

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**JULY 1, 1998**

Marilyn L. Graves  
Clerk, Court of Appeals  
of Wisconsin

**NOTICE**

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**No. 97-1718-CR**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**JAMES A. GENETT,**

**DEFENDANT-APPELLANT.**

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APPEAL from judgments and an order of the circuit court for Waukesha County: JOSEPH E. WIMMER, Judge. *Affirmed.*

Before Snyder, P.J., Brown and Anderson, JJ.

ANDERSON, J. James A. Genett appeals from two judgments of conviction for two incidents of first-degree sexual assault of a child in violation of § 948.02(1), STATS., and an order denying his postconviction motion for a new trial. Genett raises four arguments on appeal: (1) trial counsel was ineffective for failing to file a notice of alibi; (2) trial counsel was ineffective for failing to investigate the specific circumstances of Genett's prior convictions;

(3) the State's use of an overbroad time frame deprived him of due process and the ability to prepare his defense; and (4) the trial court erroneously excluded the testimony of his alibi witness. We reject his claims and affirm the judgments and the order.<sup>1</sup>

#### FACTS AND PROCEDURAL BACKGROUND

Following a preliminary examination held on August 26, 1994, Genett was charged in a criminal information with two counts of first-degree sexual assault in violation of § 948.02(1), STATS., involving alleged sexual contacts with Nicole L.T. The alleged assault occurred between October 1 and October 31, 1991, at the home of Nicole's "Auntie Bunk" during the afternoon hours. Nicole was at her Auntie Bunk's home with her mother, Patricia, her sister, Auntie Bunk and her husband, their two children and Genett, who is Auntie Bunk's brother. While alone in the home, Genett allegedly touched her vagina with his hand and then with his penis. On November 8, 1991, Nicole was treated for vaginal and anal tears at a local hospital and she was diagnosed with chlamydia.<sup>2</sup> Approximately two years later, Nicole told her stepmother about the assaults, who then reported them to the police, which led to Genett being charged.<sup>3</sup>

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<sup>1</sup> We also decline Genett's invitation to reverse the judgments of conviction and remand the case for a new trial in the interests of justice. See § 752.35, STATS.

<sup>2</sup> On Nicole's November 6, 1991 hospital visit, she tested positive for chlamydia and she was diagnosed with a bladder infection and received an antibiotic to fight the infection. On a follow-up visit on November 8, 1991, the lab results of a second chlamydia test and a syphilis test were negative. An emergency room physician testified that it is *possible* that the antibiotic eradicated the chlamydia.

<sup>3</sup> At the time of the assault, Patricia was dating Genett's brother, Jack Genett. According to Nicole's stepmother, in late 1993 while shopping with her family, Nicole bumped into Jack Genett. Jack threatened her and claimed to be her father. The Genett brothers were frequently with Nicole's mother and seeing Jack reminded her of James. After this incident, Nicole began having nightmares.

After a five-day jury trial, the jury returned guilty verdicts on both counts contained in the information. Genett was sentenced to twenty years in prison on count one and twenty years in prison on count two, stayed consecutive to count one, and placed on probation for twenty years consecutive to count one. Subsequently, Genett moved for a new trial based upon newly discovered evidence and claims of ineffective assistance of trial counsel. The trial court denied the motion. Genett appeals. Additional facts will be included within the body of the decision as necessary.

#### INEFFECTIVE ASSISTANCE OF COUNSEL

Genett first raises two claims of ineffective assistance of counsel. He maintains that his trial counsel was ineffective for failing to file a notice of alibi pursuant to § 971.23(8), STATS., and for failing to adequately investigate the specific circumstances of Genett's prior convictions before "opening the door" to impeachment on cross-examination.

In order to prevail on a claim of ineffective assistance of counsel, Genett must satisfy the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Genett must show that counsel's performance was deficient and that it resulted in prejudice to the defense. *See id.* In reviewing a trial court's decision on a claim of ineffective assistance of counsel, we accept its findings of fact unless they are clearly erroneous. *See* § 805.17(2), STATS. However, we review de novo the determination of whether counsel's performance was deficient and prejudicial. *See State v. Johnson*, 153 Wis.2d 121, 128, 449 N.W.2d 845, 848 (1990).

