RECEIVED
03-05-2020
CLERK OF COURT OF APPEA
OF WISCONSIN

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Case No. 2019AP1261-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

GARY R. SCHUMACHER,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND ORDER DENYING POSTCONVICTION RELIEF, ENTERED IN MONROE COUNTY CIRCUIT COURT, THE HONORABLE TODD ZIEGLER, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

SARAH M. SKILES
Assistant District Attorney
State Bar #1093720

Attorney for Plaintiff-Respondent
Monroe County
112 South Court Street Rm 2400
Sparta, Wisconsin 54656
(608) 269-8780
monroe.call@da.wi.gov

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES CITED

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State anticipates the issues raised in this appeal can be fully addressed by the briefs. Accordingly, the State is not requesting oral argument. Further, publication is not warranted under Wis. Stat. § 809.23.

ARGUMENT

The circuit court properly found Schumacher's trial counsel was constitutionally effective in cross-examination of the State's expert witness.

A. Applicable legal principles and standard of review.

Criminal defendants are guaranteed the right to counsel by both the United States Constitution and the Constitution of the State of Wisconsin. This right guarantees criminal defendants more than nominal representation; such representation must be effective. *State v. Felton*, 110 Wis.2d 485, 499 (1983). However, "[a] defendant 'is not entitled to the ideal, perfect defense or the best defense but only to the one which under all the facts gives him reasonably effective representation.' " *State v. Rock,* 92 Wis.2d 554, 560 (1979).

The inquiry into whether an attorney rendered effective assistance is focused on the reliability of the proceedings and not on the trial outcome. *State v. Love*, 284 Wis. 2d 111, 126 (2005). Effective representation does not equal a not-guilty verdict. *Rock*, 92 Wis.2d at 560. Therefore, in order to prevail on a claim that counsel's assistance was so defective as to require reversal of a conviction, the defendant must prove both that (1) his lawyer's representation was deficient and (2) that he suffered prejudice as a result of that deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). If the court concludes the defendant has not proven one prong of the test, it need not address the other. *Id*. at 697. The purpose of this inquiry is to ensure the defendant receives a fair trial. *State v. Johnson*, 153 Wis. 2d 121, 126 (1990).

A lawyer's performance is not deficient unless he "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland* at 687. To demonstrate deficient performance, a defendant must show trial counsel's actions fell below an objective standard of reasonableness. *Id.* at 688. More

specifically, a defendant must show specific acts or omissions of counsel that were "outside the wide range of professionally competent assistance." *Id*. 690. This is a heavy burden because judicial scrutiny of counsel's performance is highly deferential. *Id*. at 688. The courts "indulge" in a strong presumption that counsel rendered adequate assistance and "made all the significant decisions in the exercise of reasonable judgment." *State v. Glass*, 170 Wis. 2d 146, 151 (Ct. App. 1992). Courts must not second-guess trial counsel's performance through the skewed perspective of hindsight. *Strickland,* 466 U.S. at 689; *see also Felton*, 110 Wis.2d at 502 (The Wisconsin Supreme Court "disapproves of postconviction counsel second-guessing trial counsel's considered selection of trial tactics or the exercise of professional judgment in the face of alternatives that have been weighed by trial counsel.") If tactical or strategic decisions are based on rationality founded on the facts and the law, the courts will not find those decisions constitute ineffective assistance of counsel, "even though by hindsight we are able to conclude that an inappropriate decision was made or that a more appropriate decision could have been made." *Felton*, 110 Wis. 2d at 502.

To demonstrate prejudice, the defendant must show trial counsel's errors were so serious that the defendant was deprived of a fair trial and a reliable outcome. *Strickland*, 466 U.S. at 687. The defendant has to show there is a reasonable probability that, but for the alleged defect in counsel's' performance, the result of the proceeding would have been different given the totality of the evidence that was adduced at trial. *State v. Thiel*, 264 Wis.2d 571, 616 (2003). The defendant must affirmatively prove prejudice; mere speculation is insufficient. *Johnson*, 153 Wis.2d at 129.

The standard of review for both the performance and prejudice components of an ineffective assistance of counsel challenge are mixed questions of law and fact. *State v. Pitsch*, 124 Wis. 2d 628, 633-34 (1985). The circuit court's findings of fact will not be reversed unless they are clearly erroneous. *Id*.

Whether counsel's performance was deficient and prejudicial to the defendant are questions of law reviewed de novo. *Id.*

B. Schumacher fails to show trial counsel's cross-examination of the State's expert was constitutionally deficient.

On appeal, Schumacher asserts trial counsel inadequately cross-examined the State's expert witness regarding (1) the unreliability of retrograde extrapolation and (2) the variables used by the expert to perform retrograde calculations of the defendant's blood alcohol concentration. As developed below, the record refutes Schumacher's claim that trial counsel was ineffective on these grounds.

