COURT OF APPEALS
DECISION
DATED AND FILED

September 23, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP2995-CR **Cir. Ct. No. 2005CF324**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAVID MCALISTER, SR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Racine County: EMILY S. MUELLER, Judge. *Affirmed*.

Before Brown, C.J., Neubauer, P.J., and Snyder, J.

¶1 PER CURIAM. David McAlister, Sr., appeals from a judgment convicting him of one count each of attempted armed robbery with threat of force as a party to a crime, possession of a firearm by a felon, and armed robbery with

threat of force, and from an order denying his postconviction motion for a new trial. None of the issues McAlister raises persuades us. We affirm.

¶2 After a three-day trial, a jury found McAlister guilty of being involved in the robberies of a credit union and an auto title loan shop.[1] The bulk of the evidence tying him to the crimes came from two alleged accomplices, Alphonso Waters and Nathan Jefferson, to whom the State granted concessions in exchange for their testimony. The court sentenced McAlister to a total of twenty-five years' initial confinement and nine years' extended supervision.

¶3 Postconviction, McAlister moved for a new trial on grounds that the State did not fully disclose the terms of the agreement it struck with Waters and Jefferson and relied on Waters' allegedly perjured testimony; the real controversy was not fully tried because the jury was not presented alibi and other exculpatory evidence; and he received ineffective assistance of counsel. The trial court denied the motion after a hearing. Additional facts will be supplied as needed.

¶4 On appeal, McAlister again argues that he did not receive a fair trial because the State failed to fully disclose the terms of the agreements by which it granted concessions to Waters and Jefferson in exchange for their testimony. He contends that simply disclosing the agreements was insufficient because they were not reduced to writing; the jury was not told that they were "performance based"; and their terms were not disclosed to him until after Waters testified.

¶5 When the State relies on accomplice testimony, the defendant's right to a fair trial is protected as long as there is:

[1] It acquitted him of a grocery store robbery.

> (1) full disclosure of the terms of the agreements struck with the witnesses; (2) the opportunity for full cross-examination of those witnesses concerning the agreements and the effect of those agreements on the testimony of the witnesses; and (3) instructions cautioning the jury to carefully evaluate the weight and credibility of the testimony of such witnesses who have been induced by agreements with the state to testify against the defendant.

State v. Nerison, 136 Wis. 2d 37, 46, 401 N.W.2d 1 (1987) (citations omitted).

¶6 Waters testified at the end of the second day of trial. On cross-examination, he denied receiving consideration for his testimony and testified that "no one ever brought [him] anything about a deal." The next day, the court read to the jury the parties' joint stipulation as it pertained to Waters. The court informed the jury that the State agreed to reduce Waters' maximum potential sentence by either dismissing or reducing some charges and to recommend less prison time, and that the terms of the agreement were conveyed to Waters before he testified.

¶7 Jefferson testified next, and acknowledged an agreement with the State. At the close of testimony, the court instructed the jury to consider Waters' and Jefferson's testimony "with caution and great care," giving it whatever weight it merited, that they were given consideration for it, that they could be prosecuted for testifying untruthfully, and that the jury should consider whether receiving consideration affected the testimony. *See* WIS JI—CRIMINAL 300, 245 and 246.

¶8 The record does not bear out McAlister's claims. The trial court found that the defense was fully apprised of the terms of the agreement before trial. Defense counsel, Patrick Cafferty, confirmed that fact at the postconviction motion hearing. In addition, we know of no case law requiring such arrangements to be written. As McAlister also cites no legal authority for that proposition, we

need consider it no further. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992); *see also* WIS. STAT. RULE 809.19(1)(e) (2007-08).[2]

¶9 Likewise, the record does not support McAlister's claim that the consideration was "performance based." He cites CCAP notations indicating that plea offers were contingent upon Waters' and Jefferson's testimony, and speculates that the notations necessarily mean that the consideration hinged on the testimony's value to the State. His conjecture is not proof of the substance of the parties' agreement. Furthermore, cross-examination was vigorous. Waters' denial of having made a deal was balanced, if not cured, by the stipulation the court read into the record. Finally, the court gave the jury appropriate cautionary instructions. The ***Nerison*** test was easily met.

¶10 McAlister next asserts that the State relied on Waters' "perjured" testimony. He contends Waters falsely denied knowledge of a deal, and argues that the State knew the testimony was false and should have corrected it at the time instead of allowing the jury to "evaluate" it overnight and "develop an impression about the case." We disagree.

