COURT OF APPEALS DECISION DATED AND FILED

November 4, 2014

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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

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

Appeal No. 2013AP2023-CR

Cir. Ct. No. 2010CF3088

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DIMETRA CHAPPELL,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: MARY M. KUHNMUENCH and MEL FLANAGAN, Judges. *Affirmed.*

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

¶1 PER CURIAM. Dimetra Chappell appeals from an amended judgment of conviction entered after a jury found her guilty of child abuse, intentionally causing harm, with use of a dangerous weapon. *See* WIS. STAT.

§§ 948.03(2)(b), 939.63(1)(b) (2009-10).[1] She also appeals from an order denying her motion for postconviction relief.[2] We affirm.

BACKGROUND

¶2 After a trial spanning three days, a jury found Chappell guilty of child abuse, intentionally causing harm, with use of a dangerous weapon. On the date she was to be sentenced, Chappell's trial counsel informed the court that Chappell wished to have a new lawyer. New counsel was appointed, and the sentencing hearing was rescheduled.

¶3 At the rescheduled sentencing hearing, Chappell appeared with both appointed counsel and newly retained private counsel. Appointed counsel withdrew and retained counsel requested an adjournment of the sentencing hearing, which the trial court granted.

¶4 The trial court ultimately ordered Chappell to serve a six-year sentence consisting of eighteen months of initial confinement and fifty-four months of extended supervision.[3] Counsel filed a notice of Chappell's intent to

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[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

[2] The Honorable Mary M. Kuhnmuench presided over Chappell's trial, sentenced her, and entered the amended judgment of conviction. The Honorable Mel Flanagan entered the order denying Chappell's postconviction motion.

[3] The term of extended supervision was later commuted to three years.

pursue postconviction relief in the trial court, which was not processed by the clerk's office.[4] Counsel took no further action to initiate appellate proceedings.

¶5 Chappell subsequently filed a letter with this court, *pro se*, which resulted in an order enlarging the time for the State Public Defender to appoint counsel for her and to order transcripts.

¶6 Appointed counsel subsequently filed a postconviction motion, arguing that Chappell was denied the effective assistance of counsel and that the trial court erroneously exercised its discretion when it refused to adjourn her trial. The postconviction court denied the motion without a hearing after concluding that Chappell had not proven prejudice with regard to any of her ineffective-assistance-of-counsel claims. Additionally, the postconviction court rejected Chappell's claim that the trial court erroneously exercised its discretion when it denied her motion for an adjournment.

¶7 This appeal follows. Additional facts relevant to the issues presented will be provided below.

DISCUSSION

I. *Alleged ineffective assistance of counsel.*

¶8 In her postconviction motion, Chappell alleged that she received ineffective assistance in the following ways: 1) trial counsel's failure to file a timely notice of alibi, resulting in the exclusion of two witnesses; 2) trial counsel's

[4] Chappell submits that counsel violated a local rule by not filing this in the clerk's office. *See* Milwaukee County Local Rule 4.17. The postconviction court, however, found the mistake "was no fault of counsel's."

violation of the sequestration order; 3) trial counsel's failure to review discovery materials provided by the State; and 4) subsequently retained trial counsel's failure to perfect an appeal or to take further action on Chappell's behalf after sentencing.

¶9 The requirements for showing ineffective assistance of counsel are well established. A defendant must show that counsel's performance was deficient and that the deficiency prejudiced the defense. *See* ***State v. Balliette***, 2011 WI 79, ¶21, 336 Wis. 2d 358, 805 N.W.2d 334. "Whether counsel was ineffective is a mixed question of fact and law." ***Id.***, ¶19. We accept the trial court's factual findings unless they are clearly erroneous; however, the ultimate determinations of whether counsel's performance was deficient and whether it prejudiced the defendant are questions of law we review independently. *See* ***State v. Erickson***, 227 Wis. 2d 758, 768, 596 N.W.2d 749 (1999).

¶10 The defendant must show both elements of the test, and we need not address both prongs if the defendant fails to make a sufficient showing on one of them. *See* ***State v. Maloney***, 2005 WI 74, ¶14, 281 Wis. 2d 595, 698 N.W.2d 583. Further, "[a] hearing on a postconviction motion is required only when the movant states sufficient material facts that, if true, would entitle the defendant to relief." ***State v. Allen***, 2004 WI 106, ¶14, 274 Wis. 2d 568, 682 N.W.2d 433.

¶11 We will address Chappell's various claims, in turn.

1. Untimely notice of alibi

¶12 Chappell's trial counsel filed an untimely notice of alibi on October 18, 2010. *See* WIS. STAT. § 971.23(8)(a).[5] The State, consequently, moved to exclude the named alibi witnesses.

¶13 When the trial court inquired as to the reason for the late filing, trial counsel acknowledged that he was not aware the statute had changed from fifteen days to thirty.[6] The State then indicated that it had interviewed Daniel Tyson, one of the potential alibi witnesses and that the only problematic witnesses were Eddie Gooch and Edith Chappell.

