RECEIVED
07-07-2014
CLERK OF COURT OF APPEALS
OF WISCONSIN

COURT OF APPEALS
OF WISCONSIN
DISTRICT IV

STATE OF WISCONSIN,

Plaintiff-Respondent,

v. Appeal No. 2014 AP 929 CR
Clark County Case No. 06-CF-98

DEREK COPELAND,

Defendant-Appellant.

ON NOTICE OF APPEAL FROM CLARK COUNTY JUDGMENT OF CONVICTION, ENTERED JANUARY 31, 2008, AND ORDERS DENYING POST-CONVICTION MOTIONS FOR NEW TRIAL, FILED JANUARY 7, 2013, AND APRIL 3, 2014, THE HONORABLE JON COUNSELL, PRESIDING.

BRIEF-IN-CHIEF AND APPENDIX.

REBHOLZ & AUBERRY
JAMES REBHOLZ
Attorney for Defendant-Appellant
State Bar No. 1012144

1414 Underwood Ave, Suite 400
Wauwatosa, WI 53213
(414) 479-9130
(414 479-9131 (Facsimile)
jrebholz2001@sbcglobal.net

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases Cited:

Statutes Cited:

Other Authorities Cited:

STATEMENT OF ISSUES

I. Was the court's determination Copeland's trial testimony had "opened the door"erroneous?

The circuit court was not asked this question.

II. Was this evidentiary ruling, effectively causing abandonment of Copeland's only meritorious defense, harmless?

The circuit court was not asked this question.

III. Was the court's post-conviction determination that Copeland's trial testimony constituted neither an alibi nor an imperfect alibi defense erroneous?

The circuit court was not asked this question.

IV. Were the court's post-conviction credibility and testimonial impact determinations clearly erroneous?

The circuit court was not asked this question.

V. Was trial counsel's failure to present available testimony and argue the applicable statutory and case authorities mid-trial to preserve the alibi defense, and to seek a mistrial, deficient performance which prejudiced his client?

The circuit court answered no.

STATEMENT OF CASE

Derek J. Copeland (Copeland) was charged in a one-count Criminal Complaint with Sexual Assault of a Child Under 13 Years of Age, contrary to §§948.02(1) and 939.50(3)(b), Stats., alleging Copeland touched Brandon K. (Brandon) with his "privates" (R. 1).

Copeland made his initial appearance on 9/28/06. The hearing was adjourned to allow Copeland to hire a lawyer (R. 162, p. 2).

Following a waiver of the preliminary examination on 1/25/07, Copeland's case was bound over for trial (R. 165, p. 5).

Following a one-day jury trial on 7/10/07, the jury found Copeland guilty of the crime charged (R. 21; R. 170, p.166). The jury was polled (Id., pp. 166-68). Copeland was represented at trial by appointed counsel, Attorney Peter Thompson.

On 1/30/08, the court imposed a sentence of seventeen years (10 IC/7 ES) (R. 171, p. 37; A-101). Copeland was represented at sentencing by Attorney Richard Schaumberg.

A Notice of Intent to Pursue Post-Conviction relief was timely filed (R. 30). Attorney David Leeper was appointed to

represent Copeland.

Copeland sought a new trial and post-conviction discovery (R. 32; 35; 39-40; 48). Numerous pleadings were filed thereafter, including a defense motion to remove the prosecutor from the post-conviction proceedings and an interlocutory appeal[1] challenging the court's order denying a post-conviction witness sequestration motion (R. 49; 52; 75; 78).

The court conducted two post-conviction evidentiary hearings on the claims for new trial (R. 172-174). Following the hearings, Copeland filed three additional discovery documents (R. 118; 120-122).

Prior to a third scheduled post-conviction hearing, post-conviction counsel sought to withdraw and the motion was granted (R. 131; 134).

Following appointment of undersigned counsel, omnibus motions were filed, both deleting and modifying claims for a new trial and discovery (R. 137-138; 142).

Following a final evidentiary hearing on 10/1/12, the court denied the Motion for New Trial (R. 158; A-104).

A No Merit Notice of Appeal was timely filed on 4/5/13.

---

[1] Appeal No.2008AP2713-CR

On 9/4/13, this Court rejected the No Merit Report and ordered counsel to file an Advocacy Brief on the issue identified in the court's order, along with any "related sub-issues preserved for appellate review."

On 9/30/13, Copeland moved to dismiss the appeal and remand to the circuit court for further proceedings.

On 10/7/13, this Court dismissed Copeland's No Merit Appeal and extended the time for Copeland to file a post-conviction motion or notice of appeal.

On 11/13/13, this Court, having dismissed this appeal without prejudice, remitted the appellate record to the Clerk of Circuit Court for Clark County and extended until 12/2/14 the time to file a post-conviction motion or notice of appeal.

On 1/6/14, the circuit court denied Copeland's Third Amended Petition for New Trial, pursuant to §809.30, Stats., as untimely.

On 1/17/14, this Court granted Copeland's motion to extend the deadline until 2/3/14 to allow Copeland to re-file the post-conviction motion in the circuit court.

On 2/2/14, Copeland filed his Third Amended Petition for New Trial, pursuant to §809.30, Stats.

On 4/3/14, with more than 60 days having expired since

Copeland's post-conviction motion was filed, and Rule 809.30 (2)(I), Stats., requiring entry of an order denying the motion, the circuit court denied Copeland's Third Amended Petition for New Trial (R. 173; A-123).

A Notice of Appeal was timely filed on 4/21/14 (R. 175).

On 5/28/14, the record was filed in this Court and Copeland's Brief-in-Chief and Appendix is due, therefore, on 7/7/14, pursuant to Rule 809.19(1), Stats.

STATEMENT OF FACTS

On 6/4/07, the State moved pre-trial for admission of a video tape of a police interview of Brandon, the alleged sexual assault victim (R. 7). The court granted the motion (R. 9).

