

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 30, 2005

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.

**Appeal No. 04-0656
STATE OF WISCONSIN**

Cir. Ct. No. 97CF000829

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CORY T. BAKER,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Racine County:
GERALD P. PTACEK, Judge. *Affirmed.*

Before Anderson, P.J., Nettesheim and Snyder, JJ.

¶1 PER CURIAM. Cory T. Baker appeals from an order denying his motion for postconviction relief under WIS. STAT. § 974.06 (2003-04).¹ We reject

¹ All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

Baker's claim that he was denied the effective assistance of trial counsel and affirm the order.

¶2 Baker was convicted as a party to the crime and while armed with a dangerous weapon of attempted first-degree intentional homicide, first-degree reckless injury, second-degree recklessly endangering safety and seven counts of first-degree recklessly endangering safety. The underlying facts are drawn from our opinion addressing Baker's direct appeal:

Baker was charged as a result of a confrontation at the Racine home of Robert and Phyllis White on September 16, 1997. Baker and several others went to the Whites' home. A struggle on the porch took place and shots were fired at Robert. Robert was wounded in the abdominal area. Shots were also fired at Robert's stepson and brother-in-law and in the direction of the White home, which was then occupied by Phyllis and several family members.

State v. Baker, No. 98-3489-CR, unpublished slip op. at ¶2 (WI App Jan. 26, 2000).

¶3 Baker filed a motion under WIS. STAT. § 974.06, alleging ineffective assistance of trial counsel. His specific claims were: trial counsel admitted Baker's guilt when during closing argument he admitted Baker had a gun and was part of the incident but argued that Baker did not intend to kill anyone; trial counsel failed to effectively show inconsistencies in the testimony as to where Baker was standing in contrast to the location of the bullet wounds; and trial counsel failed to draw attention to the inconsistency between witness reports that eight to fifteen shots were fired but not that many casings were found. An evidentiary hearing was held. Appellate counsel, trial counsel and Baker testified. The circuit court denied the motion.

¶4 The State argues that Baker's WIS. STAT. § 974.06 motion is barred because he did not allege and did not prove a sufficient reason for not raising his claim of ineffective assistance of trial counsel on direct appeal. *See State v. Escalona-Naranjo*, 185 Wis. 2d 168, 181-82, 517 N.W.2d 157 (1994). We do not address this argument because it was not raised and was not considered by the circuit court.

¶5 The two-pronged test for ineffective assistance of counsel is deficient performance of counsel and prejudice to the defendant. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Whether counsel's actions constitute ineffective assistance is a mixed question of law and fact. *State v. Thiel*, 2003 WI 111, ¶21, 264 Wis. 2d 571, 665 N.W.2d 305. The circuit court's findings of what counsel did and the basis for the challenged conduct are factual and will be upheld unless clearly erroneous. *Id.* However, whether counsel's conduct amounted to ineffective assistance is a question of law which we review de novo. *Id.*

¶6 Trial counsel's performance is measured by the objective standard of reasonableness. *See State v. McMahon*, 186 Wis. 2d 68, 80, 519 N.W.2d 621 (Ct. App. 1994). This standard encompasses a wide range of professionally competent assistance. *See id.* We presume that counsel's performance was satisfactory; we do not look to what would have been ideal, but rather to what amounts to reasonably effective representation. *See id.* Courts must be highly deferential when evaluating counsel's performance and must avoid the distorting effects of hindsight. *Thiel*, 264 Wis. 2d 571, ¶19.

¶7 Baker first argues that in closing argument trial counsel undercut the theory of defense. He explains that the theory of defense was that he did not possess a gun and was only an innocent bystander to the shooting. He claims the

following statement during trial counsel's closing argument completely negated his trial testimony that he did not possess a gun:

There is no plan. There is no attempt to commit first degree intentional homicide. The gun went off, which is not surprising. Someone is holding a gun, and there's a struggle. Then the gun went off. If someone is on a porch and they're going to shoot, let's talk about how many opportunities existed when that individual came up on the porch.

