COURT OF APPEALS
DECISION
DATED AND FILED

May 23, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP793-CR **Cir. Ct. No. 2008CF61**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JON F. RAETHER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Calumet County: DONALD A. POPPY, Judge. *Affirmed.*

Before Brown, C.J., Reilly and Gundrum, JJ.

¶1 PER CURIAM. A jury found Jon Raether guilty of second-degree sexual assault of a child and felony bail jumping. Raether appeals the judgment of conviction and the order denying his postconviction motion, which primarily was

based on a claim of ineffective assistance of trial counsel. We agree with Raether that aspects of counsel's performance were deficient, but disagree that those deficits were prejudicial. His ineffectiveness claim therefore fails. We affirm.

¶2 Emily Bragg hosted an unsupervised underage drinking party at her home. Among the attendees were eighteen-year-old Raether and fourteen-year-old Danielle N. By all accounts, Danielle drank to intoxication. She accused Raether of forcing her to have sexual intercourse with him at the party. Raether denied any sexual contact and testified in his defense. The jury found him guilty.

¶3 Postconviction, Raether sought a new trial on grounds of ineffective assistance of counsel and erroneously admitted evidence. The trial court denied the motion after a ***Machner***[1] hearing. This appeal followed.

¶4 Raether limits his appeal to the ineffective-assistance-of-counsel claim. To demonstrate ineffective assistance of counsel, a defendant must show that: (1) defense counsel made errors so serious as to not function as the "counsel" guaranteed by the Sixth Amendment; and (2) this deficient performance prejudiced the defense so seriously as to deprive the defendant of a fair trial, a trial whose result is reliable. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984).

¶5 Deficient performance and prejudice both present mixed questions of fact and law. ***State v. Jeannie M.P.***, 2005 WI App 183, ¶6, 286 Wis. 2d 721, 703 N.W.2d 694. We uphold the trial court's factual findings unless clearly erroneous. ***State v. Thiel***, 2003 WI 111, ¶21, 264 Wis. 2d 571, 665 N.W.2d 305.

[1] *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

Whether counsel's performance is deficient or prejudicial is a question of law we review de novo. ***Jeannie M.P.***, 286 Wis. 2d 721, ¶6.

¶6 Attorney Thomas Gerleman represented Raether at trial. Raether alleges that Gerleman performed deficiently (1) when he failed to cross-examine witnesses on their contemporaneous statements to police; (2) by choosing a defense theory that was inconsistent with the evidence; and (3) in his questioning of defense witness Emily Brown. These deficiencies, Raether asserts, were serious enough to undermine confidence in the reliability of the outcome.

Statements to Police

¶7 Within days of the assault, Appleton police officer Kyle Rau spoke individually to Danielle, Raether, Bragg and Brown. Rau filed reports based on his investigation. Danielle told Rau that she recalled unprotected intercourse and that she protested. She also told him that she was "pretty highly intoxicated" and could remember only "bits and pieces of the evening," but that Bragg had told her some things. Danielle's trial testimony included numerous details not present in the police report.

¶8 Bragg's trial testimony also contrasted with the police report. She testified at trial, for example, that she and some other partygoers found the bedroom door locked, jimmied it with a credit card, that a fully-clothed Raether then walked out and that Danielle told her the next morning that Raether had raped her. In her account to the police, Bragg stated that Brown found Danielle in the back bedroom and yelled to the partygoers that Danielle had no clothes on. A "large group of individuals" then went into the back bedroom; Raether was in the room when they got there. Bragg's statement did not mention a locked door or that Danielle had told her about being assaulted.

¶9 Gerleman did not use the police reports at trial to attempt to impeach Danielle's amplified recall or the discrepancies between Bragg's statement and her trial testimony. At the ***Machner*** hearing, Gerleman acknowledged receiving the police reports in discovery but when asked if he was "familiar" with them at the time of trial, Gerleman responded only that he "had access to" and "reviewed" them. He could not recall whether strategy played a role in his not exploiting the inconsistencies.

¶10 A failure to review all discovery in a felony case is deficient performance. *See* ***Thiel***, 264 Wis. 2d 571, ¶37. Counsel's performance also may be deficient if it resulted from oversight rather than a reasoned, deliberate defense strategy. *See* ***State v. Moffett***, 147 Wis. 2d 343, 353, 433 N.W.2d 572 (1989). In this credibility battle, Gerleman's nearly total lack of recall about why the police reports did not factor into his trial strategy and his failure to use the reports as impeachment tools is puzzling, even troubling.

¶11 A defendant must establish both deficient performance *and* prejudice. *See* ***Strickland***, 466 U.S. at 687. While less detailed, the Bragg report still places Raether in the bedroom next to the bed where Danielle lay naked; the Danielle report supports her claim that Raether sexually assaulted her. Raether does not persuade us that any deficiency was prejudicial.

