

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 2, 2014

Diane M. Fremgen
Clerk of Court of Appeals

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**Appeal No. 2012AP2754-CR
STATE OF WISCONSIN**

Cir. Ct. No. 2010CF189

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

THOMAS F. GLASS, JR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Fond du Lac County: PETER L. GRIMM, Judge. *Affirmed.*

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

¶1 PER CURIAM. Thomas F. Glass, Jr. appeals from a judgment of conviction entered after a jury found him guilty of the second-degree sexual assault of his estranged wife, KG, and from an order denying his postconviction motion for a new trial. Glass argues that trial counsel was ineffective for failing to

impeach the victim at trial with her allegedly inconsistent statements made or omitted in prior court proceedings, to police officers, and to an investigator retained by Glass. The State disagrees, contending that the prior statements complained of were either not inconsistent with the victim's trial testimony,¹ or immaterial to the disputed issues. Because we conclude that Glass has failed to establish trial counsel's ineffectiveness, we affirm.

¶2 The State filed a two-count information charging Glass with: (1) first degree sexual assault, contrary to WIS. STAT. § 940.225(1)(b) (2011-12);² and (2) strangulation and suffocation, contrary to WIS. STAT. § 940.235(1). At Glass's jury trial, the victim, KG, testified that around 5:30 a.m. on July 6, 2010, her alarm clock rang to wake her up for work. She also received a phone call which she recognized as coming from Glass, her estranged husband. KG went to the front door of her apartment building to let her dog outside. She was in the process of calling Glass back.³ When she opened the door, Glass was standing there carrying a duffel bag. KG let the dog out and returned to her apartment. She found Glass in the bedroom and asked what he was doing there. Glass told KG that he was moving back into the apartment and grabbed something "like a roll of duct tape" which he then placed on the bed. KG reached for the item and asked

¹ We characterize the prior statements as "not inconsistent with the victim's trial testimony" insofar as Glass complains that the victim omitted certain facts from her testimony at an injunction hearing. As to these omissions, the State's primary argument is that there was no reason for the victim to provide the missing information at the prior injunction hearing.

² All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

³ It is undisputed that KG and Glass had children together and maintained contact after their separation. KG testified that they had consensual sex twice during the period spanning April and early May 2010.

what he was doing. Glass placed his hand over KG's mouth and nose and told her to be quiet. He stated that they were going to have anal sex and that he was going to hurt her the way she had hurt him. As they struggled, Glass told KG to shut up so the neighbors would not hear them. When KG would not stop crying and telling Glass to stop, he reached over and removed some items from his duffel bag so that KG was able to see a gun. Once she saw the gun in the bag, KG stopped struggling out of fear. Glass then forced KG to have intercourse until he ejaculated.

¶3 KG testified that Glass told her they were going to spend the day together and directed her to call in sick to work. He told her to do what she would normally do, including sending a text to her boyfriend, Casey, as Glass supervised. They stayed in the bedroom for between one and two hours and talked about their relationship and children, as well as Casey and his children. KG testified that throughout their conversation the gun was always displayed and within Glass's reach and she did not feel free to leave.

¶4 KG told Glass that she wanted to take a shower and he insisted on joining her. When their son came home from a sleepover, they sent him out for doughnuts and Glass had him take the duffel bag containing the gun down to Glass's vehicle. KG testified that at this point, Glass was acting normal again and she felt less afraid. Their son came back and left again, and Glass and KG left the apartment in Glass's vehicle. They picked up food from a Culvers drive-through and KG suggested that they visit Glass's new apartment. When they arrived, Glass brought the duffel bag inside, but complied when KG asked that he put the gun away. Glass eventually dropped KG off at her apartment and left. KG testified that she told Casey what had happened, but that she did not want to report the incident. KG called Glass the next day to ask about the gun because she was

afraid he would come back. Glass assured her that he had taken it to a friend's house, the episode was over, and she had nothing to worry about.

¶5 Casey, KG's boyfriend, testified that things did not seem normal on the morning of the incident. He testified that he and KG normally texted each other "because [they] were concerned about Mr. Glass," and that he became worried when KG did not timely reply to his morning text. He became further concerned when she did not show up for work and sent him a short text reporting that she did not feel well. Casey testified that KG's responsive texts were unusually delayed and short and so he called at around 8:00 a.m. She answered, but did not sound "normal" and told him not to come over. Concerned, Casey drove to KG's apartment and saw that Glass's vehicle was outside. Casey testified that he called KG from outside her apartment and said he knew Glass was there. KG sounded scared but told him to go back to work and that she would call at lunch time. KG called as promised, but sounded "[d]etached."