¶8 The circuit court found that trial counsel was making an alternative argument about intent in case the jury believed White's testimony that he struggled with Baker on the porch and that Baker had a gun. It found that at no time did trial counsel concede that Baker was the person who did the shooting or that he possessed a gun. We agree with the circuit court's finding that this portion of trial counsel's closing argument was not an admission of Baker's guilt. That portion of the argument only referred to "someone" being on the porch and did not concede that Baker was on the porch. Baker was charged as a party to the crime and was placed by some witnesses as being on the porch. Trial counsel needed to address in closing argument what happened on the porch and the fact that someone had a gun. It was a reasonable approach to suggest there was no plan and that the shooting was because of the struggle and not a by-product of intent to kill. It did not eviscerate Baker's testimony that he did not possess a gun. Trial counsel did not perform deficiently during closing argument.

¶9 Baker challenges trial counsel's cross-examination of witnesses with respect to Baker's location and the location of the bullet wounds.² We first

² Baker was also shot during the incident. It is not clear whether Baker's claim pertains to the location and entry of just his wound or White's as well.

observe that there is no citation to the trial testimony that Baker claims gave rise to potential inconsistencies. There is no suggestion of what additional cross-examination would have revealed. Further, there was no testimony about whether Baker's gunshot wound was either a front or back entry. White testified that during the struggle on the porch he swung his assailant towards a shooter on the driveway. Thus, the jury could believe that if Baker was the assailant on the porch, at some point in time Baker was facing the shooter and then he was turned away from the shooter at other times. Whether the wounds were from the front or back was of no consequence. Moreover, any attempt to show by cross-examination that Baker's wound was from the front would have been inconsistent with Baker's testimony that he ran from the incident when the shooting started and that he was shot from behind.

¶10 Baker also complains that trial counsel did not cross-examine police officers on the fact that they recovered a fewer number of bullet casings than the number of shots reported by witnesses. This claim is a nonstarter because not all guns eject casings and only one gun was recovered. Trial counsel also used the failure to recover more casings in closing argument to suggest that the police investigation was incomplete. Baker has not established that trial counsel was deficient in the cross-examination of witnesses.³

³ We do not address Baker's undeveloped argument that trial counsel was ineffective for not presenting a "reconstruction model" to show how the events actually occurred. Any reconstruction could only be based on the various witness accounts. There has been no showing that a reconstruction of the event would have shown that Baker's involvement was impossible. See *State v. Voss*, 205 Wis. 2d 586, 596, 556 N.W.2d 433 (Ct. App. 1996) (the defendant fails to meet his or her burden to show prejudice when there is no answer to the question of how the claimed deficiency would have changed the outcome).

¶11 Baker's final argument is that the circuit court erred in ruling that Baker received the effective assistance of appellate counsel. The remedy for ineffective assistance of appellate counsel is a petition to this court for habeas corpus. See *State v. Speese*, 191 Wis. 2d 205, 227, 528 N.W.2d 63 (Ct. App. 1995), *rev'd on other grounds*, 199 Wis. 2d 597, 545 N.W.2d 510 (1996). In arguing that appellate counsel was ineffective for refusing to argue meritorious issues regarding trial counsel's ineffectiveness, Baker fails to make the distinction between appellate and postconviction counsel. See *State ex rel. Rothering v. McCaughtry*, 205 Wis. 2d 675, 678-79, 556 N.W.2d 136 (Ct. App. 1996). We have rejected Baker's claim that he was denied the effective assistance of trial counsel. Thus, postconviction counsel was not deficient for not raising the issue.⁴ See *State v. Cummings*, 199 Wis. 2d 721, 747 n.10, 546 N.W.2d 406 (1996).

By the Court.—Order affirmed.

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

⁴ We admonish Baker's counsel for the incomplete and confusing appendix to the appellant's brief. The table of contents to the appendix does not include the corresponding record citation to the documents listed and the documents listed are not included in the appendix. Counsel is warned to give more attention in the future to providing an appendix that complies with the requirements of WIS. STAT. RULE 809.19(2).

