COURT OF APPEALS
DECISION
DATED AND FILED

August 18, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-1278-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARTISE D. ODEMS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Racine County: EMMANUEL J. VUVUNAS, Judge. *Affirmed.*

Before Brown, P.J., Snyder and Langhoff,[1] JJ.

PER CURIAM. Martise D. Odems appeals from the judgment convicting him of intentional homicide and recklessly endangering safety, and

[1] Circuit Judge Gary Langhoff is sitting by special assignment pursuant to the Judicial Exchange Program.

from the order denying his motions for postconviction relief. He argues that his defense counsel was ineffective for failing to more diligently pursue a missing witness and for not adequately advising him of the advantages of having a mistrial declared. Because we conclude that defense counsel's performance was not deficient, we affirm.

Odems was convicted of first-degree intentional homicide as a party to a crime and two counts of recklessly endangering safety while armed. A material witness, Marlan Anderson, was never located and never testified at trial. In addition, during the trial one of the twelve jurors was injured in a house fire and had to be hospitalized. After a colloquy with Odems, the court continued the trial with eleven jurors.

Odems was charged with killing Brett Cottingham, the current boyfriend of the mother of Odems's child. On the day of the incident, Odems argued with Cottingham and his girlfriend over the telephone. He then got his codefendant, Dorian Neal, to drive him to the house where Cottingham and his girlfriend were. Another person, Marlan Anderson, was also with them. The police were not able to locate Anderson and he did not testify at Odems's trial.

Cottingham was shot shortly after Odems and the others arrived at the house. Odems claimed that he did not shoot Cottingham but that his codefendant shot him. Odems further claimed that the shooting was done in self-defense because Cottingham came at them with a gun. The police found a gun next to Cottingham's body.

Odems asserts that Anderson, the missing witness, would have corroborated his testimony that he did not shoot Cottingham and that Cottingham came at them with a gun. Anderson, however, could not be located and eventually

the State issued a warrant for his arrest as a material witness. At some point before the trial, Anderson called Odems's attorney. Based on this conversation, Odems's attorney prepared an affidavit for Anderson to sign. Anderson never signed it and he did not testify at trial.[2]

On appeal, Odems claims that his trial counsel was ineffective for not doing more to make sure Anderson testified at trial. He further alleges that his counsel was ineffective for not fully explaining to him the advantages of having a mistrial declared once the injured juror could no longer serve. We conclude that defense counsel was not ineffective for either reason, and therefore we affirm.

To establish an ineffective assistance of counsel claim, a defendant must show both that counsel's performance was deficient and that he or she was prejudiced by the deficient performance. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). A reviewing court may dispose of an ineffective assistance of counsel claim on either ground. *See* ***id.*** Consequently, if counsel's performance was not deficient the claim fails and this court need not examine the prejudice prong. *See* ***State v. Moats***, 156 Wis.2d 74, 101, 457 N.W.2d 299, 311 (1990).

We review the denial of an ineffective assistance claim as a mixed question of fact and law. *See* ***Strickland***, 466 U.S. at 698. We will not reverse the trial court's factual findings unless they are clearly erroneous. However, we independently review the two-pronged determination of trial counsel's performance as a question of law. *See* ***State v. Johnson***, 153 Wis.2d 121, 128, 449 N.W.2d 845, 848 (1990).

[2] Apparently two weeks after trial, Anderson was brought before the Racine County court on the material witness warrant and was released.

There is a strong presumption that counsel rendered adequate assistance. *See* ***Strickland***, 466 U.S. at 690. Professionally competent assistance encompasses a "wide range" of behaviors and "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct and to evaluate the conduct from counsel's perspective at the time." ***Id.*** at 689.

Odems argues first that his trial counsel was ineffective because he failed to secure Anderson to testify at trial. He argues that the main issue at trial came down to one of credibility. Odems testified that Cottingham pointed a gun at him, while Cottingham's girlfriend testified that he did not. Odems states that Anderson's testimony would have "advised" the jury about which of the two versions they should believe. Because Anderson's testimony was critical to the defense, Odems further reasons, his trial counsel should have done more to assure that Anderson attended the trial.

We agree with the State's argument that Odems is judging his defense counsel with the benefit of hindsight. One month after the underlying incident, the prosecutor had issued a warrant for Anderson's arrest as a material witness. The prosecutor and the police, therefore, were looking for Anderson and defense counsel knew that. Defense counsel was asked at the ***Machner***[3] hearing what he could have done to locate Anderson that the State could not do. He stated that sometimes people on the streets will talk to a defense investigator more than to the State, and, therefore, he had asked someone to have people on the streets to keep their "ears open for the presence of Marlan Anderson" but that it was

[3] ***State v. Machner***, 92 Wis.2d 797, 285 N.W.2d 905 (Ct. App. 1979).

unsuccessful. Defense counsel further stated that he was not convinced that Anderson's testimony was likely to be helpful. Counsel stated that Anderson was at the scene of the crime and therefore might have been charged. He stated that he believed that the chance that Anderson would be cooperative "was remote."

We cannot conclude that counsel was deficient for failing to find or attempting to find Anderson. The State had issued a warrant for Anderson but was unable to locate him. Since the police were not able to locate Anderson, it would be unreasonable to expect that defense counsel could have located him. Second, counsel was not convinced that Anderson would have cooperated. Based on the circumstances, this was not an unreasonable assumption. We conclude that counsel was not deficient and, therefore, was not ineffective for failing to locate Anderson.

Odems also argues that counsel was deficient because he did not adequately explain to Odems the benefits of having a mistrial declared. He states that counsel should have informed him that a mistrial would have allowed him more time to locate Anderson, would have allowed for the possibility of the trial being severed from his codefendant, would have allowed him the opportunity to have a jury with African-American jurors and would have allowed him the benefit of having the transcripts with the State's evidence.

Counsel testified at the ***Machner*** hearing that neither he nor Odems had ever mentioned the racial composition of the jury. He further testified that a motion to sever the trial had previously been made and denied. He admitted that there would have been some benefit to having the transcripts with the State's questions. He testified further, however, that he had been satisfied with the panel of jurors selected and that based on some of the questions the jurors had asked he

thought the defense might have "made some headway" with these jurors. A mistrial would have meant starting over.

> An appellate court will not second-guess a trial attorney's 'considered selection of trial tactics or the exercise of a professional judgment in the face of alternatives that have been weighed by trial counsel.' A strategic trial decision rationally based on the facts and the law will not support a claim of ineffective assistance of counsel.

State v. Elm, 201 Wis.2d 452, 464-65, 549 N.W.2d 471, 476 (Ct. App. 1996) (quoting ***State v. Felton***, 110 Wis.2d 485, 502, 329 N.W.2d 161, 169 (1983)).

We will not second-guess the decision made by trial counsel and Odems to proceed with eleven jurors. Under these circumstances, counsel did not perform deficiently. Odems has not established that his trial counsel was ineffective, and we affirm the judgment and the order of the circuit court.

By the Court.—Judgment and order affirmed.

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