COURT OF APPEALS
DECISION
DATED AND FILED

October 31, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP1371-CR **Cir. Ct. No. 2013CF3128**

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

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

MICAH NATHANIEL RENO,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County: JONATHAN D. WATTS, Judge. *Affirmed*.

Before Kessler, Brash and Dugan, JJ.

¶1 KESSLER, J. The State of Wisconsin appeals an order of the circuit court, which vacated Micah Nathanial Reno's judgment of conviction and granted him a new trial on the basis of ineffective assistance of counsel. We affirm.

BACKGROUND

¶2 On July 11, 2013, Reno was charged with one count of kidnapping, one count of human trafficking, one count of second-degree sexual assault, one count of pandering/pimping, and one count of keeping a place of prostitution, all as a repeater. According to the criminal complaint, Reno kidnapped N.B. from Milwaukee's south side by forcing her into his car and taking her to a local motel. N.B. was holding a "homeless and hungry" sign when she was approached by Reno and told to get in the car. When N.B. refused, Reno exited the car, grabbed N.B. by the arm and forced her into the car. He then drove her to a motel. Once Reno and N.B. arrived at the motel, another woman was in the room. Reno gave N.B. heroin and told her "that the only way she was going to be able to deal with what she would be doing was by using heroin." N.B. complied. Reno then took N.B. to the Harley-Davidson Museum, where he forced N.B. to take compromising photos, which Reno then posted on a website used to advertise prostitutes. N.B. was forced to engage in approximately two acts of prostitution daily. Reno was also frequently violent with N.B. and forced N.B. to engage in sexual intercourse with him.

¶3 Prior to trial, the defense submitted a witness list which included the other woman in the motel with N.B., Reno's alleged girlfriend, A.A. A.A. herself had been arrested on June 29, 2013, on prostitution charges. A.A. entered into a deferred prosecution agreement, wherein the State agreed to defer A.A.'s conviction in exchange for her guilty plea and other conditions. A.A. was never called as a witness.

¶4 The case hinged almost entirely on N.B.'s testimony, which included great detail about her alleged kidnapping, her interactions with Reno, her acts of

prostitution, her daily activities, her attempts to contact her family, and her relationship with A.A. Specifically, N.B. testified that at some point in June 2013, while panhandling on Milwaukee's south side with a friend, a jeep with two individuals pulled up to N.B. and her friend. N.B. testified that the two occupants were Reno and A.A. Reno asked N.B.'s friend if they needed drugs or food, to which N.B.'s friend responded in the negative. Reno then drove away. N.B. stated that the following day, while panhandling in a different location, the same jeep approached N.B. Only Reno was in the car. N.B. stated that Reno again asked if she wanted drugs. N.B. stated that she did not want drugs. Reno then exited the vehicle, grabbed N.B. by the arm, and pushed her into his car. Reno drove N.B. to a nearby motel, where A.A. let Reno and N.B. into a motel room. N.B. stated that Reno offered her food and heroin and told her heroin would be "the only way I'm going to be able to deal with what was coming next." N.B. testified that she then drove with Reno and A.A. to various locations where Reno took pictures of A.A. Reno and A.A. then drove N.B. to the Harley-Davidson Museum, where Reno instructed N.B. to pose for pictures in her underwear. A.A. told N.B. not to fight Reno, and N.B. testified that she was too scared to run away while at the museum because Reno told her "you don't know who [you're] dealing with. And I [didn't] know what he's capable of. And if I ever tried to run, he would come after me and my family." N.B. stated that when Reno was taking her pictures, she knew they would be used for prostitution purposes because A.A. explained the process to her. N.B. stated that Reno posted her pictures on a website used to advertise prostitutes and from there she began to engage in prostitution "all day, everyday."

¶5 N.B. further testified that Reno generally drove A.A. and N.B. to their "prostitution date[s] together." She further testified that she would drive

Reno's car, taking him to and from work, taking him to his sister's house, and driving around his brother and niece. N.B. stated that despite gaining enough of Reno's trust to drive his car, she remained scared of him.

