COURT OF APPEALS
DECISION
DATED AND FILED

June 2, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP2425-CR **Cir. Ct. No. 2013CF200**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

THOMAS J. WOLDMOE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Eau Claire County: PAUL J. LENZ, Judge. *Affirmed*.

Before Stark and Hruz, JJ., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Thomas J. Woldmoe appeals a judgment entered on a jury verdict convicting him of stalking, contrary to WIS. STAT. § 940.32(2),[1] and an order denying his postconviction motion seeking a new trial based on alleged ineffective assistance of counsel. Woldmoe contends his trial counsel provided ineffective assistance by not asking for the jury instruction on confessions, and by advising him not to testify. Because Woldmoe has not shown that his trial counsel's failure to request the jury instruction prejudiced him and has not shown that his trial counsel was ineffective with respect to Woldmoe's right to testify, we affirm.

BACKGROUND

¶2 A jury convicted Woldmoe of stalking his ex-girlfriend, S.B., after she broke up with him. The jury heard evidence from S.B. that after the break-up, Woldmoe sent her harassing and insulting text messages and she asked him thirty to forty times to stop. He did not, so she got a new phone number. He then sent her harassing and insulting Facebook messages, so she blocked him on Facebook. He then sent her threatening messages through the game Words with Friends, so she deleted that game from her account. She also moved and did not give Woldmoe her new address. She testified about receiving in the mail two fictitious letters, which appeared to be from the Eau Claire County District Attorney's Office, advising her that she was being charged criminally with "felony breaking and entering, misdemeanor theft, and felony extortion" "for an incident occurring on June 17, 2012." The two letters were identical except that the first one had

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

transposed some numbers of her street address and a few misspelled words had been corrected in the second letter. She suspected Woldmoe of sending the letters because he had accused her of breaking and entering his apartment and taking a dresser and an Xbox video game console in June 2012. S.B. explained the dresser and Xbox belonged to her and she picked up the dresser and Xbox from Woldmoe's apartment while he was there without incident.

¶3 The police told the jury they determined the letters were fake and how their investigation led to conversations with Woldmoe. Officer Zachary Burnett testified he telephoned Woldmoe and told him he was a suspect in a case the police were investigating. Without any more information, Woldmoe asked if the situation was regarding S.B. and if it regarded letters from the DA's office. Woldmoe then came to the police station and gave a recorded interview in which he denied any knowledge or connection to the fictitious letters.

¶4 Sergeant Mark Pieper testified:

- He continued the investigation and telephoned Woldmoe.
- He told Woldmoe over the phone that the police had a DNA sample from the envelope even though police had not actually tested the envelope for DNA.
- Woldmoe confessed over the phone to making and sending the letters to S.B. The telephone conversation was not recorded, but the next day, Woldmoe voluntarily came into the police station and gave a recorded confession.

On cross-examination, Pieper denied telling Woldmoe during the phone conversation that if Woldmoe did not confess, Pieper would "hunt him down."

¶5 Woldmoe waived his right to testify after a colloquy with the trial court where he told the trial court he had discussed his right to testify with his trial

counsel and he had made the decision not to testify. Woldmoe acknowledged the right and told the trial court he understood he could testify if he desired. The trial court found Woldmoe knowingly, voluntarily, and intelligently waived his right to testify.

¶6 The jury found Woldmoe guilty, and he filed a postconviction motion alleging his trial counsel was ineffective for not asking the trial court to give the confessions jury instruction, WIS JI—CRIMINAL 180,[2] and for advising him not to testify. At the ***Machner*** hearing, Woldmoe's trial counsel testified:

[2] WISCONSIN JI—CRIMINAL 180 provides:

> The State has introduced evidence of (a statement) (statements) which it claims (was) (were) made by the defendant. It is for you to determine how much weight, if any, to give to (the) (each) statement.
>
> In evaluating (the) (each) statement, you must determine three things:
>
> - whether the statement was actually made by the defendant. Only so much of a statement as was actually made by a person may be considered as evidence.
> - whether the statement was accurately restated here at trial.
> - whether the statement or any part of it ought to be believed.
>
> It is the policy of this state to make an audio or audio and visual recording of a custodial interrogation of a person suspected of committing a felony. You may consider the absence of an audio or audio and visual recording of the interrogation in evaluating the evidence relating to the interrogation and the statement in this case.

(continued)

- He overlooked the confessions jury instruction.

- He did not make a recommendation on Woldmoe testifying. He told Woldmoe that he was not going to make a recommendation and whether to testify was entirely Woldmoe's decision.

- Woldmoe decided on his own not to testify, and Woldmoe was a student in a paralegal program with a high IQ and had "every ability to make his own decisions."

- He explained the problems that could arise if Woldmoe testified: (1) the prosecutor could send the envelope for DNA testing and if it came back as a match to Woldmoe, "he could expect to be prosecuted for perjury" – a conviction which would result in jail time; and (2) Woldmoe would be an "extremely poor witness" because he came across "angry, egotistical, vindictive, sounded like a stalker."

