COURT OF APPEALS
DECISION
DATED AND FILED

September 3, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP2679-CR **Cir. Ct. No. 2012CF706**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DESHUN LATRELL BANNISTER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: MARY E. TRIGGIANO, Judge. *Affirmed*.

Before Curley, P.J., Fine and Kessler, JJ.

¶1 KESSLER, J. Deshun Latrell Bannister appeals a judgment of conviction, following a jury trial, of one count of substantial battery and two counts of bail jumping. Bannister also appeals the order denying his postconviction motion. We affirm.

BACKGROUND

¶2 On February 4, 2012, Bannister was charged with one count of misdemeanor battery, domestic abuse, and two counts of felony bail jumping. An amended information changed the misdemeanor battery charge to a charge of felony substantial battery, domestic abuse. According to the complaint, the battery charge stemmed from a violent encounter on January 30, 2012, between Bannister and his girlfriend, Achia L. Johnson, in which Bannister struck Johnson multiple times in the face and head. The bail jumping charges stemmed from Bannister's open cases for possession of THC in Milwaukee and Racine Counties, which prohibited Bannister from committing any new crimes.

¶3 A final pre-trial date was set for March 27, 2012, and a jury trial was scheduled for April 11, 2012. On March 27, 2012, however, Bannister's counsel did not appear at the hearing. Bannister's counsel was in a different courtroom, representing a different defendant, and did not have Bannister's hearing marked on her calendar. The case remained scheduled for trial on April 11, 2012; however, on that date, the trial court adjourned the trial until July 9, 2012.

¶4 On April 30, 2012, Bannister's defense counsel filed a "Notice of Motion and Motion to File Late Motions and Witness List." Defense counsel stated that:

> [n]o witness list was previously filed as it was anticipate[d] that this matter would resolve with a plea. However, since the adjournment of the trial, defendant has become aware of a potential witness who may provide an alibi for the defendant. There is a need to investigate this potential and provide the government with notice pursuant to statutes.

The motion did not contain a supporting affidavit with any information about the potential witness, nor did the motion even mention the potential witness by name.

¶5 The trial court addressed the motion the following day at Bannister's arraignment, when defense counsel stated: "I'm asking for leave to file [a] late motion and [a] late witness list." Defense counsel explained that prior to the original April 11, 2012 trial date, she and Bannister planned to enter guilty pleas; however, "the defendant became aware and was aware of a potential new witness[] in this matter that may provide an alibi."[1]

¶6 The State objected, stating: "[I]f there is an alibi, I would think [that] it would become apparent more than a day or sometime before trial. This was originally scheduled for trial back on April 11…. [T]he state would object to an alibi at this point, judge." The trial court then asked defense counsel what the alleged alibi was, to which defense counsel responded:

> The alleged alibi, it is my client's girlfriend. He indicates he was with her at that time. I haven't spoken with her, nor have … I had an investigator to speak with her. I think with regard to whether there is a firm alibi, one I would feel comfortable presenting to a jury, that may or may not happen…. The alibi, I admit that might be shaky at best.

(Some formatting altered.)

¶7 The trial court denied the motion as untimely, stating that the case had already been set for trial twice. The matter proceeded to trial, where multiple witnesses testified, including Johnson and Bannister. Johnson testified that on January 30, 2012, she and Bannister got into an argument over money. Johnson said that the argument began while the two were driving, but then carried over into Johnson's apartment. Johnson described Bannister's demeanor as agitated and

[1] The alleged alibi is identified in the parties' briefs as "Ms. Green." A first name for Ms. Green only appears in the Presentence Investigation Report. For confidentiality purposes, we also refer to the alleged alibi as Ms. Green. *See* WIS. STAT. § 972.15(4) (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

said that Bannister was "venting." Johnson stated that Bannister then became physical by hitting her on the right side of her cheek with a closed fist. She testified that Bannister jumped on her, grabbed her and swung her into a dresser and then onto her bed. She testified that Bannister swung her into the dresser about five times. Johnson stated that she attempted to protect herself by covering her face, but Bannister continued to hit her and became annoyed when she told him that he knocked out her tooth. Johnson said that Bannister was "super amped" and then struck approximately twenty blows to her head. Johnson finally escaped her apartment and ran to the nearest public library. Johnson testified that she encountered a security guard, who called her mother. Milwaukee police also arrived at the library and took her statement.

¶8 Suave Smith, a security guard at the Milwaukee Public Library, testified that on January 30, 2012, he encountered Johnson at the library. Smith testified that Johnson's mouth was bleeding heavily and that Johnson alleged that her boyfriend had beaten her. Smith testified that Johnson had her hand over her mouth and that blood was "coming from between her fingers and down her face, her chin," and was dripping onto her clothes and onto the library floor. Smith also said that Johnson was "traumatized," "crying … sobbing, [and] breathing heavily." Smith called 911 and Johnson's mother.

