

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 10, 2014

Diane M. Fremgen
Clerk of Court of Appeals

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Appeal No. 2012AP2738-CR

Cir. Ct. No. 2010CF3443

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

v.

DONALD RAY MICHAEL,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County:
CHARLES F. KAHN, JR., Judge. *Affirmed.*

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

¶1 KESSLER, J. The State of Wisconsin appeals from an order of the circuit court, granting Donald Ray Michael's motion for a new trial on the basis of ineffective assistance of counsel. Because we agree with the circuit court that Michael's trial counsel rendered ineffective assistance, we affirm.

BACKGROUND

¶2 On July 9, 2010, Michael was charged with one count of first-degree reckless injury by use of a dangerous weapon, as a repeater, and with one count of possession of a firearm by a felon, as a repeater. The charges stemmed from a drive-by shooting that occurred on April 22, 2010, with the perpetrator shooting into the residence at 1212 West Chambers Street, Milwaukee. Symphony Winfield was injured in the shooting when bullets struck her legs. Winfield's cousin, Cassandra Davis, identified Michael as the shooter.

¶3 The matter proceeded to a jury trial, where Michael maintained that he was not the shooter.¹ Specifically, Michael's theory of defense was that at the time of the shooting, Michael was en route to a hospital to treat a gunshot wound he received earlier in the day. However, Michael argued, he did not actually make it to the hospital because he was notified within ten minutes of the shooting that he was a suspect and feared being arrested upon arriving at a hospital.

¶4 Multiple witnesses testified that they heard Davis identify Michael as the shooter within minutes of the shooting; however, Davis was the only actual eyewitness to the shooting who testified. Davis testified that she knew Michael by his nickname, "Squeaky," and that Michael lived in her aunt's neighborhood. Davis stated that during the daytime hours of April 22, 2010, she was walking towards her aunt's home at 1212 West Chambers when Michael and three other individuals pulled up next to her in a black truck. Michael asked Davis "where's them BA niggers at now[?]" Davis testified that before she could respond, both Michael and his passenger pulled out handguns and began shooting towards the

¹ The Honorable Rebecca F. Dallet presided over the jury trial.

house. Davis testified that as shots were being fired, she ran to the nearest convenience store and then made her way back to her aunt's home. Davis testified that she told her family and the investigating police officer that she saw Michael with a gun and that she spoke with the officer within minutes of the shooting.

¶5 Michael told the jury that he was not the shooter. Specifically, Michael testified that earlier in the day, on April 22, 2010, he was driving his blue Oldsmobile in the area of 10th and Chambers with a friend. Michael said that he stopped his car in front of the home located at 1212 West Chambers street to “flirt with a girl.” While Michael was flirting, his friend shot a BB gun out of the car. Michael heard someone nearby yell “to go get a gun” and immediately thereafter “the guy that was told to get the gun came running out of the front door of [his] house ... with the gun pointed at me and start[ed] shooting.” Michael testified that he was shot in the arm. Michael testified that he went home and asked friends to call 911, but a friend offered to take him to the hospital instead. Michael stated that while en route to the hospital—a ten minute drive from his home—he received a phone call informing him that the police had gone to Michael's house because Michael was a suspect in a shooting. Michael testified that he then decided not to go to the hospital because he feared being taken into custody upon his arrival. Instead, Michael asked a family friend to take care of his wound.

¶6 Michael's defense counsel also called Detective Edward McCrary. McCrary testified that he is a Milwaukee police detective and that he interviewed Davis shortly after the shooting. McCrary testified that he also interviewed Davis's aunt and cousin, and that the investigation into the shooting suspect took several hours. Specifically, McCrary testified that he did not have a suspect within the first ten minutes of the shooting, but rather, did not know to look for Michael until McCrary was able to conduct several interviews—a process which

McCrary stated took several hours. However, McCrary also testified that Davis identified “Squeaky” “early on” as the shooter.