¶14 In striking those two witnesses, the trial court stated:

> I'm prepared to make a ruling.
>
> Based on the requirements of the statute, the defense's failure to comply with the requirements and the prejudice that incurs to the State as a result of that, the Court is—instead of adjourning this trial, the Court is going to strike witnesses Eddie Gooch and Edith Chappell from the defense's witness list.
>
> ….

[5] WISCONSIN STAT. § 971.23(8)(a) provides, in relevant part:

> If the defendant intends to rely upon an alibi as a defense, the defendant shall give notice to the district attorney at the arraignment or at least 30 days before trial stating particularly the place where the defendant claims to have been when the crime is alleged to have been committed together with the names and addresses of witnesses to the alibi, if known.

[6] *See* 2005 Wis. Act 279, § 1 (eff. Apr. 20, 2006). We note that Chappell went to trial in 2010.

> And Mr. Tyson will be allowed to testify, if you call, but Eddie Gooch and Edith Chappell will not be allowed to testify.

¶15 Chappell argues that she was prejudiced by counsel's performance insofar as she was prevented from presenting witnesses to an alibi defense. With her postconviction motion, Chappell submitted her investigator's affidavit, which recapped an interview the investigator had with Edith Chappell. Additionally, Chappell submitted Gooch's affidavit, which contained a summary of his interview with the investigator.[7]

¶16 We adopt the postconviction court's analysis set forth in its written decision as to the shortcomings regarding what Edith Chappell and Gooch could offer based on the submissions before it. *See* WIS. CT. APP. IOP VI(5)(a) (Jan. 1, 2013) ("When the trial court's decision was based upon a written opinion ... of its grounds for decision that adequately express the panel's view of the law, the panel may incorporate the trial court's opinion or statement of grounds, or make reference thereto."). As to Edith Chappell, the postconviction court explained:

> The investigator's affidavit with respect to Edith Chappell also does not provide a basis for finding counsel to have been ineffective. Edith Chappell told the investigator that she is in poor health, that she sleeps a lot, and recalls only that the police were over at her house in June of 2010. She recalls that the defendant was gone when the police showed up, but the police were over at the house more than once, and she does not specify when this occurred. She reiterates that she sleeps a lot and dozes off and on all the time. Her statement is vague and unclear, fails to specify any times or why the police were there, and is not sufficient as to specificity to require the court to hold an evidentiary

[7] Chappell also submitted the affidavit of her brother, Lamont Chappell, who seemingly recanted his trial testimony against her. Because Chappell does not present a developed argument in this regard, we will not discuss Lamont Chappell's affidavit further. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

> hearing. After reading through the trial testimony, there simply is not a reasonable probability that a different result would have occurred had she testified in this fashion.

The postconviction court was similarly unpersuaded by Gooch's affidavit, which largely consisted of a report prepared by Chappell's investigator. The postconviction court concluded: "As it stands, his submission is nothing but hearsay through the investigator's mouth."

¶17 In light of the forgoing, we agree with the State that the interview summaries of Edith Chappell and Gooch "provided no definitive, verified statements that cut against the otherwise overwhelming and consistent testimony presented at trial." *See* ***Strickland v. Washington***, 466 U.S. 668, 694 (1984) (To establish prejudice, the defendant must show a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."); *see also* ***Allen***, 274 Wis. 2d 568, ¶9 ("[I]f the [postconviction] motion does not raise facts sufficient to entitle the movant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the [trial] court has the discretion to grant or deny a hearing.").

2. Sequestration order

¶18 A sequestration order was in place for Chappell's trial. The trial court explained to Daniel Tyson, one of Chappell's witnesses: "Mr. Tyson, under the Court's sequestration order, that means you must remain outside the courtroom until called in to testify. You are directed not to talk about your testimony with anyone until directed to do so by this Court."

¶19 While the trial was underway, the district attorney advised the trial court that he saw trial counsel, Chappell, and Tyson sitting together in the hallway and that it appeared they were discussing the case. When questioned by the trial court, trial counsel confirmed that he had a conversation about Tyson's testimony in the presence of Chappell.

¶20 The trial court found that trial counsel had "violated the terms of the sequestration order, at least the spirit of it," and did not allow Tyson to testify.

¶21 Chappell asserts that she was prejudiced by counsel's performance because Tyson was prevented from testifying "favorably" for her.[8] She offers no further elaboration on this point. We again agree with the postconviction court's conclusion that this argument must fail because Chappell has not established prejudice: "[I]t is unknown what Tyson's testimony would have been or how it would have impacted on the trial." *See* WIS. CT. APP. IOP VI(5)(a).