#### *Notice of Alibi*

Genett first argues that his trial counsel was ineffective for failing to file a notice of alibi pursuant to § 971.23(8), STATS. Genett contends that the trial court's finding that the State was not able to establish any particular date in October 1991 that the offense occurred is clearly erroneous. Rather, Genett insists that it is reasonable for the jury to believe that the assault took place on October 23 and that the testimony of Mr. Peter Kraus, Genett's employer for several days in October, would have "absolutely rehabilitated the truthfulness of [Genett's] statement that he was working" on October 23. We disagree with both assertions.

We will first consider the trial court's finding that the State was at no time able to establish any particular date that the offense occurred. Again, in reviewing a trial court's decision on a claim of ineffective assistance of counsel, we will not overturn a trial court's findings of fact unless they are clearly erroneous. *See* § 805.17(2), STATS.

The trial court concluded that the date of October 23, a Wednesday, was never established as the date of the offense. Genett posits that "Grandma [T.'s] log that was in evidence doesn't show any other possible days that this could have occurred." The evidence does reveal that according to the log kept by Valerie T., Nicole's grandmother, she believed October 23, 1991, was a *possible* date for the assault because Patricia had the girls that day.

However, Detective Thomas Schilling, who investigated the assault, was not convinced of the October 23 date. He stated that it was purely speculation on Valerie's part and that there was no specific date when the crime occurred. He believed it possibly occurred on a Saturday, with possible dates of October 26 and November 2, 1991, but Nicole did not know for certain. Nicole affirmed that the assaults occurred during a weekend, otherwise she would have been in school and

her mom only had visitation on weekends. Walter T., Nicole's father, recalled picking the girls up from Auntie Bunk's in October 1991. Although he did not recall the exact date, he testified that he also believed the assaults occurred during a weekend because Patricia was only allowed to see the girls on the weekends.

Nicole also told Schilling that the assaults occurred several days before she went to the hospital; several days after the assaults her "private area" started to hurt and her mother took her to the hospital. Walter testified that Nicole complained of pain during urination for two weeks after which she was eventually taken to the hospital. Based on the totality of the evidence, we cannot conclude that the trial court's finding that October 23 was never established as the date of the offense is clearly erroneous.

We next turn to Genett's contention that trial counsel was ineffective for failing to file a notice of alibi for Kraus, production manager at Everdry Waterproofing, who, according to Genett, would have provided a solid alibi for the place and time which the State presented the assault most likely had occurred. We need not address both prongs of the ineffective assistance of counsel analysis if a defendant makes an inadequate showing on one. *See Strickland*, 466 U.S. at 697. Thus, we may assume, for the purpose of addressing this argument, that trial counsel's failure to file a notice of alibi constituted deficient performance. We then turn to the question of prejudice. 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. *See id.* at 694. A reasonable probability is one sufficient to undermine confidence in the outcome. *See id.*

At trial, Genett testified that he was working from mid-October through the end of October from approximately 7:00 a.m. to 3:30 p.m. Postconviction, Kraus testified that Genett's employment record showed he was employed by Everdry from October 15 through October 25 and that he called in sick on October 21. Kraus further testified that on October 23, Genett's time card showed that he punched in at about 6:20 a.m. and was handwritten out by a supervisor at 3:30 p.m. Because Genett failed to punch out on the 23rd, Kraus could not verify when he actually left work on that day.

It is evident that Genett's alibi was far from "airtight" and Kraus' testimony would have done little to augment it. Kraus could neither account for Genett's whereabouts on October 23 because he failed to punch out, nor could he account for Genett between the dates of October 1 to 14 and October 26 to October 31, 1991. We fail to see how Genett was prejudiced by trial counsel's failure to file a notice of alibi for Kraus. The result of the trial would not have been different had Kraus testified and our confidence in the outcome of the trial is not undermined.

#### *Prior Convictions*

Genett next argues that trial counsel was ineffective for failing to adequately investigate the circumstances of his prior convictions before deciding to "air the dirty laundry" thereby opening the door to the State's scathing impeachment. As to this issue, Genett filed a motion in limine to exclude the use of evidence of his prior convictions. The parties agreed that he had three prior convictions. At trial, the State sought to clarify the number of his prior convictions. As it turned out, he had five. The court ruled that "[i]f he doesn't say [five] you have a right to go into whatever items or convictions you have there."

