COURT OF APPEALS
DECISION
DATED AND FILED

June 13, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP278-CR **Cir. Ct. No. 2012CF137**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

WAYLON D. JONES,

DEFENDANT-APPELLANT.

APPEAL from a judgment and orders of the circuit court for Ashland County: ROBERT E. EATON, Judge. *Affirmed*.

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 PER CURIAM. Waylon Jones appeals a judgment convicting him of second-degree sexual assault by use of force; battery; disorderly conduct;

misdemeanor bail jumping; and taking a vehicle without the owner's consent; the first three counts with domestic abuse modifiers and all five counts as a repeater.[1] Jones also appeals the orders denying his motion and supplemental motion for postconviction relief. Jones argues he is entitled to a new trial based on the ineffective assistance of his trial counsel and newly discovered evidence. We reject Jones's arguments and affirm the judgment and orders.

BACKGROUND

¶2 The charges against Jones arose from events that occurred during the week of October 20-27, 2012. At that time, Jones and his then-girlfriend, N.R., along with their two children, were staying in the home of Fred Pero and Shatilla Crockett. The State alleged that Jones physically abused N.R. and sexually assaulted her while threatening her with a knife. A first trial ended in mistrial. At the second trial, N.R. testified that during the subject time period, Jones physically abused her daily, hitting her in the back of the head and choking her "on occasion." N.R. further testified that during a nighttime walk in a nearby park, Jones became violent because he thought N.R. was cheating on him. According to N.R., Jones placed his fingers inside her vagina, indicating that he was checking to see if she had sex. Jones then held a knife to N.R.'s neck and had sexual intercourse with her. N.R. did not initially report the sexual assault to law enforcement because she did not think the investigating officer would believe her and because she was unsure if it was rape. When asked to explain why she was

[1] A jury found Jones guilty of the first four counts, and Jones entered a no-contest plea to taking a vehicle without the owner's consent.

not sure if it was rape, N.R. stated Jones was her boyfriend and she never said "no" or "stop" during the attack because she was "scared to say anything."

¶3 At trial, defense counsel focused on impeaching N.R.'s credibility through inconsistent statements and evidence that N.R. had recanted the sexual assault allegations and some of the domestic abuse allegations. Jones's theory of defense was that the sexual contact was consensual and that N.R. was fabricating the domestic violence allegations both to preclude Jones from seeing their children and to punish him for his infidelity. Relevant to this appeal, defense counsel disclosed three witnesses who were ultimately not called to testify at trial: Albert Whitebird, Cathy Jackson and Tanya Clark.

¶4 The jury found Jones guilty of the sexual assault and other domestic abuse charges. On those four offenses, together with the offense to which Jones pleaded no contest, the circuit court imposed concurrent sentences totaling thirteen years, consisting of eight years' initial confinement and five years' extended supervision. Jones's postconviction motions for a new trial were denied after a ***Machner***[2] hearing, and this appeal follows.

DISCUSSION

¶5 Jones contends he was denied the effective assistance of trial counsel. This court's review of an ineffective assistance of counsel claim is a mixed question of fact and law. ***State v. Erickson***, 227 Wis. 2d 758, 768, 596 N.W.2d 749 (1999). The circuit court's findings of fact will not be disturbed unless they are clearly erroneous. ***Id.*** However, the ultimate determination

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

whether the attorney's performance falls below the constitutional minimum is a question of law this court reviews independently. ***Id.***

¶6 To succeed on an ineffective assistance of counsel claim, Jones must show both (1) that his counsel's representation was deficient, and (2) that this deficiency prejudiced him. *See* ***Strickland v. Washington***, 466 U.S. 668, 694 (1984). In order to establish deficient performance, a defendant must show that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Id.*** at 687. However, "every effort is made to avoid determinations of ineffectiveness based on hindsight … and the burden is placed on the defendant to overcome a strong presumption that counsel acted reasonably within professional norms." ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990).

¶7 In reviewing counsel's performance, we judge the reasonableness of counsel's conduct based on the facts of the particular case as they existed at the time of the conduct and determine whether, in light of all the circumstances, the omissions fell outside the wide range of professionally competent representation. ***Strickland***, 466 U.S. at 690. Because "[j]udicial scrutiny of counsel's performance must be highly deferential … the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." ***Id.*** at 689. Further, "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." ***Id.*** at 690.

