COURT OF APPEALS
DECISION
DATED AND FILED

October 2, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-0038-CR **Cir. Ct. No. 01CF000047**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JUSTIN R. LOGING,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Waushara County: LEWIS R. MURACH, Judge. *Affirmed*.

Before Deininger, P.J., Dykman and Lundsten, JJ.

¶1 PER CURIAM. Justin Loging appeals a judgment of conviction and an order denying his postconviction motion. The issues relate mainly to ineffective assistance of counsel. We affirm.

¶2 Loging was convicted of endangering safety by reckless use of a firearm (firing into a building) and second-degree recklessly endangering safety by use of a dangerous weapon, both as party to the crime, for the same act. The State sought to prove that Loging fired a shotgun at an occupied residence in the early morning hours, after being dropped off in the area from a car containing three other people.

¶3 To establish ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that such performance prejudiced his defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). We need not address both components of the analysis if the defendant makes an inadequate showing on one. ***Id.*** at 697. To demonstrate prejudice, the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. ***Id.*** at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. ***Id.*** We affirm the trial court's findings of fact unless they are clearly erroneous, but the determination of deficient performance and prejudice are questions of law that we review without deference to the trial court. ***State v. Pitsch***, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985).

¶4 Loging argues that his attorney was ineffective by failing to move to suppress a statement Loging gave to an officer. Loging's trial counsel testified that he did not file that motion because he saw introduction of the statement as a means to tell Loging's side of the story without subjecting Loging to cross-examination. The circuit court found that this was a reasonable tactical decision, and therefore not deficient performance. Loging argues that this was not a reasonable tactic, because the statement also had the effect of confirming some testimony of the witnesses against him. We conclude counsel's choice was reasonable. Loging does not

suggest that any other theory of defense should have been tried instead, other than simple reliance on the presumption of innocence. Given the variety of strong circumstantial evidence against Loging, we cannot say it was unreasonable to attempt a defense based on the statement.

¶5 Loging argues that his attorney was ineffective by failing to impeach State's witness Anthony Peterson with the number of Peterson's prior convictions. The circuit court agreed that this was deficient performance, but held that Loging was not prejudiced. We agree. Given the weight of the evidence against Loging, we are satisfied that impeachment of Peterson with these convictions would not have affected the outcome of the trial.

¶6 Loging argues that his attorney was ineffective by failing to request an "accomplice" instruction for his three companions in the car, all of whom testified for the State. The suggested instruction, WIS JI—CRIMINAL 245 as it existed before April 2000, advises jurors that "ordinarily, it is unsafe to convict upon the uncorroborated testimony of an accomplice," and that they should not base a verdict of guilty on that evidence alone, unless they are satisfied, by all of the evidence, of guilt beyond a reasonable doubt.

¶7 We conclude that counsel was not deficient in not seeking this instruction. There was evidence that Loging was one of four people traveling in the vehicle. Although the State conceded that the driver could be considered an accomplice, it is more difficult to say the same about the other two. Loging argues that they were "presumably" prepared to assist Loging in his getaway if necessary, but he points to no specific evidence of that willingness. In fact, there was evidence that one of them was *not* willingly "along for the ride." She testified that she asked

to be let out of the car, and that she actually got out of the car at one point and tried to walk away, but was brought back to the car by other occupants.

¶8 In addition, as to prejudice, even if the instruction had been given as to all three, we do not believe it would have changed the result at trial, in light of their generally consistent stories, the testimony of Loging's father about the missing shotgun, and the testimony that Loging's clothes were very dirty the next morning.

¶9 Finally, Loging asks us to exercise our power of discretionary reversal under WIS. STAT. § 752.35 (2001-02),[1] on the ground that the real controversy was not fully tried, for the reasons argued above. For the reasons already discussed, we conclude that this case does not meet the well-established standards for this relief.

By the Court.—Judgment and order affirmed.

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

[1] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.