

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 7, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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No. 98-1744-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SONNIEL R. GIDARISINGH,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DOMINIC S. AMATO and JEFFREY A. KREMERS, Judges. *Affirmed.*

Before Wedemeyer, P.J., Fine and Schudson, JJ.

¶1 PER CURIAM. Sonniel R. Gidarisingh appeals from a judgment of conviction entered after a jury found him guilty of one count of first-degree intentional homicide and one count of attempted first-degree intentional homicide.

He also appeals from an order denying his postconviction motion. He claims that the trial court erred: (1) in summarily denying his postconviction motion alleging ineffective assistance of trial counsel; (2) in limiting the use of witness Robert O.'s medical and juvenile court records; (3) in denying his motion to open the eyewitness identification hearing; and (4) in admitting into evidence a photo depicting the slain victim at the scene of the shooting. Because the trial court did not erroneously exercise its discretion in any respect, we affirm.

BACKGROUND

¶2 The crime Gidarisingh was convicted of arose out of a shooting that occurred on August 17, 1996, at a residence located at 3457 North 1st Street in the City of Milwaukee. The victims in this incident were James Moore and Barry Boose. Each was shot in the head by a lone gunman. Moore survived but Boose did not. The shooting was witnessed by Robert O., a juvenile who identified Gidarisingh as the assailant. Gidarisingh avoided apprehension for over eight months. Police finally arrested him after receiving a tip from his girlfriend, Tiffany Gillette, as to where he could be found in Milwaukee.

¶3 Four days after the shooting, Moore, while hospitalized in intensive care, identified Gidarisingh as the perpetrator from a four-picture photo array presented to him by a police officer. He made the identification by means of hand signals. A nurse witnessed the procedure. Gidarisingh moved to suppress the photo-identification. After a hearing, the trial court found nothing suggestive about the identification procedure.

¶4 At trial, the State called the following witnesses: Moore, Robert O., Gillette, the investigating and arresting officers, and a neighbor who accidentally came upon the scene immediately after the shooting. After the jury convicted him,

Gidarisingh filed postconviction motions seeking a new trial. The trial court denied the motions without a hearing. Gidarisingh now appeals.

ANALYSIS

A. Ineffective Assistance.

¶5 Gidarisingh first claims that the trial court erred when it refused to conclude that his trial counsel rendered ineffective assistance. He asserts two instances of ineffective assistance: trial counsel's failure to explore the medical condition of Moore, which may have affected the accuracy of his identification; and the failure to object to allegedly improper character evidence.

¶6 The analytical framework that must be employed in assessing the merits of a defendant's claim of ineffective assistance of counsel is well-known. To sustain a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that counsel's errors were prejudicial. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). A court need not address both components of this inquiry if the defendant does not make a sufficient showing on one. *See id.* at 697.

¶7 If a defendant wishes to have an evidentiary hearing on an ineffective assistance of counsel claim, he or she may not rely on conclusory allegations. If the claim is conclusory in nature, or if the record conclusively shows that the defendant is not entitled to relief, the trial court may deny the motion without an evidentiary hearing. *See State v. Bentley*, 201 Wis.2d 303, 309-11, 548 N.W.2d 50, 53 (1996). To obtain an evidentiary hearing on the ineffective assistance of counsel claim, the defendant must allege with specificity both deficient performance and prejudice in the postconviction motion. *See id.* at

313-18, 548 N.W.2d at 55-57. Whether the motion sufficiently alleges facts which, if true, would entitle the defendant to relief is a question of law to be reviewed independently by this court. *See id.* at 310, 548 N.W.2d at 53. If the trial court refuses to hold a hearing based on its finding that the record as a whole conclusively demonstrates that the defendant is not entitled to relief, this court's review of this determination is limited to whether the court erroneously exercised its discretion in making this determination. *See id.* at 318, 548 N.W.2d at 57. With these precepts in mind, we shall now examine the two bases for Gidarisingh's first claim of error.

