COURT OF APPEALS
DECISION
DATED AND FILED

June 6, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP1656-CR **Cir. Ct. No. 2004CF48**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANTHONY J. WENDEL,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Walworth County: ROBERT J. KENNEDY, Judge. *Affirmed*.

Before Snyder, P.J., Nettesheim and Anderson, JJ.

¶1 PER CURIAM. Anthony Wendel appeals from a judgment of conviction for party to the crime of attempted armed robbery. He also appeals from an order denying his postconviction motion for a new trial. He argues that trial counsel was ineffective for not moving to sever the trial from that of his

codefendant and for not moving to redact portions of a 911 call. We conclude that Wendel was not denied effective trial counsel and affirm the judgment and order.

¶2 An attempted armed robbery of a Whitewater bank was reported. Employees of the bank reported that a white male wearing a black leather jacket with fringe, a red bandana, and ski goggles attempted to come into the bank with a gun. A second man was seen in the same vehicle and seen standing some distance from the gunman. Daniel Volkaitis was later arrested and charged as the gunman. Volkaitis was also charged with disorderly conduct for conduct in a tavern a short time after the attempted robbery at the bank. Wendel was charged as the second man involved in the attempted robbery.

¶3 Volkaitis and Wendel were tried together. One bank teller identified Volkaitis as the gunman. She could not identify Wendel as the other man. The second teller testified that the two men who attempted to enter the bank looked like Volkaitis and Wendel. Wendel's statement to police that he had been at his apartment all day on the day of the crime was admitted but contradicted by two witnesses who observed Wendel with Volkaitis the day of the crime shortly before and after the crime. There was evidence that Volkaitis's clothing matched that worn by the gunman.

¶4 A claim of ineffective assistance of trial counsel requires a defendant to show both deficient performance and prejudice. ***State v. Cooks***, 2006 WI App 262, ¶33, __ Wis. 2d __, 726 N.W.2d 322. To be deficient, counsel's performance must fall below an objective standard of reasonableness. ***Id.*** Prejudice from deficient performance exists when our confidence in the outcome is undermined. ***Id.***

¶5 "Appellate review of an ineffective assistance of counsel claim presents a mixed question of fact and law." ***Id.***, ¶34. The trial court's findings of fact control unless clearly erroneous. ***Id.*** We independently decide if counsel's performance was constitutionally deficient. ***Id.***

¶6 Wendel argues that trial counsel was ineffective for not considering whether to file a motion for severance until the morning of trial and for failing to consult with Wendel about severance to allow Wendel to make an informed decision. There is no claim that joinder of the charges was improper. *See* WIS. STAT. § 971.12(2) (2005-06).[1] Severance is appropriate where a joint trial is unduly prejudicial, such as where the defendants intend to advance conflicting or antagonistic defenses. ***Lampkins v. State***, 51 Wis. 2d 564, 572, 787 N.W.2d 164 (1971); § 971.12(3).

¶7 We first reject Wendel's suggestion that trial counsel had an obligation to inform and consult Wendel about severance. With the exception of a few decisions considered so fundamental that they must be personally waived by a defendant, a defendant delegates the balance of trial and tactical decisions to counsel. ***State v. Brunette***, 220 Wis. 2d 431, 443, 583 N.W.2d 174 (Ct. App. 1998). Whether to seek severance or joinder are not fundamental decisions only the defendant can make personally. *See* ***id.*** Trial counsel had no obligation to consult Wendel on whether to file a motion for severance.[2]

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

[2] The record shows that on the first morning of trial, Wendel and his attorney were given time to discuss severance in light of the trial court's intent to admit custodial statements of the two defendants. If Wendel's claim is that counsel should have raised the issue earlier, he did not demonstrate that there was inadequate time to consider the issue.

¶8 The trial court found that trial counsel rejected severance for several tactical reasons. First and foremost was trial counsel's fear that if Wendel was tried separately, Volkaitis would plea bargain and testify against Wendel. Trial counsel also sought to use the joint trial to contrast the strength of evidence against Volkaitis to the weakness of evidence against Wendel, particularly as to identification.

