COURT OF APPEALS
DECISION
DATED AND FILED

March 5, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP929-CR **Cir. Ct. No. 2006CF98**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DEREK J. COPELAND,

DEFENDANT-APPELLANT.

APPEAL from a judgment and orders of the circuit court for Clark County: JON M. COUNSELL, Judge. *Affirmed*.

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

¶1 BLANCHARD, P.J. Derek Copeland appeals a judgment of conviction for first-degree sexual assault of a child following a jury trial, and

orders denying postconviction relief.[1] Copeland argues that the circuit court misapplied a standard of law and failed to examine relevant facts in determining during the course of trial that Copeland "opened the door" to allowing alibi-related evidence and questioning. Copeland also argues that his trial counsel provided ineffective assistance of counsel in regard to this alibi defense. For the following reasons, we reject both arguments and accordingly affirm.

BACKGROUND

¶2 In August 2006, Copeland was charged with child sexual assault, based on alleged sexual contact with a five-year-old relative, whom we will call B. The complaint rested on evidence that Copeland had anal intercourse with B. on the afternoon of December 14, 2005, a day of heavy snows, at B.'s residence in Neillsville, Wisconsin (hereafter, the Neillsville residence).

¶3 Copeland was represented before and during trial by attorney Peter Thompson. In advance of trial, Thompson provided notice to the court on behalf of Copeland, pursuant to WIS. STAT. § 971.23(8) (2013-14),[2] stating that Copeland might introduce evidence that he was not at the Neillsville residence on December 14, 2005, but was instead in Black River Falls that day. According to the notice, "for all periods of time" on December 14, 2005, Copeland was at the residence of "Jennifer Struensee, at N6150 Juliana Road, Black River Falls,

[1] The one-day trial in this case occurred eight years ago, in July 2007. However, based on an extensive subsequent litigation history in the circuit court and in this court that we will not detail, briefing in this appeal was not completed until October 2014.

[2] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

Wisconsin[,]" except for times when he "help[ed] move Struensee to her new apartment at 519 N. 8th Street, Apt. 2D, Black River Falls, Wisconsin." In addition to the implied possibility that Copeland himself might testify in support of this alibi defense, the notice explicitly listed as potential witnesses Struensee and Copeland's brother, Bradley Copeland.[3]

¶4 At the jury trial, B.'s mother testified that she made arrangements for Copeland to babysit B. and his brother, A., on the school "snow" day of December 14, 2005, and that she left Copeland to watch B. and A. between 1:30 and 4:00 p.m. She testified that she believed that Brittany Weber drove Copeland to the Neillsville residence that day.

¶5 Also at trial, a video recording of a police interview of B. was played for the jury, while the jury followed along with a transcript. In addition, B. testified in person. B. testified in part that on a "big snow day" before Christmas in 2005, Copeland babysat for B., and at that time Copeland touched B. "in the butt" with Copeland's "wiener."

¶6 A. also testified. A. was twelve at the time of the trial. A. testified in part that he was outside playing on a snow day in December 2005, when he looked into the Neillsville residence from outside through a window and saw Copeland and B. moving around under a blanket on the couch. More specifically, Copeland "was underneath the blanket doing weird stuff with [B.] like going up and down and fighting underneath the blanket."

[3] To distinguish the two Copelands, we will refer to Derek Copeland as Copeland and to Bradley Copeland by his first and last names.

¶7 After the State rested its case, attorney Thompson announced that the defense would withdraw its alibi defense. The court noted that, pursuant to WIS. STAT. § 971.23(8)(a),[4] the State would not be allowed to comment on Copeland's withdrawal of the alibi or failure to call alibi witnesses. As a result of Copeland's withdrawal of the alibi defense, the State released as a witness Bradley Copeland, whom the State had intended to impeach in an attempt to undermine the alibi defense.

