COURT OF APPEALS
DECISION
DATED AND RELEASED

March 20, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-0239-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JAMES D. JACOBSON,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Manitowoc County: DARRYL W. DEETS, Judge. *Affirmed*.

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

PER CURIAM. James D. Jacobson appeals from a judgment of conviction of attempted first-degree homicide and from an order denying his motion for postconviction relief based on ineffective assistance of trial counsel. He argues that trial counsel was constitutionally deficient and that he is entitled to a new trial in the interests of justice. We reject Jacobson's contentions and affirm the judgment and order.

Jacobson was convicted for shooting Dale Scheley in the back of the head. Scheley testified that he and Jacobson went to a park for a private discussion. After being observed by a bird-watcher, Jacobson drove Scheley to a remote wooded area for further conversation. As they were walking back to the car, Scheley heard a click and felt something brush the nape of his neck immediately before being shot. Jacobson left Scheley on the footpath to die. Remarkably Scheley regained consciousness and walked to a nearby residence to obtain assistance.

The trial evidence revealed that Jacobson was absent from work during the time frame in which the shooting occurred. The bird-watcher testified that he saw two men matching Jacobson's and Scheley's descriptions at the park during the time that Scheley and Jacobson were together. A coworker testified that Jacobson was concerned that a woman whom Jacobson had a relationship with was having an affair with someone else. Jacobson threatened to "waste" the other man. Scheley was in a relationship with that woman. Jacobson owned a .25 caliber Raven pistol which could have shot the bullet recovered from Scheley's jaw. The box for the gun, but not the gun itself, was recovered from a locked cabinet in Jacobson's home. A partially used box of bullets consistent with the spent cartridge recovered from the shooting site was also found in Jacobson's home. Jacobson's work boots were taken from his locker at work and had tread consistent with a boot print discovered near the site of the shooting.

Jacobson testified that during his absence from the work on the day of the shooting he was stranded with car trouble while doing errands on his lunch hour. He denied having seen Scheley at all or going to the park or wooded area. The defense posited that Scheley had been shot as a result of a sour drug deal. It suggested that Jerry Lambert, who had beat Scheley several years earlier over drug dealing and within two months of the shooting had twice threatened to kill Scheley, had perpetrated the crime.

To prevail on a claim of ineffective assistance of counsel, a defendant must prove: (1) that his or her counsel's action constituted deficient performance; and (2) that the deficiency prejudiced his or her defense. ***State v. Brewer***, 195 Wis.2d 295, 300, 536 N.W.2d 406, 408 (Ct. App. 1995). Whether counsel's actions constitute ineffective assistance is a mixed question of law and fact. ***State v. Smith***, 170 Wis.2d 701, 714, 490 N.W.2d 40, 46 (Ct. App. 1992) (*cert.*

denied, 507 U.S. 1035 (1993). The trial court's findings of what counsel did and the basis for the challenged conduct are factual and will be upheld unless clearly erroneous. ***Id.*** However, whether counsel's conduct amounted to ineffective assistance is a question of law which we review *de novo*. ***Id.***

When we address whether counsel's performance was deficient, we determine whether trial counsel's performance fell below objective standards of reasonableness. ***State v. McMahon***, 186 Wis.2d 68, 80, 519 N.W.2d 621, 626 (Ct. App. 1994). This standard encompasses a wide range of professionally competent assistance. ***Id.*** We do not look to what would have been ideal, but rather to what amounts to reasonably effective representation. ***Id.*** The defendant has the burden to prove that counsel was deficient; counsel is presumed to have provided adequate assistance. ***Brewer***, 195 Wis.2d at 300, 536 N.W.2d at 409.

Jacobson's claims that trial counsel was ineffective fall into the following broad categories: failing to interview witnesses, failing to undertake or document adequate investigation of the facts, failing to make a good faith effort to locate a witness, and failing to communicate with and make himself available to Jacobson. The trial court found that alibi witnesses were interviewed by persons associated with trial counsel's office, that investigators were hired to look into the facts of the case, and that trial counsel had ample communication with and input from Jacobson. These findings are supported by trial counsel's uncontradicted testimony about his preparation of the case. Moreover, the record indicates that trial counsel did everything reasonably required of defense counsel. He made an investigation, attempted to impeach Scheley on cross-examination, counseled Jacobson on the decision to testify, and presented an alibi defense.

