COURT OF APPEALS
DECISION
DATED AND FILED

October 31, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP1292-CR

Cir. Ct. No. 2014CF2129
2014CF2933

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ERIC L. MOORE,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Milwaukee County: REBECCA F. DALLET, Judge. *Affirmed*.

¶1 BRENNAN, P.J.[1] Eric L. Moore was convicted by a jury of two counts of battery and two counts of disorderly conduct, all as a repeater.[2] He now

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

appeals, arguing that he is entitled to a new trial for two reasons. First, he argues that the trial court erred in admitting an audio recording of a 911 call made by a child to request help when Moore was violently assaulting A.J. Second, he argues that he received ineffective assistance of counsel when counsel strategically, and with Moore's agreement, opted not to offer the following evidence: (1) A.J.'s reports to police that Moore had injured her, (2) her statement recanting, and, (3) the fact that she received a citation for obstructing justice. Third, he further argues that, as to two of the counts, the evidence that he was the person who committed the crime is insufficient to sustain the jury's verdict and that the convictions must be vacated. We reject Moore's arguments and affirm.

BACKGROUND

¶2 The two cases involved in this appeal arise from separate allegations made in May and June of 2014 by A.J., the mother of Moore's children. The cases were joined for trial.

The May and June incidents.

¶3 The charges in the first incident were based on a report by A.J. to the police regarding an incident on May 18, 2014, in which Moore hit her on the top of the head, knocked her down, and struck her repeatedly while she was on the ground. A.J. told police she shouted to a child in another room to call 911. The distraught child called 911 and asked for help. Before police arrived, Moore took the phone from the child's hand and left.

[2] Moore was charged as a domestic abuse repeater with regard to each count, but the trial court struck the domestic abuse repeater at sentencing because the verdict forms had erroneously omitted that question.

¶4 A few days later, when A.J. went to the police station and recanted the allegations, she received a citation for obstructing police.

¶5 The charges in the second incident were based on A.J.'s report to police that on June 30, 2014, while she was sitting in her car outside of her house, Moore came over to her car and slashed two tires. A.J. got out of the car, and the two argued. A.J. told police that Moore then hit her in the face repeatedly, smashed a step stool on her head, and left.

¶6 The State issued a two-count complaint for the May incident and a two-count complaint for the June incident. For each incident, Moore was charged with one count of misdemeanor battery and one count of misdemeanor disorderly conduct, both as domestic abuse, and both with repeater enhancers.

The trial.

¶7 Prior to trial, Moore sought to admit the evidence that A.J. had recanted her story about the May incident and had been ticketed for obstructing police, and the trial court ruled that the citation evidence could be admitted as long as the jury also heard the two relevant statements—her initial report to police and her statement recanting the initial report. After consulting with Moore, Moore's counsel informed the trial court that they had decided not to enter into evidence anything about the citation, and the trial proceeded.

¶8 A.J. did not testify. The jury heard testimony from two 911 operators who received calls for help from A.J.'s child and A.J., respectively,

made in connection with the May 18 and June 30, 2014 incidents.[3] The jury heard an audio recording of the child's May 18 call; the recording lasted six minutes and forty seconds. In a brief portion of A.J.'s call to 911 that the jury heard, A.J. stated, "My son's father jumped on me…. [H]e punched me in the head … He slammed my head into the wall."[4] The jury also heard testimony from a police officer about her investigation into a prior domestic violence call involving Moore and A.J. in November 2013. For the defense, Moore's twin sister testified that Moore had been at her home on the evening of the May incident and had stayed overnight. During cross-examination, Moore's twin sister testified that Moore was the father of A.J.'s son. Moore did not testify. The jury convicted on all charges.

Postconviction motion and *Machner* hearing.

¶9 Moore brought a postconviction motion,[5] arguing that trial counsel was constitutionally ineffective for failing to inform the jury about A.J.'s obstruction citation. The trial court conducted a ***Machner*** evidentiary hearing, at which Moore's trial counsel testified that the decision on that topic had been made strategically, consistent with a strategy of "the less evidence that came in against Mr. Moore, the better," given that the statements by A.J. that would have come in

[3] The June 30 incident occurred late at night; the 911 call related to that incident was made after midnight that night (and thus is dated July 1).

[4] A transcript in the record indicates that a CD of the audio recording and a transcript of the recording were entered as exhibits 4 and 6; however, the record does not include the exhibits themselves. Moore's reply brief does not dispute the representation by the State of the contents of the call; therefore, we accept the description of the call as set forth in the State's response brief. *See* ***Schlieper v. DNR***, 188 Wis. 2d 318, 322-23, 525 N.W.2d 99 (Ct. App.1994) (when a reply brief does not dispute a proposition asserted in a responsive brief we may take it as a concession).

