

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 06, 2005

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2004AP2006-CR

Cir. Ct. No. 2002CF2660

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT 1**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANDREW NEWSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: MICHAEL B. BRENNAN, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Kessler, JJ.

¶1 KESSLER, J. Andrew Newson appeals from a judgment of conviction for delivery of cocaine, contrary to WIS. STAT. § 961.41(1)(cm)1.

(2001-02),¹ and from an order denying his motion for postconviction relief.² He argues that his trial counsel provided ineffective assistance when she: (1) failed to effectively cross-examine two police officers; and (2) agreed to a redaction of Newson's written statement that was presented to the jury. We reject Newson's arguments and affirm the judgment and order.

BACKGROUND

¶2 Newson was charged with selling crack cocaine outside a private home to police officer Shelondia Tarver, who was working undercover at the time of the sale. At trial, the State presented testimony from Tarver and police officers Monique Garland and Michael Terrell, who observed the transaction consistent with their surveillance roles during the undercover operation. In addition, officer Brian Stott testified about his apprehension of Newson. Newson testified that he was not the person who sold drugs to Tarver.

¶3 The case was first tried to a jury in December 2002. When the jury could not reach a unanimous verdict, the trial court declared a mistrial. Newson was retried in May 2003. As relevant to this appeal, there was a notable difference in the testimony that Tarver, Garland and Stott offered in the first and second trials: at the first trial, none of them testified about Newson's four gold-capped front teeth, but all three mentioned this identifying trait at the second trial. The jury found Newson guilty.

¹ All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

² The Honorable Michael B. Brennan presided over the trial and sentencing. The Honorable Timothy G. Dugan presided over the postconviction proceedings.

¶4 Newson was sentenced to seven years of initial confinement and five years of extended supervision. Newson filed a postconviction motion alleging that he was entitled to a new trial because trial counsel failed to effectively cross-examine Tarver and Garland about inconsistencies in their testimony between the first and second trials. Newson also alleged that trial counsel provided ineffective assistance when trial counsel agreed to a redaction of Newson’s written statement that was presented to the jury. The trial court denied the motion in a written order, without a hearing. This appeal followed.

DISCUSSION

¶5 At issue is whether Newson is entitled to a new trial based on ineffective assistance of trial counsel. The two-pronged test for ineffective assistance of counsel requires the defendant to prove deficient performance of counsel and prejudice to the defendant. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Pitsch*, 124 Wis. 2d 628, 633, 369 N.W.2d 711 (1985). The test for the performance prong is whether counsel’s assistance was reasonable under the facts of the particular case, viewed as of the time of counsel’s conduct. *Pitsch*, 124 Wis. 2d at 636-37. When evaluating counsel’s performance, courts are to be “‘highly deferential’ and must avoid the ‘distorting effects of hindsight.’” *State v. Thiel*, 2003 WI 111, ¶19, 264 Wis. 2d 571, 665 N.W.2d 305 (quoting *Strickland*, 466 U.S. at 689). “‘Counsel need not be perfect, indeed not even very good, to be constitutionally adequate.’” *Thiel*, 264 Wis. 2d 571, ¶19 (citation omitted). We indulge in a strong presumption that counsel acted reasonably within professional norms. *Pitsch*, 124 Wis. 2d at 637.

¶6 Under the second prong of the ineffective assistance test, the question is whether counsel’s errors were so serious that the defendant was

deprived of a fair trial and a reliable trial outcome. *Pitsch*, 124 Wis. 2d at 640-41. An error is prejudicial if it undermines confidence in the outcome. *Id.* at 642.

¶7 Whether counsel's actions constitute ineffective assistance is a mixed question of law and fact. *Thiel*, 264 Wis. 2d 571, ¶21. The trial court's findings of what counsel did and the basis for the challenged conduct are factual and will be upheld unless clearly erroneous. *Id.* However, whether counsel's conduct amounted to ineffective assistance is a question of law that we review *de novo*. *Id.*

A. Alleged deficiency in cross-examination

¶8 Newson argues that trial counsel failed to effectively cross-examine two officers concerning inconsistencies between their testimony at Newson's first and second trials. Newson asserts that his defenses at both trials were mistaken identity, lack of physical evidence, and failure to meet the burden of proof. He notes that the testimony of both Tarver and Garland was consistent in the two trials, with one notable exception: at the second trial, both testified about Newson's four upper gold teeth. Neither had ever testified about gold teeth previously.

