COURT OF APPEALS
DECISION
DATED AND FILED

July 2, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP1860-CR **Cir. Ct. No. 2009CF127**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

HAVEN PETTIGREW,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Fond du Lac County: GARY R. SHARPE, Judge. *Affirmed*.

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

¶1 KESSLER, J. Haven Pettigrew appeals a judgment, following a jury trial, convicting him of one count each of: substantial battery while using a dangerous weapon, second-degree reckless endangerment, and disorderly conduct.

Pettigrew also appeals the order denying his postconviction motion for a new trial.[1] We affirm.

BACKGROUND

¶2 On May 5, 2009, Pettigrew was charged with one count each of: substantial battery while using a dangerous weapon, second-degree reckless endangerment while using a dangerous weapon, and disorderly conduct. The charges stemmed from a fight that occurred between Pettigrew and Brian Karschney, in the early hours of January 1, 2009, outside of the Kosmos bar in Fond du Lac. Pettigrew allegedly stabbed Karschney during the altercation.

¶3 A three-day jury trial began on January 10, 2011. During opening statements, defense counsel suggested that two fights occurred at around the same time on January 1, 2009—on the same block—and that Pettigrew and Karschney were involved in separate fights. Defense counsel suggested that Karschney, who is white, was stabbed during a fight with an unknown African-American man at approximately 3:15 a.m. Approximately an hour later, according to defense counsel, Pettigrew, who is African-American, had a different altercation with an unknown white man, but Pettigrew and Karschney did not fight each other.

¶4 Lieutenant David LeCaptain of the Fond du Lac Police Department testified that at approximately 4:00 a.m. on January 1, 2009, he was patrolling the area outside of Kosmos when he noticed two men "fighting [and] rolling around on the ground" slightly north of the bar. Lieutenant LeCaptain stated that he

[1] The notice of appeal in this case was filed after the trial court's oral ruling denying Pettigrew's postconviction motion but before the trial court issued its written order. Per an order granted by this court, Pettigrew's appellate counsel filed a motion to supplement the record with the trial court's written order. The written order is now a part of the appellate record and we discern no jurisdictional issues pertaining to our review of Pettigrew's arguments on appeal.

pulled his squad car over and started walking toward the altercation when he noticed the two men—one African-American and one white—walk away from each other after their fight was broken up by a female. Lieutenant LeCaptain noticed that the African-American man—who he identified in court as Pettigrew—was "angry, upset, belligerent, yelling [and] swearing." When Lieutenant LeCaptain attempted to make contact with Pettigrew, the lieutenant was approached by a witness to the fight. The witness told Lieutenant LeCaptain that Pettigrew "'dropped a knife.'" Lieutenant LeCaptain then recovered a knife, but at the time did not consider it a weapon used in the altercation. A DNA analysis later identified Karschney's blood on the knife.

¶5 Detective Jeffrey Harbridge told the jury that he interviewed Pettigrew on January 12, 2009. According to Detective Harbridge, Pettigrew said that on the morning of the altercation, a white male intentionally "plowed into him" at the bar and said '"move nigger.'" Pettigrew told Detective Harbridge that he did not have a knife, that he "blacked out" after the altercation, and that "the next thing [Pettigrew] remembers is being in handcuffs." Towards the end of Detective Harbridge's direct examination, the State asked the following questions:

> Q But the last thing I want to cover with you is the Defense's argument. And you were present when openings were made, correct?
>
> A Correct.
>
> Q You heard my opening?
>
> A Yes.
>
> Q Did you hear [defense counsel's] opening?
>
> A Yes.
>
> Q When was the first time you heard that the argument was these were two separate–

> [Defense counsel] Objection, your Honor. I would ask for a hearing.

¶6 Outside of the presence of the jury, defense counsel argued that the State's incomplete question suggested that the defense had a duty to inform the State of its defense theory prior to trial. The State argued that the purpose of its question was to ascertain whether law enforcement merged two different fights and, whether as a result, the State was prosecuting the wrong individual. The trial court sustained defense counsel's objection, stating that it would be inappropriate for Detective Harbridge "to be rendering an opinion as to the Defense's theory or when this theory came up or anything else."