Also prior to trial, the court entered an order allowing the defense to present an alibi defense which was filed beyond the statutory deadline. The defense filed an alibi notice identifying Jennifer Struensee and Bradley Copeland as alibi witnesses (R. 10; 11).

On the morning of trial, the court granted the State's motion (R. 4) to impeach the defendant's testimony, if any, with evidence of one prior conviction (R. 170, p. 4).

Police Officer Jeff Baumgartner testified regarding his interview of Brandon, the video (Exhibit 1) and transcript

(Exhibit 2) of the interview describing the sexual assault, and Brandon's explanation of his anatomical drawings (Exhibits 3,4) (R. 19) (Trial Exhibits enclosed).[2]

The school district administrator testified the only December "snow day" on which students were released early in the 2005-06 school year was 12/14/05. He said students were dismissed at 12:50 p.m. (R. 170, p. 62).

Roger K., Brandon's father, testified he left his trailer for work at about 1 p.m., after Consuelo K. (Connie), Brandon's mother, arrived to babysit. He testified Brandon was home from school when he left but his son, Austin K. (Austin), had not arrived. He said Connie would have her brother, Derek, babysit when Connie was not available "from time to time" (Id., p. 67).

During the noon trial recess, the State again notified the defense that on 10/6/06 Austin recanted his earlier statement to the police in which he stated he witnessed his uncle, Copeland, sexually assaulting Austin's brother (Copeland's nephew). The State claimed the "late" notice of recantation was without prejudice because Austin would continue to recant

---

[2] All trial exhibits have been forwarded with the trial court record.

his earlier statement to police at trial (Id., p. 73).[3]

Brandon testified at trial after the jury viewed his video interview with police. Brandon testified he was home from school, "just before Christmas," on a "big snow day," being babysat by his uncle, Copeland ("DJ"), when his uncle touched him "in the butt with his wiener." Brandon told the jury it "hurt a lot" (Id., pp. 75-76; 78).

At trial, Connie testified. She said she was Brandon and Austin's mother and had made arrangements for her brother, Copeland, to babysit Brandon on the school "snow" day because she "had other plans." She left between "1:30-4:00 o'clock." She said she "believed" Brittany Weber had transported Derek to the house where Brandon lived, although she testified Brittany did not have a vehicle (Id., pp. 85-87).

Austin testified he was twelve years old and that he was Brandon's brother and Copeland's nephew. He said he was dropped off at his dad's "trailer court" on the "big snow day" and his mom and "DJ" were there when Austin arrived (Id., pp. 88-90). He said he was "looking through a window" when (after

---

[3] A CD of the interview was provided pre-trial to defense counsel by correspondence dated 6/29/07, along with a transcript of the CD, confirming the prosecution's characterization of the statement as a "recantation" (R. 119).

his mother left) he saw Derek "going up and down on Brandon." He said he called his mom to tell her that Copeland was "acting weird" underneath the blanket while going "up and down on Brandon." He testified Brandon told him "DJ was being gross and stuff." (Id., pp. 91-92)

On cross-examination, he said he could not tell through the window if they had "clothes on under the blanket" and he did not know if "Brandon was screaming from under the blanket" because Austin had "bad hearing" and was "outside."

On re-direct, Austin testified he did not remember telling the police officer that he saw (DJ) "naked going up and down on Brandon" but agreed he told police he saw a "wad of clothes" next to the couch and believed they were Copeland's. Austin also agreed he told the police officer earlier that he believed Copeland had "raped Brandon" (Id., pp. 99-101). On further re-direct, the witness said he changed his story (on 10/6/06) from his first story to police because he was afraid he was "never going to be able to see DJ again" because of the "trouble" Copeland was in (Id., pp. 106-07).

The State rested (Id., p. 109).

Jennifer Struensee, a defense alibi witness (Id., p. 111) and the defendant's estranged sister-in-law, failed to appear

for trial and the defense requested a bench warrant (Id., p. 109).[4]

Defense counsel told the court he would withdraw the defense alibi notice in consideration for preclusion of the State's presentation of a defense alibi witness, Bradley Copeland (Brad), who the defense said it would not call (Id., pp. 112;117). The parties conceded Brad had earlier misstated his employment history.

Following the defense notification to the court it would withdraw its alibi defense, the court conducted a colloquy with Copeland to address the withdrawal of the alibi defense (Id., pp.112-14). Copeland then waived his right not to testify (Id., pp. 117-18).

Copeland testified he was nineteen years old and lived in Black River Falls on 12/14/05, the day of the snowstorm and the day that Brandon claimed he was sexually assaulted.

Copeland testified he was staying with his brother, Brad, and Brad's estranged wife, Jennifer *nee* Struensee

---

[4] Ms. Struensee provided an affidavit (Post-Conviction Exhibit 20) and testified at the post-conviction hearing on 10/14/08, stating Attorney Thompson told her that her trial testimony "was not needed." She testified Copeland and his brother, Brad, were in Black River Falls when she arrived home early on 12/14/05 at approximately 4:10 p.m., due to the snow emergency (R.72, pp. 58; 63).

Copeland, between 12/14/05 and either 12/15/05 or 12/16/05, while Brad and Copeland moved Jennifer to her new apartment in Black River Falls.[5] Copeland testified this location was forty-five minutes from Neillsville and he had no vehicle at that point. He denied he was asked to babysit on 12/15/05 or that he sexually assaulted Brandon (Id., pp. 119-21).

