COURT OF APPEALS
DECISION
DATED AND FILED

December 14, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP2451-CR **Cir. Ct. No. 2013CF1158**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LEE CHANG,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dane County: JOHN W. MARKSON, Judge. *Affirmed.*

Before Blanchard, Kloppenburg, and Fitzpatrick, JJ.

¶1 PER CURIAM. Lee Chang appeals a judgment of conviction for false imprisonment, felony intimidation of a victim, battery, and disorderly conduct in this case involving alleged domestic violence. He also appeals a circuit court order denying his motion for post-conviction relief. Chang's then girlfriend, Z.Y., gave police a detailed, incriminating account after police responded to a 911 call. However, in subsequent days she began recanting, giving an exculpatory account on multiple occasions to multiple persons. At trial, Z.Y. testified consistently with the exculpatory version. The State attempted to rebut this testimony by introducing the substance of the incriminating statements that Z.Y. initially made to police. To counter this, the defense elicited some exculpatory pretrial statements of Z.Y. consistent with her trial testimony. However, defense counsel did not attempt to elicit *additional* evidence of exculpatory pretrial statements she allegedly made, which is a primary point of contention on appeal. Chang raises other issues that we will summarize. We affirm for reasons discussed below.

BACKGROUND

¶2 The following pertinent, undisputed facts are taken from court documents and trial testimony.

¶3 Police responded to an apartment unit following a 911 call. Chang's then girlfriend, Z.Y., initially told responding police that Chang had pushed her down, shouted at her, grabbed and dragged her by the hair, forced her up stairs, pinned her to a bed and refused to let her leave, strangled her, and shouted about wanting to cause her a miscarriage while pushing down on her abdomen. Z.Y. also told police that, before Chang left the apartment that night, he shouted to Z.Y. and to Chang's family members that, if anyone called police, he would "kill every

last one of you and the whole family." Z.Y.'s initial statements to police were detailed and internally consistent.

¶4 The State filed charges and the case proceeded to a jury trial. The following is a summary of trial testimony that is pertinent to one or more issues raised on appeal.

¶5 Police Officer Solon McGill testified to the following. He was among the first to arrive on scene. Z.Y. gave the incriminating account summarized above. McGill accompanied Z.Y. from the response scene to a domestic violence shelter.

¶6 Z.Y. testified in pertinent part as follows. On the night of the 911 call, Chang did not attack her or cause her injuries. She lied to the police in saying that he had. She lied because she was jealous about the fact that Chang had talked to another woman at a party. Bruises that she showed McGill had not been caused by Chang, but instead were the result of a fight she had with a woman earlier that night. Z.Y. testified that, from "[w]ay at the beginning of the case," she had been consistent in recanting all the incriminating statements that she made to McGill on the night of the 911 call.

¶7 In an effort to rebut Z.Y.'s denial at trial that Chang had been violent or threatening, the prosecutor walked Z.Y. through the incriminating statements that she had made to McGill on the night of the incident, and Z.Y. admitted to having made all these statements.

¶8 In turn, the defense attempted to rebut the prior inconsistent statements by eliciting testimony from multiple witnesses that Z.Y. had made other pretrial statements that were exculpatory. For example, Z.Y. testified that

she had written a letter before trial (to whom is unclear from her testimony) stating that she had lied to police in her original incriminating statements, and that she had tried to tell prosecutors that she initially lied to police, but that "no one want[ed] to listen to me." Further, the defense called a detective to testify that, when Z.Y. appeared at the preliminary hearing, Z.Y. said that she had initially lied to police. Defense counsel asked the same detective whether he was aware that Z.Y. had made exculpatory statements to "the pastor, [and the] defense investigator," but the State objected and the court sustained the objection.

¶9 However, defense counsel did not question Z.Y. about *additional* exculpatory pretrial statements that she allegedly made to others, specifically to Chang's father and Z.Y.'s pastor. Defense counsel mentioned these exculpatory statements to the father and the pastor in his closing argument, despite the fact that they were not in evidence, stating that Z.Y. had told "friends or family members or pastors" that she had lied to police the night of the 911 call. The prosecutor did not object to defense counsel's argument on this point.

