COURT OF APPEALS
DECISION
DATED AND FILED

January 18, 2012

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP3149-CR **Cir. Ct. No. 2008CF165**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DANIEL L. HANSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Marinette County: DAVID G. MIRON, Judge. *Affirmed*.

Before Hoover, P.J., Peterson, J., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Daniel Hanson appeals a judgment, entered upon a jury's verdict, convicting him of operating while intoxicated as a seventh, eighth

or ninth offense and battery to an emergency rescue worker.[1] Hanson also appeals the denial of his motion for postconviction relief. Hanson argues he was denied the effective assistance of trial counsel, and alternatively claims he is entitled to a new trial in the interest of justice. We reject these arguments and affirm the judgment and order.

BACKGROUND

¶2 At trial, Scott Szabo testified that on the morning of November 3, 2008, he heard tires squealing on the road in front of his house. Acknowledging that it was a foggy morning and the road is approximately seventy feet from the house, Szabo testified that from his vantage point, he saw a black pickup truck go into the ditch. Szabo then observed the truck attempt, but fail, to get out of the ditch after getting "hung up on the shoulder of the road." After watching from the house for a few minutes, Szabo went outside and as he walked up to the road, he observed a man identified as Hanson exit the truck and walk up to a van that had stopped. Szabo noticed that the truck was still in the ditch with the back wheels spinning.

¶3 As Szabo approached, Hanson asked if he would help push the truck out. Szabo testified that he refused because he smelled alcohol on Hanson's breath. According to Szabo, Hanson then told him not to call the police because he did not want to go back to prison. Because Hanson was holding his left side, Szabo suggested he sit down. After sitting for a short time, Hanson made one more attempt to free the truck and, after turning the engine off, ran north across

[1] Hanson was also convicted of disorderly conduct. He does not challenge that conviction on appeal.

the road into the woods. Szabo saw only Hanson in the truck, and the State introduced DMV records showing that the truck was registered to Hanson.

¶4 Lori Dura testified that while driving her van to work, she encountered a truck in the ditch and saw a man standing next to the driver's side of the truck, holding his chest. Dura pulled over and started dialing 9-1-1 when the man, identified as Hanson, walked up and repeatedly told her not to call the police. Dura was on the phone with dispatch when Szabo walked up. Dura indicated that she and Szabo tried to convince Hanson to sit on the bumper of her van to stop him from walking around in the road. After sitting for a short while, Hanson made a failed attempt to rock the truck out of the ditch and ultimately ran into the woods on the opposite side of the road.

¶5 Wayne Huebner testified that a man identified as Hanson came walking out of Huebner's woods complaining of chest pain. Huebner called 9-1-1. Police and a rescue squad arrived shortly thereafter. Sharon Kamin, a paramedic nurse, testified that when they responded to Hanson's location, he refused to answer questions about whether he was injured. Not knowing the extent of any possible injuries, Hanson was immobilized on a C-spine board, given oxygen and IV fluids, and transported to the hospital.

¶6 Once at the hospital, Kamin told Hanson that his blood needed to be drawn. At that point, Hanson stated "get me the fuck out of here, get me out of this fucking equipment." Hanson removed the C-collar from around his neck and threw it across the room. He also attempted to pull out his IVs, while swearing at Kamin using a "very combative … very obnoxious … very loud" voice. Although Kamin tried to calm him down and talk him out of removing the IVs, Hanson pulled them out resulting in blood and fluids flying around. Because the extent of

Hanson's injuries was still unknown, Kamin tried to prevent him from getting up off the C-spine board. Hanson grabbed and twisted Kamin's hand, as he told her to "get the fuck out of his face" and insisted he did not "need any of this fucking help." Kamin suffered a fractured hand. Hanson was ultimately restrained for the blood draw and the jury heard he had a blood alcohol concentration of 0.236.

¶7 Hanson's son, Michael, testified that he drove the truck into the ditch during a heated argument with his father. After making one attempt to get the truck out of the ditch, Michael stated that he left his father at the scene and called his then-girlfriend to pick him up down the road. Brad Sutek corroborated Michael's testimony, indicating that he and Michael drove the truck to Hanson's home and Sutek stayed at the house while father and son went for a ride. However, in rebuttal, Linda Van Den Heuvel, a charge nurse and trauma nurse specialist at the hospital, testified that Michael asked her where the truck had gone into the ditch.

¶8 The jury also heard a recorded jail conversation in which Hanson told his mother that he slid the truck off the road after trying to avoid a deer. During the call, Hanson further explained the truck was stuck with the front tires off the ground, so he could not put it in four-wheel drive to get out. Hanson indicated that he then took a walk through the woods and "figured well, hope for the best." Hanson's mother testified, however, that in subsequent conversations with Hanson, he indicated he could not remember what happened that day.

