COURT OF APPEALS
DECISION
DATED AND FILED

June 30, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-3790-CR

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JEFFREY BARNEKOW,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Vilas County: JAMES MOHR, Judge. *Affirmed.*

Before Cane, P.J., Myse and Hoover, JJ.

PER CURIAM. Jeffrey Barnekow appeals an order denying his motion for a new trial on three counts of substantial battery. He argues that his trial counsel was ineffective because counsel: (1) failed to inform him of his right to testify and advised him not to testify; (2) failed to object to a reenactment; (3) failed to object to the testimony of a defense witness, on cross-examination,

vouching for the honesty of a prosecution witness; and (4) failed to object when the prosecution asked a witness how he felt about the battery he witnessed. Barnekow also requests a new trial in the interest of justice. We reject these arguments and affirm the order.

The State presented evidence that Barnekow battered three victims during a bar fight. As the bartender escorted a group of fighting patrons from the building, one of the victims fell and Barnekow kicked him in the face. Outside, Barnekow punched the second victim, causing a cut. He punched the third victim to the ground and then "kicked him like a football." Barnekow's witnesses testified that Barnekow inflicted no injury on the first victim, that the second victim was cut as a result of someone else punching him, and that Barnekow only punched, not kicked, the third victim and acted in self-defense. Barnekow did not testify.

To establish ineffective assistance of counsel, Barnekow must show deficient performance that prejudiced his defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Judicial review is highly deferential to counsel's performance, eliminating the distorting effects of hindsight, and carrying a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. Barnekow must overcome the presumption that his counsel's challenged action might be considered sound trial strategy. ***Id***. Strategic choices made after thorough investigation of the law and facts are virtually unchallengeable. ***Id***. at 690. To establish prejudice, Barnekow must show that his counsel's conduct had more than some conceivable effect on the outcome of the proceeding. ***Id***. at 693. Rather, he must show a reasonable probability that, but for counsel's unprofessional errors, the result of the

proceeding would have been different. A reasonable probability is one that undermines this court's confidence in the outcome. ***Id***. at 694.

Barnekow has not established deficient performance from his counsel's advice that Barnekow not testify. Barnekow's claim that his counsel did not inform him of his right to testify finds no support in the record and provides no basis for relief. *See* ***State v. Albright***, 96 Wis.2d 122, 133, 291 N.W.2d 487, 492 (1980). Therefore, the question is whether counsel's advice not to testify constitutes deficient performance. Counsel presented the testimony of witnesses who refuted the State's witnesses' testimony. Counsel testified at the postconviction hearing that he believed he had won the case and that he feared putting Barnekow through cross-examination. That fear was justified, as is shown by Barnekow's testimony at the postconviction hearing in which he made statements that were inconsistent with the statements he made to police immediately after the incident. Under these circumstances, the advice not to testify constituted a reasonable trial strategy that cannot be second-guessed on appeal.

Barnekow argues that the jury expected him to testify based on statements his counsel made at voir dire and in his opening statement. At voir dire, the trial court specifically reminded the jurors that some of the potential witnesses identified might not testify. Counsel's opening statement suggested, but did not promise, that Barnekow would testify. The versions of the incident counsel described to the jury were supplied by the testimony of other witnesses. Finally, the trial court instructed the jury to draw no adverse inference from Barnekow's failure to testify. We presume that the jury followed the court's instructions. *See* ***State v. Truax***, 151 Wis.2d 354, 362, 444 N.W.2d 432, 436 (Ct. App. 1989).

Barnekow failed to establish deficient performance or prejudice from his counsel's failure to object to a reenactment of one of the batteries. Barnekow argues that the reenactment was leading and suggestive and prejudiced the defense. Our review of the record discloses no leading or suggestive testimony and no unfair prejudice arising from the reenactment.

Barnekow also failed to establish prejudice from his counsel's failure to object to the testimony of a State's witness who was asked how he felt about the kicking incident and answered that he would like to kick Barnekow that way to show him how it felt. This question and answer were a very small part of the trial. Counsel's failure to object to this testimony does not undermine this court's confidence in the outcome of the trial.

Finally, Barnekow has not established any basis for granting a new trial in the interest of justice. Barnekow's decision not to testify constituted a reasonable trial strategy. The provisions for reversal in the interest of justice should not be used to enable a defendant to present an alternative defense simply because the defense offered at trial did not succeed. *See* ***State v. Hubanks***, 173 Wis.2d 1, 29, 496 N.W.2d 96, 106 (Ct. App. 1992). We conclude that the issues were fully and fairly tried, justice has not miscarried and a new trial would be unlikely to produce a different result.

By the Court.—Order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.