COURT OF APPEALS
DECISION
DATED AND FILED

September 4, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-2928-CR **Cir. Ct. No. 99-CF-363**

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

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT-
CROSS-RESPONDENT,

V.

DAVID A. PORTH, SR.,

DEFENDANT-RESPONDENT-
CROSS-APPELLANT.

APPEAL and CROSS-APPEAL from an order of the circuit court for Washington County: PATRICK J. FARAGHER, Judge. *Affirmed*.

Before Brown, Anderson and Snyder, JJ.

¶1 SNYDER, J. The State appeals from a trial court order granting David A. Porth, Sr.'s motion for a new trial based upon ineffective assistance of counsel. The State argues that Porth was not denied effective assistance of

counsel because trial counsel's performance was neither deficient nor prejudicial. We affirm the order of the trial court.

FACTS

¶2 In a complaint filed October 22, 1999, the State alleged that between November 2, 1998, and December 31, 1998, Porth, along with co-defendant Mark Krumplitsch, committed acts of burglary and theft from various construction sites and from an outdoor power company. Tara Miller, the sister-in-law of Krumplitsch's wife, had reported to the police that Krumplitsch and Porth had been involved in various thefts. She informed police that there was a stolen air conditioning unit and fireplace insert at the Krumplitsch residence and a stolen snow blower in each of the Krumplitsch and Porth residences; Krumplitsch and Porth were next-door neighbors.

¶3 On July 29, 1999, a search of the Krumplitsch residence resulted in the seizure of items that had been involved in the thefts and burglaries charged in the complaint. After seizing these items, the police spoke to Porth at his residence. The only item of evidentiary value at Porth's residence, given voluntarily to the police by Porth, was an owner's manual for a snow blower; affixed to the manual was a serial number for one of the two snow blowers that had been stolen but there was no snow blower matching the manual in Porth's garage. As a result, Porth and Krumplitsch were charged with several counts of burglary and theft; a February 14, 2000 information charged Porth with two counts of theft, two counts of burglary and one count of receiving stolen property.

¶4 Porth's jury trial was held on April 25, 2000. At trial, Miles Miller, Tara Miller's husband and Mark Krumplitsch's brother-in-law, testified that he observed Krumplitsch and Porth burning wooden shipping pallets around

December 24, 1998. Miles also maintained that in late spring 1999, he confronted Porth about the thefts; Miles claimed that Porth admitted to the various thefts. In addition, Krumplitsch and his wife both implicated Porth in each of the thefts and the burglaries.

¶5 The State called Washington County Deputy Sheriff Mark Sette to the stand to testify about his conversation with Tara Miller. During Sette's testimony, Porth's defense counsel elicited a list of unrelated accusations about Porth; Sette, upon prompting by Porth's defense counsel, informed the jury that Tara Miller had accused Porth of sexually assaulting a child, abusing and killing animals, and refusing to allow his children to visit neighbors. Tara Miller's accusations to Sette gave a very derogatory characterization of Porth's personality, as revealed through defense counsel's cross-examination of Sette. Porth's defense counsel specifically asked:

> Q: [Tara Miller] gave you a verbal statement?
>
> A: Yes, sir.
>
> ....
>
> Q: She, as a matter of fact, showed you some notes that she had kept?
>
> A: Yes, sir.
>
> Q: And this was a couple pages worth of handwritten notes?
>
> A: Yes, sir.
>
> Q: And these were things that she related about David Porth?
>
> A: Yes.
>
> Q: And it covered a full, broad range of things?
>
> A: Yes, they did.

Q: It covered an allegation that he sexually assaulted a child?

A: Yes.

Q: Did that get called in for examination in this investigation?

A: Yes. That was also turned over to the Detective Bureau.

Q: Any action taken on that that you're aware of?

A: I don't know.

Q: She indicated that David Porth was abusing or killing animals?

A: She made that allegation; that's correct.

Q: Was that turned over to anyone else?

A: To the Detective Bureau.

Q: Were any actions taken on that?

A: I don't know.

Q: She indicated that David had, David didn't permit his kids to come over to her house or to neighbors' homes?

A: That was one of her allegations, yes.

Q: Okay. And she said he was overly domineering, or something of that order; is that correct?

A: Words to that effect. I don't believe that was the words she used.

Q: And she also said something about stealing. Are you aware of that?

A: There was numerous pages of notes including thefts, yes.

Q: And she was alleging that there was numerous things that David Porth was involved in taking?

A: That's correct.

