COURT OF APPEALS DECISION DATED AND FILED

March 18, 2009

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2008AP1003-CR

Cir. Ct. No. 2006CF4

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JERMAINE BELL,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Walworth County: JOHN R. RACE, Judge. *Affirmed*.

Before Brown, C.J., Snyder and Neubauer, JJ.

¶1 PER CURIAM. Jermaine Bell appeals from judgments of conviction for second-degree recklessly endangering safety, battery and disorderly conduct, all as a repeater, as domestic abuse and by use of a dangerous weapon,

and from an order denying his postconviction motion alleging ineffective assistance of trial counsel. He contends that trial counsel conceded his guilt during closing argument, failed to investigate the victim's mental illness and failed to advance a defense theory of "accident." We conclude that Bell was not deprived of effective assistance of counsel. We affirm the judgments and order.

¶2 The criminal complaint alleged that Bell choked Sarah Alexander during an altercation and cut her with a knife. The State charged him with first-degree reckless endangerment, battery and disorderly conduct, each with repeater, domestic abuse and weapon penalty enhancers.

¶3 Alexander testified at trial that Bell became angry when she told him she wanted to end their relationship. Bell choked her with his hands and strangled her with a cord, then drew a knife and stabbed her in the neck. Alexander eventually fled with her five-year-old daughter and called the police. The daughter testified that she heard Alexander "yelling" and saw them "fighting," and acknowledged telling police that she saw "daddy choking [her] mom." One of the police officers who responded to the scene testified that Bell had locked himself in the bathroom and yelled to the officers that he had a gun and intended to use it. The officers kicked the door in and subdued Bell with a Taser when he refused to put his hands behind his back. Bell exercised his right not to testify. No witnesses testified on his behalf.

¶4 In closing arguments, defense counsel focused on the first-degree reckless endangerment charge, for which the State had to prove that Bell endangered the safety of another human being and did so by criminally reckless

conduct,[1] and the circumstances of his conduct showed utter disregard for human life. *See* WIS JI—CRIMINAL 1345. Defense counsel argued:

> What we do have is scarey [sic] conduct. What we do have is dangerous weapon conduct…. But the question is and still remains was what occurred a substantial risk of death or great bodily harm; that's what the statute says and what the jury instruction says. And that particular question is answered in the no.
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> ….
>
> [C]an we say that there is absolutely no regard for life because that's what the statute says, utter disregard for life. There is no regard whatsoever at all, not even momentarily. And I would argue that … it doesn't meet the test of the statute. Battery, disorderly conduct, are different situations and different elements—I'm not arguing against those….
>
> Is there utter disregard for human life? The answer is no. And is this type of conduct reckless? Absolutely. But is it reckless in such a degree that it is a substantial risk of death or great bodily harm—and that's the question.
>
> When you go back and deliberate I have no doubt that you will look with absolute disfavor on what Mr. Bell did and I'm not here to defend that. What I'm here to argue is the facts and the law don't match in this particular instance …. I'm not standing up here giving an absolute declaration of innocence, meaning my client didn't do anything wrong. I think I would be ridiculous in saying that. But … the law still applies.
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> ….
>
> So when you go back, look at the law and the facts and they must match—absolutely must…. And I will argue that in this particular instance the law and the facts don't match and therefore you can't find him guilty.

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[1] "Criminally reckless conduct" means that the conduct created a risk of death or great bodily harm to another person; and the risk of death or great bodily harm was unreasonable and substantial; and the defendant was aware that his conduct created the unreasonable and substantial risk of death or great bodily harm. *See* Wis JI—Criminal 1345. "Great bodily harm" means serious bodily injury. ***Id.***

¶5 The jury found Bell guilty of second-degree reckless endangerment, *see* WIS JI—CRIMINAL 1347, as well as of battery and disorderly conduct, all with the penalty enhancers. Bell's motion for postconviction relief alleging ineffective assistance of counsel failed, and he appeals.

