COURT OF APPEALS
DECISION
DATED AND FILED

November 26, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP2913-CR **Cir. Ct. No. 2005CF413**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHRISTOPHER B. THOMPSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Kenosha County: DAVID M. BASTIANELLI, Judge. *Affirmed*.

Before Brown, C.J., Snyder and Neubauer, JJ.

¶1 PER CURIAM. Christopher Thompson appeals from a judgment of conviction and an order denying his postconviction motion for a new trial based on a claim of ineffective assistance of trial counsel. He argues that trial counsel

was ineffective at two points in his jury trial. We affirm the trial court's determination that Thompson was not denied effective trial counsel.

¶2 Thompson had a relationship with Katrina Wilcox between 2003 and 2005, and lived with her and her children for a period of time starting in December 2004. Thompson was charged and found guilty of substantial battery, as domestic abuse, for head butting Wilcox and breaking her nose on June 12, 2003. Thompson was charged and found guilty of second-degree sexual assault when he forced Wilcox into a closet on March 5, 2005, and forcibly had nonconsensual intercourse with her.[1] Thompson was also charged and found guilty of stalking for repeatedly phoning and showing up at Wilcox's residence at the termination of their relationship between March 25 and April 5, 2005.

¶3 Wilcox characterized the relationship as on again, off again. She indicated that on several occasions she tried to break up with Thompson and that she tried to move without him knowing where she was moving to. Thompson always found her and told her he would always be around. She described the fights they had and her efforts to shield her children from Thompson's angry conduct. At times she would engage in certain conduct to appease Thompson and to avoid conflict because she was afraid of him. It was Thompson's theory of defense that Wilcox sought to frame him for the crimes because she found out that he had a new girlfriend.

¶4 Prior to the start of the trial the issue was raised on whether or not the defense would be allowed to make reference to restraining orders Wilcox

[1] Thompson was also charged with misdemeanor battery for the incident that occurred that day. The jury found him not guilty of that charge.

obtained against other persons in 2002 or 2003. The defense argued that such evidence was relevant because Wilcox was presenting herself as helpless and the defense wanted to demonstrate that she knew what to do in terms of getting an injunction to protect herself. The trial court ruled that the evidence might be allowed only if Wilcox denied that she knew how and where to get a restraining order. Thompson claims that he was denied the effective assistance of counsel when counsel failed to confront Wilcox with the two prior restraining orders to establish that she knew what facts she needed and where to go to obtain a restraining order.

¶5 At one point during her direct examination, Wilcox was identifying cigarette butts found at her residence as Thompson's and blurted out, "Why is he looking at me?" A recess was taken and Thompson asked for a mistrial on the ground that he was prejudiced by Wilcox "playing up to the jury." The trial court denied the motion for a mistrial and instructed the jury to disregard that part of Wilcox's answer that was nonresponsive to the question before her. Thompson argues that trial counsel was ineffective for not objecting to the curative instruction the trial court gave because it did not inform the jury that Thompson had a constitutional right to confront and look at his accuser and it did not permit the jury to assess the accuracy of Wilcox's accusation in evaluating her credibility.

¶6 In order to find that trial counsel was ineffective, the defendant must show that counsel's representation was deficient and prejudicial. ***State v. Thiel***, 2003 WI 111, ¶18, 264 Wis. 2d 571, 665 N.W.2d 305. Whether counsel's actions constitute ineffective assistance is a mixed question of law and fact. ***Id.***, ¶21. The trial court's findings of what counsel did and the basis for the challenged conduct are factual and will be upheld unless clearly erroneous. ***Id.*** However, whether

counsel's conduct amounted to ineffective assistance is a question of law which we review de novo. ***Id.***

¶7 The test for the performance prong of the ineffective assistance analysis is whether counsel's assistance was reasonable under the facts of the particular case, viewed as of the time of counsel's conduct. ***State v. Pitsch***, 124 Wis. 2d 628, 636-37, 369 N.W.2d 711 (1985). There is a strong presumption that counsel acted reasonably within professional norms. ***State v. Smith***, 207 Wis. 2d 258, 273, 558 N.W.2d 379 (1997). Judicial scrutiny of counsel's performance will be highly deferential. ***Id.*** "Counsel need not be perfect, indeed not even very good, to be constitutionally adequate." ***Thiel***, 264 Wis. 2d 571, ¶19. Under the second prong of the test, the question is whether counsel's errors were so serious that the defendant was deprived of a fair trial and a reliable trial outcome. ***Pitsch***, 124 Wis. 2d at 640-41. An error is prejudicial if it undermines our confidence in the outcome. ***Id.*** at 642.

¶8 Thompson's claim of ineffectiveness regarding the prior restraining orders is based in large part on the testimony of the sheriff deputy that after taking Wilcox's statement on April 5, 2005, Wilcox indicated she wanted "to obtain a temporary restraining order.… I left with her and she wanted directions to the Kenosha County Courthouse." Thompson contends this is the only evidence before the jury of Wilcox's knowledge and experience about restraining orders and that it suggested that Wilcox did not know the Kenosha county court system very well or that she earlier had justification for obtaining a restraining order. But this was not the only evidence. On cross-examination Wilcox testified that she knew in June 2003 what a temporary order of protection or injunction was and that she knew how and where to obtain one. Thompson suggests this testimony is ambiguous and doesn't match the strong evidentiary value of showing the jury the

two prior injunctions Wilcox obtained. There is nothing ambiguous about the witness's admission that she knew how and where to obtain a restraining order. There is no basis to claim that the jury was not made aware that prior to the difficulties she experienced in her relationship with Thompson she knew how and where to obtain a restraining order.

