COURT OF APPEALS
DECISION
DATED AND FILED

June 9, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-3056-CR **Cir. Ct. No. 01CM000692**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROBERT A. EVANS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Walworth County: ROBERT J. KENNEDY, Judge. *Affirmed*.

¶1 NETTESHEIM, J.[1] A jury found Robert A. Evans guilty of stalking contrary to WIS. STAT. § 940.32. Evans appeals from the judgment of conviction and from an order denying his motion for postconviction relief on grounds of

[1] This appeal is decided by one judge pursuant to 752.31(2)(f) (2001-02). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

ineffective assistance of counsel. Evans additionally requests a new trial in the interests of justice. We reject Evans' arguments and affirm the judgment and postconviction order.

BACKGROUND

¶2 On January 14, 2001, the State charged Evans with engaging in a course of conduct directed at Melinda L. Buzak that would cause a reasonable person to fear bodily injury or death to herself or a member of her immediate family contrary to WIS. STAT. § 940.32(2)(a).[2] The State's evidence at the jury trial essentially tracked the following allegations set out in the criminal complaint, which recited information provided to Officer Lori Domino of the Town of Bloomfield Police Department on October 18, 2001, when Domino responded to a harassment complaint from Buzak. Buzak reported that Evans had been stalking her for over a month. Earlier that day, Buzak heard someone attempting to enter her residence and she observed the doorknob of her door moving back and forth. Because she was expecting a friend, Buzak opened the door and observed Evans

[2] The stalking statute, set forth at WIS. STAT. § 940.32(2)(a), provides:

> **(2)** Whoever meets all of the following criteria is guilty of a Class I felony:
>
> (a) The actor intentionally engages in a course of conduct directed at a specific person that would cause a reasonable person under the same circumstances to fear bodily injury to or the death of himself or herself or a member of his or her family or household.

The statute defines "course of conduct" as "a series of 2 or more acts carried out over time, however short or long, that show a continuity of purpose, including any of the following: 1. Maintaining a visual or physical proximity to the victim." Sec. 940.32(1)(a)1.

on her porch with a dog. Buzak immediately closed the door and dialed 911. Buzak was afraid of Evans and in fear for her life.

¶3 Buzak had met Evans at the end of July 2001 and informed him at that time that she only wanted to be friends. Buzak and Evans exchanged email addresses and the friendship went well through the month of August 2001. After that point, Buzak became uncomfortable with Evans' attention and began to pull away from the friendship. Sometime in the middle of September 2001, Evans told Buzak he was in love with her and had her name tattooed on his arm. Buzak told Evans that she did not want anything more to do with him and directed Evans not to call her, email her or visit her residence. Despite this directive, Evans communicated with so many emails, letters and phone calls that Buzak became very afraid of him.

¶4 Evans had also harassed Buzak's mother, Pamela Wehner, and her sister, Amber N. Karow. In response, Buzak contacted both the Town of Geneva Police Department and the Lake Geneva Police Department regarding these incidents. In addition, Evans had sent Buzak an email stating that he had taken her son from her ex-in-laws for the weekend. Buzak contacted her ex-in-laws and discovered that they had not let Evans take her son.

¶5 Domino reviewed copies of the emails and letters sent to Buzak by Evans dating dated back to September 21, 2001, which included comments that Evans did not understand why Buzak would not talk to him. Domino also contacted the Town of Geneva Police Department and Lake Geneva Police Department and confirmed that officers had spoken to Evans on September 23, 2001, and October 10, 2001, and had told him not to make contact with Buzak or her family.

¶6 The day following Buzak's original contact with Domino, Buzak reported that she had just received a package at her residence from Evans that included miscellaneous items including an "I miss you" card. As a result of this latest contact, Domino placed Evans under arrest a few days later.

¶7 On October 30, 2001, Evans appeared at the initial appearance and was released on bond with the condition that he have no contact with Buzak, Buzak's mother or sister, or Matthew Kromm, Buzak's boyfriend. On November 26, 2001, the police arrested Evans for two counts of bail jumping on grounds that he had telephoned Buzak and her mother in violation of his bond conditions. While Evans was in custody and represented by his initial trial counsel, James Martin, the prosecutor instructed Domino to interview Evans about his computer. Domino did so and at the jury trial, she testified regarding this conversation.

