COURT OF APPEALS
DECISION
DATED AND FILED

August 8, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP2531-CR **Cir. Ct. No. 2011CF1214**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

WILLIAM M. GRUNWALD,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dane County: WILLIAM E. HANRAHAN, Judge. *Affirmed*.

Before Lundsten, Higginbotham and Sherman, JJ.

¶1 HIGGINBOTHAM, J. William M. Grunwald appeals a judgment of conviction entered on a jury's verdict of one count of second-degree reckless endangerment as a party to the crime and as a repeat offender, and the order denying his motion for postconviction relief. Grunwald contends that he is

entitled to a new trial because he received the ineffective assistance of counsel in several respects. For the reasons we explain, we affirm.

BACKGROUND

¶2 A criminal complaint was filed in Dane County Circuit Court charging Grunwald with second-degree reckless endangerment as a party to a crime and as a repeat offender. The complaint alleges that police officers were dispatched to a park located at 1 John Nolen Drive in the City of Madison after a woman named Ashley Spink called 911 to report that a man was being beaten. When police arrived at the scene, numerous individuals who appeared to be homeless were congregating at the park. The victim, identified as William Stevens, was bleeding from his face.

¶3 As soon as police arrived at the scene, Spink's boyfriend, Sean Kruse, approached Officer Alexandra Nieves Reyes. Kruse, who had been walking by the park with Spink at the time of the incident, pointed out to Officer Reyes two individuals who, according to him, kicked the victim in the face while the victim was lying on the ground unconscious. Kruse pointed to an individual wearing a khaki hat as one of the individuals involved in the fight and police handcuffed him and identified him as Steven Houghton. There is no dispute that the victim's injuries stemmed from a fight mainly between the victim and Houghton. Kruse pointed to an individual dressed in black as the second individual involved in the fight. Police handcuffed that individual and identified him as Grunwald. Both Spink and Kruse were separately interviewed by police following the incident, and both reported that the man dressed in black, Grunwald, had kicked the victim once in the face while the victim was lying on the ground unconscious.

¶4 Grunwald was arrested, charged, and the case was tried to a jury. Grunwald's main theory of defense was that he was misidentified as the second man who attacked the victim. The jury found Grunwald guilty of the charged offense. Grunwald filed a postconviction motion requesting a new trial on the ground that trial counsel was ineffective in numerous respects. Following a ***Machner***[1] hearing, the court denied the motion. Grunwald appeals. Additional pertinent facts are discussed below where necessary.

DISCUSSION

¶5 On appeal, Grunwald explains that the heart of his defense strategy was to establish that the police mistakenly identified him as the second individual who kicked the victim in the face. According to Grunwald, trial counsel could have formulated a defense strategy that would have created a reasonable doubt as to whether Grunwald was the person who committed the offense charged but that counsel failed to do so and therefore provided ineffective assistance. With this context in mind, we turn now to Grunwald's specific arguments as to why counsel provided ineffective assistance.

¶6 Grunwald contends that trial counsel was ineffective in five primary ways: (1) counsel failed to name, subpoena, and call to testify four witnesses important to Grunwald's defense; (2) counsel's cross-examination of Kruse resulted in Kruse identifying Grunwald as one of the individuals who he observed kick the victim, which prejudiced Grunwald's defense because Kruse was unable to identify Grunwald as that person on direct-examination; (3) counsel failed to

[1] ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

object to four leading questions that the State asked Spink on direct-examination after Spink testified that she saw only one person attack the victim; (4) counsel failed to request the circuit court to provide the jury with WIS JI—CRIMINAL 141, the criminal jury instruction concerning the identification of the defendant; and (5) counsel failed to pursue and execute a defense strategy that would explain how a small amount of blood belonging to the victim landed on Grunwald's shoe. We address and reject each argument below.

