

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

MARCH 13, 1996

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.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-1599-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JEREMY J. SCHLITT,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Washington County: LAWRENCE F. WADDICK, Judge. *Affirmed.*

ANDERSON, P.J. Jeremy J. Schlitt appeals from a judgment of conviction on two misdemeanors: (1) reckless use of a weapon by unlawfully and intentionally pointing a firearm at another, contrary to §§ 941.20(1)(c) & 939.51(3)(a), STATS., and (2) disorderly conduct, contrary to § 947.01, STATS., and an order denying his postconviction motion for a new trial. On appeal, Schlitt claims that his trial counsel was ineffective for several reasons. He also objects to the ruling by the trial court prohibiting evidence

concerning the relationship between himself and the victim. We conclude that Schlitt's trial counsel was not ineffective and that the trial court did not misuse its discretion when prohibiting certain evidence at trial. We therefore affirm the judgment of conviction and the order denying postconviction relief.

A criminal complaint was issued against Schlitt alleging that while holding a gun to the head of Sherry Williams, Schlitt said that she was lucky he did not pull the trigger because the gun was loaded. At his initial appearance, Schlitt was not represented by counsel. At his next court appearance, he was represented by Deborah Strigenz, who was appointed by the public defender's office. She requested and was granted a brief adjournment on May 2, 1994. Following several delays and several no-shows, a new attorney, Sharon Iggens, was appointed to represent Schlitt. The case was eventually tried on November 1, 1994.

Williams testified that during a party at the apartment that she shared with Schlitt and two other people, Schlitt put a gun to her head. She went on to testify that she was nervous and scared by this incident which prompted her to move out of the apartment. Further, she testified that after reporting the incident to the police, she went back to the apartment to retrieve the rest of her belongings. When she arrived, she discovered that someone had destroyed most of her belongings. She testified that she believed this to be retaliation for reporting the incident.

The defense counsel attempted to undermine Williams' statements by eliciting testimony that Schlitt and Williams frequently joked around about

killing each other. This testimony was supposed to show the lack of intent on the part of Schlitt. The prosecutor objected and the trial court sustained the objection.

Following Williams' testimony, Officer Steven Seitz testified that he questioned Schlitt about the incident. Schlitt admitted to Seitz that he had access to the gun on a regular basis. He also admitted that he might have joked with Williams that day about killing her when the gun was out.

Officer Steven Riffel testified to the events surrounding the execution of a search warrant at Schlitt's apartment. The officer testified that he discovered a handgun belonging to Schlitt's brother in a dresser drawer. He further indicated that no locks or broken locks were encountered in the search.

Defense called Schlitt as its only witness. Schlitt contradicted the testimony of both Williams and Seitz. On cross-examination, he testified that he did not say anything about killing Williams while in possession of the handgun.

The trial was a battle of credibility due to the conflicting testimony. The jury reached a verdict of guilty on both charges and Schlitt is now appealing based on a claim of ineffective assistance of counsel and improper exclusion of evidence by the trial court.

A defendant, when establishing ineffective assistance of counsel, must show that counsel's performance was deficient and that such performance prejudiced his or her defense. *Strickland v. Washington*, 466 U.S. 668, 687

(1984). The trial court's findings of fact will be affirmed unless they are clearly erroneous, but the determinations of deficient performance and prejudice are questions of law that this court reviews without deference to the trial court. *State v. Pitsch*, 124 Wis.2d 628, 633-34, 369 N.W.2d 711, 714-15 (1985).

Looking at the performance prong first, it must be remembered that the defendant does not have the right to a perfect defense; rather, it is a right to a professionally adequate defense as would be presented by a reasonably qualified defense attorney. A fair assessment of performance requires that the use of hindsight be avoided by evaluating the attorney under the particular circumstances. *Strickland*, 466 U.S. at 689.

Schlitt sets out numerous deficiencies in defense counsel's performance. He claims that defense counsel failed to adequately investigate the case prior to trial, eliminating the opportunity to formulate a proper defense. The duty to investigate is a duty to make a reasonable investigation or to make a reasonable decision that makes particular investigations unnecessary. *Strickland*, 466 U.S. at 691. At the *Machmer* hearing, defense counsel made clear that her reason for not hiring an investigator was due to the simplicity of the case.

The decision not to investigate must be directly assessed for reasonableness under the circumstances, applying a heavy measure of deference to counsel's judgment. *Strickland*, 466 U.S. at 695. As long as Iggens' decision was reasonable, which it was, we must not second-guess her decision under the circumstances. Schlitt has failed to overcome the presumption that

under the circumstances the challenged action was sound trial strategy. *Id.* at 689.

Schlitt also claims that counsel did not devote enough time in preparation. Although there is a dispute as to the exact time defense counsel spent on the case, there are no formulas as to how much time must be spent on a case such as this. Schlitt, however, claims that it was not enough, and somehow this was below the reasonable performance of a criminal defense attorney. The Court in *Strickland* refused to set out a checklist for judicial evaluation, since no particular set of rules could account for the wide variety of circumstances faced by defense attorneys. *Id.* at 688-89. Under the circumstances of this case, the time spent by Iggens was sufficient to meet all deadlines, review discovery and make appropriate trial preparations.

