STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT 4

Case No. 2022AP002012
Circuit Court Case No. 2021CM000202

STATE OF WISCONSIN,
Plaintiff-Respondent,

v.

MICHAEL ROSS STRAIGHT,
Defendant-Appellant.

ON APPEAL FROM THE CIRCUIT COURT FOR GRANT COUNTY,
THE HONORABLE Craig R. Day, PRESIDING

BRIEF OF THE PLAINTIFF-RESPONDENT

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II. STATEMENT OF ISSUE

Whether Trial Counsel was ineffective for not requesting a Self-Defense Jury Instruction with respect to the charge of Disorderly Conduct involving C.G. (Count 2).

Trial Court answered: No

ORAL ARUGMENT AND PUBLICATION

A. STATEMENT ON ORAL ARGUMENT

The State does not request oral argument. The issue can be argued in the briefs.

B. STATEMENT ON PUBLICATION

Publication is not available in a one-judge appeal. Furthermore, the issue in this case involves well-settled principles of law.

III. STATEMENT OF THE CASE

On 10/12/2021, the State filed a Criminal Complaint charging Michael Straight with Disorderly Conduct involving D.C., as a Repeater (Count 1), Disorderly Conduct involving C.G., as a Repeater (Count 2), and Misdemeanor Battery as a Repeater (Count 3). (R.2) On 1/21/2022, a Jury Trial was held. (R.52) Michael Straight was found not guilty of Count 1 (Disorderly Conduct involving D.C.) and Count 3 (Battery). (R.35, 37) Michael Straight was found guilty of Count 2, Disorderly Conduct involving C.G. (R. 36) On 11/16/2022, the Trial Court held a *Machner*[1] Hearing and found that Trial Counsel's defense was not deficient and was not unreasonable (R.72) Michael Straight appeals.

[1] *State v. Machner*, 92 Wis. 2d 797 (Ct. App. 1979)

STATEMENT OF THE FACTS

D.C. owns a cabin over by Muscoda. (R. 52, pp. 88-89) On October 8, 2021, a white and brown bull dog was chasing his cats. (R. 52, p. 90) D.C. told Michael Straight to catch his dog or it was going to kill his cats. (R. 52, pp. 90-91) Michael Straight told D.C. that they weren't in Madison and he didn't have to do anything. (R. 52, pp. 91, 104) During the conflict between D.C. and Michael Straight, C.G. comes out of the woods, grabs the dog and ties him to a tree. (R. 52, p. 91) Michael Straight then started yelling at C.G. (R. 52, p. 96) According to D.C., Michael Straight then tells D.C. that he was going to cut his brake line and kill him. (R. 52, pp. 91-92).

William Danehy, Jr., was on a neighbor's porch. (R. 52, p. 108) William Danehy, Jr. saw C.G. get out of a car, walking towards the porch he was on, which also happened to be towards Michael Straight. (R. 52, pp. 110, 113, 115) Michael Straight approached C.G., knocked a knife out of her hand, and hit her. R. 52, p. 110) William Danehy Jr. then called 911. (R. 52 p. 110).

Eric Brechler was with William Danehy, Jr. (R. 52 p. 150) Eric Brechler testified that when Michael Straight and C.G. came back, the mood was pretty sour and he saw Michael

Straight hit C.G. on both sides of her head. (R. 52, pp. 152-154) C.G. then went to the car and retrieved a machete. (R. 52, p. 154) Michael Straight then became enraged, spun her around, flipped her onto the ground and took the knife away from her. (R. 52, p. 155) Michael Straight then straddled C.G., held the knife or machete to her throat, and then raised the machete above his head with his hands on the handle, and the point towards C.G. (R. 52, pp. 155-157) Eric Brechler yelled at Michael Straight and came storming off the porch to prevent anything more serious from happening. (R. 52, p. 155) C.G. then picked up the machete, ran back to the car, drove down the road and parked about a block away. (R. 52, p. 155) On cross-examination, Eric Brechler testified that he never saw any blood and never saw a cut on Michael Straight. (R. 52, p. 161).

Michael Straight testified that D.C. was yelling, screaming and directing profanity at him. (R. 52, p. 187) Michael Straight testified that he was in front of the porch and C.G. walked up to him. (R. 52, p. 191) Michael Straight testified that he feared for his life and thought that he was going to be severely harmed. (R. 52, pp. 193-194) Michael Straight testified that C.G. hit him in the shoulder with the machete. (R. 52, p. 192) Michael

Straight testified he went to grab her and she swung at him. (R. 52, p. 192) According to Michael Straight, they went to the ground. (R. 52, p. 192) Michael Straight testified that after he wrestled the knife away from C.G., he gave it back to her. (R. 52, p. 194) According to Michael Straight, he experienced a bruise on his shoulder and a cut on his neck. (R. 52, p. 92).

