COURT OF APPEALS
DECISION
DATED AND FILED

January 13, 2000

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 99-0935-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JONATHAN C. SEGNER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Green County: JAMES R. BEER, Judge. *Affirmed.*

Before Dykman, P.J., Eich and Vergeront, JJ.

¶1 EICH, J. Jonathan C. Segner was convicted of armed burglary (two counts), armed robbery (two counts), felony theft (two counts), intimidating a witness, and possession of a firearm by a felon (two counts). He was sentenced to seventy years in prison. He appeals from the judgment of conviction and the order

denying his motion for postconviction relief, arguing that: (1) he was denied his right to a fair trial when the prosecutor failed to disclose exculpatory evidence which he claims would have affected the credibility of the State's key witness; and (2) his trial counsel rendered ineffective assistance for failing to impeach the credibility of another prosecution witness. We reject his arguments and affirm the judgment and order.[1]

¶2 The charges arose after Jason Kotte—the State's primary witness at Segner's trial—called police to his residence, where he showed them guns and other stolen property which, according to Kotte, Segner had stolen from several area homes. Kotte told the police that Segner, who had stayed with him on the nights the various burglaries took place, told him what he had done and showed him the items he had taken. The witness-intimidation charge arose from an allegedly threatening note Segner sent to Kotte while both men were confined in the Green County jail.

¶3 Segner's defense to the burglary charges was that Kotte had committed them and had falsely accused him (Segner) of the crimes in an attempt to hide his own culpability. With respect to the witness-intimidation charge, Segner claimed he had sent Kotte an innocuous note, which Kotte replaced with one containing a threatening message: "Count your days." The jury found Segner guilty on all the charges.

¶4 Segner moved for postconviction relief, claiming he had just learned that Kotte had received consideration from the State in the form of an early release

[1] Segner also argues that he should be granted a new trial in the interest of justice. Because the argument assumes circuit court error with respect to his other claims—which, as indicated, we reject—we need not consider the interest-of-justice argument further.

from a sentence he was serving for a child-abuse conviction in exchange for his agreement to testify against Segner. He said that the State's failure to disclose this evidence—which he claimed would impeach Kotte's credibility as a witness—violated his due process rights. Following an evidentiary hearing, the circuit court denied the motion, finding as a fact "that there was absolutely no consideration given to Jason Kotte on this case for any of his testimony." The court went on to state: "[I]f by any stretch of the imagination [there was] a failure to disclose … the Court here heard this entire trial, and there was overwhelming evidence of [Segner's] guilt, and the Court cannot find that that one item would be material to the outcome of the case." The court also said any such failure to disclose would be "harmless error." Segner's ineffective assistance of counsel argument was similarly rejected.

I. Impeachment Evidence

¶5 In his trial testimony, Kotte denied that he had received any "deals" in exchange for his testimony in Segner's case. "No, I never received any deals," he said, "the only reason I cooperated was because I was told I was going to be charged with [the burglaries]." Segner argues on appeal that two items of evidence in the prosecution's hands should have been disclosed to him prior to trial, and that the failure to disclose them violated his right to due process of law. The first is a jail log indicating that, during a meeting between Kotte and the district attorney regarding a plea agreement in another unrelated case—this one involving drug charges—the prosecutor told him there was "a good chance" he would be released early from his child-abuse sentence because he was providing "good info" in still another unrelated case (where the defendant was charged with placing graffiti on the walls of the Monroe High School), "and on Segner." The second is the drug-case plea agreement itself, which, according to Segner,

provided that Kotte's child-abuse sentence would be terminated one month early because he had been of assistance to the police in resolving "a couple of serious cases." According to Segner, these two pieces of information, taken together, provide a substantial basis for impeaching Kotte's denial that he had received any "deals" from the State in exchange for his testimony at Segner's trial.

¶6 The prosecution's withholding of evidence favorable to an accused may violate due process where the evidence is "material … to guilt," ***Brady v. Maryland***, 373 U.S. 83, 87 (1963), and evidence is material to guilt only when there is a reasonable probability that it is of such a nature as would change the outcome of the trial. ***United States v. Bagley***, 473 U.S. 667, 682 (1985). Evidence which impeaches credibility may be subject to disclosure if there is a reasonable probability that it would discredit a witness whose testimony may be determinative of guilt or innocence. ***Id.*** at 676-77.

