

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

October 8, 1998

Marilyn L. Graves  
Clerk, Court of Appeals  
of Wisconsin

**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 § 808.10 and RULE 809.62, STATS.

**No. 98-0207-CR**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**v.**

**DARNELL HINES,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Dane County: MICHAEL N. NOWAKOWSKI, Judge. *Affirmed.*

Before Vergeront, Roggensack and Deininger, JJ.

PER CURIAM. Darnell Hines appeals from a judgment of conviction and an order denying his postconviction motion for relief. The issue on appeal is whether Hines was denied effective assistance of counsel. Because we conclude that the performance of Hines's counsel at trial was not constitutionally deficient, we affirm.

Hines was convicted after trial of first-degree intentional homicide while armed. Hines moved for postconviction relief alleging that he was denied his constitutionally protected right to effective assistance of counsel. After a *Machner* hearing, the trial court denied the motion. Hines appeals.

To establish an ineffective assistance of counsel claim, a defendant must show both that counsel's performance was deficient and that he was prejudiced by the deficient performance. See *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 were not deficient, the claim fails and this court need not examine the prejudice prong. See *State v. Moats*, 156 Wis.2d 74, 101, 457 N.W.2d 299, 311 (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. "To demonstrate deficient performance, a defendant bears the burden to overcome a strong presumption that counsel acted reasonably and within professional norms." *State v. Delgado*, 194 Wis.2d 737, 750, 535 N.W.2d 450, 455 (Ct. App. 1995) (citation omitted). We assess the quality of counsel's performance by the standard of whether such performance was reasonable under the circumstances. *State v. Brewer*, 195 Wis.2d 295, 300, 536 N.W.2d 406, 409 (Ct. App. 1995).

We review the denial of an ineffective assistance claim as a mixed question of fact and law. See *Strickland*, 466 U.S. at 698. We will not reverse the

trial court's factual findings unless they are clearly erroneous. However, we review the two-pronged determination of defense counsel's performance independently as a question of law. *See State v. Johnson*, 153 Wis.2d 121, 128, 449 N.W.2d 845, 848 (1990).

The basis of Hines's ineffective assistance of counsel claim concerns the defense counsel's cross-examination of one witness, Latoya Smith. Hines claims that the defense counsel was deficient in his cross-examination of this witness for failing to impeach her because she had picked different photos from two different photo arrays, and for failing to probe her statement that Hines had returned to the crime scene.<sup>1</sup>

The circuit court found that defense counsel's goal in cross-examining Smith was to show that she was not believable because she had told different versions of the events at different times. Further, the court found that defense counsel had questioned Smith about some of the inconsistencies in her stories, but not about all. The circuit court found that the answers Smith gave in response to defense counsel's questions allowed counsel to argue in his closing that she was not a person who could be believed.<sup>2</sup> The court also found that defense counsel's cross-examination "seriously undermined her explanation for not being initially truthful with the police."

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<sup>1</sup> At the first photo array, Smith identified Hines as a person who had crossed under the yellow tape to ask the police about the victim's car. At the second photo array, Hines identified a different person as the one who went under the tape. Smith also had identified Hines as someone who returned to the crime scene. In a later statement she identified him as the killer.

<sup>2</sup> For example, Smith had admitted that she had lied to the police and that she had been convicted of a crime. She also admitted that she did not identify Hines as the shooter when she was questioned on the night of the crime.

We agree with the circuit court that cross-examination is an art not a science. The questions defense counsel asked Smith on cross-examination were perfectly consistent with his theory of defense. With hindsight, it may have further undermined Smith's credibility to have asked the specific questions Hines now suggests should have been asked. It is also possible, however, that to have asked Smith these questions may have only given her another opportunity to emphasize that Hines was the killer. Therefore, under the circumstances existing at the time of trial, it was reasonable for defense counsel to have asked only the questions he did.

We cannot conclude that failure to ask the questions Hines contends should have been asked was constitutionally deficient performance. Since we conclude that counsel's performance was reasonable and not deficient, we need not consider whether Hines was prejudiced by counsel's performance.

*By the Court.*—Judgment and order affirmed.

This opinion will not be published in the official reports. *See* RULE 809.23(1)(b)5., STATS.

