COURT OF APPEALS
DECISION
DATED AND FILED

February 20, 2018

Sheila T. Reiff
Clerk of Court of Appeals

Appeal Nos. 2017AP75-CR
2017AP76-CR
2017AP77-CR

Cir. Ct. Nos. 2014CM23
2014CF2539
2014CF5489

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LEE VANG,

DEFENDANT-APPELLANT.

APPEALS from judgments and an order of the circuit court for Milwaukee County: STEPHANIE ROTHSTEIN, Judge. *Affirmed*.

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

¶1 BRENNAN, P.J. Lee Vang appeals judgments of conviction and an order denying his postconviction motion without a hearing. A jury convicted

Vang of seven counts: second-degree sexual assault, victim intimidation, battery, two counts of bail jumping, and two counts of disorderly conduct.

¶2 The charges arose from two incidents. In December 2013, Vang threatened police and multiple family members when his wife, J., reported domestic violence to police. In June 2014, Vang battered and sexually assaulted J.[1] The six counts in those cases were set for jury trial on October 29, 2014, but Vang failed to appear. A new bail-jumping charge was filed. That case was consolidated with the first two cases, and Vang proceeded to trial. The trial took place from May 18 through May 21, 2015.

¶3 Vang argues that he is entitled to a ***Machner*** hearing[2] and that the trial court erred in denying his motion without a hearing. His claims of ineffective assistance of trial counsel are based on counsel's failure to object at trial to the admission of three pieces of evidence: (1) a police officer's testimony that repeated statements the victim made to him about the June 2014 assault; (2) Vang's own testimony, elicited on direct examination, about participating in what Vang described as "an illegal street race" for money; and (3) the State's

[1] We identify the victim by initial only. Appellate counsel filed briefs that repeatedly identified a victim by her full name in direct violation of WIS. STAT. RULE 809.86 (2015-16), which states that in criminal cases, "the briefs of the parties shall not, without good cause, identify a victim by any part of his or her name but may identify a victim by one or more initials or other appropriate pseudonym or designation." No good cause exists in this case for identification by name. We admonish appellate counsel for this rule violation.

All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

[2] ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979) ("We hold that it is a prerequisite to a claim of ineffective representation on appeal to preserve the testimony of trial counsel.")

question to Vang, on cross-examination, about his knowledge that a Milwaukee television news channel reported Vang's failure to appear at his 2014 trial date in a local segment called "Wisconsin's Most Wanted."

¶4 We conclude that the record, as a matter of law, conclusively demonstrates Vang is not entitled to relief, so it was a matter of the trial court's discretion whether to permit a hearing. We further conclude that the postconviction court did not erroneously exercise its discretion when it denied Vang an evidentiary hearing. We therefore affirm.

BACKGROUND

The three consolidated cases.

¶5 Three cases were consolidated for the trial that is the subject of this appeal.

¶6 Case No. 2014CM23 arises from Vang's conduct on December 27, 2013. At about 2 a.m., a police officer and J. were in the officer's squad so that J., who had reported domestic violence, could be taken to a safe place. Vang arrived by car, approached the squad, and demanded that J. get out. Vang made a verbal threat to shoot the officer and to "shoot up" the officer's house and kill the officer's wife and children.[3] Vang's sister intervened, calmed him, and left with him. Vang later spoke to his father and mother, who also tried to calm him, and to

[3] The officer, Moua Vang, who was on duty and received the call from dispatch to transport a domestic violence victim to a safe location, did not realize until he spoke to the woman in his squad that it was J., who was the wife of his cousin Lee Vang. Lee Vang threatened Moua Vang in person outside the police station and to another relative conveyed a threat against Moua Vang's family, who lived in a location known to Lee Vang.

them Vang made further threats to kill his own children and his mother. The charges that resulted from this conduct were two counts of misdemeanor disorderly conduct, one of which was charged as an act of domestic violence.

