COURT OF APPEALS
DECISION
DATED AND FILED

September 25, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP695-CR **Cir. Ct. No. 2011CM1723**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ALEJANDRO RODRIGUEZ,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Racine County: JOHN S. JUDE, Judge. *Affirmed*.

¶1 GUNDRUM, J.[1] Alejandro Rodriguez appeals from a judgment of conviction and from the circuit court's denial of his postconviction motion claiming his trial counsel was ineffective. We find no error and affirm.

BACKGROUND

¶2 Rodriguez was charged with six misdemeanor counts—battery (Count 1); bail jumping (Counts 2, 4 and 6); criminal damage to property (Count 3); and disorderly conduct (Count 5)—all related to an incident in which Rodriguez was alleged to have yelled at the victim, broken her telephone and punched her in the face. According to the police report attached to the complaint, Rodriguez' girlfriend at the time, who was present at the scene, told police she saw Rodriguez take the victim's phone but never observed Rodriguez strike the victim.[2] According to the report and the victim's testimony at trial, the police were originally called to the scene because Rodriguez' girlfriend asked the victim to call the police because of a domestic altercation between the girlfriend and Rodriguez.

¶3 Rodriguez pled not guilty and a jury trial was held. At the time of trial, Rodriguez had a separate felony case pending against him in which his girlfriend was identified as the victim and which, as stated by Rodriguez at his

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

[2] Rodriguez cites to the police report stating that his girlfriend also told police the incident was "no big deal." Review of the police report indicates that the girlfriend's alleged "it wasn't that big of a deal" statement related to Rodriguez allegedly taking the *girlfriend's* cell phone and did not relate to Rodriguez taking and damaging the victim's cell phone and striking the victim. Rodriguez acknowledged this at the postconviction hearing.

postconviction hearing,[3] included charges of "reckless endangerment … failure to comply with officer … bail jumping … burglary … disorderly conduct."

¶4 At trial, the State called a police officer, the victim, and a Racine county case manager for criminal court as witnesses. Rodriguez did not testify and did not call any witnesses. Rodriguez was found guilty on Counts 1 through 4, and Counts 5 and 6 were dismissed by the court.

¶5 After sentencing, Rodriguez filed a postconviction motion alleging his trial counsel had been ineffective in representing him because counsel failed to call his girlfriend as a witness at the trial. The circuit court held a ***Machner*** hearing[4] at which both Rodriguez and his trial counsel testified. The court denied Rodriguez' motion, concluding that counsel had not performed deficiently in failing to call Rodriguez' girlfriend as a witness and that Rodriguez had not proven he was prejudiced by counsel's failure to do so. Rodriguez appeals.

DISCUSSION

¶6 To succeed on a claim of ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that the

[3] Both parties repeatedly refer and cite to the transcript of the postconviction hearing as Record No. 99. The transcript of that hearing is not included in the record. It is the appellant's duty to see that the record is sufficient to review the issue raised on appeal. ***State Bank of Hartland v. Arndt***, 129 Wis. 2d 411, 423, 385 N.W.2d 219 (Ct. App. 1986). Generally, when we receive an incomplete record, we assume that every fact essential to sustain the circuit court's ruling is substantiated by the record. ***Suburban State Bank v. Squires***, 145 Wis. 2d 445, 451, 427 N.W.2d 393 (Ct. App. 1988). Here, however, both parties include the identical twenty pages of the purported postconviction hearing transcript in their respective appendices. As a result, we consider these pages even though they are not part of the record.

[4] *See* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979) (***Machner*** hearing is an evidentiary hearing held on a defendant's ineffective assistance claim during which trial counsel is questioned regarding alleged deficient performance).

deficiency prejudiced the defendant. *See* ***State v. Erickson***, 227 Wis. 2d 758, 768, 596 N.W.2d 749 (1999). To prove deficient performance, the defendant must show that counsel's specific acts or omissions were "outside the wide range of professionally competent assistance." ***Strickland v. Washington***, 466 U.S. 668, 690 (1984). There is a strong presumption that a defendant received adequate assistance and that counsel's decisions were justified in the exercise of reasonable professional judgment. *See* ***State v. Domke***, 2011 WI 95, ¶36, 337 Wis. 2d 268, 805 N.W.2d 364; ***State v. Kimbrough***, 2001 WI App 138, ¶¶31-35, 246 Wis. 2d 648, 630 N.W.2d 752. "Reviewing courts should be 'highly deferential' to counsel's strategic decisions and 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.'" ***Domke***, 337 Wis. 2d 268, ¶36 (citation omitted). Counsel's performance is deficient only if the defendant proves that counsel's challenged acts or omissions were objectively unreasonable under all the circumstances of the case. *See* ***Kimbrough***, 246 Wis. 2d 648, ¶35. To prove prejudice, the defendant must demonstrate a reasonable probability that, but for counsel's error, the outcome of the proceeding would have been different. ***Strickland***, 466 U.S. at 694. If the defendant fails to prove one prong, we need not address the other. *See* ***id.*** at 697.

¶7 Rodriguez claims he received ineffective assistance of counsel because his trial counsel failed to put Rodriguez' girlfriend on the stand. We disagree.

