

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 26, 2008

David R. Schanker
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. 2007AP1143-CR

Cir. Ct. No. 2005CF134

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOSEPH B. ELLEFSEN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and order of the circuit court for Walworth County: JOHN R. RACE, Judge. *Affirmed.*

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

¶1 PER CURIAM. Joseph Ellefsen appeals from a judgment of conviction of theft of a firearm and from an order denying his postconviction motion alleging ineffective assistance of trial counsel. He argues that his trial counsel was constitutionally deficient for conceding guilt on two counts during

closing argument. We conclude that Ellefsen was not denied the effective assistance of counsel and affirm the judgment and order.

¶2 The criminal complaint alleged that Ellefsen broke into the home of Timothy Matzke and stole two handguns from under Matzke's bed on March 9, 2003. The guns were recovered in Ellefsen's garage five days later. Ellefsen's fingerprint was on one of the guns and on a glass gun cabinet in Matzke's home. Ellefsen was charged with burglary while arming himself with a dangerous weapon and two counts of theft of a firearm.

¶3 Ellefsen testified at trial that he was in his garage when a friend from school came in with two cases. The friend asked Ellefsen to keep the cases. Ellefsen handled one of the guns inside the cases. Ellefsen knew the guns belonged to Matzke and agreed to keep them in his garage as a favor to his friend. Ellefsen indicated that he knew the Matzke children, had been inside their home, and had touched the gun cabinet on occasion. Ellefsen said he never entered Matzke's home to steal the guns.

¶4 In closing argument, defense counsel first addressed credibility. Counsel pointed out that Ellefsen had admitted his prior convictions and argued that Ellefsen was being straightforward with the jury. Counsel stated:

In fact, he [Ellefsen] has done that a lot. He came right out and told you I had these guns. These guns were in my house. I had them. That's pretty damning evidence on the two counts of theft. He came right out and told you this. You know, he didn't have to. He could have sat there just looking at you and said—not gone up on the witness stand and all and said nothing, but that's not what he did.

...

Now, you know, I wish that things had turned out different. I wish that instead of the friend loyalty he would have realized this is against the law, but he didn't do it. He held

onto them and—which is one of the reasons—it’s strange you’re going to hear this. You’re not going to hear this all from the defense attorney, but I’m going to tell you right now, as far as counts two and three for the thefts you have to return guilty verdicts. In fact, I can’t believe I’m saying it right now, but that’s the truth. How do we know? We know it because Joseph came out and told you. He came straight out and told you, I admit it, I did this.

¶5 The jury returned a guilty verdict on one count of theft of a firearm. The jury could not reach a decision on the burglary and other firearm theft charges and a mistrial was declared on those counts.¹

¶6 A claim of ineffective assistance of counsel requires the defendant to show both that counsel’s representation was deficient and that the deficiency was prejudicial. *State v. Cooks*, 2006 WI App 262, ¶33, 297 Wis. 2d 633, 726 N.W.2d 322. “In order to establish deficient performance, a defendant must show that ‘counsel made errors so serious that counsel was not functioning as the “counsel” guaranteed the defendant by the Sixth Amendment.’” *Id.* (quoting *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). The inquiry is whether counsel’s conduct falls below an objective standard of reasonableness. *Id.* The defendant must overcome a strong presumption that counsel acted reasonably within professional norms. *Id.* The test for prejudice is whether our confidence in the outcome is sufficiently undermined. *Id.*

¶7 Whether the defendant was denied the effective assistance of counsel presents a mixed question of fact and law. *Id.*, ¶34. The trial court’s determination of what counsel did or did not do, along with counsel’s basis for the challenged conduct, are factual matters which we will not disturb unless clearly

¹ On retrial, Ellefsen was represented by the same trial counsel and was acquitted of burglary and theft of a firearm.

erroneous. *State v. Maloney*, 2005 WI 74, ¶14, 281 Wis. 2d 595, 698 N.W.2d 583. The ultimate determination of whether the attorney's performance was constitutionally deficient is a question of law subject to our independent review. *Cooks*, 297 Wis. 2d 633, ¶34.

