COURT OF APPEALS
DECISION
DATED AND FILED

August 27, 2013

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2012AP1090-CR **Cir. Ct. No. 2009CF8**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DEZARAY M. COLYER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Outagamie County: NANCY J. KRUEGER, Judge. *Affirmed*.

Before Hoover, P.J., Mangerson and Stark, JJ.

¶1 PER CURIAM. Dezaray Colyer appeals a judgment of conviction entered upon jury verdicts convicting her of substantial battery, two counts of criminal damage to property, one count of bail jumping, two counts of disorderly conduct and one count of throwing or expelling bodily substance. Colyer also

appeals an order denying her postconviction motion for a new trial. Colyer argues: (1) she was incompetent to stand trial, particularly to participate in pursuing a plea of not guilty by reason of mental disease or defect (NGI); and (2) her trial counsel was ineffective for his handling of issues relating to Colyer's competency and sanity. We reject these arguments and affirm the judgment and order.

BACKGROUND

¶2 Before the preliminary hearing, Colyer's counsel requested a mental health evaluation due to her failure to cooperate and her aggressive behavior. Doctor Kenneth Smail recommended an inpatient evaluation due to Colyer's refusal to be interviewed and her past diagnosis of antisocial personality disorder and cannabis abuse. The inpatient evaluation took place at the Winnebago Mental Health Institute. Despite Colyer's continued refusal to be interviewed, Dr. Tracy Luchetta determined Colyer was competent to stand trial based on observations of her interaction with the staff and other patients. Luchetta opined Colyer understood her situation and circumstances, and her aggressive behavior and lack of cooperation was volitional rather than a result of mental illness.

¶3 Colyer's trial counsel entered an NGI plea, and Colyer was examined three weeks before trial by Dr. Deborah Collins. Collins concluded Colyer did not meet the criteria for an NGI plea, and also opined Colyer was competent to stand trial. Colyer's trial counsel then withdrew the NGI plea. At the hearing on the plea withdrawal, Colyer did not respond to her counsel or the court when asked whether she approved of withdrawing her NGI plea. Counsel explained to the court that Colyer had been nonresponsive to his questions about withdrawing the plea. The court allowed counsel to withdraw the NGI plea.

¶4 The case was tried to a jury. During the trial, Colyer created disturbances throughout the proceedings and was ultimately removed from the courtroom. The jury found Colyer guilty of all but one of the charges and Colyer was sentenced to prison.

¶5 While in prison, Colyer was charged with additional offenses in Fond du Lac County. She was found not guilty by reason of mental disease or defect. She then filed a postconviction motion in this case to vacate her convictions or grant a new trial based on her claims of incompetency to stand trial and ineffective assistance of counsel. The circuit court denied the motion, finding Colyer was competent to stand trial and had not established ineffective assistance of counsel.

DISCUSSION

Colyer's Competency to Proceed

¶6 A person is not competent to stand trial if he or she lacks substantial mental capacity to understand the proceedings or assist in his or her own defense. *See* WIS. STAT. § 971.13(1) (2011-12).[1] When competency is questioned, the State must prove by the greater weight of the credible evidence that the defendant is competent. ***State v. Byrge***, 2000 WI 101, ¶29, 237 Wis. 2d 197, 614 N.W.2d 477. We must affirm the circuit court's finding of competency unless it is totally unsupported by the record. ***State v. Garfoot***, 207 Wis. 2d 214, 225, 558 N.W.2d 626 (1997).

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

¶7 Sufficient evidence supports the trial court's finding that Colyer was competent to stand trial. After approximately one month of inpatient observation, Dr. Luchetta concluded Colyer's abnormal behavior and selective refusal to participate were volitional rather than the result of a major mental disorder. Luchetta testified to a reasonable degree of professional certainty that Colyer was competent to proceed. Dr. Collins' evaluation just three weeks before trial resulted in the same diagnosis.

