

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

July 21, 1998

Marilyn L. Graves  
Clerk, Court of Appeals  
of Wisconsin

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**No. 97-2864**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**CODY J. VANDENBERG,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Brown County: RICHARD G. GREENWOOD and DONALD R. ZUIDMULDER, Judges. *Affirmed.*

Before Cane, P.J., Myse and Hoover, JJ.

PER CURIAM. Cody J. Vandenberg appeals a judgment convicting him of armed robbery and attempted first-degree intentional homicide and the order denying postconviction relief. Vandenberg contends that the trial court erred when it decided (1) there was no newly discovered evidence entitling

him to a new trial and (2) that Vandenberg had received effective assistance of trial counsel. We reject both assertions and affirm the judgment and order.

At approximately 4 a.m. on July 15, 1995, while in his mobile home, Blake Renard was stabbed repeatedly and his credit cards were stolen. Renard picked the photo of Vandenberg, the defendant, out of a photo line-up and at trial identified Vandenberg as his attacker. The jury found Vandenberg guilty of armed robbery and attempted intentional homicide.

Following sentencing, Vandenberg filed a postconviction motion seeking a new trial based on newly discovered evidence and ineffective assistance of trial counsel. At the postconviction hearing, Vandenberg introduced two witnesses, Kristi Reynolds and Tom Hoppe, to support an alibi that Vandenberg was at Harpt's Lake on July 14-15, 1995. Vandenberg claimed that this testimony provided newly discovered evidence which placed him at a different location, rather than the victim's trailer, during the time of the offense.

Harpt's Lake is about twenty to thirty miles, and about a one-half hour drive, from the victim's mobile home in Green Bay. Reynolds testified that she, Hoppe, and Vandenberg socialized and camped out at the lake on the night of July 14 and into the early morning hours of July 15. Reynolds testified that she was not sure what time they finished socializing, but "it could have been 2 in the morning, 5 in the morning, but it must have been somewhere in between there because we were socializing after the bar closed" at midnight. All three had been drinking and may have smoked marijuana. After socializing, Reynolds testified that she and Hoppe went to sleep in their vehicle and Vandenberg went to sleep in his truck. Reynolds then testified that about 8 or 9 a.m. she and Vandenberg drove to a gas station to buy soda and cigarettes. A carbon copy of the check Reynolds

wrote at the gas station and the posting of this check in the check register was offered to corroborate her testimony.

Hoppe testified that he did not remember seeing Vandenberg on the night of July 14 and early morning hours of July 15.<sup>1</sup> Hoppe also testified that he remembered camping out at the lake with Reynolds on July 15. However, Hoppe did remember that Reynolds and Vandenberg bought soda and cigarettes on July 15, possibly around 7 or 8 a.m. Also, Hoppe recalled that he and Vandenberg worked at Harpt's Lake later in the morning of July 15.

Vandenberg testified at his postconviction hearing that he had told his counsel prior to trial about the Harpt's Lake alibi and had mentioned to counsel numerous times the names of Reynolds, Hoppe, and the manager at Harpt's Lake, Julie Budsberg.<sup>2</sup> Vandenberg testified that his counsel refused to pursue this alibi defense.

Trial counsel testified that he investigated the Harpt's Lake alibi, among others, prior to trial. Although his investigator contacted or attempted to contact Hoppe and Budsberg, counsel did not believe his investigator talked to Reynolds. Counsel testified that the first time he had heard of Reynolds was two

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<sup>1</sup> Vandenberg's reply brief claims that the record reflects that "Hoppe confirmed that Vandenberg slept out at Harpt's Lake." The record does not support this assertion. Hoppe testified that he remembered camping with Reynolds on July 15. However, Hoppe testified that he did not recall where Vandenberg slept during the early morning hours of July 15.

"A lawyer must distinguish a fact from an inference he seeks to press on the court. It is unprofessional conduct to represent inferences as facts." *Skycom Corp. v. Telstar Corp.*, 813 F.2d 810, 819 (7<sup>th</sup> Cir. 1987). Misleading representations, whether deliberate or careless, misdirect the attention of the court and waste judicial resources. *Id.*

<sup>2</sup> Budsberg was served with a subpoena to testify at the post-conviction hearing. However, she failed to appear.

weeks prior to the postconviction hearing. Counsel stated that Reynolds's name "might have come up when I talked to Cody, but it's not a name that I recollect today. And I haven't seen anything in the record of what I reviewed that makes me recognize that name." Counsel further testified that "it was our practice that any names we received per Cody or any other witness that we would make substantial attempts to contact these people."