¶8 Shortly after attorney Thompson withdrew the alibi defense, the defense began its case with testimony from Copeland. The following summary represents a large percentage of Copeland's testimony on direct examination. From December 11 or 12, 2005, to December 15 or 16, 2005, Copeland resided at N6150 Juliana Road, Lot 404, Black River Falls, with Jennifer Struensee and Bradley Copeland. At that time, Struensee was in the process of moving to an apartment in Black River Falls. The drive time between Black River Falls and the Neillsville residence was "approximately 45 minutes." Copeland acknowledged that the jury had earlier heard testimony from B.'s mother that on December 14,

[4] WISCONSIN STAT. § 971.23(8)(a) provides in pertinent part:

> If the defendant intends to rely upon an alibi as a defense, the defendant shall give notice to the district attorney … 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. If at the close of the state's case the defendant withdraws the alibi or if at the close of the defendant's case the defendant does not call some or any of the alibi witnesses, the state shall not comment on the defendant's withdrawal or on the failure to call some or any of the alibi witnesses. The state shall not call any alibi witnesses not called by the defendant for the purpose of impeaching the defendant's credibility with regard to the alibi notice.

2005, Copeland had been "brought to" the Neillsville residence by Brittany Weber, whom Copeland knew. However, on December 14, 2005, Weber did not have a car, did not have a license, and could not have driven Copeland to the Neillsville residence. Moreover, Copeland did not have a car or access to a car on December 14, 2005.

¶9 After briefly cross-examining Copeland, the State argued to the court, outside the presence of the jury, that contrary to Copeland's withdrawal of the alibi defense, Copeland through his testimony had presented "a back door alibi," inviting the jury to conclude that he was in Black River Falls all day on December 14, 2005, with no means of getting to the Neillsville residence. The State argued that this opened the door to allow the State to attempt to undermine the alibi defense, primarily by cross-examining Copeland and his alibi witnesses on the alibi topic.

¶10 Attorney Thompson initially contended that the testimony was a simple denial of the offense, not an alibi.

¶11 In the course of discussion with counsel, the court expressed the view that Copeland had presented an alibi to the jury by effectively testifying that he was at a specific location, Black River Falls, other than the Neillsville residence at the time of the alleged offense. As part of the extended discussion on this topic, defense counsel and the State signaled their assent to the following: (1) the court would not give any type of curative instruction on the issue, which risked confusing the jury and drawing more attention to the matter; and (2) attorney Thompson would not refer to Copeland's testimony that he was in Black River Falls on December 14, 2005, and that he had no way to get to the Neillsville residence.

¶12 Under this understanding, all further introduction or discussion of alibi evidence would be prohibited by either party, except that the jury would be allowed to hear one specific piece of additional testimony to the effect that Copeland had not visited the Neillsville residence during the pertinent time period, because it was not alibi evidence. The specific piece of additional testimony, which the court stated would *not* open the door on the alibi issue, was testimony from Copeland that the last time he recalled being at the Neillsville residence was pegged in his mind to the November 2005 hunting season, before December 14, 2005. The court determined that this would constitute a simple denial of the crime, not a statement that he was at some other particular place on December 14, 2005. In resumed testimony to the jury, Copeland testified, "The last time I baby-sat [at the Neillsville residence] was sometime before deer hunting season, which is in November of 2005."

¶13 The jury found Copeland guilty. Copeland filed a series of motions for postconviction relief seeking a new trial, partly on grounds related to his alibi defense. The circuit court eventually denied his motions for postconviction relief, and Copeland now appeals.

DISCUSSION

¶14 We first address Copeland's arguments hinging on the premise that the circuit court misapplied a standard of law and failed to examine relevant facts in determining that Copeland "opened the door" to alibi-related evidence, then we address his argument that attorney Thompson provided ineffective assistance of counsel in withdrawing the alibi defense.

I. OPENING THE DOOR TO ALIBI-RELATED EVIDENCE

¶15 Copeland makes a series of arguments premised on the assertion that the circuit court misapplied a standard of law and failed to examine relevant facts in determining that Copeland, through his own testimony, opened the door to the admission of alibi-related evidence. Copeland makes alternative arguments as to why this decision by the circuit court, if it constituted error, was unfairly prejudicial to his defense and merits reversal. We need not attempt to parse the alternative arguments about potential prejudicial effects and express no opinion on their merits, because for the following reasons we conclude that the court did not err in determining that Copeland opened the door by offering an alibi through his testimony on direct examination. As best we understand Copeland's arguments on this topic, a conclusion that the court did not err in determining that the door had been opened to alibi-related evidence disposes of all arguments that Copeland makes that are not addressed in the separate section below regarding ineffective assistance of counsel.

