COURT OF APPEALS
DECISION
DATED AND FILED

April 23, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP1557-CR **Cir. Ct. No. 2010CF1424**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BRANDON L. FELTON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: RICHARD J. SANKOVITZ, Judge. *Affirmed*.

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

¶1 PER CURIAM. Brandon L. Felton appeals from a judgment of conviction, entered upon the trial court's verdict, on one count of conspiracy to commit armed robbery with the threat of force. Felton also appeals from an order

denying without a hearing his postconviction motion, in which he alleged ineffective assistance of trial counsel. We affirm the judgment and order.

BACKGROUND

¶2 Around 10:30 p.m. on January 28, 2010, the victim in this case awoke to two men with hoodies standing in her bedroom. One of them, who she later identified as Giovani Rodriguez, was pointing a gun at her. The men demanded the cash or drugs they believed her son had in the home. When it turned out that the son had neither cash nor drugs stored in the home, the robbers took what they could—a gaming system, a laptop, a bottle of vodka, and some cash from the victim's purse—and fled. At some point, Jolene Linder was identified as a participant in the robbery's planning; she was waiting in the car while the robbery occurred. Linder identified Felton as the second robber, though the victim was unable to identify him.

¶3 Felton, Rodriguez, and Linder were charged with conspiracy to commit armed robbery with the threat of force. Felton opted for a bench trial. Both Rodriguez and Linder agreed to testify against Felton and, while each provided different accounts of how the events of January 28 began, both testified that Felton participated. Felton's mother, Brenda Smith, also testified. She attempted to provide her son with an alibi, telling the trial court that he had been with her all evening. The trial court convicted Felton and sentenced him to five years' initial confinement and two years' extended supervision.

¶4 Felton filed a postconviction motion, alleging ineffective assistance of counsel and seeking a new trial. The circuit court denied the motion without a hearing. Additional facts will be discussed below as needed.

DISCUSSION

Standard of Review

¶5 Claims of ineffective assistance of counsel are reviewed under a two-pronged test. *See* ***State v. Allen***, 2004 WI 106, ¶26, 274 Wis. 2d 568, 587, 682 N.W.2d 433, 442. The defendant must prove that his attorney's performance was both deficient and prejudicial. ***Ibid.*** The defendant must successfully show both prongs to secure relief. ***Id.***, 2004 WI 106, ¶26, 274 Wis. 2d at 587, 682 N.W.2d at 443.

¶6 Whether the defendant's postconviction motion alleges sufficient facts to entitle him to a hearing on the motion is subject to a mixed standard of review. ***Id.***, 2004 WI 106, ¶9, 274 Wis. 2d at 576, 682 N.W.2d at 437. The facial sufficiency of the motion is subject to *de novo* review. ***Ibid.*** If the motion is not sufficient, if the motion is conclusory, or if the Record conclusively demonstrates that the defendant is not entitled to relief, the decision whether to grant a hearing on the motion is committed to the circuit court's discretion, to which we are deferential. ***Id.***, 2004 WI 106, ¶9, 274 Wis. 2d at 576–577, 682 N.W.2d at 437.

I. Failure to Object: Hearsay

¶7 According to the postconviction motion, Rodriguez testified that Smith "allegedly threatened to kill him if he was to say something about" Felton. Felton contends this was inadmissible hearsay testimony, highly prejudicial because of its adverse impact on Smith's credibility, and trial counsel should have objected. The circuit court, relying in part on ***State v. Kutz***, 2003 WI App 205, 267 Wis. 2d 531, 671 N.W.2d 660, concluded that Rodriguez's testimony about Smith's threat was not hearsay.

¶8 We agree with the circuit court that Rodriguez's testimony was not hearsay, although we believe reliance on ***Kutz*** is misplaced.[1] Rather, we conclude that Rodriguez's testimony was not hearsay because it was not offered for the truth of the matter asserted—namely, that Smith was actually going to kill Rodriguez. *See* WIS. STAT. § 908.01(3).

