COURT OF APPEALS
DECISION
DATED AND FILED

September 27, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP2985-CR **Cir. Ct. No. 2003CM748**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DANIEL J. GARCIA,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Portage County: FREDERIC FLEISHAUER, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

¶1 BRIDGE, J.[1] Daniel J. Garcia appeals from a judgment convicting him of battery and disorderly conduct and from an order denying his

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2005-06). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

postconviction motion for a new trial and for resentencing. Garcia argues he was denied effective assistance of counsel when his attorney failed to object to a comment by the State made during the prosecutor's closing argument. We disagree and affirm the circuit court's ruling on this issue. Garcia also argues that the sentence imposed by the circuit court for his disorderly conduct conviction does not comply with WIS. STAT. § 973.01(2)(b). We agree and reverse on this issue.

BACKGROUND

¶2 Garcia was convicted of battery and disorderly conduct stemming from an incident on November 29, 2003, involving Danielle Gilbert, Garcia's girlfriend at the time. Gilbert called 911 after the incident, and two sheriff's deputies responded. The deputies recorded statements from both Gilbert and Garcia and took them both into custody. The following afternoon, one of the deputies went to the jail and spoke to Gilbert, and also photographed bruises on Gilbert's body. Gilbert told the deputy that Garcia caused her injuries.

¶3 Several months later, after Garcia's mother contacted her, Gilbert wrote two letters recanting her statements about Garcia causing her injuries. Gilbert testified at trial and returned to her original version of the events. She testified that she recanted because she felt pressure from Garcia and hoped that she was "still going to be with him" at the time.

¶4 During the State's closing argument, the prosecutor told the jury:

> You know, in every one of these cases that I've done, my experience tells me the first story is always the true story. It's when they understand the consequences that loved one has to face because of their conduct that they try to take it back because they love them. Can we understand that?

Garcia's trial counsel did not object to the State's statement.

¶5 The jury found Garcia guilty of battery, disorderly conduct and obstructing an officer. At sentencing, the circuit court found that Garcia was a habitual offender and sentenced him to twenty-four months for the battery, including eighteen months of initial confinement. The court also imposed a twelve-month sentence for the disorderly conduct, including nine months of initial confinement. The sentences ran consecutively.

DISCUSSION

Ineffective Assistance of Counsel

¶6 Garcia first contends that he was denied the effective assistance of counsel guaranteed to him by the Sixth and Fourteenth Amendment to the United States Constitution and by Article I, Section 7 of the Wisconsin Constitution. The United States Supreme Court has set out a two-pronged test for determining ineffective assistance of counsel. To sustain a claim, a defendant must show both: (1) that his counsel's performance was deficient; and (2) that the deficient performance prejudiced him. ***Strickland v. Washington***, 466 U.S. 668, 687-88 (1984). If we conclude that the defendant has not proven one prong, we need not address the other. *See* ***id.*** at 697. To prove deficient performance, a defendant must show specific acts or omissions of counsel that were "outside the wide range of professionally competent assistance." ***State v. Nielsen***, 2001 WI App 192, ¶12, 247 Wis. 2d 466, 634 N.W.2d 325 (*quoting* ***Strickland***, 466 U.S. at 690). We "strongly presume" that counsel has rendered adequate assistance. ***Id.***

¶7 To demonstrate prejudice, a 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.,*** ¶13. A reasonable probability is a

probability sufficient to undermine confidence in the outcome. ***Id.*** In applying this principle, reviewing courts are instructed to consider the totality of the evidence before the trier of fact. ***Id.***

¶8 Whether a lawyer's conduct constitutes ineffective assistance presents a mixed question of fact and law. ***Id.***, ¶14. The circuit court's findings of fact will be upheld unless they are clearly erroneous. ***Id.*** Whether proof satisfies either the deficiency or the prejudice prong under ***Strickland*** is a question of law that this court reviews without deference to the circuit court's conclusions. *See* ***id.***

