COURT OF APPEALS
DECISION
DATED AND RELEASED

December 27, 1996

No. 95-2739-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MICHAEL L. WASHINGTON,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Racine County: DENNIS J. BARRY, Judge. *Reversed and cause remanded*.

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

BROWN, J. Michael L. Washington's attorney did not know that in Washington's previous trial on related drug charges, the court admitted a transcript where the State's confidential informant made statements impeaching the credibility of the investigating drug agents. As a result, Washington had to interrupt the proceedings and personally direct his attorney,

the prosecutor and the court to the pertinent parts of the record and argue for the statement's admission himself. In addition, Washington's attorney mistakenly believed that the prior court had ruled that certain "other acts" evidence was admissible in the current proceedings when the court had actually deferred making such a ruling.

Because Washington's attorney was not prepared for trial, she was unable to present effective arguments regarding how the court should treat the informant's statement and the "other acts" evidence. We hold that defense counsel's performance was deficient. And because defense counsel's deficient performance affected Washington's ability to present evidence necessary to his defense, we are not confident in the result of his trial. We reverse his conviction.

In June 1993, the State filed a complaint against Washington charging him with one count of cocaine delivery and one count of cocaine delivery within 1000 feet of a school. *See* §§ 161.41, 161.48 and 161.49, STATS. Separate trials were held on the two counts. Both juries returned guilty verdicts. This appeal concerns only the second conviction.

The two charges against Washington arose out of "Operation Crackdown," a comprehensive drug investigation conducted by the City of Racine Police Department and the State Division of Narcotics Enforcement. Regarding count one, the State alleged that on October 22, 1992, Washington

helped an undercover officer and the informant purchase 0.78 grams of cocaine. Washington met the officer and the informant at a tavern and introduced them to another individual who had the cocaine. On count two, the State alleged that on December 1, 1992, Washington sold the informant and a different officer about 1.8 grams of cocaine. Washington met the informant at a tavern and then accompanied the informant and the officer to another location where he took $120 from the officer and went inside to get the cocaine. When Washington eventually handed the cocaine over to the officer, they were parked within 1000 feet of St. Catherine's High School.

The case was first assigned to the Honorable Dennis Flynn. During pretrial proceedings, he granted Washington's motion to sever the complaint and hold separate trials on each count. The jury in the count one trial, the simple delivery charge, returned a guilty verdict and Judge Flynn sentenced Washington to seven years of imprisonment and assessed $3680 in fines and costs. Washington subsequently filed a postconviction motion challenging, among other things, the effectiveness of his attorney at the count one trial. Judge Flynn rejected these claims. Washington has also filed an appeal of the count one conviction. In a separate opinion, we are affirming that conviction and the order denying postconviction relief. *See* ***State v.***

Washington, No. 95-0365-CR, slip op. (Wis. Ct. App. Dec. 27, 1996) (per curiam).

Two components of the count one proceedings are nonetheless crucial to Washington's allegation that his counsel at the count two trial was ineffective. Washington's defense to both charges was that the police misidentified him. Accordingly, to counter this defense at the count one trial and also to prove motive, the State sought permission to introduce the factual allegations of count two as "other acts" evidence. Judge Flynn granted the State's request.

At the same time, the State also sought a comparable ruling from Judge Flynn which would have permitted it to introduce the evidence from the count one trial at the then upcoming count two trial. Judge Flynn, however, declined this request and informed the State that it should wait for an outcome from the count one trial.

Washington also sought a pretrial evidentiary ruling. He moved for an order requesting that the State disclose the name of its confidential informant, who allegedly had participated in both of the transactions. Washington believed that the informant would provide testimony discrediting the Racine police identification procedures. As an offer of proof, Washington provided a transcript from an interview that the informant conducted with an investigator from the Racine public defender's office. During the interview, the informant made general allegations that quite a few suspects had been "wrongly accused" and that the police should have been capable of "doing a

hell of a lot better job of trying to identify people than they did." Judge Flynn accepted Washington's claim that this informant might provide pertinent information and ordered the State to disclose the name of this informant.

Although Washington's counsel for the count one trial, Attorney Paul LeRose, was able to make contact with the informant, he could not persuade the informant to appear and testify. LeRose accordingly asked Judge Flynn to declare this witness "unavailable," arguing that the transcript was trustworthy enough to permit it to be read aloud to the jury as a substitute for the informant's live testimony. *See* §§ 908.04 and 908.045(6), STATS. Judge Flynn granted this request. Thus, armed with the informant's transcript, Washington argued to the count one jury that the police wrongly identified him.