¶8 The prejudice prong of the ***Strickland*** test is satisfied where the attorney's error is of such magnitude that there is a reasonable probability that, absent the error, the result of the proceeding would have been different. ***Id.*** at

694. We may address the tests in the order we choose. If Jones fails to establish one prong of the ***Strickland*** test, we need not address the other. *See* ***State v. Sanchez***, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996).

¶9 Jones argues his trial counsel was ineffective by failing to call the three witnesses disclosed pretrial. Trial counsel's failure to call a potential witness may constitute deficient performance if that witness's testimony would have been central to the theory of defense. *See, e.g.*, ***State v. Jenkins***, 2014 WI 59, ¶41, 355 Wis. 2d 180, 848 N.W.2d 786. However, trial counsel is not ineffective for failing to bring forth evidence that would have merely incrementally weakened the credibility of an already-impeached witness. *See, e.g.*, ***State v. Trawitzki***, 2001 WI 77, ¶44, 244 Wis. 2d 523, 628 N.W.2d 801; ***State v. Tkacz***, 2002 WI App 281, ¶¶20-22, 258 Wis. 2d 611, 654 N.W.2d 37. Such evidence is not enough to establish a reasonable probability that the jury would have reached a different verdict. ***Trawitzki***, 244 Wis. 2d 523, ¶44.

¶10 Jones asserts the additional witnesses were necessary to provide a motive for N.R.'s allegations and to undermine her credibility in this "he-said, she-said" case. Jones's arguments, however, ignore our standard of review and are based upon hindsight. At trial, the defense strategy was to cast doubt on N.R.'s credibility. To that end, defense counsel extensively cross-examined N.R. and exposed inconsistencies in the version of events she had given. Counsel explored N.R.'s potential motives to fabricate the allegations and elicited testimony to show that many of N.R.'s injuries depicted in photos could have been caused by a fight she had with Justina Flones. Defense counsel also challenged N.R.'s credibility using prior inconsistent statements to law enforcement in which N.R. specifically denied she had been sexually assaulted and indicated Jones had been only verbally abusive.

¶11 Defense counsel further attempted to impeach N.R.'s credibility through the testimony of Jessica Gordon and S.R., who is N.R.'s aunt and is married to Whitebird. Gordon testified that when she confronted Jones about the physical abuse N.R. had alleged, N.R. recanted her claim that Jones hit her, stating: "[N]o, no, that's not what happened, I lied … it was Justina Flones that had done it." S.R. testified that when she asked N.R. if she was raped, N.R replied, "[N]o, I wasn't raped. It wasn't like a rape." According to S.R., N.R. also stated she would not testify she was raped.

¶12 At the ***Machner*** hearing, Jones's trial counsel acknowledged that, generally, the more people you have to testify, the more it may cast doubt on a victim's credibility. However, trial counsel stressed that presentation of the defense as a whole is likewise important, explaining:

> If it looks good, if it looks smooth, if it looks effortless, then I think there's some appeal to the jury for that. And I felt like—I still feel like calling some of the witnesses that you have referenced [i.e., Whitebird, Jackson and Clark] a lot of things could have gone wrong.

Defense counsel viewed the three potential witnesses as problematic, noting he did not have "complete reliance" they would testify consistent with what was discussed beforehand. Counsel added that when things start to go wrong at trial and an attorney gets answers he or she does not expect, it looks bad.

¶13 Trial counsel recalled that N.R. made some of her denials to Whitebird, as well as to S.R., and although counsel expected to get similar information from both Whitebird and S.R., he chose S.R. to testify because she was physically present for more of what N.R. said. Counsel explained that Whitebird was disclosed as a potential witness based on counsel's belief that Whitebird might be more comfortable on the witness stand than S.R., who had

"some anxiety." Counsel, however, made a strategic decision to have S.R. testify because he wanted to avoid a hearsay problem for any statements Whitebird did not personally witness.

