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DISTRICT II

November 4, 2020

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You are hereby notified that the Court has entered the following opinion and order:

2019AP1951-CR State of Wisconsin v. Quordalis V. Sanders (L.C. #2016CF294)
2019AP1952-CR State of Wisconsin v. Quordalis V. Sanders (L.C. #2016CF466)

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

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Quordalis Sanders appeals his judgments of conviction and from orders denying his postconviction motions. He contends that the circuit court erred in granting the State's motion to preclude him from testifying at his jury trial that some of his prior convictions were on appeal and that his trial counsel was ineffective for not objecting to the State's motion. Based upon our

review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2017-18).[1] We affirm.

Background

Sanders was charged with tampering with a GPS tracking device, criminal damage to property, and, in a separate complaint, failure to register as a sex offender, all as a repeater. The two cases were consolidated, and a jury trial was held.

Prior to Sanders' testimony at trial, the State moved the circuit court to preclude Sanders from testifying that he was in the process of appealing some of his fifteen prior convictions. Counsel for Sanders made no objection; however, Sanders stated, "I object." The court granted the State's motion.

Despite being warned in advance by the circuit court that if he denied being convicted of any criminal offenses the State would be permitted to identify the convictions by name, when asked by the State during his testimony whether he had ever been convicted of a crime, Sanders responded, "Legally, no." The State then proceeded to ask Sanders about each criminal offense of which he had been convicted, including numerous sexual offenses. When the State ticked through, by name, each of Sanders' prior convictions, asking Sanders if he had ever been convicted of the particular offense, Sanders again responded, "Legally, no." After the prosecutor finished this questioning, Sanders blurted out, "Tell what you been convicted of." Following discussion between the court and the parties on the State's subsequent, related request that

[1] All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

Sanders be found in contempt for making this statement, Sanders interrupted the court's ruling on the motion with "I ain't in contempt." Despite expressing that Sanders' statement to the prosecutor was "highly inappropriate" and "offensive," the court chose to merely admonish Sanders and continue with the trial rather than "fine or jail him." The court further cautioned Sanders against any additional "outbursts or … expression of disrespect to any of the attorneys." Following Sanders' testimony, the State presented rebuttal evidence confirming all of Sanders' prior convictions.

Sanders was convicted on all three charges. Following sentencing, he filed motions for postconviction relief, which the circuit court denied.

Discussion

Sanders raises three potential avenues for relief on appeal. He first claims that he did not waive an objection to the State's motion to preclude him from testifying regarding the appellate status of any of his prior convictions because even though his counsel raised no objection, he himself did. This goes nowhere.

To begin, as the State points out, Sanders forfeited this issue by not raising it before the circuit court in his postconviction motion. ***State v. Caban***, 210 Wis. 2d 597, 604, 563 N.W.2d 501 (1997) ("The general rule is that issues not presented to the circuit court will not be considered for the first time on appeal."). Moreover, as the State further notes, Sanders had "no authority to object" because "[a] represented defendant cannot raise objections pro se; instead, he must raise objections through his attorney if at all." This is correct, *see* ***State v. Wanta***, 224 Wis. 2d 679, 699, 592 N.W.2d 645 (Ct. App. 1999); ***State v. Williams***, 2004 WI App 56, ¶38 n.4, 270 Wis. 2d 761, 677 N.W.2d 691, and thus no objection to the State's motion was made by

the defendant, and we review this issue under the rubric of ineffective assistance of counsel, Sanders' second potential avenue for relief.

Sanders claims his counsel provided him ineffective assistance by not objecting to the State's motion. Ineffective assistance of counsel requires that the defendant establish both that counsel's performance was deficient and that the deficient performance prejudiced the defendant. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient performance, the defendant must show that counsel's performance fell below an objective standard of reasonableness. ***State v. Thiel***, 2003 WI 111, ¶¶18-19, 264 Wis. 2d 571, 665 N.W.2d 305. To prove prejudice, the defendant must "show the performance was prejudicial, which is defined as 'a reasonable probability that, but for counsel's error, the result of the proceeding would have been different.'" ***State v. Allen***, 2004 WI 106, ¶26, 274 Wis. 2d 568, 682 N.W.2d 433 (citation omitted). "It is not sufficient for the defendant to show that his [or her] counsel's errors 'had some conceivable effect on the outcome of the proceeding.'" ***State v. Domke***, 2011 WI 95, ¶54, 337 Wis. 2d 268, 805 N.W.2d 364 (quoting ***State v. Carter***, 2010 WI 40, ¶37, 324 Wis. 2d 640, 782 N.W.2d 695). We conclude that Sanders has failed to demonstrate either deficient performance or prejudice.