¶8 On May 3, 2002, Martin filed a motion to withdraw as Evans' counsel. The court granted the motion and Evans was subsequently appointed new counsel, Bradley J. Lochowicz, who requested that Evans' trial, scheduled for June 3 and 4, 2002, be reset. The State opposed Lochowicz's request and the trial court denied the request.

¶9 The matter proceeded to jury trial on June 3 and 4, 2002. The jury found Evans guilty of stalking contrary to WIS. STAT. § 940.32(2)(a). On July 23, 2002, the trial court imposed and stayed a two-year prison sentence and placed Evans on probation for two years. On September 3, 2002, the court granted Evans' motion for a stay of sentence pending his postconviction proceedings and any ensuing appeal.

¶10 On March 14, 2003, Evans, by his postconviction counsel, filed a motion requesting the trial court to vacate Evans' judgment of conviction and order a new trial in the interest of justice. Evans argued that the trial court had erred in denying Lochowicz's motion for a continuance and that he was denied ineffective assistance of counsel because Lochowicz, his trial counsel, had failed to (1) object to the admission of certain of Evans' statements, (2) advise Evans of his right to testify regarding the origin of the emails, (3) object to the State's improper closing argument, and (4) request the court to instruct the jury on the theory of defense. On May 9, 2003, Evans filed an amended postconviction motion additionally alleging that Lochowicz had failed to discover certain information obtained from Buzak's mother's computer.

¶11 At the postconviction hearing, both Lochowicz and Martin testified pursuant to ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979). The trial court denied Evans' motion for postconviction relief, finding that, although Evans' statement to Domino while in jail was suppressible, the admission of the evidence did not prejudice Evans. The trial court additionally found that Evans' trial counsel was not otherwise ineffective. Evans appeals.

DISCUSSION

Ineffective Assistance of Counsel

¶12 To prove ineffective assistance of counsel, the defendant must show that counsel's performance was deficient and that counsel's errors or omissions prejudiced the defense. ***State v. Pitsch***, 124 Wis. 2d 628, 633, 369 N.W.2d 711 (1985). Performance is deficient if it falls outside the range of professionally competent representation. *See* ***id***. at 636-37. We measure performance by the objective standard of what a reasonably prudent attorney would do in similar

circumstances. *See* ***id***. Prejudice results when there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. ***Id***. at 642. We presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. ***Id***. at 637. We review de novo whether performance was deficient and prejudiced the defendant, but affirm the trial court's findings of fact unless clearly erroneous. ***Id***. at 633-34.

1. Evans' Statement to Domino

¶13 Evans first argues that either or both of his successive trial counsel were ineffective for failing to move to suppress Evans' statements to Domino at the police station after Evans had been arrested for bail jumping. Domino testified at trial that the prosecutor had told her to interrogate Evans about his computer. Domino did so. As noted, Evans was represented by counsel at this time. Domino testified that Evans stated, "The bitch down there is trying to get me for stalking, and [Buzak] is my girlfriend." When Domino asked Evans about the computer, he stated that "his attorney was telling him about an email." He stated, "I wouldn't forge anything. I do know how to do it. I'm a college graduate. I would know how to do it." The prosecutor asked Domino if Evans was "[r]eferring to forging an email?" Domino replied, "Correct."

¶14 Postconviction, Evans argued that his statement to Domino should have been suppressed because the State initiated interrogation while he was represented by counsel, *see* ***State v. Dagnell***, 2000 WI 82, 236 Wis. 2d 339, 612 N.W.2d 680, and because Domino had not informed Evans of his constitutional rights prior to taking his statements. As such, Evans argued that his trial counsel were ineffective for failing to bring a motion to suppress. Evans renews his

argument on appeal. However, he does not make a specific argument on this issue as to how he was specifically prejudiced. Rather, he cites to ***State v. Thiel***, 2003 WI 111, ¶¶59-60, 264 Wis. 2d 571, 665 N.W.2d 305, for the general proposition that in assessing prejudice, we should look to the aggregate prejudice from counsel's deficient performance.

