COURT OF APPEALS
DECISION
DATED AND FILED

October 21, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP1341-CR **Cir. Ct. No. 2013CF7**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BLAYNE T. SEEVER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Barron County: J. MICHAEL BITNEY, Judge. *Affirmed.*

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 PER CURIAM. Blayne Seever appeals a judgment of conviction for substantial battery, with intent to cause bodily harm, and an order denying his motion for postconviction relief. Seever argues that he should be granted a new trial because his trial counsel provided ineffective assistance and in the interest of

justice because the real controversy has not been fully tried. We reject Seever's arguments and affirm.

BACKGROUND

¶2 On January 6, 2013, M.H. called law enforcement at around 1:55 a.m. to report that someone hit him with a beer bottle at Skippy's Bar, located in the City of Barron. Sergeant Andrew Schofield responded to the call and met with M.H. outside the bar. M.H. told Schofield that while outside the bar, Seever struck him in the face with a beer bottle. Schofield observed M.H. was holding a rag to his mouth and that M.H. had a chipped tooth, was missing a different tooth, and that his face was bloody.

¶3 Seever was arrested later that day and was then interviewed by Officer Ray Parr. Seever claimed that: (1) M.H. pushed him without provocation; (2) although Seever had a beer bottle at the time M.H. pushed him, Seever believed the bottle slipped out of his hands after he was pushed; and (3) he and M.H. had a "struggle" with one another, consisting of them rolling on the ground. Seever did not specify what caused M.H.'s injuries or how they occurred.

¶4 On January 7, 2013, Seever was charged with one count of substantial battery, with intent to cause bodily harm. One week prior to trial, Seever's trial counsel submitted proposed jury instructions to the circuit court, which included one on the privilege of self-defense. Additionally, counsel's "trial notebook" indicated that, prior to trial, counsel's strategy was to argue that M.H.'s facial injuries occurred while Seever was attempting to defend himself. For instance, the notes indicated that counsel planned to elicit testimony from one or more witnesses that: (1) M.H. was known as being "loud" and "angry"; (2) M.H. pushed and charged Seever without provocation; (3) Seever put his arms out to

defend himself; and (4) M.H. and Seever were rolling on the ground because Seever was trying to protect himself, and that was when M.H. was injured.

¶5 On the morning of trial, the circuit court asked the State whether it intended to use a videotaped law enforcement interview of Seever. Upon hearing this, Seever's counsel stated: "I was provided only with audio copies …. I have no copy of any video." Eventually, the court determined there was no audiotape recording of the interview and that the State had informed Seever's counsel about the existence of the videotaped interview in February 2013—more than a year before the trial started. Because Seever's counsel had not yet viewed the videotaped interview of his client, the court had him watch part of it before opening statements and the remainder during the lunch break.

¶6 During his opening statement, Seever's counsel focused on two details he believed the evidence would prove to the jury: (1) M.H. was not a credible witness; and (2) Seever did not hit M.H. with a bottle. His opening statement did not specifically mention self-defense, nor did it articulate what caused M.H.'s facial injuries, or how those injuries occurred. However, during his cross-examination of M.H., Seever's counsel attempted to introduce evidence that M.H. "liked" a Facebook page titled "Wild, Crazy Fights," arguing that his client's theory of defense was self-defense. The circuit court rejected Seever's attempt to introduce this evidence, concluding its probative value was substantially outweighed by a danger of unfair prejudice.

¶7 After Seever's counsel viewed the rest of Seever's videotaped interview during the lunch break, the following exchange occurred between counsel and the circuit court:

> THE COURT: My understanding, [counsel], is that in light of the theory of defense Mr. Seever is pursuing you're not going to ask for a self-defense instruction; is that correct?
>
> [COUNSEL]: That's correct, Your Honor.
>
> THE COURT: Did you have a chance to talk to Mr. Seever about that?
>
> [COUNSEL]: No, I didn't, Your Honor.
>
> THE COURT: Why don't you take a minute to do that.

