STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2014AP1362-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JOHN BEAL,

Defendant-Appellant.

APPEAL FROM A JUDGMENT AND ORDER OF THE
CIRCUIT COURT FOR MILWAUKEE COUNTY,
MARY TRIGGIANO AND LINDSEY GRADY, JUDGES

BRIEF FOR PLAINTIFF-RESPONDENT

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ORAL ARGUMENT AND PUBLICATION

There is no need for oral argument of this appeal because it would add nothing to the arguments in the briefs. The opinion should not be published because this appeal involves only the application of settled law to the facts of this case.

ARGUMENT

Beal failed to show that his attorney was ineffective for not calling him as a witness after telling the jury that he would testify.

A criminal defendant who claims his attorney was ineffective has a dual burden to prove both that his attorney's performance was deficient and that the deficient performance prejudiced his defense. *State v. Allen*, 2004 WI 106, ¶ 26, 274 Wis. 2d 568, 682 N.W.2d 433; *State v. Thiel*, 2003 WI 111, ¶ 18, 264 Wis. 2d 571, 665 N.W.2d 305; *State v. Smith*, 207 Wis. 2d 258, 273, 558 N.W.2d 379 (1997).

A claim of ineffective assistance fails if the defendant fails to prove either one of these requirements. *State v. Williams*, 2006 WI App 212, ¶ 18, 296 Wis. 2d 834, 723 N.W.2d 719; *State v. Taylor*, 2004 WI App 81, ¶ 14, 272 Wis. 2d 642, 679 N.W.2d 893. So claims of ineffective assistance may be disposed of without considering whether counsel performed deficiently when the defendant fails to prove prejudice. *State v. Roberson*, 2006 WI 80, ¶ 28, 292 Wis. 2d 280, 717 N.W.2d 111; *State v. Johnson*, 153 Wis. 2d 121, 128, 449 N.W.2d 845 (1990).

To prove that his attorney's performance was deficient, it is not enough for a defendant to establish merely that his attorney was not very good. *Thiel*, 264 Wis. 2d 571, ¶ 19. Instead, the defendant must overcome a strong presumption that counsel acted reasonably, and establish that counsel's representation fell below an objective standard of reasonableness. *State v. Mayo*, 2007 WI 78, ¶ 60, 301 Wis. 2d 642, 734 N.W.2d 115; *Thiel*, 264 Wis. 2d 571, ¶ 19; *State v. Johnson*, 133 Wis. 2d 207, 217, 395 N.W.2d 176 (1986).

The reasonableness of an attorney's acts is judged deferentially on the facts of the particular case viewed from counsel's contemporary perspective to eliminate the distortion of hindsight. *State v. Maloney*, 2005 WI 74, ¶ 25, 281 Wis. 2d 595, 698 N.W.2d 583; *Johnson*, 133 Wis. 2d at 217.

Deficient performance is prejudicial when it is so reasonably probable that the result of the proceeding would have been different without the error that a court cannot have confidence in the reliability of the existing outcome. *Allen*, 274 Wis. 2d 568, ¶ 26; *Thiel*, 264 Wis. 2d 571, ¶ 20.

It is not enough for a defendant to speculate on what the result of the proceeding might have been if his attorney had not erred. *State v. Erickson*, 227 Wis. 2d 758, 774, 596 N.W.2d 749 (1999); *State v. Flynn*, 190 Wis. 2d 31, 48, 527 N.W.2d 343 (Ct. App. 1994); *State v. Wirts*, 176 Wis. 2d 174, 187, 500 N.W.2d 317 (Ct. App. 1993). The defendant must show actual prejudice. *State v. Keeran*, 2004 WI App 4, ¶ 19, 268 Wis. 2d 761, 674 N.W.2d 570; *Erickson*, 227 Wis. 2d at 773; *Wirts*, 176 Wis. 2d at 187.

When the defendant alleges that his attorney was ineffective for failing to take some action, he must show with specificity what that action would have accomplished if it had been taken, and how its accomplishment would have probably altered the result of the proceeding. *State v. Byrge*, 225 Wis. 2d 702, 724, 594 N.W.2d 388 (Ct. App. 1999), *aff'd*, 2000 WI 101, 237 Wis. 2d 197, 614 N.W.2d 477; *Flynn*, 190 Wis. 2d at 48.

On review, the appellate court will uphold the circuit court's findings of fact unless they are clearly erroneous. *Thiel*, 264 Wis. 2d 571, ¶ 23. Whether counsel's performance was deficient and/or prejudicial to the defense are questions of law

which are determined independently. *Thiel*, 264 Wis. 2d 571, ¶ 23.

