COURT OF APPEALS
DECISION
DATED AND FILED

July 31, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP1927-CR **Cir. Ct. No. 2010CF174**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

THOMAS SCOTT FOUNTAIN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Marinette County: JAMES A. MORRISON, Judge. *Affirmed*.

Before Hoover, P.J., Mangerson and Stark, JJ.

¶1 PER CURIAM. Thomas Fountain appeals a judgment of conviction for possession of more than forty grams of cocaine with intent to deliver.[1] Fountain argues his trial counsel was ineffective for failing to present an expert witness and for not requesting a lesser-included-offense instruction. We reject Fountain's arguments and affirm.

BACKGROUND

¶2 Fountain is legally blind and cannot drive a car. He was arrested after police officers searched a bus bound for upper Michigan on which he was a passenger, and a drug dog alerted to Fountain's backpack. There, the officers found a "corner cut" baggie containing a white substance that officers suspected was cocaine. Officers also found a baggie full of cocaine and a mirror with white powder on it in a jacket Fountain had moved under a pillow.

¶3 Officers took Fountain into custody and examined the backpack. They found four $20 bills and one $50 bill, two razor blades, a bottle with different types of pills, three balloons, a digital scale, a spoon, and two plastic baggies. Officers also found a bus ticket to Milwaukee and an Amtrak ticket to a suburb of Chicago.

¶4 The pills were later identified as Alprazolam and Hydrocodone. A baggie containing .411 grams of powder was determined to contain MDMA, also known as Ecstasy. Another baggie contained 50.103 grams of cocaine. Additionally, a substance wrapped in foil contained MDMA and psilocybin. The

[1] Fountain was also convicted of possession of amphetamine, three counts of possession of a controlled substance (alprazolam, hydrocodone, and MDMA), and possession of drug paraphernalia. However, he does not raise any challenges to those convictions.

scale found in Fountain's backpack was found to have residue of THC, MDMA, and cocaine.

¶5 At the preliminary hearing, a detective with a local drug task force testified that in his opinion the cocaine was possessed for resale based on the amount of cocaine. The detective explained, "That's just shy of two ounces of cocaine, that's a lot of cocaine." The case proceeded to a jury trial, where the principal issue was whether Fountain's possession of the cocaine was with the intent to distribute. Investigator Jon Lacombe, who did not work on Fountain's case, testified as an expert witness for the State.

¶6 Lacombe testified he had been a police officer for fourteen years, and he had arrested people for both possession of cocaine and possession of cocaine with intent to deliver. Based on people he spoke with or interviewed, Lacombe opined that if someone is going to have drugs for personal use it is going to be a "[h]alf gram, gram, eight ball, which is 3.5 grams, smaller quantities." After listing the items Fountain possessed, the State asked Lacombe, "[B]ased on your training and experience in dealing with controlled substances, do you have an opinion as to whether this 50 plus grams of cocaine was for personal use or was intended to be delivered[?]" Lacombe answered, "I believe for delivery."

¶7 Fountain did not testify, and the defense called no witnesses.

¶8 Before trial, defense counsel filed a request for a lesser-included-offense (LIO) instruction of simple possession of cocaine. During the trial, the court gave the parties a packet of jury instructions that included the LIO. At the instruction conference, the court stated it intended to give the LIO. Later that day, before the lunch break, the court asked defense counsel whether it should give the LIO, and counsel responded that he needed talk to his client about the instruction.

There was no on-the-record mention of the LIO after the break, although the court subsequently explained that it recalled lead defense counsel stating the defense did not want the LIO. The court did not instruct the jury on the LIO, and the jury found Fountain guilty.

¶9 Fountain moved for postconviction relief, asserting ineffective assistance of counsel on three grounds. He argued counsel should have objected to portions of Lacombe's expert testimony, obtained a defense expert to counter Lacombe's opinion, and requested the LIO instruction as Fountain had desired.[2]

¶10 At the ***Machner***[3] hearing, Fountain presented drug and alcohol therapist David Schreiter as an expert witness. Schreiter had thirty-four years' experience, had testified as an expert approximately fifty times, and was a former cocaine abuser. He explained that the most cocaine he used in a day was three to four grams, but only because he ran out. Further, he explained it was typical for a user to have a mirror and razor blades for consuming cocaine, and a scale so as "not to get ripped off." Schreiter reviewed the police reports and defense case file and personally interviewed and assessed Fountain.

