COURT OF APPEALS
DECISION
DATED AND FILED

February 25, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP1445-CR **Cir. Ct. No. 2012CF256**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

XAVIER D. ANDERSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: CHARLES F. KAHN, Judge. *Affirmed*.

Before Curley, P.J., Fine and Kessler, JJ.

¶1 PER CURIAM. Xavier D. Anderson appeals from a judgment, entered upon a jury's verdicts, on one count of first-degree reckless injury and one

count of possession of a firearm by a felon.[1] Anderson contends it was error for the trial court to allow the State to reopen its case to introduce additional evidence after both it and Anderson had rested. He also contends that trial counsel was ineffective for not making an objection on that ground. We conclude that the trial court did not erroneously exercise its discretion when it allowed the State to present additional evidence and that trial counsel was not ineffective. Therefore, we affirm the judgment and order.

¶2 According to the trial testimony of witness Brandy Harlow, on January 14, 2012, there was a knock at her door. She looked through the peephole and saw Anderson, whom she called "Zay." Harlow knew Anderson because her boyfriend, Andrew Boan, had done a few tattoos on him, and Anderson had been at her home every day or every other day for approximately six months prior to this date. Harlow opened the door and Anderson asked whether Boan was home. Harlow responded that he was asleep upstairs. Anderson muttered something and Harlow closed the door.

¶3 After she walked back to the kitchen, Harlow heard another knock. Again, she saw Anderson through the peephole. When she opened the door, a second man came in with a gun, asking for "Drew." Anderson was behind the unknown man when Harlow opened the door, and she saw Anderson pulling a mask down over his face. The unknown man was unmasked.

[1] According to the information, Anderson was charged with first-degree reckless injury, while armed with a dangerous weapon, as party to a crime, and as a repeater, along with possession of a firearm by a felon as a repeater. The judgment of conviction—already amended once because it referenced an incorrect crime of conviction—does not reflect any of the modifiers as listed in the information. However, we leave any modifications, if necessary, to the circuit court upon remittitur. *See* ***State v. Prihoda***, 2000 WI 123, ¶¶26-27, 239 Wis. 2d 244, 618 N.W.2d 857.

¶4 As Harlow was reacting, turning to protect her young son and daughter, she heard two guns go off. When the men left, she went to find Boan and discovered he had been shot in the leg. Harlow started "freaking out" and called 911. She testified she was "100 percent absolutely positive" Anderson was involved. In addition, Anderson's girlfriend, Heaven Zollicoffer-Spinks, told police that Anderson called her in the afternoon of January 14, 2012, and told her that he had shot someone in the leg.

¶5 The defense theory was misidentification. Anderson called one witness, a detective who took Boan's statement. The detective relayed that Boan was unable to identify the masked individual who shot him. Ultimately, the jury convicted Anderson of first-degree reckless injury while armed with a dangerous weapon and possession of a firearm by a felon. The trial court sentenced him to sixteen years' imprisonment for the reckless injury, and a consecutive five years' imprisonment for the possession.

¶6 The main issue in this appeal stems from the testimony of Officer Matthew Bell, who was called during the State's case. On cross-examination, Anderson asked him about a computer-automated dispatch report, or CAD, which the question described as "generated by somebody who is receiving a 911 call, a dispatcher[.]" The cross-examination explored the fact that an entry on the report identifying the shooter as "Zay" was recorded approximately eight minutes after the call originated:

> Q It appears from this CAD that the information about the identity of that someone wasn't provided until the police arrived.
>
> A It's hard to exactly tell.… By no means is that an exact replication of what was said when the person called 911.

> Q It may not be a word-for-word replication, but those important details, including the description and identity of the suspect, those are important, correct?
>
> A Yes.
>
> Q And those are given to the officers as quickly as possible who are responding to that scene?
>
> A Yes, that's what the dispatch tries to do.
>
> Q And we don't have that 911 recording to review and see exactly what's said?
>
> A No.

This ended the cross-examination.

¶7 Following redirect examination, one of the jurors submitted a question. The trial court held a conference in chambers and, when the parties returned to the courtroom, the trial court asked Bell what appears to be the juror's question: "Officer, do you know if there is a recording of the 911 call?"[2] Bell answered, "As with all calls, there is a recording. I am not sure how long that they keep the recording before they purge it from the history."

¶8 Bell's answer prompted follow-up questions from the trial court.

> THE COURT: So this would be held by the Milwaukee Police Department?
>
> [BELL]: Yes. The recording can be accessed for a certain amount of time is my understanding.
>
> THE COURT: When did this call come in, what date?
>
> [BELL]: It came in on January 14, 2012.