¶16 Evidentiary decisions are left to the circuit court's sound discretion, although a court erroneously exercises its discretion when it applies an incorrect standard of law. ***State v. Hunt***, 2003 WI 81, ¶34, 263 Wis. 2d 1, 666 N.W.2d 771.

¶17 Copeland contends that the circuit court misapplied the standard of law regarding alibi defenses articulated in ***State v. Shaw***, 58 Wis. 2d 25, 205 N.W.2d 132 (1973), *overruled on other grounds by* ***State v. Poellinger***, 153 Wis. 2d 493, 451 N.W.2d 752 (1990), and ***State v. Harp***, 2005 WI App 250, 288 Wis. 2d 441, 707 N.W.2d 304, when the circuit court concluded that Copeland opened the door to alibi-related evidence through his testimony on direct examination. More specifically, Copeland's argument proceeds as follows:

(1) under ***Shaw*** and ***Harp***, evidence constitutes an alibi defense only if it "categorically place[s a defendant] in a specific place at a specific time," such that his or her participation in the crime was impossible; and (2) the circuit court erred in finding that his testimony was of this type, because his testimony was nothing more than a denial that he had committed the offense. We conclude that this argument rests on a misreading of ***Shaw*** and ***Harp*** and that the circuit court did not err in finding that Copeland's testimony on direct examination offered an alibi defense, albeit a tepid one.

¶18 An alibi defense seeks to establish that the accused was at a location other than the alleged crime scene at the time the crime occurred. ***Shaw***, 58 Wis. 2d at 30 (citing ***Logan v. State***, 43 Wis. 2d 128, 135, 168 N.W.2d 171 (1969)). The court in ***Shaw*** explained that, based on logic and prior legal authority, an alibi defense is one that "'involves the physical impossibility of the accused's guilt,'" and "'a purported alibi which leaves it possible for the accused to be the guilty person is no alibi at all.'" ***Id.*** at 31 (quoted source omitted). Applying this rule, the court held that Shaw was not entitled to an alibi jury instruction based on testimony that Shaw "was in the immediate vicinity of the scene of the crime" but denying that he committed the crime. ***Id.*** at 30-31. This evidence did not tend to show that Shaw could not have committed the crime because he was at some other place when the crime occurred. ***Id.***

¶19 In ***Harp***, this court explicitly applied this rule from ***Shaw***. The circuit court in ***Harp*** had granted the State's motion for a mistrial on the grounds that a witness had testified in support of an alibi defense that the defense had not provided notice of, as required under WIS. STAT. § 971.23(8). ***Harp***, 288 Wis. 2d 441, ¶¶7-8. On interlocutory review this court reversed the mistrial order, concluding that Harp was not obligated to provide notice of an alibi, because the

testimony at issue "placed Harp in the same building and in the same hallway [as] the crime scene." ***Id.***, ¶¶22, 25. The testimony at issue "not only did not indicate that it was physically impossible for Harp to have committed the offense, it placed her 'in the immediate vicinity of the crime.'" ***Id.***, ¶22 (quoting ***Shaw***, 58 Wis. 2d at 31).

¶20 We conclude, contrary to Copeland's argument, that the rule applied in ***Shaw*** and ***Harp*** does not help Copeland. Copeland's testimony, if believed, was to the effect that it was impossible for him to have been at the Neillsville residence on December 14, 2005, because he was in Black River Falls that day without a means of travel to Neillsville. Copeland set the stage by testifying that he was then residing at a particular residence in Black River Falls, 45 minutes by car from the Neillsville residence. He then sought to *directly rebut* the prior testimony of B.'s mother that on December 14, 2005, Weber had driven Copeland to the Neillsville residence, by testifying that she did not own a car or have a license. He then testified that he had no other access to a car that day.[5]

¶21 It is true that Copeland's testimony on direct examination was not stated in forceful terms and was not detailed. However, the clear purpose was to prove that Copeland was in Black River Falls on December 14, 2005, making it impossible for him to be present that day at the Neillsville residence.

[5] Copeland confuses the issue by inaccurately stating several times that the circuit court ruled that the testimony that opened the door was that Copeland "had not been asked to babysit in Neillsville on the date of the alleged sexual assault." Copeland gave testimony to this effect beginning on cross-examination, and then again on redirect and re-cross, and the State also referred to it before the circuit court. However, in explaining its open-the-door ruling, the court did not refer to this later testimony, but only to testimony that Copeland gave on direct examination, summarized in the text.

