COURT OF APPEALS
DECISION
DATED AND FILED

March 29, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP635-CR **Cir. Ct. No. 2007CF5243**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

HENRY RYAN, JR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: CLARE L. FIORENZA and MARY M. KUHNMUENCH, Judges. *Affirmed*.

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

¶1 PER CURIAM. Henry Ryan, Jr., appeals from a judgment of conviction for one count of first-degree reckless injury, contrary to WIS. STAT.

§ 940.23(1)(a) (2007-08),[1] and from an order denying his postconviction motion, which sought to vacate the amount of restitution ordered or, alternatively, to have a hearing on restitution where the trial court could consider Ryan's ability to pay.[2] Ryan argues: (1) the trial court erroneously exercised its discretion when it ordered Ryan to pay the claimed restitution without considering Ryan's ability to pay; and (2) trial counsel provided ineffective assistance by failing to object to the restitution order. We reject Ryan's arguments and affirm.

BACKGROUND

¶2 Ryan was charged with attempted first-degree intentional homicide for severely beating his girlfriend.[3] The charge was later amended to one count of attempted first-degree intentional homicide while armed and one count of first-degree reckless injury while using a dangerous weapon. Ryan and the State reached a plea agreement pursuant to which Ryan pled guilty to first-degree reckless injury, and the other charge and penalty enhancers were dismissed.

¶3 Ryan was convicted and the case proceeded to sentencing. Ryan faced a maximum penalty of fifteen years' initial confinement, ten years' extended supervision and a $100,000 fine. At sentencing, one of the first issues that arose related to restitution. The trial court asked for clarification concerning a restitution request that sought $750 for the victim, $10,560.38 for the Wisconsin

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

[2] The Honorable Clare L. Fiorenza sentenced Ryan and the Honorable Mary M. Kuhnmuench denied Ryan's postconviction motion.

[3] The woman suffered an open skull fracture, a collapsed lung, four broken ribs, two broken orbital bones and other injuries that required hospitalization, surgery and rehabilitation.

Crime Victim Compensation Fund and $1,463.10 for American Family Insurance for property damage caused at the victim's home. The trial court and the parties discussed documentation for the requested amounts and took testimony from the victim concerning her costs. At the conclusion of the victim's testimony, trial counsel told the trial court: "Judge, based upon her statement, it's a reasonable amount. We will not contest it." The trial court then addressed Ryan directly, which led to the following exchange:

> THE COURT: Mr. Ryan, with respect to restitution, we've had some discussion regarding restitution. Are you agreeing to pay … [the victim] an amount of $750 and the Crime Victim Compensation Fund an amount of $10,560.38 and … American Family Insurance an amount of $1,463.10?
>
> [Ryan]: Yes, ma'am.
>
> THE COURT: Okay. The Court's going to set restitution in that amount to those individuals.

¶4 After the restitution discussion, the trial court and the parties discussed the presentence investigation report, heard statements from the victim and numerous relatives and heard argument concerning an appropriate sentence. The State sought imposition of the maximum sentence, while trial counsel argued that an initial confinement period of five to seven years would be appropriate. In support of her recommendation, trial counsel asserted that Ryan would benefit from a longer period of extended supervision than initial confinement, because he would be afforded more treatment options outside prison. She then added:

> The other compelling reason for a shorter period of incarceration and a longer period of extended supervision is the extremely large amount of restitution and while Mr. Ryan's work history has been minimal, certainly with [Department of Vocational Rehabilitation]-type services, he would be able to become employed … but it will take him a tremendous amount of time to even come close to paying

> the restitution and certainly [the victim's] requests are reasonable in terms of the out-of-pocket expenses to her.

¶5 The trial court concluded that the extreme violence of Ryan's crime warranted the maximum sentence of fifteen years of initial confinement and ten years of extended supervision, noting that the original charges had already been "significantly reduced." With respect to restitution, the trial court noted that restitution had been discussed at the beginning of the sentencing hearing and ordered restitution in the amounts agreed upon by the parties. The trial court added:

> I am requiring that -- while the defendant is in prison that the Department of Corrections is to collect any monetary amounts ordered today at the rate of twenty-five percent from any amounts provided in [WIS. STAT. §§ 973.05(4)(b), 303.01(8) and 973.20]. That is while the defendant is in the Department's control.

There was no further discussion of restitution at the sentencing hearing.

