COURT OF APPEALS
DECISION
DATED AND FILED

January 23, 2018

Diane M. Fremgen
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Appeal No. 2016AP2006-CR **Cir. Ct. No. 2014CF442**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GEORGE CLINTON WILSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JONATHAN D. WATTS and JEFFREY A. WAGNER, Judges. *Affirmed*.

Before Brennan, P.J., Kessler and Brash, JJ.

¶1 PER CURIAM. George Clinton Wilson appeals a judgment of conviction entered on a jury verdict and an order denying his postconviction motion for a new trial. Wilson was convicted of six counts[1] arising out of an incident when he fired a gun into a crowded apartment lobby and injured a woman. The circuit court denied Wilson's postconviction motion after a ***Machner*** hearing.[2] We now affirm.

BACKGROUND

The shooting.

¶2 This case began with a minor errand. J.S. planned to meet with Wilson's sister Cynthia at about 12:30 p.m. on December 17, 2013, in the lobby of a Milwaukee apartment building. The purpose of the meeting was arranged so that J.S. could give Cynthia fifty dollars sent by Cynthia's boyfriend. Wilson arrived with Cynthia. J.S. was in the apartment lobby with five people. Witnesses later testified that Wilson became agitated, accused the group of planning to jump Cynthia, and began saying threatening things. Wilson pulled a gun from his waistband, walked out through the lobby's glass doors, and then turned and shot back into the building. A bullet fragment struck C.S. in the head. An apartment security guard saw the incident through a window and called 911.

[1] He was convicted of four counts of recklessly endangering safety while using a dangerous weapon, one count of first-degree reckless injury while using a dangerous weapon, and one count of endangering safety by use of a dangerous weapon, discharge firearm into a building. At trial, the circuit court amended a count of attempted first-degree intentional homicide to first-degree recklessly endangering safety.

[2] ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979) ("We hold that it is a prerequisite to a claim of ineffective representation on appeal to preserve the testimony of trial counsel.")

¶3 Wilson was charged in connection with the shooting and the case proceeded to trial.

The trial.

¶4 Prior to trial, Wilson notified the trial court that he wanted to discharge his appointed counsel. He asserted as grounds that counsel had not allowed him to view surveillance video of the crime and was pressuring him to take a plea. The trial court permitted Wilson to spend time with counsel and view the video. The trial court then directly addressed Wilson to confirm that he had viewed the video and was satisfied to proceed to trial without discharging counsel. Wilson said he was.

¶5 Witnesses identified Wilson as the shooter in photo arrays and in their trial testimony. All of the witnesses except the security guard were in close proximity to Wilson prior to and at the moment of the shooting.[3]

- J.S., the sister of the shooting victim, testified that when the shot was fired, her ears started ringing and glass from the shattered door hit her in the face. She testified that she identified Wilson in a photo array and at the time she saw the photo array she was "100 percent sure" that she had identified the right person.

- C.W. testified that he was in the lobby and saw Wilson with a gun; he had turned his back to Wilson when the shot was fired. C.W. also identified Wilson in a photo array and testified that he "was certain" that

[3] Cynthia was not a trial witness. According to testimony at the postconviction hearing, neither the State nor the defense was successful in locating Cynthia after the shooting.

he had picked out the person he saw with the gun on the day of the shooting. C.W. testified that he had told police that Cynthia's brother was the shooter and that he had gold teeth.

- K.A. identified Wilson as the person who was with Cynthia on the day of the shooting. K.A. testified that she saw Wilson with a gun, that she saw him waving it around, and that she saw him fire the gun. K.A. identified Wilson in a photo array.

- C.B. identified Wilson as the shooter; she knew him because she had previously met him at a party and knew his first name. She testified that she saw him with a gun and then she saw him fire the gun.

- C.S., the person who was wounded in the shooting, testified that she personally knew Cynthia. They had once lived together for about a month. She testified that on the day of the shooting, it was Cynthia's brother who had pulled out his gun. She testified that when she saw the gun, she pointed out the fact that there were security cameras in the lobby area. She testified that she had no memory of hearing the gunshot and remembered only "falling to the ground."

- A police detective testified that he presented photo arrays to C.S. in the hospital, at a time when she was medicated, and she identified Cynthia but was unable to identify Wilson.

¶6 The trial court permitted Wilson to proceed with a mistaken identity defense and to suggest to the jury that his brother Jonathan, who resembles Wilson, was the person who committed the crime. The State objected that it had no notice of this defense and no opportunity to investigate the whereabouts of

Jonathan at the time of the shooting, but the trial court ruled that Wilson could testify about him and show the jury a photo of Jonathan.

