COURT OF APPEALS
DECISION
DATED AND RELEASED

July 27, 1995

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

NOTICE

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

No. 94-0116-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DAVID W. MATTISON,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Dane County: ROBERT A. DECHAMBEAU, Judge. *Affirmed*.

Before Eich, C.J., Gartzke, P.J., and Vergeront, J.

PER CURIAM. David Mattison appeals from a judgment convicting him of first-degree intentional homicide, and from an order denying his postconviction motion. The issues are whether Mattison received effective assistance of trial counsel and whether he should receive a new trial in the interests of justice. We conclude that he is not entitled to relief on either ground. We therefore affirm.

The jury convicted Mattison in the beating death of Alan Dushack. Mattison conceded that he fought with Dushack and hit him several times. His theory of defense was, however, that Dushack died of other causes, most likely from alcohol poisoning or injuries caused after the fight by someone who carried and then accidentally dropped him.

Mattison did not testify. In his postconviction motion, he asserted that his counsel refused to allow him to testify and did not inform him that his testimony was necessary to establish self-defense. He also asserted that counsel neglected to introduce other self-defense evidence, including Dushack's reputation for violence and Mattison's concern over the risk to his already damaged eyes. Other instances of counsel's alleged ineffectiveness included his failure to introduce evidence that (1) much of the blood seen on Dushack came from a cut lip and not the fatal head wounds, (2) a cigar tube at the scene probably fell out of Dushack's pocket when he was picked up and carried after the fight, and (3) a witness was later seen washing blood off his hands. The trial court denied the motion, concluding that Mattison knowingly and voluntarily chose not to raise self-defense or testify that counsel reasonably adopted Mattison's strategic choices, and that the neglected evidence was not relevant.

To prove ineffective assistance of trial 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, 714 (1985). Deficient performance is measured by the objective standard of what a reasonably prudent attorney would do in similar circumstances. ***Id***. at 636-37, 369 N.W.2d at 716. Whether counsel's ineffective representation prejudiced the defendant is a question of law, and we therefore review it without deference to the circuit court's decision. ***Id***. at 634, 369 N.W.2d at 715. We will uphold a trial court's finding that trial counsel reasonably conducted the defense unless it is clearly erroneous. ***State v. Harvey***, 139 Wis.2d 353, 380, 407 N.W.2d 235, 247 (1987).

The failure to have Mattison testify or to pursue a self-defense theory cannot be attributed to counsel. According to counsel's testimony at the postconviction hearing, Mattison actively participated in his own defense and made a knowing and voluntary strategic choice not to raise self-defense or testify. The trial court believed that testimony, and this court is bound to uphold the trial court's finding unless it is clearly erroneous. ***State v. Weber***,

174 Wis.2d 98, 111, 496 N.W.2d 762, 768 (Ct. App. 1993). There is nothing in the record that would lead us to believe the trial court's finding was clearly erroneous. Additionally, because Mattison chose not to argue self-defense, evidence of Dushack's violent history and Mattison's prior eye injury was irrelevant.

Furthermore, even if Mattison's allegations were believed, he has not demonstrated that the selected trial strategy prejudiced him. Prejudice results when there is reasonable probability that but for counsel's errors, the result of the proceeding would have differed. ***State v. Wirts***, 176 Wis.2d 174, 183, 500 N.W.2d 317, 319 (Ct. App.), *cert. denied*, 114 S. Ct. (1993). Here, it is very unlikely that a self-defense theory would have succeeded. It is undisputed that Mattison went looking for Dushack after they threatened each other on the phone and agreed to fight later at a designated location. Testimony established that Mattison struck first, and the medical evidence showed that the beating Mattison inflicted on Dushack went far beyond what was reasonably necessary to protect himself.

Counsel reasonably omitted the other evidence Mattison identified as significant. According to Mattison, the cigar tube probably fell out of Dushack's pocket when he was carried off the street upside down. That is, however, but one speculative possibility out of many, even assuming the unestablished fact that the cigar tube came from Dushack's pocket. Even then, it would only prove that he was carried, not that he was then dropped on his head and fatally injured.

The cut lip evidence was also irrelevant. Even if it made the photographs of Dushack seem bloodier than they otherwise would have been, the fact remains that he died of head injuries after fighting with Mattison. He did not bleed to death.

Counsel reasonably chose not to introduce the evidence of the witness's bloody hands. There is no allegation that the witness struck Dushack. The relevance of the bloody hand, according to Mattison, is that it proves that the witness saw little of the Mattison-Dushack fight because he was engaged in his own fight with another man. However, the witness admitted he was facing

another man and saw little of the fatal incident. The bloody hand evidence is merely cumulative on a nondisputed point.

Mattison is not entitled to a new trial in the interest of justice. We may in our discretion order a new trial where the real controversy has not been tried. Section 752.35, STATS. According to Mattison, that untried controversy concerns his self-defense theory. As we have noted, however, the trial court found that Mattison knowingly selected his trial strategy. Having lost with that strategy, he cannot now employ § 752.35 to try out another. ***State v. Hubanks***, 173 Wis.2d 1, 29, 496 N.W.2d 96, 106 (Ct. App. 1992).

By the Court.—Judgment and order affirmed.

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