COURT OF APPEALS
DECISION
DATED AND FILED

June 24, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP2065-CR **Cir. Ct. No. 2010CF457**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROBERT C. CARLSON,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Eau Claire County: MICHAEL A. SCHUMACHER, Judge. *Affirmed*.

Before Hoover, P.J., Mangerson and Gundrum, JJ.

¶1 PER CURIAM. Robert Carlson appeals judgments convicting him of eight offenses relating to his stalking of G. G. He also appeals an order denying his postconviction motion in which he alleged ineffective assistance of trial counsel. He contends his counsel, Francis Rivard, asked questions that allowed the jury to learn of accusations that Carlson repeatedly beat G. G. and was

investigated for sexually assaulting the victim's daughter. Because we conclude Carlson has not established prejudice to his defense, we affirm the judgment and order.

BACKGROUND

¶2 Carlson was charged with two counts of stalking, disorderly conduct, felony intimidation, four counts of bail jumping and obstructing an officer, all as a repeater. The jury convicted him of six felonies and two misdemeanors, but found him not guilty of intimidation. All of the charges arise from Carlson's turbulent relationship with G. G. Carlson lived with G. G. for nineteen months beginning in June 2009. After she moved out and went to live with her ex-husband, she continued to have contact with Carlson by text and telephone until June 30, 2010, when he confronted her at her place of employment and had to be removed from the premises. She testified that she told Carlson she did not want to talk to him any more after that incident. Nonetheless, they continued to communicate. G. G. alleged that some of the communications included threats. Eventually they talked about moving in together again and she moved some of her property to Carlson's residence. She testified her ex-husband called the police because Carlson was at his residence in violation of his bond.

¶3 Carlson testified regarding his numerous contacts with G. G. After he was arrested for stalking on July 15, 2010, he was released on a signature bond that prohibited him from having contact with her. Nonetheless, he called her on July 18 and was again arrested. He denied making any effort to initiate contact with her after July 18, but asserted G. G. contacted him. He met with her and they stayed together over night for seven days.

¶4 The State presented other evidence corroborating G. G.'s testimony. Telephone records indicated Carlson called G. G. 178 times between July 9 and July 14 after being told not to contact her. The jury also heard recordings of Carlson's abusive voicemail message left in June 2009. Other witnesses observed Carlson's disorderly and abusive conduct at G. G.'s place of employment. Finally, Carlson's letters to G. G. were introduced into evidence.

¶5 Carlson's claims of ineffective assistance of trial counsel focus on two matters that arose during G. G.'s testimony. Rivard asked G. G., "You didn't tell [Carlson], I'm moving out because you are abusive or beating me up or anything like that. He never beat you up, did he?" G. G. replied: "Yes, he did." When counsel suggested G. G. was referring to a single incident in which Carlson grabbed her wrist, G. G. responded: "He did more than that. It was more than once. It was constant."

¶6 Carlson's second claim of ineffective assistance relates to Rivard's bringing up a no-contact order regarding two of G. G.'s daughters. That question opened the door for the State to question G. G. about two restraining orders she obtained at the insistence of the Department of Social Services. G. G. explained that she requested the restraining orders "[b]ecause they [social services] wanted him out so I could have my daughters back 50-50. [One of my daughters] has said he molested her, and he refused to leave."

¶7 That allegation was further fleshed out in Carlson's testimony. He explained that the child had made some statement to a daycare worker who notified authorities. After further investigation, "It turned out to be nothing … they say nothing happened to the child." That testimony was not contradicted.

DISCUSSION

¶8 A defendant claiming ineffective assistance of counsel has the burden of proving both deficient performance and prejudice to the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). If prejudice is not established, we need not consider whether counsel performed deficiently. ***Id.*** at 697. To establish prejudice, the defendant must show more than some conceivable effect on the outcome. ***Id.*** at 693. Rather, the defendant must show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. ***Id.*** at 694. A reasonable probability is one that undermines our confidence in the outcome. ***Id.***

¶9 Carlson has not met his burden of proving prejudice to his defense. It is highly unlikely that the jury would have believed G. G.'s claim that Carlson constantly beat her. Despite the numerous charges against him, Carlson was not charged with battery and there was no evidence of injuries to G. G. She claimed that she was afraid of Carlson when he had fits of rage, but handled his rage by staying quiet and not arguing with him. This suggests verbal abuse. G. G. did not mention physical abuse as a reason for being afraid of Carlson. She also testified that she moved out and then moved back in with Carlson a number of times, conduct that would be inconsistent with being constantly beaten. In the absence of any graphic evidence of any beatings, we are not persuaded that the single mention of beatings would arouse the jurors' instinct to punish Carlson by convicting him of eight offenses that did not involve physical injury, while acquitting him of the single offense that involved threatening G. G. with force, violence or injury.

¶10 Carlson has not established prejudice from G. G.'s testimony that one of her daughters alleged molestation by Carlson. Carlson's uncontradicted

testimony explained that authorities had investigated the accusation and ultimately found "[n]othing happened to the child." We are not persuaded that mere mention of the accusation would have so inflamed the jurors' passions that it would have aroused their instinct to punish him for an uncharged and unproven offense, particularly in light of the acquittal on the intimidation charge. Counsel's alleged errors do not undermine our confidence in the outcome of the trial.

¶11 In addition to the low possibility of prejudice arising from Carlson's counsel's questions, we conclude that his conviction resulted from overwhelming evidence of guilt rather than the alleged errors of his counsel. The persuasive testimony of the State's witnesses and the telephone records and abusive voice mail message establish the basis for the convictions. Carlson's acquittal on the intimidation count confirms the lack of prejudice from the testimony about beatings and the child's allegation of sexual assault.

By the Court.—Judgments and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2011-12).