A. Beal failed to allege facts sufficient to show that his attorney performed deficiently by telling the jury that Beal would testify.

An evidentiary hearing must be held only if a defendant's postconviction motion alleges facts which, if true, would entitle him to relief. *Allen*, 274 Wis. 2d 568, ¶¶ 9, 12.

In his motion for postconviction relief, the defendant-appellant, John Beal, failed to allege facts sufficient to show that his attorney performed deficiently by telling the jury in his opening statement that Beal would testify, even though Beal ultimately did not testify.

An attorney does not perform deficiently by telling the jury that his client is going to testify when, at the time, the defendant has told counsel that he wants to testify, a decision that is ultimately for the defendant to make. *State v. Krancki*, 2014 WI App 80, ¶¶ 10-11, 355 Wis. 2d 503, 851 N.W.2d 824. Beal concedes as much in his brief. Brief for Defendant-Appellant at 9, 12.

So to make a showing of deficient performance, Beal would have had to negate this possibility that his attorney performed reasonably by relying on his decision to testify by alleging that he never told his attorney that he wanted to testify. But there is no such allegation in Beal's postconviction motion.

Beal's postconviction attorney asserted in his argument that Beal's trial counsel told him "that he never intended on having Mr. Beal testify. Trial counsel concluded well before

trial that Mr. Beal would make a poor witness, because Mr. Beal insisted on testifying about irrelevant and odd details" (23:5, A-Ap:B).

But assertions of attorneys are not evidence. *State v. Jeannie M.P.*, 2005 WI App 183, ¶ 15 n.4, 286 Wis. 2d 721, 703 N.W.2d 694; *State v. Eugenio*, 210 Wis. 2d 347, 358, 565 N.W.2d 798 (Ct. App. 1997), *aff'd,* 219 Wis. 2d 391, 579 N.W.2d 642 (1998). And this assertion by postconviction counsel is contrary to trial counsel's own statement on the record that "it was [his] intent to possibly have Mr. Beal testify" (36:103).[1]

Besides, regardless of what counsel actually intended, his intent was irrelevant because he could not waive Beal's right to testify if Beal told his attorney that he wanted to testify. *Krancki*, 355 Wis. 2d 503, ¶¶ 10-11. *See State v. Albright*, 96 Wis. 2d 122, 130-33, 291 N.W.2d 487 (1980) (counsel cannot waive defendant's right to testify if defendant expressly refuses to waive it). So the assertion about counsel's supposed intent not to have Beal testify cannot substitute for an absent allegation that Beal did not tell his attorney that he wanted to testify.

Thus, at the very least the motion would not foreclose the possibility that Beal told his attorney he wanted to testify so that counsel would not have performed deficiently by telling the jury that Beal would testify.

But the motion asserts that Beal's attorney said "Beal insisted on testifying" (23:5, A-Ap:B), which indicates that Beal in fact told his attorney that he wanted to testify.

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[1] Beal bases his statement of the issue presented on this disputed assertion of fact. Brief for Defendant-Appellant at 1.

The record suggests that Beal may have changed his mind about wanting to testify after the state rested its case during the trial. In explaining to the court why Beal chose not to testify, his attorney stated that he and Beal "talked about, again, strategy-wise what advantages and disadvantages testifying or standing silent, and at this point his election is to stand silent" (36:99-100). The statement that Beal's election "at this point" was to stand silent suggests that this election may have been different from his election at a previous time.

Finally, Beal's motion has to be considered in the context of common sense. It seems so obvious that counsel would have had no reason to tell the jury repeatedly and in such detail that Beal would testify unless Beal told his attorney that he wanted to testify. It would have been, not just unreasonable, but utterly incomprehensible for counsel to go to such lengths to tell the jury that Beal would testify if Beal had never said he wanted to testify and counsel had no intention of having Beal testify.

Thus, Beal's postconviction motion does not just fail to show he would be entitled to relief but, if anything, tends to show he is actually not entitled to relief because his attorney acted reasonably when he told the jury that Beal was going to testify.

Because Beal failed to allege facts showing that his attorney performed deficiently, the circuit court could properly deny his postconviction motion alleging ineffective assistance of counsel without a hearing.

B. The record conclusively shows that Beal was not prejudiced by his decision not to testify after his attorney said he would.

A defendant is not entitled to a hearing when the record conclusively shows he is not entitled to relief. *Allen*, 274 Wis. 2d 568, ¶¶ 16, 30.

Here, the record conclusively shows that under the unique combination of facts of this case, which differ significantly from those in any of the cases relied on by Beal, Beal was not prejudiced by his decision not to testify after his attorney told the jury that he would.

