

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

April 16, 1998

Marilyn L. Graves  
Clerk, Court of Appeals  
of Wisconsin

**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 § 808.10 and RULE 809.62, STATS.

**No. 97-0514-CR**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**v.**

**CHAD L. EDWARDS,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Rock County: MICHAEL J. BYRON, Judge. *Affirmed.*

Before Dykman, P.J., Roggensack and Deininger, JJ.

PER CURIAM. Chad Edwards appeals a judgment convicting him of robbery and an order denying his postconviction motion for a new trial. The issue is whether Edwards received ineffective assistance of counsel because his trial counsel did not request a lesser-included offense instruction on misdemeanor theft. We conclude that this was not deficient performance because the evidence

did not justify a charge on the lesser-included offense of theft. Thus, the trial court would have been correct in denying the request for this instruction had it been made. Therefore, we affirm.

Edwards was charged with armed robbery. A jury found Edwards guilty of the lesser-included offense of robbery. He then moved for a new trial alleging ineffective assistance of counsel. After reviewing the trial evidence, the court concluded that there was no reasonable probability that the jury would have found that Edwards had not threatened the use of force. Consequently, there was no basis for a theft charge. The trial court, therefore, denied the claim of ineffective assistance of counsel. Edwards appeals.

To establish an ineffective assistance of counsel claim, a defendant must show both that counsel's performance was deficient and that he was prejudiced by the deficient performance. See *Strickland v. Washington*, 466 U.S. 668, 687 (1984). A reviewing court may dispose of a claim of ineffective assistance of counsel on either ground. Consequently, if counsel's performance was not deficient the claim fails and this court need not examine the prejudice prong. See *State v. Moats*, 156 Wis.2d 74, 101, 457 N.W.2d 299, 311 (1990).

We review the denial of an ineffective assistance claim as a mixed question of fact and law. See *Strickland*, 466 U.S. at 698. We will not reverse the trial court's factual findings unless they are clearly erroneous. However, we review the two-pronged determination of trial counsel's effectiveness independently as a question of law. See *State v. Johnson*, 153 Wis.2d 121, 128, 449 N.W.2d 845, 848 (1990).

Edwards claims that his trial counsel was ineffective because he did not request an instruction on the lesser-included offense of theft. The submission

of a lesser-included offense to the jury is proper only when there are grounds in the evidence for both acquittal on the greater charge and conviction on the lesser charge. See *State v. Kramar*, 149 Wis.2d 767, 792, 440 N.W.2d 317, 327 (1989). In making this determination, the evidence must be viewed “in the light most favorable to the defendant.” *Id.* The lesser-included offense should be submitted only if there is some reasonable doubt about an element necessary for conviction on the offense charged. See *State v. Foster*, 191 Wis.2d 14, 23, 528 N.W.2d 22, 26 (Ct. App. 1995). The question of whether the evidence at trial supports a lesser-included offense is a question of law which we review de novo. See *Kramar*, 149 Wis.2d at 791, 440 N.W.2d at 327.

We thus address whether the evidence at Edwards’ trial supported the submission of the lesser-included offense of theft to the jury. The significant difference between the offense of misdemeanor theft and the offense of robbery is the use or threatened use of force. Compare § 943.20, STATS., with § 943.32, STATS. Edwards testified at trial that he grabbed a clerk in the store by the arm. In addition, the clerk testified that he pushed her towards the cash register. Since the uncontroverted evidence established that Edwards grabbed the store clerk by the arm, we agree with the trial court that there was no reasonable basis for the jury to conclude that Edwards took the money without using or threatening force. See *Whitaker v. State*, 83 Wis.2d 368, 375-76, 265 N.W.2d 575, 579-80 (1978).

Since there was no reasonable basis in the evidence for the lesser charge, Edwards’ counsel was not deficient for not asking for the charge to be submitted. Therefore, the trial court properly denied Edwards’ motion for a new trial.

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

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

