

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**October 25, 2006**

Cornelia G. Clark  
Clerk of Court of Appeals

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2005AP2284-CR**

**Cir. Ct. No. 2003CF4900**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT I**

---

**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**CARLOS A. PEREZ,**

**DEFENDANT-APPELLANT.**

---

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEAN W. DI MOTTO and MICHAEL B. BRENNAN, Judges. *Affirmed.*

Before Snyder, P.J., Brown and Nettesheim, JJ.

¶1 PER CURIAM. Carlos Perez has appealed from a judgment convicting him after a jury trial of first-degree reckless homicide by use of a

dangerous weapon. He has also appealed from an order denying his motion for postconviction relief. We affirm the judgment and order.

¶2 Perez' conviction arises from the shooting death of Anthony Mercado. In postconviction proceedings, Perez alleged that his trial counsel rendered ineffective assistance when he failed to ask Jesse Finn, a witness for the State, whether Finn admitted to a person named Freddy Abril that he was the person who shot Mercado. Perez contends that his trial counsel was also ineffective for failing to seek an adjournment of the trial in order to continue efforts to locate Freddy Abril and call him as a witness.

¶3 To establish a claim of ineffective assistance, a defendant must show that counsel's performance was deficient and that the deficiency was prejudicial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To prove deficient performance, the defendant must establish that counsel's conduct fell below an objective standard of reasonableness. *Id.* at 687-88. To prove prejudice, "the defendant must show that 'there is a reasonable probability that, but for counsel'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.'" *State v. Thiel*, 2003 WI 111, ¶20, 264 Wis. 2d 571, 665 N.W.2d 305 (quoting *Strickland*, 466 U.S. at 694). The critical focus is not on the outcome of the trial but on the reliability of the proceedings. *Thiel*, 264 Wis. 2d 571, ¶20.

¶4 Appellate review of an ineffective assistance of counsel claim presents a mixed question of law and fact. *State v. McDowell*, 2004 WI 70, ¶31, 272 Wis. 2d 488, 681 N.W.2d 500, *cert. denied*, 543 U.S. 938 (2004). We will not disturb the trial court's findings of fact unless they are clearly erroneous. *Id.* However, the ultimate determination of whether counsel's performance satisfies

the constitutional standard for ineffective assistance of counsel presents a question of law. *Thiel*, 264 Wis.2d 571, ¶21. This court reviews de novo the legal questions of whether deficient performance has been established and whether the deficient performance led to prejudice rising to a level undermining the reliability of the proceedings. *Id.*, ¶24.

¶5 After a *Machner*<sup>1</sup> hearing at which Perez' trial counsel, Attorney Jeffrey Jensen, and Jesse Finn testified, the trial court concluded that counsel's performance was not deficient. Based upon the record, we agree.

¶6 Review of trial counsel's performance gives great deference to the attorney and every effort is made to avoid determinations of ineffectiveness based on hindsight. *State v. Johnson*, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). The case is reviewed from counsel's perspective at the time of trial, and the burden is placed upon the appellant to overcome a strong presumption that counsel acted reasonably within professional norms. *Id.* The appropriate measure of attorney performance is reasonableness, considering all the circumstances. *State v. Brooks*, 124 Wis. 2d 349, 352, 369 N.W.2d 183 (Ct. App. 1985).

¶7 The evidence at trial indicated that two teenagers encountered Mercado on the street on the night of July 13, 2003, and one of the teenagers shot him with a nine millimeter handgun. At trial, the State introduced Perez' confession to the shooting. In addition, Marni Rentas, Mercado's sister, was at the scene, and identified Perez as the shooter at trial and in a pretrial photo array conducted approximately two weeks after the shooting. Jesse Finn also testified

---

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

for the State, indicating that he and Perez were riding bikes when they encountered Mercado. Finn testified that he had been carrying a handgun but dropped it, after which it was picked up by Perez. Finn testified that as he rode off on his bike, he heard what he believed was a gunshot. He denied that he was the person who shot Mercado.

¶8 At trial, Perez presented an alibi defense, and proffered a theory that another teenager named Amnac Salaam committed the crime. Perez denied that he was at the scene of the shooting, contending that his confession resulted from his immaturity and coercion. He presented multiple alibi witnesses, who indicated that he was with his family helping a relative move at the time of the shooting. In addition, the defense elicited evidence that during a police search of the area immediately after the shooting, the police located Salaam, whose clothing, age and general physical description largely matched the description of the shooter provided by Rentas. Evidence further indicated that Salaam had a nine millimeter cartridge in his pocket at the time he was apprehended by police.

¶9 Perez contends that Attorney Jensen rendered ineffective assistance when, on cross-examination of Finn, he failed to ask Finn whether he admitted to Freddy Abril, Mercado's half-brother, that he was the person who shot Mercado. Perez also contends that his trial counsel performed deficiently when he failed to seek an adjournment of the trial in order to continue efforts to locate Freddy Abril and call him as a witness.

