COURT OF APPEALS DECISION DATED AND FILED

November 06, 2007

David R. Schanker
Clerk of Court of Appeals

NOTICE

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Appeal No. 2006AP2634-CR

Cir. Ct. No. 2004CF2380

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LAWRENCE C. PAINE,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: DAVID A. HANSHER and JEFFREY A. KREMERS, Judges.[1] *Reversed and cause remanded.*

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[1] The notice of appeal refers to both the judgment of conviction and the postconviction order; however, this court is addressing only the postconviction order and the trial court's denial of the motion without an evidentiary hearing.

The Hon. David A. Hansher presided over both trials that occurred in this case, the first trial having ended in a hung jury. The Hon. Jeffrey A. Kremers presided over the postconviction motion.

Before Wedemeyer, Fine and Kessler, JJ.

¶1 KESSLER, J. Lawrence C. Paine appeals from an order denying his postconviction motion which alleged ineffective assistance of trial counsel based upon trial counsel's: (1) failure to produce two witnesses at trial who Paine asserts would corroborate significant portions of his defense; (2) failure to object to rebuttal evidence on a collateral matter offered by the State to impeach one aspect of Paine's testimony and thus attack his credibility; and (3) inadequate cross-examination of a State witness regarding information obtained by the police during the investigation. The motion was denied without a hearing. We conclude that the motion set forth facts which, if true, would entitle Paine to relief, that the trial court found reasons for trial counsel's failure to produce these witnesses which are not supported by the record, and that the trial court erroneously reached the legal conclusion that trial counsel's failures could not have prejudiced Paine. We reverse and remand for a hearing.[2]

BACKGROUND

¶2 After his first trial ended in a hung jury, Paine was convicted on retrial in July 2005, of two counts of first-degree intentional homicide in violation of WIS. STAT. § 940.02(1)(a) (2003-04).[3] The homicides occurred, according to

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[2] ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979) ("We hold that it is a prerequisite to a claim of ineffective representation on appeal to preserve the testimony of trial counsel. We cannot otherwise determine whether trial counsel's actions were the result of incompetence or deliberate trial strategies. In such situations, then, it is the better rule, and in the client's best interests, to require trial counsel to explain the reasons underlying his handling of a case.")

[3] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

the criminal complaint, when two men died as a result of being shot multiple times in the upstairs flat of a Milwaukee duplex. According to a witness who said he was present in the flat at the time of the shootings, one of the victims, Janari Saddler, got into a discussion about a parked car with a person the witness knew as “Chan.” Apparently “Chan” had parked a car, which Saddler thought was stolen, in front of the duplex which was also where Saddler lived. Ultimately “Chan” became upset with Saddler for continuing to talk about the car, pointed a gun at Saddler, followed a retreating Saddler into the bedroom and, thereafter, the witness heard multiple gunshots. The witness then heard the other victim, Aaron Harrington, yell “Don’t kill me!” followed by more gunshots. The witness then ran out of the building. Upon his return to the flat shortly thereafter, the witness saw the two bodies, one in the bedroom and one in the bathroom, and he left the flat again, this time calling 9-1-1 from another house. The witness subsequently identified a photograph of Paine as the person who he knew as “Chan.” Another witness, who also said he was present in the flat at the time of the shootings, likewise identified Paine from a photograph as someone he knew as “Chan.” Paine’s middle name is Chan. The second witness described the events preceding the shootings in a substantially similar manner, although his account was not identical to the account given by the first witness. There was no physical evidence tying Paine to the murders.

¶3 Paine’s theory of defense, as described specifically in the postconviction motion, was that he was not at the duplex that evening, but rather was first at a strip club with another friend he knew as “Skin,” and that after he dropped Skin off for the night, Paine then left for Minneapolis to visit his young son who lived there with his son’s mother. To support his statements to police, Paine provided police with Skin’s cell phone number. Paine testified that he

remained in the Minneapolis area until approximately the beginning of May, then took a bus from Minneapolis to Whitewater, Wisconsin, to stay with Zenobia Davis, a woman who he had met while in Minneapolis.

¶4 A collateral dispute arose regarding exactly when Paine left Minneapolis by bus.[4] The dispute had to do with Paine tying his memory of the date of his departure to his inability to board an overcrowded bus which he said was overcrowded because of a Timberwolves' basketball game. Paine asserted that the Timberwolves played the Lakers on the day the bus was overcrowded. The State introduced evidence of the Timberwolves' schedule which showed they did not play the Lakers on that day. Defense counsel did not object to the collateral evidence, but established on cross-examination of the State's witness that the Timberwolves played another well-known team, the Denver Nuggets, on or about the relevant day.

