**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

May 8, 2001

**Cornelia G. Clark**
**Clerk, Court of Appeals**
**of Wisconsin**



**No. 00-3285-CR**

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

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**v.**

**MARTIN J. APPLEBEE,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Rusk County: FREDERICK A. HENDERSON, Judge. *Affirmed.*

¶1 HOOVER, P.J.[1] Martin Applebee appeals a judgment of conviction and an order denying his motion for postconviction relief. He claims that he is entitled to a new trial (1) because he was denied effective assistance of counsel,

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f). All references to the Wisconsin Statutes are to the 1999-2000 version.

(2) because of newly-discovered evidence and (3) in the interest of justice. This court perceives no merit in Applebee's contentions and therefore affirms the judgment and order.

## BACKGROUND

¶2 Applebee was involved in a bar fight and was charged with battery, endangering safety by use of a dangerous weapon and disorderly conduct. *See* WIS. STAT. §§ 940.19(1), 941.20(1)(a) and 947.01. At the trial, the victim testified that as soon as he arrived at the bar he purchased some drinks. He then turned away from the bar and, as he was walking to join his girlfriend, he heard glass break and then saw Applebee, whom he did not know, lunge at him with a beer bottle. According to the victim, Applebee came on "almost like full force" waiving and swinging the broken beer bottle. The victim stepped back and tried to grab the bottle, cutting his hand in the process. As Applebee again attacked the victim, he again attempted to defend himself by grabbing the bottle. Applebee was eventually restrained and removed from the premises. As a result of the attack, the victim had "fairly deep" cuts to both hands.

¶3 An off-duty bartender testified that she saw Applebee break a beer bottle on the bar, say something "loud and hostile sounding" while looking in the victim's direction, approach the victim and then poke the broken bottle at him. The witness saw the victim's wounds and helped bandage them. Other witnesses, both the State's and defense, testified that they did not see a bottle in Applebee's hand while he was involved in the altercation.

¶4 Applebee testified that he ordered a bottle of beer and when he turned around from the bar the victim was there, about four feet away. Applebee's vague version of events suggested that the victim started the altercation without

provocation. He admits in his brief that the record demonstrates that he had a beer bottle in his hand when he argued with and pushed the victim. Applebee testified, however, that he did not jab or swing at the victim with the bottle. He further claimed that he did not break the bottle on the bar or break it "on purpose" at any time or anywhere. While he did not know how the victim cut his hand, he did admit that the bottle "got broke … somehow."

¶5 The jury convicted Applebee, who then brought a postconviction motion raising the same issues he now advances on appeal. The following facts are based upon testimony given at the postconviction motion hearing. Approximately a month and a half after being charged, Applebee identified for his attorney, Tim Korf, six potential witnesses, including Andy Krajewski. Several months later, Korf gave the witnesses' names, phone numbers and other information to an investigator, Robert J. Berg. Although Berg's records suggested that he delayed contact with the potential witnesses until shortly before the February 10 trial date,[2] Korf believed that Berg had attempted to contact Krajewski earlier. Korf recalled talking to Berg several times before February. Korf, in rejecting postconviction counsel's suggestion that Berg first attempted to locate Krajewski on February 9, testified that he remembered "having a conversation with Berg and he was attempting to locate witnesses and having problems with some of them."

¶6 On the day of trial, Korf received Berg's report. It indicated that Berg had contacted individuals close to Krajewski and had left messages, but that

[2] For example, Berg's file activity log indicated that he attempted to locate Krajewski on February 9, the day before Applebee's jury trial.

Krajewski had "proven to be elusive." Despite Berg's efforts to locate Krajewski, he was unable to find him by the trial date.

¶7 Krajewski testified that someone from Korf's office contacted him and arranged for a meeting in a restaurant, but it did not occur because of a miscommunication. Krajewski claimed to have called either Korf or Berg, he did not remember who, and left messages that were never returned. As a result, he did not testify at trial.

¶8 Krajewski claimed that he heard Applebee and the victim exchange words and saw "some pushing." He did not recall what was said. Krajewski indicated that he did not see a beer bottle, "broken or otherwise" in Applebee's hand. Krajewski left after the altercation.

¶9 The trial court denied the postconviction motion. It concluded in part that Applebee failed to demonstrate that his attorney was deficient because he failed to present expert testimony to establish that the applicable standard was breached. The trial court further held that Applebee was not entitled to a new trial on the basis of newly-discovered evidence because he knew Krajewski was a witness and had in fact contacted him before the trial. Further, the court determined that Krajewski's testimony was cumulative. It did not address Applebee's request for a new trial in the interest of justice.

## DISCUSSION

### 1. Ineffective Assistance of Counsel

¶10 To prove a Sixth Amendment violation of the right to effective counsel, the defendant must show that counsel's performance was deficient and that counsel's errors or omissions prejudiced the defense. ***State v. Pitsch***, 124

Wis. 2d 628, 633, 369 N.W.2d 711 (1985). Deficient performance falls outside the range of professionally competent representation and is measured by the objective standard of what a reasonably prudent attorney would do in the circumstances. ***Id.*** at 636-37. To prove deficient performance, a defendant must establish that his or her counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). The defendant must overcome a strong presumption that his or her counsel acted reasonably within professional norms. ***Id.***

¶11 Prejudice results when there is a reasonable probability that but for counsel's errors the result of the proceeding would have been different. ***Pitsch***, 124 Wis. 2d at 642. To satisfy the prejudice prong, the defendant must show that "counsel's errors were serious enough to render the resulting conviction unreliable." ***State v. Smith***, 198 Wis. 2d 820, 824, 543 N.W.2d 836 (Ct. App. 1995), *rev'd on other grounds,* 207 Wis. 2d 258, 558 N.W.2d 379 (1995).

