COURT OF APPEALS
DECISION
DATED AND RELEASED

DECEMBER 18, 1996

No. 96-1507-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

PAUL F. RAPALA,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Walworth County: MICHAEL S. GIBBS and ROBERT J. KENNEDY, Judges. *Affirmed*.

ANDERSON, P.J. Paul F. Rapala appeals from a judgment of conviction for one count of negligent use of a dangerous weapon, contrary to § 941.20(1)(a), STATS., and an order denying his postconviction motion for a new trial. Rapala's motion for postconviction relief alleges ineffective assistance of counsel. We conclude that any alleged defects by trial counsel were not prejudicial to Rapala's case and therefore fail to meet the

threshold requirements for ineffective assistance of counsel. Accordingly, we affirm the judgment and the order of the trial court.

FACTUAL BACKGROUND

On the night of December 10 and early morning hours of December 11, 1994, graduation night at University of Wisconsin-Whitewater, Rapala and two of his friends were visiting the Main Street Tavern. Throughout the evening, Rapala was rolling dice for money with some of the other bar patrons, including Daniel Eckstein. Rapala did quite well at the game, winning approximately $30 from Eckstein. Eventually, the dice game erupted into an argument resulting in Rapala being ejected from the bar.

As Rapala left the bar, he was followed by Eckstein's friend, Todd Stack and his friend Tom Hochmuth, who wanted "to make sure [] everybody was leaving." Other bar patrons rushed outside as well. Rapala brandished a knife and began yelling for everyone to stay back, but the group followed him up and down the street. Hochmuth approached Rapala, at which point Rapala swung at Hochmuth with the knife, cutting Hochmuth's jacket and shirt.

When the police arrived they arrested Rapala and charged him with one count of recklessly endangering safety by use of a dangerous weapon, contrary to §§ 941.30(1) and 939.63(1)(a)2, STATS.; one count of unlawfully endangering safety of another by negligent use of a dangerous weapon, as a party to a crime, in violation of §§ 941.20(1)(a) and 939.05(1), STATS.; and one count of disorderly conduct contrary to § 947.01, STATS. Although Rapala

claimed he acted in self-defense, the jury nevertheless convicted him of negligent use of a dangerous weapon.

Rapala filed a motion for postconviction relief, alleging ineffective assistance of counsel. Postconviction hearings were held.[1] The trial court denied Rapala's motion.[2] Rapala now appeals both the judgment of conviction and the order denying his postconviction motion. Other facts will be incorporated into the decision as necessary.

DISCUSSION

On appeal, Rapala claims that he was deprived of his constitutional right to effective assistance of counsel under the Sixth Amendment to the United States Constitution and art. I, § 7 of the Wisconsin Constitution. Rapala argues that his attorney: (1) failed to correct an alleged misimpression about his self-defense claim, and (2) failed to object to alleged irrelevant and prejudicial evidence of his postarrest behavior and suggestion that Rapala was dealing drugs.

When claiming ineffective assistance of counsel, a defendant must show that his counsel's performance was not only deficient, but that such performance prejudiced his or her defense such that the result of the trial cannot be said to be reliable. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). These

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[1] The hearings, on March 1, 1996, and continued to May 2, 1996, were in accordance with ***State v. Machner***, 92 Wis.2d 797, 285 N.W.2d 905 (Ct. App. 1979).

[2] The Honorable Michael S. Gibbs was the trial judge, and the Honorable Robert J. Kennedy presided over the postconviction motion.

are questions of law that we review de novo. ***State v. Johnson***, 153 Wis.2d 121, 128, 449 N.W.2d 845, 848 (1990).

Furthermore, if the defendant fails to adequately show one prong, we need not address the second. ***Strickland***, 466 U.S. at 697. Our review focuses on whether the errors claimed by Rapala cause us to believe that the outcome of his trial was unreliable. In determining this issue, we look at the totality of the circumstances and assume that the jury acted in accordance with the law. *See* ***id.*** at 694-95.