¶6 Postconviction counsel was appointed for Ryan and counsel filed a postconviction motion on his behalf, seeking to vacate the restitution previously ordered. The motion argued that the trial court had "erroneously exercised its discretion when it failed to consider Mr. Ryan's financial resources and his present and future earning ability" and that trial counsel had provided ineffective assistance when she failed to object to the restitution ordered and "present evidence of Mr. Ryan's lack of resources and inability to pay restitution." In the alternative, Ryan sought a hearing to determine his financial resources and ability to pay the restitution. The motion asserted that Ryan suffers from learning disabilities, was on Supplemental Security Income and has minimal employment experience, and for those reasons he would be unable to pay the restitution ordered.

¶7 The postconviction court conducted a ***Machner***[4] hearing on Ryan's motion. Trial counsel testified that she did not recall speaking with Ryan about restitution until she received the presentence investigation report, and she said those discussions may have first occurred on the day of sentencing. She said that she and Ryan discussed the pros and cons of contesting the amount of restitution requested and that they "agreed we did not have any facts that would overcome the bills that we had been presented with." She said that she and Ryan did not discuss his ability to pay the restitution.

¶8 When asked why she did not argue at sentencing that Ryan lacked the ability to pay restitution, trial counsel responded: "I just have to say I was focusing single[-]mindedly on the length of sentence…. I was focusing on … mitigating the length of sentence." The testimony continued:

> Q: And, in fact, you used the stipulation to the restitution amount as part of your argument to mitigate that sentence?
>
> A: Correct.
>
> Q: Was that a strategic choice by you?
>
> A: Well, I certainly argued that he should have a shorter sentence, so that he could pay restitution strategically, yes.

Trial counsel also noted that the presentence report "spoke clearly" to the proposition that Ryan had cognitive limitations and had lost jobs because of his limited abilities.

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

¶9 Trial counsel acknowledged that she could have argued to the trial court that Ryan did not have the ability to pay restitution, but she agreed that it would not have been to Ryan's "strategic advantage" to do so. She explained that having heard the victim's statement at sentencing, her "goal at that point was to minimize his prison time." She testified: "[F]rankly, I just was not very focused on the restitution issue."

¶10 The postconviction court concluded that the trial court had not erred when it ordered Ryan to pay restitution. Its written order stated:

> The record shows that Mr. Ryan stipulated and agreed to pay the restitution on the record after a substantial discussion by the parties. Mr. Ryan's former counsel also testified that she discussed the restitution issue with Mr. Ryan prior to the agreement on the record. Furthermore, the [trial court] considered Mr. Ryan's ability to pay restitution when it ordered restitution to come out of Mr. Ryan's prison wages.

The postconviction court further found that trial counsel had not provided ineffective assistance, explaining:

> First, Mr. Ryan's former counsel testified that she believed the incarceration time, specifically the in-custody time, was the focus of her argument and that she believed that the restitution issue was resolved. Her testimony is supported by the record that reflects the restitution agreement noted above and the fact that Mr. Ryan was facing substantial incarceration. Under the circumstances, this strategy by counsel was sound and not deficient. Additionally, the [trial court], as noted above, did consider Mr. Ryan's ability to pay when ordering the restitution, so even if there was additional argument by counsel on this point, it would not have changed the outcome.

Ryan now appeals from the order denying his postconviction motion and from the judgment of conviction.

DISCUSSION

I. Alleged trial court error at sentencing.

¶11 Ryan argues that the trial court erroneously exercised its discretion when it ordered Ryan to pay restitution without first considering Ryan's ability to pay. In response, the State argues that Ryan waived the right to argue he lacked the ability to pay restitution when he failed to make that argument at sentencing. We agree with the State.

¶12 Resolution of this issue requires us to interpret WIS. STAT. § 973.20, which provides for restitution in criminal cases. The interpretation of statutes is a question of law that we review *de novo*. ***State ex rel. Steldt v. McCaughtry***, 2000 WI App 176, ¶11, 238 Wis. 2d 393, 617 N.W.2d 201.

