COURT OF APPEALS
DECISION
DATED AND FILED

June 12, 2018

Sheila T. Reiff
Clerk of Court of Appeals

Appeal No. 2017AP1251-CR **Cir. Ct. No. 2011CF005883**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RICKY A. LOBLEY,

DEFENDANT-APPELLANT.

APPEAL from a judgment and orders of the circuit court for Milwaukee County: JEFFREY A. CONEN, M. JOSEPH DONALD, and PEDRO COLON, Judges. *Affirmed.*

Before Kessler, P.J., Brennan and Dugan, JJ.

¶1 PER CURIAM. Ricky A. Lobley appeals from the judgment of conviction finding him guilty, following a jury trial, of one count of armed robbery, one count of burglary, and three counts of false imprisonment, all as party to a crime (PTAC). He also appeals the orders denying his postconviction motions for a new trial.[1]

¶2 On appeal, Lobley argues that (1) newly discovered evidence represented by the affidavits of a codefendant and an acquaintance requires a new trial, (2) the prosecutor improperly vouched for a witness's credibility during closing arguments, and (3) trial counsel was ineffective for failing to object to hearsay evidence and the prosecutor's comment. For the following reasons, we affirm.

¶3 These background facts provide context for the issues raised on appeal. Additional facts are included in our discussion.

BACKGROUND

¶4 This case stems from two armed robberies that took place in early December 2011 in Milwaukee.

¶5 An armed robbery of N.M.'s apartment located on Martin Luther King Drive by four men wearing dark clothing and masks, who carried guns,

[1] The Honorable Charles F. Kahn, Jr. presided over the jury trial, convictions, and original sentencing. The Honorable M. Joseph Donald presided over a postconviction motion for a new trial and also, pursuant to the stipulation of the parties, ordered that Lobley be resentenced. As a result of that order, a second judgment of conviction was entered by the Honorable Jeffrey A. Conen. The Honorable Pedro Colon presided over a subsequent postconviction motion for a new trial. We refer to the judges who presided over the postconviction proceedings, collectively, as the postconviction court.

occurred at about 10:15 p.m. on December 3, 2011. Several cell phones were taken during that robbery.

¶6 On December 4, 2011, between 2:45 a.m. and 3:01 a.m., four men committed an armed robbery at S.S.'s home on North 61st Street. Her three daughters were also asleep in the home. Duron Means drove a Chevrolet Impala, whose passengers included D.U., a juvenile female; Lobley; Lamar Robinson; and Lequanis Strawder. He drove to S.S.'s home, parked, and all four men got out of the car. Means testified that he stood by the side of the house acting as the lookout. The other three men, Lobley, Robinson, and Strawder, dressed in dark clothing, entered the home of S.S. Two of the men had guns and were wearing masks. The third man did not have a mask. They demanded money, took an expensive black jacket from S.S.'s bedroom, and left.

¶7 Lobley went to trial on a nine-count amended information. He was tried jointly with Robinson. The case was tried to a jury in late October 2012. Trial witnesses included D.U. and codefendant Means. Lobley testified and denied involvement in the crime. He testified that from about 6:00 p.m. on December 3, 2011, until about 3:45 or 4:00 a.m. on December 4, 2011, he was at his sister's home with his nephews, their father, and Kiki, a female.

¶8 Lobley was found guilty of the charges arising out of the December 4, 2011 armed robbery, with the exception of one count of false imprisonment.[2] However, he was found not guilty of the charges arising out of the December 3, 2011 armed robbery.

[2] Lobley was found not guilty on the charge of false imprisonment of K.B., who hid in a closet during the armed robbery of S.S.'s home.

¶9 After sentencing, Lobley filed a postconviction motion for a new trial, based on newly discovered evidence and ineffective assistance of trial counsel due to the failure to object to hearsay testimony and, alternatively, for resentencing. The postconviction court denied the motion for the new trial without a hearing, but pursuant to the parties' stipulation, ordered that Lobley be resentenced. In denying the motion for a new trial, the postconviction court did not resolve whether Lobley satisfied the first four factors of the newly-discovered-evidence-test. It found that, even if the four factors were established, there was not a reasonable probability of a different result at a new trial.