On cross-examination, the district attorney claimed Copeland "opened the door" to alibi impeachment when Copeland denied he was asked to babysit on 12/14/05 by his sister, Connie, who was Brandon's mother (Id., pp.122-23). The district attorney claimed that, because the "door had been opened," the State was now able to present the testimony of Brad, a defense alibi witness, who the State had established pre-trial was, in fact, unemployed on the date of the alleged sexual assault (rather than what the alibi notice claimed regarding employment). The defense denied the "door" had been opened. The relevant cross-examination testimony included the following:

Q: And from time to time if she had other plans, other conflicts, or something, she would ask you to baby-sit?

A: Once in a while, yes.

---

[5] No alibi witnesses testified at trial.

Q: And she did that on December 14th, 2005?

A: No, she did not.

The court ruled the prosecutor's understanding that the door had been opened was correct because the defendant claimed he "was somewhere else" when Connie said Copeland had been babysitting (Id., p. 126). Defense counsel then asked if the court would permit the defense to strike the above-described questions and answers in order to preclude the testimony of Brad, who would presumably testify he was not employed on 12/14/05 (Id.).

Following the court's ruling permitting Brad's rebuttal alibi evidence, a stipulation was reached between the parties in which defense counsel would be unable to argue Copeland was in Black River Falls at some unspecified but relevant time on 12/14/05 in consideration for the prosecution not calling Brad to testify to apparently impeach the alibi. (Id., pp. 129-30).

On re-direct examination, Copeland told the jury that, while he "babysat" at Brandon's house in the past, he had not babysat since "before deer hunting season, which is in November of 2005" (Id., p. 135).

In closing, the district attorney told the jury the

testimony by Austin recanting his description of the sexual assault of his step-brother did not damage the prosecution's case, both because of Austin's explanation for his recantation and because he continued to corroborate Brandon's (and Connie's) claim Copeland was babysitting on the snow day. The district attorney explained the witness testified he recanted only when he realized he would no longer be able to see his uncle, Copeland (Id., p. 153). The prosecution also argued that there was no evidence of collaboration between Brandon and Austin to produce the "fantastical story" involving "anal intercourse" by the defendant (Id., p. 155).

The defense argued the jury shouldn't be overwhelmed by testimony from a "cute" five year old just because he was a "charming kid, bright kid" (Id., p. 158). Counsel argued the State's version "did not hang together" and itemized for the jury how there was "ample doubt" of Copeland's guilt (Id., pp. 159-60).

In rebuttal, the prosecutor revisited the recantation by Austin and told the jury that, in effect, Austin had corroborated (his observation of) the sexual assault because the real reason for his recantation was that he would not "see D.J. again" (Id., p. 162).

At the 10/14/08 post-conviction hearing, Brad described his, his wife's, and his brother's, Copeland's, snow-shoveling in a Black River Falls trailer court and their moving his wife's furniture between 12/14/05 and either 12/15 or 12/16/05.[6] Brad described how Copeland was paid by check by one or more of the trailer park residents although he didn't remember those events "exactly." (R. 172, pp. 75-76; 80-82).

Testimony and physical evidence was adduced from Dorothy Gehl, who lived in Jennifer and Brad's trailer court, that she knew Copeland stayed "kitty-corner" from her trailer in Black River Falls with Jennifer, a nurse, during the relevant snowstorm. She testified she paid Copeland with a check, dated 12/15/05, (attached to Exhibit 17) for his snow shoveling on either (the evening of) 12/14 or 12/15/05 (Id., pp. 10-12; 20).

Jennifer Struensee testified she left work at 3:51 p.m. and, after arriving home during the snowstorm, saw Brad and Copeland shoveling (Id., pp. 45-46).

---

[6] While defense counsel filed no pre-trial discovery demand, various materials were disclosed to defense counsel, including an audio CD, dated 6/20/07, of an interview by police of Brad Copeland which provided this information pre-trial.

Brittany Weber testified she, indeed, had no vehicle[7] on 12/14/05 with which to transport Copeland to Neillsville and did not help babysit Brandon as Connie suggested in her trial testimony (Id., pp. 95-96).

Copeland testified and said the reason he appeared "very calm for facing such a serious charge" to his lawyer was that he was not "worried about this case" because he was "innocent" (Id., p. 178). He said he told his lawyer pre-trial that "Austin had made up this story because he was mad at my mom for something that she had said or done to Connie and he wanted to get back at her for it" (Id., p. 182). Copeland agreed he told his attorney pre-trial that Austin was going to "change his testimony" (Id., p. 212). Copeland also testified he "drove" to Black River Falls "for the big snow storm on December . . . 14th, 15th, '05 in his sister's boyfriend's . . . . white Chevy Cavalier" (Id., pp. 215-16).

At the post-conviction hearing on 3/13/12, Attorney Peter Thompson (Thompson) answered questions regarding his failure to investigate the alibi defense; his late-but-developing pre-trial relationship with his ("calm") client for alibi

---

[7] Neither Connie nor her son, Austin, were asked how Copeland arrived at the trailer court residence on the day of the alleged sexual assault.

investigation purposes; and his personal vacation immediately prior to trial which prevented any further investigation of what he had been "discovering" prior to his vacation (R. 174, pp. 5-123).

At this same hearing, Carol Schaub testified in support of Copeland's release with conditions pending resolution of his appeal. (R. 174, pp. 198-201).

In denying modification of bail, the court summarized the alibi evidence submitted in the post-conviction process. The Court said:

* * *

> "[W]hat I have heard is that Ms. Gehl can place the defendant in Black River Falls on Friday, the day after the alleged assault and possibly the evening before. She was not sure about that. Ms. Struensee can indicate that he was there during the week . . . That she knows they shoveled snow on Friday 15th perhaps in the evening, as well, of the 14th; but that she . . . did not leave work until 3:51 in the afternoon [12/14/05] . . . and . . . [Copeland] was not at work with her on the 14th when this is all alleged to have occurred.

* * *

> So thus far, we have some evidence that he may have been in Black River Falls. We have his testimony at trial that says he did not have a car. We have his testimony the first day of the *Machner* Hearing that says he borrowed Mr. Tom Kren's white Chevy Cavalier.

