COURT OF APPEALS
DECISION
DATED AND FILED

June 22, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP1731-CR **Cir. Ct. No. 2007CF610**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LEROY M. GODARD,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Sheboygan County: GARY LANGHOFF, Judge. *Affirmed*.

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

¶1 BROWN, C.J. Leroy M. Godard appeals from his conviction of burglary on the grounds that his trial counsel was ineffective for failing to properly impeach key witnesses. Godard was convicted in a trial by jury where the evidence of his involvement in the crime came from the testimony of two accomplices. Part of the strategy by trial counsel was to claim that the

accomplices had a "deal" to testify because neither was prosecuted. On appeal, Godard faults his attorney for failing to listen to the recordings of the discussion between the police and the accomplices which, Godard claims, would have greatly strengthened this claim. This is because the police offered the accomplices a "golden ticket" or a "good possibility" of no charges in exchange for testifying. As did the trial court, we agree that counsel should have listened to the tapes and, had she done so, she likely would have used the recordings to supplement her claim. But assuming deficient representation, for reasons we will soon explain, we are satisfied that none of trial counsel's alleged deficiencies were prejudicial. We also deal with two related issues raised by Godard and affirm.

¶2 At trial, the State presented evidence from five witnesses—two employees of the business that was burglarized, an officer who worked on the case, and two people who had confessed to being at least minimally involved in the crime, Jonathan Oyler and Tori Mason. The only evidence identifying Godard as a participant in the burglary came from Oyler and Mason.

¶3 Oyler testified that sometime in July 2007 (when the burglary took place), he had driven Godard and another man, at their direction, to an unfamiliar place. He testified that they got out of the car, left his line of vision, and came back a few minutes later with a "big awkward box" that he was later able to see was a safe. They then got back into the vehicle with the safe and gave Oyler directions to Mason's house. Then, Mason testified that she met all three men in her garage, where she saw a safe on top of her freezer. She said that all three men were trying to get into the safe. She testified that she did not see who opened the safe, but she did see its contents after it was opened. The officer who interviewed Mason confirmed that they did find the safe and some of its contents in Mason's garage.

¶4 Prior to trial, defense counsel was given written summaries of the interrogations in which Oyler and Mason first implicated Godard. Although the summaries of Mason's and Oyler's interrogations indicated that there were also recordings with more information, defense counsel never requested those recordings. Even so, Godard's trial counsel was able to bring out credibility issues with both Mason and Oyler.

¶5 During opening statements, Godard's counsel described Oyler as "an eleven-time convicted criminal" with "some self-interest here and you will find out he was never prosecuted for burglary or theft." She went on to describe Mason as "a convicted criminal" who "also has some self-interest here. She was not prosecuted with the burglary." Then, during testimony, Mason admitted that she had not been charged with a crime in this case and that she had been convicted of one crime in the past, but asserted that she was telling the truth that day. Oyler, like Mason, testified that he was not charged with a crime related to the burglary and that he had been convicted of eleven crimes in the past, but that he was telling the truth that day. During closing arguments, Godard's trial counsel asserted that Oyler "probably got a deal. He wasn't prosecuted in this case.… I say to you he got a deal."

¶6 Not surprisingly, the State used its closing to argue that Mason and Oyler were both credible witnesses, in part because their stories were self-incriminating:

> I assert to you what [Mason] is saying is not inaccurate. Why would she make statements to grant herself negative repercussions?
>
> ….

> [Oyler] also made statements that impinged on his guilt in the case. Why would he make those statements that would impact himself if they're not true?

The State summarized:

> Their statements impact themselves. In essence, they came forth and made statements of their own guilt from these cases. I would assert when a person is willing to do that, their statements certainly are consistent and truthful.

¶7 Recordings of Mason's and Oyler's interrogations both contained information that was not included in the officer's summary or brought out at trial. In particular, the recording of Mason showed that she initially denied knowing who was involved and only implicated Godard after being told by police that telling everything she knew would be her "golden ticket." The recording of Oyler revealed similar information: Oyler confessed after being told that the officer was not "looking to arrest" and that if Oyler was "a hundred percent honest … there's a good possibility you're going to walk out of this without any charges." In addition, Oyler testified at trial that he was not using drugs at the time of the burglary, but in his interview he admitted that he may have been "fucked up." Notes from Oyler's probation file confirm that he also indicated to his agent that he may have been using cocaine around the time of the burglary.