¶10 Turning to background pertinent to a discovery dispute, the State introduced evidence of jail phone calls in which Chang was recorded telling Z.Y. that his attorney had informed him that, if there were no witnesses at trial, the State would not have a case and would have to drop the charges.

¶11 After his conviction on all but one charge, Chang filed a post-conviction motion arguing, among other things, ineffective assistance of trial counsel, discovery violations, and prosecutorial misconduct. Following two evidentiary hearings, the circuit court found credible the post-conviction testimony of Chang's trial counsel, the prosecutor, and Officer McGill. The court rejected all of Chang's arguments alleging ineffective assistance of counsel, discovery

violations, and prosecutorial misconduct. Chang appeals, renewing the bulk of his post-conviction arguments.

DISCUSSION

¶12 On appeal, Chang argues that: (1) trial counsel was ineffective in failing to attempt to elicit trial testimony regarding pretrial statements of Z.Y. consistent with her exculpatory trial testimony (beyond the evidence of this type that counsel did elicit, as referenced above), failing to adequately investigate evidence and witnesses who could testify to prior consistent statements, and failing to object to testimony about Z.Y.'s stay at the domestic violence shelter;[1] (2) the State withheld exculpatory evidence or failed to timely disclose exculpatory evidence; and (3) Chang is entitled to a new trial under the doctrine of plain error based on improper closing remarks by the prosecutor.

I. Ineffective Assistance of Counsel

A. Pertinent Legal Standards

¶13 To establish ineffective assistance of counsel, a defendant must prove both that counsel's performance was deficient and that the deficient performance prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 698 (1984). "[B]oth the performance and prejudice components of the ineffectiveness inquiry are mixed questions of law and fact." ***Id.*** "Thus, we will not reverse the circuit court's findings of fact, that is, the underlying findings of what happened, unless they are clearly erroneous." ***State v. Pitsch***, 124 Wis. 2d

[1] We address Chang's argument that trial counsel was ineffective for failing to object to improper prosecutorial remarks below, in the context of Chang's request for a new trial.

628, 634, 369 N.W.2d 711 (1985) (citation omitted). However, determinations of deficiency and prejudice are issues that we review de novo. ***Id.***[2]

B. Failure To Introduce Additional Evidence Of Prior Consistent Statements

¶14 Chang argues that trial counsel was ineffective in failing to seek to introduce evidence of pretrial exculpatory statements that Z.Y. made to Officer McGill, Chang's father, and her pastor. As we now explain, we reject this argument based on our conclusion that counsel's performance was not deficient and could not have been prejudicial because it would have done the defense no good to attempt to elicit these prior consistent statements. They were not admissible as a matter of law. *See* ***Peterson v. Cornerstone Prop. Dev., LLC***, 2006 WI App 132, ¶42, 294 Wis. 2d 800, 720 N.W.2d 716 (citations omitted) (circuit court decisions to admit or exclude evidence are generally reviewed under erroneous exercise of discretion standard, except that de novo review applies to the issue of whether evidence is admissible as a matter of law).[3]

¶15 A prior consistent statement of a testifying witness, who is subject to cross examination, is admissible if the prior statement is "[c]onsistent with the declarant's testimony and is offered to rebut an express or implied charge against

[2] We observe that Chang incorrectly, or at least incompletely, frames his argument as being that "the trial court erred" when it determined that particular prior consistent statements of Z.Y. "were inadmissible." Trial counsel did not seek to admit the statements at issue at trial. The post-conviction court held that trial counsel was not ineffective for failing to introduce the statements because they would have been inadmissible if counsel had tried to elicit them. Therefore, we address and analyze counsel's failure to introduce Z.Y.'s prior consistent statements at trial as a claim of ineffective assistance of counsel.