* * *

> There is no one who can testify one way or the other whether he did or did not drive that car if he was already in Black River Falls . . . "

(Id., p. 224-25).

Prior to taking testimony at the final post-conviction evidentiary hearing on 10/1/12, undersigned counsel inquired whether the court was aware of the negative contents of Thompson's letter (R. 51) to the court, filed 9/30/08, providing allegedly privileged information regarding Copeland without authorization.[8] The court advised the parties that the correspondence from trial counsel to the court, following the filing of Copeland's petition for new trial, had not affected the court's ability to impartially rule on Copeland's claims (R. 175, p. 7).[9]

At the hearing on 10/1/12, trial counsel was asked questions (R. 175, p. 10) posed in sequence from the petition for new trial about his awareness of Wisconsin case

---

[8] The letter prompted an OLR investigation and hearing which resulted, ultimately, on 5/20/14 in dismissal of an OLR complaint. *See* Office of Lawyer Regulation v. Peter J. Thompson, Attorney at Law, 2014 WI 25.

[9] *See* State v. Washington, 83 Wis.2d 808, 833, 266 N.W.2d 597 (1978) ("Due process requires a neutral and detached judge. If the judge evidences a lack of impartiality, whatever its original or justification, the judge cannot sit in judgment").

authorities and statutes affecting the reasonableness of his decision to abandon the alibi (a) when there was no strategic reason to do so; (b) when the evidence was Copeland's only defense and constituted merely an imperfect "alibi";[10] (c) when the alibi defense was only abandoned when the *prosecution* "opened the door" and was solely responsible for the witness' "offending" and exculpatory answer; (d) when there was no legal basis authorizing the prosecution to call Brad (to punish the defendant for "opening the door"), who was not going to be called by the defense; and (e) when any testimony from Brad regarding his (mistaken) dates of employment was irrelevant and extrinsic to Brad's testimony regarding the events of 12/14/05-12/15/05.

Counsel was also questioned whether he was aware of the importance and admissibility of character evidence, pursuant to §904.04, Stats, in cases in which the credibility of the defendant, as here, was a critical issue for the jury.

---

[10] Because none of this evidence categorically placed Copeland in a specific place at a specific time, thus making Copeland's participation in the sexual assault impossible, the evidence arguably constituted evidence of an imperfect alibi defense requiring no alibi notice. *See* State v. Shaw, 58 Wis.2d 25, 30, 205 N.W.2d 132 (1973) ("purported alibi which leaves it possible for the accused to be the guilty person is not alibi at all"); State v. Harp, 2005 WI App 250, 288 Wis.2d 441, 707 N.W.2d 304.

Counsel testified he was not aware of any character evidence prior to trial but believed that "type of positive evidence useless" (Id., pp. 35-36).

Trial counsel was also questioned regarding his performance in electing to cross-examine Austin, who had reaffirmed his (10/6/06) recantation in his direct trial testimony. Counsel was asked why he elected to cross-examine Austin when there was no strategic advantage to be gained by cross-examination; when the cross-examination and re-cross-examination focused only on *unsuccessful* police efforts to overcome Austin's will reaffirming his recantation; when his two cross-examinations allowed the prosecution three "cracks" at Austin to overcome his recantation; and when there was a risk Austin might concede he fabricated his recantation for some personal or otherwise misguided adolescent reason.

Ultimately, counsel was asked whether the defense was damaged by Austin's concession he fabricated his recantation (because he was "afraid" he would never "see DJ again") (Id., p. 44). In response, trial counsel testified Austin had actually abandoned his recantation on direct; counsel did not believe the "recantation" was, in fact, a recantation; and that Austin's recantation had not been "helpful at all" to the defense (Id, pp.

37; 41; 45).[11]

Scott Roberts[12], a criminal defense attorney and former prosecutor who had previously been qualified as an expert in a post-conviction hearing, testified as an expert for Copeland. He offered that trial counsel's performance was deficient in counsel's abandonment of the alibi defense when: (a) there was no legal or strategic reason requiring abandonment, even though counsel apparently believed there was; (b) the prosecution was statutorily unable, pursuant to §971.23(8), Stats.,[13] to present impeachment testimony from Brad when the defense had not called him as an alibi witness; (c) in any case, this extrinsic evidence was collateral impeachment and precluded by Wisconsin case authority; (d) the defense

---

[11] The district attorney told the jury in his opening statement that Austin would continue to recant his first statement to the police in his trial testimony (R. 170, p. 48).

[12] A motion filed 10/2/08 by Attorney Leeper sought "permission to call an expert in jury trial practice" at the post-conviction hearing. Roberts' evaluation of counsel's performance, within the context of the trial court record, was apparently sought to assist the post-conviction court to better "understand the evidence or to determine a fact in issue." §907.02, Stats.; State v. Watson, 227 Wis.2d 167, ¶¶41-42, 595 N.W.2d 403 (1999). There was no objection to Roberts testifying.

[13] **§971.23(8), Stats.** The State shall not call any alibi witnesses not called by the defendant for the purpose of impeaching the defendant's credibility with regard to the alibi notice.

evidence was, in effect, an "imperfect" alibi defense because it tended only to establish Copeland was not in Neillsville at the time of the crime, rather than he was in Black River Falls at a precise and relevant time, precluding participation in the sexual assault; and (e) this imperfect alibi defense should have been argued to the jury because it was Copeland's only meritorious defense (Id., pp. 60-61).

Attorney Roberts conceded Austin's corroboration "blessed" the prosecution with "powerful. . . and unusual" evidence, given the "secrecy" in the typical child sexual assault case (Id., p. 70). Attorney Roberts opined, based on the record: (a) there was no strategic reason to do so because Austin's testimony provided a reasonable and exculpatory version of his observations on 12/14/05 while looking through the window; (b) the cross-examination accomplished nothing in terms of any available argument supporting acquittal; and (c) the cross-examination critically damaged the defense because Austin effectively withdrew his recantation during his third direct examination (Id., pp. 74-76).

