COURT OF APPEALS
DECISION
DATED AND FILED

May 4, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP934-CR **Cir. Ct. No. 2014CF66**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOYCE M. SCHNEIDER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Jackson County: ANNA L. BECKER, Judge. *Affirmed*.

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

¶1 PER CURIAM. Joyce M. Schneider appeals a judgment of conviction entered after a jury found her guilty of substantial battery and obstructing an officer. She also appeals an order denying her motion for postconviction relief. Schneider asserts that trial counsel was ineffective because

counsel (1) provided incomplete information and misleading advice about Schneider's case, which led her to reject a favorable plea deal and proceed to trial, and (2) neglected to request an appropriate jury instruction on the obstructing charge. We reject Schneider's claims and affirm.

BACKGROUND

¶2 During a Walmart shopping trip, Schneider witnessed a verbal argument between her son, Darin, and G.C. Once they were outside the store, Darin attacked G.C. The men fell to the ground and continued to fight. Schneider kicked G.C. G.C.'s orbital bone was fractured during the altercation. Schneider was charged with substantial battery as a party to the crime and obstructing an officer. Schneider was offered a plea agreement that called for her to plead to an amended misdemeanor count of battery. In exchange, the State would move to dismiss and read in the obstructing charge and to recommend probation. Schneider rejected the offer and, after a one-day trial, was convicted of both counts and ordered to serve a term of probation.

¶3 Schneider filed a postconviction motion seeking a new trial due to the ineffective assistance of trial counsel. Schneider's first ineffective assistance claim alleged that trial counsel told her the State "didn't have a leg to stand on" and advised her not to take the plea offer. The postconviction motion alleged that trial counsel never explained to Schneider the elements of substantial battery as a party to the crime or the defenses thereto and that, as a result of trial counsel's incomplete and improvident advice, "Ms. Schneider decided to go take the case to trial." Schneider's second claim alleged that trial counsel failed to request a more

specific jury instruction tailored to the offense of obstructing an officer by giving false information. Following an evidentiary ***Machner***[1] hearing at which Schneider and her trial counsel testified, the circuit court denied the motion in full. Schneider appeals.

DISCUSSION

¶4 To prevail on an ineffective assistance of counsel claim, the defendant must show both that counsel's actions or inaction constituted deficient performance and that the deficient performance caused prejudice. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); ***State v. Love***, 2005 WI 116, ¶30, 284 Wis. 2d 111, 700 N.W.2d 62. "To prove constitutional deficiency, the defendant must establish that counsel's conduct" fell "below an objective standard of reasonableness." ***Love***, 284 Wis. 2d 111, ¶30. A defendant must show specific acts or omissions that were "outside the wide range of professionally competent assistance." ***Strickland***, 466 U.S. 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. *See* ***State v. Maloney***, 2005 WI 74, ¶25, 281 Wis. 2d 595, 698 N.W.2d 583. To prove constitutional prejudice, the defendant must show that, but for counsel's unprofessional errors, a reasonable probability exists that the result of the proceeding would have been different. ***Strickland***, 466 U.S. at 694; ***Love***, 284 Wis. 2d 111, ¶30.

[1] *See* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979) (where a defendant claims he or she received the ineffective assistance of trial counsel, a postconviction hearing "is a prerequisite … on appeal to preserve the testimony of trial counsel").

¶5 Whether counsel's actions were deficient or prejudicial is a mixed question of law and fact. ***Strickland***, 466 U.S. at 698. The circuit court's findings of fact will not be reversed unless those findings 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 right to effective assistance of counsel is a legal determination, which this court decides de novo. ***Id.*** We need not address both prongs of the test if the defendant fails to make a sufficient showing on either one. ***Strickland***, 466 U.S. at 697.

A. Schneider's Decision to Reject the Plea Offer and Proceed to Trial

¶6 It is undisputed that Schneider was presented with but rejected a plea offer wherein she would plead to a reduced charge of misdemeanor battery and the State would move to dismiss and read in the obstructing charge. Postconviction, Schneider attempted to place the responsibility for rejecting the offer at trial counsel's feet, testifying that trial counsel never explained the elements of substantial battery or party-to-a-crime liability, and told her if she went to trial she "should win it hands-down." Schneider asserted that trial counsel never told her she might lose at trial. She also asserted that she would not have gone to trial had she understood that there was a chance she could be convicted of a felony. According to Schneider, she was interested in but had not taken the plea deal because she was waiting for trial counsel to "get back to me what the total restitution costs would be, that's all I asked for."

¶7 Trial counsel testified that he did explain to Schneider the elements of substantial battery, the meaning of party-to-a-crime liability, and both self-defense and defense of others. Counsel testified that he discussed the plea deal with Schneider "[n]umerous times," "[p]robably between five and ten," and stated

that he never had and never would advise her to reject the plea deal in favor of a trial. Counsel further testified that he and Schneider discussed the strength of her case, explaining that he thought she had a "[f]air" chance of winning, but that he did not consider it a great case to go to trial. According to trial counsel, Schneider was concerned about the "very, very high" amount of restitution and, every time they met, Schneider would say "I'm not pleading guilty to anything. I'm just defending myself and my family."

