COURT OF APPEALS
DECISION
DATED AND RELEASED

October 17, 1995

No. 94-3415-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DAVID S. RHODES,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: STANLEY A. MILLER, Judge. *Affirmed.*

Before Wedemeyer, P.J., Sullivan and Schudson, JJ.

PER CURIAM. David S. Rhodes appeals from the judgment of conviction for first-degree intentional homicide while armed, and from the order denying his motion for postconviction relief. A jury found Rhodes guilty in the first phase of a bifurcated trial and, in the second phase, determined that Rhodes was not suffering from a mental disease or defect at the time he committed the crime. He argues that he received ineffective assistance of counsel. Although we conclude that Rhodes's trial counsel's performance was

deficient in two respects, we also conclude that Rhodes was not prejudiced by those deficiencies. Therefore, we affirm.

I. FACTUAL BACKGROUND

On April 30, 1993, Milwaukee Police discovered the body of Ocie E. King in a garbage cart. He died from two gun shot wounds to the head. Rhodes and several acquaintances, including King, Brenda Pettway, Yolanda Means, and Clifton Chavas had been together at a drug house the night before. Rhodes was arrested on May 3, 1993, and on that date he gave a statement to Milwaukee Police Detective Gary Temp, which became a critical component of the State's evidence.

According to Rhodes's statement to Detective Temp, Pettway told Rhodes that King had sexually molested her two children. Pettway said, "I want him [King] dead." Rhodes discussed money with Pettway and stated that he owed Means $150. Pettway said, "You can do that," meaning that he should shoot King and she would pay Means the money Rhodes owed Means. Rhodes got a gun from Means and went to the basement where he confronted King and shot him in the neck. Rhodes then ran out of the basement but, shortly thereafter, he returned to the basement and found that King was still alive, bleeding and gasping for air. Rhodes then shot King a second time. Rhodes then returned the gun to Means who gave him a ride home. A few hours later, however, he returned and, with Pettway's help, put King's body in the garbage cart.

The State called additional witnesses including Clifton Chavas who testified that on April 29, 1993, he was at the drug house with Rhodes, Means, Pettway, and others. He provided substantial corroboration for Rhodes's confession and, further, stated that later that night Rhodes, referring to King, told him, "'I popped the nigger.'"

Rhodes also testified in the first phase of the trial. He said that Pettway told him that King had molested her children. He said, however, that when he got the gun from Means, he did so to take it with him when he went to the back door to sell some drugs to a customer. He said he then went into the

basement but had no intention of doing anything to King at that time. He said he confronted King with Pettway's allegations and, when King admitted molesting the children, he (Rhodes) told King that he was going to tell Pettway to call the police. Rhodes said that King then grabbed him and slammed him against the wall.

> He grabbed me by the throat and slammed my head on the wall and he was choking me. He was rubbing on my butt, you know, and grinding on me telling me that I'm a little punk. What you gonna' do now punk mother fucker.
>
> ....
>
> He was grinding on me, and I told him to let me go and he didn't let me go, so I went in the pocket and grabbed the .380, took it off the safety and pointed it at his neck and that's when he was like, he grabbed the gun. I told him let me go. I said let me go, Ocie. He grabbed the gun and I pushed him back. He stumbled back about four feet and he launched back at me. That's when I closed my eyes and pulled the trigger and he fell.

King then testified that he left the basement, met Chavas in the living room, and returned to the basement with Chavas and another person to see if King was still alive. He said that Chavas told him that King was not dead and to shoot him but that when he (Rhodes) hesitated, Chavas grabbed the gun and shot King. Additional facts will be presented in our discussion of Rhodes's arguments.

Rhodes contends that trial counsel was ineffective for: (1) failing to seek suppression of his statement to Detective Temp; (2) eliciting testimony exposing his juvenile adjudication and details of prior adult convictions; (3) failing to call his prior counsel in an effort to impeach one of the State's witnesses in phase two; and (4) failing to call an additional expert witness in phase two.

II. STANDARD OF REVIEW

The Sixth Amendment right to counsel guaranteed criminal defendants is the right to the effective assistance of counsel. ***McMann v. Richardson***, 397 U.S. 759, 771 (1970). To establish the denial of effective assistance of counsel at trial, a defendant must prove both that counsel's performance was deficient and that such deficient performance prejudiced his defense. ***State v. Johnson***, 153 Wis.2d 121, 127, 449 N.W.2d 845, 847-848 (1990); ***Strickland v. Washington***, 466 U.S. 668, 687 (1984).