¶7 Case No. 2014CF2539 consists of four counts. On June 14, 2014, Vang was out on bail in the December 2013 case, and had returned home with J. from a party. As J. reported to police the following day, Vang refused to accept that she did not want to have sex, forcibly took her phone and threw it against a wall to break it, yelled and threatened her, hit her in the thigh and in the face, and then engaged in penis-to-vagina intercourse.

¶8 Case No. 2014CF5489 consists of a felony bail jumping charge that was issued when Vang failed to appear at his October 29, 2014 jury trial on the two earlier cases. Vang had been present at the September 16, 2014 final pretrial conference for those cases and the judge specifically informed him of the date and time of the trial.

Evidence presented at Vang's jury trial.

¶9 The first witness at the four-day trial was Officer Moua Vang, the officer who was the eyewitness to the December 27 incident. The officer testified that he had been dispatched to transport a domestic violence victim, had then encountered Vang, who appeared intoxicated, had observed J.'s fear, had been threatened by Vang both directly and through mutual relatives, and had left the scene with J.

¶10 The second witness was J. She testified that in the early morning hours of December 27, 2013, she had returned home with Vang and was afraid to

go into the house with him and had instead run two and a half blocks to the nearby police station. She testified that her children were with Vang's parents and that she "needed somewhere safe to stay." She testified about Vang's appearance at the police station, his angry demeanor and his demands that she get out of the squad car. She testified that she moved out of state with the couple's five children, but in 2014 she returned to Milwaukee and moved back in with Vang because she had no other choice for housing in the area.

¶11 J. testified that on June 14, 2014, the couple had been at the home of friends, that Vang had consumed several drinks, and that they had returned home at about 9:30 or 10 p.m. She testified that Vang sent their kids to bed shortly after they arrived home and demanded that J. come into their shared bedroom. She testified that he initiated sexual contact, and when she started crying and saying no, he became angry and made a comment about J.'s boyfriend. She described how Vang demanded her phone and then took her phone from her hand and threw it against a wall. She described being hit in the leg and in the face and being held tightly around her neck. She testified that after he shook her with his hands around her neck, "he said he was sorry, and he said, look what you made me do." She testified that he then put his hands down her pants again. She testified that she was crying and "let him" have sex with her because she was afraid she would be beaten again. She testified that Vang "held [her] that whole night" and that she got up in the morning and went to work, then went directly from work to the police station to file a report. She identified Officer Darryl Anderson, who was present in the courtroom, as the officer with whom she spoke that day.

¶12 The third and fourth witnesses testified to evidence relevant to the felony bail jumping charge.

¶13 The fifth witness was Officer Anderson, the officer to whom J. made her report on June 15, 2014. Anderson testified to the way he was dispatched to a gas station to meet with a domestic violence victim, how he met J., and how he had her follow him back to the police station. He then without objection described what J. had told him about the events of the night of June 14, 2014. He also testified that he observed swelling on J.'s right cheek bone. He testified that he took four photos of J.'s face that showed swelling and red marks on her face. These photos were entered into evidence, and Anderson testified that they were true and accurate depictions of the injuries he observed. He testified that J.'s demeanor was "very sad," "she was sobbing," "she was trembling," and "she did appear scared."

¶14 The next five witnesses were Vang's mother, father, sister, and two officers who interviewed them about the events of December 27, 2013.

¶15 The defense presented the last three witnesses. The first two—Vang's nephew and Vang's nephew's girlfriend—were present at the housewarming party Vang and J. had attended on June 14, 2014.

¶16 The final witness was Vang. Regarding the events that occurred at the police station on December 27, 2013, he testified, "I can't really remember that day. I was really drunk." He repeatedly answered that he had no memory of what he said or who he saw, and that he remembers only that he "ended up back at home somehow" and "from there on I passed out."

¶17 When questioned on direct examination about the events of June 14 and 15, 2014, he gave the following account:

- He had picked J. up at the bus station, cooked dinner for everyone, and received a phone call inviting the family to a housewarming party.