[3] Separately, we question how it could have been prejudicial to Chang that his attorney did not elicit yet more evidence that Z.Y. had made prior exculpatory statements, beyond the multiple pieces of testimony on this topic that the jury heard. But we pass over the topic because the State does not develop an argument to this effect.

the declarant of recent fabrication or improper influence or motive." WISCONSIN STAT. § 908.01(4)(a)2. (2015-16)[4]; *see also* ***State v. Peters***, 166 Wis. 2d 168, 176-77, 479 N.W.2d 198 (Ct. App. 1991) (prior consistent statements must predate the alleged recent fabrication or improper influence or motive before they have probative value).

¶16 We agree with the circuit court that Z.Y.'s prior consistent statements to McGill, Chang's father, and her pastor were inadmissible because there were not, as WIS. STAT. § 908.01(4)(a)2. requires, any allegations of recent fabrications or a new motive for Z.Y. to lie that had not existed from the time of the 911 call. *See* § 908.01(4)(a)2. That is, because the State had not made an express or implied charge to this effect against Z.Y., the conditions for application of the hearsay rule did not apply. The circuit court reasonably determined that there would have been no reason for the court to have concluded at the time of trial that Z.Y.'s apparent motives to lie about Chang's conduct—which the court found were her love for and fear of Chang—were "recent" motives, as opposed to motives that Z.Y. had "from day one."

¶17 Chang makes an additional argument based on ***State v. Gershon***, 114 Wis. 2d 8, 12, 337 N.W.2d 460 (Ct. App. 1983). Chang argues that Z.Y.'s prior consistent statements would have been admissible for the purpose of "rehabilitating Z.Y.'s credibility" under the reasoning of ***Gershon***. We agree with the circuit court that ***Gershon*** does not apply here for at least the reason that here, unlike in ***Gershon***, there was no justification for admitting prior consistent

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

statements. As the court here explained, in order for Z.Y.'s prior consistent statements to be admissible under ***Gershon***, the defense must have demonstrated some "purpose relating to the rehabilitation of [Z.Y.] other than her simply repeating the same story, because the simple repetition of a story in and of itself does not establish its credibility."[5]

¶18 In sum, we conclude that the court correctly determined that Z.Y.'s prior recantations are "not relevant to her rehabilitation or showing her credibility." Trial counsel was not deficient for failing to attempt to elicit them and no prejudice resulted from his failure to do so.

C. Failure To Adequately Investigate

¶19 What we have concluded to this point easily resolves Chang's argument that trial counsel was ineffective for failing to investigate the following post-incident, pretrial exculpatory statements made by Z.Y.: a phone call to Officer McGill a couple of days after the incident, and conversations with Chang's father and Z.Y.'s pastor, all referenced above. As we have already explained, these prior consistent statements of Z.Y. would have been inadmissible. This also resolves Chang's argument that defense counsel should have had an investigator interview Chang's father and the pastor.

[5] We note apparent tension between ***State v. Gershon***, 114 Wis. 2d 8, 12, 337 N.W.2d 460 (Ct. App. 1983), and subsequent approaches. *See* ***Ansani v. Cascade Mountain, Inc.***, 223 Wis. 2d 39, 53, 588 N.W.2d 321 (Ct. App. 1998); ***State v. Street***, 202 Wis. 2d 533, 550-51, 551 N.W.2d 830 (Ct. App. 1996); ***State v. Mainiero***, 189 Wis. 2d 80, 102-03, 525 N.W.2d 304 (Ct. App. 1994); ***State v. Peters***, 166 Wis. 2d 168, 177, 479 N.W.2d 198 (Ct. App. 1991) (each analyzing the admissibility of prior consistent statements under WIS. STAT. § 908.01(4)(a)2. without applying a discernable ***Gershon*** gloss). Regardless, ***Gershon*** is not referred to in any of these subsequent cases and as best we can discern it remains law that we must follow. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 190, 560 N.W.2d 246 (1997). In the end, however, as we explain, it does not matter here whether ***Gershon*** is good law, because it does not apply on its own terms.

