COURT OF APPEALS
DECISION
DATED AND FILED

October 10, 2001

Cornelia G. Clark
Clerk of Court of Appeals

No. 00-0846-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

PARISH M. GOLDEN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Racine County: EMILY S. MUELLER , Judge. *Affirmed*.

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

¶1 PER CURIAM. Parish M. Golden appeals from the judgment of conviction entered against him and the order denying his motion for postconviction relief. The issues on appeal are whether Golden received ineffective assistance of trial counsel and whether the trial court erred in the procedure it used to select alternate jurors. Because we conclude that Golden did

not receive ineffective assistance of counsel and that the procedure used to select the alternate jurors was proper, we affirm.

¶2 Golden was charged in the shooting death of Brian Overstreet. Overstreet was shot and killed in an alley in Racine. Another man, George Cottingham, was in the alley with Golden and Overstreet at the time of the shooting. Several young people were also near the scene and saw some of the incident, but only one of these witnesses testified at Golden's trial. At trial, the defense argued that it was Cottingham and not Golden who shot Overstreet.

¶3 Golden was convicted after trial of first-degree intentional homicide, of being a felon in possession of a firearm, and two counts of intimidation of a witness, all as a repeat offender. The court sentenced Golden to life imprisonment on the first count and sentences of varying length on the other counts to be served concurrently to count one. Following his sentencing, Golden made a motion for postconviction relief alleging that he had received ineffective assistance of trial counsel. After a ***Machner***[1] hearing, the circuit court denied the motion.

¶4 Golden first argues that he received ineffective assistance of trial counsel because his counsel did not arrange for two of the young witnesses, Artis C. and Jessica J., to testify at trial. 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. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). A reviewing court may dispose of a claim of ineffective assistance of counsel on either ground. *See* ***id.*** at 697. We will not "second-guess a trial attorney's 'considered selection of trial

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

tactics or the exercise of a professional judgment in the face of alternatives that have been weighed by trial counsel.' A strategic 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 (Ct. App. 1996) (citation omitted).

¶5 At the ***Machner*** hearing, Golden's defense counsel (he had two) testified that they did not call Artis C. as a witness because he had given conflicting statements about what he had seen. Counsel testified that in one of these statements, Artis C. gave a description of someone which closely matched a description of Golden. Counsel further stated that they discussed the decision not to call Artis C. with Golden, and Golden agreed with the decision not to call him. We conclude, as did the circuit court, that the decision not to call Artis C. was a reasonable strategic decision and did not constitute ineffective assistance of trial counsel.

¶6 Golden also asserts that defense counsel was ineffective when the attorney conducting the opening statement referred to Artis C.'s testimony. Specifically, counsel stated: "There's going to be a description from [Artis C.] given to Investigator Mich that described the shooter as wearing white sweat pants." Golden argues that this statement amounted to a promise that the defense was going to call Artis C. as a witness.

¶7 First of all, we disagree with Golden's characterization of this as a promise that defense counsel would call Artis C. In the opening statement, counsel alluded to the description given by Artis C. He did not state that Artis C. would testify. Counsel testified at the ***Machner*** hearing that in his opening statement he referred to the description Artis C. gave in an attempt to counter the

State's claim that this was an open and shut case. Further, at the time of opening statements, it was still possible that either the State or the defense would call Artis C. Moreover, the State did not refer to the fact that the defense did not call Artis C. in its closing. We conclude that the reference to Artis C. in the opening statement did not constitute deficient performance by defense counsel.

¶8 Golden also asserts that counsel was ineffective for failing to secure Jessica J. as a witness at trial. Golden believes that Jessica J.'s testimony would have supported the defense theory that Cottingham, and not Golden, had actually committed the homicide. Defense counsel testified at the ***Machner*** hearing that they did not call Jessica J. because they had a difficult time locating her, and when they found her, her mother would not let her talk to them. It is certainly reasonable for the defense to be reluctant to call a witness with whom they had not yet spoken. This was a strategic decision that counsel was entitled to make

¶9 In sum, we conclude that Golden has not established ineffective assistance of trial counsel. We affirm the order of the circuit court on this issue.

¶10 Golden next argues that the court erred when it accepted a stipulation from both parties to designate a particular juror to be one of the alternates. Golden argues that under the statute, alternate jurors must be determined by lot. WIS. STAT. § 972.10(7) (1999-2000). Golden argues that the statute mandates the use of elimination by lot, and that if the court is to depart from this mandate, it must first secure the defendant's agreement by engaging in a colloquy with the defendant. The failure of the circuit court to follow this procedure in this case, he argues, was reversible error.

¶11 We agree with the State that this issue is governed by the decisions in ***State v. Ledger***, 175 Wis. 2d 116, 499 N.W.2d 198 (Ct. App. 1993), and ***State v.***

Lehman, 108 Wis. 2d 291, 321 N.W.2d 212 (1982). In ***Lehman***, the supreme court acknowledged the authority of a circuit court to obtain a stipulation from the parties to agree to substitute an alternate juror for a juror who becomes incapacitated. ***Lehman***, 108 Wis. 2d at 313.

¶12 In ***Ledger***, the parties stipulated to a thirteen-person jury. ***Ledger***, 175 Wis. 2d at 121. Ledger argued that the use of a thirteen-person jury was not recognized by statutory law and therefore violated his constitutional right to a jury trial. ***Id.*** at 122. This court concluded that the procedure did not violate his right to a jury trial. ***Id.*** at 128. We noted that the case law established that statutory authority is required to diminish a constitutional right to a jury trial, but not to enlarge it. ***Id.*** at 127. We stated: "The constitution sets out a level of protection below which the law may not descend when seeking a criminal conviction. However, if the parties with the approval of the trial court choose to employ a procedure which accords a greater level of protection, we see no constitutional impediment." ***Id.*** at 127-28.

¶13 In this case, the State argued at the postconviction motion hearing that the prosecutor had proposed the stipulation because he was concerned that the juror would be perceived as being biased in favor of the State. The juror apparently had worked at the courthouse for many years and knew many of the people who worked for the State. The prosecutor did not want the integrity of the trial threatened by this potential claim of juror bias.

¶14 We conclude that the stipulation to designate the juror as an alternate in essence gave Golden an additional juror strike. As in ***Ledger***, the stipulation actually increased the constitutional protection provided to Golden, and therefore was valid.

¶15 Golden responds, however, that ***Ledger*** is distinguishable because in that case the court engaged in a colloquy with the defendant before accepting the stipulation. ***Ledger***, 175 Wis. 2d at 126. While it is true that the circuit court had conducted a colloquy with the defendant, the decision made it clear that while a colloquy is preferable, it is not mandated. ***Id.*** at 128-29 n.9. Further, the court is not required to engage in a personal colloquy with a defendant when defense counsel uses a peremptory strike or a strike for cause. We see no reason to impose such a requirement when, as here, defense counsel wants to remove a juror by stipulating that he or she will serve as an alternate. We conclude that the trial court did not err when it accepted the parties' stipulation to designate a particular juror as one of the alternates.

¶16 For the reasons stated, the judgment of conviction and the order denying the motion for postconviction relief are affirmed.

By the Court.—Judgment and order affirmed.

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