

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 14, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

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No. 00-0486-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROBERT TAYLOR,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Racine County: GERALD P. PTACEK, Judge. *Affirmed.*

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

¶1 PER CURIAM. Robert Taylor appeals from a judgment convicting him of being party to the crime of armed robbery as a repeat offender and from an order denying his postconviction motion for a new trial on the ground that his trial counsel was ineffective. We affirm.

¶2 Taylor was charged with being party to the crime of armed robbery of a credit union. The State alleged that Taylor visited the credit union before the robbery occurred, knew the robbery was going to occur, drove the car away from the scene and shared in the robbery's proceeds. While Taylor admitted to being in the company of the men who robbed the credit union, he denied knowing that they were going to commit a robbery. The jury convicted Taylor.

¶3 Taylor contends that his trial counsel was ineffective in three respects: (1) his questioning of Taylor's former companion, Joyce, led to the introduction of other bad acts by Taylor, including drug use and battery; (2) his attempt to establish that Taylor had an account at the credit union under a middle initial led to the introduction of evidence of previous judgments of conviction; and (3) his failure to object to a question to Taylor's wife about where they married led to an answer that they married while Taylor was incarcerated.

¶4 To establish a claim of ineffective assistance, Taylor must show that his counsel's performance was deficient and that it prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To prove deficient performance, Taylor must show that his counsel made errors so serious that he was not functioning as the "counsel" guaranteed by the Sixth Amendment. *Id.* "Review of counsel's performance gives great deference to the attorney and every effort is made to avoid determinations of ineffectiveness based on hindsight." *State v. Johnson*, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). The case is reviewed from counsel's perspective at the time of trial, and the burden is placed upon the appellant to overcome a strong presumption that counsel acted reasonably within professional norms. *Id.* Professionally competent assistance encompasses a "wide range" of behaviors. *Strickland*, 466 U.S. at 689.

¶5 Even if counsel's performance was deficient, we will not reverse Taylor's judgment of conviction unless he proves that the deficiency prejudiced his defense. "This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* at 687. "The defendant 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." *Id.* at 694.

¶6 A claim of ineffective assistance presents a mixed question of law and fact. *State ex rel. Flores v. State*, 183 Wis. 2d 587, 609, 516 N.W.2d 362 (1994). The circuit court is the ultimate arbiter of witness credibility, *State v. Marty*, 137 Wis. 2d 352, 359, 404 N.W.2d 120 (Ct. App. 1987), *overruled on other grounds by State v. Sanchez*, 201 Wis. 2d 219, 232, 548 N.W.2d 69 (1996), and we will not disturb that court's findings of fact concerning the circumstances of the case and counsel's conduct unless the findings are clearly erroneous, *State v. Knight*, 168 Wis. 2d 509, 514 n.2, 484 N.W.2d 540 (1992). However, the final determinations of whether counsel's performance was deficient and prejudicial are questions of law that we decide without deference to the lower court. *Id.*

¶7 On appeal, Taylor argues that his trial counsel made an unreasonable strategy choice in his questioning of Joyce. At trial, Joyce testified for the State that Taylor asked her to meet him at a motel on the day of the robbery. When she arrived, she noticed an inch-thick wad of cash in the room. Taylor told her that his nephew and another man robbed the credit union while he was in the car waiting for them. Taylor told her that he went into the credit union before the robbery, left and met the robbers in the alley.

¶8 On cross-examination, Taylor's counsel questioned Joyce about the end of her romantic relationship with Taylor after she and Taylor had a dispute over her use of Taylor's supply of drugs and a physical confrontation. Noting that this line of questioning was eliciting evidence unfavorable to Taylor, the court inquired of Taylor whether he understood and agreed with the tactical decision to question Joyce in this manner. Taylor affirmed that he and counsel had discussed this tactic. Thereafter, Joyce testified that Taylor beat her, kept cocaine and used drugs in the residence they shared, stole checks with her to support their drug habit, and was the subject of a no-contact order shielding Joyce. Counsel tried to suggest to the jury that Joyce's statements to the police implicating Taylor in the robbery were made in an attempt to improve her own circumstances in light of criminal charges against her. In his closing argument, trial counsel argued that Joyce was not credible.

¶9 Postconviction, Taylor contended that trial counsel was ineffective because his questioning of Joyce yielded a slew of bad acts evidence. At the postconviction motion hearing, trial counsel testified that the defense theory was that the State's witnesses, including Joyce, had lied about Taylor's involvement in the robbery in order to help themselves in their own criminal cases. Counsel felt that the jury could have reasonable doubt about Taylor's guilt because there was an alibi witness, Taylor did not receive any robbery proceeds, and the State's witnesses were lying. Counsel believed Taylor's denial of involvement in the robbery and considered him street smart and savvy as a result of his previous contacts with the criminal justice system.

