STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2014AP929-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DEREK J. COPELAND,

Defendant-Appellant.

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

BRIEF OF PLAINTIFF-RESPONDENT

J.B. VAN HOLLEN
Attorney General

SALLY L. WELLMAN
Assistant Attorney General
State Bar #1013419

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-1677
(608) 266-9594 (Fax)
wellmansl@doj.state.wi.us

TABLE OF CONTENTS

Page

STATEMENT ON ORAL ARGUMENT AND PUBLICATION 1

ARGUMENT 2

I. THE TRIAL COURT PROPERLY RULED THAT BY HIS OWN TESTIMONY, COPELAND OPENED THE DOOR TO CROSS-EXAMINATION AND POSSIBLE REBUTTAL EVIDENCE ABOUT HIS ALIBI DEFENSE, WHICH HE HAD EXPRESSLY WITHDRAWN AT THE CLOSE OF THE STATE'S CASE, IMMEDIATELY BEFORE HE TESTIFIED. 2

A. Relevant procedural history bringing this issue before this court. 2

B. Relevant facts regarding trial counsel's withdrawal of the alibi defense and the trial court's evidentiary ruling. 3

C. The trial court properly ruled that by his own testimony, Copeland opened the door to cross-examination and possible rebuttal evidence about his alibi defense, which he had expressly withdrawn at the close of the State's case. 15

Page

II. TRIAL COUNSEL DID NOT RENDER INEFFECTIVE ASSISTANCE BECAUSE HIS PERFORMANCE WAS NEITHER DEFICIENT NOR PREJUDICIAL..... 19

A. Controlling legal principles and standard of appellate review 19

B. Trial counsel did not render ineffective assistance by failing to move for a mistrial. 20

C. Trial counsel did not render ineffective assistance by failing to argue applicable statutory and Wisconsin case law in opposition to the trial court's evidentiary ruling. 21

D. Trial counsel did not render ineffective assistance by failing to call witnesses to support an alibi or imperfect alibi defense. 23

CONCLUSION 29

Page

CASES

Neder v. United States,
527 U.S. 1 (1999).....16

State v. Felton,
110 Wis. 2d 485,
329 N.W.2d 161 (1983).....20

State v. Harvey,
2002 WI 93, 254 Wis. 2d 442,
647 N.W.2d 189.....16

State v. Johnson,
153 Wis. 2d 121,
449 N.W.2d 845 (1990).....20

State v. Jones,
181 Wis. 2d 194,
510 N.W.2d 784 (Ct. App. 1993) 20

State v. Kimbrough,
2001 WI App 138, 246 Wis. 2d 648,
630 N.W.2d 752.....19

State v. Koller,
2001 WI App 253, 248 Wis. 2d 259,
635 N.W.2d 838.....19, 20

State v. Leighton,
2000 WI App 156, 237 Wis. 2d 709,
616 N.W.2d 126.....20

State v. Maloney,
2005 WI 74, 281 Wis. 2d 595,
698 N.W.2d 583.....19

State v. Oswald,
2000 WI App 2, 232 Wis. 2d 62,
606 N.W.2d 207.....19, 20

Page

State v. Pitsch,
124 Wis. 2d 628,
369 N.W.2d 711 (1985) 19

State v. Robinson,
177 Wis. 2d 46,
501 N.W.2d 831 (Ct. App. 1993) 19

State v. Shaw,
58 Wis. 2d 25,
205 N.W.2d 132 (1973) 15

State v. Shomberg,
2006 WI 9, 288 Wis. 2d 1,
709 N.W.2d 370 15

State v. Starr,
60 Wis. 2d 763,
211 N.W.2d 510 (1973) 15

Strickland v. Washington,
466 U.S. 668 (1984) 19, 20

STATUTES

Wis. Stat. § 809.30 2

Wis. Stat. § 971.23(8) 9, 21, 22

STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2014AP929-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DEREK J. COPELAND,

Defendant-Appellant.

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

BRIEF OF PLAINTIFF-RESPONDENT

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument or publication because the briefs adequately set forth the legal theories and arguments and the fact-specific issues can be resolved by application of established legal principles to the particular facts of the case.

ARGUMENT

I. THE TRIAL COURT PROPERLY RULED THAT BY HIS OWN TESTIMONY, COPELAND OPENED THE DOOR TO CROSS-EXAMINATION AND POSSIBLE REBUTTAL EVIDENCE ABOUT HIS ALIBI DEFENSE, WHICH HE HAD EXPRESSLY WITHDRAWN AT THE CLOSE OF THE STATE'S CASE, IMMEDIATELY BEFORE HE TESTIFIED.

A. Relevant procedural history bringing this issue before this court.

Following conviction and sentencing, Copeland filed a Wis. Stat. § 809.30 motion for postconviction relief,[1] alleging trial counsel Peter Thompson was ineffective for withdrawing Copeland's alibi defense at trial and failing to call any alibi witnesses.[2] In the postconviction proceedings, Copeland was originally represented by David Leeper (32). After extensive litigation, Leeper moved to withdraw and was permitted to do so (131; 134). Attorney James Rebholz was then appointed and represented Copeland throughout the remainder of the postconviction proceedings and represents him on appeal (136).

Evidentiary hearings were held on Copeland's postconviction motions at which the purported alibi witnesses, Copeland, and trial counsel Thompson testified

[1] Copeland subsequently filed several amended motions that are not pertinent on appeal.

[2] Copeland also asserted Thompson was ineffective in other respects, such as failing to call character witnesses. The trial court rejected all of those claims and Copeland has not raised them on appeal.

(189; 191; 192). The trial court issued a written decision concluding that Copeland had failed to prove either deficient performance or prejudice, and denied his claim of ineffective assistance of trial counsel (158). The trial court expressly found Thompson's testimony, regarding why he withdrew the alibi defense at trial and did not call the purported alibi witnesses, was truthful and credible (158).

