COURT OF APPEALS
DECISION
DATED AND FILED

October 31, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP1200-CR **Cir. Ct. No. 2012CF1246**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

THOMAS BART KROPP,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DENNIS R. CIMPL and WILLIAM S. POCAN, Judges. *Affirmed*.

Before Brennan, P.J., Kessler and Brash, JJ.

¶1 PER CURIAM. Thomas Bart Kropp appeals the judgment of conviction,[1] entered upon a jury verdict, of aggravated battery, contrary to WIS. STAT. § 940.19(5) (2015-16).[2] He also appeals from the order denying his postconviction motion for a new trial based on claims of ineffective assistance of counsel. We affirm.

BACKGROUND

¶2 In March 2012, Kropp was charged with one count of aggravated battery stemming from an altercation with W.R. According to the criminal complaint, on March 15, 2012, Kropp battered his friend W.R. after an argument "involving jealousy with respect to [W.B.]." W.B. told police that her boyfriend, Kropp, physically beat her other boyfriend, W.R. Upon arriving at the crime scene, police discovered W.R. on the floor, bleeding, and unable to move his left arm. W.R. sustained multiple fractures to his cheek, a right orbital fracture, a right maxillary fracture, a nasal fracture, and a complete left humeral neck fracture.

¶3 The matter proceeded to a jury trial. On the first day of trial, Kropp's trial counsel told the court that the State offered Kropp a plea to a lesser felony, but that Kropp rejected the offer. Kropp confirmed that he rejected the offer. The State also informed the court that it had obtained W.R.'s medical records outside of the statutory forty-day period that allows introduction of medical records without witness authentication. *See* WIS. STAT. § 908.03(6m). Kropp, through counsel and personally, agreed to waive his right to authentication.

[1] The Honorable Dennis R. Cimpl presided at trial and imposed sentence; we will refer to Judge Cimpl as "the trial court." The Honorable William S. Pocan reviewed and denied the postconviction motion; we will refer to Judge Pocan as "the postconviction court."

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

¶4 At trial, the jury heard from W.R. and W.B. Kropp did not testify. W.R. stated that in March 2012, he and Kropp were roommates in a home owned by W.R.'s family. On the morning of March 15, 2012, W.R. and Kropp were drinking beer on the porch before Kropp left for work. After Kropp left for work, W.R. and W.B.—who was also residing with Kropp and W.R.—went up to the attic to clean. W.R. and W.B. began "to fool around sexually," but Kropp returned home and caught them. W.R. stated that at that point, Kropp "charg[ed] straight at me," "pinned me down, started hitting me numerous times in my face; then he started hitting me in my side and my kidneys, my ribs, then he broke my arm." As a result of the battery, W.R. was hospitalized for three days, underwent surgery, had a fractured eye socket, and suffered a broken shoulder, which required eleven staples, a three-and-a-half-inch plate and eight screws to hold it together.

¶5 W.B. testified that on March 15, 2012, she was living with W.R. and Kropp and that Kropp was her boyfriend at the time. She stated that all three of them had been drinking beer that morning. After Kropp went to work, she and W.R. went to the attic and "fool[ed] around." At some point during this interaction, Kropp returned home and began "hitting" W.R. W.B. ran out of the house to call the police.

¶6 Milwaukee Police Officer Greg Colker testified that he was dispatched to the crime scene and interviewed Kropp the following day. In Kropp's first interview with Colker, Kropp said that he and W.R. were just "two drunk roomies goofing around," but in a second interview he told Colker that W.R. sustained injuries as a result of a dresser falling on his face. Colker also testified that he interviewed W.B. following the incident and that W.B. told Colker a different version of events. W.B. told Colker that at the time of the incident, she was in a romantic relationship with W.R. and that on the morning of the incident

Kropp called W.B. into the attic. W.R. went with her and a fight ensued between the two men over W.B. Colker said that W.B. told him that W.B. tried to push Kropp out of the way, but she fell down the stairs instead. W.B. did not tell Colker that she was "fooling around" with W.R. in the attic, or that she ever dated Kropp.

¶7 The jury found Kropp guilty as charged.

¶8 Kropp filed a postconviction motion for relief alleging that his trial counsel was ineffective for failing to properly prepare for trial, failing to adequately communicate with Kropp, and failing to convey the State's plea offers. The postconviction court denied the motion without a hearing. Kropp appealed the postconviction court's order and we remanded the matter for an evidentiary hearing.

