COURT OF APPEALS
DECISION
DATED AND FILED

September 20, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP1822-CR **Cir. Ct. No. 2014CF292**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RYAN R. JORGENSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Winnebago County: SCOTT C. WOLDT, Judge. *Affirmed.*

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

¶1 PER CURIAM. Ryan R. Jorgenson pled no contest to first-degree reckless homicide in the death of AR, his fiancée's three-year-old daughter. Medical personnel concluded that AR's injuries—multi-focal intracranial hemorrhaging, cerebral edema, and external contusions and abrasions—were due to high-impact, blunt-force trauma to her head and torso. Her injuries were not consistent with any of Jorgenson's accounts of how AR was critically injured while in his care.[1]

¶2 Post-sentencing, Jorgenson sought to withdraw his no-contest plea on grounds that his counsel was ineffective for not adequately investigating matters before advising him against going to trial and that newly discovered evidence made it reasonably probable he would prevail at trial. We affirm the judgment of conviction and the order denying his postconviction motion.

Ineffective Assistance of Counsel

¶3 A defendant seeking to withdraw a no-contest plea after sentencing must prove "by clear and convincing evidence that withdrawal is necessary to correct a manifest injustice." ***State v. Milanes***, 2006 WI App 259, ¶12, 297 Wis. 2d 684, 727 N.W.2d 94. Ineffective assistance of counsel is an example of a manifest injustice. ***State v. Washington***, 176 Wis. 2d 205, 213-14, 500 N.W.2d 331 (Ct. App. 1993). To prevail on a claim of ineffective assistance of counsel, a defendant must prove both that counsel's representation was deficient and that the

[1] Jorgenson's different accounts include that he was not angry with AR but when he "nudged" her to go upstairs, she lost her footing, fell, and hit the back of her head on the wall or floor; that he *was* angry with AR and felt bad about scolding her, so he called to her as she was partway up the stairs, then saw her turn, slip, and tumble down two or three steps and land face-down on the carpeted floor; and that he did not see her fall, but ran into the room upon hearing a scream and a "thump" and found her convulsing at the foot of the stairs.

deficient performance resulted in actual prejudice. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient performance, a defendant must point to specific acts or omissions by counsel that were "outside the wide range of professionally competent assistance." ***Id.*** at 690. To prove prejudice, the defendant must show that counsel's errors were so serious as to deprive the defendant of a reliable outcome. ***Id.*** at 687. The defendant must satisfy both prongs of the test to be afforded relief. *See* ***id.***

¶4 The circuit court held a ***Machner***[2] hearing on Jorgenson's claim of ineffective assistance of counsel. We uphold the circuit court's factual findings unless they are clearly erroneous. ***State v. Pitsch***, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985). Whether counsel's performance was deficient and prejudicial are questions of law we review de novo. *See* ***id.***

¶5 Attorney Richard Bollenbeck represented Jorgenson. Jorgenson contends Bollenbeck failed to: (1) consult an independent medical expert about the cause of AR's injuries to determine if any of Jorgenson's explanations were valid; (2) obtain medical records of Jorgenson's three biological children to show that they were not abused, so as to debunk the notion suggested by AR's parents and grandmother that he physically abused AR, and to investigate if AR possibly fell due to a seizure;[3] (3) adequately investigate the credibility of Willie Beasley, an inmate in a jail pod with Jorgenson who claimed Jorgenson made incriminating

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

[3] Jorgenson said his nine-month-old son with AR's mother may have had a seizure recently, but there was no medical follow-up. In his 911 call regarding AR, he said she may have had a seizure. The expert Jorgenson retained postconviction stated that seizure activity may be inherited.

admissions to him; and (4) discuss with him, before he pled no contest, the elements of first-degree reckless homicide and lesser-included crimes that might have been argued at trial.

¶6 Bollenbeck testified at the ***Machner*** hearing that he believed accidental causation was not a viable defense strategy and the best approach was to negotiate for the most favorable plea. As to the four alleged areas of deficiency, Bollenbeck testified that:

> 1. he thought it unnecessary to consult an independent expert because he was convinced that the evidence was conclusive as to causation and injury;
>
> 2. seeking to rebut that Jorgenson abused his biological children would have allowed the State to introduce instances, documented by photographs and dates, of AR—a non-biological child—with suspicious injuries acquired while in his care, and, although Jorgenson mentioned a possible seizure in his 911 call, first responders told police AR exhibited no post-seizure symptoms and Jorgenson did not mention a seizure in his numerous other accounts;
>
> 3. he did not probe Beasley's criminal history because he initially believed Jorgenson was telling the truth and Jorgenson said Beasley's statements were false, and he puts little stock in inmates' statements anyway; and
>
> 4. the prosecutor refused to consider reducing the charge to second-degree reckless homicide.[4]

¶7 Jorgenson also testified. He said he was "uncomfortable" entering a no-contest plea and told Bollenbeck—he believed before sentencing—that he

[4] The first two elements of first- and second-degree reckless homicide are the same: that the defendant (1) caused the death of the victim (2) by criminally reckless conduct. First-degree also requires proof that the defendant's conduct showed utter disregard for human life. WIS JI—CRIMINAL 1022.

wanted to withdraw his plea, but felt Bollenbeck gave him no choice. Jorgenson conceded he should not have changed his accounts of the circumstances of AR's injuries but, as he was "nervous, confused … [and] under duress," he "made a mistake" and tried to protect himself by lying.

