COURT OF APPEALS
DECISION
DATED AND RELEASED

September 6, 1995

No. 94-2681-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

GEORGE A. KING,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: ROBERT W. LANDRY, Reserve Judge, and PATRICIA D. MCMAHON, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Schudson, JJ.

PER CURIAM. George A. King appeals from a judgment convicting him of first-degree intentional homicide while armed with a dangerous weapon, and from an order denying him post-conviction relief. King asserts the following claims of trial-court error: (1) that the trial court erred in denying his request for a continuance; (2) that he was denied his right

to effective assistance of counsel; and (3) that the trial court erred in denying his request for a new trial. We affirm.

The complaint alleged that King's nephew, Michael Sims, had become involved in a dispute with Bernard Williams. On July 29, 1992, King confronted Williams at his nephew's request. King shot and killed Williams. On July 30, 1992, King was charged with first-degree intentional homicide in the death of Williams. On September 14, 1992, the trial court scheduled this matter for trial on November 2, 1992. On October 11, 1992, King filed a notice of alibi in which King alleged that at the time of the offense he was at 2163 N. 41st Street in Milwaukee with two women. On or about October 29, 1992, King claimed to recall that his actual location on the date and time of the shooting of Williams was different from the location alleged in his previously filed notice of alibi. On October 30, 1992, trial counsel requested an adjournment, informing the trial court that King had just advised him of the second alibi and that he needed time to investigate this new information. The trial court denied his request. Because a court reporter was not present at the time of the request, the trial court allowed defense counsel to renew the motion on the day of trial. On November 2, 1992, defense counsel again requested an adjournment. Defense counsel, however, did not present any second alibi witnesses as part of his offer of proof, stating that it was his understanding that the trial court did not want the second alibi witnesses present at the hearing. The motion for an adjournment was denied again and the case was tried on November 2, 1992.

At the trial, Anthony Rollins, who was with Williams when he was shot, testified that he and another man, Eric Turner, drove Williams to his cousin's house on the day of the shooting. Rollins testified that as Williams was getting out of the car at his cousin's house, a man drove up, exited the driver's side of the car, and charged at Williams with a gun. Two other people also got out of the other car. After a verbal exchange between Williams and the driver of the other car, the driver shot Williams two times in the chest. Rollins identified King as the assailant. Turner was not able to make a positive identification of King. He did, however, tell a police officer later that King "looked like" the man who shot Williams but he could not be sure.

Reginald Jones, who was in the other car with King, testified that on the day of the shooting, he and King picked up a third man, King's nephew Michael Sims, and confronted Williams. Jones testified that after all of them got

out of the car, King began arguing with Williams. Jones testified that King "hit Williams in the head with his right hand." He also testified that he heard shots but did not see who had the gun. He later signed a statement that was written by Detective David Clarke stating that he identified King from a photo array after the shooting. On cross-examination, however, Jones indicated that he signed the statement because he was told to do so by the detective. At trial, Detective Clarke disagreed with this characterization of what happened, stating that he wrote Jones's statement, read it back to him, and then Jones signed the statement freely.

Darlene Williams, the victim's mother, testified that she lived across the street from where the shooting occurred. She stated that although she heard gunfire coming from the crime scene, she was not able to get a clear view of the assailant. Hillary Reed, a neighbor of Ms. Williams, testified that he also heard gunfire coming from the crime scene. He too was unable to positively identify the assailant. Police Officer John Gunning, over hearsay objections, testified that based upon his conversations with Sims, a description was broadcast of the car in question. Further, a person with the nickname "Buddy" was given as a possible suspect. Officer Gunning was told by Sims that "Buddy" was Sims's uncle.

The defense called Samuel Roberts who testified that he was Williams's cousin. He was asleep at the home of Hillary Reed when he was awakened by four gunshots. He testified that he saw Michael Sims running from the crime scene with a gun. Tyrone Roberts, who was in the house with Samuel Roberts, saw Sims with a gun in his hand walking towards Sims's house. Tyrone Roberts testified that it was a nickel-plated .380 that he had seen in Sims's possession during a previous altercation with Williams.

King was found guilty of first-degree intentional homicide. After sentencing, King obtained a new attorney and filed post-conviction motions raising the three issues presented on this appeal. After an evidentiary hearing on May 6, 1994, the trial court denied King's post-conviction motions.