Attorney Rebholz filed a no-merit report, which this court accepted regarding the ineffective assistance of trial counsel claim and sufficiency of the evidence (164:4) This court, however, denied Rebholz permission to withdraw and ordered him to brief the issue of "whether the trial court improperly ruled that Copeland's testimony was alibi evidence and that the prosecution could present alibi rebuttal evidence" (164:4). Rebholz was permitted to withdraw the appeal, and filed a new postconviction motion alleging trial counsel Thompson was ineffective for failing to file a mistrial motion to preserve an objection to the trial court's ruling and failing to argue the issue correctly (167; 169). That motion was denied by statute because it was not decided within the statutory time limit, and the case is now again before this court on appeal of the judgment of conviction and orders denying postconviction relief (174; 175).

For clarity, in the following sections of this brief, the State addresses all of Copeland's arguments, but in a different order than that presented in his brief.

B. Relevant facts regarding trial counsel's withdrawal of the alibi defense and the trial court's evidentiary ruling.

The following facts are taken from the trial transcript (187); trial attorney Thompson's testimony from the postconviction hearing (191), which the trial court specifically found credible and true; and the trial court's decision denying Copeland's claim that Thompson was

ineffective for withdrawing the alibi defense and declining to call the purported alibi witnesses (158).

The trial court's findings of fact are not clearly erroneous. Copeland argues that the trial court should have found Thompson's testimony incredible because Thompson's response to Copeland's ethical attack on him was biased. The trial court was well aware of the dynamics between the disgruntled client and the trial attorney whose performance and ethics were being attacked. The trial court, rather than this court, was in the proper position to determine Thompson's credibility.

The trial court found that Copeland's postconviction testimony about Thompson's lack of attention to his case was not credible, in part, because Copeland's postconviction testimony that he was driving a borrowed white Chevy Cavalier at the time of the crime was inconsistent with his trial testimony that he had no vehicle and had no access to a vehicle at that time (158:8). Copeland asserts the trial court should not have made this determination, but should only have found whether the discrepancy was sufficient for the jury to find the testimony incredible so that there was a reasonable probability of a different result at trial. Copeland is wrong. Copeland's credibility, or lack thereof, at the postconviction hearing on the claim of ineffective assistance of trial counsel was a question for the trial court that was tasked with deciding that motion. It was not a jury question.

In its no-merit decision, this court agreed that Copeland's claim of ineffective assistance of trial counsel was without merit (164:4). This court should adhere to that determination.

Early in his representation of Copeland, Thompson had informed Copeland of possible defenses to a charge of child sexual assault, including the defense of alibi (191:90). Copeland responded that he might have one of those, but he would have to talk to someone (191:90).

Copeland's response made Thompson suspicious because in his experience, when a client knows that he was somewhere else at the time of a charged crime, he tells his attorney immediately, and promptly provides information in support of the alibi (191:90). Thompson told Copeland that if he did have an alibi defense, he needed to get the information to Thompson because he had to file a notice of alibi no later than 30 days before trial (191:90-91). Because Copeland did not tell him he had an alibi at that time, or tell him he was not at the victim's residence at the time of the crime, and because of his vague comment that he had to "talk to someone," Thompson believed that Copeland was trying to present a false alibi defense (191:90). Thompson was careful not to do anything to encourage Copeland to go out and create a false or non-existent alibi because he did not want to support perjury (191:90).

Less than 30 days before trial, at the close of a pretrial hearing, Copeland handed Thompson a note with the names of purported alibi witnesses (191:72). The trial court granted Thompson permission to file a late notice of alibi based on Copeland's failure to provide timely information to Thompson (11). Based on the information regarding a purported alibi and purported alibi witnesses that Copeland had provided, Thompson filed a notice of alibi that stated that at all periods of time on December 14, 2005, the date specified in the information, Copeland was at the home of his former sister-in-law, Jennifer Struensee in Black River Falls and that on that date he and his brother Brad Copeland were helping her move to her new apartment in Black River Falls (10).

After filing the notice, Thompson investigated the purported alibi and discovered that the purported witnesses did not support an alibi defense. Copeland was charged with performing anal sexual assault of his five-year-old nephew on December 14, 2005, a Wednesday, a school snow day in which the school had sent students home early (1). The sexual assault occurred between 1:30-2:00 p.m. at the child's home, which was in Neillsville,

Wisconsin (192:28-29; 158:13). Copeland's alleged alibi was that he was in Black River Falls helping his then-sister-in-law Jennifer Struensee move from the trailer in which she lived with Copeland's brother, Brad, into an apartment on that day (10; 192:21-23).

Thompson interviewed Struenesee by telephone and she told him that Copeland could not have been helping her move on December 14, 2005, because he helped her move on a weekend, not on a weekday (191:100; 192:21-23). Struensee did not tell Thompson that she had seen Copeland shoveling snow at or near her residence in Black River Falls on December 14, 2005 (191:100; 192:21-23). In Thompson's opinion, the information from Struenesee rendered Copeland's alibi that he was helping Struenesee move on December 14, 2005 worthless (191:100; 192:21-23).

In response to the notice of alibi, the police interviewed Brad Copeland, who said he remembered the date December 14, 2005, because he had taken the day off work from his job. In fact, Brad had been fired from that job months before December 2005. In Thompson's judgment, this discrepancy would have made any alibi testimony from Brad laughable, and therefore Brad provided no viable support for an alibi defense (191:118; 192:15).

