COURT OF APPEALS
DECISION
DATED AND RELEASED

February 12, 1997

NOTICE

No. 96-0708-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JEFFREY BRUNET,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Waukesha County: MARIANNE E. BECKER, Judge. *Affirmed and cause remanded with directions.*

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

BROWN, J. Jeffrey Brunet presents several arguments attacking a jury verdict finding him guilty of conspiracy to commit first-degree intentional homicide. The conviction is based on his involvement in a plot to hire a "hit man" to kill his former wife, Natalie Teafoe.

Our analysis primarily addresses Brunet's charge that he did not receive effective assistance of counsel. We are in partial agreement with Brunet. We agree that defense counsel erred by failing to object when the prosecutor improperly referred to one-party consent recordings that Brunet's co-conspirator, Jodi Zandt, made under the supervision of police detectives. Moreover, we agree that defense counsel did not adequately cross-examine Zandt regarding the details of her plea agreement. Nonetheless, because the prosecutor submitted a significant amount of other evidence to corroborate the existence of the conspiracy, we are confident in the jury's result. We hold that these errors did not prejudice Brunet's defense.

Furthermore, we reject Brunet's other argument concerning defense counsel's performance. Brunet alleges that counsel mistakenly questioned a defense witness about her knowledge of Brunet's prior behavior, thereby opening the door to otherwise inadmissible "other acts" evidence consisting of his prior battery convictions. However, we uphold the trial court's finding that defense counsel was acting pursuant to Brunet's own strategic choice.

Moreover, we reject Brunet's request to apply our discretionary authority to reverse his conviction under § 752.35, STATS., because the "real controversy" of Zandt's credibility was never tried. We conclude that even in light of defense counsel's errors, the jury was presented with sufficient evidence

to contradict Zandt's version of the story; her credibility was adequately tested. In addition, we reject Brunet's claim that the prosecutor's statement during a recess in the trial, that defense counsel was "pathetic," is a reason to order a new trial in the interest of justice. Brunet argues that the prosecutor's characterization conclusively reveals that he did not receive adequate representation. However, we see no reason to set aside the trial court's conclusion that this statement was "too ambiguous" to independently support a finding that defense counsel was ineffective.

Finally, we do agree with Brunet's claim contesting the validity of the order directing him to reimburse the county for the attorney's fees associated with his defense. Since this nonfinal order was not incorporated into the final judgment and sentence, it is invalid. Although we reverse this nonfinal order, we affirm the judgment of conviction and the postconviction order.

We will begin our analysis with a brief description of the facts surrounding the conspiracy. We will then address seriatim Brunet's various appellate arguments.

BACKGROUND

Brunet was charged with the single count of conspiracy in October 1992. The complaint alleged that Brunet had conspired with Zandt to hire a "hit man" to kill Teafoe, his former wife.

The case started in late August 1991 when a city of Waukesha detective received a tip from an investigator with the State Department of Agriculture. The investigator had learned that one of the department's food inspectors, Zandt, had been making inquiries about obtaining a "hit man."

Posing as a potential hit man, the detective contacted Zandt and arranged a meeting for September 9. There, Zandt gave him written information about Teafoe, including her address, a description of her car and a list of places that she frequented. Moreover, Zandt gave the detective two photographs.

At this meeting, the undercover detective and Zandt also discussed the price. The detective set the fee at $5000. Zandt told him that she was going to sell a 1980 Harley Davidson to get the money. The detective also told Zandt that he might accept the motorcycle in trade. During a follow-up phone conversation, the detective and Zandt agreed that the motorcycle would be given in "trade for the murder."

Zandt was subsequently arrested and charged with solicitation to commit murder. She admitted her involvement, but claimed that she was only acting at Brunet's direction, who was her boyfriend at the time. Zandt was thus able to reach a plea agreement with the State. Her charge was reduced from

felony solicitation to commit murder to misdemeanor solicitation to commit assault. In exchange, she agreed to aid the State in its prosecution of Brunet.