At the conclusion of the evidence, Judge Day held a Jury Instruction Conference. (R. 52, pp. 206-210) After some discussion regarding the extent of the Self-Defense Instruction, Judge Day decided that he would include Self-Defense in the proposed Battery Instruction. (R. 52, 206-220).

Attorney Frank did not request a Self-Defense Jury Instruction with respect to the charge of Disorderly Conduct involving C.G., as charged in Count 2.

During Attorney Frank's closing argument, Attorney Frank argued, "As far as the Disorderly Conduct, it's Ms. [G.] who's behaving in a disorderly way, who is provoking this disturbance, not Mr. Straight. So, he is entitled to defend himself, certainly, and those actions are privileged under Wisconsin law."

On November 16, 2022, Attorney Frank testified at a *Machner* Hearing. (R. 72) Attorney Frank testified that:

- Attorney Frank testified that he has had Self-Defense in hundreds of cases and that he has been defending battery type cases since about the time the defendant was born, (R. 72, p. 12).
- Their defense was not Self-Defense as to the Disorderly Conduct involving C.G. (Count 2). (R. 72, p. 5)
- That the argument he made that Mr. Straight's actions that led to that Disorderly Conduct were privileged was being taken out of context and that his argument was really just a recapitulation of what he had just argued regarding the battery charge. (R. 72, pp. 5-6)
- That Attorney Frank didn't believe they had a Self-Defense as to the Disorderly Conduct involving C.G. charged in Count 2. (R. 72, p. 9).
- That in Self-Defense a person is entitled to terminate the interference, but is not entitled to retaliate. (R. 72, p. 10)

- That Self-Defense allowed Mr. Straight to get C.G. on the ground and disarm her, but anything after that became retaliation. (R. 72, p. 10)
- That where Mr. Brechler was alleging that Mr. Straight put a machete up to her throat, that wasn't Self-Defense, Mr. Straight had the weapon, C.G. was disarmed. Mr. Straight was in a position in which he was the aggressor, he was threating her with the weapon and that conduct was retaliation, not Self-Defense. (R. 72., p. 11)
- That there is more than one potential defense to most of these charges and that the trial attorney has to decide which is the best defense to raise. (R. 72, p. 12)
- That Attorney Frank has learned not to do the shotgun approach and that asserting multiple defenses doesn't work with juries. (R. 72, p. 13)
- *That based on Weatherall* vs. *State*[2], 73 Wis. 2d 22, decisions regarding the selection of defenses are a trial tactic that is left to trial counsel and not to the retroactive conclusions of post-conviction counsel. (R. 72, pp. 14-15)

[2] *Weatherall v. State*, 73 Wis. 2d 22 (1976)

- That Attorney Frank did not concede any elements of Disorderly Conduct, (R. 72, p. 18).
- That Attorney Frank specifically argued that the elements of Disorderly Conduct were not proven by the State, (R. 72, p. 18).

Judge Day concluded that Attorney Frank's performance was not deficient and that Attorney Frank's strategic decision was not objectively unreasonable. (R. 72, p. 38)

IV. ARGUMENT

STANDARD OF REVIEW

In *State v. Breitzman*, 2017 WI 100, ¶ 37-39, 378 Wis. 2d 431, 454-455, the Court succinctly set forth the Standard of Review in cases alleging ineffective assistance of counsel when it stated:

"Under the Sixth and Fourteenth Amendments to the United States Constitution, a criminal defendant is guaranteed the right to effective assistance of counsel." [citation] The same right is guaranteed under Article I, Section 7 of the Wisconsin Constitution. Whether a defendant was denied effective assistance of counsel is a mixed question of law and fact. [citation] The factual circumstances of the case and trial counsel's conduct and strategy are findings of fact, which will not be overturned unless clearly erroneous; whether counsel's conduct constitutes ineffective assistance is a question of law, which we review de novo. *Id.* To demonstrate that counsel's assistance was ineffective, the defendant must establish that counsel's performance was deficient and that the deficient performance was prejudicial. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). If the defendant fails to satisfy either prong, we need not consider the other. *Id.* at 697.

