

RECEIVED

10-03-2019

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT 4

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

Case No. 2019AP001138 CR
Circuit Court Case No. 2018CM000137

STATE OF WISCONSIN,
Plaintiff-Respondent,

v.

SCOTT A. WALKER,
Defendant-Appellant.

ON APPEAL FROM THE CIRCUIT COURT FOR GRANT COUNTY,
THE HONORABLE ROBERT P. VANDEHEY, PRESIDING

BRIEF OF THE PLAINTIFF-RESPONDENT

Lisa A. Riniker
District Attorney
State Bar No. 1036164
Grant County District Attorney's Office
130 West Maple Street
Lancaster, Wisconsin 53813
(608) 723-4237

TABLE OF CONTENTS

Statement On Oral Argument1

Statement On Publication1

Statement Of The Case 1

Statement Of The Facts1-2

Argument3

Standard of Review3

Legal Argument4

 I. THERE WAS NO PREJUDICE TO MR. WALKER4-6

 II. THERE WAS NOT ANY DEFICIENT PERFORMANCE BY TRIAL
 COUNSEL 6-7

Conclusion7

CASES CITED

Strickland v. Washington

466 U.S. 668 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). . . p. 3

State v. Johnson

153 Wis.2d 121, 449 N.W.2d 845 (1991).p. 3

State v. O'Brien

223 Wis.2d 303, 588 N.W.2d 8 (1999).p. 3

State v. Olsen 99

Wis.2d 572, 299 N.W.2d 632 (Ct. App. 1980).p. 4

State v. Bjerkaas

163 Wis.2d 949, 472 N.W.2d 615 (Ct. App. 1991).p. 4

State v. Dundon

226 Wis.2d 654, 594 N.W.2d 780 (1999).p. 4

State v. Tolliver

187 Wis.2d 346, 523 N.W.2d 113 (Ct. App.1994).p. 6

State v. McMahon

186 Wis.2d 68, 519 N.W.2d 621 (Ct. App. 1994).p. 6

STATUTES CITED

Sec. 941.20(1)(c), Wis. Stats.p. 1

Sec. 939.49(1)(a), Wis. Stats.p. 5

STATEMENT ON ORAL ARGUMENT

The State does not request oral argument.

STATEMENT ON PUBLICATION

The State does not request publication.

STATEMENT OF THE CASE

On July 17, 2018, a criminal complaint was filed against Scott Walker alleging a July 11, 2018, violation of sec. 941.20(1)(c), Wis. Stats, pointing a firearm at another.(R.1). The case proceeded to a jury trial on October 22, 2018, where the jury convicted Mr. Walker of the crime.(R.28). On November 6, 2018, a Notice of Intent to Pursue Post-Conviction Relief was filed by Mr. Walker. (R.16). On May 13, 2019, a motion for post-conviction relief was filed alleging ineffective assistance of counsel. (R.19). A *Machner* hearing was held on June 5, 2019. (R.29). The Court did not find counsel to be ineffective and denied Mr. Walker's request for a new trial. (R.20). A notice of appeal was filed June 21, 2019. (R.21).

STATEMENT OF THE FACTS

In November, 2017, Scott Walker hired Diane Alm to clean a home located in Grant County, Wisconsin. (R.28:27). After performing services, Ms. Alm communicated via text

with Mr. Walker the amount owed to her. (R.28:29).

Eventually, Ms. Alm learned that Mr. Walker had filed for bankruptcy. (R.28:29,11.22-24).

On July 11, 2018, Ms. Alm learned that Mr. Walker was at the subject property and travelled to that address. (R.28:30-31). Ms. Alm's intentions were to ask Mr. Walker why he lied to her (about his willingness to pay for her cleaning services). (R.28:31,11.3-5). Ms. Alm parked in the driveway and, eventually, Mr. Walker parked his UTV near her vehicle. (R.11). Ms. Alm introduced herself to Mr. Walker and identified herself as the individual who did the cleaning. (R.28: 33-34). There was a brief discussion about the cleaning job Ms. Alm performed. (R.28:34). Ms. Alm indicated that once Mr. Walker realized who she was, his tone changed, and he told her to leave. (R.28:35). In a matter of seconds, the defendant asked Ms. Alm to leave and followed up by saying that he was getting his gun. (R.28:36,11.15-18). After that statement was made, Ms. Alm got into her vehicle. (R.28:36,11.21-22). As Ms. Alm was fumbling for her keys, she saw Mr. Walker coming out of the garage with a gun, causing her to freeze. (R.28:37,11. 8-16). Ms. Alm indicated the defendant was pointing the gun

at her. (R.28:38,11. 15-16). Ms. Alm was eventually able to start her car and leave the area. (R.28:39, 11.3-6).

ARGUMENT

THE COURT DID NOT ERROR WHEN FINDING THERE WAS NO INEFFECTIVE ASSISTANCE OF COUNSEL AND DENIED MR. WALKER'S REQUEST FOR A NEW TRIAL.

STANDARD OF REVIEW

When claiming ineffective assistance of counsel, deficient performance and prejudice must be established. *Strickland v. Washington*, 466 U.S. 668,687, 104 S.Ct. 2052 80 L.ED.2d 674 (1984). If one prong is not established, the Court need not consider the other. *Id.* at 697. Specific acts or omissions must be established to prove deficient performance. *Id.* at 690. The presumption is that counsel acted reasonably. *State v. Johnson*, 153 Wis. 2d 121,127,449 N.W.2d 845 (1991).

