COURT OF APPEALS
DECISION
DATED AND FILED

April 14, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP541-CR **Cir. Ct. No. 2005CF940**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOSEPH A. SUNDERMEYER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: ELSA C. LAMELAS and DENNIS P. MORONEY, Judges.[1] *Affirmed.*

Before Curley, P.J., Fine and Kessler, JJ.

[1] The Honorable Elsa C. Lamelas presided over the jury trial and sentencing. The Honorable Dennis P. Moroney presided over the postconviction motion.

¶1 CURLEY, P.J. Joseph Sundermeyer appeals from the judgment, entered following a jury verdict, convicting him of armed robbery by the use or threat of force and burglary, contrary to WIS. STAT. §§ 943.32(1)(b), (2), and 943.10(1m)(a) (2005-06).[2] He also appeals from the order denying his postconviction motion. Sundermeyer argues that his trial attorney was ineffective for failing to object to the prosecutor's introduction of other acts evidence pursuant to WIS. STAT. § 904.04(2). Specifically, he claims that the prosecutor's eliciting from Sundermeyer's mother on cross-examination, that she had earlier obtained a restraining order against him because he had threatened to tear up her house and destroy her property, was improper other acts evidence.[3] He also argues that because no objection was raised, the admission of the evidence was plain error, and consequently, he is entitled to a new trial. Because Sundermeyer's attorney was not ineffective, the admitted evidence was not other acts evidence, and thus, no plain error occurred, we affirm.

I. BACKGROUND.

¶2 According to the testimony of Loretta Howard, the victim of both the armed robbery and burglary, she and Sundermeyer were childhood friends. In 2003 they began a romantic relationship, even though, at the time, Howard was married. Howard testified that the romantic relationship ended in the summer of 2004, a matter which at trial Sundermeyer disputed.

[2] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

[3] Sundermeyer's mother had been called as a defense witness for several reasons, including as an alibi witness for the burglary and to support Sundermeyer's testimony that after vacating the victim's home in February 2005, he went to live with his mother.

¶3 Howard related to the jury that on February 7, 2005, after Howard left work, she discovered Sundermeyer waiting for her near her parking space. He asked for a ride and Howard agreed. Once in Howard's vehicle Sundermeyer asked to use her cell phone, which she permitted. According to Howard, after making a couple phone calls and having Howard drive him to a house, Sundermeyer told Howard that he wanted to resume their relationship, that he still loved her, and if he could not have her, no one else could either. After Howard remained unpersuaded, Sundermeyer became angry, and she said Sundermeyer began punching her in the face, and, a bit later, he pulled out a knife and threatened to harm her. Sundermeyer then told her he was not going to kill her, but he instructed her to go to the ATM which was nearby and take out $500. Fearing that Sundermeyer was going to seriously harm her, she related to the jury that she drove to an ATM and obtained some money, which she gave to Sundermeyer. Howard then put the car in drive and quickly drove into a busy gas station. Once there, she screamed at Sundermeyer to get out of her car. Sundermeyer complied, but grabbed her cell phone as he exited. He left the knife in the car. After driving around the corner and calming down, Howard decided against calling the police and drove home.

¶4 The next morning Howard began getting phone calls at work from Sundermeyer, which she originally refused to answer. A co-worker took one of the later calls in which Sundermeyer told the co-worker that if Howard did not get on the phone, "she's going to regret it and I'm going to do something to her house." Eventually Howard answered one of Sundermeyer's phone calls. Howard recounted that during the phone call, Sundermeyer said that if she did not want to be with him, then "whatever he does is on me." The call ended with Howard telling him to stop calling and harassing her and Sundermeyer swearing at her.

¶5 According to Howard's testimony, sometime later that day Howard received a phone call from her mother telling her that she "need[s] to come home now." Howard then left work and drove home. When she got there, she found that her house had been unlawfully entered and extensively vandalized. In recalling what she observed, she testified:

> A. I walk in my home, and it is just vandalized. Everything I had worked for was destroyed.
>
> Q. What do you mean by "everything"? Tell me what you see when you walk in.
>
> A. Nothing but glass, walls smashed, furniture sliced up, pictures slashed, coffee table smashed, every room I went to, items, walls were smashed, my furniture was smashed.
>
> Q. What did your bedroom look like?
>
> A. My bedroom was, my bed was sliced. My mattress was sliced. My blankets were sliced. My pillows were sliced. My furniture was tipped over. All my glass collectibles were smashed, broken. My curio cabinet was tipped over, smashed, broken. My bedroom mirrors, everything was smashed.
>
> Q. What about the kitchen; what did the kitchen look like?
>
> A. The kitchen table smashed, oven door smashed, holes in the walls.

