COURT OF APPEALS
DECISION
DATED AND FILED

November 23, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP2893-CR **Cir. Ct. No. 2007CF133**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

PERRI R. VOGE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Jackson County: JOHN A. DAMON, Judge. *Affirmed*.

Before Lundsten, P.J., Vergeront and Blanchard, JJ.

¶1 PER CURIAM. Perri Voge appeals a judgment of conviction for failure to support. He also appeals an order denying his postconviction motion. Voge contends that his trial counsel was ineffective by failing to: (1) secure expert testimony in support of Voge's disability defense, and (2) object to the

circuit court's response denying the jury's request to view Voge's chiropractor's report by stating that the exhibit was, in part, not relevant. Voge also contends that the circuit court's response to the jury constituted plain error. We conclude that Voge has not established prejudice and thus has not shown ineffective assistance of counsel. We also conclude that the court's response to the jury did not constitute plain error. We affirm.

Background

¶2 In September 2007, Voge was charged with eight counts of failure to support a child. *See* WIS. STAT. § 948.22(2) (2003-04 and 2005-06). At trial, Voge defended on grounds of inability to pay support due to disability. Voge testified as to the nature and extent of his injuries, and read the conclusion of his chiropractor's report for the jury, which stated Voge's total impairment exceeds 100%. The chiropractor's report was received into evidence, but the court denied the jury's request to see the report and several other exhibits during deliberations, stating that those exhibits "contain[ed] evidence that ... in part [was] not relevant." The jury found Voge guilty of multiple counts of failure to support.

¶3 Voge filed a postconviction motion asserting ineffective assistance of counsel for failing to introduce testimony by Voge's chiropractor and failing to object to the court's response to the jury's request to see the chiropractor's report. Voge also contended that he was entitled to a new trial because the court improperly instructed the jury that the chiropractor's report was not relevant.

¶4 At the postconviction motion hearing, Voge's trial counsel testified that, for most of his representation of Voge, he focused on the defense that Voge had actually paid the child support. He also discussed Voge's disability with Voge and considered inability to engage in gainful employment as a defense. At some

point close to trial, trial counsel determined that the defense of Voge having actually paid the child support was not a viable defense, and thus focused on the disability defense.

¶5 Trial counsel stated that he did not have Voge evaluated by an expert to support the disability defense. Counsel was aware that Voge had been treated by a chiropractor for work-related injuries, and that the chiropractor had prepared a report stating that, for worker's compensation purposes, Voge was incapable of working to earn a living. Counsel stated he believed the chiropractor would have been a helpful witness for trial, but that counsel did not contact the chiropractor because counsel had focused almost exclusively on the defense that the child support had been paid. Counsel stated that Voge was going to testify and had records of his disability, and counsel did not think he needed to have the chiropractor testify. Counsel explained that he believed Voge's testimony as to his condition would be more credible than having an out-of-state chiropractor testify over the phone. Counsel stated that he did not have time to obtain an expert witness, but did not seek a continuance, although a continuance would have been helpful, because he believed Voge wanted to proceed with trial quickly.

¶6 Counsel also testified that, as to the dispute over sending the chiropractor's report to the jury, he believed the prosecutor had argued that the report was inadmissible hearsay and that he had agreed with that argument. He did not remember the court using the word "relevant" or why he did not object to that language.

¶7 The court found that trial counsel was credible and an experienced trial attorney, and that counsel had made a reasonable decision not to pursue the chiropractor's testimony. The court also found that there was no prejudice

because the jury did hear the chiropractor's conclusion. The court also rejected Voge's claim of error in the court's response to the jury's request to see the exhibit. The court found that it had properly denied the jury's request to see the chiropractor's report, and that it had instructed the jury to consider all exhibits as evidence even if they were not sent to the jury room. Accordingly, the court denied Voge's motion for postconviction relief. Voge appeals.

