COURT OF APPEALS
DECISION
DATED AND FILED

June 23, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP702-CR **Cir. Ct. No. 2014CF191**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHRISTOPHER M. MARCUS A/K/A CHRIS M. MARCUS,

DEFENDANT-APPELLANT.

APPEAL from judgments and orders of the circuit court for Brown County: DONALD R. ZUIDMULDER, Judge. *Affirmed*.

Before Lundsten, Higginbotham and Sherman, JJ.

¶1 PER CURIAM. Christopher Marcus appeals from an order denying his motion for postconviction relief and an order denying reconsideration of his motion, as well as judgments of conviction and sentences for disorderly conduct and substantial battery, both as domestic abuse. He argues that he is entitled to

have the substantial battery conviction vacated because the evidence was insufficient to convict on that charge. He also argues that he is entitled to a new trial because the circuit court gave the jury an instruction on voluntary intoxication and because trial counsel was ineffective in several respects. We reject his arguments and affirm the judgments and orders.

BACKGROUND

¶2 At trial, the victim, H.W., testified that she had gone to a friend's home in the morning and Marcus was there. All present were drinking heavily. H.W. testified that she started arguing with Marcus, with whom she previously had a relationship. Marcus hit her in the face repeatedly until she started bleeding from a cut under her left eye. The arguing stopped but later resumed, and Marcus hit her in the face, cutting her lip. When she was walking out of the home, Marcus pushed her, and H.W. fell down the front steps, injuring her left knee. H.W. was taken by ambulance to the hospital. A police officer who responded to the scene observed that Marcus appeared to be "highly intoxicated." Certified medical records admitted into evidence via stipulation stated that when H.W. was examined at the hospital, she had a "laceration underneath her left eye" that the doctor "repaired with Dermabond," a tissue adhesive.

¶3 Marcus elected not to testify. At the close of evidence, trial counsel moved for dismissal based on the insufficiency of the evidence, and the circuit court denied the motion. In light of the facts testified to regarding the defendant's alcohol use, the circuit court gave the jury the voluntary intoxication instruction; the instruction states that if the jury finds that the defendant was too intoxicated to have the requisite intent to cause bodily harm, it must return a verdict of not guilty. Neither party objected to the instruction. Defense counsel made no request

for the jury to be instructed on a lesser included offense. The jury convicted on both counts.

¶4 Based on Marcus's intention to proceed pro se or retain counsel, Marcus's appointed postconviction counsel sought to withdraw, which the circuit court permitted. Marcus moved pro se for postconviction relief. He challenged the sufficiency of the evidence, he challenged the use of the voluntary intoxication instruction, and he argued that trial counsel was ineffective for failing to seek a lesser included offense instruction, failing to impeach the victim's testimony, failing to investigate adequately, and failing to advise the defendant accurately in regard to his right to testify. Trial counsel testified at the ***Machner*** hearing.[1] The circuit court accepted counsel's testimony as credible and determined that Marcus did not receive ineffective assistance of counsel. The court also held that the voluntary intoxication instruction was not error, and even if it was error, it was harmless error because it would have given the jury grounds to acquit him of the battery even if they found he had committed it. Marcus's postconviction motion was denied as was his motion for reconsideration.

DISCUSSION

A. Sufficiency of the evidence

¶5 The first issue we address is the sufficiency of the evidence. "[T]he trier of fact is free to choose among conflicting inferences of the evidence and may, *within the bounds of reason*, reject that inference which is consistent with the

[1] A ***Machner*** hearing is necessary to ultimately prevail on a claim of ineffective assistance of counsel. ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (1979).

innocence of the accused." ***State v. Poellinger***, 153 Wis. 2d 493, 506, 451 N.W.2d 752 (1990). "Thus, when faced with a record of historical facts which supports more than one inference, an appellate court must accept and follow the inference drawn by the trier of fact unless the evidence on which that inference is based is incredible as a matter of law." ***Id.*** at 506-07.

¶6 Marcus argues that the evidence was insufficient to show that the laceration H.W. suffered was one that "require[d] stitches, staples, or a tissue adhesive," as the State must show to satisfy the element of substantial bodily harm for a substantial battery charge. WIS. STAT. §§ 939.22(38), 940.19(2) (2013-14).[2] The evidence included photos of the laceration on H.W.'s face and testimony concerning the certified medical records of H.W., admitted by stipulation, which included the treating doctor's statement that he had repaired the laceration using Dermabond. The jury could reasonably infer that the doctor's choice of treatment was based on what the laceration required, and Marcus has failed to show that the evidence on which that inference was based—the photos and the certified medical record containing the treating doctor's statement—is incredible as a matter of law.[3]

[2] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

[3] To the extent that Marcus is arguing that such an inference must be supported by testimony of the treating doctor, that argument is foreclosed by the joint stipulation to the admissibility of the certified medical record. *See* ***State v. Ndina***, 2009 WI 21, ¶30, 315 Wis. 2d 653, 761 N.W.2d 612 (forfeiture rules designed to prevent counsel from failing to object to an error for strategic reasons and later claiming that the error is grounds for reversal).