Whether trial counsel performed deficiently is a question of law we review de novo. [citation] To establish that counsel's performance was deficient, the defendant must show that it fell below "an objective standard of reasonableness." [citation]. In general, there is a strong presumption that trial counsel's conduct "falls within the wide range of reasonable professional assistance." [citation] Additionally, "[c]ounsel's decisions in choosing a trial strategy are to be given great deference." [citation]

Whether any deficient performance was prejudicial is also a question of law we review

> de novo. [citation] To establish that deficient performance was prejudicial, the defendant must show that "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." [citation]

RATIONAL BASIS

In *State v. Felton*, 110 Wis. 2d, 485, 501-503 (1983), the Court stated,

> Since *Harper* we have reiterated that trial counsel and the defendant may, on the basis of a considered judgment, select a particular defense from among the alternative defenses that are available. [citations] The defense selected need not be the one that by hindsight looks best to us.
>
> This court has often stated that it disapproves of postconviction counsel second-guessing the trial counsel's considered selection of trial tactics or the exercise of a professional judgment in the face of alternatives that have been weighed by trial counsel. [citations]
>
> Nevertheless, it is apparent that the prudent-lawyer standard adopted in *Harper* implies that there be conduct that is more than just acting upon a whim. It implies deliberateness, caution, and circumspection. It is substantially the equivalent of the exercise of discretion; and accordingly, it must be based upon a knowledge of all facts and all the law that may be available. The decision must evince reasonableness under the circumstances.
>
> Consistent with the express language of *Harper*, a prudent lawyer must be "skilled and versed" in the criminal law. The prudent-lawyer standard requires that strategic or tactical decisions must be based upon rationality founded

> on the facts and the law. If tactical or strategic decisions are made on such a basis, this court will not find that 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. Thus, when we look to a lawyer's conduct and measure it against this court's standard to determine effectiveness, we cannot ratify a lawyer's decision merely by labeling it, as did the trial court, "a matter of choice and of trial strategy." We must consider the law and the facts as they existed when trial counsel's conduct occurred.

Attorney Frank is skilled and versed in the criminal law. He was trying cases and asserting the Self-Defense defense since about the time the defendant was born and had the Self-Defense defense in hundreds of cases (R. 72, p. 12). Attorney Frank exercised deliberateness, caution and circumspection, and was not just acting upon a whim when he decided not to pursue a Self-Defense defense. Attorney Frank testified that with the Self-Defense defense, a person is allowed to terminate the interference, but is not allowed to retaliate (R. 72, p. 10). Attorney Frank is correct. The distinction between Self-Defense and retaliation is almost as old as the hills and bluffs in Grant County. In *Shields v. State*, 187 Wis. 448. (1925), a Boscobel (in Grant County) Police Officer tried to unmask a member of the Ku Klux Klan during a parade. After being struck by another member of the Klan, the police officer

pulled his revolver and tried to shoot a person. The gun misfired and the officer was charged with Assault with Intent to do Great Bodily Harm. In *Shields*, 187 Wis., at p. 453, the Court stated,

> There is evidence to indicate that when the defendant recovered from the staggering effects of the blow and pulled his revolver he did not know who his assailant really was, but he merely happened to aim it at Flesch. If this be true it does not indicate that he pulled his revolver in good faith or in the belief that his personal safety was in jeopardy. It is unnecessary to dwell further upon the evidence. It furnishes abundant support for the conclusion that the defendant did not pull his revolver because of an apprehension reasonably entertained by him that either his life or his personal safety was in jeopardy. A simple assault does not justify retaliation with dangerous weapons."

In *State v. Jones*, 179 Or. 636, 638, (1946), the Court stated,

> The defendant had the right to repel force with force, but he could not under the guise of self-defense become an aggressor. If the evidence offered on behalf of the state is true-and for the purposes of this appeal it must be assumed to be so-defendant had no reasonable ground to believe that Haffner-with his arms pinioned behind him-would endanger his life or cause him bodily harm."

Attorney Frank had the correct, and therefore a rational, view of the law and of the evidence. Consistent with *Felton*, since Attorney Frank's strategic and tactical decisions were rationally based on the facts and the law,

his decisions should not constitute ineffective assistance of counsel.

STRATEGY

Attorney Frank testified that there is more than one potential defense to most of these charges and that he has learned not to do the shotgun approach because asserting multiple defenses doesn't work with juries. (R. 72, pp. 12-13)

There is nothing unreasonable or irrational about Attorney Frank's conclusions regarding the preferences of juries. Everyone recognizes that these types of cases often raise the possibility of multiple defenses and that the available defenses are not mutually exclusive. But arguing to the jury one defense, such as C.G. caused the disturbance and telling the jury if they don't care for that one, then the defense argues Self-Defense, conjures up the image the shyster who argues to the jury, "My client doesn't even own a German Shepard and if she does, Fritz wasn't even outside and if Fritz was outside, he feels really bad and will never bite anyone ever again."

There is nothing irrational about picking the strongest defense. Attorney Frank did so and obtained acquittals for the defendant on the charges of Disorderly Conduct involving D.C. (Count 1) and Battery (Count 3).