Subsequent to the filing of the alibi notice, Copeland informed Thompson that he had shoveled snow for an elderly woman in the trailer park during the snow storm and she paid him with a check, but he did not know her name or which trailer was hers (191:101). Thompson's own investigation revealed the woman was Dorothy Gehl, and he contacted her on the telephone prior to trial (191:101). Gehl informed Thompson that she could not remember anything and she did not give him any information about Copeland shoveling snow; she seemed extremely confused. Thompson asked her to look for a check she had written to Copeland for shoveling snow and contact him if she found it, but she never contacted him

(191:102). In Thompson's judgment, Gehl's lack of recall, lack of information, confusion, and inability to provide the check as corroboration made Gehl worthless as a potential alibi witness (191:123).

Thompson also talked to Copeland's friend, Brittany Weber, prior to trial. Weber told him that Copeland could not have sexually assaulted the victim on December 14, 2005, because she was always with Copeland when he watched the victim and his brothers, and she was not with him that day (191:73-74). In Thompson's judgment, this type of vague, general evidence provided no support to the defense (191:73-74).

Based on this information that Struenesee, Brad Copeland, Gehl and Weber could not provide valuable testimony in support of Copeland's purported alibi defense, Thompson decided not to pursue Copeland's purported alibi defense (191:100, 118, 120-23; 192:13, 22-23, 31, 34). Prior to withdrawing the alibi defense, he told Copeland that he could not present the alibi defense because it was garbage and was worthless, and Copeland did not argue with him or disagree (192:13, 23, 31).

A one-day trial was held on July 10, 2007 (187). During the State's case, a videotape of a police interview with the five-year-old victim, Brandon K., was shown to the jury (187:53). A school administrator testified that on December 14, 2005, school was dismissed at 12:50 p.m. for a snow day (187:62). Brandon's father (Roger) testified that he lived in Neillsville with his sons Brandon and Austin; he left the home between 1:00-1:15 p.m. on December 14, 2005, to go to work (187:64-65). The boys' mother, Connie, would come and stay with the boys while Roger worked. Connie's brother, defendant Copeland, would babysit for the boys when she requested (187:66). Connie testified that on December 14, 2005, she was at Roger's home with the boys, and called Copeland to babysit for her, and he did so (187:85). She left between 1:30-4:00 p.m. (187:85). When asked how Copeland came to the residence, Connie stated that she believed Brittany

Weber brought him (187:86). She had no idea what vehicle he came in, stating that Weber does not have one (187:87).

Brandon, who was five at the time of the sexual assault and six at the time of trial, testified that he would be in first grade when school started in the fall (187:74). He identified Copeland in court as his uncle, D.J. (187:75). Brandon remembered a big snow day before Christmas in 2005 when D.J. babysat (187:76). Using anatomically correct drawings of male figures, Brandon identified a butt and a wiener (penis) and said D.J. used his wiener to touch Brandon's butt (187:78). Brandon said it hurt a lot (187:78).

Austin, Brandon's brother, was 11 at the time of the sexual assault and 12 at the time of trial. Austin identified Copeland in court as his uncle D.J. (187:89-90). Austin testified that he remembered a snow day in December 2005, when school let out early (187:90). He was outside playing in the snow and he looked in the window and saw Brandon and D.J. moving around under a blanket on the couch; he saw D.J. going up and down on Brandon; he called his mom because he thought it was weird (187:90-92). Brandon told Austin that D.J. was being gross and stuff (187:92). Austin acknowledged that later he told the social worker and police officer that nothing had happened, and the police officer got mad at him (187:93-99). Austin did not remember telling the police officer originally that D.J. was naked, but he did remember seeing a wad of clothes by the couch that he thought belonged to D.J. (187:99-100). He remembered telling the police that he was there to talk to the officer because D.J. had raped Brandon (187:100). Austin said that he changed his story because he was afraid he was never going to be able to see his uncle D.J. again (187:106-07).

After the State rested, Thompson informed the trial court that the defense was withdrawing the alibi defense (187:112-17). The trial court reviewed the alibi statute,

Wis. Stat. § 971.23(8), which provides that if at the close of the State's case the defendant withdraws the alibi, the State shall not comment on the defendant's withdrawal of the alibi or on the failure to call some, all or any of the alibi witnesses, and the State shall not call any alibi witnesses (187:115-17). The parties and court agreed that under this statute, because Copeland was withdrawing the alibi defense, the State would not be permitted to cross-examine Copeland about his withdrawn alibi, or call any of the noticed alibi witnesses (187:117). Brad Copeland, who had been waiting in the hallway as a potential witness, was released (187:117). The trial court conducted a colloquy with Copeland, who indicated that he understood that his attorney was withdrawing the alibi defense and he agreed with that decision (187:114). The trial court then conducted a colloquy with Copeland regarding his right to testify or to not testify, and Copeland made a knowing, voluntary and intelligent decision to testify (187:117-18).

Copeland then provided the following testimony on direct examination:

> Q. How old are you, Mr. Copeland?
>
> A. I am 19 years old.
>
> Q. Now, on December 14th of 2005, what was your residence?
>
> A. It was N6150 Juliana Road, Lot 404.
>
> Q. And that is where?
>
> A. In Black River Falls.
>
> Q. Okay. And you were not living with, I don't want to use that term, but you were cohabiting or you were staying with another person?
>
> A. Yes.
>
> Q. At that time? Who was that?

A. Jennifer Struensee. And at that time, her name was Jennifer Copeland and Brad Copeland.

Q. And where was she living?

A. She at that time, she was living there. In the process of moving to a new apartment.

Q. Where was the new apartment?

A. It was somewhere on Eighth Street. It was the Eighth Street Apartments.

Q. In Black River?

A. Yes, in Black River.

Q. Okay. And do you know when she first started moving her stuff between the two apartments?

A. I want to say it was right around December 12th through the 15th, I believe.

Q. Okay. Now, just generally, how far before and how far after December 14th had you been staying with her, for what period of time?

A. I do believe I was there December I want to say it was either the 12th -- I would say it was the 11th or the 12th of December that I came there. And I think I left, it was probably the 15th or the 16th.

