

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 23, 2001

Cornelia G. Clark
Clerk of Court of Appeals

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 WIS. STAT. § 808.10 and RULE 809.62.

No. 00-3148-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MATTHEW J. ZEI,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Door County: PETER C. DILTZ, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Matthew Zei appeals a judgment convicting him of theft by a contractor contrary to WIS. STAT. §§ 779.02(5), 943.20(1)(b) and 943.20(3)(c), and an order denying his postconviction motion. Zei argues that his trial counsel was ineffective because he urged Zei not to testify and that this court should grant a new trial in the interest of justice because the true controversy was

not fully tried due to his failure to testify.¹ Because Zei's testimony would not have established a defense, we conclude that he was not prejudiced by his counsel's advice and that the true controversy was fully and fairly tried.

¶2 The State's evidence showed that Zei contracted with Greg and Deanna Koelpien to construct a log home. The Koelpiens accepted Zei's proposal on May 26, 1997, and issued a check for \$2,000 on June 6. They issued an additional check for \$32,000 for the first draw on June 9, 1997. Construction began three days later. On June 16, Zei purchased a truck for \$15,700, utilizing the Koelpiens' trust money. After the Koelpiens deposited the second draw of \$32,000, Zei paid for boat repairs and purchased an automobile with the Koelpiens' money.

¶3 Zei's defense relied on his assertion that he worked as a laborer on the project in addition to his capacity as a general contractor and that, with the Koelpiens' consent, he paid himself for his labor before completion of the project. Zei contends that he had a "bonafide dispute" with the Koelpiens. Zei argues that this defense could not succeed without his testimony and that his counsel was ineffective for relying on other evidence, including Deanna Koelpien's preliminary hearing testimony and the contract.

¶4 To establish ineffective assistance of counsel, Zei must show that his counsel performed deficiently and that the deficient performance prejudiced his defense. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). Counsel's

¹ Zei also argues that he is entitled to a new trial based on the plain error doctrine. That argument is not adequately developed to merit any response. *See State v. Pettit*, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992).

strategic choices made after thorough investigation of the law and facts are virtually unchallengeable. *Id.* at 690. To establish prejudice, Zei must show a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different. *Id.* at 693. A reasonable probability is one that undermines this court's confidence in the outcome. *Id.* at 694.

¶5 Zei has not demonstrated prejudice from his failure to testify because his testimony at the postconviction hearing establishes that his testimony would have been irrelevant. As the trial court noted, Zei's June 16, 1997, withdrawal of funds to pay for the truck constituted a completed crime of theft by a contractor. His postconviction testimony contained no justification for that withdrawal. The record as a whole, including photographs showing progress on the construction, belie his assertion that he earned the money for work he performed in his capacity as a laborer. The disputes with the Koelpiens did not arise until after that money was converted to Zei's personal use. Zei focuses on the fact that his proffered defense could not succeed without his testimony. However, his postconviction testimony demonstrates that it could not have succeeded with his testimony as well. Because we conclude that Zei has

established no prejudice from his failure to testify, we need not review whether his counsel's performance was deficient.² *Id.* at 697.

¶6 The record discloses no basis for granting a new trial in the interest of justice. Because Zei's postconviction testimony establishes that his trial testimony would have been immaterial, the matter was fully and fairly tried.

By the Court.—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5 (1999-2000).

² Trial counsel's decision to urge Zei not to testify can also be justified as a reasonable trial strategy. Counsel correctly noted that the prosecutor's cross-examination would draw the jury's attention to the fact that Zei paid himself an unjustifiable amount after having performed almost no work as a laborer. Counsel also stated a concern that Zei would be cross-examined with his tax returns and might be forced to invoke his Fifth Amendment rights. Zei criticizes counsel for not having filed a motion in limine to determine whether the trial court would allow certain questions regarding the tax return. At the postconviction hearing, Zei did not establish that the trial court would have excluded all questions relating to the tax return under WIS. STAT. § 904.03 (1999-2000). Therefore, Zei has not established prejudice from his counsel's failure to file a motion in limine. The trial court's earlier rulings allowed the prosecutor to utilize the tax returns to show that Zei did not have income from other sources to account for the truck payment and that his 1997 return did not reflect payments to other employees. If Zei had testified, other aspects of the tax returns could have become relevant to impeach his testimony and counsel reasonably feared that the tax returns would reflect badly on Zei's character and honesty, and would support the State's theory that Zei simply converted the trust money for his personal use.