¶8 Gidarisingh first alleges ineffectiveness because counsel failed to subpoena the medical records of the surviving victim, Moore, to ascertain his medical condition at the time he identified Gidarisingh as the assailant, and because counsel failed to subpoena the attending nurse, who was present when the photo-array was performed. Gidarisingh argues that, contrary to the trial court's reason for denying his motion for a *Machner* hearing,¹ i.e., he had made no showing of medical information that was contained in Moore's records different than that received in evidence, he "had no means of subpoenaing the records or the nurse to ascertain what information trial counsel had failed to gather that may have aided his defense." We are not persuaded for two reasons.

¶9 First, Gidarisingh claims that if his trial counsel had produced medical evidence at the identification suppression hearing or at trial that Moore was heavily medicated, restrained in his bed, intubated, and a victim of a gunshot wound to his head, it would have caused jurors to find him less credible in his

¹ *See State v. Machner*, 92 Wis.2d 797, 285 N.W.2d 905 (Ct. App. 1979).

identification during the trial and would have changed the outcome of the verdict.² A review of the trial record reveals that the defense achieved exactly what Gidarisingh claims trial counsel could have done with Moore's medical records.

¶10 Moore was hospitalized in the neuro-intensive care unit of Froedert Hospital because of his head wound; it was thought that "he was still going to expire"; he had trouble with his vision because of the injury; his hands were restrained because he was subject to seizures; he was intubated and attended to by a nurse; and he was being medicated. This evidence was presented to the jury not only through direct examination by the State, but also by the cross-examination by defense counsel of Moore and the detective who conducted the photo-identification. Therefore, counsel was not deficient.

¶11 Second, the motion court, in part, based its denial of Gidarisingh's motion on the determination that his motion presented "no evidence different from what was already presented which would demonstrate a reasonable probability of a different outcome." On appeal, Gidarisingh challenges this reasoning claiming that if any medical data crucial to his defense existed, he had no means to obtain any records or information from the attending nurse. To the contrary, the very same procedure that he faults trial counsel for not following as set forth in § 905.04(2), STATS., could have been used to ascertain with specificity whether evidentiary grounds existed that might have produced a different outcome. *See State v. Solberg*, 211 Wis.2d 372, 564 N.W.2d 775 (1997); *State v. Shiffra*, 175 Wis.2d 600, 499 N.W.2d 719 (Ct. App. 1993). Thus, the means were available to investigate the existence of favorable evidence. Whether the use of this

² At the pretrial motion challenging the propriety of the photo-identification, the trial court found nothing suggestive in the procedure utilized. Gidarisingh does not appeal that ruling.

procedural vehicle would have been successful is quite another issue not relevant to this appeal. We thus reject this claim of ineffective trial counsel.

¶12 Gidarisingh's second claim of ineffective assistance rests on the assertion of trial counsel's failure to object to allegedly improper character evidence. Specifically, he argues that the court allowed into evidence the extraordinary lengths to which law enforcement personnel went in their attempt to apprehend him and the vague testimony of his former girlfriend that, at some unspecified time, she may have seen him in the possession of what she perceived to be a weapon. We address these claims in turn.

¶13 It is conceded that the fact of an accused's flight, resistance to arrest, concealment and related conduct, are admissible as evidence of consciousness of guilt, and thus of guilt itself. *See Gauthier v. State*, 28 Wis.2d 412, 420, 137 N.W.2d 101, 105 (1965) (citing 2 WIGMORE, EVIDENCE § 276, at 111 (3d ed. 1977)).³

¶14 At a pretrial motion *in limine*, over objections of defense counsel, the State obtained the trial court's approval for a flight instruction, WIS J I — CRIMINAL 172, and the admission of evidence to explain the delay in apprehending Gidarisingh in spite of early identification of him as a suspect. Gidarisingh complains that the State did not limit the testimony to a brief explanation that he was out-of-state and was apprehended after he returned to Wisconsin, when he was arrested for a different offense. Instead, the State introduced evidence that police had obtained a warrant for his arrest; that police

³ In *Gauthier v. State*, 28 Wis.2d 412, 137 N.W.2d 101 (1965), the trial court allowed into evidence an FBI "wanted" circular which had been published and circulated following the issuance of a federal warrant for "unlawful flight."

had information that he left the state and might be in Miami or Jamaica; and that the FBI had obtained an unlawful flight from prosecution warrant and attempted to find him in Miami. No objection was made to this evidence.

