

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 5, 2009

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. 2007AP1954-CR

Cir. Ct. No. 2003CF3178

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JUAN ANGEL ORENGO,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DENNIS P. MORONEY and MARTIN J. DONALD, Judges. *Affirmed.*

Before Higginbotham, P.J., Lundsten and Bridge, JJ.

¶1 PER CURIAM. Juan Orengo appeals a judgment of conviction and an order denying postconviction relief. We affirm.

¶2 Orengo was found guilty by a jury and convicted on two counts of possession of controlled substances with intent to deliver. He first argues that his trial counsel was ineffective.

¶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 need not address both components of the analysis if defendant makes an inadequate showing on one. *Id.* at 697. We affirm the circuit 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 circuit court. *State v. Pitsch*, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985).

¶4 We first note that Orengo argues we should accept the court's finding that his attorney did not have a strategic reason. However, that finding is not relevant. The test for deficient performance is an objective one that asks whether trial counsel's performance was objectively reasonable under prevailing professional norms. *State v. Kimbrough*, 2001 WI App 138, ¶31, 246 Wis. 2d 648, 630 N.W.2d 752. Therefore, even if trial counsel lacked a strategic reason at the time, a claim of deficient performance fails if counsel's action was one that an attorney could reasonably have taken after considering the question. Trial counsel's own subjective explanation of his reasons for acting or not acting at the time is simply not relevant.

¶5 Turning to the substance of the argument, Orengo argues that his attorney was ineffective by not impeaching a witness for the State with a prior conviction for disorderly conduct. He argues that trial counsel attempted to attack this witness's credibility by showing that she was extensively involved in criminal

activity herself, and that bringing out the disorderly conduct conviction would have furthered that aim. The State responds that bringing out this conviction might have instead undercut counsel's strategy, because the fact of only one minor conviction could have led the jury to doubt whether the witness was indeed involved in other, more serious, crime. Orengo rejects that argument as illogical, because learning of the one minor conviction was "just as likely" to have caused the jury to speculate that the witness had engaged in crimes for which she was not convicted.

¶6 We conclude that a reasonable attorney could have decided not to impeach the witness with the disorderly conduct conviction. Orengo's use of the phrase "just as likely" is telling. With that phrase, even Orengo appears to concede that the ultimate effect of this information on the jury could not reliably be predicted, and that both effects were reasonable possibilities. Accordingly, we conclude that trial counsel could reasonably have decided that adding this one additional piece of information was not worth the risk of undermining the overall strategy.

¶7 Orengo next argues that we should grant a new trial in the interest of justice under WIS. STAT. § 752.35 (2007-08)¹ because the real controversy was not fully tried. He argues two reasons why it was not fully tried. The first is that the jury was not told of the above witness's prior conviction for disorderly conduct. We have already concluded that it was reasonable, from Orengo's perspective, for the jury not to learn this information. The second is that the jury "improperly"

¹ All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

learned that Orengo was a felon and that a gun was found in the room with the controlled substances. The jury learned this, he argues, because the court allowed the State to add a charge of felon in possession of a firearm shortly before trial, which the court later dismissed for insufficient evidence before submitting the case to the jury.

¶8 While Orengo spends considerable effort explaining why the State's evidence on the felon in possession charge was weak, and arguing that therefore the State never should have added the charge, we note that he does not actually make an argument that it was legal error for the charge to be added. In the absence of such an argument, we conclude that the jury's awareness of this information did not cause the real controversy not to be tried.

By the Court.—Judgment and order affirmed.

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

