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DISTRICT IV

October 31, 2024

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

2023AP982-CR

State of Wisconsin v. Paul M. Carter (L.C. # 2020CF189)

Before Blanchard, Nashold, and Taylor, 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).

Paul M. Carter appeals from a judgment of conviction and an order denying his postconviction motion for a new 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 (2021-22).¹ We summarily affirm.

Carter was convicted, following a jury trial, of first-degree intentional homicide for the death of a 20-year-old woman who had cerebral palsy and a seizure disorder. The victim, A.B.,

¹ All references to the Wisconsin Statutes are to the 2021-22 version.

was the daughter of Carter's fiancée, C.D.² Carter was sentenced to life in prison without eligibility for extended supervision.

Carter was represented at trial by two attorneys who served as co-counsel. Following sentencing, Carter filed a postconviction motion for a new trial in which he argued that his trial attorneys rendered ineffective assistance of counsel in two respects. First, Carter argued that his trial attorneys were constitutionally ineffective when they impugned Carter's character during opening statements and closing arguments "by describing him as unlikeable, a jerk, a grifter, immoral, a philanderer, dishonest, a mooch and a cheater." Second, Carter argued that it was also ineffective for one of his trial attorneys, in cross-examining C.D. at trial, to ask questions that opened the door for the State to introduce specific evidence of C.D.'s claims of Carter's past domestic abuse of C.D.

We now provide background regarding the second of these two arguments. C.D. testified during direct examination in general terms that she was afraid of Carter because he had abused her in the past, consistent with a pretrial order allowing such testimony but barring reference to specific acts of alleged abuse. During C.D.'s cross-examination, trial counsel elicited more detailed testimony from C.D. about specific incidents of alleged abuse. Counsel asked C.D. about being interviewed by police in 2020, when C.D. was at the hospital with A.B. for treatment of injuries that A.B. had sustained at the time. C.D. admitted on cross-examination that, while at the hospital, she was observed to have a fat lip, but that she told police at the time that she had no memory of being hit by Carter. In response to further cross-examination, C.D. testified that she

² For purposes of this opinion, we refer to the victim and her mother by initials that do not correspond to their actual names. *See* WIS. STAT. RULE 809.86(4), WIS. STAT. § 950.02(4)(a)4.a.

did in fact recall being struck by Carter, but that she was “scared” at the time of the police interview in the hospital, apparently meaning that she was then afraid to tell police the truth about why she had a fat lip. Trial counsel also elicited testimony from C.D. about a separate police interview in which she said that Carter had pushed her more than once.

During a break in the trial, the State argued that, consistent with the circuit court’s pretrial ruling about prior bad acts evidence, because trial counsel had asked C.D. multiple questions about alleged prior domestic abuse that went beyond her general fear of Carter, the State should be allowed to explore prior acts in its redirect examination of C.D. The court ruled that the defense had opened the door to other acts evidence, and said that it would “allow the State to go into some further details of specifics on the other acts.” On redirect examination, the State elicited testimony from C.D. that Carter once pushed her onto the floor, causing her to strike a microwave; that Carter would sometimes pull back his fist as if to hit her but would then push her; that Carter became violent when he drank; and that she ultimately obtained an injunction against him.

The circuit court held an evidentiary hearing on Carter’s postconviction motion pursuant to *State v. Machner*, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). Katena Roberts-Turner and Gavin Grubofski, the two attorneys who represented Carter at trial, each testified at the *Machner* hearing. Grubofski testified that he referred to Carter as “unlikeable” during his opening statement at trial because he wanted to “soften the blow to unfavorable information” that he was expecting to come in at trial. Roberts-Turner, who delivered the defense’s closing argument, testified that she mentioned Carter’s negative characteristics because “a lot of evidence was presented that reflected negatively” on Carter, and she made the assessment that it was important to point out to the jury “that someone who could be characterized as perhaps a

philanderer, an unfaithful boyfriend, someone who was a mooch, doesn't mean that they're a murderer." Roberts-Turner testified that she made a conscious choice to open the door for the State to introduce evidence regarding C.D.'s specific claims of past domestic abuse, because "it was my opinion that strategically speaking it would be more advantageous for us to allow the State to bring up those [specific instances of alleged prior abuse] in order to get the benefit of being able to further impeach" C.D.'s credibility. This was the goal, Roberts-Turner testified, because she believed that she could show that C.D. "lied about" the prior alleged incidents.

In an oral ruling, the circuit court determined that, given the facts and circumstances surrounding the case, it was not an unreasonable trial strategy for trial counsel to make negative statements about Carter's character or to open the door to prior specific acts of domestic violence. The court concluded that, in each instance, counsel's conduct did not constitute deficient performance. The court then entered an order denying Carter's postconviction motion. Carter appeals.