¶6 N.B. told the jury about instances during which Reno became violent. She testified that eventually Reno lost trust in N.B. because Reno found out that both she and A.A. used prostitution money to buy heroin. N.B. testified that Reno "hit us both. And he told me that he didn't trust me to drive the vehicle anymore. So I no longer had the vehicle privilege." Reno told them "people would be watching from a distance and would let him know what was going on." When Reno worked nights, someone came to sit in the motel room to "make sure that we weren't doing something that he did not want us to be doing."

¶7 N.B. testified that Reno became violent with A.A. at one point because A.A. kept money from one of her clients, rather than turning it over to Reno. N.B. testified that Reno became brutally violent with A.A. and then proceeded to beat N.B., leaving her with bruises along her rib cage and a red hand print on her face from the beating. N.B. told the jury that Reno sexually assaulted her multiple times, one time while A.A. was in the shower.

¶8 N.B. told the jury that her communication with her family was heavily monitored by Reno. N.B. stated that ultimately, she spoke to her mother and told her mother that she was at a motel, was "scared," and "need[ed] help." N.B. texted her brother, asking for help. N.B. stated that Reno found out about the text and forced N.B. to text her brother again saying she "was just high and homesick." She texted that she was "fine" and "[t]here is no guy." N.B. stated that she wanted her brother to believe she was "fine" because she knew that Reno was reading her messages. N.B.'s brother texted N.B. that the police had tracked

her phone and were on their way to rescue her. Ultimately, police tracked N.B.'s location and Reno was arrested and charged.

¶9 The jury found Reno guilty of all five charges.

The Postconviction Motion and Postconviction Hearing

¶10 Reno filed a postconviction motion alleging, as relevant to this appeal, that his trial counsel was ineffective for failing to call A.A. as a witness. The motion alleged that because A.A. "was there during the alleged kidnapping" and "lived [with N.B.] at a motel," A.A. could have offered testimony "completely contradict[ing] that of [N.B.]." The motion alleged that if A.A. was called to testify, she would have told the jury that: (1) N.B. was not kidnapped, but rather went with Reno willingly; (2) A.A. believed N.B. was familiar with the prostitution website before meeting Reno; and (3) A.A. never saw signs that N.B. was abused.

¶11 At a hearing on the motion, both A.A. and Reno's trial counsel testified. Prior to taking A.A.'s testimony, the postconviction court discussed A.A.'s Fifth Amendment right to protect herself against self-incrimination and asked A.A. whether she felt that any of her testimony might cause her to incriminate herself. A.A. answered in the negative. The court also informed A.A. of her right to invoke the Fifth Amendment privilege at any point during her testimony. A.A. testified that in May or June of 2013, A.A. and her boyfriend, Reno, saw N.B. holding a "homeless and hungry" sign on South 27th Street and Oklahoma Avenue. They saw N.B. again the next day. A.A. testified that she felt sorry for N.B. and asked N.B. if she would like to get something to eat with A.A. and Reno. N.B. agreed. A.A. stated that after they ate, Reno, A.A., and N.B. went to a park because Reno and A.A. were babysitting Reno's niece. A.A. stated that

she invited N.B. back to the motel room A.A. was staying in with Reno and told N.B. that N.B. could shower and change her clothes at the motel. N.B. voluntarily agreed to go with A.A. and Reno. A.A. stated that N.B. was never forced into the car or forced to go to the motel.

¶12 A.A. told the court that she and N.B. became fast friends, bonding over their history of drug addiction. She stated that the two relapsed together and "decided to start escorting" to support their "expensive habit." A.A. told the court that Reno did not know that she (A.A.) was engaged in prostitution at first. When Reno found out that A.A. was engaged in prostitution, approximately two weeks after they met N.B., he did not approve, but "was supportive" of A.A.'s decision. She stated that Reno did not take pictures for A.A. and N.B. often, but that when he did, he did not know that A.A. and N.B. planned to post them on a prostitution website.