¶7 Still outside of the presence of the jury, defense counsel then moved for a mistrial, arguing that the partial question gave the jury the impression that the defense had an obligation to inform the State of its defense theory. The court reporter read back the partial question as: "When was the first time you heard that the argument --." Defense counsel expressed different recollections about the wording of the question. The trial court denied the motion, concluding that the jury did not infer that the defense had an obligation to tell the State about its defense theory. The trial court also concluded that there was no prejudice to the defense because the question was not answered.

¶8 Back in the presence of the jury, the trial court explained that defense counsel's objection was sustained because "opening arguments are not testimony." The trial court instructed the jury to disregard the State's partial question.

¶9 The next day, again outside of the presence of the jury, the trial court readdressed defense counsel's motion for a mistrial, stating:

> [W]e had talked about exactly what the question was prior to the time the objection was made. We had talked about the fact – or at least it was this Court's belief that what was asked was the following, "When was the first time that you heard that the argument"–
>
> In speaking with my court reporter, she said that she checked through … and found that there were a couple of additional words that were part of the question, … and the question was "When was the first time you heard that the argument was these were two separate" – And then the objection was made.

¶10 The trial court gave the parties an additional opportunity to make arguments, but ultimately reached the same conclusion, stating:

> I've had the opportunity to listen to both attorneys. My position is that the decision I made yesterday I think is the correct one…. Again, I don't think that this language goes far enough to truly alert the jury as to where we were going with this and certainly there wasn't enough to taint them in any fashion. I don't believe that they would feel that the Defense had some obligation that they didn't fulfill, and I think that we corrected it by asking the jury to disregard that question and by letting them know that the entire inquiry into opening statements was not going to be allowed because opening statements are not evidence, and I think that that fixed any issue that the Defense might have had relative to the area of inquiry that was at least started.

¶11 The jury also heard testimony from Brian Karschney. Karschney told the jury that he was celebrating New Year's at Kosmos and left the bar at approximately 3:30 a.m. Karschney stated that as he was leaving the bar, he bumped into someone, said "excuse me," and then left. Karschney said that he walked towards a nearby intersection when he heard someone yelling vulgarities behind him. Karschney turned around and, as he described it, was "attacked." Karschney claims he did not realize he had been stabbed until about 10:30 a.m. on January 1, 2009. He identified Pettigrew at trial as his attacker with "100 percent" certainty.

¶12 Thomas Develice, the bouncer at Kosmos on the morning of the altercation, testified that he was an acquaintance of Karchney. Develice saw both Karschney and Pettigrew at Kosmos in the "[v]ery early morning" of January 1, 2009. Develice stated that Karschney bumped into Pettigrew inside the bar, prompting Pettigrew to get angry. Develice stepped in between Karschney and Pettigrew and ordered Pettigrew to leave because of Pettigrew's "threatening" behavior. Develice saw both Karschney and Pettigrew leave the bar. Develice stepped outside the bar after he saw Pettigrew leave, at which point he saw Pettigrew running northbound towards Karschney. Develice testified that he saw Pettigrew jump on top of Karschney and make "downward swinging motions" towards Karschney's ribs and lower back. Develice saw a "flash of metal" in Pettigrew's hand.

¶13 Sara Doro, the mother of two of Pettigrew's children, testified that Pettigrew called her after his arrest, asking for bail money. Doro stated that Pettigrew told her that he was involved in a fight and that he acted in self-defense. Doro also confirmed that she spoke with Detective Harbridge on January 29, 2009, and told him that Pettigrew called her from jail and told her that he "stabbed some white boy who called me a nigger."

¶14 Pettigrew was convicted of all three charges. Postconviction counsel filed a motion for a new trial alleging: (1) the trial court erred in denying Pettigrew's motion for a mistrial; (2) ineffective assistance of counsel related to the mistrial motion; and (3) newly discovered evidence based on a letter written by Doro recanting her trial testimony.[2] The trial court held an evidentiary hearing.

[2] The postconviction motion also challenged the admission of certain hearsay testimony; however, that matter is not at issue in this appeal.

