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DISTRICT II

March 3, 2021

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

2019AP812-CR

State of Wisconsin v. Rodney S. Peterson (L.C. #2017CF400)

Before Neubauer, C.J., Gundrum and Davis, 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).

Rodney S. Peterson appeals from a judgment convicting him of felony intimidation of a victim and from an order denying his postconviction motion seeking to withdraw his guilty plea due to ineffective assistance of trial 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 We affirm.

Peterson's conviction for intimidating a victim arose out of an incident at a PDQ store. In April 2017, relying on an alleged defect in the 1990s documents by which his family members sold the property occupied by the PDQ, Peterson and his mother attempted to forcibly repossess the property by taking control of the PDQ store and telling the PDQ employee to leave the premises. After checking with a manager, the employee informed Peterson that his family's ownership claims were false, he told Peterson to leave, and he started to call 911. As the employee was dialing, Peterson went behind the counter and pushed the employee while trying to wrest the telephone from him. The employee was able to reach 911, and Peterson left the PDQ. Peterson ultimately pled guilty to intimidating a witness; charges of disorderly conduct and terrorist threats were dismissed and read in.

Postconviction, Peterson sought to withdraw his guilty plea due to ineffective assistance of trial counsel because his counsel advised him that he did not have a defense of mistake to the victim intimidation charge. After an evidentiary hearing on Peterson's claim, the circuit court deemed credible trial counsel's testimony that he discussed the concept of mistake with Peterson but told Peterson that his reasons for entering the PDQ did not support a mistake defense. The circuit court concluded that Peterson was not prejudiced by trial counsel's opinion because the defense was not available under the circumstances of the case. Peterson appeals.

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

To withdraw a plea after sentencing, a defendant must show a manifest injustice justifying plea withdrawal. *State v. Brown*, 2006 WI 100, ¶18, 293 Wis. 2d 594, 716 N.W.2d 906. A manifest injustice can be shown if the defendant did not receive effective assistance of counsel in connection with the entry of the plea. *State v. Hudson*, 2013 WI App 120, ¶11, 351 Wis. 2d 73, 839 N.W.2d 147.

To succeed on an ineffective assistance of counsel claim, a defendant must demonstrate that counsel's representation was deficient and that the deficiency was prejudicial. *State v. Jeannie M.P.*, 2005 WI App 183, ¶6, 286 Wis. 2d 721, 703 N.W.2d 694. We will uphold the circuit court's factual findings unless they are clearly erroneous. *Id.* However, we review de novo whether counsel's performance was deficient or prejudicial. *Id.* To show prejudice arising from counsel's performance, a 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. A reasonable probability is 'a probability sufficient to undermine confidence in the outcome.'" *Id.*, ¶26 (citations omitted). We need not consider whether trial counsel's performance was deficient if we can resolve the ineffectiveness issue on the ground of lack of prejudice. *State v. Moats*, 156 Wis. 2d 74, 101, 457 N.W.2d 299 (1990).

On appeal, Peterson argues that his trial counsel was ineffective because he incorrectly advised him that he could not assert a WIS. STAT. § 939.43(1)² defense of mistake to victim intimidation. Peterson argues that victim intimidation required proof of his subjective mental state because he had to have acted against the victim "knowingly and maliciously." See WIS JI—

² WISCONSIN STAT. § 939.43(1) defines mistake as "[a]n honest error, whether of fact or of law other than criminal law, is a defense if it negatives the existence of a state of mind essential to the crime."

CRIMINAL 1296; WIS. STAT. §§ 940.44 and 940.45(1).³ To negate that required state of mind, § 939.43(1), Peterson offers his mistaken belief that his family owned the PDQ property.

The record does not support Peterson's theory. The victim intimidation charge arose from Peterson's conduct toward the PDQ employee. The factual basis for Peterson's plea to victim intimidation was found in the amended complaint: when the employee told Peterson to leave the PDQ, Peterson "then went behind the front counter, where [the employee] was standing. As [the employee] began dialing 911 on his phone, [Peterson] pushed [the employee] and tried to take the phone out of his hand." Peterson's knowing and malicious act, WIS JI—CRIMINAL 1296, was pushing the employee and trying to take the telephone out of his hand so that he could not contact law enforcement.⁴ The mistake Peterson relies upon for his defense—the Peterson family still owned the PDQ property and had a legal right to take possession of it—has nothing to do with Peterson's conduct toward the employee. There is no reasonable argument that Peterson's conduct toward the employee was other than disorderly, i.e., violent and abusive.⁵

³ WISCONSIN STAT. §§ 940.44 and 940.45(1) prohibit intimidating a victim by use of force or violence or attempted use of force or violence to "knowingly and maliciously prevent[] or dissuade[], or who attempts to so prevent or dissuade, another person who has been the victim of any crime or who is acting on behalf of the victim from" "[m]aking any report of the victimization to any peace officer or state, local or federal law enforcement or prosecuting agency."

⁴ Peterson did not limit his interaction with the PDQ employee to a discussion about the Peterson family's claims. Rather, Peterson got physical with the employee by force or use of force when the employee started to call 911, intimidating him.

⁵ WISCONSIN STAT. § 947.01(1) deems guilty of disorderly conduct a person who "in a public or private place, engages in violent, abusive, indecent, profane, boisterous, unreasonably loud or otherwise disorderly conduct under circumstances in which the conduct tends to cause or provoke a disturbance." Under the victim intimidation statute, "if the disorderly conduct is directed at a person, then that person is the victim of disorderly conduct as a matter of fact for the purpose of prosecuting a defendant with intimidation of a victim." *State v. Vinje*, 201 Wis. 2d 98, 104, 548 N.W.2d 118 (Ct. App. 1996).

We conclude that Peterson’s counsel was not deficient in advising Peterson that a mistake defense was not viable. Nor was Peterson prejudiced by such advice; more likely he was benefitted by it.⁶ Having failed to establish ineffective assistance of trial counsel, Peterson did not establish a manifest injustice warranting withdrawal of his guilty plea.

Upon the foregoing reasons,

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

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

Sheila T. Reiff
Clerk of Court of Appeals

⁶ We observe that during the evidentiary hearing, trial counsel testified that a jury would not have accepted a mistake defense given the video depicting the incident and Peterson’s conduct in the store, his actions toward the employee, his flight from the store after the employee connected with the 911 operator, his flight from the state, and his subsequent telephone calls threatening to harm the employee and others connected with PDQ. The trial court expressly found counsel’s testimony “credible”.