¶11 Schreiter opined that the amount of cocaine Fountain possessed was for his personal use and was consistent with Fountain's use and his addiction. Schreiter testified that it would take Fountain only two to three weeks to use an ounce of cocaine. During Schreiter's testimony, the court indicated it would allow

[2] On appeal, Fountain does not renew his argument that counsel was ineffective for not objecting to Lacombe's testimony.

[3] *See* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

counsel to finish his questions, but it had "already got the picture, that this would be a highly effective witness."

¶12 Fountain was represented at trial by attorney Roy Polich, and his associate, John Kivisaari. Fountain testified he asked Polich to find an expert witness to counter the State's expected expert witness testimony. Fountain offered to pay for the expert and had the ability to do so. Fountain also suggested talking to his drug counselor, who was willing to assist if necessary. Polich acknowledged he discussed the matter with Fountain and knew he was seeing a counselor.

¶13 Polich testified he investigated calling a substance abuse counselor as a witness and spoke to two or three, but he could only recall the name of one, whose name he could not spell. Polich could not recall if he asked this expert whether a given quantity of cocaine was consistent with Fountain's personal use. However, Polich recalled he "made a decision at some point that having such an expert was not helpful."

¶14 Polich also stated he discussed requesting a LIO instruction with Fountain in a conference room during the trial. Polich testified, "I don't know what [Fountain] initially told me, but in the end he told me that we weren't going to ask for the instruction." Polich stated it was his "understanding" that Fountain agreed to not ask for the LIO instruction.

¶15 Kivisaari testified he recalled the discussion about requesting a LIO instruction during the lunch break. He recalled that he, Polich, Fountain, and at least one or two friends or family members were present. Kivisaari advised Fountain "there would be significant risk in not requesting" an LIO instruction.

Further, Kivisaari described the decision to not request an LIO instruction as a "collaborative decision" between those present at the meeting.

¶16 Michelle Duder testified she was present at the LIO lunch meeting. She recalled Polich saying the State had no evidence of intent to distribute. Polich thought the defense was winning and would prevail if they removed the simple possession charge. Duder further testified that Fountain did not want the LIO instruction "removed." She stated Fountain "did not want anything to change. He wanted all of those to remain." Duder left the meeting with the impression that the LIO instruction was being requested because, "[We were] all in there, nobody agreed with Polich ...."

¶17 Fountain testified that the plan before trial was to try to get the LIO instruction. He explained that his attorneys were unsure if they were going to be able to get the instruction. Fountain testified that at the lunch meeting he told them he wanted the jury to have the option of finding him guilty of simple possession of cocaine. Fountain thought the LIO instruction was being requested and never told his attorneys he did not want the LIO instruction. He further testified that if he had heard in court that it was not being requested he would have "said something" at the time. The court denied Fountain's postconviction motion, and Fountain appeals.

DISCUSSION

¶18 Fountain argues his trial counsel rendered ineffective assistance. This requires him to establish that counsel's performance was deficient, and that the deficient performance was prejudicial. *See* ***State v. Roberson***, 2006 WI 80, ¶24, 292 Wis. 2d 280, 717 N.W.2d 111. The circuit court's findings of historical fact are not set aside unless clearly erroneous. ***Id.*** However, whether an

attorney's performance is constitutionally deficient and prejudicial presents a question of law we review de novo. ***Id.*** "Counsel's conduct is constitutionally deficient if it falls below an objective standard of reasonableness." ***State v. Thiel***, 2003 WI 111, ¶19, 264 Wis. 2d 571, 665 N.W.2d 305. Reviewing courts are to be "highly deferential" in evaluating the actions of counsel, and are to "avoid the distorting effects of hindsight." ***Id.*** (citation omitted). To prove prejudice, the defendant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id.***, ¶20 (citation omitted). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** (citation omitted).