Theory of the Case

¶12 The defense theory, as best as Gerleman could recall, was that Raether did not have the opportunity to commit the assault. Raether contends that the theory does not dovetail with evidence placing him in the bedroom with Danielle, albeit fully clothed. He argues that the only reasonable strategy would have been to adopt a "wrong place, wrong time" defense.

¶13 In hindsight, we might conclude that a another defense might have been more effective. Gerleman could only work with what he had, however. The trial court essentially found that Raether gave Gerleman changing and conflicting versions of the events. Indeed, Gerleman testified that a timeline of events Raether compiled represented just "[o]ne of [Raether's] stories." The defendant's statements or actions may substantially influence the reasonableness of counsel's actions. *See* ***State v. Pitsch***, 124 Wis. 2d 628, 637, 369 N.W.2d 711 (1985). Because Raether has not persuaded us that counsel's choice was based upon caprice rather than judgment, we will not second-guess that strategy. *See* ***State v. Felton***, 110 Wis. 2d 485, 503, 329 N.W.2d 161 (1983).

Questioning of Emily Brown

¶14 Brown, a defense witness, testified on direct that she never saw Raether or Danielle in one of the bedrooms and never saw either of them coming out of a bedroom. In her statement to Rau, however, Brown stated that at some point during the evening, she walked into a bedroom and saw Danielle lying on the bed clad only in a shirt and bra, her pants and underwear completely off, and that Raether, who was standing next to the bed, immediately made the comment that he did not do anything with Danielle. Brown told Rau she did not know how long Raether and Danielle had been in the bedroom before she arrived.

¶15 Gerleman did not attempt to elicit from Brown or to reconcile any of that information on direct. On cross, the State began by immediately impeaching Brown with her statement to police. Brown admitted that she lied on direct because she was nervous and wanted to help Raether. Gerleman's effort on redirect to elicit more of Brown's statement in the police report was excluded as

outside the scope of cross. When Brown finished testifying, the court had her arrested for perjury out of the presence of the jury.

¶16 Gerleman testified at the ***Machner*** hearing that he questioned Brown based on the report of his investigator, not the police report. He also testified that he did not recall if he had recognized discrepancies between the two reports and could offer no strategic reason for having failed to prepare her himself to explain her prior inconsistent statements. The trial court found that leaving witness preparation for an investigator is a "questionable practice, one that [it] would expect most attorneys not employ." We agree with Raether that counsel performed deficiently in this regard.

¶17 Raether posits that counsel's deficient performance was prejudicial because, after Brown's testimony, "it is hard to imagine the defense having any credibility left." We conclude that it was Raether's own lack of credibility that did him in and he therefore has not met his burden of proving that he was prejudiced by counsel's performance in regard to Brown's testimony.

¶18 The trial court found that twenty-year-old Raether's credibility took a hit when he admitted he had thirteen criminal convictions. The court continued:

> There is no doubt that there weren't any Rhodes scholars at that drunken teen-age party where these events occurred. There weren't any good citizens there. I would … characterize the people at that party as the bottom 5 percenters….
>
> They were all drinking illegally. Certainly this was all brought out. Some were drinking extraordinarily excessively. Most of them engaged in really horrible behavior, particularly when they started drawing—or scrawling obscenities with Sharpies and marking pens on the body of the victim and drawing penises on her body when she was so intoxicated after the alleged sexual assault.

> So definitely defense counsel had a difficult job given the character of the people that were present. The jury chose to believe the alleged victim's version of events over the defendant's.
>
> You know, the defendant told his attorney that they should look at somebody by the name of Cesar to be the person that sexually assaulted her, but yet when [Raether] testified … he didn't mention anything about that story that he gave to his attorney at one time.[2]
>
> So the Court has to find that Mr. Raether lacks all credibility and, quite frankly, has told so many stories that you can't believe anything that he said.

¶19 Credibility was the critical issue at trial. When a trial court's prejudice determination is rooted in its assessment of the witnesses' credibility, we accept those determinations. *See* ***State v. Quarzenski***, 2007 WI App 212, ¶19, 305 Wis. 2d 525, 739 N.W.2d 844. With Raether's own credibility impaired, and with other evidence that Raether was in the bedroom with a nearly naked Danielle, we cannot conclude that "but for counsel's unprofessional errors, the result of the proceeding would have been different." *See* ***Strickland***, 466 U.S. at 694.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

[2] Raether actually testified, consistent with the timeline, that he saw Danielle and Cesar in a bedroom. He stated that he opened the door to a bedroom, that Cesar ran past him, laughing and saying, "Gross," and that he looked in and saw Danielle squatting next to the bed, urinating on the floor. Despite hearing this testimony, the jury still found Danielle's claim more credible than Raether's denial. Also, Cesar's alleged presence in the bedroom does not disprove an assault by Raether.