¶22 Copeland contends that his testimony constituted only "an imperfect alibi defense," which could not establish that it was impossible for him to have committed the crime at the Neillsville residence, because it lacked a timing element. Specifically, Copeland argues that his testimony lacked an "unequivocal[]" assertion that he "was in Black River Falls the *entire* 'snow' day." (Emphasis added.) However, Copeland's testimony about how he lacked a way to get to the Neillsville residence on December 14, 2005, would have been irrelevant on its face if it was not offered to prove that he lacked a way to get there at any time during the day. To repeat, Copeland's testimony no doubt lacked any number of elements that might have made it more precise and persuasive, but just because it was tepid did not render it non-alibi testimony.

¶23 For these reasons, we conclude that the court did not err in determining that Copeland's direct-examination testimony opened the door to evidence and argument on the alibi issue, and for this reason we need not and do not address additional arguments of the parties that assume a contrary conclusion.

II. INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

¶24 We reject some of the arguments that Copeland raises under the heading of ineffective assistance of counsel because they are premised on the argument, which we reject above, that the circuit court erred in determining during the course of trial that Copeland's direct-examination testimony constituted alibi evidence. This includes various references Copeland makes to the effect that it was deficient performance for Thompson not to seek a mistrial based on the court's ruling that his testimony had opened the door to alibi-related testimony and argument.

¶25 What remains are arguments all premised on the idea that attorney Thompson was deficient in deciding not to fully pursue an alibi defense, and that this resulted in prejudice to Copeland. We reject these arguments. We conclude that the circuit court did not clearly err in finding credible Thompson's postconviction testimony that Thompson withdrew the alibi notice, with Copeland's consent, before Copeland testified at trial, after Thompson reached the conclusion based on pretrial investigation that the alibi described by Copeland was "garbage" and "baloney," and that Thompson made a reasonable strategic decision to avoid what he saw as a serious risk of assisting the prosecution at trial by pursuing a "garbage" defense.

¶26 The following are standards in this area pertinent to this appeal:

> Whether a defendant received ineffective assistance of trial counsel is a two-part inquiry under *Strickland v. Washington*, 466 U.S. 668 (1984). A defendant must show both (1) that counsel performed deficiently; and (2) that the deficient performance prejudiced the defendant.
>
> When reviewing whether counsel performed deficiently, the *Strickland* standard requires that the defendant show that his counsel's representation fell below an objective standard of reasonableness considering all the circumstances. A court is highly deferential to the reasonableness of counsel's performance. A court must make every effort to reconstruct the circumstances of counsel's challenged conduct, to evaluate the conduct from counsel's perspective at the time, and to eliminate the distorting effects of hindsight. Strategic decisions made after less than complete investigation of law and facts may still be adjudged reasonable….
>
> ….
>
> Whether a defendant received ineffective assistance of counsel is a mixed question of law and fact. This court will uphold the circuit court's findings of fact, including the circumstances of the case and the counsel's conduct and strategy, unless they are clearly erroneous. Whether counsel's performance satisfies the standard for ineffective

> assistance of counsel is a question of law which we determine independently of the circuit court and court of appeals, benefiting from their analysis.

State v. Jenkins, 2014 WI 59, ¶¶35-38, 355 Wis. 2d 180, 848 N.W.2d 786 (footnotes omitted).

¶27 Attorney Thompson's postconviction testimony included the following allegations of fact, which were all either explicitly or implicitly credited by the circuit court. In discussing the case with Copeland before trial, Thompson raised the question of whether an alibi defense might be available. Copeland reacted to this suggestion by being "almost entirely uncooperative," and initially provided only "vague information without names or dates or anything." Copeland's reaction left Thompson apprehensive, because in his experience an accused person with an alibi is eager to share information on the topic, and Thompson did not want to help to construct a false alibi. However, at the close of a pretrial hearing, Copeland handed Thompson a "slip of paper" with information that, despite "a lot of wobble" that persisted in Copeland's alibi account, appeared to Thompson to provide at least a basis for the filing of the alibi notice described above, which Thompson needed to file promptly in light of the statutory timeline for the filing of alibi notices. However, even as he filed the notice, Thompson remained "very suspicious of" the truth of the alibi outlined by Copeland, based on the fragmentary information that Thompson received from Copeland more than five months after Thompson first asked Copeland about any potential alibi information. Thompson filed the notice to preserve the issue so that he could investigate it.