¶9 After the jury found Hanson guilty, the court imposed consecutive and concurrent sentences resulting in a sixteen-year term consisting of eight years' initial confinement and eight years' extended supervision. Hanson filed a motion for postconviction relief alleging he was denied the effective assistance of trial

counsel. The motion was denied after a ***Machner***[2] hearing, and this appeal follows.

DISCUSSION

¶10 This court's review of an ineffective assistance of counsel claim is a mixed question of fact and law. ***State v. Erickson***, 227 Wis. 2d 758, 768, 596 N.W.2d 749 (1999). The trial court's findings of fact will not be disturbed unless they are clearly erroneous. ***Id.*** However, the ultimate determination whether the attorney's performance falls below the constitutional minimum is a question of law that this court reviews independently. ***Id.***

¶11 To succeed on his ineffective assistance of counsel claim, Hanson must show both (1) that his counsel's representation was deficient and (2) that this deficiency prejudiced him. ***Strickland v. Washington***, 466 U.S. 668, 694 (1984). In order to establish 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." ***Id.*** at 687. However, "every effort is made to avoid determinations of ineffectiveness based on hindsight … and the burden is placed on the defendant to overcome a strong presumption that counsel acted reasonably within professional norms." ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990).

¶12 In reviewing counsel's performance, we judge the reasonableness of counsel's conduct based on the facts of the particular case as they existed at the time of the conduct and determine whether, in light of all the circumstances, the

[2] ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

omissions fell outside the wide range of professionally competent representation. ***Strickland***, 466 U.S. at 690. Because "[j]udicial scrutiny of counsel's performance must be highly deferential … the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." ***Id.*** at 689.

¶13 The prejudice prong of the ***Strickland*** test is satisfied where the attorney's error is of such magnitude that there is a reasonable probability that, absent the error, the result of the proceeding would have been different. ***Id.*** at 694. We may address the tests in the order we choose. 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.

¶14 Here, Hanson argues trial counsel was ineffective by failing to object to admission of the recorded jail conversation with his mother. During the first day of trial, a police detective who was watching the trial heard Michael Hanson testify that he was driving the truck, not his father. The detective consequently decided to check the jail recordings when he arrived at work the following morning. The first phone call he listened to was the one introduced at trial. Hanson argues his counsel was deficient for failing to challenge this evidence on grounds the State violated its discovery obligations by surprising the defense with this recording on the second day of trial.

¶15 The State's discovery obligations may include information not personally known to the prosecutor, but in the possession of law enforcement agencies. ***State v. DeLao***, 2002 WI 49, ¶21, 252 Wis. 2d 289, 643 N.W.2d 480. The prosecutor, however, is not required to consult every law enforcement officer who could conceivably have information about the case. ***Id.***, ¶24. "The test of

whether evidence should be disclosed is not whether in fact the prosecutor knows of its existence but, rather, whether by the exercise of due diligence the prosecutor should have discovered it." ***Id.***, ¶22 (citing ***Jones v. State***, 69 Wis. 2d 337, 349, 230 N.W.2d 677 (1975).

¶16 Here, the court determined that the recording was discovered by happenstance. The detective did not normally listen to the recorded phone calls of inmates accused of drunk driving. The court further noted that the State did not get regular reports from the jail of the content of recorded phone calls, nor did it have an obligation "to listen to every jail recording that might be out there." Because the State did not commit a discovery violation, counsel was not deficient for failing to object on these grounds. *See* ***State v. Sandoval***, 2009 WI App 61, ¶34, 318 Wis. 2d 126, 767 N.W.2d 291 (counsel not deficient for failing to pursue meritless argument).

¶17 More importantly, counsel testified at the ***Machner*** hearing that the decision to forego an objection to the recording was made after consultation with Hanson. Counsel noted that neither he nor Hanson were surprised by the content of the phone call and they never requested the calls "for the very reason that we suspected that there may … be phone calls where Mr. Hanson may make admissions that wouldn't be beneficial to his defense." Counsel was therefore concerned that if the trial did not go forward, additional inculpatory recordings might be found. The court ultimately concluded that counsel made a tactical decision not to object. "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." ***Strickland***, 466 U.S. at 690.