¶5 In addition to the above, Paine testified to the following at trial. He testified that he knew both victims, Saddler and Harrington, and that they were both "good friends, close friends" of his. On the evening of April 9 through the early morning of April 10, Paine was not in the flat where Saddler and Harrington were killed. Instead, he was with his friend, Skin Blackman, who lived near 23rd Street and Keefe Avenue. Paine picked up Skin around 8:00 in the evening. They drove around, then "a little bit after ten o'clock [they] went to the Paradise Strip Club" where they stayed until "last call," which Paine guessed was probably 1:30 a.m. Paine testified that they then stopped for gas, after which they drove to

[4] The exact date Paine left Minneapolis has no relevance to any issue in the trial except Paine's memory and/or truthfulness.

23rd and Keefe to drop Skin off. Later, around 2:30 a.m. to 3:00 a.m., Paine left Milwaukee and drove to Minnesota to see his young son who lived with his son's mother in Mount View. He arrived at the Golden Valley Super 8 hotel around 8:30 in the morning. While he was in Minnesota, he heard from Skin about the murders. He left Minnesota by bus to visit Davis at her home in Whitewater, Wisconsin. After he arrived in Whitewater, he heard from his mother that his name was involved with the murders. He returned to Milwaukee to straighten things out with the police.

¶6 City of Milwaukee Police detectives Katherine Hein and Gilbert Hernandez interviewed Davis after Paine provided them with her contact information. Davis told police that she came to Milwaukee with her parents in 1996, went to high school for a year in Milwaukee, and has a lot of relatives in the area of 22nd Street and Townsend Street. She reported that she got a telephone call from an associate of Paine's who goes by the names of "Skin" and "Sport," and that she had known this man for a long time. She told police that Skin had a Sprint cell phone and she provided police with the cell phone number. The cell phone number she had for Skin was the same cell phone number earlier provided to police by Paine. Davis also explained to police that Skin had told her he was not answering the police calls and had changed his cell phone number because he had outstanding warrants and was afraid of going to jail.

¶7 The postconviction motion asserts ineffective assistance of counsel because trial counsel: (1) did not contact Davis and did not present testimony from either Skin or Davis; (2) did not object to the collateral evidence about the Timberwolves' basketball schedule which was introduced in rebuttal to impeach Paine's credibility; and (3) did not cross-examine the police about the information regarding Skin that they obtained from Davis.

¶8 The trial court denied the motion, stating:

> The jury heard evidence of the existence of Skin through the defendant's statements to police and his own testimony.…
>
> Obviously the best evidence of Skin's existence would have been to present Skin himself as a witness. But there is no evidence that trial counsel *could* have called this witness. The defendant was either unable or unwilling to provide Skin's real name and address. Zenobia Davis could not identify him. Police followed up the cell phone number for Skin that the defendant and Davis had given them with no results. In sum, Skin was not a person who was identifiable at the time this matter proceeded to trial. In an affidavit attached to the motion, the defendant's investigator states that Skin's name is Desmond Blackmon and that his whereabouts are known to Zenobia Davis and the defendant's mother. Even assuming that to be true, there is no indication that this information was available to trial counsel at the time he [was] preparing this case for trial. The court cannot conclude that trial counsel was deficient for failing to call this witness because the record shows that he either could not be or did not want to be found.

(Emphasis in original.)

¶9 In discussing the failure to call Davis to testify, the trial court refused to find that trial counsel was deficient because it found that Davis had no direct knowledge of events on the day of the murder. The trial court concluded that "[a]lthough her testimony would have supported the existence of Skin," the jury would not have believed Davis because her account of her prior acquaintance with Skin was implausible (she claimed to have known him long before she met Paine) as she did not know his last name, and because she described Skin's appearance differently than Paine described it. The trial court further concluded that the jury would not believe Davis because of an inconsistency between her testimony and Paine's as to who dropped Paine off at the police station.

STANDARD OF REVIEW

¶10 The two-pronged test for ineffective assistance of trial counsel requires the defendant to prove both deficient performance of counsel and prejudice to the defendant. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); ***State v. Pitsch***, 124 Wis. 2d 628, 633, 369 N.W.2d 711 (1985).

¶11 To demonstrate the performance prong of this test, the defendant "must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." ***Strickland***, 466 U.S. at 690; ***Pitsch***, 124 Wis. 2d at 636-37 (test for the performance prong is whether counsel's assistance was reasonable "on the facts of the particular case, viewed as of the time of counsel's conduct"). "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." ***Strickland***, 466 U.S. at 690-91.

