COURT OF APPEALS
DECISION
DATED AND FILED

September 17, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP2616-CR **Cir. Ct. No. 2010CF5109**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JERRY LEE CARSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: ELLEN R. BROSTROM and REBECCA F. DALLET, Judges. *Affirmed*.

Before Fine, Kessler and Brennan, JJ.

¶1 KESSLER, J. Jerry Lee Carson appeals the judgment of conviction, following a jury trial, of second-degree recklessly endangering safety.

Carson also appeals the order denying his postconviction motion for relief.[1] We affirm.

BACKGROUND

¶2 On October 8, 2010, Carson was charged with one count of second-degree recklessly endangering safety, with the use of a dangerous weapon, and one count of misdemeanor battery. According to the criminal complaint, the charges stemmed from two domestic violence incidents, one which occurred on October 6, 2010, and one which occurred the following morning.

¶3 On October 6, 2010, Milwaukee police were dispatched to the home of Bernice Walton, Carson's wife, in response to a 911 call. According to the complaint, Walton told police that she and Carson got into an argument when Walton refused to give Carson money for drugs. Carson proceeded to choke Walton and then threw her to the ground. The following morning, at approximately 12:45 a.m., police were again dispatched to Walton's home. Walton was bleeding and told police that Carson jammed a key ring into Walton's ear, causing the ring to become partially imbedded in her ear. Walton was transported to a local hospital, where the ring was removed. Carson was subsequently arrested and charged with misdemeanor battery, stemming from the acts of October 6, 2010, and second-degree recklessly endangering safety with a dangerous weapon, stemming from the key ring incident of October 7, 2010.

¶4 On October 18, 2010, Walton testified at the preliminary hearing and recanted her original statement, stating that she and Carson did not have a physical

[1] The Honorable Ellen R. Brostrom presided over the trial and the sentencing hearing. The Honorable Rebecca F. Dallet issued the decision denying postconviction relief.

altercation on October 7, 2010, and that Carson never jammed a key ring into her ear. Walton testified that she told the officers dispatched to her home that the key ring incident was "an accident." At the close of the hearing, a trial date was set for January 26, 2011.

¶5 On January 26, 2011, Walton, the State's key witness, did not appear at the trial. The State informed the court that Walton was in the hospital and requested an adjournment. The trial court granted the request and trial was continued until February 22, 2011.

¶6 At trial, Walton, Carson and Officer Shawn Humitz, one of the officers dispatched to Walton's home, among others, testified. Walton maintained that the key ring accidentally made its way into her ear, but testified several times that Carson "grabbed [her] shirt." She stated that the whole incident "happened so quick," and "how [the key ring] ended up in my ear I haven't the faintest idea."

¶7 Carson testified in his own defense, telling the jury that he retreated to his bedroom after an argument with Walton and later came out of the bedroom to find Walton laying on their living room floor. Carson said that he lifted Walton up by her clothes, at which time he did not see a key ring around Walton's neck, but that Walton told him something was in her ear. Carson said that he went to his neighbor's apartment and asked the neighbor to call for an ambulance. Carson told the jury that he stayed with Walton while waiting for the police and the ambulance because he [was] "concerned about [his] wife." Carson also told the jury that he had been previously convicted of crimes "once or twice." The State impeached Carson's testimony, telling the jury that Carson had in fact been convicted of five prior crimes—a fact the parties stipulated to at the preliminary hearing.

¶8 Officer Humitz told the jury that he was dispatched to Walton's apartment on October 7, 2010. Humitz testified that from the time he arrived at Walton's apartment until the time he took Carson to the police station following Carson's arrest, Carson kept repeating that "it was an accident, that he didn't mean to do it," and that he was just trying to get the key ring off of Walton's neck.

¶9 The jury convicted Carson of second-degree recklessly endangering safety, but acquitted Carson as to the dangerous weapon penalty enhancer. The jury was hung as to the battery charge. The battery charge was subsequently dismissed upon a request from the State. Carson was sentenced to five years of initial confinement and five years of extended supervision.

