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DISTRICT II

September 29, 2021

To:

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Circuit Court Judge
Electronic Notice

Patricia J. Hanson
District Attorney
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Clerk of Circuit Court
Racine County
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You are hereby notified that the Court has entered the following opinion and order:

2020AP1523-CR State of Wisconsin v. Daniel R. Nelson (L.C. #2018CF706)

Before Neubauer, Reilly and Grogan, 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).

Daniel R. Nelson appeals from his judgment of conviction and from the circuit court's order denying his motion for postconviction relief, arguing that his trial counsel provided ineffective assistance. Nelson claims that the court erred when it determined that while trial counsel's performance was constitutionally deficient, the deficient performance was not prejudicial. 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 (2019-20).[1] We affirm.

In May 2018, Nelson's father, Mike Nelson (the father), contacted law enforcement and reported that he found marijuana under the bed in Nelson's room.[2] An officer with the Village of Sturtevant responded to the home, collected the marijuana, and asked to search Nelson's room. The father consented, and the officer found "several vials filled with what [she] believed to be pre-rolled marijuana cigarettes" and two cellphones. The officer testified that while she "lifted up the mattress," she did not "believe" that she "search[ed] underneath the bed." Her report indicated that she "was advised by [the father] that he looked under the bed already and did not notice anything further. Therefore, [she] turned over the mattress to search between the mattress and box spring, but [she] did not search under the bed."

The next day, the father again contacted police, alleging that he found a gun, a scale,[3] and some papers under the bed when he went in to "clean [Nelson's room] more efficiently." When asked how he did "not see the firearm the day before," the father testified that "[i]t's dark under the bed and it was farther back against the wall." The same officer responded and collected the gun and another cellphone.

[1] All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

[2] Nelson lived in the father's home.

[3] The father testified that he found the scale under the bed at the same time that he found the gun, which he turned over to police. The officer testified, however, that she had no record of a scale. On cross-examination, the father admitted he was not sure when he found the scale, stating that he "might have found the scale on a later date." The father indicated that he "brought the scale in days later" but did not "get the name of the officer that [he] gave the scale[] to."

The State charged Nelson with one count of being a felon in possession of a firearm, contrary to WIS. STAT. § 941.29(1m)(a), and one count of possession with intent to deliver THC as a second or subsequent offense, contrary to WIS. STAT. §§ 961.41(1m)(h)2. and 961.48(1)(b). At trial, defense counsel's theory of the case was that the evidence had been planted in Nelson's room, possibly by the father, and, as a result, counsel attempted to highlight the contentious relationship between Nelson and his father. Trial counsel questioned the father about written communications that he had with Nelson, specifically two letters that had been provided to trial counsel. When it became apparent, however, that counsel was reading quoted language from the documents the State objected, explaining that those documents were not disclosed to the State previously, despite its WIS. STAT. § 971.23 discovery request. Trial counsel argued that he did not disclose the letters to the State because he did not intend to introduce the letters at trial. After reviewing the documents outside the presence of the jury, the court prohibited trial counsel from asking further questions regarding the letters.[4] The jury found Nelson guilty of both charges, and the circuit court sentenced him on both counts, with a concurrent sentence on count two, for a nine-year-total bifurcated sentence.

Nelson filed a WIS. STAT. § 809.30 motion for postconviction relief, arguing that his trial counsel provided ineffective assistance by failing to disclose the father's two letters to the State, which resulted in the court excluding the evidence and refusing to allow additional questions.

[4] Initially, the State expressed its "concern" that discussing the letters had "opened the door that [Nelson] was in custody," and then later noted the discovery issue. At the suggestion of the State, the court agreed to allow trial counsel to ask the father if he had written any letters to Nelson before May 16, 2018, when Nelson went into custody. If the father answered no, then counsel would ask no further questions. When questioned, the father admitted that he had left possibly four notes instructing Nelson to get rid of his cars, to stop swearing, and to not stay out so late at night prior to May 16, 2018.

The court held a ***Machner***[5] hearing. Trial counsel testified that he thought the letters "offer[ed] a possible explanation as to if the evidence was in fact planted, who might have been the person who planted it." According to counsel, the letters indicated the father's feelings that Nelson "had not been living his life correctly; that he hadn't found God; that he was living in sin and that he needed to amend his ways and needed to change his ways" and that the father "no longer wanted … Nelson to reside" in his home. There was no mention in the letters, however, about the father "placing the items under the bed," nor did the letters mention "the gun or the [marijuana] … at all." At the hearing, trial counsel, for the first time, admitted that he did actually "intend to offer [the] letters as exhibits at trial," noting that he "made reference to [the] letters in [his] opening statement to the jury." Counsel admitted his error in not turning over the father's letters upon the State's discovery demand and took "full responsibility" for the mistake: "I messed up. I missed it. I shouldn't have failed to respond, but I did fail to respond."

The circuit court denied Nelson's motion by written decision. While the court found that trial counsel's performance was constitutionally deficient, it concluded that there was not a "reasonable probability that the result of the proceeding would have been different," finding that trial counsel's "cross-examination was thorough and effective." Nelson appeals.

