RECEIVED
10-10-2014
CLERK OF COURT OF APPEALS
OF WISCONSIN

COURT OF APPEALS
OF WISCONSIN
DISTRICT IV

STATE OF WISCONSIN,

Plaintiff-Respondent,

v. Appeal No. 2014AP929 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.

REPLY BRIEF OF DEFENDANT-APPELLANT

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. iii

STATEMENT OF THE CASE. 1

ARGUMENT:

I. THE CIRCUIT COURT'S TRIAL AND POST-CONVICTION ALIBI RULINGS WERE ERRONEOUS AND DENIED COPELAND A FAIR TRIAL. 1

A. ***

B. The Court's Mid-Trial Determination Copeland's Testimony "Opened the Door" Was Erroneous and Not Harmless. 1

C. The Trial Court's Post-Conviction Determination That Copeland's Trial Testimony Constituted Neither an Alibi Nor an Imperfect Alibi Was Erroneous. 3

D. The Trial Court's Post-Conviction Credibility Determinations for Attorney Thompson's Testimony and Impact of Copeland's Testimony Were Clearly Erroneous. 4

II. THE CIRCUIT COURT'S DECISION FINDING TRIAL COUNSEL PROVIDED REASONABLE PERFORMANCE IN ABANDONING THE ALIBI DEFENSE MID-TRIAL WAS ERRONEOUS 5

A. ***

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. 5

CONCLUSION. 7

CERTIFICATION. 8

E-FILING CERTIFICATION. 8

TABLE OF AUTHORITIES

Cases Cited:

State v. Harp, 2005 WI App 250, 288 Wis.2d 441, 707 N.W.2d 304.. 4

State v. McCallum, 208 Wis.2d 463, 556 N.W.2d 707 (1987). 5

State v. Shaw, 58 Wis 2d 25, 205 N.W.2d 132 (1973). 2, 3, 4

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

Statutes Cited:

§801.15(5)(a), Wis. Stats. 1

§971.23(8)(a), Wis. Stats. 6

STATEMENT OF CASE

The State's brief was timely filed, by extension, on 9/18/14. That brief was served on counsel by First Class Mail and Copeland's Reply Brief was due, pursuant to 801.15(5)(a), Wis. Stats., on 10/7/14. The Reply brief is now due, by extension, on 10/10/14.

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

A. * * *

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

The Response argues the trial court's determination Copeland's testimony "opened the door" was not clearly erroneous because there was a rational basis for the ruling, citing State v. Shomberg, 2006 WI 9, ¶11, 288 Wis.2d 1, 709 N.W.2d 370 (Response, p.15). There was, however, no rational basis for finding Copeland's testimony opened the door because the court misconstrued both Copeland's specific testimony and the applicable case authorities addressing Copeland's "purported alibi" testimony. Because Copeland's testimony left open the possibility Copeland was still guilty of

the sexual assault in Neillsville, it was "not an alibi at all." *See* State v. Shaw, 58 Wis.2d 25, 30-31, 205 N.W.2d 132 (1973). Here, Copeland's predicate testimony (for the alibi ruling sparking the evidentiary confusion and unreasonable response by defense counsel) had simply claimed he had not babysat on the date of the alleged offense in Neillsvile. (R.170, pp. 119-21)

Moreover, the Response (pp. 16-17) misstates the record when it claims that this erroneous ruling had no impact on trial counsel who, the State argues, had decided to withdraw the alibi defense prior to trial and not as a result of the court's erroneous ruling. There was an impact, of course, because the record clearly established counsel's frantic attempts to somehow resolve this evidentiary confusion (without surrendering his client's best defense) when defense counsel had fully intended to present an alibi defense with Ms. Struensee's testimony until the court's damaging alibi ruling (R.170, pp. 129-30).

Indeed, counsel's immediate and specific reaction to the court's resolution of the alibi confusion effectively limiting Copeland's testimony and closing argument is as follows:

THE COURT: * * *

Would there by anyone else testifying after [Copeland] then?

