COURT OF APPEALS
DECISION
DATED AND FILED

August 21, 2001

Cornelia G. Clark
Clerk of Court of Appeals

No. 01-0284-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JESSIE L. FITZL,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Rusk County: FREDERICK A. HENDERSON, Judge. *Affirmed*.

Before Cane, C.J., Peterson and Dykman, JJ.

¶1 PER CURIAM. Jessie Fitzl appeals his judgment of conviction for substantial battery, contrary to WIS. STAT. § 940.19(2).[1] He also appeals from an

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

order denying his postconviction motion. Fitzl claims: (1) the trial court erroneously exercised its discretion by excluding evidence of events that took place outside the bar where the battery occurred; (2) he was denied effective assistance of counsel; and (3) he is entitled to a new trial in the interests of justice. We disagree and affirm the conviction.

BACKGROUND

¶2 On November 26, 1998, Fitzl and his brother were at the Jolly Inn Tavern in Hawkins. While playing pool in the bar, Fitzl struck Travis Ebner in the back of the head with a beer bottle. Outside the bar, Fitzl's brother allegedly hit Ebner in the head with another beer bottle. Fitzl was charged with causing substantial bodily harm to Ebner.

¶3 Prior to trial, the State filed a motion in limine seeking to exclude from evidence all events that occurred outside the bar. The State asserted that the charge against Fitzl was limited to the battery occurring inside the bar. Fitzl argued that what happened outside the bar was relevant to his theory that he acted in self-defense.

¶4 The trial court granted the State's motion and denied Fitzl's request to make a detailed offer of proof. The court concluded, "Anything that took place after the alleged attack outside of the bar is irrelevant to the actions inside of the bar."

¶5 The case proceeded to trial. At trial, Ebner testified about a photograph taken of him that showed his injuries from the beer bottles. Fitzl objected on the grounds that the picture was unduly prejudicial. The trial court overruled the objection. Fitzl was subsequently convicted.

¶6 Fitzl brought a postconviction motion for a new trial. He alleged that his trial counsel was ineffective for not objecting to the photograph based on a lack of foundation and of potential juror confusion. The trial court denied the motion. This appeal followed.

DISCUSSION

I. EXCLUSION OF EVIDENCE

A. Admissibility of Evidence

¶7 Fitzl argues that the trial court erroneously exercised its discretion by excluding all evidence relating to events that took place outside the bar because the court's decision was based on erroneous assurances by the State. He contends that the complaint actually charged two batteries, one taking place in the bar and the other taking place outside the bar. As a result, he claims the court improperly excluded the evidence.

¶8 A trial court has broad discretion in determining the admissibility of evidence. ***State v. Oberlander***, 149 Wis. 2d 132, 140, 438 N.W.2d 580 (1989). Our review is limited to determining whether the trial court erroneously exercised its discretion. ***State v. Larsen***, 165 Wis. 2d 316, 320 n.1, 477 N.W.2d 87 (Ct. App. 1991). We will not reverse the trial court's decision to admit evidence unless there is no reasonable basis for the decision. ***State v. Pharr***, 115 Wis. 2d 334, 342, 340 N.W.2d 498 (1983).

¶9 The charging section of the criminal complaint and Information charged the commission of a single substantial battery. Both allege that Fitzl did "cause substantial bodily harm to Travis Ebner, by an act done with intent to cause bodily harm to that person, contrary to [WIS. STAT.] § 940.19(2) …." Fitzl's

argument is based on the probable cause section of the complaint which refers to two incidents, one in the bar and one outside the bar. However, the complaint stated that according to Ebner, Ebner's brother, and another eyewitness, only Fitzl battered Ebner inside the bar. Ebner's brother further stated that Fitzl's brother struck Ebner with a beer bottle outside the bar.

¶10 Under WIS. STAT. § 904.02, relevant evidence is generally admissible. The test for relevancy is whether the evidence has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less than it would be without the evidence." WIS. STAT. § 904.01.

¶11 Fitzl argues that proof of what took place outside the bar was relevant because it showed that Fitzl attempted to retreat from Ebner and that Fitzl acted in self-defense. However, Fitzl's argument fails because he did not raise a claim of self-defense at trial for the battery that took place inside the bar. Rather, Fitzl asserted that someone else hit Ebner and that Ebner mistakenly thought it was Fitzl.

¶12 Further, the State neither charged nor sought to prove a second battery. Evidence of what occurred following the charged battery does not tend to prove or disprove "any fact that is of consequence to the determination of the action …." ***Id.*** Thus, the trial court reasonably exercised its discretion by finding that evidence of what occurred outside the bar was irrelevant.

B. Offer of Proof

¶13 Fitzl argues that the trial court erred by not allowing him to make an offer of proof about the events that occurred outside the bar after the initial battery.

¶14 As a general rule, "the trial court should permit an offer of proof either in question and answer form or by a statement of counsel, in the record, of what he [or she] believes the testimony would show." ***State ex rel. Schlehlein v. Duris***, 54 Wis. 2d 34, 39, 194 N.W.2d 613 (1972). There are circumstances, however, where in the exercise of discretion, the trial court may refuse an offer of proof. ***Id.*** For example, a trial judge need not permit an offer of proof as to matters that are clearly immaterial, irrelevant or without proper foundation. ***Id.***

¶15 Here, the trial court acted within the scope of its discretion by declining to hear Fitzl's detailed offer of proof. The court did permit Fitzl to summarize his position during the State's motion in limine. Fitzl stated that he wished to present evidence that after the first battery, Ebner pursued him, that he retreated, and that he acted in self-defense outside the bar.