- He, J., and their children went to the party. He and his nephew left the party and were gone from 10 p.m. to 11 p.m. He testified that he knew it was 10 p.m. "because we have a car meet which is-I know it's called an 'illegal street race.'" Trial counsel then interrupted and asked Vang to clarify "what an 'illegal street race' is[.]" Vang answered, "[i]t's when three or four of us, we schedule a time. We go meet up and we race for money." He testified that the money he made from racing was "part of" how he supported himself.

- Vang testified that he returned to the house where J. and their kids were, that they watched a movie, and that they ultimately returned home at about 1:30 a.m. He testified that he then put the kids to bed. He testified that J. was going to sleep in the bedroom and he was going to sleep on the couch, but they ended up arguing about whether he would allow two of their kids to return to Minnesota with her. He testified that J. was angry, made threats implying that she could falsely report him to the police. He testified that in response, he went outside, smoked, and decided to work on a car in the garage. He testified that he went back in the house at about 5 a.m. and went to sleep on the couch. He denied ever touching J. that night or going into the room where she was.

- He testified that he did not see her in the morning before she left the house that day, that she did not return home, and that he was arrested on the evening of June 15.

- He testified that the reason he did not appear for the October 29 jury trial was that he "wanted to see [his] kids." He testified that his nephew told him that there was a warrant out for his arrest and that when he found out, he "immediately turned [himself] in."

¶18 On cross-examination, the following exchange occurred between the State and Vang concerning his activities on the evening of June 14:

> State: Where did you go?
>
> Vang: We went to a car meet, also known as a street race.
>
> State: Yesterday you called this an illegal street race.
>
> Vang: Correct.
>
> State: Why is it illegal?
>
> Vang: Because we go race at abandon buildings where there's no rules, no-no law, if I could say it right, no law in it. I mean, it's basically we're hiding it, so it's illegal.

¶19 Vang further testified that he was racing a 1992 Honda Civic that had been souped up, and that on that date, they were racing for car titles, meaning that the winner of the race got the title to the other driver's vehicle. On that night, he testified, he won the race and the title to the other car, which was a 1992 Honda Civic hatchback that he valued at $60,000. He testified that he and his nephew left the race with the two cars and then returned to the party. He described race cars as something he was "proud of [himself]" for building. Trial counsel did not object to this testimony. Trial counsel did object to questions from the State about whether Vang was aware of penalties if he would "get caught doing this," and about whether there was "a lot of adrenalin winning a car[.]" The trial court permitted the questions to be answered.

¶20 The State also questioned Vang concerning how he came to know through a nephew that there was a warrant out for his arrest for failing to appear at the jury trial on October 29. The following exchange occurred:

> Vang: It was all over Facebook.
>
> State: It was all over Facebook?
>
> Vang: Correct.
>
> State: All over Facebook from Fox 6 News?
>
> Vang: Yes.
>
> State: And that was from a broadcast about you, correct?
>
> Vang: Correct.
>
> State: And that broadcast was the subject of a series called "Wisconsin's Most Wanted," correct?
>
> Vang: Correct.

Trial counsel did not object.

Conviction, sentencing, and postconviction motion.

¶21 The jury convicted Vang on all counts. The trial court imposed a global sentence totaling twenty-eight years and three months, bifurcated as eighteen years and three months of initial confinement and ten years of extended supervision.

¶22 Vang moved for postconviction relief on the grounds of ineffective assistance of counsel. The trial court denied the motion without a hearing. This appeal follows.

DISCUSSION

A. Standard of review and relevant law.

¶23 A postconviction motion alleging ineffective assistance of counsel does not automatically trigger the right to a ***Machner*** hearing. ***State v. Phillips***, 2009 WI App 179, ¶17, 322 Wis. 2d 576, 778 N.W.2d 157. "[N]o hearing is required if the defendant fails to allege sufficient facts in his or her motion, if the defendant presents only conclusory allegations or subjective opinions, or if the record conclusively demonstrates that he or she is not entitled to relief." ***Id.*** Whether a motion alleges sufficient facts that if true entitle the defendant to relief is a question of law that we review independently. *See* ***State v. Balliette***, 2011 WI 79, ¶18, 336 Wis. 2d 358, 805 N.W.2d 334. "If the defendant's motion and the record fail to meet these requirements, a [postconviction] court in its discretion may grant or deny an evidentiary hearing." *See* ***State v. Howell***, 2007 WI 75, ¶75, 301 Wis. 2d 350, 734 N.W.2d 48. A motion for an evidentiary hearing on a claim of ineffective assistance of counsel must "carefully address the two elements of ineffective assistance of counsel set out in ***Strickland v. Washington***, 466 U.S. 668 (1984)." ***Balliette***, 336 Wis. 2d 358, ¶3. The elements are deficient performance and prejudice that resulted from it. ***Id.***, ¶21.