¶10 Carson filed a postconviction motion for relief, arguing ineffective assistance of counsel and that his sentence was unduly harsh. The postconviction court denied the motion. This appeal follows. Additional facts are included as relevant to the discussion.

DISCUSSION

¶11 On appeal, Carson argues that his trial counsel was ineffective for the following reasons: (1) failing to file a speedy trial demand; (2) failing to adequately communicate with Carson; (2) failing to adequately cross-examine and impeach Walton; and (4) failing to have a discernible trial strategy. The totality of trial counsel's errors, Carson contends, prejudiced Carson. Carson also contends that his sentence was unduly harsh.

I. Ineffective Assistance of Counsel.

¶12 In order to prove an ineffective assistance claim, the defendant must satisfy a two-part test: the defendant must prove both that counsel's performance was deficient and that the deficient performance was prejudicial. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). As to prejudice, it is not enough for a defendant to merely show that the alleged deficient performance had some conceivable effect on the outcome. ***State v. Erickson***, 227 Wis. 2d 758, 773, 596 N.W.2d 749 (1999). Rather, the defendant must show that, but for the attorney's error, there is a reasonable probability that the result of the trial would have been different. ***Id.***

¶13 An attorney's performance is deficient if the attorney "'made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment.'" ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990) (quoting ***Strickland***, 466 U.S. at 687). Stated differently, performance is deficient if it falls outside the range of professionally competent representation. ***State v. Pitsch***, 124 Wis. 2d 628, 636-37, 369 N.W.2d 711 (1985). We measure performance by the objective standard of what a reasonably prudent attorney would do in similar circumstances. *See* ***id.***; ***Strickland***, 466 U.S. at 688. We indulge in a strong presumption that counsel acted reasonably within professional norms. ***Pitsch***, 124 Wis. 2d at 637.

¶14 A claim of ineffective assistance of counsel presents a mixed question of fact and law. ***State v. O'Brien***, 223 Wis. 2d 303, 324, 588 N.W.2d 8 (1999). Upon appellate review, we will affirm the trial court's findings of historical fact concerning counsel's performance unless those findings are clearly

erroneous. ***Id.*** at 324-25. However, the ultimate question of ineffective assistance is one of law, subject to independent review. ***Id.*** at 325.

A. Speedy Trial.

¶15 Carson argues that his trial counsel failed to file a speedy trial demand, in violation of SCR 20:1.3, which requires that "[a] lawyer shall act with reasonable diligence and promptness in representing a client," and WIS. STAT. § 971.10,[2] resulting in a delay of his trial. Had the demand been filed on time, Carson argues, his trial would have been held within ninety days of October 18, 2010, resulting in a trial date of January 17, 2011. Instead, a trial date was set for January 26, 2011, at which time the State requested an adjournment because Walton was not present. Carson contends that if his counsel had made a speedy trial demand when Carson requested one, the trial court could have done one of the following when the State requested an adjournment: (1) released Carson on

[2] WISCONSIN STAT. § 971.10 provides, as relevant:

> **Speedy Trial.**
>
> ….
>
> **(2)(a)** The trial of a defendant charged with a felony shall commence within 90 days from the date trial is demanded by any party in writing or on the record. If the demand is made in writing, a copy shall be served upon the opposing party. The demand may not be made until after the filing of the information or indictment.
>
> ….
>
> **(4)** Every defendant not tried in accordance with this section shall be discharged from custody but the obligations of the bond or other conditions of release of a defendant shall continue until modified or until the bond is released or the conditions removed.

All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

bond; (2) denied the State's request for continuance, possibly resulting in a dismissal of the case; or (3) found Walton unavailable and continued the trial, thereby requiring the State to provide evidence that Walton was actually unavailable. At a minimum, Carson argues that he was prejudiced because he was incarcerated beyond the ninety day statutory speedy trial limit. At the maximum, the entire case against him could have been dismissed.

¶16 Carson's arguments fail for multiple reasons. First, Carson fails to show how he was prejudiced by his incarceration while awaiting trial. Citing the Declaration of Independence, Carson contends that the deprivation of liberty was prejudicial. However, Carson received sentence credit for the time he spent in pretrial custody. The effective result of the sentence credit is that the total amount of Carson's incarceration time remains the same whether he was released on bond or not. Therefore, he was not prejudicially deprived of his liberty.