After Seever's counsel talked with Seever about not pursuing a self-defense instruction, the following exchange occurred:

> THE COURT: [Counsel], have you had a chance to talk to Mr. Seever?
>
> [COUNSEL]: Yes, Your Honor, and my client is in agreement that *any injuries sustained by [M.H.] were a result of his actions*.
>
> THE COURT: All right. Is that correct, Mr. Seever?
>
> [SEEVER]: Yes.
>
> THE COURT: Your theory of defense is that you did not intentionally injure [M.H.] in an act of self-defense, rather *you feel he injured himself during an ensuing scuffle after he charged you*; is that true?
>
> [SEEVER]: Yes.
>
> THE COURT: You look—is there some confusion on your face?
>
> [SEEVER]: No, I was just thinking about it, but—
>
> THE COURT: Because it's important for you to have whatever theory you want to present to the jury and the Court will allow you to go forward with your theory of defense, but I want to make sure that we're on the same page that you've had a chance to talk to [your defense counsel], that you understand why it is that he is proposing that self-defense instruction be withdrawn under the circumstances. Do you understand that?
>
> [SEEVER]: Yes.

THE COURT: Do you agree with that?

[SEEVER]: Yes.

(Emphasis added.) As a result, the jury was not instructed on self-defense.

¶8 Seever later testified that, while outside the bar: (1) M.H. pushed and charged him without provocation; (2) although he had a beer bottle with him at the time M.H. pushed him, he believed the bottle slipped out of his hands after he was pushed; (3) he and M.H. had a "struggle" with one another that involved rolling on the ground; and (4) M.H. was injured while M.H. and Seever were rolling on the ground. Seever mentioned M.H. possibly got injured when Seever "overpowered" M.H. and M.H. landed "hard on the curb[.]"

¶9 During his closing argument, Seever's counsel argued that: (1) M.H.'s testimony was not credible and should be discounted by the jury; and (2) Seever did not hit M.H. with a bottle, but instead rolled around on the ground with M.H. Seever was convicted of one count of substantial battery, with intent to cause bodily harm.

¶10 Seever's postconviction counsel subsequently moved for postconviction relief, arguing Seever's trial counsel was constitutionally ineffective and Seever was entitled to a new trial in the interest of justice, as the real controversy had not been fully tried. After a ***Machner***[1] hearing, the circuit court found that Seever's trial counsel performed deficiently in three ways: (1) failing to review the videotaped law enforcement interview of Seever prior to trial; (2) failing to consult with Seever prior to moving to withdraw the

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

self-defense instruction; and (3) failing to file or pursue pretrial motions allowing him to attack M.H.'s credibility or character during trial. However, the court determined these deficiencies did not prejudice Seever. Furthermore, the court determined that after consulting with Seever, trial counsel's decision to withdraw the self-defense instruction did not constitute deficient performance because that decision was tactical. Finally, the court determined that the "controversy was fully and fairly tried" and thus Seever was not entitled to a new trial in the interest of justice. Seever now appeals.

DISCUSSION

Ineffective Assistance of Counsel

¶11 To prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate that: (1) counsel's conduct constituted deficient performance; and (2) the defendant was prejudiced as a result of counsel's deficient performance. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To establish deficient performance, the defendant must demonstrate that counsel's actions or inactions "were outside the wide range of professionally competent assistance." ***Id.*** at 690. To establish prejudice, 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." ***Id.*** at 694. We need not address both prongs of ***Strickland*** if a defendant fails to make a sufficient showing on one prong. ***Id.*** at 697.

¶12 Ultimately, the question of whether counsel was constitutionally ineffective "involves mixed questions of law and fact." ***State v. Howard***, 2001 WI App 137, ¶23, 246 Wis. 2d 475, 630 N.W.2d 244. We will not set aside the circuit

court's factual findings about counsel's actions and the reasons for them unless they are clearly erroneous. ***State v. Pitsch***, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985). However, whether counsel's conduct violated the defendant's constitutional right to the effective assistance of counsel is ultimately a legal determination, which this court decides de novo. ***Id.***

A. Deficient Performance

¶13 Seever argues that, after consulting with him, his trial counsel was ineffective for withdrawing the proposed self-defense instruction. We disagree. The circuit court appropriately suggested Seever's trial counsel discuss the decision to withdraw the self-defense instruction with Seever and then engaged in a colloquy with Seever to ensure that he agreed with and understood the reason for the decision to withdraw the self-defense instruction. The colloquy between Seever and the circuit court demonstrated that: (1) Seever's theory of defense was M.H. injured himself during the scuffle; (2) the decision to withdraw the self-defense instruction was based on that theory of defense; and (3) Seever understood and agreed with trial counsel's decision to withdraw the self-defense instruction on that basis.

