

**COURT OF APPEALS
DECISION
DATED AND FILED**

JANUARY 27, 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. 97-1689-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

ROBERT JAMES ROGERS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Eau Claire County: GREGORY A. PETERSON, Judge. *Affirmed.*

Before Cane, P.J., Myse and Hoover, JJ.

PER CURIAM. Robert Rogers appeals a judgment and an order convicting him of battery to a fellow inmate in the Eau Claire County jail and denying his motion for postconviction relief. He argues that his trial counsel was ineffective for failing to interview other inmates who would have testified that no battery occurred. Because we conclude that Rogers has not demonstrated any

prejudice from his counsel's failure to interview and call these witnesses, we affirm the judgment of conviction and the order denying his postconviction motion.

A jury found Rogers guilty of striking Michael Potter, a fellow inmate in the Eau Claire County jail. Potter testified that he and Rogers argued over a card game and Rogers punched him in the face, breaking his nose. Potter testified that he then went to the shower area and contacted a guard, stating that he had fallen in the shower. The guard was immediately suspicious and expressed his skepticism to Potter. After twice stating that he fell in the shower, Potter told the guard that Rogers had struck him. Another inmate, Steven Stauffer, corroborated Potter's account. Rogers testified that he and Potter had a heated verbal exchange but that he never struck Potter. He testified that Potter got up from the table and went to the shower area and returned holding his nose, apparently having fallen in the shower.

At the postconviction hearing, Rogers presented testimony from two other inmates. Jermaine Nielsen testified that he and Potter left the card table at the same time and that Potter's nose was not broken when he left the table. When Nielsen returned to the table, he saw Potter returning with his nose broken. Brent Boatman testified that there was a disagreement between Rogers and Potter but that he never saw anyone get hit at Rogers' table.

The trial court denied the postconviction motion, finding that Rogers' trial counsel was not ineffective and that his failure to interview these witnesses was not prejudicial because neither of the witnesses' testimony was credible and because Rogers' demeanor at trial rendered his testimony so

unbelievable that additional corroborating witnesses would have made no difference.

To establish ineffective assistance of counsel, Rogers must show that his counsel's performance was deficient and that the deficient performance prejudiced the defense. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). We need not review whether counsel's performance was deficient because we conclude that the defense was not prejudiced by his performance. *Id.* at 697. In reaching this conclusion, we give deference to the trial court's findings of fact, but independently review the question of prejudice as a matter of law. *See State v. Johnson*, 153 Wis.2d 121, 127-28, 449 N.W.2d 845, 848 (1990).

The postconviction testimony of Rogers' witnesses does not undermine this court's confidence in the outcome of the trial. Boatman's testimony was not consistent with Rogers'. Both Nielsen and Boatman had substantial credibility problems, including numerous criminal convictions. Nielsen's testimony does not preclude the possibility of an altercation after he left the table. Boatman's testimony supported the implausible theory that Potter fell to the floor in the shower, breaking his nose. Neither of these witnesses gave their version of the incident to the jailors when they were asked to do so immediately after it occurred. As the arbiter of the witnesses' credibility, the trial court reasonably rejected their explanations and excuses for their failure to report a fall in the shower when they were given that opportunity. Rogers has not established prejudice beyond mere speculation. *See State v. Wirts*, 176 Wis.2d 174, 187, 500 N.W.2d 317, 321 (Ct. App. 1993).

By the Court.—Judgment and order affirmed.

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