On 1/7/12, the court filed its decision and order denying the Petition for New Trial (R. 158; A-104). The court determined trial counsel had not performed deficiently in the

various respects claimed by Copeland. The court determined counsel's performance was reasonable for the following reasons.

One, trial counsel's strategy not to present the character evidence proffered (Claim I-B) was reasonable because counsel did not want to "extend" the issue of his client's criminal record with a "couple of elderly female neighbors" on cross-examination. (Decision, pp. 1-2). Counsel's strategy, therefore, not to risk negative character evidence on rebuttal was, the court found, reasonable (Decision, pp. 3; 16-17).

Two, counsel's performance in choosing to examine Austin, the victim's brother, which resulted in damaging testimony impeaching the witnesses' own recantation (Claim I-C), was reasonable when the trial testimony of Austin was viewed "as a whole" (Decision, p. 3). Without cross-examination, the court found, Austin's direct testimony clearly bolstered the State's case. Counsel's attempt, therefore, to somehow explain Austin's "wobbling" testimony was a "successful and effective" strategy because it "created potential grounds for doubt" (Decision, pp. 5-6; 16).

Three, counsel's performance in investigating and

presenting any available alibi defense (Claim I-D) was reasonable for several reasons: (a) Copeland was not cooperative with counsel in investigating the alibi defense as required in McClelland v. State, 84 Wis.2d 145, 151, 267 N.W.2d 843 (1978) (Decision, pp. 7; 10-11; 15); (b) counsel's concerns about presenting a false alibi were "real," particularly given Copeland's trial testimony claiming his lack of "transportation" between Neillsville and Black River Falls on the day of the alleged assault and his inconsistent post-conviction testimony that on 10/14/08 he drove a "white Chevy Cavalier" to Black River Falls during the snow storm;[14] Copeland's brother's testimony regarding his employment at the time of the snow storm was incredible and that his brother's post-conviction (alibi) testimony was "hogwash" (Decision, p. 9); (c) counsel's determination the "alibi was worthless" was reasonable because it was bolstered by Copeland's post-conviction testimony acknowledging his own failure to get the alibi information to trial counsel (Decision, n. 6); (d) and because the two most important alibi witnesses (Dorothy Gehl and Jennifer Struensee) could not put Copeland

[14] The alibi notice (R. 10) asserted Copeland "was at the home [of his former sister-in-law] for all periods of time [on 12/14/05] . . . in Black River Falls, WI."

in Black River Falls (rather than Neillsville) "at the time of the assault" (Decision, pp. 12-14); and (e) counsel was not ineffective in failing to present an "imperfect" alibi defense because the evidence proffered in the post-conviction process did "not mean [Copeland] was not at the scene at the time of the assault," particularly given his "level of mobility notwithstanding the snow" (Decision, p. 14; n. 9).

The court also explained its various conclusions were further based upon its finding that trial counsel's testimony was nothing "more or less than the truth . . . ." (Decision p. 15).

In evaluating prejudice, the court found that, in a case involving a credibility contest, the victim's testimony was "clear and unequivocal," and corroborated by his video. The court found the jury would have seen the same lack of "honesty" communicated by Copeland to the court (in his post-conviction testimony) and the outcome would not, therefore, have been different (Decision, p. 18).

In its 9/4/13 order rejecting the No Merit Report, this Court explained it agreed with the No Merit conclusion "with regard to the issues the No Merit Report discusses." The Court, however, also required counsel to address in an advocacy brief "whether the trial court improperly ruled

Copeland's testimony was alibi evidence and that the prosecution could present alibi rebuttal evidence" (Decision, p. 4).

Following dismissal of Copeland's No Merit Appeal, counsel filed a Third Amended Motion for New Trial seeking a hearing to establish that trial counsel's failure to seek a mistrial following the court's erroneous alibi ruling (and before causing counsel to abandon Copeland's alibi defense) was deficient performance.

I. THE CIRCUIT COURT'S TRIAL AND POST-CONVICTION ALIBI RULINGS WERE ERRONEOUS AND DENIED COPELAND A FAIR TRIAL.

A. Standard of Review.

The court's ruling that the "door had been opened" by Copeland's testimony he had not been asked to babysit in Neillsville on the date of the alleged sexual assault, and its constitutional impact on Copeland's lawyer, is a mixed question of fact and law which this Court rules *de novo*. State v. Hajicek, 2001 WI 3, ¶15, 240 Wis.2d 349, 620 N.W.2d 781 (questions of constitutional fact present a mixed question of fact and law). (*See* Claim I-B).

The trial court's post-conviction determination that

Copeland's trial testimony constituted neither an alibi nor an imperfect alibi defense is a question of law which this Court rules *de novo*. *See* Nottelson v. DILHR, 94 Wis.2d 206, 215, n. 7, 287 N.W.2d 763 (1980). (*See* Claim I-C).

The trial court's post-conviction credibility determination of Attorney Thompson's post-conviction testimony is evaluated on a clearly erroneous standard. Noll v. Dimiceli's, Inc., 115 Wis.2d 641, 643, 340 N.W.2d 575 (Ct. App. 1983) (trial court findings of fact will be affirmed unless they are clearly erroneous); §805.17(2). (*See* Claim I-D).

The court's ruling on the impact of its post-conviction determination for Copeland's post-conviction testimony is a question of law which this Court reviews *de novo*. *See* State v. McCallum, 208 Wis.2d 463, 474, 556 N.W.2d 707 (1987).