The analytical framework for assessing the merits of a defendant's claim of ineffective assistance of counsel is settled. To sustain a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient, and that counsel's errors were prejudicial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). A court need not address both components of this inquiry if the defendant does not make a sufficient showing on one. *See id.* at 697.

We will assume, without deciding the issue, that Carter's trial attorneys performed deficiently both when they impugned Carter's character and also when they opened the door for the admission of Carter's alleged prior acts of domestic violence. Therefore, the first prong is

assumed to be satisfied, and we turn to the second prong to look for prejudice. *State v. Maday*, 2017 WI 28, ¶57, 374 Wis. 2d 164, 892 N.W.2d 611.

With respect to the prejudice component of the test for ineffective assistance of counsel, “[t]he defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694. When determining if counsel’s deficiency undermines confidence in the outcome of the trial and amounts to prejudice, “a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury.” *Id.* at 695.

Carter argues on appeal that he was prejudiced by his trial attorneys’ deficient performances. He asserts that, because his attorneys impugned his character in the opening statement and closing argument, the jury necessarily would have felt revulsion toward him. Carter further argues that, as a result of his counsel opening the door for the State to explore prior acts, the jury ended up hearing about acts of domestic violence that otherwise would have been inadmissible. In addition to claiming prejudice resulting from these two types of deficient performance individually, Carter argues that he was prejudiced by the cumulative effect of his counsel’s deficiencies.

In support of his prejudice argument, Carter relies on *State v. Coleman*, 2015 WI App 38, ¶41, 362 Wis. 2d 447, 865 N.W.2d 190. In *Coleman*, defense counsel had, among other alleged errors, informed the jury during voir dire that his client had been convicted of a crime in the past. *Id.*, ¶4. Defense counsel also said during his opening statement that Coleman had spent time in prison and was “not an angel.” *Id.*, ¶5. This court concluded that the cumulative effect of

defense counsel's deficiencies was prejudicial to the defense, and granted Coleman a new trial. *Id.*, ¶¶40, 47. Carter argues that he, too, should be granted a new trial. Carter asserts that the conduct of Roberts-Turner during her closing arguments, including calling Carter a “jerk” and “philanderer” who “is basically grifting off of the women in his life,” was more extensive and damaging than counsel's conduct in *Coleman*.

We disagree. In *Coleman*, defense counsel volunteered negative information about Coleman's criminal history during voir dire that would not otherwise have come before the jury because Coleman did not testify. By contrast, when Roberts-Turner made negative comments about Carter during her closing argument, those comments were based on facts already in evidence. The jury already knew from C.D.'s testimony that C.D. supported Carter financially and that she was the only one in the home who worked. The evidence presented at trial also showed that Carter continued to date other women while he and C.D. were together.

As to the opening statement at Carter's trial, Carter asserts only that Grubofski disparaged him by describing him as “unlikeable.” Carter does present any developed argument as to how Grubofski's description of him as “unlikeable” prejudiced his defense. However, given that Grubofski immediately couched his “unlikeable” comment with the unequivocal statement that Carter “is not a murderer,” we fail to see how Carter could prove that he was prejudiced, particularly in light of the strong evidence of Carter's guilt, which we discuss further below.

We also note that Carter leaves out significant key facts in his discussion of *Coleman*. Carter fails to mention that, in *Coleman*, defense counsel misrepresented to the jury in his opening statement that Coleman was going to testify. Coleman's counsel stated, ““Mr. Coleman

will testify because he has to testify here from my point of view. It's my call to make as a defense attorney.'" *Id.*, ¶5. Coleman did not in fact testify at trial. *Id.*, ¶6. Later, at a *Machner* hearing, Coleman's counsel admitted that the decision of whether Coleman testified was not counsel's decision to make. *Id.*, ¶29. Coleman's counsel also admitted that, at the time of voir dire, he knew that Coleman did not want to testify. *Id.*, ¶28. On appeal, this court concluded that "[c]ounsel unambiguously and knowingly misstated the law to the jury" regarding counsel's authority and the right to testify or remain silent. *Id.*, ¶31. Counsel's misstatement of law, as well as counsel's failure to elicit impeachment evidence to challenge the credibility of the main complaining witnesses in *Coleman*, weighed into this court's conclusion that the cumulative effect of counsel's multiple deficiencies undermined confidence in the conviction. *Id.*, ¶46. In contrast, here, Carter does not allege that his counsel made any misstatement of law, promised the jury incorrectly that Carter would testify, or failed to elicit important impeachment evidence.

