COURT OF APPEALS
DECISION
DATED AND FILED

August 11, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP2176-CR **Cir. Ct. No. 2012CF001280**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROYCE L. MCKEE, JR.,

DEFENDANT-APPELLANT.

APPEAL from an amended judgment and an order of the circuit court for Milwaukee County: ELLEN R. BROSTROM and REBECCA F. DALLET, Judges. *Affirmed*.

Before Kessler, Brennan and Bradley, JJ.

¶1 PER CURIAM. Royce L. Mckee, Jr., appeals from an amended judgment, entered upon a jury's verdict, convicting him of strangulation and suffocation, substantial battery, and disorderly conduct, all as acts of domestic

abuse and as a repeater. *See* WIS. STAT. §§ 940.235(1), 940.19(2), 947.01(1), 968.075(1)(a), 939.62(1)(a)-(b) (2011-12).[1] He also appeals the order denying, in part, his postconviction motion.[2] Mckee argues that his trial counsel gave him ineffective assistance by conceding during his closing argument that a critical portion of the victim's testimony was true. We reject Mckee's claim and affirm.

BACKGROUND

¶2 The State charged Mckee with strangulation and suffocation, substantial battery, and disorderly conduct, all as acts of domestic abuse and as a repeater. At trial, the State called five witnesses: the victim (T.W.), three officers, and one doctor.

¶3 T.W. testified that on March 15, 2012, Mckee punched her in the face, strangled her, and chipped her tooth after accusing her of cheating on him. At the time, the two were living together along with T.W.'s two children.

¶4 According to T.W., Mckee woke her up around midnight and appeared angry and intoxicated. T.W. said they went to the living room and while they argued, she drank alcohol. During the argument, Mckee got up from his chair and punched her in the face. She said that she could not remember how many times Mckee punched her but she remembered his thumbs on her windpipe, "blacking out and then waking up." T.W. testified that when she regained

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

[2] The Honorable Ellen R. Brostrom presided over Mckee's trial and sentencing hearing. The Honorable Rebecca F. Dallet presided over the postconviction motion hearing and issued the order denying the motion, in part. The circuit court granted Mckee's postconviction motion to vacate the DNA surcharge.

consciousness, Mckee choked her until she "blacked out" again. T.W. said that after Mckee punched her in the face, she spit out part of her tooth.

¶5 When Mckee left the room around 3:00 a.m., T.W. fled to her sister's residence across the street. Once there, her sister called the police.

¶6 Officer Randolph Bruso, the State's second witness, testified that he entered T.W.'s residence thirteen minutes after the incident was reported. Officer Bruso did not find Mckee inside the residence, but he did find T.W.'s children sleeping soundly in their rooms.

¶7 Sergeant Christopher Schroeder, the State's third witness, testified that he responded to the scene with three other officers. He searched the residence and spoke to T.W., who he described as having a "raspy voice," which was indicative of strangulation. He testified that T.W. "said that … her husband or boyfriend she had lived with had been hitting her and strangled her to the point where she almost fell unconscious."

¶8 Officer Nathan Woods, the State's fourth witness, testified that he spoke with T.W. after the incident. He said she "had a scratchy voice" and noted that earlier in the night she had been drinking. Officer Woods testified that T.W. told him, "[a]s far as hitting her and also choking her and strangling her, she told me she lost consciousness twice at that time and then she also told me that to get out of that situation she ran out of the house to her family member's home." T.W. told Officer Woods that as Mckee was choking her, he said: "I am going to break your damn neck." Officer Woods testified that when he first interviewed T.W., he saw handprints on both sides of her neck, which T.W. told him were from Mckee choking her.

¶9 Doctor Matthew Tews, the State's fifth witness, treated T.W. on March 15, 2012. He testified that she had bruising on her face, handprints on the sides of her neck, a "hoarse" voice, and "bone pain." Dr. Tews noted, however, that T.W.'s CT scans were normal and did not indicate that she had swelling or bruising to the inside of her throat Dr. Tews further testified that the medical reports did not indicate that T.W. had any broken teeth nor did they mention the existence of petechiae or subconjunctival hemorrhages, which would have indicted strangulation.[3] Additionally, Dr. Tews testified that some of T.W.'s bruising appeared to predate the incident and that while her injuries could have been caused by strangulation, her raspy voice could have been caused by other events, such as smoking or a blow to the throat.