Since Washington was challenging the effectiveness of LeRose's representation at the count one trial, Washington sought new counsel for his count two trial. Attorney Kathleen Lang was appointed. In addition to the change of defense counsel, a new judge, the Honorable Dennis J. Barry, was assigned when Judge Flynn's calendar became crowded with other proceedings. However, the prosecutor, Deputy District Attorney Michael Nieskes, stayed on for the count two trial. With this background information in hand, we now turn

to the merits of Washington's appellate claim that Lang provided ineffective assistance during the count two trial.[1]

Washington's basic contention is that Lang did not properly prepare for the count two trial. He claims that Lang did not review the record of the first trial and did not have a sufficient understanding of how Judge Flynn handled the two major evidentiary issues. We will now review Washington's argument in more detail, keeping our attention to the rule that Washington has the burden of proving that Lang was ineffective and that her ineffectiveness is a reason to doubt the validity of the verdict. *See* ***State v. Sanchez***, 201 Wis.2d 219, 234 n.2, 548 N.W.2d 69, 75 (1996).

Pointing first to the "other acts" issue, Washington describes how Lang mistakenly told Judge Barry that Judge Flynn had already ruled that the facts of count one would be admissible at the count two trial, when in fact Judge Flynn had specifically held off on making that ruling. Because Lang thought that admission of the count one allegation was already settled, she did not try to have this evidence excluded. Washington also notes that the prosecutor, who was present when Judge Flynn made his ruling, compounded Lang's error by

[1] Washington raises three other claims which he argues each entitle him to a new trial. He argues that LeRose, while he was still representing him on the second count, failed to communicate a plea bargain offer. He also argues that the trial court erred by refusing him the opportunity to enter a plea to another of the State's plea offers. Finally, he claims that the trial court, regardless of his defense counsel's performance, erred when it admitted the count one conviction at his count two trial as "other acts" evidence. Because we find that the ineffectiveness of his later defense counsel, Lang, warrants reversal, we conclude that these are the narrowest grounds on which to decide his case and do not address these three other claims. *See* ***State v. Blalock***, 150 Wis.2d 688, 703, 442 N.W.2d 514, 520 (Ct. App. 1989).

remaining silent, making no attempt to illuminate for Judge Barry exactly how Judge Flynn had handled this matter.[2]

Washington next claims that Lang did not know how Judge Flynn ruled in regard to the informant who could discredit the police identification procedures. While Lang seemed to know that this witness existed, she told Judge Barry that she had tried to make contact with him; she did not know (and thus could not argue) that Judge Flynn had nonetheless allowed Washington to introduce the transcript to the jury.

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[2] During the pretrial conference, Judge Barry asked the attorneys about the case history, noting: "Apparently there had been a trial on count one already?" This colloquy followed:[Prosecutor]Yes, your Honor, there had been a trial on count one. Count two was entered as Whitty evidence in the course of the trial on count one.

[The Court]It was?

[Prosecutor]Yes.

[The Court]Why weren't they tried together?

> [Prosecutor]I argued that they should be tried together, your Honor. Judge Flynn decided to sever them and allow me to enter Whitty evidence was the ruling.

Although the prosecutor never explicitly said that Judge Flynn ruled count one admissible at the count two trial, he nonetheless failed to correct the court when Lang later said that Judge Flynn "held a Whitty motion prior to the other trial and determined that this incident could come in at that trial and that that incident could come in at this trial."

Washington adds to his argument by describing how he had to personally correct Lang about the facts. We will now describe the events that took place in some detail. At the beginning of the second day of the count two trial, before the jury was brought in, Judge Barry asked whether the defense was going to present any evidence. To this question, Lang answered "no."

At this point, Washington interrupted the proceedings and personally asked the court why the informant's statement would not be read during this trial. Judge Barry responded:

> That's up to your--you and your lawyer. I don't know what you're talking about, of course; that is a trial that was before a different judge.

Lang then tried to clarify for Judge Barry why her client had asked about the statement, noting that "we are definitely in disagreement on that issue, so I want the record to be clear should the matter be appealed." She described how there was a pretrial motion made before Judge Flynn regarding this informant, but explained that "I can't find any record that it was read to the jury." Washington, however, replied: "It went to impeach [the investigating officer]. It was read for testimony to impeach." Judge Barry then invited Washington to look for the statement.[3]

While Washington was looking through the transcripts, Lang, the prosecutor and Judge Barry discussed the possible uses of this statement.