¶9 It was not ineffective for trial counsel to ask Wilcox about her knowledge on cross-examination because the trial court had already indicated that Wilcox's denial of knowledge was a precondition to showing grounds for possible admission of the prior restraining orders. Her admission opened the door to questioning her credibility about the turmoil and physical abuse in her relationship because she had not timely sought a restraining order against Thompson. Indeed, trial counsel argued that in his closing argument. However, the door to possible admission of the prior restraining orders was never opened because she admitted such knowledge. Trial counsel could not attempt to introduce the evidence in direct violation of the trial court's ruling.[2] Even if we accept Thompson's position that Wilcox was attempting to appear helpless to the sheriff deputy by asking for directions to the courthouse, Thompson is not prejudiced by what he considers unanswered evidence that Wilcox did not know where to get a restraining order. Wilcox admitted she was a lifelong resident of Kenosha and that she knew where to get one. The jury was left to consider why Wilcox would ask the sheriff deputy for directions.

[2] We need not address the trial court's pretrial ruling. However, we agree that the evidence was irrelevant unless Wilcox denied knowledge of how and where to obtain a restraining order.

¶10 Thompson's second claim of ineffective assistance of counsel is that counsel should have requested that the jury be instructed that Thompson had the right to look Wilcox in the eye while she was testifying so that it would not draw a negative inference from her accusation that he was looking at her. The constitutional right to confrontation includes the right to see a witness during testimony. ***Coy v. Iowa***, 487 U.S. 1012, 1017-18 (1988). Yet the primary purpose of the right to "face to face" confrontation is meaningful cross-examination to "assist the accuracy of the truth-determining process in criminal trials by assuring that the trier of fact has a satisfactory basis for evaluating the truthfulness of admitted evidence." ***State v. Nelson***, 138 Wis. 2d 418, 437, 406 N.W.2d 385 (1987). *See also* ***Virgil v. State***, 84 Wis. 2d 166, 186, 267 N.W.2d 852 (1978) ("the cornerstone of the right of confrontation is not merely that the state has produced a witness for eyeball-to-eyeball presentment to the defendant, but rather that the right of confrontation is satisfied in a constitutional sense only where a meaningful cross-examination of the witness who actually uttered the assertions is possible"). Thompson does not cite any legal precedent that it includes the right to look the witness in the eye or that the jury should be so instructed. *See* ***Gaertner v. State***, 35 Wis. 2d 159, 166, 150 N.W.2d 370 (1966) (the right of confrontation is "not for the idle purpose of gazing upon the witness, or of being gazed upon by him, but for the purpose of cross-examination"). The right of confrontation is not absolute and it permits exceptions when necessary to further important public policy or otherwise protect a witness. *See* ***Maryland v. Craig***, 497 U.S. 836, 853 (1990); ***Coy***, 487 U.S. at 1021; ***State v. Thomas***, 150 Wis. 2d 374, 380, 442 N.W.2d 10 (1989). Surely a defendant does not have a constitutional right to stare down or otherwise subtly intimidate the witness. There is no basis for instructing the jury that the defendant has a right to look at the witness.

¶11 Trial counsel testified that he did not request a different instruction because he thought the instruction the trial court gave was appropriate—Wilcox's accusation that Thompson was looking at her was unresponsive to the question. Thompson claimed he was prejudiced by that accusation. The instruction to disregard the outburst had the purpose of preventing any negative inference from her outburst. Counsel was not ineffective for not objecting to an instruction which addressed his claim of prejudice. *See* ***State v. Williamson***, 84 Wis. 2d 370, 391, 267 N.W.2d 337 (1978) (prejudice to a defendant is presumptively erased when admonitory instructions are properly given by a trial court).

¶12 Thompson argues that the instruction went too far and precluded the jury from considering Wilcox's false accusation[3] in assessing her credibility. He asserts that trial counsel was ineffective for not requesting an instruction that would have permitted him to argue that Wilcox made a false statement in the presence of the jury. We acknowledge that witness credibility may be affected by a wide variety of behaviors that the jury observes while the witness is testifying. *See* ***State v. Owens***, 148 Wis. 2d 922, 929, 436 N.W.2d 869 (1989) (the finder of fact sees the demeanor of the witness and the body language and hears the emphasis, volume alterations and intonations of the testimony). For example, a witness who avoids the gaze of the defendant may be exhibiting fear, embarrassment, shyness, nervousness, indifference, or evasiveness. Wilcox's accusation that Thompson was looking at her, whether true or false, is also subject to varying interpretations on how it impacts her credibility. It could exhibit fear,

[3] It is not clear if Thompson was actually looking at Wilcox when she made the accusation. Because the jury was told to disregard Wilcox's nonresponsive accusation, it is not necessary that the accuracy of her accusation be determined in the record.

intimidation, and anger, a desire to assert power over Thompson, or even confidence since it begs the question of why Wilcox was looking at Thompson. Even assuming that Wilcox falsely accused Thompson of looking at her, it was but one aspect of the vast array of testimonial indicators that the jury observed during Wilcox's testimony. The instruction to disregard Wilcox's accusation only minimally impaired the jury's opportunity to assess her credibility. *See* ***Morales v. Artuz***, 281 F.3d 55, 60-62 (2nd Cir. 2002) (permitting witness to wear dark sunglasses did not violate the defendant's right of confrontation because the jurors' inability to observe the witness's eyes was only a minimal impairment of the opportunity to assess credibility in light of all other traditional bases for evaluating testimony). Thompson was not prejudiced by the instruction given since it had such a slight effect and its relationship to credibility was de minimus. ***State v. Dyess***, 124 Wis. 2d 525, 542, 370 N.W.2d 222 (1985).

¶13 We conclude that Thompson was not denied the effective assistance of trial counsel. Counsel's performance was neither deficient nor prejudicial. Thompson is not entitled to 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.