COURT OF APPEALS
DECISION
DATED AND FILED

June 17, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP1166-CR **Cir. Ct. No. 2005CF64**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

PETER J. SEYMOUR,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Oconto County: MICHAEL T. JUDGE, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Peter Seymour appeals a judgment, entered upon a jury's verdict, convicting him of attempted first-degree intentional homicide. Seymour also appeals an order denying his motion for postconviction relief. Seymour seeks a new trial on the basis of ineffective assistance of trial counsel or,

alternatively, in the interest of justice. We reject Seymour's arguments and affirm the judgment and order.

BACKGROUND

¶2 In June 2005, the State charged Seymour with attempted first-degree intentional homicide arising from the shooting of Menominee County Sheriff's Deputy Louis Moses. At trial, Moses testified that at approximately 6:18 p.m. on the evening of May 25, 2005, he responded to a residential burglary alarm near Keshena. After doing a brief perimeter check of the house, Moses began to exit the driveway. As he was turning right out of the driveway, Moses looked to his left and noticed an individual wearing baggy blue jeans and a black shirt walking approximately 200 yards up the road. Moses started to turn his squad car around and when he looked back up the road, the individual was gone. Moses and his K-9 unit dog ultimately tracked the individual into the woods.

¶3 As Moses started to close in on the person, Moses ordered him to stop, warning that he would release the dog. The person continued to run, and Moses testified that although they were in a brushy, wooded area, he could see "flashes" of the person as he ran through the trees. After a second warning from Moses, the individual stopped running. As Moses stepped over a log to make his way to the individual, he heard a shot, felt pain in his chest and looked up to see a man he identified as Seymour pointing a gun at him from approximately twenty yards away. The bullet struck the Kevlar vest Moses was wearing. Moses then fell forward and heard a second shot go off. Moses testified that he recognized Seymour because he had arrested him three days earlier for a separate incident.

¶4 Defense witnesses placed Seymour in Green Bay between 5:30 and 6:45 p.m. on May 25, 2005, and one witness testified Seymour had his cell phone during that time. Another defense witness, Orlin Sanapaw, testified that he spoke with Seymour by phone at approximately 6:30 p.m. and again at 10 p.m. on May 25. Gregory Selig, a telecommunications engineer, testified that Seymour's prepaid cell phone operated only within the cell company's home network, and that did not include the Keshena area. Selig further testified that calls were made from Seymour's phone beginning at 5:56 p.m. on May 25, with an additional nine calls made between then and 7:31 p.m. Although those calls went through Green Bay cell towers, Selig could not identify the cell phone user. Finally, an identification expert testified about various factors affecting the accuracy of eyewitness identification. Ultimately, the jury found Seymour guilty of the crime charged. Following a ***Machner***[1] hearing, the trial court denied Seymour's postconviction motion for a new trial. This appeal follows.

DISCUSSION

I. Ineffective Assistance of Counsel

¶5 Seymour claims he was denied the effective assistance of trial counsel. This court's review of an ineffective assistance of counsel claim is a mixed question of fact and law. ***State v. Erickson***, 227 Wis. 2d 758, 768, 596 N.W.2d 749 (1999). The court's findings of fact will not be disturbed unless they are clearly erroneous. ***Id.*** However, the ultimate determination whether the

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

attorney's performance falls below the constitutional minimum is a question of law that this court reviews independently. ***Id.***

¶6 "The benchmark for judging whether counsel has acted ineffectively is stated in ***Strickland v. Washington***, 466 U.S. 668 (1984)." ***State v. Johnson***, 153 Wis. 2d 121, 126, 449, N.W.2d 845 (1990). To succeed on his ineffective assistance of counsel claim, Seymour must show both: (1) that his counsel's representation was deficient; and (2) that this deficiency prejudiced him. ***Strickland***, 466 U.S. at 694.

