COURT OF APPEALS
DECISION
DATED AND FILED

April 15, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP1149-CR **Cir. Ct. No. 2004CF943**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TREVOR M. HEIN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Outagamie County: JOHN A. DES JARDINS, Judge. *Judgment modified and, as modified, affirmed. Order affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Trevor Hein appeals a judgment, entered upon a jury's verdict, convicting him of solicitation to intimidate a victim by threat of force and intimidation of a witness.[1] Hein also appeals the denial of his postconviction motion for a new trial. Hein argues he is entitled to a new trial because his trial counsel was ineffective for failing to assert an entrapment defense. We reject Hein's arguments and affirm the judgment.

BACKGROUND

¶2 In September 2004, Hein was charged with second-degree sexual assault and intimidation of the victim of the assault. During his detention on these charges, Hein approached another jail inmate, Dennis West, about intimidating the victim and her parents to discourage them from testifying against him. West, fearful of being charged as party to the crime of the offenses Hein suggested, told his lawyer about the solicitation, and the lawyer informed the police. West, wearing an audio recording device, then spoke to Hein about the intimidation request.

¶3 Hein instructed West to threaten the victim at school, punch and kick the victim's father and grab the mother's shoulders while telling them not to show up at court. Hein also suggested that West use the sight of a gun to further intimidate them. In exchange for West's assistance, Hein offered to give West money and a Cadillac after he was released from jail. Based on these allegations,

[1] Although not an issue raised on appeal or that adversely affects Hein, we note that the judgment of conviction does not precisely reflect the jury verdict which found Hein guilty of two counts of solicitation to intimidate a witness by threat of force. Because this appears to be a clerical error, upon remittitur, the court shall enter an amended judgment of conviction correctly describing Hein's conviction for two counts of solicitation to intimidate a witness by threat of force contrary to WIS. STAT. §§ 939.30 and 940.43(3).

Hein was charged with two counts of solicitation to intimidate a witness by threat of force—the first count premised on the solicitation to intimidate the victim and the second count premised on the solicitation to intimidate the victim's parents. On the State's motion, this case was joined with the original sexual assault case.

¶4 After a trial, the jury found Hein not guilty of the sexual assault or intimidation of the victim, and guilty of the two counts of solicitation to intimidate a witness. Hein was convicted upon the jury's verdict. On count one, the court ultimately imposed twenty-five months' initial confinement and thirty-six months' extended supervision. With respect to the remaining count, the court withheld sentence and imposed a consecutive four-year probation term. Hein's postconviction motion for a new trial on grounds of ineffective assistance of trial counsel was denied after a ***Machner***[2] hearing and this appeal follows.

DISCUSSION

¶5 Hein 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 that this court reviews independently. ***Id.***

¶6 "The benchmark for judging whether counsel has acted ineffectively is stated in ***Strickland v. Washington***, 466 U.S. 668 (1984)." ***State v. Johnson***,

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

153 Wis. 2d 121, 126, 449, N.W.2d 845 (1990). To succeed on his ineffective assistance of counsel claim, Hein must show both: (1) that his counsel's representation was deficient; and (2) that this deficiency prejudiced him. ***Strickland***, 466 U.S. at 694.

¶7 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." ***Johnson***, 153 Wis. 2d at 127. 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. Further, "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." ***Id.*** at 690.

¶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 Hein fails to establish prejudice, we need not address deficient performance. ***State v. Sanchez***, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996).

¶9 Here, Hein argues counsel was ineffective for failing to assert an entrapment defense. We are not persuaded. Entrapment is the inducement of one to commit a crime not contemplated by him or her for the mere purpose of instituting criminal prosecution against him or her. ***State v. Hochman***, 2 Wis. 2d 410, 413, 86 N.W.2d 446 (1957). Our supreme court has adopted a subjective test to determine the origin of the defendant's intent. ***State v. Saternus***, 127 Wis. 2d 460, 469-70, 381 N.W.2d 290 (1986). "The subjective test focuses on the reason for the defendant's state of mind which led to the intent to commit the crime, *i.e.*, whether the police conduct affected or changed a particular defendant's state of mind." ***State v. Pence***, 150 Wis. 2d 759, 765, 442 N.W.2d 540 (Ct. App. 1989).

¶10 To establish an entrapment defense, a defendant must show by a preponderance of the evidence that he or she was induced to commit the crime. ***State v. Schuman***, 226 Wis. 2d 398, 403, 595 N.W.2d 86 (Ct. App. 1999). "If the defendant meets [that] burden of persuasion, then the burden falls on the State to prove beyond a reasonable doubt that the defendant was predisposed to commit the crime." ***Id.***

¶11 Entrapment, however, necessarily admits the act charged. ***State v. Monsoor***, 56 Wis. 2d 689, 696, 203 N.W.2d 20 (1973). "Once entrapment becomes an issue, all essential elements of the crime are taken as having been proved beyond a reasonable doubt." ***Saternus***, 127 Wis. 2d at 480. All that remains is the question of the State's "bad conduct" and the "origin of the intent" to commit the crime. ***Id.***

¶12 At the ***Machner*** hearing, trial counsel testified that although he was familiar with the entrapment defense, he never discussed using that defense with Hein. Counsel indicated that because the sexual assault case and solicitation to

intimidate witnesses case were consolidated, the entrapment defense would have been inconsistent with Hein's denial of the sexual assault and victim intimidation charges. Counsel explained:

> [M]y concern is that when you are using [the] entrapment defense, you are in essence agreeing … that you committed the offense. And my concern was that … if that basic agreement was in front of the same jury that was going to decide his sexual assault, that they could use that against him in the sexual assault case. I know they are not supposed to, but that was a concern of mine. I thought we had a really good case on the sexual assault.

We are satisfied that counsel provided a reasonable explanation for his strategy and, accordingly, we conclude that counsel's performance was not deficient. *See* ***Strickland***, 466 U.S. at 689.

¶13 Even, however, were we to conclude counsel was deficient for failing to assert an entrapment defense, Hein cannot establish that he was prejudiced by that deficiency. A necessary element of an entrapment defense is that the criminal intent did not originate with the defendant. *See* ***Saternus***, 127 Wis. 2d at 469. Here, the evidence showed that the idea to engage West's assistance in intimidating the witnesses originated with Hein. West informed the police before he was fitted with a recording device that Hein had approached him about intimidating the victim and her parents. Hein's effort to highlight West's leading role in the taped conversation does not alter the evidence showing that the idea originated with Hein. Because counsel's performance was neither deficient nor prejudicial, we conclude that the circuit court properly denied Hein's postconviction motion for a new trial.

By the Court.—Judgment modified and, as modified, affirmed. Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2005-06).