COURT OF APPEALS
DECISION
DATED AND FILED

July 20, 2017

Diane M. Fremgen
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. 2016AP240 **Cir. Ct. No. 2013CF002365**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CLARENCE BENJAMIN TAYLOR,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: TIMOTHY G. DUGAN and ELLEN R. BROSTROM, Judges. *Affirm.*

Before Kloppenburg, P.J., Sherman and Blanchard, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. Clarence Taylor appeals a judgment of conviction for armed robbery as party to a crime and an order denying postconviction relief. Taylor contends that: (1) the circuit court erred by allowing testimony by an officer not listed on the State's amended witness list; (2) Taylor's trial counsel was ineffective by failing to object to part of the victim's testimony and part of the State's closing argument; and (3) the State made an improper closing argument that amounted to plain error. For the reasons set forth below, we reject these contentions. We affirm.

¶2 In May 2013, Taylor was arrested while walking near the scene of a crash of a vehicle suspected in a recent armed robbery. Three other men who were arrested at or near the scene of the crash were charged with armed robbery, and Taylor was charged with armed robbery as a party to the crime.

¶3 At Taylor's trial, the victim, C.D., testified to the following. Three men C.D. did not recognize forced their way into C.D.'s apartment and stole marijuana and money. Taylor had brought the marijuana to C.D.'s apartment earlier that day to sell to C.D.'s boyfriend, who was planning to resell it. The money in the apartment was intended as payment for the marijuana, but C.D. did not give the money to Taylor because she planned to let her boyfriend pay him. C.D. knew Taylor through her boyfriend, and Taylor had dated C.D.'s older sister. C.D. and Taylor were close, and she considered him family.

¶4 The State questioned C.D. about two different statements she gave to police as to the marijuana that was stolen from her apartment. In C.D.'s first interview with a police officer, C.D. stated that a man named "Brian" brought the marijuana to her apartment. In C.D.'s second interview, C.D. told the officer that Taylor brought the marijuana to her apartment for her boyfriend to purchase and

then resell. C.D. testified that she initially made up a person named "Brian" because she did not want to get anybody into trouble. C.D. explained that her sister then told her that Taylor had been arrested in connection with the robbery and that, because C.D. then "knew" Taylor was involved, she decided to be truthful with police as to Taylor's connection with the marijuana.

¶5 Taylor's co-defendant, James Golden, testified to the following. Taylor, Golden, and two other men went together to C.D.'s apartment to commit the robbery. Taylor told Golden where the money and the marijuana would be located inside the apartment. Golden and the two other men forced their way into C.D.'s apartment and stole the money and the marijuana while Taylor waited in the car. The four men fled in a red SUV. The SUV crashed into a tree, and Golden, Taylor, and one of the other men fled from the front of the vehicle.

¶6 Sergeant David Ligas testified to the following. Sgt. Ligas pursued an SUV that matched the description provided by a responding officer. The SUV fled, then crashed into a tree, and Sgt. Ligas observed two people run from the SUV and found a third inside the vehicle. Sgt. Ligas found firearms, money, and marijuana inside and near the vehicle.

¶7 The State then called Officer Matthew Claudio, who was listed on the State's first witness list but not its amended witness list. Taylor objected to the testimony on grounds that the State did not list Officer Claudio on its amended witness list, and thus the potential jurors were never asked, during voir dire, whether any of them knew Officer Claudio. The circuit court allowed the testimony. Officer Claudio testified that his vehicle was behind Sgt. Ligas's vehicle during the pursuit of the red SUV and that Officer Claudio observed three people run from the SUV after the crash. After Officer Claudio testified, the

circuit court offered to bring in the jury and ask whether any of them knew Officer Claudio, but defense counsel declined.

¶8 In closing arguments, the State posited that it would be easy to think that, because the victim was involved in drug dealing, "bad things happen. Who cares?" The State argued that the jury should not take a "[w]ho cares?" view, and pointed out that the children in the apartment, the neighbors in the community, and the police officers involved were all affected by the armed robbery, in addition to the individuals involved in drug activity. There was no objection to this argument.