¶6 Casey testified that after work, he picked KG up from her apartment and they went and sat in the park. He testified that she was crying and very upset and he saw marks on her face. She appeared to be very sore and winced when he touched her, but stated she did not want to talk about what had happened. She eventually "broke down crying" and stated that Glass had raped her.

¶7 Both Casey and KG testified that the day after the assault, he picked her up and they talked for several hours in his parked car. KG told him about the gun, and said that she needed to get back together with Glass so that no one else would get hurt. Somebody called the police to report the parked car, and officers arrived to investigate. Officer Marc Medema testified that KG and Casey appeared to be very emotional, and did not seem to want to answer any questions.

Both were crying and when Medema asked Casey what was going on, he avoided eye contact and “kept saying he couldn’t tell me.” KG appeared to be “very traumatized” and eventually told Medema that her estranged husband forced her to have sex. Medema observed a small cut on KG’s nose, and bruising near her eye. Police started investigating the incident.

¶8 Police officers testified that when they first interviewed Glass, he denied having been present at KG’s apartment on July 6, 2010. When confronted with his son’s statement to the contrary, Glass admitted having been at KG’s apartment, but told police they did not have sexual contact. After police suggested that there might be DNA evidence indicating sexual contact, Glass admitted they had intercourse, but stated it was consensual. Glass told police that he did not bring a gun to the apartment. He stated that he disliked guns and had never owned one.

¶9 Steven Huss, Glass’s coworker, testified that he sold a gun to Glass on July 5, 2010. According to Huss, Glass had expressed interest in purchasing the gun for several months but said he could not afford it. On July 2, 2010, Glass called him from a Walmart store and said he had money to purchase the gun. Glass asked Huss about what type of ammunition he should purchase and said he was also buying a case for the gun. On July 5, 2010, Huss gave Glass the gun in exchange for a check. Glass called him on July 6, 2010, at around 6:00 p.m., and said he wanted to return the gun because he could not afford it and felt suicidal. Huss’s wife retrieved the gun and shredded Glass’s check. As part of the investigation, Huss was able to provide police with the shredded check.

¶10 Glass testified that on July 6, 2010, at around 9:00 a.m., thinking that KG would be at work, he went to her apartment to see their son. He stayed at the

apartment with KG until their son arrived home. After their son left again, he and KG stayed in the apartment. He testified that they were having a conversation about Casey and “got into talking about sexual things and decided we ought to go to the [bedroom]” to have sexual relations. He testified that after having intercourse, they went to Culvers and to his apartment, and that when he brought KG home, they took a shower together and Glass left for work. Glass testified that despite the testimony of KG and their son, he did not bring a duffel bag to KG’s apartment.⁴ He testified that he never purchased a gun from Huss, and stated that Huss was lying about the gun exchange and his son was lying about the duffel bag.⁵ Glass hypothesized that KG was lying about the consensual nature of their sex to avoid conflict with Casey.

¶11 In closing argument, trial counsel argued that KG’s actions on July 6, 2010, were inconsistent with those of a person who had just been assaulted or felt afraid.⁶ Trial counsel pointed out that there was no DNA evidence because KG washed the bedding, and that KG made inconsistent statements concerning the gun and regarding when she and Glass had last engaged in consensual intercourse.

¶12 At the State’s request, as to count one, first-degree-sexual assault, the trial court further instructed the jury on two lesser included offenses:

⁴ Consistent with KG’s testimony, the son testified that Glass had a duffel bag at the apartment on July 6, 2010, and that at his father’s request, he brought the duffel bag outside and placed it in Glass’s vehicle. The son also testified that he saw a gun case in his father’s car trunk on July 3, 2010.

⁵ During a search of Glass’s residence, police found in the living room area a roll of duct tape and a duffel bag containing a large sheathed knife.

⁶ Trial counsel highlighted that Glass and KG went to Culvers and to his apartment together, and even had a normal conversation with one of Glass’s neighbors. Trial counsel argued that if KG was truly afraid, she could have asked for help at any of these junctures.

(1) second-degree sexual assault by use of force; and (2) third-degree sexual assault. After nine hours of deliberation,⁷ the jury found Glass guilty of second-degree sexual assault (a lesser-included of count one), and not guilty of count two, strangulation and suffocation.