¶15 At the hearing, Pettigrew's defense counsel told the court that during her opening statement at trial, she noticed a juror staring intently at the State's table. At some point after defense counsel's opening statement, the prosecutor approached her and expressed surprise at counsel's two-fight defense theory. The prosecutor told defense counsel that when counsel proposed this theory during the opening statement, she (the prosecutor) turned to Detective Harbridge, asked, "'is this true?'" and told him that she did not want to prosecute an innocent man. Defense counsel said she did not make "the connection" that the juror may have been trying to listen to the conversation between the prosecutor and Detective Harbridge. Pettigrew argued that defense counsel's failure to call this observation to the trial court's attention during her motion for a mistrial was ineffective assistance.

¶16 Pettigrew also reiterated his contention that the partial question was prejudicial to his defense. He argued that defense counsel's delayed realization that the juror's behavior might have been connected to the prosecutor's conversation with Detective Harbridge "does possibly have a bearing on the degree of prejudice that may have resulted from … that question."

¶17 Pettigrew also argued that a recantation letter from Doro was newly discovered evidence warranting a new trial. After Pettigrew's sentencing, Doro wrote a letter to defense counsel saying that she lied when she told Detective Harbridge that Pettigrew admitted to the stabbing. Specifically, Doro wrote that Pettigrew "only told me that he was being charged with disorderly conduct" and "never told me that he stabbed someone." She wrote that she lied because she "was mad with [Pettigrew]" and "was withdrawing from my medication."

¶18 The trial court denied the postconviction motion. Addressing all of Pettigrew's arguments, the trial court stated:

> It may very well be that the … Prosecution during the opening statement of [defense counsel] was saying, you know, is this possible? Is this true? And then were surprised by the defense. And certainly it may very well be that … [the prosecutor] was asking when the officers ever found out about this defense.
>
> But I, for the life of me, can't make the leap or connection between that surprise, which is pretty natural, and some kind of a prejudice to the defendant that the jury would have expected him to prove something other than … the fact that the total testimony should have shown that there were, in fact, two fights because [defense counsel] chose to make the argument that that's perhaps what occurred.
>
> ….
>
> My suspicion is that the Defense was pointing out the conflicts in this testimony that spanned a half a block and 45 minutes with the hope that the jury would be confounded by it or that it left a reasonable doubt. But I think when all of the testimony that contributed itself came in, was very clear that there this one incident involving Mr. Pettigrew and Mr. Karschney and there were no two fights.
>
> For that reason, I just don't believe that there is a basis for a mistrial. I don't believe that the jury was misled in any fashion. I don't believe that they had some misguided … or could have from this record have some misguided sense that the Defense had some greater burden than it had.

¶19 The trial court found Doro's testimony cumulative in light of the other evidence presented at trial, namely, the testimony of Karschney, Develice, LeCaptain, and multiple other eyewitnesses, as well as the knife with Karschney's DNA. The trial court denied Pettigrew's motion in its entirety. This appeal follows. Additional facts are provided as relevant to the discussion.

DISCUSSION

¶20 On appeal, Pettigrew argues that the trial court erroneously denied his postconviction motion for a new trial because: (1) his right against self-incrimination was violated when the State asked the partial question; (2) defense counsel was ineffective for failing to notify the trial court of the prosecutor's discussion with Detective Harbridge during defense counsel's opening statement; and (3) Doro's recantation letter is newly discovered evidence warranting a new trial. We disagree.

I. Self-Incrimination.

¶21 Pettigrew argues that the State's partial question implicated his right to remain silent because it "infer[red] that he had an obligation to come forward with additional information." Specifically, Pettigrew contends that the jury may have been improperly influenced by an implication that the defense was obligated to share its defense theory with the State. Pettigrew is mistaken.