¶17 Moreover, Carson does not show how counsel's failure to file a speedy trial demand could have resulted in the dismissal of his case. Carson seems to confuse his constitutional speedy trial right with the more restrictive statutory rights set out in WIS. STAT. § 971.10. The statutory remedy for failing to bring a felon to trial within ninety days of a speedy trial demand is release on bond pending trial. *See* WIS. STAT. § 971.10(4). Therefore, even if trial counsel had made the proper request and the trial court denied the State's motion for a continuance, Carson's remedy would have been discharge from custody pending trial, not a dismissal of the case against him. Assuming, without deciding, that Carson's trial counsel was deficient in not filing a speedy trial demand, Carson has not demonstrated that the result of his trial would have been different "but for counsel's unprofessional errors." *See* ***Strickland***, 466 U.S. at 694.

B. Failing to Adequately Communicate with Carson.

¶18 Carson contends that his trial counsel failed to adequately communicate with Carson in violation of SCR 20:1.4.[3] Carson argues that because his trial counsel only visited Carson once for approximately thirty minutes prior to trial, Carson was improperly prepared to testify and was impeached twice. The first instance occurred when Carson was questioned about his prior convictions and he improperly answered that he was previously convicted "once or twice," prompting the State to clarify to the jury that Carson was previously convicted five times. The second instance of impeachment occurred when Officer Humitz told the jury that Carson referred to the key ring incident as an "accident" that occurred when he (Carson) was trying to take the keys from Walton's neck.

[3] Supreme Court Rule 20:1.4 provides:

> **Communication.**
>
> (a) A lawyer shall:
>
> (1) Promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in SCR 20:1.0(f), is required by these rules;
>
> (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
>
> (3) keep the client reasonably informed about the status of the matter;
>
> (4) promptly comply with reasonable requests by the client for information; and
>
> (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.
>
> (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

¶19 Again, assuming, without deciding, that trial counsel's conduct was deficient, we cannot conclude that Carson was prejudiced by the lack of meetings with his trial counsel. At the start of trial, but prior to *voir dire*, the parties stipulated to the number of Carson's prior convictions as five. The stipulation was made in Carson's presence. Although Carson claims that he is of limited intellectual capacity, he does not argue that he did not comprehend the discussion leading to the stipulation, or the stipulation itself. Because Carson was presumably aware of the stipulation, he cannot now argue that his incorrect response to a question about his prior convictions was trial counsel's fault.

¶20 With regard to Officer Humitz's testimony, we conclude that Carson has not provided a reason to believe that he (Carson) would have testified differently had his trial counsel spent more time with him. Carson generally alleged in his postconviction motion that he was not adequately prepared to testify, but does not specifically allege that he was ill-prepared as to his statement to Officer Humitz or as to the officer's testimony. Moreover, Carson has not demonstrated that he was prejudiced by the inconsistency between his and Officer Humitz's testimonies. Officer Humitz was one of multiple witnesses at the trial. Officer Joel Moeller testified that he arrived at Walton's apartment with Officer Humitz after responding to Walton's 911 call. Officer Moeller testified that upon arrival, he noticed Walton crying and screaming in pain because the key ring was stuck in her ear. Officer Moeller stated that while at the apartment, Walton said that Carson was responsible for the key ring incident. However, even with this testimony, the jury acquitted Carson of the dangerous weapon (the key ring) enhancer. Thus, he suffered no prejudice from this testimony. *See* ***Strickland***, 466 U.S. at 694.

C. Walton's Testimony.

¶21 Carson also contends that his trial counsel was ineffective for failing to adequately cross-examine and impeach Walton. Carson contends that Walton's trial testimony was inconsistent with her testimony at the preliminary hearing, in which she stated that there was no physical contact between Carson and herself. Carson argues that Walton changed her testimony at trial by stating that Carson "just grabbed my shirt and somehow when I was moving his hands somehow [the key ring] just got in my ear." Carson argues that Walton's statement followed several statements in which Walton testified that Carson "grabbed" her.