¶10 Subsequent to that resentencing, Lobley filed a postconviction motion contending that a new trial was required because the prosecutor improperly vouched for a witness which constituted plain error. In the alternative, Lobley argued that trial counsel was ineffective for failing to object to the hearsay evidence. The postconviction court denied Lobley's motion. The postconviction court held that the hearsay evidence was not plain error, and a new trial was not warranted due to ineffective assistance of counsel because the evidence was very strong against Lobley and, therefore, any deficiency in trial counsel's performance was not prejudicial.

DISCUSSION

¶11 We begin by addressing the newly discovered evidence issue.

I. The Affidavits do not Constitute Newly Discovered Evidence

¶12 Lobley asserts that he is entitled to a new trial on the basis of newly discovered evidence. He relies on the affidavits of codefendant Strawder and

Kiki. The State maintains that the affidavits do not satisfy the first and second factors of the newly-discovered-evidence-test. We agree with the State.

A. The Standard of Review

¶13 As explained in ***State v. Plude***:

> When moving for a new trial based on the allegation of newly-discovered evidence, a defendant must prove: "(1) the evidence was discovered after conviction; (2) the defendant was not negligent in seeking the evidence; (3) the evidence is material to an issue in the case; and (4) the evidence is not merely cumulative." If the defendant is able to prove all four of these criteria, then it must be determined whether a reasonable probability exists that had the jury heard the newly-discovered evidence, it would have had a reasonable doubt as to the defendant's guilt.

Id., 2008 WI 58, ¶32, 310 Wis. 2d 28, 750 N.W.2d 42 (internal citations omitted). The decision to grant a motion for a new trial based on newly discovered evidence is committed to the postconviction court's discretion. ***State v. Avery***, 2013 WI 13, ¶22, 345 Wis. 2d 407, 826 N.W.2d 60. This court reviews the postconviction court's determination for an erroneous exercise of discretion. *See* ***id.*** Moreover, we may affirm on grounds other than those relied upon by the postconviction court. *See* ***State v. Earl***, 2009 WI App 99, ¶18 n.8, 320 Wis. 2d 639, 770 N.W.2d 755.

¶14 In considering this issue, we take the statements in the affidavits as true. *See* ***State v. Balliette***, 2011 WI 79, ¶18, 336 Wis. 2d 358, 805 N.W.2d 334.

B. Strawder's Affidavit

¶15 In his affidavit, Strawder, who pled guilty to the December 4, 2011 armed robbery, states that he would have been willing to testify at trial that Lobley was not present at the armed robbery, but he was never asked to do so.

¶16 As noted, we may affirm the postconviction court on an alternative ground. With respect to newly discovered evidence, Lobley must show that he was unaware of the evidence at the time of his trial and that he was not negligent in failing to discover it. *See* ***Plude***, 310 Wis. 2d 28, ¶32. Here, Lobley knew that Strawder was involved in the armed robbery and that Strawder had knowledge of the facts of the case. Thus, the evidence was neither discovered after conviction nor is it evidence that Lobley was not negligent in seeking to discover. *See* ***Sheehan v. State***, 65 Wis. 2d 757, 768-69, 223 N.W.2d 600 (1974); *see also* ***State v. Jackson***, 188 Wis. 2d 187, 193-94, 525 N.W.2d 739 (Ct. App. 1994). We hold that Strawder's affidavit does not constitute newly discovered evidence.

C. "Kiki's" Affidavit

¶17 In her affidavit, Veronica Burnett states that she knows Lobley because she hung out with him once in awhile and that he called her "Kiki." She states that during the early evening of December 3, 2011, Lobley picked her and her cousin up from her cousin's house and drove them to his sister's house, where they stayed up very late drinking and talking. She states that "sometime around 4:00 a.m. or so," Lobley said he was going across the street and would be coming right back.