¶6 Howard recounted that every room in the house except her daughters' and mother's bedrooms was demolished. In addition, numerous things were missing such as her jewelry. Howard told the jury that she later received a check from her insurance company for $15,000 for the destroyed and stolen items, and another check for $8000 to repair the damage to her home.

¶7 Howard's mother had contacted the police and Sundermeyer was arrested. Several of Howard's stolen items were found among the personal

property taken from Sundermeyer when he was arrested, and other property of Howard's was recovered from the van Sundermeyer was in when he was arrested.

¶8 At Sundermeyer's jury trial, he maintained that he was innocent of both charges. He testified that he was the one who decided to break up their relationship because of Howard's physical and verbal abuse. He contended that their intimate relationship continued through 2004 and that he had been living with Howard at her house until February 3, 2005, when he left and moved in with his mother. Sundermeyer stated that on the day he was alleged to have robbed Howard he never met her in the parking lot, but rather, they agreed to meet at a different location. While there, the two of them got into an argument in her vehicle because he wanted his property back that he had left at her house, as well as some money that Howard owed him. He claimed that he never forced Howard to withdraw money from an ATM and that Howard gave him three twenty dollar bills while they sat in the vehicle and talked. He denied ever hitting Howard or threatening her with a knife. As to the burglary, he also denied being involved and claimed he was at his mother's house when the burglary and vandalism occurred.

¶9 During the trial, Sundermeyer's mother, Linda Beamon, was called as a defense witness, both to verify Sundermeyer's living arrangements, and to confirm that Sundermeyer was at her apartment when the burglary occurred. She also testified to witnessing arguments and difficulties that Howard and her son had during their relationship. Beamon was asked by Sundermeyer's attorney if Sundermeyer began living with her after he broke up with Howard and left Howard's home, as Sundermeyer contended, and Beamon responded that, "Joseph came, was back at my house—well, he couldn't exactly stay at my house." On cross-examination, Beamon revealed that the reason that Sundermeyer could not live with her was because she had a restraining order out against him because he

had threatened to tear up her house and destroy her property. No objection was made to this testimony, nor did Sundermeyer's attorney object when the trial court took judicial notice of the existence of the restraining order and so informed the jury. Sundermeyer's attorney did not ask for any jury instruction concerning this evidence. Sundermeyer's attorney also never objected when the State mentioned the restraining order during closing argument.

¶10 After the jury found Sundermeyer guilty of both offenses, Sundermeyer brought a postconviction motion seeking a new trial, arguing that the introduction of the restraining order evidence was improper other acts evidence and that his attorney was ineffective for failing to object. Further, he submitted that because admission of the evidence was improper and no objection was made to its admission, he was entitled to a new trial based on the plain error doctrine. The trial court ordered briefs and held a hearing.[4] Later, the trial court held a ***Machner*** hearing.[5]

¶11 The trial court denied the postconviction motion, finding that Sundermeyer's attorney opened the door to the State's inquiries about the restraining order when Sundermeyer's attorney asked Beamon the question concerning whether Sundermeyer was living with her, and the trial court also found that Sundermeyer's attorney was unaware of the restraining order. The trial court also found the evidence proper, as it impeached Sundermeyer's mother's testimony. Further, the trial court, based upon Sundermeyer's lawyer's testimony,

[4] At the hearing, Sundermeyer was twice found in contempt and sentenced to four months' consecutive incarceration on each count. Later the trial court reduced the sentences to thirty days each, to be served consecutively.

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

called Sundermeyer's lawyer's failure to object to the evidence or request a special jury instruction a strategic decision because the attorney testified he decided against objecting to the evidence because by doing so he would call attention to it.

II. ANALYSIS.

A. Sundermeyer's attorney's failure to object to the admission of testimony related to the restraining order obtained by Sundermeyer's mother against Sundermeyer was not ineffective assistance of counsel.

¶12 In ***Strickland v. Washington***, 466 U.S. 668, 687 (1984), the United States Supreme Court set forth a two-part test for determining whether counsel's actions constitute ineffective assistance. First, the defendant must demonstrate that counsel's performance was deficient. ***Id.***; ***State v. McDowell***, 2004 WI 70, ¶49, 272 Wis. 2d 488, 681 N.W.2d 500. Second, the defendant must demonstrate that counsel's deficient performance was prejudicial to his or her defense. ***Strickland***, 466 U.S. at 687. This requires a showing that counsel's errors were "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." ***Id.***

¶13 "The issue of whether a person has been deprived of the constitutional right to the effective assistance of counsel presents a mixed question of law and fact." ***State v. Trawitzki***, 2001 WI 77, ¶19, 244 Wis. 2d 523, 628 N.W.2d 801. The trial court's findings of fact, that is, "the underlying findings of what happened," will be upheld unless they are clearly erroneous. ***State v. Pitsch***, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985). Whether counsel's performance was deficient and prejudicial to his or her client's defense is a question of law that we review *de novo*. ***Trawitzki***, 244 Wis. 2d 523, ¶19.