¶7 To succeed on a claim of ineffective assistance of counsel, Grunwald must demonstrate that counsel's representation was deficient and that the deficiency prejudiced him. *See* ***State v. Erickson***, 227 Wis. 2d 758, 768, 596 N.W.2d 749 (1999). Both deficient performance and prejudice present mixed questions of fact and law. ***State v. Jeannie M.P.***, 2005 WI App 183, ¶6, 286 Wis. 2d 721, 703 N.W.2d 694. We uphold the circuit court's factual findings unless clearly erroneous. ***State v. Thiel***, 2003 WI 111, ¶21, 264 Wis. 2d 571, 665 N.W.2d 305. However, we review de novo whether counsel's performance was deficient or prejudicial. ***Jeannie M.P.***, 286 Wis. 2d 721, ¶6.

¶8 To prove deficient performance, Grunwald must show that, under all of the circumstances, counsel's specific acts or omissions fell "outside the wide range of professionally competent assistance." ***Strickland v. Washington***, 466 U.S. 668, 690 (1984). We review counsel's strategic decisions with great deference because a strong presumption exists that counsel was reasonable in his or her performance. ***Id.*** at 689. Accordingly, we make "every effort … to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." ***Id.***

¶9 To prove prejudice, Grunwald must establish "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.

¶10 We first address and reject Grunwald's contention that counsel was ineffective because counsel's cross-examination of Kruse resulted in Kruse identifying Grunwald as the person who he observed kick the victim, when Kruse was unable to identify Grunwald as that person on direct-examination. We next address and reject Grunwald's contention that counsel was ineffective by failing to object to four leading questions posed by the prosecutor to Spink and by failing to request the criminal jury instruction regarding identification, WIS JI—CRIMINAL 141. We then address and reject Grunwald's contention that counsel was ineffective by failing to pursue and execute a defense strategy that would explain how a small amount of the victim's blood landed on Grunwald's shoe. Finally, we address and reject Grunwald's contention that counsel was ineffective by failing to name, subpoena, and call to testify four witnesses who potentially could have bolstered Grunwald's defense.

Cross-Examination of Kruse

¶11 Kruse testified at trial on behalf of the State. During his direct-examination, Kruse was unable to identify Grunwald as one of the individuals who allegedly kicked the victim's face.[2] Although Kruse's testimony on direct-

[2] The State asked Kruse the following questions on direct-examination:

> Q: And would you be able to identify the gentleman who was wearing the black shirt and … the black shoes if you saw him in court today?

(continued)

examination was extremely favorable to the defense, trial counsel decided to cross-examine Kruse. During cross-examination, counsel asked Kruse whether he recognized Grunwald. Kruse answered that he did. During redirect-examination, the State asked Kruse whether he could identify in court the person who, according to Kruse, kicked the victim's face, and Kruse identified Grunwald as that person.

¶12 Grunwald argues that trial counsel provided ineffective assistance by asking Kruse during cross-examination whether he recognized Grunwald as the person who kicked the victim's face. Grunwald argues that asking Kruse this question after Kruse was unable to make an in-court identification of Grunwald provided Kruse a second opportunity to identify Grunwald as the person who kicked the victim's face. We will assume, without deciding, that counsel's performance was deficient. However, we agree with the circuit court that trial counsel's deficient performance did not prejudice Grunwald because "there were other witnesses that placed the defendant at the scene."

¶13 Officer Reyes, the officer to whom Kruse identified Grunwald as one of the individuals who kicked the victim, was able to make an in-court identification of Grunwald. At trial, Officer Reyes testified that Kruse approached her as soon as she arrived at the scene of the crime and that Kruse pointed out two

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> A: I believe so.
>
> Q: And do you see anyone in the court that matches the description of the guy that you saw [kick the victim]?
>
> A: No, I don't.

The State then began asking questions on a different topic, and never followed up on why Kruse was not able to make an in-court identification of Grunwald.

individuals and stated that those were the two individuals who attacked the victim. Officer Reyes testified that one of the two individuals who Kruse identified was wearing a black T-shirt and that he was handcuffed. Officer Reyes testified that the individual was then identified as Grunwald. The State asked Officer Reyes whether the individual identified as Grunwald was present in the courtroom, and Officer Reyes testified that he was and pointed to Grunwald.