> Q: And, again, you turned that over to someone else for investigation?
>
> A: That's correct.
>
> Q: Do you know if anything became of that?
>
> A: I was not made aware of what the outcome was.

¶6 On April 26, 2000, after the two-day jury trial, Porth was found guilty on all counts and was sentenced to two five-year concurrent prison terms and three years of consecutive probation.

¶7 Porth's appellate counsel filed a motion for a new trial on April 30, 2001, on three grounds: ineffective assistance of counsel, insufficient evidence to support the verdict and prosecutorial misconduct in closing arguments. In the motion, Porth argued that trial defense counsel was ineffective for introducing other acts evidence, specifically for eliciting testimony that Tara Miller had accused Porth of sexually assaulting a child; of having abused or killed animals; of being overly domineering; and of having refused to allow his children to have contact with the neighbors. A ***Machner***[1] hearing was scheduled to address the ineffective assistance of counsel claim.

¶8 When asked at the ***Machner*** hearing why he chose to elicit that information, Porth's trial defense counsel testified:

> The theory of the Defense in the case was Krumplitsch implicated Mr. Porth because Krumplitsch was angry that Mr. Porth allegedly contacted the police and reported to them that Krumplitsch had struck his child I believe. There was further testimony that was coming in from, I think Tara Miller's husband, regarding a confrontation he had with Mr. Porth on the issue of property that Mr. Porth and Mr.

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

> Krumplitsch took and that he was going to report them to the police.
>
> There were really a couple of the neighbors' families looking to hamper Mr. Porth in this case. Tara Miller was on the witness list. I was anticipating her testimony coming in. She was not called to testify. But I had received in discovery the list that she provided to the officer; so I had the officer testify as to the items listed.
>
> The reason I did that was because it went in line with the case that this was the family the neighbors were looking to dump on or slide over to Mr. Porth. And my intent was to show the whole broad gamut of claims that this woman made with no action having been made by the police against Mr. Porth for any of it.
>
> Q: Let me go back to your first statement. It was your theory that there was some kind of ... conspiracy by Miles Miller and Tara Miller and other family members of that side of the Miller clan to implicate Porth and take the weight off the Krumplitsch's [sic]? That was the theory of Defense?
>
> A: It was my theory. That was what Mr. Porth informed me and that became the theory of the Defense.

The trial court[2] denied Porth's motions as to the sufficiency of the evidence and prosecutorial misconduct but granted the motion for a new trial based on ineffective assistance of counsel. The State appeals.[3]

[2] The judge at the jury trial was Reserve Judge Richard T. Becker while the judge at the ***Machner*** hearing was Judge Patrick J. Faragher.

[3] Porth filed a cross-appeal in this matter challenging the denial of his other postconviction motions. Because we affirm the trial court's order granting him a new trial due to ineffective assistance of counsel, we need not address the issues addressed in the cross-appeal and hereby dismiss it.

DISCUSSION

¶9 The right to effective assistance of counsel derives from the Sixth Amendment to the United States Constitution and article I, section 7 of the Wisconsin Constitution. ***State v. Smith***, 207 Wis. 2d 258, 273, 558 N.W.2d 379 (1997). Both provisions grant the right to a fair trial, including the assistance of counsel in criminal cases. ***Id***. There are two components to a claim of ineffective assistance of counsel: a demonstration that counsel's performance was deficient and a demonstration that such deficient performance prejudiced the defendant. ***Id***.; *see also* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). The defendant has the burden of proof on both components. ***Smith***, 207 Wis. 2d at 273.

¶10 Whether counsel's actions constitute ineffective assistance is a mixed question of law and fact. ***State v. Pitsch***, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985). The trial court's determination of what the attorney did, or did not do, and the basis for the challenged conduct are factual and will be upheld unless they are clearly erroneous. ***State v. Harvey***, 139 Wis. 2d 353, 376, 407 N.W.2d 235 (1987). The ultimate conclusion, however, of whether the conduct resulted in a violation of the defendant's right to effective assistance of counsel is a question of law for which no deference to the trial court need be given. ***Id.***

¶11 The State alleges that trial defense counsel's performance was neither deficient nor prejudicial. We disagree.

¶12 To establish deficient performance, the defendant must prove that his or her counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment" and overcome a strong presumption that his or her counsel acted reasonably within professional norms. ***Smith***, 207 Wis. 2d at 273 (citation omitted). The ***Strickland*** Court set

forth certain elemental duties that an attorney owes the criminal defense client, among which is the duty to "bring to bear such skill and knowledge as will render the trial ... a reliable adversarial testing process." ***Smith***, 207 Wis. 2d at 273-74 (citation omitted).