Q. Okay. About how far was that from the Copeland home or Brandon's home?

A. Well, Brandon's home was here in Neillsville. And this was in Black River. So approximately 45 minutes.

Q. Okay. And we have heard some testimony from Connie King that you were brought to their house by a Brittany Weber?

A. Uh-hum (indicating yes).

Q. Do you know Brittany Weber?

A. Yes, I know Brittany.

Q. How did you know her?

A. She has been my best friend since the ninth grade, I believe.

Q. And at that time, did she have a car?

A. No, she did not.

Q. Did she have a license?

A. No, she did not.

Q. Could she have driven you to the home of Brandon?

A. No.

Q. Did you have a car on that date?

A. No, I did not.

Q. Did you have access to a car that date?

A. No, I did not.

Q. Now, did you sexually assault Brandon?

A. No, I did not.

(187:119-21).

On cross-examination, Copeland acknowledged that he did babysit for the victim and his brother sometimes (187:122). Copeland acknowledged that his sister, Connie, would take care of the boys while their father, Roger, would go to work (187:122). Copeland acknowledged that once in a while when she was taking care of the boys, Connie would ask Copeland to babysit so that she could do something else (187:122). The prosecutor asked Copeland whether Connie did that on December 14, 2005, and Copeland replied that she did not (187:122).

The prosecutor asked for a conference outside the presence of the jury and the jury was excused (187:122-23). The prosecutor argued that based on his direct examination testimony and his response to cross-examination, Copeland was putting in an alibi defense, after he had specifically withdrawn that defense prior to testifying (187:123). The prosecutor stated that based on Copeland's withdrawal of the alibi defense, he had released Brad Copeland as a potential rebuttal witness (187:123). The prosecutor argued that based on Copeland's testimony that he was residing in Black River Falls on December 14, 2005, Brittany Weber did not have a car, Copeland did not have a car, and he was not called requested to babysit by his sister that day, the defense hoped the jury would draw the inference that he was somewhere else at the time of the crime, which is in essence an alibi defense (187:124). The prosecutor argued that by his testimony, Copeland had opened the door so that the State should be allowed to cross-examine Copeland in that area (187:123).

Defense counsel Thompson argued that Copeland's testimony did not constitute an alibi; it was a simple denial of the offense (187:124).

The following discussion between the trial court and the parties then ensued:

> THE COURT: The definition in the jury instruction says there is evidence in this case that at the time of the commission of the offense charged, the defendant was at a place other than that where the crime occurred. It is not necessary for the defendant to establish that he was not present at the scene of the crime or that he was at some other place. The burden is upon the state to convince you beyond a reasonable doubt that the defendant committed the offense as charged.
>
> Didn't he just tell me that he was somewhere else?
>
> MR. THOMPSON: Well, he denied he was baby-sitting on that day.

MR. ZWIEG: Did he not just testify that he was at the Copelands between the dates that included December 14th, 2005?

MR. THOMPSON: As a resident. Not saying he was always there for 14 days or whatever. That was his residence. That's all.

MR. ZWIEG: That he didn't have a car. His brother didn't do it, so where would he be?

MR. THOMPSON: He could be a million other places.

MR. ZWIEG: That's what the argument is going to be in closing, which is an alibi.

THE COURT: I think Mr. Zwieg carries the day on this one. As I understood the testimony, he is basically saying, I wasn't there at this point in time, I was somewhere else. That's exactly what I was just told 10 minutes, 15 minutes ago that was being withdrawn, that wasn't going to be an alibi defense.

MR. THOMPSON: If that's the court ruling, can I ask the court to strike that testimony?

THE COURT: Mr. Zwieg?

MR. ZWIEG: How do you unring a bell?

THE COURT: That's always the question. I mean this has gone to the point.

MR. THOMPSON: The bell is not yet rung because it is really not tied in.

THE COURT: How is it not tied in?

MR. THOMPSON: It is sort of a general proposition. It really hasn't tied in or argued to the jury. We are not arguing.

THE COURT: These are 12 people that presumably reflect the average intelligence of the community, which means I don't believe, as they say, we, as sometimes said, we cannot underestimate

> the intelligence of the jury. They just hear someone testify that I wasn't there and now supposed to tell them to ignore that testimony. That's a very unappealing proposition, I guess, under these circumstances.
>
> Take a couple of minutes and really define what an alibi is I think in this situation.

(187:125-27).

The trial court and the parties resumed the discussion (187:127). The trial court stated that it had reviewed the case law. Based on that review, the trial court concluded that if the defendant claims that he was someplace else at the time of the offense, that constitutes a simple denial, but if the defendant puts forth some specifics as to where that somewhere else was, it becomes an alibi (187:127). The parties did not disagree with that explanation of the line between a simple denial and an alibi (187:127-28). Defense counsel acknowledged that Copeland's testimony had come very close to the line, but asserted that he had not really crossed the line (187:128).

The trial court reviewed Copeland's direct testimony and concluded that Copeland was not just saying "I was somewhere else," but rather, "that somewhere else is quite specific" and he indicated who he was with and he indicated that the person who was supposed to have brought him to the victim's house could not have done so (187:129).

This review confirmed that trial court's conclusion that although he had expressly withdrawn the alibi defense before he testified, in his own testimony, Copeland had, in fact, presented an alibi by claiming not just that he was somewhere other than the victim's house at the time of the crime, he was some specific other place at the time of the crime (187:129).

The trial court and the parties then discussed how to remedy the problem and agreed the best solution would be to leave the record as it stands, forgo a curative

instruction in order to avoid drawing more attention to the matter, and during closing argument, defense counsel Thompson would not refer to Copeland's testimony that he was in Black River Falls on the date in question or his testimony about lack of transportation (187:129-34).

On re-direct examination, Copeland was allowed to testify that the last time he recalled babysitting was sometime before deer hunting season, which was in November 2005, because that constituted a simple denial (187:133-35). On cross-examination, he admitted he could not recall anything else about when he last babysat (187:135-36).