¶14 Grunwald does not explain in his postconviction motion or in his briefs on appeal how counsel's decision to cross-examine Kruse was prejudicial in light of Officer Reyes' identification of Grunwald as the person who Kruse identified as having committed the crime. It is reasonable to question counsel's decision to give Kruse a second opportunity to identify Grunwald as one of the individuals who kicked the victim. However, Officer Reyes' in-court identification of Grunwald provided sufficient evidence for the jury to find Grunwald guilty. Because Officer Reyes' identification of Grunwald so thoroughly undermined Grunwald's misidentification defense, we conclude that the result of the proceedings would not have been different had counsel decided not to cross-examine Kruse.

Leading Questions

¶15 Grunwald asserts that trial counsel was ineffective because he strategically chose not to object to four leading questions that the State asked Spink on direct-examination. After Spink testified that she saw only one individual kick the victim in the face, which was favorable to Grunwald's misidentification defense, the State asked Spink the following leading questions to which counsel did not object:

> Q: And you talked to Officer Alexandra Nieves Reyes; correct?
>
> A: Yes.
>
> Q: And do you remember telling her that there was a white male dressed in all black … who had kicked the victim in the face once?
>
> A: Yes.
>
> Q: And do you remember an individual who was dressed in all black?
>
> A: Yes.
>
> ….
>
> Q: Would it be fair to say that at [the time of the incident] things were fresher in your memory than they are here today?
>
> A: Yes ….

¶16 Trial counsel explained at the ***Machner*** hearing that he chose not to object to the leading questions because he believed that objecting to those questions would only call the jury's attention to the questions. Counsel testified that he had a practice of not objecting to leading questions, unless the objection was likely to prevent unfavorable evidence from being introduced. Trial counsel further explained that objecting to the above questions would only "make [the] prosecutor rephrase the question" and would not "protect the jury from any secret information."

¶17 We cannot say that counsel's decision not to object to the above leading questions constituted deficient performance because it was not an unreasonable trial strategy. Grunwald readily admits in his brief on appeal that the decision whether to object to a particular question "involves strategy," and we will sustain counsel's strategic decisions as long as they were reasonable under the

circumstances. *See* ***State v. Balliette***, 2011 WI 79, ¶26, 336 Wis. 2d 358, 805 N.W.2d 334 ("Counsel's decisions in choosing a trial strategy are to be given great deference."). As trial counsel explained during the ***Machner*** hearing, there is no reason to believe that objecting to the questions would have prevented the prosecutor from rephrasing the questions in admissible form.

¶18 Grunwald also has not demonstrated that counsel's failure to object to the above questions prejudiced his defense. To establish prejudice, Grunwald must first show that there is a reasonable probability that, had trial counsel objected to the above questions, the circuit court would have sustained counsel's objections. "Whether a challenged question is truly leading and suggestive, and whether the circumstances justify a leading and suggestive question is a matter of trial court judicial discretion." ***State v. Barnes***, 203 Wis. 2d 132, 136, 552 N.W.2d 857 (Ct. App. 1996). Grunwald has not demonstrated a reasonable probability that, had counsel objected to the above questions, the circuit court would have found that the questions were unduly leading and suggestive and that the prosecutor's decision to ask the above questions was not justified by Spink's vague testimony as to whether she observed Grunwald kick the victim.

WIS JI—CRIMINAL 141

¶19 Grunwald next contends that trial counsel was ineffective for not requesting WIS JI—CRIMINAL 141, concerning the identification of the defendant.[3]

[3] WISCONSIN JI—CRIMINAL 141 states in full:

> The identification of the defendant is an issue in this case and you should give it your careful attention. You should consider the reliability of any identification made by a witness, whether made in or out of court. You should consider the

(continued)

Trial counsel testified at the ***Machner*** hearing that there were two reasons why he did not request the court to give that jury instruction: (1) "requesting [the] jury instruction ahead of time would have highlighted the defense that [counsel] was going to employ"; and (2) the jury instruction contains factors the jury is to consider in determining whether the defendant has been correctly identified as the person who committed the crime that would not have been helpful to the defense. The circuit court determined that the failure to request the identification instruction might have constituted deficient performance, but that Grunwald had not shown any resulting prejudice.

