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DISTRICT IV

June 9, 2022

To:

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Circuit Court Judge
Electronic Notice

Cindy Hamre Incha
Clerk of Circuit Court
Jefferson County Courthouse
Electronic Notice

Monica J. Hall
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You are hereby notified that the Court has entered the following opinion and order:

2020AP321-CR State of Wisconsin v. Jeffrey J. Hoppe (L.C. # 2018CF211)

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

Jeffrey Hoppe, by counsel, appeals his judgment of conviction and a circuit court order denying his postconviction motion for a new trial. 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 summarily affirm.

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

Hoppe was charged with one count of strangulation and suffocation, one count of misdemeanor battery, and one count of disorderly conduct, all with domestic abuse enhancers. The charges arose from an incident that occurred on April 30, 2018. A.B.,[2] who was Hoppe's girlfriend at the time, reported to police that she had been asleep on the couch when Hoppe came home intoxicated and grabbed her by the biceps and shoulders, hit her, and dragged her up the stairs by putting her in a chokehold, which caused her to lose consciousness. A jury found Hoppe guilty on all three counts.

Through his appointed postconviction counsel, Hoppe filed a motion for a new trial, arguing that his trial counsel, David Zarwell, was ineffective for failing to present a defense theory that A.B. and Hoppe's ex-wife, C.D.,[3] colluded to make up false allegations of abuse against Hoppe. The motion alleged that Hoppe's former attorney, Jeff De La Rosa, had withdrawn from the case after seeing A.B. and C.D. talking near the courthouse before Hoppe's probation revocation hearing. The motion further alleged that C.D. had a pattern of lying, as demonstrated by her admission that she had lied to Hoppe's parole agent in the past. Hoppe argued that, if Zarwell had presented evidence at trial that A.B. and C.D. colluded with each other, the jury likely would have acquitted Hoppe.

The circuit court held an evidentiary hearing pursuant to ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). The court heard testimony from Attorney Zarwell, Attorney De La Rosa, and Hoppe. Zarwell testified that he and Hoppe discussed the possibility

[2] To protect the identity of the victim, we refer to her as "A.B." *See* WIS. STAT. RULES 809.19(1)(g) and 809.86.

[3] We refer to Hoppe's ex-wife by the initials "C.D."

of a defense that would be based on the allegation that A.B. and C.D. had colluded to present false evidence. Zarwell testified that he decided not to pursue that defense because there were several issues that caused him concern. In addition to the conversation that occurred between the two women outside the courthouse, there was also evidence that C.D. went with A.B. to the police department when A.B. reported the abuse. Zarwell testified, "I think the fact that they were kind of a support unit for each other, being there for each other would have been a more valid argument than simply they were conspiring out in the open against Mr. Hoppe." Zarwell testified that, in his view, the public nature of the meetings between A.B. and C.D. did not "really go with a conspiracy" since they were "out there in the open doing it." Zarwell also testified that there was "very limited evidence" to support a theory of collusion to frame Hoppe.

Zarwell testified that he also had concerns that, if he introduced evidence to support a theory of collusion to frame Hoppe between A.B. and C.D., it would have led to C.D. testifying about "prior bad acts" that Hoppe had committed, which could have "opened doors to the D.A. bringing in other prior bad acts that" the circuit court had precluded in pre-trial rulings. Zarwell testified that he was aware that Hoppe had a significant history of criminal convictions and had previously been charged in a domestic abuse case involving C.D. Zarwell testified that he was also aware that A.B. had told police that she had experienced other incidents of abuse by Hoppe that preceded the April 2018 incident.

In addition, Zarwell testified that, if he had called De La Rosa as a witness to testify about the encounter that De La Rosa had observed between A.B. and C.D. outside the courthouse, the jury may have learned that Hoppe was on extended supervision.

De La Rosa testified at the ***Machner*** hearing that, on the day he observed A.B. and C.D. conversing, he had been at the courthouse to represent Hoppe at a probation revocation hearing. De La Rosa testified that, after he saw A.B. and C.D. conversing, he withdrew from representation of Hoppe because there was a possibility that De La Rosa would be a fact witness related to "some sort of collusion" between the two women.

Hoppe testified at the ***Machner*** hearing that it was his idea to argue, as a defense, that C.D. encouraged A.B. "to falsify abuse reports against" him. Hoppe testified that he kept pushing the issue at trial, but that Zarwell told him "it would be like throwing spaghetti or some such material at the wall to see what would stick." Hoppe testified that Zarwell was uncomfortable with moving forward with Hoppe's idea of a collusion defense.

After hearing all of the testimony, the circuit court denied Hoppe's postconviction motion for a new trial, concluding that Zarwell had not performed deficiently and that, if he had, "it would not have reasonably led to a differing result." The circuit court determined that Zarwell's decision not to pursue a collusion defense was a strategic decision and not deficient performance. The court stated that, if Zarwell had pursued the collusion theory that Hoppe had pushed for at trial, "it would have led to a greater likelihood of conviction." The court reasoned, "I think that a defense position that the two had conspired leads naturally to greater amounts of bad acts coming in …. If more of it comes in, the less likely that there's going to be an acquittal."

The sole issue that Hoppe presents for this court's review is whether Zarwell was ineffective for failing to raise a collusion/falsification defense. To establish ineffective assistance of counsel, a defendant must show both that counsel performed deficiently and that counsel's deficient performance prejudiced the defense. ***State v. Jenkins***, 2014 WI 59, ¶35, 355

Wis. 2d 180, 848 N.W.2d 786. To establish deficient performance, the defendant must show that counsel's representation fell below an objective standard of reasonableness. ***Id.***, ¶36. To establish prejudice, the defendant must show that, absent counsel's error, there was a reasonable probability of a different result. ***Id.***, ¶49. Whether counsel's performance satisfies the constitutional standard for ineffective assistance of counsel is a question of law that appellate courts review de novo. ***State v. Thiel***, 2003 WI 111, ¶21, 264 Wis. 2d 571, 665 N.W.2d 305.

We conclude that it was a reasonable, strategic decision—and not deficient performance—for Zarwell not to pursue a theory of defense that A.B. and C.D. colluded to falsify allegations of abuse against Hoppe. As discussed above, the record establishes that Zarwell had multiple strategic reasons for his decision that were well rooted in fact and law. A strategic trial decision rationally based on the facts and law will not support an ineffective assistance claim. ***State v. Elm***, 201 Wis. 2d 452, 464–65, 549 N.W.2d 471 (Ct. App. 1996). Trial counsel enjoys wide latitude in strategic and tactical decision-making. ***Cullin v. Pinholster***, 563 U.S. 170, 195 (2011). A circuit court's finding that counsel's trial strategy was appropriate and reasonable "is virtually unassailable in an ineffective assistance of counsel analysis." ***State v. Maloney***, 2004 WI App 141, ¶23, 275 Wis. 2d 557, 685 N.W.2d 620.

Evidence of contact between A.B. and C.D., had it been presented at trial, could likely have been interpreted by the jury as acts of support for one another against a repeat domestic abuser, rather than as a scheme to present false evidence incriminating Hoppe. In addition, Zarwell had a reasonable basis to fear that evidence of contacts between A.B. and C.D. would have opened the door for admission of incriminating evidence related to Hoppe's extensive alleged history of prior bad acts, including prior allegations of domestic violence. In light of the scant nature of any evidence of collusion to present false evidence, weighed against the

significant risks that introduction of that evidence carried for the defense, Hoppe fails to show that Zarwell performed deficiently. Given this conclusion, we need not and do not address the prejudice prong under ***Strickland v. Washington***, 466 U.S. at 668, 697.

Therefore,

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