COURT OF APPEALS
DECISION
DATED AND RELEASED

December 27, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-0365-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MICHAEL WASHINGTON,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Racine County: DENNIS J. FLYNN, Judge. *Affirmed*.

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

PER CURIAM. Michael Washington appeals from a judgment of conviction of delivery of cocaine as a party to the crime and from an order denying his postconviction motion grounded on ineffective assistance of trial counsel. He argues that trial counsel was ineffective for failing to convey to him a plea offer, in failing to object to the prosecutor's alleged misstatement of the law and in failing to secure the presence of the informant at trial. He also claims that the prosecutor's misstatement of the law justifies a new trial. We conclude that his defense was not prejudiced by the claims of error and affirm the judgment and the order.

Washington was charged with facilitating a drug sale to Juanita Banks, an undercover agent of the Department of Justice, on October 22, 1992. Banks was introduced to Washington by an informant, Jeffrey Ebener. When told that Banks was looking to purchase cocaine, Washington indicated that he could find some. Banks, Washington and Ebener drove to a different location than the original meeting place. After moving to yet another location, cocaine was eventually obtained.

Washington's first claim is that trial counsel, Attorney Paul LeRose, was constitutionally deficient for not conveying to him a plea offer made by the prosecution. He argues that under ***State v. Ludwig***, 124 Wis.2d 600, 611, 369 N.W.2d 722, 727 (1985), counsel was per se ineffective. ***Ludwig*** recognized that the failure to communicate a plea offer to a defendant and the consequential deprivation of the defendant's opportunity to accept the plea offer is deficient performance. ***Id.***

Washington's claim rests on the existence in the prosecution's file of a "post-it" note indicating a plea offer to have Washington plea to a second count of delivery of cocaine as a repeat offender[1] and dismiss and read in count one, the charge resulting in this conviction. The State would recommend a sentence of not more than three years. The trial court found that the plea offer was never communicated to LeRose.

Whether counsel's actions constitute ineffective assistance is a mixed question of law and fact. ***State v. Smith***, 170 Wis.2d 701, 714, 490 N.W.2d 40, 46 (Ct. App. 1992). The trial court's findings of what counsel did and the basis for the challenged conduct are factual and will be upheld unless clearly erroneous. ***Id.***

At the ***Machner***[2] hearing, Assistant District Attorney Margaret Borkin testified that in handling the numerous cases resulting from a city-wide

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[1] A second count charged in the criminal complaint for a drug sale on December 1, 1992, was severed for trial and is the subject of Appeal No. 95-2739-CR, also decided this day.

[2] A ***Machner*** hearing addresses a defendant's ineffective assistance of counsel claim. *See* ***State v. Machner***, 92 Wis.2d 797, 285 N.W.2d 904 (Ct. App. 1979).

drug sweep at the time of Washington's crime, it was her practice to place in the files a potential plea offer. She did not discuss the offer with LeRose. Assistant District Attorney Elizabeth Blackwood handled Washington's preliminary hearing and did not recall having conveyed the plea offer to Washington's attorney. LeRose did not recall the three-year offer being made. He indicated that he surely would have recommended that Washington take such an offer if it had been made because all other plea negotiations had involved a higher sentencing recommendation. The record also shows that Deputy District Attorney Michael Nieskes was assigned this case after the preliminary hearing because of other pending charges against Washington that Nieskes was prosecuting. LeRose indicated that plea negotiations were conducted with Nieskes and always involved a pending sexual assault charge against Washington.

Washington contends that it is obvious that the offer was conveyed to LeRose because a copy of the "post-it" note was found in LeRose's file. The mere presence of the offer in the district attorney's file, and copied by trial counsel, does not mean that the offer was made. We likewise reject Washington's contention that "it strains logic" to believe that Borkin went to the trouble of formulating the offer and it was never conveyed. Borkin was dealing only with the drug cases. The record establishes that Nieskes was attempting to make a plea agreement which would encompass all pending matters against Washington.

We conclude that the trial court's finding that the plea offer was never communicated to LeRose is not clearly erroneous. It follows that LeRose was not deficient in failing to convey the offer to Washington.