¶13 Glass filed a postconviction motion alleging that trial counsel was ineffective for failing to impeach KG with her “inconsistent versions of the assault as relayed to Officer Medema, [defense] investigator Kirkpatrick, in her restraining order/injunction hearing, and at Trial.” The motion criticized trial counsel’s failure to order a transcript of the July 20, 2010 hearing on KG’s petition for an injunction against Glass. Postconviction counsel ordered and attached a partial transcript of the injunction hearing.⁸

¶14 At the postconviction hearing, trial counsel testified that he was aware there had been a recorded injunction hearing on July 20, 2010, but never ordered the transcript because he “didn’t think it was necessary or helpful.” Trial counsel acknowledged that at the injunction hearing, KG testified that the incident occurred on July 7, 2010. Trial counsel testified that he was previously made aware of KG’s error but did not view it as an inconsistency so much as an accidental misstatement. He testified that he did not believe KG’s misstatement of the date mattered because the issue at trial was not whether or when they had

⁷ During deliberations, the jury asked several questions and to rehear some of the testimony. At one point, the jury reported it was deadlocked.

⁸ The postconviction motion also attached reports from Officers Medema and Mikulec and defense investigator Kirkpatrick and alleged that KG’s inconsistent statements therein should have been used for impeachment at trial. Though a full injunction hearing transcript was never prepared, the State does not dispute that the partial transcript represents the entirety of KG’s testimony. The partial transcript does not contain any testimony from Glass, nor any part of the court’s decision.

sexual intercourse, but whether it was consensual or forcible. Trial counsel confirmed that his strategy was to establish that KG lied about the consensual nature of the sex to avoid conflict with Casey, and testified that he believed he adequately elicited KG's inconsistent statements through cross-examination and the testimony of defense investigator Kirkpatrick.

¶15 The trial court denied Glass's postconviction motion. As to the failure to obtain the injunction hearing transcript, the court determined that trial counsel was not deficient because there is no "bright-line duty nor obligation" requiring counsel "to hunt down and obtain every transcript of a witness's prior testimony or related testimony." The trial court also determined that trial counsel's failure to obtain the transcript was not prejudicial. The trial court explained that KG came off as a "straight shooter at the jury trial" and found that her trial testimony was "highly consistent with the testimony at the injunction hearing." The court stated:

So I don't really believe, and I feel strongly that ... they have not shown prejudice; that even if we assume he should have gotten the transcript, which I don't believe he had to, even if he had it and poked around or asked some questions thereto, I think those were essentially covered at the trial and that there is no showing today that the questions and answers or the comparison of the injunction testimony to the trial testimony would have made any difference.

¶16 In addressing Glass's claim that trial counsel should have used the police and investigator reports to explore additional possible inconsistencies, the trial court acknowledged that the deliberations were long and involved multiple jury questions, but concluded these circumstances were not "instrumental in this case or the legal analysis. Lots of tough cases have long deliberations with questions by a jury, and that by itself isn't evidence of a poor job by trial counsel." The trial court continued to emphasize that Glass failed to establish any prejudice:

I appreciate the brief of the defendant postulating all the interesting questions that might have been asked at trial, but it kind of made me wonder, well, the DA might have objected to some of these questions, and ... if there was, I can see myself sustaining many of—any objections to some or most of these questions that are summarized on Page 4 and 5 of the brief. So I think the questions are interesting fodder for speculation, but I don't believe the State's conceded that these would be admissible or relevant and I may very well have sustained some objections to them.

And the other point that I have to wrestle with is that the issue of prejudice is not the questions the lawyer didn't ask. It's what would the witness have said, and in that regard the evidence is lacking. The evidence is insufficient to show that any material answers given by [KG] would have made any difference because my distinct memory of [KG] ... was that she did answer questions. She was a straight shooter at the jury trial. She wasn't obtuse or evasive or trying to hide things. ...

¶17 On appeal, Glass maintains that he is entitled to a new trial based on the ineffective assistance of trial counsel. The test for ineffective assistance of counsel has two prongs: (1) a demonstration that counsel's performance was deficient, and (2) a demonstration that the deficient performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To prove deficient performance, a defendant must show specific acts or omissions of counsel that were "outside the wide range of professionally competent assistance." *Id.* at 690. Judicial review of an attorney's performance is "highly deferential" and the reasonableness of an attorney's acts must be viewed from counsel's contemporary perspective to eliminate the distortion of hindsight. *State v. Maloney*, 2005 WI 74, ¶25, 281 Wis. 2d 595, 698 N.W.2d 583. A defendant is entitled to a fair trial, not a perfect one, with an adequate lawyer, not the best one. *State v. Hanson*, 2000 WI App 10, ¶20, 232 Wis. 2d 291, 606 N.W.2d 278.

¶18 To satisfy the prejudice prong, the defendant must demonstrate 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.” *Strickland*, 466 U.S. at 694. To establish prejudice, it is not enough for a defendant to speculate on what the result of the proceeding might have been if his attorney had not erred. *State v. Erickson*, 227 Wis. 2d 758, 774, 596 N.W.2d 749 (1999).