Failure to present expert testimony

¶19 Fountain first argues his trial counsel was ineffective for failing to adequately consult an expert and, ultimately, failing to introduce expert opinion testimony that the amount of cocaine in Fountain's possession was consistent with personal use. Fountain contends such evidence was necessary to refute the contrary opinion offered by officer Lacombe.

¶20 Regarding counsel's assertion he had consulted experts, the circuit court observed:

> Candidly, it's hard to take Mr. Polich entirely at his word on whether he consulted experts at all…. It's one thing to make a considered judgment not to hire an expert, quite another to not even consult one or be able to persuasively demonstrate that experts were consulted and a reasoned determination was made that experts could not help.
>
> [I]t's clear to the court that the defense attorney, Mr. Polich, either did not consult the experts at all, or he did not take that consultation very seriously.

Nonetheless, the circuit court determined counsel's strategic decision to not call an expert was reasonable under the circumstances. We agree.

¶21 Polich explained he decided not to retain an expert witness because he "didn't believe in the [State's] expert, so it didn't make much sense for me to have an expert that would say the same unreliable information and be subject to the same cross-examination that the [State's] expert was." Polich further explained he wanted the jury to rely on common sense, rather than on an expert witness.

¶22 As the circuit court reasoned, calling an expert could have backfired on the defense because "calling an expert by implication would have accredited the [State's] expert witness and could well have suggested to the jury that intent was something that it could not determine from the facts and from common sense …." We concur with the court's conclusion this may have suggested to the jury that it should consider expert testimony, and contradicted the defense strategy that the State's expert's testimony was not worthy of consideration. The court explained, "Polich's whole strategy was to try to … savage [sic] the expert that the [State] had called …."

¶23 The circuit court also observed that the expert Fountain called at the ***Machner*** hearing, Schreiter, was forced to make concessions in his testimony at the hearing, and would have done the same at trial. For example, Schreiter conceded that a razor blade and mirror could be used for delivery, as well as personal cocaine use.

¶24 Additionally, Polich's strategy of cross-examining Lacombe was made more reasonable because, as the court found, Lacombe was a "fairly inexperienced expert[.]" Moreover, Lacombe conceded that a mirror, razor

blades, and a digital scale were consistent with personal use, just as Schreiter would have testified. Polich also successfully attacked Lacombe's opinion that the cocaine was not for personal use because Fountain possessed neither a straw nor a rolled-up dollar bill. Lacombe conceded that a cocaine user could use any denomination of bill, not just a one-dollar bill, to snort cocaine.

¶25 Thus, apart from their ultimate opinions as to whether Fountain's possession of fifty grams of cocaine was for personal use or distribution, there was little difference between the experts' opinions. Both witnesses conceded that the various drug paraphernalia Fountain possessed was not determinative. Additionally, Schreiter opined it would take Fountain thirty to forty-five days to consume the 50.1 grams of cocaine. That equates to 1.11 to 1.67 grams per day. These amounts are largely consistent with Lacombe's testimony that a personal user would typically possess 0.5 to 3.5 grams.

¶26 In closing argument, defense counsel asserted the State failed to prove intent to deliver. He emphasized there was no evidence that officers had attempted to make contact with anyone identified from Fountain's cell phone or laptop, or that officers had spoken to any other bus passengers, or to anyone in Marquette, Michigan or Milwaukee. Counsel stressed that Lacombe was not involved in the investigation, and that he had testified that the digital scale, razor blades, and mirror could be used for delivery or for personal use, and that balloons are seldom used in cocaine delivery. Fountain's attorney then argued the quantity of cocaine found in his possession did not necessarily mean that the drugs were for delivery. He suggested that Fountain, who was blind and a business owner, who would want to hide his drug use, and who has to take a bus or train to obtain drugs, would likely buy a larger quantity and use it over time.

¶27 We conclude defense counsel's strategy of attacking the State's expert and appealing to the jurors' common sense was reasonable under the circumstances. An expert would have added little to the defense, and could have undermined counsel's strategy. Fountain therefore fails to demonstrate deficient performance. Further, because counsel cross-examined the State's expert effectively and presented a reasonable closing argument consistent with the defense strategy, Fountain's defense suffered no prejudice.