¶9 Garcia contends that his trial counsel was ineffective for failing to object to the State's characterization of the victim's conflicting statements during closing argument. Counsel is allowed considerable latitude in closing argument. ***State v. Draize***, 88 Wis. 2d 445, 454, 276 N.W.2d 784 (1979). However, even if the comment was potentially objectionable, counsel was not deficient in failing to object. Counsel testified that it is part of his general strategy not to object to the State's closing argument unless a remark is "egregious," because "that's the last thing the jury will see before they go into deliberation." He explained that an objection would have drawn attention to the comment, thereby adding emphasis to it. He testified further that an objection would have given the comment a significance that the jury might not otherwise have ascribed to it. We will not second guess trial counsel's choice of trial tactics or strategies in the face of alternatives that he has considered. *See* ***Nielsen***, 247 Wis. 2d 466, ¶26. We are satisfied that counsel has provided a reasonable explanation for his strategy and accordingly, we conclude that counsel's performance was not deficient.

¶10 In addition, Garcia has failed to demonstrate that, but for counsel's failure to object, there is a reasonable probability that the result of the trial would

have been different. Gilbert testified at trial that she wrote the letters recanting her original testimony because she felt pressured to do it by Garcia, who she still loved and that she "thought [she] was still going to be with him." The jury was free to determine whether this testimony was credible. In addition, her testimony at trial was consistent with the statement she gave at the time of the incident. Further, photographs of her bruises taken by the deputy sheriff were consistent with her testimony regarding where Garcia struck her. There is sufficient evidence in the record to support the jury's verdict, notwithstanding the prosecutor's comment. Garcia has not met either prong of the ***Strickland*** test, and we conclude that he was not denied the effective assistance of counsel.

¶11 Garcia next argues that the one year bifurcated sentence on the disorderly conduct conviction is illegal because it imposes less than one year of initial confinement, in violation of WIS. STAT. § 973.01(2)(b). Garcia's argument requires us to interpret and apply a sentencing statute. Sentencing decisions are left to the circuit court's sound discretion. *See* ***State v. Larson***, 2003 WI App 235, ¶3, 268 Wis. 2d 162, 672 N.W.2d 322. However, the meaning of a statute is a question of law which we review de novo. ***Id.***

¶12 Garcia was convicted of disorderly conduct, a Class B misdemeanor. WIS. STAT. § 947.01. Class B misdemeanors are subject to a penalty of a fine not exceeding $1000 or imprisonment not exceeding ninety days, or both. WIS. STAT. § 939.51(3)(b). Because Garcia is considered a habitual offender, a maximum term of imprisonment of one year or less may be increased to not more than two years. *See* WIS. STAT. § 939.62(1)(a). Misdemeanor crimes committed after February 1, 2003 are subject to WIS. STAT. § 973.01, which requires a bifurcated sentence of prison and extended supervision. Under § 973.01(2)(b), "[t]he portion

of the bifurcated sentence that imposes a term of confinement in prison may not be less than one year…."[2]

¶13 The circuit court sentenced Garcia to a term of imprisonment of one year on the disorderly conduct conviction, consisting of nine months in confinement and three months of extended supervision to run consecutive to Garcia's sentence on the battery charge. Because the initial confinement period of the bifurcated sentence does not conform to § 973.01(2)(b), we vacate Garcia's sentence on his disorderly conduct conviction and remand the issue to the circuit court for resentencing.[3]

By the Court.—Judgment and order affirmed in part; reversed in part and cause remanded with directions.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.

[2] The State argues that WIS. STAT. § 973.01(2) should be read together with § 973.01(10), which provides in relevant part that "the term of confinement in prison may not exceed 75% of the total length of the bifurcated sentence." It argues Garcia's nine-month term of confinement is 75% of the one year sentence, and is therefore proper. However, subsection (2) provides that the term of confinement may not be less than one year *and* is subject to various limits, including that of subsection (10). Thus, the provisions of subsection (10) are in addition to the one year requirement of subsection (2).

[3] Garcia invites us to vacate his battery sentence as well as his disorderly conduct sentence, citing ***State v. Volk***, 2002 WI App 274, 258 Wis. 2d 584, 654 N.W.2d 24. We do not read ***Volk*** as supporting his position, and we decline the invitation.