COURT OF APPEALS
DECISION
DATED AND FILED

May 31, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP548-CR **Cir. Ct. No. 2013CF3404**

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

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

DAVID EARL HARRIS, JR.,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed*.

Before Brennan, P.J., Kessler and Dugan, JJ.

¶1 KESSLER, J. The State of Wisconsin appeals an order of the circuit court granting David Earl Harris a new trial. The circuit court granted Harris a new trial on the basis of ineffective assistance of counsel. Because the

circuit court correctly determined that counsel provided ineffective assistance, we affirm.

BACKGROUND

¶2 On July 28, 2013, Harris was charged with false imprisonment, second-degree sexual assault, strangulation/suffocation, and third-degree sexual assault. According to the criminal complaint, on June 2, 2013, Harris repeatedly called his girlfriend, D.L.S., and knocked on her door. When D.L.S. opened the door, Harris grabbed her by the hair, threw her in his car, and sped away. Harris repeatedly told D.L.S. that he was going to kill her because he suspected she was cheating on him. Harris eventually pulled over outside of an apartment building somewhere in Milwaukee, where he punched D.L.S., ordered her to remove her pants, and then stuck two of his fingers inside her vagina. The complaint further alleges that Harris then forced D.L.S. inside of the trunk of his car but removed her and strangled her until she lost consciousness. Ultimately, Harris drove D.L.S. to his mother's house, where she remained for days. While keeping D.L.S. at his mother's house, Harris asked D.L.S. if she would have sex with him. The complaint alleges that D.L.S. did not want to, but had sex with Harris because she was too afraid to refuse.

¶3 The matter proceeded to trial, where the State introduced a temporary restraining order petition (TRO) that D.L.S. filed against Harris on July 16, 2013. The facts described in the TRO mirror the facts alleged in the criminal complaint. Trial counsel's defense theory was that D.L.S. made up the allegations in the TRO and only filed the petition as an act of revenge because she discovered Harris was cheating on her. Trial counsel argued that because a police investigation of D.L.S.'s allegations began after she filed the TRO, D.L.S. felt

"stuck" with her claims and could not admit that she made up the accusations. Trial counsel argued that the charges against Harris only existed because of the TRO, telling the jury that the false claims in TRO "[are] why we're here."

¶4 During deliberations, the jury twice asked to see the TRO. After the second request, the circuit court stated that "[o]ff the record it was agreed that [the TRO] can be given to the jury." The court submitted an unredacted copy of the complete TRO to the jury with no objection from the defense. The TRO, in its entirety, not only contained a handwritten statement of facts from D.L.S., but also a finding by a court commissioner that "[t]here are reasonable grounds to believe that the respondent has engaged in, or based on the prior conduct of the petitioner and the respondent, may engage in domestic abuse of the petitioner." The commissioner also found that "[t]he petitioner is in imminent danger of physical harm."

¶5 The jury found Harris guilty of false imprisonment and second-degree sexual assault, but acquitted Harris of strangulation/suffocation and third-degree sexual assault.

¶6 Harris filed a postconviction motion requesting a new trial and a ***Machner***[1] hearing to determine whether trial counsel was ineffective for failing to object when the circuit court allowed the jury to view the entire TRO during deliberations. The postconviction court denied the motion for a new trial, but granted a ***Machner*** hearing.

¶7 At the ***Machner*** hearing, Harris's postconviction counsel questioned Harris's trial counsel about her failure to object to the jury seeing the TRO,

[1] *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

specifically the portion containing the court commissioner's determinations. Trial counsel stated that she was not opposed to the jury seeing the portion of the TRO containing D.L.S.'s handwritten statement because allowing the State to introduce the TRO into evidence was a part of her trial strategy:

> At least [D.L.S.'s] handwritten statement aspect of it [was a part of the trial strategy] and the facts and circumstances as to why she went down and did it and … filed it. And also how she did not go to the police department. Instead the police department learned about the allegations in here and then went and investigated her allegations.
>
> And also the fact that she, as a result of filing this legal document, was stuck with her allegations and could not retract them. So the concept of it being a lie and now she's stuck with a lie, which is exactly what I argued in closing arguments.