¶9 Milwaukee police officer Logan Jeffery testified that at approximately 5:15 p.m. on January 30, 2012, he was dispatched to a Milwaukee Public Library location, where he encountered Smith. Smith directed Jeffery's attention towards Johnson. Jeffery stated that when he encountered Johnson she was hysterical and bleeding. Johnson showed Jeffery her injuries and "wiggled [her tooth] back and forth … to demonstrate that it was now loose." Jeffery testified that Johnson told him that Bannister struck her several times, first by

hitting her on the right side of her face, resulting in her loose tooth. Jeffery stated that Johnson went on to describe a physical struggle, in which "she was grabbed and pushed and then struck … approximately 20 more times in the head and face area." Johnson told Jeffery that the first time she attempted to flee, Bannister "physically reached out and grabbed her and stopped her from moving." The second time she attempted to flee, Jeffery stated, Johnson was able to escape to the library.

¶10 Bannister also testified in his own defense, telling the jury that on the morning of January 30, 2012, he and Johnson were in Racine County because they "had court in the morning. We went out to court. Came from court … [and] had an attorney visit where we was meeting with my attorney." Bannister said that he and Johnson began arguing in the car because Johnson was unhappy that Bannister was going to visit Ms. Green, the mother of his son, later in the day. Bannister stated he met with his attorney at 11:00 a.m., dropped Johnson off at her apartment at 2:00 p.m., and then went to Green's home. Bannister denied any physical altercations with Johnson that day, stating he stayed at Green's home playing video games until 8:00 p.m. and then watched a movie with Green and his son.

¶11 The jury convicted Bannister of all charges. Bannister was sentenced to three and one-half years of imprisonment for the substantial battery, consisting of one and one-half years of initial confinement and two years of extended supervision. Bannister was sentenced to one year of initial confinement and one year of extended supervision on each bail jumping charge, each consecutive to any other sentence stayed for two years probation.

¶12 Bannister filed a postconviction motion for a new trial arguing that his defense counsel was ineffective for filing an untimely notice of alibi and that the trial court erroneously refused to allow Bannister to present an alibi defense. Specifically, Bannister argued that if Green had been allowed to testify, Bannister's own testimony indicating that he was with Green at the time of the offense would have been more credible to the jury. The motion did not contain a supporting affidavit. The postconviction court denied the motion, finding that Bannister was not prejudiced by the lack of an alibi because "the defendant presented his alibi defense through his own testimony at trial." This appeal follows.

DISCUSSION

¶13 On appeal Bannister argues that his defense counsel was ineffective and that the trial court erroneously disallowed his alibi defense. We affirm the trial court because there is no affidavit in the record (either pretrial or postconviction) identifying with any specificity the details of the proposed alibi defense. *See* WIS. STAT. §§ 971.23(8)(a), 901.03(1)(b). We conclude that on the state of this record, the postconviction court properly denied Bannister's postconviction motion.

I. Ineffective Assistance of Counsel.

A. Standard of Review.

¶14 To establish a claim of ineffective assistance of defense counsel, the defendant must prove both that counsel's performance was deficient and that such performance prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). In analyzing such claims, we may address either deficient

performance or prejudice first and, if we determine the party alleging ineffective assistance has failed to show prejudice, we may decline to address whether counsel's performance was deficient. *See* ***State v. Sanchez***, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996).

¶15 Counsel's performance is deficient if it falls below an objective standard of reasonableness. ***State v. Thiel***, 2003 WI 111, ¶19, 264 Wis. 2d 571, 665 N.W.2d 305. When evaluating counsel's performance, courts are to be "'highly deferential' and must avoid the 'distorting effects of hindsight.'" ***Id.*** (quoting ***Strickland***, 466 U.S. at 689). "'Counsel need not be perfect, indeed not even very good, to be constitutionally adequate.'" ***Thiel***, 264 Wis. 2d 571, ¶19 (citation omitted). In order to demonstrate prejudice, the defendant must show that "'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" ***Id.***, ¶20 (quoting ***Strickland***, 466 U.S. at 694). "'The focus of this inquiry is not on the outcome of the trial, but on the reliability of the proceedings.'" ***State v. Roberson***, 2006 WI 80, ¶29, 292 Wis. 2d 280, 717 N.W.2d 111 (citation omitted).

