COURT OF APPEALS
DECISION
DATED AND FILED

January 7, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP2462-CR **Cir. Ct. No. 2009CF2042**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

FONTAINE WASHINGTON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: PATRICIA D. MCMAHON, CHARLES F. KAHN, JR., and J.D. WATTS, Judges. *Affirmed.*

Before Curley, P.J., Fine and Kessler, JJ.

¶1 KESSLER, J. The State of Wisconsin objects to an order of the circuit court granting Fontaine Washington a new trial on the basis of newly discovered evidence. We affirm the circuit court, though on different grounds.

See ***State v. Smiter***, 2011 WI App 15, ¶9, 331 Wis. 2d 431, 793 N.W.2d 920 (WI App 2010) ("[W]e may affirm the circuit court's order on different grounds.").

BACKGROUND

¶2 This case has a long, convoluted procedural history. On May 6, 2010, Washington was found guilty, following a jury trial, of one count of fleeing an officer and one count of being a felon in possession of a firearm.[1] The charges against Washington stemmed from an incident which occurred on April 24, 2009. On that date, Milwaukee Police Officers Brian Burch and Shawn Burger responded to reports of gunfire in the area of 1100 West Chambers Street, Milwaukee. The officers followed a Chevrolet Blazer, driven by Washington, after noticing that Washington had abruptly stopped at a stop sign, then turned right after signaling a left turn. The officers turned their siren on, but Washington did not stop. Instead, Washington continued to drive on North Mother Simpson Way. Washington was eventually stopped and arrested.

¶3 At trial, Officers Burch and Burger testified that they witnessed Washington throw a "shiny object" out of the car window as he was driving. The officers radioed additional Milwaukee police officers to locate the object while they pursued Washington. Approximately a half hour after the officers radioed for assistance in locating the "shiny object," Milwaukee police officer Erica Lewis responded to a separate report of gunfire on the same block where the "shiny object" was allegedly thrown. After searching for approximately ten to fifteen minutes, Officer Lewis, and her partner, Officer Kurt Saltzwadel, located a gun in

[1] The Honorable Patricia D. McMahon presided over the trial.

a vacant lot off of North Mother Simpson Way. A subsequent police report stated that the gun was found approximately 30 feet off of the roadway.

¶4 Washington denied ever throwing a gun from the vehicle. A State crime lab examiner testified that Washington's DNA was not on the gun and an identification technician for the Milwaukee Police Department testified that Washington's fingerprints were not on the gun. The State presented no evidence that the gun had scratch marks or grass stains consistent with being thrown 30 feet from a moving vehicle. The State's case as to the felon in possession charge centered almost entirely on the testimony of Officers Burch and Burger.

¶5 Following sentencing, Washington filed a postconviction motion for relief, arguing that he was entitled to a new trial because his defense counsel was ineffective. As relevant to this appeal, Washington argued that his defense counsel was ineffective for failing to introduce evidence that he could not have thrown the gun that Officers Lewis and Saltzwadel recovered because it was found too far from the roadway to have been thrown from a moving vehicle. Specifically, Washington argued that his defense counsel should have elicited testimony from Officers Lewis and Saltzwadel that the gun was found 30 feet off of North Mother Simpson Way and produced evidence that Washington could not possibly have thrown the gun that far. Taking into account the width of the road and parked cars, Washington argued, he would have had to have thrown the gun beyond 30 feet. Based on an experiment conducted by University of Wisconsin law student Andrew Pippin, Washington argued that a throw as described by police was impossible. The postconviction court denied the motion without a

hearing.[2] Washington appealed and we remanded the matter for a ***Machner***[3] hearing.

¶6 Prior to the hearing, Washington, through postconviction counsel, filed an amended postconviction motion arguing, as an alternative to his ineffective assistance of counsel claim, that newly discovered evidence warranted a new trial. The newly discovered evidence, Washington argued, was Pippin's testimony about his experiment in which Pippin drove the same route as Washington and threw a weighted gun from the front window of the moving vehicle into the vacant lot abutting North Mother Simpson Way. Pippin threw a toy gun which he weighted down to almost exactly the same weight as the recovered gun. Pippin threw the weighted gun from a moving vehicle six times. Each time he measured the distance between the gun and the roadway. Pippin, who is taller than Washington, was able to throw the weighted gun a maximum of 21 feet and four inches from the roadway. Washington argued, in accordance with Pippin's experiment, that because of parked cars along the side of the road, Washington would have had to have thrown the gun farther than the 30 feet where the gun was recovered. Washington also argued that photogrammetric[4] evidence he produced at the hearing also established that he could not physically throw a gun as far as where the gun was recovered.