¶10 Following Dr. Tews's testimony, the State rested. Mckee did not testify or call witnesses to testify on his behalf.

¶11 During his closing argument, Mckee's trial counsel argued that the State's evidence was insufficient to prove that Mckee was guilty beyond a reasonable doubt. He highlighted the following evidence: T.W.'s inconsistent testimony as to exactly when the argument became physical and what was said; the testimony that T.W.'s children were fast asleep when police searched the residence, indicating that the argument between Mckee and T.W. did not rise to the level of disorderly conduct; the medical records contradicting T.W.'s claim that Mckee chipped her tooth; and Dr. Tews's testimony that he did not observe hemorrhages, petechiae, or internal damage.

[3] Dr. Tews testified that petechiae are skin manifestations of broken blood vessels and subconjunctival hemorrhages are bleeding around the white of the eye.

¶12 Additionally, Mckee's trial counsel emphasized T.W.'s statement to Sergeant Schroeder that she "almost" felt unconscious. In context, trial counsel's remarks were as follows:

> [T.W.], in speaking with Sergeant Schroeder, doesn't say to him I blacked out once. She doesn't say to him I blacked out twice. The first person that she talks to about what occurred in the house and what happened to her, she said not that I blacked out, but *she said I almost felt unconscious*. She didn't indicate that she passed out. She didn't indicate that she couldn't and wasn't able to breathe. She didn't indicate that she revived herself and went through the process again. *She indicated that I almost felt unconscious*.
>
> It is at a later point that she indicates to others something different: That she passed out, that it happened twice, that things got dark and got light again. That wasn't her response to the initial officer on scene. Now, the argument can be made she wasn't thinking clearly initially. She was concerned. She was upset. Well, that concern and upset continued through the process. I wouldn't accept as an argument one becomes clearer [in] thinking as time passes by. If anything, as time passes by, one is able to decide what light, what spin, what you want to put on something that you are saying to obtain the results that you want. Clearly, in this case, the result that [T.W.] wanted was something to happen to Mr. McKee. *I would put forward that her first statement is the most accurate of what occurred.* At some point she said she felt that she might be—she felt almost unconscious is what she said.

(Emphasis added.)

¶13 In rebuttal, the State argued: "You know, one of the things defense counsel just said is that [T.W.'s] first description of the incident was probably the most accurate, which I disagree with how he described her first description. But even if that was true that she almost lost consciousness, he still strangled her right?"

¶14 The jury found Mckee guilty of all three counts.

¶15 Mckee sought postconviction relief arguing that his trial counsel was ineffective for conceding that T.W. "almost felt unconscious" during the attack.[4]

¶16 Following a ***Machner*** hearing, the circuit court denied Mckee's motion.[5] The circuit court concluded trial counsel's closing argument highlighted the inconsistencies in T.W.'s statements to the police, which fell within the realm of reasonable trial strategy. Additionally, the circuit court determined that even if the argument was deficient, it did not prejudice Mckee's defense because "[i]n and of itself that statement[,] I do not believe[,] would have changed the outcome here at all."

DISCUSSION

¶17 Mckee now appeals. He contends that the State did not have a strong case against him and points to "key facts" uncovered by his trial counsel, which supported his defense. Mckee, however, goes on to argue that his trial counsel ultimately undermined the defense by "conceding the essential elements of strangulation and suffocation during closing argument."

¶18 The two-pronged test for ineffective assistance of counsel claims requires a convicted defendant to prove both deficient performance by counsel and prejudice to the defense as a consequence. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To demonstrate deficient performance, the defendant must show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Id.*** To

[4] Mckee raised a number of other issues, which he is not pursuing on appeal.

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

demonstrate 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 694. If a defendant fails to make a sufficient showing on one ***Strickland*** prong, we need not address the other. ***Id.*** at 697.