Schlitt's next complaint is that Iggens erred by failing to call additional witnesses for the defense. At trial, Schlitt was the only defense witness called to the stand. Two other possible witnesses were contemplated and rejected for different reasons. First, Schlitt's girlfriend, who knew Williams, was rejected by Schlitt who feared for her health. Schlitt's girlfriend was pregnant at the time and Schlitt did not want her to testify due to that fact. Schlitt failed to put forth any evidence as to what his girlfriend would say and therefore did not put defense counsel under any obligation to not adhere to his wishes or request a continuance.

Second, Schlitt's roommate, Brian Schultz, was rejected by defense counsel due to prior criminal convictions. After interviewing Schultz, the only

thing he was going to corroborate was Schlitt's testimony that Matt Schlitt kept his gun locked in his room. Iggens reasoned that her client, who did not have any prior convictions, sufficiently testified that the door was unlocked only when his brother Matt was around. Therefore, it was not necessary to put a witness on the stand who had very little to offer if there was a potential for damaging cross-examination. It is the job of the attorney to determine which witnesses will assist the defendant and which witnesses should not take part in the trial.

Schlitt also claims that defense counsel was ineffective when failing to object to hearsay testimony. Williams testified that her imprisoned uncle overheard Schlitt's brother saying that he would get Williams for putting him in jail. Iggens testified that a tactical decision was made not to object because the testimony only served to make the victim look paranoid and was only peripheral testimony, not relevant to her client. Although there could have been an objection based on hearsay, defense counsel's reasons for not objecting are reasonable and will therefore not be second-guessed by this court.

Schlitt's next claim is that counsel was ineffective in failing to persuade the court to overrule an objection made by the State. The trial court's possible error cannot be visited on counsel. Defense counsel made the proper decision to attempt to admit the evidence, but was unable to due to an objection made by the State, which the court sustained.

Finally, Schlitt contends that counsel was deficient for not filing a motion in limine to preclude "mention of the drug activity at the house."

Defense counsel determined that the same result could be reached with an objection during trial. The result was that the objection was sustained. Prior to the objection, there was a reference to the officer's background as a drug investigator. That reference would not have been limited by the proposed motion. Therefore, we must conclude that the reference to the officer's background was not a factor to be excluded either through objection or motion in limine. Thus, Schlitt has failed to prove any prejudice in this instance, which is a necessary element in proving ineffective assistance of counsel. See *State v. Wirts*, 176 Wis.2d 174, 187, 500 N.W.2d 317, 321 (Ct. App.), cert. denied, 114 S. Ct. 257 (1993).

We now turn to the second prong in the *Strickland* test. The second prong asks whether "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687. We conclude under the specific facts of this case that they were not.

The defendant must affirmatively prove prejudice. *Pitsch*, 124 Wis.2d at 641, 369 N.W.2d at 718. The *Strickland* test emphasizes that the error is prejudicial if it undermines confidence in the outcome. *Pitsch*, 124 Wis.2d at 642, 369 N.W.2d at 719. Thus, the defendant will have to show that there is a reasonable probability that but for counsel's unprofessional errors, the result would have been different. *Id.*

Schlitt in this case has not affirmatively proven prejudice. The trial court similarly found that Schlitt failed to present proof of prejudice. Although decisions were made by defense counsel, they were not essentially wrong just

because in hindsight, Schlitt would have made a different strategic decision. Furthermore, even though the outcome was unsatisfactory for Schlitt, it does not automatically render defense counsel decisions prejudicial to Schlitt. A defendant has a right to a fair trial and not a right to a perfect trial.

Finally, Schlitt points to the trial court's ruling that sustained an objection to disallow evidence concerning the relationship between himself and the victim. The principles that govern a review of a trial court's determination on the issue of relevancy are clear. *State v. Walker*, 154 Wis.2d 158, 191, 453 N.W.2d 127, 141, *cert. denied*, 498 U.S. 962 (1990). The court in *Hartung v. Hartung*, 102 Wis.2d 58, 306 N.W.2d 16 (1981), clarified the method for reviewing a trial court's discretionary determinations as follows:

A discretionary determination, to be sustained, must demonstrably be made and based upon the facts appearing in the record and in reliance on the appropriate and applicable law. Additionally, and most importantly, a discretionary determination must be the product of a rational mental process by which the facts of record and law relied upon are stated and are considered together for the purpose of achieving a reasoned and reasonable determination. It is recognized that a trial court in an exercise of its discretion may reasonably reach a conclusion which another judge or another court may not reach, but it must be a decision which a reasonable judge or court could arrive at by the consideration of the relevant law, the facts, and a process of logical reasoning.

Id. at 66, 306 N.W.2d at 20-21.

The trial court excluded testimony about joking comments between Schlitt and Williams, deeming it irrelevant because the defense was not based on lack of intent but that the incident never happened. Allowing this irrelevant testimony to be heard at trial would not only confuse the jury but also serve to prolong the trial needlessly.

By the Court. – Judgment and order affirmed.

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