¶9 The jury returned a guilty verdict. Taylor filed a postconviction motion arguing that his trial counsel was ineffective by failing to object to: (1) C.D.'s testimony that she "knew" Taylor was involved in the robbery; and (2) the State's closing argument. Taylor also argued that the State's closing argument amounted to plain error. The circuit court denied the motion without a hearing. Taylor appeals.

¶10 Taylor contends first that he is entitled to a new trial because the State violated the discovery statute by failing to list Officer Claudio on the State's amended witness list. *See* WIS. STAT. § 971.23(1)(d) (2015-16)[1] (requiring parties to submit written lists of witnesses). Taylor contends that the State failed to disclose Officer Claudio as a witness because it did not list Officer Claudio on its amended witness list. ***State v. Rice***, 2008 WI App 10, ¶14, 307 Wis. 2d 335, 743 N.W.2d 517 (2007) (first step in our review of a claim that the State violated discovery is whether the State failed to disclose required information). He

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

contends that the State's reason for failing to include Officer Claudio on its amended witness list—that the State did not decide to call Officer Claudio until after Sgt. Ligas did not testify to seeing three individuals flee the SUV, as the State had anticipated—was based on the State being unprepared for trial and thus was not good cause. *See* ***id.*** (second step in our review of a claim of a discovery violation is whether the State had good cause for the failure to disclose). Taylor contends that the testimony was not harmless because it was critical to the State's case to show that three men exited the vehicle after the crash. *See* ***id.*** (final step in our review is whether admission of evidence that should have been excluded was harmless). We agree with the State, however, that Taylor did not preserve this argument for review.

¶11 Following Officer Claudio's testimony, the circuit court noted that, at a sidebar, the defense had objected to the testimony because Officer Claudio was not on the State's amended witness list. The court noted that the State explained that it decided to call Officer Claudio after Sgt. Ligas testified that he saw only two people run from the SUV after the crash, because the State had expected Sgt. Ligas to testify that he saw three people run from the SUV. The court also noted that Officer Claudio had been on the State's original witness list, that the defense had Officer Claudio's name and report, and that there was no surprise to the defense. Defense counsel then clarified that the defense objection to Officer Claudio's testimony was solely that "the jury was never asked whether any of them actually knew Officer Matthew Claudio," because Officer Claudio was not identified to the potential jurors during voir dire. Defense counsel stated that he "agree[d] that this wasn't a surprise, so not on that grounds," but then clarified that the issue was "not a surprise to [the defense], but a surprise to the jurors. That's all." As stated above, after the court offered defense counsel the

opportunity to ask the jurors whether any of them knew Officer Claudio, defense counsel declined the offer.

¶12 On appeal, Taylor does not argue that Officer Claudio's testimony should have been excluded because the potential jurors were not asked during voir dire whether any of them knew Officer Claudio. Rather, Taylor now contends that the testimony should have been excluded because the State failed to disclose Officer Claudio as a potential witness by failing to list Officer Claudio on its amended witness list, without good cause for the failure to disclose. *See* ***Rice***, 307 Wis. 2d 335, ¶¶13-14 (if State violates discovery statute by failing to list a witness it intends to call at trial, and does not show good cause for the violation, the witness's testimony must be excluded).

