COURT OF APPEALS
DECISION
DATED AND RELEASED

May 7, 1996

NOTICE

No. 95-1672-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RUSSELL STOKES,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JOHN J. DIMOTTO and DIANE S. SYKES, Judges. *Affirmed*.

Before Sullivan, Fine and Schudson, JJ.

PER CURIAM. Russell Stokes appeals a judgment of conviction for second-degree sexual assault and from an order denying his motion for postconviction relief. He argues that trial counsel was ineffective for failing to present testimony of two alibi witnesses. He also seeks a new trial in the interest of justice. We conclude that the trial court's factual findings support its

conclusion that trial counsel's performance was not deficient and a new trial is not necessary. We therefore affirm both the judgment and the order.

Stokes was prosecuted for sexually assaulting and robbing Carmen G. on the night of April 27, 1992, in Milwaukee.[1] To support its case, the State relied almost entirely on the testimony of the victim and her identification of Stokes through a photo array and a lineup.

Stokes attempted to present an alibi defense to establish that he was in Marion, Arkansas, at the time of the crime. An uncle and three of Stokes's siblings, including a sister who lived at the house where the assault occurred, testified at trial. Stokes's defense rested primarily on the assumption that because Stokes would regularly visit them when he was in Milwaukee, and because he had not done so on April 27, 1992, the date of the crime—he could not have been in Milwaukee at the time. Stokes's mother testified that she lived across the street from Stokes in Marion and that she saw him every day in April of 1992. Stokes contends that two additional alibi witnesses from Marion—Elijah Knighten and A.D. Clark—should have been presented to the jury.

At Stokes's ***Machner*** hearing, Knighten testified that he lived across the street from Stokes in Marion, that he worked every day except Sunday, and that he saw Stokes every morning when he (Knighten) went to work and every evening when he returned home from work. Further, Knighten testified at the hearing that he came to Milwaukee to testify but that Stokes's attorney refused to call him at trial. Knighten also testified that he attempted to talk with Stoke's attorney but was unsuccessful, stating:

> He didn't want to listen. He said he didn't have no use for us.
>
> We couldn't come in there, so there wasn't nothin' else for us to do. We sit out there and wait.

[1] The jury acquitted Stokes of the robbery charge.

Clark also testified that he lived in Marion in April 1992, that he saw Stokes every day that month, and that he and Stokes went to the dog track in West Memphis, Arkansas, on the evening of April 27, from approximately 6:30 p.m. to 11:00 p.m. Like Knighten, Clark testified that he came to Milwaukee intending to testify for Stokes, but that Stokes's attorney prevented him from doing so.

Mellie Stokes, Stokes's mother, also testified at the postconviction hearing. She stated that she brought Knighten and Clark with her from Marion because both defense counsel and defense counsel's investigator instructed her to. She testified that she had told the investigator that Stokes often went to the dog track with Knighten and Clark.

Stokes also testified at the postconviction hearing. He stated that in addition to informing his defense counsel about the existence of Knighten and Clark, he also told defense counsel of their presence at the trial "at least a half a dozen times," but that defense counsel refused to call either to testify.

At the ***Machner*** hearing, Stokes's defense counsel presented a much different account of the sequence of events. He testified that he subpoenaed many witnesses from Milwaukee and Arkansas, including Stokes's mother, but he had never known of Knighten until the morning of the first day of the trial. He stated that the only reason he took notice of Knighten at that time was because someone had told him that Knighten had driven Stokes's mother up from Arkansas. Stokes's attorney testified that he had never met Clark before the trial and was informed that he may have provided an alibi only after the trial.

This case was previously before this court to decide whether the trial court's determination that defense counsel had not provided ineffective assistance of counsel was consistent with the facts. We found that defense counsel's decision not to call the witnesses may have been prejudicial, but more facts were needed to determine whether his actions were deficient. *See* ***State v. Stokes***, No. 94-1358, unpublished slip op. (Wis. Ct. App. April 4, 1995); *see also* ***Strickland v. Washington***, 466 U.S. 668 (1984) (articulating a two-pronged test requiring defendant to show counsel's performance was deficient and prejudicial). We now conclude that the trial court's finding that defense counsel

neither knew, nor could have reasonably known, that Knighten and Clark were alibi witnesses is supported by the record, and therefore, defense counsel's performance was not deficient.