C. The trial court properly ruled that by his own testimony, Copeland opened the door to cross-examination and possible rebuttal evidence about his alibi defense, which he had expressly withdrawn at the close of the State's case.

On appeal, a trial court's evidentiary rulings are reviewed for an erroneous exercise of discretion and review is highly deferential. The appellate court will not reverse a trial court's evidentiary ruling if there is any rational basis for the ruling. *State v. Shomberg*, 2006 WI 9, ¶ 11, 288 Wis. 2d 1, 709 N.W.2d 370.

The trial court properly ruled that by his own testimony, Copeland presented an alibi defense. A defendant who simply claims that he was not present at the scene of the crime when the crime occurred does not present an alibi defense. *State v. Starr*, 60 Wis. 2d 763, 764, 211 N.W.2d 510 (1973). A defendant who claims, however, that he was elsewhere, at a place other than the scene of the crime when the crime occurred, presents an alibi defense. *State v. Shaw*, 58 Wis. 2d 25, 30-31, 205 N.W.2d 132 (1973). The trial court properly concluded that by testifying that he resided in Black River

Falls on the day of the offense, that he had no means of transportation to the victim's home in Neillsville, that his friend did not give him a ride to Neillsville and that she did not have a car, and that his sister did not ask him to babysit on that day, Copeland presented an alibi defense, rather than a simple denial that he was at the victim's home at the time of the offense. The trial court correctly concluded that in his own testimony, Copeland did not present a simple denial that he was at the victim's home at the time of the offense, but, rather, he presented an alibi defense because he represented that he was in a specific, particular other place (Black River Falls) on the date of the offense. Accordingly, this court must reject Copeland's claim that the trial court erroneously exercised its discretion in ruling that Copeland presented an alibi defense and that by so doing, he opened the door to allow the State to cross-examine him on his alibi defense and the alibi witnesses presented in his notice of alibi.

Even if this court concludes that Copeland's own testimony did not constitute an alibi defense, this court must conclude any error in the trial court's ruling was harmless beyond a reasonable doubt. Error is harmless if the reviewing court can determine beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error. *Neder v. United States*, 527 U.S. 1, 18 (1999); *State v. Harvey*, 2002 WI 93, ¶ 46-49, 254 Wis. 2d 442, 647 N.W.2d 189.

Copeland claims the trial court's ruling was not harmless because it caused trial counsel Thompson to forgo calling Jennifer Struensee as an alibi witness. That contention is incorrect. As the record reveals, Thompson withdrew the alibi defense at the close of the State's case, before Copeland testified, and before the trial court's ruling that Copeland's testimony constituted an alibi defense (187:112-18). The trial court's evidentiary ruling, which occurred after the alibi defense had been withdrawn and after Copeland's testimony, could not have had any impact on a decision trial counsel had made prior to that time.

Trial counsel testified at the postconviction hearing that he had already decided before trial not to call Struensee as an alibi witness because she would have contradicted Copeland's claim he helped her move on December 14, 2005 (191:100; 192:21-23). Struensee never told Thompson she saw Copeland shoveling snow in Black River Falls on December 14, 2005 (191:100; 192:21-23). Thompson testified at the postconviction hearing that he had subpoenaed Struensee and kept her under subpoena because she might provide useful testimony on another topic, depending on what other evidence developed (192:19, 33). The trial court specifically found Thompson's testimony credible and truthful (158:7, 15).

Copeland claims the error was not harmless because as a result of the trial court's ruling, defense counsel agreed not to argue in closing argument that Copeland lived in Black River Falls on the date of the crime, December 14, 2005; he had no transportation to Neillsville where the crime occurred; the victim's mother (Copeland's sister) did not ask him to babysit that day; and that last time he babysat was in November before deer hunting season. Although defense counsel did not argue those points in closing argument, the jury heard Copeland's testimony on those points, and that testimony was not stricken. Nothing prevented the jury from relying on the testimony, and concluding it raised a reasonable doubt about guilt, had the jury been inclined to do so.

Even if defense counsel had emphasized in closing argument Copeland's testimony that he lived in Black River Falls on the date of the offense and had no transportation, that argument would not have served to undermine the heart of the State's case. The heart of the State's case was the testimony of the victim, Brandon, who was five years old at the time of the offense and six at the time of trial (187:74). Brandon's clear, uncontradicted, straightforward testimony that Copeland, his uncle, put his "wiener" in Brandon's "butt" would not have been seriously weakened by a closing argument focusing on

Copeland's testimony. There was no evidence that Brandon had any motive to falsely accuse Copeland. Copeland admitted he had babysat for Brandon on other occasions (187:122). Copeland was Brandon's uncle (187:75-76). There was no question of mistaken identity.

Brandon's older brother Austin testified that he was outside and through the window, he saw Copeland and Brandon moving around under a blanket on the couch and he saw Copeland going up and down on Brandon (187:90-92). Austin thought it was weird and called his mom (187:92). Brandon told Austin that Copeland was being gross and stuff (187:92). Austin denied that he had actually seen Copeland naked going up and down on Brandon or that he had heard Brandon scream, as he had previously told the police (187:99-100). He admitted he had told the police that Copeland raped Brandon (187:100). He explained that he changed his statement because he was afraid he was never going to be able to see Copeland again (187:106-07).

Based on the entire record, this court can confidently conclude beyond a reasonable doubt that the jury would have found Copeland guilty of sexually assaulting Brandon, even if trial counsel had argued in closing argument that on the date of the offense, Copeland lived in Black River Falls and had no means of transportation to Neillsville and that he had not been asked to babysit on that day.

For all of these reasons, this court should conclude that the trial court properly ruled that Copeland's own testimony constituted an alibi, and that if the ruling was error, the error was harmless beyond a reasonable doubt.

