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DISTRICT II

May 28, 2025

To:

Hon. Daniel J. Borowski
Circuit Court Judge
Electronic Notice

Angela Dawn Chodak
Electronic Notice

Chris Koenig
Clerk of Circuit Court
Sheboygan County Courthouse
Electronic Notice

Anne Christenson Murphy
Electronic Notice

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

2023AP1356-CR

State of Wisconsin v. Bernell Edward Kelly (L.C. #2020CF578)

Before Gundrum, P.J., Neubauer, and Lazar, 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).

Bernell Edward Kelly appeals from a judgment of conviction and an order denying his motion for a new trial. Kelly argues that he received ineffective assistance because his trial counsel did not attempt to cross-examine a witness about the time of day the attack occurred. 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 (2023-24).¹ We affirm.

¹ All references to the Wisconsin Statutes are to the 2023-24 version.

After a jury trial, Kelly was convicted of seven counts: strangulation and suffocation, battery, disorderly conduct, intimidating a victim, and three counts of contempt of court, all charged as a repeater and the first four crimes charged as counts of domestic abuse. Kelly filed a postconviction motion seeking a new trial on three of the counts, which stem from his attack on Theresa.² He argued that he received ineffective assistance of trial counsel. After an evidentiary hearing, the circuit court denied the motion.

To prove a claim of ineffective assistance of counsel, a defendant must meet a two-pronged test: (1) that his lawyer performed deficiently, and (2) that this deficient performance prejudiced him. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). The test for deficient performance is whether “counsel’s representation fell below an objective standard of reasonableness.” *Id.* at 688. To show 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. “Such a probability ‘exists when there is a substantial, not just conceivable likelihood of a different result.’” *State v. Stroik*, 2022 WI App 11, ¶28, 401 Wis.2d 150, 170, 972 N.W.2d 640 (citation omitted). A claim of ineffective assistance of counsel fails if the defendant does not establish either prong of this test. *Strickland*, 466 U.S. at 697.

Kelly argues that he received ineffective assistance because his counsel did not cross-examine Antoine Leverett, who was the only eyewitness, about whether Leverett saw Kelly strangle Theresa in the morning or in the evening. In his initial police interview, Leverett stated

² This matter involves the victim of a crime. Pursuant to WIS. STAT. RULE 809.86(4), we use a pseudonym instead of the victim’s name.

that the assault occurred in the evening when he was playing cards at Kelly's residence. However, Leverett testified at trial that Kelly attacked Theresa in the morning. Kelly argues that this discrepancy was important because Leverett was the only witness to place him at the scene as Theresa did not testify.

Assuming for the sake of argument that counsel's failure to cross-examine Leverett constituted deficient performance—an issue we do not decide—Kelly cannot show that he was prejudiced. There is not a substantial likelihood that, but for counsel's alleged unprofessional error, Kelly would not have been convicted based on the evidence adduced at trial.

Leverett recounted in vivid detail Kelly's assault on Theresa. He said that he, Kelly, Theresa, and another friend were together when Theresa told Kelly she was in love with someone else. According to Leverett, Kelly threatened to kill Theresa, seized her by the throat, and shoved her onto a couch while choking her. Kelly then ordered everyone to leave. As Leverett and the other friend stepped outside, they heard Theresa shout, "If you leave me, he'll kill me!" Her screams were so loud they carried beyond the house. Leverett and his companion left the scene when they heard approaching police sirens.

Leverett also described a later confrontation, several weeks after the strangulation, on the night Kelly was arrested. He testified that Kelly again threatened to kill Theresa; she was crying and appeared terrified.

Theresa's mother testified that she and her daughter spoke daily. Theresa had complained to her about Kelly's physical abuse, and the mother had seen strangulation marks on Theresa's neck that resembled finger impressions from two hands. She also noticed that Theresa's voice was faint and hoarse.

Officer Jonathan Smith detailed his investigation of Theresa's allegations and reviewed 30 recorded jail phone calls in which Kelly tried to persuade Theresa to recant. The jury heard recordings of Kelly repeatedly intimidating Theresa and urging her to tell police he had never strangled her.

Two police officers recounted prior domestic abuse incidents between Kelly and Theresa. Officer Jonathan Schnabel testified about a domestic-abuse incident involving Kelly and Theresa in 2015. Officer Melanie McCarthy described another domestic-abuse incident between the couple in 2017.

Kelly had to show that there was a reasonable probability that, had his trial counsel attempted to impeach Leverett about the time of day the strangulation occurred, the jury would have acquitted him of the charges. Based on Leverett's eyewitness testimony, Theresa's mother's testimony about the marks she saw on her daughter's neck, and the evidence of Kelly's pattern of domestic abuse of Theresa over the years, Kelly has not made this showing. We agree with the State that:

impeaching Leverett on the discrepancy between whether he saw Kelly strangle Theresa in the morning or at night would not have detracted from his otherwise consistent and graphic testimony about seeing Kelly strangling Theresa, pinning her down on the couch, putting both his hands around her neck, and strangling her, while she screamed that he was going to kill her.

Kelly has not shown that he was prejudiced under *Strickland*, so we reject his claim that he received ineffective assistance of trial counsel.

IT IS ORDERED that the judgment and order of the circuit court are summarily affirmed.

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

Samuel A. Christensen
Clerk of Court of Appeals