¶10 Counsel testified that Taylor understood that the trial would be a credibility contest and that his credibility would be damaged by his previous criminal convictions. Counsel believed that Joyce would be a credible witness because she was not involved in the robbery. Counsel stated that he specifically

discussed with Taylor how to attack Joyce's credibility, and Taylor strongly felt that he wanted to portray Joyce as a person seeking revenge against him for battering her. Taylor also understood that it was risky to cross-examine Joyce about drugs they shared and which she allegedly stole from him, but Taylor wanted to proceed with the strategy of attacking Joyce on all fronts. Because Taylor was already serving a ten-year sentence at the time of trial, he was very concerned that an armed robbery conviction could effectively require him to spend the rest of his life in prison. Therefore, Taylor wanted to take the risks associated with trying to undermine Joyce's credibility. Counsel felt that it was ultimately Taylor's choice whether to take those risks. Counsel conceded that eliciting Taylor's bad acts in an effort to undermine Joyce's credibility was an unusual tactic but warranted in this case.

¶11 In contrast to counsel's testimony, Taylor testified at the postconviction motion hearing that he and counsel never discussed how to handle Joyce or any aspect of her likely testimony and that cross-examining Joyce regarding the battery and drug use was counsel's idea. Counsel never told Taylor that evidence of his prison term for forgery and his drug use would come into evidence. Taylor contended that when he affirmed the strategy of attacking Joyce in response to the court's inquiry, it was the first time he and counsel had discussed the strategy.

¶12 The court made the following findings at the conclusion of the postconviction motion hearing. Taylor was not credible when he claimed that he and counsel never discussed trial strategy vis-à-vis the State's witnesses. In contrast, trial counsel's testimony about his discussions with Taylor about trial strategy and Taylor's insistence on questioning Joyce was very credible. The colloquy during trial about the questions being posed to Joyce indicated that

Taylor and his counsel had discussed the strategy. While counsel's approach to the case was unorthodox, he discussed this approach with Taylor and the strategy decisions were supported in counsel's testimony. Counsel's approach to Joyce was a calculated risk and a defensible strategy decision under the circumstances.

¶13 The circuit court's findings regarding counsel's conduct and the circumstances of the case are not clearly erroneous. Counsel was faced with a client who might spend the rest of his life in prison if convicted and who, after being informed of the risks and advantages, agreed to attempt to discredit a witness while revealing some unfavorable information about himself. Taylor has not overcome the presumption that this trial tactic fell within the wide range of professionally competent assistance evaluated from counsel's perspective at the time of trial. *Strickland*, 466 U.S. at 689-90.

¶14 Taylor next challenges counsel's attempt to establish that Taylor had a credit union account consistent with his statement to police. Taylor told police that he had an account at the credit union by way of explaining his presence in the credit union shortly before the robbery. The prosecutor established through a credit union employee that Taylor did not have an account at the credit union. On cross-examination of the employee, Taylor's counsel brought out that the employee did not find an account for Taylor because the account was under "Robert R. Taylor" and the employee only searched for an account under the name of "Robert Taylor." Trial counsel believed that the employee could have been mistaken and wanted the jury to have the impression that the employee had not checked the records for an account under "Robert R. Taylor."¹

¹ On redirect, the employee stated that she checked for an account by last name, birth date and social security number and did not find an account for Taylor.

¶15 Counsel decided to raise the issue of an account under “Robert R. Taylor” on direct examination rather than let the prosecutor broach the subject with Taylor. On cross-examination, Taylor stated that he had always used his middle initial. However, none of the documents produced by the prosecutor during cross-examination bore a middle initial, including previous judgments of conviction. Taylor also admitted to using aliases.

¶16 Postconviction, the circuit court did not fault Taylor’s counsel for trying to suggest to the jury that Taylor had an account which the credit union employee had not located. Counsel had to buttress Taylor’s statement to the police and his trial testimony that he had an account under “Robert R. Taylor.” Counsel was attempting to demonstrate that Taylor had a legitimate reason for being in the credit union as Taylor had told the police. We see no deficient performance under the circumstances which confronted counsel.

¶17 Taylor’s final claim of ineffective assistance relates to trial counsel’s failure to object when the prosecutor asked his wife where she and Taylor were married. Taylor’s wife answered that she married him while he was imprisoned. Counsel testified postconviction that he did not object to the question and answer because he did not want to highlight the information for the jury.

¶18 The circuit court noted that even if it were to determine that counsel performed deficiently by failing to object, Taylor was not prejudiced because his own testimony and credibility and the testimony of three State’s witnesses would still have led to a conviction.

¶19 We are unpersuaded by Taylor’s claim that trial counsel performed deficiently when he failed to object to a question which established that Taylor married while in prison. We recognize that trial counsel faces a difficult choice

when considering how to respond to unfavorable evidence and whether to call the jury's attention to such evidence by objecting and seeking a cautionary jury instruction. *Cf. Watson v. State*, 64 Wis. 2d 264, 279, 219 N.W.2d 398 (1974). The desire not to call the jury's attention to the fact that Taylor was incarcerated on a prior conviction was a reasonable strategy. *Id.*

¶20 Even though we do not deem counsel's performance deficient, we disapprove of the prosecutor's inquiry because it could reasonably be expected to elicit evidence of a prior conviction and incarceration. We cannot think of any reason to ask where the Taylors were married other than to elicit such evidence. However, like the circuit court, we do not see any prejudice because Taylor testified and was impeached with the number of prior convictions. Furthermore, the court found that Taylor was his own worst enemy at trial and that his demeanor undermined his credibility. The court found that Taylor was incredible, "brash, strong-willed, controlling [and] manipulative." Therefore, deleting evidence of his status as a prisoner would not have made an acquittal reasonably probable.

By the Court.—Judgment and order affirmed.

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