¶14 "Review of counsel's performance gives great deference to the attorney and every effort is made to avoid determinations of ineffectiveness based on hindsight." ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). "[T]he case is reviewed from counsel's perspective at the time of trial, and the burden is placed on the defendant to overcome a strong presumption that counsel acted reasonably within professional norms." ***Id.*** (footnote omitted). Counsel's performance is deficient only if it was "outside the wide range of professionally competent assistance," and "the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." ***Strickland***, 466 U.S. at 689-90 (internal quotation marks and citation omitted).

¶15 In his appellate brief, Sundermeyer argues that his attorney fell below the standard for reasonable competent counsel because:

> 1. Counsel failed to move *in limine* to preclude other acts evidence without first conducting a hearing on the ***Sullivan*** factors.[6]
>
> 2. Counsel failed to object to Ms. Beamon's testimony that she had obtained a restraining order against Mr. Sundermeyer.
>
> 3. Counsel failed to object when the prosecutor asked Ms. Beamon about the threats or acts which were the grounds for obtaining the restraining order.
>
> 4. Counsel failed to object when the prosecutor moved the court to take judicial notice of the restraining order.
>
> 5. Counsel failed to object when the court informed the jury that the court was taking judicial notice of the restraining order.

[6] ***State v. Sullivan***, 216 Wis. 2d 768, 576 N.W.2d 30 (1998).

> 6. Counsel failed to request an instruction limiting the jury's consideration of the evidence of the restraining order and the threats to a permissible purpose, and prohibiting the jury from considering this evidence as proof of a character trait and [] concluding that Mr. Sundermeyer acted in conformity with that trait.
>
> 7. Counsel failed to object when the prosecutor implicitly argued that evidence regarding the restraining order is evidence of guilt.

(Bolding and footnote added.) We disagree.

¶16 We first observe that Sundermeyer's trial attorney testified at the ***Machner*** hearing that he was unaware of the restraining order. Further, the trial court made a finding that Sundermeyer's trial counsel had no knowledge of the restraining order. We are obligated to accept this finding. As noted, we review a claim for ineffective assistance of counsel under a mixed standard of review. ***Johnson***, 153 Wis. 2d at 127. "Thus, the trial court's findings of fact ... will not be overturned unless clearly erroneous. The ultimate determination of whether counsel's performance was deficient and prejudicial to the defense are questions of law which [we] review[ ] independently." ***Id.*** at 127-28 (citations omitted). As a consequence, because this finding is not clearly erroneous, we accept the trial court's finding even though Sundermeyer claimed that he told his attorney before trial of the existence of the restraining order, and his attorney said he would file a motion *in limine* to prevent its introduction. Inasmuch as the attorney was unaware of the existence of the order, it is unreasonable to suggest that the attorney should have brought a generic pretrial motion seeking to keep out such evidence.

¶17 As to Sundermeyer's suggestion that his trial attorney was ineffective for not objecting to: (1) Beamon's testimony that she had a restraining order; (2) the prosecutor inquiring as to grounds for the restraining order; (3) the

prosecutor's request that the trial court take judicial notice of the order; (4) the trial court informing the jury that it was taking judicial notice of the restraining order; and (5) the prosecutor's mention of the restraining order in closing argument, the trial court found these were all matters of strategy that a reasonable lawyer could have made. Also falling within a reasonable strategy was Sundermeyer's attorney's decision not to ask for a special jury instruction. The trial court found that it was reasonable for Sundermeyer's attorney to "try to play it down, a no big deal." We agree.

¶18 Generally, trial strategy decisions reasonably based in law and fact do not constitute ineffective assistance of counsel. *See* ***State v. Hubanks***, 173 Wis. 2d 1, 28, 496 N.W.2d 96 (Ct. App. 1992). We do not second-guess a matter of defense strategy if such strategy was found by the trial court. ***State v. Mayo***, 2007 WI 78, ¶63, 301 Wis. 2d 642, 734 N.W.2d 115. A trial court's determination that counsel had a reasonable trial strategy is "virtually unassailable in an ineffective assistance of counsel analysis." ***State v. Maloney***, 2004 WI App 141, ¶23, 275 Wis. 2d 557, 685 N.W.2d 620, *aff'd*, 2006 WI 15, 288 Wis. 2d 551, 709 N.W.2d 436.