B. The Court's Mid-Trial Determination Copeland's Testimony "Opened the Door" Was Erroneous and Not Harmless.

In State v. Gudenschwager, 191 Wis.2d 432, 440, 529 N.W.2d 225 (1995), the appellate court stated it would sustain a court's discretionary act if it found that the trial court (1) examined the relevant facts, (2) applied a proper standard of law, and (3) using a demonstrated rational process, reached a conclusion that a reasonable judge could reach. The trial

court in this case failed to examine the relevant facts or apply the proper standard of law or use a demonstrated rational process in reaching the conclusion that the "door had been opened."

The court's ruling that the "door had been opened" by Copeland's testimony he had not been asked to babysit in Neillsville, and was, therefore, apparently "somewhere else" on the date of the alleged sexual assault, was legally erroneous. The ruling was erroneous because the court failed to accurately assess the relevant exculpatory portion of Copeland's testimony in determining it constituted evidence of an alibi. The court also failed to apply the applicable legal standards in determining whether a witness had "opened the door" for impeachment of alibi evidence with relevant and otherwise admissible evidence. Gudenschwager, p. 440. The specific impact of this ruling was damaging because it permitted the court to agree with the prosecution that it could now introduce collateral evidence that Copeland's brother, Brad, was not employed at the time of the alleged sexual assault as his alibi notice claimed and, presumably, was contributing to a false alibi.

The court's ruling also failed to address Copeland's

simply exculpatory testimony as it may have affected its decision to constrict the (imperfect) alibi defense. Because none of his testimony categorically placed him in a speciific place at a specific time, thus making Copeland's participation in the sexual assault impossible, the evidence arguably constituted evidence of an imperfect alibi defense requiring no alibi notice or other constriction as eventually agreed between the parties. *See* State v. Shaw, 58 Wis.2d 25, 30, 205 N.W.2d 132 (1973) ("purported alibi which leaves it possible for the accused to be the guilty person is not alibi at all"); State v. Harp, 2005 WI App 250, ¶16, 288 Wis.2d 441, 707 N.W.2d 304.

The court's ruling was also erroneous because it failed to apply the applicable legal standards to Copeland's testimony in several respects. One, because there was a specific statutory restriction on the prosecution precluding presentation of testimony from Brad regarding his inaccurate employment information, the court's erroneous determination the defendant had, thus, "opened the door" for Brad's testimony was erroneous. The court's ruling was erroneous because §971.23(8), Stats., precluded the prosecution from introducing Brad's testimony regarding his employment history

as the defense had not called Brad as an alibi witness. Two, any evidence of Brad's employment history was extrinsic and constituted inadmissible collateral impeachment. *See* §904.03, Stats; McClelland, p. 157 (impeachment by extrinsic evidence admissible only when impeachment fact is non-collateral). Three, this ruling was erroneous and denied Copeland a fair trial because, while his testimony constituted "merely" an imperfect alibi defense, the court's misapplication of the Wisconsin Rules of Evidence unconstitutionally precluded its development for the jury. *See* Chambers v. Mississippi,410 U.S. 284 (1973) (interpretation of state evidentiary rule implicates due process if it forecloses presentation of a defendant's trial defense).

More importantly, the larger impact of this ruling prejudiced Copeland and was not harmless because this collateral evidence caused uninformed trial counsel, once his objection to Brad's testimony was overruled, to effectively abandon his client's imperfect alibi defense. Specifically, counsel's reaction to this ruling included his proposal the defense not claim in closing argument any evidence Copeland was likely elsewhere in consideration for the State's not introducing evidence of Brad's inaccurate employment status

on the date of the alleged sexual assault. The uninformed (*See* Claim II-B) "compromise" was accepted by the parties and the court conducted a colloquy with Copeland to obtain his agreement to forego any argument he was elsewhere on the date of the alleged sexual assault. Counsel's uninformed reaction also included cancelling Jennifer Struensee's subpoena and allowing her to leave the courthouse without providing her corroboration of Copeland's imperfect alibi (R.72, p. 58; 63; Copeland's Brief-in-Chief, Note 4, *ante*).

In closing argument the defense argued only that the jury shouldn't believe Brandon's testimony he had been sexually assaulted by Copeland, along with the now toothless argument (without the imperfect alibi corroboration and argument) that there was "ample doubt" of Copeland's guilt. The argument was toothless and without available corroboration because counsel elected not to present testimony from Jennifer Struensee who placed Copeland in Black River Falls approximately two hours after the time of the alleged sexual assault. It is likely, in any case, counsel would not have argued the imperfect alibi corroboration from Struensee's testimony as he had compromised his client's defense and agreed not to advance any form of alibi argument.

The argument was doomed because the court's ruling and counsel's uninformed response caused defense counsel not to argue Copeland's only meritorious defense that there was reasonable doubt Copeland committed the sexual assault because he lived in Black River Falls on the date of the alleged sexual assault; he had not been asked to babysit on that date; Copeland had no means of transportation between Neillsville and Black River Falls on that date; Copeland was with his brother Brad and Jennifer Struensee about two hours after the alleged sexual assault; and the weather would have seriously affected any travel between Neillsville and Black River Falls.

The Wisconsin Supreme Court has stated an error is harmless if the State--the beneficiary of the error--proves beyond a reasonable doubt "that the error complained of did not contribute to the verdict obtained." State v. Hale, 2005 WI 7, ¶60, 277 Wis.2d 593, 691 N.W.2d 637 (*citing* Chapman v. California, 386 U.S. 18, 24 (1967)). The Supreme Court has also used the formulation that an error is harmless if "it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." State v. Harvey, 2002 WI 93, ¶49, 254 Wis.2d 442, 467-68, 647 N.W.2d 189

(*citing* Neder v. U.S., 527 U.S. 1, 18 (1999)). These tests are equivalent in that an error does not contribute to the verdict if the court concludes beyond a reasonable doubt that a rational jury would have reached the same verdict without the error. Harvey, ¶48, n.14. The factors that aid a court in determining whether an error is harmless include:

> The frequency of the error . . . the nature of the defense, the nature of the state's case, and the overall strength of the state's case.