Trial counsel's testimony at the post-conviction hearing established trial counsel believed the central issue of the trial would be the concentration of alcohol in the defendant's blood at the time the defendant drove his motor vehicle. (130:13-14, 26-27, 29.) To increase trial counsel's chance of a successful defense at trial, counsel filed a pre-trial motion asking the court to decide whether Schumacher's prohibited alcohol concentration level was 0.02 or 0.08 due to a successful collateral attack that changed the offense from a fourth to third offense. (130:26-27.) The circuit court ultimately found in Schumacher's favor and ruled the 0.08 standard was applicable to him. (130:27.)

Trial counsel anticipated the State's expert witness would use retrograde extrapolation at trial to estimate the defendant's blood alcohol concentration at the time of driving. (130:15). With this in mind, counsel's trial strategy was to "call into question the value of retrograde extrapolation." (130:31.)

Trial counsel became familiar with retrograde extrapolation early in his legal career when he reviewed books and other materials and attended a training focused on defending operating while intoxicated (OWI) offenses.

(130:15, 23-24.) As a result, he was familiar with the reliability criticisms of retrograde extrapolation calculations. (130:16-17.) Counsel was aware variables, such as: height; weight; gender; the quantity of alcohol consumed; the alcohol content of the alcohol consumed; the time of the last drink; consumption of food; and an individual's elimination rate, may impact such calculations. (130:16-19.)

In preparation to undermine the validity and reliability of retrograde extrapolation at trial, counsel reviewed materials related to retrograde extrapolation and to "cross-examining it." (130:27.) In advance of trial, counsel conferred with the defendant about his potential trial testimony, and counsel discussed the defendant's alcohol concentration and addressing retrograde extrapolation at trial with his colleagues. (130:26-28.) Knowing the importance the retrograde calculations would play at trial, counsel even attempted to speak with the State's expert witness in advance of trial about her laboratory report and the retrograde calculations he was expecting she would complete. (130:29.)

Trial counsel was prepared to confront the reliability and validity of retrograde extrapolation head-on.

Early in counsel's cross-examination of the expert, the expert conceded the alcohol concentration measured at the time of the blood draw was not the concentration in the defendant's blood at the time of driving two hours earlier. (124:209.) Counsel's questioning further effectively elicited the expert's acknowledgement she did not "know" the defendant's blood alcohol concentration at the time of driving and she could only "estimate" it. (124:209.)

On re-direct, the expert explained she could only estimate an alcohol concentration at an earlier time due to the absorption and elimination of alcohol. (124:209-10.) She cautioned her estimation would be "only as good as the information that [went into the] estimate, so it depend[ed] on

what kind of information [that was] available." (124:210.) The expert explained she needed as much information as possible to do her calculations, information that included how many alcoholic beverages were consumed; the time the beverages were consumed and their alcohol concentrations; a known alcohol concentration from a later point; the person's gender and weight; food consumption; and someone's elimination rate. (124: 211-12, 264.) When the expert was asked to do a hypothetical calculation of a 200 pound male who eliminated alcohol at a standard rate and had an alcohol concentration of 0.171 two hours post-driving, the expert estimated the person's alcohol concentration would have been between 0.190 to 0.210. (124:212).

Trial counsel did not re-cross the expert on her estimation or the facts she used to make the estimation because counsel believed the expert "had actually done a pretty good job herself of qualifying how she had come to the conclusions . . ." and the expert explained the calculations were based on a "number of variables" and "she was making guesses." (130:17.) Trial counsel testified he consciously chose to not further highlight the speculative nature of the calculation because he believed the point had been made to the jury and counsel did not "want to beat a dead horse." (130:17, 20.)

After the defendant testified to (1) consumption of alcohol in excess of what he stated to law enforcement and (2) consumption of alcohol at a time inconsistent to what he stated to law enforcement (124:121-123; 147-150; 239-46), the State recalled the expert as a rebuttal witness. (124:257.)

On direct, the expert stated she could build on her prior calculation and incorporate the newly identified facts and make an "estimate" of the defendant's alcohol concentration at the time of driving. (124:259.) The expert explicitly and unequivocally reiterated and cautioned the jury her calculations were "just an estimate." (124:259.) She explained "[t]he solid number . . . [was] the blood alcohol concentration

that was reported on the sample that was tested in [the] laboratory." (124:259.) The expert, on her own and without prompting, repeatedly warned "the estimate is only as good as the information that goes into it, and it's absolutely nowhere near as reliable and as solid as the test result itself." (124:268.) With the additional information Schumacher testified to, the expert then calculated Schumacher's blood alcohol concentration would have been between 0.08 and 0.11 at the time of driving. (124:264.)