1. Request for Continuance

A trial court's grant or denial of a motion for a continuance to obtain the attendance of witnesses will not be disturbed on appeal unless the trial court erroneously exercised its discretion. ***Elam v. State***, 50 Wis.2d 383, 389-390, 184 N.W.2d 176, 180 (1971). "There is no set test for determining whether the trial court [erroneously exercised] its discretion. Rather, that determination must be made based upon the particular facts and circumstances of each individual case." ***State v. Anastas***, 107 Wis.2d 270, 273, 320 N.W.2d 15, 16 (Ct. App. 1982). Among the factors to be considered are "whether the testimony of the absent witness is material, whether the moving party has been guilty of any neglect in endeavoring to procure the attendance of the witness, and whether there is a reasonable expectation that the witness can be located." ***Bowie v. State***, 85 Wis.2d 549, 556-557, 271 N.W.2d 110, 113 (1978). In determining whether a trial court acted erroneously, the reviewing court must also consider "the defendant's right to adequate representation by counsel and the public's interest in the prompt and efficient administration of justice." ***State v. Echols***, 175 Wis.2d 653, 680, 499 N.W.2d 631, 640 (1993), *cert. denied*, 114 S. Ct. 246. King urges error in the denial of his request for a continuance to allow his second alibi witnesses to be interviewed and produced for trial; he claims that his interest in a fair trial outweighed that of the State in a fast trial, the testimony of the second alibi witnesses was material, the second alibi witnesses "were capable of being produced," and his late disclosure was justified because of the unique circumstances of the second alibi. All of King's arguments fail because his request for a continuance was inadequately supported by the evidence he presented.

First, King made no showing that the testimony of the witnesses would be material to his case; that is, he has not offered any evidentiary proof—by affidavit or sworn testimony—that the witnesses would testify as he represents. King claims that he was in Racine at St. Luke's Hospital visiting his son's uncle, Rodney Nabors, at the time the crime was committed. King allegedly travelled to Racine with Nabors's girlfriend and child. This is the main thrust of the second alibi. In his post-conviction motion, King states that Nabors was prepared to testify on King's behalf. Nabors and his girlfriend did not, however, testify at an offer of proof, at trial, or at the post-conviction hearing. Further, the second alibi removed King from the crime scene. His presence at the crime scene, however, was substantiated by numerous witnesses; the only real dispute was whether he was the gunman, not whether he was at the crime scene.

Second, King was negligent in waiting until the eve of trial to tell his defense attorney about his second alibi. A defendant's negligence can be shown if the defendant waits "until an unreasonably short time before a trial is scheduled to begin" before asking for a continuance to obtain a witness. ***Elam***, 50 Wis.2d at 391, 184 N.W.2d at 181. In ***State v. Moffett***, 46 Wis.2d 164, 165-167, 174 N.W.2d 263, 264-265 (1970), the supreme court held that the trial court did not misuse its discretion when it denied a motion for a continuance because the defendant had waited until the day of trial to inform his counsel of the other relevant witnesses. In ***McClelland v. State***, 84 Wis.2d 145, 267 N.W.2d 843 (1978), the court elaborated on its holding in ***Moffett***, stating that "[i]t is the implicit holding of *Moffett* that the defendant personally is to be held responsible when he has not timely cooperated with his attorney to insure the production of necessary witnesses." ***Id.***, 84 Wis.2d at 153, 267 N.W.2d at 846.

As in ***Moffett***, King did not cooperate timely with his attorney. He had an obligation to inform his counsel of any witnesses who could help his case. King had approximately two months before the trial to inform his counsel of the second alibi. King's explanation at the post-conviction hearing regarding why he waited so long to inform defense counsel of this alibi was that another attorney told him to keep this information to himself was not credited by the trial court. According to King, he told another attorney about the second alibi in a conversation concerning the possibility of this attorney representing him. At the post-conviction hearing, King testified that he was told by this attorney to keep the second alibi a secret until that attorney decided if he wanted to take King's case. The attorney testified that King told him about being in Racine, but denied that he told King to keep the information secret. Rather, he told King to fully cooperate with his appointed counsel. The trial court believed the lawyer. This finding is not clearly erroneous. *See* RULE 805.17(2), STATS. Therefore, as the trial court concluded, King was negligent in attempting to procure the alleged second alibi witnesses.