¶18 Like Strawder's affidavit, Kiki's affidavit did not constitute newly discovered evidence. Again, Lobley must show that at the time of his trial, he was

unaware of this evidence and that he was not negligent in failing to discover it. Lobley testified at trial that on the evening of December 3, 2011, he was with Kiki at his sister's house from about 6:00 or 7:00 p.m. until about 3:45 or 4:00 a.m. on December 4, 2011. Based on Lobley's testimony, he knew that he was with Kiki at a critical time. Lobley cannot show that he was unaware of this evidence. *See* ***id.*** at 768-69. Lobley asserts that the fact he did not know Kiki's real name made finding her prior to trial nearly impossible. However, this argument ignores that Lobley should have been able to locate Kiki because he knew Kiki's cousin and where the cousin lived. Thus, we conclude that Lobley has not shown that he was unaware of Kiki's evidence or that he was not negligent in failing to discover it.

¶19 The record establishes that Lobley has not met the first and second factors necessary to establish that the evidence from Strawder and Kiki is newly discovered evidence.[3] Therefore, we affirm the postconviction court's rejection of the newly discovered evidence issue, albeit on other grounds. *See* ***Earl***, 320 Wis. 2d 639, ¶18 n.8.

II. The Prosecutor's Closing Argument that Means was Truthful was Harmless Error

¶20 Lobley contends that the prosecutor improperly vouched for a witness's credibility. Acknowledging that trial counsel did not object to the argument, he asserts that the prosecutor's argument constituted plain error. The

[3] Because we have concluded that Lobley has not established two of the newly discovered evidence factors, we do not address the question of whether a reasonable probability exists that had the jury heard the newly discovered evidence, it would have had a reasonable doubt as to the defendant's guilt. *See* ***State v. Plude***, 2008 WI 58, ¶32, 310 Wis. 2d 28, 750 N.W.2d 42. As an appellate court, we decide cases on the narrowest possible grounds. *See* ***State v. Blalock***, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989).

State argues that the argument was not improper and, even if it was improper, any error was harmless.

A. The Standard of Review

¶21 The plain error doctrine allows appellate courts to review errors waived by a party's failure to timely object. ***State v. Cameron***, 2016 WI App 54, ¶11, 370 Wis. 2d 661, 885 N.W.2d 611; *see also* WIS. STAT. § 901.03(4) (2015-16).[4] A plain error is one that is fundamental, obvious, and substantial. ***State v. Jorgensen***, 2008 WI 60, ¶21, 310 Wis. 2d 138, 754 N.W.2d 77. We use our reversal power sparingly—for example, when a basic constitutional right has not been extended to the accused. *See* ***id.*** The determination of plain error depends on the facts of the case and "[t]he quantum of evidence properly admitted and the seriousness of the error involved are particularly important." ***Id.***, ¶22.

¶22 If a defendant is able to demonstrate "that the unobjected to error is fundamental, obvious, and substantial, the burden then shifts to the State to show the error was harmless." ***Id.***, ¶23. When considering whether an error is harmless, courts must determine "whether the State can prove beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." ***Id.*** (citation and internal quotation marks omitted). ***Jorgensen*** states that courts consider a number of factors "to assist in determining whether an error is harmless," including:

> (1) the frequency of the error; (2) the importance of the erroneously admitted evidence; (3) the presence or absence of evidence corroborating or contradicting the erroneously

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

> admitted evidence; (4) whether the erroneously admitted evidence duplicates untainted evidence; (5) the nature of the defense; (6) the nature of the State's case; and (7) the overall strength of the State's case.

See ***id.*** "If the State fails to meet its burden of proving that the errors were harmless, then the court may conclude that the errors constitute plain error." ***Id.***

¶23 Generally, counsel is allowed significant latitude in closing argument, and it is within the postconviction court's discretion to determine the propriety of counsel's statements and arguments to the jury. *See* ***State v. Wolff***, 171 Wis. 2d 161, 167, 491 N.W.2d 498 (Ct. App. 1992). "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." ***State v. Neuser***, 191 Wis. 2d 131, 136, 528 N.W.2d 49 (Ct. App. 1995). Argument based on facts that are not in evidence is improper. *See* ***State v. Albright***, 98 Wis. 2d 663, 676, 298 N.W.2d 196 (Ct. App. 1980).