¶10 At the postconviction hearing, Attorney Jensen testified that he was aware prior to trial that a police report existed in which Freddy Abril told police that he encountered Finn and Perez after the shooting, and that Finn told Freddy Abril that he was the shooter. Attorney Jensen testified that he sent an investigator

to the Abril home on four occasions in an attempt to talk to Freddy Abril about the report, but Freddy Abril never responded or contacted the defense. He testified that at the time of trial, Freddy Abril's whereabouts were unknown. In addition, he testified that he questioned Finn before trial, and Finn denied stating that he was the shooter.

¶11 Attorney Jensen testified that he elected not to seek an adjournment of trial to continue searching for Freddy Abril because the primary defense was alibi, combined with an alternate shooter theory. Because counsel's strategy was reasonable, no basis exists to conclude that his performance was deficient.

¶12 A trial attorney may select a particular defense from the available alternative defenses. *State v. Hubanks*, 173 Wis. 2d 1, 28, 496 N.W.2d 96 (Ct. App. 1992), *cert. denied*, 510 U.S. 830 (1993). There is a strong presumption that an attorney's choice is sound trial strategy. *State v. Marty*, 137 Wis. 2d 352, 360, 404 N.W.2d 120 (Ct. App. 1987), *partially overruled on other grounds by State v. Sanchez*, 201 Wis. 2d 219, 232, 548 N.W.2d 69 (1996). This court will not second-guess a trial attorney's considered selection of trial tactics or the exercise of professional judgment in the face of alternatives that have been weighed by trial counsel. *State v. Elm*, 201 Wis. 2d 452, 464, 549 N.W.2d 471 (Ct. App. 1996). A strategic trial decision rationally based on the facts and law will not support a claim of ineffective assistance of counsel. *Id.* at 464-65.

¶13 No basis exists to conclude that counsel's strategy was unreasonable. Evidence supported the primary defense of alibi. Consistent with this defense, counsel also offered the theory that Salaam was the shooter. This theory was supported by evidence that Salaam was found in the area of the crime shortly after it occurred, generally matched the description of the assailant, and had a cartridge

in his pocket for the kind of gun that killed Mercado. Although Rentas did not identify Salaam as the shooter when he was presented to her by the police on the night of the shooting, and testified at trial that he was not the shooter, the jury could have elected to believe Perez and his alibi witnesses, or to conclude that the evidence regarding Salaam gave rise to a reasonable doubt as to Perez' guilt.

¶14 Based upon the alibi evidence and the evidence regarding Salaam, Attorney Jensen could also reasonably conclude that pursuing evidence that Finn told Freddy Abril that he was the shooter would undercut, more than assist, Perez' case. Perez' alibi defense required the jury to believe the testimony of Perez and his witnesses, indicating that he was assisting family members when the shooting occurred. This required Perez to distance himself from Finn and Finn's testimony that Perez was at the scene of the shooting with him. Pursuing testimony that Finn, in the presence of Perez, told Freddy Abril that he was the shooter would have provided additional corroboration of the State's theory that Finn and Perez were together at the time of the shooting, and that they, rather than Salaam, were involved in it.

¶15 In concluding that counsel's defense strategy was reasonable, we recognize that counsel raised the issue of Finn's admissions when he asked Finn on cross-examination whether he told Michael Abril that he shot Mercado, an allegation Finn denied.<sup>2</sup> However, counsel ultimately elected not to pursue the question of Finn's admissions beyond eliciting Perez' testimony that Finn admitted in his presence that he shot Mercado because he wanted to be a "King,"

---

<sup>2</sup> Michael Abril and Freddy Abril are brothers. However, the police report indicated that Finn made his admission to Freddy Abril, not Michael.

or a “gang banger.” Counsel’s choice of strategy was reasonable, enabling the defense to focus on Perez’ alibi and related theory that Salaam, and not Perez or someone associated with Perez, was the shooter. This strategy allowed Perez to distance himself from Finn’s testimony that they were together at the time of the shooting, and thus to distance himself from Rentas’ testimony that Perez was present at the time of the shooting and was the actual shooter.<sup>3</sup>

¶16 The fact that the strategy failed does not render Attorney Jensen’s representation deficient. *See State v. Koller*, 87 Wis. 2d 253, 264, 274 N.W.2d 651 (1979). Because Perez has failed to establish that trial counsel’s performance was deficient, we need not address the prejudice prong of the ineffectiveness test. *See State v. Kimbrough*, 2001 WI App 138, ¶26, 246 Wis. 2d 648, 630 N.W.2d 752.

*By the Court.*—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2003-04).

---

<sup>3</sup> In upholding the trial court’s order, we also reject Perez’ claim that counsel should have pursued presenting the testimony regarding Finn’s statement to Freddy Abril because it was not inconsistent with the defense. This ignores that it was the State’s theory that Finn and Perez were together at the shooting, and it was the State that presented Finn’s testimony as to how the shooting occurred. Perez’ primary defense was to deny that testimony, relying on his alibi and his theory as to an alternate shooter, Salaam.

