COURT OF APPEALS
DECISION
DATED AND FILED

November 17, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP11-CR **Cir. Ct. No. 2007CF499**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHRISTOPHER J. KUNSELMAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Sheboygan County: GARY LANGHOFF, Judge. *Reversed and cause remanded*.

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

¶1 PER CURIAM. Christopher J. Kunselman appeals from a judgment convicting him of first-degree reckless injury and aggravated battery and from an order denying his motion for postconviction relief based on ineffective assistance

of trial counsel. We conclude that trial counsel's breach of the attorney-client privilege was deficient performance because he failed both to inform Kunselman that he gave the prosecution a copy of Kunselman's written statement and to prepare Kunselman for the damaging cross-examination that counsel reasonably should have known would ensue. In a case that so hinged on credibility, counsel's deficient performance undermines our confidence in the reliability of the outcome. We reverse and remand for a new trial.

¶2 Kunselman was tried for the non-fatal stabbing of Wendell Anderson. At his jury trial, Anderson, Anderson's ex-wife and Troy Jensen, Anderson's friend, testified that Kunselman and Anderson were looking to buy some crack cocaine through Jensen with Kunselman's money. Several witnesses, including Anderson himself, testified that Anderson was intoxicated and that he gets "angry or violent" and generally "act[s] like an asshole" when he drinks.

¶3 Anderson testified that an argument he and Kunselman had been having throughout the night escalated as they waited outside the apartment building where Jensen was making the buy. He testified that he suddenly got "spun around," that it felt like he was "getting punched in the stomach" and that he called after Kunselman, "[Y]ou punched me and I'm gonna get you." He then "noticed [his] chest filling up with blood" and realized he had been stabbed.

¶4 Kunselman's theory of defense was that he stabbed Anderson in self-defense. Kunselman testified that after smoking marijuana with Anderson and Anderson's ex-wife at their residence, he and Anderson left to "procure some marijuana." Kunselman insisted that crack cocaine "was never brought up to me" and he did not know "where all the talk of crack cocaine comes from." He testified that Anderson "was threatening [him] all night" but he stayed around

because Anderson had his money and would not give it back and he also thought Anderson was just "being drunk and being a fool." As they waited for Jensen, Anderson's bellicosity spiraled to the point where Anderson grabbed him and began choking him, hitting him in the neck and "snorting like a bull and saying weird stuff like I'm going to kill you and rip your throat out." Kunselman testified that he could not escape because Anderson had him by the neck with his back against a brick wall, and that he stabbed Anderson because he thought his life "definitely" was in danger. Kunselman testified that he then returned to Jensen's apartment with him, but had no time to call for help for Anderson because the police showed up "within a minute or two."

¶5 The jury rejected Kunselman's self-defense theory and found him guilty of first-degree reckless injury and aggravated battery. Represented by new postconviction counsel, Kunselman moved to vacate the jury verdict and judgment on grounds of ineffective assistance of counsel. The trial court held a hearing under ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979), and denied Kunselman's motion. Kunselman appeals, raising the same issue.

¶6 The issue on appeal involves a privileged statement Kunselman's trial attorney, Marcus Falk, provided to the prosecution which the prosecution then marked as an exhibit, read to the jury and used against Kunselman on cross-examination. Kunselman argues that Falk never advised him that the statement, composed in accordance with counsel's instructions, would be shared with anyone, least of all the prosecution, and, further, that Falk neglected to prepare him for its use at trial. Kunselman argues that his decision to testify therefore was unknowingly made and the inconsistencies brought out at trial damaged his credibility and weakened his self-defense claim, thereby prejudicing his defense.

¶7 On cross-examination, the prosecutor introduced the written statement Kunselman composed before trial relating the events of the night Anderson was stabbed. According to the statement, Kunselman and Anderson happened to be at the same bar. Kunselman bought Anderson a couple of beers, and later accepted Anderson's invitation to accompany him to his ex-wife's house because he "figured maybe [Anderson would] return the favor [with] some video games or similar entertainment."

¶8 Once there, they watched television a while and then walked to the apartment of Anderson's friend, "Troy Mason."[1] Anderson wanted "Mason" to "find some entertainment" for them so the three walked to a payphone where "Mason" made a call. At that point, Kunselman wrote, Anderson

> began to threaten me & generally act in a bestial manner. He snorted & salivated & scratched his fingers down a brick wall. Grunting at me w/ a wild, threatening look in his eye he made several grabs at my person.

¶9 When "Mason" rejoined them, Anderson calmed somewhat and they walked to another apartment building. As soon as "Mason" went inside, Anderson again became "aggressive and wild-eyed," backed Kunselman into a dark corner, grabbed him by the throat and told him "in a chilling tone" that he was going to "rip [his] throat out." Kunselman took out a "small lock blade" he uses for work and told Anderson to "get away" or he "would have to use it." Anderson tried to grab Kunselman around the neck and again said he would "rip [his] throat out." Frightened, Kunselman "swung the knife at [Anderson's] torso."

[1] Anderson is a friend of Troy Jensen. Troy Jensen and Troy Mason are roommates. Kunselman did not know either Troy before this night and interposes "Mason" for "Jensen" throughout the written statement.

¶10 "Mason" came out just then. Kunselman left with him and told him what happened. Back at "Mason's" apartment, his roommate "Mr. Jensen" joined them. Kunselman expressed his regret over the incident and his concern for Anderson. The police arrived five to ten minutes later.

¶11 The prosecutor seized upon several differences between Kunselman's written statement and his testimony, including that: (1) the statement said the police arrived in five to ten minutes but Kunselman testified it was a minute or two; (2) the statement said he was with Mason, but "now you are saying it is Jensen?"; (3) the statement described Anderson acting in a "bestial" manner, snorting, salivating, grunting and scratching his fingers down a wall but he testified he did not mention that to Jensen; and (4) the statement made no mention at all of drugs, let alone a goal to procure them.