¶12 Because the defendant must show both deficient performance and prejudice to succeed in establishing ineffective assistance, the court need not address both components of the test if the defendant makes an insufficient showing on either one. *See* ***Strickland v. Washington***, 466 U.S. 668, 697 (1984); *see also* ***Johnson***, 153 Wis. 2d at 128.

¶13 Appellate review of a trial court's conclusion about ineffective assistance claims involves a mixed question of law and fact. The trial court's assessment of what actually happened, the historical facts, will not be set aside unless clearly erroneous. The overall question whether the representation was deficient and prejudicial, however, is a question of law the appellate court reviews

de novo. ***State v. Behnke,*** 203 Wis. 2d 43, 62, 553 N.W.2d 265 (Ct. App. 1996). We may affirm a circuit court's decision even if the circuit court reached its result for different reasons. ***Lecander v. Billmeyer***, 171 Wis. 2d 593, 602, 492 N.W.2d 167 (Ct. App. 1992).

¶14 Applebee argues that Korf's performance was deficient because he did not attempt to locate and subpoena Krajewski "diligently and quickly." He contends that Korf's waiting until the last minute to find him constituted deficient performance. This court is not persuaded that the record fully supports Applebee's premise, but rather is ambiguous and incomplete regarding Berg's and therefore Korf's efforts to locate Krajewski. The issue need not be addressed, however, because the record demonstrates that Applebee was not prejudiced by Krajewski's absence at trial.

¶15 Applebee argues that if Krajewski had testified at trial, the result would have been different because "[i]t seems that almost every person who testified at this trial had a different perspective on what happened that evening, depending on where they were located when the pushing and shoving began." He claims that no two witnesses' testimony was the same and only one testified that she saw Applebee intentionally break a beer bottle. He also contends that "[t]he testimony of the two defense 'eye' witnesses was brief and somewhat conflicting. Had defense counsel presented the more credible testimony of … Krajewski,[3] there is every reason to believe that the jury would have had a reasonable doubt …." This court is unpersuaded.

[3] The trial court observed that according to an affidavit in support of Applebee's postconviction motion, Krajewski had consumed six mixed drinks before witnessing the altercation.

¶16 Applebee, except for interjecting his own opinion concerning Krajewski's credibility relative to his other two witnesses, accurately characterizes the testimony. Not everyone testified identically. But this generalized observation does not compel the conclusion that had one more person given yet another account, there is a reasonable probability that Applebee would have been acquitted. Moreover, not only had others testified that they had not seen a bottle in Applebee's hand during the altercation, but Krajewski's similar testimony *contradicted* Applebee's admission that he had the bottle in his hand. This court is not convinced that Applebee was prejudiced because the jury did not hear another eyewitness's testimony that was at odds with Applebee's.

2. Newly-Discovered Evidence

¶17 A motion for a new trial on the ground of newly-discovered evidence is addressed to the trial court's sound discretion, and an appellate court reviews the trial court's determination for an erroneous exercise of discretion. ***State v. McCallum***, 208 Wis. 2d 463, 484, 561 N.W.2d 707 (1997) (Abrahamson, C.J., concurring). Motions for a new trial based on newly-discovered evidence are entertained with great caution. ***State v. Terrance J.W.***, 202 Wis. 2d 496, 500, 550 N.W.2d 445 (Ct. App. 1996). This court will affirm the trial court's exercise of discretion as long as it has a reasonable basis and was made in accordance with accepted legal standards and the facts of record. ***State v. Jenkins***, 168 Wis. 2d 175, 186, 483 N.W.2d 262 (Ct. App. 1992).

¶18 The trial court may grant a new trial based on newly-discovered evidence only if the following requirements are met: (1) The evidence was discovered after trial; (2) the moving party was not negligent in seeking the evidence; (3) the evidence is material to an issue in the case; (4) the evidence is

not merely cumulative to the evidence that was introduced at trial; and (5) it is reasonably probable that a different result would be reached at a new trial. ***Terrance J.W.***, 202 Wis. 2d at 500. If the newly-discovered evidence fails to meet any of these tests, the moving party is not entitled to a new trial. ***State v. Avery***, 213 Wis. 2d 228, 234, 570 N.W.2d 573 (Ct. App. 1997).

¶19 Applebee argues that the trial court erred as a matter of law by concluding under the first factor that Krajewski's evidence was not discovered after trial because Applebee "knew he was a witness." He also assigns error to the trial court's determination under the fourth factor that Krajewski's evidence would be cumulative to the evidence introduced at trial. This court need not address the first contention because it agrees with the trial court that the evidence is cumulative.

¶20 Krajewski's testimony at the postconviction hearing was brief. He saw pushing and heard an exchange of words, but does not remember what was said. He did not see a bottle in Applebee's hand. This is the same essential testimony that the jury heard from several other witnesses. It adds nothing. This court is satisfied that the trial court correctly concluded that Krajewski's testimony was cumulative.

3. Interest of Justice

¶21 Applebee claims that Krajewski's absence at trial prevented the real controversy from being tried. *See* WIS. STAT. § 805.15(1). Principally, Applebee relies upon his assessment that Krajewski had a "clear view" of the altercation as compared to most of the other witnesses who testified. The argument is without merit.

¶22 The real controversy was tried. Applebee testified that he held the beer bottle during the altercation, and it was unintentionally broken. This effectively framed the issue as to whether Applebee intentionally used a broken beer bottle to endanger and injure the victim during the altercation. Evidence was presented precisely on this issue. As indicated above, Applebee has not explained what Krajewski could add that the jury did not hear from other witnesses. More to the point, his testimony would do little to resolve the dispute in light of Applebee's foregoing admissions. Applebee is not entitled to a new trial in the interest of justice.

*By the Court.*—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.