COURT OF APPEALS
DECISION
DATED AND FILED

October 28, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-1264-CR

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

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

v.

SUSAN J. SEIM,

DEFENDANT-RESPONDENT.

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

MYSE, J. The State of Wisconsin appeals an order granting Susan J. Seim a new trial following her conviction for battery. The State contends that the trial court erred by finding Seim's counsel to be ineffective. Because this court concludes that Seim was not prejudiced by any deficiencies of her counsel, the order for new trial is reversed.

Seim and her daughter, Shelbie Schultz, were tried together and both convicted for the battery of Ronda Barker. Barker and her sister both testified that Seim and Schultz committed the battery around 3 p.m. Seim's defense was that she was at Schultz's house all afternoon preparing for a party the next day. Seim supported her defense with her own testimony and that of Schultz's husband, who placed her at his house between noon and 1 p.m., and again shortly after 4 p.m.

Seim also sought to impeach the Barkers' testimony that she and Schultz committed the battery by showing that Schultz was elsewhere at the time. As evidence of Schultz's whereabouts, Seim sought to introduce a time clock showing Schultz punched out from work at 2:15 p.m.; testimony from Schultz 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, the son of Schultz's employer, to corroborate Schultz's story that she stayed at work until 2:30 p.m. The trial court permitted all this evidence except for Davis's testimony, faulting Seim's counsel for not giving proper notice of alibi under § 971.23(8), STATS.

Once the trial court ruled that Davis's testimony would not be admitted, Seim moved for mistrial based on the ineffective assistance of counsel. This motion was refused, and the trial continued. After Seim and Schultz were convicted, Seim brought 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, it is worth noting that Seim and the State take different views on what exactly the court decided when it granted the motion

for a new trial. Seim argues that the trial court accepted both her arguments that ineffective counsel and the interests of justice required a new trial. For support, Seim relies on this language of the trial court during the motion hearing:

> … I am in essence of the opinion that counsel's conduct so undermines the proper functioning of the adversarial process that the trial court 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 interests of justice*. (Emphasis added.)

This court does not agree, and concludes that the sole basis for the decision was ineffective assistance of counsel. First, 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. Second, the trial court specifically agreed with the State that the basis for its order 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.

This court, therefore, will only address the issue of whether the trial court erred by basing its decision for a new trial on the ineffectiveness of counsel.

In considering claims of ineffective counsel, our supreme court has adopted the test articulated in ***Strickland v. Washington***, 466 U.S. 668 (1984). ***State v. Sanchez***, 201 Wis.2d 219, 236, 548 N.W.2d 69, 76 (1996). ***Strickland***

requires the defendant to show both that counsel's performance was deficient, and that this deficiency prejudiced the defendant. ***Strickland***, 466 U.S. at 687.

Because 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. ***Sanchez***, 201 Wis.2d at 236, 548 N.W.2d at 76. To show prejudice, the defendant must demonstrate 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 that this court decides de novo. ***Sanchez***, 201 Wis.2d at 236-37, 548 N.W.2d at 76.

Seim's trial counsel was allegedly ineffective 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. This court concludes that Seim has not shown prejudice resulting from any of counsel's claimed deficiencies.

It is difficult to understand Seim's first claim that the failure to demand a witness list prejudiced her defense. Pursuant to its "open records" policy, the district attorney provided Seim with 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 any witnesses from Seim. Rather, Seim's sole argument appears to be that this court should uphold the trial court's decision because of "the trial court's advantage in assessing the impact and effect of trial counsel's errors." As noted beforehand, however, determining whether counsel's claimed deficiency was prejudicial is a question of law. To establish prejudice on appeal, the defendant

must do more than simply supply us with the trial court's conclusions. Therefore, even assuming that it was deficient behavior to fail to demand a witness list when counsel actually possessed that information, Seim has failed to meet her burden of showing that her defense was prejudiced.

The second claimed deficiency concerns the 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 with testimony that Seim confessed the battery to her. When confronted with this new witness, Seim moved to strike the testimony, but her motion was denied.[1] Although Seim expressed surprise, no motion for a continuance was made at that time. Seim argues that this prejudiced her case because had she been aware of the witness, she "could have presented rebuttal witnesses that would have severely undermined the credibility of the State's witness." There is no specific allegation, however, as to which witnesses Seim would have called, or to what they would have testified. Such an unsupported allegation is insufficient to demonstrate prejudice. Accordingly, Seim has again failed to meet her burden.

These two claimed deficiencies also do not cast doubt on the reliability of the trial's result. The State offered overwhelming evidence to support the jury conviction. 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 admitted to her that

[1] It is actually unclear whether a formal motion to strike Laiden's testimony was made. Seim's counsel claimed he made a formal motion, but neither the trial court nor the district attorney could recollect one. The trial court, however, stated for the record that Seim's counsel's characterization of the discussion in chambers was accurate.

she committed the battery. Third, another daughter of Seim testified that Seim admitted to the battery, and even claimed that her mother suborned perjury by asking her to testify that she was with her mother at Schultz's house when the battery occurred. Fourth, the police noted that Schultz removed her purse from Seim's truck when they were arrested, a fact the jury could view as contradicting Schultz's testimony that she was not traveling with Seim that day. This overwhelming evidence persuades this court that the result of the trial was reliable despite counsel's claimed deficiencies.

This court now turns to the third claim of ineffective assistance of counsel—the failure to give notice of an alibi. As a result of this deficiency, the trial court withheld Davis's testimony that Schultz stayed at work until 2:30 p.m. This court is not persuaded, however, that any deficiency of counsel prejudiced Seim.

Seim's claim at trial was that she was working at Schultz's house at the time of the battery. In support of her alibi, she herself took the stand and in addition offered the testimony of Schultz's husband, who placed her at his house twice during the afternoon. This constituted all the alibi testimony she sought to introduce, and the trial court permitted all of it to be introduced. Therefore, although Seim's counsel should have given notice of the alibi, the failure to do so did not exclude any alibi evidence. Seim cannot show any prejudice as a result of this error.

The trial court did, however, reject Davis's testimony because of the failure to provide notice of the alibi. By doing so, the trial court committed error. The effect of this testimony was not to support Seim's alibi, but rather to impeach the testimony of Barker and her sister. An alibi consists of a defense that *the*

accused was elsewhere at the time the alleged incident took place. ***State v. Horenberger***, 119 Wis.2d 237, 242, 349 N.W.2d 692, 695 (1984). While Davis's testimony may be alibi as to Schultz, it is not alibi as to Seim because it does not place *Seim* elsewhere at the time of the battery. This court cannot conclude, therefore, that Seim's counsel was deficient for failing to provide notice of the alibi insofar as it related to the exclusion of Davis's testimony.

Although this court has concluded that the trial court committed error by refusing Davis's testimony on alibi grounds, it does not further address the issue. While Seim challenged the determination that the testimony was alibi at trial, she does not challenge this determination on appeal.

By the Court.—Order reversed.

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