Harvey, ¶61. Here, the error was not harmless given the narrow nature of the defense without any full and cogent presentation of Copeland's imperfect alibi defense for the jury's consideration.

Rather, the court's error caused a domino effect resulting in the defense not presenting Struensee's corroborating testimony or arguing any reasonable inferences of Copeland's inability to travel from Black River Falls to Neillsville and return to Black River Falls later that afternoon as a result of the severe weather conditions. It cannot be said, therefore, that a rationale jury would have reached the same verdict without the error. Id.

C. The Trial Court's Post-Conviction Determination That Copeland's Trial Testimony Constituted Neither an Alibi Nor

an Imperfect Alibi Was Erroneous.

Copeland has previously established the trial court's mid-trial determination that his trial testimony opened the door was erroneous. It was erroneous because Copeland's testimony he was elsewhere on the date of the alleged sexual assault did, rather, constitute an imperfect alibi defense. Shaw, p. 30; Harp, ¶16. (*See* Claim I-B).

The trial court's post-conviction determination that Copeland's trial testimony constituted neither an alibi nor an imperfect alibi was also erroneous. This ruling unfairly prejudices Copeland because its impact functions to provide the necessary conduit for an appellate court to determine that the erroneous evidentiary ruling regarding the alibi had not prejudiced the defense while Copeland is arguing his lawyer abandoned his imperfect alibi defense.

D. The Trial Court's Post-Conviction Credibility Determinations for Attorney Thompson's Testimony and Impact of Copeland's Testimony Was Clearly Erroneous.

The circuit court's determination Attorney Thompson's testimony was credible with respect to counsel's claim he had intended to abandon the alibi defense, prior to the court's erroneous alibi ruling, was clearly erroneous. It was clearly

erroneous because the court failed to even consider trial counsel's documented bias after counsel launched a full-scale post-conviction attack on his client prior to any post-conviction hearing (R. 51).

The court believed Copeland's post-conviction testimony regarding the "white Chevy Cavalier" (R. 172, pp. 215-16) seemed to contradict his trial testimony that he had no vehicle to drive between Neillsvile and Black River Falls (R. 170, pp. 119-121). The court failed to find, in evaluating both Copeland's trial and post-conviction testimony, whether a jury would find the combination of this testimony "incredible" so that there was no reasonable probability of a different outcome. McCallum, pp. 474-476. The court found only there was "no one who can say who drove the car" (R.174, pp. 224-25).

McCallum seems to say a simple testimonial contradiction, under the facts and circumstances of this case, cannot serve to deny a defendant his due process right to finally present his full defense to a jury. This post-conviction determination was, therefore, erroneous.

II. THE CIRCUIT COURT'S DECISION FINDING TRIAL COUNSEL PROVIDED REASONABLE PERFORMANCE IN ABANDONING THE ALIBI

DEFENSE MID-TRIAL WAS ERRONEOUS.

A. Standard of Review.

In State v. Johnson, the Wisconsin Supreme Court determined that the standard of review for the ineffective assistance of counsel components of performance and prejudice is a mixed question of law and fact. State v. Johnson, 153 Wis.2d 121, 127, 449 N.W.2d 845 (1990) (*citing* Strickland v. Washington, 466 U.S. 668 (1984)). Thus, the trial court's "underlying findings of what happened," will not be overturned unless clearly erroneous. Johnson, p. 127 (*quoting* State v. Pitsch, 124 Wis.2d 628, 634, 369 N.W.2d 711 (1985), *citing* §805.17(2), Stats.)).

The ultimate determination whether counsel's performance was deficient and prejudicial to the defense are questions of law which this Court reviews independently. Johnson, p. 128.

B. Trial Counsel's Failure Mid-Trial to Present Available Testimony and Argue the Applicable Statutory and Wisconsin Case Authorities to Preserve the Imperfect Alibi Defense, and to Seek a Mistrial, Was Deficient and Prejudiced His Client.

In order to determine whether trial counsel provided ineffective assistance of counsel (IAC), either before or during

trial, the defendant must satisfy a two-part test. First, he must show his counsel's performance was deficient. Second, he must prove the deficient performance prejudiced the defense. Strickland, p. 687; Pitsch, p. 634. The test for deficient performance is whether counsel's representation fell below objective standards of reasonableness. Strickland, p. 668. Trial counsel is strongly presumed to have rendered adequate assistance and to have made all significant decisions in the exercise of reasonable professional judgement. Strickland, p. 690. *See also* Lockhart v. Fretwell, 506 U.S. 364, 369 (1993) (performance prong is analyzed at the time of trial; prejudice prong is analyzed under existing law at the time of the IAC evaluation).

Further, the defendant must show, with respect to prejudice, 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. Strickland, p. 687.

Counsel's deficient performance contributed to the verdict and prejudiced his client in several respects: counsel (a) was uninformed regarding the statutory and case law of

alibi and failed to understand the State was precluded from unilaterally admitting inaccurate but collateral employment evidence from Brad's alibi notice (*See* Claim I-B); (b) failed to inform the court of the applicable legal authorities in support of his objection to Brad's testimony; (c) failed to appreciate Copeland's testimony constituted an imperfect alibi defense and did not "open any doors" (*See* Claim I-C); (d) relinquished closing arguments supporting his only viable defense; and (e) failed to present Struensee's corroborating testimony (placing Copeland in Black River Falls about 4:10 p.m.) in support of an imperfect alibi defense. All of these deficiencies deprived Copeland of his opportunity to present his defense and denied him a fair trial and due process. *See* Chambers v. Mississippi,410 U.S. 284 (1973).[15]

Here, the court erroneously found that trial counsel's strategy was reasonable and his performance was not deficient and, even if it was, there was still no probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Counsel's uninformed strategy, including his "compromise" agreement with the court

[15] While *Chambers* arguably barred the correct application of a state statute to bar critical defense evidence, the court here misapplied the statute to effectively bar Copeland's defense.

and State to waive any imperfect alibi argument and corresponding decision not to present Struensee's testimony, was unreasonable because it eviscerated his client's only defense. State v. Felton, 110 Wis.2d 485, 503, 329 N.W.2d 161 (1983) (prudent lawyer must be skilled and versed in criminal law, including law affecting homicide trial defenses, and trial court "cannot ratify a lawyers decision by labeling it a matter of choice in trial strategy).

