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DISTRICT II

June 22, 2022

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

2021AP666-CR

State of Wisconsin v. Joseph G. Deegan (L.C. #2014CF1639)

Before Gundrum, P.J., Grogan and Kornblum, JJ.

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).

Joseph G. Deegan appeals from a judgment convicting him of second-degree sexual assault of a child after a jury trial and from a circuit court order denying his motion for a new trial due to ineffective assistance of trial counsel because counsel failed to call his supervisor as a witness at trial. 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 (2019-20). We conclude that Deegan cannot show ineffective assistance of counsel because trial counsel's decision to forego the supervisor's testimony was a reasonable trial strategy and not deficient performance. We affirm.

The jury convicted Deegan of sexually assaulting the fourteen-year-old victim after they met at a county fair. At trial, the defense highlighted the inconsistencies in the victim's various renditions of the details surrounding the assault. The closing arguments focused on the victim's credibility. Postconviction, Deegan claimed his trial counsel was ineffective for failing to call his supervisor as a trial witness because his supervisor would have rebutted the victim's testimony and challenged her credibility.

At the evidentiary hearing on Deegan's postconviction motion, trial counsel, the supervisor, and Deegan testified. Trial counsel testified that after Deegan identified his supervisor to counsel as a helpful witness, counsel interviewed the supervisor. Counsel understood the following about the supervisor's involvement: Deegan called his supervisor on the night the assault allegedly occurred, the supervisor picked up Deegan and the victim, took them to his property, and took the victim home the next morning. In explaining why she decided not to call the supervisor as a witness, trial counsel stated:

Well, for one thing in the conversation that I had with [the supervisor], he did not seem like he would be a controllable witness. In terms of he has a tendency to when asked a simple question kind of run off at the mouth and offer all kinds of information that actually might be harmful to the situation. I know that I actually talked to Mr. Deegan about that. In fact, I said, you know, I have concerns, he volunteers a lot of information. Mr. Deegan commented, yeah, he's a talker.

So we had talked about it several times as to whether or not we wanted to call [the supervisor] and ultimately determined—I was more concerned that it would be a detriment to our case than that it would be good for our case.

In addition to counsel's concern that the supervisor would not be a controllable witness, counsel was also concerned that the supervisor's testimony could undermine her trial strategy. Counsel's trial strategy was to "pin the State and the victim down to the surest anchor we had,

which was [that the assault occurred on] the last night of the fair.” Counsel concluded that the supervisor could not say on which night he picked up the victim and Deegan, which was at odds with her trial strategy relating to when the assault occurred. In addition, counsel understood matters the supervisor volunteered in the context of other information she had about the case, including Deegan’s revelation to her that he had other contacts with the victim during the fair, which, if revealed, could have led to a conviction. Counsel believed that there were enough inconsistencies in the evidence, including the victim’s various statements, to provide a defense and that whatever would be helpful about the supervisor’s testimony could be achieved in other ways without running the risk that the supervisor would say something detrimental during his testimony. Counsel told Deegan of her concerns about his supervisor, and she consulted with him about whether his supervisor should testify. After evaluating the evidence adduced at trial, counsel determined that she would not call the supervisor to testify.

The supervisor testified that Deegan accompanied him and others to the county fair, and he saw the victim at the fair. He observed the victim “hanging all over” Deegan. He left the fair without Deegan, and he later received a call from Deegan who reported that there was “a bad situation here,” and asked the supervisor to pick him up. The supervisor picked up Deegan and the victim. The supervisor stated that he told trial counsel the information to which he testified at the evidentiary hearing.

Deegan testified that he wanted trial counsel to present his supervisor’s testimony at trial, and he never agreed to forego that testimony.

