COURT OF APPEALS
DECISION
DATED AND FILED

January 18, 2012

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2011AP1050-CR **Cir. Ct. No. 2009CF1214**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JULIUS L. IVY,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Brown County: DONALD R. ZUIDMULDER, Judge. *Affirmed*.

Before Hoover, P.J., Peterson, J., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Julius Ivy appeals a judgment of conviction for armed robbery and false imprisonment, each as party to the crime. He claims a

restitution award against him should be "stricken" because it was determined in a manner that violated WIS. STAT. § 973.20.[1] He also contends that he received ineffective assistance of trial counsel in two ways: first, by virtue of his attorney's failure to call to the jury's attention that a testifying accomplice had received use immunity; and second, because his attorney failed to object to the jury's receipt of a phone record summary prepared by the State.

¶2 We reject Ivy's arguments and affirm. Ivy failed to preserve his objection to the restitution award, and has therefore forfeited his opportunity to appeal that issue. With respect to his ineffective assistance claims, we agree that Ivy's trial counsel was deficient for failing to establish that the accomplice had received immunity, but conclude Ivy was not prejudiced because any incentive for false testimony was disclosed to the jury. Finally, trial counsel did not perform deficiently for failing to object to the phone summary.

BACKGROUND

¶3 Ivy's conviction stemmed from an armed robbery in Green Bay on July 11, 2009. Before Ivy's trial, an accomplice, Enrique Fonseca, gave several statements to police. On the basis of those statements, Fonseca, like Ivy, was charged with armed robbery and false imprisonment. Fonseca reached a plea agreement with prosecutors, who agreed to recommend seven years' initial confinement and five years' extended supervision. Prosecutors offered to reduce

[1] We construe Ivy's request as one to modify the judgment. *See* WIS. STAT. § 808.09 ("appellate court may reverse, affirm or modify the judgment or order as to any or all of the parties").

All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

their recommendation further in exchange for Fonseca's cooperation in their case against Ivy.

¶4 At Ivy's trial, Fonseca invoked his Fifth Amendment right against self-incrimination. Outside the jury's presence, Fonseca was granted use immunity for his testimony. Although Fonseca disclosed the terms of his plea deal to the jury, he did not reveal on direct examination that he had received immunity for his testimony, nor did Ivy's trial counsel elicit that fact on cross-examination. Counsel also failed to request a jury instruction concerning the weight to be given to the testimony of accomplices, though the standard instruction regarding the credibility of witnesses was given.

¶5 During trial, the State introduced Exhibit 50, a summary of phone calls made on July 11, 2009 between Courtney Oien, Fonseca's girlfriend, and Ranett Jackson, Ivy's girlfriend. Exhibit 50 showed seven calls between Oien and Jackson on the day of the robbery, and listed the time, duration, origin, and recipient of each. The information in Exhibit 50 was largely derived from phone records introduced as Exhibits 48 and 49, with one exception: after the name of each account holder, Oien or Jackson, the State included a notation in parentheses indentifying the individual whom the State believed was using the phone at the time of the call. Thus, the exhibit referred to "Ranett Jackson's phone (Julius Ivy)" and "Courtney Oien's phone (Enrique Fonseca)." Exhibit 50 was permitted to go to the jury during deliberations without objection by Ivy's trial counsel.

¶6 The jury ultimately convicted Ivy on both counts and he was sentenced to fifteen years' initial confinement and ten years' extended supervision. The circuit court granted the State's request for restitution of $5,660, but noted it would revisit the matter as Ivy neared his release date.

¶7 Ivy filed a motion for postconviction relief, demanding a new trial and that the restitution order be stricken. At the postconviction hearing, trial counsel conceded that he mistakenly believed that immunity was to be handled outside the jury's presence, and that his failure to request a jury instruction regarding the credibility of accomplices was an "oversight." Trial counsel explained he saw nothing improper about Exhibit 50 being given to the jury. When Ivy's postconviction counsel attempted to examine trial counsel regarding restitution, the circuit court intervened and stated that it would lower restitution to that ordered in Fonseca's case, with Ivy and Fonseca jointly and severally liable for that amount.

¶8 The circuit court denied the remainder of Ivy's postconviction motion. The court found trial counsel deficient for failing to solicit testimony that Fonseca had been granted use immunity, but concluded that Ivy had not suffered prejudice as a result. The court found no other instances of deficient performance, but also concluded that Ivy had not been prejudiced by his attorney's failure to object to Exhibit 50.

¶9 Ivy now appeals. He claims the circuit court failed to properly establish the amount of restitution. He also challenges the court's decision regarding ineffective assistance of counsel.