[3] Judge Barry also asked the prosecutor, "You have looked through it, have you?" The prosecutor responded: "I have and my recollection is that it was not offered before the jury. There were parts that were read to the Court and then a copy I believe was placed in the record."

Because the investigating officers involved in the count one proceeding were not appearing in this proceeding, Lang explained how she did not think the statement would be admissible. She added that the informant's statement was not sworn and that this was another reason for not admitting it. The prosecutor also explained that the specific incidents that the informant referred to in the statement did not concern the State's allegations against Washington. Judge Barry then concluded that for the reasons discussed by the two attorneys, the statement would not be admissible.

Just after Judge Barry made this ruling, Washington announced that he had found it. After he was given time to discuss the matter with Lang, the parties went back on the record. Lang then reversed her position and requested that Judge Barry rule the statement admissible as part of Washington's case-in-chief. She argued that the informant's statement:

> would actually provide some impeachment for the testimony of [the current investigating officers] as to the nature of Operation Crackdown, how it was conducted, how this specific confidential informant, who was the informant in Mr. Washington's case also, was handled, what his agreement was with the DNE, and would go to impeach the identification of Mr. Washington.

The court also asked Washington why he thought the statement should be admitted. Washington responded: "I guess it goes to show to the identification procedure that they used throughout the whole investigation."

Judge Barry nonetheless rejected Washington and Lang's arguments. He found that Washington had not met his burden of showing that

the informant was unavailable. Alternatively, Judge Barry reasoned that since the informant did not specifically mention Washington's case, his statement had no "direct nexus" to Washington.

We will now assess whether Washington has established that he did not receive effective assistance of counsel. The two-pronged test that we employ on this question is set out in ***Strickland v. Washington***, 466 U.S. 668 (1984). Under the ***Strickland*** test, we inquire into whether trial counsel's performance was deficient and, if deficient, whether the deficient performance prejudiced the defense. *See* ***id.*** at 687. Trial counsel's performance is "deficient" if it falls outside the "range of competence demanded of attorneys in criminal cases." ***Id.*** (quoted source omitted). The defense has been "prejudiced" when "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id.*** at 694; *accord* ***State v. Pitsch***, 124 Wis.2d 628, 642, 369 N.W.2d 711, 718 (1985). A "reasonable probability" is one sufficient to "undermine confidence in the outcome." *See* ***Strickland***, 466 U.S. at 694.

These questions involve a mixture of law and fact. ***Sanchez***, 201 Wis.2d at 236, 548 N.W.2d at 76. A trial court's findings concerning the circumstances of the case and defense counsel's conduct are matters of fact that we cannot reverse unless clearly erroneous. *See* ***id.*** However, whether defense counsel's conduct in light of the circumstances of the case constituted a deficient

performance and whether this deficient performance prejudiced the defense are issues of law that we decide independently. *See* ***id.*** at 236-37, 548 N.W.2d at 76.

We now turn to whether Lang's lack of knowledge about the count one proceedings reveals that her performance fell below an objective standard of reasonableness. While we would ordinarily be guided by the trial court's findings concerning what Lang did before and during trial, we observe that Judge Barry did not make any findings on these matters. Instead, he chose to assume that her performance was deficient and proceed directly to the question of whether the defense was prejudiced. *See* ***id.*** at 236, 548 N.W.2d at 76.

From our review of the ***Machner***[4] transcripts, we see that Washington's appellate counsel made inquiries into what Lang did to prepare for the count two trial. While Lang testified that she was "sure at some point that [she] looked through the court file," she nonetheless could not recall at that hearing "what specific motions were brought by Mr. LeRose or what decisions were made by Judge Flynn." Still, she did not clearly admit that she neglected to read the transcripts as Washington claims. This is a matter of fact that we generally cannot settle as an appellate court.

[4] *See* ***State v. Machner***, 92 Wis.2d 797, 285 N.W.2d 905 (Ct. App. 1979).

But while Lang's ***Machner*** testimony does not provide a concrete answer as to whether she reviewed the count one transcripts, we observe that the State does not really contest this factual question. We glean from the State's brief that it concedes that Lang did not properly prepare; it writes, "Lang should have carefully read the transcript of the prior trial in preparation for the second trial." Hence, even without the aid of the trial court's findings, we can confidently conclude that Lang neglected to read the transcripts from the count one trial.