¶24 Moreover, the constitutional test is whether the prosecutor's remarks "'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" ***Wolff***, 171 Wis. 2d at 167 (citation omitted). Whether the prosecutor's conduct affected the fairness of the trial is determined by viewing the statements in context. *See* ***id.*** at 168. Thus, courts consider the prosecutor's arguments in the context of the entire trial. *See* ***id.*** Improper remarks of counsel may be cured if "'given the overall evidence of guilt and the curative effect of instructions, no prejudice is shown.'" ***Albright***, 98 Wis. 2d at 677 (citation omitted). Although Lobley cites ***State v. Rockette*** as support for his claim of error, in that case, this court did not find plain error. *See* ***id.***, 2006 WI App 103, ¶30, 294 Wis. 2d 611, 718 N.W.2d 269.

B. The Prosecutor's Comment was Improper

¶25 In closing argument, the prosecutor said,

> First let's look at Duron Means. His statement is corroborated by all the other evidence in this case. He didn't get a pass on this case. He's currently charged with the same armed robbery as these two guys. He's charged with the armed robbery of [S.S.]. His agreement which I read to you says if he testifies truthfully and takes full responsibility, then I will amend the offense to the home invasion burglary. I haven't done that yet. He's currently facing the same armed robbery, but he testified truthfully, so I will be amending his count to the burglary.

¶26 We conclude that the prosecutor's comment to the jury that Means "testified truthfully, so I will be amending his count to the burglary" improperly told the jury that they should believe Means' testimony and that the prosecutor vouched for a fact not in evidence. *See* ***State v. Smith***, 2003 WI App 234, ¶26, 268 Wis. 2d 138, 671 N.W.2d 854 (stating "[t]his portion of the prosecutor's closing argument unfairly referenced matters not in the record and vouched for the credibility of the police witnesses"). Therefore, the burden shifted to the State to prove that the error was harmless. *See* ***Jorgensen***, 310 Wis. 2d 138, ¶23.

C. The State has Demonstrated the Error was Harmless

¶27 We conclude that the State has demonstrated that the error was harmless. With regard to the armed robbery of S.S., even in the absence of the prosecutor's improper comment, the State's case was very strong. *See* ***id.*** The testimony of D.U. and several officers established that an Impala was at the scene of the armed robbery of S.S., was the getaway car, and was parked near Means' home when police arrested Lobley, Means, and Robinson. D.U., who was a back seat passenger in the Impala from sometime after midnight until sometime after 3:00 a.m. on December 4, 2011, testified that Lobley was with her in the Impala.

She knew Lobley and picked him out of a photo array. D.U.'s testimony placed him, along with Means, Robinson and Strawder, at the scene of the armed robbery of S.S.'s home and established that Lobley drove the getaway car from the scene. In addition, S.S. testified about the men watching her in a bar and their car following her as she went home.

¶28 D.U. testified that while they were driving, the car hit the median, got a flat tire, and the four men changed the tire. Then, they drove the car about a block and parked on the street around the corner. When the car pulled up and parked, all four men, including Lobley, got out of the car. They said they would be right back.

¶29 While D.U. waited in the back seat of the Impala parked near S.S.'s home, an officer came up to the car and asked for basic information about who she was and what she was doing. After the officer had talked to D.U. and left, Lobley returned to the car, asked D.U. what she told the officer, and drove to a parking lot around the corner behind some apartments. D.U. estimated that Lobley had returned to the car about fifteen minutes after he and the others left the car.

¶30 About three minutes after Lobley pulled the car into the parking lot, the other three men ran over to the car. They put something in the trunk. Moreover, one of the men in the back seat had a gun. Each of the three men who ran to the car had a mask made of black cloth on his face. Lobley drove from the parking lot and dropped D.U. and Strawder, her then-boyfriend, off at Strawder's house.