> credibility of a witness making an identification of the defendant in the same way you consider credibility of any other witness.
>
> Identification evidence involves an expression of belief or impression by the witness. Its value depends on the opportunity the witness had to observe the offender at the time of the offense and later to make a reliable identification.
>
> Consider the witness' opportunity for observation, how long the observation lasted, how close the witness was, the lighting, the mental state of the witness at the time, the physical ability of the witness to see and hear the event, and any other circumstances of the observation.
>
> You should also consider the period of time which elapsed between the witness' observation and the identification of the defendant and any intervening events which may have affected or influenced the identification.
>
> In evaluating the identification evidence, you are to consider those factors which might affect human perception and memory and all the influences and circumstances relating to the identification. Then give the evidence the weight you believe it should receive.
>
> If you find that the crime alleged was committed, before you may find the defendant guilty, you must be satisfied beyond a reasonable doubt that the defendant is the person who committed the crime.

¶20 To establish that trial counsel was ineffective for failing to request the jury instruction on identification, Grunwald has the burden to show that there is a reasonable probability that, but for counsel's failure to request the jury instruction, the result of his trial would have been different. *See* ***State v. Reed***, 2002 WI App 209, ¶¶18-19, 256 Wis. 2d 1019, 650 N.W.2d 885. To establish prejudice, Grunwald must first prove that the court would have given the jury instruction had counsel requested it, and second that, if the instruction had been given, there is a reasonable probability that Grunwald would not have been convicted of second-degree reckless endangerment as a party to the crime. Assuming for purposes of this appeal that the circuit court would have given the instruction had counsel requested it, we conclude that Grunwald has not shown a reasonable probability that the outcome of the trial would have been different had the instruction been given.

¶21 On appeal, Grunwald's arguments that trial counsel was ineffective because he failed to request the jury instruction on identification can be summarized as follows. First, that the jury instruction on identification "should be given where the identification of the defendant is at issue," based on the comment to the jury instruction explaining that "the identification issue deserves careful attention." WIS JI—CRIMINAL 141, cmt. at 2. Second, that the identification instruction should have been given because Grunwald "vigorously denied that he was guilty" and Kruse testified that the second person who kicked the victim was wearing jeans when it is undisputed that on the day of the crime Grunwald was wearing black shorts and not jeans. Third, that trial counsel ignored the local rules established by the Dane County Circuit Court requiring the submission of proposed jury instructions.

¶22 We need not address any of these arguments. Grunwald does not explain how the outcome of the trial would have been different had counsel requested the jury instruction on identification and had the court given the instruction. Because Grunwald fails to develop an argument that addresses how giving the instruction would have resulted in a different outcome, we do not address this argument any further.[4] *See* ***Techworks, LLC v. Wille***, 2009 WI App 101, ¶28, 318 Wis. 2d 488, 770 N.W.2d 727 (We will not address undeveloped arguments.).

DNA Evidence

¶23 Grunwald contends that counsel was ineffective because he did not provide to the jury an innocent explanation as to why a small amount of blood from the victim was found on Grunwald's shoe. The blood was found on the right side of Grunwald's right shoe in the toe box near the shoe lace. According to Grunwald, it was ineffective for counsel to simply argue to the jury that a much greater quantity of blood would have been found on Grunwald's shoe had Grunwald kicked a man in the face who was as covered in blood as the witnesses described in their testimony.