DISCUSSION

¶10 Ivy's argument regarding restitution is easily disposed of. He maintains that the circuit court did not consider any of the five factors listed in WIS. STAT. § 973.20(13)(a) when setting restitution. Ivy's postconviction motion challenged the restitution award. At the postconviction hearing, the circuit court acknowledged that it had overlooked the statutory factors and stated that it would

reduce the restitution award to match Fonseca's, "unless you [Ivy] wish to be heard on it at some point." Ivy, however, did not challenge the modified restitution order. Accordingly, we deem Ivy to have forfeited such a challenge. *See* ***State v. Ndina***, 2009 WI 21, ¶30, 315 Wis. 2d 653, 761 N.W.2d 612. In any event, where a defendant has been given the opportunity, but fails to offer any evidence regarding his or her ability to pay, the trial court need not make detailed findings with respect to factors two through four.[2] ***State v. Szarkowitz***, 157 Wis. 2d 740, 749-50, 460 N.W.2d 819 (Ct. App. 1990).

¶11 We proceed, then, to Ivy's challenge to his conviction based on ineffective assistance of counsel. To obtain a new trial, a defendant must show that the trial attorney's representation was deficient, and that the deficiency caused prejudice. ***State v. Erickson***, 227 Wis. 2d 758, 768, 596 N.W.2d 749 (1999). An attorney is deficient if, under the circumstances, his or her conduct fell outside the wide range of professionally competent assistance. ***State v. Smith***, 207 Wis. 2d 258, 273-74, 558 N.W.2d 379 (1997). To show prejudice, the defendant must demonstrate a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. ***State v. Sanchez***, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996).

¶12 Whether counsel's actions constitute ineffective assistance is a mixed question of law and fact. ***Id.*** We will not overturn a circuit court's factual findings concerning the circumstances of the case and counsel's conduct unless they are clearly erroneous. ***Id.*** However, whether that conduct constitutes

[2] The remaining factors are the amount of loss and "[a]ny other factors which the court deems appropriate." *See* WIS. STAT. § 793.20(13)(a)1., 5.

deficient performance and whether the defendant has suffered prejudice are questions of law which we review without deference to the circuit court. ***Id.*** at 236-37.

¶13 Ivy first contends he received ineffective assistance by his attorney's failure to establish, before the jury, that Fonseca had received use immunity for his testimony. Use immunity is afforded by WIS. STAT. §§ 972.08 and 972.085. Together, these statutes permit prosecutors to solicit testimony from a witness fearful of self-incrimination by prohibiting the imposition of criminal liability based on the testimony or evidence derived from it. *See* ***State v. J.H.S.***, 90 Wis. 2d 613, 617, 280 N.W.2d 356 (Ct. App. 1979). The parties agree that the fact that a witness has received immunity is fully disclosable to the jury. Thus, the State concedes that trial counsel was deficient for his mistaken belief to the contrary.

¶14 The more difficult question is whether Ivy was prejudiced by counsel's mistake. At trial, Fonseca testified that he, like Ivy, had been charged with robbery and false imprisonment, and that the prosecutor had offered to recommend seven years' confinement and five years' extended supervision as part of a plea deal. In addition, the prosecutor told Fonseca he would consider recommending a more lenient sentence in exchange for Fonseca's cooperation in the case against Ivy.

¶15 Because the jury was presented with evidence regarding Fonseca's motive for testifying against Ivy, the additional information that Fonseca had been granted immunity for his testimony was not likely to alter the jury's analysis of his credibility. Fonseca all but stated that he was hoping to gain a more favorable plea agreement from the prosecutor in exchange for his testimony. Because of this, the

jury had the opportunity to determine whether it could place credence on Fonseca's testimony connecting Ivy with the crimes. *See* ***Penister v. State***, 74 Wis. 2d 94, 103, 246 N.W.2d 115 (1976).

¶16 Ivy's contention appears to be premised on his belief that the jury regarded Fonseca's testimony as truthful because it appeared Fonseca was voluntarily incriminating himself. By implication, Ivy would have us conclude that disclosure of the immunity would have led the jury to conclude that Fonseca had nothing to lose by offering false testimony. To the contrary, such disclosure might have had the effect of bolstering Fonseca's credibility. Immunization does not exempt a witness from prosecution for perjury or false swearing. WIS. STAT. § 972.08(1)(a). Because Fonseca had already reached a deal with prosecutors in exchange for his truthful testimony, he had little to gain from lying; false testimony would have only made him vulnerable to additional charges. We cannot perceive how the immunity grant could have acted as an inducement for Fonseca to testify falsely, or how the jury would have regarded him as less credible if it had known of the immunity.