¶13 A.A. further testified that she did not begin using the prostitution website until she met N.B., but that after meeting N.B., the two began posting together. She stated that she was not familiar with the website, but that N.B. would post ads for both of them. A.A. also testified that she never witnessed Reno become abusive with N.B., nor did A.A. believe that Reno sexually assaulted N.B. A.A. stated that N.B. never said anything to her about an alleged sexual assault, A.A. never witnessed an assault, nor did A.A. ever hear signs of a struggle between N.B. and Reno. A.A. testified that she showered with the door slightly open to allow air into the bathroom and never heard "no sounds of struggle no … sounds indicating a sexual activity going on in the next room." She also told the court that Reno was never violent with her and "[t]here was no violence going on in our room." A.A. also stated that N.B. "could have left at any time."

¶14 A.A. also testified that she was willing and available to testify but was never subpoenaed. She told Reno's family about her willingness to testify and made an appearance at Reno's sentencing hearing because she felt "that was my only time to be heard."

¶15 Reno's trial counsel, an assistant public defender, also testified, telling the postconviction court that he was interested in interviewing A.A. to determine whether she could be a witness in Reno's case, but he "became aware first that [A.A.] had a pending case because, quite frankly, she was represented by another attorney with our office. Our office has a protocol for immediately stopping the communication between the two lawyers that are conflicted." Counsel stated that he emailed the public defender representing A.A. on her misdemeanor prostitution and cocaine possession charges and told him to "get off this case" because counsel "desperately need[ed] [A.A.] as one of our witnesses to testify." Soon after, counsel found out that A.A. had new representation and asked A.A.'s new counsel whether he (trial counsel) could speak with A.A. A.A.'s new counsel told trial counsel not to speak with his client. Reno's trial counsel did not attempt to contact A.A. or her counsel after that.

¶16 Reno's trial counsel admitted that he wanted A.A. to testify and had no reason not to call her as a witness, other than the fact that she was represented by her own counsel on her misdemeanor charges. Trial counsel stated that Reno also wanted A.A. to testify. Counsel did not consider having A.A. subpoenaed, nor did he consider making a record outside of the jury's presence about asking A.A. to waive her Fifth Amendment privilege. Counsel admitted that his theory of defense was to show that N.B. was lying and that N.B.'s version of events simply did not make sense. Counsel acknowledged that the case hinged "entirely" on

N.B.'s credibility and that A.A.'s testimony would have "[s]ubstantially" impacted that credibility.

¶17 In a written decision, the postconviction court granted Reno's motion for a new trial. The court discussed SCR 20:4.2, the Wisconsin Supreme Court rule prohibiting a lawyer's communication with a person represented by counsel, stating that Reno's trial counsel essentially felt "constrained" by the rule and chose not to call A.A. as a witness based upon his belief that he simply could not. The rule states:

> **Communication with person represented by counsel**
>
> (a) In representing a client, a lawyer shall not communicate about the subject of representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

See SCR 20:4.2.

¶18 The postconviction court found the central question to be: "was the subject matter of [A.A.'s counsel's] representation of [A.A.] the same … subject matter as [Reno's counsel's] representation of Reno [?]" The court found the "representations were of two distinct and separate matters." The court went on to find that Reno's counsel rendered ineffective assistance. This appeal follows.

DISCUSSION

¶19 The State contends that Reno's trial counsel did not render ineffective assistance by failing to call A.A. as a witness because counsel reasonably believed he was barred from contacting A.A. pursuant to SCR 20:4.2. We disagree.

Standard of Review

¶20 A defendant claiming ineffective assistance of counsel must first show that counsel's performance was deficient and, second, that the deficient performance prejudiced the defendant. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Wisconsin applies the two-part test described in ***Strickland*** for evaluating claims of ineffective assistance of counsel. ***State v. Roberson***, 2006 WI 80, ¶28, 292 Wis. 2d 280, 717 N.W.2d 111. A defendant's claim of ineffective assistance of counsel fails when he or she has not satisfied either prong of the two-part test. *See* ***Strickland***, 466 U.S. at 697.