Counsel's failure to explain and argue to the jury why the evidence required his client should be acquitted of the sexual assault was unreasonable and prejudicial. *See* Yarborough v. Gentry, 540 US. 1, 5-8 (2003) (criminal defendant is entitled to effective assistance in closing argument) (*citing* Bell v. Cone, 535 U.S. 685 (2002)). It has long been held that effective counsel needs to "sharpen and clarify the issues for resolution by the trier of fact" in closing arguments so the evidence is summarized from a "point of view most favorable to the defendant." Herring v. New York, 422 US. 853, 862; 864 (1975).[16] Counsel failed in closing argument to mention, much less "marshal evidence" to

[16] *See also* Webb and Reich, *In a Closing, Argue, Don't Summarize,* National Law Journal (May 18, 2009).

support, how his client lived in Black River Falls, had not been asked to babysit on the day in question, and had no vehicle with which to drive from Neillsville to Black River Falls (following the alleged sexual assault) in the snow storm. This prejudiced Copeland because it prevented the jury from fully considering, in combination with Struensee's testimony she met Copeland in Black River Falls later on the afternoon of the snow storm, that Copeland's testimony and the circumstances of that afternoon meant Copeland was not guilty beyond a reasonable doubt. Herring, p.862.

The court's post-conviction findings were erroneous because they failed to accurately assess the prejudice prong on the imperfect alibi defense without any corroboration from Copeland's brother, Jennifer Struensee, or even Dorothy Gehl (R.175, pp. 10-12; 45-46). The court's finding any unreasonable performance in withdrawing the alibi did not prejudice Copeland because the so-called alibi evidence from these three witnesses presented in the post-conviction proceedings did not place Copeland in Black River Falls shoveling snow, while the alleged sexual assault was taking place, was misplaced. It was misplaced because the findings did not integrate this evidence with Copeland's due process

right to present an imperfect alibi defense. This failure to integrate this proffered evidence of Copeland shoveling snow in Black River Falls at approximately 4:10 p.m. (and later), in combination with the travel difficulties, caused the court to miss the reasonable probability that presentation of this imperfect alibi evidence would have produced a different verdict.

Following the court's erroneous evidentiary ruling, counsel also unreasonably failed to seek a mistrial in order to overcome this manifest necessity before forging on without additional corroboration or any closing argument in support of his client's only meritorious defense. *See* State v. Givens, 217 Wis.2d 180, 191, 580 N.W.2d 340 (Ct. App. 1998) (mistrial appropriate only when a manifest necessity exists); State v. Davidson, 2000 WI 91,¶ 86, 236 Wis.2d 537, 613 N.W.2d 606 (a defendant's failure to timely move for a mistrial before the jury returns its verdict constitutes a waiver of objection).[17]

Even if this Court believes a mistrial motion was unnecessary or was reasonably waived, review of the court's

[17] Copeland has not challenged the court's decision denying a hearing on his Third Amended Petition for New Trial because the court's earlier ruling regarding trial counsel's performance and any prejudice would have *a priori* denied the single claim in this petition without a hearing.

alibi ruling is permissible and required because questions of due process are involved and because this ruling denied Copeland his right to a fair trial. State v. Cleveland, 118 Wis. 2d 615, 632-33, 348 N.W.2d 512 (1984) (court may analyze questions of sufficient importance not withstanding counsel's failure to object).

CONCLUSION

For the reasons stated, this Court should vacate the judgment of conviction and remand to the circuit court for further proceedings.

Dated at Wauwatosa, Wisconsin, this 2nd day of July, 2014.

Respectfully submitted,

REBHOLZ & AUBERRY

_____

JAMES REBHOLZ
Attorney for Derek Copeland
State Bar No. 1012144

P.O. ADDRESS:

1414 Underwood Ave, Suite 400
Wauwatosa, WI 53213
(414) 479-9130
(414) 479-9131 (Facsimile)
jrebholz2001@sbcglobal.net

CERTIFICATION

I certify this Brief conforms to the rules contained in §§809.19(8)(b) and (c), Stats., for a Brief, prepared using the following:

> Proportional sans serif font: 12 characters per inch, double spaced; 2.0 margins on the left and right sides and 1 inch margins on the other two sides. The length of this brief is 7547 words.

Dated: July 2, 2014.

_____
JAMES REBHOLZ

E-FILING CERTIFICATION

Pursuant to §§809.19(12)(f) and 809.32(fm), Stats., I hereby certify the text of the electronic copy of the Brief is identical to the text of the paper copy of the brief filed.

Dated at Wauwatosa, Wisconsin, this 2nd day of July, 2014.

_____
JAMES REBHOLZ

APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as part of this no merit report, is an appendix which complies with §809,19(2)(a) of the Wisconsin Statutes, and contains:

(1) a table of contents;

(2) the findings or opinions of the trial or post-conviction court; and

(3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial or post-conviction court's reasoning regarding those issues.

I further certify that, if this brief arises from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that, if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Signed: _____

JAMES REBHOLZ

APPENDIX TABLE OF CONTENTS