COURT OF APPEALS
DECISION
DATED AND FILED

February 10, 2016

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. 2014AP2706 **Cir. Ct. No. 2005CF1640**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

NIKOLAS S. CZYSZ,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Racine County: Faye M. Flancher, Judge. *Affirmed*.

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

¶1 PER CURIAM. Nikolas S. Czysz appeals from an order denying his WIS. STAT. § 974.06 (2013-14),[1] postconviction motion. Czysz argues that

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

postconviction counsel was ineffective for failing to raise claims alleging the ineffective assistance of trial counsel. We conclude that trial counsel did not perform deficiently and, therefore, postconviction counsel was not ineffective. We affirm.

¶2 Following a jury trial, Czysz was convicted of two counts of first-degree intentional homicide by use of a dangerous weapon. Postconviction counsel was appointed and, after successfully moving to amend the judgment to reflect that Czysz's sentences were to run concurrent rather than consecutive, filed a notice of appeal. On appeal, Czysz argued that the trial court erred by dismissing a juror on the fourth day of trial. We affirmed the judgment, *see* ***State v. Czysz***, No. 2010AP2804-CR, unpublished slip op. (WI App Dec. 1, 2011), and the Wisconsin Supreme Court denied Czysz's petition for review.

¶3 Thereafter, Czysz filed a WIS. STAT. § 974.06 postconviction motion alleging that trial counsel was ineffective for failing to (1) object to or request a limiting instruction concerning statements made by officers during Czysz's audiotaped statement and (2) request that the jury be instructed on the voluntary intoxication defense. Czysz further alleged that postconviction counsel provided ineffective assistance by not raising these claims in the course of his WIS. STAT. RULE 809.30 direct appeal. The trial court held an evidentiary ***Machner***[2] hearing and, after considering the testimony of both trial and postconviction counsel, denied Czysz's motion on the ground that trial counsel's performance was not deficient.

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

Trial counsel did not provide ineffective assistance by failing to object to the admission of the investigating officers' out-of-court, unsworn interview statements or by not requesting a limiting instruction.

¶4 Following his arrest, Czysz was interviewed by investigators Warmington and Wanggaard, and a redacted audio recording of the interview was admitted at trial.[3] In the interview, Czysz denied any knowledge of or involvement in the crime, and the investigators repeatedly challenged his statements and disputed his version of events. At various times, the investigators told Czysz they did not believe his story, he was lying, and his account did not match the physical evidence. Czysz argues that the investigators' statements impermissibly expressed their belief that Czysz was guilty and that trial counsel provided ineffective assistance by failing to object to the admission of the statements or request that the jury be instructed not to consider the statements as evidence.

¶5 Absent a sufficient reason, a defendant is procedurally barred from using a WIS. STAT. § 974.06 postconviction motion to bring claims that could have been raised earlier. *See* ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 184-85, 517 N.W.2d 157 (1994); § 974.06(4). The ineffective assistance of postconviction counsel may constitute a reason sufficient to overcome the procedural bar. *See* ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 682-83, 556 N.W.2d 136 (Ct. App. 1996). In determining whether postconviction counsel was

[3] After the trial court denied Czysz's motion to suppress the statement as involuntary, trial counsel sent a letter to the prosecutor detailing specific portions of the statement he believed were objectionable and should not be considered by the jury. The parties stipulated that those portions of the recording would be redacted.

ineffective, we first examine trial counsel's performance. *See* ***State v. Ziebart***, 2003 WI App 258, ¶15, 268 Wis. 2d 468, 673 N.W.2d 369.

¶6 To prevail on an ineffective assistance of counsel claim, a defendant must establish that counsel performed deficiently and this deficiency prejudiced the defendant. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To establish deficient performance, a defendant must show specific acts or omissions of counsel that were "outside the wide range of professionally competent assistance." ***Id.*** at 690. To prove prejudice, the defendant must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id.*** at 694. Whether a defendant received ineffective assistance of counsel is a mixed question of law and fact. ***State v. Pitsch***, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985). We will not reverse the trial court's findings of facts unless clearly erroneous, but whether counsel's conduct was deficient or prejudicial are questions of law we review de novo. ***Id.*** at 634. We need not address both prongs of the test if the defendant fails to make a sufficient showing on either one. ***Strickland***, 466 U.S. at 697.