The State maintains, however, that Lang's lack of preparation does not mean that her performance was legally "deficient." Because Judge Barry later confirmed her original assessment that the informant's statement was not admissible, the State contends that Lang cannot be characterized as ineffective.

We disagree for several reasons. First, Lang's failure to read the transcripts was a clear breach of the Rules of Professional Responsibility which place a duty on an attorney to make an "inquiry into and analysis of the factual and legal elements of the problem." *See* SCR 20:1.1 cmt. As the excerpt from the second day of proceedings certainly demonstrates, Lang's failure to properly prepare dramatically affected her ability to persuasively argue for her client.

Had Lang read the count one proceedings, she would have learned that Judge Flynn never ruled on what "other acts" evidence would be admitted at the count two trial. She would have then formulated a challenge to this evidence. While we do not dispute the State's claim that Judge Barry "could have" admitted this evidence even if Lang had objected, this evidence was not so plainly admissible that a competent attorney would not have tried to persuade a trial court to exclude it. Lang should have been prepared to make that argument.

More importantly, had Lang read the count one transcript, she would have also learned that Judge Flynn had permitted the introduction of the informant's statement. We acknowledge that once Washington showed her the statement, she was able to formulate a solid argument supporting its admission. But Lang did not know the facts when she should have known them. If Lang had realized the significance of this statement beforehand, she could have engaged in the necessary footwork of building a record to show Judge Barry that the informant was unavailable, just as LeRose did in Washington's count one trial.

We also disagree with the State's claim that Lang correctly evaluated the potential relevancy of this statement. Here, the State points to Judge Barry's decision at trial and posttrial that the statement was not relevant because it did not specifically mention the transactions in which Washington was allegedly involved.

Judge Barry determined that the informant's statement regarding flaws in the identifications made during "Operation Crackdown" was not relevant to Washington's defense because the informant did not specifically mention either of Washington's transactions. But the measure of relevancy is not so exact. Relevancy is determined by asking if the evidence has "any tendency" to make the existence of a fact more or less probable. *See* § 904.01, STATS. We do not understand how testimony from the *State's informant*, who the State alleges was present at both transactions, but who also made statements attacking the quality of police identification procedures, could not be relevant to Washington's theory that he had been improperly identified.

We understand that questions of relevancy are generally left to the trial court's discretion. *See* ***Shawn B.N. v. State***, 173 Wis.2d 343, 366-67, 497 N.W.2d 141, 149 (Ct. App. 1992). We also accept that two different trial courts—that is, Judge Flynn and Judge Barry—could reach opposite, but otherwise supportable, discretionary judgments about the same piece of evidence.

However, within the realm of a trial court's evidentiary analysis is the question of whether the facts logically support the trial court's ruling. *See* ***id.*** at 367, 497 N.W.2d at 149. We believe that Judge Barry's ruling did not logically reflect the facts. Judge Barry's logic is correct to the extent that the statement did not specifically detail Washington's transaction, but Washington did not view it as a specific attack upon the officer who identified him at trial. Rather, Lang and Washington argued that the statement was being offered as a general

attack on the police methods of identification in "Operation Crackdown." The informant made enough general allegations to support this theory.

Consequently, we hold that Lang's performance was deficient because she was not prepared enough to effectively argue on her client's behalf. If she had known that Judge Flynn had not ruled on the "other acts" issue, she could have made an effective argument against admitting this evidence at the count two trial. If she had a better grasp of what occurred at the count one trial, she could have substantiated the correct argument that the informant's statement was relevant and could have built the record necessary to establish that the informant was unavailable.

Our next task is to determine if Lang's deficient performance prejudiced Washington. We must apply the ***Strickland*** standard and gauge whether there is a reasonable probability that the result would have been different. ***Strickland***, 466 U.S. at 694. Here, we also observe that our supreme court recently noted that the ***Strickland*** standard is "substantively the same" as the harmless error rule. *See* ***Sanchez***, 201 Wis.2d at 230-31, 548 N.W.2d at 74 (quoted source omitted). Thus, our job is to determine whether Lang's deficient performance was harmless error.