Even if, as Jacobson asserts, trial counsel failed to make a good faith effort to locate Julian Blashka, Scheley's brother, Jacobson has not shown that the deficiency prejudiced the defense. Blashka spoke with Scheley in the hospital before Scheley revealed who shot him. Blashka told police that Scheley implied that a person known as "Midnight Rider" had shot him. The trial court ruled that the statement was inadmissible double hearsay which did not fit any of the recognized hearsay exceptions. As the State points out, Blashka's unavailability at trial was irrelevant. If Blashka had been available to testify, he would not have been allowed to repeat his hospital conversation with Scheley

because it would have constituted hearsay. Further, trial counsel indicated that for strategical reasons he would not have called Blashka as a witness. That decision was reasonable in light of Scheley's testimony that Blashka was prone to spreading "large, wild stories," Blashka's motivation to assist police to get out of jail, and the possibility of undercutting the defense theory that Lambert did the shooting by introducing an additional culprit.

Jacobson raises for the first time on appeal a claim that trial counsel was deficient because he missed one day of trial without consulting Jacobson. The claim is based on a blatant misstatement of fact. Trial counsel was present each day of trial. Jacobson's claim merely alludes to trial counsel's request that the four day trial commence on a Tuesday rather than a Monday so that counsel could attend a golf outing. That request was granted without any prejudice to Jacobson. We reject Jacobson's claim that he denied his right to the effective assistance of counsel.

Jacobson seeks a new trial in the interests of justice on the ground that he was unable to testify at trial who did the shooting because of threats of violence launched against him in jail and prison as he awaited trial. We review a trial court's order denying a postconviction motion for a new trial in the interests of justice for an erroneous exercise of discretion. *See* ***State v. Harp***, 150 Wis.2d 861, 873, 443 N.W.2d 38, 43 (Ct. App. 1989) (***Harp I***), *overruled on other grounds by* ***State v. Camacho***, 176 Wis.2d 860, 501 N.W.2d 380 (1993). Discretion is properly exercised when the trial court employs a logical rationale based on appropriate legal principles and facts of record. *See* ***id.***

The trial court's authority to grant a new trial is comparable to our authority to grant discretionary reversal under § 752.35, STATS. ***State v. Harp***, 161 Wis.2d 773, 776, 469 N.W.2d 210, 211 (Ct. App. 1991) (***Harp II***). Thus, the trial court may grant a new trial where the real controversy has not been fully tried or it is probable that justice has for any reason miscarried. A claim that the jury was not given the opportunity to hear important testimony that bore on an important issue in the case tends to fall under the "real controversy not fully tried" category. ***State v. Schumacher***, 144 Wis.2d 388, 400, 424 N.W.2d 672, 676 (1988). The trial court need not find a substantial likelihood of a different result on retrial when it orders a new trial on the ground that the real controversy was not fully tried. ***Harp II***, 161 Wis.2d at 775, 469 N.W.2d at 211. However, in order to reverse under the miscarriage of justice category, the trial court must

conclude that there would be a substantial probability that a different result would be likely on retrial. ***Schumacher***, 144 Wis.2d at 400-01, 424 N.W.2d at 676-77.

Jacobson testified at the postconviction motion hearing that he was present when Scheley was shot. He indicated he had lied at trial because he was being threatened by those actually responsible for shooting Scheley. Jacobson's new version of the events merely serves to impeach the testimony the jury heard from Jacobson himself about his whereabouts during the shooting. Thus, the jury heard relevant testimony on relevant issues. That Jacobson seeks to assert what he now characterizes as the truth does not mean that the real controversy was not fully tried. Moreover, given the trial court's rejection of Jacobson's credibility and his self-impeaching conduct, the trial court properly exercised its discretion in determining that this was not a case were justice had miscarried. A new trial in the interests of justice was properly denied.

By the Court.—Judgment and order affirmed.

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