Trial counsel quickly followed up and highlighted on cross-examination that the expert had to consider "a lot of factors" to do the calculations. (124:269). Counsel subsequently and purposefully honed in on four variables the expert was relying on for her calculations: (1) the time of consumption of alcohol; (2) the number of drinks consumed; (3) the size of the drink consumed; and (4) the alcohol content in the consumed drinks. (124:268-270.) Counsel illustrated that while retrograde extrapolation may be valid and reliable in a controlled laboratory setting with known and documented variables, it is harder to be certain of the reliability and validity in the real world with unknown and uncontrolled variables.

At the post-conviction hearing, trial counsel testified he chose to limit his cross examination to those limited issues because he did not believe "the jury was paying attention at all at that point" based on his observations of it. (130:19.) He indicated that "while [he] likely planned to go more in depth, by the time we got to cross . . . [he] just really felt like [he] had a really limited window to make an impression on the jury." (130:20.) Counsel's impression was "[he] had maybe a few questions that [the jury] would pay attention to" and he had "a really limited window to actually make an impression on the jury." (124:19.) Therefore, he adapted and chose to focus on and emphasize the variables he believed would be most familiar and understood by the jurors. (130:19.)

In closing argument, trial counsel argued and emphasized the different calculations the expert completed added up to reasonable doubt. (124:325.) He argued none of the calculations the expert did reflected the defendant's situation and that "[i]t was a lot of variables; it was a lot of speculation and guesswork." (124:326.)

Trial counsel's cross examination of the expert was far from constitutionally deficient. Trial counsel had a tough job of making the jury believe someone with an alcohol concentration nearly two times the legal limit had an alcohol concentration under 0.08 two hours earlier when he turned into oncoming traffic. In spite of this, trial counsel's cross-examination of the expert and counsel's emphasis on the parts of the expert's testimony that supported his defense demonstrated to the jurors that the State's expert could not opine with any degree of certainty what the defendant's alcohol concentration was at the time of his driving.

The record establishes counsel's cross-examination, under the circumstances of this particular case, was professionally appropriate and reasonable. Counsel accurately identified and predicted the strategy the State would use at trial. He actively, thoughtfully, and carefully prepared to mount a defense against the State's case. Counsel's strategy was to focus the juror's attention on the unreliability of retrograde extrapolation which he believed would create a reasonable doubt in the jurors' minds. Counsel's performance on cross-examination demonstrates some of the top qualities of an effective trial attorney – the ability to be flexible, to be adaptive, and the ability to shift priorities as trial unfolds.

Trial counsel had a goal. He had a plan to achieve that goal. As the trial unfolded, counsel paid attention to the jurors to try to ascertain what they might be thinking and feeling about the case. Through his observations, counsel believed the jurors had limited attention and he wanted to make the most of the time he had. To this end, counsel tailored his presentation

to make sure he was communicating effectively and his points were received in the best way possible.

Could counsel have rehashed the qualifications the expert attached to her calculations? Could counsel have brought up every possible variable that might be used in retrograde extrapolation? Could counsel have challenged the expert with a scholarly article from 1985? Of course. But those would be unreasonable decisions.

Counsel carefully contemplated, weighed, and considered his options. Trial counsel is free, after considered judgment, to select a particular tactic among other available alternatives. Counsel selected a strategic decision that he believed would have the biggest impact and would reap the highest reward under the situation. A failed strategy does not make an attorney's representation deficient. Jury trials are evolving situations that require attorneys to adapt and make strategic decisions on the spot with limited time, sometimes seconds, to explore options. Even the best attorneys do not always perform as they would like to. The contention that trial counsel should have conducted the cross-examination differently does not establish that he was ineffective. With the benefit of hindsight, it is possible to see how a lawyer could have acted differently, and thus, assistance may be deficient, in the sense that counsel could have done better, without being constitutionally ineffective.

For these reasons, Schumacher fails to show trial counsel's cross-examination of the expert was constitutionally deficient. The circuit court's order denying relief on his claim of ineffectiveness should therefore be affirmed on this basis, without addressing whether the performance was prejudicial.

