COURT OF APPEALS
DECISION
DATED AND RELEASED

September 14, 1995

No. 95-1136-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

GREGORY L. HOWERTON,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for La Crosse County: DENNIS G. MONTABON, Judge. *Affirmed*.

DYKMAN, J. This is a single-judge appeal decided pursuant to § 752.31(2)(f), STATS. Gregory L. Howerton appeals from a judgment convicting him of misdemeanor theft, contrary to § 943.20(1)(a), STATS., and from an order denying his postconviction motion for relief. The single count of theft was based upon multiple acts of theft occurring over an eight-month period. Howerton seeks a new trial on the grounds of ineffective assistance of trial counsel. We reject his claim and therefore affirm.

BACKGROUND

Gregory L. Howerton began working as a bartender at Smith's Night Club, a sports bar in La Crosse, in September 1992. He left the bar in July 1993 after the owner and manager confronted him about stealing from the bar and told him that they had recorded him on videotape using a surveillance camera.

At trial, Kenneth P. Smith, the bar owner, testified that he had decided to videotape Howerton's shifts after noticing that the cash register frequently came up short after Howerton worked. Customers testified that they saw Howerton handling money and working the cash register in such a way that would allow him to put the bar's receipts into his own pocket. Customers also testified that Howerton drank and ate the bar's alcohol and food on the job without paying for it, a practice against bar rules. Finally, Howerton admitted that he gave out free drinks to customers, another practice against bar rules. The prosecution also showed the videotapes of Howerton's shifts to demonstrate how Howerton took money from the cash register and consumed drinks without paying for them.

Before trial, counsel made various strategic decisions to aid Howerton. First, he moved *in limine* to restrict the scope of the trial to the two days shown in the videotapes instead of November 1992 through July 1993, as alleged in the complaint. The State moved to broaden the scope of the trial by adding September and October 1992 to the time period during which time Howerton allegedly stole from the bar. The trial court denied both motions and kept the relevant time period as alleged in the complaint.

Secondly, Howerton and counsel discussed the option of requesting more specificity in the State's charges against him. Counsel recommended and Howerton agreed, however, that defending against the single charge of theft that included taking money from the cash register, drinking and eating the bar's alcohol and food, and giving out free drinks was a better strategy for them to pursue: while it appeared to them that the State's case on the issues of taking money, alcohol and food was weak, they felt that it would be difficult to win a separate charge of giving away free drinks. By leaving the charge as a single count, counsel hoped that the jury would doubt Howerton's guilt in the weaker allegations of taking money, alcohol and food and that the jury would dismiss the giving away of free drinks as a common practice of bartenders, undeserving of a criminal conviction. Counsel believed

that if the single charge were broken down into three separate counts, the jury would have been forced to convict Howerton on the stronger count of giving away free drinks. If the jury found him guilty on the other counts as well, he could have faced two to three times the penalty he faced with only one charge.

Howerton claims that his counsel's representation was ineffective in two respects. First, counsel performed deficiently because he failed to request a jury instruction, such as WIS J I—CRIMINAL 517, which provides that when the jury is presented with various acts constituting the crime charged, it must be unanimous on which act the defendant committed in order to convict. Howerton believes that without this instruction, he was denied his right to unanimity in a guilty verdict. Secondly, he claims that counsel was ineffective in failing to call three potentially helpful witnesses.

INEFFECTIVE ASSISTANCE OF COUNSEL

For ineffective assistance of counsel claims, the Wisconsin Supreme Court has adopted the standard enunciated by the United States Supreme Court in ***Strickland v. Washington***, 466 U.S. 668 (1984). In order to show that counsel's performance constituted ineffective representation, a defendant must show that counsel's performance was deficient and that the deficient performance prejudiced the defense. ***State v. Pitsch***, 124 Wis.2d 628, 633, 369 N.W.2d 711, 714 (1985). We need not address the two prongs in any particular order, "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice ...." ***Strickland***, 466 U.S. at 697. In examining counsel's failure to request WIS J I—CRIMINAL 517, we will address the prejudice prong first.

In order to prove prejudice, Howerton must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. ***Pitsch***, 124 Wis.2d at 642, 369 N.W.2d at 718. That is, a court making the prejudice inquiry must ask if the decision reached would reasonably likely have been different absent the errors. ***Strickland***, 466 U.S. at 696. Finally, "[t]he assessment of prejudice should proceed on the assumption that the decisionmaker is

reasonably, conscientiously, and impartially applying the standards that govern the decision." ***Id.*** at 695.

Counsel's failure to request a jury instruction specifying the need for unanimity on the particular means of committing theft did not result in any prejudice to Howerton because such an instruction would have had no affect on the jury's verdict. Howerton testified that he knowingly gave drinks to customers for which neither he nor they paid. He also stated that he knew that giving out free drinks was against the bar owner's rules. In effect, Howerton's admission satisfied each of the elements that the State had to prove to convict him of theft.

Under these facts, if Howerton's jury acted reasonably (and we must assume it did), then it must have found unanimously that Howerton gave away free drinks and committed theft. A jury instruction such as WIS J I—CRIMINAL 517 would have done nothing to alter that finding. For that reason, counsel's failure to request this jury instruction was not prejudicial and does not constitute ineffective assistance.

Howerton also claims that counsel's failure to present all available witnesses in his defense constituted ineffective assistance. This claim of ineffectiveness fails because it does not meet the "deficient performance" prong of the ***Strickland*** test. In order to show that counsel's performance was deficient, "the defendant must show that counsel's representation fell below an objective standard of reasonableness." ***Strickland***, 466 U.S. at 688.

Counsel believed that the three witnesses in question would not have helped and could in fact have hurt the defense. One witness was not called because the initial story he told to counsel would not have proved exculpatory. A second witness was not called because her testimony would have directly conflicted with Howerton's own testimony. And, while the final witness's testimony was discovered to be potentially helpful, this discovery occurred after the jury had begun its deliberations. Not calling these witnesses was a reasonable trial tactic. Because counsel's actions were reasonable, Howerton does not meet the deficient performance prong of the ***Strickland*** test, and his claim of ineffective assistance of counsel on this issue must fail as well.

By the Court.—Judgment and order affirmed.

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