¶11 Cafferty testified at the postconviction hearing that he discussed Waters' unexpected testimony with the assistant district attorney and Waters' attorney. The ADA acknowledged the agreement and that it had been conveyed to Waters' attorney, but Waters' attorney was "very evasive" to Cafferty about the matter. Cafferty and the ADA agreed to put the joint stipulation on the record, a solution McAlister agreed was "like the State saying that Waters had lied."

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

¶12 McAlister has not shown, therefore, either that Waters' testimony was perjured or that the State relied on it. It is possible the deal was not presented to Waters, which could explain his attorney's evasiveness. Also, the record does not reflect that the State acted to capitalize on Waters' denial. The ADA worked with defense counsel to address the situation in a manner fair and reasonable to both parties. We fail to see how McAlister could have been prejudiced by the State essentially casting doubt on its own witness' testimony. We commend the trial court and the parties for their cooperative handling of the situation.

¶13 McAlister next argues that the real controversy was not fully tried because the jury did not hear testimony from alibi and exculpatory witnesses. He contends Lakecha Turner would have testified that they were Christmas shopping for three days over the time the credit union robbery occurred, and Janice Gillard, his aunt, would have testified that he was with her at a car dealership when the title loan shop robbery occurred, based on testimony they gave at his revocation hearing, well before the trial. He also contends that his niece, Monique McAlister, would have been an exculpatory witness because even her presence would have further discredited Waters' and Jefferson's testimony. Waters and Jefferson claim she took part in the two robberies. McAlister notes that she never was charged, however. Further, McAlister describes Monique as a five-foot-nine, heavyset, dark-skinned African-American, while robbery victims described the woman accomplice as slim, light-skinned, perhaps Hispanic, and about five feet tall.

¶14 We may order a new trial in the interest of justice if we conclude that the real controversy was not fully tried. ***State v. Von Loh***, 157 Wis. 2d 91, 102, 458 N.W.2d 556 (Ct. App. 1990); *see also* WIS. STAT. § 752.35. The real controversy is not fully tried when the jury was not given an opportunity to hear

important testimony bearing on an important issue in the case. ***State v. Schumacher***, 144 Wis. 2d 388, 400, 424 N.W.2d 672 (1988).

¶15 This is not such a case. The revocation hearing predated McAlister's trial by over a year and his postconviction motion hearing by three years. He did not produce Turner or Gillard at the postconviction hearing or even offer affidavits from them. Accordingly, there is no testimony as to what they would have said or that they would be available and willing to testify should McAlister be granted a new trial, depriving the trial court of any opportunity to assess their credibility. This is insufficient. *See* ***State v. McConnohie***, 113 Wis. 2d 362, 374-75, 334 N.W.2d 903 (1983).

¶16 As to Monique, whether or not she actually was involved in the heists was not central to McAlister's case. Waters had testified that McAlister called him "[b]asically whenever I got off work" with robberies already planned "and we'd go from there." Conceivably, the jury could have thought Waters, an admitted crack cocaine addict, misremembered which robbery Monique was involved in. Her participation does not go to whether the real controversy—McAlister's participation—was fully tried. In addition, the jury heard varying descriptions of Monique, which defense counsel emphasized in closing arguments, so it cannot be said that evidence was withheld from the jury.

¶17 McAlister also asserts that defense counsel's failure to present these witnesses at trial constitutes ineffective assistance. We again disagree. To establish ineffective assistance, McAlister must show that trial counsel's representation was deficient and that the deficiency prejudiced him. *See* ***State v. Erickson***, 227 Wis. 2d 758, 768, 596 N.W.2d 749 (1999). To prove deficient performance, McAlister must show that specific acts or omissions of counsel fell

"outside the wide range of professionally competent assistance." *See* ***Strickland v. Washington***, 466 U.S. 668, 690 (1984). We will strongly presume that counsel rendered adequate assistance and a challenge will fail if, in light of the particular facts viewed at the time of counsel's conduct, we conclude counsel's conduct was reasonable. ***State v. Pote***, 2003 WI App 31, ¶15, 260 Wis. 2d 426, 659 N.W.2d 82. To prove prejudice, a defendant must show that the errors "had an actual, adverse effect." ***Id.***, ¶16. We need not address both components if there is an insufficient showing on one. *See* ***Strickland***, 466 U.S. at 697.