LIO instruction

¶28 Fountain next argues attorney Polich was ineffective for failing to request an LIO instruction on simple possession, contrary to Fountain's desire and belief. We agree with the circuit court that the decision whether to request an LIO is a matter of defense strategy that ultimately belongs to counsel. We further agree the all-or-nothing strategy was reasonable under the circumstances. Consequently, counsel's performance was not deficient.

¶29 Much of the circuit court's decision merits recitation. The court explained:

> [M]uch of the ***Machner*** hearing centered on whether this decision about whether the [LIO] option … was to be offered to the jury had been fully discussed between the defendant and his counsel, and there was a lunch hour conference towards the end of the trial …. [A]nd there was a tremendous amount of testimony offered by a number of witnesses as to exactly what occurred in that conference and who understood what.
>
> First of all, based upon listening to all of those witnesses, I do not know what happened at that conference …. It is clear to me that, if I take all the witnesses at their word and believe everything they say, there was a good deal of miscommunication and disconnect going on at that conference. Mr. Fountain is quite clear that he was adamant that he wanted the [LIO] presented to the jury.

> Mr. Polich was not nearly so clear … that that had been discussed and rejected by all parties. Mr. Polich was, frankly, very frustrating to me in his recitation about what exactly was said.
>
> There never was a let's close the sale kind of … conversation … where everybody said, yes, we want the lesser option; no, we don't, and Mr. Fountain says, and I believe him, that he walked out of the conference … believing that the [LIO] option was going to be available, and he was happy about it because he thought that offer had some alternatives. The difficulty with all of that is, and I don't mean to be flippant, all that testimony comes down to my question, so what? This is a … strategic decision, everybody agrees it is, that the counsel can make. This is not a fundamental right, and the law is clear that defense counsel can make that decision and doesn't need to … have specific approval to do it.
>
> Now, would it have been better if this court had placed Mr. Fountain's understanding on the record? Perhaps. But it's not absolutely clear to me that that would have been the best way to go either. … If the court were to say to … Fountain, are you sure that's a decision that you wanted to make, that could have been interfering with the attorney/client relationship, with their strategies, etc. ….
>
> And it is also clear that it is regrettable that we did not, for some reason, and this is entirely the fault of this … court … that we did not put that decision[,] that happened after lunch that was communicated to the court that there would not be the LIO option[,] on the record. Chalk it up to my inexperience as a judge of one month … that I didn't realize we were not on the record, but the fact of the matter is there was an agreement at the ***Machner*** hearing by all of the counsel, and the court placed on the record, that there was a clear statement by Mr. Polich that the LIO option was not being sought, so there—fortunately, that's not an issue. … Now, whether Mr. Fountain agreed or participated is a different issue, but that's the decision that Mr. Polich made.

¶30 The court observed it was clear that Polich was pursuing an all-or-nothing strategy and believed that the State had not proved intent to deliver. The court then concluded the strategy was reasonable, explaining:

> [It was a] rational decision that lawyers can make. Clearly, in retrospect, the wrong decision, but not, in my opinion, … deficient performance. It's a decision he was entitled to make. … [A]nd it's a decision that was, in my opinion, warranted based on the evidence. I thought the jury could go either way on that issue, frankly.

¶31 Both the State and the defendant have the right to request an LIO instruction, "so that the jury will not be subjected to the choice of either acquitting or convicting of the higher degree where it is really convinced of only the lower degree." ***Zenou v. State***, 4 Wis. 2d 655, 668, 91 N.W.2d 208 (1958). Defense counsel should therefore generally inform the client of the availability of any LIO instructions and explain their significance. *See* ***State v. Ambuehl***, 145 Wis. 2d 343, 355 & n.4, 425 N.W.2d 649 (Ct. App. 1988) (counsel has an "initial duty … to confer with the client regarding [an LIO] request") (citing *ABA Standards for Criminal Justice*, Standard 4-5.2, cmt. (2d ed. 1980))[4]; *but see* ***State v. Eckert***, 203 Wis. 2d 497, 509-11, 553 N.W.2d 539 (Ct. App. 1996) (counsel need not advise client of LIO if it is "inconsistent with, or harmful to, the general theory of defense[,]" and the defendant is aware of the defense theory)[5]; *see also* SCR 20:1.2(a) ("Scope of representation and allocation of authority between lawyer and

