COURT OF APPEALS
DECISION
DATED AND FILED

November 17, 2009

David R. Schanker
Clerk of Court of Appeals

NOTICE

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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. 2008AP740-CR **Cir. Ct. No. 2002CF7248**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROOSEVELT BATES,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JOHN A. FRANKE and JEFFREY A. WAGNER, Judges. *Affirmed.*

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

¶1 PER CURIAM. Roosevelt Bates appeals from a judgment of conviction for false imprisonment and second-degree sexual assault, and from a

postconviction order denying his motion for plea withdrawal.[1] The issue is whether defense counsel's deficient performance—for failing to interview a witness who would have corroborated Bates's defense—was prejudicial, constituting the ineffective assistance of counsel. We conclude that it was not reasonably probable that this corroborative proposed testimony from Bates's live-in stepdaughter would have largely negated the physical evidence, and would have prompted Bates to forego a plea bargain that reduced the charges and his maximum sentencing exposure by half. Therefore, we affirm.

¶2 Bates was charged with two counts of second-degree sexual assault with the use of force, second-degree recklessly endangering safety and false imprisonment for offenses allegedly committed against his live-in girlfriend. Incident to a plea bargain, Bates entered no-contest pleas to one of the sexual assaults and to false imprisonment, in exchange for the dismissal of the other sexual assault and a recklessly endangering safety charge, reducing his sentencing exposure by half.[2] Additionally, the plea bargain contemplated the State not

[1] The Honorable John A. Franke presided over the plea and sentencing hearings and entered the judgment of conviction. The Honorable Jeffrey A. Wagner decided Bates's postconviction motion.

[2] A no-contest plea means that the defendant does not claim innocence, but refuses to admit guilt. *See* WIS. STAT. § 971.06(1)(c) (2001–02); *see also* ***Cross v. State***, 45 Wis. 2d 593, 599, 173 N.W.2d 589 (1970). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

The second-degree sexual assaults with the use of force are Class BC Felonies, WIS. STAT. § 940.225(2)(a), each carrying a maximum sentencing exposure of thirty years. *See* WIS. STAT. § 939.50(1)(bc) and (3)(bc). The false imprisonment, in violation of WIS. STAT. § 940.30, and the second-degree recklessly endangering safety, in violation of WIS. STAT. § 941.30(2), are Class E Felonies, each carrying a maximum sentencing exposure of five years. *See* § 939.50(1)(e) and (3)(e).

specifying a particular length of imprisonment. After an extensive plea colloquy, the trial court accepted Bates's no contest pleas and imposed concurrent sentences of twenty-five and five years, comprised of fifteen- and two-year concurrent periods of initial confinement and ten- and three-year concurrent periods of extended supervision. On direct appeal, this court rejected a no-merit report in which Bates personally responded to the report, seeking plea withdrawal. *See* ***State v. Bates***, No. 2004AP1601-CRNM, unpublished slip op. at 1-2 (WI App June 21, 2006).

¶3 Successor postconviction counsel was appointed, and Bates filed a postconviction motion seeking plea withdrawal, alleging that his trial counsel was ineffective for failing to interview his live-in stepdaughter who would have proffered testimony to support his defense.[3] The trial court conducted an evidentiary hearing and found that trial counsel's performance was "potentially deficient," but that his failures did not prejudice Bates because it was not reasonably probable that a fabrication or consent defense would have succeeded. Bates appeals.

¶4 The sole issue before this court is whether trial counsel's deficient performance constituted prejudice resulting in the ineffective assistance of trial counsel that would constitute a manifest injustice compelling the withdrawal of Bates's two no-contest pleas. To prevail on an ineffective assistance claim, the defendant must show that trial counsel's performance was deficient, and that this

[3] Bates also sought plea withdrawal because his no contest pleas were invalid, and his trial counsel was ineffective for misadvising him that his good behavior in prison could result in early release. At the evidentiary hearing, Bates withdrew his claim about the invalidity of his plea. On appeal, he does not pursue his ineffective assistance claim on the misadvice he claims to have received about the possibility of early release.

deficient performance prejudiced the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). The trial court found that trial counsel's failure to interview Bates's live-in stepdaughter, Latrece Foster, was "potentially deficient" performance. Consequently, all that Bates is challenging is the trial court's determination that the deficient performance was not prejudicial. To establish prejudice, the defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id.*** at 694. Prejudice must be "'*affirmatively* prove[n].'" ***State v. Wirts***, 176 Wis. 2d 174, 187, 500 N.W.2d 317 (Ct. App. 1993) (citation omitted; emphasis in ***Wirts***).

¶5 Bates contends that the trial court applied the wrong test for prejudice. The trial court evaluated prejudice in the context of a different result at trial, namely whether Bates would have been acquitted. Bates contends that the proper context within which to assess prejudice is whether he would have rejected the proposed plea-bargain and had instead proceeded to trial. *See* ***Hill v. Lockhart***, 474 U.S. 52, 58-60 (1985). In other words, had trial counsel interviewed Foster, who testified that she would have corroborated Bates's potential defenses, would Bates have rejected the State's proposed plea-bargain, and instead proceeded to trial? *See* ***id.*** We agree that the reasonable probability of a different outcome in this situation is whether Bates would have rejected the State's proposed plea bargain, not whether he would have been acquitted at trial. *See* ***id.***

¶6 After the evidentiary ("***Machner***") hearing on trial counsel's effectiveness, the trial court found that trial counsel's performance was deficient

for failing to interview Foster and to apprise Bates of Foster's proposed testimony.[4] Foster testified that she was Bates's stepdaughter and that she and her three children lived in the same house: Foster and her children on the first floor, Bates and the victim on the second floor. Foster also admitted that Bates and the victim had argued over a number of things including the victim wanting Foster and her children to live elsewhere. On December 26, 2002, two days before the charged incidents, Bates and the victim argued because the victim, although living with Bates, was dating another man. Foster testified that she overheard the victim tell Bates "that she was going to get him … [b]ecause he wouldn't let her go out [and s]he didn't want to be with him anymore." Foster testified that the victim said, "[t]hat she was going to try to get [Bates] locked up." Foster said that the victim "just threatened, said that he got some coming."

