COURT OF APPEALS
DECISION
DATED AND FILED

February 23, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP1715-CR **Cir. Ct. No. 2009CM426**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RICHARD L. DANIELS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Outagamie County: MITCHELL J. METROPULOS, Judge. *Affirmed*.

¶1 HOOVER, P.J.[1] Richard Daniels appeals a judgment of conviction for lewd and lascivious behavior, disorderly conduct, and two counts of bail jumping. He also appeals an order denying postconviction relief. Daniels requests

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

a new trial on the basis that he was prejudiced by counsel's deficient performance. We conclude his trial counsel's performance was not deficient and affirm.

BACKGROUND

¶2 Daniels was charged following an incident where Daniels, while under the influence of alcohol, exposed himself. Daniels pled no contest to one count of bail jumping prior to a jury trial, and a jury found him guilty on the remaining counts.

¶3 At trial, the State's witness, Mao Vang, testified that she left her mother's house around midnight. Vang stated she took her two small children out to her car, placed them in their car seats, and then climbed into the front passenger seat to wait for her husband. The garage lights were on and her vehicle was parked on the driveway. While she was waiting for her husband, Daniels appeared at her window and started masturbating. Vang stated when she saw what Daniels was doing, she honked the car horn, and Daniels quickly walked away.

¶4 Daniels testified he had been drinking at home and then walked to a bar. Daniels explained that when he arrived at the bar, he was not feeling well so he decided to walk home. On the way home he felt a painful urge to urinate and defecate. Daniels stated he decided to urinate, hoping it would relieve his symptoms. He went over to a tree by the road because "[the area] was covered" and "it was late [at] night, … there was nobody around, [and] it was dark." Once he began urinating, he decided he needed to defecate, so he stopped urinating and began looking "for a dark spot … far enough off the street so [he] could relieve [himself]." Daniels testified he went "to the darkest area that [he] could find" and did not see anyone in the vehicle parked on the driveway. He explained when he

got near the car, he heard a car alarm go off. Daniels stated he got scared and left the area.

¶5 The jury found Daniels guilty. Daniels brought a postconviction motion, alleging ineffective assistance of counsel. Daniels asserted his counsel was ineffective for failing to present a voluntary intoxication defense and for failing to object during closing arguments when the prosecutor "made an improper comment" on Daniels' credibility.

¶6 At the hearing on the motion, trial counsel testified he did not consider using the voluntary intoxication defense because he thought it was inconsistent with Daniels' version of events. Daniels told counsel he did not intend to expose himself because he went to a darkened area to avoid detection. Counsel thought it would have been inconsistent to also assert that if the jury found Daniels exposed himself publicly, it was because he was so intoxicated he did not know what he was doing. Additionally, trial counsel testified he did not object to the prosecutor's statement regarding Daniels' credibility during closing because he thought it was a proper argument. The circuit court denied Daniels' motion.

DISCUSSION

¶7 On appeal, Daniels argues he is entitled to a new trial because his trial counsel was ineffective. Daniels relies on the same two arguments from the postconviction hearing and also asserts his trial counsel was ineffective because he failed to object when the State misstated the evidence in its closing argument.

¶8 To succeed on a claim of ineffective assistance of counsel, a defendant must prove: (1) his or her counsel's performance was deficient; and

(2) the deficient performance prejudiced his or her defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); ***State v. Pitsch***, 124 Wis. 2d 628, 633, 369 N.W.2d 711 (1985). To prove counsel's representation was deficient, a defendant must show counsel's specific acts or omissions were "outside the wide range of professionally competent assistance." ***Strickland***, 466 U.S. at 690. However, there is "a strong presumption that counsel acted reasonably within professional norms." ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). Prejudice is proven if the defendant shows "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Strickland***, 466 U.S. at 694. If a defendant fails to establish either prong of the ***Strickland*** test, we need not determine whether the other prong was satisfied. ***Id.*** at 697.

¶9 An ineffective assistance of counsel claim is a mixed question of law and fact. ***Id.*** at 698. We will accept the circuit court's findings of fact unless they are clearly erroneous; however, the determination of whether counsel's performance was deficient and whether it prejudiced the defendant is reviewed de novo. ***Johnson***, 153 Wis. 2d at 128.