¶19 Inasmuch as Sundermeyer's attorney did not perform deficiently, we decline to address whether the evidence prejudiced the jury. We need not reach the question of prejudice if counsel did not perform deficiently. *See* ***Strickland***, 466 U.S. at 697. We assess whether counsel's "performance was reasonable under the circumstances of the particular case." ***Hubanks***, 173 Wis. 2d at 25. Having accepted the trial court's finding that Sundermeyer's attorney was unaware of the existence of the restraining order until the question was asked on cross-examination and that his attorney's decision to play down the restraining order

was a reasonable trial strategy, we conclude that there was no ineffective assistance of counsel.

B. The admission of evidence that Sundermeyer's mother obtained a restraining order against him was not improper other acts evidence and consequently not plain error.

¶20 Sundermeyer submits that the introduction of evidence at his trial, that his mother obtained a restraining order against him because he threatened to destroy her property, was a violation of the evidence rule embodied in WIS. STAT. § 904.04, entitled "Character evidence not admissible to prove conduct; exceptions; other crimes." Inasmuch as Sundermeyer contends that the introduction of the evidence was improper and no objection was raised, he asserts he is entitled to a new trial because admitting the evidence was plain error.

¶21 WISCONSIN STAT. § 904.04(2)(a), in relevant part, directs:

> evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. This subsection does not exclude the evidence when offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Sundermeyer cites ***State v. Sullivan***, 216 Wis. 2d 768, 576 N.W.2d 30 (1998), the seminal case dealing with the admission of other acts evidence, for support. ***Sullivan*** commands the trial court to analyze the evidence under a three-step framework:

> (1) Is the other acts evidence offered for an acceptable purpose under WIS. STAT. § (RULE) 904.04(2), such as establishing motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident?
>
> (2) Is the other acts evidence relevant, considering the two facets of relevance set forth in WIS. STAT. § (RULE)

> 904.01? The first consideration in assessing relevance is whether the other acts evidence relates to a fact or proposition that is of consequence to the determination of the action. The second consideration in assessing relevance is whether the evidence has probative value, that is, whether the other acts evidence has a tendency to make the consequential fact or proposition more probable or less probable than it would be without the evidence.
>
> (3) Is the probative value of the other acts evidence substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence?

Sullivan, 216 Wis. 2d at 772-73 (footnote omitted).

¶22 After applying the ***Sullivan*** test, we conclude that the admission of evidence that Beamon obtained a restraining order against Sundermeyer did not constitute impermissible other acts evidence.[7] Assuming without deciding that evidence of a restraining order is a crime, wrong, or act, in looking at the three prongs of the ***Sullivan*** test, it is apparent that the evidence was offered for an acceptable purpose, was relevant, and was not unduly prejudicial.

¶23 At trial there were several disputes. Sundermeyer claimed that he continued in an intimate relationship with Howard and was living with Howard in her home until February 3, 2005, when he moved back with his mother. Howard, on the other hand, claimed that she had broken up with Sundermeyer in the summer of 2004. This disagreement was pivotal to the jury's determining who was more credible, Howard or Sundermeyer. Sundermeyer listed Beamon as an

[7] The trial court ruled that the evidence of the restraining order was other acts evidence but it was admissible because the defense "opened the door" and was impeachment testimony. The State did not completely adopt the trial court's reasoning, and instead offers several other explanations as to why the evidence was admissible.

alibi witness. The question as to whether Sundermeyer could legally live with his mother, as he claimed he had, and an exploration of how long he had lived with her, was admissible and relevant evidence. Again, it may have been prejudicial, but it was not unduly prejudicial evidence. Thus, we conclude that the admission of evidence that Sundermeyer's mother had obtained a restraining order was not inadmissible other acts evidence.

¶24 Finally, Sundermeyer argues that he is entitled to a new trial because even though no objection was raised to its admissibility, the evidence of the restraining order falls within the plain error rule. Plain error is codified in WIS. STAT. § 901.03(4), which reads: "PLAIN ERROR. Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the judge." The plain error rule only applies to evidentiary questions. *See* ***State v. Schumacher***, 144 Wis. 2d 388, 402, 424 N.W.2d 672 (1988). Inasmuch as we have determined that the existence of a restraining order obtained by Sundermeyer's mother against him was admissible evidence, Sundermeyer has had no substantial rights violated. For the reasons stated, we affirm.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.