COURT OF APPEALS
DECISION
DATED AND FILED

April 15, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-1663-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GREGORY T. MILLER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Fond du Lac County: PETER L. GRIMM, Judge. *Affirmed.*

Before Snyder, P.J., Nettesheim and Anderson, JJ.

PER CURIAM. Gregory T. Miller appeals from a judgment of conviction of first-degree reckless homicide as a party to the crime, and from an order denying his postconviction motion for a new trial based on the alleged ineffective assistance of trial counsel. We reject Miller's claims that he is entitled to a new trial, and we affirm the judgment and the order.

Miller was charged with first-degree intentional homicide as a party to the crime for causing the death of Alan Ericksen. It was proven that on October 4 and 5, 1994, Miller had participated in beating Ericksen. The medical examiner found that Ericksen had suffered a skull fracture which ultimately caused his death on October 10, 1994.

At trial, the jury heard a tape-recorded conversation between Miller and his neighbor. During the conversation Miller admitted that he had paid another man, Dale Bronstad, to beat Ericksen and that Miller himself had karate kicked Ericksen. Miller's neighbor also made a videotape of a subsequent conversation with Miller. These tapes were made in secret and admitted into evidence without objection.

Debra Miller acknowledged that in October 1994 she was married to Miller but that they had been separated since 1990. She recounted a telephone conversation she had with Miller when he called her on October 28, 1994, from the Fond du Lac County Health Care Center. She had asked Miller if he had killed Ericksen, and Miller replied, "Yes, Debra, I did."

Miller argues that trial counsel was constitutionally deficient for not objecting to the admission of the audio and videotapes and the testimony of Debra. "There are two components to a claim of ineffective assistance of trial counsel: a demonstration that counsel's performance was deficient, and a demonstration that such deficient performance prejudiced the defendant. The defendant has the burden of proof on both components." ***State v. Smith***, 207 Wis.2d 258, 273, 558 N.W.2d 379, 386 (1997) (citation omitted). Whether counsel's actions constitute ineffective assistance is a mixed question of law and fact. *See* ***State v. Sanchez***, 201 Wis.2d 219, 236, 548 N.W.2d 69, 76 (1996). The trial court's findings of

what counsel did and the basis for the challenged conduct are factual and will be upheld unless clearly erroneous. *See* ***id.*** However, whether counsel's conduct amounted to ineffective assistance is a question of law which we review de novo. *See* ***id.***

We do not question that with respect to the audio and videotapes, trial counsel's performance was deficient because counsel did not know that under § 968.29(3)(b), STATS., 1993-94, the tapes could not be played in a homicide prosecution. *See* ***State v. Felton***, 110 Wis.2d 485, 507, 329 N.W.2d 161, 171 (1983) (a strategic decision must be based upon rationality founded on the facts and law). Therefore, we turn directly to the prejudice prong.

To establish prejudice, the defendant must show that there is a reasonable probability that the outcome of the proceedings would have been different but for counsel's errors. *See* ***State v. Pitsch***, 124 Wis.2d 628, 642, 369 N.W.2d 711, 718 (1985). But this is not an outcome determinative standard. *See* ***id.*** Rather, reasonable probability contemplates a probability sufficient to undermine confidence in the outcome. *See* ***id.*** at 642, 369 N.W.2d at 719.

We conclude that there was no prejudice. The recorded conversations were admissible through the neighbor's testimony. *See* ***State v. Maloney***, 161 Wis.2d 127, 130, 467 N.W.2d 215, 216 (Ct. App. 1991) (even when the audio tape is inadmissible, the party who consented to recording the conversation may testify about the contents of the communication). The evidence was cumulative to the evidence which could have been and was admitted by the neighbor's testimony. *See* ***State v. Albrecht***, 184 Wis.2d 287, 305, 516 N.W.2d 776, 783 (Ct. App. 1994) (harmless error to play audiotape of conversation where jury had already heard the evidence through the witness who was a party to the