B. Jury instruction

¶7 "A [circuit] court has wide discretion in presenting instructions to the jury." ***State v. Morgan***, 195 Wis. 2d 388, 448, 536 N.W.2d 425 (Ct. App. 1995). "We will not reverse such a determination absent an erroneous exercise of discretion." ***Id.*** Marcus's trial counsel did not object to the instruction and in fact affirmed the correctness of using it, so the claim of error must be reviewed as a claim of ineffective assistance of counsel. *See* ***State v. Schumacher***, 144 Wis. 2d 388, 408 n.14, 424 N.W.2d 672 (1988) (unobjected-to errors are not generally reviewable on appeal except as ineffective assistance of counsel claim). In order to establish that trial counsel was ineffective, the defendant must show that counsel's representation was deficient and prejudicial. ***State v. Thiel***, 2003 WI 111, ¶18, 264 Wis. 2d 571, 665 N.W.2d 305. There is no deficient performance where the alleged error is not in fact an error. *See* ***State v. Berggren***, 2009 WI App 82, ¶21, 320 Wis. 2d 209, 769 N.W.2d 110 (trial counsel was not deficient for deciding not to make a meritless objection); ***State v. Wheat***, 2002 WI App 153, ¶14, 256 Wis. 2d 270, 647 N.W.2d 441 (counsel's failure to present legal challenge is not deficient performance if challenge would have been rejected).

¶8 The circuit court instructed the jury as follows:

> Now[,] evidence … has been presented[,] which[,] if believed by you[,] tends to show that the defendant was intoxicated at the time of the alleged offense. You must consider this evidence in deciding whether the defendant acted … with the intent required for the offense.
>
> If the defendant was so intoxicated that the defendant did not have the intent to cause bodily harm, then you must find the defendant not guilty of substantial battery.

¶9 Marcus argues that it was error for the circuit court to give that instruction to the jury. Marcus's argument is that the instruction is inflammatory because it "essentially tells the jury the defendant committed the crime" but due to intoxication should not be "held accountable for his actions." We disagree. The instruction simply informed the jurors that if the defendant had been too intoxicated to intend bodily harm, they "must find the defendant not guilty" of the charge.

C. Ineffective assistance of counsel

¶10 In order to obtain a new trial based on ineffective assistance of counsel, the defendant must show that counsel's representation was deficient and prejudicial. *See* ***Thiel***, 264 Wis. 2d 571, ¶18. The test for the performance prong is whether counsel's assistance was reasonable under the facts of the particular case, viewed as of the time of counsel's conduct. *See* ***State v. Pitsch***, 124 Wis. 2d 628, 636-37, 369 N.W.2d 711 (1985). Under the second prong of the test, the question is whether counsel's errors were so serious that the defendant was deprived of a fair trial and a reliable trial outcome. *See* ***id.*** at 640-41. Reviewing courts are "'highly deferential'" to counsel's strategic decisions. ***State v. Domke***, 2011 WI 95, ¶36, 337 Wis. 2d 268, 805 N.W.2d 364 (quoted source omitted).

¶11 Marcus alleges several instances of ineffective assistance of trial counsel.[4] Based on the record and trial counsel's testimony at the ***Machner*** hearing, whose testimony the trial court implicitly credited, we conclude that

[4] Marcus raises for the first time in his appellate brief trial counsel's failure to object during closing argument to the State's use of photos that had been admitted into evidence. We will not review issues made for the first time on appeal. *See* ***State v. Huebner***, 2000 WI 59, ¶10, 235 Wis. 2d 486, 611 N.W.2d 727.

Marcus has failed to show ineffective assistance because, as we explain below, the alleged deficiencies were either reasonable as trial strategy, reasonable under the facts of the case, or reasonable because challenges on those issues would have been rejected.

¶12 Marcus argues that the fact that he unsuccessfully sought to have the charges amended by the State in a plea agreement prior to trial is proof that he would have wanted counsel to request the lesser included offense instruction for misdemeanor battery, and therefore, credibly testified that he told his trial counsel that he did. However, at the ***Machner*** hearing, in response to questioning by Marcus, counsel explained why he had not done so: "At the time you said that you didn't want any—you wanted full acquittal. You didn't want any lesser included. You didn't want any battery, disorderly, or substantial battery." The circuit court plainly credited counsel's testimony and, thus, properly rejected their argument.