¶7 Wilson testified that Cynthia Wilson was his sister. Wilson testified that he was not with Cynthia on December 17, 2013. He testified that he and Cynthia had a brother named Jonathan. Wilson testified that he did not know if Jonathan was with Cynthia on December 17, 2013, and that he did not know "where either one of them was" on that date. He testified that he did not have gold teeth in December 2013 but that his brother did.

¶8 In rebuttal, the State presented testimony from a detective who showed a photo of Wilson from 2013 in which Wilson does have two upper front gold teeth. The State also showed the jury the photo of Wilson used in the photo arrays shown to witnesses, which was altered by the police to cover the gold teeth so that the witness's identification is "based on the facial features, not on a scar, not on hair, not on [a] gold tooth," as a detective explained. The detective testified that most gold teeth are removable.

¶9 The jury convicted Wilson on all counts.

The postconviction motion and evidentiary hearing.

¶10 Wilson moved for a new trial on the grounds that trial counsel had been ineffective for failing to investigate an alibi defense. In support of his motion, Wilson submitted an affidavit stating that at the time of the shooting, he was living in Janesville with his brother, Earl Wilson, and Jennifer Jones. He further averred that he had told trial counsel this "at least one month" before trial. Wilson also submitted affidavits from Earl Wilson and Jones. These affidavits stated that Wilson had lived there, that he had had no form of transportation, that

in general he had never left the house alone, and that he had not left the house on that particular day.

¶11 The postconviction court[4] granted an evidentiary hearing on the motion. At the hearing there was testimony from Wilson's trial counsel, Wilson, and two witnesses whose testimony purported to support Wilson's unpresented alibi defense.

¶12 Wilson's trial counsel testified as follows:

- That Wilson had told him that he was in Janesville at the house of his brothers Jonathan and Earl at the time of the shooting.

- That Wilson had not told him he was living in Janesville at the time but only that "at the time of the shooting that's where he was."

- That "[t]he way it was left" was that Wilson was to get trial counsel "either an address or a phone number" and let trial counsel know how to contact his brothers.

- That Wilson never provided any further information to counsel.

- That trial counsel had fifteen years' experience as a lawyer in Milwaukee and that "plenty of clients say 'I've got an alibi,'" and then when the client is asked to provide more details, counsel will "never hear again."

[4] The Honorable Jonathan D. Watts presided over the trial. The Honorable Jeffrey A. Wagner presided over the postconviction motion hearing.

- That counsel had informed Wilson prior to trial that there was no alibi and that the case would be tried on mistaken identification.

- That on the first or the second day of the trial, Wilson "came up with well, Jonathan looks just like me. And that was important because the witnesses-they knew [Wilson's] sister. And she said I brought my brother with me, and he said he didn't have the first name."

¶13 Wilson testified that he had obtained his brother Earl's phone number from his mother while he was in jail and had provided trial counsel with his brother's phone number. On cross-examination, Wilson was asked if he had called his brother and he said he had not. He said he could not recall why he had been able to call his mother but not his brother. Wilson also testified that his brother Jonathan was also living with Earl in Janesville at the time Wilson was living there. He was asked on cross-examination why he had never raised trial counsel's failure to investigate the alibi when he asked the trial court to discharge his counsel, and instead asserted that he was being forced to take a plea without having viewed some surveillance video evidence. He responded that he "never got to continue to talk" about the alibi investigation.

¶14 Jones testified that Wilson was living with her and Earl Wilson in December of 2013. She testified that she went shopping on December 17, 2013, with her child support check to pick up a gift and left her son with Wilson. She testified that Wilson never left the house that day. In addition to Wilson, she listed her son and four other unrelated people who were living in the house with her and Earl. She testified that no other brother of Wilson's was living with them. She testified that Wilson "had Earl's number."

¶15 Earl Wilson testified that Wilson had been picked up in Milwaukee on December 6, 2013, and left in "early January." He named the others living in the home and testified that Jonathan was not living with them at the time. He also testified that Wilson never contacted him at any time during the court proceedings.

¶16 An investigator for the state public defender's office testified that he would have been able to locate Earl Wilson with the information available to trial counsel.