In order to establish prejudice, a defendant must establish a reasonable probability that without the acts or omissions, the results of the proceeding would have been different. *Strickland*, 466 U.S. at 694.

An ineffective assistance claim is a mixed question of law and fact. *State v. O'Brien*, 223 Wis.2d 303,324, 588 N.W.2d 8 (1999). A trial court's findings regarding the performance of counsel will be affirmed unless those

findings are clearly erroneous. *Id.* at 324-25, 588 N.W.2d 8.

LEGAL ARGUMENT

I. THERE WAS NO PREJUDICE TO MR. WALKER.

Mr. Walker asserts that the Court erred when determining no prejudice existed related to a defense of property defense. Specifically, the Court ordered:

"Second, any deficiency in counsel's performance was harmless. In taking the evidence in the light most favorable to the defense, the court would not have given a defense of property instruction if requested. It was objectively unreasonable for the defendant to believe that once any unlawful interference with his property had been terminated, and he was safely in his home, it was reasonable to reemerge and point a firearm at the victim who was already in her vehicle fumbling with her keys."

A defendant is not entitled to have a jury consider his or her theory of defense when there is no evidence to support it. *State v. Olsen*, 99 Wis.2d 572,578-79, 299 N.W.2d 632 (Ct. App. 1980); See also *State v. Bjerkaas*, 163 Wis. 2d. 949,954, 472 N.W.2d 615 (Ct. App. 1991). In order to justify criminal acts on the basis of self-defense, defense of others, or defense of property, the danger must be imminent. *State v. Dundon*, 226 Wis.2d 654,668, 594 N.W.2d 780 (1999). Further, a person may threaten only the degree of force "reasonably believe[d] is necessary to

prevent or terminate the interference." Wis. Stat. §939.49(1)(a). Also, "[i]t is not reasonable to intentionally use force intended or likely to cause death or great bodily harm for the sole purpose of defense of one's property." *Id.*

The facts of this case do not support a defense of property claim. There was not an impending threat by Ms. Alm to Mr. Walker's property. The uncontroverted testimony was that Ms. Alm remained standing outside of her vehicle, had a brief conversation with Mr. Walker, and retreated into her vehicle. Mr. Walker then returned from his home with a firearm and approached Ms. Alm.

There was not an impending threat by Ms. Alm. Ms. Alm was not forcing her way into Mr. Walker's home, garage, shed, or vehicle. The mere presence of Ms. Alm in Mr. Walker's driveway does not rise to the level of an imminent threat to Mr. Walker's property. There is even less of a threat to Mr. Walker's property when Mr. Walker exits his home and sees Ms. Alm already in her vehicle. Yet, Mr. Walker continued to approach Ms. Alm and point the firearm at her.

Additionally, the insertion of a firearm under these circumstances is wholly inappropriate and uses a degree of force that is likely to cause great bodily harm. The

defense of property statute at §939.49(1), specifically prohibits the introduction of such unreasonable force for a defense of property claim.

As such, because there was not an imminent threat, and because Mr. Walker used a degree of force likely to cause great bodily harm to defend his property, the defense of property defense is not available to him. There was no prejudice which resulted from the omission of that instruction.

II. THERE WAS NOT ANY DEFICIENT PERFORMANCE BY TRIAL COUNSEL.

There is not an ineffective assistance of counsel claim when counsel does not pursue a meritless issue. *State v. Tolliver*, 187 Wis.2d 346,360, 523 N.W.2d 113 (Ct. App. 1994). Ineffective assistance cases should be limited to situations where reasonable counsel should know enough to raise the issue. *State v. McMahon*, 186 Wis.2d 68,85, 519 N.W.2d 621 (Ct. App. 1994). There needs to be a clear duty to raise defense of property as an affirmative defense before counsel can be found ineffective. *Id.*

With the facts as they are, it was not unreasonable for counsel to fail to pursue the issue. Counsel did consider issues of self-defense and indicated that he sort of lumped a defense of property claim in with it. (R.29:5).

Counsel went above and beyond his duty when even considering the meritless defense.

CONCLUSION

The State believes that the Circuit Court did not err when finding there was not ineffective assistance of counsel and/or prejudice to the defendant. The State respectfully requests the Court of Appeals to affirm the trial court's denial of Mr. Walker's request for a new trial.

Dated this 4th day of October, 2019.

Respectfully submitted,

Lisa A. Riniker
District Attorney
State Bar No. 1036164

District Attorney's Office
Grant County Courthouse
130 West Maple Street
Lancaster, WI 53813
(608) 723-4237

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in § (Rule) 809.19(8)(b) and (c) for a brief produced with a monospaced font. The length of the brief is seven pages.

Dated this 4th day of October, 2019.

Lisa A. Riniker
District Attorney
State Bar No. 1036164
Grant County, Wisconsin

APPENDIX INDEX

Excerpts from trial transcript
(Record No. 28). I-XI

APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with the content requirements of Wis. Stat. S (Rule) 809.19(2)(a); that is, the record documents contained in the respondent's appendix fall into one of the categories specified in sub. (2)(a).

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 4th day of October, 2019.

Signed:

Lisa A. Riniker
District Attorney
State Bar No. 1036164

District Attorney's Office
Grant County Courthouse
130 West Maple Street
Lancaster, WI 53813
(608) 723-4237

**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 4th day of October, 2019.

Lisa A. Riniker
District Attorney
State Bar No. 1036164
Grant County, Wisconsin