¶7 In order to establish deficient performance, a defendant must show that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Id.*** at 687. However, "every effort is made to avoid determinations of ineffectiveness based on hindsight … and the burden is placed on the defendant to overcome a strong presumption that counsel acted reasonably within professional norms." ***Johnson***, 153 Wis. 2d at 127. In reviewing counsel's performance, we judge the reasonableness of counsel's conduct based on the facts of the particular case as they existed at the time of the conduct and determine whether, in light of all the circumstances, the omissions fell outside the wide range of professionally competent representation. ***Strickland***, 466 U.S. at 690. Because "[j]udicial scrutiny of counsel's performance must be highly deferential … the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." ***Id.*** at 689. Further, "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." ***Id.*** at 690.

¶8 The prejudice prong of the ***Strickland*** test is satisfied where the attorney's error is of such magnitude that there is a reasonable probability that, absent the error, the result of the proceeding would have been different. ***Id.*** at 694. We may address the tests in the order we choose. If Seymour fails to establish prejudice, we need not address deficient performance. ***State v. Sanchez***, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996).

¶9 Here, Seymour makes related arguments concerning the theory of defense pursued at trial. Specifically, Seymour claims trial counsel was ineffective for (1) pursuing the "cell phone defense theory," which attempted to use Seymour's cell phone records to show that he was in Green Bay at the time of the shooting; (2) inadequately investigating whether Lance Casper was the person who shot Moses; and (3) failing to call two witnesses, Frank and Ruth Sanapaw, to testify about Casper's alleged admissions that he shot Moses. Ultimately, the crux of Seymour's arguments is that counsel was ineffective for pursuing an alibi defense rather than arguing that Lance Casper was the shooter. We are not persuaded.

¶10 At the ***Machner*** hearing, trial counsel testified regarding his reasons for opting not to pursue the Lance Casper defense. With respect to Ruth and Frank Sanapaw, Seymour contends that counsel's decision to "abandon" the Sanapaws' testimony was unreasonably based on counsel's mistaken belief that their testimony was inadmissible hearsay. Even assuming their testimony was admissible, counsel indicated that the Sanapaws' testimony regarding Casper's alleged inculpatory statements was "not very strong." Counsel explained he was concerned about the Sanapaws' credibility because of the "close connection" between Seymour and the Sanapaws. Counsel continued:

> Also, as far as I was concerned, I was very worried about—well, Peter Seymour was up there in the reservation. He had very close ties to the Sanapaws. I know he was involved with drugs. So frankly, I was concerned about getting that type of information, and I was concerned generally with how the credibility of the witnesses as far as the Sanapaws were concerned would come down and how that would influence the jury.

Seymour fails to establish that he was prejudiced by counsel's failure to pursue a defense based on this arguably weak testimony.

¶11 Additionally, Seymour has not established that pursuing the Casper defense would have led to a different outcome. Counsel testified that he rejected the Casper defense because Casper did not look like Seymour, making it harder to argue that Moses had mistaken Seymour for Casper. On direct examination at trial, Moses testified he was positive that Casper did not shoot him. Moses indicated that Casper was "practically [his] neighbor" and he saw Casper on a daily basis. Moses also indicated that although the assailant was around 6' 3" to 6' 4" tall—Seymour's height—Casper was around 5' 8" tall.

¶12 Citing Orlin Sanapaw's postconviction hearing testimony, Seymour nevertheless argues that he and Casper look alike. When asked whether Seymour and Casper look alike, Orlin responded: "From a ways away, yeah. How are you going to tell them apart?" Orlin acknowledged, however, that the two men were of dramatically different heights. Moreover, three other witnesses, including a woman who was once Casper's girlfriend, testified at the postconviction hearing that Seymour and Casper look nothing alike. Given Moses' familiarity with both men and their dissimilar appearances, counsel made a reasonable strategic decision to forego the Casper defense.

