COURT OF APPEALS
DECISION
DATED AND FILED

August 2, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP956-CR **Cir. Ct. No. 2013CF302**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CRAIG A. HRON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Washington County: JAMES G. POUROS, Judge. *Affirmed*.

Before Neubauer, C.J., Gundrum and Hagedorn, JJ.

¶1 PER CURIAM. Craig A. Hron appeals a judgment of conviction entered after a jury found him guilty of four felonies including the attempted first-degree intentional homicide of his ex-girlfriend, T.J., and an order denying his motion for postconviction relief. Hron argues that he was denied the right to effective assistance of counsel because trial counsel failed to (1) request a lesser-included offense instruction without first discussing the decision with Hron, (2) present evidence contradicting testimony offered by the State's witnesses, and (3) object to evidence that T.J. obtained a harassment injunction against Hron after his arrest. We reject Hron's claims and affirm.

BACKGROUND

¶2 Hron and T.J. were previously involved in a romantic relationship and lived together for several years until T.J. moved out in June 2013. On the morning of August 4, 2013, T.J. finished her work shift at Walmart and was getting into her car when she saw Hron running toward her. Hron was carrying a knife and a BB gun. The ensuing struggle was captured on video surveillance and witnessed by others in the parking lot, some of whom intervened. During the incident, Hron tried to take control of T.J.'s car and stabbed her with his knife. Law enforcement arrived and Hron was charged with attempted first-degree intentional homicide, first-degree reckless injury, stalking resulting in bodily injury, carjacking, and first-degree recklessly endangering safety. The stalking charge included the Walmart incident and alleged contacts by Hron with T.J. or the residence at which she was staying, the home of a friend, Larry McCartney.

¶3 At trial, the court granted Hron's request to instruct the jury on self-defense with respect to the charges of attempted homicide, reckless injury, and

recklessly endangering safety. The jury acquitted Hron of reckless injury but found him guilty of the other four charges.[1]

¶4 Hron filed a postconviction motion seeking a new trial based on the ineffective assistance of trial counsel. Following an evidentiary ***Machner***[2] hearing and briefing by the parties, the circuit court entered a written decision denying the motion in full.

DISCUSSION

¶5 Hron maintains that he is entitled to a new trial due to trial counsel's ineffective assistance. To prevail on an ineffective assistance of counsel claim, the defendant must show that counsel's actions or inaction constituted deficient performance which 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. ***State v. Maloney***, 2005 WI 74, ¶25, 281 Wis. 2d 595, 698 N.W.2d 583. To prove constitutional prejudice, the

[1] With respect to the crime of carjacking, the charge was amended and Hron was convicted of an attempted crime.

[2] ***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").

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.

¶6 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 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 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.

Trial counsel did not provide ineffective assistance by failing to request a lesser-included offense instruction.

¶7 As to the most serious charge, attempted first-degree intentional homicide, trial counsel did not request that the jury be instructed on any lesser-included offenses. Postconviction, Hron asserted that trial counsel provided ineffective assistance by failing to request an instruction on the included offense of first-degree recklessly endangering safety and by failing to discuss this option with Hron.

¶8 At the ***Machner*** hearing, trial counsel testified that he was aware reckless endangerment is a lesser-included offense of first-degree intentional homicide and that he believed the trial evidence would have supported an instruction on the lesser offense. Counsel testified that he did not request the lesser-included instruction because he believed the attempted homicide was "overcharged," allowing for "a good possibility of an acquittal," and he did not

want to increase Hron's exposure by giving the jury the option of convicting on the lesser offense. Counsel also testified that Hron had rejected a plea offer which would have required that he plead to the stalking and carjacking counts, with the State agreeing to cap its recommendation at between twelve and fifteen years of initial confinement.

¶9 The circuit court found trial counsel's testimony credible and observed that counsel's closing argument comported with this all-or-nothing strategy. The court determined that trial counsel made "a logical strategic decision" and did not perform deficiently.

¶10 We conclude that trial counsel's decision not to request an instruction on the lesser-included offense of reckless endangerment did not constitute deficient performance. The circuit court's finding that trial counsel made a strategic decision to pursue an all-or-nothing defense on the homicide charge is not clearly erroneous, and the all-or-nothing approach was consistent with the defense theory that the prosecutor overcharged the case.[3]

[3] For example, defense counsel's closing argument included the following:

> Now the decision on who files charges, it's not your decision, it's not the judge's decision, it's [the State's] decision. If they overcharged something and then don't have the evidence to back it up, it's nobody's fault but theirs. And that's what you have here.

and:

> First of all, attempted first degree homicide. I'm not going to skip this one. I don't have to tell you that this is an extremely serious charge, attempted first degree homicide. But it's not there. Not even close. This isn't a close call.