Pursuant to this plea agreement, Zandt arranged to meet with Brunet in June 1992 at a department store parking lot in Fond du Lac. She wore an electronic monitoring device, hoping to get Brunet to admit his involvement. Moreover, she later permitted the police to record a phone call she made to Brunet while he was serving a jail sentence on an unrelated charge. During these two conversations, Brunet made various incriminating statements, including suggestions about how Zandt could easily convince the police that he was not involved in the conspiracy.

The prosecutor's case thus rested on the following evidence: Zandt's testimony regarding Brunet's lead role in the conspiracy; the testimony from the city of Waukesha detectives who conducted the undercover investigation; and various physical evidence, including the title records tracing the transfer of the Harley Davidson from Brunet to Zandt, and the written information and photographs which Zandt gave to the undercover detective. The jury found Brunet guilty.

With this background information in hand, we will now turn to Brunet's appellate claims, setting forth further facts as necessary.

INEFFECTIVE ASSISTANCE OF COUNSEL

1. Applicable Law and Standard of Review

The two-pronged test we employ when gauging whether a defendant received effective assistance of counsel was set out in ***Strickland v. Washington***, 466 U.S. 668 (1984). Under ***Strickland***, we ask whether trial counsel's performance was deficient and, if deficient, whether the deficient performance prejudiced the defense. *See* ***id.*** at 687.

The inquiries involve a mixture of law and fact. *See* ***State v. Sanchez***, 201 Wis.2d 219, 236, 548 N.W.2d 69, 76 (1996). 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 deficient performance and whether this deficient performance prejudiced the defense are issues of law which we decide de novo. *See* ***id.*** at 236-37, 548 N.W.2d at 76.

2. One-Party Consent Recordings

As our outline of the case reveals, Zandt's testimony was a very important element of the prosecution's case. Indeed, Zandt spoke with Brunet on two occasions with the express purpose of getting Brunet to confess that he was involved in the conspiracy. With Zandt's consent, the investigating detectives recorded these two conversations.

Before trial, however, defense counsel filed a motion in limine to limit the use of these tapes pursuant to Wisconsin's electronic surveillance law.[1] *See* ***State ex rel. Arnold v. County Court***, 51 Wis.2d 434, 442, 187 N.W.2d 354, 358 (1971). The trial court correctly ruled that even though the conversations were monitored, Zandt could still testify about what Brunet said to her. The court also ruled that the contents of the tapes could be disclosed to impeach Brunet should he take the stand. Otherwise, the trial court sided with defense counsel and ordered that the contents of the tapes be suppressed.

Although the prosecutor adhered to the strict letter of this ruling, Brunet claims that the prosecution nonetheless violated the surveillance law by making numerous "references" to the tapes, allegedly attempting to "corroborate Zandt" and "bolster her credibility." Brunet argues that defense counsel's failure to object to these repeated references demonstrates that defense counsel was ineffective.

We agree with Brunet that defense counsel should have objected. We reject the State's claim that the prosecutor's references to the tapes should not have triggered a response because of several "mitigating" factors, such as the need to foreshadow for the jury how Zandt was going to testify and the need to explain the terms of the plea agreement with Zandt—wearing a wire in exchange for leniency. The prosecutor's *repeated* references to the tapes signify

[1] This motion was filed by Attorney William J. Reddin. Before the trial court ruled on this motion, however, Reddin filed a motion to withdraw from the case. The trial court granted this motion and Attorney Thomas Awen was appointed as Brunet's trial counsel. Brunet's various allegations are directed at Awen.

that he was indeed seeking much more; he was trying to bolster Zandt's credibility by signaling to the jury that her testimony had to be credible because it was backed up on tape. The prosecutor's references should have triggered an objection. *See* ***State v. Waste Management of Wisconsin, Inc.***, 81 Wis.2d 555, 573, 261 N.W.2d 147, 155 (1978) ("[T]he prosecutor's reference to the tapes did not violate that statute ... [n]onetheless, the reference was improper.").