¶31 Additionally, S.S. testified that earlier that evening, when she and her boyfriend were at a bar, she noticed three men were looking at her and it made her feel uncomfortable. She and her boyfriend ate some food and left in her car.

The three men left at the same time. S.S. noticed that the car with the men was following her car so, about a block and a half from her home, she pulled over to the side of the road and the men's car swerved, hit the median, and the tire blew out.[5] S.S. drove home. As S.S.'s boyfriend was leaving her home, they noticed that the same car that had followed them and whose tire had blown out was at the corner near S.S.'s house, with the police flashing a light in the car. S.S. said that, after she had dozed off on the couch, three men wearing all black came in through the unlocked door to the house saying, "where the money at?"[6] One was the man staring at her in the bar; he was not wearing a mask. The two other men had guns and were wearing masks. They took S.S.'s jacket with $700 in it. S.S. estimated that the entire incident lasted fifteen minutes.

¶32 The officer who talked to D.U. at about 2:45 a.m. also placed the Impala at the scene of the armed robbery of S.S.'s home during the relevant time period and, using the license plate information he had obtained from the Impala, other officers determined that the vehicle was in the 4800 block of North 47th Street, which was near Means' home. When the officers arrived at that location at about 4:22 a.m., they found the Impala with its lights on. First, they saw Lobley exiting the residence and approaching the Impala, then Means exited the house and walked towards the Impala, and then Robinson left the residence. The officers arrested Lobley, Means, and Robinson. When officers searched the vehicle they found S.S.'s stolen jacket, with currency in a pocket, in the trunk. They also found

[5] S.S.'s testimony about the men's car hitting the median and the tire blowing out is consistent with D.U.'s testimony that the Impala got a flat tire and the officers' testimony that they found a tire in the front seat of the Impala.

[6] S.S.'s testimony that the door to her home was unlocked is consistent with D.U.'s testimony that, after the three men got back into the Impala, someone said the door was open.

a tire in the front seat and a gun in the rear passenger seat pouch. Lobley, Means, and Robinson were wearing dark clothing. At the scene of the arrest, Lobley admitted that he had been in the Impala that night.

¶33 Moreover, Means testified that Lobley was involved in the December 3, 2011 armed robbery of N.M. The State told the jury that Means testified truthfully when he said that Lobley participated in that robbery. Despite the prosecutor's improper argument, the jury acquitted Lobley of the charges involving the December 3, 2011 armed robbery even though Means testified that Lobley was involved in that armed robbery. This shows the jury was not swayed by the prosecutor's improper comment.

¶34 We also note that at the close of the evidence, the trial court instructed the jury that its duty was to follow all of the court's instructions and that it should "[c]onsider only the evidence offered and received during the trial and the law as given to you by these instructions[.]" The trial court also instructed the jury that "[r]emarks of the lawyers are not evidence. If any remarks made during the trial suggest certain facts not in evidence, disregard the suggestions. Consider carefully the closing arguments of the lawyers, but their arguments, and conclusions, and opinions are not evidence." Thus, the jury was properly instructed that closing arguments are not evidence and, based on the verdicts, it heeded those instructions. Thus, we conclude that the prosecutor's improper comment on Means' credibility constitutes harmless error. *See* ***id.***

III. Lobley has not Established that Trial Counsel was Ineffective Because he did not Object to the Hearsay Evidence or the Prosecutor's Closing Argument

¶35 Lobley also maintains that trial counsel was ineffective for failing to object to a hearsay statement by S.S. He also contends that trial counsel was ineffective for failing to object to the prosecutor's comment.

