COURT OF APPEALS
DECISION
DATED AND FILED

October 20, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-2499-CR **Cir. Ct. Nos. 98CF000343, 00CF001134**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RODRIGO RODRIGUEZ,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Kenosha County: MICHAEL FISHER, Judge. *Affirmed.*

Before Brown, Nettesheim and Snyder, JJ.

¶1 PER CURIAM. Rodrigo Rodriguez appeals from judgments of conviction for possession of cocaine with intent to deliver and conspiracy to deliver cocaine within 1000 feet of a school. He also appeals from an order denying his postconviction motion for a new trial. He argues that evidence that he absconded and forfeited $50,000 cash bond was improperly admitted at trial and

that he was denied the effective assistance of trial counsel. We affirm the judgments and order.

¶2 In 1998, as a result of a controlled drug buy, Rodriguez was charged with possession, with intent to deliver, of 84 grams of cocaine. He posted a $50,000 cash bond but failed to appear at a May 1998 status hearing. On September 9, 2000, he was arrested on a fugitive warrant in Bloomington, Indiana.

¶3 On November 14, 2000, a second criminal complaint was filed against Rodriguez charging him with conspiracy to deliver cocaine within 1000 feet of a school. The charge arose out of a controlled buy by informant Anthony Turpin of one kilo of cocaine from Jesse Vasquez on September 7, 2000, at the Kenosha county residence of James Kennedy. The complaint recited that Vasquez indicated Rodriguez had brought the cocaine to Vasquez in Kenosha six days before the September 7 transaction. Vasquez arranged to meet Rodriguez in Bloomington, Indiana to turn over the drug money, and that is when Rodriguez was arrested.

¶4 Ultimately the two cases were tried together.[1] A state drug agent testified that he had arrested Rodriguez in 1998. He indicated that Rodriguez failed to appear for a hearing scheduled on May 5, 1998, that prior to that date a $50,000 cash bond had been posted, and that Rodriguez did not make any further court appearance until after his September 9, 2000 arrest. Rodriguez objected to admission of that testimony as highly prejudicial.

[1] Rodriguez entered a guilty plea to an amended charge in the 1998 case but was allowed to withdraw his plea on the first day of trial in the 2000 case.

¶5 On appeal Rodriguez argues that evidence of his failure to appear and the amount of the cash bond should have been excluded under either WIS. STAT. § 904.03 or § 904.04(2) (2001-02).[2] Section 904.03 requires the court to conduct a balancing test weighing relevance against potential prejudice or other factors. *See* ***State v. Walters***, 2004 WI 18, ¶32, 269 Wis. 2d 142, 675 N.W.2d 778. Section 904.04 governs the admissibility of "other acts" evidence. We address only Rodriguez's claim under § 904.03. His claim that the evidence constituted "other acts" evidence subject to analysis under § 904.04(2) is raised for the first time on appeal. We need not address issues raised for the first time on appeal. *See* ***State v. Caban***, 210 Wis. 2d 597, 604, 563 N.W.2d 501 (1997).

¶6 The trial court has broad discretion in determining the relevance and admissibility of proffered evidence. ***State v. Brecht***, 143 Wis. 2d 297, 320, 421 N.W.2d 96 (1988). "The criterion of relevancy is whether or not the evidence adduced tends to cast any light upon the subject of the inquiry. Evidence of any fact is admissible as relevant which might establish the hypothesis of innocence, or show the defendant's guilt." ***State v. Wedgeworth***, 100 Wis. 2d 514, 532, 302 N.W.2d 810 (1981) (quoted sources omitted).

¶7 Rodriguez argues that the evidence of his nonappearance had only marginal relevance to the charge regarding the 1998 controlled drug buy.[3] He further contends that evidence of the amount of money posted had no probative

[2] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

[3] For the first time on appeal Rodriguez contends that the evidence had absolutely no relevance to the second filed charge for conspiracy to deliver cocaine. We do not consider this claim or his attempt to divide the evidentiary decision.

value. Evidence of flight or absconding has probative value as to guilt as evidence of consciousness of guilt. ***State v. Miller***, 231 Wis. 2d 447, 460, 605 N.W.2d 567 (Ct. App. 1999). There is no suggestion that the evidence was inadmissible because Rodriguez's failure to appear was for an independent reason that could not be explained to the jury. *See* ***id.*** Evidence of the amount of the bond was probative of the seriousness of Rodriguez's flight. The trial court properly exercised its discretion in determining the evidence was relevant.

