COURT OF APPEALS
DECISION
DATED AND FILED

August 30, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP2456-CR **Cir. Ct. No. 2004CF633**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

STEVEN L. GARCIA,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Outagamie County: JOSEPH M. TROY, Judge. *Affirmed*.

Before Dykman, Vergeront and Lundsten, JJ.

¶1 LUNDSTEN, J. Steven Garcia appeals a judgment convicting him of first-degree intentional homicide. He also appeals an order denying his motion for a new trial. Garcia challenges his conviction based on his claim of ineffective assistance of counsel. He argues that counsel was ineffective by (1) failing to

challenge evidence resulting from a "showup" involving Garcia, and (2) failing to request that the jury receive certain pattern jury instructions.[1] We reject these arguments and affirm the judgment and order.

Background

¶2 In the early morning hours of August 28, 2004, Kenton Wilson was fatally shot outside an Appleton gas station convenience store. Leonard Fields, Wilson's father and a key eyewitness at the scene, identified Garcia as the shooter at a showup that police conducted shortly after the shooting.

¶3 The State charged Garcia with first-degree intentional homicide by use of a dangerous weapon, as a repeater. The case was tried to a jury. Garcia's defense was that another man, Christopher Jackson, who was with Garcia that night, was the shooter. It was undisputed at trial that Garcia and Jackson were both at the scene, and that one of the two men shot Wilson. Except as noted, the following evidence is summarized from the trial transcript.

¶4 On the night of the shooting, Wilson and a friend, Shawn Tucker, had been at an area club. Also at the club were Garcia and a number of his acquaintances, including Jackson and Jackson's girlfriend, Sylvia Sitta. Sitta was Wilson's ex-girlfriend.

¶5 Garcia and Jackson had known each other for approximately one or two weeks. Jackson met Garcia while Jackson was staying at the apartment of

[1] A "'showup'" is "'an out-of-court pretrial identification procedure in which a suspect is presented singly to a witness for identification purposes.'" ***State v. Dubose***, 2005 WI 126, ¶1 n.1, 285 Wis. 2d 143, 699 N.W.2d 582 (quoting ***State v. Wolverton***, 193 Wis. 2d 234, 263 n.21, 533 N.W.2d 167 (1995)).

Garcia's then-girlfriend, Samara Manns. Jackson brought a gun with him when he moved in to the apartment and kept it in a bedroom he shared with Sitta. Garcia and Manns testified that they had seen Jackson with the gun on one or more prior occasions. Other witnesses similarly testified that they had seen Jackson in possession of a gun on prior occasions. According to Jackson, everyone knew the gun was kept in the bedroom, and others, including Garcia, had previously handled the gun.

¶6 There is no dispute that Jackson's gun was the gun used to kill Wilson.

¶7 Jackson was acquainted with Wilson before the night of the shooting and told a defense investigator that there had been "trouble" between the two men. Garcia did not know Wilson before the night of the shooting. According to Jackson, Sitta pointed Wilson out to Jackson at the club, and Jackson then pointed Wilson out to Garcia.

¶8 After Wilson and Tucker left the club, Wilson's father, Fields, picked them up in his minivan, and the three men headed to a gas station convenience store. Garcia, Jackson, and others in their group also went to the store.

¶9 At some point, Garcia, Jackson, Wilson, and Tucker were all in the store. The details of what occurred between the men inside the store were disputed at trial. Tucker testified that Wilson was arguing with Garcia in the store. Garcia testified that he and Wilson never said anything to each other in the store. Jackson testified that both he and Garcia were arguing with Wilson and Tucker. Fields testified that he saw Jackson "mugging" Wilson in the store, meaning that Jackson was looking at Wilson "mean like."

¶10 Fields testified in detail as to what occurred after all four men left the store. Fields observed Wilson saying something to Jackson or Garcia, who were standing together. Fields returned to the van and told Wilson to come along. As Wilson returned to the van, Fields, who was sitting in the driver's seat of the van, saw Garcia walk towards the van from the left of the van with his hand under his shirt or in his pants. When Garcia neared the front-right headlight of the van, Fields heard Garcia say something to the effect of "I'll cap your ass," with his hand still in his pants or waistband. Fields observed that Jackson was approximately six feet behind Garcia and that Jackson remained at the front of the van.