¶15 At the postconviction motion hearing, Lochowicz testified that he had not objected to the admission of Evans' statement because he "didn't believe the statement completely hurt [the defense]," and could be considered exculpatory. Also, at the time Domino testified, Lochowicz believed there was still a possibility that Evans would testify, offering similar statements indicating that he did not send the emails and that he did not stalk Buzak.

¶16 Without ruling with finality on the matter, we question the trial court's determination that Lochowicz's explanation for not seeking suppression of this portion of Domino's testimony constituted ineffective assistance of counsel. It does not follow that a lawyer must seek to suppress evidence simply because a legal basis for suppression exists. Sometimes potentially suppressible evidence carries a benefit to the defense, justifying a decision to forego a suppression motion. Here, Lochowicz saw Domino's testimony about Evans' emails to Buzak, on balance, as more beneficial than damaging since, in some respects, it supported the theory of defense that Evans and Buzak were continuing their relationship. In addition, Lochowicz believed that the evidence would come forth from Evans in any event. Thus, we think a plausible argument can be made that Lochowicz was not ineffective for strategically deciding to not seek suppression of Domino's testimony.

¶17 However, accepting for purposes of this appeal that Lochowicz was ineffective, we nonetheless agree with the trial court's further determination that Lochowicz's performance did not prejudice Evans. Our holding is premised on the same reasoning stated above as to why Lochowicz may not have been ineffective in the first place. Lochowicz testified that the theory of defense was "that there was not enough evidence … to demonstrate that there were two or more occurrences of either physical or visual proximity between Mr. Evans and Ms. Buzak." Buzak had stated that other than on one occasion, she never saw Evans. We agree with the trial court that Evans' statements to Domino did not damage this theory of defense and, in some respects, allowed Evans to convey his belief that he was not stalking Buzak, that they had emailed each other and that she was his girlfriend. We conclude that Lochowicz's failure to object to Evans' statements did not create any specific or aggregate prejudice to Evans.

2. Exhibit 8 Email

¶18 Evans next argues that Lochowicz performed deficiently in failing to investigate and to impeach Buzak with her motive to lie about her relationship with Evans in order to preserve her living arrangement with her then-boyfriend, Kromm. At trial, Buzak denied that her relationship with Evans was sexual and that she did not tell Kromm, with whom she lived, about her relationship with Evans until the beginning of September 2001. Evans contends that Lochowicz had failed to read certain discovery material carefully and, as a result, did not know that a compact disc provided to him by the State contained evidence tending to impeach Buzak by suggesting that she had, in fact, been engaged in a sexual relationship with Evans.

¶19 The evidence in question originated from a police inspection of the computer of Buzak's mother, Pamela Wehner. Buzak had emailed Evans from the computer at Wehner's home. Buzak's hotmail address was "Melinda1Timmy." At the postconviction hearing, Domino testified that she received a compact disc from the State crime lab containing the contents of the hard drive from Wehner's computer. She and the chief of police viewed and printed only some of the information on the CD and then turned over the printed emails and the CD to the district attorney. Neither Lochowicz nor Evan's first trial counsel, Martin, recalled whether the State's discovery materials included a CD. Lochowicz testified, "I cannot honestly say I reviewed the compact disk." Lochowicz reviewed his file, which did not include Exhibit 8, a late July 2001 email in which Buzak wrote to Evans using her "Melinda1Timmy" email address. In the email, Buzak stated that Kromm's home was "the only place I have right now that is keeping me off the streets" and that she had to "kiss [Kromm's] ass to make things work for now." Lochowicz testified that he believed the State had printed the contents of the entire CD and, therefore, he concluded that he had access to all the emails in the State's file. However, he conceded that he did not have a tactical reason for failing to make sure that this was so.

¶20 Here again, we will assume that Lochowicz was ineffective. However, once again, we agree with the trial court and the State that Evans was not prejudiced. We so conclude because the evidence was cumulative to other evidence that already established that Buzak and Evans saw each other on an almost daily basis, went on outings together and had been regularly communicating by email since July 2001. Further, the email in question also contained evidence detrimental to Evans because it supported the notion that Buzak was trying to distance herself from Evans. In it, Buzak states, "I have to

kiss [Kromm's] ass to make things work for now. If you can't understand that I'm sorry, but that is how it is. I don't want to fight about this any more. If you can't understand this I don't want to go on with this relationship. I can't take any more of this bullshit of u yelling at me or piss at me about this shit life I have with [Kromm]."