¶11 Hron argues that trial counsel performed deficiently by failing to consult with him before deciding to forego the lesser-included instruction. We disagree. The right to request a lesser-included offense instruction is neither a constitutional nor a fundamental right. ***State v. Eckert***, 203 Wis. 2d 497, 509, 553 N.W.2d 539 (Ct. App. 1996). "[T]he decision of whether to request a lesser-included offense instruction is a complicated one involving legal expertise and trial strategy." ***Id.*** As such, we concluded in ***Eckert*** that trial counsel was not required to consult with the defendant:

> [A] defendant does not receive ineffective assistance where defense counsel has discussed with the client the general theory of defense, and when based on that general theory, trial counsel makes a strategic decision not to request a lesser-included instruction because it would be inconsistent with, or harmful to, the general theory of defense.

Eckert, 203 Wis. 2d at 510 (citation omitted).

¶12 According to Hron, ***Eckert*** does not apply because the reckless endangerment instruction was not "harmful to" the "general theory" that he did not intend to kill T.J. We decline to read ***Eckert*** so narrowly. Trial counsel's decision was in line with the defense's all-or-nothing strategy on the homicide charge. This strategy is also in sync with Hron's decision to reject the State's plea offer which would have resulted in two convictions, neither for attempted homicide.

¶13 Hron also contends that even if trial counsel was not required to consult with him, counsel's go-for-broke strategy was objectively unreasonable due to vulnerabilities in Hron's self-defense claim. This is precisely the type of second-guessing that ***Strickland*** instructs reviewing courts to avoid. *See* ***Strickland***, 466 U.S. at 689 (a reviewing court must be vigilant against the skewed perspective that may result from hindsight, and it may not second-guess counsel's

performance solely because the defense proved unsuccessful). *See also* ***State v. Felton***, 110 Wis. 2d 485, 502, 329 N.W.2d 161 (1983) (counsel's performance is not deficient where he or she has made "strategic or tactical decisions … based upon rationality founded on the facts and the law."). Hron has failed to "overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *See* ***Strickland***, 466 U.S. at 689 (citation omitted).

Trial counsel did not provide ineffective assistance by failing to introduce data from Hron's ignition interlock device to contradict witness testimony on the stalking charge.

¶14 Among other elements, the stalking charge against Hron required that the State prove he engaged in a "course of conduct" comprising "a series of [two] or more acts" directed at T.J. that caused her to suffer serious emotional distress or to fear bodily injury or death. *See* WIS. STAT. § 940.32 (2015-16).[4] The State alleged five acts including incidents occurring on July 31, 2013, and August 1, 2013. McCartney and T.J. testified that Hron rang McCartney's doorbell on July 31, 2013, between 7:30 and 8:00 a.m. McCartney opened the door, told Hron to leave, and called the police. As to the August 1 incident, McCartney testified that as he was leaving for his third-shift job, he saw Hron parked in his Ford truck a short distance from McCartney's home and described how he saw Hron "pull away and drive up the street." T.J. said this occurred at about 6:10 p.m. McCartney testified that he immediately went to the police station to report the incident.

[4] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

¶15 Postconviction, Hron argued that trial counsel was ineffective for failing to present data gleaned from his truck's interlock ignition device (IID), and in support, introduced IID records to refute the trial testimony of McCartney and T.J. Whereas McCartney testified that Hron rang his doorbell on the morning of July 31, 2013, the IID records reflected that Hron's truck was not operated on that date until the afternoon. As to the August 1 contact, Hron alleged that the IID records when combined with the police report of Officer Nicholas Wenzel contradicted the testimony of McCartney and T.J. Specifically, though Wenzel's report stated that he was dispatched to discuss the incident with McCartney at 6:35 p.m. on August 1, his report and postconviction testimony indicated that the incident took place at 6:10 a.m. The IID records reflected that Hron's truck was not operated on that date until 8:35 a.m.

¶16 Trial counsel testified that Hron asked him to retrieve GPS data from his truck's IID to show he was not near McCartney's house at the relevant times, and that counsel was informed by the company who provided the IID that GPS-type data was not available. The circuit court determined that Hron failed to establish ineffective assistance given that trial counsel made attempts to obtain these records and because there were sufficient other acts supporting the stalking charge. On appeal, Hron argues that trial counsel performed deficiently by failing to investigate further and to obtain data retained by the IID company which, though it does not show the truck's location, reveals whether the truck was in movement at a given time.

¶17 We conclude that Hron has failed to establish prejudice. Neither T.J. nor McCartney testified that they saw Hron's truck as part of the July 31, 2013 incident, rendering the IID records irrelevant. As to the August 1, 2013 incident, the IID records in no way contradict the trial testimony of either McCartney or T.J.

The potential impeachment value of any discrepancy between the witnesses' firsthand accounts and Wenzel's incident report is marginal at best.

Trial counsel did not provide ineffective assistance by failing to present testimony from Fred Hron to contradict the testimony of State's witness John Kumrow.

¶18 At trial, John Kumrow testified about two conversations he had with Hron. In the first, according to Kumrow, Hron pulled out a knife and said that if he could get T.J. alone, "they'd never find her." Kumrow testified that the second conversation occurred in a garage with Hron and Hron's Uncle Fred, when Hron said "I have been dreaming and I really feel like killing someone." Kumrow said Hron had two BB guns and pulled out what looked like a pistol. Hron denied both conversations.