¶11 As Tucker was climbing into the back of the van through the open front passenger-side door, Wilson was standing inside the door by the door's hinges. Fields described what he observed and heard next:

> [Garcia] was like standing in between the door and he … was saying something like, I'll cap your ass, or, I'll shoot your ass…. Then Kenton [Wilson] mumbled something, so then [Garcia] said it one more time, he said it one more time, and Kenton mumbled something. Then I heard pop, and my son fell, fell right away. And then the defendant—I could see when my son fell, I'm looking straight at him, and I kind of like, I was in shock, so I'm looking at him, and he hesitated for a moment, he hesitated, he didn't run right away, he hesitated for like a second, I looked at him, and then he ran. So I got out of the car, and I ran after him.

¶12 Wilson's friend Tucker corroborated several key aspects of Fields' testimony, including that Garcia was "telling [Wilson] that he was going to shoot him." Tucker, however, was not in a position to see where either Garcia or Jackson was at the moment Wilson was shot because Tucker was crawling into the back of the van.

¶13 Fields and Tucker both testified that they did not see Garcia with a gun. Similarly, they testified that they did not see Jackson with a gun. Immediately after the shooting, Garcia and Jackson fled.

¶14 Fields did not know Garcia at the time of the shooting, but described him to responding police officers as short, "Mexican" or "mixed race," having a "little fat face" and "chubby or fat cheeks," and wearing blue jeans, a gray shirt, and a hat. Other evidence at trial demonstrated that Garcia and Jackson looked very different. Garcia was wearing a black hat. Jackson was described as a five-foot-ten-inch- or five-foot-eleven-inch-tall black male who was wearing a white shirt and a white hat. Still photos derived from the surveillance camera footage confirm that Garcia and Jackson differed starkly in appearance.

¶15 The police promptly located and detained Garcia. They also located the gun wrapped in Garcia's hat in a bush near where Garcia was spotted by one of the officers.

¶16 The police transported Fields to Garcia's location and presented Garcia to Fields for identification. As soon as he saw Garcia, Fields became extremely upset and tried to get out of the police car by kicking the windows. Although Fields did not claim to have actually seen Garcia fire the shot that killed Wilson, Fields told police that Garcia was the gunman. One officer present described Fields' reaction to Garcia as "absolutely uncontrollable." The officer testified that Fields began "screaming and hollering, jumping up and down," exclaiming "let me out of the car, that's him, that's the guy who shot my son."

¶17 Both Jackson and Garcia testified at trial, but they gave conflicting accounts of what occurred outside the store.

¶18 According to Jackson, Garcia approached Wilson with his hands in his pants, causing Jackson to think Garcia had a gun. Jackson heard a clicking sound and thought Garcia was cocking the gun. Jackson walked toward Garcia and told him to "leave it alone," but Garcia responded by saying something like "Fuck these niggers." Jackson observed Garcia follow Wilson to the passenger side of the van and heard Wilson say that Garcia "had a gun, so what, he ain't gonna use it." Jackson saw Garcia with the gun, saw Wilson swing at the gun, and heard a shot.

¶19 According to Garcia, when Wilson and Tucker came out of the store, Tucker said, "Fuck you, nigger," to Jackson, and Wilson said, "Whatever you want to do," which Garcia interpreted as an invitation to fight. Garcia approached Wilson but was not interested in a fight; instead, Garcia wanted to find out what the problem was. According to Garcia, both he and Jackson walked around to the passenger side of the van. Garcia and Jackson stopped close to Wilson outside the passenger door of the van, with Jackson to Garcia's left. Garcia saw Jackson pull out a gun and raise his hand. Garcia tried to take the gun but, as he reached for it, the gun went off while still in Jackson's hand.

¶20 Garcia explained how he came to be in possession of the gun after the shooting. Garcia claimed that after Jackson shot Wilson, Garcia gained control of the gun. Garcia told the jury he panicked and ran with the gun after Jackson told him that Jackson was on parole and asked Garcia to take it. Garcia wrapped the gun in his hat and attempted to hide it in a bush.