¶7 The jury found Michael guilty of both charges. Following sentencing, Michael, through new counsel, filed a motion for postconviction relief. Michael argued that his trial counsel was ineffective for failing to introduce a computer automated dispatch (CAD) report of a 911 call identifying Michael as a suspect in the shooting less than ten minutes after an initial call reporting “shots fired.” Michael argued that the CAD report would have corroborated his testimony that he was on his way to the hospital to treat his own gunshot wound at the time of the shooting and that he decided not to go to the hospital because he received word that he was a suspect in the shooting. Michael also argued that McCrary’s testimony that Michael was not a suspect until several hours after the shooting would have been contradicted by the CAD report and that the report would have shown that “McCrary’s testimony on this point was demonstrably false.” Michael further argued that counsel was ineffective for failing to introduce the testimony of Nikita Young, another eyewitness to the shooting. Michael argued that Young was also interviewed by police following the shooting and that her description of the shooter was inconsistent with Michael’s appearance.

¶8 The postconviction court² held a hearing on Michael’s motion. Both Michael’s trial counsel and Young testified. Michael’s trial counsel testified that his theory of defense was that Michael could not have been the shooter for two reasons: (1) Michael himself suffered a gunshot wound earlier in the day and physically would not have been able to shoot a gun out of his car window; and (2) Michael was on his way to the hospital to treat the wound at the time the shots

² The Honorable Charles F. Kahn presided over the postconviction motion.

were fired. Trial counsel also noted that no physical evidence tied Michael to the shooting and that Michael's case turned on witness credibility. Trial counsel testified that the CAD report logging the 911 call made minutes after the shooting identified Michael as a suspect, contrary to McCrary's testimony that Michael was not a known suspect until hours after the shooting. The report also corroborated Michael's testimony that he was made aware that he was a suspect within ten minutes of the shooting. Michael even pointed out the discrepancy between the CAD report and McCrary's testimony to his counsel. Trial counsel stated that he did not have a tactical reason for failing to introduce the report, but rather just "forgot to ask."

¶9 Trial counsel also testified that Young's description of the shooting to police included a description of the shooter that did not match Michael's physical description. Trial counsel testified that financial concerns prevented him from hiring a private investigator to locate Young and that he did not attempt to subpoena her, though he "absolutely" would have called Young to testify if he had interviewed Young and she provided information consistent with her police interview.

¶10 Young also testified at the hearing. Young stated that she lived about one block from the scene of the shooting and that she witnessed the incident from approximately twenty feet away. Young observed a passenger in an "off-black" or "dark blue" Oldsmobile pull out a gun and start shooting. Young described the shooter as a dark-skinned African-American man and stated that she knew of Michael, a "light-skinned" man, from the neighborhood. She stated with "100 percent" certainty that Michael was not in the car from which the shots were fired. Young also testified that she moved out of the neighborhood, did not leave

a forwarding address, and did not receive a subpoena from the State until after the trial had concluded.

¶11 In an oral decision, the postconviction court granted Michael's motion for a new trial on the basis of ineffective assistance of counsel, stating:

Is there a reasonable probability that but for counsel's unprofessional errors the result of the proceeding would have been different? I have to say there is that reasonable probability, and again, it's not merely that [trial counsel] failed to include the bolstering CAD report, it's not merely that [trial counsel] failed to contact the only other apparent eyewitness to the shooting, but it's those two things together with the manner in which the testimony of Mr. Michael is impeached by the prosecutor that give me these concerns.

¶12 This appeal follows.

DISCUSSION

¶13 On appeal, the State argues that the postconviction court erroneously granted Michael's motion for a new trial because Michael's trial counsel did not render ineffective assistance. We disagree.

Standard of Review.

¶14 In order to demonstrate ineffective assistance of counsel, the defendant must prove that his trial counsel's performance was deficient, and that the deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The issues of deficient performance and prejudice constitute mixed questions of law and fact. *See State v. Sanchez*, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996). We will not upset findings of fact unless they are clearly erroneous, but whether counsel's performance was deficient and

whether the deficient performance prejudiced the defendant are legal questions we decide *de novo*. See *id.* at 236-37.

Deficient Performance.