Third, King points to nothing in the record that enables us to conclude that the second alibi witnesses were "capable of being produced." None of the alibi witnesses testified at the November 2, 1992, offer of proof, during the trial or at the May 2, 1994, post-conviction motion hearing. At no time throughout the proceedings was there any indication that Nabors or his girlfriend would actually testify.

Finally, King fails the test set forth in ***Echols***. The trial court considered the need for efficient and speedy administration of justice. The record reflects that the trial court found that a continuance for King at the "eleventh hour" would be inconsistent with the goal of speedy justice, which exists to serve not just the defendants, the State or the victims, but also the court system and community as a whole. *See* ***Echols***, 175 Wis.2d at 680, 499 N.W.2d at 640. In this case, the record clearly reveals that the trial court carefully considered and evaluated King's interests and balanced those interests with the need for prompt and efficient justice. The trial court properly exercised its discretion in denying King's request for a continuance.

2. Ineffective Assistance of Counsel

For a defendant to prevail on a claim of ineffective assistance of counsel, he or she must establish that counsel's actions constituted deficient performance, and that the deficiency prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Because representation is not constitutionally ineffective unless both elements of the test are satisfied, ***State v. Guck***, 170 Wis.2d 661, 669, 490 N.W.2d 34, 37 (Ct. App. 1992), *aff'd*, 176 Wis.2d 845, 500 N.W.2d 910 (1993), we may dispose of an ineffective-assistance-of-counsel claim where the defendant fails to satisfy either element. ***State v. Johnson***, 153 Wis.2d 121, 128, 449 N.W.2d 845, 848 (1990).

On appeal, the issues are both fact and law. ***Strickland***, 466 U.S. at 698. The trial court's findings on what the attorney did, what happened at trial, and the basis for the challenged conduct are factual and will be upheld unless they are clearly erroneous. ***State v. Weber***, 174 Wis.2d 98, 111, 496 N.W.2d 762, 768 (Ct. App. 1993). Whether counsel's actions were so deficient and if so, whether they prejudiced the defense, however, are questions of law that we review independently. ***State v. Hubanks***, 173 Wis.2d 1, 25, 496 N.W.2d 96, 104-105 (Ct. App. 1992), *cert. denied*, 114 S. Ct. 99 (1993).

A court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. ***Strickland***, 466 U.S. at 697. The standard for the element of prejudice is whether "there is a reasonable probability that, but for

counsel's errors, the result of the proceeding would have been different." ***Strickland***, 466 U.S. at 694.

We are requested to determine whether King's defense counsel was ineffective in failing to procure King's second alibi witnesses for trial and by failing to have King testify regarding the second alibi. King, however, has failed to show prejudice; he has not shown that Nabors or his girlfriend could have been able to be produced at trial. In the absence of such a showing, King cannot argue that he was denied effective assistance of counsel.

King also argues that the failure to call him as a witness to testify about the second alibi was also deficient performance. Again, King has not demonstrated prejudice. This second alibi contradicted the first alibi. In light of this, and in light of the strong eyewitness evidence placing him at the scene, King has not demonstrated that "the result of the proceeding would have been different," ***Strickland***, 466 U.S. at 694, had he testified. Since King has failed to prove that he was prejudiced by the alleged deficient representation, his ineffective-assistance-of-counsel claim must be rejected.

3. Request for New Trial

Finally, King asks this court to exercise our power of discretionary reversal and order a new trial. Pursuant to § 752.35, STATS., we may reverse a circuit court judgment and remand a matter for a new trial, "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." Section 752.35, STATS. "[A] new trial in the interest of justice will be granted only if there has been an apparent miscarriage of justice and it appears that a retrial under optimum circumstances will produce a different result." ***Jones v. State***, 70 Wis.2d 41, 56, 233 N.W.2d 430, 438 (1975).

King argues that the real controversy has not been fully tried because the absence of the second alibi evidence deprived the jury of the opportunity of hearing important testimony regarding his guilt. This is a repeat of the argument we have already rejected and does not warrant reversal under § 752.35, STATS. *See* ***Mentek v. State***, 71 Wis.2d 799, 809, 238 N.W.2d 752, 758

(1976) ("zero plus zero equals zero"). Further, King asserts that his nephew, Michael Sims, who could not be located by the State for the trial, could provide helpful testimony at a new trial. King, however, does not indicate what this testimony would be or how it would produce a different result at a new trial.

King has failed to establish that it is probable that justice has in any way been miscarried or that a retrial would produce a different result.

By the Court.—Judgment and order affirmed.

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