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DISTRICT II

October 23, 2024

To:

Hon. Timothy D. Boyle
Circuit Court Judge
Electronic Notice

Amy Vanderhoef
Juvenile Clerk
Racine County Courthouse
Electronic Notice

Christopher P. August
Electronic Notice

Daniel J. O'Brien
Electronic Notice

You are hereby notified that the Court has entered the following opinion and order:

2023AP87-CR State of Wisconsin v. Daniel B. Mengestu (L.C. #2018CF457)

Before Gundrum, P.J., Neubauer and Grogan, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Daniel B. Mengestu appeals a judgment convicting him of fleeing or eluding a law enforcement officer. He also appeals an order denying his postconviction motion after a hearing. He argues that: (1) during closing argument, the prosecutor misstated the legal standard for his defense, which constitutes "plain error" entitling him to a new trial; (2) he received ineffective assistance of counsel because his trial counsel did not object to the prosecutor's misstatement; and (3) he is entitled to a new trial in the interest of justice pursuant to WIS. STAT. § 752.35

(2021-22).[1] Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21.

Mengestu was driving a Greyhound bus from Minneapolis to Chicago when multiple police vehicles with lights on and sirens blaring began to follow him. Mengestu did not pull over until the police placed an object in the road ahead of him that caused his tire to go flat, requiring him to stop. He later told the police that he believed that the police vehicles were part of some sort of training exercise and he did not realize that they wanted his bus to stop. The jury, however, rejected this defense and found him guilty of fleeing or eluding an officer. Mengestu was convicted and sentenced to a fine. Mengestu filed a postconviction motion seeking a new trial, which the circuit court denied.

Mengestu argues that the prosecutor misstated the legal standard applicable to his mistake-of-fact defense during closing arguments. The prosecutor said during closing arguments that Mengestu's defense that he made a mistake of fact was not reasonable. Mengestu contends that this was inaccurate because Wisconsin law requires only that the mistake be honest, which is a subjective standard, not that it be objectively reasonable.

An honest error of fact is a defense if it negates the existence of a state of mind essential to a crime. *See* WIS. STAT. § 939.43. The "principle behind the mistake of fact defense is that no person should be subjected to criminal punishment where intent is necessary to constitute an offense, unless that person has performed a voluntary act while possessing a guilty mind or mens rea." ***State v. Bougneit***, 97 Wis. 2d 687, 691, 294 N.W.2d 675 (Ct. App. 1980). This is because

[1] All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

for some types of crimes "[t]here can be no crime when … criminal … intent is wanting." ***Id.*** In ***Bougneit***, we explained that "[t]he objective approach, which asks what a reasonable man would have thought or perceived, has been specifically rejected by the legislature" and is, therefore, not the proper test in determining whether the mistake-of-fact defense applies. ***Id.*** We further explained that "[i]t does not matter, therefore, whether a person's mistake is reasonable, only that it is an honest mistake." ***Id.*** at 691-92.

Although the prosecutor inartfully used the word "reasonable" in his closing argument, we conclude that the prosecutor's statement that Mengestu's defense was not reasonable did not substantively misstate the law. When considered in the context of the prosecutor's overall argument, it is clear that the prosecutor was attacking Mengestu's credibility. The key to a mistake-of-fact defense is that, if the mistake is real and it negates a state of mind essential to the crime, the actor is entitled to the defense. The jury was informed of this by jury instruction and during the closing arguments. The prosecutor was not asking the jury to ignore that legal standard and apply a higher standard of objective reasonableness. Instead, the prosecutor was attacking the credibility of Mengestu's claim that he made an honest mistake. The prosecutor was arguing Mengestu's claim that he did not think he had to pull over was incredible because twenty or thirty police cars chased him for many miles and across state lines. Although the prosecutor said Mengestu's defense was not reasonable, the prosecutor meant that Mengestu was not credible. He did not mean that the jury should apply an objective reasonable person standard to Mengestu's claim that he made a mistake. Therefore, Mengestu is not entitled to a new trial under the plain error doctrine.

Mengestu next argues that he received ineffective assistance of counsel because his trial counsel did not object to the prosecutor's statement. To prevail on a claim of ineffective

assistance of counsel, a defendant must demonstrate both that counsel's performance was deficient and that that the deficient performance prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Because we conclude that the prosecutor did not substantively misstate the law, we reject Mengestu's claim that he received constitutionally ineffective assistance. *See* ***State v. Wheat***, 2002 WI App 153, ¶14, 256 Wis. 2d 270, 647 N.W.2d 441 (failing to raise an issue is not deficient performance if the issue is without merit).

Finally, Mengestu argues that he is entitled to a new trial in the interest of justice pursuant to WIS. STAT. § 752.35. That statute allows this court to reverse a judgment or order for a new trial in the interest of justice whenever the real controversy has not been fully tried or it is probable that justice has for any reason miscarried. ***Id.*** The real controversy—whether Mengestu honestly believed he did not need to pull over—was fully and fairly presented to the jury, which properly rejected it. There is no indication that there was a miscarriage of justice, and thus no grounds for discretionary reversal.

IT IS ORDERED that the judgment and order of the circuit court are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Samuel A. Christensen
Clerk of Court of Appeals