¶12 To demonstrate prejudice, "[t]he 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." ***Id.*** at 694. The focus of this inquiry is not on the outcome of the trial, but on "the reliability of the proceedings." ***Pitsch***, 124 Wis. 2d at 642; *see also* ***State v. Thiel***, 2003 WI 111, ¶20, 264 Wis. 2d 571, 665 N.W.2d 305.

¶13 A defendant who has made factual allegations with sufficient specificity which, if true, would establish both prongs of the ***Strickland*** test is entitled to the opportunity to make the necessary record in an evidentiary hearing. *See* ***State v. Bentley***, 201 Wis. 2d 303, 313-18, 548 N.W.2d 50 (1996). Whether a motion alleges facts which, if true, would entitle a defendant to relief is a question of law that we review *de novo*. ***Id.*** at 310.

¶14 A trial court must hold a ***Machner*** hearing if the defendant alleges facts that, if true, would entitle the defendant to relief. *See* ***Bentley***, 201 Wis. 2d at 309. If, however,

> the defendant fails to allege sufficient facts in his motion to raise a question of fact, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the trial court may in the exercise of its legal discretion deny the motion without a hearing.

Id. at 309-10 (quoted source omitted).

DISCUSSION

I. Failure to investigate or call witnesses

¶15 The trial court concluded that "Skin was not a person who was identifiable at the time this matter proceeded to trial," and "the record shows that he either could not be or did not want to be found." However, the record does not support the trial court's conclusion that Skin was not identifiable, or that he could not be found. He was described physically, albeit differently, by Davis and Paine. His cell phone number and provider were disclosed. The only evidence in the record of any attempt to locate Skin are several unanswered telephone calls police made to his cell phone number. Davis explained to the police why Skin did not

respond to these calls (his fear of arrest because of outstanding warrants). The area where Skin was believed to live was identified with reasonable particularity, i.e., near the intersection of 23rd Street and Keefe Avenue. There is nothing in the record that suggests any other efforts by the police or others to actually locate Skin before trial. The record, thus, does not support the trial court's conclusion that Skin "either could not be or did not want to be found."

¶16 On the question of whether trial counsel's failure to call Davis to testify at trial was deficient performance, the trial court concluded that "trial counsel *could have* reasonably decided not to call Davis." (Emphasis added.) This finding of a possible state of mind on the part of trial counsel is not sufficient, however, to constitute a finding that there was an affirmative strategic decision not to call Davis, made after a thorough investigation. *See* ***Strickland***, 466 U.S. at 690 ("[S]trategic choices made *after [counsel's] thorough investigation* of the law and facts relevant to plausible options are virtually unchallengeable.") (emphasis added).

¶17 There is also no support in the record for the trial court's conclusion that trial counsel's failure to call Davis was not prejudicial to Paine. The police summary of Davis's statement shows that her testimony not only would be corroborative of a disputed issue in the case, i.e., Skin's existence, but that it provides an explanation for Skin's failure to respond to police efforts to contact him, i.e., that he told Davis that he was avoiding the police because he had some outstanding warrants. The trial court concluded that no prejudice was shown because Davis was not an alibi witness, noting that "Davis's testimony … would not have established that the defendant had no opportunity to commit these crimes." However, the purpose of Davis's testimony was never to provide an

alibi, but rather, was to corroborate the existence of Skin, a fact which the State was disputing.

¶18 The trial court's conclusion that Paine was not harmed by trial counsel's failure to have Davis's testimony before the jury corroborating Skin's existence because the jury heard about Skin both from Paine and from police reports of Paine's statements, misses the dual purpose for Davis's testimony—corroboration of Skin's existence *and* this corroboration's impact on Paine's credibility. The State's theory was that two witnesses identified Paine as the shooter. The theory of the defense was that the witnesses were mistaken because Paine was not present at the flat, but was either with Skin at a club or was alone driving to Minneapolis during the time the homicides occurred. When Skin was not produced at trial, Davis's testimony to corroborate his existence, and to offer an explanation for why Skin did not respond to police telephone calls, was all the more important to the question of Paine's credibility. In this case, Paine's credibility was essential to his defense. There is no physical evidence tying Paine to the crime. This case had once resulted in a hung jury. Without a hearing at which trial counsel's reasons for not calling these significant witnesses can be fully examined, we cannot conclude[5] that failure to call a corroborating witness is neither deficient performance nor prejudicial.

