COURT OF APPEALS
DECISION
DATED AND FILED

June 16, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP1004-CR **Cir. Ct. No. 2012CF173**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ERNEST M. HOLUB,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Shawano County: WILLIAM F. KUSSEL, JR., Judge. *Affirmed*.

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

¶1 PER CURIAM. Ernest Holub appeals a judgment, entered upon a jury's verdict, convicting him of operating while intoxicated and with a prohibited alcohol concentration, both as an eighth offense; operating after revocation; possession of a controlled substance; and obstructing an officer. Holub also

challenges the order denying his postconviction motion for a new trial. Holub argues he was denied the effective assistance of trial counsel. We reject Holub's arguments and affirm both the judgment and order.

BACKGROUND

¶2 The State charged Holub with operating while intoxicated and with a prohibited alcohol concentration, both as an eighth offense; operating after revocation; possession of a controlled substance; and obstructing an officer. At trial, Lona Saldana testified that at approximately 4:00 a.m. on July 16, 2012, she discovered Holub parked in her driveway, revving his truck's engine and loudly demanding to speak to Lona's daughter, Amanda. When Lona indicated Amanda was not at home, Holub made vulgar statements to Lona.[1] After Holub refused to leave, Lona contacted the police.

¶3 Deputy Sheriff Nathan Thornborrow testified that he responded to the scene and saw Holub "crouched down" beside the truck. As Thornborrow approached, Holub indicated he had not been driving. Once in close proximity, Thornborrow noticed Holub was swaying from side to side, had glossy, bloodshot eyes and emitted an "extreme odor of intoxicants." A witness informed Thornborrow that Holub pulled into the driveway and nobody was with him. Although Holub claimed a friend drove him there, Thornborrow called that friend and she confirmed she had not been driving. Thornborrow subsequently performed field sobriety tests on Holub and arrested him. During Holub's

[1] Lona testified that Holub stated: "Cunt. You dumb fucking bitch, get your daughter out here. Your daughter hates you. You are nothing but a liar or she lies, what she was doing was she wanted me for a babysitter for her daughter."

transport for blood testing, Holub made vulgar and belligerent statements to Thornborrow.[2]

¶4 A jury ultimately convicted Holub of the crimes charged and the court imposed concurrent and consecutive sentences resulting in five years and ten months' initial confinement followed by five years' extended supervision.[3] Holub filed a postconviction motion for a new trial, alleging he was denied the effective assistance of trial counsel. Holub's postconviction motion was denied after a ***Machner***[4] hearing. This appeal follows.

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[2] Thornborrow testified:

> We get in my car, begin the transport back to Shawano Medical Center, and he immediately goes out of control, just begins yelling obscenities, wanting to talk to a supervisor, starts calling me profane names, wanting to talk about the case. Just began to ignore him, at one point told him we are not talking about the case, and if he wanted to continue to talk, I ignored him, and like I said, he was using vulgar language, discredited my abilities, called me sexual slang names, again kept screaming for a supervisor, wanting me to stop at a friend's house because that friend was driving, that I could stop there and that friend would tell me he was driving and it was that the entire way to Shawano Medical Center, he was screaming in the back seat. That's why I requested assistance down at Shawano Medical Center from another deputy.

[3] Although the jury found Holub guilty of both OWI, eighth offense, and the companion violation of operating with a prohibited alcohol concentration, eighth offense, the two counts were deemed a single conviction for purposes of sentencing in accordance with WIS. STAT. § 346.63(1)(c).

All references to the Wisconsin Statutes are to the 2013-14 version.

[4] ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

DISCUSSION

¶5 Holub claims he was denied the effective assistance of trial counsel. This court's review of an ineffective assistance of counsel claim is 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 determination whether the attorney's performance falls below the constitutional minimum is a question of law this court reviews independently. ***Id.***

¶6 To succeed on his ineffective assistance of counsel claim, Holub must show both (1) that his counsel's representation was deficient and (2) that this deficiency prejudiced him. *See* ***Strickland v. Washington***, 466 U.S. 668, 694 (1984). In order to establish deficient performance, a defendant must show that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Id.*** at 687. 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).

¶7 In reviewing counsel's performance, we judge the reasonableness of counsel's conduct based on the facts of the particular case as they existed at the time of the conduct and determine whether, in light of all the circumstances, the omissions fell outside the wide range of professionally competent representation. ***Strickland***, 466 U.S. at 690. Because "[j]udicial scrutiny of counsel's performance must be highly deferential … the defendant must overcome the

presumption that, under the circumstances, the challenged action might be considered sound trial strategy." ***Id.*** at 689.