¶9 As relevant to this appeal, both Kropp's trial counsel and Kropp testified at the ***Machner***[3] hearing. Kropp testified that trial counsel did not adequately keep in touch with him or show him the relevant discovery she obtained. Specifically, Kropp stated that counsel did not bring her computer to any pretrial visits and therefore, he was unable to listen to his recorded statement to police. He also testified that counsel did not show him photos of W.R.'s injuries or W.R's medical records; indeed, Kropp claimed that counsel told him that she did not receive W.R.'s medical records. Kropp also stated that he told counsel he wished to go to trial if the State did not have medical records or pictures of W.R.'s injuries, but that if the State did have those materials, Kropp wished to review them before making a final decision about proceeding to trial.

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

Kropp also stated that he did not know W.R.'s medical records would be used at trial until he observed counsel obtain the records on the first day of trial and that he was unaware the State had photos of W.R.'s injuries until the trial started. Kropp stated that he would have taken a plea offer had he known the State had those materials. Kropp also stated that once he obtained postconviction counsel, he received a copy of W.R.'s medical records, which revealed that W.R. told his doctor he broke his arm in a fall, W.R. had good vision and did not sustain the type of eye injury he initially claimed, and W.R. did not sustain facial injuries. Kropp stated that W.R. had opiates in his system and a blood alcohol concentration of .282 at the time of his alleged injuries. Kropp also stated that he was not made aware of certain plea offers.

¶10 Trial counsel stated that she met with Kropp three times prior to trial. She acknowledged that Kropp attempted to contact her multiple times regarding discovery and stated that she did provide him with "police reports and things like that." She stated that she received a notice from the District Attorney's office, prior to trial, that W.R.'s medical records would be available and that she "believe[d] that an office mate … picked those up for me." Counsel stated that she reviewed the records prior to trial, as well as the photos of W.R.'s injuries. Counsel stated that had Kropp requested the photos, she would have provided him with copies, but that W.R.'s actual injuries were not central to the theory of defense, which was that W.R. was injured from a fall. Counsel also stated that she did not take her computer to the jail when visiting Kropp most likely because Sheriff's Department rules regarding computers changed frequently and she probably visited Kropp on days on which computers were not permitted.

¶11 Counsel also testified that following the preliminary hearing, the State offered a plea deal but then revoked the offer shortly thereafter upon learning

that Kropp's mother contacted the victim. At the final pretrial date, counsel told the State that Kropp wanted to plead to a misdemeanor, but the State did not accept the offer. Finally, just before the start of trial, the State put forth a plea offer which counsel extended to Kropp. Kropp told counsel he would only plead to a misdemeanor and nothing else. The matter then proceeded to trial.

¶12 The postconviction court denied Kropp's motion. The court found counsel credible and found that Kropp failed to show any reasonable probability of a different result had counsel performed differently. The court also found Kropp not credible.

¶13 This appeal follows.

DISCUSSION

¶14 On appeal Kropp argues that counsel was ineffective for: failing to "completely prepare for trial by timely reviewing and obtaining medical records of the alleged victim and not using the records to impeach the witness at trial"; failing to communicate with him; and failing to timely convey plea offers and "competently advise [him] about the acceptance of such offers." (Bolding and some capitalization omitted.)

¶15 In order to obtain a new trial based on ineffective assistance of counsel, the defendant must show that counsel's representation was deficient and prejudicial. *See* ***State v. Thiel***, 2003 WI 111, ¶18, 264 Wis. 2d 571, 665 N.W.2d 305. The test for the performance prong is whether counsel's assistance was reasonable under the facts of the particular case, viewed as of the time of counsel's conduct. *See* ***State v. Pitsch***, 124 Wis. 2d 628, 636-37, 369 N.W.2d 711 (1985). Under the second prong of the test, the question is whether counsel's errors were

so serious that the defendant was deprived of a fair trial and a reliable trial outcome. *See* ***id.*** at 640-41. Reviewing courts are "'highly deferential'" to counsel's strategic decisions. ***State v. Domke***, 2011 WI 95, ¶36, 337 Wis. 2d 268, 805 N.W.2d 364 (citation omitted).