- A conviction on stalking would not carry jail time.

- He explained the advantages to testifying: the defense theory without Woldmoe's testimony was weak and if he did not testify, he would probably be convicted.

¶7 Woldmoe testified at the ***Machner*** hearing that his trial counsel told him not to testify because the prosecutor would "tear him apart." Woldmoe said he wanted to testify but his trial counsel "insisted" that he did not. He also said his trial counsel never talked to him about the advantages of testifying or disadvantages of not testifying. Woldmoe also testified that when Pieper called him, Pieper said if Woldmoe "did not confess to this he would hunt me down, have me arrested for identity theft." Woldmoe claimed he did not write or send

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> You should consider the facts and circumstances surrounding the making of (the) (each) statement, along with all the other evidence in determining how much weight, if any, the statement deserves.

the fictitious letters but confessed because he was afraid he would be arrested if he did not do what Pieper wanted. Woldmoe explained that he was in the Criminal Justice Program at the technical college and he would have been expelled if he was arrested. Woldmoe claimed Pieper told him he would not be arrested if he confessed. Woldmoe admitted his trial counsel told him that the prosecutor had a reputation for filing perjury charges against defendants who testified.

¶8 The trial court ruled Woldmoe did not prove his trial counsel was ineffective, and denied his postconviction motion. Woldmoe appeals.

DISCUSSION

¶9 Woldmoe's only argument on appeal is that his trial counsel provided ineffective assistance by not requesting the confessions jury instruction and by advising him not to testify. In order to prove a postconviction claim of ineffective assistance of counsel, Woldmoe must show his counsel's performance was deficient and also that the deficient performance prejudiced the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To demonstrate deficient performance, Woldmoe must show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *See* ***id.*** To demonstrate prejudice, "[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." ***Id.*** at 694. If a defendant fails to satisfy one prong of the ineffective assistance of counsel test, we need not address the other. ***Id.*** at 697. "Counsel's conduct is constitutionally deficient if it falls below an objective standard of reasonableness." ***State v. Thiel***, 2003 WI 111, ¶19, 264 Wis. 2d 571, 665 N.W.2d 305. Defendants must overcome a strong presumption that their counsel acted reasonably within professional norms. ***State***

v. Johnson, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). Prejudice is proven when the defendant shows that his counsel's errors were so serious that the defendant was deprived of a fair trial and reliable outcome. *See* ***Strickland***, 466 U.S. at 687.

¶10 Whether a defendant has been denied the right to effective assistance of counsel presents a mixed question of law and fact. ***State v. Trawitzki***, 2001 WI 77, ¶19, 244 Wis. 2d 523, 628 N.W.2d 801. The circuit court's findings of historical fact will not be disturbed unless they are clearly erroneous. ***Id.*** The ultimate determinations based upon those findings of whether counsel's performance was constitutionally deficient and prejudicial are questions of law subject to our independent review. ***Id.***

A. Confessions Jury Instruction

¶11 The trial court found Woldmoe's attorney's failure to ask for the confessions jury instruction was error, but that it did not affect the outcome of the case. We agree. Woldmoe has not shown his attorney's failure to ask for this jury instruction was so serious that he was deprived of a fair trial and reliable outcome because the evidence in this case was overwhelming against Woldmoe. Woldmoe's confession went into great detail admitting to stalking S.B. S.B.'s testimony, the similarity of the letters to Woldmoe's earlier threats to S.B., and his initial statement to officer Burnett referencing the letters before being told about

them convince us that this error did not deprive Woldmoe of a fair trial and reliable outcome.[3]

B. Woldmoe's Decision Not to Testify

¶12 Although the trial court ruled Woldmoe failed to establish his attorney was ineffective on this ground, it did not make specific findings of fact. The trial court simply found Woldmoe's trial counsel had a valid strategic reason for telling Woldmoe he would make a poor witness. When a trial court does not make express findings of fact, we assume it determined those facts in a manner that supports the trial court's decision. *See* ***State v. Martwick***, 2000 WI 5, ¶31, 231 Wis. 2d 801, 604 N.W.2d 552. Accordingly, we can assume the trial court found Woldmoe's trial counsel's version of events to be more credible. Woldmoe's trial counsel testified he did not advise Woldmoe not to testify. Instead, trial counsel discussed with Woldmoe the advantages and disadvantages of testifying and left that decision to Woldmoe. The record also shows the trial court engaged Woldmoe personally in a right-to-testify colloquy, and Woldmoe told the trial court it was his decision not to testify. Woldmoe has not shown his trial counsel was deficient with respect to this allegation, and therefore, Woldmoe's claim of ineffective assistance fails.

[3] Woldmoe's reliance on ***Arrowood v. Clusen***, 732 F.2d 1364 (7th Cir. 1984), is misplaced. The facts in ***Arrowood*** are different from the facts here, and ***Arrowood*** involved an older version of WIS JI—CRIMINAL 180.

By the Court.—Judgment and order affirmed.

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