¶17 The postconviction court denied the motion. In a hearing, the postconviction court stated that "there was certainly credibility issues" and it made a specific finding that trial counsel was "certainly more credible than … the testimony of others who in fact testified." The court stated that it believed the conclusions of law as submitted by the State "to be true and accurate" and entered the order denying the motion.[5]

DISCUSSION

A. Standard of review and relevant law.

¶18 A ruling on an ineffective assistance claim presents a mixed question of law and fact; we "uphold the [trial] court's findings of fact unless they are clearly erroneous," but the determination of whether counsel's assistance was

[5] In Wisconsin, a circuit court is not prohibited from adopting a party's brief as its decision in the case, so long as the court otherwise indicates the factors on which it relied when making its decision and states those reasons on the record. *See* ***Trieschmann v. Trieschmann***, 178 Wis. 2d 538, 544, 504 N.W.2d 433 (Ct. App. 1993). However, even when the circuit court's adoption of a party's brief is without such adequate explanation, we typically do not remand when the issues raised are otherwise addressed by us *de novo*. *See* ***State v. McDermott***, 2012 WI App 14, ¶9 n.2, 339 Wis. 2d 316, 810 N.W.2d 237.

ineffective is a question of law we review *de novo*. *See* ***State v. Carter***, 2010 WI 40, ¶19, 324 Wis. 2d 640, 782 N.W.2d 695.

¶19 In order to prevail on a claim of ineffective assistance of counsel and obtain a new trial, a defendant must prove that counsel's performance was deficient and that as a result, the defendant suffered prejudice. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984).

¶20 Deficient performance is established when a defendant overcomes the strong presumption that his counsel acted reasonably within professional norms and shows that counsel's actions were objectively unreasonable. ***State v. Swinson***, 2003 WI App 45, ¶58, 261 Wis. 2d 633, 660 N.W.2d 12; ***State v. Koller***, 2001 WI App 253, ¶8, 248 Wis. 2d 259, 635 N.W.2d 838. "The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." ***Strickland***, 466 U.S. at 691. "[A] particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." ***Id.***

¶21 Prejudice is established where a defendant demonstrates "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id.*** at 694. "[N]ot every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding." ***Id.*** at 693. If we conclude that the defendant has not proven one prong, we need not address the other. *See* ***id.*** at 697. Where a claim is based on an allegation of ineffective assistance of counsel, a reviewing court will not grant a motion for a new trial absent a hearing at which trial counsel's

testimony is preserved. ***State v. Machner***, 92 Wis. 2d 797, 908-09, 285 N.W.2d 905 (Ct. App. 1979).

B. Under the proper legal standard, Wilson's counsel's actions were not objectively unreasonable.

¶22 Wilson's ineffective assistance claim is premised on his counsel's alleged failure to investigate the possible alibi Wilson mentioned. Wilson does not challenge the postconviction court's finding that he never provided a phone number to trial counsel. Rather, he argues that "it was objectively unreasonable for [trial counsel] to rely on his incarcerated client to obtain contact information for the alibi witnesses." He asserts that "[c]ounsel could have found Earl Wilson, and by extension, Jones, with minimal effort." He also asserts that "[t]here was no strategic reason to ignore the alibi."

¶23 Wilson relies on ***State v. Cooks***, 2006 WI App 262, ¶50, 297 Wis. 2d 633, 726 N.W.2d 322, for the proposition that an attorney's failure to independently investigate an alibi that would reinforce a defendant's theory of defense is objectively unreasonable. In ***Cooks***, one witness testified at the evidentiary hearing "that she had spoken with [trial counsel] on many occasions about testifying on Cooks' behalf. She stated that she would have testified that she was with Cooks at his mother's house on the night of the robbery." ***Id.***, ¶27. Another witness testified "that she had spoken with [trial counsel] on several occasions at … various court dates. She also stated that she told [trial counsel] what happened on [the date of the crime] and she would be willing to testify on Cooks' behalf." ***Id.***, ¶28. The defendant "testified that he spoke with [trial counsel] about his whereabouts [at the time of the crime] and gave him names of [six] individuals … who would verify his story." ***Id.*** The defendant testified that

he told trial counsel "to contact these witnesses and have them testify at trial" and that he mistakenly believed that trial counsel had spoken to them. ***Id.***, ¶29.

¶24 The law recognizes that a defendant's actions are a factor to consider in our analysis: "[t]he reasonableness of counsel's actions may be *determined* or *substantially influenced by* the defendant's own statements or actions." ***Strickland***, 466 U.S. at 691 (emphasis added). It is not disputed by trial counsel that Wilson told him that he had been in Janesville at the time of the crime and that he told him the names of his brothers. The question here is whether trial counsel's response to that information—which was to tell Wilson to obtain a phone number and address so counsel could follow up—was "reasonable[] in all the circumstances," given that we "apply[] a heavy measure of deference to counsel's judgments." ***Id.*** For the following reasons we conclude that it was. Trial counsel testified that it was not uncommon for clients to make an initial claim of a potential alibi and then abandon the claim when asked for information to corroborate it. Trial counsel testified that Wilson did not ever provide any alibi witness information, and the trial court found that trial counsel was the more credible witness.