When Genett took the stand, trial counsel asked him how many times he was convicted and Genett answered five. Counsel then began to ask him questions about the facts surrounding those five convictions. On cross-examination, the State brought out the more sordid details of Genett's convictions.

At the postconviction motion hearing, trial counsel testified that he explained to Genett that by discussing the facts relating to his convictions the State could ask questions too. He asked Genett about the nature of the offenses and the basic factual situations of those offenses. He explained that the benefit of testifying is that the jury would know that none of Genett's prior convictions were for sexual assault whereas without further explanation, it would be possible that a juror might infer that the prior convictions were sexual in nature. He further testified that it was Genett's decision to testify.

In reviewing a claim of ineffective assistance of counsel, we may avoid the deficient performance analysis if the defendant has failed to show prejudice. *See State v. Wirts*, 176 Wis.2d 174, 180, 500 N.W.2d 317, 318 (Ct. App. 1993). More than mere speculation is required to establish prejudice; the defendant must affirmatively prove prejudice. *See State v. Pitsch*, 124 Wis.2d 628, 641, 369 N.W.2d 711, 718 (1985). To establish prejudice under *Strickland*, 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. *See Strickland*, 466 U.S. at 694. A reasonable probability is defined as "a probability sufficient to undermine confidence in the outcome." *Id.* The touchstone of the prejudice component is "whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair." *State v. Smith*, 207 Wis.2d 259, 276, 558 N.W.2d 379, 387 (1997) (quoted source omitted).

In its postconviction order, the trial court commented that “[i]n light of the [victim’s] clear and convincing testimony to the effect that the defendant sexually assaulted her during the fall of 1991, it was practically necessary for the defendant to take the stand himself to refute that testimony.” It found credible trial counsel’s testimony that he discussed the pros and cons of testifying with Genett, that he discussed each of the prior convictions with Genett and that Genett then made the decision to testify. The court concluded that “[t]he result of the trial would clearly have been the same if Mr. Genett had not testified ... [and] there was no need to refute the statement that the assault may have occurred on October 23, 1991 when it was clear ... that the assault could just as easily have occurred on a different date.” Based upon our independent review of the evidence, we cannot conclude that these findings are clearly erroneous.

Genett nevertheless maintains that “the only reason why [he] found himself on the witness stand, subject to impeachment of his credibility and character, was because counsel had failed to file a notice of alibi. This error was compounded by counsel’s unwise decision to ‘open the door’ when he was, at best, minimally informed as to the consequences of his decision.” Genett insists this caused him prejudice.

We disagree. The trial court specifically found that “the date of October 23, 1991 had no exceptional significance” and we cannot say that this finding is clearly erroneous. Thus, counsel’s failure to file a notice of alibi, although arguably deficient, did not prejudice Genett’s case.

Genett maintains that his credibility was decimated after the State’s impeachment which arose from his counsel’s “uninformed strategy.” While this may be true, it was his decision to testify and he cannot now lay the adverse



consequences on his attorney. See *State v. Schambow*, 176 Wis.2d 286, 301-02, 500 N.W.2d 362, 368 (Ct. App. 1993). Moreover, it is somewhat disingenuous for Genett to now lay blame on his counsel's "uninformed strategy" when counsel's strategy was based upon his discussions with Genett as to the facts underlying Genett's prior convictions. If counsel was "uninformed," it was largely because of Genett's failure to be open and forthright about his past behavior which then paved the way for counsel's allegedly unwise decision to "open the door."

Moreover, Genett's argument simply ignores the trial court's finding that the victim's testimony was extremely credible. If Genett had decided not to testify, the result would not have been different. The victim still would have testified, clearly and unequivocally, that Genett perpetrated the assault. Genett was the only person who could refute her allegations and his testimony was necessary to do so. Thus, we conclude that Genett has failed to show that the result of the trial would have been any different had he decided not to testify. Any errors of trial counsel were not so serious as to deprive him of a fair trial.

