

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 10, 2006

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. 2005AP3132

Cir. Ct. No. 2002CF103

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MISTYE L. DOUGHTY,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Brown County: PETER NAZE, Judge. *Affirmed.*

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

¶1 PER CURIAM. Mistye Doughty appeals the circuit court's judgment of conviction and order denying her motion for postconviction relief. She alleges her trial counsel was ineffective for failing to impeach a witness with that witness's statements in a prior trial. Because trial counsel did in fact impeach

the witness with inconsistencies to the extent that they existed, we affirm the judgment and order.

BACKGROUND

¶2 This appeal arises out of the January 9, 2002 murder of Doug Tappa, a Green Bay jeweler. According to the criminal complaint, Mistye Doughty and her husband Matthew Doughty arranged a meeting at Tappa's house to discuss jewelry Matthew had previously purchased and which Matthew believed contained fake diamonds. While there, Matthew beat Tappa to death by repeatedly striking him in the head with a wrench. The two then escaped with a significant amount of jewelry.

¶3 Matthew and Mistye were charged with armed robbery. Matthew was also charged with first-degree intentional homicide, and Mistye with felony murder. The two were tried separately, with Matthew's trial scheduled first. Matthew was convicted of both charges against him.

¶4 Mistye's trial commenced one week later, on August 12, 2002. The State's theory of the case was that Mistye had been a part of a plan to rob Tappa from the very beginning. She needed money to support her drug habit, and was accustomed to getting money by having Matthew steal things for her. The State argued that "Mistye Doughty is not some innocent, ignorant bystander but, rather, someone who is the prime reason for this robbery and who aided and abetted it."

¶5 Mistye painted a very different picture. Counsel argued Matthew was exclusively responsible for the planning of the robbery. Once in the house, Matthew killed Tappa while Mistye was in the bathroom, and she attempted to

stop him but was too late. The defense argued that testimony to the contrary was not credible.

¶6 One witness who contradicted the defense account was Renee Rogers. The Doughtys had moved into Rogers' home approximately three weeks before the murder. Rogers testified that prior to the murder she heard Mistye telling Matthew that it would be easy to rob Tappa. She testified Mistye would talk about the plan "on a regular basis," Mistye was "really trying to push [Matthew] to do it" and Mistye was desperate for money. Finally, Rogers noted that when Mistye and Matthew returned from Tappa's house after the murder, "[t]hey both acted as if they had won the lottery."

¶7 The jury convicted Mistye on both counts, and she was sentenced to sixty years, thirty-five in confinement and twenty-five on extended supervision.¹ She appealed, alleging that the evidence was insufficient to support her conviction. We affirmed her conviction. *State v. Doughty*, No. 2003AP1187-CR, unpublished slip op. (Wis. Ct. App. Apr. 13, 2004).

¶8 Mistye then brought a WIS. STAT. § 974.06² postconviction motion alleging several ineffective assistance claims, including that counsel failed to properly impeach Rogers with statements Rogers made at Matthew's trial. According to Mistye, Rogers testified at Matthew's trial that Matthew had

¹ The information was amended shortly after Mistye's conviction to properly treat felony murder as a penalty enhancer rather than a separate charge. The end result, then, was that Mistye was convicted of armed robbery with a felony murder penalty enhancer.

² All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

conceived the plot to rob Tappa, then testified at Mistye's trial that it was in fact Mistye who had conceived the plan.

¶9 The circuit court denied most of the claims but ordered a *Machner*³ hearing on Mistye's claim regarding Rogers' cross-examination. At the hearing, trial counsel stated that he did not "have any independent recollection of the questioning ... of anybody" but that inconsistent statements by Rogers would have been worthy of use in cross-examination. He could recall no strategic reason for not asking questions about any inconsistent statements, and noted that his main focus was to impeach Rogers with inconsistent statements in police reports and to establish that she was "a pawn for the police" testifying in exchange for lenient treatment on an unrelated drug charge.

¶10 The circuit court denied Mistye's motion. It held trial counsel was "arguably deficient" for failing to bring up the inconsistent statements, but Mistye had not met her burden of showing prejudice.

STANDARD OF REVIEW

¶11 Ineffective assistance claims pose a mixed question of law and fact. *State v. Johnson*, 153 Wis. 2d 121, 127-28, 449 N.W.2d 845 (1990). We will overturn the circuit court's findings of the underlying facts only if they are clearly erroneous. *Id.* However, whether those facts constitute ineffective assistance is a question of law that we review without deference to the circuit court, but benefiting from its analysis. *Id.*

³ See *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

DISCUSSION

¶12 Trial counsel provides ineffective assistance when counsel’s performance is deficient and that deficiency prejudices the client. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To prove deficient performance, a defendant must specifically identify the alleged deficient acts or omissions. The court then decides whether the acts or omissions fall “outside the wide range of professionally competent assistance.” *Id.* at 690.