¶19 On review, the appellate court will uphold the trial court’s findings of fact unless they are clearly erroneous. *State v. Thiel*, 2003 WI 111, ¶23, 264 Wis. 2d 571, 665 N.W.2d 305. Whether counsel’s performance was deficient and/or prejudicial are questions of law to be determined independently. *Id.*

¶20 First, we conclude that trial counsel’s failure to obtain the injunction hearing transcript was not prejudicial.⁹ According to Glass, KG should have been impeached with her injunction hearing testimony or omissions therefrom because at that hearing: (1) she testified that the incident occurred on July 7, rather than July 6, 2010; (2) she testified that she found the duct tape in the comforter while Glass was rustling around in the duffel bag and bed, and threw it at him; (3) she testified that Glass placed his hand over her nose, not her nose and mouth; (4) she testified that Glass was going to take her to a motel in Oshkosh and kill himself; (5) she did not mention the injuries to her eye and nose; (6) she did not mention the events leading up the assault, specifically that Glass had called her on the phone and was at the door when she went to let the dogs out; (7) she did not

⁹ We do not mean to imply that trial counsel’s failure to obtain the transcript was deficient. We agree with the trial court that “defense counsel is [not] obligated to requisition transcripts just because they’re there.” However, we do not need to address both prongs of the test if the defendant fails to make a sufficient showing on either one. *Strickland v. Washington*, 466 U.S. 668, 697 (1984). “The object of an ineffectiveness claim is not to grade counsel’s performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.” *Id.*

mention events occurring after the assault, specifically that she and Glass took a shower, went to Culver's and to his apartment, or that Glass hugged and/or kissed her when he dropped her off; and (8) she did not mention that they had twice engaged in consensual sex after their separation.

¶21 We agree with the State that the alleged inconsistencies between KG's injunction hearing and trial testimony were either nonexistent or immaterial. As to the offense date, there is no reasonable probability that the trial would have ended any differently had trial counsel informed the jury that KG misstated the date by one day at a prior hearing. The act of intercourse was undisputed and KG's misstatement of the date has no bearing on whether the intercourse was consensual or forcible. Additionally, KG's injunction hearing testimony concerning the details of the duct tape and the placement of Glass's hand were not materially different from her trial testimony. Further, though KG did not repeat at trial her earlier testimony that Glass threatened to drive to Oshkosh and make her watch as he committed suicide, neither did she deny this occurrence. Quite simply, she was never asked about this incident at trial. We reject as pure speculation Glass's argument that trial counsel's failure to elicit this information from KG prejudiced Glass because it would have engendered sympathy or made the possibility of KG's consent more plausible.

¶22 Similarly, Glass has not established any prejudice based on trial counsel's failure to question KG about facts testified to at trial, but omitted from her injunction hearing testimony. KG's limited testimony at the injunction hearing was guided by the court commissioner's direct and specific questions. There was no reason for her to tell the court about peripheral events which occurred either

prior to or after the assault itself.¹⁰ KG did not testify inconsistently at the injunction hearing by not answering questions that were never asked and did not have to be asked by the court in determining whether to issue an injunction.

¶23 Glass also provides a list of KG’s prior statements culled from police or investigator reports, which he complains were inconsistent with her trial testimony and left unexplored by trial counsel. He asserts that: (1) KG told Officer Medema that Glass assaulted her anally; (2) KG told Kirkpatrick that Casey was “fidgety” when they were approached by police in their parked car; (3) according to the Kirkpatrick’s report, over the course of their two-part interview, KG told him once that she last had consensual sex with Glass in early March, and at their second meeting, told him it was “two times in April and early May, and one time in June;” and (4) KG told Officer Medema and Kirkpatrick that Glass told her the gun was a nine-millimeter, showed it to her, and at her direction, unloaded its magazine.¹¹

¹⁰ Glass argues that KG was specifically asked at the injunction hearing whether she had sustained any injuries. At that hearing, KG testified that Glass put his hand over her face and nose so she could not breathe, and showed her a gun in his duffel bag. The court commissioner then asked whether there was anything else she wanted to tell him about the incident, or if there was “any other physical harm or threats of physical harm [,]” to which she answered “No.” Considering that KG had previously reported and others had observed her injuries, along with the ambiguity in the court commissioner’s compound question, this omission would not have effectively impeached KG’s trial testimony.