conversation). In light of the trial court's findings that the tapes were largely inaudible, we reject Miller's characterization that the tapes provided the "dramatic centerpiece of the trial." The tapes also served to defuse Miller's bare admissions recited by the neighbor. The tapes revealed Miller's demeanor and could have suggested that he lacked an intent to kill Ericksen. In the case of the videotape, Miller's proclivity for intoxication was verified. It could have negated his intent at the time of the beating and called into question the reliability of his admissions. That the tapes served this purpose is demonstrated by Miller's conviction of the lesser included homicide charge rather than first-degree intentional homicide. In light of the evidence of Miller's motive for the beating, his ability to inflict substantial harm, and the causal connection, our confidence in the outcome of the trial is not undermined by the admission of the tapes.

We now consider trial counsel's failure to object to Debra's testimony based on the marital privilege, § 905.05(1), STATS. We recognize that trial counsel admitted that he would have moved to exclude the wife's testimony if he had thought of the privilege. This does not alone establish deficient performance. If a motion to exclude the evidence would have been unsuccessful, trial counsel was not deficient for not filing it. *See* ***State v. Simpson***, 185 Wis.2d 772, 784, 519 N.W.2d 662, 666 (Ct. App. 1994); *see also* ***State v. Cummings***, 199 Wis.2d 721, 747 n.10, 546 N.W.2d 406, 416 (1996) ("It is well established that an attorney's failure to pursue a meritless motion does not constitute deficient performance.").

The record establishes that a nurse was present during the phone conversation between Miller and his wife. The presence of or hearing by a third person destroys the privileged nature of a conversation between a husband and wife. *See* ***State v. Sabin***, 79 Wis.2d 302, 306, 255 N.W.2d 320, 322 (1977).

Miller argues that the nurse was a mere eavesdropper and that her presence does not negate the privilege where he did not consent to the nurse hearing the conversation. What is necessary is not explicit consent but an awareness that the third party may be in a position to hear the communication. *See* 1 MCCORMICK ON EVIDENCE § 80, at 299-300 (4th ed. 1992) ("if a third person … is present to the knowledge of the communicating spouse, this stretches the web of confidence beyond the marital pair, and the communication is unprivileged").

The record is sufficient to establish that Miller was aware that the nurse would overhear his phone call. The nurse testified that Miller requested permission to use the phone on her desk and that she remained "quite close" to Miller to be sure that he was not harassing anyone over the phone. She heard parts of what Miller was saying to his wife. Moreover, she stood in such proximity to Miller that she needed only to tap her watch to let him know that his ten minutes were up. The nurse was not an unknown eavesdropper. The marital privilege did not apply and trial counsel was not deficient for not moving to exclude the wife's testimony about the phone conversation.

Miller seeks a new trial in the interests of justice. *See* § 752.35, STATS. He characterizes his case as plagued by inadmissible and prejudicial evidence which so clouded a crucial issue that the real controversy was not fully tried. *See* ***Vollmer v. Luety***, 156 Wis.2d 1, 19-20, 456 N.W.2d 797, 805-06 (1990). If we were to conclude that the real controversy had not been tried, we could order a new trial without consideration of whether the outcome might be different on retrial. *See* ***id.*** at 19, 456 N.W.2d at 805. The State argues that because Miller's request is based on a claim of ineffective assistance of counsel, this court should apply the higher standard applicable under ***Strickland v. Washington***, 466 U.S. 668 (1984), when it considers the effect of the alleged error

on the outcome of the trial. We need not resolve here whether the ***Vollmer*** or ***Strickland*** test applies when a defendant claims that the real controversy has not been tried because of ineffective trial counsel. Under either test, Miller has not established that the real controversy was not fully tried. We have not found error. We decline to grant a new trial. *See* ***State v. Marhal***, 172 Wis.2d 491, 507, 493 N.W.2d 758, 766 (Ct. App. 1992) (a final catch-all plea for discretionary reversal based on the cumulative effect of nonerrors cannot succeed).

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.