Review of an ineffective assistance of counsel claim involves a mixed question of law and fact. ***Johnson***, 153 Wis.2d at 127, 449 N.W.2d at 848. The trial court's factual findings from the postconviction motion will not be disturbed unless clearly erroneous. ***Id.*** The legal conclusions of whether the performance was deficient and prejudicial based on those factual findings, however, are questions of law reviewed independently by this court. ***Id.*** at 128, 449 N.W.2d at 848.

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 127, 449 N.W. 2d at 847 (citation omitted). Trial and appellate court reviews of counsel's performance remain highly deferential. ***Id.*** To demonstrate deficient performance, a defendant bears the burden to overcome a strong presumption that counsel acted reasonably and within professional norms. ***Id.*** at 127, 449 N.W.2d at 847-848. Further, counsel's strategies and performance must be reviewed from counsel's perspective at the time of trial. ***Id.***

It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. (Citation omitted). A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight....

State v. Ludwig, 124 Wis.2d 600, 608, 369 N.W.2d 722, 725 (1985) (quoting ***Strickland***, 466 U.S. at 689).

Should a defendant establish his counsel's deficient performance, he or she next must prove prejudice. ***Johnson***, 153 Wis.2d at 129, 449 N.W.2d at 848. Prejudice has occurred when counsel's deficient performance was "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." ***Strickland***, 466 U.S. at 687. To demonstrate prejudice, a defendant must show a reasonable probability that, but for counsel's deficient performance, the result of the trial would have been different. ***Johnson***, 153 Wis.2d at 129, 449 N.W.2d at 848. A reasonable probability is one sufficient to undermine confidence in the outcome of the trial. ***Id.***

III. COUNSEL'S ALLEGED DEFICIENCIES

A. Failure to Seek Suppression of Rhodes's Statement

Rhodes argues that counsel was ineffective for failing to seek suppression of his confession. At the ***Machner*** hearing, trial counsel testified that although predecessor counsel had filed a motion to suppress the statement, he (trial counsel) decided not to pursue the suppression motion because there was not "a Chinaman's chance that the statement would be suppressed." Counsel was correct.

Detective Temp testified at the trial that he read the ***Miranda*** rights to Rhodes and that Rhodes acknowledged understanding them. Rhodes agreed to answer questions, signed the waiver of rights form, stated he was not under the influence of drugs or alcohol, and appeared physically and mentally able to provide a knowing and voluntary statement. After Temp completed his written account of Rhodes's statement, Rhodes reviewed it line by line with Temp, made some corrections, signed each page at the bottom stating that Temp's written account was true, and also wrote, "I'm sorry for killing Ocie."

At the postconviction motion hearing, trial counsel testified that Rhodes told him that he did not dispute Temp's account but rather, did not remember what occurred. Counsel testified that "[h]e did not say that he specifically remembered giving the statement. He said that what was in the statement was substantially true but not all that there was to be said." Counsel explained:

> My feeling was that, you know, based solely upon the defendant's recollection that he did not remember the circumstances, that struck me as a very weak basis for proceeding with the motion.
>
> Secondly, as our strategy evolved in the case, it was apparent that he was going to testify and that he was going to testify substantially in accordance with ... the statement. Therefore, I really did not see any

> strategic or tactical advantage to be gained in attempting to suppress the statement.

Counsel's theory, therefore, was not that the statement was involuntary or inaccurate, but rather, that it was incomplete.

On appeal, Rhodes maintains that his failure to recall making the statement, in combination with his ingestion of controlled substances, render the statement involuntary. Rhodes, however, has failed to provide any authority in support of that proposition or any evidence to establish that he was under the influence of drugs when he made the statement. Rhodes did not testify at the ***Machner*** hearing. Further, as trial counsel testified, "given the time between his arrest and ... the statement, the intoxicating drugs should have worn off from him, and I believe an expert witness would have testified to that effect." A "refusal to pursue an issue of very dubious merit does not constitute deficient performance." ***State v. Jones***, 181 Wis.2d 194, 202, 510 N.W.2d 784, 787 (Ct. App. 1993). We conclude that trial counsel was not deficient for failing to seek suppression of Rhodes's statement.

B. Prior Convictions

Rhodes next argues that trial counsel was ineffective because he elicited testimony regarding prior convictions. He contends that this was prejudicial in both phases of his trial.

Before Rhodes testified, the only reference to his prior record occurred when the prosecutor, in the course of introducing another witness stated:

> The next witness I am going to call is an individual by the name of Clifton Chavas. He has two prior convictions. I have discussed that with [defense counsel] and when I ask if he's been convicted of a crime on two prior occasions, his answer will be yes. Mr. Rhodes has

> two convictions so if he is going to testify, I would use those as well.