¶8 The trial court found that counsel's concession of guilt was based on a discussion counsel had with Ellefsen about trial strategy. That finding is not clearly erroneous. Trial counsel testified that he advised Ellefsen that because the evidence on the theft charges was much stronger than the burglary charge, in order to strengthen the credibility of Ellefsen's testimony that he did not enter Matzke's home it would be appropriate to concede guilt on the two theft charges. Counsel testified that Ellefsen verbally told counsel that he wanted to concede guilt on the two theft charges in order to pursue a stronger defense against the burglary charge. Although Ellefsen denied ever agreeing to letting counsel concede guilt because of his possession of the stolen guns, the trial court resolved the conflict in the testimony in favor of counsel's testimony. We are bound by the trial court's credibility determination. *State v. Peppertree Resort Villas, Inc.*, 2002 WI App 207, ¶19, 257 Wis. 2d 421, 651 N.W.2d 345; *State v. Long*, 190 Wis. 2d 386, 393, 526 N.W.2d 826 (Ct. App. 1994).

¶9 Counsel's strategic choices made after a thorough investigation of the law and facts relevant to plausible options are virtually unchallengeable on appeal. See *Strickland*, 466 U.S. at 690-91. A court considering the performance prong of the test must assess the reasonableness of trial counsel's performance under the facts of the particular case, viewed as of the time of the counsel's conduct. See *State v. Marcum*, 166 Wis. 2d 908, 917, 480 N.W.2d 545 (Ct. App. 1992). We are not to second-guess trial counsel's selection of trial tactics or the exercise of professional judgment after weighing the alternatives. See *State v.*

Felton, 110 Wis. 2d 485, 502, 329 N.W.2d 161 (1983). We examine counsel's conduct to be sure it is more than just acting upon a whim; there must be deliberateness, caution, and circumspection. *See id.* A strategic or tactical decision must be based upon rationality founded on the facts and law. *Id.*

¶10 Here the trial strategy was designed to bolster Ellefsen's credibility so the jury would believe his testimony that he did not enter Matzke's home. Ellefsen sought to avoid a conviction on the burglary charge which carried a higher maximum sentence. Such strategy is reasonable. *See State v. Gordon*, 2003 WI 69, ¶26, 262 Wis. 2d 380, 663 N.W.2d 765 (counsel's concession of guilt on one count in closing argument "was a reasonable tactical approach under the circumstances, plainly calculated to maintain credibility with the jury and enhance the prospects of acquittal on the two more serious charges").

¶11 We recognize that counsel's concession of guilt did not exactly match the elements of the offense on which the jury was instructed. Counsel's concession was based on Ellefsen's testimony that he possessed and retained the stolen guns. A person is guilty of theft by concealing or retaining possession of the property of another without the person's consent. *See WIS JI—CRIMINAL 1441*. However, the jury was instructed that to find Ellefsen guilty of firearm theft it must find that Ellefsen "intentionally took and carried away moveable property of another," an alternative way of committing the crime. Ellefsen's testimony did not admit to taking and carrying away the guns.

¶12 Trial counsel discussed conceding guilt on the theft charges with Ellefsen before trial and before the jury instructions were finalized. Ellefsen argues that trial counsel performed deficiently because he did not revise trial

strategy when it turned out that the jury would be instructed only on the “take and carry away” means of committing the crime of theft.²

¶13 Trial counsel explained why he stuck with his original strategy in light of how the trial progressed:

And then during the course of trial we listened to the testimony, made arguments, and it was my fear that it was—that as the testimony played out, that a jury, even though in my opinion the evidence was very clear that Mr. Ellefsen did not take and carry away the guns from the Matzke household, that they might go their own way, and based in part on the fact that Ellefsen had the guns in his possession, which was undisputed, and the fact that, to be honest, going up against Attorney Donohoo, um, I knew from my experience that she was especially effective in trial and very persuasive, and it was my fear that the judge—that the jury panel might go along with her, and despite the fact that no taking and carrying away occurred from the Matzkes.

¶14 Trial counsel’s explanation reflects that he was aware that Ellefsen had not testified to the take and carry away commission of the theft crime. It was reasonable to continue with the concession on the theft charges to reinforce Ellefsen’s testimony that he just took possession of the guns at his home and was not involved with entry to Matzke’s home. As counsel anticipated, the jury was very likely to find Ellefsen guilty of something. It was reasonable to employ all available tactics to bolster Ellefsen’s credibility since his cross-examination was damaging by the discussion of his nine prior convictions and prior inconsistent statements in court and to a police officer. Further, trial counsel’s strategy was successful. Despite the concession of guilt, Ellefsen was convicted of only one

² Trial counsel acknowledged that he did not further discuss the concession of guilt trial strategy with Ellefsen after the trial started.

count of theft and the jury was unable to reach a verdict on the other charges. Trial counsel's performance was not deficient and did not deny Ellefsen his right to the effective assistance of counsel.

By the Court.—Judgment and order affirmed.

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