[2] The postconviction motion was denied by the Honorable Charles F. Kahn.

[3] *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

[4] Photogrammetry is defined as "the science of making reliable measurements by the use of photographs." MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/photogrammetry (last visited Dec. 9, 2013).

¶7 At the ***Machner*** hearing,[5] the circuit court heard testimony from (1) Officer Lewis; (2) Officer Saltzwadel; (3)Ann Bowe, Washington's defense counsel; (4) Dr. Chin Wu, a photogrammetric expert; and (5) Pippin. After a three-day hearing, the circuit court concluded that defense counsel was not ineffective, but that Washington was entitled to a new trial on the basis of newly discovered evidence.

¶8 The State now files a written statement of objections to the circuit court's order. *See* WIS. STAT. § 808.075(8) (2011-12).[6] The State argues that the circuit court lacked the competency to consider Washington's newly discovered evidence argument because this court remanded Washington's case for a ***Machner*** hearing only. The State also argues that regardless of the competency question, the circuit court erred in granting Washington a new trial because Washington did not put forth newly discovered evidence. We need not address the questions of competency and newly discovered evidence, however, because we conclude that Washington's defense counsel was ineffective. *See* ***State v. Castillo***, 213 Wis. 2d 488, 492, 570 N.W.2d 44 (1997) ("An appellate court should decide cases on the narrowest possible grounds."); ***Smiter***, 331 Wis. 2d 431, ¶9 ("[W]e may affirm the circuit court's order on different grounds."). Additional facts are discussed as relevant.

[5] The Honorable J.D. Watts presided over the ***Machner*** hearing and issued the order granting Washington a new trial.

[6] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

DISCUSSION

¶9 On appeal, we address only the question of whether Washington's defense counsel was ineffective for failing to present evidence suggesting the improbability that Washington could have thrown the gun to the location where it was discovered. Accordingly, we focus only on defense counsel's testimony.[7]

¶10 To establish an ineffective assistance of counsel claim, a defendant must show both that counsel's performance was deficient and that he or she was prejudiced by the deficient performance. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). The performance inquiry determines whether counsel's assistance was reasonable under prevailing professional norms and considering all the circumstances. ***Id.*** at 688. A defendant must overcome the presumption that, under the circumstances, the challenged action of defense counsel might be considered sound trial strategy. ***Id.*** at 689. Under the prejudice prong, "[t]he defendant must show there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** at 694.

¶11 We review the denial of an ineffective assistance claim as a mixed question of fact and law. *See* ***id.*** at 698. We will not reverse the circuit court's factual findings unless they are clearly erroneous. *See* ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). However, we review the two-pronged determination of defense counsel's performance independently as a question of law. *See* ***id.*** at 128.

[7] Because we do not address the question of newly discovered evidence, we do not discuss Washington's reliance on photogrammetric evidence any further.

¶12 We conclude, based on the circuit court's findings and defense counsel's testimony, that defense counsel's failure to introduce available evidence that the gun was recovered so far from the roadway that Washington probably could not have thrown the gun that far from a moving vehicle was both deficient and prejudicial. Consequently, we affirm the circuit court's order granting a new trial.

I. Deficient Performance.

¶13 At trial, the only evidence linking Washington to the recovered gun was the testimony of Officers Burch and Burger, both of whom testified that they witnessed Washington throw a "shiny object" from the vehicle Washington was driving. Neither officer testified with certainty, however, that the object allegedly thrown was indeed a gun. The State's case regarding the felon in possession of a firearm was based solely on the testimony of the officers.

