COURT OF APPEALS
DECISION
DATED AND FILED

August 17, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP310-CR **Cir. Ct. No. 2003CM1102**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ELIZABETH A. QUINLAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Waukesha County: DONALD J. HASSIN, JR., Judge. *Affirmed.*

¶1 BROWN, J.[1] Elizabeth A. Quinlan appeals from a judgment of the circuit court convicting her of violating a harassment injunction and an order

[1] This opinion is decided by one judge, pursuant to WIS. STAT. § 752.31(2)(f) (2003-04) All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

denying her postconviction motion where she claimed ineffectiveness of counsel. Elizabeth asserts that an absent witness would have been able to relate the events in a manner directly contrary to the State's witnesses, which testimony would have exculpated her. She further asserts that her trial counsel did not ask for an adjournment of the proceedings so that this important witness could testify and thereby rendered ineffective assistance. However, because the absent witness's testimony would have inculpated her rather than exculpated her, there was no ineffective assistance, and we affirm.

¶2 Elizabeth was ordered by the court to follow the conditions of a harassment injunction. The injunction prohibited her in pertinent part from "having contact with Carol Quinlan ... (which includes any [indirect] contact through third persons …)." The order also directed Elizabeth to avoid "any premises temporarily occupied by [Carol]. "

¶3 The facts that will determine the outcome of this appeal are not disputed by any testimony Elizabeth is willing or able to adduce. On March 20, 2003, at about 7:00 p.m., Carol arrived at Champps Americana in Brookfield and sat down at the bar with some friends. Later that evening, Elizabeth arrived at Champps and soon became aware of Carol's presence in the restaurant. According to Carol, Elizabeth "glar[ed] at [her]" for two or three minutes. This is undisputed. There is also undisputed testimony that, awhile after Elizabeth entered the establishment, she walked up to where Carol was seated, stood directly in front of her, and then turned and walked away.

¶4 Approximately fifteen minutes later, Carol felt someone pushing on her back. She turned around to look and saw Kimberly Montini—the girlfriend of Elizabeth's brother—and Elizabeth standing right behind her. Carol testified that

it was Montini who was pushing on her back with Elizabeth immediately behind her. Carol at first ignored it, but Montini continued to push her in the back. Carol finally turned around and said, "excuse me," but the two women would not retreat.

¶5 The sole factual dispute that is the genesis of this appeal concerns what happened next. At trial, multiple State's witnesses, including Carol, testified that Elizabeth then struck Carol on the side of the head. While this testimony was undisputed at trial, the absent witness, Tammy Krueger, testified at a ***Machner***[2] hearing that it was not Elizabeth who hit Carol, but Montini. In Elizabeth's view, this disputed testimony was important because it would have directly called into question the testimony of the State's witnesses such that Elizabeth would have stood a better chance of acquittal. Elizabeth faults her trial counsel for not asking the circuit court for an adjournment when counsel learned that Krueger could not attend because of the death of her father. She claims that this failure rendered counsel's assistance ineffective and prejudiced her.

¶6 Elizabeth is wrong to think that Krueger's testimony would have made any difference. We must remember what Elizabeth was prohibited from doing by the terms of the harassment order. First, she was to avoid being on any premises temporarily occupied by Carol. The testimony is undisputed that Elizabeth knew Carol was in Champps almost from the get-go. In violation of the harassment order, she stayed and glared at Carol. Krueger's testimony would not have contradicted this violation of the order. In fact, her testimony would have confirmed that Elizabeth stayed at Champps once she knew that Carol was on the premises.

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

¶7 Second, the order prohibited Elizabeth from having contact with Carol, either directly or indirectly. Yet, Krueger did not dispute Carol's recounting of how Elizabeth, of her own volition, walked up to where Carol was seated fifteen minutes prior to the event that Krueger was willing to testify about. A fact finder could readily determine that Elizabeth at least indirectly contacted Carol by walking up to her when the spirit of the harassment order was to avoid any such junction. Krueger's testimony would not have helped.

¶8 Third, fifteen minutes later, Elizabeth—again of her own volition—walked up to where Carol was seated and was standing right next to Montini while Montini was poking Carol in the back. Again, a fact finder could easily determine that Elizabeth was guilty of intentionally making contact with Carol, whether she was actually the one who hit Carol or not. This is yet another violation of the harassment order and one that Krueger's testimony would have done nothing to call into dispute. In fact, by being willing to testify that Elizabeth went up to Carol with Montini, Krueger would be inculpating Elizabeth, not exculpating her.

¶9 Fourth, after being stuck, Carol retired to the ladies' bathroom and was followed there by Elizabeth and Montini where they began verbally antagonizing Carol. One of the State's witnesses, a waitress at Champps, confirmed that Elizabeth was in the bathroom calling Carol names and that Carol asked the waitress to summon a manager. If this is not an intentional making of contact with Carol, there is no such animal. Krueger would have provided absolutely no help in Elizabeth's favor since Krueger never even claimed to have been in the bathroom to see what happened.

¶10 Finally, the State offered evidence that even after Carol had involved security in the matter, Elizabeth and her group of friends continued to stare at

Carol from across the bar and to point and wave at her. Although nonverbal, these actions were certainly communicative and therefore constituted contact, in violation of the harassment injunction. Elizabeth does not assert that Krueger would have testified differently.

¶11 At the ***Machner*** hearing, counsel justified her action, in relevant part, by explaining how she believed that Krueger's testimony was not material. Counsel was correct. While Krueger would have countered the State's witnesses regarding who it was that hit Carol, that part of the night's events was only a small slice of the State's case. For a conviction of a statutorily defined crime, the State need not prove all facts alleged but only those sufficient to constitute the statutory offense. ***State v. Baldwin***, 101 Wis. 2d 441, 447, 304 N.W.2d 742 (1981). Therefore, the State need not have proved that Elizabeth struck Carol at the bar. The State merely had to prove that Elizabeth had contact with Carol, and there was plenty of evidence, even assuming that Krueger had testified, to so prove. Elizabeth seems to be of the opinion that contact means physical contact. If that is indeed her belief, we reject it. The order that Elizabeth not contact Carol does not have to be physical. It is, as we said, a junction. There is plenty of that in the record, and it would not have gone away, even had Krueger testified.

¶12 The question of whether a defendant has been deprived of her constitutional right to the effective assistance of counsel is a mixed question of law and fact. ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). In order for a convicted defendant to show that his or her trial counsel was ineffective, the defendant must show that counsel's performance was deficient and that the deficient performance prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); ***State v. Pitsch***, 124 Wis. 2d 628, 633, 369 N.W.2d 711 (1985). We hold that counsel was not ineffective. We affirm.

By the Court.— Judgment and order affirmed.

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