In the short section of his appellant's brief devoted to the prejudice prong of the *Strickland* test, Carter fails to come to grips with the strength of the evidence against him, which we will describe in more detail below. *Strickland*, 466 U.S. at 687. We are not persuaded that, absent either of trial counsel's alleged deficiencies, there is a reasonable probability that the result of Carter's trial would have been different, or that the deficiencies collectively created such a reasonable probability. That is, even if Carter's trial attorneys had pursued different strategies on each of these issues, it would not change the overwhelming evidence that proved Carter's responsibility for A.B.'s death.

The evidence showed that, in December 2019, Carter moved in with C.D. and her two daughters, both of whom had cerebral palsy and a seizure disorder. C.D. testified that, on the evening of January 17, 2020, she fed A.B. via a feeding tube, gave her a shower, and put her into

bed with the bed railings up. C.D. then helped her other daughter bathe and tucked her into bed. C.D. herself then took a bath. C.D. testified that, after bathing, she went and watched television with Carter and they also played games on their phones. C.D. went to check on A.B. ten to twenty minutes later and found her in medical distress with foam coming out of her mouth. C.D. told Carter to call 911 and he did so. Attempts by emergency personnel to revive A.B. were unsuccessful. The deputy coroner arrived at the home and pronounced A.B. deceased.

A forensic pathologist, Dr. Michael Stier, conducted an autopsy after A.B.'s death. Stier testified at trial that the cause of A.B.'s death was blunt physical trauma to the head and neck. After preliminary results of the autopsy were available, police interviewed Carter on January 20, 2020. Carter initially denied that he had any involvement in A.B.'s death. Carter stated that he never touched A.B. that night and that he was never alone with her.

A few days later, in another interview with police, Carter apologized for not being honest initially and said that he wanted to come clean. He then stated the following. On the night A.B. died, he went to get a beer from the kitchen while C.D. was taking a bath. On the way back to his and C.D.'s bedroom, he stopped in to check on A.B. While in the bedroom, he grabbed A.B.'s arm to reposition her in the bed and, while he was doing that, A.B. fell out of bed onto the floor and possibly struck her head on a medical device stand next to the bed. A.B. hit the floor and made a gasping sound. Carter picked her up and put her back into the bed, at which point A.B. made another gasping sound. About twenty minutes later, C.D. found A.B. in medical distress.

C.D. testified at trial that Carter told her, before he gave this last statement to police, that he thought he had seen A.B. take her last breath, and that he should perhaps go to the authorities or talk to somebody like a priest.

Trial testimony from the State's expert, Stier, contradicted Carter's statement that A.B. fell out of bed. Stier testified that A.B.'s injuries were not consistent with injuries from a fall. Rather, Stier testified that his autopsy findings showed that A.B. had been struck in the head multiple times. Stier opined that A.B. had bruising all over her scalp, as well as a severe impact injury to the top of the head that could not have been sustained in a fall. Stier described A.B.'s brain injuries among the worst he had seen in his career, which had included more than 4,000 autopsies.

C.D. testified at trial that Carter told her that he did not want C.D. to allow an autopsy to be performed on A.B. because he did not want A.B.'s head to be cut open. The evidence at trial also revealed that Carter had admitted both to C.D. and to law enforcement that he had hit A.B. in the face before the night she died. This admission was corroborated by physical evidence. After Carter moved into C.D.'s home in December 2019, A.B.'s caregivers noticed injuries on A.B.'s face. C.D. testified that she believed Carter had been abusing A.B. and that he had killed her.

The evidence presented at trial showed that Carter had the opportunity to kill A.B. According to the uncontroverted testimony, Carter was the only person who admitted to having seen A.B. in the time between when C.D. put A.B. to bed and then found her in medical distress later that evening. Both C.D. and Carter agree that C.D. was taking a bath at the time that Carter claims to have gone to check on A.B. after getting a beer. Further, the jury could credit Carter's

admissions that he had hit A.B. in the head in the past and that he might have seen her take her last breath.

In light of the totality of the evidence presented, we are not persuaded that there is a reasonable probability that the outcome would have been different if Carter's trial counsel had not elected to impugn Carter's character in opening and closing statements and to open the door to C.D.'s specific allegations of past domestic abuse. Because Carter has failed to show that he was prejudiced by his counsel's alleged errors, he cannot prevail on his claims of ineffective assistance of counsel.

IT IS ORDERED that the judgment and order are summarily affirmed under WIS. STAT. RULE 809.21(1).

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

Samuel A. Christensen
Clerk of Court of Appeals