[4] The version of the ABA standard cited in both ***State v. Ambuehl***, 145 Wis. 2d 343, 425 N.W.2d 649 (Ct. App. 1988), and ***State v. Eckert***, 203 Wis. 2d 497, 508-09, 553 N.W.2d 539 (Ct. App. 1996), was revised in 1993. The earlier version stated it should be the defendant, not counsel, who decides whether to submit an LIO instruction. That language was removed in the revision. However, the revision retains the advisement, "It is … important in a jury trial for defense counsel to consult fully with the accused about any lesser included offenses the trial court may be willing to submit to the jury." ABA Standard for Criminal Justice 4-5.2, cmt. (3d ed. 1993).

[5] In ***Eckert***, the court reasoned it would be inconsistent to argue Eckert was not present at an armed robbery, but that if he was, he was not armed. ***Eckert***, 203 Wis. 2d at 508, 510.

client."); SCR 20:1.4(a)(2), (b) ("Communication.").[6] However, the right to request an LIO instruction is neither a constitutional nor a fundamental right. ***Eckert***, 203 Wis. 2d at 509 (citing ***State v. Nicholson***, 148 Wis. 2d 353, 366, 435 N.W.2d 298 (Ct. App. 1988)). Consequently, the ultimate decision whether to request an LIO instruction is a matter of trial strategy reserved to defense counsel. *See* ***State v. Kimbrough***, 2001 WI App 138, ¶¶31-32, 246 Wis. 2d 648, 630 N.W.2d 752.

¶32 The circuit court and the State are correct that, at bottom, the issue is whether Polich's decision to forgo the LIO instruction in favor of an all-or-nothing strategy was reasonable under the circumstances.[7] "The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." ***Strickland v. Washington***, 466 U.S. 668, 688 (1984); *see also* ***State v.***

[6] SCR 20:1.4(a)(2) provides: "A lawyer shall … reasonably consult with the client about the means by which the client's objectives are to be accomplished[.]" Subsection (b) provides: "A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."

[7] The parties disagree somewhat regarding the application of ***Ambuehl*** and ***Eckert***. Any dispute is irrelevant, as those cases involved the extent of counsel's duty to consult the defendant regarding LIO instructions under certain circumstances, while here there is no dispute that Polich *did* consult at length with Fountain at the end of trial. Nonetheless, we observe the State's position relies entirely on Judge Vergeront's dissent in ***State v. Miller***, 2009 WI App 111, 320 Wis. 2d 724, 772 N.W.2d 188 (released 7/2/09). That dissent is, of course, nonbinding. Although we agree with one of the dissent's conclusions in the body of our decision, the dissent is particularly uninstructive under the unusual circumstances of that decision. We released and then withdrew the decision in ***Miller*** twice. In the first decision, the entire panel agreed trial counsel was ineffective under the circumstances for failing to advise the defendant of the option to request an LIO instruction. *See* David Ziemer, *Attorney must advise of lesser offense*, WIS. LAW JOURNAL (Apr. 30, 2009). In the second version, the LIO holding was the same, but Judge Dykman withdrew from that portion of the decision because the court had reversed on other grounds. *See* David Ziemer, *Client must be told of lesser offense*, WIS. LAW JOURNAL (June 1, 2009). In the third version, the majority no longer addressed whether counsel had any obligation to inform the defendant of LIOs, *see* ***Miller***, 320 Wis. 2d 724, ¶¶45 n.16, 46, but Judge Vergeront then wrote a dissent concluding counsel was not deficient for failing to so advise. Given there is no majority opinion addressing the matter, the one-judge dissent is less persuasive.