Defense counsel acknowledged, "[t]hat's correct," but no colloquy followed, and the trial record reflects no direct inquiry of or advice to Rhodes before he testified. At the postconviction motion, however, trial counsel testified that he clearly advised Rhodes of the manner in which he would be questioned regarding his prior convictions and of the obligation to acknowledge two prior convictions.

When Rhodes testified, things rapidly unraveled. Defense counsel questioned Rhodes:

Q:Have you been convicted of crimes as an adult in the past?

A:Yes.

Q:Okay. Is that two times?

A:One other time and this.

Q:Were there two times prior to this?

A:Two times prior that I got convicted.

Q:Pled guilty?

A:Yes. Yes, one other time.

Q:Well, let's refresh our memory. Perhaps there was one incident.

> [Prosecutor]: I object to this question. I guess I would like to approach sidebar if we could.

(Discussion held off the record.)

> Q:Mr. Rhodes, I'm trying to refresh your memory a little bit here. You were found guilty of recklessly

endangering safety with regard to an incident regarding your stepfather; is that correct?

A:Yes.

Q:And was there not also an incident in which you were found to have been riding in a car with someone else in the car, turned out to have been stolen?

A:Yes.

Q:Did you plead guilty to that, do you remember?

A:I pleaded guilty to the incident with my father.

Q:Yes. The car incident that was while you were a juvenile?

A:Yes.

Q:Was there another incident involving possession of a firearm?

A:Yes.

Q:Did you plead guilty on that?

A:No.

Q:Were you convicted after trial?

A:Yes.

Q:Okay.

On cross-examination, the prosecutor then pursued the subjects of Rhodes's prior convictions and exposed that "[t]he recklessly endangering safety conviction was for when you got angry with your father, you left the home, got a gun, and you came back and you shot him," and that "the other conviction was for having a sawed-off shotgun."

After the defense rested, the prosecutor, defense counsel, and the trial court made a record of the side bar conference that occurred immediately after Rhodes incorrectly responded that he had been convicted once. As summarized by defense counsel:

> [The prosecutor] made an objection to my follow-up question and had a sidebar conference at which it was determined that I was going to put in the record the nature of the offenses.
>
> Following that on [the prosecutor's] cross-examination, he exhibited an intention to go further into the nature of the offenses to which I objected. We had a conference in Court's chambers and it was determined that [the prosecutor] might go a bit further into the nature of the offenses than I had but I objected to his going into the underlying facts of the offenses because .... we were entitled to make it clear on the record what the nature of the offense was, the fact of the conviction, but not the underlying facts.
>
> And I believe then and I do believe that by going into the underlying facts of conviction, particularly his reckless endangerment conviction and putting on the record that Mr. Rhodes shot his stepfather, ... I think went impermissibly far in that regard.

At the postconviction motion, trial counsel explained that he was planning to call Rhodes's stepfather to testify regarding the reckless endangering offense "to establish a pattern of irrational mental behavior on Mr. Rhodes's part as part of his defense. So we knew in advance that some of the details at least of the incident of which he shot his stepfather were going to come out because we were going to introduce that information." Curiously, however, trial counsel further explained that he subsequently abandoned that strategy after the information "had kind of willy-nilly gotten in in Mr. Rhodes's testimony." Thus, trial counsel left Rhodes with the worst of both worlds: reference to the prior shooting of his stepfather in the first phase of the trial, although he only intended to introduce that in the second phase, and no further effort to connect that prior offense to the originally planned theory of defense in

the second phase. Moreover, whatever may have been the probative value of this prior offense in phase two, there is no suggestion that introduction of this information provided any advantage to Rhodes in phase one. Further, in neither phase of the trial did Rhodes gain any conceivable benefit from the introduction of his juvenile offense or his sawed-off shotgun conviction.

On appeal, the State characterizes defense counsel's efforts to rehabilitate Rhodes as merely "a bit awkward," and as "[a]n isolated blunder." We conclude, however, that defense counsel's performance was deficient. With specific, detailed, leading questions, counsel's efforts to correct the confusion caused by Rhodes's misstatement quickly exposed a juvenile conviction and details of prior offenses that, ordinarily, would not have been admissible, at least in phase one.