¶28 Investigation of Copeland's purported alibi was conducted by both Thompson and the State. Thompson testified after trial that, in the course of those

investigations, information surfaced that included the following: (1) Struensee at first told Thompson that she did not remember anything on this topic, but when pushed, said that Copeland had helped her move on a weekend, which directly undermined the alibi, because December 14, 2005, was a weekday; (2) Bradley Copeland told police that he recalled the day that his brother had helped with the move, because Bradley Copeland had taken the day off from work, but the police report documenting this interview reflected that Bradley Copeland had been fired from that job months before December 14, 2005, which struck Thompson as a "laughable" problem for Bradley Copeland's credibility.

¶29 Based on these and other factors, Thompson testified that he told Copeland, before Copeland testified at trial, that Thompson could not present the alibi defense because it was "garbage" and "baloney." In this conversation, Copeland "did not deny" that the alibi was "garbage" and "baloney."

¶30 In addressing postconviction motions, the circuit court found, regarding the alibi issue, that Thompson "pulled teeth to get information from his client and the witnesses and when it was investigated in the limited time available, the alibi in essence evaporated. The witnesses did not support it. In the time frame created by his client, trial counsel acted reasonably." We conclude that these findings, not seriously challenged by Copeland, support the court's conclusion that Copeland failed to show deficient performance by Thompson.

¶31 In a single sentence in his principal brief, Copeland asserts that the circuit court's finding that Thompson was credible in testifying in the post-conviction proceedings was clearly erroneous "because the court failed to even consider [Thompson's] bias after [Thompson] launched a full-scale post-conviction attack on his client prior to any post-conviction hearing." Copeland

cites to a six-page letter that Thompson sent to the court in September 2008 after Copeland alleged ineffective assistance by Thompson through new counsel, but Copeland fails to explain why we should conclude that any statement or combination of statements in Thompson's letter merited consideration by the circuit court in its detailed 19-page decision that addressed its factual findings, much less does Copeland now explain why failure to consider the letter would have been error. We reject as undeveloped whatever specific argument Copeland intends to make regarding the Thompson letter. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

¶32 One tact Copeland now takes is to emphasize repeatedly that Thompson's decision not to pursue an alibi defense "eviscerated his client's only defense," leaving the defense "toothless." If intended as an argument, these references fail to come to grips with Thompson's testimony, credited by the circuit court, that Thompson believed that an alibi defense would come across to a jury not as merely tenuous, but as "garbage" and "baloney." That is, Thompson reasonably concluded that Copeland's defense would have been just as toothless, perhaps more so, with the "garbage" alibi defense.

¶33 Without fully developing any argument along these lines, Copeland suggests that Thompson was deficient in not pursuing an alibi defense because Thompson wrongly believed that the State could impeach the part of Bradley Copeland's alibi testimony asserting that he remembered the day because he had the day off from work. We reject this argument because Copeland fails to explain the manner in which Copeland preserved for appeal whatever argument he now intends to make. *See* ***id.*** We further observe that, if the argument Copeland intends to make is that Thompson should have realized, at the time of trial, that any attempt by the State to impeach Bradley Copeland based on the alleged

discrepancy between his day-off-from-work statement to police and the fact that he was not then employed would *necessarily* have run afoul of the rules of evidence limiting impeachment by use of extrinsic evidence, we fail to see the merit in such an argument. For one thing, Thompson could reasonably have been concerned about the possibility that the State might ask Bradley Copeland whether he was employed on December 14, 2005, in hopes of eliciting a truthful answer, "no," and this would not have involved the use of any extrinsic evidence.[6]

¶34 Having concluded that the court did not clearly err in making pertinent factual findings or err in concluding that Thompson's performance was not deficient, we need not and do not address the arguments of the parties regarding the prejudice prong of the ineffective assistance test.

CONCLUSION

¶35 For these reasons, we affirm the judgment of conviction and orders denying postconviction relief.

By the Court.—Judgment and orders affirmed.

Not recommended for publication in the official reports.

[6] Copeland acknowledges that he conceded in the circuit court that Bradley Copeland "misstated" his employment history as part of his account to police regarding the alleged alibi.