¶21 The trial court determined that the content of Exhibit 8 would not have been sufficient "to create a problem in the jury's mind about the motive for Buzak to lie" such that a different result at trial would have been likely. We likewise conclude that Buzak's statements in Exhibit 8 demonstrating her dislike for her reliance on Kromm, coupled with the statements aimed at distancing herself from Evans, create an overall tenor that would not have helped Evans' theory of defense. We are not convinced that there is a reasonable probability that, but for Lochowicz's failure to uncover this email, the result of the proceeding would have been different. *See* ***Pitsch***, 124 Wis. 2d at 642. We therefore conclude that Evans was not prejudiced by counsel's failure to discover the Exhibit 8 email.

3. Jury Instruction During Deliberations

¶22 Next, Evans contends that Lochowicz was ineffective for failing to ensure that the jury was adequately instructed. This argument relates to Evans' theory of defense that the State had failed to prove that Evans had visual or physical proximity to Buzak on more than one occasion.

¶23 During closing arguments, the State argued that the content of certain emails demonstrated that Evans was in visual proximity to Buzak even if Buzak had not seen Evans other than the day he left a dog on her front door step. In one email, Evans stated, "Oh by the way you look absolutely gorgeous today,"

and in another, Evans implied that he had seen a certain letter she had placed by the microwave in her residence. The State argued that these comments indicated that Evans was watching Buzak.

¶24 Evans contends that the jury was confused on the question of physical or visual proximity, demonstrated by the jury's note to the trial court during deliberations asking, "Are emails and letters considered to be physical or visual proximity to [Buzak] as well as seeing or contacting [Buzak's] family and friends?" The trial court conducted a hearing on the matter outside the presence of the jury. During this exchange, Lochowicz did not ask the trial court to answer "no" to the jury's question. Instead, he indicated his belief that the question was one for the jury. The court agreed, informing the jury that it would not answer the question and that the jury should read its instructions and apply the evidence to the law.[3]

¶25 Lochowicz testified at the postconviction hearing that he did not ask the trial court to answer "no" to the jury question because of his concern that the State might then ask the court to remind the jury of the circumstantial evidence instruction, prompting the jury to treat the emails as circumstantial evidence that he had been stalking Buzak. In addition, Lochowicz felt that the jury's question indicated that it understood his argument—that the State had not proved via the emails that Evans was in visual or physical proximity to Buzak. Lochowicz felt that absent instruction, the jury would use a commonsense approach in determining that "a piece of paper couldn't be visual or physical proximity."

[3] We note that Evans does not challenge the trial court's instructions to the jury as to the elements of the offense of stalking under WIS. STAT. § 940.32.

¶26 We conclude, as did the trial court, that trial counsel's strategy in this instance was reasonable given the theory of defense that the State had simply failed to prove that Evans had twice been in physical or visual proximity to Buzak. *See* ***State v. Arredondo***, 2004 WI App 7, ¶31, 269 Wis. 2d 369, 674 N.W.2d 647, *review denied,* 2004 WI 20, 269 Wis. 2d 199, 675 N.W.2d 805 (Wis. Feb. 24, 2004) (No. 02-2361-CR) ("We will uphold the strategic decision, even if it appears in hindsight that another defense would have been more effective, as long as the decision is rationally based on the facts of the case and the applicable law."). Insofar as Evans is arguing as a matter of law that Lochowicz should have requested the court answer "no" to the jury's question because an email cannot be evidence of visual or physical proximity under the statute, he is mistaken. The content of those emails constituted circumstantial evidence that Evans had visual or physical proximity to Buzak to make the observations contained in the emails. We conclude that counsel was not ineffective for failing to request that the court answer "no" to the jury's question during deliberation.