¶12 On redirect, Falk attempted to rehabilitate Kunselman's testimony:

> Q. Do you understand, Christopher, that the difference between statements that you wrote out for me and what you are saying on the stand today is that today you are under oath?
>
> A. Yes, sir.
>
> Q. And do you realize that anything you say today that isn't to the best of your memory could be against the law and could be perjury?
>
> A. Yes, sir.
>
> Q. Knowing that now you are under penalty of perjury, are you telling us the best things that you have a memory of?
>
> A. Yes, I am.
>
> Q. Are you also admitting that you don't remember everything perfectly?

> A. I don't remember everything perfectly; who does? Who does two days after something happens to you? This has been four months.

¶13 Kunselman testified at the ***Machner*** hearing that he was interested in finding marijuana that night but that Falk said he wanted any mention of drugs "completely removed at trial," if possible, so he should "write [the statement] from that perspective." Falk testified that he gave a copy of Kunselman's statement to the prosecutor to counterbalance the unfavorable interrogation at the police station, which began with Kunselman denying everything, and to show that the defense had "a pretty solid case" to hopefully spur a settlement. He conceded he did not tell Kunselman that he shared it or prepare him to be questioned from it.

¶14 Kunselman stated that the prosecutor's "hammering" about crack cocaine "threw [him] off quite a bit," as he was not prepared "for that kind of confrontation because it looked prejudicial." The trial court denied Kunselman's motion because it concluded that sharing the statement may not have been the best idea or even a good one, but at the time it was part of the self-defense strategy and negotiating a reduced charge.

¶15 To establish a claim of ineffective assistance of counsel, a defendant must show that trial counsel's performance was deficient and that the deficient performance prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficiency, the defendant must show that counsel made errors so serious as not to function as the "counsel" guaranteed by the Sixth Amendment. ***Id.*** Prejudice exists if a reasonable probability exists that, but for counsel's unprofessional errors, the result of the proceeding would have been different. ***Id.*** at 694. The measure of prejudice is whether the deficient performance undermines the reviewing court's confidence in the reliability of the

trial that took place. ***Id.*** On review, we accept the trial court's findings of fact unless they are clearly erroneous. ***State v. Sanchez***, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996). Deficient performance and prejudice to the defense, however, are questions of law which we decide independently. *See* ***id.*** at 236-37.

¶16 The State effectively concedes, and we accept, that Falk's unauthorized waiver of Kunselman's attorney-client-privileged statement to the prosecution was deficient performance. *See* ***State ex rel. Dudek v. Circuit Court for Milwaukee County***, 34 Wis. 2d 559, 605, 150 N.W.2d 387 (1967) (stating that only the client can waive objections to discovery that are based upon the attorney-client privilege). Falk's motivation for disclosure may have been reasonable, but it was not reasonable to follow through without Kunselman's knowledge and certainly not without readying him for the cross-examination that very possibly would—and ultimately did—ensue.

¶17 The State vigorously argues, however, that Falk's deficient performance was not prejudicial because the inconsistencies, parsed out individually, were de minimis. True, some of the discrepancies seem trivial: Whether the police arrived in two minutes or five; whether Kunselman mistakenly wrote "Troy Mason" for "Troy Jensen," when he had met neither of them before that night; or whether Kunselman's statement colorfully described Anderson as behaving in a "bestial" manner, but he did not tell that to Jensen. Omitting any mention of drugs, of course, is less trifling.

¶18 We nonetheless disagree with the State's position. The particular discrepancies, singly or in combination, are not the issue. Rather, it is that Kunselman so unnecessarily was made to look like a liar before the jury. Had he been properly advised, he could have declined to write the statement in the first

place. He could have refused to allow the statement to be disclosed to the jury. As a third option, he could have chosen not to testify. At the very least, he could have carefully reviewed his statement with counsel to identify inconsistencies, however slight, between it and his testimony.

¶19 A defendant's testimony is critical in a self-defense case. It is well established that inconsistencies and contradictions in a witness' testimony are for the jury to consider in judging his or her credibility and the relative credibility of the witnesses also is a decision for the jury. ***Kohlhoff v. State***, 85 Wis. 2d 148, 154, 270 N.W.2d 63 (1978). Faced with the statement Falk directed him to write in the manner Falk directed him to write it, Kunselman came across as fumbling and self-serving, if not untruthful. A reasonable jury could well believe that Kunselman's written statement lacked candor—especially regarding whether drugs were involved.

¶20 Indeed, Falk's deficient effort to rehabilitate Kunselman's testimony virtually encouraged the jury to believe that Kunselman either was lying on the stand or had lied in his statement. We make no guess as to what else Falk might or could have attempted to shore up the damage. Even if there was nothing more to be done, that is in Falk's lap for his unauthorized waiver of Kunselman's privilege. The result, however, is that the jury heard Kunselman's statement that made no mention of drugs as compared to the abundant testimony at trial of being on the prowl for crack cocaine—or, best case, marijuana.

¶21 Who can say to what degree the jury's determination of Kunselman's credibility was impacted by his demeanor after being blindsided with the privileged and undiscoverable statement. We cannot see Kunselman's reaction, nor the jury's reaction to it. We also cannot know the utility—or

futility—of Falk's nominal effort to mitigate the damage. Any harm caused by introducing the statement was wholly preventable. It was too late for Falk to try to unring the proverbial bell. As a result, we do not have confidence in the reliability of the outcome. We therefore vacate the verdict, reverse the judgment and remand for a new trial.

By the Court.—Judgment and order reversed and cause remanded.

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