¶13 Seymour nevertheless claims counsel should not have pursued the alibi/cell phone defense without corroboration. That defense, however, was consistent with Seymour's statements to law enforcement that he was in Green Bay at the time of the shooting. Counsel attempted to bolster this defense through the use of cell phone records and witnesses who would corroborate Seymour's alibi claim. Based on trial counsel's testimony, the trial court found that counsel's "pursuit of the cell phone defense theory was a reasonable and reasoned defense strategy." Given this finding of reasonableness, counsel's chosen strategy is "virtually unassailable." ***State v. Maloney***, 2004 WI App 141, ¶23, 275 Wis. 2d 557, 685 N.W.2d 620. That the jury did not believe Seymour's alibi witnesses is not enough to demonstrate ineffective assistance of trial counsel. *See* ***State v. Robinson***, 177 Wis. 2d 46, 58, 501 N.W.2d 831 (Ct. App. 1993). "Effective representation is not to be equated with a not guilty verdict." ***Id.***

¶14 Seymour next contends that counsel was ineffective for failing to follow up with the identification expert concerning the effect of distance on the reliability of eyewitness identification. We are not persuaded. It is a matter of common knowledge that one's ability to identify someone decreases as distance increases. Seymour cannot, therefore, establish that he was prejudiced by counsel's failure to elicit expert testimony on a point that required no expert testimony.

¶15 Seymour additionally argues that counsel was ineffective with respect to the manner in which he handled Seymour's request to take a polygraph test. Seymour contends that after he volunteered to take a polygraph test, his trial counsel "ill-advised Seymour that the SPD does not pay for polygraph tests." Seymour, however, does not provide any evidence that the SPD would have paid for a polygraph test. Seymour nevertheless contends that he "lost any benefit from

a polygraph, not because the SPD would not pay for it, but because [counsel] acquiesced to the district attorney's opposition to admitting polygraph results." To the extent Seymour claims that but for counsel's acquiescence, the polygraph test would have been admissible, Seymour is mistaken. "The result of a polygraph test is inadmissible in Wisconsin." ***State v. Shomberg***, 2006 WI 9, ¶39, 288 Wis. 2d 1, 709 N.W.2d 370.

¶16 Seymour correctly notes that an offer to take a polygraph test is relevant to an assessment of the offeror's credibility and may be admissible for that purpose. *See* ***id.*** "However, such an offer is only relevant to the state of mind of a person making the offer as long as the person making the offer believes that the test or analysis is possible, accurate, and admissible." ***Id.*** Nothing in the record demonstrates that at the time Seymour offered to take a polygraph test, he believed that the test would be "possible, accurate, and admissible." Seymour further fails to show how his offer to take the test would have benefitted him. Seymour did not testify at trial, but contends "it is not improbable that he may have testified in his own defense, if he were given proper legal advice about the admissibility of polygraph information." Seymour's speculation that he *may* have testified does not satisfy his burden of showing that he was prejudiced by this claimed deficiency on the part of trial counsel.

¶17 Seymour concludes his ineffective assistance of counsel argument with a discussion of purported errors in the circuit court's decision denying postconviction relief. Seymour argues the trial court applied the wrong legal standard when deciding his postconviction motion, claiming the court should have applied the standard set forth in ***State v. McCallum***, 208 Wis. 2d 463, 561 N.W.2d 707 (1997). Even were we to assume the court applied the wrong legal standard, that would not be a basis for reversal because the ultimate determination whether

the attorney's performance falls below the constitutional minimum is a question of law that this court reviews independently. ***Erickson***, 227 Wis. 2d at 768.

¶18 Seymour next argues that the circuit court "made an erroneous factual determination when it disregarded" the testimony of Orlin and Roger Sanapaw at the postconviction hearing. Although the circuit court erred, as a factual matter, when it stated in its decision that Orlin did not testify at the postconviction hearing, Seymour has failed to show that Orlin's testimony supported his ineffective assistance of counsel claim. As noted above, Orlin's testimony that Seymour and Casper looked similar "from a ways away," despite their height difference, was countered by Moses' trial testimony and the postconviction hearing testimony of three defense witnesses who testified that the men looked nothing alike. *See supra,* ¶¶11-12. Seymour also complains that the jury never heard Orlin's testimony that he considered Casper to be dangerous and a potential suspect because Casper previously threatened to shoot up his house. Seymour fails, however, to explain how Orlin's opinion about Casper would be admissible or how its admission would have changed the outcome.