¶17 Ivy claims that prejudice can be presumed under ***State v. Nerison***, 136 Wis. 2d 37, 401 N.W.2d 1 (1987). In ***Nerison***, prosecutors reached a complicated set of deals to secure the testimony of accomplices. ***Id.*** at 43-44. Among other things, the state promised to grant transactional immunity[3] and

[3] Unlike use immunity, transactional immunity broadly prohibits prosecution for crimes to which compelled testimony relates, regardless of whether prosecutors may be able to pursue charges based on sources other than the testimony. *See* ***State v. J. H. S.***, 90 Wis. 2d 613, 617, 280 N.W.2d 356 (Ct. App. 1979). State law no longer authorizes prosecutors to seek transactional immunity in exchange for testimony. *See* WIS. STAT. § 972.085; ***J.H.S.***, 90 Wis. 2d at 618-19 n.8.

agreed not to pursue certain charges against the accomplices. ***Id.*** at 43. Our supreme court held that when the state grants concessions in exchange for accomplice testimony implicating the defendant,

> the defendant's right to a fair trial is safeguarded by (1) full disclosure of the terms of the agreements struck with the witnesses; (2) the opportunity for full cross-examination of those witnesses concerning the agreements and the effect of those agreements on the testimony of the witnesses; and (3) instructions cautioning the jury to carefully evaluate the weight and credibility of the testimony of such witnesses who have been induced by agreements with the state to testify against the defendant.

Id. at 46.

¶18 ***Nerison***, however, speaks more to deficiency than prejudice. We agree that Ivy's trial counsel was deficient for failing to elicit from Fonseca the full terms of his agreement. But it does not follow from ***Nerison*** that Ivy has been prejudiced by his attorney's deficient performance. Because Fonseca had been charged and disclosed the prosecutor's offer to make a favorable plea recommendation in exchange for his testimony, the jury could adequately assess Fonseca's credibility even without knowing that he had received use immunity.

¶19 Similarly, we agree that Ivy's trial counsel should have requested a jury instruction concerning the weight to be given to the testimony of accomplices.[4] However, Ivy has not established a reasonable probability that the jury would have acquitted him absent the error. As the State notes, the jury was given the standard instruction regarding the credibility of witnesses, WIS JI—CRIMINAL 300 (2000). This instruction requires the jury to consider whether a

[4] Ivy suggests that WIS JI—CRIMINAL 246, "Testimony of Witness Granted Immunity or Other Concessions," would have been appropriate.

witness has an interest in the outcome of the trial and a witness's possible motives for offering false testimony. These instructions adequately ensured that the jury properly weighed Fonseca's testimony.

¶20 Lastly, Ivy argues his trial counsel was ineffective for allowing the jury to receive Exhibit 50 during deliberations.[5]

¶21 Ivy first claims that the State's parenthetical notations on Exhibit 50 regarding whom it believed was using Oien's and Jackson's phones were nothing more than argument, to which his attorney should have objected. We disagree. The notations were consistent with the evidence adduced at trial. Fonseca testified that both he and Ivy used their girlfriends' cell phones on the day of the crime. Oien, who also testified at Ivy's trial, stated that Fonseca "always" had her phone and used it on July 11, 2009. Even Ivy admitted that he used Jackson's phone, although he claimed that not all the outgoing calls made to Oien's phone were from him. Thus, counsel was not deficient for failing to object on the ground that the notations represented mere argument.

¶22 Ivy also contends that Exhibit 50 was merely a demonstrative exhibit rather than admissible evidence in its own right. A circuit court has discretion to admit demonstrative exhibits, ***State v. Olson***, 217 Wis. 2d 730, 740, 579 N.W.2d 802 (Ct. App. 1998), and send them to the jury during deliberations, ***State v. Anderson***, 2006 WI 77, ¶27, 291 Wis. 2d 673, 717 N.W.2d 74. As the State points out, even if defendant's counsel had objected, it would not have been an

[5] Some portions of Ivy's brief may be read as challenging counsel's failure to object to Exhibits 48 and 49, upon which most of Exhibit 50 is based. However, Ivy has not explained why Exhibits 48 or 49 were inadmissible, and we therefore decline to consider his undeveloped argument. *See* ***State v. Butler***, 2009 WI App 52, ¶17, 317 Wis. 2d 515, 768 N.W.2d 46.

erroneous exercise of discretion to admit Exhibit 50 and send it to the jury. The exhibit was based on properly admitted evidence and was easier to understand than Exhibits 48 or 49, which contain substantial extraneous information.

¶23 Ivy also asserts Exhibit 50 "resembles the inadmissible computer-generated animation in ***State v. Denton***." In ***Denton***, 2009 WI App 78, ¶¶16-22, 319 Wis. 2d 718, 768 N.W.2d 250, we concluded that a sophisticated computer simulation "depict[ing] the State's three key witnesses' 'memories' and show[ing] 'what people did'" should not have been admitted because its designer lacked personal knowledge of the events and its probative value was outweighed by the danger of unfair prejudice and confusion. We were careful to note that "the computer-generated animation was not simply a demonstrative exhibit—like a rough drawing on a chalkboard—used to illustrate a testifying lay witness's testimony." ***Id.***, ¶16. We do not perceive the same risk of unfair prejudice with Exhibit 50 in this case. Unlike the computer simulation, Exhibit 50 was a simple summary of other evidence in the case. It did not require its preparer to compile complex testimony about how a crime occurred, or to creatively fill gaps in testimony to create a visual representation. Because the exhibit was relatively straightforward, there was little risk of jury confusion. Trial counsel was not ineffective for failing to object under ***Denton***.

By the Court.—Judgment affirmed.

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