## TIME FRAME

Genett's next contention is that the State's use of an overbroad time frame of one month within which the crime was alleged to have occurred violated his right to due process and deprived him of the opportunity to prepare an adequate defense. Genett maintains that the State's use of the whole month of October "serves not to compensate for the possible vagaries of memory of a young child that had been traumatized, but to obfuscate the facts ... in effect, sandbagging the defendant."

The information generally charged that the incidents of sexual contact occurred between October 1 and October 31, 1991. However, Genett never challenged the time frame in the trial court. Alleged errors resulting from nonjurisdictional procedural defects are waived by a defendant if not properly preserved with a timely and specific objection. *See State v. Webster*, 196 Wis.2d 308, 319, 578 N.W.2d 810, 814 (Ct. App. 1995). Contemporaneous objection is required for several reasons. It leads to finality in criminal litigation, encourages the parties to view the trial as an event of significance that should be kept as error free as possible, and places the issue before the court where society's resources have been concentrated. *See State v. Davis*, 199 Wis.2d 513, 518-19, 545 N.W.2d 244, 246 (Ct. App. 1996). In the present case, Genett never objected to the State's filing of the information despite the one-month time frame; thus, Genett has waived review of this issue.

Even if the issue were not waived, the information is nevertheless sufficient. The supreme court has previously upheld the sufficiency of an information which alleged the occurrence of an act of sexual assault within a four-

week period. See *Gutenkunst v. State*, 218 Wis. 96, 104, 259 N.W. 610, 614 (1935). This court has also found that an information which alleged two sexual assaults over a six-month period adequately informed the defendant of the charges against him. See *State v. Fawcett*, 145 Wis.2d 244, 254, 426 N.W.2d 91, 95-96 (Ct. App. 1988). Because the vagaries of a child's memory more properly go to the credibility of the witness and the weight of the testimony, rather than to the legality of the prosecution in the first instance, we concluded that a more flexible application of the notice requirements is required and permitted in cases involving a child victim. See *id.* at 254, 426 N.W.2d at 96. Such circumstances ought not prevent the prosecution of one alleged to have committed the act. See *id.* Similarly, we conclude that the charging period set forth in this case is reasonable and that Genett was adequately informed of the charges against him.

#### EXCLUSION OF ALIBI WITNESS

Genett's final argument is that the trial court misused its discretion when it decided to exclude the testimony of Genett's alibi witness, Kraus. Genett argues that "there was no reasoning process utilized in deciding to exclude the witness rather than recess or grant a continuance, nor could there have been because there were never any facts with which the court could reasonably make a decision."

At trial, the court ruled that because Genett had failed to file a notice of alibi it would not allow Kraus' testimony for that purpose. Postconviction, the court stated that even if the notice of alibi had been filed, it would not have allowed Kraus' testimony. The court noted that "Genett's whereabouts throughout the date of October could conceivably be relevant; however, defense counsel was only prepared to indicate [Genett's] whereabouts on a portion of one day only." Therefore, the court concluded that under § 904.03, STATS., Kraus' testimony

would have confused the issues and misled the jury because it focused on a portion of one day when the time frame for the offense was the entire month of October 1991.

We review this evidentiary decision under the erroneous exercise of discretion standard. *See State v. Hamm*, 146 Wis.2d 130, 142, 430 N.W.2d 584, 590 (Ct. App. 1988). “The decision will not be upset on appeal if it has ‘a reasonable basis’ and was made ‘in accordance with accepted legal standards and in accordance with the facts of record.’” *State v. Blair*, 164 Wis.2d 64, 74, 473 N.W.2d 566, 571 (Ct. App. 1991) (quoted source omitted).

Upon reviewing the record, we conclude that excluding Kraus’ testimony was not an erroneous exercise of discretion. The evidence reveals that Kraus could neither account for Genett’s whereabouts on October 23rd because Genett failed to punch out, nor could he account for Genett between the dates of October 1 to 14 and October 26 to October 31, 1991. Clearly, Kraus’ testimony to this effect may have confused the issues for the jury. Accordingly, the trial court had a reasonable basis to exclude Kraus’ testimony.

*By the Court.*—Judgments and order affirmed.

Not recommended for publication in the official reports.