¶8 The circuit court credited trial counsel's testimony and determined that he did not perform deficiently. The court found that trial counsel adequately explained the crimes and elements to Schneider, including party-to-a-crime liability. The court further found that trial counsel did not tell Schneider they were guaranteed to win at trial or that she should reject the plea offer, "which directly controverts what Ms. Schneider is indicating." The circuit court rejected Schneider's assertions that she did not understand she faced a felony conviction and that she wanted to enter a plea but was waiting to find out from trial counsel the amount of restitution. The circuit court relied not only on trial counsel's testimony but also on the transcript from the first day of the jury trial in which Schneider directly and unequivocally told the circuit court that she did not want to accept the State's misdemeanor offer, which would have included an estimated $10,000 restitution. Schneider also confirmed that she understood that she could be convicted of a felony. The circuit court also found that Schneider's "consistent theme" with trial counsel was that she would not accept any plea offer because she was convinced she was defending herself and her family.

¶9 Against this backdrop, the circuit court found that Schneider "clearly had an understanding of what the risks were" but "did not want to take a plea," and that, "whatever the discussions were in detail with [trial counsel]," Schneider

would not have accepted the plea offer. The court's findings are not clearly erroneous and support a determination that trial counsel's performance was neither deficient nor prejudicial.

¶10 On appeal, Schneider maintains that trial counsel did not adequately advise her on the strengths and weaknesses of her case, leading her to reject a favorable plea deal. As the State points out, Schneider glosses over the circuit court's finding that she would not have accepted the plea agreement offer whatever the details of her discussions with trial counsel. Instead of arguing that this finding is clearly erroneous, Schneider seems to suggest that the circuit court improperly failed to consider trial counsel's "unsupportable legal theories" as dispositive proof that counsel "did not inform his client of the actual merits of the case." We are not persuaded.

¶11 First, the circuit court's finding that Schneider would not have accepted the plea offer was based on predicate findings supported by the record. These include that trial counsel adequately explained the crimes to Schneider and did not tell her she was going to win at trial or suggest that she reject the plea offer, and that Schneider understood the risks when she opted for trial. Second, counsel's trial performance does not prove that his legal analysis was deficient, let alone that any information based on any analytic deficiency was communicated to Schneider and caused her to reject the plea offer.

B. Jury Instruction

¶12 Schneider was charged with obstructing an officer in violation of WIS. STAT. § 946.41(1) (2011-12). Schneider concedes, and the trial evidence supports, that she provided discrepant statements to law enforcement about the

fight. Using the pattern instruction for obstructing an officer, WIS JI—CRIMINAL 1766, the circuit court instructed the jury as follows:

> Number one, that the defendant obstructed an officer.… To obstruct an officer means that the conduct of the defendant prevents or makes more difficult the performance of the officer's duty.
>
> Number two, the officer was doing an act in [an] official capacity ….
>
> Number three, the officer was acting with lawful authority.…
>
> Number four, the defendant knew that the city police officer was an officer acting in [an] official capacity and with lawful authority and the defendant knew her conduct would obstruct the officer.

¶13 Schneider contends that her trial counsel was ineffective for not requesting that the jury instead be instructed pursuant to WIS JI—CRIMINAL 1766A, Obstructing an Officer: Giving False Information, which sets forth the following elements:

> "1. The defendant knowingly gave false information to an officer."
>
> "2. The officer was doing an act in an official capacity."
>
> "3. The officer was acting with lawful authority."
>
> "4. The defendant intended to mislead the officer."

WIS JI—CRIMINAL 1766A. Schneider does not argue that the instruction provided to the jury misstates the law, but asserts that WIS JI—CRIMINAL 1766A would have been "more appropriate" because it includes the defendant's intent to mislead officers. The State argues that trial counsel did not perform deficiently because WIS JI—CRIMINAL 1766 reflects the charged offense and the State's theory at trial,

and, additionally, that Schneider has failed to demonstrate any prejudice from the allegedly improper jury instruction.

¶14 We reject Schneider's ineffective assistance of counsel claim because she has not established prejudice.[2] The jury was instructed that it had to find beyond a reasonable doubt that Schneider "knew her conduct would obstruct the officer." Schneider fails to present a reasoned, plausible explanation for why there is a substantial likelihood that the jury, having found that she had the requisite knowledge, would not have found that she had the requisite intent. *See* ***Harrington v. Richter***, 562 U.S. 86, 112 (2011) (to establish prejudice under ***Strickland***, the "likelihood of a different result must be substantial, not just conceivable"). The jury believed beyond a reasonable doubt that Schneider gave false information knowing this would obstruct an officer. Any argument that the jury would have nonetheless declined to find that she made the statement with the intent to mislead is purely speculative. *See* ***State v. Erickson***, 227 Wis. 2d 758, 774, 596 N.W.2d 749 (1999).

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2015-16). This opinion may not be cited under RULE 809.23(3)(b).

[2] At the ***Machner*** hearing, trial counsel testified that he could not recall why he submitted WIS JI—CRIMINAL 1766, if he reviewed WIS JI—CRIMINAL 1766A, or whether he made a decision "between those two instructions." In denying Schneider's postconviction motion, the circuit court did not make any findings on this ineffective assistance claim. Because we determine that Schneider failed to establish prejudice, we affirm. *See* ***State v. Smiter***, 2011 WI App 15, ¶9, 331 Wis. 2d 431, 793 N.W.2d 920 (WI App 2010) (this court is not constrained by the circuit court's reasoning when affirming its order).