COURT OF APPEALS
DECISION
DATED AND FILED

September 30, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP1215-CR **Cir. Ct. No. 2013CF3705**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RICO R. HILL,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: TIMOTHY M. WITKOWIAK, Judge. *Affirmed*.

Before Brennan and Brash, JJ., and Daniel L. LaRocque, Reserve Judge.

¶1 PER CURIAM. Rico R. Hill appeals a judgment convicting him of one count of battery and one count of strangulation and suffocation. He also appeals an order denying his motion for postconviction relief. Hill argues that he

received constitutionally ineffective assistance from his counsel because his lawyer did not call an alibi witness to testify on his behalf at trial. We affirm.

¶2 To prove a claim of ineffective assistance of counsel, a defendant must show that his lawyer performed deficiently and that this deficient performance prejudiced him. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). The test for deficient performance is whether counsel's representation fell below objective standards of reasonableness. ***State v. Carter***, 2010 WI 40, ¶22, 324 Wis. 2d 640, 782 N.W.2d 695. To show 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.'" ***Id.***, ¶37 (citation omitted). A reviewing court may dispose of a claim of ineffective assistance of counsel on either ground. ***Strickland***, 466 U.S. at 697.

¶3 Whether counsel provided constitutionally ineffective assistance presents mixed questions of law and fact. ***State v. Pitsch***, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985). "[W]e will not reverse the circuit court's findings of fact, that is, the underlying findings of what happened, unless they are clearly erroneous." ***Id.*** at 634. "[W]hether counsel's behavior was deficient and whether it was prejudicial to the defendant are questions of law." ***Id.*** We review questions of law independently of the circuit court. ***Id.***

¶4 At the ***Machner***[1] hearing, Hill's lawyer, Stephan Sargent, testified that Hill told him on the day of the final pretrial conference that a girlfriend could provide alibi testimony on his behalf. Sargent testified that he asked Hill why he

[1] ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

did not share this information earlier in the process and asked him how he remembered that he was with the girlfriend on the night the crime occurred. Hill did not have good answers for him. Sargent testified that he told Hill, "we can't mess around with this" and explained that they were required to give the State notice of an alibi witness. He told Hill to bring the potential witness to his office so that he could have his investigator interview her. Sargent testified that Hill never gave him the girlfriend's name or telephone number, and did not give him any further information about his potential alibi. Sargent also testified that he set up an office appointment with Hill two weeks later, which would have been two weeks in advance of the trial, but neither Hill nor the girlfriend came to the appointment. Sargent said that he asked Hill on the day of the trial whether he was ready to proceed, and Hill said "yes." Sargent said he did not pursue the potential witness at that time because he did not "like putting clients on the spot" when they may have been dishonest with him because it could harm the lawyer-client relationship.

¶5 Hill remembered events differently. He testified that he told Sargent that a girlfriend could provide an alibi for him "towards the beginning of the … case," but acknowledged that he did not provide Sargent with her name or contact information. Hill testified that Sargent told him that "a girlfriend alibi is not a strong alibi." Hill testified that he did not remember Sargent asking him to bring the witness to Sargent's office for an interview. Hill also testified that during the trial, he asked Sargent to call the girlfriend as a witness.

¶6 After hearing the testimony, the circuit court made a factual finding that Hill did not provide the name or contact information for the potential alibi witness to Sargent. The circuit court also found as a matter of fact that Hill had more than one opportunity to provide the information to Sargent, but did not, and

that he did not attend an office visit scheduled prior to trial. The circuit court found that Sargent would have proceeded with investigating the alibi witness and assessing her credibility if he had been given her name and contact information. Based on these factual findings, the circuit court concluded that Sargent did not perform deficiently in failing to call the witness because Sargent did not know who the witness was, he had no opportunity to assess the witness's credibility, and he was not given an opportunity to investigate whether she would be helpful to the defense.

¶7 Hill first challenges the circuit court's factual finding that Sargent would have investigated Hill's alibi and pursued it as a possible defense if Hill had given him the contact information for the witness. Hill contends that Sargent dismissed the potential alibi witness out of hand.

¶8 We will uphold the circuit court's factual findings unless they are clearly erroneous. ***Pitsch***, 124 Wis. 2d at 634. The circuit court's factual finding that Sargent would have investigated the girlfriend as a potential alibi witness if Hill had given him her contact information is based squarely on Sargent's testimony. The circuit court implicitly found that Sargent's testimony was more credible than Hill's testimony. We will not overturn the circuit court's credibility determinations about the witnesses. *See* ***State v. Oswald***, 2000 WI App 3, ¶47, 232 Wis. 2d 103, 606 N.W.2d 238. Therefore, we uphold the circuit court's factual finding that Sargent would have pursued calling the alibi witness if Hill had given him contact information.

¶9 Turning to the legal question of whether Sargent performed deficiently, Sargent's decision not to call the girlfriend as an alibi witness was reasonable because he did not know her name and had no opportunity to assess her

credibility to determine whether she would assist the defense if called as a witness. *See* ***Carter***, 324 Wis. 2d 640, ¶22 ("To demonstrate deficient performance, the defendant must show that his counsel's representation 'fell below an objective standard of reasonableness considering all the circumstances.'"). Hill counters that Sargent's conduct was deficient because he had a duty to investigate the alibi defense. *See* ***Strickland***, 466 U.S. at 691. This argument ignores the circuit court's factual finding that Sargent *would have investigated* but for Hill's failure to provide him contact information for the witness. Sargent did not perform deficiently in failing to investigate the potential alibi witness because Hill did not bring her to Sargent's office for an interview as Sargent asked him to do if he wanted to pursue the matter, and Hill did not provide Sargent with her name or contact information. *Cf.* ***McClelland v. State***, 84 Wis. 2d 145, 152, 267 N.W.2d 843 (1978) (a defendant has an obligation to cooperate with trial counsel in timely identifying possible alibi witnesses).

By the Court.—Judgment and order affirmed.

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