Where counsel takes or fails to take a specific action at trial for reasonable strategic reasons, such choice is "virtually unassailable," will not amount to deficient performance, and results in the failure of the defendant's ineffective assistance of counsel claim. *See* ***State v. Sholar***, 2018 WI 53, ¶54, 381 Wis. 2d 560, 912 N.W.2d 89. That is the case here.

At the evidentiary hearing on Sanders' postconviction motion, his trial counsel testified that he intentionally declined to object, for strategic reasons, to the State's motion to preclude

Sanders from testifying regarding the appellate status of his prior convictions. One of the reasons was because

> Mr. Sanders wanted to get up to the jury and argue that he shouldn't be under a sex offender reporting [order] for a variety of legal reasons and he wanted to walk through with the jury what he was going to argue on appeal.
>
> I felt that if he went down that road, he would be demonstrating to the jury quite clearly that he understood what the order was, that he was under the order, and all the legal reasons why he felt that that order shouldn't be applied to him. So I thought that … allowing him to go through that exercise would have doubled down on the idea that he understood that he was under the order; he just didn't like it.

Counsel also explained that:

> There was no doubt in my mind that if given the opportunity he would go in any direction, and I couldn't tell you which one it would be. He was a totally unpredictable client and demonstrated that time and time again during this trial in front of the jury that he was totally unpredictable in what he would say and how he would say it.

The circuit court found that counsel declined to object to the State's motion for reasonable strategic reasons, including that Sanders "show[ed] routinely that he is unpredictable."

We agree with the circuit court that Sanders failed to demonstrate that his trial counsel performed deficiently in declining to object to the State's motion. Through his direct-examination questioning of Sanders regarding the failure to register as a sex offender charge, counsel tried to show to the jury that Sanders did not understand any of the sex offender reporting-requirement paperwork that he had signed. Allowing Sanders to testify, potentially regarding an appeal of his earlier 2008 conviction for failure to register as a sex offender, would have undermined counsel's strategy by, as counsel stated it at the postconviction hearing, "demonstrating to the jury quite clearly that he understood what the [sex offender registration

requirement] order was, that he was under the order," and "that he understood that he was under the order; he just didn't like it." Furthermore, counsel and the court are correct that Sanders demonstrated before the jury that he was a very uncooperative and unpredictable person and that the risk was high that if Sanders was allowed to begin testifying regarding the appellate status of his prior convictions, it could have been harmful to the defense. Counsel reasonably chose to refrain from objecting to the State's motion.

Sanders also has not met his burden to demonstrate a reasonable probability of a different result at the trial if he had been permitted to testify regarding the appellate status of his prior convictions. First, he fails to sufficiently develop an argument to show that he was prejudiced. *See* ***Clean Wis., Inc. v. PSC***, 2005 WI 93, ¶180 n.40, 282 Wis. 2d 250, 700 N.W.2d 768 ("We will not address undeveloped arguments."). Moreover, we conclude he was not prejudiced for the reasons explained below related to our harmless error analysis.

In his third potential avenue for relief, Sanders contends he should be given a new trial because the circuit court committed plain error in precluding him from testifying that he was in the process of appealing some of his prior convictions. Sanders points to WIS. STAT. § 906.09(5), which provides: "The pendency of an appeal [from a conviction] does not render evidence of a conviction … inadmissible. Evidence of the pendency of an appeal is admissible."