II. TRIAL COUNSEL DID NOT RENDER INEFFECTIVE ASSISTANCE BECAUSE HIS PERFORMANCE WAS NEITHER DEFICIENT NOR PREJUDICIAL.

A. Controlling legal principles and standard of appellate review

A criminal defendant alleging ineffective assistance of trial counsel must prove that trial counsel's performance was constitutionally deficient and that, as a result, he suffered actual prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Pitsch*, 124 Wis. 2d 628, 633, 369 N.W.2d 711 (1985); *State v. Koller*, 2001 WI App 253, ¶ 7, 248 Wis. 2d 259, 635 N.W.2d 838.

There is a strong presumption that the defendant received adequate assistance and that all of counsel's decisions could be justified in the exercise of reasonable professional judgment. *See State v. Kimbrough*, 2001 WI App 138, ¶¶ 31-35, 246 Wis. 2d 648, 630 N.W.2d 752. An attorney's performance is not deficient unless the defendant proves the attorney's challenged acts or omissions were objectively unreasonable under all of the circumstances of the case. *State v. Oswald*, 2000 WI App 2, ¶ 49, 232 Wis. 2d 62, 606 N.W.2d 207; *Koller*, 248 Wis. 2d 259, ¶ 8; *Kimbrough*, 246 Wis. 2d 648, ¶¶ 31-35.

Judicial review of counsel's performance is highly deferential and may not be based on hindsight. *Strickland*, 466 U.S. at 687; *State v. Robinson*, 177 Wis. 2d 46, 55-56, 501 N.W.2d 831 (Ct. App. 1993). The fact that the defendant was convicted does not render a reasonable strategic decision by counsel unreasonable. *State v. Maloney*, 2005 WI 74, ¶¶ 43-44, 281 Wis. 2d 595, 698 N.W.2d 583. Trial counsel's strategic choices that were made after thorough consideration of the options in

light of the relevant facts and law are virtually unchallengeable. *Strickland*, 466 U.S. at 690-91. The reviewing court will second-guess counsel's strategic or tactical decision only if it is shown to be an irrational trial tactic or if it was based upon caprice rather than upon judgment. *State v. Felton*, 110 Wis. 2d 485, 502-03, 329 N.W.2d 161 (1983).

The defendant must also prove counsel's challenged acts or omissions actually prejudiced the defense to the degree that defendant was deprived of a fair trial that yielded a reliable result. *Oswald*, 232 Wis. 2d 62, ¶ 50. The defendant must prove there is a reasonable probability that the result would have been different, but for counsel's deficient performance. *Koller*, 248 Wis. 2d 259, ¶ 9.

On appellate review, the circuit court's findings of historical and evidentiary fact are binding unless they are clearly erroneous. *State v. Leighton*, 2000 WI App 156, ¶ 33, 237 Wis. 2d 709, 616 N.W.2d 126; *State v. Jones*, 181 Wis. 2d 194, 199, 510 N.W.2d 784 (Ct. App. 1993).

The appellate court determines de novo whether, under those facts, the defendant has proven deficient performance and prejudice. *Koller*, 248 Wis. 2d 259, ¶ 10. The reviewing court need not address both prejudice and deficient performance prongs if the defendant fails to prove either one of the prongs. *State v. Johnson*, 153 Wis. 2d 121, 128, 449 N.W.2d 845 (1990).

B. Trial counsel did not render ineffective assistance by failing to move for a mistrial.

Trial counsel did not perform deficiently by failing to move for a mistrial when the trial court ruled that Copeland's own testimony constituted an alibi defense that opened the door to cross-examination and possible rebuttal by the State. The discussion between the parties and the trial court about how to proceed after Copeland testified indicates that none of the parties were anxious to

have a second trial (187:122-34). A successful mistrial motion would have resulted in a second trial. In the postconviction proceedings, Copeland never indicated that he wanted a mistrial. Moreover, as the State has demonstrated in the merits argument above, the trial court's ruling was correct. Therefore, a mistrial motion would have been properly denied by the trial court. Failure to file a meritless motion is not deficient performance. Because the trial court's ruling was correct, there was also no prejudice in failing to file the motion.

C. Trial counsel did not render ineffective assistance by failing to argue applicable statutory and Wisconsin case law in opposition to the trial court's evidentiary ruling.

As the State has demonstrated above, the trial court correctly ruled that after Copeland withdrew his alibi defense at the close of the State's case, Copeland proceeded to present an alibi defense in his own testimony, and by so doing he opened the door to allow the State to cross-examine him and possibly present rebuttal evidence to rebut the alibi defense. Because the trial court's ruling was demonstratively correct, it cannot have been either deficient performance or prejudicial for defense counsel to fail to argue the motion differently.

Copeland's primary argument is that his own testimony presented only an imperfect alibi, not an alibi. Copeland seems to think this means that because he presented an imperfect alibi, the State could not cross-examine him or rebut the imperfect alibi. His argument misses the boat. If Copeland is correct that he presented only an imperfect alibi, rather than an alibi, then Wis. Stat. § 971.23(8) did not apply at all, because that statute by its own terms applies only to alibi evidence. If § 971.23(8) did not apply, then there was no statutory impediment to the State cross-examining Copeland on his imperfect alibi

testimony or presenting rebuttal witnesses. Copeland presents no case law holding that § 971.23(8) applies to imperfect alibi evidence.

The trial court relied on Copeland's direct testimony in determining that he had presented an alibi. Copeland's answer to one cross-examination question, that his sister had not asked him to babysit that day, was not the essence of his alibi defense. Accordingly, the State did not cause Copeland to cross over the line from a simple denial to an alibi defense.