The question remains, however, whether trial counsel's deficient performance was prejudicial. Rhodes argues that the information had "the effect of prejudicing [him] by both damaging his credibility and indicating a propensity to commit a crime involving a gun." In phase one, however, there was never any dispute that Rhodes obtained the gun and shot King. Thus, the fact that on another occasion he obtained a gun and shot someone was not pivotal in persuading the jury of anything in dispute. Simply stated, because Rhodes admitted getting the gun and shooting King, his previous possession and use of weapons had little if any bearing on the jury's understanding of any disputed fact in this case. Further, the fact of an unrelated juvenile adjudication had no apparent bearing on the jury's verdict. Significantly, there was no further reference to the prior offenses. In fact, as if to punctuate the relative insignificance of Rhodes's prior conduct, the prosecutor made no comment whatsoever on the prior offenses in his closing arguments in either phase of the trial.

Thus, although under some other circumstances improper introduction of prior offenses can be prejudicial, *see* ***State v. Pitsch***, 124 Wis.2d 628, 638-646, 369 N.W.2d 711, 716-720 (1985), we conclude that Rhodes, in phase one of this case, has not established that introduction of specific information about juvenile and adult offenses deprived him "of a fair trial, a trial whose result is reliable." ***Strickland***, 466 U.S. at 687. Nor do we see any apparent way in which the revelation of this information had a bearing on the outcome in phase two of the trial. Additionally, we note that Rhodes has failed to

specifically argue prejudice stemming from this deficient performance in phase two, except to contend that "credibility and propensity to handle guns versus mental disease and responsibility were very much issues placed before the jury."

IV. IMPEACHMENT OF DR. SMAIL

Rhodes next argues that counsel was ineffective for failing to present testimony of Attorney Robert LeBell to attempt to impeach the testimony of Dr. Kenneth Smail in phase two of the trial. LeBell originally had been appointed to represent Rhodes. LeBell met briefly with Dr. Smail to provide an overview of Rhodes's case in order to learn whether Dr. Smail might be a potential witness in support of Rhodes's phase two defense. Based on this brief consideration of the case, Dr. Smail advised LeBell that he would be unable to support Rhodes's theory that his conduct was attributable to post-traumatic stress disorder. LeBell, learning that Dr. Smail subsequently had been retained by the State, withdrew from the case believing that he (LeBell) might become a witness regarding the views Dr. Smail had expressed to him. Ultimately, Dr. Smail testified for the prosecution in phase two.

At the postconviction motion hearing, trial counsel explained that he did not call LeBell because he believed that Dr. Smail had not been a strong witness for the State, and that efforts to impeach him would only highlight his testimony. More fundamentally, however, we conclude that the record offers nothing to suggest that LeBell's testimony would have impeached Dr. Smail in any way. It simply establishes that Dr. Smail, when contacted by the defense, provided a preliminary view of the case that proved to be consistent with the testimony he ultimately offered for the prosecution. Rhodes has offered no authority in support of his implicit argument that Dr. Smail did anything inappropriate by becoming a witness for the State after having been consulted by the defense. Further, as the State points out:

> [C]alling LeBell would simply have made it very clear to the jury that the defendant's first attempt to find an expert to support his defense failed and that he had to shop around to find an expert who would provide a favorable opinion. It also would have made Smail's

> testimony seem more favorable; the fact that LeBell had initially consulted him suggests that Smail is qualified and objective.

Thus, we conclude that counsel's failure to call LeBell was not deficient performance.

V. FAILURE TO CALL DR. MARSHALL

Rhodes argues that trial counsel was ineffective for failing to call Dr. John Marshall, professor of psychiatry at the University of Wisconsin Medical School, as a defense witness in phase two. Dr. Marshall had been retained on Rhodes's behalf, had examined him, and would have testified in support of his phase two theory of defense. At the postconviction hearing, however, counsel testified that he decided to rely solely on the testimony of his other expert witness, Dr. Hutchinson, because she was the more valuable witness, and was more difficult to schedule because she would be flying in from Kansas City. Counsel testified that he had one telephone conversation with Dr. Marshall "a couple of weeks before the trial," in which Dr. Marshall informed him "that he had a prior subpoena for a case" and, therefore, would not be available to testify. Counsel said that he decided not to ask the court for an adjournment "because that would have involved rescheduling Dr. Hutchinson." Counsel denied that his decisions derived from special time pressures resulting from the fact that he knew he was about to be suspended from the practice of law.

Dr. Marshall testified that he had been contacted by Attorney LeBell for consultation on Rhodes's case and, as a result, provided an evaluation and report that did support Rhodes's phase two defense. Testifying at the postconviction hearing, however, Dr. Marshall said that he did not recall whether trial counsel ever contacted him. Although he did not have his calendar at the postconviction hearing, Dr. Marshall said that he believed that he would have been available to testify during the week of the trial. Asked whether it was possible that trial counsel had contacted him and whether he would have been available to testify, Dr. Marshall responded:

Well, it's possible. It's not likely, I would guess.