3. Discovery materials

¶22 Chappell argues that trial counsel failed to review discovery materials provided by the State. We need not explore the alleged shortcomings by trial counsel in detail because Chappell's motion fails to show what adverse effect they had on the outcome of the trial. Chappell offers only that "[c]ounsel's unfamiliarity with the contents of his file reflect an attorney who was unprepared for trial." This conclusory statement is insufficient to establish prejudice. *See*

[8] In this regard, Chappell relies on the fleeting description of Tyson's testimony found in a decision of the Office of Lawyer Regulation (OLR) following its investigation of trial counsel's conduct. The OLR decision, without elaboration as to the specifics of Tyson's testimony, simply describes it as "a favorable defense witness' testimony." We are wholly unconvinced that description is sufficient to establish prejudice for purposes of this appeal.

State v. Byrge, 225 Wis. 2d 702, 724, 594 N.W.2d 388 (Ct. App. 1999) ("A defendant who alleges that counsel was ineffective by failing to take certain steps must show with specificity what the actions, if taken, would have revealed and how they would have altered the outcome of the proceeding.").

4. Postconviction proceedings

¶23 Here, although counsel filed a notice of intent to pursue postconviction relief, he failed to perfect an appeal. Chappell asserts that she was prejudiced by this deficient performance because the unreasonable delay cost her the availability of at least one witness, Daniel Tyson.

¶24 There was, however, no prejudice to Chappell in this regard because her appellate rights were reinstated and she was ultimately able to pursue postconviction relief. Regarding the unavailability of a witness, as noted above, Chappell has not explained what Tyson would have testified to.

¶25 Chappell's motion falls short of meeting the requirements to warrant a hearing.

II. *Denial of request for adjournment.*

¶26 Next, Chappell challenges the denial of her request for an adjournment. Whether to grant a motion for a continuance lies within the discretion of the trial court, and the exercise of that discretion will not be disturbed on appeal except where it is clearly shown that the court erroneously exercised its discretion. ***State v. Leighton***, 2000 WI App 156, ¶27, 237 Wis. 2d 709, 616 N.W.2d 126. "'An [erroneous exercise] of discretion exists if the trial court failed to exercise its discretion or if there was no reasonable basis for its decision.'" ***Rechsteiner v. Hazelden***, 2008 WI 97, ¶92, 313 Wis. 2d 542, 753 N.W.2d 496

(citation omitted; brackets in ***Rechsteiner***). Moreover, even when a trial court's reasoning is not fully expressed, we may independently search the record to determine whether it provides a reasonable basis for the court's discretionary decision. ***Farrell v. John Deere Co.***, 151 Wis. 2d 45, 78, 443 N.W.2d 50 (Ct. App. 1989).

¶27 Here, immediately after the trial court ruled that Gooch and Edith Chappell would not be allowed to testify, trial counsel moved for an adjournment, and the trial court responded: "I already denied it."

¶28 Chappell argues that the record fails to reflect the trial court's exercise of discretion. We disagree.

¶29 Chappell presumably requested the adjournment so that her notice of alibi would be deemed timely such that Gooch and Edith Chappell would ultimately be allowed to testify. Prior to denying her adjournment request, the trial court considered Chappell's argument that the State knew early on that she said she was not present when the abuse occurred:

> [Chappell's trial counsel]: The State was well aware of the fact that my client had—had made a statement to police that at the time that this offense was alleged to have occurred, she was not present. She told—
>
> THE COURT: [Trial counsel], that— Assume for the sake of argument that that's true. That does not negate your responsibility to set forth with specificity.
>
> Looking at the statute [i.e., WIS. STAT. § 971.23(8)(a)], it not only talks about providing in a timely fashion, a/k/a 30 days in advance of trial, it also requires with specificity as to the names and addresses of all witnesses that support such an alibi or theory, plus the location with specificity. That's the language of the statute, so that—so the State has [a] full understanding of the nature [of] the alibi defense that you are providing.

> Specificity includes not only the location, the time and date that these individuals will be speaking to that support or formulate a basis for your alibi defense, and the fact that the State has a statement and is aware of what a defendant in a case—statement that defendant allegedly as you're representing to the Court gave to law enforcement, which is in a police report which the State has access to does not negate your responsibility to indicate what you are going to be using in terms of your theory of defense, in this case the alibi, and to set forth all of the particulars of that alibi. That does not remove or negate your responsibility under the statute in that regard.

¶30 The record reveals that the trial court properly exercised its discretion when it denied Chappell's request for an adjournment, which would have effectively enabled her to circumvent the notice-of-alibi statute.

III. New trial in the interest of justice.

¶31 Chappell asserts that counsel's performance should give rise to a finding that the real controversy has not been fully tried and that the result of her trial was not reliable. Given that Chappell has not established that she received the ineffective assistance of counsel, we are not persuaded that this case warrants the use of our power of discretionary reversal. *See* WIS. STAT. § 752.35; *see also* ***Vollmer v. Luety***, 156 Wis. 2d 1, 11, 456 N.W.2d 797 (1990) (emphasizing that our power of discretionary reversal is reserved for only the exceptional case).

By the Court.—Judgment and order affirmed.

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