[2] The in-chambers conference does not appear to have been memorialized in the transcript, nor does the juror's written question appear to have been included in the record.

> THE COURT: And it's now April 2. Do you know if it would still be in existence?
>
> [BELL]: Sir, I would hate to speculate. I would possibly say it might, but I am not an expert with that.

The State rested after Bell's testimony. Anderson called his single witness, whose examination was finished before the end of the day. After the jury was excused, Anderson asked to be allowed until the following morning to decide whether to rest because he was going to attempt to get a copy of the 911 call to review.

¶9 The next morning, the State asked the trial court for permission to reopen its case to introduce the recording of the 911 call, which Bell had obtained overnight. Anderson objected to admission of the tape on multiple grounds, including discovery and hearsay violations, but he did not specifically object to the State reopening its case. The State explained that it had not intended to introduce the recording but it was made relevant by Anderson's cross-examination.

¶10 The trial court permitted the State to reopen its case and present the recording by recalling Officer Bell. The trial court explained, in response to defense counsel's claim that he did not know the recording was available until he received the CAD, that defense counsel should have known that 911 calls are routinely recorded and accessible, and that he could have demanded its production in discovery or possibly by open records request if he wanted to review it earlier. The trial court further pointed out that defense counsel had provided no law requiring the State to disclose non-exculpatory statements it had no intention of introducing. The trial court noted that the recording was relevant, raised by defense counsel in cross-examination and requested by the jury. It opined that playing the recording was a matter of fairness to both parties in the "search for the truth." Anderson then moved for a mistrial, which was denied.

¶11 As noted, the jury convicted Anderson. He filed a postconviction motion, challenging the trial court's decision to let the State reopen its case and claiming ineffective assistance of trial counsel. The trial court rejected the challenges and denied the request for a new trial. Anderson appeals.

¶12 Whether to allow a party to reopen its original case rather than present a rebuttal is within the trial court's discretion. *See* WIS. STAT. § 972.10(3) (2011-12);[3] *see also* ***State v. Hayes***, 2004 WI 80, ¶19, 273 Wis. 2d 1, 681 N.W.2d 203; ***State v. Harvey***, 2001 WI App 59, ¶10, 242 Wis. 2d 189, 625 N.W.2d 892. This particular discretionary decision is grounded in concepts of equity and justice. *See* ***State v. Hanson***, 85 Wis. 2d 233, 237, 270 N.W.2d 212 (1978); ***State v. Vodnik***, 35 Wis. 2d 741, 746, 151 N.W.2d 721 (1967). We review the trial court's discretion decision for an erroneous exercise of that discretion. *See* ***State v. Avery***, 2013 WI 13, ¶23, 345 Wis. 2d 407, 826 N.W.2d 60.

¶13 On appeal, Anderson challenges the trial court's exercise of discretion in numerous ways. He contends that the trial court's decision to let the State reopen its case "ignores the fact … that the question relating to its existence was asked by the court and not by the defense.… [T]he defense cannot in any way be said to have questioned the existence of the 911 call and to thereby have opened the door for the admission of the 911 call audio." He also asserts that his cross-examination of Bell did not open the door for the recording because his questions "concerned primarily … the timing of the identification of the defendant some eight minutes after the call itself, as revealed by the CAD printout."

[3] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

¶14 Anderson appears to believe the jury's question, asked by the trial court, about whether Bell "know[s] if there is a recording of the 911 call" is the first time the recording's existence is questioned. It is not. The first question asking Bell about the recording's existence was Anderson's question, "And we don't have that 911 recording to review and see exactly what's said?" Indeed, this question appears to be what prompted the jury to inquire whether Bell knew if a recording existed at all. Accordingly, we reject any argument that Anderson did not open the door to admission of the recording.

¶15 Relying on ***United States v. Peterson***, 233 F.3d 101 (1st Cir. 2000), Anderson also argues that "there is no indication that the court gave due consideration, (or, indeed, any consideration), to the question of disruption or prejudice that could result from the admission of this tape … which had and could have had no other purpose than to demonstrate for the jury the emotional state of the caller[.]" Thus, he claims that "[h]ad the court carried out the required analysis, it would have had to conclude that the State did not have a reasonable excuse for failing to present the 911 call audio during its case in chief[.]" However, our review of the trial court's decision satisfies us that it properly exercised its discretion in letting the State reopen its case.

