COURT OF APPEALS
DECISION
DATED AND FILED

NOVEMBER 4, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-1265-CR

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

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

v.

SHELBIE SUE SCHULTZ,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for St. Croix County: SCOTT R. NEEDHAM, Judge. *Affirmed.*

CANE, P.J. The State of Wisconsin appeals an order granting a new trial following Shelbie Schultz's conviction for battery. The State contends that the trial court erred by finding Schultz's counsel ineffective and prejudicial. Because the trial court could reasonably conclude that Schultz was prejudiced by her counsel's deficiencies, the order for new trial is affirmed.

Schultz and her mother, Susan Seim, were tried together and convicted of the battery of Ronda Barker. Barker and her sister both testified that Seim and Schultz committed the battery around 3 p.m. Schultz's defense at trial was that she left work at 2:30 p.m., performed some errands and could not have been at the battery scene at 3 p.m. As evidence of her whereabouts, Schultz sought to introduce a time clock showing that she punched out from work at 2:15 p.m.; that she stayed at work fifteen minutes late; that she ran some errands after work, and that it would not have been possible for her to leave work when she did, run the errands, arrive home in time to meet with Seim, and then drive to Barker's house by 3 p.m.; and finally testimony from Troy Davis to corroborate her story that she stayed at work until 2:30 p.m. The trial court permitted all this evidence except for Davis's testimony, agreeing with the State that Schultz's counsel did not give proper notice of alibi under § 971.23(8), STATS.

After both Seim and Schultz were convicted, Schultz filed a motion for a new trial based on ineffective assistance of counsel and the interests of justice. The trial court granted the motion based on the claimed ineffective assistance of counsel, and the State appeals.

As a preliminary matter, Schultz and the State take different views on what exactly the court decided when it granted the motion for a new trial. Schultz argues that the trial court accepted both her arguments that ineffective counsel and the interests of justice required a new trial. For support, Schultz relies on the following language of the trial court during the motion hearing:

> I am in essence of the opinion that counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result based on the failure first to obtain the witness list; secondly, the failure to request a continuance; third, the

> failure to notify the State of the alibi; and *fourthly, in the interest of justice.* (Emphasis added.)

However, the sole basis for the trial court's decision was ineffective assistance of counsel. The language of the written order is clear: "Defendants' motion for new trial is granted on the basis of ineffectiveness of counsel;" no mention is made of "the interests of justice" in the order. The trial court specifically agreed with the State that the basis for its holding was ineffectiveness of counsel alone, as the following exchange demonstrates:

> MR. ERICKSON [appearing for the State]: … but I guess this Court isn't ruling that a new trial is to be ordered in the interest of justice or so forth, but, rather, because of errors of counsel.
>
> THE COURT: Exactly.

Therefore, the issue is whether the trial court erred in basing its decision for a new trial on ineffectiveness of counsel.

In ***State v. Harvey,*** 139 Wis.2d 353, 374-75, 407 N.W.2d 235, 244-45 (1987), our supreme court adopted the test for ineffective assistance of counsel articulated in ***Strickland v. Washington***, 466 U.S. 668 (1984). In order to prevail on an ineffective assistance of counsel claim, ***Strickland*** requires the defendant to show that counsel's performance was deficient and that this deficiency prejudiced the defendant. ***Id.*** at 687.

Since the ***Strickland*** test requires the defendant to make both showings, if the defendant fails to show prejudice, a court may omit the inquiry into whether counsel's performance was deficient. ***State v. Sanchez***, 201 Wis.2d 219, 236, 548 N.W.2d 69, 76 (1996). In order to show prejudice, the defendant must show that "counsel's errors were so serious as to deprive the defendant of a

fair trial, a trial whose result is reliable." ***Strickland***, 466 U.S. at 687. Where the underlying facts are not in dispute, determining whether counsel's performance was deficient or whether the defense was prejudiced are questions of law which this court decides de novo. ***Sanchez,*** 201 Wis.2d at 236-37, 548 N.W.2d at 76.

Here, Schultz's trial counsel admitted that he had been ineffective counsel in three ways: he did not demand a list of witnesses from the district attorney; he failed to ask for a continuance on learning of a new prosecution witness the morning of trial; and he failed to give notice of an alibi.

