COURT OF APPEALS
DECISION
DATED AND FILED

December 17, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP2777-CR **Cir. Ct. No. 2004CF4739**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

VONDERRICK LAMAS RAYFORD,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: WILLIAM W. BRASH and JEFFREY A. KREMERS, Judges. *Affirmed.*

Before Vergeront, Lundsten and Higginbotham, JJ.

¶1 PER CURIAM. Vonderrick Rayford appeals a judgment of conviction and an order denying his motion for postconviction relief. We affirm.

¶2 Rayford was convicted of several felonies and misdemeanors based on conduct that was alleged to have occurred in one evening. It was alleged that, in response to a traffic stop by police, Rayford fled and resisted arrest, and that he had been a felon in possession of a concealed firearm with a silencer.

¶3 On appeal, Rayford argues that he should be given a new trial or an evidentiary hearing, or have the charges dismissed, due to two comments made by the prosecutor during closing argument. The first comment was made during the initial closing argument:

> You have heard the testimony of the officers and perhaps most significantly and most interestingly you've heard the testimony of Mr. Rayford. I have formed an impression of Mr. Rayford, as I'm sure all of you have. The impression that I have formed from Mr. Rayford was an impression that I had when I first handled this case when the officers brought it to me, when I read the reports, and it became most concrete for me when I saw him testify on Friday afternoon and again this morning.
>
> Mr. Rayford is a manipulator. Mr. Rayford plays games. Mr. Rayford likes to play with people, toy with people and try and push his limits. We all know someone like this or many people like this, people who think they can get away with things, people who try and press the limits, people whose behavior doesn't quite conform to the norm.

¶4 The prosecutor's second comment came during rebuttal closing argument. The reference to police misconduct is to the force used against Rayford in making the arrest:

> You all heard the evidence. You know what the testimony was, so just bear with me briefly. I want to talk a little bit about the law enforcement performance in this case because the District Attorney's Office also polices the police. In fact, we prosecute police officers. We prosecute police officers for misconduct in office. We prosecute police officers when they fail to do their job properly. When they use excessive force, et cetera.

> Here in this case I believe the officers acted appropriately and I wouldn't have charged the case and I wouldn't have got the case otherwise. They did not presume that Mr. Rayford was guilty of these crimes that evening until they saw him commit a crime. They thought he committed a speeding violation. This was going to be a simple traffic stop until Mr. Rayford escalated the situation. The defense has made a lot of focus on this case on what the police did to Mr. Rayford at 5633 N. 64th Street. And the Milwaukee Police Department just like every other law enforcement agency in the nation has to use force from time to time. I don't believe they just do it on a whim. They don't like to do it, but it's part of their job. It's part of their responsibility and here they had to use it.

¶5 Rayford argues that these comments were improper, and we agree. The first comment, that Rayford is a manipulator, was improper because the prosecutor referred to the time when he was first assigned to the case and read the police reports. This is improper because the prosecutor was referring to his own thought process and his own opinion that he drew from the police reports. The second comment was improper because the prosecutor appeared to personally vouch for the police, saying that as a prosecutor he is part of an office that polices the police officers for misconduct. The prosecutor was effectively telling the jury that, if there had been misconduct by the police, it would have been prosecuted by his office and, by implication, that no such prosecution was commenced in this case. This was clearly a reference to facts that are not in evidence and using those facts to vouch for the police.

¶6 The impropriety of these remarks, however, does not necessarily mean that Rayford is entitled to the relief sought. Rayford did not object to either comment at trial and, as a result, he seeks postconviction relief on a variety of indirect theories.

¶7 Rayford first argues that his trial counsel was ineffective by not objecting to the comments. To establish ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that such performance prejudiced his defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). We need not address both components of the analysis if defendant makes an inadequate showing on one. ***Id.*** at 697. To demonstrate prejudice, the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. ***Id.*** at 694. A reasonable probability is one sufficient to undermine confidence in the outcome. ***Id.***

¶8 Rayford's argument as to prejudice on this theory is not well developed. We regard any potential prejudice from the "manipulator" comment as slight. Without referring to his own review of the reports or his personal opinion, the prosecutor would still be permitted to suggest to the jury that *it* should regard Rayford as a manipulator. We are satisfied that, even when told of the prosecutor's personal opinion, the jury would still review the evidence and arguments to reach its own conclusion.