¶15 The trial court's stated reasoning in admitting this evidence was to allow the State to prove: (1) Gidarisingh's identity as the perpetrator; (2) his flight; and (3) his admissions against interest to his former girlfriend. Central to this task was the testimony of the State's witness, Gillette, who was Gidarisingh's girlfriend at the time of the shootings. Gillette testified that during the month of August 1996, Gidarisingh asked her to meet him at a south-side motel, which she did. While there, Gidarisingh told her that he was wanted for shooting two individuals and would be leaving. She did not see him again until April 7, 1997, when he called to inform her that he was staying at a house at 1433 North 37th Street. She met him and agreed to drive him to the Grand Avenue Mall the next day. While en route, they began to argue. He grabbed the car keys from the ignition. She jumped out of the car and ran to a telephone booth to call her mother. She eventually retrieved the keys, drove home, and called the police to report him. Two police detectives complemented Gillette's testimony by telling the jury about the warrant and FBI intervention.

¶16 The State argues that the evidence presented by the detectives completes the story of the crime and how and why the defendant was apprehended. In response, Gidarisingh claims that the only purpose for the additional evidence was to cast him as a bad actor or a person of low character. Regardless of the respective positions of the parties, Gidarisingh was not prejudiced.

¶17 The uncontroverted evidence demonstrates that Gidarisingh knew he was a wanted person. He intended to leave the jurisdiction. Sequentially, warrants for his arrest were issued. He eluded apprehension for over eight months before he was arrested for another reason. Thus, any evidence of efforts by the FBI to find him and where they looked for him was of little probative value. Because Gidarisingh was not prejudiced, he was not the victim of ineffective assistance of counsel.

¶18 The last instance of alleged ineffective assistance of counsel relates to the testimony of Gillette, who stated on direct examination that she had never seen Gidarisingh with a gun, but that she had seen him with what she perceived to be a semi-automatic weapon in the waistband of his trousers when he visited her home. Trial counsel did not object to this line of questioning.

¶19 The State, relying on *State v. Hereford*, 195 Wis.2d 1054, 537 N.W.2d 62 (Ct. App. 1995), contends the evidence was relevant to prove that Gidarisingh was the gunman because the victims were shot with a semi-automatic weapon. Thus, even if trial counsel had objected, the State claims that the objection would have been rejected. We deem this line of testimony to be so speculative and void of evidentiary probity that it ought to have been challenged by trial counsel. Nevertheless, in the face of Gidarisingh's admission to Gillette that he had shot two individuals, Robert O.'s identification testimony that he witnessed Gidarisingh shoot the two victims, and Moore's photo-array identification, we again conclude that Gidarisingh suffered no prejudice and, therefore, ineffective assistance of counsel did not result.

B. Limiting Use of Robert O.'s Records.

¶20 Gidarisingh's next claim of error is that the trial court erroneously exercised its discretion when it improperly restricted his use of eyewitness Robert O.'s juvenile court and medical records.

