COURT OF APPEALS
DECISION
DATED AND FILED

October 12, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP1409-CR **Cir. Ct. No. 2011CF579**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LARRY HOLDEN DUNN, JR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Racine County: WAYNE J. MARIK, Judge. *Affirmed.*

Before Neubauer, C.J., Gundrum and Hagedorn, JJ.

¶1 PER CURIAM. Larry Holden Dunn, Jr., appeals from a judgment of conviction and an order denying his postconviction motion. He contends that his trial counsel was ineffective. He also contends that he is entitled to a new trial in the interests of justice. We disagree and affirm.

¶2 In the early morning hours of May 10, 2011, Andrew Schuckman's body was discovered lying face up on a concrete patio behind a bar in Racine. He had sustained a laceration to the back of his head and a massive skull facture, causing traumatic injuries to his brain, which led to his death.

¶3 Dunn and his friend, Michael Crochet, were arrested later that same day after witnesses identified them as having an altercation with Schuckman in the parking lot of the bar on the night of May 9, 2011. The State charged Dunn with felony murder, theft,[1] and battery, all as a party to a crime and as a repeater. The matter proceeded to trial.

¶4 At trial, the State relied principally upon the testimony of two witnesses to show that Dunn had caused Schuckman's death. One witness was police investigator Kevin Kupper, who interrogated Dunn about his altercation with Schuckman. The other witness was Dr. Lynda Biedrzycki, the medical examiner who conducted the autopsy.

¶5 According to Kupper, Dunn initially denied striking Schuckman during their altercation in the parking lot. However, he subsequently changed his story, saying that he slapped Schuckman in the face when Schuckman approached Crochet in a threatening manner. Dunn told Kupper that, as a result of the slap, Schuckman fell to the ground and his head "bounced" off the pavement. Dunn believed that Schuckman was badly hurt and went back inside the bar to notify the bartender. When the bartender did not go outside to check on Schuckman immediately, Dunn returned to the parking lot and observed Schuckman "still

[1] Dunn was accused of taking Schuckman's cell phone.

laying on the ground knocked out…." Dunn said that he checked on Schuckman two or three more times to make sure that he was still breathing before the bartender came out to assist and moved Schuckman to the patio area behind the building.[2]

¶6 Dr. Biedrzycki, meanwhile, described the injuries on Schuckman's head and testified that he had sustained at least five separate "points of impact." The most severe impact, she said, was the one to the back of the head causing the laceration and skull fracture. Dr. Biedrzycki opined that the skull fracture was consistent with Schuckman's head striking the pavement. She further opined that that the brain injuries associated with this impact were a "substantial factor" in causing Schuckman's death. Dr. Biedrzycki testified that such injuries would not necessarily cause "instantaneous" death, nor would they necessarily prevent the victim from communicating or moving.

¶7 Dunn's trial counsel did not call an expert witness to rebut the State's theory of causation. However, he challenged the theory in other ways. For example, counsel noted that while Dunn's slap may have caused an injury to Schuckman, none was seen when the bartender went outside to check on him. Counsel further noted that the bartender left Schuckman alone and highly intoxicated[3] propped against a chair in the patio area. Counsel suggested that Schuckman could have tried to get up but fell and hit his head. He also suggested

[2] Kupper testified that scrape marks on Schuckman's back appeared to indicate that he had been dragged by his legs to the patio area. However, the bartender, who gave multiple versions of what happened that night, denied doing that. Instead, he insisted that he talked to Schuckman after the altercation and helped escort him to the patio area.

[3] Schuckman's blood alcohol level was .298.

that Schuckman may have been attacked in the patio area by a person other than Dunn.[4] Finally, counsel advanced an additional theory that Dunn reasonably acted in self-defense in slapping Schuckman.

¶8 Ultimately, the jury rejected Dunn's arguments and found him guilty on all counts. The circuit court subsequently sentenced Dunn for his crimes.

¶9 After sentencing, Dunn filed a postconviction motion raising a number of claims, including a claim of ineffective assistance of counsel and a claim that he was entitled to a new trial in the interests of justice. Following a hearing on the matter, the circuit court denied the motion. This appeal follows.

¶10 On appeal, Dunn first contends that his trial counsel was ineffective. Specifically, he faults counsel for failing to adequately investigate the manner of Schuckman's death and call a forensic pathologist to testify in support of a no-causation defense. Such an expert, Dunn maintains, could have established an alternative theory of causation, *i.e.*, that Schuckman most likely sustained the fatal injuries when he fell backwards onto the patio.