Because trial counsel elected not to argue Copeland's testimony during closing argument, there is no record of what questions the State would have asked on cross-examination, what the answers would have been, what witnesses the State might otherwise have called, or what the witnesses would have said, to rebut the imperfect alibi. Copeland's argument that the State would not have been allowed to present extrinsic evidence is pure speculation. At the postconviction motion hearing, Copeland could have put in evidence on this matter, if he had chosen to do so in pursuit of a claim of ineffective assistance of counsel, but he did not do so.

Trial counsel Thompson's decision not to argue Copeland's testimony in closing argument was not objectively unreasonable. It was an objectively reasonable response to the trial court's decision. During closing argument, Thompson focused on more critical issues that went to the heart of whether the jury should believe Brandon's testimony that Copeland sexually assaulted him. Thompson suggested that the social worker and police had coached or influenced the five-year-old boy to name an assailant, rather than objectively and properly investigating the case (187:157-59). Thompson focused attention on Brandon's brother's recantation, and the heavy-handed pressure the police put on the child to recant his recantation (187:157-58). Thompson emphasized that the State bore the heavy burden of proof beyond a reasonable doubt, and that it was not enough for

the jury to believe that something had happened or to merely suspect Copeland (187:160).

It was not objectively unreasonable for trial counsel to ask the questions he asked Copeland on direct examination. Trial counsel had objective reasons to believe Copeland's alibi was false. Trial counsel was duty-bound not to present or assist in the presentation of perjured testimony. In order to fulfill Copeland's desire to testify, trial counsel reasonably attempted to walk a fine line between simple denial and an alibi. The fact that the trial court concluded he had crossed the line does not make his strategy objectively unreasonable.

Finally, the State has demonstrated above that any error in the trial court's ruling was harmless beyond a reasonable doubt. For all of those same reasons, any deficient performance by Thompson was not prejudicial.

D. Trial counsel did not render ineffective assistance by failing to call witnesses to support an alibi or imperfect alibi defense.

As demonstrated in the merits argument above, Thompson did not withdraw the alibi/imperfect defense and decide not to call Struensee, Gehl or Brad because of the trial court's ruling that Copeland's own testimony had opened the door. Rather, the record demonstrates unequivocally that Thompson withdrew the alibi, with Copeland's consent, at the close of the State's case, before Copeland testified and before the trial court ruled on the impact of Copeland's testimony (187:112-18). The trial court found Thompson's testimony at the postconviciton hearing credible (158). That testimony establishes that Thompson had already decided before trial not to call the purported alibi witnesses because, based on the information they provided to him before trial, they rendered the alibi/imperfect alibi worthless (191:100, 118, 120-23; 192:13, 22-23, 31, 34).

In order to make his argument that Thompson should have called Struenesee as a witness, Copeland relies exclusively on Struenesee's postconviction hearing testimony.

Copeland relies on the fact that at the post-conviction motion hearing, Struenesee testified that she went to work about 7:45 a.m. on December 14, 2005; she arrived home at the Black River Falls trailer she shared with Copeland's brother, Brad, about 4:00 p.m. and she saw Copeland shoveling snow at that time (189:45-46). The record, however, demonstrates that trial counsel Thompson did not know that information at the time of trial (191:100; 192:21-23; 158:13). Struenesee testified that she talked to Thompson prior to trial, but she did not testify to what questions he asked her, and she did not testify about what information she provided to him at that time. Struenesee never testified that she told Thompson that she saw Copeland shoveling snow in Black River Falls about 4:00 p.m. on December 14, 2005.

Thompson testified that Struenesee did not tell him that she saw Copeland shoveling snow in Black River Falls at 4:00 p.m. on December 14, 2005 (191:100; 192:21-23; 158:13).

To the extent Copeland is also arguing the Thompson should have called Gehl to testify as a witness at trial, that claim must also be rejected. At the postconviction hearing, Gehl testified that a nice young fellow shoveled snow for her on the big snowstorm in December 2005, but she could not identify him (189:10). She saw him at an unidentified time possibly in the evening of December 14, 2005, and then the next day in the morning he shoveled for her and she gave him a check, which she identified, on December 15, 2005 (189: 11-12). She did not testify that she provided any of this information to Thompson, and she did not recall talking to Thompson, although she might have done so (189:21). Thompson testified at the postconviction hearing that when he talked to Gehl prior to trial, she could not

remember anything and she was confused and could not provide any support for any type of alibi defense (191:108, 123).

As the trial court concluded in denying the postconviction motion:

> - Trial counsel received incomplete alibi information from defendant roughly 31 days before trial.
> - Jennifer Struensee could not support the alibi as she told trial counsel defendant helped her move on a weekend, and not the day of the assault.[7] She asserted she did see defendant in Black River Falls sometime after 4:00 on the day of the assault. (However, she did not convey this information to trial counsel.) Oct. 1, 2012, Transcript, p. 21.
> - Dorothy Gehl was confused, stated she could not remember anything and could not provide any information.
> - Bradley Copeland provided false information about his employment and dates related to the alibi[8] and would have been laughed off the stand.
>
> Trial counsel was not ineffective. He pulled teeth to get information from his client and the witnesses and when it was investigated in the limited time available, the alibi in essence evaporated. The witnesses did not support it. In the time frame created by his client, trial counsel acted reasonably.
>
> While post-conviction counsel did go to great lengths to try to pull together an alibi argument from Jennifer Struensee and Dorothy Gehl, the end result of those efforts was to show that defendant was in Black River Falls at times before or after the assault. No one testified that defendant was in Black River Falls at the time of the assault.
>
> Post-conviction counsel laid out the time line when questioning trial counsel. Post-conviction counsel placed the assault between 1:30 and 2:00 pm on the afternoon of December 14th. Oct. 1, 2012 Transcript, p. 28, lines 24-25, p. 29, line 1. No witness provided any testimony as to defendant

being in Black River Falls that morning or afternoon. Jennifer Struensee did not place defendant in Black River Falls until after 4:00 pm. Thus, at least two hours were available to go roughly 30 miles. That would require an average of only 15 mph.