Counsel testified that when he investigated the Harpt's Lake alibi, he could not find any evidence or witnesses to support it. He testified that Budsberg could not remember specific weekends Vandenberg worked at the lake. Counsel testified that "there were no records, either check receipts, work receipts or anything else which would indicate as to when Cody or any other employee worked there ... [a]nd what we were trying to do [sic] establish through some written record as to when Cody was at certain places and we were unable to do that." Also, his investigator contacted Hoppe, but Hoppe could also not remember what happened on July 14-15. Counsel testified that he and his investigator also tried to find other witnesses to substantiate the alibi but "some names we could not find. But some names we did find who could not say that on July 14 and 15 that he was at Harp[t]'s Lake. We found a lot of witnesses that said yeah, he was at Harp[t]'s Lake every weekend that summer. But that did not advance our alibi."

Counsel testified that he therefore chose to file a different alibi, the "sub shop" alibi, after Vandenberg claimed that, on July 14-15, 1995, he was with other individuals at a bar, then at a sub shop, and afterwards at an after-hours party. Counsel further testified that he put the most effort into this alibi because it seemed the most promising. Counsel testified "the one [alibi] that looked like it had the most fruitful or looked like it was the one that's going to be the one most easily proved was the Zeppelins Sub Shop and that's the first one we really

pursued and then the Harp[t]'s Lake alibi was a backup." The sub shop alibi eventually could not be substantiated, after witnesses claimed that these events did not happen on the weekend of July 14-15.

Based upon the testimony, the trial court concluded that Vandenberg failed to demonstrate newly discovered evidence. The court found that defense counsel knew about the Harpt's Lake alibi before trial, but was unable to substantiate it. The court further found that the witnesses could not place Vandenberg at the lake during the exact time of the attack. Therefore, the court concluded that the testimony was not "newly discovered" evidence and that it would not have affected the verdict. In addition, the trial court held that Vandenberg was not denied effective assistance of counsel on its finding that defense counsel had interviewed various witnesses in preparation of the case. Therefore, the court refused to grant Vandenberg's motion for a new trial.

Vandenberg argues that the Harpt's Lake evidence was discovered after trial, and there is a reasonable probability a new trial would produce a different result. Vandenberg argues that the Harpt's Lake evidence supported his alibi by placing him at a different location, and not at the victim's trailer, during the time of the attack. Vandenberg claims that this evidence counters the State's theory at trial, that Vandenberg was in a white car seen driving around the victim's neighborhood on July 14-15, prior to the attack on the victim and at the same time he was socializing with Reynolds and Hoppe.

We conclude that Vandenberg failed to show that the evidence was newly discovered. To grant a new trial based on newly discovered evidence, the following must be shown by clear and convincing evidence:

1. The evidence must have come to the moving party's knowledge after trial;
2. the moving party must not have been negligent in seeking to discover it;
3. the evidence must be material to the issue;
4. the testimony must not be merely cumulative to the testimony which was introduced at trial; and
5. it must be reasonably probable that a different result would be reached on a new trial.

*State v. Brunton*, 203 Wis.2d 195, 200, 552 N.W.2d 452, 455 (Ct. App. 1996).

The defendant must meet all five requirements in order to receive a new trial.

*State v. Kaster*, 148 Wis.2d 789, 801, 436 N.W.2d 891, 896 (Ct. App. 1989).<sup>3</sup>

The trial court correctly concluded that Vandenberg failed to meet all five requirements. Vandenberg testified that he was aware of the Harpt's Lake alibi prior to trial and had asked counsel to pursue it. Vandenberg testified that Harpt's Lake was "where I believed I was from the beginning." Also, Vandenberg testified that he had told his counsel "numerous times, over and over" about witnesses Budsberg, Hoppe, and Reynolds. Thus, this information is not "newly discovered" because it was known to Vandenberg prior to trial.