¶11 To establish a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that such performance prejudiced his or her defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To show deficient performance, the defendant must point to

[4] Counsel submitted that two African-American men had reason to attack Schuckman after he used a racial epithet and behaved aggressively toward them inside the bar. Likewise, he submitted that Crochet had reason to attack Schuckman, as they had argued inside the bar. Counsel reminded the jury that the African-American men were the first to discover Schuckman's body and left before police arrived. He also reminded them that Crochet was observed walking away from the patio area after Schuckman had been moved there and that he had Schuckman's blood on his jeans.

specific acts or omissions by counsel that were "outside the wide range of professionally competent assistance." ***Id.*** at 690. To show prejudice, the defendant must demonstrate that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. ***Id.*** at 694. We need not address both components of the analysis if the defendant fails to make a sufficient showing on either one. *See* ***id.*** at 697.

¶12 Appellate review of an ineffective assistance of counsel claim is a mixed question of fact and law. ***State v. Pitsch***, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985). We will not disturb the circuit court's findings of fact unless they are clearly erroneous, but the ultimate determination of whether counsel's performance fell below the constitutional minimum is a question of law we review independently. ***Id.*** at 634.

¶13 Here, we are not persuaded that trial counsel performed deficiently in his investigation of Schuckman's death and presentation of a no-causation defense. To begin, counsel did consult with a pathologist in preparation for trial. At the hearing on Dunn's postconviction motion, counsel testified that he spoke with Dr. Robert Corliss of the University of Wisconsin. Counsel provided the autopsy report to Dr. Corliss to "help develop a possible argument that there may have been intervening causes of Mr. Schuckman's death" and because he wanted Dr. Corliss "to help translate the medical examiner's report to [him] so that [he] understood it so that if there were facts that [he] could pull out of that on cross-examination, that [he] would make sure to address them."

¶14 Based on his discussions with Dr. Corliss, trial counsel said he "was well aware that there were multiple injuries on the body." Counsel believed that "as long as [he] could pull out on cross-examination from the medical examiner

that there were multiple injuries, especially in the absence of any evidence that Mr. Dunn caused injuries to Mr. Schuckman … that was a big deal." He explained:

> The biggest thing that I learned from Dr. Corliss – and, again, I want to stress I know I talked to him in October, and I know I talked to him in April. When I talked to him in April, the biggest thing that he was able to tell me is that there were multiple, at least two, hits on Mr. Schuckman's head. In other words, Mr. Dunn's slap did not cause each of those injuries.
>
> And I thought that that was important, and I thought it meant that something else had to happen to him after Mr. [Dunn] went inside the bar, and maybe even after Mr. [Dunn] left the bar for the night.

¶15 When asked whether he regretted not calling Dr. Corliss as a witness at trial, trial counsel answered "[n]o" and explained why. The first reason was strategic, as counsel observed, "I feel very strongly that if I can get information out of the State's witness that I can use in my closing argument, I feel that that's better than calling my own witness." The second reason was more practical, as counsel noted, "I don't think that Dr. Corliss contradicted the medical examiner in any way. Dr. Corliss told me that he thought that the conclusions of the medical examiner in this case were well-reasoned, well-thought." In the end, counsel believed that he had sufficient evidence to present a plausible no-causation defense without an expert witness.

¶16 Trial counsel's testimony provides a reasonable explanation for his approach to investigating Schuckman's death and presenting a no-causation defense. While another lawyer may have handled the matter differently, that is not the standard for judging whether counsel's representation was incompetent. Rather, the standard is whether counsel's actions fell "outside the wide range of professionally competent assistance." ***Strickland***, 466 U.S. at 690. On this

record, we cannot say that they did. We will not second-guess counsel's actions simply because the defense proved unsuccessful. *See* ***id.*** at 689; *see also* ***State v. Harper***, 57 Wis. 2d 543, 556–57, 205 N.W.2d 1 (1973) ("In considering alleged incompetency of counsel, one should not by hindsight reconstruct the ideal defense.").

¶17 Finally, Dunn contends that he is entitled to a new trial in the interests of justice. He asserts that, due to his trial counsel's performance, the manner of Schuckman's death was not fully tried.

¶18 WISCONSIN STAT. § 752.35 (2013-14)[5] allows this court to reverse a judgment or order if we are convinced that the real controversy was not fully tried. This discretionary reversal power is reserved for "exceptional cases." ***State v. Cuyler***, 110 Wis. 2d 133, 141, 327 N.W.2d 662 (1983).

¶19 We have already concluded that trial counsel did not perform deficiently in his investigation of Schuckman's death and presentation of a no-causation defense. Accordingly, we determine that such exceptional relief is unwarranted and decline to grant Dunn a new trial.

¶20 For these reasons, we affirm the judgment and order.[6]

By the Court.—Judgment and order affirmed.

[5] All references to the Wisconsin Statutes are to the 2013-14 version.

[6] To the extent we have not addressed any other argument raised by Dunn on appeal, the argument is deemed rejected. *See* ***State v. Waste Mgmt. of Wis., Inc.***, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978) ("An appellate court is not a performing bear, required to dance to each and every tune played on an appeal.").

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