C. Schumacher fails to prove counsel's performance, if it was deficient, prejudiced him.

Schumacher further asserts he was prejudiced by trial counsel's deficient cross-examination of the expert because the jury's decision on whether he had a prohibited alcohol concentration hinged on expert's credibility and additional cross-examination would have diminished the reliability of the expert's opinion in the jurors' eyes. Schumacher claims there is a reasonable probability he would have been found not guilty of operating with a prohibited alcohol concentration if there had been additional cross-examination. As developed below, Schumacher fails to prove the trial outcome is unreliable and that counsel's performance, if it was deficient, was prejudicial.

The test for prejudice is whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland* at 694.

The jury in this case was instructed:

> You may consider the evidence regarding the analysis of the blood sample and the evidence of how the body absorbs and eliminates alcohol along with all the other evidence in the case, giving it the weight you believe it is entitled to receive.

(124:286.) The jury was also instructed:

> Opinion evidence was received to help you reach a conclusion. However, you are not bound by any expert's opinion.

(124:297-98.) The jury was further instructed the expert was asked a hypothetical question and the expert's

> [o]pinion does not establish the truth of the facts upon which it is based. Consider the opinion only if you believe the assumed facts upon which it is based have been provided. If you find that facts stated in the hypothetical question have not been proved, then the opinion based on those facts should not be given any weight.

Id.

Perhaps if those were the only instructions given to the jury, Schumacher's argument might be able to gain more traction. However, Schumacher overlooks that the jury was also instructed:

> The law states that the alcohol concentration in a defendant's blood sample taken within three hours of operating a motor vehicle is evidence of the defendant's alcohol concentration at the time of driving.

Id. at 285-86.

In this case, Schumacher's blood was taken within three hours of operation and the toxicology report confirmed the presence of alcohol. The State's expert repeatedly emphasized to the jury the "solid" blood alcohol concentration was the concentration reported on the sample tested in the laboratory. The jury could have concluded the defendant was guilty of driving with a prohibited alcohol concentration solely on the fact that the defendant's blood was taken within three hours of driving and analysis indicated the defendant had a blood alcohol concentration of 0.171.

Beyond the toxicology report, there was an abundance of evidence from which the jury could make the finding the defendant had a prohibited alcohol concentration at the time of driving:

- Schumacher turned into oncoming traffic at highway speeds. (124:184, 237.)
- After the crash, Schumacher smelled like alcohol and he appeared confused and aloof. (124:175, 178, 185.)
- After the crash, Schumacher's speech was slurred and the victims believed he was intoxicated. (124:187, 189.)
- The defendant admitted he consumed three beers prior to the crash, between 6 and 7:30 PM. (124:

241-242.) The crash occurred around 8:45 PM. (124:106.)

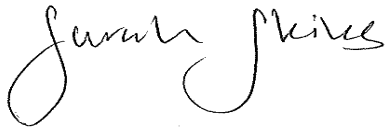
Given all the evidence adduced at trial, it is not reasonably probable that the jury, had it been given the omitted information Schumacher complains of, would have had a reasonable doubt respecting guilt. Schumacher's claim is merely speculative which is exactly what the law prohibits when assessing whether alleged deficient performance caused prejudiced.

Thus, counsel's performance did not cause prejudice, and the circuit court's order denying post-conviction relief should be affirmed.

CONCLUSION

Schumacher's claims are without merit. Trial counsel's conduct did not fall below an objective standard of reasonableness, nor was it prejudicial. The State respectfully asks this Court to affirm the circuit court.

Dated this 2nd day of March, 2020.



SARAH M. SKILES
Assistant District Attorney
State Bar #1093720

Attorney for Plaintiff-Respondent

CERTIFICATION AS TO FORM AND LENGTH

I certify this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 points for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line. The length of the brief is 3,591 words.

Dated this 2nd day of March, 2020.

SARAH M. SKILES
Assistant District Attorney
State Bar #1093720

Attorney for Plaintiff-Respondent

CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

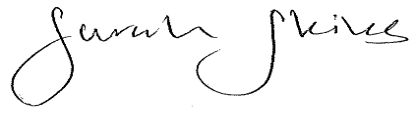
I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Rule 809.19(12).

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 2nd day of March, 2020.



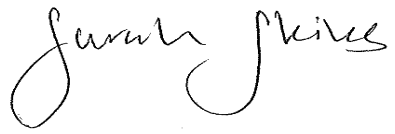
SARAH M. SKILES
Assistant District Attorney
State Bar #1093720

Attorney for Plaintiff-Respondent

CERTIFICATION OF MAILING

I certify that this brief was mailed via the United States Postal Service to the Wisconsin Court of Appeals, District IV and to all parties associated with this action on March 2, 2020.

Dated this 2nd day of March, 2020.



SARAH M. SKILES
Assistant District Attorney
State Bar #1093720

Attorney for Plaintiff-Respondent