....

... If I'm involved in another trial, it's almost always on a one-day-at-a-time basis, so we probably could have worked something out if there were a couple of days' leeway in there.

Dr. Marshall said that he would have attempted to work out the schedule so that he could have testified and, further, that such arrangements were feasible because, in his twenty years of experience, he did not recall ever testifying for more than one day on a case.

Denying the postconviction motion, the trial court observed, "If, in fact, [trial counsel] was being untruthful [regarding his contact with Dr. Marshall], that's a troubling aspect of the case." Although the trial court did not make a specific factual finding regarding trial counsel's credibility in this regard, we may assume that its finding was implicitly in favor of its decision. *See* ***State v. Hubanks***, 173 Wis.2d 1, 27, 496 N.W.2d 96, 105 (Ct. App. 1992), *cert. denied*, 114 S. Ct. 99 (1993). Thus, on appeal we will assume that trial counsel contacted Marshall as he described. We also will accept, however, Dr. Marshall's uncontroverted testimony that he then would have advised trial counsel of his availability and flexibility in arranging to provide testimony in Rhodes's trial. Thus, the record provides no adequate basis for trial counsel not to have attempted to arrange to have Dr. Marshall testify. Clearly, trial counsel's performance was deficient.

Whether trial counsel's failure to attempt to seek an adjournment or arrange for Dr. Marshall's appearance produced prejudice is difficult to assess. The State, however, provides some important clarification, arguing:

> Assuming Dr. Marshall would have testified consistently with his written report, he was vulnerable because, like the state's witnesses, he performed no psychological tests. His opinion was also subject to attack because he stated that

defendant's ingestion of drugs before the crime may have played a role in lowering the threshold to his behavior. Furthermore, using Marshall would have exposed defendant to yet one more attack on the credibility of his story, since the rendition of events he gave to Marshall differed from his police statement and trial testimony and somewhat from what he had told the other experts.

Moreover, an additional defense expert in this case would have made little difference. Even Dr. Fosdal, who testified [for the State] defendant did not have a mental disease that caused him to lack substantial capacity to conform his behavior or appreciate the wrongfulness of his conduct, agreed that defendant suffers various psychological disorders including possible PTSD. And Dr. Smail did not reject the diagnosis of PTSD. So adding Dr. Marshall's opinion supporting such a diagnosis would have added nothing significant. What is significant is that, even though no expert ruled out the possibility that defendant suffered PTSD at the time of the crime, and, even though the state and defense experts disagreed only on whether that condition had the legally required effect—i.e., whether because of it defendant lacked substantial capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law, the jury did not find against the defendant on the basis of whether his mental disease rose to this level. Rather, the jury found that defendant had not proved that he suffered a mental disease at all.

As to this question, obviously one more opinion from one more expert that was consistent with Hutchinson's opinion and not inconsistent with the state's experts would have made no difference whatsoever.

While we cannot say that Dr. Marshall's testimony "would have made no difference whatsoever," Rhodes has failed to establish that the testimony would have had any measurable impact on the jury. Although overstated, the State's theory is sound. Had the phase two trial proved to be a battle of experts on whether Rhodes suffered from a mental disease, certainly additional testimony from Dr. Marshall could have had substantial impact. Here, however, as the State points out, Dr. Hutchinson testified that Rhodes suffered from PTSD, and neither Dr. Fosdal nor Dr. Smail refuted that contention. As defense counsel emphasized in his rebuttal argument to the jury, "both Dr. Smail and Doctor Fosdal went so far as to agree that there was post-traumatic stress syndrome, that was not unreasonable as a diagnosis." Nevertheless, the jury concluded that Rhodes was not suffering from a mental disease at the time of the crime. Under these circumstances, we cannot conclude that Dr. Marshall's absence from the trial was "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." ***Strickland***, 466 U.S. at 687.

VI. CUMULATIVE ERRORS

Finally, Rhodes argues that the accumulation of trial counsel's failures establishes a "pattern of neglect in presenting the defense" requiring a new trial. Although we agree that trial counsel's performance was deficient in the two respects we have described, we conclude that the specific circumstances of this case were such that prejudice did not result. The first deficiency occurred in phase one, the second in phase two, and Rhodes has offered nothing to establish that, somehow, their cumulative effect rendered either verdict unreliable or fundamentally unfair.

By the Court. – Judgment and order affirmed.

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