¶6 Bell contends that his trial counsel was constitutionally ineffective because in closing argument he conceded Bell's guilt on all three charges, failed to file a ***Shiffra-Green***[2] motion for an in camera inspection of Alexander's confidential mental health treatment records, and failed to pursue an accident defense. To establish ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that the deficiency was prejudicial. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Counsel's conduct is deficient if it falls below an objective standard of reasonableness. ***State v. Thiel***, 2003 WI 111, ¶19, 264 Wis. 2d 571, 665 N.W.2d 305. To prove prejudice, a defendant must show 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.'" ***Id.***, ¶20 (citation omitted). The strong presumption is that counsel rendered adequate assistance. ***Strickland***, 466 U.S. at 690.

¶7 Appellate review of an ineffective assistance of counsel claim presents a mixed question of law and fact. ***State v. McDowell***, 2004 WI 70, ¶31, 272 Wis. 2d 488, 681 N.W.2d 500. We will not disturb the trial court's findings of fact unless they are clearly erroneous. ***Id.*** The ultimate determination of

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[2] *See* ***State v. Shiffra***, 175 Wis. 2d 600, 606-07, 499 N.W.2d 719 (Ct. App. 1993), and ***State v. Green***, 2002 WI 68, ¶34, 253 Wis. 2d 356, 646 N.W.2d 298.

whether counsel's performance satisfies the constitutional standard for ineffective assistance of counsel presents a question of law which we review de novo. ***Thiel***, 264 Wis. 2d 571, ¶21.

¶8 Bell first contends that trial counsel conceded guilt on all three charges. We disagree. Counsel argued in closing that under the statute and the jury instructions, "criminally reckless conduct" means conduct that creates a substantial risk of death or great bodily injury. He told the jury "that particular question" should be answered "no … not because it's not dangerous, not because it's not serious, but it doesn't meet the test of the statute." We assume the trial court implicitly found that counsel did not concede reckless endangerment, and we accept that finding because the record is clear. *See* ***Town of Avon v. Oliver***, 2002 WI App 97, ¶23, 253 Wis. 2d 647, 644 N.W.2d 260. We may assume a missing finding was determined in a manner that supports the final decision. ***State v. Pallone***, 2000 WI 77, ¶44 n.13, 236 Wis. 2d 162, 613 N.W.2d 568.

¶9 As to the other two charges, the trial court found at the close of the ***Machner***[3] hearing that trial counsel's concession to the facts underpinning the two misdemeanors was a means of maintaining credibility and directing the jury's attention away from the "very substantial felony" of reckless endangerment, and declined to find that Bell had to accede to this strategy. These findings are not clearly erroneous. Defense counsel testified that his primary concern was the first-degree reckless endangerment and that he acknowledged Bell's culpability on the battery and disorderly conduct charges, of which there was significant credible evidence, so as to be taken more seriously by the jury.

[3] *See* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

¶10 Bell asserts that if the concession was a trial strategy, counsel should have gotten his consent to pursue it or at least consulted with him. A lawyer is not required to consult with the client on tactical moves, however. ***State v. Gordon***, 2003 WI 69, ¶29, 262 Wis. 2d 380, 663 N.W.2d 765. Counsel's concession of guilt on a lesser count in a multiple-count case, in light of overwhelming evidence on that count and so as to gain credibility and win acquittal on the other charges, is a reasonable strategy which does not render counsel constitutionally ineffective. ***Id.***, ¶28. Bell tries to distinguish ***Gordon*** on the basis that Gordon conceded his guilt during his own testimony. *See* ***id.***, ¶13. We see this as a distinction without a difference. ***Gordon*** still does not mandate that a defendant approve counsel's strategic decisions. We decline Bell's invitation to "take another look at ***Gordon*** [] and declare it no longer good law." *See* ***Cook v. Cook***, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997). Bell's citation to other jurisdiction's contrary leanings is unpersuasive. Failing to raise an unsettled point of law is not ineffective assistance. *See* ***State v. McMahon***, 186 Wis. 2d 68, 84, 519 N.W.2d 621 (Ct. App. 1994). Besides, counsel's strategy bore some fruit: the jury convicted Bell of second-degree reckless endangerment, rather than first.

