

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 28, 2003

Cornelia G. Clark
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. 02-2607

Cir. Ct. No. 98-CF-808

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JOSEPH ECKSTEIN,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Brown County:
RICHARD G. GREENWOOD, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PETERSON, J. Joseph Eckstein appeals from an order denying his motion for postconviction relief from his conviction for conspiracy and solicitation to commit first-degree intentional homicide. Eckstein claims he is entitled to a new trial because (1) his trial attorneys were ineffective for failing to impeach a witness based on the witness's history of mental health issues, and (2) his attorneys were ineffective for failing to suppress a tape recording of his

conversations with that witness. We disagree with Eckstein's arguments and affirm the order.

BACKGROUND

¶2 Joseph and Annamaria Eckstein were married in 1988. Annamaria filed for divorce in 1998. In March 1998, Joseph Eckstein met Chrystal Graham through his then-girlfriend, Delores Wuhrman.

¶3 During Eckstein's trial to the court, Graham testified that in April 1998, Eckstein told Graham he wished he knew somebody who could "get rid of" his wife. Graham informed Eckstein that her son, Mervel, could find someone to do it. Although specifics were not mentioned during this first conversation, Graham and Eckstein later met to discuss the price of "the job," ultimately agreeing to \$10,000. The two met for a third time a few days later. Eckstein reiterated that he wanted his wife "bumped off" the week of June 13 as he would be attending a wedding out of town. Graham informed Eckstein that Mervel suggested planting drugs on Annamaria rather than killing her, as "it would be too risky to kill somebody." Eckstein agreed to the alternative plan. Ultimately, however, Graham was unable to obtain any drugs.

¶4 In August 1998, Graham and Eckstein again discussed the plan to "get rid of" Annamaria. Graham, however, had changed her mind about participating in any criminal activity. Consequently, on August 31, Graham reported her discussions with Eckstein to the Green Bay Police Department and agreed to be wired for her next meeting with Eckstein.

¶5 On September 1, Eckstein contacted Graham to ask if she would be a witness for his divorce proceedings. The two agreed to meet in person on

September 2. The subsequent conversations between Eckstein and Graham were memorialized by two tape recordings. Graham was wired by the police, and Eckstein made his own recording. During the September 2 meeting, Eckstein stated that “he was going to do things his way this time” and further told Graham that he wanted her to get rid of Annamaria by October 15. Eckstein then made various suggestions on how to kill Annamaria. He demonstrated, without speaking, how to slash her throat or stab her in the stomach. Alternatively, he suggested that Graham spray oven cleaner in her mouth. Graham and Eckstein additionally agreed that Eckstein would pay \$500 up front and another \$500 several days after the job was done. Eckstein would then pay Graham \$10,000 after he was cleared of any involvement in the crime. Finally, the two agreed that the job would be done the following weekend, as Eckstein would be out of town.

¶6 On September 3, the two met again and, as with the meeting the previous day, two recordings were made. Eckstein gave Graham the initial \$500, a business card with Annamaria’s photo, keys to Annamaria’s car and information on where to find her. Eckstein suggested that it would be easy for Graham to bury Annamaria’s body in a cornfield because it was time for farmers to plant their corn. Eckstein additionally told Graham that if she needed a car, she should just change the vehicle identification number on Annamaria’s car and retitle it in her name.

¶7 At trial the State played the police recording of the September 2 conversation and submitted transcripts of the recording into evidence. The State also played Eckstein’s recording of the September 3 conversation, which had been

seized from Eckstein's truck sometime after his arrest.¹ The State entered transcripts from the police recording of that same conversation into evidence but did not play the recording in court. The recordings and transcripts corroborated Graham's testimony.

¶8 Eckstein testified that it was Graham who initially broached the idea of "getting rid" of Annamaria. He claimed that Graham conferred with her son and suggested three options to Eckstein: (1) plant drugs on Annamaria; (2) take her out of the country; or (3) kill her. Eckstein testified that although he agreed to pay \$10,000 to plant drugs on Annamaria, he never agreed to any plan that involved killing his wife. He further testified that it was his understanding that any subsequent references to "hurting" or "getting rid of" Annamaria involved only the plan to plant drugs on her.