¶7 We conclude that trial counsel did not perform deficiently by allowing the jury to hear the investigators' interview statements. An officer's unsworn out-of-court statements made in the context of an investigation or interrogation, including statements concerning whether a witness is telling the truth or lying, are admissible at trial. *See* ***State v. Miller***, 2012 WI App 68, ¶¶13-16, 341 Wis. 2d 737, 816 N.W.2d 331; ***State v. Smith***, 170 Wis. 2d 701, 718-19, 490 N.W.2d 40 (Ct. App. 1992). In ***Miller***, the defendant's videotaped interrogation was admitted at trial, including the officer's multiple statements to Miller that he was lying. ***Miller***, 341 Wis. 2d 737, ¶¶4, 8. Miller argued it was error to admit the video because the officer's statements ran afoul of the rule in

State v. Haseltine, 120 Wis. 2d 92, 96, 352 N.W.2d 673 (Ct. App. 1984), which prohibits a witness from testifying that another witness is telling the truth. The court determined that the officer's interview statements amounted to an unsworn interrogation technique which had "neither the purpose nor the effect of" attesting to Miller's truthfulness. ***Miller***, 341 Wis. 2d 737, ¶15. The court held that because the statements "were made in the context of a pretrial police investigation and were not made as sworn testimony in court, the ***Haseltine*** rule was not violated." ***Miller***, 341 Wis. 2d 737, ¶11. Here, as in ***Miller***, the investigators' unsworn out-of-court statements were made in the context of a pretrial police investigation and trial counsel's failure to object was not deficient.[4] *See* ***State v. Wheat***, 2002 WI App 153, ¶14, 256 Wis. 2d 270, 647 N.W.2d 441 (counsel's failure to raise meritless claim not deficient performance).

¶8 We further conclude that trial counsel's failure to object was the result of reasonable trial strategy. ***Strickland***, 466 U.S at 690 ("[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable."). At the ***Machner*** hearing, trial counsel testified that once the trial court ruled Czysz's statement admissible, his goal was to "get

[4] We reject Czysz's assertion that ***State v. Miller***, 2012 WI App 68, 341 Wis. 2d 737, 816 N.W.2d 331, is distinguishable because it addressed the propriety of the officer's statements concerning the defendant's truthfulness as opposed to his guilt. We see no meaningful distinction. While Czysz argues that the reason for the rule prohibiting opinions on guilt "is that it is the jury's responsibility to decide a defendant's guilt, not some witness or party who acts as a thirteenth juror," the same concern about a witness usurping the jury's role underlies the rule in ***State v. Haseltine***, 120 Wis. 2d 92, 96, 352 N.W.2d 673 (Ct. App. 1984). *See* ***State v. Krueger***, 2008 WI App 162, ¶16, 314 Wis. 2d 605, 762 N.W.2d 114; ***Haseltine***, 120 Wis. 2d at 96. Indeed, Czysz's own characterization of the investigators' statements—that they "repeatedly challenged Czysz on his claim that he did not stab [the victims]," "repeatedly told him that he was lying," "repeatedly explained how the evidence did not support his version of events," and "repeatedly expressed their belief that he stabbed the two men" despite his continuing denials—demonstrates that there is no practical distinction between statements regarding Czysz's truthfulness and statements regarding his guilt.

something out of that statement myself." He wanted to highlight that Czysz repeatedly denied committing the crime and Czysz's statements "in a vacuum without some context … wouldn't have made as much sense, wouldn't have been as helpful as they were." Trial counsel decided to take advantage of Czysz's statement as a way to get his story in front of the jury without having to testify. Counsel agreed he likely would have objected at trial had the State asked investigators whether they believed Czysz was guilty or thought he stabbed the victims, but stated he did not consider their out-of-court statements made in the course of an interrogation similarly objectionable or "bad enough" to warrant an objection:

> If [the prosecutor] says to an officer on the witness stand as part of his direct examination did Mr. Czysz kill this person in your opinion, that's objectionable. In the context of this question and answer and the whole thing coming in and the benefit of the jury hearing Mr. Czysz, I don't equate those two [situations].