¶16 Whether a defendant was denied the effective assistance of counsel presents a mixed question of fact and law. ***State v. Pitsch***, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985). We reverse the trial court's findings of fact regarding counsel's actions only if those findings are clearly erroneous. *See* ***id.*** at 634. Whether counsel's performance was deficient and whether counsel's actions prejudiced the defense are questions of law that we review *de novo*. *See* ***id.***

B. Application of Ineffective Assistance of Counsel Standard.

¶17 In his postconviction motion, the entirety of Bannister's argument regarding his ineffective assistance of counsel argument is as follows:

> [Defense counsel's] performance was deficient because she did not file a notice of alibi timely. Bannister informed [defense counsel] of his alibi at their first meeting. Further, [defense counsel] did not attend the Final Pre-Trial hearing, and she did not file a witness list. A reasonably prudent attorney would attend all court hearings and if they could not attend would ask for a rescheduled date. A reasonably prudent attorney should file a witness list and notice of alibi.
>
> [Defense counsel] tried to remedy the situation by filing a motion to request to file the notice of alibi but her motion was denied. This denial prejudiced Bannister because he was not able to use his alibi witness at trial. Bannister testified at trial that he did not injure the victim because he was at Ms. Green's residence that day and that Ms. Green was there. His alibi witness would have been able to bolster his defense and if his defense was bolstered it would be reasonable to believe that … if the jury had heard the testimony of Ms. Green that there is a reasonable probability that there could have been a different trial outcome.

¶18 We assume, without deciding, that Bannister's defense counsel performed deficiently by failing to file a timely notice of alibi. However, based on the record before us, we conclude that Bannister was not prejudiced by the lack of an alibi. Nowhere in the motion does Bannister explain who Green is or what she would have said. The only known information about Green comes from Bannister's trial testimony. Bannister's motion does not address any relevant information as to how Green's testimony would have helped him at trial—he does not allege the precise times he was supposedly at Green's home, where Green's home is in relation to where the crimes took place, or why he was with Green to begin with. Moreover, Bannister did not support his motion with an affidavit from

Green stating that she actually would testify in his favor and what exactly she would testify to. Speculative assertions that a witness will provide supporting testimony are insufficient to support a claim of ineffective assistance of counsel.

II. The trial court did not erroneously deny Bannister's request to present alibi testimony at trial.

¶19 Bannister also contends that the trial court erroneously denied his defense counsel's motion to file a late witness list in order to include Green's testimony. We disagree.

¶20 The trial court has wide discretion in determining whether or not to admit evidence and we will not reverse such a determination unless the trial court erroneously exercised its discretion. *See* ***State v. Evans***, 187 Wis. 2d 66, 77, 522 N.W.2d 554 (Ct. App. 1994). We will sustain an evidentiary ruling if the trial court examined the relevant facts, applied the pertinent law, and reached a rational conclusion. *See* ***Loy v. Bunderson***, 107 Wis. 2d 400, 414-15, 320 N.W.2d 175 (1982).

¶21 WISCONSIN STAT. § 971.23(8) sets out the procedure to be followed when a defendant intends to defend against a criminal charge by way of an alibi. The statute's purpose is to notify the State that the defendant intends to defend against the criminal charges by showing that it was physically impossible for the accused to have committed the crime because he or she was somewhere else at the time of the crime. *See, e.g.,* ***McClelland v. State***, 84 Wis. 2d 145, 151, 267 N.W.2d 843 (1978). A defendant must make an offer of proof to the trial court to preserve appellate review of proposed alibi testimony that was excluded from trial. *See* ***State v. Brown***, 2003 WI App 34, ¶16, 260 Wis. 2d 125, 659 N.W.2d 110. We conclude that Bannister's offer of proof was insufficient.

¶22 Not only did defense counsel's notice fail to comply with the mandates of WIS. STAT. § 971.23(8)(a), which requires a notice of alibi to be filed thirty days before trial, but at Bannister's arraignment, when defense counsel discussed the alibi motion with the trial court, counsel stated that she did not speak with or investigate the alleged alibi. Indeed counsel did not even name the alleged alibi, but rather referred to her simply as "my client's girlfriend." Defense counsel, much like Bannister's postconviction motion, completely lacked any sort of specificity when requesting an opportunity to file the witness list, and even indicated that an alibi defense may not even have been possible, stating "[t]he alibi, I admit that might be shaky at best." Simply stated, there was no basis for the trial court to grant defense counsel's request when absolutely nothing about the alleged alibi, other than her status as Bannister's girlfriend, was offered to the trial court.

¶23 No scheduling order appears in the record, thus Bannister cannot argue the late filing was permitted by such an order. To the extent Bannister argues that defense counsel's motion should have been granted because it was filed more than the statutory thirty days in advance of the *adjourned* trial date, we disagree. The trial court could reasonably exercise its discretion and deny defense counsel's motion because neither the motion nor the offer of proof contained any *specific* information identifying the proposed alibi witness by full name, stating where she could be found, and disclosing by way of her affidavit what she would say that tended to establish that Bannister could not possibly have committed the crime charged. In addition, because a trial date had already been set twice, the court could reasonably determine not to risk further delay of proceedings by allowing this inadequate identification of an alibi witness who neither party appeared to have even interviewed. "'Every court has inherent power, exercisable

in its sound discretion, consistent within the Constitution and statutes, to control … its docket.'" *See* ***Neylan v. Vorwald***, 124 Wis. 2d 85, 94, 368 N.W.2d 648 (1985) (citation and quotation marks omitted).

¶24 For the foregoing reasons, we affirm the trial court.

By the Court.—Judgment and order affirmed.

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