

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 26, 2010

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. 2009AP1665-CR

Cir. Ct. No. 2007CF374

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GREGORY G. HOLLINGSWORTH,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Walworth County: JAMES L. CARLSON, Judge. *Affirmed.*

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

¶1 PER CURIAM. Gregory G. Hollingsworth appeals from a judgment convicting him of aggravated battery with intent to cause bodily harm and from an order denying his postconviction motion to reduce the monthly

restitution payment to the victim. Hollingsworth argues that he received ineffective assistance of counsel at his restitution hearing and that the circuit court erroneously exercised its discretion in ordering restitution beyond his ability to pay. We disagree and affirm.

¶2 Hollingsworth pled guilty to one count of aggravated battery with intent to cause bodily harm, contrary to WIS. STAT. § 940.19(4) (2007-08).¹ The beating shattered the victim's nose, nasal cavity, eye sockets and right cheekbone. He required reconstructive surgery that included the placement of a permanent plate and screws. The parties did not dispute the victim's special damages of \$35,939.68. The circuit court sentenced Hollingsworth to a bifurcated sentence of two years' initial confinement and three years' extended supervision and ordered that he pay full restitution, subject to his right to a hearing on his ability to pay.

¶3 Defense counsel Valerian Powell moved to challenge the amount of restitution on grounds that it was beyond Hollingsworth's ability to pay. After a hearing on the motion, the court commissioner found that the amount of damages was undisputed, reasonable and related to the battery conviction. He also found that Hollingsworth is functionally illiterate with diagnoses that include mild mental retardation, impulse control disorder and bipolar disorder; is unable to hold a regular job due to his cognitive disabilities; receives \$706.08 monthly in Supplemental Security Income (SSI) and state benefits; and is responsible for his twenty-month-old son, who lives with Hollingsworth's foster parents. The commissioner concluded that Hollingsworth's ability to make restitution was limited and ordered him to repay the victim first and then the Crime Victim

¹ All references to the Wisconsin Statutes are to the 2007-08 version unless noted.

Compensation Fund² at the rate of \$150 per month throughout his incarceration, extended supervision or probation. The circuit court adopted the commissioner's findings of fact and conclusions of law. *See* WIS. STAT. § 973.20(13)(c)4.

¶4 On appeal, Hollingsworth first contends that Powell rendered ineffective assistance by failing to adequately investigate and present evidence about his inability to make the \$150 monthly restitution payments.

¶5 We review ineffective assistance claims as a mixed question of law and fact. *State v. Thiel*, 2003 WI 111, ¶21, 264 Wis. 2d 571, 665 N.W.2d 305. We uphold the circuit court's findings of fact unless they are clearly erroneous. *Id.* Findings of fact include "the circumstances of the case and the counsel's conduct and strategy." *Id.* (citation omitted). Whether a given set of facts amount to ineffective assistance is a question of law, which we review de novo. *Id.*

¶6 To prove ineffective assistance, a defendant must prove both that counsel's performance was deficient and that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Allen*, 2004 WI 106, ¶26, 274 Wis. 2d 568, 682 N.W.2d 433. To prove deficient performance, a defendant must show that counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687. To prove prejudice, the defendant must show that counsel's errors deprived him or her of a fair trial and a reliable outcome. *Id.* We strongly presume counsel's assistance was adequate. *Id.* at 690.

² The Crime Victim Compensation Fund had paid nearly \$25,000 of the victim's damages.

¶7 Powell testified that Hollingsworth was uncooperative and hostile throughout virtually the entire representation, hindering communication and investigation. Powell thus turned for financial information to Social Security documents and to Barbara Ruskiewicz, Hollingsworth's foster mother. Ruskiewicz, who is Hollingsworth's SSI payee and keeps his bank account, demonstrated her familiarity with his finances. She testified that upon his release, he "more than likely" would return to live with her and her husband, where he has lived since infancy; that she and her husband are raising and supporting Hollingsworth's son; and that Hollingsworth is physically strong, can hold a job if supervised, and is anticipated to get a job working three to five hours a day upon his release. Ruskiewicz's restitution hearing testimony plausibly supports Powell's impression Hollingsworth would have few living expenses upon his release from incarceration.

¶8 At the postconviction motion hearing, the circuit court found that Powell performed reasonably under the circumstances. He went to Ruskiewicz, "the reliable source on income and expenses" and summarized Hollingsworth's financial situation to the court commissioner who was "very experienced in this area" and "understood the situation." The court also found that the \$150 restitution order represents about twenty-one percent of the approximately \$700 per month in SSI Hollingsworth is eligible for when not incarcerated. In addition, the court found that Hollingsworth was ordered to make the payments only for five years, the duration of his confinement and extended supervision. Thus, despite contributions from the Crime Victim Compensation Fund, the seriously injured, non-aggressor victim would not recoup his full out-of-pocket expenses. None of these findings is clearly erroneous. We, too, conclude counsel's efforts were reasonable under the circumstances. Matters of reasonably sound strategy,

without the benefit of hindsight, are “virtually unchallengeable,” and do not constitute ineffective assistance. *Strickland*, 466 U.S. at 690-91.

¶9 Having concluded that Powell’s performance was not deficient, we are not obliged to reach the issue of prejudice. *See id.* at 697. Nonetheless, we conclude that Hollingsworth has not proved it. Ruskiewicz presented updated information at the postconviction motion hearing indicating that Hollingsworth’s expenses were greater than earlier shown. Even with that accounting, the circuit court adopted the court commissioner’s findings and conclusions and denied the motion. If it was error for Powell not to be more thorough, we simply cannot say that the error was so serious as to deprive Hollingsworth of a reliable outcome.

¶10 Hollingsworth next asserts that the circuit court failed to analyze on the record the factors set out in WIS. STAT. § 973.20(13)(a). The appropriate standard of review of a restitution order is the erroneous exercise of discretion standard. *See State v. Haase*, 2006 WI App 86, ¶5, 293 Wis. 2d 322, 716 N.W.2d 526. In determining whether to order restitution and, if so, the amount, § 973.20(13)(a) directs that the court “shall consider all of the following” factors:

1. The amount of loss suffered by any victim as a result of a crime considered at sentencing.
2. The financial resources of the defendant.
3. The present and future earning ability of the defendant.
4. The needs and earning ability of the defendant’s dependents.
5. Any other factors which the court deems appropriate.

Hollingsworth contends the court did not address his financial resources or present and future earning ability or the needs of his dependent son.

¶11 The record does not bear out Hollingsworth's claim. At the postconviction motion, the circuit court stated that it had looked at the totality of the circumstances and deemed the court commissioner's findings and decision to be reasonable. The evidence included Hollingsworth's monthly disability benefits when not incarcerated, his employability, and his likely return to live with his foster family who care for and support his son. The evidence also addressed the victim's serious injuries, for which he was uninsured. We conclude the circuit court considered the statutory factors. We see no reason that the court in its discretion could not give greater weight to certain factors more than others.

By the Court.—Judgment and order affirmed.

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