¶16 Based on this summary, the trial court had enough facts before it to know that the proffered evidence was irrelevant. Had the State charged Fitzl with committing a second battery, then the proffered evidence would have been relevant. Because Fitzl was only charged with the first battery occurring inside the bar, we conclude that the court did not erroneously exercise its discretion.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

¶17 Fitzl argues that he is entitled to a new trial because his trial counsel was ineffective. He contends that his trial counsel failed to properly object to the

introduction of a photograph showing injuries to Ebner's head and shoulder. He contends that counsel: (1) failed to object to the State's failure to establish an appropriate foundation for admission of the photograph; and (2) failed to object to the photograph on the grounds that the photograph would cause juror confusion.

¶18 To establish an ineffective assistance of counsel claim, a defendant must show both that counsel's performance was deficient and that he or she was prejudiced by the deficient performance. ***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. ***Id.*** at 697.

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

A. Foundational Objection

¶20 At trial, the State introduced a photograph of Ebner's injuries taken approximately twelve hours after the incident.

Q Mr. Ebner, I'm showing you what has been marked as Exhibit No. 1, and I ask you if you recognize what that is – go ahead and take a look at it and tell us what the picture shows.

A It shows the picture of the top of my head and also across the back of my right shoulder where I —

Q All right. Let's just concentrate on your head. It shows some cuts?

A Yes.

Q How did you receive those cuts?

A From the beer bottle.

Q Did someone treat you for those cuts?

A Yes.

Q How did they treat you?

A I had stitches.

Q And where did that occur?

A At the Rusk County Memorial Hospital.

Q And does that picture accurately depict the cuts that you had on your head, and what you looked like when that picture was taken?

A Yes.

¶21 Defense counsel objected to the photograph on the grounds that it was unfairly prejudicial. The trial court overruled the objection and received the photograph in evidence.

¶22 During the postconviction proceeding, trial counsel explained that he did not make a foundational objection because he believed that such an objection would have ultimately failed. Trial counsel explained that both Ebner and the deputy who took the picture were present and prepared to testify to provide the

foundation that the picture accurately displayed the injuries. According to trial counsel, even if a foundational objection had been sustained, the State "could have remedied its omission with a single question. My belief is that such objections do not – do not enhance the credibility of a defense case with the jury."

¶23 The trial court found the decision not to object to the photograph's foundation reasonable. The record reveals that the State did lay an adequate foundation when it established through Ebner that the photograph accurately depicted the appearance of the cuts on his head when the picture was taken. Further, even if the foundation by the State was lacking, the State could have easily cured the defect. Under these circumstances, trial counsel made a reasonable strategic judgment that pursuing a foundational objection would have been fruitless.

B. Potential For Juror Confusion

¶24 Fitzl argues that his trial counsel was deficient because counsel failed to object to the photograph on the basis of potential juror confusion. He contends that the photograph depicts several head and shoulder injuries, some of which Ebner could have sustained outside the bar. Fitzl argues that because the jury did not hear evidence about other potential causes for Ebner's injuries, the jury may have mistakenly concluded that the first battery caused each of the injuries depicted in the photograph.

¶25 Fitzl has not shown that trial counsel's decision not to object on the basis of juror confusion constitutes deficient performance. At the postconviction hearing, trial counsel was asked if there was any way of knowing if the cuts Ebner received were even caused by getting hit in the head with a beer bottle. Trial

counsel responded that Ebner testified "that after being hit with a bottle inside of the bar he was bleeding profusely from his scalp area."[2]

¶26 Trial counsel's response suggests that he reasonably believed the State had established an adequate link between the first battery and at least some of Ebner's head injuries. The purpose of the photograph was to prove that Fitzl's actions caused substantial bodily harm, not to inflame and prejudice the jury. *See* ***State v. Lindvig***, 205 Wis. 2d 100, 108, 555 N.W.2d 197 (Ct. App. 1996).

¶27 In addition, the focus of Fitzl's defense was not on the extent of Ebner's injuries. Even assuming an objection would have succeeded in suppressing the photograph, there is little chance that it would have changed the outcome of the trial. The central issue in the case was whether Fitzl or someone else hit Ebner in the head. The photograph had nothing to do with this question. Because the photograph was introduced for the limited purpose of corroborating Ebner's testimony that he suffered substantial bodily harm, we conclude that trial counsel's performance was not deficient. Therefore, we need not address the second prong of ineffective assistance of counsel.

III. NEW TRIAL IN THE INTERESTS OF JUSTICE

¶28 Last, Fitzl argues that we should grant him a new trial pursuant to WIS. STAT. § 752.35 because the real controversy in this case has not been tried. Under WIS. STAT. § 752.35, we may reverse a trial court's judgment if we conclude that: "(1) the real controversy has not been fully tried, or (2) it is

[2] We note that trial counsel was never asked whether his decision not to raise an objection on the ground of juror confusion was a strategic one.

probable that justice has miscarried." ***State v. Shea***, 221 Wis. 2d 418, 433, 585 N.W.2d 662 (Ct. App. 1998).

¶29 Fitzl argues that the admission of the photograph and the suppression of all evidence resulting from what happened outside the bar prevented the real controversy from being tried. However, the real controversy had nothing to do with Fitzl's arguments. The real issue in this trial was whether someone other than Fitzl hit Ebner with a beer bottle inside of the bar. The defense presented several witnesses who testified that they saw someone other than Fitzl hit Ebner.

¶30 After considering all of the evidence, the jury determined that it was Fitzl who struck Ebner. We conclude that the real controversy was fully and fairly tried. We reject Fitzl's argument that this is one of the rare cases that merits a new trial in the interests of justice.

By the Court.—Judgment and order affirmed.

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