COURT OF APPEALS
DECISION
DATED AND FILED

December 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. 2013AP436-CR **Cir. Ct. No. 2010CF1405**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOREL T. NORWOOD,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Brown County: SUE E. BISCHEL and TAMMY JO HOCK, Judges. *Affirmed*.

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

¶1 PER CURIAM. Jorel Norwood appeals a judgment, entered upon a jury's verdict, convicting him of substantial battery, as a repeater. Norwood also challenges the order denying his motion for postconviction relief. Norwood claims he was denied the effective assistance of trial counsel. We reject his arguments and affirm the judgment and order.

BACKGROUND

¶2 In December 2010, the State charged Norwood with substantial battery with intent to cause bodily harm, as a repeater. The complaint alleged Norwood punched Michael Shade in the face in a bar parking lot. Shade was knocked unconscious and suffered a "severe laceration" to the back of his head and a laceration to his cheek. Norwood pleaded not guilty and proceeded to trial claiming self-defense.

¶3 At trial, the State presented nine witnesses, six of whom witnessed all or part of the events leading up to and including the battery. Norwood was the only defense witness who testified. Although testimony regarding the events preceding the battery varied somewhat among the witnesses, only Norwood testified that Shade was threatening him before the punch. Three of the State's witnesses testified that, when exiting the bar, Norwood and an off-duty bar manager bumped into each other and exchanged heated words. When the bar manager went inside, a female bar employee who was standing outside with Shade and at least one other person said something to Norwood. Four witnesses heard Norwood respond "[d]on't think I wouldn't hit a woman," or something to that effect. When Shade attempted to de-escalate the situation by standing between Norwood and the woman, Norwood punched him.

¶4 A jury found Norwood guilty of the charged crime, and the court imposed a five and one-half-year sentence, consisting of three and one-half years' initial confinement followed by two years' extended supervision. Norwood filed a postconviction motion for a new trial, claiming he was denied the effective

assistance of trial counsel. His motion was denied after a ***Machner***[1] hearing, and this appeal follows.

DISCUSSION

¶5 A claim of ineffective assistance of counsel requires a showing that counsel's performance was deficient and that the deficient performance prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). An attorney's performance is deficient if it is outside the range of professionally competent assistance, meaning the attorney's acts or omissions were not the result of reasonable professional judgment. ***Id.*** at 690. However, "every effort is made to avoid determinations of ineffectiveness based on hindsight … and the burden is placed on the defendant to overcome a strong presumption that counsel acted reasonably within professional norms." ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). The prejudice prong of the ***Strickland*** test is satisfied when the attorney's error is of such magnitude that there is a reasonable probability that, absent the error, the result of the proceeding would have been different. ***Id.*** at 694. We may address the tests in the order we choose. If Norwood fails to establish prejudice, we need not address deficient performance. *See* ***State v. Sanchez***, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996).

¶6 This court's review of an ineffective assistance of counsel claim presents a mixed question of fact and law. ***State v. Erickson***, 227 Wis. 2d 758, 768, 596 N.W.2d 749 (1999). The trial court's findings of fact will not be disturbed unless they are clearly erroneous. ***Id.*** However, the ultimate

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

determination whether the attorney's performance falls below the constitutional minimum is a question of law that this court reviews independently. ***Id.***

I. Failure to Investigate

¶7 Norwood contends his trial counsel was ineffective by failing to review the preliminary hearing and revocation hearing transcripts, and by failing to interview witnesses. Citing ***State v. Jeannie M.P.***, 2005 WI App 183, 286 Wis. 2d 721, 703 N.W.2d 694, Norwood argues counsel's failure to investigate matters affecting credibility prejudiced Norwood's defense at trial. Although both cases hinged on credibility determinations, ***Jeannie*** is distinguishable on its facts. There, the defendant provided counsel with a motive for the victim to lie, and counsel failed to adequately investigate that motive. ***Id.***, ¶¶12-15. Here, counsel was not presented with any motive to investigate and there is no indication from the record that such a motive existed.

¶8 Norwood notes that one of the State's witnesses, Anthony Routheau, testified at the preliminary hearing that he knew Shade for two years and knew him to be a pacifist. Because Routheau's trial testimony did not specify how long he had known Shade, Norwood faults counsel for failing to explore the length and nature of their association. He similarly faults counsel for failing to interview the State's other witnesses regarding the nature of their respective relationships with Shade and with each other. As the circuit court noted, however, the jury was aware that these witnesses all knew each other from the bar. Shade had been described as a "regular" and a bar acquaintance by the various witnesses. Ultimately, Norwood has not articulated why the State's witnesses would collude to convict him, and there is nothing to suggest that highlighting these relationships would have bolstered Norwood's credibility or detracted from the others'.