Trial counsel, however, admitted that the jury should not have seen the portion of the TRO in which the court commissioner found reason to grant the restraining order and found D.L.S. to be in imminent danger:

> [Postconviction Counsel] And if the jury were to see this document, the jury will see that a court commissioner had validated the victim's allegations; is that true?
>
> [Trial Counsel] I agree with that.
>
> [Postconviction Counsel] Is there any reason why any defense attorney would have allowed this document to be physically seen by a jury?
>
> [Trial Counsel] I would say that, as it relates to her handwritten statement, that … was completely, totally discussed in the testimony – her written statement would have been, I think, something the jury could see without a problem.
>
> As it relates to the court commissioner's finding … and the language and verbiage that is around that concept, I don't think the jury should have seen that.
>
> ….

> [Postconviction counsel] But your conclusion today is you don't think the jury should have seen the entire [TRO]?
>
> [Trial counsel] No. I think they should have only seen the statement of facts she wrote[.]
>
> ….
>
> [Trial counsel] So as I sit here today, the only thing that I can say is I would not have wanted the court commissioner portion and only would have wanted the part of the restraining order that was relevant to my case which was her handwritten words.
>
> ….
>
> [Trial counsel] I would have had a major issue with a court commissioner finding on a document going back to a jury.

¶8 The postconviction court ultimately granted Harris's motion for a new trial, finding that "[d]espite [trial counsel's] remarks from the ***Machner*** hearing, she failed to object to the court commissioner's findings on the restraining order documents given to the jury while the jury decided Harris's case." The postconviction court also found that: "[t]he jury viewing of the judicial portion of the TRO could not be considered beneficial to the defense"; allowing the jury to see the TRO was not a reasonable trial strategy; counsel's strategic reasons for not objecting were undermined by the court commissioner's validation of D.L.S.'s allegations; and "[i]t is unknown what weight the jury placed on the commissioner's findings in its decision to find the defendant guilty of false imprisonment and second[-]degree sexual assault." This appeal follows.

DISCUSSION

¶9 The right to effective assistance of counsel derives from the Sixth Amendment to the United States Constitution and article I, section 7 of the Wisconsin Constitution. ***State v. Smith***, 207 Wis. 2d 258, 273, 558 N.W.2d 379

(1997). Both provisions grant the right to a fair trial, including the assistance of counsel in criminal cases. ***Id***. "There are two components to a claim of ineffective assistance of counsel: a demonstration that counsel's performance was deficient, and a demonstration that such deficient performance prejudiced the defendant." ***Id***.; *see also* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). "The defendant has the burden of proof on both components." ***Smith***, 207 Wis. 2d at 273.

¶10 Whether counsel's actions constitute ineffective assistance is a mixed question of law and fact. ***State v. Pitsch***, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985). The postconviction court's determination of what the attorney did, or did not do, and the basis for the challenged conduct are factual and will be upheld unless they are clearly erroneous. *See* ***State v. Harvey***, 139 Wis. 2d 353, 376, 407 N.W.2d 235 (1987). The ultimate conclusion, however, of whether the conduct resulted in a violation of the defendant's right to effective assistance of counsel is a question of law for which no deference to the postconviction court needs to be given. ***Id.***

¶11 To establish deficient performance, the defendant must prove that his or her counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment" and overcome a strong presumption that his or her counsel acted reasonably within professional norms. ***Smith***, 207 Wis. 2d at 273 (citation and one set of quotation marks omitted). The ***Strickland*** Court set forth certain elemental duties that an attorney owes the criminal defense client, among which is the duty to "'bring to bear such skill and knowledge as will render the trial ... a reliable adversarial testing process.'" ***Smith***, 207 Wis. 2d at 273-74 (citation omitted).

