OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT II/IV

February 19, 2013

To:

Hon. James R. Kieffer
Circuit Court Judge
Waukesha County Courthouse
515 W. Moreland Blvd.
Waukesha, WI 53188

Kathleen A. Madden
Clerk of Circuit Court
Waukesha County Courthouse
515 W. Moreland Blvd.
Waukesha, WI 53188

Gregory Bates
Bates Law Offices
P.O. Box 70
Kenosha, WI 53141-0070

Katherine Desmond Lloyd
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Brad Schimel
District Attorney
515 W. Moreland Blvd.
Waukesha, WI 53188-0527

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

2012AP1123-CR State of Wisconsin v. Michael A. Conley (L.C. # 2010CF648)

Before Lundsten, P.J., Higginbotham and Blanchard, JJ.

Michael Conley appeals judgments convicting him of strangulation and misdemeanor battery, and an order denying his postconviction motion for relief from those judgments. Conley argues that trial counsel was ineffective in two respects: failing to discover before trial a recording of a 911 call that Conley made and giving Conley mistaken legal advice. 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(1) (2011-12).[1] We affirm.

Conley was charged with strangulation, misdemeanor battery, robbery with use of force, criminal trespass, and misdemeanor intimidation of a victim. All of the charges were in connection with an incident in which Conley was alleged to have entered the victim's apartment without permission, demanded money, and attacked the victim, including by choking her and poking her with a stick.

The State offered Conley a plea bargain under which he would plead guilty to the strangulation charge, a felony. As part of the offer, the State would recommend three years of initial confinement and three years of extended supervision on that charge.[2] Conley did not accept the State's offer and proceeded to trial on all five charges.

In the midst of trial, defense counsel learned from the State that there was a recording of a 911 call that Conley made after the incident. The prosecutor had been aware of the recording but had not realized before trial that it was of a telephone call made by Conley, not a call made by the victim. The recording of the call revealed Conley making incriminating statements, including that the victim might need medical attention, that he had used a stick to poke her in the back, that he had "wrapped [the stick] around her neck," and that "it was completely vicious."

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

[2] The parties dispute whether the State's offer was that Conley would plead guilty to the strangulation charge or to both the strangulation and battery charges. The grounds on which we decide this appeal do not require us to resolve this dispute.

Conley pled guilty to the strangulation and battery charges but proceeded with trial on the remaining charges. The jury found Conley not guilty on the robbery charge and guilty on the criminal trespass charge. The circuit court dismissed the intimidation of a victim charge for lack of evidence.

The two-pronged test for an ineffective assistance of counsel claim requires a defendant to prove both deficient performance and prejudice. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). "To show prejudice from ineffective assistance of counsel where a plea offer has lapsed or been rejected because of counsel's deficient performance, defendants must demonstrate a reasonable probability they would have accepted the earlier plea offer had they been afforded effective assistance of counsel." ***Missouri v. Frye***, 132 S. Ct. 1399, 1409 (2012).

Conley argues that counsel's failure to discover the 911 call recording before trial resulted in prejudice because Conley "lost the opportunity to accept the State's original [plea] offer" and was therefore "denied the opportunity of effective plea-bargaining." We disagree with Conley and instead agree with the State's argument that Conley fails to show a reasonable probability that he would have accepted the State's original plea offer if he and his counsel had been aware of the 911 call recording. As the State points out, Conley ultimately conceded at the postconviction hearing that, "I don't know what I would have done," when asked about whether he would have taken the original plea offer knowing about the 911 call recording. Conley fails to reply on this point. In addition, Conley's postconviction testimony strongly suggested that, at the time of the original plea offer, he had been unwilling to enter a plea that would expose him to imprisonment beyond time served. Similarly, Conley's counsel testified that Conley did not at that time want to plead guilty to strangulation or any other felony and was interested only in a plea deal that was "more along the line of time-served." All of this testimony supports a

conclusion that it was not reasonably probable that Conley would have accepted the State's original plea offer even if he and counsel had then been aware of and considered the 911 call recording.

Conley also argues that counsel's failure to discover the 911 call recording before trial was prejudicial because it deprived him of the opportunity to seek suppression of the recording. We reject this argument because Conley fails to explain why a motion to suppress might have had merit. *See* ***State v. Harvey***, 139 Wis. 2d 353, 380, 407 N.W.2d 235 (1987) (counsel does not act ineffectively by failing to bring fruitless suppression motions).

Finally, Conley argues that he was prejudiced because he chose to proceed to trial on the robbery and criminal trespass charges based on mistaken legal advice by counsel on the viability of those charges. However, the portion of the record Conley cites for this argument shows that, assuming without deciding that counsel gave mistaken advice, it would have been only as to the robbery charge on which Conley was acquitted. Accordingly, Conley has not shown prejudice even assuming mistaken advice by counsel.

Therefore,

IT IS ORDERED that the judgments and order are summarily affirmed pursuant to WIS. STAT. RULE 809.21(1).

Diane M. Fremgen
Clerk of Court of Appeals