Here, the jury was expressly instructed that a defendant in a criminal case has an absolute constitutional right not to testify, and that the "defendant's decision not to testify must not be considered by you in any way and must not influence your verdict in any manner" (37:12).

It is presumed that juries follow admonitory instructions. *State v. Marinez*, 2011 WI 12, ¶ 41, 331 Wis. 2d 568, 797 N.W.2d 399; *State v. Searcy*, 2006 WI App 8, ¶ 59, 288 Wis. 2d 804, 709 N.W.2d 497; *State v. Pitsch*, 124 Wis. 2d 628, 644 n.8, 369 N.W.2d 711 (1985). Such instructions are presumed to erase any prejudice unless the record suggests that the jury disregarded the admonition. *State v. Sigarroa*, 2004 WI App 16, ¶ 24, 269 Wis. 2d 234, 674 N.W.2d 894; *State v. Bembenek*, 111 Wis. 2d 617, 634, 331 N.W.2d 616 (Ct. App. 1983).

There is no such suggestion in this record.

To begin with, the court's instruction was strongly reinforced by the prosecutor who told the jury in his closing argument, "You cannot use the defendant's decision [not to

testify] as evidence of guilt. That would be completely inappropriate" (37:36).

If even the attorney who wanted the jury to find Beal guilty agreed that they could not appropriately find him guilty because he did not testify, it seems highly likely that the jury got the message that it would be completely inappropriate for them to let Beal's failure to testify influence their verdict in any way.

Indeed, the jury affirmatively indicated that they could and would decide the case in accord with an instruction not to be influenced by Beal's decision not to testify.

On voir dire, Beal's attorney told the prospective jurors that Beal may or may not testify during the trial (34:10). Counsel subsequently asked if there was "anyone who if Mr. Beal elects not to testify would assume that is some indication or inference that he's done something wrong or that he's guilty of something" (34:44)? No one indicated that they would hold it against Beal if they anticipated he would testify and he did not (37:20).

Moreover, there were good reasons for the jury not to hold Beal's election not to testify against him.

When Beal decided he was not going to testify after all about all those irrelevant and odd details he once insisted on testifying about (23:5, A-Ap:B; 36:100), his attorney gave the jury a plausible explanation for his decision not to take the stand. Counsel explained that when the state finished its case, the defense concluded that the state had not met its burden of proof (37:21). Thus, there was nothing Beal needed to say to rebut the state's case because the state had not proved its case (37:21).

Beal has a dozen bullet paragraphs in his brief litanizing the ways in which the state's case was deficient. Brief for Defendant-Appellant at 19-21.[2]

Perhaps the most important deficiency for the purpose of assessing prejudice because of the failure to have Beal testify is that the state also failed to present witnesses. The victim testified that two people who came out of a barber shop saw Beal beating her up (36:28-29). Yet the state failed to call either of these people who might have been able to corroborate the victim's version of events, resting its evidence about what Beal did on the victim's testimony alone.

It is not likely that the jury would consider Beal's failure to testify as an indication that the victim's testimony was true anymore than they would consider the state's failure to have eyewitnesses testify as an indication that the victim's testimony was false.

Furthermore, Beal's attorney did not just tell the jury that Beal would testify, but told them what that testimony would be (35:15-17, A-Ap:D). Counsel told the jury that Beal's version of what happened was that his girlfriend pulled out a knife when she got mad at him, that they struggled over the knife, and that his girlfriend got cut and bruised during the struggle (35:15-17, A-Ap:D).

Although the jury was instructed that the arguments of counsel were not evidence (37:12), the jury nevertheless was made aware that Beal disagreed with his girlfriend's claim that

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[2] This does not mean that the evidence was insufficient to convict Beal. Although there were problems with the victim's credibility, her testimony was not incredible as a matter of law, and the jury could convict Beal beyond a reasonable doubt if they believed her.

he attacked her, and could have considered that Beal had a different version of events in determining whether to believe the victim.

So there is no reason to believe that the jury failed to follow the instruction not to hold Beal's failure to testify against him, and every reason to believe that they did. Because the jury presumptively followed this admonitory instruction, the result of Beal's trial would have been no different if his attorney had not told the jury that he would testify.

Therefore, the record conclusively shows that Beal was not prejudiced by his failure to testify when his attorney said he would.

CONCLUSION

It is therefore respectfully submitted that the judgment convicting Beal of aggravated battery while using a dangerous weapon, and the order denying Beal's motion for postconviction relief, should be affirmed.

Dated: October 14, 2014.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,363 words.

Dated this 14th day of October, 2014.

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Thomas J. Balistreri
Assistant Attorney General

CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 14th day of October, 2014.

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