

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**February 22, 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. 2004AP1083-CR**

**Cir. Ct. No. 2001CF2743**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**IVAN C. MITCHELL,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Dane County: PAUL B. HIGGINBOTHAM and JAMES L. MARTIN, Judges.  
*Affirmed.*

Before Snyder, P.J., Nettesheim and Anderson, JJ.

¶1 PER CURIAM. Ivan Mitchell appeals from a judgment convicting him as a party to the crimes of first-degree intentional homicide, attempted first-degree intentional homicide, armed robbery, and of conspiracy to deliver cocaine.

He also appeals from an order denying his motion for postconviction relief. He argues that he was denied the effective assistance of trial counsel because counsel failed to prevent the defense's most crucial witness from being impeached by irrelevant and prejudicial evidence. We affirm the judgment and order.

¶2 Mitchell and Lashaun Benson were found guilty of killing and robbing Kevin Mills in the parking lot of a grocery store in Madison on December 14, 2001. Money and drugs were taken from Mills after he was shot multiple times. The female passenger in Mills's car was shot in the face but survived. She explained to police that Mills was meeting Mitchell to collect on a large debt Mitchell owed for prior drug deals. Mills got in the back seat of the car occupied by Mitchell and Benson. At trial, the female survivor identified Benson as the man who drove the car, turned and shot Mills in the back seat of the car, and got out of the car and shot her.

¶3 Mitchell and Benson were tried together. Benson's theory of defense at trial was that he was not present during the shooting and that someone else accompanied Mitchell that night. His testimony repudiated an earlier statement to police that he had gone along with Mitchell and Mitchell had killed Mills and forced him to shoot the female witness.

¶4 Mitchell's theory of defense at trial was relatively consistent with his statements to police. He indicated that Benson drove him to meet Mills. After they stopped in the grocery store parking lot, Mitchell saw that Benson had a gun in his pocket. Mitchell told Benson the gun wasn't needed and that Mills never had a gun. Mitchell claimed that without any direction Benson turned around and shot Mills. He testified that after the shooting, the two drove to a northern suburb

to meet Benson's brother. The two then drove to a party at the Road Star Inn on the far west side of Madison.

¶5 Mitchell called Kim Kubitz as a witness to testify about her interactions with Mitchell and Benson following the shooting. She had known Mitchell since October 2001. She indicated she arrived at the Road Star about 11:00 p.m. on December 14, 2001, after work. She observed Mitchell and Benson arrive at the Road Star around 1:00 a.m. on December 15. She indicated that Mitchell was angry and upset with Benson and seemed to be trying to get away from him. Benson refused to return Mitchell's cell phone and car keys, and he left the party. Mitchell asked Kubitz for a ride. She indicated that during the ride to the far east side of town, Mitchell was uncharacteristically quiet. After dropping Mitchell off, she returned to the party at the Road Star. She testified she had not ingested any drugs prior to giving Mitchell a ride. Mitchell characterizes Kubitz as a very important defense witness who lent credibility to his claim that he had no idea Benson was going to kill Mills and that he was upset by what Benson had done.

¶6 On cross-examination, Kubitz was questioned by the prosecution about her association with drug friends, establishing that one of her drug friends was at the Road Star party doing drugs. Kubitz indicated that when she returned to the party she started freebasing cocaine. Benson's cross-examination of Kubitz brought forth an admission that in December 2001, Kubitz was freebasing cocaine three out of seven days a week.<sup>1</sup> Additional cross-examination established that

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<sup>1</sup> Kubitz was asked to describe the freebasing process. After she did so, Mitchell objected to any further questions about how cocaine was used other than those relevant to whether or not her drug use affected her ability to recall observations.

Kubitz would do a couple of grams of cocaine on days that she used and that it could cost a couple of hundred dollars to use that amount. Kubitz denied that she was freebasing or sniffing cocaine in front of “Mr. Jackson,” denied that she was dressed in a tee shirt and panties at the Road Star party, and denied that she provided sexual favors in return for cocaine at that party.

¶7 Two days before Kubitz testified, Stanley Jackson, a close friend of Mitchell’s and an admitted drug dealer, had testified for the defense. He was asked on cross-examination about what was going on at the Road Star. He indicated that he and Mitchell went to the Road Star in the afternoon of December 14, 2001 and Benson and his brother were there snorting cocaine. He saw Kubitz and another female smoking dope. Benson and his brother were there and seemed upset about the poor quality of cocaine which Mills had been selling. He observed the females, Kubitz and her friend, engaging in sexual activity but denied having told an investigator that sex was being exchanged for cocaine.

