COURT OF APPEALS DECISION DATED AND FILED

January 22, 2003

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 02-0065-CR

Cir. Ct. No. 00-CF-24

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CORY L. BROWN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Forest County: ROBERT A. KENNEDY, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Cory L. Brown appeals a judgment convicting him of second-degree sexual assault by use of force contrary to WIS. STAT.

§ 940.225(2)(a).[1] Brown additionally appeals the order denying his postconviction motion. Brown argues his trial counsel was ineffective by: (1) failing to demand Brown's presence in the courtroom when the trial court responded to jury questions and gave a supplemental jury instruction; and (2) rejecting the trial court's offer of a mistrial after the jury indicated it was deadlocked. Brown also argues that he was denied his right to a fair trial and that a new trial should be granted in the interest of justice because there has been a miscarriage of justice and the real controversy was not fully tried. We reject Brown's arguments and affirm the judgment and order.

BACKGROUND

¶2 In April 2000, the State charged Brown with one count of second-degree sexual assault by the use or threat of force or violence and one count of intimidation of a victim, both counts as a habitual criminal. The complaint arose from allegations that Brown raped Corral F. and then attempted to prevent or dissuade Corral from making a report of the victimization to law enforcement officials.

¶3 At the jury trial, Corral testified that on the night of the sexual assault, she went to various taverns with Brown and two other friends—Carla Kalata and Candy Sears. After kissing each other a few times at the final bar of the evening, Corral invited Brown to her house to watch movies. At some point while watching the movie, Corral left the room and returned wearing her pajamas. Corral testified that she and Brown ultimately ended up lying on the couch

[1] All references to the Wisconsin Statutes are to the 1999-2000 version.

together and although they kissed, Corral rejected Brown's sexual advances. Corral further testified that after she rejected Brown's advances, he became forceful, holding her hands behind her head as he removed her clothing. Corral testified that although she tried to fight, Brown threatened to hit her. Following the sexual assault, Corral gave Brown a ride home. Brown testified at trial that he and Corral had consensual sex.

¶4 Ultimately, the jury found Brown guilty of second-degree sexual assault but acquitted him on the intimidation of a victim charge. Following a ***Machner***[2] hearing, the trial court denied Brown's postconviction motion for a new trial. This appeal follows.

ANALYSIS

I. Ineffective Assistance of Counsel

¶5 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 trial court's findings of fact will not be disturbed unless they are clearly erroneous. ***Id.*** However, the ultimate determination whether the attorney's performance falls below the constitutional minimum is a question of law that this court reviews independently. ***Id.***

¶6 Wisconsin employs a two-prong test to determine the validity of an ineffective assistance of counsel claim. ***Strickland v. Washington***, 466 U.S. 668, 694 (1984). To succeed on his claim, Brown must show both (1) that his

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

counsel's representation was deficient and (2) that this deficiency prejudiced him. ***Id.*** Further, we may reverse the order of the tests and avoid the deficient performance analysis altogether if the defendant has failed to show prejudice. ***Id.*** at 697.

¶7 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). 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.

A. Brown's absence in the courtroom during the trial court's response to jury questions and the supplemental jury instruction.

¶9 Brown initially argues that his trial counsel was ineffective by failing to demand Brown's presence in the courtroom when the trial court responded to jury questions and gave a supplemental jury instruction. During deliberations, the jury submitted three written questions regarding the evidence, to which the trial court responded in writing.[3] Brown has failed to show how he was prejudiced by his absence when the trial court responded to the jury's questions. Brown does not allege that the trial court's answers were factually incorrect or otherwise harmed his defense.

¶10 In addition to the jury's questions regarding evidentiary matters, the jury sent out three notes asking about the effect of being unable to agree on a verdict. The first note, sent after approximately two hours of deliberation, stated: "Having difficulty reaching a unanimous verdict – What do we do next?" In response to this question the court called the jury back into the courtroom and gave the following supplemental jury instruction:

> You jurors are as competent to decide the disputed issue of fact in this case as the next jury that may be called to determine such issues. You're not going to be made to agree. Nor are you going to be kept out until you do agree.

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[3] The first jury question asked if there was a statement from Nathan Kane, the lead investigator on the case, or a reason why he was not present at trial. The court answered: "There is a statement of Kane but it was ruled inadmissible by the Court. Nathan Kane refused to attend this trial, even though requested by [the district attorney]." Second, the jury asked about an exhibit's reference to a state crime lab report. The court answered: "The court deemed the crime lab report irrelevant because the defendant admitted to sexual intercourse. The crime lab report was silent on the issue of whether the clothing was worn that evening." The jury's final evidentiary inquiry questioned why Candy Sears was not called as a witness. The court simply responded that "[n]either attorney called her as a witness."