¶16 In ***Peterson***, the First Circuit explained that a trial court, asked to allow a party to reopen its case, "must consider whether the likely value of the [evidence] outweighs the potential for disruption or prejudice[.]" ***Id.*** at 106. The First Circuit approved of several factors to be used in that consideration, as previously enumerated by the Fifth Circuit. Those factors include:

> "the timeliness of the motion, the character of the testimony, and the effect of the granting of the motion. The party moving to reopen should provide a reasonable explanation for failure to present the evidence in its case-

> in-chief. The evidence proffered should be relevant, admissible, technically adequate, and helpful to the jury in ascertaining the guilt or innocence of the accused. The belated receipt of such testimony should not imbue the evidence with distorted importance, prejudice the opposing party's case, or preclude an adversary from having an adequate opportunity to meet the additional evidence offered."

Id. (citing ***United States v. Walker***, 772 F.2d 1172, 1177 (5th Cir. 1985)).

¶17 Here, the trial court noted that the State's request was timely, "like one hour in court case time … but really overnight, the very next morning, immediately" the State had obtained the recording. The trial court considered the character of the testimony and its effect, explaining, "I am not talking about necessarily giving the jury what they want because they want it but, rather, because it's fair overall in our search for the truth, and it certainly respects Mr. Anderson's right to have the jury know what really took place." The trial court also determined that it was "perfectly reasonable not only for the parties to have the right to present it to the jury but for the jury to expect to be able to receive it."

¶18 The trial court considered the testimony to be admissible by application of hearsay exceptions and contingent upon proper authentication by Bell. It rejected any notion of prejudice to Anderson, given that the recording was raised in his cross-examination of the State's witness, and because if Anderson had wanted to use it or review it, he could have made his own efforts to obtain it. And, though Anderson believes that the State should be held to be aware of the recording's availability before trial like he was, the State adequately explained that it had no intention of introducing the recording until Anderson's cross-examination brought it into question. In short, the record displays an adequate

basis for the trial court to conclude it was appropriate to let the State reopen its case.

¶19 Anderson also claimed ineffective assistance of trial counsel. He contends that although trial counsel made several objections to the admissibility of the 911 recording,

> what counsel should have done … is interpose an objection to the State being allowed to reopen its case in chief, citing as grounds for that objection that the State was aware, well before trial, that there was a recording of the 911 call, that the State was aware, well before trial, that CAD printouts can be made of recorded 911 calls; and that the State must have known that the recording of the 911 call and the CAD printout of that recording could be used at trial by either party.

He also contends that counsel should have "argued to the court that the State's deliberate decision not to obtain or present that evidence in its case in chief did not later give rise to a reasonable excuse for reopening the State's case to present evidence that the State earlier made a deliberate decision not to present."

¶20 A defendant must show two elements to establish counsel's assistance was ineffective: deficient performance and prejudice from the deficiency. *See* ***State v. Balliette***, 2011 WI 79, ¶21, 336 Wis. 2d 358, 805 N.W.2d 334. In rejecting Anderson's claim, the trial court determined that there was no prejudice. "The proper test for prejudice … [is] whether 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" ***Id.***, ¶24 (citation omitted).

¶21 The trial court explained that "[t]here was no additional information offered in the 911 recording that the jury had not already heard during Brandy

Harlow's testimony." That is, while Anderson claims the tape impermissibly served to draw attention to Harlow's emotional state, she had already testified that she "freaked out" when she discovered Boan had been shot.[4] The trial court also noted that "even if the 911 recording had not been allowed, there is no reasonabl[e] probability that the outcome of the trial would have been different given Ms. Harlow's familiarity with and identification of the defendant on the date of the incident, and the testimony of the defendant's girlfriend." We agree with this assessment; our confidence in the outcome is not undermined by admission of the 911 tape.

¶22 Additionally, Anderson argues that "[i]t cannot be said that the Court would have allowed the State to reopen its case had an appropriate objection been made and supported." The trial court, however, said just that, writing: "The court would not have ruled any differently … had counsel advanced the proposed additional arguments at trial." We therefore conclude the trial court properly denied the postconviction motion.

By the Court.—Judgment and order affirmed.

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

[4] In light of the trial court's conclusion that there was no additional evidence in the tape that the jury had not already heard, Anderson also argued that it was "needlessly cumulative and liable to exclusion" under WIS. STAT. § 904.03, which provides that evidence, though relevant, "may be excluded if its probative value is substantially outweighed by … needless presentation of cumulative evidence." However, the exclusion of cumulative evidence remains a discretionary *option* for a circuit court, not a mandate. *See* ***State v. Franklin***, 2004 WI 38, ¶65, 270 Wis. 2d 271, 677 N.W.2d 276.