¶9 Norwood also contends counsel could have utilized preliminary and revocation hearing testimony regarding Shade's mental health issues and his difficulty recalling the battery to impeach Shade at trial. Shade, however, admitted at trial that he could not recall everything about the evening. He testified that although he was unable to remember much when interviewed by police the day after the battery, some memories had since returned. Shade added that his psychiatrist told him he would remember "bits and pieces" over time. The jury, therefore, heard testimony about Shade's memory issues and Shade alluded to his mental health issues. In light of the testimony given by the State's witnesses, Norwood fails to establish how underscoring the victim's issues would have diminished his credibility to a point that undermines our confidence in the outcome at trial. We therefore conclude Norwood was not prejudiced by counsel's alleged failure to investigate.

II. Failure to Prepare and Advise

¶10 Norwood argues counsel was ineffective by failing to review with him the audio recording of his police statement. After the State confronted Norwood at trial with various inconsistencies between his police statement and his testimony, Norwood alleged that the statement was hidden from him. After an off-the-record conversation, the court stated: "Ladies and gentlemen, … [defense counsel] agrees that the District Attorney provided him with a copy of the audio disk of his [police interview]."

¶11 Norwood asserts he was prejudiced by counsel's alleged failure to review the recording with him because he could have explained any inconsistency on direct examination. In determining Norwood was not prejudiced by this claimed deficiency, the court acknowledged "he could have been better prepared

for what he had said previously." The court added, however, that Norwood was under oath. Thus, if Norwood told the truth on the witness stand and at the time he gave his police statement, there would be no need for him to refresh his recollection—the statements of what occurred would have been the same or similar.

¶12 Even if review of the audio recording would have afforded Norwood the opportunity to explain any inconsistencies on direct examination, his credibility was nevertheless compromised by other factors at trial. The jury was informed that Norwood had been convicted of seven crimes. Further, it appeared Norwood was attempting to influence Jade Moermond, his girlfriend at the time of the altercation, during her trial testimony. Additionally, as noted above, his testimony was inconsistent with the version of events described by the various State's witnesses. Given these challenges to his credibility and the overwhelming evidence of his guilt, Norwood has failed to show that reviewing the audio recording would have changed the trial outcome.

¶13 Norwood also claims that, but for counsel's deficiency, he would not have alleged at trial that the recording was hidden from him and the court would not have had to advise the jury that the recording was provided to Norwood's attorney. Norwood asserts that as a result of counsel's error, the court made a credibility determination for the jurybecause its advisement equated to a finding that Norwood lied about his access to the recording. We disagree. The court did not negate Norwood's assertion that he had not heard the recording. The court merely clarified, by stipulation, that the State had provided the recording to defense counsel. The court, therefore, made no credibility determination.

III. Closing Argument

¶14 Norwood contends trial counsel was ineffective by failing to use the phrase "self-defense" during his closing argument. Counsel, however, is not ineffective for not specifically referring to an affirmative defense by name during closing arguments. *See* ***State v. Ambuehl***, 145 Wis. 2d 343, 353, 425 N.W.2d 649 (Ct. App. 1988) (failing to use the word "accident" during closing argument did not amount to ineffective assistance when counsel's argument allowed for inference that conduct was accidental).

¶15 Here, counsel's closing argument developed the theory of self-defense, discussing the threat Norwood perceived before his "instinctual" reaction to strike Shade. Further, the term "self-defense" was presented to the jury multiple times by the State during its closing argument and by the court when instructing the jury on self-defense. Because the jury was fully aware that Norwood was claiming self-defense, he was not prejudiced by his attorney's failure to mention the term during the closing argument.

IV. Cumulative Prejudice

¶16 Norwood alternatively argues that even if each claimed deficiency, by itself, did not prejudice his defense, their cumulative effect undermines confidence in the outcome at trial. Specifically, he contends the alleged cumulative errors prejudiced the jury's determination of whether Norwood struck Shade in self-defense. We are not persuaded. As discussed above, there was overwhelming evidence of Norwood's guilt. Counsel's claimed deficiencies were all relatively minor. Therefore, the alleged errors, even when considered cumulatively, do not undermine our confidence in the outcome.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2011-12).