¶7 Our inquiry, then, is: (1) whether the jury probably would have disbelieved Kotte's testimony if the so-called "impeaching" evidence had been presented at trial; and (2) if so, whether Segner probably would have been acquitted as a result. *See* ***United States v. Boyd***, 55 F.3d 239, 245 (7th Cir. 1995). And our review of the record satisfies us that the answer to both questions should be "no."

¶8 Even if the evidence had been admitted at trial, it shows, at best, only that prosecutors may have taken Kotte's cooperation into consideration when deciding to give him a deal in the drug case (which would reduce his sentence in the child-abuse case by one month)—not that Kotte himself believed he was getting a deal in exchange for his cooperation at the Segner trial. We have already referred to Kotte's trial testimony that he didn't receive "any deals" for testifying.

At the hearing on Segner's postconviction motion, when again asked, Kotte stated: "I believe I didn't receive anything for the case on the [burglaries] …. I can't remember what was said in the office, but I know that the only thing that I have received was the release from—early for a month for [testifying in] the graffiti [case]."[2]

¶9 On this record, we do not see how Segner could have successfully impeached Kotte's testimony with the evidence he describes. Even if Segner had been able to show that Kotte believed he was receiving something for his cooperation in Segner's case (as well as the graffiti case), it does not follow that

[2] At the hearing on his postconviction motions, Segner argued that an answer Kotte gave to a question from the defendant's attorney during his testimony in the graffiti case—which was tried several weeks after Segner's trial—establishes that he was, in fact, aware that he had a deal with the prosecutors in Segner's case. He was asked in the graffiti trial: "And as a result of your cooperation in these two matters [the Segner case and the graffiti case] you received some consideration didn't you?," to which Kotte replied: "Sir, I was released early, sir, a month, and that was it."

As indicated, Kotte testified at the hearing that he didn't receive any "deals" for his testimony in Segner's case—that the "only thing" he received was the month-early release in exchange for his testimony in the graffiti case. In addition, Kotte's attorney testified that, despite the fact that he had been "pushing" for a deal for Kotte in exchange for testifying against Segner, both the police and prosecutor refused to make any such agreement—essentially because Kotte had already cooperated in Segner's case in the absence of any "deal" having been made. The circuit court, having both Kotte's "live" testimony and his graffiti-case testimony before it—as well as the testimony of his attorney—found as follows:

> I think it's clear on the record that … there was absolutely no consideration given to … Kotte on this case for his testimony. He got nothing for it, which angered his attorney, but was the situation.

Thus, to the extent any inconsistency could be found between Kotte's in-court denial of any "deals" with prosecutors in Segner's case and his answer to counsel's question in the graffiti trial, it was resolved by the circuit court; and resolving inconsistencies and conflicts in the evidence is for that court, not this one. *See* ***State v. Owens***, 148 Wis. 2d 922, 929-30, 436 N.W.2d 869 (1989) (findings resulting from trial court's resolution of either external or internal consistencies of the testimony of the witnesses will not be disturbed on appeal unless they are clearly erroneous).

there was a reasonable probability that the jury would have discredited Kotte's testimony implicating Segner in the burglaries and acquitted Segner of those charges. Kotte testified that the reason he told the police that Segner had committed the burglaries was to avoid being charged with them himself. Kotte was on probation at the time, and the jury could reasonably infer that avoiding being charged with a crime—which could lead to revocation of his probation—would constitute an even stronger motive to testify against Segner than merely getting released from his sentence in the child-abuse case a month early. Finally, Kotte's testimony implicating Segner in the burglaries was corroborated by three other witnesses. Kenneth Kotte, Jr., Kip Groom and Segner's brother, Shane Segner, either testified or told police that Segner had admitted the burglaries to them and showed them the items he had stolen. Another eyewitness to one of the burglaries described the burglar as someone of Segner's height and weight, and when he was arrested, police found a video rental card taken in one of the robberies on his person.