MR. THOMPSON: No. Your ruling has sort of eliminated the need for Ms. Struensee. While we are at it, we should cancel the warrant.

(R.170, pp. 133-34).

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

The claim in the Response (p.16) that the court's decision was not erroneous because the court correctly concluded Copeland was in a "specific other place" (Black River Falls), on the *date* of the offense, avoids the requirement that an alibi necessarily places a defendant at another place on a particular date and at a particular *time*. Shaw, pp. 30-31. Critically, Copeland's testimony never unequivocally claimed he was in Black River Falls the entire "snow" day. This is confirmed by defense counsel's predictable caution during Copeland's direct testimony (before any objection) and the prosecution's understandable unwillingness to establish on cross-examination that Copeland was *never* in Neillsvile on the snow day.

Second, the Response is wrong when it argues the trial court's mid-trial determination that Copeland's trial testimony

"opened the [alibi] door" was not erroneous because Copeland's testimony he was elsewhere on the date of the alleged sexual assault did, rather, constitute an imperfect alibi defense. Shaw, pp. 30-31; State v. Harp, 2005 WI App 250, ¶16, 288 Wis.2d 441, 707 N.W.2d 304 ¶16.

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

The Response argues the circuit court's post-conviction 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 not clearly erroneous (Response, p. 17). However, it was clearly erroneous because there was no hint in the trial court record that counsel had already abandoned his client's best defense as counsel frantically sought to salvage its presentation, along with Ms. Struensee's testimony (R.170, pp. 129-34). *See also* Claim I-B, *ante*.

The Response does not address the court's erroneous determination that, because Copeland's post-conviction testimony regarding the "white Chevy Cavalier" (R.172, pp. 215-16) seemed to apparently contradict his indirect trial testimony that he had no vehicle to drive between Neillsvile

and Black River Falls (R.170, pp. 119-21), there could be no reasonable probability of a different outcome. *See* State v. McCallum, 208 Wis.2d 463, 474-76, 556 N.W.2d 707 (1987). The court was correct (and echoed *McCallum*) when it earlier addressed this apparent contradiction but limited its finding that there only was "no one who can say who drove the car" (R.174, pp. 224-25).

II. THE CIRCUIT COURT'S DECISION FINDING TRIAL COUNSEL PROVIDED REASONABLE PERFORMANCE IN ABANDONING THE ALIBI DEFENSE MID-TRIAL WAS ERRONEOUS.

A. * * *

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.

The Response is wrong when it argues the trial court's post-conviction ruling that trial counsel's performance was neither deficient nor prejudicial was not clearly erroneous when the court's findings were, in fact, not based on the full and entire trial court record (Response, p. 21).

The Response is also wrong when it argues cross-examination of Copeland's alibi testimony would have been precluded, if the court had found it constituted merely an

imperfect alibi (Response, pp. 21-22). Copeland claims only that any testimony from Brad Copeland was impermissible to impeach Copeland's "imperfect" alibi because it was testimony from a witness who, while identified as an alibi witness, was not called to testify by Copeland; the evidence regarding Brad Copeland's testimony regarding any employment on the date of the crime constituted extrinsic evidence; and this testimony was, in any case, irrelevant given only Struensee's testimony that Brad and Derek were shoveling snow in Black River Falls on and after 4:10pm on the date of the crime. *See* §971.23(8)(a), Wis. Stats.

The Response is correct when it argues 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 would have called, or what the witnesses would have said to rebut the imperfect alibi." (Response, p. 22). The State is wrong when it seems to argue that it was Copeland's responsibility to proffer how the State's potential cross-examination of Copeland would have been unfairly limited without Brad's testimony rather than to acknowledge it is the State's burden to make its proffer to establish unfair prejudice from a ruling consistent with §971.23(8)(a), Wis.

Stats.

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 8th day of October, 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), Wis. 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 1158 words.

Dated: October 8, 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: October 8, 2014

JAMES REBHOLZ