Discussion

¶8 A claim of ineffective assistance of counsel requires a showing that counsel's performance was deficient and that the deficient performance prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). An attorney's performance is deficient if it is outside the range of professionally competent assistance, in that the attorney's acts or omissions were not the result of reasonable professional judgment. ***Id.*** at 690. To establish 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. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** at 696.

¶9 Voge argues that trial counsel was ineffective for failing to secure Voge's chiropractor's testimony for trial. He asserts that trial counsel's failure to secure the chiropractor's testimony was objectively unreasonable, and thus demonstrated deficient performance. Voge asserts that a reasonably skilled attorney would understand the value of expert medical testimony to support the defense, and would have at least spoken with the chiropractor to determine if his testimony would have been helpful. He asserts that the failure to secure the chiropractor's testimony was prejudicial because the chiropractor's testimony

would have supported a reasonable doubt as to Voge's guilt, which otherwise did not exist. Voge asserts that there is a reasonable probability that the outcome of the trial would have been different if the chiropractor had testified, because the chiropractor presumably would have testified consistent with his report as to the nature and extent of Voge's injuries and the chiropractor's treatment of Voge. Instead, Voge points out, the jury heard only the chiropractor's conclusion that Voge's total disability exceeds 100%, which did not provide an explanation of the chiropractor's specific diagnoses, leaving the jury to speculate.

¶10 The problem with Voge's argument is that, even assuming deficient performance, he has not shown prejudice because he did not present sufficient evidence regarding what would have happened if the chiropractor had testified. Voge seems to believe we must assume that the chiropractor would have testified consistent with the specifics provided in his report. This is incorrect. It frequently occurs that witnesses give testimony that significantly adds to or differs from written statements. Thus, we cannot conclude that there is a reasonable probability that the outcome of the trial would have been different had the chiropractor testified.

¶11 Next, Voge contends that trial counsel was ineffective for failing to object to the circuit court's response to the jury's request to view certain exhibits, including the chiropractor's report, by stating that the court was not sending the jury those exhibits because "they contain evidence … that in part is not relevant." Voge asserts that the court's response to the jury instructed the jury that the chiropractor's report was not relevant, undermining Voge's defense. He asserts that, if trial counsel had objected to the court's statement that the chiropractor's report was not relevant, there is a reasonable probability that the jury would have given the chiropractor's report more weight, and the outcome of the trial would

have been different. Voge also argues that the circuit court's response to the jury was plain error, requiring reversal. *See* ***State v. Stank***, 2005 WI App 236, ¶35, 288 Wis. 2d 414, 708 N.W.2d 43. We disagree.

¶12 The jury requested to see five exhibits, including the chiropractor's report. The State objected to the jury seeing the chiropractor's report, arguing that it was not appropriate for the jury to see an expert's report when the State had not had a chance to cross-examine that expert. Voge's trial counsel argued the report should be sent to the jury. The court determined that it would not send in the chiropractor's report or two other items, but did allow two of the exhibits to be sent to the jury. The court then informed the parties that its note to the jury would state that the court decided not to send back several exhibits because "they contain evidence … that in part is not relevant." Voge's trial counsel stated he was satisfied with that language.

¶13 As our summary above demonstrates, the court did not inform the jury that the exhibits they requested were not relevant. Rather, the court stated that the exhibits contained evidence that was *in part* not relevant. Additionally, the court had already instructed the jury to consider all of the evidence, and that the evidence included exhibits, whether or not those exhibits were sent to the jury room. We agree with Voge that there is an apparent conflict between the court's initial instruction to consider all exhibits as evidence and its later statement that certain exhibits contained some evidence that was not relevant. However, we conclude that the only reasonable inference the jury would have drawn on these facts is that the part of the chiropractor's report that was read in court was relevant, but that other parts the jury did not hear were not relevant. As a whole, then, the instruction directed the jury to consider the part of the report read to the jury. We discern no error in this instruction. Accordingly, we affirm.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2009-10).