¶22 We note first that Carson's postconviction motion does not mention Walton's statement that Carson "just grabbed my shirt and somehow when I was moving his hands somehow [the key ring] just got in my ear." Carson's postconviction motion states that "[a]t trial Ms. Walton changed her testimony to say that Mr. Carson put his hands on her neck." Accordingly, we are not convinced that Carson preserved the issue he complains of now for appeal. *See* ***State v. Huebner***, 2000 WI 59, ¶¶10-12, 235 Wis. 2d 486, 611 N.W.2d 727 (Appellants cannot raise issues for the first time in the court of appeals because the trial court must be given an opportunity to review the issue.). In addition, Carson has not demonstrated that he was prejudiced as a result of Walton's statement. As the trial court correctly noted, Walton did not change her testimony. Rather, Walton's testimony about Carson grabbing her referred to the incident which took place on October 6, 2010—the basis for the battery charge. Walton was not referring to the key ring incident of October 7, 2010—the basis of the reckless endangerment charge. Walton's testimony at trial as to the key ring incident was that it was accidental. This is consistent with her testimony at the preliminary

hearing. There was neither deficient performance nor prejudice because the battery charge was dismissed.

D. Trial Counsel's Strategy.

¶23 Finally, Carson contends that trial counsel failed to present a defense with a discernible trial strategy. He also argues that trial counsel failed to appear for a portion of deliberations, giving the jury the impression that counsel "abandoned" Carson. Given that Carson was acquitted on the dangerous weapon penalty enhancer and that the jury was hung on the battery charge, leading to a dismissal of that charge, we can hardly conclude that trial counsel did not present an effective defense.

II. Carson's Sentence was not Unduly Harsh.

¶24 Carson argues that his sentence was unduly harsh. Carson's argument centers on his contention that the gravity of the offense should have been mitigated by the facts that: (1) Walton was intoxicated at the time of the key ring incident; (2) Walton was not permanently injured as a result of the incident; and (3) Walton testified that Carson did not put the key ring into her ear.

¶25 "A sentence is unduly harsh ... when it is 'so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances.'" ***State v. Berggren***, 2009 WI App 82, ¶47, 320 Wis. 2d 209, 769 N.W.2d 110 (citation omitted). Where, as here, a sentence is within the maximum sentence allowed, it is unlikely to be unduly harsh or unconscionable. *See* ***id.*** We review an allegedly harsh and excessive sentence for an erroneous

exercise of discretion. *See* ***State v. Giebel***, 198 Wis. 2d 207, 220, 541 N.W.2d 815 (Ct. App. 1995).

¶26 Carson was sentenced to five years of incarceration and five years of extended supervision—the maximum penalty. *See* WIS. STAT. §§ 941.30(2), 939.50(3)(g). In explaining its decision, the trial court examined multiple factors, stating:

> [W]hen I sentence, I have to look at how serious was what occurred.
>
> I have to look at your character and then the best way to protect the public.
>
> ….
>
> It was, and the jury found a violent, vi[le] act of violence….
>
> And I do see a pattern of escalating violence here that is extremely concerning to the Court.
>
> So when I look at the gravity of what occurred, when I look at your character, not only the convictions that you have, that clearly show alcohol and drug issues, but also the arrests, which are, frankly, not irrelevant.
>
> They go to [your] character, … but there is an escalating pattern of domestic violence that is woven throughout this[.]
>
> ….
>
> It is very common for women, for whatever reason, [who] subject themselves to violent, abusive relationships like this, that they also have drug and alcohol problems because they're trying to escape.
>
> ….
>
> So, I share the P.S.I. writer's concern, I share the State's concern and I think this is a maximum case.

¶27 The trial court clearly stated its sentencing objectives and described the facts relevant to its primary objectives. *See* ***State v. Gallion***, 2004 WI 42, ¶¶40-42, 270 Wis. 2d 535, 678 N.W.2d 197. We will not interfere with the trial court's proper exercise of discretion. *See* ***State v. Ziegler***, 2006 WI App 49, ¶22, 289 Wis. 2d 594, 712 N.W.2d 76.

By the Court.—Judgment and order affirmed.

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