The State expectedly argues that it was. It contends that the undisputed evidence against Washington was "so strong" that "any error" by the judge, the prosecutor or Lang should not affect our confidence in this verdict. The State emphasizes how the undercover officer confidently identified Washington in court and from the officer's description of the undercover buy,

"the jurors knew that [the officer] had a very good opportunity to observe Washington." In addition, the State emphasizes that Washington admitted to this investigating officer that he had previously arranged drug sales for his friends.

In response, Washington contends that the informant's statement was a necessary part of the defense. He argues that this statement posed a solid challenge to the credibility of the police. Indeed, if the State is that confident in the quality of its identification, Washington rhetorically asks why the prosecution also sought to have the "other acts" admitted on grounds that it bolstered Washington's identification.

Washington has persuaded us that there are reasonable grounds to doubt the outcome of his trial. The State's argument for applying the harmless error itself informs us that its case hinged on the investigating officer's testimony. But as we explained above, Lang's poor preparation effectively left Washington in a position of trying to personally convince the trial court to admit his rebuttal evidence. While we acknowledge that this evidence was rejected by the count one jury, we believe that a rational jury could certainly conclude that the informant's statements concerning the quality of the police investigation were a basis for not convicting. Washington was prejudiced by his counsel's ineffective assistance.

Finally, we must address one more matter in this already lengthy opinion. During the briefing stage of this case, Washington moved to strike a portion of the State's brief on grounds that it made reference to facts that he

alleges were not part of the count two appellate record. During the count one ***Machner*** hearing, one issue was whether LeRose should have sought the informant's appearance at trial, not just the introduction of his out-of-court statement. Judge Flynn, however, accepted LeRose's explanation that he met with the informant but concluded that the informant's live testimony would not have been helpful because the informant could have indeed linked Washington to these two transactions. The State thus contends that at a new trial, the court would certainly not admit the informant's statement to support Washington's claim that the police misidentified him. The State, moreover, seems to argue that we can rely on this "evidence" from the count one ***Machner*** hearing when gauging if Lang's poor preparation was harmless.

We are not blind to the fact that the appellate files contain evidence that the informant's statement, in retrospect, might not have been helpful to Washington. In fact, we rely on Judge Flynn's conclusion regarding the informant's statement as grounds for affirming Washington's count one conviction. *See* ***Washington***, No. 95-0365-CR, slip op. at 8-9.

But the measure of prejudice under the ***Strickland*** standard does not turn on an assessment of whether the defendant will probably be found guilty at a new trial should that trial take place. It involves a determination of confidence in the result of the *trial that did take place. Cf.* ***Sanchez***, 201 Wis.2d at 236, 548 N.W.2d at 76 ("We are to consider the totality of circumstances *before the trier of fact*") (emphasis added). Accordingly, we cannot speculate that Lang might have actually uncovered information unhelpful to Washington if she had

been prepared and taken the same steps that LeRose followed. The bottom line is that Lang did not take those steps.

Of course, since our doubts about the verdict center on Lang's failure to utilize the informant's statement, but the record reveals that even effective counsel may not be able to get this statement admitted at a new trial, we anticipate that the State may ask why we demand that it expend more resources to secure the same result—a conviction on count two. Lang's error must certainly be harmless.

This case, however, exemplifies the limitations of the harmless error doctrine. Even in those circumstances where the evidence against a defendant seems overwhelming and undisputed, the Constitution still requires that this allegedly guilty person be given a fair trial, including a right to effective counsel. *Cf.* ***Walberg v. Israel***, 766 F.2d 1071, 1074 (7th Cir.), *cert. denied*, 474 U.S. 1013 (1985). We hold in this opinion that Washington was denied his Sixth Amendment right to effective assistance of counsel. Therefore, he is entitled to a remedy and that remedy is a right to a new trial.[5]

By the Court. – Judgment and order reversed and cause remanded.

[5] We are also somewhat troubled by how the prosecution reacted when it became apparent that Lang did not have a good handle on the facts of the case. We are not prepared to say that the prosecutor intentionally made misrepresentations to the court. However, the prosecutor was present when Judge Flynn made his rulings, and perhaps with better preparation the prosecutor could have recalled exactly what Judge Flynn had done and could have corrected Judge Barry about the record. Moreover, as the above discussion reveals, the State's informant could have apparently confirmed Washington's identification had he been placed on the stand. Thus, the prosecutor could have avoided any possible error by simply calling its witness during its case-in-chief, thus ending Washington's claim that the informant would somehow help his defense.

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