¶10 We conclude, therefore, that (a) the additional evidence would not have significantly impeached Kotte's testimony at Segner's trial, and (b) even if the jury disbelieved Kotte, there was sufficient evidence corroborating Segner's guilt that we see no reasonable probability that he would have been acquitted. As a result, we are satisfied that Segner's right to a fair trial was not compromised and that the circuit court did not err in so ruling.

II. Ineffective Assistance of Counsel

¶11 Segner next argues that his trial counsel was ineffective for failing to impeach another prosecution witness, Jail Sergeant Reyne Phillips, with regard to the circumstances surrounding Kotte's receipt of the allegedly threatening note

from Segner. To prevail on an ineffective-assistance-of-counsel claim, Segner must show that trial counsel's performance was deficient *and* that the deficient performance prejudiced his defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). If Segner fails to satisfy one element of the ***Strickland*** test, we need not address the other. ***State v. Johnson***, 153 Wis. 2d 121, 128, 449 N.W.2d 845 (1990). Because we conclude that Segner was not prejudiced by trial counsel's failure to cross-examine Phillips regarding the threatening note, we need not address whether counsel's performance was deficient.

¶12 Segner's defense to the witness-intimidation charge was that he had sent an innocuous letter to Kotte while both were jail inmates, and that Kotte substituted the "count your days" note for his letter and showed it to Officer Phillips. Phillips testified at trial that she received the Kotte letter on May 29, opened the envelope, took out a piece of paper, shook it, and put it back. And she confirmed that Kotte showed her the "count your days" letter two days later, on May 31. Segner claims that his counsel was ineffective for failing to "impeach" Phillips's testimony with her testimony at the preliminary hearing stating that it was not she, but Officer Warren, who opened Segner's letter on May 29. Segner says it was "absolutely critical" to his defense—that Kotte substituted a threatening note for the original—that his attorney "establish that the note was not brought to the attention of the jail authorities at the time it was received" on May 29, but a day or two later.[3]

[3] Segner's argument is based in large part on what he sees as the effect of the prosecutor's closing remarks to the jury suggesting that Segner's claim that Kotte had replaced his innocuous note with a threatening message was unbelievable and meritless and that Phillips's trial testimony was true and correct. He says this emphasizes the need for his attorney to try to impeach Phillips's testimony with her preliminary-hearing statements that Warren, not she, opened the letter. For all the reasons discussed above, Segner has not persuaded us that, on this record, he was prejudiced by his counsel's failure to make such an attempt.

¶13 We share the State's view that Phillips's testimony was not materially inconsistent with Segner's defense. Phillips never claimed in her trial testimony that she had seen or read the letter, only that she had opened the envelope, "shook" the paper and replaced it. And she said Kotte didn't show her the letter, or complain about the threat, until a day or two later. In other words, while Phillips's testimony differed as to who actually received and opened the letter, it was consistent with Segner's claim that Kotte had time between its receipt and its reporting to Phillips, to replace it. And, as to Segner's argument that Phillips's inconsistencies with respect to who first received and opened the letter should have been explored by counsel in order to impeach her overall credibility as a witness, we also agree with the State that, while it may be that her trial testimony that she had received the letter could be impeached, it would be at an "extravagant price," for the State would then have been able to call Officer Warren to the stand; and he would have said, as he did at the postconviction hearing, that, when he opened Segner's letter on May 29 he read it and it said: "Count your days."

¶14 Thus, we do not see how Segner could have been prejudiced by his counsel's failure to attempt to impeach Phillips's testimony—or even her credibility as a witness—through use of her preliminary-hearing testimony.[4]

[4] It also appears that Segner's counsel's decision not to cross-examine Phillips was tactical. Counsel testified:

> [M]y belief at the time was that it didn't make any difference whether she opened it or the officer who logged it in opened it. It got opened.
>
> And it didn't strike me as being an important issue to try to cross-examine a witness on where I didn't think I could gain anything from the cross-examination.

(continued)

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.

We said in ***State v. Elm***, 201 Wis. 2d 452, 464-65, 549 N.W.2d 471 (Ct. App. 1996), that we "will not second-guess a trial attorney's considered selection of trial tactics … in the face of alternatives that have been weighed by trial counsel," and that "[a] strategic trial decision rationally based on the facts and the law will not support a claim of ineffective assistance of counsel."