¶21 An accident reconstruction expert for the State testified that Fields could have seen events unfold as Fields had described them. The expert assumed that Fields was in the driver's seat of the van at the time Wilson was shot, as

Fields testified. The expert also assumed that Tucker was climbing into the back of the van through the open front passenger-side door, as Tucker had testified. Garcia called his own expert, a consulting engineer, in an attempt to undercut the State's expert.

¶22 Another State expert, a "firearms and toolmark examiner" from the state crime lab, performed a gunpowder residue analysis on the shirt Wilson was wearing. His testimony demonstrated that Wilson was shot from a range of only two or three feet. Under Garcia's account, which placed Jackson to Garcia's immediate left, apparently outside Fields' field of vision, Jackson would have been close enough to fire the fatal shot.

¶23 In addition, the State and Garcia called separate witnesses who spent time in jail with Garcia. The State's witness testified that Garcia said that he shot Wilson. Garcia's witness testified that Garcia told him that someone else shot Wilson.

¶24 The jury also viewed video footage from surveillance cameras at the store. Garcia admitted that the video showed him outside the convenience store walking toward Wilson while Wilson was backing up.

¶25 Garcia's trial counsel neither sought to suppress the evidence resulting from the showup nor objected to the State's use of that evidence at trial.

¶26 The jury found Garcia guilty. Garcia filed a postconviction motion, claiming ineffective assistance of counsel. He asserted that counsel was ineffective for failing to challenge the evidence resulting from Garcia's showup and for failing to request certain pattern jury instructions. After a ***Machner*** hearing, the circuit court denied Garcia's motion.

Discussion

I. Standards For Ineffective Assistance Of Counsel

¶27 To establish a claim of ineffective assistance of trial counsel, the defendant must prove both that counsel's performance was deficient and that such performance prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). In analyzing such claims, we may address either deficient performance or prejudice first and, if we determine the party alleging ineffective assistance has failed to show prejudice, we may decline to address whether counsel's performance was deficient. *See* ***State v. Sanchez***, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996).

¶28 Counsel's performance is deficient if it falls below an objective standard of reasonableness. ***State v. Thiel***, 2003 WI 111, ¶19, 264 Wis. 2d 571, 665 N.W.2d 305. When evaluating counsel's performance, courts are to be "'highly deferential'" and must avoid the "'distorting effects of hindsight.'" ***Id.*** (quoting ***Strickland***, 466 U.S. at 689). "Counsel need not be perfect, indeed not even very good, to be constitutionally adequate." ***Thiel***, 264 Wis. 2d 571, ¶19 (citation omitted).

¶29 In order to demonstrate 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.'" ***Thiel***, 264 Wis. 2d 571, ¶20 (quoting ***Strickland***, 466 U.S. at 694). "The focus of this inquiry is not on the outcome of the trial, but on the reliability of the proceedings." ***State v. Roberson***, 2006 WI 80, ¶29, 292 Wis. 2d 280, 717 N.W.2d 111 (citation omitted).

¶30 Whether a defendant was denied the effective assistance of counsel presents a mixed question of fact and law. ***State v. Pitsch***, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985). We reverse the circuit court's findings of fact regarding counsel's actions only if those findings are clearly erroneous. ***Id.*** at 634. Whether counsel's performance was deficient and whether counsel's actions prejudiced the defense are questions of law that we review *de novo*. ***Id.***

II. Application Of Ineffective Assistance Of Counsel Standards

A. Failure To Challenge Evidence Resulting From The Showup

¶31 Garcia argues that his trial counsel was ineffective by failing to challenge evidence resulting from the showup. Garcia argues that this evidence was inadmissible under both ***State v. Dubose***, 2005 WI 126, 285 Wis. 2d 143, 699 N.W.2d 582, and ***State v. Wolverton***, 193 Wis. 2d 234, 533 N.W.2d 167 (1995).[2]

¶32 For reasons we explain below, we conclude that Garcia has failed to show prejudice. Thus, rather than decide whether Garcia's counsel performed deficiently with respect to the showup evidence, we will assume deficient performance.

