

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 31, 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. 2004AP3216-CR

Cir. Ct. No. 2002CF5399

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

ANDRE D. WELCH,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JOHN A. FRANKE, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

¶1 PER CURIAM. Andre D. Welch appeals from a judgment entered after a jury found him guilty of first-degree intentional homicide, while using a dangerous weapon, contrary to WIS. STAT. §§ 940.01(1)(a) and 939.63(1)(a)

(2003-04).¹ He also appeals from an order denying his postconviction motion alleging ineffective assistance of trial counsel. Welch contends that the trial court erred in ruling that his counsel provided him with effective assistance. Because the trial court did not err in rejecting Welch's ineffective assistance claim, we affirm.

BACKGROUND

¶2 On September 2, 2002, Robert Lamon was shot while on a porch located at 2563 North 15th Street in the City of Milwaukee. After interviewing several witnesses, Welch was arrested and charged. He pled not guilty.

¶3 At trial, the State called Eddie Rawls, who testified that at about 1:00 a.m., he was across the street from the scene and observed an argument between Welch and Lamon. He then saw Welch leave and walk around the side of the house. When Welch returned a short time later, he came toward Lamon. Rawls testified that Lamon screamed and then he heard a gunshot.

¶4 The State also called Larry Moore, a relative of Lamon, who was present when the shooting occurred. Moore testified that Welch approached Lamon on the porch to discuss some problem between them. Moore then heard a "pop" and jumped behind a tree. He did not see the shooting but, when he looked back toward the porch, he saw Welch holding a gun and standing over Lamon who was lying on the porch. Moore saw Welch leave with the gun. Moore gave the police a statement shortly after the shooting indicating that he did not see Welch

¹ All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

with a gun. Due to Moore's state of inebriation, however, the police discontinued the questioning until a later time.

¶5 The State also called Alvin Ford, who was a longtime friend of Welch. Ford testified that sometime on or about September 7, he received a phone call from someone claiming to be Welch's sister. The caller asked Ford to come and pick up Welch, and indicated that Welch was in some kind of trouble. Ford stated that he and another man picked up Welch in Milwaukee and drove him to the home of Chris Cagle in Racine. Ford testified that on the way to Racine, Welch stated that he had shot a boy in the stomach during a disagreement because the boy wanted to "get tough." Ford also testified that they arrived at Cagle's house at about 11:00 a.m., and he left Welch with Cagle. Ford returned the next day to pick up Welch.

¶6 Before trial began, Welch's trial attorney, Richard Poulson, Jr., moved to adjourn the trial because he was having difficulty locating a witness—Chris Cagle. Poulson advised the court that he needed Cagle as a witness if Ford was going to testify. The State proposed that instead of adjourning the case, they could stipulate to allow Cagle's statement to police to be admitted into evidence. The trial court denied the request for adjournment.

¶7 Cagle's statement to police indicated that although she knew Ford, she did not know Welch. She claimed that on the date in question, Ford arrived at her home with his two teenage nephews, stayed for a short time, and then left. She stated that Welch never came to her home.

¶8 During the trial, Poulson questioned the police witness regarding his interview with Cagle, but he did not move to admit her statement. The jury convicted Welch. He filed a postconviction motion alleging ineffective assistance

of counsel. After conducting a hearing at which Poulson testified, the trial court denied the motion. Welch now appeals.

DISCUSSION

¶9 Welch claims his trial counsel provided ineffective assistance by failing to enter into a stipulation which would have allowed the defense to use a statement given by Cagle and by failing to introduce Cagle's statement at trial.² We are not persuaded.

¶10 In order to succeed on an ineffective assistance claim, Welch must prove that counsel's performance was deficient, and that such deficient performance prejudiced the outcome. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). A court need not address both components of this inquiry if the defendant does not make a sufficient showing on one. *Id.* at 697.