The "plain error" doctrine "allows appellate courts to review errors that were otherwise forfeited by a party's failure to object." ***State v. Miller***, 2012 WI App 68, ¶18, 341 Wis. 2d 737, 816 N.W.2d 331. As we have stated:

> Plain error is "error so fundamental that a new trial or other relief must be granted even though the action was not objected to at the time." The error, however, must be "obvious and substantial," and

> courts should use the plain error doctrine sparingly. There is no bright-line rule for what constitutes plain error. Rather, the existence of plain error will turn on the facts of the particular case.

Id. (citations omitted). The defendant bears the burden in the first instance to "show[] that the unobjected to error is fundamental, obvious, and substantial." ***State v. Jorgensen***, 2008 WI 60, ¶23, 310 Wis. 2d 138, 754 N.W.2d 77. This court independently reviews the record to determine if a new trial is warranted due to plain error. ***State v. Mayo***, 2007 WI 78, ¶28, 301 Wis. 2d 642, 734 N.W.2d 115.

Here, the record is clear that trial counsel did not "fail[] to object"; rather, he intentionally and strategically chose not to object. ***Miller***, 341 Wis. 2d 737, ¶18. As we stated in ***Miller***, the plain error doctrine should be used "sparingly." ***Id.*** Where there is no dispute that counsel made a strategic decision fully contemplating the challenged issue, the lack of an objection should be reviewed under ineffective assistance of counsel, rather than employing the plain error doctrine. Moreover, Sanders fails to develop a sufficient argument to demonstrate that counsel's decision not to object to the State's trial motion was fundamental, obvious, and substantial. Furthermore, for the reasons addressed in our harmless error anaylsis below, we conclude that the court's preclusion of Sanders from testifying as to his appeals of prior convictions was not "substantial."

Lastly, we conclude that even if there was error by the circuit court in precluding Sanders from testifying that he was in the process of appealing some of his prior convictions, such error was harmless. The evidence of Sanders' guilt as to each of the charges was overwhelming, and testimony by Sanders that any particular prior conviction was on appeal would have added almost nothing to his defense. This is particularly so because when the State ticked through each individual prior conviction by name and asked Sanders whether he had been convicted of each

offense, Sanders responded, "Legally, no" as to each identified offense. Sanders' credibility was thoroughly undermined when the State subsequently put a witness on the stand who confirmed that Sanders had in fact been convicted of those crimes.

Furthermore, any potential boost to his credibility would not have aided him as he provided almost no substantive testimony of any assistance to his defense. The only potentially helpful testimony Sanders gave was the following relating to the charge of failing to comply with sex offender registration requirements despite Sanders having signed a document informing him of such requirements.

> [Counsel]: Did she [(Sanders' Department of Corrections sex offender agent)] tell you that you had to sign the paperwork or you would go to jail?
>
> [Sanders]: That's what she told me. That's what she testified to.
>
> ….
>
> [Counsel]: Did you read what you were signing?
>
> [Sanders]: No, not really.
>
> [Counsel]: Okay. Did you understand that you were signing anything that required you to report as a sex offender under the law?
>
> [Sanders]: No.

This testimony of Sanders, however, was followed up with the following exchange. Counsel asked: "Did she read to you anything from [the] sex offender registration paperwork that told you of the requirements of the law under [WIS. STAT. §] 301.45?" Sanders responded, "She blabbers what she wanted to. We didn't have to go through all that." When asked if he "den[ied] refusing to register under [§] 301.45 as a sex offender," Sanders responded with, "I have no answer to that. I assert my Fifth Amendment right." When asked if he "den[ied]

tampering with or cutting off or damaging in any way a GPS device that was given" to him, Sanders responded, "I have no answer. I assert my Fifth Amendment right, to provide no evidence against me."

Additionally, by the time Sanders would have testified that he was in the process of appealing any particular conviction, it would have been unmistakably clear to the jury that Sanders was confrontational with those involved in the legal process. Because of this and his "Legally, no" answers, the jury would not have been surprised to learn that Sanders had appealed any or all of his prior convictions.

For all of the reasons stated, had Sanders been permitted to testify that any of his prior convictions were on appeal, such testimony would not have aided him. We are convinced beyond a reasonable doubt that the jury verdicts would have been the same.

Therefore,

IT IS HEREBY ORDERED that the judgments and orders are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals