COURT OF APPEALS
DECISION
DATED AND FILED

March 6, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP844-CR **Cir. Ct. No. 2010CF529**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CALVIN NASH,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Brown County: SUE E. BISCHEL, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Mangerson, JJ.

¶1 PER CURIAM. Calvin Nash appeals a judgment, entered upon a jury's verdict, convicting him of battery, disorderly conduct, criminal damage to property, and substantial battery with the intent to cause bodily harm, all counts as domestic abuse and as a repeater. Nash also appeals the order denying his motion

for postconviction relief. Nash argues he is entitled to a new trial on grounds he was denied effective assistance of trial counsel. We reject Nash's arguments and affirm the judgment and order.

BACKGROUND

¶2 The State charged Nash with one count each of strangulation and suffocation; battery; disorderly conduct; criminal damage to property; and substantial battery with the intent to cause bodily harm, all as domestic abuse and as a repeater. The charges arose from events involving Nash's live-in girlfriend, Connie Homman. At trial, Homman testified that after a two-month absence, Nash returned to live with her on May 9, 2010. Homman testified that over the course of the next four days, Nash hit her in the face and stomach, and she had bruising on her arm from blocking a punch. Although Homman expressed some confusion about what happened on each of the four days, she testified she ran out of the apartment after Nash tried "to pull a knife" on her. Nash followed and when Homman attempted to call her son, Nash smashed her cell phone. Homman further testified that Nash hit her in the eye, causing a cut that required twenty-one stitches. Neighbors called the police and Homman was ultimately transported to the hospital.

¶3 An emergency room nurse testified that on May 13, 2010, she took photos of Homman's injuries at the hospital. Those injuries included: extensive bruising on the left side of her back; bruising on her right arm, her left arm and shoulder, her chin, the right side of her abdomen, her left elbow, right buttock and left wrist; a "bite like mark" on her right jaw; scratches on her neck; and a laceration over her eye. The photos of Homman's injuries were shown to the jury.

¶4 Officer Chad Ramos testified that he was dispatched to Homman's residence at 5:30 p.m. on May 13, 2010, following a 911 call. Ramos testified that Homman was crying and emotional, and told him that Nash had smashed her phone. Ramos stated that he noticed Homman had bruises on her back and wrists, and that Homman told him the bruises resulted from Nash hitting and punching her. Ramos further testified that he picked up pieces of the cell phone from the sidewalk and grass.

¶5 Officer Derek Wicklund testified that he responded to a 911 call at Homman's residence at approximately 10:30 p.m. that same evening. Wicklund met with Homman, who was "very emotional" and "covered in blood" and had "a large laceration above her left eye." The jury found Nash guilty of all but the strangulation and suffocation charge. Nash's postconviction motion for a new trial was denied after a hearing. This appeal follows.

DISCUSSION

¶6 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.***

¶7 To succeed on his ineffective assistance of counsel claim, Nash 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. 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. A reasonable probability is a probability sufficient to undermine our confidence in the outcome. ***Id.*** 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.

¶8 Here, Nash asserts that his trial counsel was ineffective based on three grounds.[1] First, he claims counsel should have objected when the prosecutor asked Homman to read into the record a written statement she gave police on May 13, 2010. Homman read the following:

> After [Nash] beat me up the first time, he left. The police came. And then he came back again. The second time he came back, it was about 10 p.m. He has a key, so he just walked right in. He walked in and started arguing. I asked him why he smashed my cell phone. He asked me why the cops were there. He was very belligerent, yelling and screaming. He even went – he then went into the hallway. He was acting crazy. I know he has been drinking all day. I tried to calm him down. I told him to go to sleep. He doesn't like it when I suggest things. He yelled, don't tell me what to do. That is when he blasted me. He punched me right in the face with a closed fist. After he hit me, he got his stuff together and left. All the rest, the bruising I have on me is from when he beat me on Monday. He also choked me on Monday. He applied pressure to my neck for about 5 seconds and it impended (sic) my breathing a little bit. I never gave [Nash] permission to hit me or beat me. What he did to me hurt me physically and mentally.

[1] Nash's postconviction motion raised additional issues that are not briefed on appeal. Issues raised in the trial court, but not raised on appeal, are deemed abandoned. *See* ***Tatur v. Solsrud***, 167 Wis. 2d 266, 269, 481 N.W.2d 657 (Ct. App. 1992).

¶9 Nash intimates that absent the written statement, Homman's testimony was less reliable because it described events that took place approximately five hours apart as taking place at the same time. We disagree. Homman expressed an inability to remember the sequence of events because they had occurred months before she testified. Further, while Homman's testimony was not entirely consistent, she was certain that during the four-day period from May 10 to May 13, 2010, Nash smashed her phone and hit her several times, including the hit to her face that caused a laceration requiring twenty-one stitches. Police testimony made clear that they responded to two 911 calls on May 13, 2010—one at 5:30 p.m. involving the phone incident, and one at 10:30 p.m. when Homman was transported to the hospital to treat the laceration above her eye.

¶10 Even without Homman's written statement, her testimony, coupled with the officers' testimony, was sufficient to support the jury's verdicts. Therefore, Nash has failed to establish that he was prejudiced by counsel's failure to object to Homman's reading of the written statement.

¶11 Second, Nash contends counsel was ineffective by "failing to adequately object" to Ramos' testimony that Homman told him Nash smashed her cell phone. The trial court determined that the challenged testimony was admissible as an excited utterance. Nash now argues that trial counsel should have objected on grounds that the breaking of a cell phone is not the type of startling event contemplated by the excited utterance exception to hearsay. Nash further asserts that by reinforcing Homman's testimony, the officer "inappropriately" boosted Homman's credibility. Even assuming counsel was deficient in this regard, we are not persuaded that Nash was prejudiced by this claimed deficiency.

¶12 The officer did not vouch for Homman's credibility by merely repeating what she had reported to him about the phone. Moreover, the officer also testified that he personally saw a smashed cell phone on the sidewalk. In light of Homman's testimony that Nash smashed her cell phone, and the officer's testimony about finding a smashed cell phone, admission of the challenged testimony does not undermine our confidence in the outcome. *See* ***Strickland***, 466 U.S. at 694.

¶13 Finally, Nash argues counsel was ineffective by failing to object to the court's instruction about the jurors' use of notes. The pattern jury instruction on notetaking provides, in relevant part: "You may rely on your notes to refresh your memory during your deliberations. Otherwise, keep them confidential." WIS. JI—CRIMINAL 55 (2000). Here, Nash indicates that after telling the jury members that their notes "should be kept confidential during the trial," the court stated: "The purpose of the notes is obvious. If you have a dispute as to what a witness may have said or a lack of recollection, they might help you resolve that."

¶14 Nash contends that the court's instruction differed from the pattern jury instruction because it did not tell the jurors to keep their notes confidential during deliberations and is "reasonably interpreted as affirmatively conveying to jurors that the notes could serve as independent evidence, above and beyond their actual recollections, of what took place at trial." Again, even were we to assume counsel was deficient by failing to object to the court's instruction, Nash fails to establish prejudice as he has not shown that any juror actually took notes, much less relied on them as evidence. At most, Nash can only speculate that a juror may have relied on his or her notes in a manner inconsistent with the pattern jury instruction. A showing of prejudice requires more than speculation; the defendant must affirmatively prove prejudice. ***State v. Wirts***, 176 Wis. 2d 174, 187, 500

N.W.2d 317 (Ct. App. 1993). Because Nash has failed to establish that he was prejudiced by any of the claimed deficiencies on the part of his trial counsel, we affirm the judgment and order.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2009-10).