¶13 We review de novo whether the State violated its discovery obligations and, if so, whether the State had good cause for the violation. ***Id.***, ¶14. However, to preserve a claim of circuit court error for review on appeal, a defendant must object with specificity sufficient for the circuit court to review and correct any error. *See* ***State v. Nielsen***, 2001 WI App 192, ¶11, 247 Wis. 2d 466, 634 N.W.2d 325. Here, the court stated on the record that it allowed Officer Claudio's testimony based on the State's explanation that the State had not intended to call Officer Claudio but then decided to call him after Sgt. Ligas did not testify as the State expected. The defense did not argue that the State's explanation established that the State had violated the discovery statute or that the State did not have good cause for the violation. Rather, the defense expressly limited its objection to Officer Claudio's testimony on grounds that it had not had the opportunity to voir dire the potential jurors as to whether any of them knew Officer Claudio. Based on the defense's specific objection, the court offered the defense the opportunity to voir dire the jury on that issue. Had the defense

objected on grounds of a violation of the discovery statute without good cause, the court could have addressed whether a violation occurred and whether the State had good cause for any violation, and then fashioned an appropriate remedy. By limiting the defense objection to the issue of whether the jury was asked about personal knowledge of Officer Claudio, Taylor forfeited his argument that the testimony should have been excluded because the State failed to list a witness it intended to call at trial without good cause for the violation. *See* ***Tatera v. FMC Corp.***, 2010 WI 90, ¶19 n.16, 328 Wis. 2d 320, 786 N.W.2d 810 ("Arguments raised for the first time on appeal are generally deemed forfeited.").

¶14 Taylor contends that he preserved the issue of whether the State violated WIS. STAT. § 971.23(1)(d) without good cause by objecting to Officer Claudio's testimony on grounds that Officer Claudio was not listed on the State's amended witness list. He asserts that his objection was specific and obvious from its context, because the only right to a written witness list is by statute. *See* ***State v. Agnello***, 226 Wis. 2d 164, 172-74, 593 N.W.2d 427 (1999) (party need only "object in such a way that the objection's words or context alert the court of its basis"). We disagree. Taylor did not argue in the circuit court that the court should exclude Officer Claudio's testimony as a sanction for the State's failure to list Officer Claudio on the State's amended witness list without good cause for the failure. *See* WIS. STAT. § 971.23(1)(d) and (7m) ("The court shall exclude any witness not listed or evidence not presented for inspection or copying required by this section, unless good cause is shown for failure to comply."). Instead, as we have explained, when the State told the court why it had not listed Officer Claudio as a witness on its amended witness list, the defense clarified that its objection was limited to not having had the opportunity to voir dire the potential jurors as to their

knowledge of Officer Claudio. Accordingly, Taylor has forfeited the argument he seeks to raise for the first time on appeal.

¶15 Moreover, were we to reach Taylor's argument that the State violated the requirement that it provide a written list of all witnesses it intended to call at trial, without good cause for the violation, we would reject that argument on the merits. Taylor argues that the State failed to list Officer Claudio on its amended witness list because it failed to adequately prepare for trial. He contends that, had the State adequately prepared, it would have known how Sgt. Ligas would testify and that it would need to call Officer Claudio. He cites ***Wold v. State***, 57 Wis. 2d 344, 350-51, 204 N.W.2d 482 (1973), for the proposition that "the failure of adequate preparation for trial should not constitute 'good cause ... shown for failure to comply'" with the discovery statute. (Quoting WIS. STAT. § 971.23(7m).) However, so far as the record reflects, it was not unreasonable for the State to expect that Sgt. Ligas would testify that he saw three individuals exit the SUV, in light of evidence that other officers on the scene reported witnessing three men flee the SUV. Thus, the record does not support the conclusion that the State intended to call Officer Claudio or reasonably should have anticipated the need for his testimony. *See* ***State v. Wille***, 2007 WI App 27, ¶¶36-38, 299 Wis. 2d 531, 728 N.W.2d 343 (question of whether State intended to call a witness not listed on its witness list embodies an objective standard of what a reasonable prosecutor would have known and done under the circumstances). Moreover, for the same reason, even if the State's failure to list Officer Claudio were a violation, the State showed good cause for the violation. *See* ***Rice***, 307 Wis. 2d 335, ¶¶16-18 (whether State had good cause is an objective question of whether the State acted in good faith and established a specific reason for failing to disclose).