We review a claim of ineffective assistance of counsel under a well-established standard: the defendant must prove that counsel's performance was deficient and that the deficient performance prejudiced his or her defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); ***State v. Thiel***, 2003 WI 111, ¶¶18-20, 264 Wis. 2d 571, 665 N.W.2d 305. To establish

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

deficient performance, the defendant must demonstrate that counsel's "acts or omissions were outside the wide range of professionally competent assistance" and were "errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Strickland***, 466 U.S. at 687, 690. Once deficient performance is established, the second prong requires that the defendant establish that counsel's deficient performance was prejudicial, meaning "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." ***Strickland***, 466 U.S. at 687. In other words, 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. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** at 694; ***State v. Breitzman***, 2017 WI 100, ¶39, 378 Wis. 2d 431, 904 N.W.2d 93.

Both deficient performance and prejudice present a mixed question of fact and law. ***Thiel***, 264 Wis. 2d 571, ¶21. We uphold the circuit court's findings of fact unless clearly erroneous. ***Id.*** "Whether counsel's performance satisfies the constitutional standard for ineffective assistance of counsel is a question of law, which we review de novo." ***Id.*** We need not address both prongs of the test if the defendant fails to prove one. *See* ***Strickland***, 466 U.S. at 697; ***Breitzman***, 378 Wis. 2d 431, ¶37.

In this case, Nelson argues a "single prejudicial error": trial counsel failed to provide the two letters in response to the State's discovery request, which resulted in the circuit court excluding the evidence and refusing to allow further questions regarding the letters. According to Nelson, trial counsel's deficiency resulted in the jury not being "presented with [the father's] own beliefs about his son," which "cut to the very heart of [Nelson's] trial strategy" and "necessarily undermines the confidence in the result of the trial." The State, in contrast, argues

that the father's letters "would have hurt Nelson's trial defense rather than help it," as the letters contained information prejudicial to Nelson; trial counsel's cross-examination sufficiently "highlighted [the father's] contentious relationship with his son"; and the "witness testimony describing how the physical evidence in this case was discovered severely undermined Nelson's theory that his father planted it in Nelson's room."

We conclude, like the circuit court, that Nelson was not prejudiced by trial counsel's deficient performance, as there is not a "reasonable probability" that "the result of the proceeding would have been different."[6] *See* ***Strickland***, 466 U.S. at 694. Nelson has done little more than make conclusory arguments that there was prejudice based on his defense theory that his father set him up. Trial counsel's cross-examination of the father brought to light the relationship between father and son, which was fraught with "tension and stress" that "was always there." The father testified that Nelson "lies to [him] a lot" and that after this incident the father told Nelson he did not want him living at home with him anymore. According to the father, "I said that [Nelson] hasn't found Jesus and he's not welcome in my house." The father also testified that he did not want Nelson to "have a car," but that Nelson had "these junk cars sitting … on [his] property" that he failed to remove. The father explained that while "[i]t wasn't easy" to call the police on his son, "it was necessary" because "[h]e broke the law." The circuit court found that "the father came across as credible and sincere," at one point becoming "overcome with emotion on redirect with the State" that he was "losing his son." Introducing the letters would

[6] Given the ***Strickland*** Court's instruction that we need not address both prongs, we will assume, without deciding, that the circuit court was correct in its conclusion that Nelson's trial counsel's performance was constitutionally deficient. *See* ***Strickland v. Washington***, 466 U.S. 668, 697 (1984).

have, at best, merely supported the testimony the father gave on cross-examination, and, at worst, may have prejudiced his defense by introducing facts negative to Nelson.

"In assessing prejudice under ***Strickland***, the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently. Instead, ***Strickland*** asks whether it is 'reasonably likely' the result would have been different." ***Harrington v. Richter***, 562 U.S. 86, 111 (2011) (citations omitted). "That requires a 'substantial,' not just 'conceivable,' likelihood of a different result." ***Cullen v. Pinholster***, 563 U.S. 170, 189 (2011) (citation omitted). As the circuit court explained, Nelson would like us to "find, now, that a jury could have found that the father was so upset with his son's behavior and 'junk' vehicles in the driveway, that the father procured … marijuana and a firearm and hid such contraband in the son's bedroom. Further, that the father was not satisfied with the police removing the … marijuana on the first day, that the father then planted a firearm in his son's bedroom and called the police again to the house." And, Nelson asks us to conclude that there is a substantial likelihood that the jury would have been swayed to this theory of the case had trial counsel's error not precluded the letters—which do not mention the marijuana or the gun—from reaching the jury. As the court's decision implied, while this series of events may be conceivable, it was far from substantially likely under the circumstances of the case. Nelson's claims fail to demonstrate that had the letters been shown to the jury or had trial counsel been allowed to continue to question the father regarding the content of the letters, the jury's credibility determinations or verdict would have been different.

IT IS ORDERED that the judgment and order of the circuit court 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