Next, Vandenberg contends that the trial court erred when it denied his motion for a new trial based on ineffective assistance of trial counsel. Vandenberg states that counsel refused to investigate the Harpt's Lake alibi. Moreover, he claims that counsel did not interview or subpoena Reynolds or

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<sup>3</sup> The State argues that the standard of review for a motion based on newly discovered evidence should be addressed to the trial court's discretion. See *State v. Brunton*, 203 Wis.2d 195, 200-01, 552 N.W.2d 452, 455 (Ct. App. 1996). When the original trial and the new trial motion are held before different judges, a motion for a new trial is subject to de novo review on appeal. *State v. Herfel*, 49 Wis.2d 513, 521, 182 N.W.2d 232, 237 (1971). In this case, the original trial and the postconviction hearings were held before different judges. For purposes of this opinion, the *Herfel* standard applies.

Hoppe for trial. Vandenberg argues that the two witnesses' testimony would have supported this alibi defense and, as a result, the verdict would have been different. We disagree.

The test for ineffective assistance of counsel consists of two prongs; first, that counsel's performance was deficient, and second, that the deficient performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The defendant must satisfy both components to receive a new trial. *Id.*

Under the first prong, the defendant must demonstrate that counsel made serious errors that could not be justified under an objective reasonable standard. *Id.* at 687. The defendant must also overcome the presumption that the challenged action might be considered reasonable trial strategy. *Id.* at 689. Counsel has a right to select a particular defense from among the various alternatives available. *State v. Felton*, 110 Wis. 2d 485, 501-02, 329 N.W.2d 161, 169 (1983). Additionally, counsel is not required to dilute a chosen defense by arguing the alternative theories as well. *Lee v. State*, 65 Wis. 2d 648, 654-55, 223 N.W.2d 455, 458 (1974).

Under the "prejudice" prong, the test is whether "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. Further, the defendant must show a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. A "reasonable probability" is "a probability sufficient to undermine confidence in the outcome." *Id.*

The question whether counsel's actions constitute ineffective assistance of counsel is a mixed question of law and fact. *Id.* 466 U.S. at 698.

The appellate court does not reverse the underlying findings of fact unless clearly erroneous. *State v. Pitsch*, 124 Wis.2d 628, 633, 369 N.W.2d 711, 714 (1985); § 805.17(2), STATS. The questions of whether counsel's behavior was deficient and whether it was prejudicial to the defendant are questions of law, and the appellate court will not give deference to the trial court. *Pitsch*, 124 Wis.2d at 633-34, 369 N.W.2d at 715.

Counsel made various attempts to find and interview witnesses who frequented Harpt's Lake. Also, attempts to corroborate Vandenberg's alibi were unsuccessful. However, none of the witnesses, including Budsberg and Hoppe, could place Vandenberg at the lake on the evening of July 14 or the early morning hours of July 15. Hoppe could not recall any of the events on the night of July 14. He also testified that he did not remember seeing Vandenberg during the early morning hours of July 15. We conclude the trial court correctly determined that counsel made reasonable efforts to investigate the Harpt's Lake alibi claim, among others, by Vandenberg.

The trial court apparently found credible counsel's testimony that Reynolds was not identified as a material witness before trial. Counsel testified that he did not have any recollection of Reynolds and had first heard the name only two weeks before the postconviction hearing. The trial court, not this court, assesses the weight and credibility of testimony. *See Day v. State*, 92 Wis.2d 392, 284 N.W.2d 666, 671 (1979). Although the trial court did not make a specific credibility assessment, its decision indicates that it believed counsel. *See Yurmanovich v. Johnston*, 19 Wis.2d 494, 120 N.W.2d 707, 710 (1963) (We will assume that when a finding is not specifically made, it was determined by the trial court to be in support of the judgment.). Therefore, counsel could not have been



expected to investigate and interview Reynolds since she was unknown to counsel prior to trial.

We conclude that the trial court correctly determined that the evidence presented at the postconviction hearing was not newly discovered because Vandenberg claimed that it was known to him prior to trial. We further conclude that trial counsel's efforts at investigation in an attempt to substantiate Vandenberg's alibi were reasonable and, as a result, Vandenberg received effective assistance of counsel.

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

This opinion will not be published. RULE 809.23(1)(b)5, STATS.