¶12 In addition to proving deficient performance, a defendant must also show that the deficient performance prejudiced the defense. ***Strickland***, 466 U.S. at 687. Proof of prejudice requires a showing that the defendant was deprived of a fair proceeding whose result is reliable. ***Smith***, 207 Wis. 2d at 275. The essential question for the court "is whether the deficient performance undermines confidence in the outcome." ***State v. Maday***, 2017 WI 28, ¶54, 374 Wis. 2d 164, 892 N.W.2d 611.

¶13 Judicial scrutiny of an attorney's performance is highly deferential. ***Smith***, 207 Wis. 2d at 274. We must determine whether, under all the circumstances, counsel's conduct was outside the wide range of professionally competent assistance. *See* ***id***. In ***Strickland***, the court noted that counsel's actions are often based on "'informed strategic choices made by the defendant.'" ***Smith***, 207 Wis. 2d at 274 (citation omitted).

¶14 However, strategic decisions must be analyzed utilizing the standard set forth in ***Strickland***: was trial counsel's performance objectively reasonable according to prevailing professional norms? ***Id.***, 466 U.S. at 688. Not every trial counsel action grounded in strategy can be construed as reasonable. We must measure whether trial counsel's performance was reasonable under the circumstances of the particular case. *See* ***State v. Oswald***, 2000 WI App 2, ¶49, 232 Wis. 2d 62, 606 N.W.2d 207. Trial counsel's subjective testimony as to strategy is not dispositive but is simply evidence to be considered along with other evidence in the record that a court must examine in assessing counsel's overall performance. ***State v. Kimbrough***, 2001 WI App 138, ¶35, 246 Wis. 2d 648, 630 N.W.2d 752.

¶15 Here, the State alleges that trial counsel's performance was neither deficient nor prejudicial. Specifically, the State contends that the TRO was not prejudicial, as the jury acquitted Harris of the strangulation and third-degree sexual assault charges, and as witness testimony supported the verdicts on the other two charges. We disagree.

¶16 Trial counsel admitted that there was no strategic reason for allowing the jury to see the portion of the TRO containing the court commissioner's findings—she simply did not realize that the commissioner's determinations were included. Counsel also agreed that the jury should not have seen the court commissioner's findings and that she "would have had a major issue with a court commissioner finding on a document going back to a jury." Counsel's failure to either redact that portion of the TRO containing the court commissioner's determinations, or to object to that portion of the TRO before the court allowed the jury to see it, constitutes deficient performance.

¶17 Trial counsel's admissions also acknowledge the prejudicial effect of her oversight. The TRO contained a handwritten statement from D.L.S. detailing her violent claims against Harris. The jury saw—for the first time during deliberations—that the court commissioner found "reasonable grounds" to conclude that Harris engaged in, or would engage in, acts of domestic violence, and that D.L.S. was in imminent danger. The jury was not provided with any explanation as to the meaning and effect of the court commissioner's signature on the TRO. It is impossible to imagine any way in which the court commissioner's findings, a judicial endorsement of D.L.S.'s claims, could have helped the defense.

¶18 Our confidence in the outcome is undermined because of the obvious probability that viewing the commissioner's findings served to undercut

the entire defense theory of fabrication and instead bolstered D.L.S.'s credibility. D.L.S.'s credibility was acknowledged by trial counsel as paramount to the case. While it is impossible to determine how much weight the jury gave to the court commissioner's findings, we can perceive no strategic or tactical advantage for Harris's trial counsel to allow the jury to read a judicial officer's determination that Harris probably committed the acts underlying the charges here and that he posed a risk to the complaining witness. We agree with the postconviction court's finding that trial counsel's failure to either redact the judicial findings in the TRO, or to object to the TRO in its entirety because of those judicial findings, establishes deficient performance and prejudice to Harris's defense. Accordingly, we affirm the postconviction court's order for a new trial.

By the Court.—Order affirmed.

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