

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

March 25, 1997

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.

NOTICE

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No. 96-2911-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

State of Wisconsin,

Plaintiff-Respondent,

v.

Charlotte Kotlov,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DANIEL L. KONKOL and ROBERT CRAWFORD, Judges. *Judgment affirmed; order reversed, and cause remanded with directions.*

FINE, J. Charlotte Kotlov pled guilty to, and was convicted of, endangering safety by use of a dangerous weapon. See § 941.20(1)(c), STATS. The trial court sentenced Kotlov to serve a six-month term of incarceration under § 303.08(1), STATS. (“Huber” work-release), stayed that sentence, and placed Kotlov on probation for two years, with a sixty-day work-release confinement imposed as one of the conditions of probation, see § 973.09(4), STATS. Subsequently, Kotlov sought postconviction relief,

alleging ineffective assistance of the lawyer who represented her at the plea and sentencing hearings. Kotlov also alleged that the sentencing court misused its discretion and imposed a sentence that was unduly harsh. The trial court held a hearing on Kotlov's motion, which it denied. Kotlov appeals from the judgment of conviction and sentence, and from the order denying her motion for postconviction relief.¹ We reverse, and remand for a new sentencing hearing.

I.

The criminal complaint in this matter alleges that Kotlov pointed a loaded handgun at her former stepfather, saying that she “could kill” him, but that “[i]t's not worth it.” The complaint indicates that a test of Kotlov's blood-alcohol after the incident revealed a concentration of .15 percent.

The dispute before the postconviction trial court and on appeal centers on the failure of the lawyer who represented Kotlov at the plea and sentencing hearings to tell the trial court, in mitigation of Kotlov's sentence, that she pointed the gun at her former stepfather in what was, at least, quasi-self-defense. According to Kotlov's testimony at the postconviction hearing, she had been sexually abused by the former stepfather when Kotlov was twelve. She told the postconviction trial court that at the time of the pointing incident she was “scared” and, although she was then thirty-two, she was “so afraid that it was going to happen again.” Kotlov, not her former stepfather, called the police.

According to the lawyer who represented Kotlov at the plea and sentencing hearings, Kotlov's former stepfather “had quite a bit to drink” the night of the

¹ The Honorable Daniel L. Konkol presided over the plea and sentencing hearings. The Honorable Robert Crawford presided over the postconviction hearing.

pointing incident. Moreover, the former stepfather made sexual advances toward Kotlov that night, had twice grabbed the telephone from her hand, and had tried to physically stop her from leaving his house. Additionally, a social worker with whom Kotlov was working in an attempt to come to grips with her feelings of anger against her former stepfather, told the lawyer who represented Kotlov at the plea and sentencing hearings—as recounted by the lawyer during his testimony—that he, the social worker, believed that the pointing incident “was an aberration in that she did not have an anger management problem of a great significance and that she wouldn't engage in this type of thing on a regular basis.” The lawyer did not present evidence or argument on these matters during the sentencing hearing because, as he explained at the postconviction hearing, he “never had a positive experience with” bringing out “allegations of misconduct by the alleged victim.” He testified that in his experience “[m]ost judges react very negatively to trying to excuse your conduct or explain your conduct by pointing your finger at the person that was victimized.”

The postconviction trial court found that the lawyer who represented Kotlov at the plea and sentencing hearings made a decision “to pursue a strategy at the sentencing hearing that would avoid blaming the victim.” The postconviction trial court found that the lawyer's performance “was adequate in all respects,” meeting “constitutional muster.” Additionally, the postconviction trial court found that there was no prejudice.² Further, the postconviction trial court concluded that the sentencing court did not misuse its discretion in structuring Kotlov's sentence as it did. Accordingly, it denied Kotlov's motion for postconviction relief.

² The postconviction trial court concluded that Kotlov had not demonstrated prejudice because the sentencing court had before it a report from the social worker. That report, however, is sparse, and does not recount the self-defense aspects of Kotlov's relationship with her former stepfather.

II.