[2] Under ***Wolverton***, 193 Wis. 2d 234, courts applied a two-step test to determine whether a defendant's right to due process required suppression of "showup" identification evidence. *See* ***id.*** at 264-65; *see also* ***State v. Hibl***, 2006 WI 52, ¶25, 290 Wis. 2d 595, 714 N.W.2d 194. Under ***Wolverton***, the defendant first had to show that the showup identification procedure was impermissibly suggestive. ***Wolverton***, 193 Wis. 2d at 264. If the defendant made such a showing, the burden shifted to the State to prove that the identification was reliable under the totality of the circumstances even though the procedure was suggestive. ***Id.*** In ***Dubose***, 285 Wis. 2d 143, the supreme court overruled ***Wolverton***, holding that evidence obtained from an out-of-court showup is "inherently suggestive" and not admissible unless the showup procedure was "necessary." ***Dubose***, 285 Wis. 2d 143, ¶33 & n.9; *see also* ***Hibl***, 290 Wis. 2d 595, ¶26. The ***Dubose*** court said that a showup is "necessary" only if police lack probable cause for an arrest or, as a result of other exigent circumstances, cannot conduct a lineup or photo array. ***Dubose***, 285 Wis. 2d 143, ¶33.

¶33 The evidentiary portion of Garcia's trial lasted four days and included 40 witnesses. But the key question for the jury was simple: Was Garcia the shooter, or was Jackson? The answer to this question did not hinge on the showup evidence.

¶34 Garcia's defense was *not* based on the proposition that Fields mistook Garcia for Jackson as the man standing by Wilson when Wilson was shot. Rather, Garcia's defense was based on the proposition that Fields failed to perceive that Jackson was the shooter. Garcia based this argument primarily on the following evidence and assertions: 1) Jackson was the owner of the gun; 2) Jackson, not Garcia, was the person with a motive to shoot Wilson; 3) Jackson was also close to Wilson when the shot was fired; 4) Fields did not claim he saw Garcia holding or possessing a gun; and 5) Fields failed to notice how close Jackson got to Wilson and, therefore, Fields wrongly concluded that Garcia was the shooter.

¶35 Garcia could not plausibly claim that Fields mistook Garcia for Jackson. The two men were strikingly dissimilar in appearance. And there was no dispute that Garcia was the man Fields saw standing near his son when Fields heard the shot fired and saw his son die. Thus, Garcia's defense was based on the proposition that, when Fields identified Garcia as the shooter at the showup, Fields was correctly identifying the person he *thought* shot his son, but he was wrong.

¶36 It follows that Fields' identification of Garcia at the showup added nothing to the trial, apart from an element of drama. From a common-sense standpoint, the trial proceeded no differently than if there had been no showup and Fields simply told the jury that the shorter, "Mexican" or "mixed race" man with a "fat face," rather than the taller black man, shot his son.

¶37 As to Fields' emotional reaction at the showup upon seeing the man who he thought had just killed his son, the jury would have understood that this was a normal reaction to what Fields *believed* he knew. What remained for the jury, with or without the showup evidence, was the question whether Garcia was in fact the shooter.

¶38 Finally, to the extent Garcia is asserting that counsel's failure to object to the State's use of the showup evidence during closing argument might have confused or misled the jury into believing that Fields saw something he did not actually see, we reject that assertion. Garcia notes that the State commented during closing argument that Fields said, upon seeing Garcia during the showup, "that's him, that's the guy *that I saw shoot* my son" (emphasis added). We are confident, however, that the jury was not misled. Fields' testimony was clear that he never saw Garcia with the gun. Indeed, the State plainly acknowledged this fact during closing argument.

¶39 In sum, Garcia has not shown that his trial counsel's failure to challenge the showup evidence resulted in prejudice and, therefore, has not shown that he received ineffective assistance of counsel in this respect.

B. Failure To Request Jury Instructions

¶40 Garcia also argues that trial counsel was ineffective by failing to request four form jury instructions, thereby depriving Garcia of his due process right to a fully and fairly instructed jury. We evaluate the absence of each instruction in light of the general instructions on credibility that the jurors were given.