¶19 Postconviction, Hron asserted that trial counsel should have called Fred as a witness to contradict Kumrow's testimony. In support, Fred testified at the ***Machner*** hearing that he was present on the occasion Kumrow described, he did not recall Hron stating that he had been dreaming and felt like killing someone, and he believed he would have remembered a statement expressing a desire to harm someone. Trial counsel agreed it would not have hurt Hron's case to call Fred at trial but testified it was not something he "spent a lot of time on or focused on" because the alleged dream statement was "somewhat ambiguous" and "there were other avenues that [he] intended to tag Mr. Kumrow on." The circuit court characterized Fred's testimony as "vague, [and] very brief," and found him not credible. The court also stated that "Kumrow was crossed well" by trial counsel, and determined that Hron failed to meet his burden to show deficient performance.

¶20 We conclude that trial counsel's failure to interview Fred or call him as a witness was not deficient. Fred was not present during and could not dispute Hron's more inculpatory statement specifically naming T.J., the circuit court found Fred's testimony not credible, and the record shows that Kumrow's credibility was directly attacked and thoroughly vetted at trial. Hron has not established that trial counsel's conduct fell below an objective standard of reasonableness.

Trial counsel did not provide ineffective assistance by failing to object to evidence that T.J. obtained an injunction against Hron after his arrest.

¶21 The jury heard evidence that two days before the incident at Walmart, T.J. applied for and the court granted a temporary restraining order (TRO) against Hron, a copy of which was received into evidence and published to the jury. The jury also heard evidence that twelve days after Hron's arrest, the court granted T.J. a harassment injunction against Hron. While Hron does not dispute the admissibility of the TRO evidence,[5] he maintains that trial counsel was ineffective for failing to object to evidence about the post-arrest harassment injunction.

¶22 Postconviction, trial counsel testified that he did not object to the harassment injunction evidence because he did not consider it "case-changing" and did not want to appear obstructive to the jury. Counsel characterized it as "one of those strategic decisions that you make in every trial that takes about a second," and explained he did not think the information that an injunction had

[5] Trial counsel testified he believed the TRO was helpful to Hron's case because the defense theory was that Hron had not yet received a copy of the TRO when the Walmart incident occurred and this helped explain the actions of both Hron and T.J. in the parking lot.

issued "was going to be detrimental to Mr. Hron one way or the other." He said his thinking at the time was that given the undisputed fact that somebody was stabbed, the jury would not be surprised to learn an injunction had issued. Though the circuit court acknowledged the injunction may not have been admitted had counsel objected, it found that counsel made a strategic decision not to object and determined the decision was objectively reasonable, stating the injunction "did not add much, if anything to the story heard by the jury."

¶23 We conclude that the circuit court properly determined that trial counsel's failure to object to evidence about the injunction was not deficient. The court's findings of fact as to the theory of defense and trial counsel's strategy are not clearly erroneous. *See* ***State v. Carter***, 2010 WI 40, ¶19, 324 Wis. 2d 640, 782 N.W.2d 695 ("Findings of fact include 'the circumstances of the case and the counsel's conduct and strategy.'" (citation omitted)).[6]

¶24 We reject Hron's argument that counsel's strategy was rendered objectively unreasonable by the fact that the injunction was issued by a court and "would appear to the jury as a judicial determination that Mr. Hron had engaged in stalking behavior." The indisputably admissible TRO was also issued by a court and published to the jury, and served essentially the same purpose as the injunction, though on a temporary basis. The circuit court had the opportunity to observe the trial and agreed with trial counsel's assessment that the injunction

[6] Additionally, the same judge presided over Hron's trial and postconviction proceedings. In determining that trial counsel made a strategic decision, "[i]t is significant that the trial court had the opportunity to both see and hear counsel's presentation and evaluate its purpose in conjunction with [trial] counsel's testimony." ***State v. Maloney***, 2004 WI App 141, ¶23, 275 Wis. 2d 557, 685 N.W.2d 620. In these circumstances, the postconviction court's determination that trial counsel acted pursuant to a reasonable trial strategy is "virtually unassailable." *See* ***id.***

evidence, while likely irrelevant, was also not harmful.[7] Hron has not established that counsel's failure to object to the injunction was "outside the wide range of professionally competent assistance." ***Strickland***, 466 U.S. at 690; s*ee also* ***State v. Hanson***, 2000 WI App 10, ¶20, 232 Wis. 2d 291, 606 N.W.2d 278 (a defendant is entitled to a fair trial, not a perfect one).[8]

By the Court.—Judgment and order affirmed.

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

[7] Neither the TRO nor the injunction went back to the jury during deliberations.

[8] Because we have not determined that trial counsel's allegedly deficient acts or omissions constituted deficient performance, we reject Hron's contention that the cumulative effect of trial counsel's errors entitles him to a new trial. *See* ***State v. Thiel***, 2003 WI 111, ¶61, 264 Wis. 2d 571, 665 N.W.2d 305 (to be included in the calculus for prejudice, each act or omission must fall below an objective standard of unreasonableness).