

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 18, 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. 97-2292-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JUAN MATA,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Racine County:
RICHARD J. KREUL, Judge. *Affirmed.*

SNYDER, P.J. Juan Mata appeals from a judgment of conviction for battery and disorderly conduct. See §§ 940.19(1) and 947.01, STATS. Mata argues that because the trial court stated to the jury that Mata was “a habitual offender,” this constituted prejudicial error and he should be granted a new trial. We agree that the error was prejudicial, but because we conclude that defense counsel elected a different remedy rather than requesting a mistrial, we affirm the judgment of conviction.

Mata was charged with the above crimes as a result of a bar fight with his girlfriend. He pled not guilty and elected to be tried by a jury. After the venire was assembled but before the jury was sworn, the court read the charges to the jury. This reading included the following statement that Mata did “unlawfully, intentionally, and as a habitual offender cause bodily harm to another” The reading of the complaint alleging the disorderly conduct charge also included the phrase that Mata was charged “as a habitual offender.”

Counsel then conducted voir dire and the jury was sworn. Neither side objected to the composition of the jury. However, outside of the presence of the jury, defense counsel indicated that the court’s statement that Mata was charged as a habitual offender was not something “that [the jury] need[s] to take into account.” Defense counsel requested that when the charges against Mata were read at the end of the trial, the trial court not mention Mata’s habitual offender status. The court agreed; defense counsel had no objection to then proceeding with the trial.

Following a midday recess, the case continued with opening statements. After the State had presented five witnesses, it rested its case. Defense counsel moved for dismissal, arguing that the State had not proved its case. This motion was denied and the defense called its first witness to the stand. Following the presentation of that witness, the jury was excused for the evening.

The next morning before the start of trial, defense counsel asked the trial court to revisit the issue of the court reading Mata’s status as a habitual offender to the jury. Defense counsel stated that “the case law indicates if I do not ask for a mistrial before the verdict is read, that I waive my right to ask for it.” The trial court denied the motion, reasoning that Mata’s status as a habitual

offender was clearly indicated by the criminal complaint and that defense counsel had permitted the jury to be sworn in and the trial to proceed without objection. The trial court noted that no objection was made until after a substantial portion of the State's case was entered, and that when the objection was initially made, defense counsel indicated that she did not want a cautionary instruction. Instead, she requested that the information not be read to the jury again. On these bases, the court denied defense counsel's motion for a mistrial and proceeded with the case.

Mata now claims that the trial court committed prejudicial error when it read the repeater portion of the charging document to the jury. Mata argues that the error deprived him of a fair trial and that the remedy is to reverse his conviction and remand for a new trial. While we agree with Mata that the reading of the repeater language was prejudicial, we conclude that when defense counsel raised the issue to the trial court, she then elected the remedy of requesting that the trial court not make that statement again at the end of the trial. She agreed to proceed with the trial after her request was granted.

A disclosure to a jury that a defendant is a habitual offender is prejudicial. *See Mulkovich v. State*, 73 Wis.2d 464, 467, 243 N.W.2d 198, 200 (1976). The repeater charge is relevant only to the trial court at sentencing; a defendant's status as a repeater should be withheld from the jury. *See id.* at 468, 243 N.W.2d at 201. However, a defendant may waive an error if, "knowing that an error has been committed, [he] rel[ies] on the hope that a jury may nevertheless rule in his favor." *Id.* at 469, 243 N.W.2d at 201. Furthermore, defense counsel may make a deliberate choice of trial strategies and elect between alternative remedies for an error. *See Wells v. State*, 40 Wis.2d 724, 734, 162 N.W.2d 634, 639 (1968).

In the instant case, defense counsel made a timely objection to the trial court's error when it included Mata's repeater status in reading the complaint. Defense counsel requested that when the complaint was read at the end of the trial that the words "habitual offender" be left out. The court agreed and the trial proceeded. It was not until the State had rested its case and one defense witness had appeared that Mata's counsel requested a mistrial. Because we conclude that defense counsel elected a remedy and thereby waived the right to request a mistrial, we affirm the trial court.

Defense counsel's opportunity to bring a motion for a mistrial occurred when she first objected to the reading of the complaint. A defendant who fails to make a motion for a mistrial at the time he or she is prejudiced has, in effect, waived the right to claim prejudice later. See *Pohl v. State*, 96 Wis.2d 290, 302, 291 N.W.2d 554, 559 (1980). This rule is in place because a "[f]ailure to make a timely motion can only be construed as an election to rely on the possibility of a favorable jury verdict." *Id.* at 303, 291 N.W.2d at 560 (quoted source omitted). In view of the fact that Mata's defense counsel did not fail to object to the error, but rather objected and then elected the remedy of assuring that the trial court would not mention again that Mata was a repeater, we are compelled to construe her actions as a calculated attempt to remedy the error and continue with the trial.

Appellate counsel argues that if this court concludes that waiver applies, then we must also conclude that "counsel was ineffective in this regard and Mata was thereby denied a fair trial." However, it is well settled that a claim of inadequate trial counsel must be raised before the trial court. See *State v. Machner*, 92 Wis.2d 797, 804, 285 N.W.2d 905, 908 (Ct. App. 1979). This is so because without an evidentiary hearing an appellate court cannot determine

“whether trial counsel’s actions were the result of incompetence or deliberate trial strategies.” *Id.* As noted by the supreme court in *State v. Simmons*, 57 Wis.2d 285, 297, 203 N.W.2d 887, 894-95 (1973), it is inappropriate for appellate counsel to attack the competency of trial counsel when it is based on an unsupported assumption. When the actions of trial counsel are questioned, “[I]t is incumbent upon one who seeks to show that incompetency to give notice to trial counsel that his handling of a criminal matter is being questioned” *Id.*

In the present case, no *Machner* hearing was held. We therefore do not have the benefit of defense counsel’s reasoning behind her request that Mata’s repeater status not be mentioned again and her decision to proceed with the trial. We review the record submitted on appeal; there is no need to consider the effectiveness of Mata’s trial counsel as Mata has failed to show that counsel’s representation was deficient.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.