¶41 The jurors received instructions telling them that they were the judges of the credibility of witnesses and the weight to give evidence. More specifically, they were told that it was for them to scrutinize the testimony and evidence and decide what to believe. The instructions told the jurors that it was up to them to decide whether witnesses "know what they're talking about." The instructions made it clear that the jurors should look at the "whole range of circumstances" before them in assessing credibility. The jurors were told to consider:

> Whether the witness has an interest or lack of interest in the result of the trial;
>
> The witness' conduct, appearance, and demeanor on the witness stand;
>
> The clearness or the lack of clearness of the witness' recollections;
>
> The opportunity that the witness would have had for observing and knowing the things that they have testified about;
>
> The reasonableness of their testimony;
>
> The apparent intelligence of the witness;
>
> Any bias or prejudice of the witness that may have been shown through the evidence;
>
> Any possible motives the witness may have for falsifying their testimony; and
>
> All other facts and circumstances appearing in this trial which tend either to support or to discredit the testimony of each witness.

The jurors were told to use their "common sense and [their] experience" in evaluating the evidence. With respect to Garcia, the jurors were told that his testimony should not be discredited just because he was charged, but that they

should use the same factors to assess Garcia's credibility as used for other witnesses.

¶42 In light of these general instructions, we conclude that the absence of the more specific instructions discussed below was not prejudicial under the circumstances here.

1. WIS JI—CRIMINAL 141: "Where Identification Of Defendant Is In Issue"

¶43 Garcia argues that counsel was ineffective for failing to request the following pattern identification instruction:[3]

> 141 WHERE IDENTIFICATION OF DEFENDANT IS IN ISSUE
>
> The identification of the defendant is an issue in this case and you should give it your careful attention. You should consider the credibility of a witness making an identification of the defendant in the same way you consider credibility of any other witness.
>
> Identification testimony involves an expression of belief or impression by the witness. Its value depends on the opportunity the witness had to observe the offender at the time of the offense and later to make a reliable identification.
>
> In evaluating the identification testimony, you are to consider those factors which might affect human perception and memory and all the influences and circumstances relating to the identification.
>
> Consider the witness' opportunity for observation, how long the observation lasted, how close the witness was, the lighting, the mental state of the witness at the time,

[3] WISCONSIN JI—CRIMINAL 141 has been modified somewhat since the time of Garcia's trial. *See* Comment to WIS JI—CRIMINAL 141.

> the physical ability of the witness to see and hear the events, and any other circumstances of the observation.
>
> You should also consider the period of time which elapsed between the witness' observation and the identification of the defendant and any intervening events which may have affected the identification.
>
> If you find that the crime alleged was committed, before you may find the defendant guilty, you must be satisfied beyond a reasonable doubt that the defendant is the person who committed the crime.

¶44 Garcia argues that this instruction was critical because the identification of him as the shooter was the only issue for the jury. However, as explained above, there was no suggestion at trial that Fields mistook Garcia for Jackson. The issue was not whether Fields misidentified Garcia, but rather whether Fields wrongly inferred that Garcia was the shooter. In any event, the important concepts contained in the omitted instruction would all have been apparent to the jurors from the general credibility instructions they did receive.

2. WIS JI—CRIMINAL 180: "Confessions - Admissions"

¶45 Garcia next argues that counsel was ineffective for failing to request the pattern confession instruction:[4]

> 180 CONFESSIONS – ADMISSIONS
>
> The State has introduced evidence of (a statement) (statements) which it claims (was) (were) made by the defendant. It is for you to determine how much weight, if any, to give to (the) (each) statement.
>
> In evaluating (the) (each) statement, you must determine three things:

[4] This pattern jury instruction has also been modified since the time of Garcia's trial. *See* Comment to WIS JI—CRIMINAL 180.

> - whether the statement was actually made by the defendant. Only so much of a statement as was actually made by a person may be considered as evidence.
>
> - whether the statement was accurately restated here at trial.
>
> - whether the statement or any part of it ought to be believed.
>
> You should consider the facts and circumstances surrounding the making of (the) (each) statement, along with all the other evidence in determining how much weight, if any, the statement deserves.