¶19 With respect to Roger Sanapaw, Seymour emphasizes Roger's testimony in which he recounted meeting with a police detective during the trial. According to Roger, the detective indicated they were not looking at the possibility of other people committing the crime because they "had the right guy." It is neither surprising nor noteworthy that law enforcement officials would think they had the "right guy" by the time of trial. Seymour therefore fails to establish that Roger's testimony supported his ineffective assistance of counsel claim.

II. A New Trial in the Interest of Justice

¶20 Seymour seeks a new trial under WIS. STAT. § 752.35,[2] which permits us to grant relief if we are convinced "that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried." In order to establish that the real controversy has not been fully tried, Seymour must convince us "that the jury was precluded from considering 'important testimony that bore on an important issue' or that certain evidence which was improperly received 'clouded a crucial issue' in the case." ***State v. Darcy N.K.***, 218 Wis. 2d 640, 667, 581 N.W.2d 567 (Ct. App. 1998) (quoting ***State v. Hicks***, 202 Wis. 2d 150, 160, 549 N.W.2d 435 (1996)). To establish a miscarriage of justice, Seymour "must convince us 'there is a substantial degree of probability that a new trial would produce a different result.'" ***Darcy N. K.***, 218 Wis. 2d at 667 (quoting ***State v. Caban***, 210 Wis. 2d 597, 611, 563 N.W.2d 501 (1997)). An appellate court will exercise its discretion to grant a new trial in the interest of justice "only in exceptional cases." ***State v. Cuyler***, 110 Wis. 2d 133, 141, 327 N.W.2d 662 (1983).

¶21 Seymour argues the real controversy has not been fully tried because the jury did not hear Frank and Ruth Sanapaw's testimony regarding Casper's alleged inculpatory statements. As noted above, Seymour fails to establish that he was prejudiced by the omission of this arguably weak testimony that counsel reasonably believed could compromise the defense. Given the testimony's low probative value, we conclude that its omission did not prevent the real controversy from being fully tried. Seymour also contends there has been a miscarriage of

[2] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

justice based on the omission of testimony from Ruth, Frank and Orlin Sanapaw and Lace Weeder concerning Casper's alleged admissions. Orlin, however, did not testify that he heard Casper admit shooting Moses but, rather, that he "heard [Casper] was going around saying he shot the cop." Seymour offers no basis for admission of this double hearsay. With respect to the other three witnesses, each is an acknowledged friend of Seymour. In light of Moses' emphatic denial that Casper was the shooter, Seymour fails to establish to a substantial degree of probability that a jury would reach a different verdict based on this proffered testimony.

¶22 Ultimately, these claims for discretionary reversal in the interest of justice hinge on a conclusion that counsel was ineffective for failing to pursue the Casper defense. As we discussed above, counsel made a reasonable strategic decision to forego that defense. Moreover, WIS. STAT. § 752.35 "was not intended to vest this court with power of discretionary reversal to enable a defendant to present an alternative defense that may have not been advanced by trial counsel … whose representation is alleged to be ineffective because of that failure." ***State v. Flynn***, 190 Wis. 2d 31, 49 n.5, 527 N.W.2d 343 (Ct. App. 1994).

¶23 Finally, Seymour asserts there has been a miscarriage of justice because the identification expert's "information about the significant relationship between distance and accurate information was minimally presented to the jury." Seymour fails to establish to a substantial degree of probability that the submission of expert testimony on a point that required no expert testimony, would produce a different result. Accordingly, we conclude there is no reason to exercise our discretionary authority under WIS. STAT. § 752.35 to grant Seymour a new trial.

By the Court.—Judgment and order affirmed.

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