¶21 Prior to trial, Gidarisingh moved to obtain from Robert O.'s juvenile court and medical records any and all exculpatory evidence. *See* § 938.78(2), STATS. The trial court ordered production of the records for an *in camera* inspection prior to ruling whether to release any of the records. Initially, on April 4, 1997, the trial court reviewed the records from the juvenile court center and released seven documents to the parties. These included: three psychological evaluations; transcripts of two juvenile court hearings, one that occurred before the shooting and one after, both involving extension of supervision; a summary discharge report from the Homme Youth and Family Center where Robert O. lived for a short time; and a report from his supervising agent. During the trial on August 5, 1997, after the receipt and review of the mental health records, the trial court concluded that, although Robert O. was a "rebellious young teenager," he was nevertheless competent to testify as a witness in the trial. In addition, the court concluded that none of the records contained material of a potentially exculpatory nature. The trial court then prohibited the use of any of the released records to impugn Robert O.'s character. It only allowed the documents to be used to prove that Robert O. had been adjudicated a delinquent. In the words of the trial court:

Everything else is excluded. I cannot give you a blanket ruling across the board to give you, quote, a wide latitude on cross-examination, unquote, in these areas, though you already have a wide latitude on cross-examination, but I will not allow any of these records that were provided through the juvenile justice system or ... from the mental

health complex to be used during the course of this trial, though you have the information now, and that's key.

I gave you the information so you can zealously represent your client. In addition to that, 906.08 and the subsequent statutes don't allow it. And the only time it's allowed is when the defendant himself puts his character and reputation into evidence, and we're not -- we're talking about a witness here.

¶22 On appeal, Gidarisingh does not challenge either conclusion reached by the trial court. Rather, he contends that the restrictive use of the released records violated his right to confrontation and cross-examination. We are not convinced.

¶23 The right to confrontation and cross-examination is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process. See *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973). Our supreme court has stated that "while the right to confront one's accusers is protected by the constitution, this right is not violated when the court precludes a defendant from presenting evidence which is irrelevant or immaterial." *State v. McCall*, 202 Wis.2d 29, 44, 549 N.W.2d 418, 424 (1996). The proper test of relevancy on cross-examination is not whether the answer sought will elucidate any of the main issues in the case, but whether it will be useful to the trier of fact in appraising the credibility of the witness and evaluating the probative value of the direct testimony. See *Rogers v. State*, 93 Wis.2d 682, 689, 287 N.W.2d 774, 777 (1980). Among the circumstances in which trial courts have excluded bias evidence is whether the evidence

would divert the trial to an extraneous issue. A court can and should exclude bias evidence which has little bearing on the witness's credibility, but which would impugn the witness's character because such evidence "opens the door to improper considerations and lends to the confusion of the jury by placing undue emphasis on collateral matters."

State v. Lindh, 161 Wis.2d 324, 363, 468 N.W.2d 168, 182 (1991) (citation omitted). The extent and scope of cross-examination allowed for impeachment purposes are matters within the sound discretion of the trial court. See *Rogers*, 93 Wis.2d at 689, 287 N.W.2d at 777. We shall not reverse a trial court's determination to limit or prohibit a certain area of cross-examination unless the court's ruling demonstrates an erroneous exercise of discretion. We shall refrain from such action if a reasonable basis exists in the record.

Inquiry into the existence of and treatment for mental affliction is proper where it appears that a connection exists between the affliction and the reliability of the witness's testimony.... Trial courts possess considerable latitude in determining the proper scope of cross-examination, the matter resting in the sound discretion of the court.

Johnson v. State, 75 Wis.2d 344, 360-61, 249 N.W.2d 593, 601-02 (1977).

¶24 From our review of the briefs and record, we are unable to ascertain for what precise purpose Gidarisingh desired to use the juvenile records released to him. His counsel asked the court to review its ruling relating to Robert O.'s mental health condition and speculated that "just from the materials you released, it seems to me that this child could easily be delusional. There is testimony in these documents that if he doesn't take his medicine he is potentially out of control and delusional." The trial court reviewed the mental health records, and read into the record portions of a discharge report of M. Schultz, M.D., dated June 28, 1996, from the Milwaukee County Mental Health Complex. We have read the entire report. As stated by the trial court, Robert O. was given a mood stabilizer, Depakote, for his hypomania and mood swings and he responded well to its administration. Moreover, although not mentioned by the court, the report contained no evidence of delusions, and indicated that the results of an electroencephalogram were normal. Once the trial court made its ruling about the

use of the documents, no offer of proof was made demonstrating a connection between any mental health affliction, any medicine prescribed, and the credibility of Robert O.'s identification of Gidarisingh. *See* § 901.03(1)(b), STATS.; *Milenkovic v. State*, 86 Wis.2d 272, 284, 272 N.W.2d 320, 326 (Ct. App. 1978).