The theory of defense at trial was a mistake in identification by agent Banks. Banks was cross-examined as to the methods used to identify Washington. Banks was also asked whether the investigators had recording equipment available and whether anyone had tried to monitor Washington's whereabouts on the evening of the buy. She explained that she did not wear a body wire during her dealings with Washington because she did not feel endangered. Toward the end of redirect examination, the prosecutor asked Banks whether she had ever been involved in an undercover buy where the informant's car was wired for cameras and sound. The prosecutor then asked the court to take "judicial notice of the statutes of the State of Wisconsin which

indicate that before a sound recording is used in a trial against an individual, that that sound recording has to be approved through a judicial magistrate or it's not admissible in any court in the State." There was no objection and the court stated that "the court will take judicial notice of that fact as stated." The prosecutor then asked Banks whether, in light of the foregoing statement of the law, it was correct that evidence obtained from a body wire could not be used as evidence. Banks indicated that was correct.

It is undisputed that the prosecutor's statement of the law regarding the use of wire recordings was wrong.[3] There was, however, no objection to the prosecutor's statement and the claim of error is waived. *See* ***State v. Divanovic***, 200 Wis.2d 210, 226, 546 N.W.2d 501, 507 (Ct. App. 1996). The claim is subject to review because Washington argues that trial counsel was ineffective for failing to object to the misstatement. *See* ***State v. Smith***, 170 Wis.2d 701, 714 n.5, 490 N.W.2d 40, 46 (Ct. App. 1992), *cert. denied*, 507 U.S. 1035 (1993) (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).

Washington also argues that the prosecutor's misstatement constitutes prosecutorial misconduct which justifies a new trial. He relies on ***State v. Neuser***, 191 Wis.2d 131, 528 N.W.2d 49 (Ct. App. 1995), as illustrating his point. In ***Neuser***, despite the defendant's waiver, we concluded that the prosecutor's misstatement of law in closing argument was improper and resulted in a miscarriage of justice. ***Id.*** at 139, 528 N.W.2d at 52. The error in ***Neuser*** was "one of those rare instances where judicial intervention, even in the absence of an objection, was warranted." ***Id.*** at 140, 528 N.W.2d at 53.

We examine Washington's claim to determine whether the misstatement resulted in a miscarriage of justice. "Whether the prosecutor's conduct affected the fairness of the trial is determined by viewing the statements in context." ***Id.*** at 136, 528 N.W.2d at 51. We look to whether the prosecutor's remarks "so infected the trial with unfairness as to make the

[3] Section 968.29(3)(b), STATS., as amended by 1995-96 Wis. Act 30, § 1, allows one-party consent tapes to be introduced under certain circumstances. The prosecutor stipulated at the postconviction motion hearing that he had misstated the law.

resulting conviction a denial of due process." ***Id.*** (quoting ***State v. Wolff***, 171 Wis.2d 161, 167, 491 N.W.2d 498, 501 (Ct. App. 1992)).

We conclude that the prosecutor's misstatement was harmless error. The statement was on a peripheral matter. It was not a misrepresentation, as in ***Neuser***, of a "ruling of the trial court on a crucial matter." ***Id.*** at 139, 528 N.W.2d at 52. The absence of a wire recording was just one of many criticisms leveled at the investigator's efforts to identify Washington. There was no testimony that a wire recording would have permitted a positive identification. In fact, Banks testified that the only reason to "wear a wire" during an undercover operation is to promote the agent's safety. For this reason, the prosecutor's repetition of the misstated law in his closing argument does lead us to believe that the jury deliberations were infected by the misstatement. Although the prosecutor suggested in his closing argument that it was not practical for Banks to obtain a court order to wear a wire and permit the recording to be admitted as evidence, it did not matter because Banks indicated that she would wear a wire only to protect herself. In the end there was no direct link between the misstated requirement that the investigators needed a court order to record the transaction and the issue of identification.

The misstatement by the prosecutor does not justify a new trial in the interests of justice. Section 752.35, STATS. Given the other attacks on Banks' identification,[4] the misstatement did not prevent the real controversy from being tried. Nor are we persuaded that there is a substantial degree of probability that a new trial will likely produce a different result. Because we conclude that the prosecutor's conduct was harmless, we need not address Washington's claim that trial counsel was ineffective for not objecting to the prosecutor's misstatement of the law. No prejudice results from the failure to object.[5] *See* ***State v. Kuhn***, 178 Wis.2d 428, 438, 504 N.W.2d 405, 410 (Ct. App.

