COURT OF APPEALS
DECISION
DATED AND FILED

July 18, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP609-CR **Cir. Ct. No. 2014CF75**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BILLY J. STAVES,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Polk County: MOLLY E. GALEWYRICK, Judge. *Affirmed*.

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

¶1 PER CURIAM. Billy Staves appeals a judgment, entered upon a jury's verdict, convicting him of receiving between $2500 and $5000 worth of stolen property; burglary while armed with a dangerous weapon; and eight counts of theft of movable property (firearms), with all ten crimes as a repeater and all but the receiving stolen property count as party to a crime. Staves also appeals an order denying his motion for postconviction relief. Staves argues he is entitled to a new trial based on the ineffective assistance of his trial counsel. We reject Staves's arguments and affirm the judgment and order.

BACKGROUND

¶2 The State initially charged Staves with one count of receiving stolen property. An Amended Information added one count of burglary while armed with a dangerous weapon, as a repeater, and nine counts of theft of firearms. On the morning of the first day of trial, the State moved to file a Second Amended Information that deleted one of the theft counts and alleged that the burglary and theft counts were committed as party to a crime (PTAC).

¶3 The charges arose from allegations that Staves was involved in the theft of personal property from the home of D.G. on January 10, 2014. DNA evidence received shortly before trial showed that DNA from both Staves and another individual was found on an empty "Twisted Tea" can left in D.G.'s driveway. Staves's DNA was also found on items within a car that contained several of the items stolen from D.G.'s home. The car had gotten stuck in snow and was discovered a few miles from D.G.'s home two weeks after the crime occurred. Additionally, Staves had traded items stolen from D.G.'s home for gasoline from one individual and a car from another. Items, including D.G.'s class ring, were found in yet another vehicle Staves had been driving.

¶4 Over defense counsel's objection, the circuit court granted the State's motion to amend the Information to add the PTAC allegations. Defense counsel then moved for a continuance, arguing that the addition of the PTAC allegations changed "the nature of the evidence that is presented" and "the potential defense that Mr. Staves has to this charge." Defense counsel added, "I just think it's fundamentally unfair to require that Mr. Staves and I be prepared to go and meet those amendments on such short notice." When the circuit court suggested the proof is no different despite the addition of the PTAC allegations, defense counsel disagreed, stating:

> I think it is different. I think the nature of a party to a crime instruction is a sweeping sort of thing. They allege [Staves] did it. And while I agree that if it's charged out originally as a party to a crime[,] [t]hey don't have to prove that he actually did it. From day one it was originally charged as a receiving stolen property. A week and half ago it changed to all of these others and now we're confronted with two more changes this morning. I agree that if we have a trial the State would have had to have proved under the old [charges] that he actually committed the crime. With a party to the crime addition, they don't even … have to prove that. It gives them expanded and expansive sort of way [sic] to deal with their charges. … [U]p until this morning there has been zero indication that that was going to happen. And I just think it's fundamentally unfair.

¶5 The circuit court denied the motion for a continuance and ultimately determined that the PTAC instruction would only be given if the trial evidence supported it. At the close of the State's presentation of evidence, the State's renewed motion for the PTAC instruction was granted over defense counsel's objection. The jury found Staves guilty of the crimes charged, and the circuit court imposed concurrent sentences totaling eleven years, consisting of six years' initial confinement and five years' extended supervision. Staves's postconviction

motion for a new trial was denied after a ***Machner***[1] hearing, and this appeal follows.

DISCUSSION

¶6 Staves contends he was denied the effective assistance of trial counsel. This court's review of an ineffective assistance of counsel claim is a mixed question of fact and law. ***State v. Erickson***, 227 Wis. 2d 758, 768, 596 N.W.2d 749 (1999). The circuit court's findings of fact will not be disturbed unless they are clearly erroneous. ***Id.*** However, the ultimate determination whether the attorney's performance falls below the constitutional minimum is a question of law this court reviews independently. ***Id.***

¶7 To succeed on an ineffective assistance of counsel claim, Staves must show both that his counsel's representation was deficient, and that this deficiency prejudiced him. *See* ***Strickland v. Washington***, 466 U.S. 668, 694 (1984). In order to establish deficient performance, a 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.*** at 687. However, "every effort is made to avoid determinations of ineffectiveness based on hindsight … and the burden is placed on the defendant to overcome a strong presumption that counsel acted reasonably within professional norms." ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990).

¶8 In reviewing counsel's performance, we judge the reasonableness of counsel's conduct based on the facts of the particular case as they existed at the

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

time of the conduct and determine whether, in light of all the circumstances, the omissions fell outside the wide range of professionally competent representation. ***Strickland***, 466 U.S. at 690. Because "[j]udicial scrutiny of counsel's performance must be highly deferential … the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." ***Id.*** at 689. Further, "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." ***Id.*** at 690.

¶9 The prejudice prong of the ***Strickland*** test is satisfied where the attorney's error is of such magnitude that there is a reasonable probability that, absent the error, the result of the proceeding would have been different. ***Id.*** at 694. We may address the ***Strickland*** prongs in the order we choose. If Staves fails to establish one prong of the ***Strickland*** test, we need not address the other. *See* ***State v. Sanchez***, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996).