[4] Although we do not further address Grunwald's jury instruction argument, we do not discount the significance that Grunwald's identification as the second perpetrator played in this case. Indeed, as we have explained, whether Grunwald was the person who committed the crime was the central issue at trial. We also acknowledge the concerns raised by our supreme court in recent cases regarding false identification and the recent research on the same topic. *See, e.g.,* ***State v. Shomberg***, 2006 WI 9, ¶¶15-16, 288 Wis. 2d 1, 709 N.W.2d 370; ***State v. Dubose***, 2005 WI 126, ¶¶29-30, 285 Wis. 2d 143, 699 N.W.2d 582; *see also* Richard A. Wise & Martin A. Safer*, A Survey of Judges' Knowledge and Beliefs about Eyewitness Testimony*, 40 CT. REV. 6, 6-16 (2003) (explaining that eyewitness error is at least partially responsible for numerous wrongful convictions). Nevertheless, it is Grunwald's burden to show that the outcome of the trial would have been different had trial counsel requested the jury instruction and the circuit court given it, and Grunwald does not develop any argument along this line.

¶24 Trial counsel testified at the ***Machner*** hearing that he chose to focus on the fact that only a small amount of the victim's blood was found on Grunwald's shoe because Grunwald's "defense wasn't about how a tiny … piece of DNA got on the shoe. [It was] about how a tremendous amount of DNA was missing." Trial counsel explained that the jury could infer that a small amount of blood from the victim spattered onto Grunwald's shoe based on undisputed evidence that Grunwald was in the same general area as the victim at the time of the incident. The circuit court determined that trial counsel's strategic decision to focus on the fact that only a small amount of blood was found on Grunwald's shoe, rather than to focus on *why* a small amount of blood was found on the shoe, was "a clever defense given the cards that [counsel] was dealt under those circumstances" and therefore did not constitute deficient performance. We agree with the circuit court.

¶25 It is well established that "[a] trial attorney may select a particular defense from the available alternative defenses." ***State v. Arredondo***, 2004 WI App 7, ¶31, 269 Wis. 2d 369, 674 N.W.2d 647. "We will uphold the strategic decision, even if it appears in hindsight that another defense would have been more effective, as long as the decision is rationally based on the facts of the case and the applicable law." ***Id.*** Regardless whether it would have been a more effective trial strategy to explain that such a small amount of blood may simply have spattered onto Grunwald's shoe as Grunwald stood nearby, it was nonetheless reasonable for trial counsel to select a defense strategy based on the argument that the amount of blood on Grunwald's shoe was inconsistent with guilt. Because trial counsel's strategic decision was rationally based on the facts of the case, we conclude that counsel was not deficient in selecting the defense strategy that he did.

Failure to Name, Subpoena, and Call Four Witnesses

¶26 Finally, Grunwald contends that trial counsel was ineffective by failing to name on the defense's witness list, subpoena, and call to testify four individuals who allegedly reported to police that Grunwald was not involved in the incident.[5] The witnesses Grunwald maintains trial counsel should have called to testify are: Timothy Vaughn, Charles Reed, Gina Van Altena, and John Van Altena. For the reasons that follow, we conclude that trial counsel did not perform deficiently by not calling these witnesses to testify.

¶27 Vaughn and Reed were among the group of homeless individuals who were congregating at the park on the day of the incident, and they allegedly reported to police that Grunwald was not involved in the incident. Trial counsel testified at the ***Machner*** hearing that he attempted to locate Vaughn and Reed at Occupy Madison, where a number of homeless people were gathered, but was unable to locate them or anyone who knew them. According to trial counsel, he could not locate Vaughn and Reed because they are transients who may not have

[5] To the extent that Grunwald may be arguing that counsel was ineffective for failing to name on the defense's witness list, subpoena, and call to testify a fifth person named Terry Larson, Grunwald has forfeited that argument. Larson was at the park at the time of the incident and is alleged to physically resemble Grunwald in certain respects. Trial counsel subpoenaed Larson to compel his appearance at trial. Larson appeared on the first day of trial, but he was not called to testify that day. According to trial counsel, Larson was informed that he must appear for the second day of trial, the day on which counsel presented Grunwald's defense and would have called Larson to testify, but Larson failed to appear. Trial counsel chose not to move for a continuance of the trial because Grunwald asked counsel not to do so. Because Grunwald requested his counsel not to move for a continuance of the trial based on Larson's failure to appear, we conclude that Grunwald has forfeited any argument that counsel was ineffective in failing to place Larson on the defense's witness list or to call Larson to testify.