¶8 The prejudice prong of the ***Strickland*** test is satisfied where 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 Holub 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).

¶9 Holub argues trial counsel was ineffective by failing to object to evidence of Holub's bad behavior and profane language during his interactions with Lona and Thornborrow. Holub further contends that the "inflammatory" testimony undermines confidence in the jury's verdict.[5] We conclude counsel's challenged performance was neither deficient nor prejudicial.

¶10 At the ***Machner*** hearing, trial counsel testified she did not object to this testimony at trial because she believed it would refocus the jury's attention on the prosecutor's case in general, and on Holub's statements in particular. Counsel indicated that she considered the jury "very relaxed," to the point of a juror "potentially falling asleep." Counsel therefore decided objections might "cause them to suddenly pay attention to the bad that I didn't want them to pay that much attention to"—especially as it related to showing Holub's intoxication.

[5] We note that trial counsel provided strategic reasons for not filing a pretrial motion to exclude Holub's statements. Specifically, counsel did not want to highlight the statements for fear it could result in additional charges or otherwise remind the prosecutor of the statements. Holub makes no argument regarding this pretrial decision. By his silence, Holub is not challenging that aspect of counsel's performance.

¶11 Counsel also believed objections would draw the jury's attention to Holub's petulant courtroom behavior. During trial, Holub constantly hissed in counsel's ear, shoved papers loudly, and slammed his pen down on the table. Counsel consequently worried that if she objected, the jury would turn its eyes on her client while he was misbehaving. "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." ***Strickland***, 466 U.S. at 690.

¶12 Holub contends trial counsel's explanations for not objecting were unreasonable, as a timely objection would have kept the jury from hearing the testimony in the first place, thus avoiding the possibility of underscoring this testimony. As counsel noted, however, it was not just the testimony itself that she did not wish to underscore—she also wanted to avoid drawing attention to Holub's courtroom behavior. Holub fails to establish that counsel's explanations were unreasonable.

¶13 Holub further asserts, without citation to authority, that the trial court would have automatically granted a relevancy objection, had it been raised. We disagree. "Relevant evidence" is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." WIS. STAT. § 904.01. Further, "[a]ll relevant evidence is admissible, except as otherwise provided by the constitutions of the United States and the state of Wisconsin, by statute, by these rules, or by other rules adopted by the supreme court." WIS. STAT. § 904.02.

¶14 Holub intimates that evidence of conduct that tended to prove his intoxication was irrelevant as intoxication was not a point of contention.

According to Holub, "there was not a theory of defense in which he was not intoxicated." Rather, the disputed issue was whether Holub was the driver. Holub's choice of defense, however, did not determine the consequential facts of this case. To prove Holub's guilt, the State had to prove his intoxication. It could do that, at least in part, by offering his statements and behavior as circumstantial evidence of his condition. Holub had no right to tell the prosecution how to prove its case. *See* ***Old Chief v. United States***, 519 U.S. 172, 186-89 (1997). Trial counsel, therefore, reasonably and correctly decided that evidence of Holub's vulgar and belligerent statements to Lona and Thornborrow tended to prove Holub's intoxication—a fact of consequence to this litigation—making the evidence both relevant and admissible. Counsel, therefore, was not deficient by failing to object to this testimony.

¶15 Although we need not address prejudice where there is no deficient performance, we nevertheless conclude Holub has likewise failed to establish prejudice. Holub bases his claim of prejudice on his own characterization of the conduct and statements, repeatedly referring to them as inflammatory and claiming they make him "look like a very mean, aggressive, disrespectful, and unlikeable person." Holub adds that such language is "shocking to most laypersons in a court of law and is never without effect in any conversation." Holub treats the admission of this evidence as prejudicial per se, but he cites nothing to support his position. We are not persuaded that the use of profanity has any unique tendency to prejudice a jury or automatically establish low character. Holub's speculative claims do not undermine this court's confidence in the outcome of the trial. *See* ***State v. Flynn***, 190 Wis. 2d 31, 48, 527 N.W.2d 343 (Ct. App. 1994).

¶16 Further, Holub overemphasizes the impact of his statements given the complete trial record. The description of Holub's specific language amounts to a few pages of transcript split between two witnesses, out of a one-day trial involving ten witnesses and over 200 pages of transcript. Further, the prosecutor did not mention the challenged statements during his closing or rebuttal statements. Ultimately, there is no reasonable probability that, absent the claimed error, the result of the proceeding would have been different.

By the Court.—Judgment and order affirmed.

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