¶25 We have carefully read all of the juvenile and medical records that were either part of the original court record or which were supplemented by order of this court. There is no dispute that the contents of the released records reflect that Robert O. had a low IQ; that he had been taking medication for delusions allegedly experienced six months prior to the shooting; that he tested positive for marijuana use in a period of time prior to the shooting; that he was in violation of the rules of his supervision; that he suffered from mood swings; and that he had been diagnosed as having a bipolar disorder. Given these factors, we cannot surmise how these factors could have reasonably affected Robert O.'s ability to observe who shot the victims. If the juvenile court and medical records can serve no purpose in challenging the identification made by Robert O., the only other purpose for using the records would be to assail his character which, as the trial court correctly pointed out, is not permitted by § 906.08, STATS.

¶26 From our review of the record, it is clear that through cross-examination Gidarisingh was able to elicit testimony that Robert O. admitted fighting with him because he was angry either over Gidarisingh's relationship with his sister or over a pair of shoes; that Robert O. was fearful of the two victims who were members of the Vice Lords gang who had previously beaten him up, and that this was a possible motive for identifying Gidarisingh; and that he denied making a positive photo-identification of Gidarisingh, and said it was made by his mother. These were all proper grounds upon which to challenge Robert O.'s identification of Gidarisingh.

¶27 On the other hand, Gidarisingh's desire, as set forth in his brief, to use the juvenile and medical records for the purpose of demonstrating the low level of Robert O.'s intelligence, his use of marijuana, the frequent violation of terms of supervision, and that he had mental health problems were not proper grounds and therefore were properly restricted. The trial court did not fully explicate the basis for its evidentiary ruling restricting the use of the records. We may, however, assign a correct supporting reason to a correct result. See *State v. Holt*, 128 Wis.2d 110, 124, 382 N.W.2d 679, 687 (Ct. App. 1985). In keeping with *Johnson* and *Lindh*, Gidarisingh has not met the burden of demonstrating a connection between an alleged affliction and how it could affect the credibility of the targeted witness.

C. Eyewitness Identification Hearing.

¶28 Gidarisingh's next claim of error is that the trial court erroneously exercised its discretion when it denied his motion to reopen the eyewitness identification hearing because of alleged newly discovered evidence. The basis for this claim was testimony contained in one of the juvenile court transcripts that was released to the defense by the court before trial. The transcript revealed that Robert O. testified that his mother was the individual who had picked out Gidarisingh's photo on the occasion when Robert O. picked out the same photo.⁴ We reject this claim of error for several reasons.

¶29 The test to determine whether newly discovered evidence warrants a new trial has five factors: (1) the evidence must have been discovered after the

⁴ Police arranged to meet Robert O. in Union Cemetery, a neutral location, because he feared retribution for cooperating with police. Robert O. arrived at the scene in an automobile accompanied by several other people, at least one of whom was a family member.

trial; (2) the moving party must not have been negligent in seeking to discover it; (3) the evidence must be material to the issue; (4) the testimony must not be merely cumulative to the testimony which was introduced at trial; and (5) it must be reasonably probable that a different result would be reached at a new trial. *See State v. Coogan*, 154 Wis.2d 387, 394-95, 453 N.W.2d 186, 188 (Ct. App. 1990). If the newly discovered evidence fails to satisfy any one of these five requirements, it is not sufficient to warrant a new trial. *See State v. Kaster*, 148 Wis.2d 789, 801, 436 N.W.2d 891, 896 (Ct. App. 1989). A motion for a new trial is addressed to the sound discretion of the trial court and we will not reverse the trial court decision unless it erroneously exercised its discretion. *See id.*