¶8 At the ***Machner*** hearing, both Rodriguez and his trial counsel testified that they discussed calling the girlfriend as a witness, but that counsel expressed that it was in Rodriguez' best interest not to call her. Rodriguez testified that he recognized counsel was making a tactical decision in not calling

the girlfriend, but expressed to counsel that he disagreed with that decision and wanted her called as a witness. Rodriguez testified that in one of the felony cases he had pending, his girlfriend had also "[c]all[ed] the police on [him] for arguing."

¶9 Rodriguez' trial counsel testified that he had practiced law for twenty-six years, with ninety-five percent of his practice being criminal cases, and that he represented clients in jury trials approximately eight to ten times a year. Regarding pretrial discussions he had with Rodriguez about the girlfriend testifying, counsel stated that they had discussions "about her being less than credible and about recanting many times" and that "her reputation for truth … [was] weak." Counsel testified that "there had been long allegations about conflict between" Rodriguez and his girlfriend and that he was aware there was a "no contact" order related to the felony charge. Counsel stated he did not want to call the girlfriend as a witness in part because of the "no contact" order and because he "had questions about her ability to be truthful and … didn't know which way she would go." Counsel continued:

> Basically, I was concerned about a couple of things. One was if she testified about the snatching of the phone that may have been tantamount to admitting a burglary. So not knowing which way she was going to go, and the hope that we would not antagonize her for the felony, as well as the fact that I really didn't want him to get in trouble with supposedly trying to manipulate her. I just didn't feel it was [in] his best interest to do it. I also base that on [the victim's] testimony at trial. I thought she was very weak. I actually thought I had probably won the trial.

Counsel further testified that he had spoken to the girlfriend prior to the trial and "[s]he just indicated to me she didn't want to talk to me." Counsel reiterated his concern that the girlfriend had told police she saw Rodriguez take the phone from the victim.

¶10 The circuit court observed that "one view of [the statement in the police report attributed to the girlfriend] could be looked on as exculpatory" in that the report indicated the girlfriend stated that she saw Rodriguez take the victim's phone but did not see him hit her. The court noted that the statement was "certainly something that was of significant potential exculpatory value to follow up on." The court pointed out, however, that trial counsel did try to call the victim, but that she did not want to talk to him. The court also noted counsel's consideration of the State's main witness, the victim, and his belief that the victim had credibility issues, due to her own history of accusations and recantations. Regarding the girlfriend, the court recognized that there were "certainly some question about whether [the girlfriend] would be less than a [credible] witness." The court recognized the legitimacy of counsel's concern "about what [the girlfriend] would actually say on the stand" due to the pending felony charge against Rodriguez involving her, the "no contact" order, and her unwillingness to cooperate with counsel. The court also recognized counsel's concern that he did not want to risk antagonizing the victim because of the pending felony charge against Rodriguez involving her. The court acknowledged that trial counsel "is an experienced trial attorney." The court concluded:

> There were some valid and legitimate reasons why [counsel] believed that [the girlfriend's] testimony would not advance the cause of the defense and in fact may backfire entirely and [the girlfriend] may get on the stand indeed and not only be a hostile witness to Mr. Rodriguez, which would leave basically [counsel] without much by way of cross-examination other than a statement that appears in the police report, but also that she may make statements which would further implicate Mr. Rodriguez in these charges that he was facing on the felony.

The court found that counsel had not performed deficiently and further concluded that Rodriguez had not proven he was prejudiced by counsel's failure to call Rodriguez' girlfriend as a witness.

¶11 We agree wholeheartedly with the decision of the circuit court and for the reasons stated by the court. Trial counsel recognized that the girlfriend was an unpredictable and potentially harmful witness and believed it was strategically more sound, both for the trial in this case and in relation to the pending felony charge, not to call her as a witness. We certainly cannot conclude that counsel's performance fell "outside the wide range of professionally competent assistance." ***Strickland***, 466 U.S. at 690. From our view, counsel's decision made perfect sense.

¶12 Rodriguez complains that because his trial counsel called no witnesses, the State's evidence "was in no way rebutted." We disagree. As the parties well know, the State has the burden of proof, and if it fails to meet that burden in the eyes of the jury, the defendant prevails. Here, trial counsel conducted significant cross-examination of the State's three witnesses. Counsel procured testimony from the State's police officer witness that the officer observed no injuries to the victim's face and further procured testimony raising questions about whether Rodriguez actually caused damage to the victim's phone. Through counsel's cross-examination, the victim confirmed that, though she claimed Rodriguez struck her, she received no visible injuries and never sought medical attention. Counsel challenged the accuracy and veracity of various aspects of the victim's story. Counsel next challenged the testimony of the Racine county criminal court case manager, who testified regarding the bail jumping charges. Prior to closing arguments, counsel succeeded in getting the court to dismiss the disorderly conduct charge and related bail jumping count. During

closing arguments, counsel framed aspects of the victim's story as being inconsistent or unbelievable, calling into question her veracity. In short, Rodriguez' appellate contention that his trial counsel "in no way rebutted" the State's evidence is simply unsupported by the record.

¶13 Because Rodriguez has failed to prove his trial counsel performed deficiently, we need not address whether he was prejudiced by counsel's performance. ***Id.*** at 697. We affirm.[5]

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.

[5] In this appeal, both parties have cited unpublished cases inappropriately. We direct counsel for both parties to WIS. STAT. § 809.23(3), and particularly the "on or after July 1, 2009" rule.