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DISTRICT IV

October 17, 2019

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You are hereby notified that the Court has entered the following opinion and order:

2018AP1238-CR State of Wisconsin v. Christopher Swatzak (L.C. # 2013CF2071)

Before Fitzpatrick, P.J., Blanchard, and Kloppenburg, 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).

Christopher Swatzak appeals a judgment convicting him of stalking and two counts of burglary, and an order denying his postconviction motion seeking a new trial due to the ineffective assistance of counsel. 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

(2017-18).[1] Because Swatzak fails to show that trial counsel's performance was deficient, we affirm.

While Swatzak and his wife Hannah[2] were in divorce proceedings, Hannah filed a petition seeking a temporary restraining order (TRO) and a harassment injunction against Swatzak. Hannah alleged that Swatzak had gone to Hannah's friends' house and told them Hannah was being raped and having sexual contact with a parish priest. The petition also alleged that Swatzak had entered Hannah's home and taken a pair of her underwear "for DNA testing," and that he had told Hannah's friends he had set up cameras at the parish school where Hannah worked. The circuit court entered a TRO after finding "[t]here are reasonable grounds to believe that [Swatzak] has engaged in harassment with intent to harass or intimidate [Hannah]," and set a hearing on the injunction petition.

On the same day that she filed her petition for a TRO, Hannah also sought an ex parte family court order suspending placement of their children with Swatzak. The circuit court entered an ex parte order temporarily suspending placement with Swatzak and ordered that Swatzak appear at a placement hearing.

Based on allegations that included those referenced above, the State charged Swatzak with (1) stalking, (2) capturing a nude photo of Hannah without her consent, (3) burglary of a

[1] All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

[2] Like the parties, we use the pseudonym "Hannah" to protect the identity of the victim. *See* WIS. STAT. RULE 809.19(1)(g).

bathroom in the Swatzaks' marital home with intent to capture an unconsented nude photograph, and (4) burglary of the marital home with intent to steal Hannah's underwear.

In the criminal case, trial counsel filed a motion in limine asking the court to "[p]reclude the State from introducing any evidence regarding the existence of an injunction between" Hannah and Swatzak. Here, trial counsel was referring to evidence concerning the harassment TRO and injunction petition. The court denied the motion, determining that evidence of Hannah seeking an injunction was evidence of the effect of Swatzak's alleged course of conduct on Hannah's state of mind, which was relevant to proof of the stalking charge.

At trial, the State moved Exhibit 37 into evidence. Exhibit 37 consisted of a letter and attachments that Swatzak had hand-delivered to the FBI, demanding that it investigate Hannah, including her alleged sexual activity. Swatzak represented to the FBI that he was acting as an investigator to protect his wife and children. The attachments included the following: Hannah's TRO petition; the TRO; Hannah's motion for and affidavit in support of the ex parte order suspending placement; the circuit court's ex parte order suspending placement; and a letter Swatzak wrote to the Dane County District Attorney's office requesting the same type of investigation. Exhibit 37 was Swatzak's own compilation.

The trial lasted for four days. The theory of defense on the stalking charge was that Swatzak's behaviors, while bizarre, were not intended "to cause [Hannah] to fear for her life." Trial counsel argued that Swatzak became fixated on the belief that Hannah was being raped by a priest and that they were involved in an inappropriate relationship. He argued that an intent to stalk was inconsistent with Swatzak's compilation and dissemination of letters and information to law enforcement. Trial counsel also argued that Hannah became fearful of Swatzak only after

a police officer suggested that he was dangerous. In support, counsel offered the testimony of an attorney who had briefly represented Swatzak in connection with his divorce. She testified that she had a conversation with Hannah's divorce attorney about possibly settling a motion and was told by Hannah's attorney that settlement was unlikely because a police officer had told the attorney "to tell [Hannah] to get a restraining order because in his mind [Swatzak] fit the profile of someone who would take his wife and kids and kill them." During deliberations, the jury asked to see Exhibit 37. Neither party objected and the exhibit went back to the jury. The jury convicted Swatzak of stalking and two counts of burglary, and acquitted him on the nude photo charge.

Swatzak brought a postconviction motion alleging that his trial counsel provided ineffective assistance by failing to object to (1) the admission of the ex parte family court order, and (2) the court providing the TRO and the ex parte order to the jury during deliberations. At a ***Machner***[3] hearing, trial counsel testified that the case was unusual "in the sense that the majority of the State's evidence came from Mr. Swatzak in terms of writings that he provided to law enforcement and to the District Attorney's Office." Counsel testified: "Legally, I viewed those all as admissions against [a] party opponent[:] … Mr. Swatzak." When asked why he did not object to the admission of the ex parte order at trial, counsel testified that "the judge had already denied my objection in limine" to the TRO evidence and he was unaware "of anything that happened during the trial [] that would have likely caused the court to change its ruling." Believing that the circuit court would have similarly denied an objection to the ex parte family

[3] ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979) (where a defendant claims he or she received the ineffective assistance of trial counsel, a postconviction hearing "is a prerequisite … on appeal to preserve the testimony of trial counsel").

court order, counsel did not "want to draw more attention to [the orders] during the trial by objecting." The postconviction court determined that "defense counsel's failure to object to the jury receiving those exhibits was neither deficient performance nor prejudicial," and it denied Swatzak's motion. Swatzak appeals.