¶9 A review of the context of Rodriguez's testimony is illuminating. The State had shown Rodriguez a handwritten letter sent to Felton. Rodriguez denied recognizing the letter, and the State indicated it had no more questions. Defense counsel then cross-examined Rodriguez, and one of their exchanges was as follows:

> Q All right. In more of the statements to police, you admitted that you did write Brandon Felton a letter and send it to him while he was in custody; is that correct?
>
> A Yes.
>
> Q But it was not the letter that you've been asked about, that you just looked at?
>
> A No. The letter I sent him was telling him that when his mom threatened to kill me, I told him that if his mom going to kill me, I would rather have him do it instead of his mom. That's the letter I wrote to him the first time.

[1] The cited portion of ***State v. Kutz***, 2003 WI App 205, 267 Wis. 2d 531, 671 N.W.2d 660, on which the circuit court relied, discussed a homicide victim's instruction to her mother to come looking for her if she had not returned within a specified time frame. ***Id.***, 2003 WI App 205, ¶¶34, 36, 267 Wis. 2d 557–558, 671 N.W.2d at 673–674. The case later deals more directly with whether certain threats constituted hearsay; those threats were deemed inadmissible under the state-of-mind exception the State had utilized. ***Id.***, 2003 WI App 205, ¶62, 267 Wis. 2d at 584, 671 N.W.2d at 686.

Thus, as the circuit court noted, there were apparently multiple letters and Rodriguez had "offered to distinguish among them by their contents." On re-direct, the State had the following exchange with Rodriguez:[2]

> Q You said earlier in your testimony that you told Brandon you would rather he would kill you?
>
> A I would rather have him kill me than his family. The day before the police came to my house, I got a phone call from his mom threatening to kill me if I was to say something about Brandon Felton.
>
> Q Did you recognize his mom's voice?
>
> A Yeah. It was her phone number too.

¶10 "'The hearsay rule does not prevent a witness from testifying as to what he heard; it is rather a restriction on the proof of fact through extrajudicial statements.'" ***State v. Curbello-Rodriguez***, 119 Wis. 2d 414, 427, 351 N.W.2d 758, 765 (Ct. App. 1984) (citation omitted). We do not discern the State to have been attempting to prove Smith had threatened Rodriguez and, thus, his testimony was not hearsay. Accordingly, trial counsel was not ineffective for the lack of objection. *See* ***State v. Cummings***, 199 Wis. 2d 721, 747 n.10, 546 N.W.2d 406, 416 n.10 (1996).

II. Failure to Impeach Linder

¶11 In exchange for her truthful testimony against Felton, the State offered Linder a reduced charge and a sentence recommendation of probation.

[2] The State, in its brief to this court, attempts to concede that some of Rodriguez's testimony may have been hearsay. Whether statements are hearsay is a question of law, *see* ***State v. Sharp***, 180 Wis. 2d 640, 650, 511 N.W.2d 316, 321 (Ct. App. 1993), and we are not bound by parties' legal concessions, *see* ***Fletcher v. Eagle River Memorial Hospital, Inc.***, 156 Wis. 2d 165, 168, 456 N.W.2d 788, 790 (1990).

Felton contends that trial counsel was ineffective for failing to impeach Linder with evidence of this plea bargain, and he argues that trial counsel's failure to expose the State's promises to Linder "undermines confidence in the outcome of the trial."[3] Specifically, Felton argues that "[t]he trial court found that there had been no showing that Linder's testimony had been motivated by cooperation promises. This shows that the circuit court found this lack of showing important to her credibility. Accordingly, trial counsel's failure to impeach … [Linder] was prejudicially ineffective."

¶12 Assuming without deciding that trial counsel was, in this case, deficient for not examining Linder about her plea bargain, we agree with the circuit court that there was no prejudice. The circuit court, in ruling on the postconviction motion, explained that the key factor of Linder's testimony, relative to her credibility, was that she had identified Felton from the beginning. That is, her identification of Felton as a co-defendant was not provided in exchange for charge or sentence concessions but was instead proffered before any promise of gain was made by the State.

¶13 In light of the circuit court's exposition, which contains historical facts that are not clearly erroneous, *see* ***State v. Johnson***, 153 Wis. 2d 121, 127–128, 449 N.W.2d 845, 848 (1990), we uphold the circuit court's decision that

[3] The motion references a failure to impeach both Linder and Rodriguez with evidence of their pleas. The appellate brief discusses only trial counsel's failure to impeach Linder.

