COURT OF APPEALS
DECISION
DATED AND FILED

June 4, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-3006-CR **Cir. Ct. No. 01-CF-633**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

RICARDO A. MONTEMAYOR, JR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Sheboygan County: TIMOTHY M. VAN AKKEREN, Judge. *Affirmed*.

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

¶1 PER CURIAM. Ricardo A. Montemayor, Jr. appeals from a judgment of conviction for driving after revocation, fleeing an officer, and obstruction, and from an order denying his motion for postconviction relief. He argues that trial counsel was ineffective for not requesting a jury instruction on eyewitness identification and that he was denied a fair trial by improper references

to his and his witness's prior, unrelated contacts with law enforcement officers and by the prosecutor's improper closing argument. He also requests a new trial under WIS. STAT. § 752.35 (2001-02),[1] because the real controversy was not fully tried. We reject his claims and affirm the judgment and order.

¶2 On October 28, 2001, a city of Sheboygan police officer observed a car go the wrong way down a one-way street. He attempted to make a traffic stop and pulled his squad car in position to block the driver's door when the car stopped in a parking lot. The occupants fled the car from the passenger side, escaped into a wooded area, and were not apprehended. From previous contacts with him, the officer recognized Montemayor as the driver. The officer later discovered that the car was registered to Alma Cruz, formerly Montemayor's girlfriend and the mother of Montemayor's children. A couple of days later Montemayor was arrested when a traffic stop was conducted on a car in which he was a passenger.

¶3 At trial, Montemayor relied on an alibi defense. His aunt testified that she was with Montemayor in Milwaukee between October 26 and 29, 2001, because he was helping her move. Misidentification was also a theory of defense. Cruz testified that on October 28, 2001, she had loaned her car to a Hispanic individual, Antonio Ramirez. Defense counsel argued that the police officer only had a short glimpse of the driver and was mistaken on his identification of Montemayor as the driver.

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

¶4 Montemayor first argues that his trial counsel was ineffective for not requesting a jury instruction on eyewitness identification. He contends the instruction was particularly important here because it was a "cross-racial" identification.[2]

> To establish an ineffective assistance of counsel claim, a defendant must show both that counsel's performance was deficient and that he or she was prejudiced by the deficient performance. A reviewing court may dispose of a claim of ineffective assistance of counsel on either ground. Consequently, if counsel's performance was not deficient the claim fails and this court's inquiry is done.
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> We review the denial of an ineffective assistance claim as a mixed question of fact and law. We will not reverse the trial court's factual findings unless they are clearly erroneous. However, we review the two-pronged determination of trial counsel's effectiveness independently as a question of law.

State v. Kimbrough, 2001 WI App 138, ¶¶26-27, 246 Wis. 2d 648, 630 N.W.2d 752 (citations omitted). To establish prejudice, "the defendant must affirmatively prove that the alleged defect in counsel's performance actually had an adverse effect on the defense." ***State v. Reed***, 2002 WI App 209, ¶17, 256 Wis. 2d 1019, 650 N.W.2d 885, *review denied*, 2002 WI 121, 257 Wis. 2d 120, 653 N.W.2d 891 (Wis. Sept. 26, 2002) (No. 01-2973-CR). The defendant "'must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" ***Id.*** (quoting ***Strickland v. Washington***, 466 U.S. 668, 694 (1984)).

[2] Montemayor's ethnicity is Hispanic. The record does not reflect the police officer's ethnicity.

¶5 Trial counsel's postconviction affidavit indicated that she had no strategic reason for not requesting an identification instruction. The trial court did not explicitly find that counsel's failure to request the instruction was deficient performance. It noted that because identification was a bigger issue in this case than most, it was "troubling" that the request was not made. Thus, we turn to the prejudice prong of the ineffective assistance test.[3]

¶6 We conclude that trial counsel's failure to request any identification instruction does not undermine our confidence in the outcome. We first observe that although WIS JI—CRIMINAL 141[4] was not given and consequently the jury

[3] In his reply brief, Montemayor disavows any suggestion that trial counsel was required to request a detailed instruction identifying factors to be used in appraising the identification testimony such as an instruction modeled after ***United States v. Telfaire***, 469 F.2d 552 (D.C. Cir. 1972). Our supreme court has refused to mandate use of the ***Telfaire*** instruction. ***State v. Waites***, 158 Wis. 2d 376, 383-84, 462 N.W.2d 206 (1990). Counsel's failure to request it would not be deficient performance. Montemayor's claim is that counsel should have requested, at a minimum, WIS JI—CRIMINAL 141, dealing with identification.

[4] WISCONSIN JI—CRIMINAL 141 provides:

> The identification of the defendant is an issue in this case.
>
> In evaluating the evidence relating to identification, you are to consider those factors which might affect human perception and memory and all the circumstances relating to the identification.
>
> Consider the witness' opportunity for observation, how long the observation lasted, how close the witness was, the lighting, the mental state of the witness at the time, the physical ability of the witness to see and hear the events, and any other circumstances of the observation.
>
> With regard to the witness' memory, you should consider the period of time which elapsed between the witness' observation and the identification of the defendant and any intervening events which may have affected the witness' memory.