¶9 The postconviction court found that trial counsel reviewed the interview in its entirety and made a strategic decision to allow the jury to hear the officers' statements. *See* ***State v. Carter***, 2010 WI 40, ¶19, 324 Wis. 2d 640, 782 N.W.2d 695 (findings of fact for the trial court include trial counsel's conduct and strategy). This finding is not clearly erroneous and, in fact, is amply supported by the record of Czysz's jury trial. Trial counsel made liberal use of the unredacted statement in cross-examination and during closing argument to Czysz's advantage, for example, to dispute the State's contention that Czysz admitted guilt during the interview and to further the argument that law enforcement focused too early on

Czysz, thereby neglecting to conduct a thorough investigation or follow-up on other leads.[5]

¶10 Czysz argues that his ineffective assistance claim remains viable because it is grounded in due process, whereas ***Haseltine*** and ***Miller*** relied on state court evidentiary law. To the extent Czysz suggests that trial counsel was ineffective for failing to object to the officers' statements on due process grounds and that postconviction counsel should have raised this issue, we disagree. Nothing in Czysz's briefs persuades us that the admission of the investigators' unsworn out-of-court statements made in the context of a pretrial interrogation violates due process. Further, it is well established that counsel's failure to raise a novel constitutional claim cannot be deemed deficient. *See* ***State v. Maloney***, 2005 WI 74, ¶¶28-30, 281 Wis. 2d 595, 698 N.W.2d 583. Successful ineffective assistance claims "should be limited to situations where the law or duty is clear." ***Id.***, ¶29 (citation omitted). At the ***Machner*** hearing, postconviction counsel testified that she considered the propriety of the officers' statements and determined they were admissible under ***Miller***. Czysz has not established that either trial or postconviction counsel performed deficiently by failing to raise his novel due process claim.

¶11 Next, Czysz argues that trial counsel was ineffective for failing to ask the trial court to instruct the jury that the investigators' comments "did not constitute evidence." We disagree. Through his cross-examination of

[5] Similarly, trial counsel highlighted to the jury portions of the taped interview where Czysz expressed surprise in response to the investigators' questions. Counsel argued that a person actually involved in the crime would have already known and not been surprised by the information presented in the questions.

Warmington, trial counsel made it abundantly clear that the recorded statement was an investigative interrogation technique:

> Q: … At the beginning of the tape when Mr. Czysz told you that he didn't do anything, you told him, well, we don't know whether you did anything or not; that's why you're here or words to that effect, do you remember that?
>
> A: Yes.
>
> Q: And the goal of taking this statement, like any statement I assume, is to get some details as to what happened. You want to things like—well, of course who committed the crime, why the crime was committed, how it was committed, what order things happened in, all of that, correct?
>
> A: Yes.
>
> Q: Now, I noticed on the tape that at various points in time you and Investigator Wanggaard seem to be trying to suggest various scenarios to Mr. Czysz, is that an investigation technique of some sort or … were you just really trying to figure out what was going on?
>
> A: That would be both.

¶12 Warmington agreed he suggested a variety of scenarios to Czysz because the officers did not know what really happened.[6] The cross-examination continued:

> Q: And although I know you didn't believe him or we wouldn't be having this conversation, I guess, Mr. Czysz obviously maintained throughout that he did not kill these guys, correct?
>
> A: Yes.

[6] For example, the officers suggested to Czysz that he killed the victims in self-defense, he killed one victim to defend the other, or one of the victims came at him with a weapon and Czysz disarmed and then stabbed the victim.

> Q: So at this point all those scenarios that you were suggesting to Mr. Czysz, even today three years later, we don't know if any of them could be true or not, do we?
>
> A: I can't really give you a yes or no on that one because—
>
> Q: Because you don't know, correct?
>
> A: Right.
>
> Q: Three years later we don't know why this happened, do we?
>
> A: No.
>
> Q: We don't know who started it?
>
> A: No.

¶13 We conclude that trial counsel's failure to request a special limiting instruction was not deficient.[7] Trial counsel squarely addressed and used the officers' interview statements to further the theory of defense. An instruction directing the jury not to consider these statements as evidence would have been awkward and confusing.

