COURT OF APPEALS
DECISION
DATED AND FILED

August 24, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP1589-CR **Cir. Ct. No. 2014CF232**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANDREW T. WHITCOMB,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Winnebago County: JOHN A. JORGENSEN, Judge. *Affirmed*.

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

¶1 PER CURIAM. Andrew T. Whitcomb appeals from a judgment of conviction and an order denying his postconviction motion. He raises several arguments on appeal, all related to the circuit court's striking of his alibi testimony at trial. For the reasons that follow, we affirm.

¶2 In April 2014, the State filed a criminal complaint charging Whitcomb with one count of armed robbery and one count of felony bail jumping, both as a repeater. The charges stemmed from allegations that he had robbed a gas station in the City of Neenah while out on bond for a different felony offense. The matter proceeded to trial.

¶3 At trial, Whitcomb testified in his own defense. When asked by his attorney of his whereabouts at the time of the robbery, he replied, "I would have been at the address 214 and a half Pacific Street, Appleton, Wisconsin." Whitcomb explained that that was the address of a friend (Emily Hyde) and her boyfriend (Christopher Pearson) and that he had been staying there "for a little bit."

¶4 The State objected to this testimony on grounds that it constituted alibi evidence and Whitcomb had not provided the requisite notice under the notice-of-alibi statute, WIS. STAT. § 971.23(8) (2013-14).[1] Whitcomb's attorney responded that his client had a right to testify and deny he was "at the scene." The circuit court overruled the State's objection and allowed Whitcomb to proceed.

[1] WISCONSIN STAT. § 971.23(8) provides in relevant part:

> **(8)** NOTICE OF ALIBI. (a) If the defendant intends to rely upon an alibi as a defense, the defendant shall give notice to the district attorney at the arraignment or at least 30 days before trial stating particularly the place where the defendant claims to have been when the crime is alleged to have been committed together with the names and addresses of witnesses to the alibi, if known….
>
> (b) In default of such notice, no evidence of the alibi shall be received unless the court, for cause, orders otherwise.

All references to the Wisconsin Statutes are to the 2013-14 version.

¶5 Whitcomb continued his testimony by explaining that he had been working a job during the relevant time period with the hours of "6:00 at night until 6 in the morning." Thus, he was "fairly certain" that he "would have been sleeping" at the Appleton address when the robbery occurred (9:00 a.m.) because he did not normally get up at that time.

¶6 At the conclusion of Whitcomb's testimony, the State renewed its objection to the alibi evidence. After further argument by the parties and consideration of the issue, the circuit court sustained the State's objection. Accordingly, it struck Whitcomb's testimony regarding where he was at the time of the robbery and instructed the jury to disregard it.

¶7 The jury eventually returned guilty verdicts on both counts. The circuit court entered judgment and sentenced Whitcomb to fifteen years of initial confinement followed by eight years of extended supervision.

¶8 Whitcomb filed a postconviction motion alleging ineffective assistance of trial counsel. Following a hearing on the matter, the circuit court denied the motion. This appeal follows.

¶9 On appeal, Whitcomb first contends that the circuit court erred in applying the notice-of-alibi statute to his testimony. He suggests that his testimony was intended only to support a generalized denial that he committed the robbery rather than a true alibi defense. As such, the court should not have struck it based upon his failure to provide notice.

¶10 We review a circuit court's decision to exclude testimony under the erroneous exercise of discretion standard. ***State v. Brown***, 2003 WI App 34, ¶12, 260 Wis. 2d 125, 659 N.W.2d 110. However, we review its application of a

statute de novo. ***State v. Iverson***, 2015 WI 101, ¶19, 365 Wis. 2d 302, 871 N.W.2d 661.