¶13 Judicial scrutiny of an attorney's performance is normally highly deferential. ***Id.*** at 274. We must determine whether, under all the circumstances, counsel's conduct was outside the wide range of professionally competent assistance. ***Id***. In ***Strickland***, the Court noted that counsel's actions are often based on "informed strategic choices made by the defendant." ***Smith***, 207 Wis. 2d at 274 (citation omitted).

¶14 However, strategic decisions must be analyzed utilizing the standard set forth in ***Strickland***: was defense counsel's performance objectively reasonable according to prevailing professional norms? ***Strickland***, 466 U.S. at 688. Not every defense counsel action grounded in strategy can be construed as reasonable. We must measure whether defense counsel's performance was reasonable under the circumstances of the particular case. ***State v. Oswald***, 2000 WI App 2, ¶49, 232 Wis. 2d 62, 606 N.W.2d 207. Defense counsel's subjective testimony as to strategy is not dispositive but is simply evidence to be considered along with other evidence in the record that a court must examine in assessing counsel's overall performance. ***State v. Kimbrough***, 2001 WI App 138, ¶35, 246 Wis. 2d 648, 630 N.W.2d 752, *review denied*, 2001 WI 117, 247 Wis. 2d 1035, 635 N.W.2d 783 (Wis. Sept. 19, 2001) (No. 00-2133-CR).

¶15 At trial, Porth's defense counsel elicited testimony from a deputy sheriff that Tara Miller had accused Porth of sexually assaulting a child and abusing and killing animals. At the ***Machner*** hearing, trial defense counsel

testified that he elicited this information from the deputy because he anticipated the State calling Tara Miller to testify. Trial defense counsel wanted to demonstrate that Tara Miller intended to implicate Porth to shift attention from Krumplitsch and that she had made a broad array of accusations against Porth, with no action taken by the police, thus impugning her credibility.

¶16 But Tara Miller did not testify as either the State's or the defense's witness. Therefore her credibility was never at issue. The testifying officer did not know the outcome of the accusations nor were these claims ever disproved before the jury. During the ***Machner*** hearing, trial defense counsel acknowledged that the information he elicited from the deputy would, under normal circumstances, be damaging other acts evidence and inadmissible hearsay. Eliciting such injurious information is not objectively reasonable, especially without Tara Miller's testimony. We agree with the trial court's reasoning:

> Let me explain.... I sat through half of the trial and read the transcript; so I have a very good sense of the nature of the trial and the nature of the strategy in which you can't get simply by reading a transcript. And I do believe that I'm in a good position to, you know, as the trial judge which I am now technically, to make this decision.
>
> ....
>
> Frankly, I can't recall whether I was in court when these statements were made or read them later, but just as I'm sure was true of any other lawyer or judge who might have been in the courtroom as this time, this line of inquiry set off alarms.
>
> It's not just the hearsay which naturally immediately any lawyer is going to, you know, -- but getting into evidence of character and habit, which is an area that is difficult and with risk and has certain constitutional implications.
>
> Whether I heard it in court or read it later, it was like a giant bell going off. Why is he going into this area? Why is he introducing evidence of character that might not be

admissible? If the State would have done this, have gone through the analysis of weighing probative value and it prejudiced the other factors necessary for character and habit, that would have been something that I think the Judge would have expected a real fight. And, of course, a fight outside of the presence of the jury. They would have heard none of this.

So, why was this, a fairly radical strategy, taken? That's the question before the Court. Something, I think, was shocking. Well, first of all, it's clear that it was a trial strategy. Whether it was competent or not is another issue. It represents this lawyer's decision that it was critical to get this very unusual, provocative testimony before the Court.

Now, [trial defense counsel] testified he initially believed Tara Miller would be called. If Tara Miller had been called, I think the analogy would be much simpler. It would be much simpler to show that Tara Miller made a whole range of accusations that, you know, sexual assault of a child, abuse of animals, domineering and less serious things like not letting the kids play with the other kids.

[Trial defense counsel] is clearly and obviously showing that Tara Miller is complaining about everything in the world. And secondly, that nothing seemed to have come of these and what that would have been -- would have done to the credibility of Tara. The Court could well understand that strategic decision; however, Tara Miller was not called.

