

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 7, 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. 2005AP1457-CR

Cir. Ct. No. 2003CF470

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

HARDILL BOWIE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Brown County: KENDALL M. KELLEY, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Hardill Bowie appeals a judgment convicting him of armed robbery and an order denying his postconviction motion in which he alleged ineffective assistance of trial counsel. He argues that his counsel was ineffective in three respects: (1) counsel failed to move to strike the entire jury

panel after one prospective juror, a jail employee, stated that he knew Bowie from the jail; (2) counsel failed to object to testimony and argument regarding a gun found in Bowie's dorm room that the State concedes was not the weapon used in the robbery, and counsel failed to request a limiting instruction; and (3) counsel failed to impeach the State's primary witness, Tiffany Peters, with a prior conviction for misdemeanor theft. We reject these arguments and affirm the judgment and order.

¶2 To establish ineffective assistance of counsel, Bowie must show both deficient performance and prejudice. See *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Judicial scrutiny of counsel's performance is highly deferential and Bowie must overcome a presumption that counsel's challenged actions might be considered sound trial strategy. *Id.* at 689. Strategic decisions made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable. *Id.* at 690. To establish prejudice, Bowie must show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is one that undermines our confidence in the outcome. *Id.* at 694. Because Bowie must show both deficient performance and prejudice, this court is not required to address both components if he fails to make a sufficient showing on one. *Id.* at 697.

¶3 Bowie has not established prejudice from his counsel's failure to move to strike the entire jury panel. The jail employee merely informed the panel of something they undoubtedly already surmised, that Bowie was in custody at some time. Jurors in an armed robbery case are likely to presume that the defendant, irrespective of his guilt or innocence, has spent at least some time in custody as a result of being charged. See *Burton v. Renico*, 391 F.3d. 764, 777-78 (6th Cir. 2004).

¶4 Bowie next argues that his trial counsel was ineffective for failing to object to admission of evidence and argument regarding a gun found in the search of his dorm room. His accomplice in the robbery, Tiffany Peters, testified that Bowie used a painted toy gun to rob the Subway restaurant. Bowie contends that evidence of possession of a real gun was irrelevant, more prejudicial than probative, and inadmissible other acts evidence.

¶5 Bowie's possession of the real gun was relevant to Peters' credibility. The defense portrayed Peters as a scorned lover who inculcated Bowie after he refused to develop a more serious relationship with her. Peters testified that she knew Bowie possessed a real gun and that he acquired it after the robbery. The prosecutor appropriately argued that, if she were merely trying to get Bowie in trouble, she would not have corrected the police impression that he used a real gun. The added detail that he used a toy gun, even though Peters knew he possessed a real gun, enhances her credibility.

¶6 Evidence that Bowie possessed a real gun was not inadmissible under WIS. STAT. § 904.03.¹ That statute allows the trial court to exclude otherwise relevant evidence if its probative value is "substantially outweighed by the danger of unfair prejudice." No one suggested that Bowie's possession of the real gun was illegal. Because the gun was relevant to Peters' credibility, the prejudicial effect of lawfully possessing a firearm, if any, does not substantially outweigh its probative value.

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

¶7 The testimony regarding the gun is not other acts evidence under WIS. STAT. § 904.04(2) because it was not introduced to show Bowie’s character or suggest a propensity to commit crimes. *See State v. Speer*, 176 Wis. 2d 1101, 1115, 501 N.W.2d 429 (1993). It was introduced to bolster Peters’ credibility. Therefore, trial counsel had no basis for objecting to the admissibility of evidence regarding the gun.

¶8 In his closing argument, the prosecutor asked, “Why does this college student have a loaded .357 in his dorm room?” While that argument utilizes the real gun evidence for reasons other than Peters’ credibility, the trial court appropriately concluded counsel’s failure to object or request a limiting instruction constituted a reasonable strategy. Any objection or instruction would have called more attention to the argument. In the context of the entire trial, one sentence suggesting that possessing the real gun was improper does not undermine our confidence in the outcome.

¶9 Finally, Bowie has not established prejudice from his trial counsel’s failure to impeach Peters with her previous conviction for misdemeanor theft. Peters was not portrayed as an innocent citizen reporting a crime. Her admitted involvement in this robbery informed the jury of her bad character. Trial counsel’s failure to elicit evidence that she had been convicted of misdemeanor theft does not undermine our confidence in the outcome.

By the Court.—Judgment and order affirmed.

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