¶9 The trial court convicted Eckstein of both conspiracy and solicitation to commit first-degree intentional homicide. He was sentenced to forty years' imprisonment on the conspiracy count, and ten years on the solicitation count, to be served concurrently. He appealed to this court raising issues of insufficient evidence, double jeopardy and sentencing. We affirmed the trial court's judgment. *State v. Eckstein*, No. 00-0117 unpublished slip op. (July 25, 2000).

¶10 Eckstein subsequently acquired new counsel and filed a motion for postconviction relief based on ineffective assistance of counsel for (1) failure to examine Graham about her history of emotional problems which could have interfered with her ability to recall the events, and (2) failure to seek to suppress

¹ Eckstein's recording of the September 2 conversation was not played at trial, nor admitted into evidence.

Eckstein's recording of the September 3 conversation. The court denied the motion and Eckstein appeals.

STANDARD OF REVIEW

¶11 The test for ineffective assistance of counsel has two prongs: (1) a demonstration that counsel's performance was deficient, and (2) a demonstration that the deficient performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To prove deficient performance, a defendant must establish that his or her counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* The defendant must overcome a strong presumption that his or her counsel acted reasonably within professional norms. *State v. Johnson*, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). To satisfy the prejudice prong, the defendant must show that counsel's errors were serious enough to render the resulting conviction unreliable. *Strickland*, 466 U.S. at 687. We need not address both components of the test if the defendant fails to make a sufficient showing on one of them. *Id.* at 697.

¶12 This analysis requires a mixed standard of review. We review the circuit court's findings of fact regarding counsel's conduct under a clearly erroneous standard. *State v. Pitsch*, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985). Whether those facts constitute deficient performance and prejudice are questions of law that we review independently. *State v. Tulley*, 2001 WI App 236, ¶5, 248 Wis. 2d 505, 635 N.W.2d 807.

DISCUSSION

Graham's testimony

¶13 Graham admitted at the preliminary hearing that she suffers from clinical manic depression. She stated that she has problems remembering things in stressful situations or when she did not take her medication. Graham argues his trial counsel knew of Graham's condition and should have questioned her about it at trial in order to cast doubt on her credibility. Eckstein's lead trial counsel testified that he did not use the information because Graham's testimony was corroborated by other evidence. The trial court ruled that his attorneys reasonably decided not to impeach Graham and therefore did not perform deficiently.

¶14 Eckstein contends Graham's testimony was critical to the State, and a reasonable attorney would have recognized this. He claims Graham's problems were likely to affect her ability to recall the facts. Eckstein also claims that his counsels' deficient conduct prejudiced his right to a fair trial because Graham's credibility was crucial, and impeachment of her testimony would likely have affected the outcome of the case.

¶15 We will not second-guess a trial attorney's selection of trial tactics or exercise of professional judgment in the face of alternatives that have been weighed by trial counsel. *State v. Elm*, 201 Wis. 2d 452, 464, 549 N.W.2d 471 (Ct. App. 1996). A strategic trial decision rationally based on the facts and the law will not support a claim of ineffective assistance of counsel. *Id.* at 464-65.

¶16 Here, Eckstein's lead trial attorney testified that he had reviewed Graham's testimony from the preliminary hearing and concluded that her testimony was corroborated by the tape recordings of her conversations with

Eckstein, which reflected the “critical time where the crime was alleged to have been committed.” He therefore determined that Graham’s psychological condition was irrelevant given the other evidence. The trial court did not erroneously conclude that this was a strategic trial decision. We therefore conclude Eckstein’s attorneys’ performance was not deficient in this regard.

¶17 Even were we to determine that trial counsels’ performance was deficient, Eckstein suffered no prejudice. Graham testified at trial regarding her depression, that she took medication for it, and that she was unable to remember some of the conversations with her son due to stress. The court was therefore aware of Graham’s mental condition, and in fact stated that Graham’s testimony may not have been credible absent corroboration by the tape recordings and physical evidence. Additional testimony regarding her psychological problems would therefore not likely have led the court to reach a different conclusion.

Tape recordings

¶18 Eckstein also argues his counsels’ performance was deficient because they failed to seek to exclude his audiotape of the September 3 conversation. The police obtained this tape after finding it in a microcassette recorder during a custodial inspection of Eckstein’s truck. Eckstein argues he was led to believe that his September 3 recording was inaudible, and did not know otherwise until the State sought to admit the recording at trial.