SELF-DEFENSE CLAIM

Rapala first argues that "[t]rial counsel's failure to correct a misimpression on the key point of the defense constituted ineffective assistance of counsel." Rapala questions trial counsel's cross-examination of the alleged victim here, Hochmuth. Hochmuth testified that Rapala threw a bike rack at him and then lunged at him with the knife, cutting his jacket and shirt.[3] On cross-examination, trial counsel asked him, "You would disagree with testimony of other witnesses who observed what was going on at that time was that you were approaching Mr. Rapala; is that right? You would disagree with that characterization that you were the one charging Mr. Rapala?" The State

[3] Hochmuth described the incident as follows. When he and Stack exited the bar, Hochmuth was hit in the head with a bottle, allegedly thrown by Rapala's friend, and Rapala wielded a knife. Hochmuth threw the bottle at Rapala to attempt to knock the knife out of his hand. A few seconds later, while the group was on the street, Rapala lunged at Hochmuth's friend Manigel Guenter, and Hochmuth ran to intercept him. Rapala turned when "he saw that he wasn't going to get to Guenter before [Hochmuth] was." Hochmuth then kicked at Rapala to knock him down, but he fell down instead. Rapala then threw the bike rack and lunged at Hochmuth with the knife, cutting his jacket.

objected, arguing that "[Stack] certainly never said that [Hockmuth] charged the defendant." The trial court agreed and sustained the objection. Trial counsel rephrased the question and asked him, "You would disagree with any witness who would have characterized that it was you who was approaching Mr. Rapala rather than the other way around at the time the two of you came close enough for your jacket to have been cut." Hochmuth responded, "I would disagree if they said I was approaching him, yes."

Rapala now argues that trial counsel's follow-up was insufficient. He contends that "[t]he dangerous possibility of the court's ruling in the presence of the jury was that it gave them the impression that Stack *had not at all* testified that Hochmuth went to Rapala." He maintains that "it was incumbent upon counsel to make it clear to the jury that Stack had, in fact, testified that Hochmuth was the one closing the distance to Rapala." Rapala's argument is unfounded.

First of all, on direct examination, Stack testified that "[e]verybody was walking towards like—outside the bar walking down the sidewalk. Then they stopped and [Hockmuth] took a couple more steps and then stopped and it's like Mr. Rapala swung and sort of lunged towards him." In response to the State's question, "Did Mr. Rapala make a move toward Mr. Hochmuth or was it the other way around," Stack clarified that "Mr. Rapala stopped. [Hockmuth] probably took one or two more steps then Mr. Rapala lunged."

On cross-examination, trial counsel and Stack had the following colloquy:

Q: At the time when Tom Hochmuth was approaching Paul Rapala, you testified that Paul Rapala stopped, right?

A: Right.

Q: And that Tom Hochmuth kept taking two or three more steps toward Rapala, right?

A: One or two more, yes.

….

Q: But you were also hoping that in the mean time before the police arrived that your friend Tom Hochmuth would stop *his approaching* of Paul Rapala, right?

A: Right. [Emphasis added.]

Stack's testimony, as brought out on direct and cross-examination, is very clear—Hochmuth took two steps and then Rapala swung at him with the knife. Other witnesses corroborated Stack's testimony that Hochmuth was "chasing" or "following" Rapala. Trial counsel's cross-examination only helped to highlight this testimony.[4]

We also agree with the trial court's comments at the postconviction hearings. The trial court noted:

Mr. Pangman was absolutely right in not pressing the point. Of course, he's not going to press the point. He tried to do, as a good tactical attorney would, his best to turn the word 'approach' from the other witness into the

[4] We also fail to see how trial counsel's further examination of Hochmuth could make it "clear to the jury that Stack had, in fact, testified that Hochmuth was the one closing the distance to Rapala." Stack's testimony was quite clear on this point. In addition, trial counsel could not possibly "rehabilitate" any ambiguities in Stack's testimony by following up on the trial court's ruling during Hochmuth's testimony.

> word 'charging' so he'd have two charges. The objection caught it.

….

> And if you have used the word 'charge,' what have you done? You put the thought in the jury's mind. There's the objection. Leave it alone. The jury is going to remember something. … If it's 'approach' they remember, you haven't accomplished a whole lot. Does I walking toward you justify you taking a knife and jumping towards me and cutting at me in such a way that my jacket and shirt get cut? But if I charge you, that's there. So he leaves the word 'charge.' Stops. The objection. What's the jury got? The jury at least has the word 'charge' in their mind as if Stack said 'charge.' Hopefully that's the way they'll construe it.

….

> But if he presses the point, they'll know it's 'approach.'

We also conclude that trial counsel's strategy was tactically sound and did not constitute deficient performance.