¶13 WISCONSIN STAT. § 973.20(13)(a) provides a list of factors that courts must consider when ordering restitution. *See* ***id.***[5] Section 973.20(13)(c) provides that a court "shall give the defendant the opportunity to stipulate to the

[5] WISCONSIN STAT. § 973.20(13)(a) provides:

> The court, in determining whether to order restitution and the amount thereof, shall consider all of the following:
>
> 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.

restitution claimed by the victim and to present evidence and arguments on the factors specified in par. (a)." Applying these statutes, we have recognized on numerous occasions that the defendant bears the burden of presenting evidence of inability to pay, and that a defendant waives that issue by not raising it at sentencing. *See, e.g.*, ***State v. Johnson***, 2002 WI App 166, ¶12, 256 Wis. 2d 871, 649 N.W.2d 284; ***State v. Dugan***, 193 Wis. 2d 610, 624-25, 534 N.W.2d 897 (Ct. App. 1995); ***State v. Szarkowitz***, 157 Wis. 2d 740, 749-50, 460 N.W.2d 819 (Ct. App. 1990). As ***Szarkowitz*** explained:

> Where a defendant has been given the opportunity, but fails to offer any evidence on the issue of his inability to pay amounts claimed as restitution, he has failed in his assigned burden of proof under sec. 973.20(14)(b), and the trial court is entitled to award restitution under sec. 973.20(13)(c). In such a case, the trial court need not make detailed findings with respect to factors two through four listed in sec. 973.20(13)(a) because the defendant's inability to pay claimed restitution is not an issue before the court.

Szarkowitz, 157 Wis. 2d at 750.

¶14 In this case, Ryan not only failed to raise the issue of his ability to pay, he personally told the trial court that he was agreeing to pay the specific amount of restitution sought. We conclude that Ryan waived his right to assert that he should not be ordered to pay restitution based on his lack of ability to pay.[6] *See* ***id.***

[6] We note, however, that Ryan is not precluded from seeking sentence modification in the future. *See* ***State v. Dugan***, 193 Wis. 2d 610, 624-25, 534 N.W.2d 897 (Ct. App. 1995) (noting that even though the defendant failed to raise the issue of ability to pay restitution at sentencing and therefore waived the issue, "if in the future [the defendant] believes that he is unable to meet his restitution obligation, he can bring a motion for modification of the sentence at that time").

II. Alleged ineffective assistance of trial counsel.

¶15 Ryan argues that he was denied the effective assistance of counsel. To establish ineffective assistance of counsel, a defendant must show: (1) deficient performance; and (2) prejudice. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). We need not discuss both prongs "if the defendant makes an insufficient showing on one." ***Id.*** at 697.

¶16 To prove deficient performance, a defendant must point to specific acts or omissions by the lawyer that are "outside the wide range of professionally competent assistance." ***Id.*** at 690. The Sixth Amendment to the United States Constitution "guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." ***Yarborough v. Gentry***, 540 U.S. 1, 8 (2003) (per curiam); *see also* ***Strickland***, 466 U.S. at 689 (court must make "every effort … to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time").

¶17 To prove prejudice, a defendant must demonstrate that the lawyer's errors were so serious that the defendant was deprived of a fair trial and a reliable outcome. ***Strickland***, 466 U.S. at 687. Thus, in order to succeed on the prejudice aspect of the ***Strickland*** analysis, "[t]he 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 694.

¶18 On appeal, we affirm the trial court's findings of fact unless they are clearly erroneous, but we review the trial court's determination of deficient

performance and prejudice—both questions of law—without deference to the trial court. ***State v. Pitsch***, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985).

¶19 With those standards in mind, we consider Ryan's allegation that his "[t]rial counsel's failure to object to the restitution order was both deficient performance and prejudicial to Mr. Ryan." First, Ryan contends that his trial counsel was deficient for not talking with Ryan about his ability to pay restitution. The postconviction court rejected this argument, concluding that trial counsel's performance was not deficient because she employed a sound strategy of focusing on reducing Ryan's period of initial incarceration.

¶20 We agree with the postconviction court. Trial counsel's testimony, which the postconviction court accepted, confirms that trial counsel made a strategic decision to focus on the length of incarceration. Part of that strategy was to emphasize that Ryan should serve less time in prison so that he could earn money in the community to meet his restitution obligation. We agree that trial counsel's strategy was rational and does not constitute deficient performance. *See* ***State v. Felton***, 110 Wis. 2d 485, 502, 329 N.W.2d 161 (1983) ("If tactical or strategic decisions are made on [a rational] basis, [we] will not find that those decisions constitute ineffective assistance of counsel.").

¶21 Because we have concluded that trial counsel did not perform deficiently, we need not reach the prejudice prong of the ***Strickland*** analysis. *See* ***id.***, 466 U.S. at 697. We reject Ryan's argument that he was denied the effective assistance of counsel.

By the Court.—Judgment and order affirmed.

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