[5] Moore's postconviction motion raised a sentencing argument that he does not raise on appeal.

along with the citation evidence were more detailed than what came in via the 911 calls. Trial counsel also described other tactics he used to undermine A.J.'s credibility, such as eliciting damaging testimony about her from law enforcement officers and presenting an alibi witness. The trial court held that Moore did not satisfy either of the requirements for an ineffective assistance of counsel claim.[6] First, the trial court found that there was no deficient performance because the allegedly deficient performance consisted of a decision made as a part of trial strategy to avoid a situation where there "would have been more information to the jury against Mr. Moore[.]" Second, there was no prejudice because the other evidence, specifically the child's distraught 911 call, was so compelling that even if the evidence of A.J.'s recanting and citation for obstruction had come in, there was not a reasonable probability of a different outcome.

¶10 The trial court rejected Moore's argument that letting the jury hear the child's 911 call violated his constitutional right to confront witnesses because the child was not made available for cross-examination. The trial court stood by its earlier rulings in the case. In its earlier rulings, it made the threshold determination that, contrary to Moore's argument, there was no Confrontation Clause violation because the child's 911 call was not "testimonial." *See* ***State v. Mattox***, 2017 WI 9, ¶24, 373 Wis. 2d 122, 890 N.W.2d 256 ("[C]onfrontation challenges begin with an analysis of whether the out-of-court statements used against a defendant are 'testimonial.' If the statements are not testimonial, the Confrontation Clause is not implicated."); ***Davis v. Washington***, 547 U.S. 813,

[6] *See* ***Strickland v. Washington***, 466 U.S. 668, 700 (1984) (defendant must demonstrate deficient performance and sufficient prejudice, and "[f]ailure to make the required showing of either … defeats the ineffectiveness claim").

822 (2006) (statements are non-testimonial when they are made to police with the "primary purpose" of "enabl[ing] police … to meet an ongoing emergency"). The trial court then proceeded to the question of whether the statement was admissible under state evidentiary rules and admitted the evidence as non-testimonial hearsay under the "excited utterance" exception to the hearsay rule. *See* WIS. STAT. § 908.03(2) (hearsay exception permitted for "statement[s] relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition").

¶11 The trial court also rejected Moore's argument that the evidence as to identity was insufficient to convict on the second set of charges.

¶12 The trial court therefore denied Moore's motion as to all issues, and Moore now appeals.

DISCUSSION

The alleged Confrontation Clause violation.

¶13 "[W]hether the admission of evidence violates a defendant's right to confrontation is a question of law subject to independent appellate review." ***State v. Williams***, 2002 WI 58, ¶7, 253 Wis. 2d 99, 644 N.W.2d 919. However, evidentiary rulings that do *not* implicate constitutional rights are discretionary, and therefore we review them under an erroneous exercise of discretion standard. ***State v. Hammer***, 2000 WI 92, ¶43, 236 Wis. 2d 686, 613 N.W.2d 629.

¶14 The Sixth Amendment's Confrontation Clause provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." U.S. CONST. amend. VI. The threshold question in a Confrontation Clause analysis is whether the contested statement is testimonial or

non-testimonial. ***Crawford v. Washington***, 541 U.S. 36, 68 (2004). "Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law[.]" ***Id.*** "Where testimonial evidence is at issue, however, the Sixth Amendment demands … unavailability [of the declarant] and a prior opportunity for cross-examination" for the statement to be admissible. ***Id.*** Although the United States Supreme Court has not provided a definitive statement of what "testimonial" includes, it has stated that "the term … applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." ***Id.*** Statements are non-testimonial when they are made to police with the "primary purpose" of "enabl[ing] police … to meet an ongoing emergency." ***Davis v. Washington***, 547 U.S. 813, 822 (2006). Statements are testimonial when there is "no … ongoing emergency" and when their primary purpose is "to establish or prove past events potentially relevant to later criminal prosecution." ***Id.***

¶15 Moore's conclusory argument that the admission of the child's 911 call deprived him of his fundamental right to cross-examine is unsupported by any law.

¶16 The call in question was specifically made to summon police to help A.J., who was being beaten. The trial court found that the child making the call was "clearly upset," was "seeking help," and was "crying and very upset and under the influence of the emotion of the events." The answer to the first question—whether the statement is non-testimonial—is clearly yes under ***Crawford*** and ***Davis*** because 1) it is not any of the types of testimonial statements ***Crawford*** listed, and 2) it is *exactly* the type of non-testimonial statement described in ***Davis***, made in the course of "an ongoing emergency" with the "primary purpose" of obtaining help from the police in a violent situation.