¶15 An attorney's performance is deficient if the attorney "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *State v. Johnson*, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990) (quoting *Strickland*, 466 U.S. at 687). Stated differently, performance is deficient if it falls outside the range of professionally competent representation. *State v. Pitsch*, 124 Wis. 2d 628, 636-37, 369 N.W.2d 711 (1985). We measure performance by the objective standard of what a reasonably prudent attorney would do in similar circumstances. See *id.* We indulge in a strong presumption that counsel acted reasonably within professional norms. See *id.* at 637.

¶16 At the postconviction hearing, Michael's trial counsel acknowledged that his failure to introduce the CAD report and Young's testimony were oversights, not strategic decisions. Counsel also acknowledged that because no physical evidence linked Michael to the shooting, witness credibility was critical to the jury's decision. The CAD report would have both bolstered Michael's testimony that he forewent a hospital visit because he became aware that he was a suspect in the shooting within ten minutes of the 911 call reporting the incident, and undermined McCrary's testimony that Michael did not become a suspect until hours after the shooting. The CAD report showed that police broadcasted Michael's home location less than seven minutes after the 911 call and his name less than ten minutes after the call. Young's testimony would have directly contradicted Davis's testimony if Young testified consistent with her statement to

police. Davis was the only eyewitness to the shooting at trial and she identified Michael as the shooter. Young stated with “100 percent” certainty that she did not witness Michael fire shots towards 1212 West Chambers Street—Young did not even place Michael at the scene.

¶17 Trial counsel’s failure to introduce evidence that would have enhanced the defendant’s credibility and undermined the credibility of both an officer on the scene and an eyewitness was deficient performance in this case. Counsel was aware of the discrepancy between the CAD report and McCrary’s testimony, as well as the potentially exculpatory nature of Young’s testimony. The failure to introduce the CAD report and to investigate Young—both of which were available to him—fell below an objective standard of reasonableness. *See State v. Jeannie M.P.*, 2005 WI App 183, ¶25, 286 Wis. 2d 721, 703 N.W.2d 694. When a case turns on witness credibility, trial counsel has a duty to investigate and present impeaching evidence when counsel knows or should have known of its existence. *Id.*, ¶11.

Prejudice.

¶18 To establish prejudice, “the defendant must affirmatively prove that the alleged defect in counsel’s performance actually had an adverse effect on the defense.” *State v. Reed*, 2002 WI App 209, ¶17, 256 Wis. 2d 1019, 650 N.W.2d 885. The defendant “‘must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.’” *Id.* (quoting *Strickland*, 466 U.S. at 694).

¶19 The central question in this case—whether Michael was the shooter—hinged on witness credibility. Trial counsel had available information

which would have enhanced the defendant's credibility and cast doubt on the credibility of two other witnesses. However, the jury did not hear this information. The CAD report not only corroborates Michael's testimony that he was on his way to the hospital at the time of the shooting, it also undermines McCrary's testimony that Michael was not a suspect until hours after the incident. The CAD report could have been used to impeach McCrary. Young's testimony would have directly contradicted the testimony of the State's only eyewitness, perhaps its key witness—Davis. Multiple other witnesses testified based on what Davis told them. Young's testimony that Michael was not even at the scene of the shooting, let alone the actual shooter, would have presented the jury with a crucial credibility choice that it did not have at trial. We agree with the postconviction court that trial counsel's failure to present two key pieces of evidence, without strategic reasons, undermines our confidence in the outcome.

¶20 For the foregoing reasons, we affirm the postconviction court.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

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¶21 FINE, J. (*dissenting*). In my view, the Majority misapplies the “prejudice” standard set by *Strickland v. Washington*, 466 U.S. 668 (1984). Accordingly, I respectfully dissent.

¶22 When a defendant contends that he or she was wrongfully convicted because the trial lawyer gave the defendant constitutionally deficient representation, the defendant “must show that his lawyer’s errors were so serious that he was deprived of a fair trial and reliable outcome.” *Id.*, 466 U.S. at 687. Thus, “[t]he defendant must show that there is a reasonable probability that, but for lawyer’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.” *Id.*, 466 U.S. at 694. The Majority asserts that Donald Ray Michael’s trial lawyer’s representation was deficient in two respects: (1) he did not use a police-department computer-assisted-dispatch report that showed that police suspected Michael from the get-go; and (2) he did not interview and call Nikita Young as a witness. I address these two elements in turn.