¶10 On appeal, Staves argues his trial counsel was ineffective by failing to object to the PTAC instruction with "sufficient specificity" to establish how Staves's defense was affected by that instruction.[2] We are not persuaded. In objecting to the PTAC instruction, defense counsel argued: "[T]here's no evidence in front of this court that Mr. Staves cooperated or did anything with

[2] The State construes Staves's argument as a challenge to trial counsel's failure to keep the State from amending the Information with the PTAC allegations. As the State properly notes, defense counsel was not deficient in this regard, as he objected to the amendment on proper grounds—claiming the last-minute amendment was unfair to Staves and could potentially change his defense strategy. *See* ***State v. Malcom***, 2001 WI App 291, ¶26, 249 Wis. 2d 403, 638 N.W.2d 918 ("[W]hile a charge may be 'undeniably related to the transaction or facts considered at the preliminary hearing … if there is no adequate notice of that charge, the prosecution cannot be legally sustained.'") (citation omitted).

anybody else. This is strictly whether the State's allegation is and was that he did it, and … there's no indication whatsoever." Defense counsel reiterated that he was "[n]ot prepared to deal with party to a crime because there's nothing that indicates anybody else was involved." Although defense counsel acknowledged evidence suggesting the presence of another DNA source, defense counsel argued "it doesn't go to whether … somebody else committed the crime." Defense counsel added it was the State's duty "to show some connection that somehow [Staves] participated with somebody else in the commission of this crime."

¶11 Defense counsel further argued that the PTAC instruction "changes the ability of a defendant to respond to the charges," stating:

> There are additional elements that I couldn't be aware of in a charge of receiving stolen property or even two weeks ago changing it to a theft of firearms. Those, I indicated to the court, I had knowledge of those. I was prepared to deal with those. Not prepared to deal with party to a crime because there's nothing that indicates anybody else was involved. Now, I certainly … can use it as a defense and it doesn't mean that they've proven their case.

Counsel reiterated at the ***Machner*** hearing that he objected on grounds the PTAC instruction changed the fundamental nature of the case:—"One hand you're saying one person does it. On the other hand you're saying one person cooperated with another. Totally different."

¶12 In denying Staves's postconviction motion, the circuit court recounted that although it had rejected defense counsel's objections to the PTAC amendments, the PTAC jury instruction, and the request for a continuance, the circuit court "did something [it] normally [does not] do"—it did not read the substantive instructions to the jury as part of voir dire but, rather, delayed a decision on the State's request for the PTAC instruction until "the evidence [came]

in." Defense counsel made an appropriate objection and obtained a favorable result for Staves in putting off the PTAC instruction until the circuit court could confirm the evidence warranted it. Staves fails to establish that the absence of additional explanation to support defense counsel's objection to the PTAC instruction constitutes deficient performance.

¶13 Staves also claims his trial counsel was ineffective by failing to adequately consult with Staves about testifying after the PTAC allegations were made. At trial, the circuit court engaged Staves in a colloquy in which Staves confirmed he was aware of his right to testify and his right not to testify; the decision was his alone to make; he had not been threatened or influenced in making his decision; and he had adequate opportunity to discuss with his counsel whether he would testify. Staves indicated that he had decided "to not testify." The circuit court then asked defense counsel whether he had sufficient opportunity to thoroughly discuss the case and Staves's decision not to testify or to testify. Defense counsel responded: "We have discussed it quite a number of times before, your Honor, and again today and I'm satisfied he understands his right to testify and his understanding of his decision not to testify."

¶14 At the ***Machner*** hearing, trial counsel testified that although he could not recall all of the details of his conversations with Staves regarding the right to testify, he generally discusses the pros and cons of testifying with his clients but leaves the ultimate decision whether to testify up to the client. *See* ***Jones v. Barnes***, 463 U.S. 745, 751 (1983) (defendant has the "ultimate authority to make certain fundamental decisions regarding the case," including whether to testify on his or her own behalf). Trial counsel added:

> Mr. Staves and I talked about him testifying. I remember sitting at the jail with him discussing whether or not he …

> would testify. I discussed it with him over the phone as well. I remember talking with him at the close of the State's evidence about whether or not he wanted to testify. … [D]id I specifically talk with him about the nature and effect of the party to a crime allegation at that last possible moment? I don't know that I did. I don't know that I didn't. I can't answer that. Generally I talk [sic] with him about his right to testify or not testify.

Counsel added that at the close of the State's case, Staves was "quite obviously" aware that the charges had been amended to add the PTAC allegations, and "I suspect that Mr. Staves and I would have talked about what party to a crime means, if we hadn't talked about it earlier."

¶15 Although Staves testified at the ***Machner*** hearing that defense counsel never talked to him about his decision to testify following the addition of the PTAC allegations, the circuit court found that Stave's credibility was "not the greatest" and rejected Staves's claim that his decision not to testify was somehow uninformed. The circuit court, as fact-finder, is the ultimate arbiter of witness credibility, and we must uphold its factual findings unless they are clearly erroneous. *See* ***State v. Peppertree Resort Villas, Inc.***, 2002 WI App 207, ¶19, 257 Wis. 2d 421, 651 N.W.2d 345.

¶16 The circuit court recalled that at the December 2014 trial, Staves "was a highly participatory defendant … not the type of defendant that sat there mildly." According to the court, Staves "was actively … engaged in his own defense." The court recounted:

> [Staves] knew as early as September 23, 2014 … that [a plea] offer had been extended and … as a result of this plea [the State] would agree not to file any burglary charges as a result of further investigation, including anything that was discovered on … any further DNA evidence. [Staves] was put on notice at least that far in advance of trial that there was evidence sent to the crime lab.

Although the DNA evidence was not received until right before trial "because of the constraints on the crime lab," Staves knew there was "evidence out there that might have his DNA on it" and, therefore, would have known if there was an innocent explanation for that evidence. Ultimately, defense counsel was not deficient with respect to Stave's decision whether to testify, as Staves knew the evidence presented and how the jury would be instructed. Because Staves failed to establish he was denied the effective assistance of trial counsel, the circuit court properly denied his postconviction motion for a new trial.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2015-16).