

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 7, 2017

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. 2017AP532-CR

Cir. Ct. No. 2014CF462

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KINYATER A. GRANT,

DEFENDANT-APPELLANT.

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

Before Lundsten, P.J., Sherman and Blanchard, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. Kinyater Grant appeals a judgment convicting him of attempted first-degree intentional homicide and possessing a firearm as a felon. He also appeals an order denying his postconviction motion for a new trial. Grant contends that he was denied the effective assistance of counsel. For the reasons discussed below, we reject that contention and affirm.

BACKGROUND

¶2 The convictions were based upon a woman's testimony that, on the evening of December 29, 2013, in the City of Milwaukee, Grant fired a gun at her, striking her in the head.

¶3 Following a jury trial and his conviction, Grant filed a postconviction motion alleging that trial counsel provided ineffective assistance by failing to contact and present two potential alibi witnesses: Adrian Hendrix and Alexis Booker. Grant produced affidavits from both women averring that Grant was with them at Hendrix's house in Green Bay on the evening of the shooting.

¶4 At an evidentiary hearing on Grant's motion, trial counsel testified that Grant did not tell counsel that Grant was at a different location at the time of the alleged offenses, or that he had any potential alibi witnesses, until the eve of trial. Trial counsel testified that he then advised Grant that counsel would need to seek an adjournment in order to investigate the witnesses and provide the required notice of alibi. Grant responded that he did not want an adjournment and would prefer to proceed without an alibi.

¶5 At the hearing, Grant introduced a police report stating that he had claimed that he was with Hendrix on December 28, 2013, the day *before* the shooting. When trial counsel was asked whether he had considered that the date in

the police report might be inaccurate and that, taken in context, the assertion might be an alibi, counsel responded that he did not specifically recall the police report, but that he would have already asked Grant about any potential alibi when counsel met with Grant prior to the preliminary hearing. Counsel further stated that he had read many made-up alibis in police reports and did not check them all out.

¶6 The circuit court found counsel's testimony to be credible, and denied the postconviction motion. Grant appeals.

STANDARD OF REVIEW

¶7 Claims of ineffective assistance of counsel present mixed questions of law and fact. *Strickland v. Washington*, 466 U.S. 668, 698 (1984). We will not set aside the circuit court's factual findings about what actions counsel took or the reasons for them unless those findings are clearly erroneous. *See State v. Pitsch*, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985). Whether counsel's conduct violated the defendant's constitutional right to have the effective assistance of counsel is ultimately a legal determination, which this court decides de novo. *See id.* at 634.

DISCUSSION

¶8 A claim of ineffective assistance of counsel has two parts: (1) deficient performance by counsel and (2) prejudice resulting from that deficient performance. *State v. Swinson*, 2003 WI App 45, ¶58, 261 Wis. 2d 633, 660 N.W.2d 12. To prove deficient performance, a defendant must overcome a strong presumption that his or her counsel acted reasonably within professional norms and show that his or her attorney made errors so serious that he or she was essentially not functioning as the counsel guaranteed the defendant by the Sixth

Amendment of the United States Constitution. *Id.* In evaluating counsel’s conduct, we must be careful to avoid the “distorting effects of hindsight.” *State v. Thiel*, 2003 WI 111, ¶19, 264 Wis. 2d 571, 665 N.W.2d 305 (quoted source omitted). To prove prejudice, the defendant must additionally show that counsel’s errors rendered the resulting conviction unreliable in light of the other evidence presented. *Swinson*, 261 Wis. 2d 633, ¶58. We need not address both components of the test if the defendant fails to make a sufficient showing on one of them. *Id.*

¶9 Grant argues that trial counsel should have contacted Hendrix based on the information in the police report that Hendrix had been with Grant “on the weekend in question.” We disagree. Aside from the fact that the police report did not state that Grant was asserting an alibi for the night in question, we are satisfied that it was reasonable for counsel to rely on what Grant himself told counsel when deciding how to prepare a defense. We therefore conclude that trial counsel’s performance was not deficient.

By the Court.—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5. (2015-16).