¶8 Mitchell argues that his trial counsel was ineffective for not objecting to testimony relating to Kubitz’s drug habits outside the night in question, conduct of the women at the Road Star trading sex for cocaine, and references to Kubitz’s drug friends. Whether counsel has acted ineffectively is judged under the two-part test stated in *Strickland v. Washington*, 466 U.S. 668 (1984). The first part requires the defendant to show that his counsel’s performance was deficient; the second part requires the defendant to prove that his defense was prejudiced thereby. See *State v. Johnson*, 153 Wis. 2d 121, 126-27, 449 N.W.2d 845 (1990). The test for prejudice is whether our confidence in the outcome is sufficiently undermined. *Strickland*, 466 U.S. at 694. These questions present mixed questions of fact and law. *Johnson*, 153 Wis. 2d at 127. The trial court’s findings of fact as to what happened will not be overturned unless clearly

erroneous *Id.* “The ultimate determination of whether counsel’s performance was deficient and prejudicial to the defense are questions of law which this court reviews independently.” *Id.* at 128.

¶9 We first observe that at the *Machner*<sup>2</sup> hearing, Mitchell’s defense counsel indicated that he did not object during Kubitz’s cross-examination because he felt her testimony was going well and she was handling the cross-examination.<sup>3</sup> He knows that the jury wants to hear the story and unnecessary objections disrupt the flow of the case. He also believed the jury did not like the way Benson was treating Kubitz during cross-examination and sympathy for Kubitz was building. This explanation represents trial strategy. A court considering the performance prong of the ineffective assistance test must assess the reasonableness of trial counsel’s performance under the facts of the particular case, viewed as of the time of counsel’s conduct. *See State v. Marcum*, 166 Wis. 2d 908, 917, 480 N.W.2d 545 (Ct. App. 1992). We are not to second-guess trial counsel’s selection of trial tactics or the exercise of professional judgment after weighing the alternatives. *See State v. Felton*, 110 Wis. 2d 485, 502-03, 329 N.W.2d 161 (1983). Here counsel’s assessment that it would not serve Mitchell well to interrupt Kubitz’s cross-examination was reasonable and did not reflect deficient performance.

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<sup>2</sup> A Machner hearing addresses a defendant’s ineffective assistance of counsel claim. *See State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

<sup>3</sup> Mitchell argues that his defense counsel should have filed a motion in limine to limit the use of other acts evidence during Kubitz’s cross-examination. We do not address this contention because counsel explained that he was not sure Kubitz would appear as a witness at trial. Further, the State is correct that no statute or case law requires prior notice of the intent to produce or elicit other acts evidence such that it can be deemed per se deficient performance for counsel not to object on the ground of lack of notice.

¶10 Moreover, we conclude that any deficient performance related to Kubitz's credibility was not prejudicial.<sup>4</sup> First of all, testimony that Kubitz used drugs on the night in question was relevant and admissible. Kubitz was attending a party that had been going on for two days and at which people were using drugs. The jury would have learned of this aspect of Kubitz's character in any event. Her testimony was that she did not use drugs until she returned to the Road Star after dropping Mitchell off. Her friendship with her drug friend, a female also present at the Road Star, and the frequency of her drug use in the months before and after the night in question bears on her credibility that she abstained from drugs until after dropping Mitchell off. Jackson's testimony about observing Kubitz at the Road Star in the afternoon also served to impeach her testimony that she did not arrive there until 11:00 p.m. There was no direct testimony that she had traded sex for drugs since both she and Jackson denied it.

¶11 Finally, we are not persuaded that Kubitz was the crucial witness that Mitchell claims her to be. The testimony of the female surviving witness was most compelling. It placed both Mitchell and Benson at the scene of the shooting. Mitchell owed Mills a large sum of money, which he was unable to pay in full. According to Mitchell's own testimony, he knew Benson was in possession of a gun and the parties were engaged in drug trade just as Benson started shooting. Kubitz's testimony that Mitchell was moody and unhappy about what occurred, even if true, did not directly relate to what transpired in the car just before the shooting. Mitchell's post-crime behavior described by Kubitz was ambiguous as to its source. He may have been unusually quiet for any number of reasons related

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<sup>4</sup> The trial court found that aspects of Kubitz's cross-examination as to drug usage prior to the night in question and how one makes freebase cocaine could have been curtailed.

to the crimes. In sum, our confidence in the outcome is not undermined by counsel's failure to thwart attacks on Kubitz's credibility.

*By the Court.*—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2003-04).

