COURT OF APPEALS
DECISION
DATED AND FILED

January 27, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP2968 **Cir. Ct. No. 2002CF1246**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROSS J. TAMMS,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Waukesha County: LEE S. DREYFUS, JR., Judge. *Affirmed*.

Before Neubauer, P.J., Anderson and Snyder, JJ.

¶1 NEUBAUER, P.J. Ross J. Tamms appeals from an order denying his motion for postconviction relief based on his allegation of ineffective

assistance of trial counsel. Tamms was convicted of stalking, as a repeater, in violation of WIS. STAT. § 940.32(2) and (3)(b) (2001-02).[1] Tamms argues that his trial counsel was ineffective in three respects: (1) counsel failed to object to the application of a revised version of Wisconsin's antistalking statute to conduct occurring prior to the effective date of the revision; (2) counsel failed to offer any argument relating to the victim's lack of knowledge that Tamms had driven by her apartment—an act constituting a basis for the fulfillment of the "course of conduct" requirement under the stalking statute; and (3) counsel failed to object to the introduction of evidence relating to an act not mentioned in the complaint and outside the time frame for the course of conduct pled in the complaint and failed to object to the State's request to enlarge the course of conduct time frame so as to include this act. Tamms argues that counsel's representation was deficient and prejudicial and the trial court erred in denying his motion for postconviction relief. We reject Tamms' arguments and affirm the order.

BACKGROUND

¶2 On December 3, 2002, Tamms was charged with stalking Theresa DiMotto, in violation of WIS. STAT. § 940.32(2) and (3)(b) (2001-02), based on conduct occurring between January 1999 and October 2002. According to the complaint, Tamms had a previous conviction in 1999 for stalking DiMotto. The complaint alleged that on October 25, 2002, DiMotto received, and reported to the police, a phone call from Tamms to her residence. Tamms informed the investigating officer that he did, in fact, call DiMotto because he believed they

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless, as here, it is otherwise noted.

have a child together.[2] Tamms also admitted that, since his January 1999 conviction for stalking DiMotto, he had driven past DiMotto's residence twelve to fifteen times in an attempt to see DiMotto or DiMotto's child. Tamms indicated that he drove by the home during the summer of 2001.

¶3 A trial to the court was held on May 13, 2003, at which DiMotto, her mother, and two investigating officers testified. The evidence at trial supported the charges in the complaint as to the drive-bys and phone call. However, there was also testimony that Tamms had filed paperwork in November 2002 to commence a paternity action, and a notice was sent to DiMotto. It was later stipulated by counsel that, while an application to commence a paternity action was filed, the matter never moved forward. Based on this information, the State moved to amend the charging period to conform to the proof at trial that Tamms' conduct occurred in part in November 2002. When asked by the court, Tamms' counsel had no objection.

¶4 Following the trial to the court, Tamms was convicted of stalking, as a repeater. He was sentenced to prison for one year, eight months, followed by forty months of extended supervision. Tamms, still represented by trial counsel, subsequently filed a motion for postconviction relief based on insufficient evidence to support the conviction and misuse of sentencing discretion. The trial court denied Tamms' motion, and the court of appeals later affirmed the judgment and order of the trial court by summary disposition dated December 15, 2004.

[2] By all accounts in the record, Tamms and DiMotto do not have a child together and were never involved in a romantic relationship.

¶5 On March 6, 2006, Tamms brought another motion for postconviction relief, this time alleging ineffective assistance of trial counsel and appellate counsel. A ***Machner***[3] hearing was held on February 19, 2007. The court issued an oral decision denying Tamms' motion. The court found that the offense was charged under the appropriate statutory framework and the enlargement of the time frame for the course of conduct was properly granted; therefore, counsel was not ineffective for failing to object. As to trial counsel's failure to argue the legal significance of the fact that DiMotto did not know that Tamms drove past her residence, the trial court found that counsel had objected and those objections had been overruled.

¶6 Tamms appeals the trial court's determination that his trial counsel was not ineffective.