¶14 Trial counsel also explained why he opted against calling Cathy Jackson as a witness. Jackson, who is Jones's mother, claimed that during a telephone conversation in February 2013, N.R. denied that Jones raped her. Counsel indicated that a family relationship is only part of his calculation in determining whether to call a potential witness. Here, counsel believed Jackson would perform poorly on the stand, not only because she was Jones's mother, but also because she was unable to stay focused and on topic during the investigation. Counsel feared he would not be able to control Jackson during direct examination, not to mention cross-examination, and believed that her testimony would be more harmful than helpful.

¶15 With respect to Tanya Clark, counsel recalled that Clark had "significant credibility issues" related to her sobriety and criminal history. Although counsel acknowledged Clark might have supported the defense theory that N.R. fabricated the allegations against Jones, counsel was unable to speak with Clark personally because she was difficult to reach. Counsel also expressed concern about Clark's eleven prior convictions, indicating he felt she would not have been a compelling witness. Although Clark told the defense team that N.R. told her "I am going to get [Jones]," counsel recalled that Clark's statement was not supported by an investigator's follow-up with her. Counsel indicated he did not feel the need to find Clark or adjourn the trial because he believed there was a reasonable prospect for a favorable outcome based on the testimony of the existing defense witnesses.

¶16 Ultimately, defense counsel made a reasonable, strategic decision to focus on calling the witnesses who would best impugn N.R.'s credibility, rather than calling additional witnesses who might have harmed Jones's defense. The fact that a strategy fails does not make the attorney's representation deficient. *See* ***State v. Koller***, 87 Wis. 2d 253, 264, 274 N.W.2d 651 (1979). The jury had an ample basis to discredit the victim's testimony and evidence from the additional three witnesses would have been merely cumulative. Therefore, counsel was not deficient by failing to call the additional witnesses.

¶17 Jones alternatively claims the circuit court erred by denying his motion for a new trial on the basis of newly discovered evidence. The decision to grant or deny a motion for a new trial based on newly discovered evidence is committed to the circuit court's discretion. ***State v. Plude***, 2008 WI 58, ¶31, 310 Wis. 2d 28, 750 N.W.2d 42. To obtain a new trial based on newly discovered evidence, a defendant must prove: (1) the evidence was discovered after his or her conviction; (2) the defendant was not negligent in seeking the evidence; (3) the evidence is material to an issue in the case; and (4) the evidence is not merely cumulative. ***Id.***, ¶32. If the defendant establishes all four of these factors, then the court must determine "whether a reasonable probability exists that had the jury heard the newly-discovered evidence, it would have had a reasonable doubt as to the defendant's guilt." ***Id.*** Whether there is a reasonable probability that a new trial would produce a different result is a question of law we review independently. ***Id.***, ¶33.

¶18 Here, Jones argued that posttrial testimony N.R. gave at a tribal court hearing impugned her credibility. According to Jones, N.R.'s tribal court testimony contradicted her trial testimony regarding an incident of physical abuse that Pero and Crockett witnessed in October 2012. At trial, N.R. testified that Pero

and Crockett witnessed Jones choking N.R. while she was sitting on a couch in the living room. At the tribal court hearing, however, N.R. testified that the only incident the couple witnessed that week was when Jones punched her in the kitchen while she was holding one of their children. Although N.R. testified in tribal court that the couple witnessed only the one incident, both Pero and Crockett testified at trial that they saw repeated acts of physical abuse by Jones on a daily basis over the course of the entire week.

¶19 Although we assume without deciding that Jones has satisfied the four factors set forth in ***Plude***, we conclude there is no reasonable probability that a new trial would produce a different result. N.R., Pero and Crockett all testified unequivocally that the abuse occurred, and physical evidence supported that testimony. The fact that the three accounts were slightly different as to the location of the abuse and the number of times it was witnessed is not likely to so impact N.R.'s credibility that it would change a jury's mind about Jones's guilt. Therefore, the circuit court properly denied Jones's motion for a new trial based on N.R.'s tribal court testimony.

By the Court.—Judgment and orders affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2015-16). This opinion may not be cited except as provided under RULE 809.23(3) (2015-16).