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DISTRICT II

October 23, 2024

To:

Hon. Bryan D. Keberlein
Circuit Court Judge
Electronic Notice

Desiree Bongers
Clerk of Circuit Court
Winnebago County Courthouse
Electronic Notice

Jeremy Newman
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Jacob J. Wittwer
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You are hereby notified that the Court has entered the following opinion and order:

2023AP1448-CR State of Wisconsin v. Brandon D. Fahley (L.C. #2021CF26)

Before Neubauer, Grogan and Lazar, 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).

Brandon D. Fahley appeals a judgment, entered following a jury trial, convicting him of first-degree sexual assault of a child under the age of thirteen. He also appeals an order denying postconviction relief. On appeal, Fahley argues he is entitled to resentencing because trial counsel's sentencing statements violated his right to assert a defense of innocence pursuant to ***McCoy v. Louisiana***, 584 U.S. 414 (2018), or because counsel provided ineffective assistance at sentencing. 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 (2021-22).[1] We summarily affirm.

A jury convicted Fahley of first-degree sexual assault of a child under the age of thirteen. At trial, the State presented testimony from Fahley's victim along with a recording of the victim's forensic interview. The State also presented testimony from a woman, who Fahley met through a dating website. The woman testified that she and Fahley would text all day and talk on the phone a couple of times per week. The woman testified that one night, an intoxicated Fahley admitted to her that he touched the victim. The woman reported Fahley's confession to authorities.

The State also presented testimony from police who interviewed Fahley along with Fahley's recorded interview. In the interview, Fahley denied touching the victim. However, Fahley's denials ranged from—"I don't believe I did this"—to—"100 percent certainty" that he did not touch the victim. At one point, when asked if he touched the victim, Fahley said: "[N]o, not that I'm a-fucking-ware of. I don't do bad things."

When the interviewer said that "not that you['re] aware of ... kind of leaves an opening there," Fahley responded that he had been drinking a lot lately. He said that since he broke up with his fiancée, "I have a drinking problem. I drink daily, but it's no more than any other day and there's no amount of alcohol that's going to fucking get me to do something like that, there's just no way." Fahley said that he drinks "three or four beers" and "three or four shots a night," and he agreed that this was enough for him to "lay down and basically pass out." At trial, the

[1] All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

interviewing officer testified that he took Fahley's comments about having a drinking problem to be an admission that he had been drinking on the night of the assault.

Fahley testified he never touched the victim, and he denied the victim's version of events. When asked if he was intoxicated that night, Fahley responded, "I would not say I was intoxicated." He also denied that he told the woman from the dating website that he touched the victim. The jury convicted him as charged.

At sentencing, Fahley's trial counsel stated, in part: "[F]rom the beginning of this case Mr. Fahley has maintained the same position, that—essentially that he did not intentionally do this and that's why we had a trial." Counsel continued: "Mr. Fahley told the officers that essentially he was intoxicated. It could have happened and that was what the officer testified to at trial. So the issue is whether he intended to have sexual gratification I guess for this." Trial counsel noted Fahley had obtained treatment for his drinking problem and had already suffered serious consequences including being placed on leave from his job. Fahley did not allocute.

The circuit court noted Fahley's explanation of what happened had shifted during the case. It stated:

> It's been everything from maybe I did it, I'm not sure what I did. Initial talk with the officer, he didn't outright deny it. That's certainly the case. So then the more he started talking about it, the more he started thinking about it, well, I couldn't have done that. People are going to think I'm a monster, like he was convincing himself he didn't do it. Then he talks with [the woman from the dating website]. That was … substantial testimony in terms of someone else. Denied and denied and then admitted and then denied.

The court observed that Fahley's level of intoxication:

> is a factor in terms of when the defendant says he remembers it clearly now where at the time with the officer it sounded more like that's why he was a little confused or not quite as sure, because of how much alcohol he had had.
>
> So just many different versions to now hearing today, well, he didn't intentionally do it. That's opening up the door again to, well, maybe he did it, but he didn't intentionally do it. Part of that may be because of the alcohol.

Ultimately, the court sentenced him to four years of initial confinement and ten years of extended supervision.

Fahley moved for postconviction relief. He argued he was entitled to resentencing because his trial counsel's sentencing statements violated his right to assert a defense of innocence pursuant to ***McCoy***, or because counsel provided ineffective assistance at sentencing. In support of his motion, Fahley emphasized trial counsel's sentencing statement that Fahley "has maintained the same position, that—essentially that he did not intentionally do this and that's why we had a trial." He argued that his trial counsel's sentencing statements constituted "an implicit concession to the state's 'intoxication' theory, which was contrary to Mr. Fahley's clear, consistent, and repeatedly expressed assertion of absolute innocence."