[Trial defense counsel] indicated that his strategy was to show that the Krumplitsch's [sic] were trying to dump on Mr. Porth. And what this demonstrated was, first of all, lack of credibility and that there was -- his word, not mine -- a vendetta of the neighbor's family and ... conspiracy.

This was the theory of the Defense which he testified had been discussed with Mr. Porth. It rings true with what Mr. Porth was told and I believe it was the theory and strategy.

Now, the question is then, twofold. Does this Court believe, because of the nature of this strategy, was it a competent decision, not knowing if Tara Miller was going to testify, to try to attack Tara Miller's credibility, in general, with an attack on a witness that may not testify by questioning an officer who doesn't have the whole story?

By the way, one of the other important questions to ask or was unable to get an answer to was to each of these

> things -- if he could have asked, had anything come of the sexual assault. No. Had anything come of -- he didn't pursue that. He never got to that. Because the fact is, when he questioned the officer, the officer said he didn't know.
>
> In other words, he had the allegation in, but he didn't have the, he didn't -- except by implication or inference -- he didn't know. The fact is, the jury doesn't know. They don't know. They may get that, but they don't know that.
>
> So, to that extent, that evidence was received. But the nature of the evidence, these, you know, secondhand and perhaps third-hand hearsay comments that Mr. Porth may be involved in sexual assault, may be an abusive and violent man, I believe that the Defense simply thought that Tara would be called and that Tara would be present and they would all wrap together.
>
> Now, the fact that that didn't occur, does that mean counsel's performance was deficient? I believe under the circumstances and under the totality of the circumstances as to that alone, I believe that his performance was below standard of reasonableness. Primarily, I think he needed some way to verify that Tara was going to be called before he risked doing this.

We agree that trial defense counsel's performance was deficient.

¶17 In addition to proving deficient performance, a defendant must also show that the deficient performance prejudiced the defense. ***Strickland***, 466 U.S. at 687. Proof of prejudice requires a showing that the defendant was deprived of a fair proceeding whose result is reliable. ***Smith***, 207 Wis. 2d at 275. The defendant need only demonstrate that the outcome is suspect but need not establish that the final result of the proceeding would have been different. ***Id***.

> An ineffective assistance claim asserts the absence of one of the crucial assurances that the result of the proceeding is reliable, so finality concerns are somewhat weaker and the appropriate standard of prejudice should be somewhat lower. The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome .... The defendant must show that there is 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. at 275-76 (citing ***Strickland***, 466 U.S. at 694).

¶18 The ***Strickland*** test is not an outcome determinative test. ***Smith***, 207 Wis. 2d at 276. In decisions following ***Strickland***, the Supreme Court has reaffirmed that the touchstone of the prejudice component is "whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair." ***Smith***, 207 Wis. 2d at 276 (citation omitted). The Supreme Court has said that the "benchmark" of the right to counsel is the "fairness of the adversary proceeding." ***Id.*** (citation omitted).

¶19 During a trial for burglary and theft, the jury heard, via questioning by Porth's own attorney, that Porth was an accused pedophile and animal killer with abusive, antisocial tendencies. These appalling allegations went unchallenged. These inflammatory unrefuted accusations so polluted the proceedings as to undermine confidence in the jury's verdict and deprived Porth of a fair trial. Again, we agree with the trial court:

> Now, does this prejudice the defendant? The standard where the Court believes there is deficient performance is and it bears on the defendant to show prejudice to the Defense, and as Counsel knows, the mere fact that something like this could conceivably affect a jury's view is not enough for the Court to infer that this defendant was deprived of a fair trial or results of the trial are unreliable.
>
> So looking at the trial as a unit and all those things that occurred at trial, it's up to me to decide primarily, did this defendant have a fair trial based on that performance?
>
> In viewing this, one of things I look at is, did this [undermine] confidence in the outcome of the trial? Do I think this statement would have changed the outcome of the trial? I think that this statement had bearing on the way

> the jury looked at it and in all circumstances, I think it was a strategic decision that went awry only because Tara was never called. I'm not saying it was a good idea, but Tara could have been called by the Defense as well.
>
> Under the circumstances, I do find that there was prejudice and that it was material enough that I do lack view of the totality. I lack confidence in the fairness of the trial and based upon that, the Court will grant a new trial.

The inflammatory nature of the uncontested claims of sexual assault and animal abuse undermines confidence in the fairness of the trial and prejudiced Porth.

CONCLUSION

¶20 Porth was denied effective assistance of counsel because trial defense counsel's performance was both deficient and prejudicial. We affirm the order of the trial court granting Porth a new trial.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.