¶11 Whether counsel's actions constitute ineffective assistance is a mixed question of law and fact. *State v. Pitsch*, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985). "The trial court's determinations of what the attorney did, or did not do, and the basis for the challenged conduct are factual and will be upheld unless they are clearly erroneous." *State v. Harvey*, 139 Wis. 2d 353, 376, 407 N.W.2d 235 (1987) (citation omitted). The ultimate conclusion, however, of whether the conduct resulted in a violation of defendant's right to effective assistance of counsel, is a question of law for which no deference to the trial court need be given. *Id.*

² Welch also argued that trial counsel was ineffective for failing to secure Cagle's presence at trial to testify. This claim, however, was abandoned when Welch was unable to secure Cagle's presence at the postconviction motion hearing.

¶12 Welch contends that Poulson provided deficient performance when he failed to introduce Cagle's statement into evidence to impeach Ford's testimony. Welch argues on appeal that the record seems to indicate that Poulson simply overlooked the State's offer to allow Cagle's statement into evidence. The trial court ruled after the postconviction motion, that Poulson's failure to introduce the statement was a reasonable strategic choice.

¶13 The basis for this ruling was that the State had two additional witnesses, who would testify that they saw someone who looked like Welch on Cagle's porch. Both witnesses were neighbors of Cagle. The State indicated it would call these witnesses in rebuttal only if Cagle's statement was introduced by the defense. The court found that Poulson weighed the advantages and disadvantages of introducing the Cagle statement and made a reasonable choice not to introduce it. The court made its finding, despite Poulson's claim at the postconviction hearing that he was not concerned about the neighbor witnesses because neither one could absolutely identify Welch as the man they saw on Cagle's porch.

¶14 We conclude that the trial court's finding was not clearly erroneous. Although Poulson testified as noted above, he also offered the following testimony. Poulson said that his cross-examination of Milwaukee Police Detective Scott Gastrow, who interviewed Cagle, sufficiently established a record from which he could make arguments similar to what he could make if the statement came into evidence.

¶15 We conclude that the trial court did not err in finding Poulson's conduct reasonable. Even when counsel disavows a particular strategy, the court can find that his performance was not deficient if the court can conclude that

counsel's action would have been reasonable had he relied on the strategy. *State v. Kimbrough*, 2001 WI App 138, ¶¶31-32, 246 Wis. 2d 648, 630 N.W.2d 752.

¶16 Here, a decision to forgo introduction of the Cagle statement was reasonable trial strategy. There were clearly advantages and disadvantages to using the statement. The advantage would be to impeach Ford's testimony. The disadvantage would be that the State would call two additional live witnesses in rebuttal, who would identify Welch as being at Cagle's house. The last thing a defendant wants is for the final witness to point a finger at him or her and say he or she looks like the person seen at that time. Moreover, under the circumstances here, counsel was able to get some of the Cagle information introduced through Gastrow, so that the jury could make reasonable inferences in favor of the defense, without having to use the statement.

¶17 Accordingly, we conclude that the defense attorney's decision not to use the Cagle statement under the facts and circumstances here was objectively reasonable. Thus, Poulson's conduct was not deficient.

¶18 Moreover, we further conclude that Poulson's conduct did not prejudice the defense. In order to establish prejudice as a result of counsel's conduct, Welch must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. That standard has not been satisfied here.

¶19 It is not reasonably probable that the result of Welch's trial would be different if Cagle's statement had been admitted into evidence. As the State points out, had that occurred, two witnesses would have testified to rebut Cagle's statement. One said that Welch's picture looked like the person he had seen on

Cagle's porch on the day in question. Thus, the jury would have had additional evidence to believe that Welch was at Cagle's home when Ford said he was. This would have hurt the defense, not result in an acquittal or conviction of a lesser-included offense.

¶20 In addition, the absence of the statement did not prevent the defense from making similar arguments, which it would have made without the introduction of the statement. Thus, if the defense could make the same argument without the testimony of additional witnesses, Welch could not have been prejudiced. Because Welch failed to prove deficient performance and prejudice, he failed to prove that his trial counsel provided ineffective assistance. Therefore, we affirm the judgment and order.

By the Court.—Judgment and order affirmed.

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