D. Failure To Object To Domestic Violence Shelter Evidence

¶20 The State elicited testimony from an officer to the effect that he coordinated placement for Z.Y. in a domestic violence shelter after the assault because otherwise she would not have had a "safe place" to stay. The State also elicited from McGill testimony that such interventions are typically done only "in more significant cases." Chang argues that his attorney was deficient for failing to object to this evidence, and to the prosecutor's arguments at trial related to this evidence.

¶21 We conclude that trial counsel was not deficient for failing to object to this evidence and that this failure to object could not have been prejudicial. Evidence of this type is admissible under ***State v. Jensen***, 147 Wis. 2d 240, 257-58, 432 N.W.2d 913 (1988) ("relevant facts" regarding the behavior of alleged victim following "an assault may be admitted as circumstantial evidence that an assault occurred," "as an evidentiary link in the prosecutor's case"), and Chang fails to persuade us that the circuit court could not have made a proper discretionary decision to admit this evidence in this case.

¶22 Evidence of this type is not necessarily "irrelevant" or "unduly prejudicial," as Chang suggests. We see no defect in the reasoning of the circuit court that this testimony was "part of the absolute flavor and context and character of what happened at the site of this incident that night, and that [Z.Y.] availed herself of that offer [was] perfectly consistent with the State's version of what happened." In part, "the testimony was relevant to rebut the defense's theory that [Z.Y.] fabricated the … assault charge." *See* ***id.*** at 250. To repeat, Z.Y. did not deny at trial that she told police responding to the 911 call that Chang had been violent and threatening. Therefore, the concept that police took seriously all

evidence gathered in response to the 911 call, including Z.Y.'s initial incriminating statements, was not inconsistent with the defense theory of innocence, which is that Z.Y. initially fabricated a serious domestic violence incident. Because the evidence was properly admitted, trial counsel was not ineffective in failing to object to the introduction of this evidence and the prosecutor's related arguments.

II. Alleged Discovery Violations

A. Pertinent Legal Standards

¶23 It violates the due process rights of an accused when the prosecution withholds certain evidence. ***Brady v. Maryland***, 373 U.S. 83 (1963). The following are necessary for a ***Brady*** violation: (1) the evidence must be material and favorable to the accused, either because it is exculpatory or because it impeaches testimony; (2) the evidence must have been withheld by the State, either willfully or inadvertently; and (3) prejudice must have ensued. ***State v. Harris***, 2004 WI 64, ¶15, 272 Wis. 2d 80, 680 N.W.2d 737.

¶24 Reinforcing ***Brady***, Wisconsin prosecutors "shall, within a reasonable time before trial, disclose to the defendant or his or her attorney and permit the defendant or his or her attorney to inspect and copy or photograph ... [a]ny exculpatory evidence." WIS. STAT. § 971.23(1)(h). As the Wisconsin Supreme Court has stated, this statute requires, "at a minimum, that the prosecutor disclose evidence that is favorable to the accused if nondisclosure of the evidence undermines confidence in the outcome of the judicial proceeding." ***Harris***, 272 Wis. 2d 80, ¶27. Section 971.23(1)(h) differs from ***Brady*** in that it requires disclosure "'within a reasonable time before trial,'" which ***Brady*** does not. ***Id.***, ¶37 (quoting § 971.23(1)(h)).

B. Chang's Arguments Regarding Alleged Discovery Violations

¶25 Chang argues that the circuit court erred in concluding that the State did not violate ***Brady*** and WIS. STAT. § 971.23 by failing to disclose (1) statements that Z.Y. made to Officer McGill in a phone call a few days after Chang's arrest[6] and (2) discs containing recordings of Chang's phone calls from jail, along with portions of the transcripts made from the jail recordings. Details regarding the content of these exculpatory statements are not important based on the way we resolve these arguments.

