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DISTRICT I

January 20, 2021

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

2019AP560-CR State of Wisconsin v. Jennifer L. Garcia (L.C. # 2014CF2778)

Before Brash, P.J., Dugan and Donald, 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).

Jennifer L. Garcia appeals a judgment convicting her of eleven felonies related to her abuse of three-year-old T.B.-W. She also appeals the circuit court's order denying her motion for postconviction relief. Garcia argues: (1) that the circuit court erroneously exercised its discretion when it denied her counsel's motion to withdraw a week before trial; and (2) that she

received ineffective assistance of trial counsel. Based on the briefs and record, we conclude at conference that summary disposition is appropriate. *See* WIS. STAT. RULE 809.21 (2017-18).[1] Upon review, we affirm.

T.B.-W. was taken to the hospital from Garcia's home after Garcia's friend called 911 to report that T.B.-W. was unresponsive. T.B.-W. had a serious brain injury that caused him profound cognitive damage. In addition, his liver was lacerated and he had bruises, abrasions and burns on his body. After a jury trial, Garcia was convicted of one count of child abuse, intentionally causing great bodily harm; six counts of child abuse, intentionally causing harm; one count of neglecting a child, causing great bodily harm; one count of causing mental harm to a child; and three counts of conspiracy to intimidate a victim. The circuit court sentenced Garcia to an aggregate term of thirty-six years of initial confinement and eleven years of extended supervision.

Garcia argues that the circuit court erroneously exercised its discretion when it denied her trial counsel's motion to withdraw made one week before trial. "Whether counsel should be relieved and a new attorney appointed in his or her place is a matter within the [circuit] court's discretion." ***State v. Lomax***, 146 Wis. 2d 356, 359, 432 N.W.2d 89 (1988). When determining whether the circuit court properly exercised its discretion "a reviewing court must consider a number of factors including:" (1) whether the circuit court adequately inquired into the defendant's complaint; (2) "the timeliness of the motion"; and (3) "whether the alleged conflict between the defendant and [counsel] was so great that it likely resulted in a total lack of

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

communication that prevented an adequate defense and frustrated a fair presentation of the case." ***Id.*** "[T]he defendant must show 'good cause' to warrant substitution of counsel." ***Id.*** at 360. The circuit court should "balance[] the defendant's constitutional right to counsel against societal interest in the prompt and efficient administration of justice." ***Id.***

The circuit court questioned Garcia's counsel at some length about the reasons she was moving to withdraw. Counsel explained that Garcia wanted her to withdraw because there had been a complete breakdown in communication, Garcia was unhappy with her representation, and Garcia lacked confidence in her. Counsel also explained that Garcia believed that she was not working in Garcia's best interest and believed she may be sharing information with the State. Counsel informed the court that they had been having issues for several months but had been trying to work them out. The circuit court did not personally question Garcia about the reasons why Garcia wanted new counsel, but Garcia was present while her counsel explained the basis for the motion to the court.[2]

As for timeliness of the motion, the circuit court said that the timing of the motion was "extremely concerning" because the case had been pending for a year and counsel was moving to withdraw a week before trial. The circuit court noted that the State had already arranged travel for its out-of-state witnesses. The circuit court also stated that it believed that Garcia was making the request in order to delay the trial based on Garcia's demeanor; Garcia initially

[2] Garcia contends that the "better reading" of ***State v. Lomax***, 146 Wis. 2d 356, 432 N.W.2d 89 (1988), is that the circuit court should conduct a personal colloquy with a defendant. Garcia argues that this court should remand this matter to the circuit court so that she can explain her reasons for wanting to discharge counsel. ***Lomax*** does not mandate such a colloquy. Moreover, Garcia has not identified any specific reasons that would have supported her motion beyond the statements counsel previously made to the circuit court. She has therefore not shown any basis for the remand she seeks.

refused to come out of her cell to participate in court proceedings on the day the motion was made.

Turning to the extent of the conflict, the circuit court noted that there had been multiple pre-trial conferences over the weeks prior to counsel's motion to withdraw and Garcia had not indicated that there were any problems during those hearings. The circuit court said that Garcia had been able to work with her counsel and participate in her defense during the recent court hearings. The circuit court also said that despite Garcia's reservations about counsel's performance, Garcia's counsel was an excellent attorney who was litigating the case to the utmost on Garcia's behalf.

