COURT OF APPEALS
DECISION
DATED AND RELEASED

June 26, 1997

NOTICE

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

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No. 96-2899-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

DARCY STAFFORD,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Marquette County: ANDREW P. BISSONNETTE, Judge. *Affirmed.*

Before Vergeront, Roggensack and Deininger, JJ.

DEININGER, J. Darcy Stafford appeals a judgment convicting her of arson and insurance fraud, and an order denying postconviction relief. She claims that her trial counsel was ineffective, that the trial court erred in allowing certain testimony, and that she should have a new trial in the interest of justice. We disagree and affirm the judgment and order.

BACKGROUND

James Bennett, an ex-husband of Stafford's, confessed in 1994 to the arson of Stafford's residence. He claimed that he set the fire on August 9, 1989 at Stafford's request, in return for her promise to pay him $5,000 out of the insurance proceeds on the dwelling. After a three day trial, a jury found Stafford guilty of being a party to the crimes of arson and insurance fraud. Stafford sought postconviction relief, claiming that her trial counsel had ineffectively represented her. Her motion was denied and she appeals. Additional facts will be discussed in the analysis which follows.

ANALYSIS

a. Ineffective Assistance of Counsel

In order to prevail on her claim that trial counsel was ineffective, Stafford must show that counsel's performance was deficient and that she was prejudiced thereby. ***Strickland v. Washington,*** 466 U.S. 668, 687 (1984). We defer to a trial court's factual findings regarding counsel's actions during trial court proceedings. ***State v. Jones***, 181 Wis.2d 194, 199, 510 N.W.2d 784, 786 (Ct. App. 1993). Whether counsel's performance was deficient, however, and, if so, whether that performance prejudiced the defense, are questions of law which we review de novo. ***State v. Pitsch***, 124 Wis.2d 628, 634, 369 N.W.2d 711, 715 (1985). Finally, since Stafford has the burden to show both deficient performance and prejudice, we will affirm the denial of postconviction relief if we conclude she has failed to meet her burden on either issue. *See* ***Jones***, 181 Wis.2d at 200, 510 N.W.2d at 786.

Although several of Stafford's arguments overlap, she cites at least seven instances of alleged deficient performance on the part of her trial counsel. We have examined her claims in light of the trial record and her attorney's testimony at the postconviction hearing. We conclude, as did the trial court, that Stafford's counsel's performance did not fall below constitutional norms. *See* ***Strickland***, 466 U.S. at 689 (judicial scrutiny of counsel's performance must be "highly deferential"; defendant must overcome presumption that counsel pursued "sound trial strategy"). In the paragraphs which follow, we discuss each of Stafford's claims of deficient performance.

(1) Counsel "presented" hearsay that Stafford had attempted to procure another ex-husband, Van Johnston, to commit the arson, and then failed to impeach Johnston's credibility.

Counsel's primary theory of defense was that Stafford had taken numerous actions that were inconsistent with any knowledge or intent on her part that her residence would burn. Counsel presented evidence to that effect and argued the points to the jury. A second defense strategy was to raise the inference that Stafford's two ex-husbands, Bennett and Johnston, conspired to commit the arson and implicate Stafford. In furtherance of the conspiracy theory, counsel attempted to have a detective acknowledge that the "dormant" investigation of the fire was only reactivated because Johnston had told the detective that Stafford had solicited him to burn the house. The attempt was thwarted by an objection from the State, but the jury did hear the substance of the question.

Johnston never testified because the State could not locate or procure him for trial, and Stafford's counsel did not try to do so. Stafford claims that once the jury had heard the question regarding Stafford's alleged solicitation of

Johnston to commit the arson, her counsel should have put evidence before the jury to impeach Johnston's credibility. As the State points out, however, Johnston's out of court statement was not admitted into evidence, and thus the predicate for impeaching hearsay statements, "when a hearsay statement has been admitted in evidence," was not present. Section 908.06, STATS. Stafford's counsel cannot be faulted for not attempting to do what a rule of evidence precludes.

We also conclude that the attempt to get Johnston's solicitation accusation before the jury was not deficient performance. It was consistent with counsel's strategy to paint a conspiracy between Johnston and Bennett, other evidence of which was successfully introduced, including phone records of a series of lengthy telephone calls between the residences of the two ex-husbands in the days leading up to the fire.

(2) Counsel failed to present testimony of Bennett's suspected drug dealing.

The State presented testimony at trial that Bennett had substantial cash in his possession in the months following the fire that could not be attributable to employment or other legitimate sources. Stafford's counsel attempted to elicit from a friend of Bennett's, Patrick Garrison, that Bennett had "sold drugs for money." The State successfully objected to the question on the grounds that it was improper impeachment of a witness by extrinsic evidence of specific instances of conduct. *See* § 906.08(2), STATS. Stafford attacks her counsel's performance in not prevailing on the issue because he failed to cite the proper law in attempting to have the question allowed.