¶26 Regarding Z.Y.'s exculpatory statement to Officer McGill, we conclude that the State did not commit a discovery violation by not disclosing the statement to McGill because it is not contested that Z.Y. informed the defense investigator before trial of her phone conversation with McGill. Therefore, this evidence was not in the State's exclusive possession, even beyond the fact, which we have already explained, that the statements were not admissible. Put differently, Chang fails to demonstrate that the result of the trial would have been any different if the State had disclosed the McGill evidence to defense counsel prior to trial. *See* ***United States v. Bagley***, 473 U.S. 667, 682 (1985) (withheld evidence is material only if there is a reasonable probability that, had the evidence

[6] We reject as unsupported Chang's apparent argument that it constituted an independent discovery violation that McGill did not create a writing memorializing this particular exculpatory statement by Z.Y. It is true that the State is obligated to make available "relevant written or recorded statements of a witness" named at trial, *see* WIS. STAT. § 971.23(1)(e), and also true that ***Brady*** requires the defense to be informed of exculpatory evidence, regardless of whether the statement has been written or recorded. ***Brady v. Maryland***, 373 U.S. 83 (1963). Thus, given the exculpatory nature of the statement, if the State had a duty to inform the defense about the substance of the statement, that duty existed regardless of whether the statement had been memorialized at any point. However, all that matters regarding this statement, as we explain in the text of this opinion, is that defense counsel did not need to be informed of it by the State, because the defense was independently made aware of the conversation in advance of trial.

been disclosed to the defense, the result of the proceeding would have been different).

¶27 Turning to the recordings and transcripts of the jail calls, the circuit court found, based on testimony at the post-conviction hearing, that the State did not fail to produce the discs and the accompanying partial transcripts to the defense in advance of trial. We accept a circuit court's findings of historical fact unless they are clearly erroneous. ***State v. Sturgeon***, 231 Wis. 2d 487, 496, 605 N.W.2d 589 (Ct. App. 1999). Here, the court's finding is supported by the testimony of both the prosecutor and trial counsel at the post-conviction hearing, which the court credited. Chang does not argue that the court's findings based on its credibility determinations constitute an erroneous exercise of discretion.

¶28 Finally on the discovery topic, we reject Chang's limited argument that the State violated WIS. STAT. § 971.23 through late disclosure. There is no proof, nor even an allegation by Chang's trial attorney, that the State failed to turn over exculpatory evidence "within a reasonable time before trial." *See* § 971.23(1).

III. New Trial Resulting From Plain Error Based On Prosecutor's Remarks In Closing Arguments

¶29 In her closing argument-in-chief, the prosecutor told the jury, in part, that it is her "job to do the right thing to keep [Z.Y.] safe, even if she's unable to do so herself." The prosecutor also argued the following during her rebuttal argument: "If you believe he didn't do any of this, you absolutely have to find him not guilty. But if you believe that he committed these crimes, then you must hold him accountable, even if [Z.Y.] cannot. You must find him guilty." Chang

argues that, because trial counsel did not object to these two sets of statements, he is entitled to a new trial under the doctrine of plain error. We disagree.

A. Pertinent Legal Standards

¶30 Regarding plain error, WIS. STAT. § 901.03(4) allows appellate courts to review clear errors that were otherwise forfeited through a party's failure to object. *See* ***State v. Mayo***, 2007 WI 78, ¶¶28-29, 301 Wis. 2d 642, 734 N.W.2d 115. "Of particular importance is the quantum of evidence properly admitted and the seriousness of the error involved." ***State v. Lammers***, 2009 WI App 136, ¶13, 321 Wis. 2d 376, 773 N.W. 2d 463.

¶31 Turning to the topic of improper argument, "[w]hen a defendant alleges that a prosecutor's statements and arguments constituted misconduct, the test applied is whether the statements 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" ***Mayo***, 301 Wis. 2d 642, ¶43 (quoting ***State v. Davidson***, 2000 WI 92, ¶88, 236 Wis. 2d 537, 613 N.W.2d 606). "Even if there are improper statements by a prosecutor, the statements alone will not be cause to overturn a conviction. Rather, the statements must be looked at in context of the entire trial." ***Id.*** Counsel are generally afforded considerable latitude in closing argument. ***State v. Neuser***, 191 Wis. 2d 131, 136, 528 N.W.2d 49 (Ct. App. 1995). "A prosecutor may comment on the evidence, argue to a conclusion from the evidence, and may state that the evidence convinces him or her and should convince the jury." ***Lammers***, 321 Wis. 2d 376, ¶16.