In sum, the circuit court adequately inquired into Garcia's complaint regarding counsel and concluded that the motion was made too close to the date of trial, Garcia was attempting to cause delay, and Garcia did not have a serious conflict with her counsel. The circuit court made a reasoned decision to deny counsel's motion to withdraw that was based on the proper legal standards and the facts of this case. Therefore, we conclude that the circuit court properly exercised its discretion in denying Garcia's motion for new counsel. *See* ***State v. Evans***, 2000 WI App 178, ¶7, 238 Wis. 2d 411, 617 N.W.2d 220 (describing that a circuit court properly exercises its discretion when it reaches "a reasonable conclusion based on proper legal standards and a logical interpretation of the facts").

Garcia next argues that she received ineffective assistance of counsel because her counsel should have objected to the State's cross-examination of Dr. Ophoven regarding her fees. To prove a claim of ineffective assistance of counsel, a defendant must show that his or her lawyer performed deficiently and that this deficient performance prejudiced him or her.

See ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). The test for deficient performance is whether "counsel's representation 'fell below an objective standard of reasonableness[.]'" ***State v. Carter***, 2010 WI 40, ¶22, 324 Wis. 2d 640, 782 N.W.2d 695 (citation omitted). To show prejudice, "the defendant must show that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" ***Id.***, ¶37 (citation omitted). A reviewing court may dispose of a claim of ineffective assistance of counsel on either ground. ***Strickland***, 466 U.S. at 697.

At trial, Dr. Ophoven opined that T.B.-W.'s brain injury was not the result solely of something that happened immediately before he became unresponsive. She testified that he had a pre-existing brain injury and that his unresponsive state was the result of a "collapse in circumstances" of the pre-existing injury that could have been caused by something as simple as slipping and falling. Garcia's counsel questioned Dr. Ophoven about her fee for working on the case. Dr. Ophoven explained that she charged $400 per hour, but capped the total fee at $5200, or thirteen hours of work, regardless of how many hours she worked for an evaluation. She further explained that she charged an additional maximum of thirteen hours for a written analysis and documentation of her findings and an additional fee of the same amount for testifying. She testified that the majority of her work has been for the defense since 2008. During cross-examination, the prosecutor brought out through questioning that Dr. Ophoven earned $16,200 for her work in this case and earns approximately $180,000 per year working almost exclusively for the defense.

Garcia acknowledges that expert fees may be relevant to show bias. *See* WIS. STAT. §§ 904.01, 904.02. She also concedes that the circuit court properly ruled that the evidence was relevant here because the bias of a witness may show a motive for the witness to be untruthful.

Cf. ***State v. Williamson***, 84 Wis. 2d 370, 383, 267 N.W.2d 337 (1978), *overruled on other grounds*, ***Manson v. State***, 101 Wis. 2d 413, 304 N.W.2d 729 (1981); *see also* WIS. STAT. § 906.11(2) ("A witness may be cross-examined on any matter relevant to any issue in the case, including credibility."). She contends, however, that the evidence should have been excluded under WIS. STAT. § 904.03, which provides that relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice[.]" She asserts that the evidence was unfairly prejudicial.

Garcia's argument that she received ineffective assistance of trial counsel fails. Had Garcia's trial counsel objected to the prosecutor's cross-examination regarding Dr. Ophoven's fees, counsel would not have been successful. Garcia's counsel put most of the fee information in front of the jury during direct examination, not the prosecutor. Garcia has presented no cogent argument that the cross-examination was unfairly prejudicial. Garcia contends that the jury may have seen the payments as "sinister," but what she really means is that the jury may have considered whether Dr. Ophoven had a monetary motive to testify that affected her credibility. That question was squarely in the jury's wheelhouse as trier of fact and arbiter of witness credibility. Counsel did not render ineffective assistance by failing to raise an issue that is meritless. *See* ***State v. Golden***, 185 Wis. 2d 763, 771, 519 N.W.2d 659 (Ct. App. 1994).[3]

[3] Garcia also appears to contend that her constitutional rights were violated because the State has an unfair advantage regarding expert testimony. She argues that she had to pay for an expert witnesses to assist her, and thus was subject to what she characterizes as unfair cross-examination regarding her expert's fees, while the State did not have to pay its expert witnesses because they were employees of the hospitals where T.B.-W. was treated. She also suggests that this was unfairly prejudicial to her. We reject these arguments because they are not adequately supported by relevant legal authority. *See* ***State v. Pettit***, 171 Wis. 2d 627, 647, 492 N.W.2d 633 (Ct. App. 1992) (we may decline to review issues that are inadequately developed).

Upon the foregoing,

IT IS ORDERED that the judgment and order of the circuit court are summarily affirmed. *See* WIS. STAT. RULE 809.21(1).

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

Sheila T. Reiff
Clerk of Court of Appeals