To establish ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and also that this deficient performance was prejudicial. ***Strickland***, 466 U.S. at 687. Analysis of both the performance and prejudice prongs involve mixed questions of law and fact. ***State v. Johnson***, 153 Wis.2d 121, 127, 449 N.W.2d 845, 848 (1990). We will not reverse the trial court's findings of fact unless the findings are clearly erroneous. ***Id***. The ultimate determination of whether counsel's performance was deficient and prejudicial is reviewed *de novo*. ***Id***. at 128, 448 N.W.2d at 848. In applying the two-pronged ***Strickland*** test, both elements must be satisfied—and if the defendant fails to adequately show one prong, we need not address the second. ***Strickland***, 466 U.S. at 697.

In our review of the trial court's findings, we consider that the trial court is the ultimate arbiter of the credibility of defense counsel and all other witnesses at a postconviction hearing on the claim of ineffective assistance of counsel. ***State v. Marty***, 137 Wis.2d 352, 359, 404 N.W.2d 120, 123 (Ct. App. 1987). In addition, because of the difficulties attendant to making a post hoc evaluation of defense counsel's performance, we recognize that "counsel is *strongly presumed* to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." ***Strickland***, 466 U.S. at 690 (emphasis added).

On remand, the trial court evaluated the strength of Knighten and Clark's testimony and found it to be vague and contradictory. Knighten claimed to have seen Stokes every day during April of 1992 because he saw Stokes on his (Knighten) way to work and on his way home from work. Knighten, however, admitted to not knowing what day of the week April 27, 1992 (date of the assault) was. Knighten's testimony, simply stated, implies that because Knighten believed that he saw Stokes every day in April of 1992, he must have seen Stokes on April 27, 1992. Knighten also testified that he stopped seeing Stokes on April 28th or 29th, when Stokes was taken to jail, whereas the record shows that Stokes was not arrested until June of 1992.

Knighten testified that he could not identify the lawyer with whom he had been in contact. Knighten's testimony was contradictory in that he first said that a lawyer, whose name he could not remember, had asked him to come to Milwaukee to testify. Then he testified that it was actually Stokes's mother who asked him to come to Milwaukee. Knighten stated that once at the trial, "the lawyer" or the "little short guy" who testified earlier in the hearing, had told him that he could not enter the courtroom, so Knighten waited outside in the hallway.

The trial court found Clark's testimony at the postconviction hearing similarly incredible. Clark's alibi for Stokes, like Knighten's, boils down to the implication that because Clark and Stokes often went to the dog track, they must have done so on April 27, 1992. Like Knighten, Clark was not able to identify which day of the week April 27, 1992 was. Although Clark claimed to have contacted defense counsel before and during the trial, at the postconviction hearing, Clark could never affirmatively testify that he had ever talked to defense counsel. Throughout the hearing, the trial court found Clark to be confused, particularly at one point when Clark had to be reminded where he was. The court pointed to Clark's age, hearing difficulties, and vague and sometimes incoherent responses as evidence of Clark's lack of credibility.

Neither Knighten nor Clark could independently remember April 27, 1992. Likewise, neither Knighten nor Clark could testify with any degree of certainty that they had ever been in contact with defense counsel before trial.

On the other hand, the trial court found defense counsel's testimony that he had never heard of or met either Knighten or Clark until the day of the trial to be more credible. Defense counsel testified that he was introduced to Knighten on the first day of the trial, not as an alibi witness, but as the individual who drove Stokes's mother and sister to Milwaukee for the trial. Defense counsel also testified that he had never heard of A.D. Clark before the trial, but that afterwards, at the sentencing, Stokes proffered the name "A.B. Clark."

The crux of defendant's argument is that defense counsel was told of the additional alibi witnesses and then failed to interview them. In resolving this issue, the trial court must rely on the more credible testimony. As the

determination of credibility is one of the trial court's duties, in light of its better position to gauge truthfulness, we will follow its findings absent evidence that they are clearly erroneous. Although testimony from non-relative alibi witnesses would obviously be helpful to Stokes's defense, the trial court evaluated Knighten and Clark's testimony and found it unconvincing, and thus believed defense counsel's version of events.

Concluding that defense counsel did not know, nor could have known of the existence of these two alibi witnesses, the trial court found defense counsel's performance not deficient. We affirm, based on the trial court's extensive findings of fact and support in the record.

Because the trial court has provided ample justification for its conclusions, we conclude that Stokes is not entitled to a new trial in the interest of justice. As Stokes's defense counsel's performance was not deficient, Stokes "is not entitled to a second roll of the dice with the hope that this time he will get lucky." ***State v. Flynn***, 190 Wis.2d 31, 52, 527 N.W.2d 343, 351 (Ct. App. 1994) (citations omitted).

By the Court.—Judgment and order affirmed.

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