

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 12, 2013

Diane M. Fremgen
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. 2012AP1034-CR

Cir. Ct. No. 2010CF167

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

STEVEN E. MAXSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Walworth County: DAVID M. REDDY, Judge. *Affirmed.*

Before Lundsten, Sherman and Kloppenburg, JJ.

¶1 PER CURIAM. Steven Maxson appeals a judgment of conviction and an order denying his motion for postconviction relief. The issue is ineffective assistance of counsel. We affirm.

¶2 As relevant to this appeal, Maxson was found guilty by a jury of battery to a police officer. The charge was based on a facial injury the officer suffered while Maxson was resisting being handcuffed by officers. After trial, Maxson filed a postconviction motion claiming that his trial counsel was ineffective by not objecting to all testimony by the officer's widow. Her testimony related mainly to the nature, extent, and duration of the officer's injury. The circuit court held an evidentiary hearing at which trial counsel explained his reasons for not objecting. The circuit court denied the motion on the ground that it was a reasonable strategy for counsel to choose not to object.

¶3 To establish ineffective assistance of counsel a defendant must show that counsel's performance was deficient and that such performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). We affirm the trial court's findings of fact unless they are clearly erroneous, but the determination of deficient performance and prejudice are questions of law that we review without deference to the trial court. *State v. Pitsch*, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985).

¶4 Maxson argues that trial counsel should have made a pretrial objection to the appearance by the officer's widow because her testimony would be irrelevant. We disagree. Bodily harm to the officer is one of the elements of the battery charge. *See* WIS. STAT. § 940.20(2) (2011-12).¹ In addition, the severity of the injury was potentially relevant to the question of Maxson's intent, if the jury found that Maxson caused the injury. The more forcible the contact with

¹ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

the officer, the more it might be inferred that the injury was the result of an act done with the mental purpose to cause bodily harm, rather than being the result of a minor or incidental contact that might have occurred without the mental purpose to cause bodily harm. Because this testimony was relevant, trial counsel was not deficient by not making a pretrial objection to the witness's appearance.

¶5 Maxson also argues that, once the full nature of the testimony by the officer's widow became clear at trial, counsel should have objected under WIS. STAT. § 904.03. Maxson argues that objection would have been proper on grounds of unfair prejudice and confusion of the issues, waste of time, and as cumulative evidence.

¶6 We focus on the question of deficient performance. We agree with the circuit court's conclusion that it was a reasonable strategy for counsel to avoid objecting to her testimony. Trial counsel testified that, in its substance, her testimony was not damaging to Maxson's defense. Because there was no witness who could testify as to precisely how the officer's injury occurred, the main issue for the trial was whether Maxson caused the injury. The officer's widow did not testify as to that point.

¶7 Counsel also testified that there were potential perils to objecting. He did not want to "cause a scene" by objecting, and did not want to cause the witness to become emotional. He testified that an objection might cause the jury to increase its focus on her testimony, and could leave the jury with the impression that her testimony was more damaging to Maxson's case than it really was. Therefore, given the lack of substantive testimony the witness gave on the disputed issue at trial, we conclude that even if trial counsel could have expected

that objections might have resulted in some limiting of the witness's testimony, it was a reasonable strategic decision to withhold objections.

¶8 Maxson also argues that we should reverse under WIS. STAT. § 752.35 because the real controversy was not fully tried. He argues that it was not fully tried because the testimony of the officer's widow distracted the jury. Her testimony was only nine transcript pages of the trial. We are satisfied that the jury was sufficiently able to focus on the disputed issues of the trial, namely, whether Maxson caused the officer's injuries and whether he did so intentionally.

By the Court.—Judgment and order affirmed.

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