DISCUSSION

¶7 To substantiate a claim of ineffective assistance of trial counsel, a defendant must prove that counsel performed deficiently and that he or she was prejudiced by counsel's performance. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient performance, a defendant must show specific acts or omissions of counsel that are "outside the wide range of professionally competent assistance." ***Id.*** at 690. To prove prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id.*** at 694. "It is not enough for the defendant to show that the errors had some conceivable effect

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

on the outcome of the proceeding." ***Id.*** at 693. The defendant's burden is to show that counsel's errors "actually had an adverse effect on the defense." ***Id.***

¶8 Whether counsel's actions constitute ineffective assistance is a mixed question of law and fact. ***State v. Oswald (Theodore)***, 2000 WI App 2, ¶51, 232 Wis. 2d 62, 606 N.W.2d 207. We will not overturn a trial court's findings of fact, including those regarding the circumstances of the case and counsel's conduct and trial strategy, unless the findings are clearly erroneous. ***Id.*** However, the final determinations of whether counsel's performance was deficient and prejudiced the defense are questions of law which we decide without deference to the trial court. ***Id.***

1. Counsel was not Ineffective for Failing to Object to the Application of the 2001-02 Statutes.

¶9 Tamms argues that trial counsel's performance was deficient and prejudicial because he failed to argue that the application of WIS. STAT. § 940.32 (2001-02) to the drive-bys occurring in July 2001 violated the ex post facto clause of the U.S. and Wisconsin constitutions. *See* U.S. CONST. art. I, § 9, cl. 3 and § 10, cl. 1; WIS. CONST. art. I, § 12. In considering Tamms' ineffective assistance of counsel claim, we must examine the merits of his ex post facto claim. An ex post facto law includes any law which was passed after the commission of the offense for which the party is being tried. ***State ex rel. Britt v. Gamble***, 2002 WI App 238, ¶23, 257 Wis. 2d 689, 653 N.W.2d 143. In determining whether a violation of the ex post facto clause has occurred, we look to see whether "the application [of an ex post facto law] violates one or more of that clause's recognized protections." ***State v. Haines***, 2002 WI App 139, ¶6, 256 Wis. 2d 226, 647 N.W.2d 311. Specifically, we must determine whether application of the new law: (1) criminalizes conduct that was innocent when committed, (2) increases the

penalty for conduct after its commission, or (3) removes a defense that was available at the time the act was committed. ***Id.***

¶10 Tamms was charged under WIS. STAT. § 940.32 (2001-02) for engaging in a course of conduct from January 1999 through October 2002, which was directed at DiMotto, which would cause a reasonable person to fear bodily injury and which Tamms knew or should have known would cause such fear. The 1999-2000 version of § 940.32 differs from the 2001-02 version both in its definition of "course of conduct" and in penalties. The previous version of § 940.32 defined "course of conduct" as "repeatedly maintaining a visual or physical proximity to a person." Sec. 940.32(1)(a) (1999-2000). A person would be guilty of a Class A misdemeanor if he or she met the following criteria: (1) he or she intentionally engages in a course of conduct directed at a specific person that would cause a reasonable person to fear bodily injury to himself or herself or family members, (2) he or she has knowledge or should have knowledge that the specific person will be placed in reasonable fear of bodily injury to himself or herself or family members, and (3) the acts induce fear in the specific person of bodily injury to himself or herself or family members. Sec. 940.32(2)(a)-(c) (1999-2000). However, if the actor had a previous stalking conviction involving the same victim, the penalty increased to a Class E felony. Sec. 940.32(3)(b) (1999-2000).

¶11 The 2001-02 version of WIS. STAT. § 940.32, which was not effective until August 2002, expanded the definition of "course of conduct." The revised statute defined "course of conduct" as "a series of 2 or more acts carried out over time, however short or long, that show a continuity of purpose." Sec. 940.32(1)(a) (2001-02). It then enumerates several examples of acts which could be covered by the statute, including the previous definition of "course of

conduct"—"[m]aintaining a visual or physical proximity to the victim"—and also "[a]ppearing at the victim's home" and "[c]ontacting the victim by telephone … regardless of whether a conversation ensues." Sec. 940.32(1)(a)1., 4., 6. (2001-02).[4] An individual who was guilty of stalking under § 940.32(2) (2001-02)

[4] WISCONSIN STAT. § 940.32(1) (2001-02) provides in its entirety:

> **(1)** In this section:
>
> (a) "Course of conduct" means a series of 2 or more acts carried out over time, however short or long, that show a continuity of purpose, including any of the following:
>
> 1. Maintaining a visual or physical proximity to the victim.
>
> 2. Approaching or confronting the victim.
>
> 3. Appearing at the victim's workplace or contacting the victim's employer or coworkers.
>
> 4. Appearing at the victim's home or contacting the victim's neighbors.
>
> 5. Entering property owned, leased, or occupied by the victim.
>
> 6. Contacting the victim by telephone or causing the victim's telephone or any other person's telephone to ring repeatedly or continuously, regardless of whether a conversation ensues.
>
> 7. Sending material by any means to the victim or, for the purpose of obtaining information about, disseminating information about, or communicating with the victim, to a member of the victim's family or household or an employer, coworker, or friend of the victim.
>
> 8. Placing an object on or delivering an object to property owned, leased, or occupied by the victim.
>
> 9. Delivering an object to a member of the victim's family or household or an employer, coworker, or friend of the victim or placing an object on, or delivering an object to, property owned, leased, or occupied by such a person with the intent that the object be delivered to the victim.
>
> 10. Causing a person to engage in any of the acts described in subds. 7. to 9.

was guilty of a Class I felony; however, under § 940.32(2m), if the stalking involves the same victim of a previous stalking conviction, the individual was guilty of a Class H felony.

¶12 Tamms argues that the 2001-02 statute altered the definition of "course of conduct" to make it easier to prove, and therefore its application to the 2001 drive-bys violates the ex post facto law. We disagree. Under the 1999-2000 statute, the drive-bys would have been encompassed by the definition of "course of conduct" as "repeatedly maintaining a visual or physical proximity to a person." *See* WIS. STAT. § 940.32(1) (1999-2000). *See e.g.*, ***State v. Reusch***, 214 Wis. 2d 548, 551, 571 N.W.2d 898 (Ct. App. 1997) (pre-2001 stalking charge based in part on drive-bys of the victim's residence). While the definition of "course of conduct" now includes "appearing at the victim's home," we fail to see how this renders the course of conduct easier to prove. Driving by the victim's residence is conduct not expressly included in either version of the statute and is no easier to prove under "appearing at the victim's home" than "maintaining visual and physical proximity." We therefore reject Tamms' argument as to an ex post facto violation.

¶13 Next, Tamms argues that the July 2001 drive-bys were sufficient to constitute a "completed act of stalking" in violation of WIS. STAT. § 940.32(1)(a) (1999-2000) because the "testimony at trial … establish[ed] that there were (considerably) more than two such events." Tamms contends that because he could have been charged based on the drive-bys alone under the previous statute, it violated the ex post facto clause to apply the 2001-02 version of the statute. We reject Tamms' argument. The supreme court has recognized that when charging a defendant who has engaged in a series of separate offenses which may properly be viewed as one continuing offense, "it is within the State's discretion to elect

whether to charge 'one continuous offense or a single offense or series of single offenses.'" ***State v. Lomagro***, 113 Wis. 2d 582, 587, 335 N.W.2d 583 (1983) (citing ***State v. George***, 69 Wis. 2d 92, 100, 230 N.W.2d 253 (1975)). *See also* ***State v. Chambers***, 173 Wis. 2d 237, 250, 496 N.W.2d 191 (Ct. App. 1992).

¶14 Here, Tamms was charged under WIS. STAT. § 940.32 (2001-02) for engaging in a course of conduct from January 1999 through October 2002, which was directed at DiMotto, which would cause a reasonable person to fear bodily injury and which Tamms knew or should have known would cause such fear. The State determined that the offense under § 940.32—the course of conduct—was not complete until October 2002 when Tamms contacted DiMotto by telephone. Because it was within the State's discretion to charge Tamms' acts as a "course of conduct," and because Tamms failed to demonstrate that the burden of proof was lesser under the 2001-2002 statutes, i.e. an ex post facto violation, no prejudice

resulted and counsel was not ineffective for challenging the State's exercise of discretion in charging the course of conduct as it did.[5]

2. Trial Counsel was not Ineffective for Failing to Argue the Legal Significance of the Victim's Ignorance of the 2001 Drive-bys until she was Informed of them Sixteen to Eighteen Months Later.