While defense counsel should have objected, we need not elaborate on whether the failure to object demonstrates that defense counsel's error proves that defense counsel was "deficient" as a matter of law. Our supreme court has held that an appellate court may simply presume that defense counsel's performance was deficient and proceed directly to the issue of whether the deficient performance prejudiced the defense. *See* ***Sanchez***, 201 Wis.2d at 236, 548 N.W.2d at 76. We will follow this shortcut.

The State cites two primary reasons why Brunet's defense was not prejudiced. It first argues that Zandt's testimony, regardless of the prosecution's improper references, was independently reliable because "the story presented by the state made so much more sense than the story presented by Brunet."

More importantly, the State points to other legitimate evidence that the prosecution offered to corroborate Zandt's story. For example, one of the detectives described how Brunet was at Zandt's apartment when the arrest warrant was served on Zandt and that Brunet and Zandt looked like they had just awakened. The State contends that this testimony supports Zandt's statement that she and Brunet were intimate and rebuts Brunet's claim (made

during a police interview) that he was "not really living with her." The State further explains that this testimony buttresses Zandt's statement that her emotional ties to Brunet motivated her to "act[] on behalf of her lover."

The State also points to physical evidence corroborating Zandt's testimony. For example, it submitted documentary evidence demonstrating that the title to Brunet's Harley Davidson was signed over to Zandt. While we observe that Brunet, during his police interview, tried to offer an alternative hypothesis, it is not convincing on its face. Although he valued the motorcycle at approximately $4800, he also explained that he transferred the title to Zandt as collateral for his debt to her of roughly $600 to $700. He did not, however, offer any explanation why he over-collateralized his debt to Zandt.

Indeed, Brunet concedes in his reply brief that Zandt's testimony is "arguably" corroborated to the extent that it showed that he was involved in a "plot against Natalie." But Brunet maintains that the most crucial aspect of Zandt's testimony was her claim that "Brunet participated in a murder-for-hire plot" and argues that this component, except for the prosecution's improper references, was uncorroborated.

Nonetheless, we are not persuaded by Brunet's effort to dissect the issue of Zandt's credibility. Brunet's brief-in-chief emphasizes that "[t]here can be no serious question that Zandt's credibility was a critical issue in this trial." This is exactly the point. Zandt's overall credibility was extremely important.

But Zandt's testimony did not stand alone. The prosecutor presented a sufficient amount of corroborating evidence. Aside from the prosecution's improper references, there was other properly admitted testimony and physical evidence supporting Zandt's version of what happened. We reject Brunet's attempt to characterize this case as a simple claim of "he said, she said." To the contrary, the prosecution was able to successfully buttress *its* witness's credibility with physical evidence. This corroborating evidence gives us confidence that the verdict did not turn on the prosecutor's improper references to the inadmissible tapes. We conclude that defense counsel's failure to object was not prejudicial.

3. Zandt's Credibility

Although Brunet argues that defense counsel's "gravest single error" was the failure to object to the prosecutor's references to the tape recordings, an issue we have resolved in the State's favor, Brunet nonetheless claims that defense counsel made other "blunders and mishaps" affecting the outcome. We now turn to the first alleged mishap, defense counsel's failure to adequately cross-examine Zandt about her deal with the State.

Brunet begins with an excerpt from the trial transcript. He identifies it as defense counsel's "only attempt to impeach Zandt."

> COUNSEL:Do you recall offhand at least working with you (sic) attorney in terms of trying to obtain at least some favorable resolution of your case? I guess when I say favorable resolution, I am trying to make sure that you did not have to go to prison or anything like that?

ZANDT:So what you are asking me then is?

COUNSEL:Were those efforts made?

ZANDT: Yes.

COUNSEL:... Did your attorney talk to you and tell you or at least inform you as to what responsibilities would be to get any leniency from the District Attorney in regards to your case?

ZANDT:Yes.

COUNSEL:And did that leniency include the fact that the charges would be reduced substantially?

ZANDT:I would say the charges would be reduced, and there was no talk of substantially.

At this point, the trial court sustained the prosecution's objection to the inquiry about whether Zandt thought she would have gone to prison had she not struck a deal. The focus of Brunet's complaint is that the jury never learned that Zandt, by having her charges reduced, received "so much consideration in exchange for her testimony."