In summary, the victim and his brother place defendant with them at the Neillsville address at the time of the assault. No one testified that he or she was with defendant in Black River Falls at the time of the assault. Defendant at postconviction proceedings testified (contrary to trial testimony) he had a car available to him.[9] Even assuming he had been in Black River, nothing prevented him from driving to the scene of the assault. Thus, there was no alibi. Nor was there an imperfect alibi. Assuming Jennifer Struensee testified accurately, defendant being in one place, much later, when he had access to a car simply means he traveled. It does not mean he was not at the scene of the assault.

Therefore, trial counsel's withdrawal of the alibi, with the information available at the time, was appropriate. Trial counsel testified that he withdrew the alibi because the witnesses did not support it-and not because of an issue related to an "open door" allowing the state to introduce contrary evidence. October 1, 2012 Transcript, p. 31. He stated that he had always been suspicious of the alibi, but filed it to preserve it. ld., p. 13. Trial counsel then concluded that his suspicions of the alibi were confirmed by the information he learned himself, plus the rebuttal information he received from the district attorney. ld., p. 13. The record shows that as a strategy decision, trial counsel held the alibi out there as long as he could with the information he had. He withdrew the alibi when

> . . . it was not corroborated in the fact it was specifically rejected by Jennifer Struensee in my interview with her who said the move - this is tied to the move from the mobile home.
>
> . . . in the morning, I met with the defendant and again I went over this with him and I told him I could not use the alibi. Just as a matter of practice, you withdraw the alibi at the last

> possible minute sort of a game playing aspect of this. And that's what I did. I knew I was going to withdraw it.

Oct. 1, 2012, Transcript, p. 22-23. Post-conviction counsel argues that this is not valid, because it "looks like it wasn't your [trial counsel's] intent the whole day to withdraw the alibi" but only did so because of the door being opened. ld., p. 23.

This is again second guessing with hind sight. Trial counsel explained his strategy of keeping all options open, including the alibi, for as long as possible. The strategy makes sense-the more things on the table, the more options one has, then the less sure the other side is of strategy etc. Post-conviction counsel can argue at length about the circumstances "looking suspicious" in hindsight. But it does not change the fact that trial counsel utilized an appropriate strategy. The court understands and accepts trial counsel's strategy to "play the card" as long as possible, which is not an unusual negotiating and trial strategy. There was nothing ineffective in this process.

As to alibi issues the court concludes trial counsel was not ineffective. Defendant is to be blamed for not raising the details of any alibi, imperfect or otherwise, with trial counsel. *McClelland v. State,* 84 Wis. 2d 145, 152-153.[10] With 31 days left before trial, trial counsel finally gets limited information from the defendant. Under these circumstances, trial counsel did an admirable job of tracking down those witnesses. Unfortunately, the witnesses did not support the alibi and were, in some instances, seemingly hostile (Jennifer Struensee) or lying (defendant's brother). The third witness testified she had a hard time remembering anything. In obtaining this information, trial counsel fulfilled his duty to defendant. As stated in *State v. McGuire,* 328 Wis. 2d 289, 317-318 (2010), "Counsel need not investigate every potential witness, but he has a duty to make reasonable investigation or to make a reasonable decision that makes particular investigations unnecessary." Trial counsel made a reasonable investigation under the facts and circumstances of this case.

In part, the court's conclusions in this decision rest on the credibility of trial counsel's statements. Throughout this decision, the court has referred to the testimony and statements of trial counsel. The court observed trial counsel's demeanor as he testified. The court finds trial counsel to be a very credible witness. His answers were generally direct and to the point. Where he could answer "yes" or "no," he did. If he did not know or recall something he would say so. His body language and tone of voice gave the court no reason to doubt his credibility. He was straightforward and to the point. While testifying, trial counsel gave the court no reason to believe or infer that he was stating anything more or less than the truth - his answers gave no impression of bias or slant. Trial counsel did the things he said he did for the reasons he has stated. The court has no doubt of this.

---

[7] See also, October 1, 2012 Transcript, p. 20-21.

[8] The problem with Bradley Copeland's testimony was that he said the day of the assault was the day he had been off work. However, employment records show that Bradley Copeland lost his job several months prior to the date of the assault. He could not have been off of work for a day, because he was unemployed. October 1, 2012, Transcript, p. 14-15.

[9] Much was made of the testimony of Atty. Scott Roberts that because of the snow storm, it would have been "physically impossible" for defendant to drive from Black River to Neillsville or vice versa. October 1, 2012 Transcript, p. 63. The court does not consider Mr. Roberts to be an expert on bad weather travel. Moreover, this claim of physical impossibility is not supported by the record. For example, Jennifer Struensee testified she was angry with defendant because he drove in the bad weather to buy her a Trivial Pursuit game. ld., p. 42. While this driving does not appear to be the same day as the assault, it shows defendant maintained a level of mobility not withstanding the snow.

> [10] *McClelland* states: " . . . the defendant personally is to be held responsible when he has not entirely cooperated with his attorney to ensure the production of necessary witnesses."

(158:13-15).

For all of these reasons, trial counsel did not render ineffective assistance by failing to call witnesses to support an alibi or imperfect alibi defense.

CONCLUSION

Based on the record and the legal theories and authorities presented, the State respectfully asks this court to affirm the judgment of conviction, sentence, and order denying postconviction relief entered below.

Dated this 18th day of September, 2014

Respectfully submitted,

J.B. VAN HOLLEN
Attorney General

SALLY L. WELLMAN
Assistant Attorney General
State Bar #1013419

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-1677
(608) 266-9594 (Fax)
wellmansl@doj.state.wi.us

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 8,235 words.

Dated this 18th day of September, 2014

_____
SALLY L. WELLMAN
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 18th day of September, 2014

_____
SALLY L. WELLMAN
Assistant Attorney General