¶15 It is undisputed that DiMotto was not aware of Tamms' drive-bys of her residence until she spoke with Officer Pautz following his October 2002 conversation with Tamms. Based on this, Tamms contends that trial counsel was ineffective for failing to argue that the drive-bys could not meet the requirement under WIS. STAT. § 940.32(2)(c) (1999-2000) that the conduct must "induce fear" in the victim of bodily injury to herself or himself or to family members. Simply put, Tamms argues that § 940.32(2)(c) (1999-2000) does not include "fear that comes from learning of events that occurred approximately 16-18 months earlier." We reject Tamms' argument that counsel was ineffective on this basis.

[5] Because Tamms fails to establish an ex post facto violation, we need not resolve the issue of which statutory scheme should have been applied, nor do we address the State's contention that stalking is a continuing offense. *See* ***Sweet v. Berge***, 113 Wis. 2d 61, 67, 334 N.W.2d 559 (Ct. App. 1983) (if decision on one point disposes of an appeal, we need not decide other issues raised). However, we do note that the parties have not pointed us to, nor have we uncovered, any Wisconsin law addressing the proper application of statutes when a "course of conduct" under WIS. STAT. § 940.32 occurs under two statutory schemes. Indeed, in ***State v. Thums***, 2006 WI App 173, ¶8, 295 Wis. 2d 664, 721 N.W.2d 729, this court declined to address the State's argument that when a continuing offense—or here, a course of conduct—"straddles" the effective date of a penalty change for that offense, the sentencing court should apply the penalty scheme in place when the course of conduct began. Because the conduct falling under the previous statutory scheme would have been encompassed by the "course of conduct" definition regardless of which statutory scheme he was charged under, there simply is no ex post facto violation much less any prejudice giving rise to an ineffective assistance of counsel claim. ***State ex rel. Britt***, 2002 WI App 238, ¶23, 257 Wis. 2d 689, 653 N.W.2d 143 (ex post facto law "criminalizes conduct that was innocent when committed"). As the trial court aptly noted in ruling on Tamms' postconviction motion, "It isn't a question of his conduct suddenly being deemed to be criminal when it was not previously."

¶16 As the trial court found during the postconviction motion hearings, Tamms' defense counsel did raise this objection at trial. During the questioning of Pautz as to what Tamms informed him regarding the drive-bys, Tamms' trial counsel made the following objection:

> I'm going to object to that because the statute specifically states in its jury instructions that the Defendant intentionally engaged in the course of conduct directed at a person that induced fear in that person, so unless Ms. DiMotto was aware of things that Mr. Tamms might have said to this officer as to the things that he did, she would have to have known of that to have been taking place for it to be material and relevant to this charge.
>
> What I'm suggesting is that if, hypothetically, Ms. DiMotto was in Florida for a 30-day period, and during that 30-day period, Mr. Tamms went and sat in front of her house in a car for 24 hours a day, they could not use that course of conduct to prove the case under the statute charged because it must put fear into the person who is making the claim that they were being violated by virtue of stalking.
>
> It's Jury Instruction 1284 … and I make that statement for purposes of the record.

While Tamms' attorney ultimately withdrew the objection because it involved testimony from a different witness, the objection was later "renewed" prior to testimony from the appropriate witness. The trial court and the State were aware of the content of that objection as evidenced by the State's summary to the court:

> This is the officer that will testify regarding things that [Tamms] did that ostensibly might have been unknown to [DiMotto] …. [T]he summary would be that he was driving by the residence, and [DiMotto] really didn't know that. My response, Judge, is all the law requires is that the Defendant do something that a reasonable person would expect under all the circumstances to instill fear in herself or a member of her immediate family, and the Defendant knew or should have known that that act that he was doing would result in that.

The trial court overruled defense counsel's motion. Tamms did not challenge the trial court's ruling either on direct appeal or as a claim of ineffective assistance of appellate counsel. However, even if counsel had failed to object, it would not have been ineffective assistance of counsel.

¶17 This court has previously addressed the issue of whether the victim must be personally aware of all of the acts committed by the defendant, or whether it is sufficient under WIS. STAT. § 940.32(2)(c) that the victim's knowledge of a single act in the course of conduct charged is sufficient. ***State v. Sveum***, 220 Wis. 2d 396, 413, 584 N.W.2d 137 (Ct. App. 1998). This court concluded that § 940.32(2)(c) requires only that the actor's *acts* induce fear in the victim—not the actor's course of conduct; the term "acts" as used in § 940.32 refers to a single act as well as multiple acts and, "evidence is sufficient to support a stalking conviction *if the victim's knowledge of one of the actor's acts induces fear in the victim*." ***Sveum***, 220 Wis. 2d at 413 (emphasis added).