1.

¶23 As the Majority relates, Michael claimed that at the time of the shooting he was on his way to a hospital for a previously-inflicted bullet wound, but decided not to go because he was warned that the police were looking for him for the shooting that is the subject of this appeal. Majority, ¶3. A witness to the shooting, Cassandra Davis identified Michael as the shooter, and frantically told

Cynthia Davis contemporaneously that Michael was the shooter. Significantly, the police-department computer-assisted-dispatch report indicated that Michael was identified as a suspect fewer than ten minutes after the shooting. This, of course, was consistent with Michael's testimony that he was alerted that the police were looking for him shortly after the shooting, and it was also consistent with Cassandra Davis's testimony.

¶24 The sole benefit that the defense might have had from the police-department computer-assisted-dispatch report was that it contradicted the testimony of Detective Edward McCrary because, as related by the Majority:

McCrary testified that he is a Milwaukee police detective and that he interviewed Davis shortly after the shooting. McCrary testified that he also interviewed Davis's aunt and cousin, and that the investigation into the shooting suspect took several hours. Specifically, McCrary testified that he did not have a suspect within the first ten minutes of the shooting, but rather, did not know to look for Michael until McCrary was able to conduct several interviews—a process which McCrary stated took several hours.

Majority, ¶6. *But*, as we have seen, the police-department computer-assisted-dispatch report verified that Cassandra Davis had identified Michael as the shooter from the start. I do not see, and the Majority does not explain, how the impeachment of Detective McCrary's memory would have bolstered Michael's case in any way. Indeed, Michael's trial lawyer testified at the postconviction hearing that he knew of the dispatch report, recognized that it "cut both ways" because it bolstered Cassandra Davis's testimony but that he might have used it in his cross-examination of Detective McCrary but forgot to do so. So what? Michael was fully able to tell the jury that he was *en route* to the hospital at the time of the shooting but never got there because he was alerted that he was wanted as a suspect in the shooting. The police-department computer-assisted-dispatch

report is both consistent with his theory, and also with the State's theory; impeachment of Detective McCrary would not have added anything to the mix. Michael has not come anywhere close to satisfying his *Strickland*-prejudice burden.

2.

¶25 Michael testified that he and a friend drove by the house in his blue Oldsmobile, and that his friend fired shots in front of a nearby house with a BB gun. Then, according to Michael, a man came out of the house and shot at the blue Oldsmobile as Michael drove away. One of the bullets hit him, and it was that bullet wound, he said, that prompted his attempt to go to the hospital.

¶26 Catherine Davis testified at the trial that although she did not see the shooting, she did see a black truck similar to that she knew Michael drove heading from Michael's house to the house where the shooting happened moments later. Michael's trial lawyer testified at the postconviction hearing that he read the report of what Young told the police at the time and recalled that "she observed a long gun pointed from the driver's side of I believe a blue vehicle, I think she was specific about the color, and that shots were fired from that vehicle towards that house." Young testified at the postconviction hearing that she saw a blue Oldsmobile sedan, not a truck, shooting into the house, and gave a description of the shooter that did not match that of Michael. The postconviction circuit court recognized, however, that Young's testimony at the postconviction hearing raised significant credibility problems: "[W]hen she came here to testify, a lot of facts were different than what she told the police."

¶27 Further, Young's testimony that the shots came from a blue Oldsmobile rather than the black truck would have permitted a reasonable jury to

conclude that what she saw was the BB incident earlier and not Michael's revenge-motivated shooting that the State alleged. Although a reasonable jury would not *have to* accept that interpretation, it certainly vitiates any reasonable contention that Young would have helped Michael's case so much that not calling her met the high burden of *Strickland* prejudice.

¶28 I would reverse and respectfully dissent.