Garcia argues that counsel was ineffective for failing to request this instruction because the trial evidence included a jail mate's testimony that Garcia said he shot Wilson, Fields' testimony that Garcia said "I'll cap your ass" to Wilson, and Tucker's testimony that he heard Garcia tell Wilson that he was going to shoot him.[5]

¶46 Garcia's argument assumes that, without the omitted instruction, the jurors would not have known that it was up to them to decide whether Garcia actually made the statements attributed to him. But we conclude that, even without this instruction, it would have been readily apparent to the jurors that they could choose to disbelieve the State's witnesses on this topic.

3. WIS JI—CRIMINAL 200: "Expert Opinion Testimony: General" And WIS JI—CRIMINAL 205: "Expert Testimony: Hypothetical Questions"

¶47 WISCONSIN JI—CRIMINAL 200 and WIS JI—CRIMINAL 205 provide:

[5] Whether the evidence to which Garcia refers qualifies as a "statement" under the instruction is questionable. The title of the instruction and the comments accompanying the instruction suggest that the instruction is concerned foremost with confessions or admissions obtained during custodial interrogations. *See* Comment to WIS JI—CRIMINAL 180.

> 200 EXPERT OPINION TESTIMONY: GENERAL
>
> Ordinarily, a witness may testify only about facts. However, a witness with expertise in a particular field may give an opinion in that field.
>
> You should consider:
>
> - the qualifications and credibility of the expert;
> - the facts upon which the opinion is based; and
> - the reasons given for the opinion.
>
> Opinion evidence was received to help you reach a conclusion. However, you are not bound by any expert's opinion.
>
> [CONTINUE WITH THE FOLLOWING IF EXPERTS HAVE GIVEN CONFLICTING TESTIMONY.]
>
> [In resolving conflicts in expert testimony, weigh the different expert opinions against each other. Also consider the qualifications and credibility of the experts and the facts supporting their opinions.]
>
> 205 EXPERT TESTIMONY: HYPOTHETICAL QUESTIONS
>
> During the trial, an expert witness was told to assume certain facts and then was asked for an opinion based upon that assumption. This is called a hypothetical question.
>
> The opinion does not establish the truth of the facts upon which it is based. Consider the opinion only if you believe the assumed facts upon which it is based have been proved. If you find that the facts stated in the hypothetical question have not been proved, then the opinion based on those facts should not be given any weight.

Garcia argues that counsel was ineffective in failing to request these instructions because there was extensive expert testimony at trial but the jury was never provided with guidance as to how to weigh this testimony. We disagree.

¶48 We conclude that it would have been apparent to the jurors that the general credibility instructions covered the expert witnesses, and that these instructions adequately covered any credibility issues among the experts. Although the general instructions did not single out expert witnesses, those instructions told the jurors that it was up to them to decide whether witnesses "know what they're talking about" and to consider the "whole range of circumstances."

¶49 We note that Garcia used his expert witness in an attempt to undercut the State's accident reconstruction expert. Garcia's expert effectively demonstrated how the State's expert's opinion as to Fields' field of vision was based on assumptions about Fields' and Tucker's positions at the moment Wilson was shot. Thus, the jurors necessarily had to determine which of the competing experts was more persuasive. The jurors did not need an instruction to do so.

¶50 Finally, Garcia suggests that counsel's failure to ensure that the jury be given WIS JI—CRIMINAL 200 was prejudicial because the defense called only one expert while the State called several. Even assuming, however, that the jury was swayed by the fact that the State had more expert firepower, Garcia fails to develop any argument as to how instructing the jury with WIS JI—CRIMINAL 200 would have changed matters. If anything, that instruction may have drawn additional attention to the fact that the bulk of the expert testimony was provided by and favored the State.

Conclusion

¶51 In sum, we conclude that trial counsel's failure to challenge the showup evidence did not prejudice Garcia's defense and, therefore, did not constitute ineffective assistance of counsel. We also conclude that counsel was

not ineffective in failing to request the jury instructions referenced above. Accordingly, we reject Garcia's ineffective-assistance-of-counsel claim and affirm the judgment and order of the circuit court.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.