¶9 Trial counsel cross-examined Tarver about her testimony concerning the gold teeth:

[Trial counsel]: Did you testify at a prior hearing that the person had gold teeth?

[Tarver]: Not that I can recall.

[Trial counsel]: Today's the first time that's come up, isn't it?

[Tarver]: I believe so.

[Trial counsel]: And, in fact, that was one of the first items of identification that you noted today, is that what you're stating?

[Tarver]: Yes. One of the things I've noticed about him, yes.

[Trial counsel]: Okay. But it wasn't so noteworthy on two prior occasions that you testified about this, is that correct?

[Tarver]: I was never asked on the two prior occasions that I can recall.

[Trial counsel]: You were asked to identify him previously though, weren't you?

[Tarver]: Yes.

Trial counsel then moved on to other areas of examination.

¶10 With respect to officer Garland, trial counsel likewise asked if she had previously testified about gold teeth:

[Trial counsel]: And at some point you've indicated that you noticed the person's gold teeth?

[Garland]: Yes.

[Trial counsel]: Have you given testimony in these proceedings before?

[Garland:] Yes.

[Trial counsel]: Have you ever testified about gold teeth before?

[Garland]: Yes, ma'am.

[Trial counsel]: You did?

[Garland]: In this particular hearing or are you saying in general?

[Trial counsel]: On a prior date.

[Trial court:] We're talking about not any hearing that you've ever testified concerning any defendant, we're

talking about this case involving these two parties. Have you ever testified to any gold teeth?

[Garland]: To the best of my knowledge, yes.

Trial counsel then moved on to other areas of examination.

¶11 Newson argues that his trial counsel should have impeached both witnesses by

physically handing them the relevant transcript of proceedings from the first trial and asking them to look through the sixty-five pages of testimony in Officer Tarver's case and the eighteen pages in Officer Garland's case to demonstrate for the jury, in the clearest possible terms, that they did not, at any time, mention the most vitally relevant fact about Mr. Newson's appearance.

¶12 We begin our analysis with trial counsel's cross-examination of Tarver. Through cross-examination, trial counsel brought to the jury's attention the fact that Tarver had failed to testify on previous occasions about the gold teeth. While Newson suggests another way trial counsel could have impeached Tarver—handing her the actual transcript—trial counsel's method of cross-examination was certainly within the bounds of a reasonable approach. Trial counsel's questions established that the testimony was new, and prepared trial counsel to argue that point in closing argument, which she did. Trial counsel's cross-examination of Tarver was not constitutionally deficient.

¶13 The fact that trial counsel did not elicit testimony to contradict Garland's assertion that "to the best of her knowledge" she had previously testified about the gold teeth, presents a closer call. Following up on Garland's answer and showing that she had not previously testified about the teeth would have highlighted the fact that Garland was either lying or mistaken. However, trial attorneys have limited time to examine witnesses. While trial counsel could have

followed up on Garland's answer, trial counsel instead chose to move on to other inconsistencies in Garland's testimony, which trial counsel then pointed out during closing argument. In hindsight, this may not have been perfect performance, but perfection is not required. See *Thiel*, 264 Wis. 2d 571, ¶19. We conclude that trial counsel's performance was constitutionally adequate.

B. Alleged performance concerning the redaction

¶14 Newson argues that his trial counsel was ineffective because for the second trial she agreed to redact certain information from Newson's alleged statement to police detective Jeffrey Sullivan. Newson testified at both trials that he spoke to Sullivan, but said that Sullivan's account of what Newson said was inaccurate.