¶14 At the ***Machner*** hearing, defense counsel acknowledged that the only issue with regard to the possession count was whether Washington threw the gun that Officers Lewis and Saltzwadel located. However, defense counsel testified that Washington's ability to throw the gun never occurred to her as a defense theory. She stated that she "didn't conceptualize that 30 feet would be a possible or impossible distance to throw." Accordingly, defense counsel stated that she had no strategic reason for failing to introduce evidence about where exactly the gun was found. While the failure to present a particular defense strategy does not automatically render a defense counsel's performance deficient, in this case it requires us to consider, based on the information available, whether defense counsel's trial tactics were objectively reasonable. *See* ***State v. Koller***, 2001 WI App 253, ¶53, 248 Wis. 2d 259, 635 N.W.2d 838 (reviewing

court can determine that defense counsel's performance was objectively reasonable, even if defense counsel offers no sound strategic reasons for decisions made), *modified on other grounds*, ***State v. Schaefer***, 2003 WI App 164, 266 Wis. 2d 719, 668 N.W.2d 760. We conclude, based on the unique facts here, that they were not.

¶15 It is undisputed that (1) Officer Lewis was responding to a report of gunfire in the same area; (2) neither Washington's DNA nor his fingerprints were found on the gun; (3) no argument was made that the gun had scratch marks consistent with the gun hitting the ground after being thrown 30 feet or more; (4) there was no evidence of registration records tying Washington to the gun; and (5) Washington consistently denied possessing a gun. The critical question was whether Washington threw the gun from his car window because nothing else linked Washington to the weapon found by police. Defense counsel did nothing to suggest it was improbable, much less impossible, for Washington to have thrown the weapon that far from the moving car he was driving. Defense counsel did not question Officer Lewis about where the gun was recovered.

¶16 At the preliminary hearing, Officer Saltzwadel testified that the gun was found in a grassy field approximately 30 feet from the roadway. Officer Burch testified that cars were parked on both sides of the road, which implies the gun would have to have been thrown at least a car's width beyond 30 feet to support Officer Saltzwadel's estimation. Defense counsel did not call Officer Saltzwadel to testify at Washington's trial. Demonstrative evidence, such as that developed by Pippin, or other simple weight/distance demonstrations, could have explained why it was improbable that Washington threw the gun. Defense counsel testified that she did not think to focus on the location of the gun, Washington's ability to throw the gun, or the physical appearance of the gun. She agreed that if

Washington was unable to throw the gun to the location where it was found, he would have had a possible defense. Defense counsel admitted that she did not strategically reject the distance defense because she did not explore it. Under the circumstances of this case, this was deficient performance. *See* ***State v. Felton***, 110 Wis. 2d 485, 503-04, 329 N.W.2d 161 (1983) (failure to raise a viable defense may, in some circumstances, constitute ineffective assistance of counsel).

II. Prejudice.

¶17 Having concluded that defense counsel's performance was deficient, we next consider whether the performance was prejudicial. "To establish constitutional prejudice the defendant must show that but for counsel's unprofessional errors, there is a reasonable probability that the result of the proceeding would have been different." ***State v. Champlain***, 2008 WI App 5, ¶28, 307 Wis. 2d 232, 744 N.W.2d 889 (WI App 2007). "'A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" ***Id.*** (citation omitted). "The focus of this inquiry is not the outcome of the trial, but on 'the reliability of the proceedings.'" ***State v. Thiel***, 2003 WI 111, ¶20, 264 Wis. 2d 571, 665 N.W.2d 305 (citation omitted). Applying these standards, we conclude that defense counsel's deficiency was prejudicial.

¶18 The State's case with regard to the possession charge was entirely dependent on the testimonies of Officers Burch and Burger—both of whom testified that Washington threw a "shiny object" from his car window—and the subsequent recovery of a firearm in a vacant field on North Mother Simpson Way. Because the jury was not aware of where exactly the gun was recovered, the jury could have assumed that the gun was recovered within easy throwing distance of Washington's car. Evidence that the gun was recovered approximately 30 feet

from a roadway, and, consequently, that the throw was practically impossible, would have been probative given the following undisputed facts: (1) Officer Lewis testified that she responded to reports of gunfire in the same area at around the same time she was contacted by Officers Burch and Burger; (2) the gun had neither Washington's DNA nor fingerprints; (3) no argument was made that the gun had scuff marks suggesting the gun had hit the ground after being thrown 30 feet from a moving vehicle; (4) Washington consistently denied possessing a gun; and (5) neither registration records nor other witness accounts linked Washington with the recovered firearm. The lack of evidence suggesting the probability of Washington's ability to throw a gun 30 feet or more from a moving vehicle undermines our confidence in the outcome.

By the Court.—Judgment and order affirmed.

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