¶30 Our supreme court held:

The test for determining the admissibility of an out-of-court identification has two parts: “First, the court must determine whether the identification procedure was impermissibly suggestive. Second, it must decide whether under the totality of the circumstances the out-of-court identification was reliable, despite the suggestiveness of the procedures.” The defendant has the burden of showing the out-of-court identification was improper.

State v. Armstrong, 110 Wis.2d 555, 576-77, 329 N.W.2d 386, 397 (1983). If the in-court identification can stand independently of an excluded or suppressed pretrial identification, the in-court testimony is admissible. *See Jones v. State*, 59 Wis.2d 184, 198, 207 N.W.2d 890, 897 (1973).

¶31 Gidarisingh’s claim of error fails all recited tests. First, Robert O.’s version of how the photo-identification was conducted was available prior to trial. Second, given the availability of the juvenile court transcript, Gidarisingh made no showing or offer of proof of improper conduct on the part of the officers who conducted the photo-identification. Third, assuming for the sake of argument that

the out-of-court photo-identification was improperly conducted, the evidence demonstrating Robert O.'s prior acquaintanceship with Gidarisingh, his presence in his home while visiting his sister, and the conversation between the two for approximately one-half hour on the porch of the residence where Robert O. witnessed the shooting, unequivocally establish the independent nature of the in-court identification. Lastly, if one considers Robert O.'s presence and conversation on the porch with Gidarisingh, together with the victim Moore's positive identification of Gidarisingh and Gidarisingh's admission to Gillette that he committed the shooting, any error that might have been committed in the identification process would be harmless. *See State v. Dyess*, 124 Wis.2d 525, 543, 370 N.W.2d 222, 231-32 (1985).

D. Admission of Photo of Victim.

¶32 Gidarisingh's last claim of error relates to whether the trial court properly exercised its discretion in allowing the State to introduce into evidence a colored photograph of the slain victim at the scene of the shooting. The trial court ruled that the picture was not unduly prejudicial and allowed it into evidence. Later, the court permitted it to be shown to the jury.

¶33 The admission of photographs in evidence is a matter within a trial court's discretion. *See Simpson v. State*, 83 Wis.2d 494, 505, 266 N.W.2d 270, 274 (1978). "Photographs should be admitted if they will help the jury gain a better understanding of material facts; they should be excluded if they are not 'substantially necessary' to show material facts and will tend to create sympathy or indignation or direct the jury's attention to improper considerations." *Sage v. State*, 87 Wis.2d 783, 788, 275 N.W.2d 705, 708 (1979). When a trial court has applied the appropriate discretionary standards, we shall not reverse its ruling

unless it appears that, in light of the record as a whole, its conclusion was wholly unreasonable, or the circumstances indicate that the only purpose of the photographs was to inflame or prejudice the jury. *See id.* at 789, 275 N.W.2d at 708.

¶34 Gidarisingh claims the State did not explain how the photograph would aid the jury in securing a clear idea of a material situation or why the photograph was necessary to supplement the testimony, or probative of any disputed fact. We reject his claim.

¶35 Gidarisingh's theory of defense was misidentification and absence from the scene of the shooting. The State desired to establish the appearance of the site through a citizen witness who happened upon the scene moments after the shooting. The photograph served as linkage evidence. It further corroborated the testimony of Robert O. and Moore as to how and where the victim was shot, and by reasonable inference the circumstances of the injury sustained by Moore. Although the photograph can be considered graphic, it nevertheless depicts the crime scene and corroborates the testimony of the eyewitnesses. Thus, it was relevant and admissible at the discretion of the trial court. There was a reasonable basis for its admission. The trial court did not err.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