¶13 Marcus argues that trial counsel performed deficiently when counsel failed to impeach the victim with evidence of prior injuries and with evidence of texts Marcus alleges the victim sent him.[5] At the ***Machner*** hearing, trial counsel explained how the evidence for which Marcus was arguing would have put the "credibility of our defense into question." Regarding the prior injuries,

[5] Marcus also appears to dispute the stipulation between the State and the defense that the victim had two convictions; he argues that his check of online court records showed no convictions for her. To the extent that Marcus is arguing that she could have been impeached by the fact that online records show no prior convictions, his argument does not make sense. Nor has he offered any factual basis for concluding that the stipulation was incorrect. In any event, the fact and number of convictions was admitted in connection with her testimony as the statute provides. *See* WIS. STAT. § 906.09(1), ***State v. Midell***, 39 Wis. 2d 733, 738–39, 159 N.W.2d 614 (1968) (witnesses may be asked if they have been convicted of a crime, and if the answer is yes, the number of convictions, but nature of the convictions is not to be discussed by the proffering party).

purportedly sustained in a bar fight, counsel stated, "I do remember you bringing up prior injuries of her, but the problem is is that the dates that you brought up were well before the incident ...." The texts in question purportedly included the victim's messages seeking to reunite with Marcus after the fight. When Marcus asked counsel about their impeachment value, counsel responded, "[W]e'd run into trouble with that if we had your phone and we said they were text messages on my phone that you forwarded me from her, and you told me that the messages on your phone were deleted. So all we were left with were the messages on my work phone." The credibility of the defense is a reasonable strategic consideration. *See* ***State v. Johnson***, No. 2010AP2654, unpublished slip op. (WI App Sept. 13, 2011) (trial counsel's decision to admit undisputed facts was a reasonable strategy likely made to gain credibility in front of the jury).

¶14 Marcus also challenges counsel's decision to stipulate to certified medical records on the grounds that he "should have challenged" the evidence. At the ***Machner*** hearing, trial counsel stated that there were two reasons for this decision: first, that the medical records included information that was favorable to the defense about the victim's intoxicated state, and second, that the records, which would have come in in any event, were less damaging than having testimony of an expert witness. Again, this was a reasonable strategic consideration and not deficient performance.

¶15 Marcus next challenges trial counsel's failure to investigate, specifically with regard to a potential witness who Marcus alleges was a witness to the victim's "falling down against a table causing further injury to an already injured eye." At the ***Machner*** hearing, trial counsel was asked, "Why didn't you seek or try to interview James E – James Ergerbertsen (sic)?" Counsel answered, "I couldn't find him." Marcus does not offer any fact in the record to the contrary.

Without more, this is insufficient to overcome the strong presumption that Marcus's counsel acted reasonably. *See* ***State v. Arredondo***, 2004 WI App 7, ¶36, 269 Wis. 2d 369, 674 N.W.2d 647 (strong presumption that counsel acts reasonably).

¶16 Finally, Marcus asserts that he received ineffective assistance of counsel because trial counsel gave him incorrect information about whether his prior domestic violence convictions would be "used against" him if he testified; he asserts that that information caused him to decide not to testify in his own defense.[6] "The language of [WIS. STAT. §] 906.09 [] indicates the intention that all criminal convictions be generally admissible for impeachment purposes." ***State v. Kuntz***, 160 Wis. 2d 722, 751-52, 467 N.W.2d 531 (1991). "Wisconsin law presumes that all criminal convictions have some probative value regarding truthfulness." ***Id.*** at 753. A conviction may be excluded by the circuit court for impeachment purposes only if its probative value is lower than its prejudicial value. WIS. STAT. § 906.09(2). That determination is based on the following factors: lapse of time, rehabilitation, gravity of crime, and involvement of dishonesty in the crime. ***Kuntz***, 160 Wis. 2d at 752.

¶17 In his postconviction motion, Marcus asserted the following: "When defendant asked trial counsel 'will past domestic violence convictions be used against me,' trial attorney replied 'yes.'" Marcus points to six of his prior

[6] To the extent that Marcus further argues that he did not understand that prior conviction use for impeachment is limited to the number of convictions, *see* ***Midell***, 39 Wis. 2d at 738-39, or that he did not have enough time to discuss his decision about testifying with his trial counsel, those assertions are contradicted by the record. At a point in the trial prior to Marcus's colloquy on testifying, when Marcus was present, the circuit court explained the limited use of prior convictions for impeachment. During a colloquy with the circuit court, Marcus testified that he did not need to consult any further with trial counsel on the matter of whether he would testify.

convictions that he argues should qualify to be excluded under the factors set forth in ***Kuntz***: a burglary, forgery, two traffic violations, an escape, and an operating without owner's consent. However, he makes no argument that his prior domestic violence convictions qualify to be excluded. Those convictions, which occurred in 1999, 2000, 2007, and 2009, were the ones he alleges he asked counsel about. Given the presumption in favor of counting prior convictions for impeachment purposes, Marcus's view that the other six prior convictions should have been excluded is unlikely to have been shared by the circuit court, but even if it was, Marcus's concession that the domestic violence convictions do not qualify to be excluded is fatal to his argument. If the convictions he asked about are not excludable under WIS. STAT. § 906.09(2), trial counsel was correct to affirm that they could be used against him. If the information he received from trial counsel was correct, he cannot show that counsel performed deficiently.

By the Court.—Judgments and orders affirmed.

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