¶11 Bell next contends that trial counsel failed to investigate whether Alexander suffered from a psychiatric disorder and mental illness at the time in question so that he might have undermined the reliability of her testimony. Relying on ***State v. Shiffra***, 175 Wis. 2d 600, 499 N.W.2d 719 (Ct. App. 1993), and ***State v. Green***, 2002 WI 68, 253 Wis. 2d 356, 646 N.W.2d 298, Bell claims trial counsel should have requested a hearing seeking an in camera review of Alexander's treatment records.

¶12 A defendant may obtain an in camera review of a victim's confidential mental health records upon showing that the records are material to

the defense. *See* ***Shiffra***, 175 Wis. 2d at 605. The preliminary showing must set forth "a specific factual basis demonstrating a reasonable likelihood that the records contain relevant information necessary to a determination of guilt or innocence". ***Green***, 253 Wis. 2d 356, ¶34. Information is "necessary to a determination of guilt or innocence" if it tends to create a reasonable doubt that otherwise might not exist. ***Id.*** The fact-specific evidentiary showing must describe as precisely as possible the information sought and its relevance to the particular defense. ***Id.***, ¶33. The request must be based on more than mere speculation as to what the records contain and show more than a mere possibility that they will contain evidence of use to the defense. ***Id.*** Whether the defendant has met his or her burden of making the preliminary evidentiary showing is a question of law that we review de novo. *See* ***id.***, ¶20.

¶13 Bell provided an affidavit in support of his postconviction motion asserting that Alexander's accusations were fabrications, and that he believed Alexander "may have suffered from" bipolar disorder for which she was prescribed medication. He stated that he sought review "only to obtain evidence concerning whether … Alexander [] may have suffered from a psychiatric disorder or mental illness which causes her an inability to truthfully relate facts as she perceives them." Bell asserted that trial counsel "never inquired of me whether I was aware of whether [Alexander] suffered from a mental illness or a disorder," and would have given counsel this information had counsel so inquired.

¶14 Bell does not carry his burden. His tentatively phrased affidavit falls short of the fact-specific evidentiary showing ***Green*** requires. It speculates about what the records might contain, rather than showing a reasonable likelihood of relevant information that would create a reasonable doubt that otherwise might not exist. *See* ***Green***, 253 Wis. 2d 356, ¶34. Furthermore, the issue was not whether

Alexander fabricated the incident. The jury saw photographs depicting ligature marks and the stab wound and heard the daughter's testimony. Trial counsel's failure to bring a meritless motion does not constitute deficient performance. ***State v. Swinson***, 2003 WI App 45, ¶59, 261 Wis. 2d 633, 660 N.W.2d 12.

¶15 Bell next contends trial counsel failed to raise the affirmative defense of accident and to request the associated jury instruction. *See* WIS JI—CRIMINAL 772. An instruction on a valid applicable theory of defense must be supported by credible evidence. *See* ***State v. Bernal***, 111 Wis. 2d 280, 282, 330 N.W.2d 219 (Ct. App. 1983). The credible evidence here did not support that Alexander's ligature marks and stab wound to her neck were the result of an accident. Failure to raise a meritless legal issue is not deficient performance. ***State v. Wheat***, 2002 WI App 153, ¶14, 256 Wis. 2d 270, 647 N.W.2d 441.

¶16 Lastly, Bell argues that the cumulative effect of his trial defense counsel's errors is sufficient to undermine our confidence in the outcome of his trial. *See* ***Thiel***, 264 Wis. 2d 571, ¶60. We disagree. Each alleged error must be deficient in law to be included in the calculus for prejudice. ***Id.***, ¶61. We have rejected all of his arguments that counsel's performance was deficient. We therefore reject this argument, too.

By the Court.—Judgments and order affirmed.

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