¶14 Further, Czysz has failed to establish that the absence of a special limiting instruction was prejudicial. Though we observed in ***Miller*** that the trial court instructed the jury that the officer's statements "were not being offered as true but to provide continuity for the entire interview," *see* ***Miller***, 341 Wis. 2d 737, ¶15, we reject Czysz's contention that the limiting instruction "was key" to our decision. The ***Miller*** analysis focused on the nature and context of the

[7] Czysz states that trial counsel "offered no compelling explanation during the ***Machner*** hearing as to why he did not seek a limiting instruction." This assertion is misleading. On the State's objection, the postconviction court restricted Czysz's ability to question trial counsel concerning the absence of a limiting instruction. As a result, trial counsel was not afforded the opportunity to testify about this issue.

officer's unsworn statements, determining that because they were made in the course of a pretrial investigation as part of an interrogation technique, there was no risk the statements would be construed as opinion evidence in violation of ***Haseltine***. ***Miller***, 341 Wis. 2d 737, ¶¶11, 16. As in ***Miller***, the recording of Czysz's interview played to the jury demonstrated that the officers' statements to Czysz were part of an interrogation technique, and their purpose was not to attest to Czysz's truthfulness or guilt, but to gain information and evidence in furtherance of a pretrial investigation. Similarly, in this context, the effect of the recorded statements and Czysz's responses was not to attest to Czysz's truthfulness or guilt, but to "provide[] the jury the necessary framework for understanding those responses." ***Id.***, ¶15.

Trial counsel did not perform deficiently by failing to seek a voluntary intoxication instruction.

¶15 Czysz argues that trial counsel provided ineffective assistance by failing to request that the jury be instructed on the defense of voluntary intoxication. To support the applicability of this defense, Czysz points to statements made in his recorded interrogation indicating that he had consumed substantial amounts of alcohol and taken some unknown pills that were "supposed to be a high powered painkiller." Czysz acknowledges that his statement "varied at points regarding the amount of alcohol that he had consumed."

¶16 At the ***Machner*** hearing, trial counsel testified that he did not pursue this instruction for a number of reasons, the primary one being that "Mr. Czysz's

recollection of the events, imperfect as it was, would have made an intoxication defense inappropriate."[8] Counsel further stated:

> More to a strategic analysis, Mr. Czysz had no interest in being found guilty of any crime in this case. He didn't want to go to prison for 40 years or 80 years or a life sentence.
>
> And … an intoxication defense in the case of a homicide is an imperfect defense, and Mr. Czysz had insisted, as apparently he still does today, of course, that he was innocent of these offenses.
>
> And a lesser included offense, and I understand the analysis is somewhat different, but it amounts to the same thing, was not what Mr. Czysz wanted, and in this case I was prepared to accede to his wishes in that regard.
>
> Finally, from a strategy standpoint, I really didn't think that it did him a lot of good to be found guilty of a lesser included under these circumstances, aside from the issue of his specific wishes about how he wanted the case to come out.

¶17 In questioning trial counsel, the State brought out the fact that Czysz's blood alcohol level about six hours after arrest was 0.097 grams per milliliter, suggesting that it was around 0.187 at the time of the offense. Trial counsel agreed that the other substances found in Czysz's blood—caffeine, a nicotine metabolite, and vitamin E—would not support a voluntary intoxication defense.

¶18 The postconviction court found that trial counsel made a reasonable strategic decision not to pursue an involuntary intoxication defense. The postconviction court also determined that based on Czysz's blood test results, "the

[8] Counsel testified that based on his conversations with Czysz, he was "aware that Mr. Czysz frankly knew more than what he told the police, which created a problem at the beginning of the case or in the preparation of the case for doing an intoxication defense."

voluntary intoxication defense would have been inappropriate under all of the circumstances."

¶19 We conclude that trial counsel's decision to forego requesting a voluntary intoxication instruction was made "in the exercise of reasonable professional judgment." ***Strickland***, 466 U.S. at 690. Counsel testified that Czysz maintained his innocence and "we were looking to win this case; we weren't looking to compromise it." *See* ***id.*** at 691 ("The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions."). Aside from his determination that the instruction was unsupported by the evidence, trial counsel strategically decided not to pursue an instruction that would have forced the defense to argue alternate theories and provided an opportunity for a compromise verdict that counsel reasonably believed would have achieved little practical benefit. Czysz has failed to "overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" ***Id.*** at 689 (citation omitted).

By the Court.—Order affirmed.

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