¶19 A claim that counsel was ineffective presents mixed questions of law and fact. ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). We will uphold a circuit court's findings of historical fact unless they are clearly erroneous. ***Id.*** Whether counsel's performance was deficient and whether any deficiency prejudiced the defendant are questions of law that we review *de nov*o. ***Id.*** at 128. With these principles in mind, we turn to Mckee's claim.

¶20 To prove strangulation and suffocation, the State had the burden to prove:

> 1. The defendant impeded the normal breathing or circulation of blood by applying pressure on the throat or neck or by blocking the nose or mouth of [T.W.]
>
> 2. The defendant did so intentionally.
>
> This requires that the defendant acted with the mental purpose to impede normal breathing or circulation of blood or was aware that [his] conduct was practically certain to cause that result.

WIS JI—CRIMINAL 1255; *see also* WIS. STAT. § 940.235 (2011-12). Mckee's defense, as previously noted, was to show inconsistencies in T.W.'s testimony. To this end, Mckee's trial counsel offered in closing that T.W.'s "first statement," where she stated that "she felt almost unconscious" was "the most accurate of what occurred."

¶21 Mckee argues: "Since the jury was instructed that *any* intentional action to impede T.W.'s breathing would constitute strangulation and suffocation, trial counsel's concession left the jury with no other alternative than to find Mr. McKee guilty (because he could not have rendered T.W. 'almost unconscious' without restricting her breathing"). He argues that this concession—if believed by the jury—had a direct impact on the verdict for strangulation and suffocation. Moreover, because it bolstered T.W.'s credibility, he submits that it likely had an impact on the jury's verdicts on the other counts as well.

¶22 We are not convinced. First, we do not view Mckee's trial counsel's remarks as a concession. Instead, he tried to establish reasonable doubt by pointing out T.W.'s initial statement that she almost—but did not—lose consciousness. In so doing, Mckee's trial counsel was suggesting that Mckee did not impede T.W.'s breathing and consequently, did not strangle her. Later in his closing, Mckee's trial counsel specifically argued, "[i]f I don't cut[ ]off the airflow, you can't find the offenses charged have occurred."

¶23 Second, we agree with the circuit court's conclusion that it was reasonable trial strategy to try to show T.W.'s inconsistencies by highlighting the differences between her statements to police. T.W. initially told Sergeant Schroeder that Mckee had strangled her to the point that she almost fell unconscious. T.W. later told Officer Woods that she had lost consciousness twice. Mckee's trial counsel explained during the ***Machner*** hearing that part of his strategy was to argue that because of the animosity between T.W. and Mckee, T.W. was making things up as she went along to create problems for him. *See* ***State v. Elm***, 201 Wis. 2d 452, 464-65, 549 N.W.2d 471 (Ct. App. 1996) ("A strategic trial decision rationally based on the facts and the law will not support a claim of ineffective assistance of counsel."). "[C]ounsel is 'strongly presumed to

have rendered' adequate assistance within the bounds of reasonable professional judgment," ***State v. Balliette***, 2011 WI 79, ¶25, 336 Wis. 2d 358, 805 N.W.2d 334 (citation omitted), and in this case, Mckee has not overcome that presumption.

¶24 Because Mckee has not satisfied the deficiency prong of the ***Strickland*** analysis, we need not address the prejudice prong. *See* ***id.***, 466 U.S. at 697. However, we do here for the sake of completeness.

¶25 All of T.W.'s statements alleged strangulation. Mckee's trial counsel attempted to minimize the effect of these statements by highlighting the statement most favorable to Mckee in an effort to establish reasonable doubt that the strangulation actually occurred. Mckee essentially argues his trial counsel should have pointed out T.W.'s inconsistent statements and left it at that. Even if Mckee's trial counsel had taken this approach, the jury still would have been left with abundant evidence of guilt, which notably included—among other things—Officer Woods's first-hand observation of handprints on both sides of T.W.'s neck along with the medical records that substantiated his observation. Mckee has not shown that there is a reasonable probability that the outcome of his trial would have been different had Mckee's trial counsel not described T.W.'s first statement to the police as "the most accurate" description of what occurred. *See* ***id.*** at 694.

By the Court.—Amended judgment and order affirmed.

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