

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 3, 2009

David R. Schanker
Clerk of Court of Appeals

NOTICE

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Appeal No. 2008AP651-CR

Cir. Ct. No. 2005CF6366

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RAHIM ABDUL JACKSON,

DEFENDANT-APPELLANT.

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

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

¶1 BRENNAN, J. Rahim Abdul Jackson appeals from a judgment entered after a jury found him guilty of five counts of armed robbery with threat of force as a party to a crime, contrary to WIS. STAT. §§ 943.32(1)(b) & (2) and

939.05 (2005-06).¹ He also appeals from an order denying his postconviction motion alleging ineffective assistance of counsel. Jackson claims: (1) his trial counsel provided ineffective assistance by failing to call two alibi witnesses; and (2) he is entitled to a new trial in the interests of justice. We reject both contentions and affirm the judgment and order.

BACKGROUND

¶2 The charges in this case arose from multiple armed robberies which were charged in one criminal complaint. The State filed an amended information before trial charging Jackson with five counts arising out of two armed robberies. Counts one through four pertained to an armed robbery of four victims on October 26, 2005 at 7:30 p.m. at Lores Bar & Grill in Milwaukee. Four masked persons entered the tavern, one of whom was brandishing a handgun. Owner Harish Mehta and patrons Jason Rick, Theresa Thompson and Leroy Anderson were robbed.

¶3 At 8:08 p.m., the ATM card taken from Rick was used at an ATM machine near Jack's Liquor store. Surveillance tape from the liquor store showed Paul Anthony Bates and Jackson attempting to withdraw cash using Rick's stolen ATM card. Bates was brought in for questioning and admitted committing the robbery. He told police that Jackson and two other accomplices were involved. Jackson admitted that he was on the liquor store video trying to use the stolen ATM, but denied committing the robbery.

¹ All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

¶4 The fifth count arose out of the second robbery which occurred on October 31, 2005 at approximately 9:18 p.m. at the Corner Pub. Bartender David Beix told police that four, black, masked males entered the bar and one had a handgun. They stated: “It’s a robbery” and demanded the money from the cash register. Beix opened the cash register and turned over the money to the robbers. Four patrons in the tavern were also robbed. When the police questioned Bates about this robbery, he admitted that he and Jackson and the same two accomplices from the first robbery also committed this robbery.

¶5 Bates, Jackson and a third defendant were charged. Jackson pled not guilty. Bates worked out a plea agreement with the prosecutor and agreed to testify against Jackson. Jackson filed a notice of intent to call alibi witnesses listing three names: Shauna Coleman, Jessica Williams and Emery Hines. After several adjournments, the case was presented to a jury on October 30, 2006 through November 1, 2006. At the close of the State’s case, defense counsel advised the court that no alibi witnesses would be called. Jackson did not testify and no witnesses were called by the defense.

¶6 The jury returned a guilty verdict on all five counts. Jackson was sentenced and judgment was entered. Subsequently, he filed a postconviction motion asserting that his trial counsel provided ineffective assistance by failing to call any alibi witnesses. The trial court conducted a *Machner* hearing.² At the hearing, the trial court heard testimony from Jackson’s trial counsel (Louis Epps) and from two alibi witnesses, Coleman and Williams,³ who testified only as to the

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

³ The alibi argument raised by Jackson involves only Coleman and Williams, and not the third alibi witness, Emery Hines.

second robbery date. At the conclusion of the hearing, the trial court found that Epps's account was more credible than the witnesses on the content of the proposed alibi trial testimony, on his reasons for not calling the two witnesses and on his consultation with Jackson about the decision not to call the alibi witnesses. The trial court ruled that Epps's decision not to call alibi witnesses was a reasonable strategic decision and therefore his representation was not deficient. The trial court also found that even if the omission constituted deficient performance, it was not prejudicial—that the result of the trial would have been the same even if the alibi witnesses had testified. This appeal followed.

DISCUSSION

A. Ineffective Assistance of Counsel.

¶7 Jackson asserts that his trial counsel provided ineffective assistance by failing to call any alibi witnesses on his behalf. This claimed error applies to the October 31, 2005 incident only because the two witnesses testified only with regard to that date. Jackson's argument is that the alibi witnesses were critical to his defense because they contradicted, in part, the main witness against him, Bates. Bates admitted committing the robberies at both taverns, but testified at trial that Jackson was part of the foursome in both robberies. There was no physical evidence connecting Jackson to the Lores Bar & Grill robbery, although the video showed him using the ATM card obtained in the robbery right after it. The defense theory was that Bates falsely implicated Jackson in exchange for a better deal for himself. Thus, Jackson argues that guilt or acquittal in his case depended solely on whether the jury believed Bates. Jackson argues that if alibi witnesses were called to testify, the jury would have had a basis to conclude that Bates was lying about Jackson being involved. The State responds that trial counsel's

decision not to call alibi witnesses was a reasonable trial strategy and therefore did not constitute ineffective assistance. We agree with the State.

