COURT OF APPEALS
DECISION
DATED AND FILED

December 6, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP902-CR **Cir. Ct. No. 2002CF982**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANTHONY L. SALMON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Brown County: WILLIAM M. ATKINSON, Judge. *Affirmed*.

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 CANE, C.J. Anthony Salmon appeals a judgment of conviction and an order denying postconviction relief. Salmon argues he is entitled to a new trial due to ineffective assistance of counsel. We disagree and affirm.

Background

¶2 Salmon was charged with sexual assault and bail jumping arising from allegations made by Lori Raisanen. Raisanen stated that she met Salmon at a tavern in Green Bay. After getting acquainted, they went for a ride on Salmon's motorcycle. The two eventually ended up at a department store parking lot. Apparently with the intent of ingesting cocaine, they went into a grassy area near the parking lot. Raisanen next alleged that Salmon beat and sexually assaulted her. Raisanen then walked toward the store to alert someone of what had just happened, and Salmon drove off on his motorcycle. After Salmon was identified, he was contacted for questioning by a Green Bay Police Department detective. Salmon wrote a statement, in the form of a letter, to the detective. The letter stated that he had sexual intercourse with Raisanen, but it was consensual.

¶3 The prosecution provided the letter to defense counsel in discovery. At trial, Salmon's counsel decided to proceed with a consent defense. Her trial strategy was to demonstrate the inconsistencies and lack of plausibility of Raisanen's representation of the incident. Salmon told his trial counsel that he wanted the jury to hear both sides of the incident. Trial counsel responded that she believed his side would be heard when the State introduced the letter. She also advised Salmon against testifying because the State could impeach him with his criminal record.

¶4 In her opening statement, Salmon's trial counsel made it clear to the jury that they would hear Salmon's position on the alleged sexual assault. Salmon's trial counsel referenced the contents of the letter, which supported Salmon's consent defense. The State, however, rested without presenting the

letter, and the letter was never introduced at trial. Salmon was convicted of both the sexual assault charge and the bail jumping charge.

¶5 Salmon filed a postconviction motion requesting a new trial. The motion alleged that his trial counsel had failed to provide effective assistance of counsel by discussing the contents of the letter in her opening statement and failing to anticipate that the State might not introduce the letter. Further, Salmon argued his trial counsel failed to adapt when the letter was not introduced. The circuit court ruled that Salmon's trial counsel was not ineffective because she had made a rational strategic decision to discuss the letter, and she felt it would be admitted.

Discussion

¶6 Salmon argues that he is entitled to a new trial because his trial counsel was ineffective. Salmon contends his trial counsel was deficient because she incorrectly anticipated that the State would enter the letter into evidence. Further, Salmon argues his trial counsel failed to respond adequately after the State failed to introduce the letter.

¶7 A defendant contending ineffective assistance of counsel must prove: (1) that his or her lawyer's performance was deficient; and (2) that he or she suffered prejudice as a result of that deficient performance. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); ***State v. Nielsen***, 2001 WI App 192, ¶12, 247 Wis. 2d 466, 634 N.W.2d 325. If the defendant fails to satisfy the first prong of the test, we need not address the second. *See* ***Strickland***, 466 U.S. at 697.

¶8 To demonstrate deficient performance, a defendant must identify specific action or omission by counsel that is "outside the wide range of

professionally competent assistance." ***Strickland***, 466 U.S. at 690; ***Nielsen***, 247 Wis. 2d 466, ¶12. A strong presumption exists that counsel adequately rendered assistance. ***Nielsen***, 247 Wis. 2d 466, ¶12. To prove prejudice, a defendant must show that there is a reasonable probability, but for counsel's errors, the result of the proceeding would have been different. *See* ***Strickland***, 466 U.S. at 694. Reasonable probability means a probability sufficient to undermine confidence in the outcome of the proceeding. *See* ***id.***