been in the Madison area for long and were not known by the homeless individuals in the area.[6]

¶28 It is well established that counsel has a duty to make a reasonable investigation of potential witnesses or make a reasonable decision that makes the particular investigation unnecessary. *See* ***Strickland***, 466 U.S. at 690-91. The question, then, is whether counsel's efforts to locate Vaughn and Reed and the decision not to further investigate were reasonable under the circumstances.

¶29 We conclude that counsel's efforts to locate Vaughn and Reed and his decision not to further investigate their whereabouts were reasonable under the circumstances. Counsel reasonably attempted to locate Vaughn and Reed, and Grunwald does not explain what additional steps counsel could have taken to locate Vaughn and Reed or how those steps would have resulted in counsel locating them. Accordingly, we conclude that Grunwald has failed to overcome the strong presumption that counsel acted reasonably in his investigation of Vaughn and Reed as potential witnesses.

¶30 Grunwald also contends that trial counsel was ineffective for deciding not to subpoena and call Gina and John Van Altena to testify because they were the only two witnesses, aside from Vaughn and Reed, who reported to police that Grunwald was not involved in the incident, and accordingly, their testimony would have bolstered the defense. Both individuals were in the vicinity of the park and reported to police that Grunwald was not involved in the incident.

[6] According to trial counsel, one individual was from Mississippi and the other had convictions in Sheboygan, and therefore, it was unlikely that either individual had been in town long.

At the ***Machner*** hearing, trial counsel testified that, prior to trial, he contacted Gina, but not John, and that Gina stated that both she and John "did not remember what happened th[e] day [of the incident] and would not be willing to testify." Trial counsel testified that he decided not to list the Van Altenas on the defense's witness list or call them to testify because he did not want to call potentially hostile witnesses at trial, and he feared that, if he called the Van Altenas to testify, the situation "could easily spin out of control." The circuit court determined that trial counsel made a reasonable strategic decision in deciding not to call the Van Altenas to testify, given their reluctance to testify at trial and claimed lack of recollection of the incident.

¶31 We agree with the circuit court that counsel's decision not to list the Van Altenas on the defense's witness list was a reasonable trial strategy and therefore did not constitute deficient performance. We will sustain counsel's strategic decisions as long as they are reasonably supported by the circumstances of the case. *See* ***Balliette***, 336 Wis. 2d 358, ¶26 ("Even [strategic] decisions made with less than a thorough investigation may be sustained if reasonable, given the strong presumption of effective assistance and deference to strategic decisions."). It was reasonable for counsel not to call the Van Altenas to testify because it was unknown what their testimony would be and it is generally prudent not to call witnesses whose testimony cannot be predicted with any reasonable degree of certainty. Here, there was a substantial risk that the Van Altenas would have testified that they had no recollection of informing the police that Grunwald was not involved in the incident. Such testimony would not have been helpful to the defense, even if the Van Altenas were subsequently impeached with their prior statements to police. Because it was reasonable to believe that the Van Altenas' testimony would not have bolstered Grunwald's misidentification defense, we

conclude that counsel's strategic decision not to call the Van Altenas as witnesses was reasonable under the circumstances.

CONCLUSION

¶32 For all of the above reasons, we conclude that Grunwald has failed to establish that trial counsel provided ineffective assistance, and therefore, Grunwald is not entitled to a new trial.[7] We affirm the judgment of conviction and order denying Grunwald's motion for postconviction relief.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.

[7] To the extent that Grunwald contends that the cumulative effect of the above alleged instances of ineffective assistance prejudiced him, we disagree. Adding together Grunwald's failed ineffective assistance claims "adds nothing. Zero plus zero equals zero." ***Mentek v. State***, 71 Wis. 2d 799, 809, 238 N.W.2d 752 (1976).