COURT OF APPEALS
DECISION
DATED AND FILED

July 5, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP3048-CR **Cir. Ct. No. 2004CF180**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANDREW N. BAUERFIELD,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Barron County: EDWARD R. BRUNNER, Judge. *Affirmed.*

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

¶1 PER CURIAM. Andrew Bauerfield appeals a judgment of conviction and an order denying postconviction relief. Bauerfield contends that his trial attorney was ineffective because he did not adequately cross-examine a witness. We reject Bauerfield's arguments and affirm.

¶2 Bauerfield was charged with two counts of burglary, as a party to a crime, contrary to WIS. STAT. §§ 943.10(1)(a) and 939.05.[1] The charges stemmed from two separate burglaries of a tavern across the street from Bauerfield's home. One burglary occurred in July 2003; the other in November 2003. After a jury trial, Bauerfield was convicted of the July robbery, but acquitted of the November robbery.

¶3 Bauerfield argues that his attorney was ineffective because he did not effectively cross-examine a witness named Mathew Norton. His argument hinges upon a single inconsistency between Norton's preliminary hearing testimony and his trial testimony. At the preliminary hearing, Norton testified that he arrived at Bauerfield's home *after* the July burglary took place. Norton testified that he visited Bauerfield's home and observed "a lot of alcohol and cigarettes." Bauerfield allegedly told Norton that he had directed Adam Scott and Robert Sigsworth to break into the tavern and retrieve the items on a prior occasion.

¶4 However, at trial Norton testified that he arrived at Bauerfield's home *before* the July burglary. Norton testified that upon arriving at Bauerfield's home in July 2003, Bauerfield told him that "later in the evening" certain individuals were going to steal alcohol and cigarettes from the tavern. Norton also testified that Bauerfield asked him to take part in the burglary, that he refused, but that at Bauerfield's instruction, Scott and Sigsworth eventually went to the tavern and came back with duffel bags full of alcohol, cigarettes, pizza and candy.

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

¶5 The standard for assessing claims of ineffective assistance of counsel is well established. A defendant claiming ineffective assistance must show that counsel's performance was deficient and that the deficient performance prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Deficient performance requires a showing that defense counsel's representation fell below an objective standard of reasonableness. ***Id.*** at 688. When examining counsel's performance, courts must be "highly deferential" and avoid the "distorting effects of hindsight." ***State v. Thiel***, 2003 WI 111, ¶19, 264 Wis. 2d 571, 665 N.W.2d 305. "Counsel need not be perfect, indeed not even very good, to be constitutionally adequate." ***Id.*** (quoting ***State v. Williquette***, 180 Wis. 2d 589, 605, 510 N.W.2d 708 (1993)). Courts must strongly presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. ***State v. Pitsch***, 124 Wis. 2d 628, 637, 369 N.W.2d 711 (1985). This presumption is even more difficult to rebut in cases where the defendant was acquitted on one of the counts against him. *See* ***United States v. Banks***, 405 F.3d 559, 568 (7th Cir. 2005). The test for the prejudice prong is whether there is "a reasonable probability that, but for counsel's error, the result of the proceeding would have been different." ***State v. Guerard***, 2004 WI 85, ¶43, 273 Wis. 2d 250, 682 N.W.2d 12. Failure to prove either prong dooms the defendant's claim. *See* ***State v. Williams***, 2001 WI App 123, ¶22, 237 Wis. 2d 591, 614 N.W.2d 11.

¶6 We conclude that Bauerfield has not established that his counsel's performance was deficient. Although counsel may not have cross-examined Norton concerning when he arrived at Bauerfield's home in relation to the July robbery as vigorously as Bauerfield would have liked, it does not follow that counsel therefore performed deficiently. To the contrary, counsel vigorously and

effectively cross-examined Norton by eliciting errors, gaps, inconsistencies and other reasons to doubt his recollection of facts related to the July robbery.

¶7 For example, counsel initially highlighted the fact that Norton had entered into a deferred prosecution agreement in exchange for his testimony. Counsel also tested Norton's recollection of the details of the evening and pressed Norton concerning why he did not call the police. Counsel further obtained a concession from Norton that the reason he decided not to participate in the July robbery was because he "had other plea agreements that [he was] working on." Perhaps most importantly, he challenged Norton to show where in the preliminary hearing transcript Norton ever mentioned that he was present at Bauerfield's home in July. Thus, the jury's attention was drawn to Norton's inconsistency in his trial testimony as to when he was present at Bauerfield's home in relation to the July robbery and when he heard of Bauerfield's plan to have other people go to the bar.

¶8 Contrary to Bauerfield's perception, the cross-examination of Norton was not a discrete, self-contained event. Rather, it was part of a broader cross-examination that concerned Norton's general trustworthiness, among other things. For instance, counsel pointed out that although Norton claimed at trial that Bauerfield "forced" him into participating in the November robbery, Norton made no mention of being forced by Bauerfield to do anything in his initial statement to the police. Indeed, he only told police that version of events months later, after obtaining an attorney. Counsel also read back a question from the transcript of the preliminary examination, where Norton was sworn under oath to tell the truth, and solicited Norton's concession that he answered "No" when asked whether Bauerfield threatened him in any way to get him to go over to the bar in November. Norton was also confronted with his testimony from the preliminary examination where he stated, "This was something to impress four girls."

¶9 Through cross-examination, counsel thus depicted Norton as a criminal who had a capacity for untruthfulness, and whose willingness to comply with the law varied according to circumstances and his particular interests at the time. Although counsel's actions during the heat of trial were not perfect, even a cold dissection of the record does not raise concerns to the level of ineffective assistance. The one error alleged by Bauerfield would not have measurably contributed to the portrait already painted of Norton as a criminal and a potentially untrustworthy witness. Counsel's performance was within the wide range of conduct that constitutes competent assistance when viewed from counsel's perspective at the time rather than through the potentially distorting prism of hindsight. *See* ***Strickland***, 466 U.S. at 689.

¶10 Moreover, we cannot conclude that had counsel pressed Norton further on this one inconsistency, there is a "reasonable probability" the jury would have reached a different result. ***Guerard***, 273 Wis. 2d 250, ¶43. Counsel gave the jury ample reason to entirely disbelieve Norton's testimony. Counsel's single claimed error did not undermine confidence in the outcome of this case, and Bauerfield has failed to convince us that any perceived error was prejudicial.

By the Court.—Judgment and order affirmed.

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