The circuit court made the following findings. The particular night of the fair on which the assault occurred was important to the defense, as trial counsel had testified, but the

supervisor could not say on which night of the fair he picked up Deegan and the victim. The court inferred that the detrimental information possessed by counsel could have led to a conviction if it were revealed at trial. In line with her trial strategy to limit what the jury heard, counsel excluded the supervisor because he had volunteered unhelpful information during her interview of him and would be uncontrollable during his testimony. Counsel's statement that she consulted with Deegan about his supervisor's testimony was more credible than Deegan's claim that they did not discuss it. After discussing it with Deegan and evaluating the defense's ability to highlight inconsistencies in the evidence, counsel released the supervisor from his subpoena. The court concluded that counsel did not perform deficiently because she made a decision of trial strategy not to have the supervisor testify. Deegan appeals.

To succeed on an ineffective assistance of counsel claim, a defendant must demonstrate that counsel was ineffective, i.e., that counsel's performance was deficient and that the deficient performance prejudiced the defendant. *State v. Jeannie M.P.*, 2005 WI App 183, ¶6, 286 Wis.2d 721, 703 N.W.2d 694. Both deficient performance and prejudice present mixed questions of fact and law. *Id.* We will uphold the circuit court's factual findings unless they are clearly erroneous. We review de novo whether counsel's performance was deficient or prejudicial. *Id.*

"Trial strategy is afforded the presumption of constitutional adequacy." *State v. Breitzman*, 2017 WI 100, ¶65, 378 Wis. 2d 431, 904 N.W.2d 93. In evaluating counsel's performance, we are highly deferential to counsel's strategic decisions. *State v. Balliette*, 2011 WI 79, ¶26, 336 Wis. 2d 358, 805 N.W.2d 334. "A strategic trial decision rationally based on the facts and the law will not support a claim of ineffective assistance of counsel." *State v. Elm*, 201 Wis. 2d 452, 464-65, 549 N.W.2d 471 (Ct. App. 1996). We "will not second-guess a

reasonable trial strategy, but . . . may conclude that an attorney’s performance was deficient if it was based on an ‘irrational trial tactic’ or ‘based upon caprice rather than upon judgment.’” *State v. Domke*, 2011 WI 95, ¶49, 337 Wis. 2d 268, 805 N.W.2d 364 (citation omitted).

At the postconviction motion hearing, the circuit court. was “the ultimate arbiter of the credibility of the witnesses and the weight to be given to each witness’s testimony.” *State v. Peppertree Resort Villas, Inc.*, 2002 WI App 207, ¶19, 257 Wis. 2d 421, 651 N.W.2d 345. The circuit court’s conclusion that trial counsel did not perform deficiently is rooted in the circuit court’s credibility determinations, and we accept those determinations. *State v. Quarzenski*, 2007 WI App 212, ¶19, 305 Wis. 2d 525, 739 N.W.2d 844.

Deegan argues that trial counsel’s strategic decision to exclude his supervisor from trial was not reasonable. In so arguing, Deegan focuses on the evidence the supervisor might have provided at trial. However, the circuit court found that counsel was primarily concerned about evidence the supervisor might have blurted out at trial. Moreover, Deegan does not show that the following circuit court findings are clearly erroneous: trial counsel determined that the supervisor would not be controllable and could divulge information harmful to the defense, counsel’s concerns about the supervisor as a witness were never allayed, and counsel consulted with Deegan about foregoing the supervisor’s testimony in line with counsel’s assessment of the risks and benefits of that testimony. The circuit court’s findings do not support a determination that trial counsel’s strategy was irrational or capricious. *See Domke*, 337 Wis. 2d 268, ¶49.

The circuit court applied the proper legal standard to Deegan's ineffective assistance of trial counsel claim. We agree with the circuit court that trial counsel's strategic decision was not a deficient performance. Deegan's ineffective assistance of trial counsel claim fails.¹

Upon the foregoing reasons,

IT IS ORDERED that the judgment and order of the circuit court are summarily affirmed pursuant to WIS. STAT. RULE 809.21 (2019-20).

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

Sheila T. Reiff
Clerk of Court of Appeals

¹ In the absence of deficient performance, we need not consider whether trial counsel's performance was prejudicial. See *State v. Mayo*, 2007 WI 78, ¶61, 301 Wis. 2d 642, 734 N.W.2d 115.