

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 24, 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. 2015AP191-CR

Cir. Ct. No. 2010CF1208

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BRETT M. SPITZER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Kenosha County:
ANTHONY G. MILISAUSKAS, Judge. *Affirmed.*

Before Neubauer, C.J., Gundrum and Hagedorn, JJ.

¶1 PER CURIAM. Brett M. Spitzer appeals from a judgment convicting him of substantial battery, disorderly conduct, and two counts of bail jumping, all as a repeater. He contends that he is entitled to a new trial due to the ineffective assistance of trial counsel. We disagree and affirm.

¶2 In December 2010, the State filed a complaint against Spitzer for substantial battery, disorderly conduct, and two counts of bail jumping, all as a repeater. The charges arose out of an incident involving Spitzer, his then-girlfriend Jessica Laws, and a man named R.K. The case was tried to a jury. Testimony at trial established the following basic facts.

¶3 After eating, drinking, and playing cards at the home of a mutual acquaintance, Spitzer, Laws, and R.K. went to R.K.'s home, where they continued to drink while Spitzer and R.K. played foosball. At some point, Spitzer left the room to talk on his phone. While he was out of the room, Laws lifted her shirt and "flashed" her breasts at R.K. What happened next was in dispute at trial.

¶4 According to R.K., Spitzer walked back into the room while Laws was "flashing" her breasts and asked what was going on. R.K. told Spitzer to "check your girlfriend," after which Spitzer "sucker punched" R.K. on the side of his head. R.K. said that Spitzer punched him repeatedly and pulled his shirt up over his head so that he could not swing back. R.K. also said that he fell down and heard Laws telling Spitzer to stop, that he was going to kill R.K. R.K. remembered Spitzer kicking him in the face and chest area and that he ultimately lost consciousness. R.K. suffered a broken nose and had extensive bruising and bleeding as well as cuts and scrapes on his back.

¶5 Laws also testified that Spitzer began the altercation by hitting R.K. in the head. According to Laws, after she "flashed" her breasts at R.K, she kissed him. Spitzer came into the room during the kiss, became angry, and hit R.K. in the head. Laws claimed that Spitzer kept hitting R.K. until R.K. fell down, and then Spitzer "used his boot and stomped on his face." Laws remembered getting down and trying to stop Spitzer and protect R.K's head, saying, "you're going to

kill him.” She did not remember much of what happened after that, though she indicated that she may have hit Spitzer with a pool cue when trying to get him to stop.

¶6 Spitzer’s version of events was very different. According to Spitzer, he saw Laws kiss R.K. and asked what was going on. R.K. replied to the effect of “what’s it to you,” and straightened up, bumping into Laws and causing her to stagger backwards. When Spitzer tried to get Laws to leave with him, R.K. attacked him with a pool cue. The two exchanged blows. Thus, while Spitzer admitted to hitting R.K, he maintained that he was acting in self-defense after R.K. started the fight. Spitzer had a bruise on his ribs and a bloody nose, though he told the police he had the bloody nose because he had been hit by Laws.

¶7 The jury rejected Spitzer’s claim of self-defense and found him guilty on all four counts. The circuit court subsequently sentenced Spitzer for his crimes.

¶8 After sentencing, Spitzer filed a motion for postconviction relief raising, among other things, a claim of ineffective assistance of trial counsel. Following a hearing on the matter, the circuit court rejected the claim. However, it granted a new sentencing hearing on other grounds.

¶9 After resentencing, Spitzer filed another motion for postconviction relief related to the issue of sentence credit. The circuit court granted the motion. Spitzer then filed this appeal, challenging the denial of his earlier claim of ineffective assistance of trial counsel.

¶10 On appeal, Spitzer contends that he is entitled to a new trial due to the ineffective assistance of trial counsel. Specifically, he complains that counsel

(1) failed to object to testimony about the testing of Spitzer's boots for the presence of blood, (2) failed to present additional evidence that Laws was expecting consideration for her testimony in the case, and (3) failed to object to the prosecutor's comment in closing argument regarding a prior statement Laws had given.

¶11 To establish a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that such performance prejudiced his or her defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Appellate review of an ineffective assistance of counsel claim is a mixed question of fact and law. *State v. Pitsch*, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985). We will not disturb the circuit court's findings of fact unless they are clearly erroneous, but the ultimate determination of whether counsel's performance fell below the constitutional minimum is a question of law we review independently. *Id.* at 634.

¶12 Spitzer's first complaint of ineffective assistance of counsel stems from the trial testimony of Detective David May. May had reviewed evidence taken from Spitzer when he was arrested, including the boots that Spitzer was wearing. May testified that the boots had discoloration that appeared to be dried blood. He requested that the substance be examined by another police officer. According to May, that other officer's test results indicated that three points on the left boot were blood, but that other areas on the right boot that appeared to be blood stains were not.

¶13 Trial counsel did not object to May's testimony though there were two bases for doing so: (1) it contained hearsay, and (2) allowing the testimony of

the other officer's test results violated Spitzer's right to confrontation. Counsel later explained the reason for her inaction.

¶14 At the hearing on Spitzer's postconviction motion, trial counsel testified that she did not object to May's testimony because she thought it was more helpful than harmful to the defense. Counsel noted that the testimony indicated that there was "significantly less" blood on the boot than the prosecutor had expected. She said:

When I was initially shown the boots, they said, oh, there's blood all over these boots, on the bottom, the sides, the tops, they're just covered with what we believe is dried blood. And that would have fed into their theory that this was— They made reference to Mr. Spitzer stomping on [R.K.], kicking him with the steel toed boot, and to me the results of having no blood on the bottom of the boots and no blood on the sides, it was clearly it was something else. And just having a couple speckles of blood on top was consistent with what Mr. Spitzer had to say, that he had a bloody nose because he was attacked and that drops of blood had gotten onto his boots because that's all there was on the top of the boots was a few speckles of blood, and it wasn't consistent with the State's theory that there was this blood bath war, that Mr. Spitzer was just kicking [R.K.] and stomping on him. And, I mean, it favored us so that's why I was happy with the results.

¶15 Reviewing trial counsel's testimony, which the circuit court found credible, we are satisfied that her failure to object to May's testimony resulted from reasonable trial strategy and not deficient performance. As noted by counsel, the small amount of blood found on one of Spitzer's boots did not strongly support the prosecution's theory that Spitzer had kicked and stomped R.K. If anything, it supported the defense's version of events, which acknowledged the altercation and the fact that both men were bleeding. The jury could have concluded that the small amount of blood came from either R.K. or Spitzer or both of them during the incident as Spitzer described it.

¶16 Spitzer’s next complaint of ineffective assistance of counsel stems from the trial testimony of Laws. Laws acknowledged that she was facing serious criminal charges in unrelated cases. She further acknowledged that she did not give a statement to police about the incident in this case until after she was in jail on those charges. Laws said that she had not been offered any leniency for her testimony or promised any consideration for talking to the police and that she did not ask for or expect any reward for testifying at trial. However, she did admit that her attorney had told her that it would be a “good idea” to testify.

¶17 In closing argument, Spitzer’s trial counsel questioned Laws’ reasons for testifying, stating:

She refused to give a statement. She was asked by Detective May, approached by him if she could give a statement and she refused to give a statement. It wasn’t until she has very serious charges – we heard that she’s got two batteries to a law enforcement officer, possession of cocaine with intent to deliver, and some bail jumpings, felony bail jumpings – that’s what she’s testified to – She’s actually in a more precarious situation than even my client is at this point. And it’s when she’s in jail that she decides maybe I need to help myself out here and I’m going to give a statement.

Now, the State hasn’t promised her anything in return. That’s true. But they’re going to look more favorably upon her when it comes her time to get her comeuppance because of her testimony here. And to that I say that she has a large motivation to go along with the story that – or the version of events that the State is putting forward because they’re trying to convict my client not [R.K.] She has a huge motivation.

¶18 Spitzer believes this line of attack would have been more effective if trial counsel had presented additional evidence that Laws was expecting consideration for her testimony, even in the absence of a specific agreement with the State. This evidence includes (1) a transcript of a hearing from Laws’ other

cases in which the circuit court asked Laws' counsel if she wanted to wait to plead until after Spitzer's case was concluded so that "consideration can be considered," and (2) records indicating that Laws' other cases were postponed until after Spitzer's trial.

¶19 We are not persuaded that trial counsel performed deficiently by failing to present this additional evidence to the jury. To begin, counsel cannot be faulted for failing to obtain a transcript of a hearing from Laws' other cases. Nothing in our case law requires counsel to go to such lengths in order to provide minimally competent professional representation. In any event, at most, the additional evidence may have suggested that the State and Laws' attorney would consider whether there would be consideration after Spitzer's trial. But Spitzer's trial counsel already brought out that information at trial. There, Laws admitted that her attorney had told her that it would be a "good idea" to testify. The clear implication was that, even in the absence of a specific agreement with the State, it would be in Laws' self-interest to testify in light of her pending charges. The additional evidence would have made the same point.

¶20 Spitzer's final complaint of ineffective assistance of counsel stems from the prosecutor's comment in closing argument regarding a prior statement Laws had given. At trial, Laws revealed that when she was in jail right after this incident in December 2010, she had given a statement to someone she believed was an investigator from the public defender's office. She said she believed the statement was written down and that she signed it, but she was not certain because of her intoxicated state. No copy of the statement was introduced into evidence, and neither Laws nor any other witness testified about its contents.

¶21 During closing argument, the prosecutor addressed Laws' pending charges and made the following comment about her testimony regarding the prior statement.

Yeah, she's got charges, she's got cases pending. She doesn't know whether this is going to help her or not being forthcoming this way, but the bottom line is she wanted to be truthful from the very beginning. *And, in fact, she says she gave a statement to the public defender's office right in December, right after this happened, and that that statement was the same essentially as this statement.*

(Emphasis added.)

¶22 Because Laws never testified that her earlier statement was essentially the same as her later statement to police, the prosecutor's comment was improper. Trial counsel should have recognized this and objected. Because she did not, her performance was arguably deficient.

¶23 That said, we are not persuaded that counsel's failure to object resulted in prejudice to Spitzer. Again, there was no information about the contents of the earlier statement, and Laws admitted that she was intoxicated when she gave it. Thus, the jury had little to work with on this matter other than the prosecutor's conclusory and erroneous comment.

¶24 Moreover, in assessing prejudice, we cannot ignore the overall strength of the State's case and relative weakness of Spitzer's self-defense claim. In its oral decision denying Spitzer's ineffective assistance of counsel claim, the circuit court, which presided over the trial, commented on this and summarized the evidence as follows:

We had the testimony of the victim. We had severe injuries. We had photos which presented the severe injuries. We had the testimony of Jessica Laws, who I thought was credible as to the incident. She was a witness

to the incident. We had the testimony of Dr. Quetz, Q-U-E-T-Z, who testified as to the severe injuries of the victim. We had the testimony of Deputy Carroll, who had contact with the defendant who basically denied the incident from the beginning when he talked to the deputy, said the defendant indicated that he had been in a fight with his girlfriend. We had the testimony of a witness, Mr. La Roche, who testified for the defense, who basically indicated that the defendant had been trying to provide some false information to the deputy. We had the testimony of Officer Bandi, B-A-N-D-I, who described the incident of the basement, that is the blood that was found in the basement, hair from the victim that was found in the basement. We had the testimony of Dr. Kasalajtis, K-A-S-A-L-A-J-T-I-S, who looked at the injuries, again indicated they were consistent with the actions of the defendant. We had the testimony of Deputy McCann, again who spoke to the defendant who had given a different version, ample evidence.

¶25 For these reasons we reject Spitzer’s claim of ineffective assistance of trial counsel and affirm the judgment of the circuit court.

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5 (2013-14).