¶24 The well-settled standards for those elements are set forth in ***Strickland***. "Counsel's conduct is constitutionally deficient if it falls below an objective standard of reasonableness." ***State v. Thiel***, 2003 WI 111, ¶19, 264 Wis. 2d 571, 665 N.W.2d 305. "When evaluating counsel's performance, courts are to be 'highly deferential' and must avoid the 'distorting effects of hindsight.'" ***Id.*** (citation omitted). "Counsel need not be perfect, indeed not even very good, to be

constitutionally adequate." ***Id.*** (citation omitted). As for the prejudice prong: "a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors." ***Strickland***, 466 U.S. at 696.

¶25 When a "motion fails to allege sufficient facts entitling the defendant to relief or presents only conclusory allegations, or the record, as a matter of law, conclusively demonstrates the defendant is not entitled to relief," then this court considers whether the postconviction court erroneously exercised its discretion when it decided to grant or deny a hearing. ***Howell***, 301 Wis. 2d 350, ¶79.

B. The record conclusively demonstrates that Vang is not entitled to a new trial on the basis that trial counsel was constitutionally ineffective.

¶26 Vang's arguments relate to counsel's failure to object on three occasions during the jury trial. The record conclusively demonstrates that the decision reached would reasonably likely have been the same absent the errors. *See* ***Strickland***, 466 U.S. at 696. Because the record conclusively demonstrates that Vang is not entitled to the relief he seeks, the circuit court had the discretion to deny Vang's request for an evidentiary hearing. *See* ***Phillips***, 322 Wis. 2d 576, ¶17. We address each of the claimed errors in turn.

The police officer testimony.

¶27 Vang argues that trial counsel performed deficiently by failing to object on hearsay grounds when Officer Anderson described on direct examination what J. reported to him on June 15, 2014. Vang argues that the testimony constituted hearsay evidence that was not permitted under any hearsay exception. He argues that counsel's failure to object prejudiced him because this case turned

solely on credibility, and the admission of the hearsay evidence "improperly bolster[ed] [J.'s] testimony by offering it a second time, and in a much more detailed and clear manner, through the testimony of Officer Anderson."

¶28 We assume without deciding that the failure to object to the testimony constituted deficient performance, and we consider the question of whether the failure to object prejudiced Vang. We cannot conclude that "the decision reached would reasonably likely have been different" if trial counsel had succeeded in excluding this portion of Officer Anderson's testimony. ***Strickland***, 466 U.S. at 696. That is because J.'s extensive and detailed testimony was corroborated by non-hearsay, admissible evidence, namely, the essentially unrebutted testimony of Officer Vang about the events of December 27, 2013, the testimony of Officer Anderson about his observations of J.'s injuries and her demeanor on June 15, 2014, and the photographs entered into evidence. We note that in denying Vang's postconviction motion, the trial court that had presided over Vang's trial made a finding that J.'s testimony was "completely credible." Where the testimony of a credible witness whose account is supported by independent eyewitness corroboration and physical evidence, any additional "bolstering," even if erroneously admitted, does not constitute the kind of error that makes a different outcome reasonably probable. *See* ***State v. Sanchez***, 201 Wis. 2d 219, 237, 548 N.W.2d 69 (1996) (finding error not to be prejudicial where the evidence against the defendant was "overwhelmingly probative" of his guilt).

The street racing testimony.