AVALIABLITY OF SELF-DEFENSE

Eric Brechler testified that Michael Straight became enraged, spun C.G. around, flipped her onto the ground, took the knife away from her, straddled her, held the knife or machete to her throat and then raised the machete above his head with his hands on the handle and the point towards C.G. Eric Brechler testified that he yelled at Michael Straight and came storming off the porch to prevent anything more serious from happening. (R. 52, pp. 155-157)

Michael Straight testified that C.G. walked up to him, (R. 52, p. 191), that he feared for his life and thought that he was going to be severely harmed, (R. 52, pp. 193-194), that C.G. hit him in the shoulder with the machete, (R. 52, p. 192), that she swung at him, (R. 52, p. 192), that they went to the ground, (R. 52, p. 192), and that after he took the knife away from C.G., he gave it back to her. (R. 52., p. 194)

In *State v. Olsen*, 99 Wis. 2d 572 (Ct. App. 1980), the Trial Court, Grant County Circuit Judge William L. Reinecke, presiding in that Vernon County case, declined to give a Self-Defense Instruction in a Disorderly Conduct case. In *Olsen*, 99 Wis. 2d, at 580, the Court of Appeals stated,

> The state did not claim that defendant used force. Defendant and his codefendants emphasized that they did not resist arrest and that they were peaceful at all times during their demonstration. In the absence of an allegation or evidence that defendant used force, the trial court was correct in ruling that the defenses of self-defense and defense of others were not available to defendant.

Michael Straight testimony was significantly different then Eric Brechler's testimony. While Eric Brechler testified that he saw Michael Straight take the knife or machete away, hold it to C.G.'s throat and then raise it over C.G., Michael Straight testified that after he took the machete away from C.G., he simply gave it back to her. Under those circumstances, a Self-Defense Jury Instruction would have undermined Michael Straight's testimony.

Michael Straight could argue during this appeal that he used force by flopping C.G. to the ground and disarming her, but it would have been impractical at trial for him to argue that he didn't put the knife to C.G's throat and hold it above her in an apparent windup to stabbing her and then argue that if he did do that, he was acting in Self-Defense. Furthermore, it would have been almost impossible for Judge Day to instruct the jury and it would have been confusing for the jury to dissect the facts and the Self-Defense Instruction so that the Defense could be applied to flopping C.G. to the ground and disarming her, but not to

putting the knife to her throat and raising the knife in apparent prelude to the coup de grace.

NO PREJUDICE

As *Strickland* and *Breitzman* point out, the defense must demonstrate that counsel's performance was deficient and that the performance prejudiced the defendant. Not only was Attorney Frank's performance not deficient, but his performance certainly did not prejudice Michael Straight.

The State presented evidence that Michael Straight was yelling at a stranger and threatened to cut his brake lines. Attorney Frank secured acquittal or Michael Straight on that charge. The State presented evidence that Michael Straight committed a Battery against C.G. Attorney Frank secured acquittal for Michael Straight on that charge.

How would a Self-Defense Jury Instruction have benefited a defendant who denied putting a machete to C.G.'s throat and then holding the machete over the top of her, in a highly charged situation, with the point aimed at the victim? Not only would it have been non-sensical for Attorney Frank to argue Self-Defense for a defendant who denied putting a machete to the victim's throat and then holding it over the

top of her, but Michael Straight has not proven or demonstrated at this point that Judge Day would have given the Self-Defense Instruction for the jury to consider in connection with the defendant's denial of those facts. Michael Straight has also not proven that if a Self-Defense Jury Instruction had been given with respect to Count 2, the jury would have probably found him not guilty of that count.

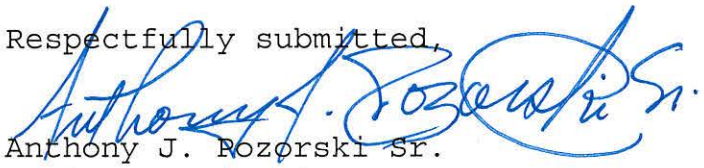
Furthermore, a shotgun approach could very well have been a bridge to far. An overreach by Attorney Frank could have undermined his credibility with the jury which could have resulted in convictions on one or both of the other charges.

CONCLUSION

Attorney Frank understood the law, the facts and how best to navigate the tetras waters of a criminal prosecution. He steered Michael Straight's ship clear of two convictions. Attorney Frank did not provide ineffective assistance with counsel to Michael Straight. Attorney Frank's assistance should be commended, not attacked.

Dated this 3rd day of April, 2023.

Respectfully submitted,



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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 22 pages.

Dated this 3rd day of April, 2023.

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