¶11 A defendant who simply claims that he was not present at the scene of the crime when the crime occurred does not present an alibi defense within the meaning of the notice-of-alibi statute. *See* ***State v. Starr***, 60 Wis. 2d 763, 764, 211 N.W.2d 510 (1973). However, a defendant who claims that he was elsewhere, at a place other than the scene of the crime when the crime occurred, does present such a defense. *See* ***State v. Shaw***, 58 Wis. 2d 25, 30-31, 205 N.W.2d 132 (1973), *overruled on other grounds by* ***State v. Poellinger***, 153 Wis. 2d 493, 451 N.W.2d 752 (1990); *see also* ***State v. Harp***, 2005 WI App 250, ¶¶15, 22, 288 Wis. 2d 441, 707 N.W.2d 304.

¶12 Reviewing Whitcomb's testimony, we are satisfied that he presented an alibi defense within the meaning of the notice-of-alibi statute. As noted by the State, the obvious purpose of the testimony was to persuade the jury that Whitcomb was in Appleton when the robbery occurred, making it impossible for him to have committed the crime. Because Whitcomb presented an alibi defense, he was required to provide notice under the notice-of-alibi statute. Because he failed to do so, the circuit court properly struck his testimony.

¶13 Whitcomb next contends that the circuit court violated his constitutional right to testify on his own behalf when it struck his testimony based upon his failure to provide notice under the notice-of-alibi statute. In support of his claim, he relies upon ***Alicea v. Gagnon***, 675 F.2d 913 (7th Cir. 1982).

¶14 In ***Alicea***, the Seventh Circuit Court of Appeals held that the preclusion of a defendant's alibi testimony for failure to give notice under Wisconsin's notice-of-alibi statute violated the defendant's constitutional right to

testify on his own behalf. ***Id.*** at 924-25. The court balanced the defendant's right against the state's interests in preventing unfair surprise and facilitating the orderly administration of justice. ***Id.*** at 923-24. It ultimately concluded that the defendant's right outweighed the interests of the state in that case. ***Id.*** at 924-25.

¶15 Since ***Alicea*** was decided, our supreme court has acknowledged its holding and rejected it. In ***State v. Burroughs***, 117 Wis. 2d 293, 305-06, 344 N.W.2d 149 (1984), it explained:

> We disagree with that interpretation of Wisconsin's alibi statute. The statute does not deny the defendant the right to testify, but rather, only requires that if he is going to claim not to have been at the scene of the crime, then he must notify the state where he was. That is not a denial of a right to testify; it is only a reasonable requirement needed to achieve orderly trials and procedures….
>
> [N]either this court nor the United States Supreme Court has ever held that there cannot be reasonable limitations or conditions placed on this right. The defendant's right to testify is limited to being truthful and relevant and, if in the form of an alibi, subject to notice pursuant to [WIS. STAT. §] 971.23(8).

¶16 Given our supreme court's decision in ***Burroughs***, which we are obligated to follow, we cannot say that the circuit court violated Whitcomb's constitutional right to testify on his own behalf when it struck his testimony based upon his failure to provide notice under the notice-of-alibi statute. The notice-of-alibi statute is a reasonable limitation that can be placed on a defendant's constitutional right to testify, and Whitcomb plainly violated it in this case.

¶17 Finally, Whitcomb contends that his trial counsel was ineffective in several ways. Specifically, he faults counsel for (1) failing to give notice of the alibi defense, (2) failing to present two witnesses (Emily Hyde and Christopher

Pearson) to support the alibi defense, and (3) failing to move for a mistrial based upon the striking of his alibi testimony.

¶18 To prevail on a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that he or she suffered prejudice as a result. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). A reviewing court need not address both prongs of the analysis if the defendant makes an insufficient showing on either one. ***Id.*** at 697.

¶19 Our review of an ineffective assistance of counsel claim is a mixed question of fact and law. ***State v. Pitsch***, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985). We will not disturb the circuit court's findings of fact unless they are clearly erroneous, but the ultimate determination of whether counsel's performance fell below the constitutional minimum is a question of law we review de novo. ***Id.*** at 634.