¶8 The circuit court found that Bollenbeck's testimony was credible; that Jorgenson's was "self-serving at best"; that, when pressed on the issues, Jorgenson either claimed not to remember or "hedge[d]"; that, as Jorgenson had told Bollenbeck the allegations in the complaint were essentially true, counsel's strategy of seeking the most advantageous plea agreement was reasonable; that scouring Beasley's background and investigating a familial seizure disorder both were "non-issue red herrings"; and that counsel's overall performance was reasonable. The court's findings are not clearly erroneous. Being satisfied that Bollenbeck's representation of Jorgenson was not deficient, we conclude it was not ineffective. *See* ***Strickland***, 466 U.S. at 687.

Newly Discovered Evidence

¶9 Newly discovered evidence may create a manifest injustice. ***State v. Krieger***, 163 Wis. 2d 241, 255, 471 N.W.2d 599 (Ct. App. 1991). To prevail on a claim alleging newly discovered evidence, the defendant must prove that the evidence was discovered after conviction; he or she was not negligent in seeking it; it is material to an issue in the case; and it is not merely cumulative. ***State v. McCallum***, 208 Wis. 2d 463, 473, 561 N.W.2d 707 (1997). "If the defendant proves these four criteria by clear and convincing evidence, the circuit court must determine whether a reasonable probability exists that a different result would be reached in a trial." ***Id.*** A motion to withdraw a plea rests in the circuit court's sound discretion. ***Krieger***, 163 Wis. 2d at 250.

¶10 The issue was whether it could be proved that AR's injuries were the result of criminal recklessness by conduct showing utter disregard for human life. *See* WIS JI—CRIMINAL 1022. Postconviction, Jorgenson retained Dr. Jeffrey Jentzen, a forensic pathologist and medical examiner, to make "specific determinations on the cause and manner of death." Dr. Angela Rabbitt, AR's attending pediatrician at Children's Hospital, had found that AR's retinal hemorrhage "could be consistent with abusive head injury" and that the pattern of her subdural and subarachnoid hemorrhages was "consistent with forceful acceleration-deceleration to the head with rotational component, with or without impact," which "can be seen when a child is violently slammed, shaken and/or thrown."

¶11 Necessarily limited to a record review, Dr. Jentzen distanced himself from Dr. Rabbitt's assessment.[5] Observing that "[s]ubdural hemorrhage can occur[] in a variety of injuries or natural disease," and a "shaken-baby" case in a child over the age of two is "extremely uncommon," Dr. Jentzen opined that there was "no specific injury that could be considered as diagnostic for an intentional type of injury." He also noted that seizure activity may be inherited, that prior allegedly suspicious injuries to AR "were not reported, documented or confirmed by a medical professional," and that AR missed five well-baby checkups by the time she was fifteen months old, indicating parental neglect. He said such matters "require expert consultation with pediatric neurologists and psychologists," but were not made available to Jorgenson.

[5] Dr. Jentzen pointed out that a clinical pediatrician is less well-versed than is a forensic pathologist in the interpretation of fatal injuries. A forensic pathologist performed AR's autopsy, however. She concluded, as Dr. Jentzen's report notes, that the cause of AR's death was "Complications of Traumatic Blunt Force Injuries of the Head."

¶12 Jorgenson labels Dr. Jentzen's findings and conclusions "newly discovered" because he was unaware of them before entering his no-contest plea and they are "at odds" with those of the State's experts. The circuit court got it right. The expert may have been new but the evidence was not. The materials Dr. Jentzen reviewed—the complaint, police reports, ambulance and medical records, the autopsy report, photographs—all were available to Jorgenson before his conviction. Dr. Jentzen merely drew different conclusions.

¶13 Jorgenson also amplified his postconviction motion with "newly discovered" documentation of Beasley's Winnebago County arrest history and a jail log to underscore Beasley's "instability," "erratic" nature, and lack of credibility. The circuit court found that the "Beasley defense" was "manufactured" and did not fit Bollenbeck's strategy of focusing on achieving the most favorable sentence for Jorgenson. The finding is not clearly erroneous.

¶14 Jorgenson has not met his burden of showing that Dr. Jentzen's opinion or the Beasley information was newly discovered; that they were material to an issue in the case; that they would have undercut the varying, admittedly self-serving accounts Jorgenson gave to explain AR's mortal injuries; or that there is a reasonable probability of an acquittal or conviction of a lesser charge at trial.

By the Court.—Judgment and order affirmed.

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