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[5] The defendant's burden is to establish by a mere preponderance of the evidence that the deficient performance probably had an effect on the outcome of the trial. *See* ***State v. Pitsch***, 124 Wis. 2d 628, 642, 369 N.W.2d 711 (1985); *see also* ***State v. Thiel***, 2003 WI 111, ¶20, 264 Wis. 2d 571, 665 N.W.2d 305 ("In order to demonstrate that counsel's deficient performance is constitutionally prejudicial, 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.' The focus of this inquiry is not on the outcome of the trial, but on 'the reliability of the proceedings.'") (citing ***Strickland v. Washington***, 466 U.S. 668, 694 (1984) and ***Pitsch***, 124 Wis. 2d at 642).

II. Failure to object to rebuttal evidence

¶19 The State introduced rebuttal evidence of the Timberwolves' basketball schedule, through a detective's testimony, in order to impeach Paine's statement that the Timberwolves played the Lakers on the day he was unable to board a bus because of overcrowding. Trial counsel did not object to this testimony, but rather cross-examined the detective to show that another well-known team, the Denver Nuggets, played the Timberwolves in Minnesota on the day in question. Although WIS. STAT. § 906.08(2) would have permitted the State to impeach, through cross-examination, Paine's statement regarding the reason for his inability to board the bus because the Lakers were playing in Minnesota that day, § 906.08(2) expressly prohibits "impeachment of a witness on the basis of collateral facts introduced by extrinsic evidence." ***State v. Sonnenberg***, 117 Wis. 2d 159, 174, 344 N.W.2d 95 (1984); *see also* ***State v. Barreau***, 2002 WI App 198, ¶33, 257 Wis. 2d 203, 651 N.W.2d 12. Accordingly, we must determine whether trial counsel's failure to object to this rebuttal evidence constituted ineffective assistance of counsel. *See* ***Kimmelman v. Morrison***, 477 U.S. 365, 374-375 (1986); *see also* ***State v. Carprue***, 2004 WI 111, ¶47, 274 Wis. 2d 656, 678, 683 N.W.2d 31, 41-42.

¶20 Under ***Strickland***, if we determine that Paine was not prejudiced by trial counsel's failure to object, we need not determine whether that failure was deficient performance. ***Id.***, 466 U.S. at 687. Paine must show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," to establish that he was prejudiced. ***Id.*** at 694.

¶21 Here, trial counsel cross-examined the rebuttal witness, eliciting the information that while the Lakers may not have been in Minnesota on the date Paine had testified about, another well-known team, the Denver Nuggets, were present. This was a minor discrepancy in Paine's testimony regarding the reason he did not leave on the bus on May 1, weeks after the murders. It must be weighed against the trial testimony of two eye witnesses who identified Paine as the perpetrator of the two murders in Milwaukee weeks earlier. Based on our review of the record in this case, we cannot conclude that the minor discrepancy in the collateral references to the Timberwolves' opponents undermines our confidence in the reliability of the proceedings. *See* ***id.***; *see also* ***Thiel***, 2003 WI 111, ¶20; ***Pitsch***, 124 Wis. 2d at 642. Accordingly, Paine has failed to show that he was prejudiced by trial counsel's failure to object to admission of the rebuttal testimony and, as such, has not shown that trial counsel was ineffective.

III. Failure to adequately cross-examine

¶22 Paine claims that trial counsel did not adequately cross-examine Hein regarding her interview of Davis and the additional information thus in possession of the police regarding Skin. Monday-morning quarterbacking of any cross-examination will frequently reveal things that might have been done differently or more effectively. However, as we know, perfection measured through the lens of hindsight is not the standard required of defense counsel. *See* ***State v. Machner***, 92 Wis. 2d 797, 802, 285 N.W.2d 905 (Ct. App. 1979) ("In considering alleged incompetency of counsel, one should not by hindsight reconstruct the ideal defense.") (quoting ***State v. Harper***, 57 Wis. 2d 543, 556-57, 205 N.W.2d 1 (1973)). We have examined the record and, based upon that review, determine that trial counsel did not perform deficiently in his cross-

examination of Hein. Accordingly, Paine has not established deficient performance under the ***Strickland*** standards on this issue.

CONCLUSION

¶23 We conclude that Paine has made a *prima facie* case for ineffective assistance of counsel under ***Strickland*** on the claim of failure to investigate and to call Davis and Skin as witnesses at trial. Paine is entitled to the opportunity to try to establish by a preponderance of the evidence that trial counsel's performance was deficient as to those two witnesses, and that he was prejudiced thereby, such that there is a reasonable probability that the result of the proceeding would have been different had they testified.

By the Court.—Order reversed and cause remanded.

Not recommended for publication in the official reports.