Nonetheless, we again agree with the State that defense counsel's error was not prejudicial. Brunet's factual analysis is correct to the extent that the above excerpt reveals defense counsel's only attempt to impeach Zandt on these grounds. But this excerpt does not reveal the only occasion where the jury heard information concerning the scope of Zandt's deal with the prosecutor.

The prosecutor addressed this issue at the beginning of his direct examination of Zandt:

PROSECUTOR:As a result of [your] cooperation, were you given consideration, ma'am?

ZANDT:Yes, I was.

PROSECUTOR: What happened?

ZANDT:I was given a reduced sentence of solicitation to commit intentional battery I believe.

Although this questioning did not reveal whether Zandt avoided prison because of her deal, a defense witness (who knew Zandt and Brunet) provided the jury with this missing link. This defense witness testified that Zandt believed that her testimony "would determine whether she would be looking at jail time or probation." We thus are satisfied that the jury, despite defense counsel's failure to explore the issue with Zandt, had the information necessary to assess whether Zandt's testimony should be discounted because it was given in exchange for leniency. Defense counsel's error did not prejudice Brunet's defense.[2]

[2] As we explained above, defense counsel did try to ask Zandt if she believed that she would have gone to jail if she had not entered into the deal with the prosecution. This inquiry, however, was ended when the trial court sustained the prosecutor's objection that such a response would have required Zandt to speculate.

4. Opening the Door to "Other Acts" Evidence

We next turn to the second of defense counsel's alleged "blunders." During Brunet's case-in-chief, defense counsel called Laurie Steffes. She explained that she had been dating Brunet for five years. Steffes tried to offer a general characterization of Brunet as a nonviolent person.

However, because defense counsel asked Steffes about her knowledge of Brunet's character, the trial court permitted the State to introduce "other acts" evidence comprised of Brunet's prior battery convictions. Brunet now claims that defense counsel was deficient because this line of questioning needlessly opened the door to this otherwise inadmissible "other acts" evidence. We do not agree.

We rest our conclusion on the trial court's findings following the *Machner*[3] hearing. Here, the trial court found that defense counsel entered into this line of questioning at Brunet's direction. The court found that defense counsel was aware that he was on "dangerous ground," but nonetheless

(..continued)

The State, however, seems to concede that defense counsel may not have erred because Zandt's belief about whether she would have gone to prison was indeed relevant. Hence, the trial court may have erred when it sustained the prosecutor's objection. Nonetheless, since defense counsel's error was not prejudicial to Brunet's defense, we are equally confident that the trial court's ruling was harmless error. *See* ***State v. Sanchez***, 201 Wis.2d 219, 230-31, 548 N.W.2d 69, 74 (1996) (noting that the test of whether the defense was prejudiced is "substantively the same" as the harmless error rule).

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

followed the wishes of his client. The court further explained that it based this finding on its conclusion that defense counsel's testimony was "credible; extremely credible."

On appeal, Brunet challenges the trial court's decision by pointing to other testimony gathered during the ***Machner*** hearing that seems to contradict this finding, such as his own testimony that defense counsel never asked him about his prior convictions. However, the trial court's findings concerning the circumstances of the trial and defense counsel's conduct are matters of fact that we cannot reverse unless clearly erroneous. *See* ***Sanchez,*** 201 Wis.2d at 236, 548 N.W.2d at 76. We see no reason to upset the trial court's finding in this case. And since defense counsel was acting pursuant to his client's directive, we cannot reach the legal conclusion that defense counsel's performance was deficient.

APPLICATION OF § 752.35, STATS.

Under this statute, we may reverse a verdict if it appears that the real controversy has not been tried or it is probable that justice has been miscarried. *See* ***State v. Schumacher***, 144 Wis.2d 388, 401, 424 N.W.2d 672, 677 (1988). Brunet submits attacks on the verdict under both prongs.