In addition, Rapala has not affirmatively proven prejudice. The witnesses' testimony combined with the "possibility" that the jury misinterpreted the trial court's ruling does not establish the reasonable probability of a different outcome. After the objection, defense counsel continued to pursue the self-defense line of questioning. He also elicited similar testimony, that Hochmuth "approached" or "chased" Rapala, from other witnesses. Even if his failure to press the objection constituted deficient

performance, we conclude that there is no reasonable probability of a different outcome had he proceeded as Rapala now argues.

IRRELEVANT AND PREJUDICIAL EVIDENCE

Next, Rapala contends that "[t]rial counsel's failure to object to irrelevant and prejudicial evidence regarding defendant's rude comments and crude behavior and suggestions that he might have been involved in drug-dealing constituted ineffective assistance of counsel." Specifically, Rapala argues that trial counsel failed to object to: (1) police testimony regarding Rapala's postarrest demeanor, and (2) police testimony regarding the $693 found in Rapala's possession. Rapala contends that trial counsel "adopted a theory of the case that clumsily accommodated these bits of evidence, rather than attempting to keep them out altogether. And he admitted he erred by doing so."

At the ***Machner*** hearing, appellate counsel asked trial counsel whether "this evidence of Mr. Rapala's attitude about his, his money, about ill-gotten gains, cash, drug dealing, his urinating, did this have anything to do with whether or not Mr. Rapala had committed the crimes prior to going to the police station?" Trial counsel affirmed that he had "a strategic reason for having that come in." Trial counsel explained that:

> I thought that it would be good to allow in information to come out to suggest that these police officers did indeed step out of their role of being detached evaluators of evidence … allow their emotions, their snap-judgment conclusions, biases, to cause them to target my client rather than these other clean-cut college boys.

….

> I wanted to show that these officers took an attitude with my client early and took it primarily because of my clients appearance and his attitude.

….

> And I think all the exchanges between he and the officers supported my theory that my client was not regarded very fondly by these officers, nor did he regard them fondly.

Trial counsel did not object to the officer's testimony regarding Rapala's conduct in jail because he "wanted to show that my client had taken an attitude and the officers decided to help build a case against my client because he had hacked 'em off."

In regard to the police officer's testimony concerning the money, trial counsel explained that:

> Also, that my client was the victim of bias and predisposition on the part of the officers by saying, … just because he had money in his wallet that anyone else would be entitled to carry around with them, that those officers felt they could jump to certain conclusions that weren't based on facts but just based on irrelevant factors such as appearance.

….

> [The] flippant comment by my client and that their seizing of the money when there was absolutely no basis for it and holding on to it showed that the officers were, were just being heavy-handed and disrespecting of the limits to their power. And I hoped that that would engender some bit of sympathetic response from the jurors.

….

> I think just looking at Paul, with the black leather, long hair, goatee, the jurors are going to jump to that conclusion [that Paul was a drug dealer/criminal]. I'd rather get it right out there and say: And surprise surprise, the officers jumped to the same conclusion. Now let's all be honest and forthright about it and say just because someone looks a certain way doesn't mean they should be convicted of anything. … And the proper response is to kind of be ashamed for jumping to the conclusions and be proud that you stuck to the fact. Now let's do the same thing on this other accusation.

Trial counsel had strategic reasons for allowing in the evidence not at issue. A trial attorney's selection of trial tactics in the exercise of professional judgment is "substantially the equivalent of the exercise of discretion …." ***State v. Felton***, 110 Wis.2d 485, 502, 329 N.W.2d 161, 168 (1983). Professionally competent assistance encompasses a wide range of behaviors and a "fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." ***Strickland***, 466 U.S. at 689.

Appellate counsel believes, and trial counsel may now agree, that too much "prejudicial" evidence was allowed before the jury. However, the distorting effects of hindsight are to be avoided on appeal. Because trial counsel had good strategic and tactical reasons for allowing the testimony regarding

Rapala's postarrest behavior and money into evidence, we conclude that his performance was not deficient.

Even if trial counsel's tactics constituted deficient performance, we are unconvinced that but for trial counsel's alleged errors, the result of the trial would have been different. Rapala was convicted of one count of negligent use of a dangerous weapon. The remainder of the evidence was overwhelmingly probative of Rapala's guilt on this charge. Whether in self-defense or not, numerous witnesses testified that Rapala wielded a knife and swung it at Hochmuth. As such, confidence in the outcome of the trial is not undermined and there is no reasonable probability that but for counsel's alleged errors the result of the proceeding would have been different.

By the Court.—Judgment and order afffirmed.

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