

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 21, 2007

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2007AP897-CR

Cir. Ct. No. 2005CF957

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TEROME A. THOMPSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Eau Claire County: WILLIAM M. GABLER, Judge. *Affirmed.*

Before Higginbotham, P.J., Lundsten and Bridge, JJ.

¶1 PER CURIAM. Terome Thompson appeals a judgment convicting him on eleven felony charges. He also appeals an order denying postconviction relief. Thompson contends that he is entitled to a new trial because the State

knowingly used perjured testimony to convict him, and he did not receive effective representation at sentencing. We affirm.

¶2 The State charged Thompson with eleven counts of unauthorized use of another's personal identification document, WIS. STAT. § 943.201(2)(a) (2005-06).¹ The complaint alleged that Thompson stole an ATM card belonging to his girlfriend, Marení Pinero, and used it eleven times to withdraw money from her bank account. At Thompson's jury trial, Pinero testified that Thompson took her card and used it without her knowledge. When asked how Thompson might have discovered the PIN he needed to use the card, Pinero testified that it was written on the envelope in which she kept the card. On cross-examination, Pinero first testified that there was no significance to the PIN, but then acknowledged that the number she chose, 0421, coincided with Thompson's April 21 (04/21) birth date. However, she denied ever giving Thompson the PIN.

¶3 Thompson testified that Pinero gave him the card with permission to use it, and with no limit on the amount he could spend. He also testified that he knew the PIN because of its connection to his birth date. He further explained that Pinero later concocted the theft allegation because she was jealous, or wished to conceal from her parents his permissive use of the card. The jury rejected the defense, and found Thompson guilty on all charges.

¶4 At the start of Thompson's sentencing hearing, the court heard Thompson's attorney's motion to withdraw. Counsel explained that, among other problems, Thompson had, in so many words, lied to him, and expected him to

¹ All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

present those lies to the court. Counsel added that he had “an ethical duty to be straight.” The circuit court denied counsel’s motion, and subsequently sentenced Thompson to eleven concurrent terms of 39 months of initial confinement and 36 months of extended supervision.

¶5 In a postconviction motion, Thompson alleged that he was convicted on the basis of perjured testimony from Pinero, citing a police report in which Pinero admitted that she had deliberately used Thompson’s birth date for her PIN, and had told him the number. He further alleged that the prosecutor must have known that Pinero was lying in her testimony. In a hearing on the motion, the prosecutor confirmed that she knew Pinero’s testimony conflicted with Pinero’s earlier statement to police, but said nothing because the prosecutor did not consider the inconsistency “necessarily essential or material.” The circuit court denied Thompson’s request for a new trial, concluding that the evidence was such that there was no reasonable likelihood of an acquittal even had Pinero testified consistently with her earlier statement.

¶6 In his postconviction motion, Thompson also moved for resentencing, alleging that counsel failed to provide effective representation at the sentencing hearing by making highly negative comments about Thompson in connection with counsel’s motion to withdraw. The court denied Thompson’s request for resentencing, noting that counsel had a duty to disclose his reasons for withdrawal under SCR 20:3.3, entitled “[C]andor toward the tribunal.” The court further concluded that Thompson suffered no prejudice because nothing counsel said contributed to the sentence. As noted, Thompson appeals the court’s ruling on both issues raised in his postconviction motion.

¶7 A defendant is entitled to a new trial when the conviction depends on evidence the prosecutor knew or should have known to be false. *See Napue v. Illinois*, 360 U.S. 264, 269-72 (1959). The test on appeal is whether there is a reasonable likelihood that the false testimony affected the verdict. *United States v. Agurs*, 427 U.S. 97, 103 (1976).

¶8 It is not reasonably likely that Pinero's testimony about her PIN affected the verdicts because her lack of credibility on the subject was obvious. On direct examination, Pinero denied that the PIN held any significance to her. Then, on cross-examination, she conceded that the PIN was the same as Thompson's birth date. It would have been obvious to the jury that the chances that her four-digit PIN just happened to match Thompson's birth date, rather than have no particular significance, were almost nil. With no apparent reason for her false testimony on direct other than to conceal the fact that Thompson already knew the PIN, no reasonable jury would have believed her assertion that she never gave the number to him.

¶9 Additionally, the evidence of Thompson's guilt was substantial whether Pinero gave him the PIN or if he obtained it by other means. Over three days, Thompson used Pinero's ATM card eleven times to obtain \$435, first emptying out the \$218 in Pinero's account, and then obtaining additional cash through overdrafts. At the time of the withdrawals, Pinero was caring for her one-month old twins, and had been off work for two and one-half months. Part of the money stolen was a gift from her aunt, and Pinero had given Thompson at least

\$135 just before the theft.² Nevertheless, according to Thompson, Pinero gave him the card so that he could go out without her and without limits on the amounts he could withdraw, an implausible story. Additionally, although Pinero had frequently given Thompson money in the past, she had never previously let Thompson use the card.

¶10 Furthermore, Thompson's credibility was weakened by his admission to ten prior convictions, his inability to remember how he spent the money he withdrew, and proof that he used the card several hours after the time he testified he returned it. In other words, an acquittal was not reasonably likely, even with the PIN issue resolved in Thompson's favor, given the other evidence against him and the weakness of his defense.

¶11 Thompson failed to show prejudice from counsel's explanation for his motion to withdraw. Here, the circuit court provided an extensive explanation for the sentence it imposed, including an itemized listing of aggravating factors. The court made no reference to counsel's comments, and only mentioned Thompson's honesty, which was the subject of those comments, in the context of Thompson's long criminal record and other past conduct. To the extent counsel's comments implied that Thompson was a liar, the circuit court indicated that it had already made that judgment based on Thompson's trial testimony.³ Additionally, the court declared at the postconviction hearing that counsel's comments had no effect on the sentence. Where, as here, the court expressly states that it did not

² Pinero testified that in addition to wire transfers shown to be \$135, she had given Thompson \$20 in cash the day he took the ATM card. Thompson denied receiving the \$20 cash gift.

³ The court described Thompson's testimony as "preposterous."

rely on the objectionable material for sentencing purposes, and the record of the proceeding indicates the same, any error in introducing or permitting the objectionable material is harmless. *See State v. Marsh*, 177 Wis. 2d 643, 653-55, 502 N.W.2d 899 (Ct. App. 1993). If an error is harmless, counsel's role in causing it cannot be deemed prejudicial. *See State v. Harvey*, 2002 WI 93, ¶41, 254 Wis. 2d 442, 647 N.W.2d 189 (test for harmless error essentially the same as test for prejudice on an ineffectiveness claim).

By the Court.—Judgment and order affirmed.

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