¶9 Whether an attorney rendered ineffective assistance is a mixed question of fact and law. ***Nielsen***, 247 Wis. 2d 466, ¶14. "The trial court's findings of fact will be upheld unless they are clearly erroneous." ***Id.*** Whether a defendant has satisfied either prong is a question of law that we review without deference. *See* ***id.***

¶10 We have previously held that "[a] strategic trial decision rationally based on the facts and the law will not support a claim of ineffective assistance of counsel." ***State v. Elm***, 201 Wis. 2d 452, 464-65, 549 N.W.2d 471 (Ct. App. 1996). As we explained:

> Generally, trial strategy decisions reasonably based in law and fact do not constitute ineffective assistance of counsel. Defense counsel may select a particular defense from available alternative defenses and is not required to present the jury with alternatives inconsistent with the chosen defense. Even if, in hindsight, selecting a particular defense appears to have been unwise, counsel's decision does not constitute deficient performance if it was reasonably founded on the facts and law under the circumstances existing at the time the decision was made.

State v. Snider, 2003 WI App 172, ¶22, 266 Wis. 2d 830, 668 N.W.2d 784 (citations omitted).

¶11 We agree with the circuit court that Salmon has failed to show ineffective assistance of counsel. Salmon's trial counsel was aware that the State may not introduce Salmon's statement into evidence, and she decided to take that risk. Her other option was to put Salmon on the stand, but she rationally feared the State would impeach his testimony with prior convictions. She made the strategic determination that the best opportunity to hear Salmon's side of the story was through the introduction of the letter by the State. *See* ***Elm***, 201 Wis. 2d at 464-65. When the State failed to introduce the letter in evidence, trial counsel's alternative was to have Salmon testify. However, counsel made a reasonable strategic decision, advising her client not to testify. Instead, she mounted a defense by presenting testimony from witnesses that supported Salmon's consent defense. Further, during Salmon's trial counsel's cross examination of Raisanen, she sought to highlight statements that Raisanen made indicating that the sexual encounter was consensual.

¶12 Salmon points to several cases[1] where deficient performance resulted from remarks attorneys made in their opening statements. However, these cases are distinguishable from the present situation. In the cases Salmon cited, counsel referenced specific witnesses in their opening statements and then failed to call them without adequate reason. Here, Salmon's trial counsel made the strategic decision to discuss certain evidence that she reasonably thought the State would enter into evidence. When the letter was not admitted into evidence, she

[1] *See*, *e.g.*, ***United States ex rel. Hampton v. Leibach***, 347 F.3d 219, 257-59 (7th Cir. 2003); ***Ouber v. Guarino,*** 293 F.3d 19, 22 (1st Cir. 2002); ***Anderson v. Butler***, 858 F.2d 16, 17 (1st Cir. 1988).

made a reasonable effort to present a consent defense without his testimony. We fail to see how this constitutes deficient performance.

¶13 We are not required to address the second prong of the test; however, we do not see how Salmon was prejudiced. In the cases Salmon cites, the respective courts found the defendant was prejudiced because the attorney promised a theory of defense and then failed to support the defense. For example, in ***Anderson***, the attorney promised a psychiatric defense with an emphasis on expert testimony but never presented any evidence in support of the psychiatric defense. In ***Anderson*** and the other cited cases, the juries could have inferred the failure to present evidence in support of the theories of defense meant that no evidence actually existed in support of the theories. In contrast, Salmon's trial counsel elicited testimony from witnesses in support of Salmon's defense, and the jury could have concluded that the intercourse was consensual if it gave sufficient weight to the testimony.

¶14 We do not believe the outcome of the trial would have differed but for Salmon's trial counsel's action or inaction. There was abundant evidence that Raisanen did not have consensual sex with Salmon, including Raisanen's visible physical injuries and emotional state after the incident, statements from a witness on the scene immediately after the incident, and statements from a medical expert that Raisanen had been physically assaulted. Thus, we are confident Salmon was not prejudiced.

By the Court.—Judgment and order affirmed.

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