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DISTRICT II

May 8, 2024

To:

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Circuit Court Judge
Electronic Notice

April Higgins
Clerk of Circuit Court
Manitowoc County Courthouse
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Michael J. Conway
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Ralph Sczygelski
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You are hereby notified that the Court has entered the following opinion and order:

2022AP721-CR State of Wisconsin v. David Robert Heiden (L.C. #2019CF312)

Before Gundrum, P.J., Neubauer and Lazar, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

David Robert Heiden appeals from a judgment of conviction, entered upon his guilty plea, and from an order denying his motion for postconviction relief. He contends he should be permitted to withdraw his plea because his counsel provided him ineffective assistance leading up to the plea by "fail[ing] to inform [him] of the use of lesser-included offenses" that could be available to him at trial. Based upon our review of the briefs and record, we conclude at

conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2021-22).[1] For the following reasons, we affirm.

Background

Heiden pled guilty to the Class A felony of Physical Abuse of a Child, repeated acts causing death, for causing the death of a two-year-old child. As part of the plea agreement, numerous other charges were dismissed and read in. The Class A conviction required the imposition of a life sentence, but the circuit court set extended supervision eligibility at twenty-five years. Heiden filed a postconviction motion seeking to withdraw his plea on the basis that his counsel performed ineffectively by failing to discuss with him pre-plea "the concept [of] lesser included offenses, which could have been available through either a [p]lea [a]greement or a [t]rial." Heiden claimed, and claims again on appeal, that had he known "there were options such as lesser included offenses," he would not have entered the plea that he did.

Counsel and Heiden both testified at the ***Machner***[2] hearing on Heiden's motion. Counsel testified that he had been a licensed attorney since 1985. While he had done at least some criminal defense work "since the beginning as an attorney," such work constituted more than half of his practice for at least the last two decades. He agreed he is certified with the public defenders office "to handle every level of felony, including class A felonies," and had handled between fifteen to twenty homicide cases, several of which had gone to trial.

[1] All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

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

Counsel testified that he had twice attempted to get the State to agree to let Heiden plead to a lower level felony, instead of the Class A felony he pled to, but the State was not willing to go along with that. As relevant to this appeal, on direct examination, counsel testified,

> I did see my file, I did have copies of the jury instructions, my normal procedure would have been to share those jury instructions with my client and explain them as far as amendments. I don't know specifically if I did that with Mr. Heiden, I'm just saying that would have been my normal course so I think he would have been well appri[s]ed of what I was trying to do.

He further testified:

> [Question:] Now, in your discussions [with Heiden] about what would potentially happen at trial, did you go over the idea of asking for lesser included offenses, both on the jury instructions, the verdict form, and arguing such to the jury?
>
> [Counsel:] I think I would have because that's my normal course, but again, I don't have the specific memory…. I can tell you that [Heiden] asked a lot of … good questions, so did his family, I had several discussions with his mother and his sister. So I think I would have done that at least from my normal course of representing somebody.
>
> [Question:] So … with … this offense, which is a class A felony, did you discuss with him the idea that the jury might have been able to consider a class B or class C felony instead as a lesser included offense should you go to trial?
>
> [Counsel:] Yeah I would answer that the same way, I think that would have been my normal conduct as an attorney, but again, I don't have a specific—I'm not really one to keep notes much when I talk to my clients, so I don't have any other independent basis to tell you that.

On cross-examination by the State, counsel agreed that as part of his representation of Heiden, he "did discuss the nature of the charge and clearly some other options that [counsel] could propose to the State."

On direct examination, Heiden testified that counsel "never mentioned" to him that there were lesser included offenses that could be considered by a jury at trial and that if he had known such was an option, he believes he would have taken the matter to trial "versus just taking the deal." On cross-examination by the State, Heiden agreed he had "discussed plea offers" with counsel; "worked with [counsel] to put together some counter offers to the State's offer," including "some lesser forms of homicide," such as first- and second-degree reckless homicide, and was thus "aware of lesser forms of homicide"; and the State "was unwilling to amend the charge." When then asked, "When you were having those discussions with your attorney he discussed with you jury instructions or different elements that the State would have to prove, correct," Heiden responded, "No. He didn't talk anything about jury or anything like that." Heiden agreed counsel "discussed strategy as far as whether [Heiden] should take it to trial or take an offer," specifically stating counsel "did explain that I should take an offer versus go []to trial."

The circuit court recounted from the testimony that counsel "is a highly experienced attorney." The court noted that even though counsel "could not specifically recall whether he had done so in this case," "his practice is to review lesser included offenses." The court further recapped that Heiden "testified that he did not know that the potential for lesser included offenses existed, that they were a possibility, however remote, and if he had known he would have proceeded to trial." The court noted that WIS JI—CRIMINAL 2114A, the jury instruction for the particular offense to which Heiden pled,

> includes the lesser included offenses of this Class A felony. It's a unique charge where a jury, if they find that the defendant committed physical abuse of a child, makes the determination without the [c]ourt intervening or exercising it's discretion under [WIS. STAT. §] 939.66 to give the lesser included instructions.