1. Zandt's Credibility

Brunet first asserts that because of defense counsel's errors, "[t]he real controversy over Zandt's credibility was not fully tried." He points to defense counsel's failure to object to the prosecution's references to the tape recordings and counsel's failure to zealously impeach Zandt regarding her plea

agreement; he argues that the collective effect of these errors should lead us to doubt that Zandt's credibility was really tested.

Nonetheless, we are confident that the analysis which led us to the conclusions that the above errors were not prejudicial to Brunet also dictates that we not reverse this verdict pursuant to § 752.35, STATS. Brunet's argument correctly identifies that Zandt's testimony (and thus her credibility) was crucial. But although we emphasize above that the prosecutor submitted substantial evidence corroborating Zandt's story, this does not mean that the jury heard nothing to impeach her story. There was information before the jury that could have supported Brunet's theory that Zandt was the instigator and he was accidentally dragged in. For example, the jury heard information that Brunet had another girlfriend and thus could conclude that Zandt had acted out of jealousy. It was the jury's role to look at the evidence and make a decision about which story was correct. We decline to exercise our discretionary power and reverse Brunet's conviction.

2. The Prosecutor's Statement

During a recess in the proceedings, the prosecutor was overheard making negative statements about the quality of defense counsel's courtroom performance. Brunet's witness claims that the prosecutor used the terms "pathetic" and "worst he had ever seen" or something very similar. Brunet contrasts the hallway statements of the prosecutor with the prosecutor's later representation to the court that "[t]here has been nothing in this record to even remotely approach ineffective claims." Based on the prosecutor's seemingly

contrary positions inside and outside the courtroom, Brunet suggests that "[h]ad the prosecutor been honest with the court at trial and admitted that trial counsel's performance was ineffective, the result would have been a mistrial." Brunet asks us to reverse his conviction in the interest of justice.

The State objects to how Brunet "besmirches" the prosecutor. The State explains that the prosecutor could not have possibly misled the court about defense counsel's performance because "the court was there." Moreover, the State dismisses the prosecutor's hallway statement as irrelevant because it was nothing more than "heat-of-battle bravado" made by an "adrenaline-pumped" attorney.

We do not, however, have to answer whether the prosecutor misled the court or whether his statement carried any legal significance. The bottom line is that Brunet brought this statement to the trial court's attention during posttrial proceedings, and the court ultimately concluded that it was insignificant. While the court accepted that the prosecutor made this statement, because the prosecutor was not called to testify, the court found that it could not reach any positive conclusion about what the prosecutor meant. The court accordingly determined that this simple statement, standing alone, was "too ambiguous" to be grounds for finding that defense counsel's performance was ineffective. Because the trial court was in the best position to assess the effectiveness of counsel at the time the prosecutor's out-of-court comments came to light and because it is not the prosecutor who determines effectiveness

but the court, we conclude that the trial court did not misuse its discretion and we will not use § 752.35, STATS., to overturn the judgment.

ORDER DIRECTING BRUNET TO PAY ATTORNEY'S FEES

This is the last of Brunet's appellate claims. On June 22, 1993, the trial court issued a written order appointing defense counsel. This order, moreover, directed Brunet to "reimburse the County of Waukesha for services rendered at the rate of $60.00 per hour." However, since this order was not incorporated into the final sentencing order, Brunet claims that it is invalid. He is correct.

In ***State v. Grant***, 168 Wis.2d 682, 685, 484 N.W.2d 370, 371 (Ct. App. 1992), this court held that attorney's fees could not be taxed against a criminal defendant in an order separate from the sentence. Thus, pursuant to ***Grant***, we direct that the trial court vacate the portion of the June 22, 1993, order that directs Brunet to reimburse the county for those fees.[4] We otherwise affirm the judgment of conviction and the postconviction order.

By the Court. – Judgment and order affirmed and cause remanded with directions.

Not recommended for publication in the official reports.

[4] Although this June 22, 1993, order is not incorporated into the judgment of conviction or the postjudgment order from which Brunet appeals, this nonfinal order is nonetheless properly before us. *See* RULE 809.10(4), STATS. ("An appeal from a final judgment or final order brings before the court all prior nonfinal judgments, orders and rulings adverse to the appellant ....").