¶8 We next consider whether the probative value was outweighed by the danger of unfair prejudice. The balancing test favors admissibility. ***Lievrouw v. Roth***, 157 Wis. 2d 332, 349-50, 459 N.W.2d 850 (Ct. App. 1990). "Unfair prejudice does not mean damage to a party's cause.... Rather, unfair prejudice results where the proffered evidence, if introduced, would have a tendency to influence the outcome by improper means...." ***State v. Mordica***, 168 Wis. 2d 593, 605, 484 N.W.2d 352 (Ct. App. 1992).

¶9 Rodriguez claims that the evidence, and particularly evidence of the amount of the cash bond, was highly prejudicial by suggesting that he was a drug dealer capable of posting such a large amount of cash and willing to forfeit it. The prosecution did not make that argument to the jury. There was no indication that the bond was posted by Rodriguez personally. Further, the prosecution referred to the evidence only as bearing on consciousness of guilt and never asked the jury to infer that Rodriguez was a drug dealer because he was able to post the $50,000 bond. It was Rodriguez's burden to show that the probative value of the evidence was substantially outweighed by unfair prejudice. ***State v. Speer***, 176 Wis. 2d 1101, 1114, 501 N.W.2d 429 (1993). He failed to meet that burden. The trial court properly exercised its discretion in admitting the evidence.

¶10 We turn to consider whether Rodriguez was denied the effective assistance of trial counsel. The two-pronged test for ineffective assistance of counsel is deficient performance of counsel and prejudice to the defendant. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); ***State v. Pitsch***, 124 Wis. 2d 628, 633, 369 N.W.2d 711 (1985). The test for the performance prong is whether counsel's assistance was reasonable under the facts of the particular case, viewed as of the time of counsel's conduct. ***Pitsch***, 124 Wis. 2d at 636-37. Under the second prong of the test, the question is whether counsel's errors were so serious that the defendant was deprived of a fair trial and a reliable trial outcome. ***Id.*** at 640-41. An error is prejudicial if it undermines confidence in the outcome. ***Id.*** at 642.

¶11 Whether counsel's actions constitute ineffective assistance is a mixed question of law and fact. ***State v. Thiel***, 2003 WI 111, ¶21, 264 Wis. 2d 571, 665 N.W.2d 305. 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.*** However, whether counsel's conduct amounted to ineffective assistance is a question of law which we review de novo. ***Id.***

¶12 Two alibi witnesses testified at trial that they saw Rodriguez every day between the last days of August and September 1, 2000. One witness indicated that Rodriguez did not have a car. Jesse Vasquez testified at trial that he had obtained the cocaine from Rodriguez six to ten days before Vasquez's September 7, 2000 arrest. Rodriguez looks to September 1, 2000 as the critical date because upon his arrest, Vasquez's first statement to an agent was that the cocaine had been delivered six days earlier. From this Rodriguez argues that counsel failed to adequately investigate and prepare alibi witnesses to establish that Rodriguez could not have made the fourteen-hour round trip from

Bloomington, Indiana to Kenosha and delivered the cocaine to Vasquez on September 1, 2000. This claim intersects with his contention that trial counsel failed to impeach Vasquez with his first statement to an agent that the cocaine was transferred on September 1, 2000, and failed to subpoena the agent to whom the first statement was made.

¶13 The evidence did not single out September 1, 2000, as the only possible day the cocaine was delivered. The agent's report states that: "Vasquez stated that Vasquez received a kilogram of cocaine from Rodrigo Rodriguez 6 days prior to this date." What constitutes "this date" is not clear since the report discusses Vasquez's arrest and interview on September 7, 2000, but the report is dated September 8, 2000. Moreover, trial counsel indicated he was aware of the report but that he decided not to use it to try and narrow the delivery date to September 1, 2000, because counsel did not have a specific alibi for that day. Counsel made a sound strategy decision to not impeach Vasquez with the agent's report because even if successful in pinpointing September 1, 2000, as the delivery date, no alibi existed for that date. Counsel further explained that he didn't want alibi witnesses to focus on a single day because it might make their testimony appear contrived to match the day for which the alibi was needed. Counsel felt that alibi testimony for a range of possible days was more credible. We are not to second-guess trial counsel's selection of trial tactics or the exercise of professional judgment after weighing the alternatives. *See* ***State v. Felton***, 110 Wis. 2d 485, 502, 329 N.W.2d 161 (1983). Where, as here, a strategic decision is based upon rationality founded on the facts and law, counsel is not deficient. *See* ***id.***

¶14 Not even the offer of proof at the postconviction hearing suggested an alibi specifically for September 1, 2000. The offer of proof was that four of Rodriguez's friends would testify generally about their work hours and the habit of

playing basketball nightly with Rodriguez in a ten-day period between August 28 and September 6, 2000.[4] Rodriguez's postconviction testimony was similarly vague. He indicated he could not remember who he was with because his friends all worked different schedules. A defendant who alleges a failure to investigate on the part of his or her counsel must allege with specificity what the investigation would have revealed and how it would have altered the outcome of the case. *See* ***State v. Flynn***, 190 Wis. 2d 31, 48, 527 N.W.2d 343 (Ct. App. 1994). Rodriguez has not demonstrated anything beyond the general alibi presented at trial.

