COURT OF APPEALS
DECISION
DATED AND FILED

June 4, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-2996-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KENNETH J. ERDMANN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Rock County: JOHN W. ROETHE, Judge. *Affirmed.*

Before Eich, C.J., Dykman, P.J., and Roggensack, J.

PER CURIAM. Kenneth Erdmann appeals from a judgment convicting him of aggravated battery with a dangerous weapon, contrary to §§ 940.19(5) and 939.63, STATS., first-degree reckless injury while armed, contrary to §§ 940.23(1) and 939.63, STATS., and two counts of bail jumping, one

by use of a dangerous weapon, contrary to §§ 946.49(1)(a) and 939.63, STATS.[1] He also appeals from an order denying his motion for postconviction relief. He claims that he was denied effective assistance of counsel due to his attorney's failure to subpoena and call two potential alibi witnesses. We disagree and affirm.

At approximately 2:15 a.m. on February 23, 1996, while in his home, Steve Woodard was beaten on the head with a blunt object, causing severe and permanent injuries. Due to memory loss, Woodard was unable to identify his assailant. However, at a party a few hours earlier that evening, several witnesses observed Erdmann accuse Woodard and another man of being gang members who had jumped him on a prior occasion. In addition, Ben Bishop and Chris Fuller told police that they had driven with Erdmann to Woodard's house and that Erdmann had a baseball bat with him at the time which he later hid under a trailer near their place. Bishop, Fuller and two other people all said that Erdmann had later bragged to them about hitting Woodard with the bat.

Erdmann told police that he had left the party earlier that evening with Crystal Erickson, and that they had driven to Christopher Martin's house at 1:00 a.m. and sat in his driveway until 2:30 or 2:45 a.m. Erickson stated at trial that after a brief trip to a park she sat with Erdmann, her former boyfriend, in Martin's driveway for about half an hour. Erickson then drove with Erdmann a few blocks over to Wendy Novy's house at about 2:00 a.m. She testified that Erdmann had knocked at Novy's door for about ten minutes and then had left in another car with Bishop and Fuller, at about 2:30 a.m., although she had earlier

[1] The State also proved that Erdmann was a habitual criminal, but the judgment of conviction does not refer to an additional penalty for habitual criminality. *See* § 939.62, STATS. Erdmann was sentenced to concurrent twenty-five-year terms on the aggravated battery and first-degree reckless injury counts, and was placed on probation for the bail jumping counts.

told police that she left Novy's at about 2:15 a.m. Defense counsel did not subpoena Martin or Novy to testify to the jury. At a postconviction motion hearing, Novy stated that she heard Erdmann knock at her door and call her name at 2:30 a.m., but she did not answer the door. Martin testified that sometime between 1:00 and 1:30 a.m. he woke up and noticed Erdmann and Erickson sitting in his driveway. Erdmann claims on appeal that Novy and Martin's testimony would have helped to substantiate his alibi, and that the failure to call them deprived him of his constitutional right to effective assistance of counsel.

The right to effective assistance of counsel stems from the Sixth Amendment to the United States Constitution and Article I, Section 7 of the Wisconsin Constitution, which guarantee a criminal defendant a fair trial. *See* ***Strickland v. Washington***, 466 U.S. 668, 684-86 (1984); ***State v. Sanchez***, 201 Wis.2d 219, 225-36, 548 N.W.2d 69, 71-76 (1996). The test for ineffective assistance of counsel has two prongs: (1) a demonstration that counsel's performance was deficient, and (2) a demonstration that the deficient performance prejudiced the defendant. ***Strickland***, 466 U.S. at 687. The defendant has the burden of proof on both components of the test. ***State v. Smith***, 207 Wis.2d 258, 273, 558 N.W.2d 379, 386 (1997). To satisfy the prejudice prong, the defendant must show that counsel's errors were serious enough to render the resulting conviction unreliable. ***Strickland***, 466 U.S. at 687. This means that under the totality of the circumstances, there is a reasonable probability that a new trial would yield a different result. ***State v. Johnson***, 153 Wis.2d 121, 129-130, 449 N.W.2d 845, 848-49 (1990).

Whether counsel's actions constitute ineffective assistance is a mixed question of fact and law. ***Id.*** at 127, 449 N.W.2d at 848. We will not disturb the circuit court's findings of fact unless they are clearly erroneous. ***Id.***;

see also § 805.17(2), STATS. However, we will independently determine whether counsel's performance was deficient and prejudicial. ***Johnson***, 153 Wis.2d at 128, 449 N.W.2d at 848.

We first note that the circuit court's finding that Woodard was attacked between 2:15 and 2:20 a.m. is supported by the timing of the 911 call, and is not clearly erroneous. We also agree with the circuit court that, because nothing in the proffered testimony of either Novy or Martin would have precluded Erdmann from committing the crime at 2:20 a.m., neither one would have been an alibi witness. The testimony of the witnesses also would not have fortified the defense theory that Bishop and Fuller had been motivated by gang loyalties to falsely implicate Erdmann. In fact, Novy's testimony would have placed Erdmann five to six blocks from the crime scene about fifteen minutes after the crime was committed. Furthermore, Novy's account would have conflicted with the times given by both the defendant and his only true alibi witness, Erickson, rather than corroborating either of their stories. Martin similarly would have contradicted Erickson's claim that she had waited in the car while Erdmann had gone into Martin's house with another friend earlier that evening. In those respects, Novy and Martin's testimony would have undermined, rather than substantiated, the defendant and his alibi witness's credibility. Therefore, there is no reasonable probability that obtaining the testimony of Novy or Martin would have resulted in a different outcome. Since Erdmann was not prejudiced by the performance of counsel, he received constitutionally adequate assistance, regardless of whether the performance was in any way deficient.

By the Court.—Judgment and order affirmed.

This opinion will not be published in the official reports. *See* RULE 809.23(1)(b)5, STATS.