¶8 Colyer argues that the court "blindly deferred to the evaluator's conclusions." She correctly notes that competency is a judicial rather than a clinical inquiry. ***Byrge***, 237 Wis. 2d 197, ¶48. However, that does not mean the court cannot rely on expert testimony when making its findings. Furthermore, the court expressed its independent belief that Colyer's disruptive acts were volitional. The court noted the reports of jail staff indicating that Colyer understood the proceedings and Colyer's attorney's postconviction testimony that he had "no reason to believe that Miss Colyer's behavior was anything more than a conscious choice not to participate in her defense." The court reasonably determined that Colyer's outbursts were acts of defiance calculated to disrupt the proceedings and were not evidence of incompetency.

¶9 Colyer relies on the postconviction testimony of Dr. Kent Berney, who evaluated her for the Fond du Lac County charges. Berney testified that Colyer's behavior raised an issue for him "that Miss Colyer *may have*, in fact, been experiencing symptoms of a delusional system which had been previously determined and subsequently determined by [his] own evaluation …." (Emphasis added.) The words "may have" do not indicate a sufficient reasonable degree of professional certainty for an expert opinion. *See* ***Pucci v. Rausch***, 51 Wis. 2d 513, 519, 187 N.W.2d 138 (1971). In addition, the court reasonably discounted

Berney's evaluation because it took place at least eighteen months after Colyer's trial in this case. The court noted that the symptoms and effects of mental illness can fluctuate over time, particularly after a patient has been incarcerated. Therefore, the court reasonably found little probative value in Berney's evaluation.

Effective Assistance of Counsel.

¶10 To establish ineffective assistance of counsel, Colyer must show both deficient performance and prejudice to her defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Judicial scrutiny of counsel's performance must be highly deferential and a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. ***Id.*** at 689. Strategic choices made after thorough investigation of the law and facts relevant to plausible options are virtually unchallengeable. ***Id.*** at 690. The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. ***Id.*** at 691. To establish prejudice, a defendant must show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is one that undermines our confidence in the outcome. ***Id.*** at 694.

¶11 Colyer's trial counsel reasonably withdrew the NGI plea based on Dr. Collins' evaluation. All of the evidence available to counsel at that time showed that Colyer chose not to cooperate with her attorney's attempt to establish grounds for an NGI plea. Colyer faults her attorney for not interviewing her mother or the arresting officers as a part of the investigation into her sanity. Colyer's mother could have provided information regarding Colyer's history of mental illness. However, the existence of mental illness over the course of a

lifetime is not enough to support an NGI defense. ***State v. Leach***, 224 Wis. 2d 648, 667, 370 N.W.2d 240 (1985). Regarding the arresting officers, Colyer provides no reason to believe they had significant information regarding her mental health. It appears they could only describe her behavior, which was consistent with her behavior throughout the court proceedings. Due to Colyer's apparently volitional lack of cooperation and the absence of any expert testimony to support the NGI plea, Colyer's counsel had no choice but to withdraw the NGI plea.

¶12 Colyer contends her attorney had a continuing duty to assert her lack of competency as the trial proceeded. After two expert witnesses opined that Colyer was competent to stand trial and counsel's own observations suggested that her outbursts were volitional, counsel reasonably elected not to make a continuing issue of Colyer's competency.

¶13 Colyer next faults her trial counsel for failing to request a mistrial when Colyer was removed from the courtroom due to her disruptive behavior. Counsel made a reasonable strategic decision that the defense was better off if Colyer was not present in the courtroom. There is no reason to believe a mistrial would have been granted. The jury was removed from the courtroom, so none of the jurors witnessed the officers subduing Colyer. The court instructed the jury that it was not to hold her behavior against her. Each of the jurors individually promised that he or she would decide Colyer's guilt or innocence based on the evidence presented at trial and would not consider Colyer's courtroom behavior. In light of these precautions, there is no reason to believe the court would have rewarded Colyer's bad behavior by granting a mistrial. Therefore, Colyer has not established deficient performance from her attorney's failure to request a mistrial.

See ***State v. Cummings***, 199 Wis. 2d 721, 747 n.10, 546 N.W.2d 406 (1996) (failure to pursue meritless motion is not deficient performance).

By the Court.—Judgment and order affirmed.

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