¶18 Cafferty testified why he opted not to call Turner, Gillard or Monique. He grew "extremely cautious" about McAlister's alibi witnesses after learning that some may have lied at the revocation hearing. Turner's criminal history included multiple fraud-type felonies and, currently incarcerated, she would have appeared in prison garb. He also thought the Christmas shopping alibi was "really lame" and that Gillard's alibi was too limited. Finally, he found Monique "very nervous [and] difficult to keep on track" due to her concern about being implicated in the robberies. She struck him as a "very high-risk witness" since he already had numerous ways to discredit Waters' and Jefferson's testimony. Not calling the alibi witnesses McAlister wanted in lieu of other more reliable fact witnesses was a reasonable trial strategy. We will not second-guess counsel's exercise of professional judgment after weighing the alternatives. ***State v. Felton***, 110 Wis. 2d 485, 502, 329 N.W.2d 161 (1983).

¶19 McAlister next argues that the evidence was insufficient to convict him. Evidence is insufficient to support a conviction only if, when viewed most favorably to the State, the evidence "is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could

have found guilt beyond a reasonable doubt." ***State v. Booker***, 2006 WI 79, ¶22, 292 Wis. 2d 43, 717 N.W.2d 676 (citation omitted).

¶20 Waters and Jefferson testified that McAlister planned the robberies and provided the gun and a car. Waters testified that the car was either a gray Hyundai or Honda; Jefferson testified it was a gray Hyundai. Both identified Exhibit 11 as a gun similar to the one McAlister supplied. Waters', Jefferson's and the victims' descriptions of the sequence of events during the robberies generally corresponded.

¶21 Credibility determinations and the weight of the evidence are for the trier of fact. ***State v. Poellinger***, 153 Wis. 2d 493, 504, 451 N.W.2d 752 (1990). We accept McAlister's argument that Waters' and Jefferson's testimony might have supported other inferences. Nonetheless, we must adopt all reasonable inferences which support the jury's verdict. ***Id.*** It is allowable for the jury to believe some of one witness' testimony and some of another's even if, read as a whole, their testimony is inconsistent. ***State v. Toy***, 125 Wis. 2d 216, 222, 371 N.W.2d 386 (Ct. App. 1985). We conclude that the jury, acting reasonably, could have been convinced of McAlister's guilt beyond a reasonable doubt by evidence it had a right to believe and accept as true. *See* ***Poellinger***, 153 Wis. 2d at 503-04.

¶22 The last issue is whether the trial court erred in refusing to give the *falsus in uno* instruction, WIS JI—CRIMINAL 305.[3] The instruction may be given if

[3] WIS JI—CRIMINAL 305 provides:

> If you become satisfied from the evidence that any witness has willfully testified falsely as to any material fact, you may disregard all the testimony of the witness which is not supported by other credible evidence in the case.

the false testimony is willful and intentional and is on a material point. ***State v. Robinson***, 145 Wis. 2d 273, 281, 426 N.W.2d 606 (Ct. App. 1988). The trial court has great latitude in determining which jury instructions to give. ***State v. Laxton***, 2002 WI 82, ¶29, 254 Wis. 2d 185, 647 N.W.2d 784. We will reverse and order a new trial only if the instructions, as a whole, misled the jury or communicated an incorrect statement of law. ***Id.***

¶23 McAlister requested the instruction on the basis that Waters' and Jefferson's testimony was willfully untrue. Besides Waters asserting he had no deal with the State, McAlister also notes the pair testified that they were not aggressive or violent, whereas the victims testified that the robbers kicked and shoved them and pulled their hair. The court declined the request and instead gave instructions on witness credibility, accomplice testimony and testimony of witnesses granted concessions. *See* WIS JI—CRIMINAL 300, 245 and 246. In making its ruling, the court expressly stated that it would permit the defense to argue that the jury could disregard Waters' and Jefferson's testimony.

¶24 How roughly Waters and Jefferson treated the robbery victims is not a material point. We accord "much weight" to the trial court's determination that it was for the jury to resolve inconsistencies and determine witness credibility, rather than a necessary basis for a *falsus in uno* instruction. *See* ***Robinson***, 145 Wis. 2d at 282. Moreover, that instruction is disfavored, *see* ***id.*** at 281, a point McAlister concedes. The three instructions given instead stated the law adequately and completely.

By the Court.—Judgment and order affirmed.

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