Felton has not shown any prejudice from counsel's failure to impeach Linder with evidence of her plea bargain.[4]

III. Failure to Object: Trial Court Questioning

¶14 Finally, Felton complains that trial counsel should have objected when the trial court began questioning Smith about a letter she had sent to the court two months before trial. This letter described Smith's interactions with police, her interactions with Felton's parole agent, her lupus, and her appearance at one of Felton's first court dates in this matter.

¶15 At trial, Smith was supposed to provide Felton's alibi. She testified that he came into her house around 8 p.m., went to lay down in her daughter's room, and did not get up until the next morning. Smith further testified that she never heard Felton leave, and she had been up until 4 or 5 a.m. While Smith was on the stand, the trial court asked her about the letter, noting that at no point in the letter did she mention Felton was in the home with her at the time of the robbery.[5] Smith responded that she "didn't want to put too much on the letter because ain't think you was going to read it. That was my opinion…. So I was trying to put as much so you could understand a little bit where I was coming from." Felton

[4] The circuit court had also presided over Linder's plea and sentencing. While we agree with the State that there is a reasonable inference that the trial court would have been aware of Linder's bargain when it heard her testimony and evaluated her credibility, we decline to rely on that inference because the circuit court made no reference to those other proceedings in its explanation.

[5] Also attached to Smith's submission was a letter from Felton to her, explaining to her why he thought the State's case against him was weak. He referenced two alibis without detail, and never argued what would have been the key point if the alibi were true: that the State's case was weak because Felton was with her all night.

contends that by asking questions and referring to the letter, the trial court was impermissibly acting as the State's advocate.

¶16 A judge may not only interrogate witnesses but may call them as well. *See* WIS. STAT. § 906.14(1)–(2). In doing so, a judge "must be careful not to function as a partisan or advocate." ***State v. Asfoor***, 75 Wis. 2d 411, 437, 249 N.W.2d 529, 540 (1977). Felton appears to believe that it was the introduction of his mother's letter—evidence that neither party offered—that caused the trial court to cross the boundary of what is permitted.

¶17 We presume that circuit court judges strive for impartiality. *See* ***State v. Carprue***, 2004 WI 111, ¶46, 274 Wis. 2d 656, 677, 683 N.W.2d 31, 41. Whether a circuit court judge has shown a lack of impartiality is a question of law. ***State v. Murray***, 128 Wis. 2d 458, 463, 383 N.W.2d 904, 907 (Ct. App. 1986).

> However, the trial judge is more than a mere referee. The judge does have a right to clarify questions and answers and make inquiries where obvious important evidentiary matters are ignored or inadequately covered on behalf of the defendant and the state. A judge does have some obligation to see to it that justice is done but must do so carefully and in an impartial manner.

Asfoor, 75 Wis. 2d at 437, 249 N.W.2d at 540–541. "'While the court cannot function as a partisan, it may take necessary steps to aid in the discovery of the truth.'"[6] ***Carprue***, 2004 WI 111, ¶41, 274 Wis. 2d at 675, 683 N.W.2d at 40 (citation omitted).

[6] It also appears that a good portion of our concern about the circuit court maintaining an appearance of impartiality stems from a need to ensure a jury is not tainted by the circuit court's actions. *See* ***State v. Carprue***, 2004 WI 111, ¶¶40–44, 274 Wis. 2d 656, 674–677, 683 N.W.2d 31, 40–41. With a bench trial, those concerns are not implicated.

¶18 We suspect that the only reason neither party had Smith's letter was because she did not send them a copy, and we do not perceive the trial court to have done anything beyond taking necessary and neutral steps to determine the truth. "'A judge is more than a moderator; he is charged to see that the law is properly administered, and it is a duty which he cannot discharge by remaining inert.'" ***Ibid.*** (citation omitted). Any objection by trial counsel to the trial court's questioning would have been properly overruled and, as noted above, counsel is not ineffective for failing to pursue meritless objections.

¶19 The Record conclusively demonstrates that Felton was not entitled to relief on his motion. We discern no erroneous exercise of discretion by the circuit court in denying the motion without a hearing.

By the Court.—Judgment and order affirmed.

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