¶8 To sustain a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that counsel's errors were prejudicial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Sanchez*, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996). A court need not address both components of this inquiry if the defendant does not make a sufficient showing on one. *Strickland*, 466 U.S. at 697.

¶9 An attorney's performance is not deficient unless he or she "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687. To satisfy the prejudice prong, defendant must demonstrate that counsel's deficient performance was "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* In other words, there must be a showing that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

¶10 Whether counsel's actions constitute ineffective assistance is a mixed question of law and fact. *State v. Pitsch*, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985). "The trial court's determinations of what the attorney did, or did not do, and the basis for the challenged conduct are factual and will be upheld unless they are clearly erroneous." *State v. Johnson*, 133 Wis. 2d 207, 216, 395 N.W.2d 176 (1986) (citation omitted). The ultimate conclusion, however, of whether the conduct resulted in a violation of defendant's right to effective

assistance of counsel is a question of law for which no deference to the trial court need be given. *State v. Harvey*, 139 Wis. 2d 353, 376, 407 N.W.2d 235 (1987).

¶11 Here, the alleged error was Epps's decision not to call Coleman or Williams to testify. Jackson argues there was no good reason not to call them and Epps's reasons as testified to at the *Machner* hearing were "mistaken" memories of what the witnesses would have testified to. Epps testified at the *Machner* hearing that he made a specific strategic decision not to call these alibi witnesses after the State finished presenting its case. His reason was based on his success in the cross-examination of Bates and the weakness of the proposed alibi witnesses.

¶12 The theory of defense was that Bates implicated Jackson to gain consideration for himself. The strategy was to impeach Bates. Epps testified that his cross-examination of Bates had "shredded him sufficiently that we could argue to the jury that they could not place Mr. Jackson [at the crimes] based on [Bates's] word alone." During the cross-examination, Epps impeached Bates on inconsistencies in his statement and on Bates's admission that he had a gun only after DNA came back linking the gun to Bates and not Jackson. Prior to the DNA results, Bates claimed that Jackson was the only one with a gun.

¶13 In the heat of the trial, Epps believed his cross-examination of Bates had gone well and the alibi witnesses presented problems. He remembered that they had been vague as to times and they placed Jackson in the company of Bates which Epps did not want to do. So, he made a strategic decision to forgo calling the alibi witnesses to avoid taking the risk such testimony could bring. In addition, Epps testified:

The other problem that came up was that they placed Mr. Bates at a location outside of Mr. Jackson's house and that they indicated that Mr. Bates had been there

and that they had left. They had been there with Mr. Jackson, that Mr. Bates had come there, that they had left and that when they left, Mr. Bates was still outside of Mr. Jackson's house, and that caused me some concern because I felt at the time that Mr. Bates had been damaged enough in cross-examination that his credibility was in doubt enough that I didn't want to do anything that would have given I guess any type of support or corroboration to his argument that he was with Mr. Jackson on that particular date.

Epps, an experienced criminal defense lawyer who had represented individuals charged with felonies for the past thirty years, felt it would not be in the best interests of his client to call the alibi witnesses.

¶14 Epps further testified at the *Machner* hearing that he discussed the decision to forgo calling the alibi witnesses with Jackson, Jackson understood the decision and did not object. Epps also testified that ultimately the decision would be Jackson's and if "he had insisted that I call them, then I would have called them. But I certainly would have told him why I didn't think it was a good idea at the time."

¶15 Coleman's testimony at the *Machner* hearing was somewhat different than Epps recalled her statement at the time of trial. Coleman testified at the *Machner* hearing that she was Jackson's girlfriend and pregnant with his child at the time the second robbery occurred. She told the court that on October 31, 2005, her cousin, Williams, came and picked her up and they drove to Jackson's home about 7:00 or 7:30 p.m. She knew it was not earlier than 7:00 p.m. because she had already eaten dinner. The three then went to a nearby Wal-Mart where she browsed for baby clothes and Jackson purchased clippers. After that, they went through the drive-thru at Checkers restaurant to get some food and parked near Jackson's house. Coleman believes it was about 9:00 p.m. at this point in time. The girls stayed in the car to eat and Jackson went inside his home to eat.