¶8 Postconviction, Godard alleged that his trial counsel was ineffective for failing to obtain the recordings and investigate Oyler's probation file. At his postconviction motion hearing, Godard's trial counsel testified that she had never obtained the recordings of Mason's and Oyler's interrogations and had "no idea what was in the audio recording." Oyler's probation agent testified that there was no record of Godard's trial counsel looking at Oyler's probation file either. However, while both Mason and Oyler were promised a "golden ticket" or a "good possibility" of no charges by the interrogating officer, there is no evidence

that either one received a formal deal with the prosecutor in exchange for testimony against Godard.

¶9 Godard's only claim on appeal is that his trial counsel was ineffective. A criminal defendant asserting ineffective assistance of trial counsel must prove that trial counsel's performance was deficient and that he suffered prejudice as a result of the deficient performance. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); *see also* ***State v. McGuire***, 2010 WI 91, ¶65, 328 Wis. 2d 289, 786 N.W.2d 227, *cert. denied*, 131 S. Ct. 832 (2010). For this claim, we are bound by the trial court's findings of fact unless they are clearly erroneous. ***State v. Koller***, 2001 WI App 253, ¶10, 248 Wis. 2d 259, 635 N.W.2d 838. Then, we review de novo whether the facts of the case show that the defendant has proven deficient performance and prejudice. ***Id.***

¶10 In this case, the trial court found that "trial counsel likely could have done a better job attacking the credibility of Oyler," and that Mason's testimony was "crucial to the State's case" because it "torpedoed the theory of the defense." The trial court also stated that Mason was not an accomplice to the burglary. We disagree with the trial court as to Mason's status as an accomplice—according to her own testimony, she was present when three men tried to break into a safe and she even helped them by going into her house "to find something to open it." With that level of involvement, she was vulnerable to prosecution. *See* WIS. STAT. § 939.05(2)(b) (2009-10).[1] Other than that fact, though, we accept the trial court's

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

findings because they are supported by the record, and we use them to frame our analysis. *See* ***Koller***, 248 Wis. 2d 259, ¶10.

¶11 At the trial level, the State conceded that it was deficient performance for trial counsel not to obtain and review the recordings of the interrogations. *See generally* ***State v. Thiel***, 2003 WI 111, ¶¶37-38, 264 Wis. 2d 571, 665 N.W.2d 305 ("We can perceive no strategic or tactical advantage for a criminal defense attorney not to read discovery provided by the prosecution that may yield exculpatory evidence."). Though the State reminds us on appeal that we are not bound by the State's concessions at trial, it does not argue that this was not deficient performance.

¶12 The real issue in this case, as both parties acknowledge, is whether trial counsel's deficient performance was prejudicial.[2] Godard argues that if his trial attorney had known about the interrogating officer's "golden ticket" statements, she could have used that information to impeach both of the accomplice witnesses' testimony more effectively. He acknowledges that the deal came from the police, not prosecutors, but asserts that whether the deal was legally enforceable is "not the issue." Indeed, in ***State v. Delgado***, 194 Wis. 2d 737, 753, 535 N.W.2d 450 (Ct. App. 1995), we pointed out that "what tells, of course, is not the actual existence of a deal but the witness' belief or disbelief that a deal exists." (Quoting ***U.S. v. Onori***, 535 F.2d 938, 945 (5th Cir. 1976)). Godard complains that "[b]ecause of trial counsel's deficient performance the [S]tate was able to

[2] "Under the two-pronged test that underlies the claim of ineffective assistance of counsel, we need not address both the performance and the prejudice elements, if the defendant cannot make a sufficient showing as to one or the other element." ***State v. Mayo***, 2007 WI 78, ¶61, 301 Wis. 2d 642, 734 N.W.2d 115. Because we find no prejudice in this case, we will not address whether trial counsel's performance was deficient.

present Mason and Oyler as good Samaritans, with nothing to gain from their testimony and everything to lose."

¶13 We disagree with Godard's assessment. Because of Godard's thorough postconviction motion hearing, we have a good idea what would have happened if Godard's attorney had asked the witnesses whether they had a deal. When asked at the postconviction hearing, Mason testified that it was her understanding that she would not get into trouble for testifying as to her involvement in the burglary. She also testified that the understanding was based on a conversation with someone from the district attorney's office. However, when the prosecutor asked her whether she knew "who the district attorney's office [was]," she answered "[n]o, not completely." Godard's attorney later clarified that the district attorney's office had told him it had no formal deal with Mason, and he was "not asserting today that [the State's] been untruthful with me."