¶25 It is true that in all the circumstances present in ***Cooks***—which included the defendant's mistaken belief that the alibi defense was being investigated and counsel's ignoring two witnesses who personally informed trial counsel of facts supporting defendant's alibi and offered to testify—Cooks' trial counsel failed to satisfy the constitutional standard. But the circumstances here are quite different. Wilson's counsel did not endorse an alibi defense by allowing Wilson to testify to an alibi, as counsel did with Cooks. Wilson's counsel told Wilson prior to trial that no alibi defense was supported and they adopted an alternative defense strategy—that Wilson's brother Jonathan "looks just like"

Wilson—and supported it with a photo of his brother which was shown to the jury. It is not disputed that Wilson initially told counsel he had been in Janesville on the date of the crime. Unlike Cooks, Wilson then completely abandoned the issue—not mentioning it again even when he was listing his counsel's professional failings to the trial court prior to trial in an attempt to discharge his counsel and delay the trial. Wilson did not believe, as Cooks had, that his counsel had pursued the alibi witnesses for use at trial.

¶26 We are required to give deference to counsel's explanation of the representation—specifically, counsel's explanation of his experience that abandoned alibi claims were common. This, along with the fact that Wilson abandoned the issue after raising it briefly, compels the conclusion that the way counsel proceeded was not unreasonable. In addition to that, the fact that the substituted defense strategy of the implication of Wilson's brother was presented to the jury. The holding in ***Cooks*** did not rest on a solitary statement by the defendant to counsel that he had been elsewhere at the time of the crime and it does not require a different result. While Wilson asserts that "[t]here was no strategic reason [for counsel] to ignore the alibi," it was Wilson who "ignored" the alibi by failing to provide information to which, evidence showed, he had access.

C. There is not a reasonable probability that the result of the proceeding would have been different even if trial counsel had located the Janesville witnesses.

¶27 Wilson's prejudice prong argument is that he was prejudiced by counsel's failure to investigate the alibi witnesses "[g]iven that [the alibi witnesses'] testimony would greatly help Wilson, and [presumably] would have been found credible by the jury[.]" Even assuming, without deciding, that trial counsel was deficient, Wilson has not shown that there is a reasonable probability

that Wilson would have been acquitted but for counsel's errors. Although our conclusion on the first prong is dispositive, we briefly address the prejudice argument.

¶28 First, we note that the evidence presented at trial was direct and overwhelming. Multiple eyewitnesses identified Wilson as the shooter; there was conversation and interaction between him and the others present prior to the shooting. At least one testified that she knew him by first name from meeting him at a party prior to the shooting. Others knew his sister well and identified him as her brother. Although the shooting victim could not identify him in a photo array (while medicated and hospitalized from her head wound), multiple witnesses did so with a high level of certainty.

¶29 Second, Wilson was permitted by the trial court, over the State's objection, to proceed with a defense of essentially pointing the finger at his absent brother—the only other party who could possibly match the witnesses' testimony—and showing a photo of him even though the trial court seemingly acknowledged that the ***Denny***[6] standard had not been satisfied. The jury had the opportunity to hear Wilson's denial, assess his "brother who looks like me" defense and thereby weigh his credibility vis-à-vis the multiple identification

[6] ***State v. Denny***, 120 Wis. 2d 614, 624, 357 N.W.2d 12 (Ct. App. 1984) (adopting the test for admissibility of evidence implicating a third party), states: "[A]s long as motive and opportunity have been shown and as long as there is also some evidence to directly connect a third person to the crime charged which is not remote in time, place or circumstances, the evidence should be admissible." The trial court here identified the ***Denny*** standard but stated that it was allowing the evidence because "[Wilson's] testimony is contingent on my ruling" on the admissibility of the photo of Wilson's brother. The trial court stated, "[I]f the court excludes it because it doesn't pass the ***Denny*** test, then he's in this situation where that decision adversely affects his right to testify. So I am going to allow defense to ask these questions as outlined in the offer of proof." The court further stated, "[M]y decision is not based so much on ***Denny*** but my concern that the defendant may feel that his right to testify or not has been limited[.]"

witnesses. They did not believe him. Adding the testimony of his brother and his brother's girlfriend—not precise as to time—is not reasonably probable to change their verdict.

¶30 Third, the proffered testimony itself cannot be taken as true because Wilson and his alibi witnesses offered internally inconsistent versions. Most significantly, they did not testify consistently about whether Jonathan was living with Earl and his girlfriend at the time of the crime. Wilson said he was; Earl and his girlfriend said he was not.

¶31 For all of these reasons we conclude that Wilson has failed to meet his burden of showing deficient performance and any reasonable probability of a different result. The judgment and order are therefore affirmed.

By the Court.—Judgment and order affirmed.

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