¶29 Vang argues that trial counsel was constitutionally ineffective when counsel failed to object to the State's follow-up questioning after Vang

volunteered on direct examination that he participated in street racing of modified cars—an activity Vang had described on direct examination, unprompted, as illegal. We start with the question of whether this failure prejudiced him. *See* ***Strickland***, 466 U.S. at 697 (holding that if the defendant fails to adequately satisfy one prong of the test, a court need not address the second).

¶30 Vang's testimony on this point came during his account of what happened June 14. Besides the denial of any sexual activity and violence, Vang's account of that evening differed from J.'s version in that it included the street racing event at 10 p.m. and a much later return to their home after the party. This testimony presented a contrast to J.'s version of a very drunk Vang. And Vang was the one who volunteered the description as "illegal street racing." All trial counsel did at that point was try to put the racing in the best possible light: Vang was successful at building and racing cars, won a $60,000 car that night and used the money from racing to support his family. Trial counsel elicited from Vang that they did the races in a way no one would get hurt—for example, that no people were ever around who could be injured and that it occurred near abandoned factories. However, the primary reason that failure to object to this testimony is not prejudicial is that, as the trial court noted, the racing testimony "was tangential at best." In light of the testimony by eyewitnesses to Vang's drunken and threatening behavior in the first incident and J.'s testimony and the related corroborating evidence, the failure to object to this description of this activity falls far short of the standard for prejudice. On this record, it is not possible to conclude that the outcome would have been different if trial counsel had objected to the description of the street racing.

The reference to "Wisconsin's Most Wanted" on Fox6 News.

¶31 Vang argues that trial counsel was constitutionally ineffective when counsel failed to object to the State's questioning about Vang's account that he had come to know of the warrant for his arrest only after hearing about it from a nephew. In the course of that questioning, the State elicited from Vang that his case had been featured on Fox 6 News' segment entitled "Wisconsin's Most Wanted." Vang argues that failing to object to the disclosure that Vang had been on a "most wanted list" is both deficient and prejudicial because such lists have a "highly negative connotation" and represent "an elite company of bad guys" and "dangerous fugitives."

¶32 We address the issue of whether failure to object constituted deficient performance. *See* ***Strickland***, 466 U.S. at 697 (holding that if the defendant fails to adequately satisfy one prong of the test, a court need not address the second). The State's questioning related to Vang's purported lack of knowledge of the arrest warrant despite being in court at the final pretrial and knowing the date of trial. On direct examination, Vang had portrayed himself as learning of the arrest warrant from his nephew and "immediately" going with family to turn himself in. The prosecutor's questions were intended to rebut that self-serving description of what happened and elicited testimony that was relevant and not unduly prejudicial. An objection would not have been sustained. "It is not deficient performance for counsel not to make a pointless objection." ***State v. Cameron***, 2016 WI App 54, ¶27, 370 Wis. 2d 661, 885 N.W.2d 611. Neither was the failure to object prejudicial. Learning that Vang's non-appearance was mentioned on a TV news segment was not more prejudicial than what the jury had already learned—that he had not appeared for his jury trial despite being present in

court when the date was set. Even without the mention of the TV news segment, the record shows no probability of a different result. *See* ***Strickland***, 466 U.S. at 696.

C. The postconviction court did not erroneously exercise its discretion when it denied Vang's motion for an evidentiary hearing.

¶33 The trial court correctly determined that Vang was not entitled to an evidentiary hearing on his motion. Therefore, it was not required to grant his motion, and the decision to grant or deny the motion was made as an exercise of its discretion. We will not find an erroneous exercise of discretion "if there is a reasonable basis for the trial court's determination," and "we generally will 'look for reasons to sustain a trial court's discretionary ruling[s].'" ***Erbstoeszer v. American Cas. Co.***, 169 Wis. 2d 637, 644, 486 N.W.2d 549 (Ct. App. 1992) (citation omitted). The trial court properly applied the law and its determinations are supported by the record and have a reasonable basis. In denying the evidentiary hearing, the trial court did not erroneously exercise its discretion.

¶34 For these reasons, we affirm the judgments and order.

By the Court.—Judgments and order affirmed.

Not recommended for publication in the official reports.