¶21 Whether a defendant received ineffective assistance of counsel is a mixed question of law and fact. *See* ***State v. Pitsch***, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985). We uphold a postconviction court's findings of fact unless they are clearly erroneous. *See* ***id.*** at 634. However, whether those facts meet the legal standard for ineffective assistance of counsel is a question of law that we review *de novo*. *See* ***id.***

¶22 To establish deficient performance, the defendant must show "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed [to him or her] by the Sixth Amendment." *See* ***Strickland***, 466 U.S. at 687. In other words, the defendant must show his counsel's "representation 'fell below an objective standard of reasonableness' considering all the circumstances." *See* ***State v. Carter***, 2010 WI 40, ¶22, 324 Wis. 2d 640, 782 N.W.2d 695 (quoting ***Strickland***, 466 U.S. at 688).

¶23 With respect to the prejudice component of the test, the defendant must demonstrate that the alleged defects in counsel's performance "actually had an adverse effect on the defense." *See* ***Strickland***, 466 U.S. at 693. A defendant

cannot meet his or her burden by merely showing that the errors had "some conceivable effect on the outcome"; rather, he or she must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id.*** at 693-94. A "reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** at 694.

SCR 20:4.2

¶24 The State contends that the postconviction court erred in granting Reno a new trial because Reno's trial counsel did not perform deficiently, nor did counsel's performance prejudice Reno in any way. The heart of the State's argument is that the application of SCR 20:4.2 to "the pre-trial investigative phase of a criminal case" is unsettled law in Wisconsin and counsel could not have rendered ineffective assistance by "failing to argue an unclear legal point." (Bolding omitted.) Relying primarily on the Wisconsin Supreme Court's decision in ***State v. Maloney***, 2005 WI 74, 281 Wis. 2d 595, 698 N.W.2d 583, the State contends that the question of whether SCR 20:4.2 applies under this set of circumstances is unclear. We disagree and conclude that trial counsel was not barred by SCR 20:4.2 from asking the circuit court to permit him to subpoena A.A. as a witness.

¶25 As stated, SCR 20:4.2 provides, as relevant:

> (a) In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer *or is authorized to do so by law or a court order.*

(Emphasis added.) The ***Maloney*** court addressed the applicability of this rule as it pertained to the pre-charging criminal investigative stage. ***Id.***, 281 Wis. 2d 595, ¶30. In that case, the defendant alleged that counsel was ineffective for failing to challenge the admissibility of videotape evidence based on an alleged violation of SCR 20:4.2 by the special prosecutor. ***Id.***, ¶2. In noting "the unclear and unsettled nature of SCR 20:4.2's applicability in Wisconsin to the pre-charging criminal investigative setting," the court analyzed the rule's applicability in multiple jurisdictions and ultimately concluded that the defendant's counsel did not render ineffective assistance. ***Id.***, ¶¶19-23,30.

¶26 We do not find ***Maloney*** instructive under this set of facts. The ***Maloney*** court very narrowly decided the applicability of the no contact rule to the pre-charging investigation stage. The set of facts here deal with counsel's ability to interview, and perhaps subpoena, an eyewitness in a criminal proceeding. SCR 20:4.2 is neither unsettled nor unclear as to this issue. The rule prohibits a lawyer from communicating with a represented person *about the subject of the representation*. A.A. was charged with misdemeanor counts of prostitution and cocaine possession. The dates, locations, and subject matters of A.A.'s counsel's representation differed from Reno's case. Moreover, A.A. was not a codefendant in Reno's case and the State asserted that it was unlikely to prosecute A.A. with anything relating to Reno's case. Reno and A.A. were represented in separate and distinct matters. Accordingly, Reno's counsel had no interest in A.A.'s case or her counsel's representation of her in that matter. We conclude that Reno's trial counsel was not precluded by SCR 20:4.2 from interviewing A.A. or calling A.A. as a witness in Reno's trial.

Counsel Rendered Ineffective Assistance

¶27 Having concluded that Reno's counsel was not barred by SCR 20:4.2 from calling A.A. as a witness, we turn to the question of whether counsel provided ineffective assistance by believing that he was precluded from doing so. We conclude that counsel's performance was deficient because he failed to seek approval to contact A.A. and perhaps call A.A. as a witness. We also conclude that the deficiency prejudiced Reno's defense.