During cross-examination of Bennett, Stafford's counsel had established that Bennett had been arrested for possession of marijuana with intent to deliver. The arrest occurred in 1993, some four years after the fire. Stafford points to no evidence in the record or in her or her counsel's possession that would establish that Bennett had "sold drugs for money" in the fall of 1989. The trial court refused to allow the questioning of Garrison on this point because the court concluded it was a "fishing expedition." The ruling was not an erroneous exercise of discretion, and would not have been so even if Stafford's counsel had argued admissibility on the basis of relevance to the issue of the source of Bennett's cash in late 1989. *See* § 904.03, STATS., (court may exclude relevant evidence if its probative value is substantially outweighed by danger of unfair prejudice, confusion of issues, etc.).

(3) Counsel failed to "protect the credibility of a key defense witness."

Stafford's daughter-in-law, Cynthia Artz, testified that Johnston and Bennett had bragged in 1992 about how they had started the fire in Stafford's house. The State impeached her credibility on this point by establishing that Artz had not reported these conversations to the police in timely fashion. Stafford claims that her counsel should have rehabilitated Artz by establishing that a transcript of Artz's statement to Stafford's counsel, including these allegations, was provided to the prosecutor fifteen months before trial.

We do not understand how establishing the fact that Artz told her mother-in-law's defense counsel about the Bennett-Johnston statements fifteen months before trial would somehow negate the negative impression created by the fact that she failed to tell the police about the statements during the two years prior

to that. Moreover, the details of how Artz's statement was obtained would have then been before the jury, and we cannot conclude that counsel was wrong in his assessment that this would not "help my client at all."

(4) Counsel elicited from Stafford that she had been on welfare, and he did not object to testimony that she was "involved with the department of social services."

Stafford claims that this testimony was harmful to her because it prejudiced the jury against her. Her counsel testified at the postconviction hearing that he wanted the jury to know that his client had worked herself off of welfare because it showed character strengths, and because it tended to refute the State's theory that Stafford's need for money gave her a motive for arson and insurance fraud. Stafford's testimony that she had been on welfare some years ago was prefaced with the following question from her counsel:

> Q: Is there any particular reason, Ms. Stafford, that you've been working, holding two jobs for many years since you graduated [from a technical college program]?
>
> A: To stay off welfare.

The framing of the question is consistent with counsel's stated rationale for eliciting the testimony.

Evidence of Stafford's dealings with social services had come in during the State's cross-examination of defense witnesses. The testimony related to the fact that Stafford and her family had been ordered to vacate the house about two weeks before the fire because it was "unlivable." The circumstances surrounding Stafford's departure from the residence on or about July 24, 1989, and the condition of the premises at that time, were relevant to both the State's and

defense theories of the case. Stafford's counsel testified that he wanted to ensure that the jury understood that Stafford's vacating the residence shortly before the fire was not a voluntary choice on her part.

The welfare testimony was brief and framed to further defense strategies. Objections would not have prevented some testimony regarding the condition of the house and Stafford's departure from it from being admitted. Counsel did what he could to make sure that points favorable to the defense were made. Moreover, counsel was successful in preventing the State from re-visiting the condition of the house prior to the fire yet again with rebuttal testimony. We cannot fault counsel on his handling of either matter.

(5) Counsel failed to "adequately develop" the Bennett-Johnston conspiracy defense.

Stafford argues that there was a sufficient basis on which to offer evidence that Johnston and Bennett had conspired to implicate Stafford in the crimes, but that her counsel failed to do so. *See* ***State v. Denny,*** 120 Wis.2d 614, 624, 357 N.W.2d 12, 17 (Ct. App. 1984) (upon a showing of motive and opportunity, evidence connecting a third person to the crime is admissible). She claims this should have been done by having Johnston declared "unavailable" under § 908.04(1)(e), STATS., and then introducing certain statements Johnston had made in the presence of defense witnesses via § 908.045, STATS.[1]

[1] Section 908.045(4), STATS., allows statements of a declarant who is unavailable as a witness to be admitted if:

> [The statements are] so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability or to render invalid a claim by the declarant against another or to make the declarant an object of

(continued)

We agree with the State that even had Johnston been declared an "unavailable" witness, it is unlikely that many of the statements attributed to him and cited now by Stafford would have been admissible. None of those statements connect Johnston directly to the arson, but are generally expressions of Johnston's dislike of Stafford.[2] Moreover, Stafford's counsel was able to get several facts before the jury that suggested Johnston's involvement with Bennett in the arson, for example: the long-distance telephone records preceding the fire; statements made by Bennett implicating Johnston; and Johnston's trip from Iowa to visit the scene the morning after the fire. Counsel also weaved the Bennett-Johnston connection into his closing argument.