¶22 Defendants have a constitutional right to remain silent. U.S. CONSTIT. amend.V; ***Miranda v. Arizona***, 384 U.S. 436, 467-68 (1966). That right is violated if the State comments on the defendant's silence during a criminal trial. ***Griffin v. California***, 380 U.S. 609, 614 (1965). "The test for determining if there has been an impermissible comment on a defendant's right to remain silent is whether the language used was manifestly intended or was of such character that the jury would naturally and necessarily take it to be a comment on the defendant's right to remain silent." ***State v. Nielsen***, 2001 WI App 192, ¶32, 247 Wis. 2d 466, 634 N.W.2d 325. "The court must look at the context in which the statement was made in order to determine the manifest intention which prompted it and its natural and necessary impact on the jury." ***Id.***

¶23 Pettigrew's argument stems from the following line of questioning between the State and Detective Harbridge:

> Q But the last thing I want to cover with you is the Defense's argument. And you were present when openings were made, correct?
>
> A Correct.
>
> Q You heard my opening?
>
> A Yes.
>
> Q Did you hear [defense counsel's] opening?
>
> A Yes.
>
> Q When was the first time you heard that the argument was these were two separate –
>
> [Defense counsel] Objection, your Honor. I would ask for a hearing.

¶24 First, Pettigrew's argument rests on the faulty premise that the State's line of questioning called attention to Pettigrew's right to remain silent. The partial question reflects the State's attempt to discredit the defense theory that there were two separate fights. The question did not reference Pettigrew's right to remain silent. The State was not able to complete the question as the trial court sustained defense counsel's prompt objection. Therefore, there is no evidence that the jury was aware of the intended full question. In the context of the entire three-day trial, during which the jury heard from multiple witnesses, nothing in this series of questions suggests that the jury "naturally and necessarily" reached the conclusion that the defense had an obligation to share its theory with the State. *See* ***Nielsen***, 247 Wis. 2d 466, ¶32. Moreover, Pettigrew did not exercise a right to remain silent; rather, he spoke with police after his arrest.

¶25 Second, it is well established that "'improper remarks by a prosecutor are not necessarily prejudicial where objections are promptly made and sustained and where curative instructions and admonitions are given by the court.'" ***State v. Moeck***, 2004 WI App 47, ¶14, 270 Wis. 2d 729, 677 N.W.2d 648 (citation omitted), *aff'd* 2005 WI 57, 280 Wis. 2d 277, 695 N.W.2d 783. Here, the trial court sustained defense counsel's prompt objection and instructed the jury to disregard the partial question. We assume that juries follow instructions. *See* ***Johnson v. Pearson Agri-Sys., Inc.***, 119 Wis. 2d 766, 776, 350 N.W.2d 127 (1984).

¶26 To the extent Pettigrew argues that he was prejudiced by the combination of the partial question and the State's comment to Detective Harbridge, we conclude that his argument is based on mere speculation. Pettigrew's argument is based upon defense counsel's observation that a juror was staring at the State's table during defense counsel's opening statement, the prosecutor's comments to defense counsel after the opening statement, and defense counsel's delayed realization that there may be a "connection" between the two. However, Pettigrew's argument is not based upon information from any of the actual jurors. There is no evidence in the record suggesting that the juror actually overheard a conversation between the State and Detective Harbridge. Without such evidence, Pettigrew could not have been prejudiced by the conversation.

II. Ineffective Assistance of Defense Counsel.

¶27 Pettigrew also contends that defense counsel was ineffective for failing to inform the trial court of the State's remark to Detective Harbridge and that a juror may have heard the remark.

¶28 To establish ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that he was prejudiced by the deficient performance. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). A reviewing court may dispose of a claim of ineffective assistance of counsel on either ground. ***Id.*** at 697. To prove deficient representation, a defendant must point to specific acts or omissions by the lawyer that are "outside the wide range of professionally competent assistance." ***Id.*** at 690. To prove prejudice, a defendant must demonstrate that the lawyer's errors were so serious that the defendant was deprived of a fair trial and a reliable outcome. ***Id.*** at 689. Thus, in order to succeed on the prejudice aspect of the ***Strickland*** analysis, "[t]he defendant must show that 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.*** at 694. This is not, however, "an outcome-determinative test…. In decisions following ***Strickland***, the Supreme Court has reaffirmed that the touchstone of the prejudice component is 'whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair.'" ***State v. Smith***, 207 Wis. 2d 258, 276, 558 N.W.2d 379 (1997) (citation omitted).