¶16 Next, Taylor contends that he is entitled to a hearing on his claim of ineffective assistance of counsel. He contends that his trial counsel was ineffective by: (1) failing to object to C.D.'s testimony that she "knew" Taylor was involved with the armed robbery; and (2) failing to object to the State's closing argument.

¶17 If a postconviction motion alleges sufficient material facts that, if true, would entitle the defendant to relief, the circuit court must hold an evidentiary hearing on the motion. ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. "However, if the motion does not raise facts sufficient to entitle the movant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the circuit court has the discretion to grant or deny a hearing." ***Id.***

¶18 A claim of ineffective assistance of counsel must show that counsel's performance was deficient and that the deficient performance prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Counsel's performance is deficient if his or her conduct fell outside the wide range of professionally competent representation. ***Id.*** at 690. The deficiency prejudiced the defense if it deprived the defendant of a fair trial with a reliable result. ***Id.*** at 687. If a defendant makes an insufficient showing as to either deficient performance or prejudice, we need not address the other. ***State v. Mayo***, 2007 WI 78, ¶61, 301 Wis. 2d 642, 734 N.W.2d 115.

¶19 Taylor's first claim of ineffective assistance of counsel is that his trial counsel erred by failing to object to C.D.'s testimony that she "knew" Taylor was involved with the armed robbery based on information C.D. received from her sister. Taylor asserts that his counsel should have objected to C.D.'s testimony

that she "knew" Taylor was involved as inadmissible because it was not based on personal knowledge and because it was hearsay. *See* WIS. STAT. §§ 906.02 (lay witnesses must testify based on personal knowledge); 908.02 (hearsay not admissible). Taylor asserts that his counsel performed deficiently by failing to object to the inadmissible testimony when the failure to object served no strategic purpose. He contends that he was prejudiced by counsel's failure to object because, according to Taylor, C.D.'s testimony went to the ultimate issue of guilt. Taylor asserts that the key issue at trial was whether Taylor was involved in setting up the robbery and was in the SUV when it crashed, and that C.D.'s testimony that she "knew" Taylor was involved established that Taylor was directly involved in the robbery. We disagree with Taylor's reading of C.D.'s testimony.

¶20 The disputed testimony occurred in the context of the State questioning C.D. as to why she first told police that she obtained the marijuana from "Brian" and later told police that she obtained the marijuana from Taylor. As we have explained, C.D. took the position that, initially, she made up a person named "Brian" because she did not want to get anyone in trouble. The State then asked C.D. when she found out who was arrested in this matter. C.D. answered that her sister informed her that the sister had called Taylor and a police officer had answered and said that Taylor was being taken into custody. C.D. stated: "That's how I found out he had something to do with it." The State asked C.D. whether she had observed or identified the other people involved in this incident to the police. C.D. answered: "Yes, I had. Before [the officer] even had showed me a lineup or anything of them, my sister had Googled [Taylor's] name. She put his name in. And when his picture popped up, him and other suspects had popped up; and it had something to do with my incident." C.D. went on to explain: "So that's

how—when [the officer] called me in for the second time when [the officer] interviewed me, I had already told [the officer] like, yeah, [Taylor] has something to do with it."

¶21 The State asked C.D. whether she was holding back information or whether she trusted the officer at the second interview. C.D. answered: "I kind of started trusting [the officer] …. So I said … I'm just gonna tell the truth this time. So I went in with her to the second interview. And after I knew [Taylor] had something to do with it, that's when I told her everything." C.D. affirmed that it was during the second interview that she felt comfortable telling the whole truth. The State asked C.D.: "[W]hat specifically do you recall that was different about the second interview; what are the things that you finally came forward with?" C.D. answered: "I came forward with and told her who … the drugs belonged to, who were gonna be selling the drugs, and whose they was."