> It is your duty to make an honest and sincere attempt to arrive at a verdict. Jurors should not be obstinate. They should be open-minded. They should listen to the arguments of others and talk matters over freely and fairly. And make an honest effort to come to a conclusion of all the issues presented to them.
>
> You will now please retire again to the jury room.

WIS JI—CRIMINAL 520. After another hour, the jury sent another note stating: "We are still [at] a point where we do not all agree. Now what?" The trial court engaged in a colloquy with the jury foreperson that led the court to state that it would declare a mistrial, absent any objection. The mistrial offer was subsequently declined by defense counsel and the court read WIS JI—CRIMINAL 520 a second time. The court also sent a note stating: "A deadlocked jury can be declared a mistrial by the judge. This means the [S]tate can retry this case in the future with a new jury." This note was sent in response to the jury's inquiry: "What is meant by a mis-trial? What are the consequences of this?"

¶11 Again, Brown fails to establish how he was prejudiced by his absence when the court gave WIS JI—CRIMINAL 520 or responded, in writing, to the jury's inquiry regarding the meaning of a mistrial. Brown does not allege any factual or legal error in the instruction or the court's answers to the jury's questions. Because Brown cannot show that he was prejudiced by his absence during this portion of the jury's deliberation, we need not address the deficient performance analysis. ***Strickland***, 466 U.S. at 694.

B. Counsel's decision to reject the trial court's mistrial offer

¶12 Brown also claims that his trial counsel was ineffective for declining the court's offer to declare a mistrial without Brown being present and without

obtaining Brown's permission to refuse to seek a mistrial.[4] At the ***Machner*** hearing, trial counsel's testimony established that counsel's decision to reject the mistrial offer after approximately three-and-one-half hours of deliberating constituted sound strategy. Specifically, with respect to the jury's evidentiary questions, counsel testified that "it would be a reasonable interpretation that the jury was having trouble or had some troubles with the [S]tate's case." Because counsel's decision to reject the mistrial offer was based on a reasonable strategy, we conclude that counsel's actions did not constitute deficient performance. *See* ***Strickland***, 466 U.S. at 690.

¶13 In any event, Brown has failed to show how he was prejudiced by any claimed deficiency on the part of trial counsel. The jury ultimately acquitted Brown on the charge of intimidation of a victim. Brown cannot establish a reasonable probability that he would have been acquitted of both charges by a second jury. Because Brown has failed to establish either deficient performance or prejudice, we conclude that Brown was not denied the effective assistance of trial counsel and the trial court properly denied his postconviction motion for a new trial.[5]

[4] Although Brown additionally claims that counsel declined the mistrial offer without discussing the issue, it is undisputed that the record shows counsel discussed the mistrial offer with Brown.

[5] Brown additionally argues that he was denied the right to a fair trial when the trial court responded to jury questions and gave the supplemental instruction in his absence. Brown has waived this issue by failing to raise it before the trial court. As discussed above, Brown has failed to establish how he was prejudiced by his counsel's failure to secure Brown's presence in the courtroom during this portion of the jury's deliberation.

II. A New Trial in the Interest of Justice

¶14 Brown seeks a new trial under WIS. STAT. § 752.35, which permits us to grant relief if we are convinced "that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried." In order to establish that the real controversy has not been fully tried, Brown must convince us "that the jury was precluded from considering 'important testimony that bore on an important issue' or that certain evidence which was improperly received 'clouded a crucial issue' in the case." ***State v. Darcy N.K.***, 218 Wis. 2d 640, 667, 581 N.W.2d 567 (Ct. App. 1998) (quoting ***State v. Hicks***, 202 Wis. 2d 150, 160, 549 N.W.2d 435 (1996)). To establish a miscarriage of justice, Brown "must convince us 'there is a substantial degree of probability that a new trial would produce a different result.'" ***Darcy***, 218 Wis. 2d at 667 (quoting ***State v. Caban***, 210 Wis. 2d 597, 611, 563 N.W.2d 501 (1997)). An appellate court will exercise its discretion to grant a new trial in the interest of justice "only in exceptional cases." ***State v. Cuyler***, 110 Wis. 2d 133, 141, 327 N.W.2d 662 (1983).

¶15 As we discussed above, Brown has failed to establish that he was denied the effective assistance of counsel. Accordingly, we conclude there is no reason to exercise our discretionary authority under WIS. STAT. § 752.35 to grant Brown a new trial.

By the Court.—Judgment and order affirmed.

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