¶9 Even if these tactical decisions were made for the first time on the morning of trial,[3] they represent reasonable strategy. We are not to second-guess trial counsel's selection of trial tactics or the exercise of professional judgment after weighing the alternatives. *See* ***State v. Felton***, 110 Wis. 2d 485, 502, 329 N.W.2d 161 (1983). We examine trial counsel's conduct to be sure that it is more than just acting upon a whim; there must be deliberateness, caution, and circumspection. ***Id.***

¶10 At the joint trial, neither Volkaitis nor Wendel testified. It was reasonable to stick to the joint strategy of attacking identification evidence rather than risk the possibility that Volkaitis would testify against Wendel. Additionally, the evidence against Volkaitis was that he was the primary actor—he carried the gun and attempted to enter the bank. Evidence of Wendel's involvement tended to portray him as more of a bystander and gave hope for possible acquittal on the party to a crime elements. Here, trial counsel's strategic decision to proceed with a joint trial was based on adequate deliberation. Trial counsel's strategy decision was not deficient performance.

[3] Although trial counsel testified that he could not recall ever discussing severance with Wendel before the first day of trial, counsel indicated it was an issue he had definitely thought about.

¶11 Wendel also claims he was prejudiced by the joint trial because Volkaitis's disorderly conduct had a racial component.[4] However, the difference in conduct supported trial counsel's desire to contrast the evidence against the two defendants. The trial court instructed the jury to consider the evidence against each defendant separately. The racial slur pertained only to Volkaitis and the disorderly conduct charge. We presume the jury followed the instruction. ***State v. Truax***, 151 Wis. 2d 354, 362, 444 N.W.2d 432 (Ct. App. 1989).

¶12 This was not a case where the defendants were pursuing conflicting defenses. Both sought to challenge the strength of the circumstantial evidence. Further, the evidence against Volkaitis connecting him to the crime would have been admissible in a separate trial against Wendel. Wendel was not prejudiced by trial counsel's failure to move for severance.

¶13 At trial the recording of the 911 call reporting the attempted robbery was played for the jury in its entirety. Wendel claims that trial counsel's failure to move to have portions of the recording redacted resulted in a good volume of "highly prejudicial" information being presented. Wendel does not identify the "highly prejudicial" portions of the recording.

¶14 Contrary to Wendel's position, trial counsel was not constitutionally ineffective simply because counsel testified that he missed the issue of possible redaction of the recording. A court is not required to accept trial counsel's admission of deficient conduct. ***State v. Kimbrough***, 2001 WI App 138, ¶35, 246 Wis. 2d 648, 630 N.W.2d 752.

[4] Volkaitis used racial slurs against an African-American police officer in the tavern.

¶15 We consider whether Wendel was prejudiced by trial counsel's failure to move to redact a portion of the record. The recording was relevant since it was a direct report by witnesses to the crime while it was happening. The trial court found that the 911 recording reflected the terror the two tellers experienced and might have created some sympathy for those witnesses as victims. However, the court also found that the witnesses exhibited that same terror during their live testimony. Sympathy was created in any event.

¶16 Additionally, the trial court found that due to their traumatic state, the two tellers were not good witnesses for the prosecution. It further found that the 911 recording reflected that they were so afraid that they were not good observers. The reliability and accuracy of their identifications were weakened by the hysterical state reflected on the recording. The recording was somewhat beneficial to Wendel in supporting his theory of defense of misidentification.

¶17 Potential prejudice from the 911 recording was reduced twofold. Our confidence in the outcome is not undermined. Wendel was not prejudiced by trial counsel's failure to move to redact the tape.

¶18 A $150 sanction is imposed against Wendel's appellate counsel, Attorney Jack Hoag, for filing a false appendix certification. *See* ***State v. Bons***, 2007 WI App 124, ¶¶20-25 (No. 2006AP1625-CR). Contrary to counsel's certification, the appendix does not include the trial court's findings or opinion on the postconviction motion. As the concurring opinion in ***Bons*** observes, the order denying a postconviction motion for reasons stated on the record does not satisfy WIS. STAT. RULE 809.19(2)(a). ***Bons***, 2007 WI App 124, ¶¶29-30 (Brown, J., concurring). The transcript of the oral findings and opinion should have been

included in the appendix. Attorney Hoag shall pay the $150 sanction within fourteen days of this opinion.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.