¶9 The prosecutor's comments about police misconduct are more problematic. However, the role of the police misconduct issue was limited in this case. Rayford does not argue that police misconduct would, by itself, be a proper basis for the jury to acquit. In other words, whether the police did or did not commit misconduct is not directly relevant to whether Rayford committed the crimes charged.

¶10 Instead, Rayford appears to see the significance of the possible misconduct as going to the credibility of the police. His argument, though not so directly stated, appears to be that, if the police were willing to commit misconduct

and then lie about it at trial, the jury could then conclude that police were also lying about other more important points disputed at trial. Accordingly, he regards the prosecutor's personal vouching for the lack of misconduct as an improper bolstering of police credibility.

¶11 With that context in mind, we are satisfied that Rayford was not prejudiced by the prosecutor's comment. First, we are again skeptical as to how much weight the jury would put on the personal opinion of the prosecutor, or on the prosecutor's factual implication that these officers were not prosecuted. While some jurors may have seen the prosecutor as an authoritative figure worthy of belief, other jurors may have assumed that prosecutors are often aligned with police on such matters, and that such prosecutions rarely occur, even when warranted.

¶12 Second, the prosecutor's comments must be viewed in the context of the totality of the trial. Those comments comprise less than two pages of a trial that occurred over four court days and produced over 800 pages of transcript. This included an ample opportunity to personally view the testimony of Rayford and police. It is simply not tenable to suggest that, in this larger context, what happened in those two pages was so prejudicial as to have a significant effect on the jury's own opinions about the testimony and arguments more directly related to the substance of the case.

¶13 In addition to ineffective assistance, Rayford seeks relief on a theory of plain error. This theory includes consideration of whether the error was harmless. *See* ***State v. Mayo***, 2007 WI 78, ¶29, 301 Wis. 2d 642, 734 N.W.2d 115. In light of our discussion above about prejudice, we conclude that, if the prosecutor's comments are regarded as plain error, the error was harmless.

¶14 Rayford also seeks dismissal of the charges on grounds of prosecutorial overreaching and double jeopardy. *See* ***State v. Jaimes***, 2006 WI App 93, ¶8, 292 Wis. 2d 656, 715 N.W.2d 669. Under that theory, the prosecutor's action must be intentional in the sense of a culpable state of mind in the nature of an awareness that his activity would be prejudicial to the defendant, and must have been designed either to create another chance to convict or to prejudice the defendant's rights to successfully complete the criminal confrontation at the first trial, that is, to harass the defendant by successive prosecutions. ***Id.***

¶15 Rayford argues that we should order an evidentiary hearing to determine the prosecutor's state of mind, but we do not regard that as necessary. The argument fails on the second part of the test. Rayford does not point to anything in the record that reasonably can be read as suggesting that the prosecutor's motive was to cause a second trial or to harass the defendant with a second trial. Nor does Rayford suggest that there is some additional evidence he would introduce at such a hearing to help establish this element. It appears that his goal is little more than to ask the prosecutor whether this was the reason for the comments, and then hope the prosecutor admits that it was. We decline to order an evidentiary hearing on such a meager showing.

¶16 Similarly, we do not regard an evidentiary hearing as necessary to decide either the ineffective assistance or plain error issues. Our analysis on both issues turns on the likelihood of prejudice at trial. Postconviction evidence does not help us decide that question.

¶17 Finally, Rayford argues that we should reverse under WIS. STAT. § 752.35 (2007-08)[1] because the real controversy was not fully tried. For the reasons we have already discussed, we conclude the controversy was fully tried.

By the Court.—Judgment and order affirmed.

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

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.