COURT OF APPEALS
DECISION
DATED AND FILED

November 14, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP2561-CR **Cir. Ct. No. 2004CM1381**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

AARON M. BLACKHAWK,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Brown County: SUE E. BISCHEL, Judge. *Affirmed.*

¶1 HOOVER, P.J.[1] Aaron Blackhawk appeals a judgment of conviction for misdemeanor theft, entered after a jury trial, and an order denying

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

his postconviction motion. Blackhawk argues trial counsel was ineffective for not impeaching a witness and for failing to object to inadmissible hearsay. Blackhawk also argues there was insufficient evidence to convict him. Because trial counsel was not ineffective and the jury had sufficient evidence to convict Blackhawk, the judgment and order are affirmed.

BACKGROUND

¶2 Blackhawk worked in the automotive department at Sears. Sears discovered four tires and rims were missing from that department. After a jury trial on October 27, 2004, Blackhawk was convicted of one count of misdemeanor theft for stealing the tires and rims.

¶3 At trial, Brett Seifert, the loss prevention manager, testified he investigated the missing tires and rims. Seifert took pictures of the tires and rims on Blackhawk's car because they looked like those missing from inventory. Customer invoices for the tires and rims showed that Blackhawk was involved in both transactions. The invoices listed the customer as Randy George. However, the charges were voided by a "charge back" request to the credit card company.

¶4 Seifert testified he called the phone number on the invoice and the individual who answered, Wagner,[2] had no knowledge about the missing tires or rims. However, at the ***Machner***[3] portion of the postconviction motion hearing, defense attorney Carrie La Plant stated Seifert admitted in his written report that the phone number he actually dialed included a wrong area code. La Plant stated

[2] Wagner's first name is not mentioned in the record.

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

she intentionally did not impeach Seifert on the fact that he never called the correct phone number listed on the invoice. Her trial strategy was to attempt to show that the store would have had video footage of Blackhawk exiting the store with the merchandise if he had stolen it. She called into question Seifert's poor investigation, showing he barely questioned Wagner, never questioned George, and focused exclusively on Blackhawk. At trial, La Plant argued Blackhawk purchased the tires and rims from a customer. She also did not object to the introduction of the invoice which included the customer's name and phone number and Seifert's notes stating Wagner denied purchasing the rims and tires.

¶5 La Plant did not object to Seifert's testimony regarding statements Wagner made during their telephone conversation. At the postconviction motion hearing, La Plant admitted the statements were hearsay, but stated she wanted the information admitted. In her closing argument at trial, La Plant referred to the phone conversation between Seifert and Wagner and painted Wagner's responses as suspicious.

¶6 At trial, Seifert testified that after the tires and rims were purchased, Sears received a "charge back" from the credit card company. Seifert asserted a "charge back" meant the customer told the credit card company they never purchased the items. The State did not produce documentation relating to the "charge back." At the postconviction motion hearing La Plant stated she intentionally decided not to object to the evidence on hearsay or foundation grounds. La Plant stated that she did not think it was necessary or relevant to her strategy of showing Sears had not looked into other possible suspects.

¶7 The court denied Blackhawk's postconviction motion alleging ineffective assistance of counsel and insufficient evidence. Blackhawk now appeals that decision.

DISCUSSION

I. Ineffective Assistance of Counsel

¶8 This court's review of an ineffective assistance of counsel claim is a mixed question of fact and law. ***State v. Erickson***, 227 Wis. 2d 758, 768, 596 N.W.2d 749 (1999). The trial court's findings of fact will not be disturbed unless they are clearly erroneous. ***Id.*** "However, the ultimate determination of whether the attorney's performance falls below the constitutional minimum is a question of law which this court reviews independently …." ***Id.***

¶9 In order to succeed on his claim, Blackhawk must show both that counsel's representation was deficient and that the deficiency prejudiced him. *See* ***id.*** Proof of either the deficiency or the prejudice prong presents a question of law this court reviews without deference. ***State v. Pitsch***, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985). If we conclude Blackhawk has not proved one prong, we need not address the other. *See* ***Strickland v. Washington***, 466 U.S. 668, 697 (1984). To prove deficient performance, Blackhawk must show that counsel's specific acts or omissions were "outside the wide range of professionally competent assistance." ***Id.*** at 690. To show prejudice, Blackhawk must demonstrate a reasonable probability that, but for the error, the outcome of the proceeding would have been different. ***Id.*** at 694.