A. Standard of Review

¶36 A defendant must show two elements to establish that counsel's assistance was constitutionally ineffective: (1) counsel's performance was deficient; and (2) the deficient performance resulted in prejudice to the defense. ***State v. Erickson***, 227 Wis. 2d 758, 768, 596 N.W.2d 749 (1999). As to the second prong of the ineffective assistance of counsel test, prejudice occurs when the attorney's error is of such magnitude that there is a "reasonable probability" that but for the error, the outcome would have been different. ***Id.*** at 769. "Stated differently, relief may be granted only where there 'is a probability sufficient to undermine confidence in the outcome,' i.e., there is a 'substantial, not just conceivable, likelihood of a different result.'" ***State v. Starks***, 2013 WI 69, ¶55, 349 Wis. 2d 274, 833 N.W.2d 146 (quoting ***Cullen v. Pinholster***, 563 U.S. 170, 189 (2011)).

¶37 The standard of review of the ineffective assistance of counsel components, deficient performance and prejudice, is a mixed question of law and fact. ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). Thus, the postconviction court's findings of fact, "'the underlying findings of what happened,'" will not be overturned unless clearly erroneous. *See* ***id.*** (citations omitted). "The ultimate determination of whether counsel's performance was deficient and prejudicial to the defense are questions of law which this court

reviews independently." ***Id.*** at 128. "Courts may reverse the order of the two tests or avoid the deficient performance analysis altogether if the defendant has failed to show prejudice." ***Id.***

B. Lobley was not Prejudiced by the Hearsay Evidence

¶38 Lobley contends that the hearsay evidence was prejudicial because it implicated him as the likely person who directed the other men to rob S.S.'s home, since he had previously been there.

¶39 During cross-examination, counsel for Robinson asked S.S. about her testimony that one of the defendants had previously been in her house and whether she could identify that defendant in the courtroom. S.S. then testified as follows:

> [Robinson's counsel] Okay, of the two individuals, the one to my left and the one to my immediate right.
>
> [S.S.] One my son know. His name is Ricky Lobley.
>
> [Robinson's counsel] Okay. Do you see Ricky Lobley in court?
>
> [S.S.] No, I don't know him.
>
> [Robinson's counsel] Okay. So when you say that one of the individuals, one named Ricky Lobley, had previously been by your house, did you see Ricky Lobley by your house on a previous occasion?
>
> [S.S.] No. My son told me, and he didn't want to tell me.

¶40 We conclude that the record demonstrates that Lobley was not prejudiced by S.S.'s statements because there was more than sufficient evidence to convict Lobley of the December 4, 2011 armed robbery as PTAC. We rely on the previous summary of D.U.'s testimony, the testimony of the officer who spoke to D.U. as she waited in the Impala; the testimony of the officers who located the

Impala, its contents (including S.S.'s jacket), Lobley, Means, and Robinson near Means' residence; S.S.'s testimony regarding the vehicle following her from the bar and her description of the clothing and masks of the armed robbers; and Lobley's admission that he had been in the Impala that night. Given the other strong non-hearsay evidence connecting Lobley with the December 4, 2011 armed robbery, he has not shown a "reasonable probability" that but for the alleged error, the outcome would have been different. *See* ***Erickson***, 227 Wis. 2d at 769. Lobley has presented a faulty paradigm—the outcome of the charges against him relating to the December 4, 2011 armed robbery was not dependent on whether he directed the men to S.S.'s home. Because Lobley has not shown prejudice, he has not established that trial counsel was ineffective. *See* ***Johnson***, 153 Wis. 2d at 128.

C. Lobley was not Prejudiced by the Prosecutor's Comment

¶41 Lobley also contends that trial counsel was ineffective for failing to object to the prosecutor's improper statement in the closing. However, this argument fails since Lobley cannot establish that he was prejudiced. *See* ***id.*** The jury's verdicts finding Lobley not guilty of the charges related to the December 3, 2011 armed robbery demonstrate that it was not influenced by the prosecutor's improper comment. Moreover, the evidence summarized above, from which we have intentionally omitted Means' testimony, demonstrates that given all the other evidence against Lobley, he has not shown a "reasonable probability" that the outcome of the trial would have been different without the prosecutor vouching for the truthfulness of Means' testimony. *See* ***Erickson***, 227 Wis. 2d at 769.

¶42 For all the foregoing reasons, we affirm the judgment and orders.

By the Court.—Judgment and orders affirmed.

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