COURT OF APPEALS
DECISION
DATED AND FILED

July 9, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-0978-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DONALD BOESHAAR,

DEFENDANT-APPELLANT.

APPEAL from a judgment and orders of the circuit court for Columbia County: RICHARD REHM, Judge. *Affirmed.*

Before Eich, C.J., Dykman, P.J., and Vergeront, J.

PER CURIAM. Donald Boeshaar appeals from a judgment of conviction of two counts of issuing worthless checks in amounts over $1000 in violation of § 943.24(2), STATS., and from the orders denying his postconviction motions for acquittal and for a new trial. The issues on appeal are whether he was denied effective assistance of counsel, whether we should exercise our statutory

discretion to reverse the conviction, and whether there was sufficient evidence at trial to support the conviction. Because we conclude that his counsel was not ineffective and the evidence was sufficient to support the conviction, and because we decline to exercise our discretion to reverse, we affirm.

On March 31, 1994, Boeshaar issued two checks to pay for two cars purchased from Interstate Auto Auction. Both checks were returned for insufficient funds, redeposited and returned a second time. At the time of trial, Boeshaar had neither covered the checks nor returned the cars.

Boeshaar gives many reasons why his trial counsel was ineffective. Although the reasons are somewhat confusing, the main reasons appear to be: counsel did not obtain discovery documents until the day of trial; counsel did not present evidence that on April 14, 1994, Boeshaar attempted to deliver some cars to Interstate Auto allegedly to be sold to cover the bad checks; counsel did not call any witnesses to testify for Boeshaar;[1] counsel did not present other relevant evidence that involved money Interstate Auto owed to Boeshaar, past dealings and understandings between Boeshaar and Interstate Auto, and an explanation of why Boeshaar had not responded to a certified demand letter from Interstate Auto.

To establish a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that the deficient performance prejudiced the defendant. *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

[1] Trial counsel testified at the ***Machner*** hearing that Boeshaar chose not to testify.

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).

There is a strong presumption that counsel rendered adequate assistance. ***Strickland***, 466 U.S. at 690. Professionally competent assistance encompasses a "wide range" of behaviors, and "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." ***Id.*** at 689. To meet the prejudice test, Boeshaar must show that, but for defense counsel's unprofessional errors, the result of the proceeding would have been different. ***State v. Sanchez***, 201 Wis.2d 219, 236, 548 N.W.2d 69, 76 (1996).

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 circuit court's factual findings unless they are clearly erroneous. However, we review the two-pronged determination of trial counsel's performance independently as a question of law. *See* ***State v. Johnson***, 153 Wis.2d 121, 128, 449 N.W.2d 845, 848 (1990).

We conclude that none of the alleged errors prejudiced Boeshaar and therefore we do not reach the issue of whether trial counsel performed deficiently. The evidence at trial was sufficient to establish that Boeshaar issued two worthless checks over $1000 and that he neither covered the checks nor returned the cars he purchased with the checks. We agree with the circuit court that the late receipt of the discovery documents did not significantly affect the outcome of the case. Moreover, any evidence concerning Boeshaar's dealings with Interstate Auto before or after he wrote the checks also would not have affected this

determination. Since the evidence would not have affected the outcome of the case, Boeshaar was not prejudiced by his counsel's decision not to introduce it. Consequently, Boeshaar has not established that his trial counsel was ineffective.

Boeshaar also asks us to exercise our discretion to reverse his conviction pursuant to § 752.35, STATS. This statute grants us the authority to reverse a matter if it appears from the record that the real controversy has not been fully tried or that justice has miscarried. Because we conclude that the real controversy has been fully tried, we decline to exercise our discretion to reverse in this case.

Boeshaar also asks us to reverse because the evidence was insufficient to support his conviction. He claims that there was insufficient evidence to establish a *prima facie* case of intent because no evidence was presented that he had received notice that the checks had bounced.[2] We agree with the State that this argument confuses the elements of the crime with the acceptable evidence for proving the elements of intent.[3] The issue is whether the evidence was sufficient to justify the finding of intent to issue worthless checks.

When considering a challenge to the sufficiency of the evidence, this court must affirm "if it finds that the jury, acting reasonably, could have found guilt beyond a reasonable doubt.... [T]he jury verdict will be overturned only if,

[2] The circuit court noted that Boeshaar's argument that he had not received notice of the bounced checks was inconsistent with his statement that he took other cars to Interstate Auto to be sold to cover the bad checks only two weeks after he wrote the checks.

[3] Section 943.24(2), STATS., sets forth the elements of the crime of issuing worthless checks. Subsection (3) of that same statute sets forth ways in which the element of intent may be proven. The State does not have to prove that Boeshaar received notice of the bounced check in order to prove a violation of § 943.24(2).

viewing the evidence most favorably to the state and the conviction, it is inherently or patently incredible, or so lacking in probative value that no jury could have found guilt beyond a reasonable doubt." ***State v. Alles***, 106 Wis.2d 368, 376-77, 316 N.W.2d 378, 382 (1982) (citation and emphasis omitted). If more than one inference can be drawn, the inference which supports the jury's verdict must be followed unless the evidence was incredible as a matter of law. ***Id.*** at 377, 316 N.W.2d at 382. "[I]f any possibility exists that the jury *could* have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, we will not overturn the verdict even if we believe that a jury *should* not have found guilt based on the evidence before it." ***Id.***

The evidence presented at trial included bank statements bearing Boeshaar's name and address which indicated that the checks at issue, as well as many others, had bounced. Further, the evidence established that Boeshaar neither covered the checks he issued to Interstate Auto nor ever returned the cars he had purchased with the worthless checks. We conclude that there was sufficient evidence before the jury from which it could determine beyond a reasonable doubt that Boeshaar did not intend to cover the worthless checks. Consequently, we affirm the judgment and orders of the circuit court.

By the Court.—Judgment and orders affirmed.

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