¹¹ Glass’s appellate brief catalogues KG’s allegedly inconsistent statements in both chart and narrative form and by reference to his postconviction pleadings in the trial court. Many assertions are redundant and some are too inconsequential to merit mention. To the extent that any alleged inconsistencies are not explicitly addressed, they were considered and rejected by this court as grounds for a new trial. *See State v. Waste Mgmt. of Wis., Inc.*, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978) (“An appellate court is not a performing bear, required to dance to each and every tune played on an appeal.”).

¶24 We conclude that trial counsel’s failure to impeach KG with these alleged inconsistencies does not constitute deficient performance. The first two statements cannot be characterized as inconsistencies. According to Officer Medema’s report, KG never told him there was anal sex.¹² She clearly stated that Glass wanted to but never successfully inserted his penis into her anus. As to the “fidgety” remark, Medema witnessed Casey’s demeanor in the parked car, and described Casey as upset, emotional, crying, and unable to make eye contact. “Fidgety” would not have added anything of material value to this picture.

¶25 We also conclude that trial counsel did not perform deficiently by failing to further question KG about her prior statements concerning her post-separation sexual encounters with Glass. On KG’s cross-examination, trial counsel elicited the critical fact that she and Glass had consensual sex two times, in April or early May. Trial counsel elicited from Kirkpatrick that KG’s recollection of this time period changed between their first and second interviews. There was no reason for trial counsel to further question KG or Kirkpatrick about her prior statements.¹³

¹² The State pointed this out in its respondent’s brief. Nevertheless, Glass reasserts in his reply brief that KG told Medema “that vaginal sex was first, then anal sex, then vaginal again later on.” It is troubling that Glass either misread the report twice, neglected to re-read the report, or has chosen to misrepresent the report.

¹³ As the State points out, trial counsel reasonably declined to probe that portion of Kirkpatrick’s report referring to a “June” sexual encounter, because KG described a one-sided incident wherein Glass masturbated himself. It was also reasonable for trial counsel to leave intact Kirkpatrick’s incorrect statement that in the first interview, KG said that the last consensual encounter was in April. In actuality, she stated it was in March. Without ever alerting the jury that KG’s earliest recollection (March) was further in time from the July offense date, Kirkpatrick was still able to inform the jury that KG changed her timeline from April, to “extend[ing] into May, late-April, early May [.]”

¶26 Similarly, trial counsel's failure to further probe KG about how Glass handled the gun during the assault was not deficient. At trial, KG testified that Glass did not threaten to use the gun during the assault and showed it to her after the assault. On cross-examination, trial counsel elicited from KG that though not mentioned on direct, she previously reported to Medema and Kirkpatrick having asked Glass to unload the gun, and that he complied. When confronted with her prior statement, KG agreed but added that Glass then reloaded the gun. Upon further questioning by trial counsel, KG conceded that she may not have told police that Glass reloaded the gun. Glass argues that trial counsel should have gone a step further and impeached KG with her prior statement to Medema that Glass showed her the gun and told her it was a nine-millimeter. We disagree. After effectively cross-examining KG, it was reasonable for trial counsel to refrain from eliciting that she previously reported that Glass showed and implicitly threatened her with the gun, a behavior more egregious than what was told to the jury.

¶27 In his appellate brief, Glass proposes an evaluative standard based on a synthesis of several published cases which, he argues, leads to the inescapable conclusion that trial counsel was ineffective. We disagree. As Glass concedes, trial counsel elicited from KG critical statements omitted from her direct examination, such as her request that Glass unload the gun, their post-separation consensual sex, that she would have "reluctantly" consented if Glass had not threatened anal sex, that there was a second act of intercourse on July 6, 2010, during which she apparently did not physically struggle, and that Glass never actually used the duct tape during the assault. Through cross-examination, trial counsel pointed out inconsistencies in KG's statements, such as whether Glass reloaded the gun, hugged or kissed her after dropping her off, or if she at some

point might have characterized the intercourse as consensual. During Kirkpatrick's direct examination, trial counsel elicited that KG told him the second act of intercourse was consensual, she did not feel pressure from Glass during her calls and texts with Casey, and that she never told Kirkpatrick she was "threatened" or "forced in any way." At bottom, Glass's brief asks this court to rewrite the law and "hold[] that every reasonable stone should be turned, and every inconsistency or thread of bias should be exposed." As the State's brief points out, this is not what the law requires.¹⁴

By the Court.—Judgment and order affirmed.

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

¹⁴ Glass's reply brief takes the state to task for suggesting that Glass made this representation in his appellant's brief. However, the preceding quote is taken directly from Glass's appellant's brief and implies that perfection based on a hindsight evaluation of trial counsel's performance is the appropriate standard. As Glass concedes in his reply brief, it is not.