¶14 Then, the following exchange took place between Godard's postconviction counsel and Oyler:

> DEFENSE COUNSEL: Do you remember [the officer] telling you things like that, that he wasn't going to charge you?
>
> OYLER: I do.
>
> DEFENSE COUNSEL: And the fact that he told you he wasn't going to charge you, that's one of the reasons you were telling him these things about Mr. Godard; right?
>
> OYLER: I guess the reason I was telling him these things was because I was trying to be honest and cooperate with [the officer].
>
> DEFENSE COUNSEL: Okay. You also were worried about not getting charged while you were on probation for a burglary; right?

> ….
>
> OYLER: That's fair to say.
>
> DEFENSE COUNSEL: And isn't it true, Mr. Oyler, that if you admitted to [the officer] that you knowingly were the get-away driver and you helped open that safe, at the minimum your probation probably would have been revoked; right?
>
> OYLER: I believe that if I told the truth, that would—what [the officer] was offering me would have held true.

In other words, when asked specifically about his motives for testifying in light of the promises made by police, Oyler maintained that his testimony was truthful.

¶15 The postconviction motion hearing testimony shows that Godard's case was not weakened without the line of questioning from the recordings. At trial, Godard was able to show the jury that two accomplice witnesses, both of whom had criminal records, had not been charged based on their own involvement in the crime for which Godard was charged. His attorney was then able to argue that Oyler in particular "probably had a deal." The State, meanwhile, was able to emphasize that it would not make sense for the witnesses to lie because they were implicating themselves, too. On the other hand, if Godard's attorney had used the interview recordings to ask more questions about the officer's "golden ticket" comments, Godard and the jury would have learned that while promises were made by the police, there was never an enforceable deal between the district attorney's office and either witness. Godard's attorney could not have argued that either witness "got a deal," but the State still would have been able to use the same argument as to the credibility of their testimony. Arguably, then, a line of questioning about the "golden ticket" comments and a possible deal would have

strengthened the State's case, not Godard's.[3] We certainly cannot say it was prejudicial.

¶16 Godard also argues that if his trial counsel had listened to the recording of Oyler's interrogation, she could have more effectively cross examined him as to his possible drug use at the time of the burglary. During his interrogation, Oyler denied using drugs, but then admitted that he might have been "fucked up." At trial, Oyler maintained his denial of being under the influence at the time of the crime. We are not persuaded that this was prejudicial, either. Godard has not offered an explanation as to how Oyler's potential use of drugs may have impeded his ability to identify Godard, whom he had known since he was thirteen, as having participated in the burglary with him. And when defense counsel pointed out his poor memory and asked whether he had been under the influence at the time of the burglary, he admitted that he "may have had a couple of beers." There was ample evidence about the reliability of his memory of the events. We see no prejudice here.

¶17 Godard's final argument is that trial counsel's failure to request the accomplice testimony jury instruction, when considered alongside trial counsel's failure to listen to the recordings, was prejudicial. *See* ***State v. Thiel***, 264 Wis. 2d

[3] We note that Godard has not asserted that the police actively encouraged either Mason or Oyler to implicate Godard in particular. The State asserts that neither witness was ever encouraged "to provide anything but the truth in exchange for non-prosecution." Godard responds by pointing out that both witnesses lied to the police before the promises were made, but it is irrelevant whether the witnesses would have talked without a "deal." What is relevant to the jury is whether they were telling the truth, and Godard has not shown us that the jury would have had reason to believe that they were untruthful based on the promise of a "golden ticket" or a "good possibility" of no charges.

571, ¶59 ("prejudice should be assessed based on the cumulative effect of counsel's deficiencies"). That instruction, WIS JI—CRIMINAL 245, reads:

> You have heard testimony from (name accomplice) who stated that (he) (she) was involved in the crime charged against the defendant. You should consider this testimony with caution and great care, giving it the weight you believe it is entitled to receive. You should not base a verdict of guilty upon it alone, unless after consideration of all the evidence you are satisfied beyond a reasonable doubt that the defendant is guilty.

As the State points out, the jury was given a full cautionary instruction on the credibility of witnesses, which instructs the jury to consider witnesses' possible interests and prejudices.[4] *See* WIS JI—CRIMINAL 300. In addition, as we already discussed, the jury was made aware of the fact that both of the accomplices were involved in the crime and had not been charged. Even if it was error to omit the accomplice instruction, the error was not prejudicial on its own or in combination with the other alleged errors of trial counsel.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.

[4] The State also argues that the failure to give the instruction was not error because the accomplice testimony was sufficiently corroborated when the police found some of the safe's contents in Mason's home. We do not address that argument because we do not think the error, if any, was prejudicial.