The circuit court held a ***Machner***[2] hearing. At the hearing, trial counsel testified that Fahley's initial statement to police could be construed as an admission that he was intoxicated, and counsel acknowledged this evidence at sentencing "to soften the judge's opinion of the case," and maybe avoid "ten instead of four years in prison." Counsel believed the judge "would go easier on [Fahley] if she knew that he may have not done it intentionally or had been

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

intoxicated." Trial counsel said that he talked with Fahley about "softening" up the judge with this acknowledgement, and Fahley did not object to this strategy.

Fahley testified, "[W]e never had any kind of discussion on a [sentencing] strategy or what his intentions were at sentencing." Fahley then stated: "I believe at one time [counsel] did say that maybe we should go in there admitting guilt or something like that. I don't—not in those exact words … And I said absolutely not."

The circuit court denied Fahley's postconviction motion. Fahley renews his arguments on appeal.

We first address Fahley's argument that his trial counsel's sentencing statements violated his right under ***McCoy*** to maintain his innocence. "In ***McCoy***, the Court held that trial counsel cannot concede a client's guilt when a client expressly asserts that the objective of the defense is to maintain innocence and the client objects to the concession of guilt." ***State v. Chambers***, 2021 WI 13, ¶2, 395 Wis. 2d 770, 955 N.W.2d 144. "[T]his error is structural, and one for which a new trial is required." ***Id.*** "[T]o succeed on a ***McCoy*** claim, the defendant must show that he or she 'expressly assert[ed] that the objective of 'his defence' is to maintain innocence of the charged criminal acts' and the lawyer did not 'abide by that objective and [overrode] it by conceding guilt.'" ***Id.***, ¶20 (citation omitted).

As a threshold matter, the State emphasizes that ***McCoy*** has only been applied to the guilt phase of a trial and questions whether it applies after a jury has convicted a defendant. We need not resolve whether ***McCoy*** applies to the sentencing stage because we conclude Fahley acquiesced to trial counsel's sentencing strategy. Trial counsel's strategy was to acknowledge the evidence from trial, which included Fahley's own statements to police that as far as he was

aware he did not assault the victim and that he had been drinking. Trial counsel explained that acknowledging the evidence was part of his strategy of "softening" up the judge, and he had discussed this strategy with Fahley, who in turn did not object to counsel's strategy. The circuit court implicitly found trial counsel credible. *See* ***Jacobson v. American Tool Cos., Inc.***, 222 Wis. 2d 384, 390, 588 N.W.2d 67 (Ct. App. 1998) ("If a circuit court does not expressly make a finding about the credibility of a witness, we assume it made implicit findings on a witness' credibility when analyzing the evidence."). Fahley's ***McCoy*** argument fails.

We next turn to Fahley's argument that trial counsel's sentencing statements amounted to ineffective assistance of counsel. To establish a claim of ineffective assistance, a defendant must prove both: (1) deficient performance by counsel; and (2) prejudice resulting from that deficient performance. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). We need not address both elements of the ineffective assistance test if the defendant fails to make a sufficient showing on one of them. ***State v. Dalton***, 2018 WI 85, ¶32, 383 Wis. 2d 147, 914 N.W.2d 120.

"To demonstrate deficient performance, a defendant must show that counsel's representation fell below an objective standard of reasonableness considering all the circumstances." ***Id.***, ¶34. "In evaluating counsel's performance, this court is highly deferential to counsel's strategic decisions." ***Id.***, ¶35. We must make "every effort ... to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." ***Strickland***, 466 U.S. at 689. "Counsel's performance need not be perfect, or even very good, to be constitutionally adequate." ***Dalton***, 383 Wis. 2d 147, ¶35.

We conclude trial counsel's sentencing statements did not amount to deficient performance. As noted above, trial counsel testified that his sentencing statements were part of his strategy to acknowledge the evidence at trial and try to "soften up" the judge for sentencing. We agree with the circuit court that trial counsel pursued a reasonable trial strategy and therefore Fahley cannot establish deficient performance. *See* ***id.***, ¶¶34-35.

Upon the foregoing reasons,

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

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

Samuel A. Christensen
Clerk of Court of Appeals