¶15 At the first trial, Sullivan testified that Newson gave a statement in which he stated that there was another person known as "T.K." on the porch at the time, that the officer asked for two rocks of cocaine, and that the officer gave Newson \$20 or \$25. According to Sullivan, Newson said that T.K. left the porch and Newson walked along the side of the house to a side door. He gave the money to T.K. and T.K. gave him three or four rocks of crack cocaine. Newson gave two or three of these to the officer and kept one for himself, which he smoked before he was arrested.

¶16 At the second trial, the parties agreed to redact the written statement, so that Sullivan testified that Newson said he received an unspecified number of crack cocaine rocks from T.K. and gave two to the officer. No mention was made of Newson's alleged consumption of one crack cocaine rock following the transaction.

¶17 The redaction of Newson's statement occurred by agreement of the parties. The issue arose at the start of the second trial, when the trial court asked whether the State intended to introduce any other acts evidence. The State indicated that the portion of Newson's statement in which he said that he had smoked crack cocaine could be considered other acts evidence, but argued that it was admissible to prove that Newson knew that what he was delivering was cocaine because it demonstrated Newson's familiarity with the drug. Trial counsel objected to the admission of that evidence; the trial court reserved its ruling.

¶18 The trial court revisited the issue at trial. The trial court also asked the State for its position on the admissibility of that portion of the statement in which Newson said that he had "smoked the crack cocaine rock before the police arrested him in the alley." The prosecutor said that this statement might be relevant to explain what happened to the third rock of cocaine that T.K. gave Newson. The prosecutor suggested that the last sentence of Newson's statement could be redacted as long as the earlier reference in the statement to three rocks was also redacted, because he did not want the jury wondering what happened to the third rock. Defense counsel agreed with that suggestion, noting:

Your Honor, I think that may be a better course of action to follow. I think that that statement – aside from issues of prejudice and whatnot, I think that statement certainly is self-incriminating. Certainly, Mr. Newson denies the statement was made, but nonetheless, I think it's also confusing. I think ... that ... it may have a spill-over effect of simply tainting the issues here, and I think that it's something that should not be brought, and I think it should be redacted, and we would adjust the amounts of the items that were the items of crack cocaine involved.

Based on the parties' agreement, the trial court ordered that the statement be redacted.

¶19 Newson argues that trial counsel should not have agreed to the redaction, because the result was to remove all references to anything that contradicted the officers' testimony. He also complains that trial counsel did not discuss the possibility of redacting the document with him prior to consenting to the State's rewritten version.

¶20 It is apparent from the record that trial counsel made a deliberate, strategic decision to agree to the redaction. As trial counsel explained at trial, she believed that allowing the jury to hear that her client smoked crack cocaine could "taint[] the issues" and that redacting the reference to Newson's drug use would best advance her client's case. Our role on appeal is not to second-guess trial counsel's selection of trial tactics or the exercise of professional judgment after weighing the alternatives. *State v. Felton*, 110 Wis. 2d 485, 502, 329 N.W.2d 161 (1983). Where, as here, a strategic decision is based upon rationality founded on the facts and law, trial counsel is not deficient. *See id.*

¶21 Moreover, the fact that trial counsel did not discuss this issue with Newson does not make her ineffective. As the State points out, trial counsel was under no obligation to consult with Newson on that decision. The State explains:

With the exception of a few decisions considered so fundamental that they must be waived personally by the defendant, such as the decision whether to plead guilty or to request a trial by jury, when a defendant accepts counsel, the defendant delegates to counsel "the myriad tactical decisions an attorney must make during a trial." *State v. Brunette*, 220 Wis. 2d 431, 443, 583 N.W.2d 174 (Ct. App. 1998).

We agree. Newson was not entitled to be consulted before trial counsel made a tactical decision about redacting the statement. Trial counsel's performance was not deficient.

CONCLUSION

¶22 We conclude that trial counsel's representation was constitutionally adequate. Therefore, we need not consider whether Newson was prejudiced by the alleged error. *See Strickland*, 466 U.S. at 697 (reviewing court need not address performance prong if the defendant has failed to show prejudice and vice versa). We affirm the judgment and order.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.