¶22 It is clear from C.D.'s testimony as a whole that when C.D. stated that she "knew" Taylor "had something to do with" the robbery, she meant only that she had learned that Taylor had been arrested in connection with this case. Read in context, C.D.'s statements were an explanation that C.D. first made up a person named "Brian" as the source of the marijuana, but decided to tell the truth that Taylor had supplied the marijuana after C.D. learned from her sister that Taylor had been arrested in connection with this case.

¶23 We conclude that, even if counsel performed deficiently by failing to object to C.D.'s testimony as inadmissible based on lack of personal knowledge or hearsay grounds, Taylor was not prejudiced by the jury hearing that testimony. As explained above, the only information conveyed to the jury by the disputed testimony was that Taylor had been arrested in connection with this case. The jury

learned the same from the arresting officer. Because the jury was informed through other testimony that Taylor was arrested in connection with this case, we discern no prejudice to the defense from C.D. testifying that she learned that Taylor had been arrested. Accordingly, Taylor has not shown he was deprived of the effective assistance of counsel by his counsel's failure to object to C.D.'s testimony.

¶24 Taylor's next claim of ineffective assistance of counsel is that his counsel erred by failing to object to the State's closing argument. Taylor contends that the State made an appeal to the jury to find Taylor guilty in order to send a message that the community would not tolerate these sorts of crimes. He argues that the State's argument was improper because it was meant to inflame the jury's emotions. *See* ***State v. Neuser***, 191 Wis. 2d 131, 136, 528 N.W.2d 49 (Ct. App 1995) ("The line between permissible and impermissible argument is drawn where the prosecutor goes beyond reasoning from the evidence and suggests that the jury should arrive at a verdict by considering factors other than the evidence."). Taylor contends that the State improperly called upon the jury to find Taylor guilty not based on whether Taylor was involved with the armed robbery but because of the impact the armed robbery had on "the children in the apartment"; "the neighbors in that apartment building"; "the officers"; "all the innocent people who are just living their lives in those residential neighborhoods"; and "the kids who are out on the street finishing up a celebration who had just been to prom." We are not persuaded.

¶25 We conclude that the State did not argue that the jury should find Taylor guilty even if it was not convinced that Taylor was involved in the armed robbery. Rather, the State argued that the jury should not find Taylor not guilty based on any possible negative feelings about the victim.

¶26 The State argued first that the evidence at trial had proved that Taylor organized the armed robbery and that he was in the SUV when it crashed. The State then posited that it would be "an easy argument to make" that the jury should disregard that evidence and find Taylor not guilty anyway because: "[S]o what? Drug dealer gets robbed, the drug dealer's selling out in our community, selling drugs to kids and whoever else wants it, and it's illegal and violent, and bad things happen. Who cares?" The State argued that such reasoning was "a very narrow view of what happened that night and how our community was impacted by this crime." The State described how other people were affected by the crime—children, officers, neighbors—and then argued that: "This is the kind of crime that has a big picture impact ... and that's why it's so important." The State then argued that the elements of the crime did not include anything about C.D., but rather: "This trial is all about the defendant, his actions, and accountability. Holding him responsible for the decisions that he made, the information he provided to facilitate this crime, and made it happen."

¶27 Thus, the State described the impact of the armed robbery on the community to attempt to dissuade the jury from disregarding the crime merely because the victim was involved in drug dealing. The State specifically argued that the jury should find Taylor guilty based on the evidence establishing his involvement in the armed robbery, not based on any other factors. We discern nothing improper about the State's closing argument. Accordingly, Taylor's counsel did not perform deficiently by failing to object.

¶28 Finally, Taylor contends that the State's closing argument set forth above amounted to plain error. *See* ***State v. Lammers***, 2009 WI App 136, ¶12, 321 Wis. 2d 376, 773 N.W.2d 463 ("Plain error is 'error so fundamental that a new trial or other relief must be granted even though the action was not objected

to at the time.'" (quoted source omitted)). Because we have concluded that the State's closing argument was not improper, we reject Taylor's plain error argument.

By the Court.—Judgment and order affirmed.

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