COURT OF APPEALS
DECISION
DATED AND FILED

July 11, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 99-3233-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOHN G. ANDERSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for St. Croix County: SCOTT R. NEEDHAM, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. John Anderson appeals a judgment convicting him of second-degree reckless endangering safety as a repeater, and an order denying his motion for a new trial. He argues that his trial counsel provided ineffective assistance by: (1) failing to move for a mistrial after a State's witness violated a

pretrial order by testifying that Anderson had violated his probation; (2) stipulating that Officer Cary Rose knew Anderson to be a person difficult to manage or control; (3) refusing to honor Anderson's request to testify at trial; and (4) failing to contradict the State's version of the incident through testimony of Donna Reichert, Anderson's girlfriend. He also argues that this court should grant a new trial in the interest of justice because the controversy was not fully tried due to the limited questions counsel posed to Reichert. We reject these arguments and affirm the judgment and order.

¶2 The State presented testimony by police officers and Anderson's probation agent regarding Anderson's conduct when they took him into custody for a probation violation. They testified that after a preliminary breath test showed that Anderson had been drinking in violation of his probation, he became angry and verbally abusive. He grabbed a pair of scissors from the dresser, cut off his electronic monitoring ankle bracelet and then set down the scissors. After another conversation with his probation officer in which she told him he was going to jail, he began swinging his arms about wildly and grabbed the scissors again, waved and jabbed the scissors and told the officers they would have to fight to take him to jail.

¶3 The defense contended that Anderson was not sufficiently close to other people in the room to create an unreasonable and substantial risk of death or great bodily harm to another person, an element of the offense. That argument was supported by Reichert's testimony regarding the size of the room and the parties' locations. The jury, however, believed the officers' version.

¶4 To establish ineffective assistance of trial counsel, Anderson must show that his counsel's performance was deficient and that the deficient

performance prejudiced the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Judicial scrutiny of counsel's performance is highly deferential, and Anderson must overcome a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance and that it might be considered sound trial strategy. *See* ***id.*** at 689. Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable. *See* ***id.*** at 690. To establish prejudice, he 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 one that undermines confidence in the outcome. *See* ***id.*** at 694.

¶5 Anderson has established neither deficient performance nor prejudice from his counsel's failure to move for a mistrial when Anderson's probation agent testified that he was required to wear a bracelet because he had violated the rules of his probation. Counsel immediately objected based on a pretrial ruling that excluded any evidence as to why Anderson was on probation, prior contacts in jail, the length of supervision or the reasons for prior custodies. The trial court sustained the objection. That single reference to Anderson's previous conduct, which the jury was instructed to disregard, does not make a new trial a "manifest necessity." *See* ***State v. Bunch***, 191 Wis. 2d 501, 507, 529 N.W.2d 923 (Ct. App. 1995). Because the trial court correctly concluded that there was no basis for granting a mistrial, counsel cannot be faulted for failing to request a mistrial and Anderson suffered no prejudice from counsel's performance.

¶6 Anderson next argues that his trial counsel was ineffective for stipulating that Rose, one of the arresting officers and a jailer, could testify that Anderson was a person for whom law enforcement would take precautions

regarding his conduct. Counsel explained that she was attempting to prevent further inquiry into Anderson's character by agreeing to allow the State to make general references without getting into specifics. Anderson argues that the pretrial ruling prohibiting testimony on Anderson's probation, prior contacts in jail, length of supervision and reason for prior custodies would have precluded any adverse character testimony. The pretrial ruling did not necessarily prohibit all testimony regarding Anderson's character for unruly behavior. His trial attorney could reasonably have concluded that the trial court would allow some testimony regarding Anderson's behavior and reputation in order to provide a contextual foundation for the incident and to establish the nonprovocative nature of the officers' conduct at his home. Rose's testimony explained the officers' behavior and added little to the jury's impression of Anderson. Counsel employed a reasonable trial strategy by agreeing to a brief stipulation that would avoid any possibility of a more prejudicial detailed account of any prior incident.

¶7 Anderson's argument that his trial counsel was ineffective for refusing to honor Anderson's request to testify at trial is premised on a factual assertion that is not supported by the record. The record shows that Anderson accepted his counsel's advice and chose not to testify. Counsel testified that she made it clear to Anderson that "all of the major decisions in this case were to be his" and that it was for him to decide whether he would testify The defense strategy was to present the defense through Reichert's testimony and did not include Anderson testifying.[1] Counsel received no indication from her client that he changed his mind about the strategy during the trial.

[1] In light of Anderson's 10 prior convictions, counsel reasonably chose to rely on Reichert's testimony regarding the size of the room and the parties' location to support the mutually agreed upon strategy.

¶8 Anderson has not established deficient performance based on his counsel's decision to focus Reichert's testimony on the room's dimensions and the distance between Anderson and the officers. Reichert's postconviction testimony indicates that she would have testified that Anderson was holding the scissors in a manner used for cutting, not stabbing, and that she never saw him lunge at the officers. While this testimony would have been favorable to Anderson, it was not necessary to the defense chosen by counsel to which Anderson agreed. Had Reichert testified in direct contradiction to the State's witnesses, she would have been subject to more intense cross-examination that likely would have disclosed that Anderson physically abused her on prior occasions. Counsel employed a reasonable trial strategy by avoiding a direct credibility contest between Reichert and a probation officer and three police officers, particularly when that testimony would not have advanced the theory of defense she selected and would have opened the door to more prejudicial cross-examination.

¶9 Because the real controversy was fully and fairly tried, there is no basis for a new trial in the interest of justice. Anderson chose a defense that was not successful. He cannot be heard to complain that another defense that he chose not to present might have been more successful. *See* ***Cross v. State***, 45 Wis. 2d 593, 605, 173 N.W.2d 589 (1970).

By the Court.—Judgment and order affirmed.

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