¶19 Eckstein maintains the recording was the product of an illegal search as well as a violation of discovery because it was not disclosed to the defense prior to trial. The trial court agreed that Eckstein’s counsels’ performance was deficient by not seeking to exclude the recording. However, the court determined that

Eckstein was not prejudiced because there was other evidence to support the conviction, including the police recordings of the conversations.

¶20 Eckstein bears the burden of proving both prongs of the *Strickland* test. *Strickland*, 466 U.S. at 687. Because we conclude there was no prejudice, we focus our discussion on that prong only and need not determine whether Eckstein's counsels' performance was deficient. Eckstein argues the State did not have sufficient corroborating evidence absent Eckstein's recording of the September 3 conversation. He also claims the prejudice was not mitigated by the police tape because it was not played in court and was not considered by the factfinder. Finally, Eckstein points to the trial court's statement that Graham's credibility may have been questionable without the corroboration of Eckstein's recording. Therefore, Eckstein maintains the outcome of the trial would have been different had the recording been excluded.

¶21 We conclude that Eckstein was not prejudiced because there is no evidence the conviction was unreliable. We first turn to the September 2 police recording, which was played at trial and the transcripts entered into evidence. In this recording, Eckstein was heard discussing possible ways to kill his wife. For example, Eckstein stated:

Ah, you know the other thing is what that one lady does with that cleaner, oven cleaner. I mean, if somebody I think got that all over their body and in their mouth and in their lungs or knocked out and, ya know, virtually I mean sprayed their mouth and lungs full or that as well as the whole body, ya know, I think they're gonna be gone.

Eckstein also expressed that it was important he not know what Graham was planning, and that he be out of town when she did it so he would have an alibi, stating, "Cause if, ya know, I know you're gonna shoot her, I might goof up."

Eckstein and Graham discussed payment and agreed to meet the next day so Eckstein could make an initial payment to Graham.

¶22 Next we turn to the police recording of the September 3 conversation. Although Eckstein claims the recording was not considered by the trial court, a transcript of the tape was entered into evidence as a trial exhibit. When it rendered its decision, the court stated it had “looked at the exhibits, read over the exhibits, some of which I had a chance to consider in the course of the trial and some of which I had not, so I looked through those as well.”

¶23 In this recording, the following conversation is heard:

ECKSTEIN: You do this right, ya know, like say in the garage or something. Ya know, murder her in the garage or do it in the garage or something. Load her in the car. Bury her in the cornfield or something.

GRAHAM: Right.

ECKSTEIN: Ya know, between the rows of corn. Nobody will ever know it. You get a car, take the license plate off it, put a LAF on it and, ya know until, ya know, you can get license from um, ya know, a junked or wrecked car or, ya know, steal some license plates or change that little number, ya know, that's up there on the dash.

GRAHAM: The VIN?

ECKSTEIN: Yeah.

GRAHAM: Okay.

ECKSTEIN: Ya know, apply for a new title, ya know, you get a car.

GRAHAM: Okay.

ECKSTEIN: If you wanted a car ...

GRAHAM: Right.

ECKSTEIN: I mean that would be one of the quickest ways there was.

GRAHAM: Right.

ECKSTEIN: Put the person in the car, take the car and the person, get rid of the person, get rid of the license plate and get (undiscernible).

GRAHAM: That's what I plan to do. Thank you.

Eckstein then said he was leaving that afternoon until “the smoke clears” and then he would pay Graham. Graham said she planned on killing Annamaria that weekend, to which Eckstein responded, “Yeah, okay.”

¶24 Eckstein claims the meaning of his words on the tape are “open to dispute,” that he only agreed to plant drugs on his wife, and he was only going along with Graham because he thought she would not actually do anything. However, a fact-finder could determine that the police recordings indicate otherwise. There is nothing ambiguous or open to dispute about Eckstein’s statement to “murder her in the garage.”

¶25 Thus, even without Eckstein’s recording there is enough evidence in the police recordings to corroborate Graham’s testimony and allow a reasonable fact-finder to determine that Eckstein did indeed wish to have his wife killed. Consequently, Eckstein suffered no prejudice.

By the Court.—Order affirmed.

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