Schultz's first claim that the failure to demand a witness list prejudiced her defense is unpersuasive. Pursuant to its "open records" policy, the district attorney provided the names of all the witnesses to be used against her at trial. No claim is made that the State actually withheld the names of witnesses. However, even assuming that it is deficient behavior to fail to demand a witness list when counsel actually possesses the information such a demand would disclose, Schultz has failed to meet her burden of showing how her defense was prejudiced.

The second deficiency concerns defense counsel's failure to ask for a continuance after the prosecution introduced a witness on the morning of the trial. Betsy Laiden, Seim's former friend, approached the police the night before trial and informed them that Seim told her that she and Schultz had beaten Barker. When confronted with this new witness, defense counsel moved to strike the testimony, but the motion was denied. At that time, although counsel expressed surprise, no decision was then made to ask for a continuance. Schultz argues that the short notice did not allow defense counsel enough time to prepare for a meaningful cross-examination. Additionally, she argues that this has prejudiced

her case because had she been aware of the witness, she could have presented rebuttal witnesses that would have severely undermined Laiden's credibility. This court notes, however, that there is no specific allegation as to what witnesses she would have called, or their testimony, other than a vague reference by counsel who said he talked to other people about Laiden's lack of credibility.

The trial court's third basis for its ineffective assistance of counsel finding was counsel's failure to give notice of an alibi. The trial court accepted the State's argument and prohibited Davis's testimony that Schultz stayed at work until 2:30 p.m. This testimony would help support Schultz's defense that she could not have left work at 2:30 p.m., run her errands and drive to the crime scene by 3 p.m. Contrary to the State's position at trial, during the postconviction motion, the State suggested that Davis's testimony was not an alibi defense in that it did not place Schultz elsewhere at the time of the alleged incident. As defense counsel argued at the postconviction hearing, it is unfair for the State to successfully argue that Davis's testimony is inadmissible at trial because counsel failed to give a timely notice of alibi testimony and then to argue later that there is no error in excluding the testimony because it is not alibi testimony. This court agrees and, consequently, will accept the trial court's holding that defense counsel failed to give proper alibi notice.

The State contends, however, that even if defense counsel's performance was deficient, there is overwhelming evidence to support the jury's conviction and, therefore, Schultz failed to establish prejudice. It makes three observations. First, the victim and a witness present at the time of the battery both identified Seim and Schultz as the people responsible for committing the battery. Second, Laiden testified that Seim told her that she and Schultz committed the battery. Third, the police noted that Schultz removed her purse from Seim's truck

when Seim and Schultz were arrested, a fact the jury could view as contradicting Schultz's testimony that she was not traveling with Seim that day.

As stated previously, to establish prejudice, Schultz must show that, but for counsel's deficient performance, there is a reasonable probability the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. ***State v. Pitsch***, 124 Wis.2d 628, 642, 369 N.W.2d 711, 719 (1985).

Here, the trial judge has the advantage in assessing the impact and effect of defense counsel's errors. It observed that credibility was the crux of this case and analyzed defense counsel's admitted failings in terms of the overall effect on the judicial process. It felt that excluding Davis's testimony was critical to Schultz's defense as it would have presented an unbiased witness who the jury could reasonably conclude supported Schultz's testimony. That, coupled with Schultz's lack of an opportunity to have a meaningful cross-examination of a critical State's witness and present rebuttal witnesses, persuaded the trial court to conclude that defense counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. This court agrees with the trial court's conclusion and, therefore, affirms the order granting a new trial.

This court recognizes that the result of this case is different from the one-judge appeals court determination made in the companion case of Seim. While the holding in a one-judge decision is not precedent, this court wishes to note that in the companion case, Davis's testimony was entirely unrelated to any claim of alibi by Seim and reflected only on the credibility of the victim's version of the offense. Here, however, his testimony could be reasonably construed as

direct evidence of Schultz's innocence. Additionally, in the companion case, the appeals court decision noted that two additional witnesses testified to an admission Seim made providing even greater evidence of her guilt. For these reasons, this court does not view the dissimilar results as inconsistent.

By the Court.—Order affirmed.

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