I. Voluntary Intoxication Defense

¶10 Daniels first alleges his trial counsel was ineffective for failing to raise the voluntary intoxication defense. The voluntary intoxication defense is governed by WIS. STAT. § 939.42(2) and provides: "An intoxicated or drugged condition of the actor is a defense only if such condition: ... Negatives the existence of a state of mind essential to the crime." For the voluntary intoxication defense, it is not enough for a defendant to establish he or she was under the influence of an intoxicant. ***State v. Strege***, 116 Wis. 2d 477, 483-84, 343 N.W.2d

100 (1984) (citing ***State v. Guiden***, 46 Wis. 2d 328, 331, 174 N.W.2d 488 (1970)). "He must establish a degree of intoxication [that shows] he was utterly incapable of forming the intent requisite to the commission of the crime charged." ***Guiden***, 46 Wis. 2d at 331. If a defendant has vivid and detailed memories of his crime, this weighs against a voluntary intoxication defense. *See* ***State v. Nash***, 123 Wis. 2d 154, 166, 366 N.W.2d 146 (Ct. App. 1985.)

¶11 At trial, Daniels testified he was "looking for the darkest spot he could find" in order to relieve himself. Trial counsel testified Daniels told him that he "didn't intend to do it, he was just urinating, and that he wasn't intentionally exposing himself; as a matter of fact, he was trying not to expose himself by going to a darkened area away from where someone could possibly see him." Trial counsel testified that in his opinion, Daniels' version of events was inconsistent with a voluntary intoxication defense.

¶12 It was reasonable for Daniels' trial counsel to view Daniels' version of events as inconsistent with a voluntary intoxication defense, especially given Daniels' testimony—his explanation was reasoned and thought out. Daniels' "vivid and detailed" testimony showed he was not so impaired as to qualify for the voluntary intoxication defense. *See* ***Nash***, 123 Wis. 2d at 166. Further, it is a reasonable strategy to avoid inconsistent defenses. *See* ***Lee v. State***, 65 Wis. 2d 648, 654, 223 N.W.2d 455 (1974). We conclude Daniels' trial counsel's performance was not deficient.

II. State's Closing Argument

¶13 Daniels also asserts his trial counsel was ineffective for failing to object during closing arguments when the prosecutor "improperly expressed a personal opinion" and misstated the evidence. First, Daniels argues the

prosecutor's statement, "in the State's position that means he's not credible," was an improper personal opinion.

¶14 An attorney cannot give a personal opinion regarding the guilt or innocence of an individual or the credibility of a witness. SCR 20:3.4(e) (2009-10); ***State v. Jackson***, 2007 WI App 145, ¶22, 302 Wis. 2d 766, 735 N.W.2d 178. But such statements are not improper when "it is clear that the lawyer's belief is merely a comment on the evidence before the jury." ***Jackson***, 302 Wis. 2d 766, ¶22.

¶15 During closing, the prosecutor stated:

> Now, the last thing I want to talk about with regards to credibility, which path you need to choose, is this: Mr. Daniels got up and testified on the stand, one, that he was intoxicated; and two, he's got six previous convictions. As the judge instructed to you, where a witness has prior criminal convictions you can look at that to determine their credibility. Here he got up and admitted he had six. He's been convicted of a crime six times. That should weigh on your mind as to whether or not he's credible, and in the State's position that means he's not credible.

¶16 The prosecutor's remarks did not amount to an improper opinion. It is apparent the State was arguing that the evidence of Daniels' six prior convictions made his testimony less credible. This argument was proper because Daniels testified that he had six prior convictions and the circuit court instructed the jury that convictions could be used to determine the credibility of the witnesses. *See* ***State v. Embry***, 46 Wis. 2d 151, 160, 174 N.W.2d 521 (1970) (noting when "an opinion is expressed it must be clear that it is based solely upon the evidence in the case"). Consequently, we conclude Daniels' trial counsel was not deficient for failing to object to that statement.

¶17 Next, Daniels contends his trial counsel was deficient for failing to object during closing when the prosecutor misstated the evidence and told the jury Daniels was "leaning on the vehicle" while masturbating. The State concedes the record does not support the prosecutor's assertion that Daniels was "leaning on the vehicle" and instead, the evidence only reflects that Daniels was standing next to the vehicle while masturbating. However, we agree with the State that in the context of the overall trial, the difference between "standing next to the vehicle" and "leaning on the vehicle" is negligible. Further, Daniels does not show there would have been a reasonable probability that the result of the proceeding would have been different had his trial counsel objected to this statement. Vang testified Daniels was masturbating next to her car window. Her testimony was strong, clear, and specific.

¶18 We also note Daniels did not raise this argument during his postconviction motion hearing; therefore, his trial counsel's reasoning or lack of reasoning for not objecting to this statement is not contained within the record.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.