Medical Records

¶16 Kropp contends that his trial counsel was ineffective for failing to timely obtain and review W.R.'s medical records and for failing to impeach W.R.'s testimony about his injuries with those records. We disagree. Counsel testified at the ***Machner*** hearing that upon learning the medical records were available, she believed her officemate picked up the records for her. Counsel stated that she reviewed the records prior to trial, but did not think W.R.'s actual injuries were relevant to the defense. She testified that W.R.'s injuries were undisputed and the focus of the defense was on how W.R. obtained those injuries. Moreover, on the first day of trial, counsel told the court that she and Kropp had discussed the timing of the State's disclosure of the medical records and that Kropp waived his right to require authentication of the records. Any claim by Kropp that counsel was ill-prepared with regard to the medical records is purely speculative and contrary to counsel's ***Machner*** testimony, which the postconviction court found credible. We are bound by the court's credibility findings. *See* ***State v. Peppertree Resort Villas, Inc.***, 2002 WI App 207, ¶19, 257 Wis. 2d 421, 651 N.W.2d 345 (The trial court "is the ultimate arbiter of the credibility of the witnesses and the weight to be given to each witness's testimony.").

¶17 As to Kropp's allegation that counsel failed to impeach W.R. with the medical records, we conclude that Kropp has not shown either that counsel

performed deficiently or that the alleged deficiency prejudiced his defense. Kropp's argument is based on a very limited portion of the medical records. On the sixth page of W.R.'s medical records, it states "patient fell." Kropp contends that this statement supported his defense theory that a dresser fell on W.R. and that counsel should have impeached W.R. with the record. Kropp also argues that the records indicate W.R. had good vision, a high BAC, and opiates in his system—information counsel also could have used to impeach testimony about W.R.'s eye injury and W.R.'s version of events.

¶18 Kropp ignores the other portions of the medical record that clearly indicate that W.R. was treated for an "assault by an individual that [W.R.] knows" and that W.R. suffered from an "orbital fracture." Even if counsel had attempted to impeach W.R. with the medical records, the records themselves still would have supported the jury's verdict. Accordingly, Kropp cannot show that a different result was probable had counsel tried to impeach W.R. We therefore conclude that counsel did not render ineffective assistance in any regard as to W.R.'s medical records.

Pretrial Communication and Plea Offers

¶19 Kropp contends that counsel failed to adequately communicate with him regarding the status of his case, discovery matters, and potential plea offers. Kropp argues that counsel's failures led him to proceed with trial when he would have accepted a plea to a lesser felony.

¶20 Following the preliminary hearing, which CCAP records show took place on March 23, 2012, the State extended an offer, but revoked it almost immediately thereafter upon learning that Kropp may have attempted to intimidate a witness. Counsel admitted that she first received a viable plea offer from the

State on April 2, 2012, but that the State informed her the following day that it mistakenly offered the wrong plea and amended the offer. Counsel did not convey the amended offer to Kropp and the offer was ultimately revoked on April 9, 2012. At the final pretrial date, which CCAP records show took place on May 31, 2012, counsel told the State that Kropp wanted to plea to a misdemeanor but the State did not accept the offer. Finally, just before the start of trial, the State put forth a plea offer which counsel extended to Kropp. Kropp told counsel he would only plead to a misdemeanor and nothing else.

¶21 Kropp contends that if he knew the State possessed W.R.'s medical records, he would have accepted a plea. The State obtained W.R.'s medical records on May 23, 2012, over one month after the April 2012 offer. Even if we assume, without deciding, that counsel was deficient in failing to convey this offer, Kropp cannot show that he was prejudiced because the State did not have the medical records at that time. As to the other offers made after the State obtained the medical records, Kropp contends that he had no knowledge about the State's possession of the records and that if he knew the State had the records, he would have accepted the subsequent offers.

¶22 The postconviction court did not find Kropp's testimony credible, but rather believed counsel's testimony that she reviewed the medical records prior to trial and that she discussed the records with Kropp "at length" prior to trial. According to counsel, Kropp refused to plead to anything other than a misdemeanor offense. The postconviction court also found credible counsel's testimony that she met with Kropp multiple times prior to trial, provided him with certain discovery, and reviewed the medical records and her trial strategy with Kropp. Again, we are bound by the postconviction court's credibility determinations. *See* ***Peppertree Resort Villas, Inc.***, 257 Wis. 2d 421, ¶19.

Accordingly, we conclude that counsel was not ineffective with regard to the plea offers.

¶23 For the foregoing reasons, we affirm the postconviction court.

By the Court—Judgment and order affirmed.

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