¶15 Rodriguez further faults trial counsel for not asking the two alibi witnesses presented at trial more specific questions in terms of dates, specific time frames of activities and who would have been present during those activities. He also generally faults counsel for not identifying and using other alibi witnesses. Trial counsel testified that he spoke with other potential alibi witnesses while investigating the alibi defense but that no one could specifically account for Rodriguez's whereabouts and activities during the relevant time period. Counsel noted that during their first meeting Rodriguez could not provide details on what the alibi would be. Counsel's performance is evaluated based on information counsel possessed at the time of representation. Rodriguez does not indicate he ever told counsel about other potential witnesses that counsel ignored. Further, as his offer of proof demonstrated, not one witness had detailed information pinpointing Rodriguez's whereabouts on each day during the relevant period.

[4] We summarily reject Rodriguez's contention that the trial court violated due process by not allowing alibi witnesses to give live testimony at the postconviction motion hearing. It was within the trial court's discretion to determine how the information would be conveyed. The critical step was that the information was communicated to the court and considered by it. The trial court did not prejudge the information to be incredible. Simply, the offer of proof was no more specific than the general alibi established at trial.

Counsel could not utilize information that did not exist. Counsel's performance was not deficient with respect to the investigation and presentation of the alibi defense.

¶16 Rodriguez next complains that trial counsel failed to object to improper closing argument by the prosecutor and, therefore, rendered ineffective assistance of counsel. He contends the prosecutor's comparison between the amount of evidence adduced in this case with the amount of evidence adduced in a typical drug case was objectionable because it referred to information not in evidence.[5] Trial counsel indicated that he did not object because the argument was not improper.

> The judicially established guideposts for a prosecutor's closing argument are basic. This court has said that counsel in closing argument should be allowed "considerable latitude," with discretion to be given to the trial court in determining the propriety of the argument. The prosecutor may "comment on the evidence, detail the evidence, argue from it to a conclusion and state that the evidence convinces him and should convince the jurors." ….

[5] In rebuttal closing argument the prosecutor stated in part:

> The State offered you three eyewitnesses to the fact that the defendant has been in an active agreement to sell cocaine through Jesse Vasquez, Anthony Turpin, and James Kennedy. There are many days where you would sit on a jury where one eyewitness would be all the State would provide you or maybe in our luckiest days two eyewitnesses would be here, the person it happened to and somebody across the street would see that crime happen to. In this case, the posture is there are three ….
>
> Now, you know, you heard counsel say the only man on the planet who knows about this transaction is Mr. Vasquez. I suggest to you three eyewitnesses came in here. That's better than the State does on virtually any day.

> The line between permissible and impermissible argument is thus drawn where the prosecutor goes beyond reasoning from the evidence to a conclusion of guilt and instead suggests that the jury arrive at a verdict by considering factors other than the evidence.

State v. Draize, 88 Wis. 2d 445, 454, 276 N.W.2d 784 (1979) (citations and quoted source omitted). The "invited reply" or "measured response" rule concerning prosecutorial comments also applies. *See* ***State v. Wolff***, 171 Wis. 2d 161, 168, 491 N.W.2d 498 (Ct. App. 1992).

¶17 We conclude that the prosecutor's argument was in fair response to the defense argument that Vasquez was the only witness. The defense also argued that the informants would say anything to help themselves. In fair response, the prosecutor sought to impress upon the jury that the prosecution had presented multiple eyewitnesses. The prosecutor was arguing that the case was stronger than cases where there was only one eyewitness. Rodriguez argues that this case is like ***State v. Smith***, 2003 WI App 234, ¶22-26, 268 Wis. 2d 138, 671 N.W.2d 854, where, because the jury's determination on credibility was critical and a close call, the prosecutor's closing argument referring to matters outside the evidence was prejudicial. Here the prosecutor's remarks stand in sharp contrast to the remarks in ***Smith***. The prosecutor did not refer to a "typical drug case" or to his own personal experience or knowledge of other cases. The comments did not invite the jury to arrive at the verdict by considering factors other than the evidence. Counsel was not deficient for not objecting to the rebuttal argument.

By the Court.—Judgments and order affirmed.

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