[4] Notably, the defense emphasized that Banks identified Washington only from a photograph several days after the drug transaction. She looked at photos on three occasions before identifying Washington. Banks also indicated that on the night of the drug buy, no attempt was made to follow Washington to his place of residence to verify his identity.

[5] We note that LeRose advanced reasonable strategy reasons for not objecting to the prosecutor's misstatement, including the desire not to draw the jury's attention to a potentially confusing and collateral issue. It appears that LeRose's decision made as the trial proceeded was rationally based on the facts so as to constitute a reasonable strategy decision and not deficient performance. *See*

1993) (if we conclude on a threshold basis that the defendant could not have been prejudiced by trial counsel's performance, we need not address whether such performance was deficient).

The final issue is whether trial counsel was ineffective for failing to procure the attendance of police informant Ebener. Washington's argument focuses on LeRose's performance and does not suggest any prejudice suffered by Ebener's failure to provide testimony at trial.[6] The trial court found that LeRose interviewed Ebener and was informed by Ebener that Washington was the perpetrator. LeRose made a strategy decision not to use Ebener as a witness. Based on LeRose's testimony, these findings are not clearly erroneous.[7]

Washington contends that LeRose's testimony at the 1994 postconviction motion hearing is incredible because LeRose was sanctioned in an attorney disciplinary proceeding for dishonesty. *See* ***Matter of Disciplinary Proceeding Against Paul Alan LeRose***, 182 Wis.2d 595, 514 N.W.2d 412 (1994). The credibility of LeRose was for the trial court to determine based on the testimony before the court.[8] Section 805.17(2), STATS. Credibility was not predetermined by the results of a disciplinary proceeding.

(..continued)
State v. Felton, 110 Wis.2d 485, 502, 329 N.W.2d 161, 169 (1983) (a strategic or tactical decision must be based upon rationality founded on the facts and law).

[6] The record does establish, however, that Washington was unable to locate Ebener for the purpose of providing testimony at the postconviction hearing. We need not address whether, as the State contends, a defendant is absolutely obligated to demonstrate what the missing witness would have testified about. *See* ***United States v. Green***, 882 F.2d 999, 1003 (5th Cir. 1989).

[7] We note that during the trial, LeRose made a contemporaneous record that he had spoken with Ebener and had waited into the evening on the first day of the trial to serve Ebener with a subpoena.

[8] We summarily reject Washington's claim that LeRose was incredible because he had no time slips or notes in his work file that reflected the alleged meetings with Ebener, his work file did not contain the picture of Washington which LeRose testified he showed to Ebener, the prosecution believed Ebener to be in Michigan at the time of trial, and Washington's posttrial investigation showed that Ebener was not living at the address at which LeRose served the subpoena. These facts were known to the trial court in assessing LeRose's credibility.

Washington also contends that it was inherently inconsistent for LeRose to decide not to call Ebener as a witness and yet on December 15, 1993, personally serve a subpoena on Ebener to appear at trial the next day. While it may be true that LeRose could not be sure when he served the subpoena that Ebener would not appear at trial, the subpoena served the defense well.[9] At trial, based on service of the subpoena and Ebener's failure to appear, Washington asked the trial court to declare Ebener unavailable as a witness. The court declared Ebener unavailable under § 908.04(1)(e), STATS. As a result, a statement Ebener made to an investigator with the state public defender was admitted into evidence under § 908.045(6). The statement was favorable to the defense because Ebener criticized the manner in which investigators in the large drug sweep being conducted at the time of Washington's crime were identifying drug offender suspects. Although the statement did not extend to Washington's case, it bolstered the theory of defense of misidentification.[10]

Even if we were required to reject LeRose's strategy reason for not pursuing Ebener's appearance more vigorously because it was inconsistent with service of the subpoena, Washington was not prejudiced by trial counsel's conduct. Ebener's statement was far more favorable to Washington's defense than Ebener's testimony would have been. Washington was not denied the effective assistance of trial counsel.

By the Court.—Judgment and order affirmed.

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

[9] Ebener told LeRose after service of the subpoena that he had no intention of appearing at trial.

[10] Ebener's statement was taken on October 15, 1993. Ebener asserted that he was pressured by the police to identify people. He described one investigation in which agent Frank Vittacco had assisted where the police tried to get him to agree with a misidentification. (Vittacco was a witness at Washington's trial.) Ebener mentioned other cases where misidentification may have occurred. He suggested that the police used questionable identifications to get more arrests and advance political agendas.