¶20 With respect to Whitcomb's first complaint, the circuit court found that he was not prejudiced by trial counsel's failure to give notice of the alibi defense. The record supports that conclusion.

¶21 There are two reasons why Whitcomb's alibi testimony would not have made a difference to the outcome of his trial. First, it was extremely weak. Not only was the testimony self-serving and coming from a person of dubious credibility,[2] but it also lacked corroboration. As noted by the circuit court, "unless

[2] The circuit court found that Whitcomb did not come "off as very credible to the jury." This finding is supported by Whitcomb's admission that he had been convicted of a crime on ten prior occasions.

you have corroboration of some of this evidence, just saying that you're somewhere else, I didn't do it, I was somewhere else, really isn't saying much."

¶22 Second, the testimony would have been overshadowed by the strong evidence of Whitcomb's guilt. At trial, the State presented testimony from Whitcomb's accomplice, who admitted driving Whitcomb to the gas station. She described how he entered it briefly and came out holding money and a gun. The State also presented testimony from Whitcomb's friend, who saw Whitcomb the day after the robbery. She related the incriminating statements[3] he gave and turned over to police the clothes he left in her apartment. The clothes appeared to match those worn by the robber on the gas station's surveillance video. Moreover, Whitcomb's boots were consistent with the footprints left at the scene of the crime. In the face of this evidence, Whitcomb's uncorroborated assertion that he "would have been" in Appleton would not have held up.

¶23 Turning to Whitcomb's next complaint, the circuit court found that trial counsel was not deficient for failing to present two witnesses (Emily Hyde and Christopher Pearson) to support the alibi defense. Again, the record supports that conclusion.

¶24 At the hearing on Whitcomb's postconviction motion, trial counsel testified that he dispatched his investigator to interview Hyde and Pearson "to see if they could verify Mr. Whitcomb's whereabouts on the date in question." His investigator reported back that neither witness "could place Mr. Whitcomb at their

[3] According to Whitcomb's friend, upon arriving at her house, Whitcomb immediately borrowed her phone and did an Internet search for "[a]rmed robbery gas station in Neenah," which pulled up a local news video about the robbery. Whitcomb asked her whether the person on the surveillance footage looked like him, and she responded in the affirmative. Whitcomb then stated, "I can't believe I did it" and "I fucked up by doing it."

apartment at the time of the armed robbery." Thus, counsel determined that Hyde and Pearson "were not going to be helpful witnesses," and elected not to call them.

¶25 Trial counsel's testimony makes clear that the failure to present Hyde and Pearson as witnesses was the result of a strategic decision. Consequently, Whitcomb cannot base a claim of ineffective assistance of counsel upon it. *See* ***State v. Elm***, 201 Wis. 2d 452, 464-65, 549 N.W.2d 471 (Ct. App. 1996) ("A strategic trial decision rationally based on the facts and the law will not support a claim of ineffective assistance of counsel.").

¶26 Finally, with respect to Whitcomb's last complaint, the circuit court did not address whether trial counsel was ineffective for failing to move for a mistrial based upon the striking of the alibi testimony. However, we are satisfied that counsel was not.

¶27 As explained above, the circuit court properly excluded Whitcomb's testimony for his failure to comply with the notice-of-alibi statute. Therefore, a motion for mistrial would have been meritless. Failure to file a meritless motion is not deficient performance. ***State v. Wheat***, 2002 WI App 153, ¶14, 256 Wis. 2d 270, 647 N.W.2d 441.

¶28 For these reasons, we affirm the judgment and order.[4]

[4] To the extent we have not addressed any other argument raised by Whitcomb on appeal, the argument is deemed rejected. *See* ***State v. Waste Mgmt. of Wis., Inc.***, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978) ("An appellate court is not a performing bear, required to dance to each and every tune played on an appeal.").

By the Court.—Judgment and order affirmed.

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