¶18 Even were we to assume that counsel was deficient for not objecting to the recording, Hanson has failed to establish prejudice in light of the overwhelming evidence of his guilt. A blood test established that Hanson was intoxicated and, as the court noted at the ***Machner*** hearing, there was powerful eyewitness testimony identifying Hanson as the driver. Although Michael Hanson testified that he was the driver, a rebuttal witness effectively undermined that claim when she testified that Michael did not know where the accident occurred. Because Hanson has failed to show a reasonable probability that the result of the proceeding would have been different had counsel raised an objection to the recording, we conclude that Hanson was not prejudiced by this claimed deficiency.

¶19 Hanson also argues his attorney was ineffective by failing to pursue a voluntary intoxication defense. Voluntary intoxication may be a defense only if it negates a state of mind essential to a crime. *See* WIS. STAT. § 939.42(2).[3] The defendant, however, has the burden to produce enough evidence to make intoxication an issue in the case. ***State v. Strege***, 116 Wis. 2d 477, 485-86, 343 N.W.2d 100 (1984). Our supreme court has clarified:

> To be relieved from responsibility for criminal acts it is not enough for a defendant to establish that he was under the influence of intoxicating beverages. He must establish that degree of intoxication that means he was utterly incapable of forming the intent requisite to the commission of the crime charged.

State v. Guiden, 46 Wis. 2d 328, 331, 174 N.W.2d 488 (1970).

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

¶20 Here, Hanson contends his counsel should have argued he was too intoxicated to form the intent element of the battery charge. Hanson noted a disparity between the alcohol levels found after testing by both the State Hygiene Lab and the hospital emergency room. The State Hygiene Lab result, which was presented to the jury, showed Hanson had a blood alcohol concentration of 0.236. In emergency room records discovered after trial, however, a report noted: "Alcohol level elevated at 0.277." Although Hanson emphasized the 0.277 level during postconviction proceedings, he failed to demonstrate how that level of intoxication would have supported a potential voluntary intoxication defense.

¶21 Hanson also claims counsel should have elicited testimony regarding medications Hanson was taking that could have exacerbated the effects of the alcohol. Even if trial counsel had presented evidence that Hanson took medication on the morning of the accident, Hanson failed to show that the medication amplified the effect of the alcohol. Because Hanson did not provide sufficient evidence at the postconviction motion hearing to establish that he would have been entitled to a voluntary intoxication instruction, the circuit court properly determined trial counsel was not deficient for failing to request the instruction. Moreover, although Hanson stated that failure to request the instruction prejudiced him, he presented no argument to establish that prejudice.

¶22 In any event, counsel testified that with respect to the battery charge, he pursued an accident defense at trial. Counsel indicated that after discussing the possibility of a voluntary intoxication instruction with Hanson, "it was decided" not to use that defense. While counsel acknowledged that voluntary intoxication and accidental injury were not mutually exclusive defenses, counsel explained his belief that during trial you stick with one defense because "it gets muddy when

you try to pick multiple defenses and convince a jury that … he's not responsible because of this and because of this and because of this."

¶23 The court acknowledged that defense counsel walks a very fine line when trying to say that "no, my client was not intoxicated and driving this vehicle … but by the way, he voluntarily got himself so intoxicated that he didn't have the intent to do this crime. And if you don't buy that, well, then it was just an accident." The court ultimately determined that counsel made a reasonable tactical decision when he opted to pursue only the accident defense. A circuit court's determination that counsel undertook a reasonable trial strategy is "virtually unassailable." ***State v. Maloney***, 2004 WI App 141, ¶23, 275 Wis. 2d 557, 685 N.W.2d 620.

¶24 Alternatively, Hanson seeks a new trial on grounds that the real controversy has not been fully tried. *See* WIS. STAT. § 752.35. In order to establish that the real controversy has not been fully tried, Hanson must convince us "that the jury was precluded from considering 'important testimony that bore on an important issue' or that certain evidence which was improperly received 'clouded a crucial issue' in the case." ***State v. Darcy N.K.***, 218 Wis. 2d 640, 667, 581 N.W.2d 567 (Ct. App. 1998) (quoting ***State v. Hicks***, 202 Wis. 2d 150, 160, 549 N.W.2d 435 (1996)). An appellate court will exercise its discretion to grant a new trial in the interest of justice "only in exceptional cases." ***State v. Cuyler***, 110 Wis. 2d 133, 141, 327 N.W.2d 662 (1983).

¶25 Here, Hanson argues that the real controversy has not been fully tried based on the errors alleged above. We have rejected Hanson's challenges to his conviction—the case was fully tried and Hanson was allowed to present his

version of events. Accordingly, we decline to exercise our discretionary authority under WIS. STAT. § 752.35 to grant Hanson a new trial.

By the Court.—Judgment and order affirmed.

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