The testimony of Stafford's counsel showed that, except for the preceding evidence, he did not discover any evidence directly correlating or connecting Van Johnston to the crime. We concur with the trial court's conclusion that this did not constitute "a case against Johnston," and that defense counsel's performance cannot be deemed deficient for failure to more "adequately develop" a defense not sustainable by the facts and evidence available to counsel.

(6) Counsel failed to elicit testimony regarding a statement by Bennett that he burned Stafford's house for revenge.

> hatred, ridicule, or disgrace, that a reasonable person in the declarant's position would not have made the statement unless the person believed it to be true.

[2] Johnston allegedly made the following statements at different times to various witnesses: he wanted to "get Darcy [Stafford] back"; he wanted to burn Stafford's current residence with both her and her current husband in it; he wanted to kill Stafford, torture her and "put her out in the woods"; he was angry at Stafford over certain medical insurance reimbursements and for taking his children from him.

Holly Sherd, Stafford's oldest daughter, testified briefly for the defense. She had previously told a police investigator that Bennett had said he started the fire as revenge against Stafford for her failure to reimburse him for some tools he had lost in an unrelated fire. Stafford's counsel did not ask Sherd to relate Bennett's statement because he felt she would have been a "terrible witness," in that she did not get along with her mother and had been aligned with the State during most of the investigation and prosecution of the offenses.

In her statement to the police investigator, Sherd had also told the investigator the following:

> Sherd: Well, put it this way ever since that house burned I felt like she [Stafford] had done it.
>
> Investigator: You felt that she had done it?
>
> Sherd: Yea. I felt that she had someone set it on fire.
>
> Investigator: What made you feel that?
>
> Sherd: Just something that she would do, something deviant like that.

At other points in the lengthy police interview, Sherd told the investigator that her brothers and sisters also suspected their mother's involvement in the fire; that Stafford got upset whenever the topic of the fire came up; that Van Johnston had said Stafford had offered him $5,000 to burn down the house; and that Stafford had been pressuring her to go to Stafford's lawyer and tell lies to help in Stafford's defense.

The trial court concluded that Stafford's counsel made a wise decision in calling Sherd only for the limited purpose of verifying that certain family mementos that were not consumed in the fire were in Sherd's possession,

and not Stafford's, at the time of the fire. We agree that asking Sherd to repeat the Bennett statement would have been an open invitation to the State to explore the numerous comments detrimental to Stafford which Sherd had made to the police investigator. The State was apparently equally wary of Sherd as a witness, since after the limited questioning on direct, the State elected not to cross-examine her. We concur with the trial court that counsel's handling of this witness did not constitute deficient performance.

(7) Counsel failed to object to certain hearsay and erred in calling a State witness for impeachment purposes.

Patrick Garrison testified that Bennett was usually broke and behind on rent, had lost a job due to intoxication, and that in the fall of 1989, Bennett had a roll of cash and $3,000 in a checking account. Stafford's counsel did not object to this testimony, and Stafford claims it was deficient performance not to do so. She also claims that counsel was deficient in calling Detective Campion to the stand for the purpose of showing that Garrison's testimony at trial was inconsistent with Campion's police report of his interview with Garrison.

Stafford's counsel testified at the postconviction hearing that he did not consider most of Garrison's statements to be hearsay, since Garrison could have based most of his testimony on things he had observed while in Bennett's company. Moreover, counsel felt that much of the information would come in from other sources, and that some of it was even helpful to the defense in that it confirmed the defense portrayal of Bennett as a deadbeat and a drunk. Finally, counsel's purpose in calling Detective Campion to the stand was to show that the

most damaging of Garrison's testimony[3] was not included in Campion's report of his interview with Garrison, thereby suggesting that Garrison had subsequently embellished his story. As counsel testified, this is a common impeachment technique. His rationale for employing it was "to show that Darcy [Stafford's] name never came up in that first conversation, was never written down by Detective Campion.… I expect the jury to believe what's in writing more than what somebody is saying to them, especially when they're talking six years later."

We cannot fault counsel's performance in responding to Garrison's obviously damaging testimony. Counsel objected to what he considered to be excludable statements, and did what he could thereafter to minimize the damage of the testimony by casting doubts on the veracity of the witness's trial testimony.

As we have previously observed, a defendant does not have a right to the ideal, perfect, or best defense, only to reasonably effective representation. ***State v. Lukasik***, 115 Wis.2d 134, 140, 340 N.W.2d 62, 65 (Ct. App. 1983). Stafford may plausibly claim that with respect to certain of the matters discussed above, her trial counsel could have or should have done things differently. We conclude, however, that counsel's performance was well within the "wide range" of professionally competent assistance when evaluated from "counsel's perspective at the time," as opposed to the distorted vantage point of hindsight. ***Strickland v. Washington,*** 466 U.S. 668, 689 (1984).