A. Failure to Impeach a Witness

¶10 Blackhawk argues trial counsel was ineffective for failing to impeach Seifert regarding a misdialed telephone number. At the postconviction motion hearing La Plant stated she intentionally did not impeach Seifert regarding his failure to call the correct phone number listed on the invoice. La Plant testified it was her strategy to show that Seifert focused exclusively on Blackhawk, without thoroughly investigating two other potential suspects. La Plant wanted evidence of Wagner, the incorrect phone number, and George, the customer listed on the invoice, admitted to show that neither person was properly investigated. The trial court determined La Plant had a reasonable trial strategy. The trial court had the opportunity to see and hear La Plant's presentation and evaluate its purpose. *See* ***State v. Maloney***, 2004 WI App 141, ¶21, 275 Wis. 2d 557, 685 N.W.2d 620. A trial court's determination that counsel had a reasonable trial strategy is "virtually unassailable in an ineffective assistance of counsel analysis." ***Id.***, ¶23. Attempting to show somebody else was responsible for the crime is a common and reasonable strategy. "Trial counsel is not ineffective simply because an otherwise reasonable trial strategy was unsuccessful." ***Id.*** La Plant's failure to impeach Seifert was not a result of deficient performance.

B. Inadmissible Hearsay

¶11 Blackhawk also argues trial counsel was ineffective for failure to object to inadmissible hearsay. Blackhawk objects to: (1) La Plant allowing Seifert to testify to statements Wagner made during their telephone conversation; (2) written notes on the customer invoice stating customer did not order the rims or tires; and (3) evidence of the "charge back" on the credit card.

¶12 Regarding Wagner's statements and the notes on the invoice, La Plant testified that she "wanted it in because I wanted to show that there were at least two other individuals … who were somehow connected to the case." The trial judge held admitting the hearsay statements was part of La Plant's trial strategy. As stated above, attempting to show somebody else was possibly responsible for the crime is a common and reasonable strategy. La Plant's failure to object to Seifert's statements regarding Wagner and the notes on the invoice was not a result of deficient performance.

¶13 Blackhawk further asserts La Plant was ineffective for failing to object to evidence relating to the "charge back." At trial Seifert stated Sears did not get paid for the tires. When the State questioned how Seifert knew Sears did not get paid, Seifert stated Sears received a "charge back" from the credit card company. Seifert stated a "charge back" meant the credit card holder "never bought tires or rims and disputes the charges." La Plant stated she intentionally decided not to object to the evidence on hearsay or foundation grounds.[4] La Plant stated she did not think it was necessary or relevant to her strategy. Challenging the "charge back" would not have aided La Plant in her trial strategy to show Sears had not properly investigated other suspects, and Blackhawk legitimately purchased the tires from a Sears customer. La Plant's failure to challenge the "charge back" testimony was not a result of deficient performance, but rather a reasonable part of her trial strategy.

[4] While the State does not address Blackhawk's argument relating to the "charge back," this argument lacks merit to a degree that we do not deem the State's failure as a concession.

II. Insufficient Evidence

¶14 Blackhawk also argues the evidence was insufficient to prove he was guilty of misdemeanor theft. When reviewing the sufficiency of evidence, this court may not substitute its judgment for that of the trier of fact unless no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. *See* ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). The relative credibility of witnesses is a jury question and the appellate court must "view the evidence in the light most favorable to the finding." ***Id.*** at 504 (citation omitted).

¶15 The elements of misdemeanor theft are that defendant: (1) intentionally take and carry away; (2) movable property of another; (3) without consent; and (4) with intent to permanently deprive the owner the possession of the property. WIS. STAT. § 943.20.

¶16 The jury heard Seifert's testimony that Blackhawk's car had tires and rims resembling the missing merchandise, and Sears did not receive payment. The customer listed on the invoice did not testify. Blackhawk testified he did not steal the tires. He stated the customer who purchased the wheels and rims came back to the store and wanted to return the merchandise because the vehicle he purchased it for had been wrecked. Blackhawk testified he told the customer he would not get a full refund because the tires and rims had already been mounted and balanced. Blackhawk stated he offered to, and in fact did, buy the tires and rims from the customer because they fit his vehicle. The jury had an opportunity to weigh the credibility of Blackhawk's story against the rest of the evidence and chose not to believe Blackhawk. A reasonable jury could have found guilt beyond a reasonable doubt. *See* ***Poellinger***, 153 Wis. 2d at 501.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.