¶17 Because it is non-testimonial, it is subject to state evidence law, and Wisconsin evidence law permits the admission of testimony regardless of the availability of the declarant. *See* WIS. STAT. § 908.03(2) (hearsay exception permitted for "statement[s] relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition"). Moore does not challenge the trial court's findings about the child's emotional state. Applying § 908.03(2) to those findings, the trial court properly concluded that the statement was admissible. The trial court's ruling admitting the evidence was therefore not an erroneous exercise of discretion. *See* ***Hammer***, 236 Wis. 2d 686, ¶43.

Ineffective assistance claim.

¶18 When we review a claim of ineffective assistance of counsel, we uphold the circuit court's factual findings unless they are clearly erroneous. ***State v. O'Brien***, 223 Wis. 2d 303, 324–25, 588 N.W.2d 8 (1999). Whether counsel's assistance was ineffective based on these facts presents a question of law, which we review *de novo*. ***Id.*** Reviewing courts should be "highly deferential" to counsel's strategic decisions. ***State v. Carter***, 2010 WI 40, ¶22, 324 Wis. 2d 640, 782 N.W.2d 695 (quoting ***Strickland v. Washington***, 466 U.S. 668, 689 (1984)). There is a "'strong presumption' that [counsel's] conduct 'falls within the wide range of reasonable professional assistance.'" ***Id.*** (quoting ***Strickland***, 466 U.S. at 689). "[S]trategic or tactical decisions must be based upon rationality founded on the facts and the law." ***State v. Felton***, 110 Wis. 2d 485, 502, 329 N.W.2d 161 (1983). "If tactical or strategic decisions are made on such a basis, this court will not find that those decisions constitute ineffective assistance of counsel[.]" ***Id.*** A court need not address both prongs—deficient performance and prejudice—when

a defendant makes an insufficient showing on one. ***Strickland v. Washington***, 466 U.S. 668, 697 (1984).

¶19 Moore's ineffective claim is that trial counsel's decision not to offer the obstructing citation evidence was deficient. He contends that the strategy counsel testified to at the ***Machner*** evidentiary hearing was not reasonable and below the standard of reasonably competent counsel. The facts his argument is based on are not in dispute. A.J. made statements to the police on two occasions: May 18, when she reported that Moore had attacked her, and several days later, when she returned to recant her first statement. She was ticketed for obstruction of justice. When Moore sought to enter into evidence the obstruction citation to discredit A.J., the judge held it would be permitted only if the prior statements were admitted as well. Most significantly, because A.J. was not present for trial, her prior statements to police were hearsay and not otherwise admissible. Nonetheless, and even though he agreed with trial counsel during trial to drop the effort to enter the citation once it became clear that the other statements would also come in, Moore now argues that "[f]ailure to present this evidence falls well below ***Strickland***'s objective standard of reasonableness."

¶20 This court disagrees. Moore's counsel's strategic decision was "based upon rationality founded on the facts and the law." *See* ***Felton***, 110 Wis. 2d at 502. The decision required weighing the citation's value to the defense against the harm to the defense that would be done by the more detailed statements A.J. gave to police that the judge had held would come in along with it. In the context of the rest of the evidence, it was a rational decision to abandon the citation evidence in order to minimize specific damaging evidence against Moore

from the victim.[7] This is especially true given that it would permit the State to argue as to the June offense that A.J. was fully aware when she reported that incident that she could be charged with obstructing if it was later admitted to be false. Therefore, this court will not find that the decision "constitute[d] ineffective assistance of counsel[.]" *See* ***id.***

The sufficiency of the evidence.

¶21 In a review of the sufficiency of the evidence, an appellate court will affirm the conviction "unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990). "If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn a verdict[.]" ***Id.*** This is true "even if it believes that the trier of fact should not have found guilt based on the evidence before it." ***Id.***

¶22 Moore argues that "no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt" as to the two counts based on the June 30 incident because there was not specific enough evidence that identified Moore as the person responsible. Moore argues that as to those two counts, "[t]he only evidence presented in support of identification … was a vague statement about [A.J.]'s stating that it was her child's father who had done this." He says the "generality" of the statement means it is too weak to support a reasonable

[7] We note that Moore does not argue on appeal that the trial court's decision on the admission of A.J.'s statements was error.

inference of identity. Moore points to the fact that the circuit court denied the State's motion to admit a separate statement by A.J. that Moore was the father of her children; he argues that without that direct statement, the State could not present the proof it needed for identity. We disagree.

¶23 The jury heard the excerpt of the 911 call from that incident in which A.J. stated, "My son's father jumped on me," and the testimony of Moore's sister that Moore was the father of A.J.'s son. From this evidence, the jury "could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt," and therefore this court may not overturn the verdict. *See* ***Poellinger***, 153 Wis. 2d at 507.

By the Court.—Judgments and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.