To demonstrate ineffective assistance, the defendant must prove both that counsel's performance was deficient and that the deficiency prejudiced the defense. ***State v. Carter***, 2010 WI 40, ¶21, 324 Wis. 2d 640, 782 N.W.2d 695. "To prove constitutional deficiency, the defendant must establish that counsel's conduct [fell] below an objective standard of reasonableness." ***State v. Love***, 2005 WI 116, ¶30, 284 Wis. 2d 111, 700 N.W.2d 62. The defendant must overcome the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." ***Strickland v. Washington***, 466 U.S. 668, 689 (1984). Whether counsel's actions were deficient or prejudicial is a mixed question of law and fact. ***Id.*** at 698.

To the extent that Swatzak maintains that trial counsel performed deficiently by failing to object to the admission of the ex parte family court order at trial, we disagree.[4] Trial counsel offered two reasons for not objecting. First, he testified that, given the circuit court's ruling on

[4] Swatzak concedes that, because trial counsel challenged the admissibility of the TRO evidence, he cannot argue that trial counsel was ineffective for failing to object to the admissibility of the injunction-related evidence. It is less clear whether Swatzak challenges trial counsel's failure to object to the admissibility of the ex parte family court order. In his appellate brief's statement of the issue, Swatzak asserts only that trial counsel was ineffective for "fail[ing] to object to both a restraining order petition and ex parte family court order being provided to the jury during deliberations." However, at one point in his appellate brief, he argues that "trial counsel was ineffective for failing to request the court to exclude evidence of the ex parte order in family court from use during the criminal trial." For the sake of completeness, we choose to address Swatzak's undeveloped argument that trial counsel performed deficiently by failing to object to the ex parte order's admissibility.

the admissibility of the TRO, he thought that an objection would be unsuccessful and would draw unwarranted attention to the order. Second, he considered the order admissible under WIS. STAT. § 908.01(4)(b)1.-2., as an admission by a party opponent.[5] The ex parte order was part of Exhibit 37, which as noted above was Swatzak's own creation and was hand-delivered to law enforcement. Swatzak has not filed a reply brief responding to the State's admissibility argument. We take Swatzak's lack of argument on this topic as a concession that the State is correct that the circuit court properly exercised its discretion to admit the evidence at trial, and that trial counsel's failure to object was not ineffective. *See* ***United Coop. v. Frontier FS Coop.***, 2007 WI App 197, ¶39, 304 Wis. 2d 750, 738 N.W.2d 578 (appellant's failure to respond in reply brief to an argument made in response brief may be taken as a concession).

Swatzak argues that trial counsel was ineffective for allowing the TRO and the ex parte order to go back to the jury during deliberations. First, we reject his contention that these papers constituted hearsay; they were admissible under WIS. STAT. § 908.01(4)(b)1.-2. Swatzak submitted them as part of a compilation designed to persuade authorities that he was being unfairly treated. As we explained previously, by not filing a reply brief effectively countering the State's arguments, he concedes the point.

Second, we reject his argument that the orders likely confused or misled the jury. The jury heard extensive testimony about the petitions and orders. Swatzak admitted engaging in the underlying behaviors and nothing in Exhibit 37 should have been much of a surprise to the jury.

[5] "A statement is not hearsay if" it is "offered against a party and is … [t]he party's own statement" or "[a] statement of which the party has manifested the party's adoption or belief in its truth[.]" WIS. STAT. § 908.01(4)(b)1.-2.

Third, we are not persuaded by Swatzak's proposition that it was "unfair for the jury to be able to read [Hannah's] written statement while not having a written summary of [Swatzak's] defense to the charges." Swatzak's reliance on ***State v. Jaworski***, 135 Wis. 2d 235, 242, 400 N.W.2d 29 (Ct. App. 1986), is misplaced. According to Swatzak, ***Jaworski*** stands for the proposition "that it is inequitable to allow one side to make its case with written statements while requiring the other side to rely on the jury's recollection of oral testimony." In Swatzak's case, he, himself, compiled Exhibit 37 and submitted it as a package. He did not testify at trial, and therefore there were no oral statements of his for the jury to recall. In fact, as trial counsel testified at the ***Machner*** hearing, Swatzak's defense "was all written in [the] letters" comprising Exhibit 37.[6] Trial counsel testified that he wanted to avoid Swatzak having to testify because he "was fearful that Mr. Swatzak would be pretty effectively cross-examined by the prosecutor with regards to those written statements[.]" Through Exhibit 37, the jury was exposed to Swatzak's views, as told through his own letters, without requiring him to face the risks of cross-examination. This was a reasonable strategy.

Upon the foregoing reasons,

IT IS ORDERED that the judgment and the order of the circuit court are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

[6] This included statements in Swatzak's letters and Hannah's affidavit that trial counsel asserted supported the defense theory that Hannah's fear arose from a police officer's statement that Swatzak fit the profile of someone "who could kill his wife and children." Trial counsel testified it was part of the theory of defense "that but for those statements [Hannah] was not fearful of [Swatzak] hurting her or causing her harm."

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

Sheila T. Reiff
Clerk of Court of Appeals