¶14 At the postconviction hearing, Seever's trial counsel testified he withdrew the self-defense jury instruction because: (1) Seever's theory of defense was that he did not cause M.H.'s injuries; and (2) that theory was inconsistent with a theory of self-defense. A theory of self-defense would have required, among other things, for Seever to admit to the fact he battered M.H. *See* ***State v. Head***, 2002 WI 99, ¶84, 255 Wis. 2d 194, 648 N.W.2d 413 (noting a defendant must demonstrate "the amount of force the [defendant] intentionally used was necessary" to succeed on theory of perfect self-defense). This admission would

have significantly affected Seever's credibility as his defense was that he did not cause M.H.'s injury. Because Seever's theory of defense was inconsistent with a theory of self-defense, trial counsel's decision to withdraw the self-defense instruction was a "strategic decision based upon a reasonable view of the facts" and, thus, did not constitute deficient performance. *See* ***Whitmore v. State***, 56 Wis. 2d 706, 715, 203 N.W.2d 56 (1973); *see also* ***Strickland***, 466 U.S. at 691 ("The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions.").

B. Prejudice

¶15 The circuit court concluded Seever's trial counsel was deficient in three ways: (1) failing to review the videotaped law enforcement interview of Seever prior to trial; (2) failing to consult with Seever prior to moving to withdraw the self-defense instruction; and (3) failing to file or pursue pretrial motions allowing him to attack M.H.'s credibility or character during the trial. Seever argues the cumulative effect of these deficiencies prejudiced him. We assume without deciding that trial counsel's performance was deficient in the three ways previously mentioned. However, we conclude these deficiencies did not prejudice Seever individually or cumulatively.

¶16 "[W]hen a court finds numerous deficiencies in a counsel's performance, it need not rely on the prejudicial effect of a single deficiency if, taken together, the deficiencies establish cumulative prejudice." ***State v. Thiel***, 2003 WI 111, ¶59, 264 Wis. 2d 571, 665 N.W.2d 305. In other words, "we may aggregate the effects of multiple incidents of deficient performance in determining whether the overall impact of the deficiencies satisfied the standard for a new trial under ***Strickland***." ***Id.***, ¶60. However, "in most cases errors, even unreasonable

errors will not have a cumulative impact sufficient to undermine confidence in the outcome of the trial, especially if the evidence against the defendant remains compelling." ***Id.***, ¶61.

¶17 Whether considered separately or cumulatively, trial counsel's deficiencies did not prejudice Seever. First, although Seever's trial counsel failed to fully review the videotaped interview of his client prior to trial, he did review a portion of the videotape before opening statements and the remainder during a lunch break. According to Seever's trial counsel, the videotape revealed no new information. Furthermore, the State did not use the videotaped interview, or mention it, during trial.

¶18 Second, although Seever's trial counsel failed to consult with Seever prior to moving to withdraw the self-defense instruction, he did consult with Seever prior to Seever's colloquy with the circuit court and the actual withdrawal of the self-defense instruction. Additionally, the colloquy between the circuit court and Seever demonstrates that the ultimate decision to withdraw the self-defense instruction was influenced by Seever's statements and was explicitly ratified by Seever.

¶19 Finally, although Seever's trial counsel failed to file or pursue pretrial motions allowing him to attack M.H.'s credibility or character during the trial, this failure did not prejudice Seever. Seever contends his counsel's failure to file these pretrial motions prejudiced him because when he tried to present evidence that M.H. had a history of getting into bar fights at trial, the circuit court prevented him from doing so due to his failure to file pretrial motions. However, the record belies this claim. Seever's trial counsel did not attempt to introduce evidence at trial that M.H. had a history of getting into bar fights. Instead, counsel

asked M.H. whether he had ever been in a bar fight in order to provide the foundation for M.H.'s knowledge that another witness, Zachary Kuehndorf, had been in bar fights previously. Furthermore, although counsel attempted to introduce "other acts" or "character" evidence at trial that M.H. "liked" a Facebook page titled "Wild, Crazy Fights," the court rejected this attempt, not on the basis of failing to file pretrial motions, but because the evidence's probative value was substantially outweighed by a danger of unfair prejudice. Therefore, Seever has not demonstrated his trial counsel's failure to file pretrial motions allowing him to attack M.H.'s credibility or character prejudiced him.

New Trial in the Interest of Justice

¶20 Seever argues that he is entitled to a new trial in the interest of justice because the real controversy—whether M.H.'s injuries occurred as a result of Seever acting in self-defense—has not been fully tried. We disagree. The real controversy was whether Seever caused the facial injuries to M.H., not whether Seever did so in self-defense. At trial, the jury heard testimony from multiple witnesses, including Seever and M.H., regarding whether Seever hit M.H. in the face with a bottle. Therefore, we conclude that the real controversy was fully tried.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2013-14).