A. Deficient Performance

¶28 "Failure to call a potential witness may constitute deficient performance." ***State v. Jenkins***, 2014 WI 59, ¶41, 355 Wis. 2d 180, 848 N.W.2d 786. An attorney's failure to call a witness whose testimony would have been central to the theory of defense can constitute deficient performance. ***State v. White***, 2004 WI App 78, ¶¶20-21, 271 Wis. 2d 742, 680 N.W.2d 362 (defense counsel's performance was deficient for failure to call witnesses who would have brought in evidence that "went to the core of [the] defense"). However, we give great deference to counsel's strategic decisions. *See* ***State v. Balliette***, 2011 WI 79, ¶26, 336 Wis. 2d 358, 805 N.W.2d 334. We will sustain counsel's strategic decisions as long as they were reasonable under the circumstances. *See* ***id.***

¶29 At the postconviction hearing, counsel admitted that he wanted A.A. to testify and had no reason not to call her as a witness, other than the fact that she was represented by her own counsel. Counsel also admitted that discrediting N.B. was central to his defense theory and that A.A.'s testimony could have substantially undermined N.B.'s credibility. Trial counsel's failure to take steps permitted by SCR 20:4.2 to obtain permission to interview and perhaps introduce

evidence that would have undermined the credibility of the alleged victim, who was also the central witness, was deficient performance in this case.

¶30 Counsel was aware that there would have been a discrepancy between N.B.'s testimony and what A.A. would have testified about because Reno was adamant that A.A. testify at Reno's trial. Indeed, A.A. testified at the postconviction hearing that she was willing to testify. Any hesitation counsel had about the applicability of SCR 20:4.2 could have easily been resolved. SCR 20:4.2 specifically provides for contact with a represented person if it is "authorized by a court order." *See* ***id.*** American Bar Association comment six to the rule underscores the obvious: "A lawyer who is uncertain whether a communication with a represented person is permissible may seek a court order." *See*, SCR 20:4.2, Comment 6. Counsel could have sought a court order to sort out questions regarding access to A.A. Counsel admitted that it did not occur to him to do so.

¶31 We conclude that counsel's failure to seek a court order allowing contact with A.A., and perhaps calling her as a witness, fell below an objective standard of reasonableness. *See* ***State v. Jeannie M.P.***, 2005 WI App 183, ¶25, 286 Wis. 2d 721, 703 N.W.2d 694. Counsel did not articulate a strategic reason for failing to seek to obtain access to A.A.; indeed, counsel did not make a decision at all. Counsel's failure to act was based upon being unaware of the plain language of a supreme court rule. This case turned on witness credibility; thus, trial counsel had a duty to investigate and present impeaching evidence when counsel knew or should have known of its existence. *See* ***id.***, ¶11.

B. Prejudice

¶32 We also conclude that counsel's failure to call A.A. as a witness prejudiced Reno's defense.

¶33 The State's case hinged on the jury believing N.B.'s version of events. The only other eyewitness to the allegations against Reno, aside from Reno himself, was A.A. "In such a case, contradictory eyewitness testimony supporting the defendant would expose vulnerabilities at the center of the State's case." ***Jenkins***, 355 Wis. 2d 180, ¶53. Here, it is reasonably probable that "the excluded contradictory eyewitness would have contributed strongly to doubts regarding the prosecution's case." *See* ***id.*** "In assessing *the prejudice caused by the … trial counsel's performance, i.e.*, the effect of the … trial counsel's deficient performance, a circuit court may not substitute its judgment for that of the jury in assessing which testimony would be more or less credible." ***Id.***, ¶64. Accordingly, we cannot determine which witness the jury would have found more credible—N.B. or A.A. However, we do conclude that there is a reasonable probability that the result of the proceeding would have been different had trial counsel called A.A. to testify at trial.

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

By the Court.—Order affirmed.

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