¶29 Pettigrew's contention that his defense counsel was ineffective is based on the purely speculative assertion that a juror heard the State's remark.

Defense counsel testified that she did not make "the connection" between the juror's focus on the State's counsel table and the State's comment until after the trial was over. She testified that while she did notice that the juror was not paying attention to her opening statement, she did not want to call attention to the juror's inattentiveness because she did not want to break her train of thought. At some point after her opening statement the State informed her of its remark to Detective Harbridge. That defense counsel did not automatically leap to the assumption that the juror in question heard the remark is hardly deficient performance—Pettigrew has not demonstrated that the juror even heard the remark. We conclude, therefore, that defense counsel did not render ineffective assistance.

III. Newly Discovered Evidence.

¶30 Lastly, Pettigrew argues that a letter from Doro recanting her trial testimony is newly discovered evidence warranting a new trial. In order for newly discovered evidence to warrant a new trial, "'the defendant must prove, by clear and convincing evidence, that: (1) the evidence was discovered after conviction; (2) the defendant was not negligent in seeking evidence; (3) the evidence is material to an issue in the case; and (4) the evidence is not merely cumulative.'" ***State v. Armstrong***, 2005 WI 119, ¶161, 283 Wis. 2d 639, 700 N.W.2d 98 (citation omitted). "'If the defendant proves these four criteria by clear and convincing evidence, the [trial] court must determine whether a reasonable probability exists that a different result would be reached in a [new] trial.'" ***Id.*** (citation omitted).

¶31 When the newly discovered evidence is a witness's recantation, the recantation must be corroborated by other newly discovered evidence. ***State v. McCallum***, 208 Wis. 2d 463, 473-74, 561 N.W.2d 707 (1997). "'The degree and

extent of the corroboration required varies from case to case based on its individual circumstances.'" ***Id.*** at 477 (citation and brackets omitted). The corroboration requirement for recantation is fulfilled if "there is feasible motive for the initial false statement" and "there are circumstantial guarantees of the trustworthiness of the recantation." ***Id.*** at 477-78.

¶32 Pettigrew argues that Doro's letter meets the first four criteria of the newly discovered test. He also contends that Doro's recantation creates a reasonable probability of a different result in a new trial because the eye witness testimony relied upon by the trial court was weak. We disagree.

¶33 We assume, without deciding, that Doro's letter meets the first four elements of the newly discovered evidence test. However, we conclude that Pettigrew has not provided any corroboration for Doro's recantation. "Recantations are inherently unreliable," because the recanting witness is admitting that he or she has lied under oath. ***Id.*** at 476. The corroboration element may be met by showing that there is a feasible motive for the initial false statement and there are circumstantial guarantees of the trustworthiness of the recantation. ***Id.*** at 477-78.

¶34 Pettigrew has not provided any corroboration of the recantation. He claims that Doro "heard stories from other individuals," who are not identified, and that Doro "wanted to assist [him] by providing him with the self-defense claim." However, a reason for lying is not a fact that corroborates a newly asserted fact. Pettigrew also contends that the conversation that was "alleged to have occurred between [himself] and [Doro] over the phone [occurred] in an open booking area in the likely presence of law enforcement officers." No officers are identified and no affidavits of witnesses to the phone conversation are presented.

Pettigrew's "corroboration" is vague, speculative, lacking factual support and does not warrant a new trial.

¶35 Moreover, even if Pettigrew had satisfied the corroboration element and Doro's testimony was not a part of the trial, we cannot conclude that a jury would reach a different result at a new trial. Multiple witnesses testified about the fight, including Karschney and Develice, both of whom identified Pettigrew as Karschney's attacker. Develice saw a "flash of metal" in Pettigrew's hand and saw Pettigrew strike Karschney with "downward" motions. Lieutenant LeCaptain testified that he recovered a knife near the scene of the altercation after he was told that Pettigrew dropped it. The knife contained Karschney's DNA. Pettigrew is not entitled to a new trial.

CONCLUSION

¶36 For the foregoing reasons, we affirm the trial court.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.