(continued)

was not instructed that identification was at issue, the opening and closing arguments put the jury on notice that identification was at issue. In opening, the prosecutor made reference to reliance on the eyewitness identification by the police officer. Montemayor highlighted the officer's brief observance of the driver's face and the inability to identify the passenger. He urged the jury to consider the details very closely. In closing, the defense pointed to the officer's observation as the driver looked over his shoulder and that the officer's observation was only a "glimpse." Montemayor's alibi defense also raised the question of whether the officer's identification could have been mistaken.

¶7 Both the opening and closing instructions to the jury explained the factors relevant to the credibility of witnesses, including the opportunity the witness had for observing and knowing the matters testified about. The factors for assessing identification are well within a juror's common knowledge. *See* ***Hampton v. State***, 92 Wis. 2d 450, 461, 285 N.W.2d 868 (1979) ("All people, including those serving on a jury, recognize at least to some extent the difficulties involved in attempting to accurately perceive and remember events in stressful situations.").

¶8 Finally, the officer's identification is markedly different from that made by a citizen eyewitness or victim. Here the officer had numerous prior contacts with Montemayor over the preceding eleven years. The officer testified that Montemayor had unique features and that he would be able to pick him out of

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> If you find that the crime alleged was committed, before you may find the defendant guilty, you must be satisfied beyond a reasonable doubt that the defendant is the person who committed the crime.

the crowd. The officer's focus at the time of observing the driver was for the very purpose of identification. The identification was contemporaneous with the observation. These circumstances contrast with other chance observations that citizen eyewitnesses or victims may make. Thus, the circumstances and dangers of misidentification that standard jury instruction on identification is designed to address were not necessarily present here. We are not convinced that the giving of the instruction would have changed the outcome. Trial counsel was not ineffective for failing to request the identification instruction.

¶9 Montemayor next argues that repeated references by two police officers to prior contacts with Montemayor and Cruz were improper bad character evidence.[5] While WIS. STAT. § 904.04 excludes evidence of other crimes or wrongs as character evidence, such evidence is admissible when offered for the purpose of identification. Sec. 904.04(2). The officer's testimony that he knew Montemayor from prior contacts was admitted for the permissible purpose of showing why the officer was able to make an identification of Montemayor. The misidentification theory of defense permitted the prosecution to offer an explanation as to why a misidentification had not occurred. It was not error to permit reference to the officer's prior contacts with Montemayor.[6]

[5] No objection was made to the officers' testimony that they had prior contacts with Montemayor and Cruz. Montemayor raises an alternative claim of ineffective assistance of counsel for the failure to object. We just address the merits of the argument. *See* ***State v. Smith***, 170 Wis. 2d 701, 714 n.5, 490 N.W.2d 40 (Ct. App. 1992) (we may reach the merits of the issue under the ineffective assistance claim because only if there was actual error could counsel's performance be deemed deficient or prejudicial).

[6] We further note that potential prejudice was reduced because the officers only referenced "contacts" and there was no description of prior convictions or bad acts.

¶10 With respect to Cruz, the police officer testified that she had a reputation for not telling the truth. That was permissible evidence under WIS. STAT. § 906.08. Evidence regarding prior contacts with Cruz explained why the police officer held an opinion about Cruz's character for truthfulness and was permissible under WIS. STAT. § 904.04(1)(c). Further, because the defense suggested that the officers refused to investigate other possible perpetrators, the officer was permitted to explain why he did not pursue Cruz's story that someone else was driving her car. The prior contacts and the officers' knowledge about Cruz's relationship with Montemayor was the explanation. There was no evidentiary error. Consequently, the prosecutor was allowed to mention this testimony in closing argument.

¶11 Montemayor contends that the prosecution's closing argument was improper because the prosecutor gave his personal opinion about the truthfulness of the witnesses and did so with an inference that he had personal knowledge about the truthfulness of the witnesses.[7] ***State v. Adams***, 221 Wis. 2d 1, 17, 584 N.W.2d 695 (Ct. App. 1998) (citations omitted), holds:

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[7] The prosecutor stated:

> [T]ake a look at the story of Ms. Cruz, which I don't really say this about witnesses, but from the moment she started talking to the police on that night, I think she told nothing but lies and told lies here today to protect this defendant.
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> ….
>
> Ms. McNitt I think has the wrong weekend. I do not know her as I know some of the other witnesses to say that she comes in here and lies.

Again, there was no objection to the form of argument, but Montemayor raises an alternative ineffective assistance of counsel claim. *See supra* note 5.

> [A] prosecutor is permitted to comment on the credibility of witnesses as long as that comment is based on evidence presented. Moreover, the court's admonitory instruction that any remarks by the attorneys implying the existence of certain facts not in evidence were to be disregarded is similarly presumed to have eliminated any prejudice.

¶12 Here, there was evidence that Cruz lacked a reputation for truthfulness. The prosecutor's argument was within the bounds of summation of that evidence regarding credibility. We have reviewed the prosecutor's argument and conclude it was acceptable under ***Adams***. The admonitory instruction that the arguments of counsel are not evidence cured any potential prejudice.

¶13 Montemayor's final request for a new trial in the interests of justice because the real controversy was not fully tried adds nothing new. It is based on the allegation of non-errors. His request cannot succeed. *See* ***State v. Marhal***, 172 Wis. 2d 491, 507, 493 N.W.2d 758 (Ct. App. 1992).

By the Court.—Judgment and order affirmed.

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