> Instead the jury determines whether a charge caused death, which charges caused great bod[il]y harm, caused bodily harm, and the jury is instructed to be unanimous in making that determination.

The court continued:

> [G]iven the nature of the charge, given the specifics of the charge to which Mr. Heiden did ultimately enter a plea, and the jury instruction for it, the lesser included instructions are necessarily a part of that discussion. The individual acts of abuse would also have to have been a part of the discussion because the jury is instructed in the instruction to be unanimous as to which act of physical abuse caused which harm.
>
> Now [counsel's] testimony that his practice is to review lesser included offenses, but couldn't remember whether he had done so here, is a far cry from him saying he just did not. His long experience and his practice are relevant to determining whether it is wholly out of the question that he had done so. Now in light of the jury instruction and the questions directed to the jury, it's far more likely that that discussion did occur, in fact, it is difficult to imagine a circumstance where an attorney would have reviewed this jury instruction with a client without discussing lesser included offenses. Mr. Heiden's testimony to the contrary is implausible and is self serving.[3]

The court denied Heiden's post-conviction motion, and he appeals.

Discussion

As we have summarized:

> To succeed on a claim of ineffective assistance of counsel, a defendant must show counsel's performance was deficient and the deficiency prejudiced him/her. If the defendant fails to prove one prong, we need not address the other.
>
> To prove deficient performance, a defendant must show that counsel's acts or omissions were "outside the wide range of professionally competent assistance," and were "errors so serious

[3] The circuit court also found counsel's performance to not be deficient on other grounds and also found that even if there was deficiency, Heiden was not prejudiced by it.

> that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment[.]" The defendant must overcome a strong presumption he/she received adequate assistance and counsel acted reasonably within professional norms….
>
> To prove prejudice, a defendant must show the alleged errors of counsel were "of such magnitude that there is a reasonable probability that, absent the errors, 'the result of the proceeding would have been different.'" "It is not sufficient for the defendant to show that his counsel's errors 'had some conceivable effect on the outcome of the proceedings'"; rather, he/she must demonstrate that an alleged error of counsel actually had some adverse effect….

State v. Morales-Pedrosa, 2016 WI App 38, ¶¶15-17, 369 Wis. 2d 75, 879 N.W.2d. 772 (citations omitted). Deficient performance and prejudice are both mixed questions of fact and law. ***Id.***, ¶18. "We uphold the [circuit] court's factual findings unless clearly erroneous; but whether counsel's performance was deficient or prejudicial is a question of law we review de novo." ***Id.*** (citation omitted).

In the present case, Heiden's entire appeal rests on his foundational contention that counsel failed to discuss lesser included offenses with him prior to his plea. He asserts that this contention is supported by counsel's testimony that he "could not specifically recall" whether he had discussed lesser included offenses with Heiden and Heiden's testimony that counsel did not have such a discussion with him.

Heiden fails to persuade. As stated, "[w]e uphold the [circuit] court's factual findings unless clearly erroneous," and here the court implicitly found that counsel *did* discuss lesser included offenses with Heiden prior to his plea. *See* ***id.*** The court implicitly found counsel's testimony to be credible, and that credible testimony showed, as the court also found, that counsel was "a highly experienced attorney" and it was his "practice … to review lesser included offenses." The finding that counsel discussed lesser included offenses with Heiden was also

supported by the court's observation that "in light of the jury instruction and the questions directed to the jury, it's far more likely that that discussion did occur, in fact, it is difficult to imagine a circumstance where an attorney would have reviewed this jury instruction with a client without discussing lesser included offenses." While Heiden testified that counsel had not discussed lesser included offenses with him, and he hangs his appeal on this testimony, the court found Heiden's testimony not credible. We give great deference to a fact-finding court's credibility determinations. *See* ***Tang v. C.A.R.S. Prot. Plus, Inc.***, 2007 WI App 134, ¶19, 301 Wis. 2d 752, 734 N.W.2d 169 ("'[I]t is well settled that the weight of the testimony and the credibility of the witnesses are matters peculiarly within the province of the [circuit] court acting as the trier of fact' because the [circuit] court has a superior opportunity 'to observe the demeanor of witnesses and to gauge the persuasiveness of their testimony.'" (citation omitted)). It is also for that court, not this court, "to resolve conflicts in the testimony, and we review the evidence in the light most favorable to the findings made by the [circuit] court." ***Id.*** (citation omitted). While Heiden insists the recollections that he testified to—that counsel did not discuss lesser included offenses with him—"make[] sense," in large part due to the mandatory life sentence at stake with the Class A felony he pled to, the court's credibility determinations are sufficiently supported by the testimony that we do not disturb them. Thus, with the court's finding that Heiden failed to show that counsel did not discuss lesser included offenses with Heiden intact, Heiden's appeal falls.

IT IS ORDERED that the judgment and order of the circuit court is affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Samuel A. Christensen
Clerk of Court of Appeals