[3] Garrison testified that on the night of the arson, Bennett had come by his house and offered him $2,500 to assist in the arson, saying that Stafford had offered to pay Bennett $5,000 to burn down the house. The court's evidentiary ruling on this testimony is discussed below. *See* n.4.

b. Evidentiary Rulings

We review a trial court's evidentiary rulings to determine whether the court exercised discretion in accordance with accepted legal standards and the facts of record. ***Bittner v. American Honda Motor Co.***, 194 Wis.2d 122, 146-47, 533 N.W.2d 476, 486 (1995). We will sustain a discretionary determination of the trial court if the record shows "that the court looked to and considered the facts of the case and reasoned its way to a conclusion that is (a) one a reasonable judge could reach and (b) consistent with applicable law." ***Burkes v. Hales***, 165 Wis.2d 585, 590, 478 N.W.2d 37, 39 (Ct. App. 1991) (footnote omitted). The trial court need not exhaustively state the reasons for its decision; we will affirm the decision if the trial court's determination indicates to the reviewing court that the trial court undertook a reasonable inquiry and examination of the facts and the record shows there is a reasonable basis for the court's determination. ***Id***. at 590-91, 478 N.W.2d at 39. We generally look for reasons to sustain a trial court's discretionary decision. ***Id***. at 591, 478 N.W.2d at 39.

Stafford's complaint is that the trial court allowed two witnesses, Crystal Johnston and Patrick Garrison, to testify that Bennett had told them of his solicitation and compensation by Stafford to commit the arson. The trial court admitted the statements under § 908.01(4)(a)2., STATS., as "prior consistent testimony" of a witness whose credibility had been attacked.[4]

[4] Section 908.01(4)(a), STATS., provides that a statement is not hearsay if a declarant testifies and is subject to cross-examination, and the statement is:

> 2. Consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive.

Bennett had testified that he told both Crystal Johnston and Garrison that he set the fire, but he did not testify that he told them of Stafford's involvement. Thus, Stafford claims that their testimony was not consistent with Garrison's. This argument misconstrues the application of the rule that prior consistent statements are not hearsay when offered to refute claims of fabrication. Bennett's statements to Crystal Johnston and Garrison were introduced to corroborate Bennett's trial testimony that Stafford solicited the crime, not his testimony regarding his conversations with Johnston and Garrison. Even if Bennett had not testified at all regarding his conversations with the other two witnesses, they could have been called to testify as they did, provided the requirements of § 908.01(4)(a)2., STATS., were met.

Stafford also argues, however, that the requirements of § 908.01(4)(a)2., STATS., were not met because there had been no charge that Bennett's trial testimony was a "recent fabrication" or the product of "improper influence or motive." To the contrary, the cross-examination of Bennett had established that his testimony against Stafford was part of a plea bargain involving numerous charges he was facing; that his relationship with Stafford during their marriage was discordant; and that he was frequently unemployed, a problem drinker, and a convicted criminal. Apart from generally undermining Bennett's credibility, the cross-examination raised the distinct implication that Bennett's testimony regarding Stafford was a recent fabrication, influenced by his deal with the State, and motivated in part by ill-will stemming from his divorce from Stafford.

We conclude the trial court did not err in allowing the witnesses to relate Bennett's prior statements implicating Stafford in the arson and insurance fraud.

c. New Trial in the Interest of Justice

This court may exercise its discretion to reverse Stafford's convictions if we conclude that either (1) the real controversy has not been tried, or (2) that it is probable that justice has miscarried. Section 752.35, STATS. It is not clear from Stafford's argument under which rationale she makes her request. If it is the former, she must convince us that the jury was precluded from considering "important testimony that bore on an important issue" or that certain evidence that was improperly received "clouded a crucial issue" in the case. ***State v. Wyss***, 124 Wis.2d 681, 735, 370 N.W.2d 745, 770-71 (1985). If her request is grounded on the miscarriage of justice rationale, Stafford must convince us that she "should not have been found guilty and that justice demands [that she] be given another trial." ***Id.*** at 736, 370 N.W.2d at 771 (quoting ***Lock v. State***, 31 Wis.2d 110, 118, 142 N.W.2d 183, 187 (1966)) (emphasis omitted).

Stafford does not specify in her brief why she believes the real controversy was not fully tried or why a new trial would likely result in an acquittal. She simply refers to the claims of ineffectiveness and error discussed above, and argues that even if any one of her claims is insufficient to grant a new trial, "the cumulative effect of all these errors" is sufficient. We disagree and find no reason to order a new trial. Moreover, since Stafford's argument for a new trial in the interest of justice is cursory and undeveloped, we will not address it further. *See* ***State v. Pettit***, 171 Wis.2d 627, 647, 492 N.W.2d 633, 642 (Ct. App. 1992).

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.