B. Chang's Arguments Based On Prosecutor's Remarks

¶32 Regarding the "do the right thing" statement, we agree with the circuit court that these remarks did not "infect the trial with unfairness," or

constitute improper vouching for the credibility of the witness, and instead represented reasonable explanation given the circumstances here. Chang argues that it was improper for the State to comment on the irrelevant topic of *why* the State would pursue a case even though the victim had recanted, because "the only question that mattered for the jury was whether the evidence supported guilt beyond a reasonable doubt." It is true that this was the ultimate question for the jury to answer as to each count charged. But advocates are entitled to provide reasonable context for the consideration of ultimate questions. As summarized above, the jury was presented with evidence of detailed incriminating statements by an alleged victim who recanted before trial and at trial. It was not improper for the State to briefly explain, in non-inflammatory and non-misleading terms, that if prosecutors were convinced of Chang's guilt they could properly prosecute Chang's crimes with the goal of protecting Z.Y. and society at large, even if Z.Y. disagreed with the State. This briefly clarified for the jury the differing roles of prosecutors and alleged victims. *See* ***Mayo***, 301 Wis. 2d 642, ¶45 (prosecutorial comments providing "general information regarding the prosecutorial process" did not "give the jury any information that would unfairly influence its decision and 'infect[ ] the trial with unfairness[.]'") (first alteration in original) (quoted source omitted).

¶33 To be sure, prosecutorial commentary that starts out along these lines could fairly easily move into irrelevant and prejudicial territory, depending on the details of the statements and the nature of the case. But the prosecutor here did not cross the line with these limited statements.

¶34 Turning to the prosecutor's statements concluding with "[y]ou must find him guilty," Chang argues that the statements were "legally incorrect" and a "misstatement of law," including the law governing the State's burden of proof.

Chang fails to provide a reason for us to disagree with the circuit court's assessment that all of what the prosecutor said—considered in the context of the entire trial, including all instructions on the law from the court—merely summarized the view of the prosecutor and was not improper.

¶35 As the circuit court noted at the post-conviction hearing, it instructed the jury correctly that "[r]emarks of the attorneys are not evidence. If the remarks suggested certain facts not in evidence, disregard the suggestion." The court also instructed the jury to "[c]onsider carefully the closing arguments of the attorneys," and cautioned that "their arguments and conclusions and opinions are not evidence. Draw your own conclusions from the evidence, and decide upon your verdict according to the evidence, under the instructions given you by the court."

¶36 In addition, and even more to the point of Chang's argument, the court correctly instructed the jury about the State's burden of proof multiple times. We "recognize the import of the trial court's instructions to the jury that the attorneys' arguments, conclusions, and opinions are not evidence, that the jury is the sole judge of credibility, and that jurors should draw their own conclusions from the evidence and decide upon their verdict according to the evidence." *See* ***State v. Miller***, 2012 WI App 68, ¶22, 341 Wis. 2d 737, 816 N.W.2d 331. "These instructions, which we presume the jurors followed, alleviate the likelihood that jurors placed any significant weight on the prosecutor's comments other than the weight that came from their own independent examination of the evidence." ***Id.*** (citations omitted).

¶37 Stated simply, considered in the context of all that the jury heard, the jury would have understood the prosecutor to be merely stating "that the evidence convinces … her and should convince the jury." *See* ***Lammers***, 321 Wis. 2d 376,

¶16. Therefore, a new trial is not merited because the remarks did not constitute "'plain error' that 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *See* ***id.***, ¶25 (citations omitted).[7]

CONCLUSION

¶38 For the foregoing reasons, we affirm the judgment of conviction and the circuit court's order denying Chang's motion for post-conviction relief.

By the Court.—Judgment and order affirmed.

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

[7] This conclusion disposes of Chang's argument that trial counsel's failure to object constitutes ineffective assistance of counsel.