***Id.*** at ¶15. Each of these three steps presents us with a question of law, which we will review independently of the trial court. ***Id.*** at ¶¶14, 15. We conclude Gracia was not prejudiced by use of his statement.

¶25 WISCONSIN STAT. § 971.23(1)(b) requires the district attorney to give to the defense, upon demand, a "written summary of all oral statements of the defendant which the district attorney plans to use in the course of the trial and the names of witnesses to the defendant's oral statements." The phrase "plans to use" embodies an objective standard: what a reasonable prosecutor would have done under the circumstances of the case. ***DeLao***, 2002 WI 49 at ¶30.

¶26 We acknowledge that under different circumstances, the State might attempt to use this testimony to portray Gracia as uncaring. Here, however, Gracia explained his statement when the officer questioned why Gracia had not mentioned his daughter. Gracia told the officer it was not on "the list of things" Gracia had in his mind when the officer asked. As the State contends, the jury could reasonably believe that Gracia thought the question referred to "things," not people or relationships. The prosecutor might reasonably assume that this explanation would defeat any negative portrayal of Gracia that might be sought by introducing the answer and decide not to use the statement at trial.

¶27 We will, however, assume but not decide that the State *did* violate its discovery obligations without good cause. We conclude nonetheless that there was no prejudice to Gracia. Trial counsel testified at the postconviction hearing that he seized upon the officer's testimony as opportunity to highlight poor investigation

techniques, thus working the statement into the defense theory. We will not second guess trial counsel's strategy. *See* ***State v. McDonald***, 50 Wis. 2d 534, 538, 184 N.W.2d 886 (1971). Additionally, even if the statement served to show Gracia as uncaring, the officer actually did testify about Gracia's explanation of why he failed to include his daughter. The jury could have reasonably concluded, as the prosecutor could, that Gracia did not consider his daughter a "thing." Finally, even if the jury still thought the statement portrayed Gracia as uncaring, this is too insignificant to undermine our confidence in the trial's result given the other evidence presented in the case.

C. Single Photo "Showup"

¶28 Gracia contends that there was no immediate need for the police to use a single-photo showup for Rodriguez's confrontation. He argues that because there was no urgency, a single photo identification was improper. Gracia also claims that Rodriguez's identification of him was too unreliable because she claimed the man she saw in the car looked like a suspect she had seen on "America's Most Wanted."

¶29 In reviewing a trial court's determination whether a pretrial identification should be suppressed, we apply the same rules as the trial court. ***State v. Benton,*** 2001 WI App 81, ¶5, 243 Wis. 2d 54, 625 N.W.2d 923. The rules are based on the United States Supreme Court's rejection of a per se rule that would exclude all single-photo identification testimony. The Court concluded instead that "reliability is the linchpin in determining the admissibility of identification testimony" and laid out five factors to be considered in examining whether identification testimony is reliable. ***Manson v. Brathwaite***, 432 U.S. 98, 114 (1977). These factors include

> the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his [or her] prior description of the criminal, the level of certainty demonstrated at the confrontation [lineup], and the time between the crime and the confrontation.

Id. Against these factors we weigh the corrupting effect of the suggestive identification itself. ***Id.***[7] The trial court's findings of fact, of course, may not be disturbed unless they are clearly erroneous. ***Benton***, 2001 WI App 81 at ¶5. Whether the pretrial identification is impermissibly suggestive is a question of law. *See* ***id.***

¶30 **The opportunity to view.** Rodriguez was in her yard playing when the man she identified as Gracia pulled up across the street from her. Although it was nearly dark outside, there was still some light. They stared at each other for about three minutes. This was not a mere glance at someone driving by. Gracia's car was stopped for several minutes, giving Rodriguez ample opportunity to view Gracia.

¶31 **The degree of attention.** Because Rodriguez stared at Gracia so long, she necessarily paid a great degree of attention to him. She did not resume playing in the yard. Gracia argues that Rodriguez was impressionable, scared by a television show, and that this makes her unreliable. However, it is equally

[7] This is essentially our method in ***State v. Benton,*** 2001 WI App 81, 243 Wis. 2d 54, 625 N.W.2d 923. Our enunciation of the test says that first, we decide whether the pretrial procedure was "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." ***Id.*** at ¶5. The defendant has the initial burden on this issue. ***Id.*** If the defendant shows that the procedure was impermissibly suggestive, the State must prove that the identification was reliable under the totality of the circumstances in order for the identification to be admissible. ***Id.***

reasonable to infer that this fear made Rodriguez pay *more* attention to the man in the car.

¶32 **The accuracy of prior descriptions.** Gracia suggests that Rodriguez misidentified the color of Gracia's vehicle. This is neither altogether clear from the record nor fatal; Rodriguez was not attempting to identify the suspect by his vehicle when he pulled up across from her home. She was attempting to match faces. In this regard, the trial court reviewed the photograph the police used as well as the episode of "America's Most Wanted" that Rodriguez had seen. The court found enough similarity between the suspect on television and Gracia to consider Rodriguez's identification logical and reliable. Based on our review of the record, we conclude the trial court's finding was not clearly erroneous.

¶33 **The level of certainty.** Even if Rodriguez was uncertain in identifying Gracia's vehicle, she had no hesitation identifying him in court or at the police station when she made the identification from the photograph. The officer conducting the identification session testified that he put Gracia's photo in front of Rodriguez and before he could say anything, Rodriguez sat forward in her chair, gasped, and said "that's the guy."

¶34 **Time between the crime and the confrontation.** Nearly three months passed before Rodriguez participated in the photo identification session at the police station. Gracia suggests her age and fear of the man on television are factors that weigh into this factor but does not develop this argument. However, time is only one factor of many to be viewed as a whole; even if we were to conclude that three months constituted too long of a gap, we do not think it would undermine the weight of the other factors.

¶35 **The corrupting effect of the suggestive identification.** Rodriguez's spontaneous, shocked reaction indicates that she had no doubt about the man in the photograph. Had there been some difference between the photograph and her recollection, it is reasonable to expect that there would have been some initial hesitation.

¶36 Rodriguez's veracity is bolstered by the fact that the interviewing officer said nothing to her as he put the photograph in front of her. Thus, the officer put no pressure on her to make an identification. Indeed, without the officer saying something to her, Rodriguez could have reasonably anticipated that she would be seeing additional photos. Instead, she was shocked to see that the first photo she viewed was correct.

¶37 We thus conclude Gracia has failed to carry the burden of showing this particular showup was impermissibly suggestive. Even if Gracia had carried this burden, we are convinced that the State has shown Rodriguez made a reliable identification of Gracia as the man she saw the day Colleen was killed.

Conclusion

¶38 Gracia's trial counsel was not ineffective for failing to object to references to Aranka's notes because Gracia was not prejudiced by their use and they were not obtained in violation of the Fourth Amendment. Further, even if the State violated its discovery obligations by failing to disclose Gracia's statement to the police about what was important in his life, there was no prejudice. Gracia's defense counsel incorporated the statement into the theory of defense. Finally, Gracia has failed to show how the single-photo showup was impermissibly suggestive. Even if he had, the totality of the circumstances convinces us that Rodriguez's identification of Gracia was reliable.

By the Court.—Judgment and order affirmed.

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