Some time later, Jackson came back out to the car. At this time, Coleman and Jackson argued, culminating in the girls leaving Jackson at about 10:30 p.m. When questioned by the court, Coleman admitted that she was not 100% sure that she spoke with defense investigators about the specific date of October 31, 2005, suggesting some lack of certainty as to the date. She testified she had come to the trial and talked to Epps but that she had not seen Williams there.

¶16 The second alibi witness, Williams, testified that Jackson and Coleman came to pick her up on October 31, 2005 at about 4:00 or 5:00 p.m. and that the three drove around to different friends' homes, including one home where they stopped, went in and watched television with three other people present. Then they left, drove around some more, went through the drive-thru at Checkers restaurant and parked to eat. Williams stated that they did not park by Jackson's house and that the argument between Coleman and Jackson took place in the car. She stated the two dropped her off at her home sometime after 9:00 p.m. Williams testified she never came to court for the trial, but had been interviewed before trial by a person who was not from the police.

¶17 Jackson's appellate counsel argued at the *Machner* hearing that Coleman's and Williams's testimony at that hearing showed that Epps never interviewed Williams on the day of trial and that he was mistaken in his testimony that they were vague as to time and that they placed Jackson in the company of Bates. Accordingly, Jackson argues that Epps was wrong not to call them.

¶18 The first part of the analysis of the ineffective claim then is whether the trial court's factual findings at the *Machner* hearing were clearly erroneous. The court found Epps credible on his memory of what Williams and Coleman would have testified to at the time of trial and as to whether Epps consulted with

Jackson on the decision not to call the witnesses. The trial court did not find the discrepancy as to whether Epps met face-to-face with Williams during the trial significant with respect to the strategic decision at issue in this case, but rather attributed it to the passage of time between the trial and the *Machner* hearing. The trial court, as the factfinder of the *Machner* hearing, found Epps's testimony to be more credible.

¶19 Issues such as inconsistencies in the testimony or contradictory evidence are for the trier of fact to resolve. See *State v. Perkins*, 2004 WI App 213, ¶15, 277 Wis. 2d 243, 689 N.W.2d 684. The trial court was in the best position to determine the credibility of the witnesses having seen and heard them all. The trial court found Epps the most believable on both points. This finding is not clearly erroneous from this record. The trial court, which was the same court that presided over Jackson's trial and personally heard all the trial witnesses testify, ruled:

Mr. Epps is known to this court as being a very credible attorney. He obviously has extensive experience in representing criminal defendants, and the court recalls his performance in representing the defendant specifically in this trial. The court felt that he was very effective in his representation of the defendant at trial. The court did hear the cross-examination of the witnesses.

¶20 The next part of the ineffective assistance analysis is whether the trial court's legal conclusions were correct. The trial court rejected Jackson's contention that there was no good reason not to call the witnesses. Instead, the court found several "very obvious reasons" not to call Coleman or Williams to testify:

Number one, [Epps] did testify under oath ... he does recall and did testify very vividly, and I believe credibly, that she wasn't certain as to the times and place and she was not being specific. Now, months later

obviously she has testified today as to specific events and specific times. However, the court did have the opportunity to observe her as well, and I would note that one thing that stood out, aside from the discrepancy in her testimony with Ms. Williams, ... that when asked questions regarding specific times and what happened on October 31st, 2005, she very visibly flushed in terms of her face. Her face turned very red to the court which was evidence because I was only a few feet away from her. I noticed that not only in terms of her reaction, but I did not feel that she was being entirely credible in terms of her recitation of the events on October 31st, 2005, as specifically as to the times and what they were doing ... in this court's opinion I did not think she was being entirely credible.

... The fact alone that she wasn't specific as to the time and place at the time that he spoke to her, which would have been on the date of the trial.

And I do believe and find his testimony credible that he did discuss this with the defendant, and I believe the record from the trial substantiates that, ... Mr. Epps is an experienced trial counsel. He's testified under oath. He discussed this with Mr. Jackson, and quite frankly, this was a strategic decision on his part, ... based upon those factors he testified to including ... the effective cross-examination of Mr. Bates, the fact that the witness was not specific as to the times, and the fact that it may have placed Mr. Jackson with Mr. Bates on the evening of October 31st, 2005.

¶21 We agree with the trial court's analysis. Based on the specific and credible testimony Epps provided at the *Machner* hearing, we conclude that the decision to not call alibi witnesses was a reasonable strategic choice and does not constitute ineffective assistance of counsel.