New Trial in the Interest of Justice

¶27 Evans' final argument is that we should grant a new trial in the interest of justice because the real controversy was not fully tried. *See* WIS. STAT. § 752.35 ("if it appears from the record that the real controversy has not been fully tried … the court may reverse the judgment or order appealed from, regardless of whether the proper motion or objection appears in the record"). We exercise our discretionary power to grant a new trial infrequently and judiciously. *See* ***State v. Ray***, 166 Wis. 2d 855, 874, 481 N.W.2d 288 (Ct. App. 1992). Evans' request focuses on two circumstances. First, that defense counsel did not know about two important pieces of evidence in the State's possession and, second, that the jury lacked adequate direction in its consideration of the email evidence.

¶28 With respect to the State's evidence, Evans relies on two items: (1) the CD evidence—Exhibit 8—which he argues could have been used to impeach Buzak and (2) the State crime lab report which concluded that there was nothing of evidentiary value on the computer and WEBTV equipment seized from Evans.[4]

¶29 As for trial counsel's lack of knowledge as to the entire contents of the CD, we have already rejected Evans' contention that he was prejudiced by this lack of knowledge. Given that, we see nothing about this evidence that supports Evans' request for a new trial in the interest of justice.

¶30 As to the State crime lab report, Evans cites to postconviction testimony of the state crime lab examiner that he could not say to a reasonable degree of certainty that the email the State used during the jury trial was sent by Evans. Evans argues that Lochowicz should have obtained an expert prior to trial to support the exclusion of the State's email evidence on this basis.

¶31 We reject Evans' assertion that expert testimony to this effect at trial would have resulted in the exclusion of the email evidence. The emails used by the State and purportedly sent by Evans to Buzak were identified by Buzak as emails that she had received from Evans. The expert testimony cited by Evans did not rule out Evans as the sender. Therefore, the source of the emails would have remained a question for the jury. We are not convinced from the record that the

[4] The State did not receive a copy of the crime lab report until the second day of jury trial when it immediately gave a copy to defense counsel. The State alerted the trial court to the delay and the court questioned defense counsel as to whether his strategy would have been different had he received the report earlier. Defense counsel replied that the report would not have changed his strategy.

lack of expert testimony on this issue resulted in the real controversy not being tried.

¶32 Next, Evans contends that the jury did not receive adequate direction for its consideration of the email evidence. Evans contends that Lochowicz should have argued to the jury, as he did at the sentencing, that his comment on Buzak's appearance ("you look absolutely gorgeous today") was a manner of speech and that there were other explanations for Evans' knowledge of Buzak's whereabouts than having her in his visual proximity. Evans additionally argues that the trial court should have explained to the jury the distinction between the use of emails as direct evidence of stalking versus the content of the email being circumstantial evidence. We deem neither argument so persuasive as to warrant a discretionary reversal.

¶33 First, we have already rejected Evans' contention that Lochowicz was ineffective in the manner in which he responded to the jury's question regarding its use of the email evidence. In that discussion, we concluded, in light of the theory of defense, it was a reasonable trial strategy to forego additional instruction rather than risk the jury would focus on the circumstantial nature of the emails. *See* ***Arredondo***, 269 Wis. 2d 369, ¶31. ("We will uphold the strategic decision … as long as the decision is rationally based on the facts of the case and the applicable law.") In addition, Lochowicz began his closing argument by clarifying that "[s]talking is not communication by emails, telephones, letters." He stressed that the elements of stalking required that Evans, on two or more calendar days, "maintained a visual and physical proximity to [Buzak]." He laid out for the jury the State's evidence which included only one instance in which Buzak testified to having physical proximity to Evans. Lochowicz then ended his closing arguments by again stressing that while the State's evidence, "telephone

calls, emails, letters," did not "paint Evans in a good light," it did not constitute stalking. "[S]talking isn't about emails, or letters, or telephone calls. It's about physical or visual contact on two or more days that induce a reasonable fear." As to the arguments Lochowicz could have made and did not, we conclude that those hindsight omissions did not result in the real controversy not being fully tried.

¶34 We reject Evans' request for a new trial in the interest of justice.

CONCLUSION

¶35 We conclude that Evans' right to effective assistance of counsel was not violated by defense counsels' performance. We further conclude that Evans is not entitled to a new trial in the interest of justice. We affirm the judgment and postconviction order.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.