Miller, 2009 WI App 111, ¶92 n.4, 320 Wis. 2d 724, 772 N.W.2d 188 (Vergeront, J., dissenting) (defendant's wishes regarding LIO instruction "may be a factor in assessing the reasonableness of the attorney's decision not to request one"). In ***Strickland***, the Supreme Court explained:

> From counsel's function as assistant to the defendant derive the overarching duty to advocate the defendant's cause and the more particular duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution.
>
> ….
>
> These basic duties neither exhaustively define the obligations of counsel nor form a checklist for judicial evaluation of attorney performance. *In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances.* Prevailing norms of practice as reflected in American Bar Association standards and the like, e.g., ABA Standards for Criminal Justice 4–1.1 to 4–8.6 (2d ed. 1980) ("The Defense Function"), are guides to determining what is reasonable, but they are only guides. No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions.

Id. at 688-89 (emphasis added). The court continued, "Thus, a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." ***Id.*** at 690.

¶33 We return now to the facts of the present case. At the close of trial, Polich and Fountain discussed whether to present the LIO instruction on simple possession of cocaine. Fountain was "adamant" that he wanted the LIO

instruction submitted. Following that meeting, Fountain understood that the jury would receive the instruction, and was "happy" about that prospect. However, Polich subsequently informed the court that the defense did not want the LIO instruction. That direction was off the record. Thus, it is unclear whether Fountain was present at that time, or if so, whether he heard what Polich told the court. However, Fountain later maintained he did not know the jury was not being instructed on the LIO. These circumstances are unfortunate; clearly, Polich failed to adequately communicate with his client.[8] That does not, however, resolve the question whether he provided ineffective assistance.

¶34 Instead, the question turns on whether Polich's all-or-nothing defense strategy was reasonable, despite his client's objection to, and unawareness of, that strategy. This question is informed in large part by the presumption that

[8] To avoid the very circumstance presented here, the Wisconsin criminal jury instruction committee advises:

> The Committee recommends that the possible problems regarding the submission of [LIOs] be anticipated and dealt with at the instruction conference. The defendant must be present; the conference must be recorded and should raise all appropriate considerations. It is good practice to ask the state and the defendant if instructions on [LIOs] are requested. If requests are not made for offenses that the trial judge believes may be raised by the evidence, specific inquiry should be made regarding the defendant's strategic decision not to request submission of that offense. The Committee recommends that the defendant be addressed personally in this regard even though the Wisconsin Supreme Court has held that a defendant is bound by counsel's decision not to request an instruction. Given the potential importance of the decision and the close relationship of the judge's sua sponte instruction authority to the need to protect defendants from ineffective counsel, it may be significant to have the record indicate that the defendant fully participated in the decision.

WIS JI—CRIMINAL SM-6 III.D. (Apr. 2014).

counsel's strategic decisions were proper: "[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. … [S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable[.]" ***Strickland***, 466 U.S. at 690.

¶35 Polich was well aware of the option to present the jury a LIO instruction on simple possession, and he consulted his client on the matter. Polich believed he was winning and that by withholding the LIO he would obtain an outright acquittal on the cocaine charge. That was a reasonable impression of the case. The evidence of intent to distribute was not strong. Indeed, the circuit court observed it was a close call and it would not have been surprised if the jury acquitted. Polich's alternative was to offer a compromise verdict to the jury, but because the possession charge was modified with a repeater enhancer, that compromise was not without significant downside to his client.[9] Under these circumstances, it was an entirely reasonable strategy to seek the best possible outcome for Fountain: an outright acquittal on the cocaine charge. "Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." ***Id.*** at 693. Because counsel's all-or-nothing trial strategy was reasonable under the circumstances, he did not perform deficiently. Fountain's ineffective assistance claim therefore fails. *See* ***id.*** at 697

[9] Fountain explains that the maximum penalty on the compromise verdict would have been seven and one-half years' imprisonment.

(court need not discuss both prongs of ineffective assistance "if the defendant makes an insufficient showing on one").[10]

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2011-12).

[10] Fountain alternatively argues the cumulative prejudice of trial counsel's errors demonstrates either ineffective assistance or that real controversy was not tried. Because trial counsel did not perform deficiently in the first instance, these arguments necessarily fail.