¶7 Bates testified that he told his trial counsel that he did not commit the sexual assaults, although he intimated that he had committed the battery. Bates testified that he had told his trial counsel that Foster would:

> co[rro]borate that I didn't commit this crime, that [the victim] was making this just … out of jealousy…. [because s]he's a manipulator and, you know, she was angry, she was mad at me…. [because s]he wanted to have her way … me and the other fellows that she was out sleeping around with.

Bates also testified that his trial counsel had told him that he had talked with a potential witness other than Foster, but that Bates did not "remember if he said anything about anybody else." He then testified that had he known that Foster

[4] A ***Machner*** hearing is an evidentiary hearing to determine trial counsel's effectiveness. *See* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

would have testified in his defense that he would have rejected the proposed plea bargain and gone to trial "[b]ecause then the court would have kn[o]w[n] that, they would have heard from me that I really didn't do the crime that [the victim] fabricated that I did."

¶8 The trial court found that defense counsel's deficient performance was not prejudicial because Bates:

> gave a statement to police indicating that he had been drinking and that the alcohol took over. He admitted to slapping the victim a couple of times and pushing her down on the bed. He indicated she was fighting back and that he had sex with her. He admitted to tying her hands and he admitted to taking a belt and wrapping it around both of her wrists because she was swinging her arms at him. He admitted using straps to tie her to the bed. He stated that he was upset and wanted the victim to tell him the truth about seeing another man. He admitted to picking up the gun and telling her he hated her. He claimed that he did not point the gun at her and indicated that the victim merely fell on a little bat, but that he never hit her with it. In addition, police observed a bullet hole in the bathroom of the residence as well as straps tied to the bedframe.

The trial court also referenced the physical evidence observed by Officer Young at the Sexual Assault Treatment Center at Sinai-Samaritan Hospital as follows: "[a]t the treatment center, Officer Young observed deep bruising to her butt, a bruise to her lip, a cigarette burn on her upper arm, abrasions to her wrists and ankles, and noted that she had difficulty walking as a result of her injuries." The trial court ultimately determined that:

> [b]ased on the victim's injuries and the defendant's statement acknowledging much of what the victim stated occurred, in addition to admitting that the victim was fighting back and swinging her arms at him, the court concludes that there is not a reasonable probability that either a fabrication defense or a consent defense would have been successful in this case. It therefore finds that trial counsel's failure to interview Latrece Foster, apprise the defendant of the relevance of her potential testimony,

> subpoena Latrece Foster for trial, or go to trial with either a fabrication or a consent defense supported by Latrece Foster's testimony did not constitute ineffective assistance.

¶9 Bates insists that had he known that Foster would have supported his consent defense, he would not have agreed to the plea-bargain. "A defendant must do more than merely allege that he would have pled differently; such an allegation must be supported by objective factual assertions." ***State v. Bentley***, 201 Wis. 2d 303, 313, 548 N.W.2d 50 (1996) (footnote and citations omitted). Bates contends that without knowing that Foster would have supported his defense, he was unable to fully and fairly evaluate whether to agree to a plea bargain as opposed to standing trial. However, Bates also testified at the ***Machner*** hearing that he gave his lawyer the names of witnesses, including Foster, who would support his defense. Bates further testified that there were other witnesses who supported his defense that the victim was lying; Bates merely did not know whether defense counsel had interviewed those witnesses or whether they were in court.

¶10 Bates has not "*affirmatively* prove[n]" that defense counsel's deficient performance was prejudicial, in that he would not have accepted the State's plea bargain. First, Bates admitted that he knew that there were potential witnesses, including Foster, who supported his defense. He testified that these potential witnesses could "co[rro]borate" that he had not committed the charged crimes. Foster's proposed testimony, albeit not necessarily as self-serving as Bates's testimony may have been perceived, was nevertheless "co[rro]borat[iv]e," not new or different from Bates's own expected trial testimony. Second, to evaluate the reasonable probability of Bates rejecting the State's proposed plea bargain requires us to assess the favorability of that proposal. Defense counsel testified that his advice to Bates was to accept the proposed plea bargain "[b]ased primarily on the medical information and [Bates's] statement."

¶11 This case was comprised of more than conflicting accusations by Bates and the victim, there was sufficient physical evidence, along with considering only those admissions that Bates has not even now disputed, to indicate the strength of the State's case in pursuing the four charges against Bates, and the obvious and considerable benefits to Bates of the plea bargain. We consequently conclude that Bates has not "*affirmatively* prove[n]" that it is reasonably probable that had he known that Foster would have "co[rro]borate[d]" his testimony to support his defense that he would have rejected the State's proposed plea bargain, reducing the charges and Bates's sentencing exposure by half.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2007-08).