¶22 At the time Epps made this decision, he was operating with the belief that he had successfully impeached the State's key witness. The alibi witnesses' proposed testimony at the time of trial placed Jackson in the company of Bates, bolstering Bates's credibility which Epps had just worked to undermine.

They were vague about times and events. And finally, Epps consulted with Jackson on this strategy choice which was placed on the record.

¶23 In reaching this conclusion we recognize these cases are guided by the principle set forth in *Strickland*, 466 U.S. at 690 “that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” In hindsight, we know now that the jury found Bates’s testimony to be credible. Hindsight, however, is not the standard governing our review: “one should not by hindsight reconstruct the ideal defense. The test of effectiveness is much broader and an accused is not entitled to the ideal, perfect defense or the best defense but only to one which under all the facts gives him reasonably effective representation.” *State v. Harper*, 57 Wis. 2d 543, 557, 205 N.W.2d 1 (1973). Here, Epps provided Jackson with reasonably effective representation. The trial court, which personally observed Epps in his representation of Jackson in this case, noted: “The court felt that [Epps] was very effective in his representation of the defendant at trial.” Thus, Jackson not only received *reasonably* effective representation, but *very* effective representation.

¶24 Moreover, even if Epps would have elected to call an alibi witness, and even if her testimony at trial would have been the same as she offered at the *Machner* hearing, the trial court found that Coleman’s testimony would not have changed the outcome of this case:

I do not find that the defendant was prejudiced or that there was a reasonable probability that, but for Mr. Epps’ failure to call Ms. Coleman, that the result of the proceeding would have been different. In fact, from what I heard this afternoon, I believe that the jury may have come to an even sooner or easier decision than they did.

¶25 We agree with the trial court's assessment. Although Coleman offered testimony at the *Machner* hearing that Jackson was with her and Williams from 7:00 p.m. to 10:30 p.m. on October 31, 2005, she testified that he left her sight at 9:00 p.m. and went into his house. Coleman testified he returned to her sight in the car at some later, unspecified time. As an alibi for a 9:18 p.m. armed robbery which occurred in close proximity to Jackson's home, this gap is critical. In addition, the trial court found she was not a credible witness. Her story differed in many respect from Williams's and contained internal inconsistencies. Further, Coleman had an obvious bias and motivation for offering Jackson an alibi: She was pregnant with his child and presumably did not want the father of her child to be in jail.

¶26 In its decision, the trial court focused more on Coleman's alibi testimony as the primary witness, but much of the same reasoning discussed relative to Coleman applies to Williams as well. Her version was inconsistent in many respects with Coleman's, she was not specific with respect to times and she had Jackson dropping her off at home some time around 9:00 p.m. which directly contradicts Coleman. These factors, together with Epps's belief that Williams would place Bates with Jackson on the night in question renders Epps's decision to not call her to testify a reasonable strategic decision and consistent with the theory of defense at the time. The inclusion of the alibi witnesses' testimony was not likely to create a different result for Jackson. Accordingly, we conclude there was no prejudice to Jackson.

B. Interests of Justice.

¶27 Jackson requests that we exercise our discretionary reversal power under WIS. STAT. § 752.35 on the basis that the real controversy was not tried and

the interests of justice demand he be given a new trial so the jury could hear the testimony of Coleman. We are not convinced that exercising our discretionary reversal power is appropriate in this case.

¶28 WISCONSIN STAT. § 752.35 provides:

In an appeal to the court of appeals, if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried, the court may reverse the judgment or order appealed from, regardless of whether the proper motion or objection appears in the record and may direct the entry of the proper judgment or remit the case to the trial court for entry of the proper judgment or for a new trial, and direct the making of such amendments in the pleadings and the adoption of such procedure in that court, not inconsistent with statutes or rules, as are necessary to accomplish the ends of justice.

We will grant discretionary reversals under this statute only “infrequently and judiciously.” *State v. Ray*, 166 Wis. 2d 855, 874, 481 N.W.2d 288 (Ct. App. 1992). There is nothing in this record warranting a discretionary reversal.

¶29 Jackson argues that Coleman’s testimony was important and failing to present it to the jury resulted in the real controversy not being decided. He cites *State v. Ward*, 228 Wis. 2d 301, 306, 596 N.W.2d 887 (Ct. App. 1999) for the proposition that the real controversy has not been tried when a “jury was erroneously not given the opportunity to hear important testimony.” Such was not the case here. We have concluded that the decision constituted reasonable trial strategy and did not constitute ineffective assistance of counsel. Thus, there is no basis for us to conclude that the real controversy was not tried or that a new trial is necessary in the interests of justice.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.