¶18 Tamms does not argue that his phone call to the victim's residence or her receiving notice that Tamms had taken preliminary steps to initiate a paternity proceeding involving her child were not sufficient to induce fear, particularly when combined with his prior actions in stalking DiMotto. Therefore, even assuming Tamms is correct that trial counsel failed to object to the legal significance of the victim's lack of knowledge of the drive-bys with sufficient specificity, counsel's objection would have nevertheless failed under ***Sveum***. *See* ***State v. Cummings***, 199 Wis. 2d 721, 747 n.10, 546 N.W.2d 406 (1996) ("It is well-established that an attorney's failure to pursue a meritless motion does not constitute deficient performance."). We therefore reject Tamms' contention that trial counsel's performance was deficient on this basis.

3. Trial Counsel was not Ineffective for Failing to Object to the Admission of Evidence Regarding Tamms' Filing of a Request to Commence a Paternity Action and the State's Request to Amend the Information to Comport with the Evidence at Trial.

¶19 Tamms' final argument pertains to the State's motion during trial to amend the charges to comport with evidence that Tamms' course of conduct continued through November 2002 when he took steps to commence a paternity action involving DiMotto's child.[6] Tamms contends that trial counsel was ineffective for failing to object to the motion to amend the charges and failing to object to the admission of the evidence underlying it.

¶20 At trial, the State questioned DiMotto regarding the impact that Tamms' conduct had on her emotional state. In recounting the fear caused by Tamm's phone call to her residence, DiMotto explained that she feared what Tamms would do to her or to her son. Elaborating on her fear for the safety of herself or her son, DiMotto testified to the notification of the paternity action filed by Tamms which indicated that he knew her child's date of birth and that he believed he had sexual relations with DiMotto in 1992. In fact, the two first had

[6] WISCONSIN STAT. § 971.29(2) governs the amendment of charges and provides:

> At the trial, the court may allow amendment of the complaint, indictment or information to conform to the proof where such amendment is not prejudicial to the defendant. After verdict the pleading shall be deemed amended to conform to the proof if no objection to the relevance of the evidence was timely raised upon the trial.

visual contact in mid-1993 and had never had intimate relations.[7] The filing of the paternity action caused DiMotto to "put even more safety on [her] son."

¶21 At the ***Machner*** hearing, trial counsel testified that he did not object to the amendment of the charges because the State was "completely within [its] rights to do that." Trial counsel stated that he was aware of the paternity action being filed, he could not state that it was a surprise, and did not want the State to refile the case. Following the ***Machner*** hearing, the trial court observed that the issue regarding the paternity of DiMotto's child was relevant to Tamms' motivation in driving by and calling DiMotto's residence, and thus admitted it into evidence at trial. Tamms' explanation for his conduct was that he was trying to resolve his questions regarding whether he was the child's father. In denying Tamms' postconviction motion, the court determined that the trial court deemed the amendment of the complaint to be appropriate and would have permitted it whether trial counsel had objected or not.

¶22 While Tamms contends on appeal that, had the objection been raised, the trial court would have had to find that Tamms would be prejudiced by the amendment of charges and would have denied the motion under WIS. STAT. § 971.29, he fails to allege what, if any, prejudice he suffered as a result of the amendment. Even absent the notice of a paternity filing, the State had sufficient evidence to support a conviction and had, in fact, filed its initial complaint absent any allegation regarding that specific conduct. We therefore conclude that Tamms

[7] Tamms additionally complains that the police suggested he file a paternity action to determine the status of his relationship to the child. However, the police officer's suggestion was premised upon false information provided by Tamms. As the State observes, only Tamms knew that his paternity claim was completely baseless.

has failed to demonstrate that there was a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. ***Strickland***, 466 U.S. at 694.

CONCLUSION

¶23 For the reasons stated above, we conclude that Tamms has failed to demonstrate that his trial counsel's performance was deficient or that the alleged deficiencies had an actual adverse effect on the defense resulting in prejudice. We therefore affirm the trial court's order denying his motion for postconviction relief based on ineffective assistance of counsel.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.