¶13 Here, Mistye alleges one specific deficient act: trial counsel’s failure to cross-examine Rogers about inconsistencies in her testimony as to who conceived the plot to rob Tappa.⁴ We conclude Rogers’ testimony was largely consistent, and to the extent that it was inconsistent, trial counsel did in fact cross-examine Rogers about the inconsistency. We therefore conclude counsel’s action was well within the acceptable range of competent assistance.

¶14 At Matthew’s trial, Rogers testified on direct as follows:

Q: Do you recall hearing Matt Doughty talk about Doug Tappa –

A: Yes.

....

Q: And what would [Matthew] talk about?

A: Um, about the jewelry [Tappa] made for Mistye, um, how he could rob him. That’s about it.

....

⁴ Mistye also alleges ineffective assistance of appellate counsel. However, that claim is based on appellate counsel’s failure to raise the claim addressed here on direct appeal. Because we conclude trial counsel was not ineffective, we need not address this second claim.

Q: How did that come up?

A: I'm not exactly sure how it came. Well, yes, I am, because Mistye kept getting on Matt telling him he need[ed] to go get some money, tell these stories about things you used to do and how you used to get all this money. "Well, we're broke. You got to go out and get some money." So that's when he start[ed], you know, talking about how he could rob him.

Q: Where did this – how – did he talk about that on more than one occasion?

A: Yes.⁵

At Mistye's trial, Rogers testified on direct as follows:

Q: Maybe I should ask it this way. What else did [Mistye] talk about concerning Doug Tappa and his jewelry?

A: She said it would be easy to rob him, um, that there weren't any cameras or anything like that there, and she could rob him real easy.

Q: Who was she telling this to?

A: Her husband, Matthew Doughty.

....

Q: Do you know why Mistye Doughty was talking to her husband about robbing Doug Tappa?

A: Because she said she needed money. And she told me that she told Matt to go out and get her some money. She didn't care how he did it. He would tell her all the stories he used to do [sic], so go out and get her some money now.

⁵ This questioning appears in Misty's appendix, and the State does not dispute its accuracy.

Mistye argues this excerpt from the record shows that Rogers claimed it was Matthew's idea to rob Tappa in Matthew's trial, then turned around and claimed it was Mistye's idea to rob Tappa in Mistye's trial one week later.

¶15 The record simply does not support that assertion. Rogers never testified in Mistye's trial that Mistye conceived the idea of robbing Tappa. Rogers only testified that Mistye told Matthew it would be easy to rob Tappa. One inference from this testimony is that Mistye conceived the plan, but a more reasonable inference is that Rogers overheard Mistye encouraging Matthew after the plan had already been hatched – something Rogers testified in both trials that Mistye did. As for Rogers' testimony in Matthew's trial, Rogers stated Matthew started talking about robbing Tappa after Mistye insisted that Matthew get them some money. But again, this statement does not indicate which Doughty originated the plan. It simply indicates Matthew's motive for the crime.

¶16 As the State points out, this inconsistency is at most one of emphasis. That is, at Matthew's trial, Rogers primarily discussed statements Matthew made. At Mistye's trial, Rogers primarily discussed statements Mistye made. However, counsel fully explored that inconsistency:

Q: And isn't it true that it was Matthew Doughty, at least according to you in your testimony in his trial, was the one that was talking about robbing Mr. Tappa?

A: Yeah, he talked about it. Mistye is the one that initially brought it up and the one that kept hounding, "when are you going to do it?"

Q: When did that – when did that occur?

A: All the time.

Q: Mistye hounding Matthew?

A: On a regular basis until it was done.

¶17 We conclude that to the extent Rogers’ testimony was inconsistent, Mistye’s trial counsel fully explored the inconsistency. Counsel’s performance therefore was not deficient, and Mistye’s claim is without merit.⁶

By the Court.—Judgment and order affirmed.

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

⁶ In her reply brief, Mistye alleges a new claim of ineffective assistance: that counsel failed to impeach Rogers about the nature of Mistye’s plan. Mistye claims that Rogers testified at Matthew’s trial that Mistye’s plan was to shoplift from Tappa, while at Mistye’s trial Rogers testified that Mistye’s plan was to rob him.

This claim was not raised in the circuit court, discussed at Mistye’s *Machner* hearing, or brought up in this appeal until Mistye’s reply brief. It is therefore waived, and we decline to address it. See *Terpstra v. Soiltest, Inc.*, 63 Wis. 2d 585, 593, 218 N.W.2d 129 (1974) (issues waived if not preserved in circuit court); see also *Schaeffer v. State Personnel Comm’n*, 150 Wis. 2d 132, 144, 441 N.W.2d 292 (Ct. App. 1989) (court generally will not address arguments raised for the first time in reply briefs).