Every criminal defendant has a Sixth Amendment right to the effective assistance of counsel, *Strickland v. Washington*, 466 U.S. 668, 686 (1984), and a coterminous right under Article I, § 7 of the Wisconsin Constitution, *State v. Sanchez*, 201 Wis.2d 219, 225, 548 N.W.2d 69, 71–72 (1996). In order to establish violation of this fundamental right, a defendant must prove two things: (1) that his or her lawyer's performance was deficient, and, if so, (2) that “the deficient performance prejudiced the defense.” *Strickland*, 466 U.S. at 687; *Sanchez*, 201 Wis.2d at 236, 548 N.W.2d at 76. A lawyer's performance is not deficient unless he or she “made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” *Strickland*, 466 U.S. at 687. The defendant must also prove prejudice; he or she must demonstrate that the trial lawyer's errors “were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.” *Ibid*. As recently restated, the “prejudice” component of *Strickland* “focuses on the question whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair.” *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993). Stated another way: “In order to show prejudice, ‘[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.’” *Sanchez*, 201 Wis.2d at 236, 548 N.W.2d at 76 (quoting *Strickland*, 466 U.S. at 694).

The issues of performance and prejudice present mixed questions of fact and law. *Id.*, 201 Wis.2d at 236, 548 N.W.2d at 76. Findings of historical fact will not be upset unless they are clearly erroneous, *ibid.*; RULE 805.17(2), STATS., and the questions of whether counsel's performance was deficient, and, if so, whether it was prejudicial, are legal issues that we review *de novo*, *Sanchez*, 201 Wis.2d at 236, 548 N.W.2d at 76.

The lawyer who represented Kotlov at the plea and sentencing hearings did not alert the sentencing court to the core of the pointing incident—his client's contention that she pointed the gun at her former stepfather because he was drunk and was making sexual advances to her that fearfully reminded her of the episode when she was twelve, and that he had attempted to physically prevent her from leaving. Moreover, the lawyer did not advise the sentencing court that Kotlov knew that her former stepfather had been abusive with her siblings and his former wife. Indeed, the lawyer who represented Kotlov at the plea and sentencing hearings told the trial court that *Kotlov's* drinking “was a driving force in her conduct.”

The circumstances of the crime is a critical sentencing factor. *See Elias v. State*, 93 Wis.2d 278, 284, 286 N.W.2d 559, 561 (1980). The law recognizes that the character of a victim is relevant when a defendant claims that he or she acted in self-defense. *See* RULE 904.04(1)(b), STATS.; *State v. Daniels*, 160 Wis.2d 85, 95–96, 465 N.W.2d 633, 636–637 (1991). To keep critical information about Kotlov's offense from a sentencing court, when the evidence adduced at the postconviction hearing indicates that she pointed the gun at her former stepfather not to “endanger” his safety but to protect herself from perceived harm, cannot be excused as a matter of “strategy.” *See State v. Glass*, 170 Wis.2d 146, 150–152, 488 N.W.2d 432, 433–434 (Ct. App. 1992) (trial counsel's conduct of trial may be deficient even if an element of his or her “strategy”).

It may very well be that evidence at the new sentencing hearing will not support Kotlov's contentions, although no contrary evidence was brought out at the postconviction hearing. She is, however, entitled to present to a sentencing court all evidence relevant to the imposition of sentence. The lawyer who represented her at the sentencing hearing failed to do so, and, under our *de novo* review, we cannot say that confidence in the sentencing proceeding has not been undermined by that failure. Accordingly, we reverse the trial court's order denying Kotlov's motion for

postconviction relief, and remand this case to the trial court with directions that although Kotlov's judgment of conviction is affirmed, her sentence must be vacated, and that the matter be set down for a new sentencing hearing.³

By the Court.—Judgment affirmed; order reversed, and cause remanded with directions.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.

³ In light of our resolution of Kotlov's ineffective-assistance-of-counsel claim, we do not discuss her contentions that the sentencing court either misused its sentencing discretion or imposed a sentence that was unduly harsh. *See Gross v. Hoffman*, 227 Wis. 296, 300, 277 N.W. 663, 665 (1938) (only dispositive issue need be addressed).

