**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

March 31, 1998

**Marilyn L. Graves**
**Clerk, Court of Appeals**
**of Wisconsin**



**No. 96-2804-CR**

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

---

**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**v.**

**HIRAM JOHNSON,**

**DEFENDANT-APPELLANT.**

---

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JOHN A. FRANKE, Judge. *Reversed and cause remanded with directions.*

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

PER CURIAM. A jury found Hiram Johnson guilty of substantial battery and aggravated battery, in violation of §§ 940.19(3) and 940.19(6), STATS. The charges arose out of a single criminal incident involving one victim. The trial court imposed and stayed concurrent sentences and placed Johnson on probation

for four years. Johnson subsequently filed a postconviction motion seeking a new trial on the ground that trial counsel provided ineffective assistance because he failed to challenge the two counts as multiplicitous. Without an evidentiary hearing, the trial court concluded that counsel's performance was deficient, but that Johnson had not shown prejudice meriting the relief requested.

Johnson appeals from the judgment of conviction and the order denying his motion. Johnson contends that trial counsel provided ineffective assistance when he did not object to the multiplicitous charging of the two battery counts and the submission of the two counts to the jury. We agree with the trial court that Johnson has not shown that counsel provided ineffective assistance. We reverse the judgment and the order, however, because conviction on both counts is barred by statute. We remand the case for further proceedings.

Johnson's claim is based on § 939.66(2m), STATS., which prohibits convictions for both a crime charged and an included crime and defines an equally serious battery as an included crime of another battery. Thus, by statute, equally serious battery charges are included offenses of each other. Both batteries specified in §§ 940.19(3) and 940.19(6), STATS., are class D felonies and are equally serious. Thus, the judgment of conviction violates this statute.

Johnson contends that his trial counsel provided ineffective assistance entitling him to a new trial. A defendant has a constitutional right to effective assistance of counsel. ***State v. Ludwig,*** 124 Wis.2d 600, 606, 369 N.W.2d 722, 725 (1985). To establish a claim of ineffective assistance of counsel, a defendant must show that trial counsel's performance was deficient and that the deficient performance prejudiced the defense and deprived him or her of a fair trial. ***Id.*** at 607, 369 N.W.2d at 725. Prejudice exists if "there is a reasonable probability

that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Strickland v. Washington,*** 466 U.S. 668, 694 (1984). The measure of prejudice is whether the deficient performance undermines the reviewing court's confidence in the reliability of the trial that did take place. ***Id.***

The trial court concluded that if counsel had timely raised the multiplicity issue, it would have ordered the prosecution to elect one count, and it would have dismissed the second. The court also concluded that failing to do so was deficient performance. Although the State does not concede that this portion of the trial court's ruling is correct, we need not review it to resolve the appeal. In denying relief, the trial court concluded that because Johnson had not shown that the multiple convictions affected the trial, he failed to establish that he was prejudiced by counsel's deficient performance.[1] We agree that Johnson has not shown prejudice warranting a new trial.

Johnson claims prejudice on the theory that submission of both counts to the jury created the possibility of juror confusion and of a non-unanimous verdict. He suggests that the jury may have focused on the age and injury to the victim and ignored the element of intent. Johnson relies on ***State v. Seymour***, 183 Wis.2d 683, 515 N.W.2d 874 (1994), to support his claim; however, the case is inapposite. ***Seymour*** involved a single count that alleged violation of a statute, which the court concluded described three independent offenses. ***Id.*** at 686, 515 N.W.2d at 876. The court held that the jury instructions were defective and violated the right to a unanimous verdict because the jurors

[1] The trial court did not decide if Johnson waived the right to have one of the convictions vacated. The court, however, declined to grant a remedy not requested.

were not told that they all had to agree on a single alternative. ***Id.*** at 685-86, 515 N.W.2d at 876.

In the present case, Johnson was charged with two separate counts. Johnson does not claim that the jury instructions were deficient regarding the elements of each offense or the need for unanimity on each count; thus, we assume the jury instructions were correct. We also assume that the jurors followed the instructions they were given, *see* ***State v. Lukensmeyer***, 140 Wis.2d 92, 110, 409 N.W.2d 395, 403 (Ct. App. 1987), and unanimously found that the prosecution had proven the elements of both counts. Additionally, because Johnson was found guilty of both counts, there can be no claim that the verdict was the result of any improper juror compromise.

Johnson also asserts, without citation to authority, that the jury's consideration of both counts was prejudicial *per se*. The case law does not support this claim. Even when the trial court erroneously refuses to dismiss multiplicitous counts prior to trial, the error is reviewed to determine if it was harmless. ***State v. Kennedy***, 134 Wis.2d 308, 324, 396 N.W.2d 765, 771 (Ct. App. 1986). Error that can be harmless is not per se sufficient to satisfy the prejudice prong of a claim of ineffective assistance of counsel. Thus, Johnson did not meet his burden of showing that counsel's failure to raise the multiplicity issue prejudiced his defense and deprived him of a fair trial.

We conclude, however, that the trial court should have addressed the issue of an invalid conviction *sua sponte*. Therefore, we reverse the judgment of conviction and the order denying postconviction relief, and we remand the case to the trial court for further proceedings. The trial court is to dismiss one count,

pursuant to § 939.66(2m), STATS., and re-sentence Johnson on the remaining count. *See* ***State v. Gordon***, 111 Wis.2d 133, 146, 330 N.W.2d 564, 570 (1983).

*By the Court.*—Judgment and order reversed and cause remanded with directions.

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